IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **No. B14 of 2017**

BETWEEN: **THORNE**
Appellant

and

KENNEDY
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. It is certified that these submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The Respondent submits that the issues presented by the appeal are:

   (a) Whether, having regard to the facts as found, the Full Court of the Family Court (**FC**) ought to have been satisfied that the financial agreement made by the parties under s.90C of the *Family Law Act 1975* on 20 November 2007 was void, voidable or unenforceable on the ground that it was entered into by the Appellant under duress or under the undue influence of the Respondent or in circumstances where the Respondent took unconscionable advantage of a special disadvantage of the Appellant within the meaning of the equitable doctrine of unconscionable dealing.

   (b) If so, whether, having regard to the facts as found, the FC ought to have been satisfied that the financial agreement made by the parties under s.90B of the *Family Law Act 1975* on 26 September 2007 was void, voidable or unenforceable on the ground that it was entered into by the Appellant under duress or the undue influence of the Respondent or in circumstances where the Respondent took unconscionable advantage of a special disadvantage of the Appellant within the meaning of the equitable doctrine of unconscionable dealing.

   (c) Whether the trial judge gave adequate reasons.

Part III: Notice under s 78B of the *Judiciary Act 1903*

3. It is certified that the Respondent has given consideration, and determined that it is not necessary, to give notice pursuant to sec 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Facts

4. In addition to the facts at AS [4]-[15], the Respondent relies on the following material facts, as found at first instance (**TJ**) and on appeal (**FC**):

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(a) Before they met in person, the husband said to the wife: "If I like you I will marry you but you will have to sign paper. My money is for my children": TJ [33], [47].

(b) The husband was at pains from the outset of the relationship to make it clear to the wife that his wealth was his and he intended it to go to his children, the wife was aware at all times of that position , she acquiesced in that position; and she was aware from the outset of the relationship and was keen to acquiesce in the notion that there would be a document to sign before a wedding to protect the husband's and his children's position: TJ [35], [47]; FC [12], [74], [118], [161(b)], [164].

(c) The wife's concern was not about what would happen to her financially while her husband-to-be was alive, but as to what would happen after his death: TJ [35]; FC [74], [121].

(d) When presented with the two draft agreements, the wife's only concern was with the testamentary provisions. The wife was not concerned about the separation provisions because she would never leave her husband, and she was "not interested" in the idea that the husband might ever leave her: TJ [57], [80]-[81]; FC [120]-[121], [132], [165].

(e) The wife received independent legal advice before both agreements to the effect that the respective agreement was no good and she should not sign it; but the wife signed both agreements anyway: TJ [48]-[53], [57]; FC [109], [161(i)-(k)], [167].

(f) The husband made the arrangements for the wife to obtain her legal advice: TJ [47], [49]; FC [161(d), (g)].

(g) The wife understood the terms of the agreements and the legal advice which she received: TJ [83]-[86]; FC [141]-[150].

(h) There were handwritten amendments made to the agreements by the wife's solicitor (relating to the testamentary provisions), and they were agreed to by the husband: FC [139], [166]

(i) The financial agreements provided that for the following consequences in the following circumstances:

a. During the continuance of the marriage, the husband would:
   i. pay for all the outgoings for their marital home;
   ii. pay the Appellant maintenance of the greater of $4,000 per month or 25% of net income from a property development project;
   iii. permit the Appellant's family to reside rent-free in a unit in the development;
   iv. allow the Appellant to have sole use and possession of a certain Mercedes Benz car or a replacement vehicle of equal or greater value.

b. If the husband died during the relationship, the Appellant would receive:
   i. a unit not exceeding a market value of $1.5 million;
   ii. maintenance of the greater of $5,000 (indexed yearly) per month or 25% of net income from a property development project;
   iii. the Mercedes Benz car or a replacement vehicle of equal or greater value.

c. On separation:
   i. within 3 years of the marriage, the Appellant would not receive anything;
   ii. occurring after 3 years of marriage, the Appellant would receive $50,000 (indexed yearly). Further provisions were made if the parties had a child together (which they did not).

5. The Respondent contests the statements at AS [17]-[18]. The only factual finding of the trial judge in TJ [91]-[93] that was upheld by the Full Court was the finding challenged in appeal ground 1 below, and set out in FC [54]. 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. While the Full Court could not "see the point" of grounds 2-5 "in isolation" (FC [59]), it does not follow that the Full Court upheld the trial judge's findings of fact on those issues. The Full Court's judgment must be read as a whole, including the comments that it made on the grounds of appeal which were upheld; and the findings that it made in the course of disposing of the wife's Notice of Contention. For example, the comments at TJ [92]-[93]:

> *"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."*
>
> *"Mr [K] knew that Ms [T] 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."*

are inconsistent with the Full Court's finding that there were handwritten amendments made to the agreements by the wife's solicitor, and they were agreed to by the husband (FC [139], [166]). Indeed, the Full Court found (FC [166]) that "it was not in fact the case that the agreements were non-negotiable" and that "changes were made by the wife through her solicitor, and they were accepted by the husband".

Part V: Legislation

6. The Respondent accepts the Appellant's statement of applicable legislative provisions but also contends that the Court should have regard to section 87 of the Act and sections 90F, 90SA, 90UB, 90UC, 90UD 90UJ, 90UM and 90UN within Part VIIIAB of the Act.

Part VI: Argument

Summary

7. Having regard to the facts as found, no real interpretational choice is required to be made in order to resolve the issues arising on this appeal. Whatever the proper scope of the doctrines of duress, undue influence and unconscionable dealing in the context of financial agreements made under Part VIIIA, none of those doctrines are enlivened by the facts of this case. In particular, the facts that:

   (a) the husband made it clear to the wife, and the wife understood and accepted, from the outset of their relationship, that if they were to marry his wealth was to be preserved for his children, and the wife would need to sign papers to give effect to that; and

   (b) when, after deciding they would marry, the foreshadowed papers which gave effect to the husband's stated intention were furnished to the wife for her signing, she was not concerned at all with the provisions about which she now complains, being provisions about which she received independent legal advice and the effect of which she understood when she signed the agreements,

   are facts that negate any conclusion that the financial agreements were entered into by the wife under duress or under the undue influence of the husband or in circumstances

where the husband took unconscionable advantage of a special disadvantage of the wife within the meaning of the equitable doctrine of unconscionable dealing. The wife knew from the outset of the relationship that agreements preserving the husband's wealth for his children would need to be signed if she was to marry the husband. She built a relationship with the husband at all times knowing of that matter. When the foreshadowed agreements came, the wife understood them, was not concerned by them, and signed them.

