FEDERAL CIRCUIT COURT OF AUSTRALIA

THORNE & KENNEDY *[2015] FCCA 484*

Catchwords:
FAMILY LAW – Property – financial agreements – validity – enforceability – first agreement signed just prior to wedding – second agreement signed just after the wedding – whether the wife was under duress to sign the agreements – whether the wife's lack of proficiency in English hindered her capacity to understand the legal advice – whether errors in the schedule of the husband's assets and liabilities renders the agreements void – whether errors in the legal advisors' certificates renders the agreements void will with.

Legislation:
Family Law Act 1975, ss.90C, 90CB, 90D, 90(1), 90(1A), 90(c), 90MH

Cases cited:
Wallace & Stelzer & Anor [2013] FamCAFC 199

Applicant:	MS THORNE
Respondent:	THE ESTATE OF THE LATE MR KENNEDY
File Number:	LEC 206 of 2012
Judgment of:	Judge Demack
Hearing dates:	12 & 13 March 2014 and 27, 28 & 29 January 2015
Date of Last Submission:	29 January 2015
Delivered at:	Brisbane
Delivered on:	4 March 2015

REPRESENTATION

Counsel for the Applicant:	Mr Kearney, SC
Solicitors for the Applicant:	Somerville Laundry Lomax
Counsel for the Respondent:	Mr Lethbridge, SC
Solicitors for the Respondent:	Jones Mitchell Lawyers

ORDERS

(1) That neither the first financial agreement of 26 September 2007 nor the second financial agreement of 20 November 2007 are binding upon the parties.

(2) That both the first financial agreement of 26 September 2007 and the second financial agreement of 20 November 2007 be set aside.

(3) That the respondent pays the applicant's costs of the application thus far, with the quantum of such costs as agreed or failing agreement referred back to the court for determination.

(4) That this matter be adjourned for directions to 9.30am on 27 April 2015 in the Federal Circuit Court of Australia at Brisbane.

(5) That the solicitors for both parties have leave to appear by telephone link on 27 April 2015.

IT IS NOTED that publication of this judgment under the pseudonym *Thorne & Kennedy* is approved pursuant to s.121(9)(g) of the *Family Law Act 1975* (Cth).

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE

LEC 206 of 2012

MS THORNE
Applicant

And

THE ESTATE OF THE LATE MR KENNEDY
Respondent

REASONS FOR JUDGMENT

1. On (omitted) 2007, with their wedding scheduled for (omitted) 2007, Ms Thorne and Mr Kennedy each signed a document headed "Financial Agreement (Pre-Nuptial Agreement s. 90B *Family Law Act 1975*)" (the first agreement).

2. They each received legal advice about the agreement. Ms Thorne remembers the advice that she was given to include[1]:

> *It is the worst contract I have ever seen. Don't sign.*

3. The document included at paragraph B3:

> *Each Mr Kennedy and Ms Thorne acknowledge one to the other and agree that within 30 days of the signing of this Agreement, they will each enter into and sign another Agreement being a Financial Agreement pursuant to section 90C of the Family Law Act 1975, in terms similar to the terms provided herein.*

4. Ms Thorne and Mr Kennedy married on (omitted) 2007.

[1] Paragraph 70 of the wife's affidavit filed 14 January 2013.

5. And by 20 November 2007, a second agreement was signed by both parties and their respective lawyers, headed "Financial Agreement (Agreement S.90C *Family Law Act 1975*)" ("the second agreement").

6. The husband signed a document called a "Separation Declaration" on 16 June 2011, signalling his view that the marriage was over. On 9 August 2011, the wife left their home.

7. The wife through her application filed 27 April 2012 seeks declarations that the agreements be declared non-binding, or alternatively, set aside, or declared void. Further she seeks an adjustment of property in the order of $1,100,000, along with lump sum spousal maintenance of $104,000.

8. The husband, through his response filed 27 June 2012, opposes the orders sought by the wife, and seeks orders that the second agreement be declared binding.

9. The husband died on (omitted) 2014 from non-Hodgkin's lymphoma.

10. The trial was part heard at that stage, indeed the trial dates had been fitted in around Mr Kennedy's significant hospital treatments. The trial had been adjourned during his cross-examination when it became clear that there was a need for better evidence about Mr Kennedy's financial position in 2007. The executors of Mr Kennedy's estate (two of his three adult children to an earlier marriage) were substituted as parties in his stead.

The Evidence and the History of Litigation

11. Having separated in August 2011, on 27 April 2012 the wife filed her initiating application dealing with the financial agreements and seeking an order for property adjustment and lump sum spousal maintenance. She filed a financial statement and affidavit in support of her application. The husband attended to the filing of his response on 27 June 2012 seeking on an interim and final basis the dismissal of the wife's applications and a declaration that the financial agreement of 20 November 2007 be declared binding on the parties. He filed an affidavit contemporaneously with his response document but filed his first financial statement on 3 August 2012.

12. At the time of filing his documents the husband had already been diagnosed with non-Hodgkin's lymphoma and was in receipt of significant medical treatment including extensive chemotherapy and stem cell treatment. The husband's health limited his capacity to participate in the litigation easily. Trial dates were eventually found which fitted in between chemotherapy bouts and the trial commenced on 12 March 2014. On 13 March 2014, whilst the husband was still under cross-examination, the trial was adjourned so that evidence could be garnered with respect to the husband's financial position with greater particularity in 2007. Directions were made for valuations to be obtained.

