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FAMILY COURT OF AUSTRALIA

KENNEDY & THORNE ***[2016] FamCAFC 189***

FAMILY LAW – APPEAL – PROPERTY – BINDING FINANCIAL AGREEMENTS – Where the appellant trustees of the estate of the late husband appeal the orders made by the trial judge which found that the two financial agreements entered into by the parties were not binding on them and should be set aside – Where there is merit in four of the grounds of appeal – Where the trial judge applied the incorrect test in relation to duress – Where the reasons in relation to a finding of duress were inadequate – Where the trial judge did not provide procedural fairness to the appellant trustees before pronouncing an order for costs against them – Where the appeal should be allowed and the matter re-determined – Where the issues for re-determination are the fate of the agreements and the costs of the trial – Where it is not apparent on the evidence what the "threatened or actual unlawful conduct" of the husband was –Where the wife was "keen to acquiesce" with the husband's requirements and accepted that his wealth was his own and intended for his children – Where the requirement of an agreement being entered into before marriage cannot be seen as a basis for a finding of duress and nor can the fact that a second agreement was required – Where the wife's focus was always on what would happen to her in the event that the husband pre-deceased her – Where the agreements were not non-negotiable and the wife suggested changes which were accepted by the husband – Where the wife's real difficulty in establishing duress is that she was provided with independent legal advice, she was advised not to sign the agreements, but she went ahead regardless – Where both agreements are valid and enforceable but only the second agreement need be considered because it terminates the first agreement – Found that the second agreement is binding on the parties.

FAMILY LAW – APPEAL – PROPERTY – NOTICE OF CONTENTION – Where the wife filed such a Notice – Where the Family Law Rules 2004 (Cth) do not provide for the filing of such a Notice – Where s 38(2) of the *Family Law Act 1975* (Cth) provides that in that event r 42.08.5 of the High Court Rules 2004 (Cth) applies – Where the wife filed the Notice in accordance with that rule without objection – Where there is no merit in any of the grounds – Notice of Contention dismissed – Where the determination that the appeal should be allowed, stands.

FAMILY LAW – APPEAL – COSTS – Where submissions are required from the parties in order to determine the costs of the trial – Where the parties sought the opportunity to present written submissions on the question of the costs of the appeal – Written submissions ordered.

Family Law Act 1975 (Cth) – ss 38, 90G(1)(b), 90K(1)(a), 90K(1)(b) and s 90K(1)(e)

Family Law Rules 2004 (Cth) – r 17.02
High Court Rules 2004 (Cth) – rr 42.08.1, 42.08.5 and Form 27

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Australia & New Zealand Banking Group v Karam (2005) 64 NSWLR 149
Bilal & Omar (2015) FLC 93-636
Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447
Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40
Hoult & Hoult (2013) FLC 93-546
Johnson v Buttress (1936) 56 CLR 113
Logan & Logan (2013) FLC 93-555
Metwally v University of Wollongong (1985) 60 ALR 68
Suvaal v Cessnock City Council (2003) 200 ALR 1
Wallace & Stelzer and Anor (2013) FLC 93-566
Yerkey v Jones (1939) 63 CLR 649

APPELLANT:	The Estate of the late Mr Kennedy
RESPONDENT:	Ms Thorne
FILE NUMBER:	LEC 206 of 2012
APPEAL NUMBER:	NA 24 of 2015
DATE DELIVERED:	26 September 2016
PLACE DELIVERED:	Adelaide
PLACE HEARD:	Brisbane
JUDGMENT OF:	Strickland, Aldridge & Cronin JJ
HEARING DATE:	26 November 2015
LOWER COURT JURISDICTION:	Federal Circuit Court of Australia
LOWER COURT JUDGMENT DATE:	4 March 2015
LOWER COURT MNC:	[2015] FCCA 484

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REPRESENTATION

COUNSEL FOR THE APPELLANT:	Mr Lethbridge SC and Ms Eldershaw
SOLICITOR FOR THE APPELLANT:	Jones Mitchell Lawyers
COUNSEL FOR THE RESPONDENT:	Mr Kearney SC
SOLICITOR FOR THE RESPONDENT:	Somerville Laundry Lomax

ORDERS

(1) The appeal be allowed.

(2) The Notice of Contention be dismissed.

(3) Paragraphs (1), (2) and (3) of the order made on 4 March 2015 be set aside.

(4) It is declared that the financial agreement dated 20 November 2007 is binding on the parties.

(5) Within 28 days of the date hereof the trustees file and serve written submissions as to the costs of the trial and of the appeal.

(6) Within 14 days of the receipt of the submissions of the trustees the wife file and serve written submissions in response.

(7) Within 14 days of the receipt of the submissions in response of the wife the trustees file and serve any written submissions in reply.

Note: The form of the order is subject to the entry of the order in the Court’s records.

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

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

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THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT BRISBANE

Appeal Number: NA 24 of 2015
File Number: LEC 206 of 2012

The Estate of the late Mr Kennedy
Appellant

And

Ms Thorne
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. By Amended Notice of Appeal (NA 24/2015) filed on 21 August 2015, Mr P and Ms J ("the trustees"), the trustees for the estate of the late Mr Kennedy ("the husband"), appeal against orders made by Judge Demack on 4 March 2015.

2. In summary, the orders provided, inter alia, that the financial agreements signed by the husband and Ms Thorne ("the wife") on 26 September 2007 and 20 November 2007 were not binding on the parties; that the two financial agreements be set aside; and that the husband pay the wife's costs of the application accrued to the date of the orders with the quantum to be determined.

3. The appeal is opposed by the wife.

4. The wife filed a Notice of Contention on 14 September 2015. Leave is sought to rely on this Notice in the respondent's Summary of Argument filed on 14 September 2015. In this Notice, the wife seeks that the decision of the trial judge be "affirmed" on a number of grounds which we will explain later in these reasons.

5. The trustees do not oppose the wife relying on the Notice of Contention, and thus we do not need to make an order allowing that.

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BACKGROUND

6. The husband and wife met in early to mid-2006 on a dating site. The wife was aged 36 years and the husband was aged 67 years at the time. The wife's profile read as follows (at [32]):

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

7. The wife was born in Country A and lived in Country B at the time the parties met. She had acquired her English language skills informally. The wife had no children and no assets of substance.

8. The husband was an Australian property developer from City E with assets of at least $18 million. The husband had three adult children from a previous marriage.

9. The husband visited the wife in Country B on two occasions, and the two of them spent a couple of months travelling around Europe together. Whilst travelling, they made arrangements for an appropriate visa for the wife to come to Australia. It is clear that the visa which was organised was going to be valid for nine months, and the parties formed the joint intention that they would marry during that time, and a visa of a different nature would then be obtained.