Introduction

8. The husband and wife signed a financial agreement under Part VIIIA of the *Family Law Act* ("**the Act**") on 26 September 2007 ("**the First Agreement**"), shortly before their wedding on 30 September 2007. The couple then signed a second financial agreement on 20 November 2007 ("**the Second Agreement**"), which terminated the effect of the First Agreement, but was otherwise in similar terms.

9. The trial judge made orders setting aside the First and Second Agreements on the ground of duress (TJ [87]-[98]). The Full Court upheld an appeal, including on the basis that the trial judge had applied the wrong legal test for duress (FC [64]-[78]); found that the wife did not enter into either the First or Second Agreements under duress (FC [159]-[168]); held that the Second Agreement was binding and enforceable (FC [169]); and dismissed the wife's Notice of Contention, which relevantly sought findings that the First and Second Agreements be set aside on the basis of undue influence and/or unconscionability (NoC Ground 6, FC [125]-[140]).

Legislative context

10. At common law, an agreement which excluded the jurisdiction of the courts in respect of financial adjustment between spouses was, historically, contrary to public policy and void: *Hyman v Hyman* [1929] AC 601.

11. Since 1959, legislation has empowered the Court to sanction agreements, being agreements that could only be made between marital parties following separation (s 87(1)(k) *Matrimonial Causes Act 1959* (Cth)). Such agreements could be made in lieu of parties' rights to obtain orders for property settlement otherwise capable of being made by the Court and were only valid and effective if approved by the Court. Other than in those circumstances, financial agreements were void as contrary to public policy: *Shaw v Shaw* (1965) 113 CLR 545 at 548-549 per Barwick CJ. Agreements of this type continue to be recognised by the Act (see s 87) although can no longer be entered into anew.

12. Part VIII of the Act governs proceedings for property settlement and spousal maintenance on marital breakdown. However, s 71A provides that Part VIII does not apply where there is a binding financial agreement under Part VIIIA. Comparable provisions to Parts VIII and VIIIA found in Part VIIIAB apply to de facto relationships including same-sex relationships (s 90SA being the counter-part of s 71A).

13. Part VIIIA was introduced into the Act in 2000. Part VIIIAB, dealing with de facto relationships, was introduced into the Act in 2009.

14. Part VIIIA permits parties, before, during or after marriage, to enter into an agreement that ousts the court's jurisdiction under Part VIII. Such agreements are styled "financial agreements", and are binding on the parties if and only if the relevant preconditions are met. Part VIIIA was introduced to give parties greater control and choice over their own affairs in the event of marital breakdown, and avoid the risks and expense of litigation.

15. The Attorney-General's second reading speech in relation to the amending Bill included (Commonwealth Parliamentary Debates, HoR, 22 September 1999, 10152):

> Currently, under the act, people can make prenuptial agreements about their property. However, the use of these agreements has been limited because the agreements are not binding. Despite the existence of an agreement, the court has been able to exercise its discretion over any of the property dealt with in the agreement.
>
> The settlement of the financial affairs following separation has remained basically unchanged since the act commenced in 1976. However, the Australian community – and its attitude to marriage – has undergone substantial change during that time. The changes in this bill will attempt to bring the act into line with prevailing community attitudes and needs.
>
> Binding financial agreements will be of particular benefit to people who are entering subsequent marriages as well as to people on the land and those who own family businesses.
>
> The aim of introducing binding financial arrangements is to encourage people to agree about how their matrimonial property should be distributed in the event of, or following, separation. Agreements will allow people to have greater control and choice over their own affairs in the event of marital breakdown. Financial agreements will be able to deal with all or any of the parties' property and financial resources and also maintenance. An agreement may cover how property would be divided or how maintenance would be paid. Particular assets, such as rural properties, would be able to be preserved.
>
> People will be encouraged, but not required, to make financial agreements....Requiring parties to obtain independent advice will mean that couples will be aware of the implications of the agreements that they are entering into and will not unknowingly enter an agreement that is not in their best interests. (emphasis added)

16. The Further Revised Explanatory Memorandum relating to the Bill stated (page 6):

> Part VIII of the Act deals with property, spousal maintenance and maintenance agreements and has remained basically unaltered since commencement, in 1976. Since then, the family unit and its social context have changed significantly. Importantly, the increased workforce participation by women before and during marriage has meant that marriage is becoming increasingly recognised as an economic partnership as well as a social relationship. As a result of these changes, the Act has 'fallen behind' in recognising prevailing community attitudes towards marriage.
>
> ...The objectives of the amendments are 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. (emphasis added)

17. In Part VIIIA, ss 90B-90D set out the circumstances in which a financial agreement can be made. By s 90G(1), a financial agreement is binding on the parties to the agreement if, and only if a number of criteria are satisfied. Relevantly, one of those criteria is that each party must have been provided with independent legal advice about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement. If any of the criteria are not satisfied, the court must be satisfied that "it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement": s 90G(1A)(c).

18. Section 90K(1) governs the setting aside of a financial agreement. Relevantly, it provides:

> *A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that:*
> ...
> *(b) the agreement is void, voidable or unenforceable; or*
> ...
> *(e) in respect of the making of a financial agreement — a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable;* or [...]

19. The Attorney-General noted in the second reading speech for the amending Bill: "*Requiring parties to obtain independent advice will mean that couples will be aware of the implications of the agreements that they are entering into and will not unknowingly enter an agreement that is not in their best interests. Because parties will have obtained prior advice, the court will only be able to set aside an agreement in certain limited circumstances reflecting the contractual nature of the agreement.*" (Hansard, HoR, 22 September 1999, 10153).

20. Section 90KA provides:

> "*The question whether a financial agreement or a termination 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* [...]"

21. The language of s 90KA requires the Court to apply those principles of law and equity by which the validity, enforceability and effect of contracts is determined.

Appellant's contention – 'regard to the matrimonial context'

22. The Appellant contends that "the principles of law and equity" for determining the validity of contracts under s 90KA must "have regard to the matrimonial context" (AS [39], similarly [47]). However, it is unclear what status the Appellant contends this "regard for the matrimonial context" properly to have (beyond leading to her success on the appeal), particularly in light of the substantially identical provisions concerning de facto relationship financial agreements in Part VIIIAB.