13. On (omitted) 2014, the respondent husband died.

14. Probate of the Will was granted on 8 October 2014, and the deceased's adult son and daughter were substituted as the respondents in the proceedings.

15. Valuations still needed to be obtained and understandably the process was a little delayed. Finally the matter was ready to be listed and trial directions were made to recommence the trial on 27 January 2015.

16. With the substitution of the adult son and daughter as the respondents in the proceedings, within this judgment I will sometimes refer to the respondent in the first instance as "the deceased". I will otherwise variously call the parties, the wife and husband, or the bride and groom.

17. The wife's witnesses included herself and her sister, Ms G. Both of those witnesses gave their evidence with the assistance of a (omitted) interpreter, Ms C. The use of the interpreter for the wife's evidence was objected to as one of the questions before the court is the wife's capacity to speak and understand English. It seemed to me that the question of the wife's capacity at the time that she signed the two agreements was a question for my determination and that I would not be assisted in that regard by requiring the wife to give her evidence before me without the assistance of an interpreter.

18. The wife's evidence also included a report by Ms S, the Director of Studies at (omitted) Language School, who had assessed the applicant's ability to comprehend the proper meaning of the legal

document signed by her on November 20, 2007. Ms S was required and made herself available for cross-examination

19. The wife also relied upon an affidavit by a town planner, Mr J who had produced a report with respect to an assessment of a development application made by the husband over land at Property N, which, I was told, was subsequently the subject of approval. Mr J was not required for cross-examination.

20. The wife's other witness appeared pursuant to a subpoena. This was the solicitor who had given the wife advice in 2007 and had subsequently signed the certificate as to legal advice attached to the financial agreements. She is Ms Harrison, accredited family law specialist, who, in 2007 was an Associate of a firm on the (omitted). Ms Harrison's evidence in chief was given orally. She was required and made herself available for cross-examination.

21. As earlier stated the husband was cross-examined to some extent during the first tranche of hearings. At that point in time, his only other witness was a friend of his, Mr M and after successful objections to parts of his affidavit, he was no longer required.

22. At the second tranche of hearings, the only witness for the respondent who was eventually relied upon and then required for cross-examination was the solicitor for the deceased who had acted for him in 2007 with respect to the financial agreements and who had provided him with advice and who had signed the requisite certificates. Mr W had attended to the filing of an affidavit. He was required and made himself available for cross-examination. His firm continued to act for the respondent at the time of the final hearing although it is clear from his answers in cross-examination that the carriage of the action has been in the hands of another solicitor at the firm.

23. In setting out the evidence as I have found it, I must record that the husband's oral evidence had many difficulties. He was 74 at the time, and seriously unwell. He was frail, and wheelchair bound. He found the courtroom cold. On the first day of the trial, when the wife was being cross-examined, he went home during the morning tea adjournment. He was feeling pain. The next day he gave evidence, having been interposed by me in the hope that he may be better placed

to come to court earlier, rather than later in the day. He wasn't always responsive to questions, and at times, his evidence seemingly contradicted something that he had said only moments earlier. He seemed not to understand questions posed as suggestions, or when based upon someone's earlier affidavit evidence, even his own. The longer questions revolved about one point in time, or one issue, the more confusing it became. I make no criticism of the husband in any of these remarks. He was plainly frail and unwell. I did not form the view that he was trying to be evasive or unhelpful. But, it must be said, that I found his evidence difficult, and I have done the best I can with it.

24. I was not so troubled by the wife's evidence.

The Wife's Contentions

25. The wife's Outline of Case document e-filed on 10 March 2014 identifies that the issue for determination at this hearing is "in relation to the competing positions regard two asserted Financial Agreements" as identified in that documents paragraphs 2 and 3, thus:

> *The question to be determined is whether each of the documents described as a 'Financial Agreement' pursuant to the Act being:*
>
> *2.1 that dated 26 September 2007 [the First Agreement]; and,*
>
> *2.2 that dated 20 November 2007 [the Second Agreement];*
>
> *is to be considered 'binding' upon the parties or not. More particularly for determination of this issue:*
>
> *2.3 whether there existed a 'valid, enforceable and effective' agreement between the parties at either date (section 90KA);*
>
> *2.4 to the extent necessary (if at all consequent upon the proposition in the preceding paragraph), whether each party received advice as required by section 90G in respect of either Agreement in the face of certificates form legal representatives of each to the contrary;*
>
> *2.5 again to the extent necessary (if at all), whether the wife in fact received advice as required by section 90G in respect of each Agreement;*
>
> *2.6 again to the extent necessary(if at all), whether a declaration ought be made pursuant to section 90G(1A) such that*

the Second Agreement is to be considered binding upon the parties;

2.7 again to the extent necessary (if at all), whether there is any circumstance in which the First Agreement can be 'revived' or continue to operate in circumstances where inter alia it was been expressly terminated by the Second Agreement; and,

2.8 again to the extent necessary (if at all), whether a declaration ought be made pursuant to section 90G(1A) such that the Second Agreement is to be considered binding upon the parties.

3. Further, and to the extent necessary to consider the same given the issues identified in paragraph 2, whether any binding Agreement is one that ought be set aside pursuant to each of the following provisions of s90K of the Act:

3.1 section 90(1)(a) – the non-disclosure of a material matter;

3.2 section 90K(1)(b) – that the Agreements are void, voidable and/or unenforceable on the basis of each of:

3.1.1 duress;

3.1.2 undue influence; and/or,

3.1.3 unconscionability;

3.3 section 90K(1)(e) - that the husband engaged in conduct that was, in all the circumstances, unconscionable in respect of the making of the agreement.