10. The parties arrived in Australia in February 2007 and began living in the husband's penthouse in City E.

11. On 8 August 2007 the husband and wife attended on the husband's solicitor, Mr Jones, for the purpose of drafting a financial agreement prior to the wedding. Mr Jones spoke only with the husband on this occasion. The same occurred on 14 August 2007. The trial judge found that during these conferences, the husband's solicitor was adamant that the husband maintained his view that the marriage would only go ahead if the wife signed the agreement.

12. On or around 16 September 2007 (and most likely on 19 September 2007), the husband told the wife that they were going to see solicitors about the signing of some documents. The trial judge found that the wife had known for some time that there would be documents to sign before the wedding.

13. The trial judge found that at this time, the wife knew that the only option was to sign the document or there would not be a wedding.

14. On 20 September 2007 the wife met with Ms Harrison, her solicitor, for advice regarding the financial agreement. This was the first time the wife was advised

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on the contents of the agreement, and had information about the husband's financial position.

15. On 21 September 2007 the solicitors for each of the husband and wife communicated. It was on this date that the wife's solicitor first raised the suggestion of duress.

16. Ms Harrison provided her written advice to the wife on 21 September 2007 and explained this advice to the wife in person on 24 September 2007. The trial judge was satisfied that all advice given by Ms Harrison was consistent with the written advice in her letter of 21 September 2007. Her Honour set this letter out in full (at [52]). In effect, the wife was advised that the agreement was "no good" and should not be signed.

17. Despite Ms Harrison's advice, on 26 September 2007 the husband and wife each signed a document headed "Financial Agreement (Pre-Nuptial Agreement s. 90B Family Law Act 1975)" ("the first agreement"). This agreement contained a provision that within 30 days of signing, another agreement would be entered into pursuant to section 90C of the Act in similar terms.

18. The parties were married in late September 2007.

19. On 26 October 2007 the husband again visited Mr Jones seeking advice on the drafting of the second agreement. The draft of the second agreement was provided to Ms Harrison on 30 October 2007.

20. On 5 November 2007 Ms Harrison advised the wife on the contents of the second agreement, again providing advice to the effect that the "agreement was terrible and that she shouldn't sign it".

21. The second agreement was signed by both the husband and wife on 20 November 2007, and was headed "Financial Agreement (Agreement S.90C Family Law Act 1975)" ("the second agreement").

22. The husband signed a separation declaration in June 2011.

23. The wife left the home in August 2011.

24. The wife filed her Initiating Application on 27 April 2012 seeking declarations that the agreements be declared non-binding, or alternatively, set aside, or declared void. The wife also sought an adjustment of property in the order of $1,100,000, along with lump sum spousal maintenance of $104,000.

25. The husband died in May 2014 and the trial was part heard at that stage. The executors and trustees of his estate (two of his three adult children by an earlier marriage) were subsequently substituted as parties in his stead.

SUMMARY OF TRIAL JUDGE'S REASONS

26. In relation to the evidence of the parties, her Honour explained that the "husband's oral evidence had many difficulties" as he "was 74 at the time, and

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seriously unwell", and as a result, "wasn't always responsive to questions, and at times, his evidence seemingly contradicted something that he had said only moments earlier". Further, her Honour considered that the husband "seemed not to understand questions posed as suggestions, or when based upon someone's earlier affidavit evidence, even his own". However, her Honour explained that, though the evidence was difficult, she "did not form the view that he was trying to be evasive or unhelpful" (at [23]). There were no similar concerns about the wife's evidence.

27. Her Honour then set out the contentions of each of the parties and the background leading to the signing of the agreements. It is important to detail a number of her Honour's findings in this regard.

28. At [35], her Honour found that the husband was "at pains from the outset to make it clear to [the wife] that his wealth was his, and he intended it to go to his children". Her Honour was satisfied that the wife "was certainly aware of that position from the outset". Her Honour rejected the evidence of the husband that the wife had introduced the concept of signing an agreement, and found that it was the husband, and the wife had been "keen to acquiesce" as "she understood [the husband's] need to ensure that his children's financial position was protected". The trial judge was satisfied that the wife's 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" (at [35]).

29. In relation to the extent of the husband's wealth, the trial judge found that at the time the wife moved into the husband's City E penthouse it could be "expected that [the wife] would have been aware that this was an expensive home". However, her Honour accepted "the husband's evidence that he didn't ever specifically advise his future bride as to his exact wealth" (at [37] – [38]).

30. The husband asserted that he had provided the wife with a copy of the agreement he drafted for his previous partner, and that this should have "alerted [the wife] to the terms of the agreement that he was wanting her to sign, and to some specifics as to his wealth and particular assets" (at [38]). The wife "denied ever being given a copy of that document and denied any knowledge of the content of that document". Her Honour held that it was "improbable" that the document was ever given to the wife, and there was "no reason for [her Honour] to form the view that it informed her as to the likely contents of any agreement that she might be asked to sign" (at [40]).

31. Nevertheless, the trial judge considered that the wife knew the husband was wealthy through his actions and what he had said to her.

32. Her Honour found that, at the time the wife signed both the first and second agreements, the wife believed 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

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concerned about that issue but remained concerned about what provision would be made for her in the event that her husband predeceased her". The trial judge noted the "impression" of the wife's solicitor that "the wife was being pressed to not spend too long on this issue but to get the document signed" (at [57]).

33. Her Honour then turned to Part VIIIA of the *Family Law Act 1975* ("the Act"). Her Honour noted that the "legislative provisions at the time of the agreement being signed are the operative law", and that the "amendments made in 2009 to s90G (including s90G(1A)) were not retrospective".

34. The trial judge recorded that only s 90G(1) was relevant to this matter. Her Honour then stated (at [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.

35. In light of these principles, her Honour began to consider the two financial agreements by analysing first whether there were "[a]ny Deficits in the Legal Advice Given to either Party", and whether there were any "[s]ubsequent Issues of Enforceability".

36. The trial judge commenced by discussing the certificates from the parties' respective lawyers which were attached to both financial agreements. Her Honour noted that the "certificates for the first agreement for each of the lawyers [were] worded identically except to the name of the lawyer and their professional address". Her Honour quoted the respective certificates in full (at [69]) and explained that the reference in the certificates to s 90D of the Act "is wrong" as this section "refers to financial agreements after a divorce order is made". Her Honour considered this reference to be a mere "drafting error" as the correct section, s 90CB, had been referred to on the "coversheet and in the body of the document" (at [70]).

37. Another drafting error which her Honour noted was the reference in the certificates to s 90MH which her Honour considered was "unnecessary and … wrong" as it related to superannuation interests, which were not relevant to either agreement (at [71]).