23. It can be accepted that the fact that the agreement between the parties in this case was made in anticipation of marriage is a relevant factual matter, in the proper application of "the principles of law and equity" as contemplated by s 90KA. However, it is a factor that the Full Court did take into account (for example [161]-[165]), and in any event it is but one of a number of important factual matters to be considered.

24. However, the Appellant's submissions seek to provide a particular status as a matter of legal principle to the "matrimonial context" when applying ss 90K(1)(b) and (e) and 90KA. Such a contention should be rejected for the following reasons.

25. **First**, the Appellant cites the common law position that such financial agreements between spouses were unenforceable as contracts and ineffective to oust the courts'

jurisdiction to determine property and maintenance disputes, as expressed in *Hyman v Hyman* (AS [21], [41], [47]); and Lady Hale's dissent in *Radmacher v Granatino* [2010] UKSC 42; [2011] AC 534 at [132] (AS [23]). The crux of the Appellant's argument is that if Part VIIIA financial agreements are construed "without proper regard to the marital context ... it would extinguish the critical public policy expressed [in *Hyman v Hyman*]" (AS [47]).

26. Plainly, public policy considerations relating to the assessment of financial agreements in Australia would be determined by reference to the legislation that Parliament has enacted on this very issue, not to a judgment of the House of Lords from 1929, and a dissenting judgment from the UK Supreme Court in 2010. Neither *Hyman v Hyman* nor *Radmacher v Granatino* took place in a legislative context which gave effect to financial agreements entered into before marriage: see e.g. *Radmacher v Granatino* at [2], [47] (Lord Phillips).

27. Accordingly, the Appellant's reliance on these cases is erroneous. The public policy of this jurisdiction with respect to financial agreements between spouses is expressed in Part VIIIA and Part VIIIAB of the Act. The approach taken by the UK Parliament, while of general interest, is irrelevant. The purpose of Part VIIIA was to facilitate, indeed to encourage, such agreements, with the objective of giving people greater control and choice over their own affairs in the event of marital breakdown.

28. The Appellant's argument appears to reduce to the proposition that financial agreements which oust the jurisdiction of the Court to make 'just and equitable' agreements should not be allowed, because such agreements can be inconsistent with 'the obligations of mutual support and maintenance inherent in the marriage relationship'. If so, the Appellant is fighting a battle that has already been lost through the passage of the *Family Law Amendment Act 2000* (Cth).

29. **Second**, it can be accepted that s 43 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" (cf AS [32]-[33], which refers instead to s 5 *Marriage Act 1961* (Cth)) when exercising its jurisdiction under the Act. However, that statement of principle does not advance the Appellant's position given that Parliament has allowed financial agreements under Part VIIIA and Part VIIIAB.

30. A level of certainty in the binding nature of Part VIIIA financial agreements is necessary to maintain their effectiveness and parties' confidence in them. Without such confidence, there is the risk that people who require such agreements for legitimate reasons such as the preservation of existing assets, intergenerational arrangements or expectations for existing family members, may choose not to marry where they would otherwise do so. Viewed from that perspective (as was the situation in the instant appeal), the availability of a financial agreement effectively facilitated the marriage because without such an instrument, the husband would not have entered into it. Accordingly, the Appellants have not demonstrated why "the matrimonial context" should be considered as a factor weighing *in favour of setting aside* a Part VIIIA financial agreement, as opposed to *upholding* the agreement.

31. **Third**, the Appellant argues that special regard must be had to marriage as a relationship of mutual support and maintenance (AS [20]). The purpose of Part VIIIA

is to encourage and allow agreements which not only contemplate the breakdown or end of the marriage (see e.g. s 90B(2)(a), (b)(ii)-(iii); s 90C(2)(a), (b)(ii)-(iii)), but to encourage and allow the parties to agree the financial consequences of such a breakdown, by reference to the property and financial resources of either or both of the spouses, which includes agreeing to exclude any property settlement and/or maintenance payments after a breakdown.

32. The husband and wife of course shared the intention that their marriage be a union for life (see AS [27], referring to affidavit evidence). The fact that these parties entered into an agreement which contemplated as a possibility the breakdown of the marriage is not inconsistent with that; and indeed such an agreement is contemplated by the Act and reflects a pragmatic recognition of life's trevallies. Nor is it inconsistent with Part VIIIA that the parties entered into an agreement that did not provide for ongoing maintenance for the Appellant.

33. Section 90F (and in the context of Part VIIIAB agreements, s 90UI) provides that if at the time a financial agreement comes into effect, a party is unable to support himself or herself without government income support, then the court may make a maintenance order, notwithstanding the agreement. No reliance was placed on s 90F by the Appellant in these proceedings. However, by enacting s 90F (and s 90UI) Parliament has dealt with the topic of the ouster of the court's power in this context. That being so, there is no basis for concluding that public policy considerations concerning spouses being cast onto the community are relevant to determining whether a financial agreement is void, voidable or unenforceable under s 90(k)(1)(b).

34. It is also an overstatement or oversimplification for the Appellant to suggest that there is a duty operating between spouses to provide mutual financial support to one another. In looking to Part VIII for the purpose of comparison, no such positive prima facie duty exists. Instead, pursuant to s 72 of the Act and its related provisions a spouse may bring an application for maintenance but whether maintenance is in fact ordered requires that party to firstly demonstrate he or she is unable to support him or herself adequately by reason of having the care of a child of the marriage, or by reason of age or physical or mental incapacity for appropriate gainful employment or for some other adequate reason, and secondly that the other party to the marriage is reasonably able to maintain the first-mentioned party.

35. **Fourth**, the Appellant's submissions overlook the array of situations in which the principles expressed in ss 90K and 90KA are to apply. Sections 90K and 90KA apply to "financial agreements" under Part VIIIA. A financial agreement can be made before marriage (s 90B), during marriage (s 90C) or even *after a divorce order is made* (s 90D). Sections 90K and 90KA do not distinguish between the manifold situations in which a "financial agreement" can be made: the same principles under the legislation are expressed to apply.