26. The wife also seeks her costs of this application.

The Husband's Contentions

27. The husband contends[2] that:

Consistent with s90KA of the Act, the wife should be estopped from asserting that she did not receive any or any adequate legal advice that the purposes of s90G(1)(b) of the Act in circumstances where she represented to the husband that she sought and obtained relevant advice as described in recital F – 1 of the agreement; ...

[2] Per his Outline of Case document filed 1 February 2013.

> *That subject to any generally accepted vitiating factor available to her at common law or in equity then pursuant to s90KA of the Act it is not open to the wife to contend that she failed to read or adequately read or understand the agreement before signing it is a basis to avoid the agreement; …*
>
> *That subject to any generally accepted vitiating factor available to her at common law or in equity, then pursuant to s 90KA of the Act it is not open to the wife to contend that she failed to understand or adequately understand the terms of the agreement and their full effect before signing it is a basis to avoid the agreement.*

28. The husband seeks that the initiating application be dismissed and that pursuant to s90G(1) or in the alternative s90G(1A) of the *Family Law Act 1975* ("the Act"), the financial agreement entered into between the parties on 20 November 2007 pursuant to s90C of *the Act* be declared as binding on the parties. He further seeks orders with respect to costs as the Court considers appropriate and any other order or declaration the Court considers appropriate.

Background Facts

29. The parties met over the internet in early to mid-2006.

30. She was a 36 year old (country omitted) born, (country omitted)-living (occupation omitted), with her English language skills informally acquired. She had been married and divorced once, and later been in a four year de facto relationship which had ended when her partner was transferred to (country omitted) with his work and she could not follow him. She had no children and no assets of substance.

31. He was a 67 year old (nationality omitted) property developer from the (omitted) with assets in the order of maybe as much as $24 million, but at least $18 million. He was divorced from his first wife, with whom he had three children, now all in adulthood.

32. They had met (website omitted).com. Ms Thorne's profile read:

> *I am single female with no children. I don't smoke or drink. I am of (religion omitted) religion and speak a little (language omitted) and English. I wish to marry and have a good life.*

33. Having met on the website in early to mid-2006, the parties then commenced speaking with each other on the telephone. They spoke in English and in (language omitted). The applicant records[3] that the deceased said to her "I will come to (country omitted) and we will see if we like each other. If I like you I will marry you but you will have to sign paper. My money is for my children."

34. Shortly thereafter in July 2006, indeed seemingly only a matter of days or weeks after they had commenced speaking on the telephone, the deceased asked the applicant to travel to Australia to see if she would like it. When she said that "no, you come to (country omitted)", he said "I'll be there next Thursday", and he was. He says that he was attracted to Ms Thorne as they shared a religion and could speak to each other in (language omitted).

35. Although plainly keen to have a relationship, and potentially, another marriage, Mr Kennedy was at pains from the outset to make it clear to Ms Thorne that his wealth was his, and he intended it to go to his children. Ms Thorne was certainly aware of that position from the outset. Mr Kennedy was not so clear in his oral evidence as to how he made it plain to Ms Thorne that although he would provide for her financially whilst they were in a relationship she would be needing to sign an agreement with respect to their financial position prior to any marriage taking place. Mr Kennedy seemed to express the view in cross-examination that Ms Thorne was the first to introduce the notion of signing a document to protect Mr Kennedy's financial position. I am not satisfied that was the case. It seems to me more likely than not that Mr Kennedy was the first to introduce the notion of a document being needed to be signed and that Ms Thorne was keen to acquiesce. I accept Ms Thorne's position that she understood Mr Kennedy's need to ensure that his children's financial position was protected, and that her concern was, not what would happen to her financially while her husband-to-be was alive, but, as to what would happen to her financially if he died without making proper provision for her in his Will.

36. During their courtship phase, Mr Kennedy travelled to (country omitted) twice and further, together they spent a couple of months

[3] to at paragraph 25 of the applicant's affidavit filed 14 January 2013.

travelling around (country omitted) particularly (country omitted) and (country omitted). In (country omitted) they met Ms Thorne's family. During this travel they made arrangements for an appropriate Visa for Ms Thorne to come to Australia. It appears that the Visa was going to be valid for nine months and the parties formed the joint intention that they would marry during that time which would then have the effect of allowing a different visa to be sought and obtained.

37. They came, then, to Australia, arriving in (omitted) 2007. Ms Thorne moved into Mr Kennedy's penthouse on the (omitted). The valuation lately done for litigation purposes[4] reveals this property to be 4 bedrooms, 5 bathrooms plus guest powder room, kitchen, dining, family, wet bar, lounge, living, study nook, laundry, multiple balconies and upper roof deck with pool. It has marble flooring, decorative cornicing, gold leaf decorative fittings, a chandelier, gold plated tap wear, and murals on some internal walls and ceilings. It may be expected that Ms Thorne would have been aware that this was an expensive home.

38. I accept the husband's evidence that he didn't ever specifically advise his future bride as to his exact wealth. He believed that he had given Ms Thorne a copy of an earlier financial agreement that he had had solicitors draw up when he had been in a relationship with Ms B[5]. He had asked Ms B to sign the agreement, and when she had refused, he had ended that relationship. That agreement set out his financial position (he said) at that time, and Mr Kennedy considered that by giving Ms Thorne a copy of that agreement, that would have alerted her to the terms of the agreement that he was wanting her to sign, and to some specifics as to his wealth and particular assets.