38. In relation to these errors, her Honour found:

> 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 [sic] 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

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> 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.

39. Next, the trial judge considered whether there were any errors in Part "C" of the agreements, which set out the "Property, Financial Resources and Liabilities of [the husband], as at the dates of the Agreements".

40. The trial judge began by explaining that during the adjournment of the hearing the parties had received "valuations of the husband's interests at the time of the signing of the financial statements", and that such valuations had demonstrated that the husband's previous attempt to value his assets "was not completely accurate". Despite this, her Honour did not consider that the husband 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". In relation to the wife's knowledge of the husband's wealth at the time he valued the property, her Honour found that the wife "could infer wealth from [the husband's] words to her, and his actions and their circumstance, but not from any firm basis of knowledge" (at [73]).

41. Her Honour noted that the husband had "some complex business interests in 2007", and that he had given evidence in cross-examination to the effect 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 [sic] and his companies' assets" (at [74]). Her Honour then detailed the major assets of the husband, the valuations he ascribed to those assets, and the valuations provided by the independent valuer (at [75]). Her Honour noted the wife's concern that "the husband's use of the expression 'shares in public companies' may reflect his shareholdings in companies for which he [had] no personal interest rather than companies of which he lawfully [held] an interest". This was rejected by her Honour as she was satisfied that the husband only meant "shares in his own companies". It was notable that the husband's "then estimate was not too far off the mark of the $11 million which seems to now be accepted" (at [76]).

42. Significantly, her Honour recorded that the husband's "schedule, if anything, [inflated] his worth", and her Honour was not satisfied the husband had "any intention to defraud or misrepresent his true situation". Her Honour noted that there is no requirement for independent valuations to be conducted prior to the signing of financial agreements (at [77]).

43. Having analysed whether there were any deficits in the agreements themselves, her Honour then discussed "[t]he Wife's Proficiency in English and Any

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Bearing this has on her Capacity to Understand the Nature and Effect of the two Agreements".

44. Her Honour noted that the husband and wife "spoke with each other in English and Greek" and appeared "to have been able to make themselves understood well enough". The wife was also found to have spoken to the husband's family and friends in English and "appeared to others to be able to participate in conversations" (at [78]).

45. Ms Harrison gave evidence that the wife spoke to her in English and she was "not concerned about the [wife's] capacity to understand her". She formed the "view that her client was understanding her" as "she was able to answer the solicitor's question's and able to give her information" (at [79]).

46. Ms Harrison also provided evidence to the effect that the wife was unconcerned about the "separation provisions" in the agreement, though she was aware of them, as she claimed she would never leave the husband and was "not interested in the idea that [the husband] might ever leave her". Rather, it was asserted that the wife was only concerned with the "testamentary provisions" as she wished to "ensure that the agreement contained protection for her from [the husband's] Estate, should he predecease her" (at [80] – [81]).

47. Ms S, an expert witness, gave evidence about the wife's proficiency in English. Ms S claimed that, though the wife was "not fluent in English" she would "be capable of understanding words to the effect of 'this is a bad agreement; do not sign it'. And, in short, that is what Ms Harrison's advice was" (at [83]).

48. Thus, the trial judge found that Ms Harrison had made "her points clearly and plainly to the wife, and that the wife was understanding the final effect of the advice". This was particularly in light of the wife's evidence that Ms Harrison told her "[i]t is the worst contract I have ever seen. Don't sign" (at [84]).

49. Her Honour noted that in this regard there was a significant gap "between the level of understanding of the advice, and the actions of the [wife]" (at [85]).

50. Therefore, her Honour held:

> 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.

51. Finally, the trial judge turned to the issue of "Duress or Undue Influence and noted the husband's submission that "to establish duress, there must be pressure the practical effect of which is compulsion or absence of choice" (at [87]).

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52. Thus, her Honour considered whether the wife had been subject to duress when she signed the first financial agreement. It is convenient to set out in full her Honour's findings in this regard:

> 88. The [wife] 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 [the husband] said there would be no wedding, that meant that the relationship would be at an end.
>
> 90. The [wife] wanted a wedding. She loved [the husband], and wanted a child with him. She had changed her life to be with [the husband].
>
> 91. She was in Australia only in furtherance of their relationship. She had left behind her life and minimal possessions in [Country B]. 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 [the wife]. 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 [the husband's] hands. Either the document, as it was, was signed, or the relationship was at an end. The husband made that clear.
>
> 93. [The husband] knew that [the wife] 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 [the wife]. If she wanted to marry him, which he knew her to want, she must sign. That situation is something much more than inequality of financial position. [The wife'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 [the husband] 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.

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

53. Having arrived at this conclusion in relation to the first agreement, her Honour turned to the second financial agreement. Her Honour explained that the second agreement was entered into "to allow the time pressure of the impending wedding to be released and for the agreement to be signed absent that time pressure". Thus, her Honour considered that the only difference between the first and second agreements was the "time pressure … for the parties, and particularly the wife" (at [95]). In light of this finding, her Honour held:

> 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.

THE APPEAL

Ground 1

That the learned trial judge erred in finding as a fact that, save and except for her visa status, if the relationship with the [husband] ended "*she would have nothing. No job, no visa, no home, no place, no community. The consequences of the relationship being at an end would have significant and serious consequences for [the wife]. She would not be entitled to remain in Australia and she has nothing to return to anywhere else in the world*" in circumstances where the [wife] has resided for many years in [Country B] and was at all times a [Country A] citizen with a right of return and not in need of asylum (Reasons at [91] and [93]).

54. An analysis of the evidence before her Honour, as referred to in the written summary of argument of the wife, demonstrates that the findings by her Honour at [91] and [93] were open to her. There is also no ambiguity about those findings, and they do not lend themselves to any need for interpretation. Thus, it is not open to the trustees to surmise that the findings are "predicated on two incorrect assumptions", namely that unless the wife could remain in Australia pursuant to its migration laws, she would be rendered either actually or constructively Stateless, and that her pre-relationship lifestyle was incapable of being resumed in Country B. Neither "assumption" can be found in the actual findings of her Honour, and they plainly overstate what her Honour said.

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55. In relation to the wife's status, the evidence was that she found herself in Australia on a limited visa and having cut her ties with Country B. In relation to Country B, it was not suggested in the evidence that she could return there, or to any aspect of her life there.

56. In these circumstances there is no merit in this ground of appeal.

Grounds 2 – 5

That the learned trial judge erred in finding as a fact that the [wife] relied on the [husband] "*for all things*" at the time the first financial agreement was signed (Reasons [93]).

That the learned trial judge erred in finding as a fact that the [husband] "*held every bargaining chip and every power*" (Reasons [92]).

