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Précis Paper

Pre-nuptial Agreements

A discussion of the recent decision of *Thorne v Kennedy [2017]* HCA 49 and its implications for practitioners when dealing with Binding Financial Agreements.

Discussion Includes

- Key Facts
- Independent legal advice
- Duress, undue influence and unconscionable conduct
- Acting for the 'advantaged' party
- Saintclaire v Saintclaire
- Takeaways for practitioners
- Alternatives to Binding Financial Agreements

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Pre-nuptial Agreements

1. In this edition of BenchTV, Heather McKinnon (Practice Group Leader – Slater and Gordan) and The Hon Ian Coleman SC (Barrister – Culwulla Chambers) discuss the recent decision of *Thorne v Kennedy [2017]* HCA 49 and its implications for practitioners when dealing with Binding Financial Agreements.

Key Facts

1. The case involved a couple who had met online.
2. Ms Thorne was from Eastern Europe, 36 and childless when she formed a relationship Mr Kennedy over the internet.
3. They met and travelled to and from Europe and Australia in the courtship period of their relationship.
4. Mr Kennedy was a much older, very successful property developer with a net wealth pushing over $20 million.
5. A wedding date was set and the decision was made that it would take place in Australia.
6. Just prior to the wedding Mr Kennedy approached Ms Thorne asking her to sign a document, which was a binding financial agreement.
7. She signed the document and shortly after the wedding she was asked to go back and sign a second agreement.
8. Mrs Thorne's solicitor wrote her a letter advising her not to sign the document and she did so anyway.
9. Ms Thorne ultimately appealed to the High Court, which held that the agreements should be set aside for unconscionable conduct. A majority of the court also held that the agreements should be set aside for undue influence.

Independent legal advice

10. Before a Binding Financial Agreement can be legally valid a lawyer must sign a certificate of independent legal advice.
11. However, the problem with this is that generally people who are acting under duress, undue influence or unconscionable conduct will act contrary to the legal advice provided to them.
12. Therefore, a certificate of independent legal advice will not always disadvantage someone from trying to subsequently set the agreement aside.
13. Binding Financial Agreements are almost always invariably advantageous to one party and commercially highly disadvantageous to the other party.
14. When there is unequal bargaining power when the agreement is entered into relying on the independent certificate as an insurance policy is not adequate.

15. In the current case, the psychological state of Ms Thorne was such that her ability to take time to reflect on what she was doing was highly compromised.
16. This is due to the fact that her drive for children, being in her late 30s lead her to enter into the agreements without fully understanding the ramifications.
17. This case indicates that, whilst someone may present as competent, their English may be great and they may appear to be commercially astute, a lawyer needs to be aware of what else may be driving these people to enter into agreements which on an objective analysis, might not be in their best interests.
18. Practitioners must be aware of what drives a human being to commit to a relationship.
19. Practitioners must also keep in mind the legal framework which the evidence must fit if you are going to get relief.

Duress, undue influence and unconscionable conduct

20. Absent some conduct which would offend the equitable principles which govern the effect of Binding Financial Agreements (that is Sections 90 and 90KA of the Family Law Act 1975 (Cth) it is not enough for a Judge to consider an agreement to be so unfair that it must be overturned.
21. In the matter of *Thorne v Kennedy* [2017] HCA 49 the trial judge's advantage (in having seen and heard the witnesses) was significant as the Court of Appeal made it clear that provided a trial judge makes findings of fact with respect to credibility, such findings will be notoriously hard to disturb on Appeal.
22. The majority in the High Court found that whilst the primary judge described her reasons for setting aside the agreements as being based upon 'duress', a better assessment would have been that the agreements were set aside for undue influence.
23. Their Honours found that the primary judge had mislabeled undue influence as duress.
24. The case of *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149 dealt with duress and it is important to note that the decision in *Thorne v Kennedy*, did not change anything in regard to the law of duress.
25. Therefore, the law of duress remained as at common law that there needs to be proof of threatened or actual unlawful conduct.
26. The High Court observed that duress will fit within undue influence, however it may not fit within unconscionable conduct,
27. Their Honours dealt with the two branches of undue influence the crux of both being if someone makes a decision which is not the result of the free and deliberate judgement of the person making it.
28. There was a distinction in the High Court between the majority decision and Justice Gordon's decision in relation to undue influence. The majority found that there had been undue influence on the part of Mr Kennedy, whereas Justice Gordon did not.

29. Their Honours said that in the modern era, there is no presumption of undue influence in the case of a relationship between fiancé and fiancé.
30. Actual undue influence, as in the case of *Tulloch (deceased) v Braybon (No. 2) [2010]* NSWSC 650, refers to an instance where somebody's will is overborne by another and they do not have the capacity to exercise a free and independent will.
31. Unconscionable conduct, which all of the Judges agreed was the basis upon which the agreement should be set aside in this case, involves someone who is in a position of special disadvantage.
32. The crux of unconscionable conduct is that someone takes advantage of the special disadvantage of another person.
33. Where there is a position of special disadvantage there is an evidentiary onus on the party seeking to retain the agreement, in this case Mr Kennedy.
34. This means it was for Mr Kennedy to establish that Ms Thorne's execution of the agreement was procured in circumstances which were free of and not influenced by her special disadvantage (that is all of her circumstances, but in particular her desire for a family).