39. Ms Thorne denied ever being given a copy of that document and denied any knowledge of the content of that document.

40. Mr Kennedy's evidence about the timeframe of when he gave the (omitted) agreement to Ms Thorne was confused and confusing. No other evidence corroborates him giving it to Ms Thorne. No evidence corroborates Ms Thorne ever reading and understanding the (omitted)

[4] Exhibit 17 – valuation by (omitted) dated 7 November 2014.
[5] This document was referred during the trial as the "(omitted) Agreement". Ms B's name should not be used in any copy of this judgment available publicly.

agreement. So, if it was given to her, which seems improbable, there is no reason for me to form the view that it informed her as to the likely contents of any agreement that she might be asked to sign.

41. Mr Kennedy's wealth was known by Ms Thorne by other means. He told her that he was wealthy. He demonstrated that he had personal wealth through his actions: for example, travelling to (country omitted) to meet her at short notice, spending money on her there, gifting her money, buying her expensive jewellery, holidaying in (country omitted) for two months, telling her about his business interests and developments, telling her that he would look after her, etc.

42. On 8 August 2007, Ms Thorne, in the company of Mr Kennedy attended on the groom's solicitor, Mr Jones, for the purposes of Mr Kennedy instructing Mr Jones to prepare a financial agreement to be signed prior to the wedding. Mr Jones records Ms Thorne's presence at the meeting, and remembers meeting her at the time, exchanging pleasantries ("welcome to the (omitted)", "congratulations on your upcoming wedding"), and then speaking only with his client, privately. Their next conference for the same purposes appears to have occurred on 14 August 2007.

43. Throughout their conferences, Mr Kennedy told his solicitor plainly and repeatedly that "there will only ever be a wedding if there is an agreement first". From the solicitor's perspective, his client never deviated from this position.

44. On 15 August 2007, his solicitor sent the groom a letter enclosing a draft agreement. Some discussion between solicitor and client ensued as the solicitor tried to get some better up-to-date information about his client's financial position (no doubt so that Schedule C could be correct). A further letter and draft agreement was sent on 30 August 2007 and then another, on 5 September 2007.

45. The draft by Mr Jones included the important point that the agreement to be signed required that a further agreement would need to be signed after the wedding. The second agreement would be, on all essential points, the same as the first agreement, save for the fact that it would now be down post-wedding, not pre-wedding. Mr Jones included that provision in the first agreement as he was concerned about the

proximity of the wedding date, and that it may be considered that the agreement was signed in haste which might be considered to amount to stress and pressure. Mr Jones had a number of conversations with his client about the agreement not being signed on the eve of the wedding.

46. As the wedding drew nearer, usual preparations were undertaken. A few weeks before the wedding, the bride's parents and sister were flown to Australia from (country omitted) by the groom. They were accommodated by the groom.

47. Sometime around 16 September 2007 (and most likely on 19 September 2007), the groom told the bride that they were going to see solicitors about the signing of some documents. The wife had, of course, long known, that there would be a document to sign, before the wedding. It was on 19 September 2007 that the solicitor received a phone call from Mr Kennedy saying that he had lost the list of solicitors that he was to give to Ms Thorne for her to get her own legal advice. That list had been included in own of the earlier letters from the groom's solicitor. The information was again provided to Mr Kennedy, and he made an appointment for Ms Thorne to see one of those named: Ms Harrison.

48. Ms Thorne asked Mr Kennedy whether she would have to sign the Agreement. And he told her that if she did not sign, the wedding would be off. Before going to see the solicitor, Ms Thorne knew that the only available outcomes to her where to either sign the document, or there would not be a wedding.

49. On 20 September 2007, Ms Harrison met Ms Thorne for the first time. Her sister came with her to the appointment. Mr Kennedy drove them to that appointment and waited in the car outside.

50. It was during that appointment, that, for the first time, Ms Thorne became aware of the contents of the agreement, and had information about Mr Kennedy's financial position.

51. After the bride's appointment with her solicitor on 20 September, Mr Jones received a phone call from Mr Kennedy reporting that Ms Harrison was saying the agreement was no good. A further urgent message was received by Mr Jones from Mr Kennedy. On 21

September, the solicitors had some contact with each other during which the bride's solicitor suggested that due to the proximity of the wedding, there was the suggestion of duress.

52. On 21 September 2007, Ms Harrison attended to the completion of her written advice to Ms Thorne. On 24 September 2007, Ms Thorne again attended at the offices of Ms Harrison and Ms Harrison went through her letter of 21 September with Ms Thorne face-to-face. I am satisfied that all advice given by Ms Harrison was consistent with the written advice in her letter of 21 September 2007. That letter is annexure 1 to the wife's affidavit filed 14 January 2013. It is now reproduced in full:

> *You have sought my advice regarding a financial agreement which your fiancée Mr Kennedy ("Mr Kennedy") has asked you to sign before your wedding. A copy of the agreement is* ***enclosed****. You have told me that Mr Kennedy has told you that the wedding which is now only days away will not go ahead if you do not sign the agreement. Mr Kennedy has told you and our office that the terms of the agreement are "not negotiable".*
>
> *The agreement that Mr Kennedy wants you to sign makes the following provisions: –*
>
> *1. For your maintenance during the relationship;*
>
> *2. What property you will receive if the two of you separate;*
>
> *3. That you* **can not** *make a claim against Mr Kennedy to help him maintain if you separate;*
>
> *4. What you will receive if Mr Kennedy dies and the two of you have not separated.*
>
> ***Provision for your maintenance during the course of the marriage***
>
> *The agreement provides that during the marriage until such time as you separate, Mr Kennedy will: –*
>
> *A. Meet all the outgoings with respect to the home in which the two of you live;*
>
> *B. Pay your maintenance of not less than $4000 each month or 25% of the net income generated by the management rights of the Property N development, whichever is the greater;*

C. Permit your family to reside rent free in a unit located in the Property N development;

D. Permit you to reside rent free in a penthouse unit located in the Property N development;

E. Allow you to have sole use and possession of the Mercedes Benz (omitted) which he currently owns or a replacement vehicle of the same or higher value.

Comments regarding maintenance

Whilst Mr Kennedy promises to meet all outgoings with respect to the home it appears that any of your own needs should be met from the $4,000.00 you receive. That would include clothing and potentially includes all your personal items, toiletries and even the food you eat.

Whilst mention is made of the Property N development, you have instructed me that council has refused permission for the development to go ahead and that Mr Kennedy and his business partners will need to "take the council to Court" to get development approval. As such throughout the Agreement wherever there is a reference to the Property N development there is no guarantee that Mr Kennedy can meet any of his obligations in particular: –

a. To permit your family to reside rent-free in a unit in the Property N development;

b. To meet permit you to reside rent-free in a penthouse unit located at the Property N development (if you resided rent-free in a penthouse unit located in the Property N development this may well constitute the separation from Mr Kennedy in which case you're right to reside in the penthouse would cease). As such, unless Mr Kennedy resides with you this is a provision you may well be incapable of ever enjoying;

c. There is also the possibility that in order to get council approval the Property N development might be significantly altered from the current proposed plan which may lead to Mr Kennedy or you arguing that it is no longer the development which was anticipated at the time of the agreement;

With respect to the car, as time goes by the value of the car will reduce so that over time a replacement vehicle of the same value may well be something that is far more modest than a Mercedes Benz .

If you and Mr Kennedy separate all of the above rights will cease. The agreement makes this clear. Keep in mind that separation not only means that you decide that the marriage is at an end and leave Mr Kennedy but it can also mean that Mr Kennedy decides that the marriage is at an end and tells you to go or leaves you. If you separate you will immediately cease receiving income whether it is the payment of $4,000.00 a month from Mr Kennedy or part of the funds from the management rights, your parents will have 14 days to move out of the Property N apartment, and you will have 14 days either to move out of the home you share with Mr Kennedy and/or to move out the penthouse unit.

My comments

If you only receive $4,000.00 per month and have to meet all of your own expenses from that money this is a very poor payment to someone in Mr Kennedy's circumstances. Mr Kennedy makes no provision in the agreement for the amount he gives you to increase over time and if you and Mr Kennedy live together for a significant period of time he need not pay you more than $4,000.00 and you cannot demand more from him. Of course if the Property N development goes ahead then you may be entitled to receive 25% of the net income after expenses derived from the management rights. However, you do not control the expenses or the profitability of those management rights and there is no guarantee that this sum will ever exceed $4,000.00 per month, if it ever becomes payable.

Property settlement

If you and Mr Kennedy ever buy a house, land or unit together you will loan that property in accordance with its title. However you are entirely dependent on Mr Kennedy's generosity and if he chooses not to ever put anything in your name and then you will never own property.

If you and Mr Kennedy separate within the first three (3) years of your marriage, whether there is a child or not you will get nothing. Mr Kennedy will not be obliged to pay you any money or to support you in any way apart from the payment of child support if you have a child together.

If you separate after three (3) years and there is no child Mr Kennedy's obligation is only to pay you $50,000.00. There is no obligation to him to pay for your support and you will have no right to make any claim from him. Whilst the $50,000.00 is indexed to rise each year, such increases over time will not be

significant and this money will continue to be a piteously small sum.

If you separate after your third year at wedding anniversary and you have one or more children Mr Kennedy will pay you $50,000.00 once again indexed to increase by small increments each year. If there are children then Mr Kennedy must provide you with the unit in the Property N development with a market value of not less than $500,000.00 or, if that is not possible, a unit with a market value of not less than $500,000.00. This does not become your property however and you only have the ability to live in that property until: –

i. Any children you have with Mr Kennedy ceases to live with you; or

ii. You start living in a de facto relationship.

If Mr Kennedy dies

If Mr Kennedy dies whilst you are still living together and not separated the agreement provides that Mr Kennedy must have made a will to ensure that you receive: –

(1) A penthouse at the Property N development or a unit on the (omitted) chosen by you not exceeding a market value of $1.5 million;

(2) 40% of the net income of the management rights of the Property N development or $5000 per month indexed yearly, whichever is the greater;

(3) The Mercedes Benz (omitted) presently in your possession or a replacement vehicle of the same or higher value.

Background

Mr Kennedy is 67 years of age and has significant means. According to the Financial Agreement Mr Kennedy says he has net assets valued at over $24 million.

You are 36 years of age and have relatively insignificant assets. In the Agreement your assets are set out as being cash at the bank of $16,000 and a quarter interest in a flat in (country omitted) which has a value of $50,000.00.

You and Mr Kennedy have been living together since earlier this year.