That the learned trial judge failed to give proper weight to the evidence that the [wife] wanted a "*good life*" and to live outside [Country A] where to do so would have affected the verdict (Reasons [33]).

That the learned trial judge failed to give proper weight to the evidence that the [husband] was "*at pains from the outset to make clear to [the wife] that his wealth was his and he intended it to go to his children*" and that he required the [wife] to sign a financial document as a condition of marriage where to do so would have affected the verdict (Reasons [35]).

57. The trustees addressed these grounds together, arguing that "although separate and distinct pleas, [three] and [four] [in fact they mean two and three] are better explained by the factual matters addressed by [five] and [six] [in fact they mean four and five]". We do not quite understand that submission, but it seems that what the trustees are attempting to suggest is that it was not all one way, and the agreement signed reflected a "bargain" between the parties. This is explained in paragraphs 11 and 12 of the written summary of argument of the trustees as follows:

> 11. The [husband] offered her a marriage and "a good life" but on terms that she "*sign paper*" and in the knowledge that his money would go to his children. The [wife's] acceptance of the [husband's] offer to marry represents no more than the striking of a bargain in circumstances where consideration passed between the parties [*Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460; *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189 at 221]. Becoming reliant on the [husband] during the early stages of her time in Australia (assuming that the [wife] could acquire greater financial independence as her visa conditions changed over time, including acquiring the right to work) was a natural and known incident of her acceptance of the [husband's] offer to marry him and for him to facilitate her living here.

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> 12. Thus, the learned trial judge erred by failing to give proper weight [sic] the valuable consideration that the [husband] afforded to the [wife] from the outset of their relationship, including the financial support he gave to her from their first meeting in [Country B], and [sic] opportunity to marry him and lead a "good life" outside [Country A]. Had proper weight been given that [sic] that evidence:
>
> (a) the finding expressed in [93] could not have attracted any weight or any substantial weight in the learned trial judge's overall analysis; and
>
> (b) the remark at [92] would have no reasoned place at all in the judgment.

58. However, as the wife points out in her written summary of argument, these submissions do not support the claim of error by her Honour as described in Grounds 2 and 3, and just go to the weight afforded to such findings as opposed to those the subject of Grounds 4 and 5.

59. It is difficult to see the point of these grounds of appeal. As the wife also says, "[i]n circumstances where no submission is made in support of the contention that such findings were not available to the Court, what is relevant is the manner in which each of the relevant findings was applied in determining the issues raised [in the proceedings]", but that is not what is complained of here. It does though arise in other grounds of appeal, and in particular Grounds 6, 7 and 11. We agree with those observations, and in isolation can see no merit in these grounds of appeal.

Ground 6

That the learned trial judge erred in law in failing to give adequate reasons for finding that the [wife] executed the Financial Agreement dated 26 September 2007 in circumstances of duress (Reasons [93] and [94]).

60. The nub of the complaint here is explained in paragraph 19 of the written summary of argument of the trustees as follows:

> In the instant case, the learned trial judge erred in law by failing to give adequate reasons for finding that the [wife] executed the Financial Agreement dated 26 September 2007 in circumstances of duress in that she did not identify the relationship or nexus between or relative status or weighting of the six factors identified at [93] of the Reasons, namely the [wife's]:
>
> (a) lack of financial equality viz. the [husband];
>
> (b) lack of permanent status in Australia at the time;
>
> (c) reliance on the [husband] "for all things";

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(d) emotional connectedness to their relationship and the prospect of motherhood;

(e) emotional preparedness for marriage; and

(f) the publicness of her upcoming marriage.

61. Unfortunately, the response of the wife does not address this complaint directly, but it is a complaint that has merit.

62. It is not possible to determine which of the factors were fundamental to the decision, or were collateral or subsidiary only. The importance of that here is that if the first factor, viz the lack of financial equality was determinative in her Honour's mind, then that is a problem for the decision given that a finding of financial inequality could never provide a reasoned basis for duress.

63. In these circumstances, this ground of appeal is made out.

Ground 7

That the learned trial judge erred in applying the wrong legal test to the facts namely that:

a. "*to establish duress, there must be pressure the practical effect of which is compulsion or absence of choice*" (Reasons [87]); and

b. "*duress was born [sic] out of the inequality of bargaining power where there was no outcome available to [the wife] that was fair or reasonable*" (Reasons [94]).

64. Although as pleaded the wife sought relief (i.e., the setting aside of the agreements) on the basis of duress, undue influence, and/or unconscionability (both under s 90K(1)(b) and s 90K(1)(e) of the Act), her Honour only accepted the first ground, namely duress.

65. At [68] her Honour said that "[d]uress is a form of unconscionable conduct", but there is nothing in the reasons that indicates her Honour set aside the agreements on the basis of unconscionability under s 90K(1)(b) or s 90K(1)(e). Similarly, although in the heading immediately above [87] of the reasons there is reference to "Undue Influence", there is no analysis thereunder, or elsewhere in the reasons, directed to a finding that there was undue influence, and the agreements should be set aside on that basis.

66. Thus, to repeat, the issue is duress, and her Honour made two statements about what needs to be established in that regard. First, at [87] her Honour said this:

> It is submitted on behalf of the [husband] through his Outline of Case, that to establish duress, there must be pressure the practical effect of which is compulsion or absence of choice.
>
> (Footnote omitted)

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Secondly, her Honour said this at [94]:

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

67. As can be seen, the first statement came from the trustees, but it seems to have been adopted by her Honour. The second statement though is the relevant one because, as can be seen, that appears in the paragraph where her Honour found that the wife signed the first agreement under duress. Further, in the following paragraph her Honour applies this test in finding that the wife also signed the second agreement under duress.

68. That brings us to the complaint raised in this ground, that her Honour applied the wrong legal test to the facts, and we agree that that is the case. Indeed that was effectively conceded by the wife's senior counsel in oral submissions before us. However, we do not necessarily agree with the trustees' submission as to the law. The reliance on *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 45 – 46 is not entirely justified. There McHugh JA was discussing the conceptual basis of the defence of economic duress, albeit in terms in which the other members of the court did not join, and said this at 45:

> The rationale of the doctrine of economic duress is that the law will not give effect to an apparent consent which was induced by pressure exercised upon one party by another party when the law regards that pressure as illegitimate.

His Honour continued at 45 – 46:

> A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.

69. Although the remarks of his Honour have been picked up in subsequent decisions, there has also been some difficulty in fitting the doctrine of economic duress within the equitable doctrines. Indeed, the court of appeal in *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149 said as much. At [61] the court said this:

> How the doctrine of economic duress fits with the equitable doctrines is unclear. The reference to "unlawful" conduct, read in context of the earlier

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> authorities, was originally a reference to unlawful detention of goods. Concepts of "illegitimate pressure" and "unconscionable conduct", if they do not refer to equitable principles, lack clear meaning, outside, possibly, concepts of illegitimate pressure in the field of industrial relations.