36. **Fifth**, Division 4 of Part VIIIAB permits the enforcement of "Part VIIIAB financial agreements": financial agreements between de facto partners (inserted by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth)). The provisions largely mirror Part VIIIA: the agreements can be made before a de facto relationship (s 90UB), during a de facto relationship (s 90UC) or after the breakdown of a de facto relationship (s 90UD). Part VIIIAB financial agreements can

be set aside on the principles set out in ss 90UM(1)(e) and (h) and 90UN, which are worded in identical terms, *mutatis mutandis*, to ss 90K(1)(b) and (e) and 90KA.

37. The effect of the above is that, contrary to the Appellant's apparent submission, there is no special consideration to the "matrimonial context" under ss 90K and 90KA as a matter of legal principle. Indeed, the same principles would apply to an agreement made after a divorce order was made, or between two people who cannot get married under current Australian law.

GROUND 1: DURESS

38. The Respondent contends that the Full Court correctly identified the relevant test for duress, being that stated in *Australia and New Zealand Banking Group Limited v Karam* (2005) 64 NSWLR 149 at 168 [66] (and approved in *Canon Australia Pty Ltd v Patton* [2007] NSWCA 246, (2007) 244 ALR 759 at [3] and *The Owners - Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at [45]); and correctly applied that test to determine that the financial agreement should not be set aside for duress.

39. However, even if this Court were minded to set down a different test for duress, it is plain that the Appellant would be unable to satisfy that test on the facts as found. The Respondent relies on the facts listed at paragraph 4 above, in particular the findings that:

    (a) the Respondent was at pains from the outset of the relationship to make it clear to the Appellant that his wealth was his and he intended it to go to his children, the Appellant was aware at all times of that position, she acquiesced in that position; and she was aware from the outset of the relationship and was keen to acquiesce in the notion that there would be a document to sign before a wedding to protect the Respondent's and his children's position (TJ [35], [47]; FC [12], [74], [118], [161(b)], [164]);

    (b) When presented with the two draft agreements, the Appellant's only concern was with the testamentary provisions. The Appellant was not concerned about the separation provisions because she would never leave her husband, and she was "not interested" in the idea that the Respondent might ever leave her (TJ [57], [80]-[81]; FC [120]-[121], [132], [165]);

    (c) the Appellant's solicitor proposed amendments to the financial agreement, and those amendments were accepted (FC [139], [166]); and

    (d) the Second Agreement (which terminated the First Agreement) was signed after the wedding had taken place and therefore after the threat of cancelling the wedding had passed.

40. On those facts, it simply could not be said that the Appellant acted under duress, whatever may be the scope of that doctrine.

First alleged error: failure to recognise that 'duress is a form of unconscionable conduct'

40. The Appellant argues that the trial judge was correct when she stated that "duress is a form of unconscionable conduct" (TJ [68]). The statement of McHugh JA in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 45-46 does not provide support for the Appellant's contention. Subsequent cases

have emphasised that McHugh JA's reference to "unconscionable conduct" does not mean that the equitable doctrine of unconscionable dealing provides a ground on which a contract may be set aside for common law duress: see *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267 at 289 (Kiefel J).

41. That is because the common law defence of duress, like undue influence in equity, but unlike the doctrine of unconscionable conduct, looks to the quality of the consent of the weaker party: *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 at 474; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at [117]; *Hussain v Haynoum Developments Pty Ltd* [2015] NSWCA 420 at [5] (Leeming JA).

Second alleged error: failure to accept 'lawful act duress'

42. In *Karam* at 168 [66], the NSW Court of Appeal held that the doctrine of duress is "limited to threatened or actual unlawful conduct". The Court observed that if the conduct or threat is not unlawful, then it is still open to the plaintiff seek to challenge the relevant transaction on the basis of other doctrines, such as undue influence or unconscionable dealings, or by seeking (where available) similar relief under statute.

43. If relief under the principles as to duress is only available where there is unlawful conduct or a threat of such conduct, the consequence is that the Appellant's case on this ground cannot succeed. That conclusion applies for both the First and Second Agreements.

44. **First**, the test from *Karam* is correct as a matter of authority. At common law, relief from a contract under the principles of duress was initially understood as requiring actual violence, threats of violence or deprivation of liberty (*Barton v Armstrong* [1973] 2 NSWLR 598 at 634; *McLarnon v McLarnon* (1968) 112 SJ 419 (P); *Newdigate v Davy* (1694) 1 Ld Raym 742; 91 ER 1397), and was extended to the unlawful detention of goods or the withholding of a legal right (*Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298), threats to destroy property (*Occidental Worldwide Investment Corp v Skibs A/S Avanti (The Siboen and the Sibotre)* [1976] 1 Ll Rep 293 at 335); and threatened breach of contract (*Nixon v Furphy* (1925) 25 SR(NSW) 151).

45. The only case in this jurisdiction on which the Appellant relies to justify "lawful act duress" appears to be *Tsarouhi v Tsarouhi* [2009] FMCAfam 126. In that case, the principal authority cited in support of the finding of duress was *Mutual Finance Ltd v John Whetton & Sons Ltd* [1937] 2 KB 389, a case in which a claim of duress was rejected but a claim of undue influence upheld: see 394-397. Accordingly, Justice Brereton has correctly observed (as cited by the Appellant: see AS [26]) that *Tsarouhi v Tsarouhi* [2009] FMCAfam 126 is better seen as a case of actual undue influence (or for that matter, unconscionable conduct, the alternative finding in that case: see [47]-[58]).

46. Even the overseas cases which accept the doctrine of "lawful act" duress are typically cases in which no duress is found on the facts: see *R v Attorney General for England and Wales* [2004] 2 NZLR 577. On the other hand, the paradigm cases of duress exhibit a high degree of threatened unlawful conduct: see e.g. *Barton v Armstrong* [1976] AC 104 (threats of murder). The restriction propounded in *Karam* is therefore

'not difficult to reconcile' with the classic cases of duress: see *A v N* [2012] NSWSC 354 at [509] (Ward J).

47. **Second**, the apparent alternative concept of "illegitimate pressure", unmoored from the unlawfulness of the act in question:

    (a) begs the question which needs to be answered; and

    (b) invites judges, in characterising particular conduct as either impermissible economic duress or the permissible (even necessary) operation of the market economy, to pretend to economic expertise and judgment which they generally lack (as observed by Kirby P (as his Honour then was) in *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 at 106-107 and cited in *Karam* at [57]). There is no inconsistency in resisting development of a common law or equitable doctrine on the basis that the proposed test is uncertain and vague, while still noting that Parliament may have enacted statutes (such as the *Trade Practices Act 1974* (Cth)) containing statutory tests that are similarly uncertain.