At 36 years of age you advise that you want to child but do not wish to fall pregnant out of wedlock.

You and Mr Kennedy are to be married on (omitted). The wedding has been arranged, the guests have been invited, your family has come from (country omitted) for the wedding, your dress has been made and there is a booking at the (omitted) for your reception.

You wish to remain in Australia and potentially that cannot occur if your marriage does not proceed. You have no job and it may well be that your Visa does not presently, and will not for some time, permit you to work.

If you marry Mr Kennedy without this agreement you would have the ability under the Family Law Act *to make an application for property settlement and spousal maintenance on separation.*

Spousal maintenance

If you separate without an Agreement and you are unable to adequately support yourself Mr Kennedy, because of his income and means, would be required to support you or contribute towards your support. This obligation would continue until you are either remarried or died or until Mr Kennedy died.

Property settlement

If you separate without an Agreement and were unable to agree about a division of property you could ask the Family Court or the Federal Magistrates' Court to make a decision about what would occur. If a Court will called upon to make a determination in this matter they would consider the following: –

- *The net value of the asset pool to be divided;*
- *The contributions that you and Mr Kennedy respectively made to the acquisition, conservation and improvement of the assets and in the role of homemaker and parent;*
- *Any disparities in your respective futures in areas such as the amount of income you both receive and who is have who is to have the primary carer of any children.*

Having regard to the above three factors a Court would ensure that the orders made regarding the division of assets between you and Mr Kennedy was just and equitable.

If you and Mr Kennedy lived together for a short period of time it is unlikely that you would receive very much by way of Property Settlement but you are still likely to be entitled to Spousal Maintenance, provided you are unable to support yourself. Given the type of lifestyle you would lead with Mr Kennedy it is difficult to see you would be able to obtain any employment that would enable you to continue to support yourself in the same lifestyle. For that reason I believe that you would obtain an order for Spousal Maintenance.

As your relationship goes on, over a number of years it would become likely that you would receive a not insignificant sum (in any event more than $50,000.00) in any Property Settlement following separation.

There are a number of requirements for the agreement you sign to be binding. Those are as follows; –

➢ *That the Agreement be in writing and signed by both you and Mr Kennedy;*

➢ *That you and Mr Kennedy receive independent legal advice as to; –*

o *The effect of the agreement on your rights;*

o *The advantages and disadvantages of entering into the Agreement.*

➢ *That the two (2) lawyers giving the independent advice certify in an annexure to the Agreement that the advice has been given;*

➢ *That the original of the Agreement is given to one of you and a copy given to the other;*

➢ *Upon separation the Agreement is not binding until one or both of you sign a Separation Declaration declaring that you have separated and are living separately and apart at the time the Declaration is made. You must also further say that there is no reasonable likelihood of cohabitation being resumed.*

In accordance with my obligations to advise you in relation to this matter I advise as follows: –

- *The effect of the Agreement on your rights is to limit the scope of your ability to make an Application for Property Settlement and do away entirely with your ability to seek to seek Spousal Maintenance following separation;*

- *There is no advantage to you to enter into this Agreement as it significantly compromises your rights to seek property adjustment or ongoing Spousal Maintenance from Mr Kennedy.*

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

With regards

Ms Harrison

Accredited family law specialist

53. Contrary to that advice, and understanding Ms Harrison to be telling her that the agreement was the worst contract she had ever seen, Ms Thorne signed the first agreement.

54. The wedding went ahead on (omitted) as planned.

55. Mr Jones next saw Mr Kennedy on 26 October 2007, with respect to the signing of the second agreement which he had contemplated being signed after the wedding. The necessary changes were made and the document provided to Mr Kennedy.

56. On 30 October 2007, Jones Mitchell lawyers wrote to Ms Harrison enclosing the second financial agreement.

57. Ms Harrison next saw the applicant on 5 November 2007. Her evidence was that she didn't believe that she went through the second agreement with the exactitude as the first agreement but gave the same overall advice that the agreement was terrible and that she shouldn't

sign it. Again the wife thought that the agreement would only take effect if she left her husband and that as she was never going to do that she wasn't concerned about that issue but remained concerned about what provision would be made for her in the event that her husband predeceased her. Ms Harrison recalls that during her interview with the wife for the purposes of providing her advice to the second agreement, the wife received a phone call from her husband wanting to know how much longer she was going to be. Ms Harrison gained the distinct impression that the wife was being pressed to not spend too long on this issue but to get the document signed.

58. The second agreement was signed on that day by Ms Thorne. It contains the same essential provisions as the first agreement and the same information with respect to the husband's schedule of property, financial resources and liabilities.

59. The second agreement was signed on 20 November 2007 by Mr Kennedy.

60. On 16 June 2011, the husband signed a separation declaration. The wife considers that the parties separated on a final basis in August 2011.

61. The parties had had no children together. For a short time, Ms Thorne had tried IVF unsuccessfully.

62. Mr Kennedy's evidence was that he signed the Separation Declaration at a time when he had told Ms Thorne repeatedly to stop "frustrating him", and she didn't.

63. The parties had been married for just shy of four years, and cohabitating, all up, for about four and a half years.

The Law

64. The legislative provisions with respect to Financial Agreements are found in Part VIIIA of the *Family Law Act 1975*. They were introduced in 2000.

65. The legislative provisions at the time of the agreements being signed are the operative law. The amendments made in 2009 to s90G

(including s90G(1A)) were not retrospective: *Wallace & Stelzer and Anor* [2013] FamCAFC 199 per Finn, Strickland and Ryan JJ at 73.