70. Further, the uncertainty around the terminology led the court of appeal to make the following comments at [66]:

> The vagueness inherent in the terms "economic duress" and "illegitimate pressure" can be avoided by treating the concept of "duress" as limited to threatened or actual unlawful conduct. The threat or conduct in question need not be directed to the person or property of the victim, narrowly identified, but can be to the legitimate commercial and financial interests of the party. Secondly, if the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence (actual or presumptive) or unconscionable conduct based on an unconscientious taking advantage of his or her special disability or special disadvantage, in the sense identified in *Commercial Bank of Australia Ltd v Amadio*.

71. The correct test is whether there is "threatened or actual unlawful conduct", and not the test identified by her Honour. There needed to be a finding that the "pressure" was "illegitimate" or "unlawful".

72. It is not sufficient as her Honour says in [87] that the pressure may be overwhelming and that there is "compulsion" or "absence of choice". As is pointed out by the trustees in their written summary of argument at paragraph 35:

> The law's tolerance for at times intense pressure in relation to the making of agreements was long ago identified by Lords Wilberforce and Simon of Glaisdale in *Barton v Armstrong* [[1976] AC 104 at 118] (although in the minority generally, consistent with the majority on this issue):
>
> > '…in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this pressure must be one of a kind that the law does not regard as legitimate."
>
> (Emphasis omitted)

73. As to the different test set out at [94] it is beyond doubt that "inequality of bargaining power" cannot establish duress. Thus, again, her Honour has erred.

74. In any event, the trustees say that there was no "inequality of bargaining power", and the trial judge erroneously found that "there was no outcome available to [the wife] that was fair or reasonable". The facts are that the husband was at pains to point out to the wife from the outset, that his wealth

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was his, and he intended it to go to his children. The wife was aware of that at all times and she acquiesced in that position. Relevantly, the trial judge found that the wife's interest lay in what provision would be made for her in the event the husband pre-deceased her, and not what she would receive upon separation. And we note that the agreements provided for the wife to receive what she sought in that regard.

75. Finally, we note that the error by her Honour in applying the incorrect test arises in respect of both agreements, and not just the first agreement.

76. We find there is merit in this ground of appeal.

Ground 8

That the learned trial judge erred in finding as a fact that "*the only difference*" between the circumstances surrounding the signing of the first and second financial agreement was the absence of "*time pressure*" and "*[a]ll other inequalities set out above [ie Reasons [93]-[94]] remained. The wife had no bargaining power, nothing to persuade a different outcome, no capacity to effect any change*." (Reasons [95]).

77. Plainly there were a number of differences between the circumstances surrounding the execution of the two agreements, and prima facie her Honour erred in finding that there was only one, namely the absence of "time pressure" in relation to the second agreement.

78. However, it is apparent that her Honour was focussing on the key issue of the pressure that was on the wife to sign each agreement, her Honour considering that if that was overwhelming and/or there was an inequality of bargaining power, then a finding of duress could be made, leading to setting aside both agreements. As we have explained though, her Honour was applying the wrong test for duress, and it matters not whether her Honour erred in only finding one difference. Thus, this ground of appeal can go nowhere.

Ground 9

That the learned trial judge erred in finding as a fact that *"[i]n 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"* in circumstances where the marriage had already occurred (Reasons [96]).

79. Again, this is a clear error by her Honour, but the more important error is that her Honour applied the wrong test when considering whether there was duress in relation to the agreements. Accordingly, this ground also can go nowhere.

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Ground 10

That the learned trial judge erred in finding as a fact that the [wife] "*had no choice that she could reasonably see but to sign the [second] agreement*" in circumstances where the marriage had already occurred (Reasons [97]).

80. Once again, this ground of appeal does not need to be considered, given our finding in relation to the application of an incorrect test for duress. Although strictly her Honour may have erred in making the finding in circumstances where the marriage had already occurred, that cannot be the basis on which this court would interfere with her Honour's orders.

Ground 11

That the learned trial judge erred in law in failing to provide any adequate reasons for finding that the [wife] executed the Financial Agreement dated 20 November 2007 in circumstances of duress (Reasons [97]).

81. This is the same complaint as was raised in Ground 6, but this time in relation to the second agreement.

82. In the circumstances, it is a complaint that must also succeed.

83. In [95] her Honour found that in relation to the second agreement all the inequalities set out in [93] that applied in relation to the first agreement applied in relation to the second agreement as well. There were two further strands though to the finding that it was signed by the wife under duress [97], namely the release of the time pressure of the impending wedding, and the fact that the marriage would be over before it had begun if the agreement was not signed. Thus, the difficulty with her Honour's finding is compounded, and it is even more impossible to determine which of the factors are fundamental to the decision, or collateral or subsidiary only.

84. Thus, for the same reasons as expressed in considering Ground 6, this ground of appeal has merit.

Ground 12

That the learned trial judge erred in law by failing to provide the [husband] with procedural fairness prior to making an order that the [husband] pay the [wife's] costs.

85. This is a ground that is conceded by the wife. The wife adds though that if she was "to be successful on the primary issue, the same order would follow in any event". That may be so, but she has not been successful on the primary issue, and there is no doubt that this ground of appeal has merit.

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Ground 13

That the learned trial judge erred in law by failing to provide any reasons for ordering the [husband] to pay the [wife's] costs.

86. There is no need for this court to consider this ground given the success of Ground 12. Out of abundant caution though, we do not accept that the trial judge erred in law by failing to provide any reasons for making the order for costs. Her Honour's reasons are to be found in [99], namely:

> The wife has been wholly successful in this hearing. Costs should follow the event. The [husband] 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.

87. However, that cannot save the order, given the lack of procedural fairness.

CONCLUSION AS TO THE APPEAL

88. Grounds 6, 7 11, and 12 have succeeded, and subject to the Notice of Contention, the appeal must be allowed.

THE NOTICE OF CONTENTION

89. The Family Law Rules 2004 (Cth) ("the Rules") do not provide for the filing of a Notice of Contention, but s 38(2) of the Act provides that, in that event, the rules of the High Court apply. The relevant High Court rule is r 42.08.5 which provides as follows:

> Where a respondent does not seek a discharge or variation of a part of the judgment actually pronounced or made, but contends that the judgment ought to be upheld on the ground that the court below has erroneously decided, or has failed to decide, some matter of fact or law, it is not necessary to give a notice of cross-appeal, but that respondent shall file and serve, within the time limited by rule 42.08.1, a notice of that contention in Form 27.