48. **Third**, and relatedly, the test propounded in *Karam* provides certainty. Indeed, the exceptional breadth of the alternative 'no reasonable alternative' test for duress propounded by the Appellant or the 'illegitimate pressure' test demonstrates precisely why *Karam* was correctly decided. It is difficult to see how the "illegitimate pressure" test can be kept from slipping to such extremes.

49. **Fourth**, the test propounded in *Karam* promotes the coherent development of the law. *Karam* sets out a clear test, conceptually distinct from the existing doctrines of undue influence and unconscionable conduct under *Amadio* principles: see *Karam* at [66]. Even though all three doctrines are concerned with exploitation or victimization, it would not promote the coherent development of the law to have a doctrine of "lawful act" duress which essentially overlaps with, and blurs the boundaries between, the other doctrines: see *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267 at 289 (Kiefel J). There are already sufficient examples of conceptual confusion occurring: see e.g. AS [24]-[25].

Appellant's apparent alternative test: 'no reasonable alternative' duress

50. In *Barton v Armstrong* [1976] AC 104 at 121, Lord Wilberforce and Lord Simon of Glaisdale observed (dissenting as to the result, consistent with the majority on this issue, and subsequently approved in *Pao On v Lau Yiu Long* [1980] AC 614 at 635):

    "*... in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law...*"

51. That observation must be correct. One can consider many situations in life where people have no reasonable alternatives but act (for example, a householder entering into a contract with a monopoly supplier of utilities), but it could not be said that they acted under duress so as to negate their consent in law. That is sufficient to dispose of the Appellant's proposed 'no reasonable alternative' test for duress.

52. A conclusion of 'no reasonable alternative' may be relevant to the question of causation - as an evidentiary matter going to the question of whether the victim of the duress was in fact influenced by the threat. But it is not relevant to the question whether the threat or pressure was unlawful (or whether lawful pressure was illegitimate): Edelman & Bant, *Unjust Enrichment* (2nd ed, 2016), pp 223-224.

UK test: 'no reasonable or justifiable connection'

53. The position in the UK is that the fact that the threat is lawful does not necessarily make the pressure legitimate. To determine whether lawful conduct (or the threat of such conduct) establishes duress, it is necessary to ask whether the demand supported by the threat could be justified or was reasonable: *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, 401 (Lord Scarman); *R v Her Majesty's Attorney-General for England and Wales* (New Zealand) [2003] UKPC 22 [15]-[20].

54. Even if (contrary to the submissions in support of *Karam* above) this court were to adopt the UK position, there is no factual basis in this case to find duress. The husband's "demand" was for the wife to agree that his wealth be reserved for his children and to sign a financial agreement to give effect to that, and the "threat" was that he would withdraw from the relationship and not go ahead with the marriage.

55. Accordingly, the Appellant's submission must be that it was not reasonable or justified for the husband to insist that the Appellant sign the financial agreement in circumstances where:

    (a) the husband had from the outset expressed his intention to ensure that the financial position of his children was protected;

    (b) the Appellant acquiesced in that position and was aware that there would be a document to sign before a wedding; and

    (c) the financial agreement reflected that intention.

56. That submission is not sustainable. Further, the corollary appears to be that it would be not reasonable or justified for the husband to refuse to marry the Appellant if she did not sign the financial agreement. The fact that in that circumstance the husband would be bound to marry someone against his will is a *reductio ad absurdum* and reflects the degree to which the Appellant's submissions privilege her autonomy over the husband's.

57. Furthermore, the facts of the case do not support a conclusion that any pressure exerted by the relevant conduct of the Respondent caused or materially contributed to the Appellant signing the financial agreements. When presented with the two draft agreements, the Appellant was not concerned about the separation provisions because she would never leave her husband, and she was "not interested" in the idea that the husband might ever leave her. The Appellant's only concern was with the testamentary provisions, in relation to which her solicitor requested amendments which the Respondent accepted. Those facts deny causation or contribution.

58. Moreover, the relevant financial agreement is the Second Agreement which terminated the First Agreement. By the time of the Second Agreement, the wedding had taken place and the parties had married. The Respondent's threat not to marry the Appellant

(and the consequent cancellation of the wedding and the impact of that on the Appellant and her family) had passed. There was no finding (nor any evidence) that the Respondent had threatened to end the marriage if the Second Agreement was not signed. As the Full Court held (FC [77] and [79]), the trial judge was in error when concluding (TJ [95] and [96]) that the only difference between the First Agreement and the Second Agreement was the absence of time pressure and that the marriage would be at an end before it was begun if the Second Agreement was not signed. The wedding had already occurred and the marriage had already begun by the time of the Second Agreement.

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59. The fact that the First Agreement stated that the parties will enter into another financial agreement pursuant to section 90C in terms similar to the First Agreement does not have the consequence that the pressure exerted by the threat not to proceed with the wedding remained after the wedding had taken place. Plainly, that pressure ceased once the wedding occurred and the parties were married. The Appellant's solicitor gave the Appellant advice that she should not sign the Second Agreement, but the Appellant signed it and was not concerned about the separation provisions (TJ [57]). On the findings of fact made, there is no basis for any conclusion that she did so under any threat of anything from the Respondent, much less under any illegitimate
20 pressure from the Respondent.

60. The Respondent accepts that the fact that the Appellant received independent legal advice is not, in itself, a sufficient basis to find that there was no duress. However, that is not the reasoning of the Full Court: see FC [167]; and it is perfectly consistent to view the presence of independent legal advice as an important factual matter, raising doubts as to whether any psychological or other pressure was in fact operative at the time: see *A v N* [2012] NSWSC 354 at [511] (Ward J).

GROUND 2: UNDUE INFLUENCE

30 61. The doctrine of undue influence looks to the quality of the consent or assent of the weaker party, and applies where the will of the innocent party is not independent and voluntary because it is overborne: *Amadio* at 461 (Mason J); 474 (Deane J).