66. Sections 90G(1) and (1A) of the Act provide:

> *(1) Subject to subsection (1A), a financial agreement is binding on the parties to the agreement if, and only if:*
>
> *(a) the agreement is signed by all parties; and*
>
> *(b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner 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; and*
>
> *(c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and*
>
> *(ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and*
>
> *(d) the agreement has not been terminated and has not been set aside by a court.*
>
> *Note: For the manner in which the contents of a financial agreement may be proved, see section 48 of the Evidence Act 1995 .*
>
> *(1A) A financial agreement is binding on the parties to the agreement if:*
>
> *(a) the agreement is signed by all parties; and*
>
> *(b) one or more of paragraphs (1)(b), (c) and (ca) are not satisfied in relation to the agreement; and*
>
> *(c) a court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made); and*

> *(d) the court makes an order under subsection (1B) declaring that the agreement is binding on the parties to the agreement; and*
>
> *(e) the agreement has not been terminated and has not been set aside by a court.*

67. Accordingly, only s90G(1) is herein relevant.

68. As to whether a financial agreement is valid, enforceable or effective, is determined according to the principles of law and equity that are to be applied when determining the validity and enforceability or effectiveness of contracts and purported contracts (see section 90KA of the Act). Conduct which is unconscionable would have a bearing on the validity or enforceability of an agreement. Duress is a form of unconscionable conduct.

Any Deficits in the Agreements and Subsequent issues of Enforceability

Any Deficits in the Legal Advice Given to either Party, and Subsequent Issues of Enforceability

69. The agreements attach at "A" and "B" certificates from the parties' respective lawyers. The certificates for the first agreement for each of the lawyers are worded identically except to the name of the lawyer and their professional address:

> *CERTIFICATE FOR THE PURPOSES OF S.90G OF THE FAMILY LAW ACT 1975 AS AMENDED BY THE FAMILY LAW AMENDMENT ACT 2000*
>
> *I, [lawyer's full name and practising address], hereby certify that:*
>
> *1. I am a legal practitioner practising as a Lawyer.*
>
> *2. I have provided [client's name and residential address] with independent legal advice as to the effect of a Financial Agreement pursuant to s90D and 90MH of the Family Law Act proposed to be entered into between MR KENNEDY and MS THORNE. I have provided the said [client's name] with independent legal advice before [s/he] signed this Agreement as to the following matters:*

(a) The effect of the Agreement on the rights of [client's name]; and

(b) The advantages and disadvantages to her at the time that this advice was provided to [him/her], of making this agreement.

DATED the [date of signing]

[Signature of Lawyer]

70. The reference to section 90D is wrong. That section refers to financial agreements after a divorce order is made. Section 90CB applies when a financial agreement is made before marriage. On the Agreement's cover sheet and in the body of the document, the correct section was referenced. It would appear to have been merely a drafting error in the Lawyers' Certificates.

71. The reference to section 90MH is unnecessary, and to that end, wrong. It refers to financial agreements that deal with superannuation interests. This agreement did not deal with any superannuation interest. Again, it would appear to have been merely a drafting error in the Lawyers' Certificates.

72. I am not satisfied that a drafting error of this nature is sufficient to offend s90G(c) which requires the provision of a signed statement by the legal practitioner stating that the 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. The fact that the lawyers used an incorrect short hand reference by way of referring to a section of *the Act* does not take away from the advice that was given. It is unfortunate for the reference to be wrong, but in the circumstances of this case, I do not consider that it is terminal to the agreements.

Errors in the Part "C" Schedule of Property, Financial Resources and Liabilities of MR KENNEDY, as at the dates of the Agreements

73. During the adjournment of the trial between the first tranche of evidence and the second tranche of evidence, the parties attended to valuations of the husband's interests at the time of the signing of the financial statements. That exercise demonstrated that the husband's estimates of the value of several of his assets at the time that he

provided it to his solicitor Mr Jones was not completely accurate. There is no reason for me to think that Mr Kennedy was doing anything but his best to reflect his financial position at that time and that he did that without the benefit of any independent valuations. There was no reason for the wife to have any particular view about Mr Kennedy's worth. As stated earlier, it would seem from Mr Kennedy's evidence that the applicant source of knowledge about his financial position would not have been obtained by him telling her directly rather but from her reading the (omitted) agreement. And, as I have found, Ms Thorne could infer wealth from Mr Kennedy's words to her, and his actions and their circumstance, but not from any firm basis of knowledge.

74. The husband had some complex business interests in 2007 including shares in his own companies and interest in land at Property N on the (omitted). The husband's evidence in cross-examination included that he didn't think it was necessary to mention all of his companies and trusts when setting out his assets but that he did understand that the assets that he was declaring were is and his companies' assets.

75. The valuations revealed that at the time of the agreements the Penthouse in which the husband was living should have been ascribed the value of $4.7 million not the $6 million that the husband provided. Further his shares in various companies were probably in the order of between $11 million and $13 million not the $10 million that he had ascribed. The interest in land at Property N, the valuation demonstrates, should have been ascribed to the value of $3 million not the $6 million that Mr Kennedy provided.

76. The difficulty that is suggested by the wife is that the husband's use of the expression "shares in public companies" may reflect his shareholdings in companies for which he has no personal interest rather than companies of which he lawfully holds an interest. I understood Mr Kennedy's evidence to include that the schedule "C" to the agreements reflected his assets and his companies' assets and to that end I am not satisfied there is any basis for me to form the view that where at .8 he nominates "shares in public companies" he means anything other than shares in his own companies. To that end it is

notable that his then estimate was not too far off the mark of the $11 million which seems to now be accepted.