90. Thus, a Notice of Contention may be filed in the Family Court of Australia in accordance with that rule, and that is what has occurred here without objection.

91. The grounds set out in the Notice of Contention filed by the wife on 14 September 2015 are as follows:

    1. That the Court ought to have found that the Financial Agreement dated 26 September 2007 [the First Agreement] was not binding upon the parties as it was expressly terminated by the terms of the Financial Agreement dated 20 November 2007 [the Second Agreement].

    2. That the Court ought to have found that the Second Financial Agreement and, to the extent (if any) necessary, that the First

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Financial Agreement, was not binding upon the parties because of an absence of compliance with section 90G(1)(b).

3. That the Court ought to have found that the husband had failed to make full and frank disclosure of material matters as to his financial circumstances at the time of entry into each of the Agreement [sic] such that the Second Agreement (and to the extent, if any, necessary) the First Agreement ought to be set aside.

4. That the Court ought to have found that the Second Agreement (and to the extent, if any, necessary) the First Agreement was void and/or voidable as a result of the husband misrepresenting to the [wife]:

   4.1 his financial position at or about the time of each Agreement; and/or,

   4.2 his intentions as to the [wife's] personal and financial security at or about the time of each Agreement;

   which representations:

   4.3 were intended to induce the [wife] to enter into the Agreements; and,

   4.4 induced the [wife] to enter into the Agreements.

5. That, having regard to the facts and relevant principle, the Court was correct to conclude that the Second Agreement (and to the extent, if any, necessary) the First Agreement was void and/or voidable as a result of duress.

6. That the Court ought to have found that the Second Agreement (and to the extent, if any, necessary) the First Agreement was void and/or voidable as a result of:

   [6].1 undue influence; and/or

   [6].2 unconscionability/

7. That the Court ought to have found that the [wife] was not capable of understanding the advice provided, or a sufficiency of the advice provided, in relation to the Second Agreement (and to the extent, if any, necessary) the First Agreement.

8. That, having regard to the facts and relevant principle, the Court was correct to conclude that the [husband] ought bear the [wife's] costs of the proceedings.

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Ground 1

92. There is no merit in this contention. It fails to establish that the trial judge has erroneously decided some matter of fact or law. The trial judge was not called upon to make a decision about this issue because the wife's case at trial was that the second agreement should be declared void. If it is void, then it falls in its entirety, and is incapable of terminating the first agreement.

93. As to whether the trial judge failed to decide some matter of fact or law, the High Court has held that a respondent may rely on an argument in a Notice of Contention, even though it has not been raised in the court below "so long as the argument does not depend on an issue of fact not litigated in courts below and 'so long as it is open to the respondent on the pleadings and having regard to the way in which the case has been conducted'" (*Suvaal v Cessnock City Council* (2003) 200 ALR 1 at [105] per McHugh and Kirby JJ).

94. Here, the argument does depend on an issue of fact not litigated in the court below, and it is not open to the wife on the pleadings and having regard to the way in which the case was conducted. Thus, the contention by the wife cannot be relied on to support the judgment below.

95. Despite it not being part of the ground, in her written summary of argument the wife suggests that "a failure of the Second Agreement, for any reason, cannot operate to 'revive' the First Agreement." However, this submission is misconceived. As the trustees point out in their written summary of argument, a failure of the second agreement must be capable of reviving the first agreement. If the second agreement is void, then it is as though it never existed and thus it cannot disturb the first agreement.

Ground 2

96. This was an issue raised before her Honour, and although her Honour did not specifically address whether s 90G(1)(b) of the Act was satisfied, her Honour appears to have been of the view that the parties had been provided with the advice required. For example, in [72] her Honour said this:

> 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.
>
> (Emphasis omitted)

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97. Importantly though, as pointed out by the trustees, "[t]he nature or completeness of the husband's legal advice has never been in issue", and it can only be the wife's advice that is in doubt.

98. Further, the wife cannot rely on the defects on the face of the certificate provided by her lawyer. They are capable of being rectified, and this was clearly within her Honour's contemplation (see [72]).

99. Plainly, her Honour did not go behind the certificates to query whether the requisite legal advice had in fact been given, but that is consistent with authority and fails to demonstrate error on her part.

100. In *Hoult & Hoult* (2013) FLC 93-546, Thackray J (with whom Strickland and Ainslie-Wallace JJ agreed on this issue) clarified the onus of proof and evidentiary burden in the following terms:

> 60. In my view, the onus of establishing that an agreement is binding falls upon the party asserting that fact because the legislation provides that an agreement is binding "if, and only, if" the prescribed matters are established. It follows that the party relying upon the agreement must establish the existence of all those matters, including the giving of the requisite legal advice to both parties.
>
> 61. I recognise the potential forensic difficulty faced by a party who seeks to uphold a financial agreement when the other party claims not to have received the prescribed legal advice. However, the fact there is difficulty in proving something within the knowledge of only the other party and their solicitor does not mean the legal burden of proof passes to the party who seeks not to be bound by the agreement.
>
> 62. Importantly, however, I consider that once the party seeking to rely upon the agreement produces in evidence the certificate signed by the other party's solicitor, there is a forensic obligation on the other party to adduce evidence which would disprove, or at least throw into doubt, the inference or conclusion to be drawn from the certificate (especially when read with the recital in the agreement to the same effect).
>
> 63. This forensic obligation is properly conceptualised as the burden of introducing evidence and should not be confused with the burden of proof as a matter of law and pleading. For a discussion of the difference see Purkess v Crittenden (1965) 114 CLR 164 especially at 167-168 per Barwick CJ, Kitto and Taylor JJ and 170-171 per Windeyer J.

(See also *Logan & Logan* (2013) FLC 93-636 and *Wallace & Stelzer and Anor* (2013) FLC 93-566).

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101. Applying those principles here, the trustees relied on the certificates (together with the recitals in the agreements) as providing sufficient evidence for finding that the advice referred to in s 90G(1)(b) had been given. The question then becomes whether that evidentiary foundation had been undermined by other evidence presented by the wife. However, that was not raised with her Honour.

102. In the submissions of the wife in support of this ground, the wife refers to evidence given by the wife's solicitor, but we are not persuaded that that evidence was sufficient to displace the inference from the certificates, or even to place the matter into doubt. Thus, this ground also fails.

103. We note that the wife mounted an argument that her Honour could not be satisfied that the requisite advice was given because of the lack of financial disclosure of the husband contained within each agreement. However, the alleged lack of financial disclosure is the subject of Ground 3 of the Notice of Contention, and if necessary we will return to this issue once we have addressed that ground.