62. The Respondent again relies on the facts identified at paragraph 4 of these submissions, including the findings that:

(a) the Appellant received independent legal advice in relation to the transaction, which she understood: TJ [48]-[53], [57]; FC [109], [161(i)-(k)], [167]

(b) the Appellant knew from the outset of the relationship that the Appellant required her to sign a financial agreement that would preserve his wealth for him and his
40 children: TJ [33], [35]; FC [74], [118], [161(b)], [164];

(c) the Appellant's solicitor proposed amendments to the financial agreement, and those amendments were accepted: FC [139], [166];

(d) by the time of the Second Agreement, the Respondent's threat not to marry the Appellant (and the consequent cancellation of the wedding and the impact of that on the Appellant and her family) had passed.

63. The Respondent contends that these factual findings are sufficient to rebut any presumption of undue influence which arises between fiancé and fiancée (the

existence of which the Respondent denies); and to demonstrate that there was no actual undue influence.

No presumption of undue influence between fiancé and fiancée

64. The Appellant relies on a presumption of undue influence said to arise between fiancé and fiancée.

65. There is no authority of this Court upholding a presumption of undue influence between fiancé and fiancée. It may be noted at the outset that there is no such presumption between spouses: *Yerkey v Jones* (1939) 63 CLR 649 at 659 (Latham CJ), 675 (Dixon J); *National Westminster Bank Plc v Morgan* [1985] AC 686; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 409 [33]. Nor is there a presumption between de facto partners: *Hillston v Bar-Mordecai* [2003] NSWSC 89 at [45]-[46]; assumed by Kirby J in *Garcia* at 421-428 [66].

66. The Appellant relies on Dixon J's inclusion of "a man [and] the woman he has engaged to marry" on his Honour's list of relationships in which the presumption arose in *Johnson v Buttress* (1936) 56 CLR 113 at 134 and a similar observation in *Yerkey v Jones* (1939) 63 CLR 649 at 675. Both these comments were obiter dicta. The Appellant asserts at AS [27] that the majority of this Court in *Garcia* confirmed the existence of a presumption between fiancé and fiancée. That assertion is incorrect. The High Court in *Garcia* did not cite Dixon J's dicta in question, and in any event expressly stated at 404 [22] that its reasons should not be applied outside the context of a wife acting as surety for her husband.

67. In *Louth v Diprose* (1992) 175 CLR 621 at 630, Brennan J referred to the observation of Lord Langdale MR in *Page v Horne* (1848) 11 Beav 227 at 235; 50 ER 804 at 807: "no one can say what may be the extent of the influence of a man over a woman, whose consent to marriage he has obtained". Brennan J continued: "It may no longer be right to presume that a substantial gift made by a woman to her fiance has been procured by undue influence", with a footnote: "See *Zamet v Hyman* [1961] 1 WLR 1442; but cf. *Johnson v Buttress* [at 134], and *Yerkey v Jones* [at 675]."

68. In *Zamet v Hyman*, the Court of Appeal had reviewed the earlier authorities and concluded that the presumption no longer applied to the relationship. Lord Evershed observed at WLR 1445: "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 today." In a similar manner, Dixon J's comments about the position of a fiancée should be considered in the context of social conditions in 1936 and 1939; and not 2017. The Respondent submits that the rationale for application of the presumption of undue influence to the relationship between fiancé and fiancée no longer exists. It is offensive to the status of women (and men) today to suggest that fiancées, as such, are so subservient or vulnerable to exploitation so as to need special protection supported by a legal presumption in their favour.

69. In any event, as a factual matter, the relevant financial agreement is the Second Agreement, because it terminated the First Agreement. As the Second Agreement was not entered into as fiancé and fiancée, the presumption (if it exists) cannot apply to this Agreement.

No presumption of undue influence between fiancé and fiancée in the context of Part VIIIA financial agreements.

70. In the alternative to the above, there can be no presumption of undue influence between fiancé and fiancée *at least in the context of Part VIIIA financial agreements*, as a matter of statutory construction of Part VIIIA.

71. As noted above, ss 90K(1)(b) and 90KA (or their cognate provisions ss 90UM(1)(e) and 90UN) apply:
    (a) where a financial agreement is made between fiancé and fiancée (s 90B);
    (b) where a financial agreement is made between husband and wife (s 90C);
    (c) where a financial agreement is made between former husband and wife following a divorce (s 90D);
    (d) where a financial agreement is made before entry into a de facto relationship (s 90UB);
    (e) where a financial agreement is made during a de facto relationship (s 90UC); and
    (f) where a financial agreement is made following the breakdown of a de facto relationship (s 90UD).

72. In only one of these contexts (an agreement made under s 90B) would the purported presumption apply. Part VIIIA provides no warrant for there to be such a differential approach in the application of principles under ss 90K(1)(b) and 90KA.

73. Further, financial agreements between fiancé and fiancée are what might be considered the paradigm case of Part VIIIA financial agreement. An application of a presumption of undue influence to all cases of such cases would significantly undermine the effectiveness of the Part VIIIA regime, in a manner which it could not be supposed Parliament intended. It may be recalled that the grounds in ss 90K(1)(b) and 90KA were intended to provide for agreements to be set aside "in certain limited circumstances"; not that the standard case of a financial agreement would be presumed to be invalid unless proved to have been made free of undue influence.

No actual undue influence

74. In the absence of any presumption, undue influence may still be established by proof of the fact that the particular transaction in question was the outcome of such an actual influence over the mind of the party impugning the transaction that it cannot be considered his free act: *Johnson v Buttress* (1936) 56 CLR 113 at 134 (Dixon J).

75. The "most obvious" way to rebut a presumption of undue influence is to prove that the plaintiff received independent legal advice in respect of the impugned transaction: *Johnson v Buttress* (1936) 56 CLR 113 at 120 (Latham CJ). It may even be the case that receipt of independent legal advice may be sufficient in itself to rebut an allegation of undue influence: *Haskew v Equity Trustees Executors and Agency Company Limited* (1919) 27 CLR 231 at 235 (Isaacs J) (though in the context of Part VIIIA, the combined effect of ss 90G(1), 90K(1)(b) and 90KA suggests that the enquiry into whether a financial agreement is valid and binding goes further than merely asking whether independent legal advice was provided).