Acting for the 'advantaged' party

35. *Thorne v Kennedy* shines the spotlight on what could have been done that may have led to the agreement being upheld.
36. It might have been useful to have a fairly good time gap between the presentation of the idea of the agreement and the actual signing of the same as well as some evidence of Ms Thorne's free agency such as evidence from a psychologist.
37. A person who is going to sign an agreement such as this needs to understand the consequences for her economic future.
38. Time for mature reflection and deliberation is critical.
39. The question in the present case is whether the opportunity for Ms Thorne to have financial and legal advice would have given the High Court comfort that her special disadvantage would be no longer considered as such.
40. The Court must look at all circumstances surrounding the execution of an agreement.
41. However an important question is at what point will the Court form the view that the special disadvantage is such that the person does not have free agency.
42. The provisions in the *Family Law Act 1975* (Cth) with respect to Binding Financial Agreements clearly envisage that you can just make a bad bargain and if this is the case, the Court will not grant relief.
43. That is, as long as one has received independent legal advice which strictly complies with the Act, the Binding Financial Agreement will be valid and upheld.

Saintclaire v Saintclaire

44. In the matter of *Saintclaire v Saintclaire* [2015] FAMCAFC 245 both parties were corporate executives and there were 6 amendments to the Binding Financial Agreement requested by the wife, all of which were agreed to by the husband.
45. The Binding Financial Agreement was intended to be executed prior to the marriage but the stress of the wedding was too much for the wife and the Binding Financial Agreement was put off until after the wedding.
46. They had previously had a Financial Agreement under state legislation, which was manifestly unfair to the wife.
47. The Financial Agreement was overturned by the primary judge, and the decision of the primary judge was overturned on Appeal.
48. The Binding Financial Agreement in this case was upheld as the parties had far better evidence of equality in bargaining power at the beginning.

Takeaways for Practitioners

49. The factual question which comes out of the matter of *Thorne v Kennedy*, as well *as Saintclaire v Saintclaire* is when will the Court be prepared to let a person make a bad decision against their own best interests?
50. The case of *Thorne v Kennedy* is important as it invites lawyers to look at the complex nature of whether or not any person was at an unfair disadvantage at the time the bargain was struck.
51. The decision is instructive as it provides roadmaps to duress, undue influence and unfair advantage and it reminds practitioners to explore all these factual issues before clients are given advice on whether or not the Binding Financial Agreement will be upheld or not.
52. It may be argued that *Thorne v Kennedy* represents one end of the spectrum and *Saintclaire v Saintclaire* represents the other and that Practitioners would be well advised to look at the facts of the two and how the decisions of each may be distinguished from each other.

Alternatives to Binding Financial Agreements

53. When you have clients who have accumulated significant wealth in their lifetime it is imperative to make them aware of how the Family Law Act works.
54. This means that they have to have excellent up to date valuations so that there is no doubt as to what their net worth is.
55. The best defence of all is to have property outside the jurisdictional reach of the Family Court.
56. If someone has legitimately, either prior to marriage or a defacto relationship taken steps to divest in Family Trusts etc, it will probably be more secure than relying on a Binding Financial Agreement.

BIOGRAPHY

Heather McKinnon

Practice Group Leader – Slater and Gordon

Heather McKinnon was admitted as a lawyer in 1984. For the past 35 years, Heather has built a formidable reputation as one of the leading Family Law authorities in Australia. She is currently a member of the Board of Women's Legal Services NSW and the Specialist Accreditation Family Law Advisory Committee in the NSW Law Society. Heather is an Arbitrator under Family Law Act Regulations and a qualified Independent Children's Lawyer. Amongst her many achievements, Heather was named Lawyer of the Year in 1989 by the Law Society of NSW.

The Hon. Ian Coleman SC

Barrister – Culwulla Chambers

The Honourable Ian Coleman was admitted as a lawyer in 1974, called to the NSW Bar in 1975 and appointed as a senior counsel in 2013. He was appointed to the trial division of the Family Court of Australia in 1991, Judge advocate of the Australian defence force in 1992, Commissioner of the Australian Law Reform Commission in 1993, appointed to the appeal division of the Family Court in 1999 and was Judge in the Family Court of Australia in 2009 – 2013. He is currently an Adjunct Professor at the Western Sydney University School of Law.

BIBLIOGRAPHY

Focus Case

Thorne v Kennedy [2017] HCA 49

Cases

Saintclaire v Saintclaire [2015] FAMCAFC 245
Australia & New Zealand Banking Group v Karam [2005] 64 NSWLR 149
Tulloch (deceased) v Braybon (No. 2) [2010] NSWSC 650

Legislation

Family Law Act 1975 (Cth)