Ground 3

104. The wife seeks to transpose the obligation to make full and frank disclosure under Part VIII of the Act to the entering into of financial agreements under Part VIIIA. However, this is erroneous given the clear difference between the two parts. As the trustees say in their written submission:

> 22. …The obligation of disclosure under Part VIII occurs in a context where a court is required to make findings about the assets, liabilities and financial resources of the parties, and where the court is also required to be satisfied that it is just and equitable to make orders.
>
> 23. By contrast, a financial agreement is a private contract between parties into which there is no express statutory requirement that disclosure be made or valuations be obtained; and there is no judicial scrutiny relating to their formation. A party may enter an agreement, and such agreement is capable of being binding, with little or no knowledge of the other party's financial position. That is, consistent with the doctrine of freedom of contract, a party enter into a bargain without undertaking due diligence if they choose to do so, just as they may enter a bad bargain in the face of the proper due diligence. The fact that a financial agreement results in a difference outcome to that which may have been awarded under s 79 and s 75 is not relevant to whether the agreement should be set aside [(*Hoult & Hoult*)].
>
> (Footnotes omitted)

105. The safeguard, if you like, where financial agreements are entered into, is that if there is thought to be inadequate disclosure, then the legal advice given to the

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other party can be, for example, not to enter into the agreement, or even, where there is no necessary suggestion of non-disclosure, to only sign after receipt of specific financial information. Further, if it subsequently transpires that the agreement was obtained by fraud, including non-disclosure of a material fact, the Act provides a remedy in the form of s 90K(1)(a).

106. Here, there were issues about the husband's financial circumstances, but there is no clear evidence of a failure to disclose materially relevant information. The wife is critical of the husband's evidence, but her Honour said this about that evidence:

> 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.

107. Further, as referred to in [40] above, valuations of the husband's "interests" were obtained during an adjournment of the hearing, and there was a difference between those valuations and the husband's previous estimate of value. There was also an issue about terminology in relation to shares (see [41] above). Her Honour, as can be seen from [76] determined to treat the shares the husband described as being in public companies as being shares in his own companies. The evidence as to this was confused and incomplete, but it seems to us that her Honour was entitled to take that view.

108. Her Honour's conclusion as to these matters appears at [77] as follows:

> 77. It is also of note that, on that basis, [the husband'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.

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We consider this finding well open to her Honour.

109. In any event, fatal to this ground is the circumstance that the wife cannot point to any detriment suffered by her as a consequence of her claims of non-disclosure, given that her legal advice was not to sign the agreement, it being described by her lawyer as "the worst agreement I have ever seen". Despite that advice, the wife went ahead and signed the agreement. We also fail to see how that advice would have altered if the husband's worth had indeed not been fully disclosed, and in fact, when the entirety of the advice given is analysed, there is no room to suggest, as the wife does, that the advice as to her rights would have been different.

110. There is no merit in this ground.

Ground 4

111. The trustees submit that the wife should not be permitted to pursue the contentions raised in this ground. First, it is said that when comparing how the wife "framed" her "misrepresentation case" below, with the contentions now raised, there are differences which substantially change the way the case was presented below. It is said that is impermissible in that the wife is bound by the manner in which she conducted her case at first instance, and she should not be able to raise an altogether different issue. That is the principle that applies to a Notice of Appeal (*Metwally v University of Wollongong* (1985) 60 ALR 68) and, as referred to above, it is a similar principle that applies to a Notice of Contention (see [92] above).

112. In the circumstances, we agree with the trustees that this principle prevents these contentions being raised in the way that they are framed.

113. The second objection raised by the trustees is on a similar basis, but limited to the second of the misrepresentations alleged in the ground. It is said that at trial the wife did not pursue that issue, and thus she should be prevented from raising it by way of a Notice of Contention.

114. We are also attracted to this argument, and it provides another basis for the wife not being able to pursue the second contention.

115. However, even if we are wrong about all of this, we do not consider that there is any merit in this ground for the following reasons.

116. As to the first alleged misrepresentation, it is entirely unclear from the ground itself or the submissions in support thereof, what it is claimed the husband misrepresented about his financial position, at or about the time of each agreement. If it relates to the contention raised in Ground 3, as to the alleged non-disclosure by the husband of his financial position, then in our view that claim clearly fails for the reasons we have expressed in addressing that ground.

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Moreover, this was the subject of a factual finding by the trial judge at [77], a finding that we have quoted above (at [108]).

117. It has not been demonstrated that her Honour erroneously decided this issue.

118. As to the second alleged misrepresentation, that claim must fail for two reasons. First, her Honour found (at [35]) that from the outset the husband made it clear to the wife that his wealth was his, and he intended it to go to his children, and the wife was well aware of that. Her Honour also found (at [35]) that it was the husband who first introduced "the notion of signing a document to protect [his] financial position", and that the wife was "keen to acquiesce".

119. Thus, as emphasised by the trustees in their written submissions:

> 35. The contention as to misrepresentation is inconsistent with the [wife's] evidence and the trial judge's unchallenged findings in that she cannot both:
>
> (a) say that she knew that she was aware that the husband's wealth was his – the logical corollary being that she would not receive any material part of his wealth from an agreement in the event of separation; and
>
> (b) contend on appeal that she entered the agreement on the basis of a representation by him that she would be financially secure.

120. Secondly, the evidence of the wife at trial was that when she entered into the agreements she believed that they would never take effect because she "staunchly" believed that the husband would never separate from her, and that they would only take effect if she left him, but she was never going to do that. Thus, plainly, any representation by the husband about what would occur post-separation had no effect on the wife.

121. We also observe that what the wife was concerned about 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" (at [35]). Clearly though, that was addressed in both agreements, and no alleged misrepresentation by the husband is raised by the wife in relation thereto.

122. It is submitted by the wife that "the effect of the husband's representation … survived [the wife's entry into each agreement], notwithstanding their terms". However, that submission cannot be maintained in the face of the fact that the wife had no concern about the arrangements upon separation.

123. We confirm that this ground fails to demonstrate that the trial judge erroneously decided, or has failed to decide, some matter of fact or law, and thus it has no merit.

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Ground 5

124. We agree with the trustees that the contention raised in this ground cannot be the subject of a Notice of Contention. This contention does not demonstrate that the trial judge erroneously decided, or has failed to decide, some matter of fact or law; indeed, in reality, the ground contends that her Honour was correct to find that there was duress such that the agreements should be set aside.

Ground 6

125. Although the wife's case at trial was that the agreements should be set aside on a number of grounds, including duress, undue influence and/or unconscionability (s 90K(1)(b) and s 90K(1)(e)), as has been explained, her Honour mentioned the latter two, but only accepted one ground, namely duress. As a result, the trustees argue that the contention in this ground must fail. It is said that her Honour has not made an erroneous decision here, and nor has she failed to decide a matter of fact or law, given that she was not obliged to consider any other basis than she did for setting aside the agreements.