76. In this case, the Appellant received independent legal advice before the First and Second Agreements, understood that advice, but chose not to follow it: see TJ [48]-[53], [57]; FC [109], [161](i)-(k), [167]. The legal advice was not merely an explanation of the terms and effect of the transaction, but importantly also advice on the advantages and disadvantages of entering into the transaction. Where it can be shown that the plaintiff received adequate independent legal advice, and understood that advice, it is not necessary, in order to rebut the presumption, to show also that the advice was followed: *Inche Noriah v Shaik Allie bin Omar* [1929] AC 127 at 135. As Lord Nicholls observed in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at [61]:

> *If the solicitor considers the transaction is not in the wife's best interests, he will give reasoned advice to the wife to that effect. But at the end of the day the decision on whether to proceed is the decision of the client, not the solicitor. A wife is not to be precluded from entering into a financially unwise transaction if, for her own reasons, she wishes to do so.*

(It should be noted in any event that the First and Second Agreements were not 'financially unwise': while the separation provisions were not generous to the Appellant, she would be entitled to significant amounts under the testamentary provisions, and those provisions were the Appellant's focus, as well as significant amounts during the marriage.)

77. Further, having regard to the facts set out at paragraph 4 above, the allegation that the husband exercised any undue influence (whether actual or presumed) over the Appellant must be rejected.

GROUND 3: UNCONSCIONABLE CONDUCT

78. The Appellant has previously accepted that the principles to be applied in determining unconscionable conduct under s 90K(1)(e) are the principles expressed by this Court in *Amadio* and subsequent cases (special leave transcript p5, lines 150-160). It is unclear to the Respondent whether the Appellant's submissions at AS [28] represent an attempted application (but misunderstanding) of those principles, or a contention that this Court should apply a different principle of "unconscionability".

If s 90K(1)(e) is limited to equitable doctrine of unconscionable dealing

79. To establish *Amadio* unconscionable conduct, the Appellant must demonstrate that she was under a "special disadvantage", seriously affecting her ability to make a judgment as to her own best interests, and that the Respondent took unconscientious advantage of that disabling condition: *Amadio* (1983) 151 CLR 447 at 462-463 (Mason J); *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 76-77 [55]. The Appellant has not sought to identify such a "special disadvantage". No disadvantage rising to the relevant standard can be identified. By way of example, the trial judge rejected the Appellant's contention that her limited English affected her ability to understand the terms of the agreement or the legal advice she received: TJ [83]-[86]; FC [141]-[150]; cf *Amadio*. There was no finding that the Appellant was so emotionally dependent upon, and influenced by, the husband as to disregard entirely her own interests: FC [163]; cf *Louth v Diprose* at 626.

80. Conversely, the Appellant was able to make judgments as to her own best interests. Her concern was with the testamentary provisions of the First and Second Agreements, and she was not concerned about the separation provisions: TJ [57], [80]-[81]; FC [120]-[121], [132], [165]. She (through her solicitor) sought amendments to the First and Second Agreements, which were accepted: FC [139], [166]. There was nothing irrational or self-sacrificing about the course that she took. Nor has the Appellant sought to articulate how the husband could be said to have taken advantage of any "special disadvantage" on the part of the Appellant.

81. On the contrary, the husband expressly informed the Appellant from the outset that his wealth was his and he intended it to go to his existing children, and that the Appellant would need to sign a document to give effect to that intention: see TJ [33], [35], [47]; FC [74], [118], [161(b)], [164]. It is not the case that the husband took advantage of the Appellant's lack of English: cf *Amadio*; nor that he dishonestly manufactured a crisis so as to play upon the Appellant's emotional dependence: cf *Louth v Diprose* at 638. Although independent legal advice was a statutory prerequisite, it is nonetheless relevant to the allegation that the husband took unconscionable advantage of the Appellant that he arranged for her to obtain independent legal advice: see, for example, *Aboody v Ryan* [2012] NSWCA 395 at [74]-[80]. As Deane J said in *Louth v Diprose* at 638, the intervention of equity "*is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimization*".

82. In any event, where an appeal is made by a plaintiff to the *Amadio* principle, it is abundantly clear that an element of hardship or unfairness in the terms of the transaction in question is not a sufficient basis to give rise to the necessary 'equity': *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 325 [26]; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at [19]. Nor does equity give relief merely on the basis that there is some inequality of bargaining power between the parties: *Amadio* at 459 (Gibbs CJ), 462 (Mason J); *Berbatis* at 64 [11] and [14]; 65 [17] (Gleeson CJ); 77 [56] (Gummow and Hayne JJ), and 87 [85] (Kirby J).

83. The only case which the Appellant cites in support of her contention for "substantive unconscionability", being the alleged harshness of the terms under the financial agreement, is *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610. That case concerned the *Contracts Review Act 1980* (NSW). It would be a fundamental misapplication of principle to unthinkingly apply the principles for 'unjustness' under the *Contracts Review Act* to *Amadio* unconscionable conduct. Indeed, to the extent that the Appellant's argument relies on the asserted *unfairness* or *harshness* of her entitlement under the agreement upon separation, it should be noted that those criteria were expressly proposed in a rejected amendment to s 90K, which would have substantially replicated the *Contracts Review Act* notion of 'unjustness' (discussed further below).

84. The content of the asserted "substantive unconscionability" appears to be that the wife received less under the financial agreement upon a separation than she would have received had she had access to the Family Court's jurisdiction to make 'just and equitable' property adjustment and spouse maintenance orders: see AS [28]. Yet 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, by enabling and encouraging people to agree how their matrimonial property should be distributed, including in the event of separation. The utility in doing so would be significantly reduced, if not eliminated, if their agreements were liable to be set aside on the ground that they chose

a different distribution than that which might be thought to obtain if the Court retained its jurisdiction to make 'just and equitable' orders.

85. Further, the financial agreements included provisions favourable to the Appellant during the period of the marriage and also in the event that the Respondent died prior to separation. Provisions of the latter sort are not able to be obtained under the Family Court's jurisdiction to make 'just and equitable' property adjustment and spouse maintenance orders (unless such proceedings had been brought before the death of the spouse and had not been completed: s 79(8)). It is therefore not possible to make any accurate comparison between the suite of provisions made in the Financial Agreements and the possible property adjustment and spouse maintenance orders that the Family Court might order under Part VIII. To focus solely on the separation provisions in the Financial Agreements is to ignore the true effect of those agreements.

If s 90K(1) is asserted to extend beyond equitable doctrine of unconscionable dealing

86. Assuming, contrary to the above, that the Appellants are in fact contending that 'unconscionable conduct' within the meaning of s 90K(1)(e) is broader than the established doctrine of unconscionable dealing as articulated in *Amadio* and other cases, that contention should be rejected for the following reasons.