77. It is also of note that, on that basis, Mr Kennedy's schedule, if anything, inflates his worth. There is no basis for me to form the view that that was done with any intention to defraud or misrepresent his true situation but rather was a reflection of his understanding of his financial position at the time. There is, of course, no requirement for parties to have assets and liabilities expertly valued prior to the signing of financial agreements.

The Wife's Proficiency in English and Any Bearing this has on her Capacity to Understand the Nature and Effect of the two Agreements

78. The husband and wife, during their courtship and during their marriage spoke with each other in English and in (language omitted). They appear to have been able to make themselves understood well enough. When speaking with the husband's family and friends, the wife would speak English and appeared to others to be able to participate in conversations.

79. When the applicant went to consult Ms Harrison, she spoke in English. Ms Harrison was not concerned about the applicant's capacity to understand her, and formed that the view that her client was understanding her: she was able to answer the solicitor's questions and able to give her information.

80. Ms Harrison's oral and written advice was, simply put, that the proposed Financial Agreement was terrible and that the applicant should not sign it. Ms Harrison understood the applicant's position to be that the testamentary provisions were at the forefront of her mind. Indeed, the applicant was concerned to ensure that the agreement contained protection for her from Mr Kennedy's Estate, should he predecease her, given that was likely bearing in mind their respective ages.

81. Ms Harrison's evidence included that she considered that the applicant was not concerned about the separation provisions, but was aware of them. Ms Harrison considered that the wife's understanding included

that the separation terms of the agreement would only "kick in", if she left the husband, and that she would never do that; the applicant was not interested in the idea that Mr Kennedy might ever leave her.

82. The evidence of the applicant's expert witness, Ms S, demonstrates, it seems to me, that the wife is not fluent in English. Indeed, no-one seems to be arguing that she is fluent in English. Ms S was not satisfied that the results of the IELTS test undertaken by the wife in September 2011 accurately reflected her true ability, and considered as a result of her assessment of the wife that the test produced an incorrect higher mark, than she assessed of the wife.

83. Importantly, though, the evidence of Ms S included, that, for any lack of fluency in the wife's understanding of English, she would be capable of understanding words to the effect of "this is a bad agreement; don't sign it". And, in short, that is what Ms Harrison's advice was.

84. I am satisfied on Ms Harrison's evidence that she was making her points clearly and plainly to the wife, and that the wife was understanding the final effect of the advice. Indeed, the wife's own evidence is that Ms Harrison told her: "It is the worst contract I have ever seen. Don't sign."

85. There is a gap, then, between the level of understanding of the advice, and the actions of the applicant, the then client of Ms Harrison. If she understood such plain advice, why, then, would she sign the document? And within that question, if she understood the advice, why would she fail to conceive of the notion that the husband might be the one to end the marriage, leaving her exposed to the poor outcome?

86. I am not satisfied that there is any basis for me to consider that the wife's poorer English can be associated with that outcome. If I am satisfied that her English was sufficient to understand the purpose and effect of the agreement, and to understand the solicitor's advice about those matters, then I cannot attribute her lack of proficiency in English to her signing the agreement despite the advice.

Any Matters of Duress or Undue Influence

87. It is submitted on behalf of the Respondent through his Outline of Case[6], that to establish duress, there must be pressure the practical effect of which is compulsion or absence of choice.

88. The applicant knew that there would be no wedding if she didn't sign the first agreement. The husband's position about that was plain.

89. The husband did not negotiate on the terms of the agreement as to matters relating to property adjustment or spousal maintenance. He did not offer to negotiate. He did not create any opportunities to negotiate. The agreement, as it was, was to be signed or there would be no wedding. Without the wedding, there is no evidence to suggest that there would be any further relationship. Indeed, I am satisfied that when Mr Kennedy said there would be no wedding, that meant that the relationship would be at an end.

90. 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.

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

[6] paragraph 4 of the outline of case document filed (omitted) 2013.

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

94. In those circumstances, the wife signed the first agreement under duress. It is duress borne of inequality of bargaining power where there was no outcome available to her that was fair or reasonable.

95. The point of the second agreement, as best as I can understand the thinking of Mr Kennedy's solicitor, was to allow the time pressure of the impending wedding to be released and for the agreement to be signed absent that time pressure. As I find it, the time pressure was, for the parties, and particularly the wife, the only difference. All of the other inequalities set out above remained. The wife had no bargaining power, nothing to persuade a different outcome, no capacity to affect any change.

96. In all respects the second agreement was simply a continuation of the first – the marriage would be at an end before it was begun if it wasn't signed.

97. The wife plainly had no choice that she could reasonably see, but to sign the agreement. In those circumstances the second agreement was plainly signed by the wife under duress.

98. I'm satisfied that, in the circumstances, the operative second agreement was signed by the wife under duress. The agreement must be set aside.

99. The wife has been wholly successful in this hearing. Costs should follow the event. The respondent will pay the wife's costs of this part of the application. The quantum of such costs, if not agreed, will need to be the subject of further submissions.

100. I make the orders as set out at the commencement of these reasons.

I certify that the preceding one hundred (100) paragraphs are a true copy of the reasons for judgment of Judge Demack

Date: 4 March 2015