87. **First**, as a matter of statutory construction, Parliament chose to use the words "conduct that was, in all the circumstances, unconscionable" and "in respect of the making of a financial agreement". The necessary task is to identify and apply the values and norms that Parliament must be taken to have considered relevant to the assessment of unconscionability: being the values and norms from the text and structure of the Act, and from the context of the provision: see *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at [262]; *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [41]. Arrangements (contractual or otherwise) between people in close personal relationships are paradigm cases for the equitable doctrine of unconscionable dealing: for example *Louth v Diprose* (1992) 175 CLR 621; *Bridgewater v Leahy* (1998) 194 CLR 437. Unlike ss 51AB and 51AC *Trade Practices Act 1974* (Cth) (**TPA**), where the term "unconscionable" was applied by statute to a large number of situations to which it would previously have had no application under equitable principle, here Parliament has used the term "unconscionable" in the particular context of arrangements between people in close personal relationships, in which it has a well-established legal content.

88. **Second**, s 90KA requires the court to apply "the principles of law and equity that are applicable" in determining whether an agreement is "valid, enforceable or effective". That language would undoubtedly capture a determination that a party had engaged in unconscionable conduct (under s 90K(1)(e)), as it would a determination that a party had exerted undue influence (under s 90K(1)(b)).

89. **Third**, any analogy between s 90K(1)(e) and the jurisprudence in respect of the (former) ss 51AB and 51AC *TPA* (cf ss 20-22 *ACL*) is unsustainable, given the following structural differences between the respective legislation:

    (a) Section 90K(1)(e) does not contain the extensive list of relevant factors contained in s 51AC *TPA*;

(b) Section 90K(1)(e) does not contain a provision such as s 51AA *TPA* which expressly excludes conduct that is unconscionable within the meaning of the unwritten law of the States and Territories from ss 51AB and 51AC; and

(c) Section 90KA does not find an equivalent in the *TPA*.

90. **Fourth**, the legislative history of the provision makes it clear that it would be contrary to parliamentary intent to construe the provisions in this way (to which regard may be had under s 15AB *Acts Interpretation Act 1901* (Cth)). When the Family Law Amendment Bill 1999 was under consideration in the House of Representatives, the Opposition moved an amendment which would have provided two additional paragraphs to s 90K (Commonwealth, Parliamentary Debates, HoR, 31 August 2000 Page 19811 (Robert McClelland)):

(e) at the time the agreement was entered into, the agreement is unfair, harsh or unconscionable, or against the public interest; or

(f) the agreement subsequently became unfair, harsh or unconscionable, or against the public interest, because of any conduct by the parties to the agreement or for any other reason.

91. The Government refused to accede to this amendment and it was rejected. In expressing the refusal, the Attorney-General observed: (Commonwealth Parliamentary Debates, HoR, 31 August 2000, 19807 (Darryl Williams), similarly 19811):

This proposal would, in fact, fundamentally undermine the government's objective of having binding and certain financial agreements. Our policy in allowing people to make binding financial agreements is to provide, to the greatest extent possible, certainty in the way couples settle their personal financial affairs. The objective is to keep people out of court wherever possible. For this reason we have carefully constructed the grounds for setting aside financial agreements to limit the ability of a court to interfere with a couple's genuine agreement....

[The proposed amendment] would remove any certainty in financial agreements by allowing a court to set aside any agreement simply on an application and not much else. It would mean that parties would be reluctant to enter into a financial agreement because any certainty they sought would not be realised. This is an example of the problems of making policy on the run. The member for Barton has found a provision in the New South Wales Contracts Review Act and seeks to put it in an inappropriate context without appreciating any of the broader implications of this change to the Bill.

92. The current s 90K(1)(e) was proposed in the Senate by the Democrats and acceded to by the Government. In explaining the Government's acceptance of the amendment, the Attorney-General commented (Commonwealth Parliamentary Debates, HoR, 9 November 2000, 22611 per Darryl Williams, Attorney-General):

The Senate added to those grounds [for a court to set aside a financial agreement] a new paragraph 90K(1)(e). That paragraph states that a court may set aside a financial agreement where a party to the agreement has engaged in conduct that was in all the circumstances unconscionable.

Although the government did not oppose this amendment, it was in our view not necessary. The bill as it stood included grounds for setting aside where the agreement is void or voidable. These grounds incorporate both common law and equitable grounds and, in the view of the government, included the position where an agreement would have failed because of unconscionable conduct. In the government's view, the

amendment was to make it clear that engaging in unconscionable conduct was a ground for setting aside. It is not the intention that that ground now be taken to have greater importance than other equitable or common law grounds, nor that it have a different meaning than it would have at common law or in equity.

93. The statement of legislative intent could hardly be clearer: s 90K(1)(e) was intended to capture unconscionable conduct under existing equitable principles.

94. **Fifth**, it might be suggested that it would be otiose to construe s 90K(1)(e) as limited to the principles expressed in *Amadio*, because those principles would already incorporated in s 90K(1)(b). Such an argument can be rejected: it is clear that there already is overlap between the grounds in s 90K(1). For example, a contract procured by a fraudulent misrepresentation would be voidable in equity, and could be set aside under s 90K(1)(a) or (b). In any event, the fact that s 90K(1)(e) would be essentially otiose was noted by the Attorney-General in the passage above.

95. Contrary to all of the above, even if this Court accepts that s 90K(1)(e) does import a broader doctrine of unconscionability and is not confined to the established doctrine of unconscionable dealing as articulated in *Amadio* and other cases, the facts of this particular case do not give rise to unconscionable conduct in the making of the First Agreement or the Second Agreement. As set out above, the Appellant was perfectly capable of robustly conserving her own interests.

GROUND 4: ADEQUACY OF REASONS

96. The Respondent understands that this ground has been raised in order to meet a basis upon which the Full Court found against the Appellant below, but would not lead to success on this appeal if the Appellant were unsuccessful on all other Grounds. However, if the Appellant succeeds on one of those other grounds, she needs to also succeed on this ground in order to be entitled to the orders sought in the appeal. The Respondent submits that the findings of the Full Court on this topic were correct for the reasons given at FC [60]-[63] and [81]-[84].

Part VIII: Time Estimate

97. The Respondent seeks about 2 hours for the presentation of its oral argument.

Dated 10th May 2017

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