126. We agree with the submission that her Honour has not made an erroneous decision here, but although she was not obliged to consider any other basis than she did for setting aside the agreement, it seems to us that that can be treated as a failure to decide a matter of fact or law, and thus it is open for the wife to pursue the contention on this basis. That said though, we do not consider that this ground has any merit for the following reasons.

127. We first need to address a submission by the trustees that it is insufficient for the wife to point to the evidence and suggest that demonstrates that the agreements should be vitiated because of undue influence. It is said that the wife "must be able to show that the trial judge made the relevant findings on which to base a determination" that that is the case. However, we do not accept that as an accurate portrayal of what must be done. Plainly, if there are findings by the trial judge that establish undue influence, then that can result in the contention being upheld, but where there is uncontested evidence that bears upon the issue of undue influence, the wife is able to point to that in support of her claim, despite there being no findings by the trial judge.

128. The trustees in effect conceded that the parties being engaged at the time of entering into the first agreement meant that there was a relevant relationship which provided a prima facie basis for a claim of undue influence (*Johnson v Buttress* (1936) 56 CLR 113 at 134 per Dixon J). Thus, the issue in relation to the first agreement is whether there was evidence that the trustees could point to, that demonstrated there was no undue influence, and the wife's consent was a true consent.

129. As to the second agreement, there was no relevant relationship alleged, but it is said that the position of the husband was one of ascendancy or influence over

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the wife and that she "reposed considerable trust and confidence in him". As a result, the onus was on the husband to establish that the agreement was not procured by undue influence, and again that the wife's consent was a true consent (*Yerkey v Jones* (1939) 63 CLR 649 at 675 – 676 per Dixon J).

130. In relation to these issues, the trustees submit that the evidence and the relevant findings of the trial judge demonstrate that the agreements were "entered into free of influence".

131. Relevant findings, for example, of the trial judge, are those appearing in [35] where her Honour said this:

> Although plainly keen to have a relationship, and potentially, another marriage, [the husband] was at pains from the outset to make it clear to [the wife] that his wealth was his, and he intended it to go to his children. [The wife] was certainly aware of that position from the outset. [The husband] was not so clear in his oral evidence as to how he made it plain to [the wife] 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. [The husband] seemed to express the view in cross-examination that [the wife] was the first to introduce the notion of signing a document to protect [the husband's] financial position. I am not satisfied that was the case. It seems to me more likely than not that [the husband] was the first to introduce the notion of a document being needed to be signed and that [the wife] was keen to acquiesce. I accept [the wife's] position that she understood [the husband'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.

132. In relation to those findings, it is relevant to note that, in respect of the second agreement, the evidence of the wife's solicitor was that "[a]gain 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 pre-deceased her" (at [57]).

133. As to the evidence generally, and in particular of what was said by the husband, and what was said by the wife, around the signing of the agreements, we need go no further than refer to what we have said when addressing Ground 4. As the trustees say in their written summary of argument:

> It is scarcely possible to conclude that the husband exerted influence over the [wife] at the time the agreement was signed in circumstances where the wife was told of the need for an agreement from the outset of the relationship and while still living in [Country B], was keen to acquiesce to entering an agreement and was aware that the husband's wealth "was his".

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134. Further, we repeat the findings of the trial judge set out above and emphasise that the wife could not have been influenced at all by the husband, when she had no concern about what she would receive upon separation.

135. As to the question of unconscionability, the same result follows, and for the same reasons.

136. As the High Court has held, "[u]nconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so" (*Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 474 per Deane J).

137. In her written summary of argument the wife submitted that the following factors demonstrate that she was "in a position of disadvantage vis-a-vis the husband":

> 71.1.1 the [wife's] age, sex and absence of any commercial and financial experience, limited understanding of the English language and conditional rights of residence in a foreign country;
>
> 71.1.2 the [wife's] financial dependence upon the husband;
>
> 71.1.3 the husband's awareness of the [wife's] desire to marry him;
>
> 71.1.4 the husband's declining to marry the [wife] unless she agreed to enter into the agreement and then to remain unless the Second Agreement was entered; and,
>
> 71.1.5 the husband's representations as referred to above.

138. There is no doubt that the wife was in a position of disadvantage vis a vis the husband, but the question is whether the husband took unconscionable advantage of that position in securing her signature to the agreements, and it is here where the difficulty for the wife arises. The evidence does not support a finding that there was such conduct on the part of the husband, and particularly when the evidence as to the wife's position is factored in. Again we refer to what we said when addressing Ground 4.

139. We also note that the wife lays great store in oral evidence given by the husband that the agreements were non-negotiable and would not be changed. However, that was not the reality. There were handwritten amendments made to the agreements by the wife's solicitor, and they were agreed to by the husband. Thus, this is a prime example of how the evidence does not support the wife's contentions.

140. In these circumstances there is no merit in this ground.

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Ground 7

141. The issue that is sought to be explored here is "the ability of the [wife] to understand both the terms of the Agreements and of any advice provided to her". The answer to that question though can only be of any value if the wife in fact did not understand the terms of the agreement and the advice given to her.

142. There was evidence before her Honour from an expert as to "language ability", and there was also evidence from the wife's solicitor as to the wife's understanding of the terms of the agreements and the advice given, and we will address the evidence of those witnesses shortly. First though, the question that must be asked is what is the relevance of that evidence to the issue her Honour had to decide?

143. As the trustees correctly submit in their written summary of argument, a party "seeking to set aside [an] agreement need not actually have understood the advantages or disadvantages of [the agreement]" (*Bilal & Omar* (2015) FLC 96-636), and the only relevance can be how that might impact upon the claims of undue influence and/or unconscionability.

144. Turning to the evidence, that is best explained by setting out what her Honour said about this topic in her reasons for judgment:

> **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 Greek. 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 [wife] 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 [wife] should not sign it. Ms Harrison understood the [wife's] position to be that the testamentary provisions were at the forefront of her mind. Indeed, the [wife] was concerned to ensure that the agreement contained protection for her from [the husband's] Estate, should he predecease her, given that was likely bearing in mind their respective ages.

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> 81. Ms Harrison's evidence included that she considered that the [wife] 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 [the husband] might ever leave her.
>
> 82. The evidence of the [wife'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 [wife], 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.

145. As can be seen, her Honour's findings are clear, and the task of the wife is to demonstrate that her Honour erroneously decided this question of fact, or failed to decide some other matter of fact or law.

146. In this regard the wife took us to the evidence of the expert witness.

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147. In her report of 19 November 2012, attached to her affidavit sworn on 1 February 2013, that witness stated that, based on certain test scores, she did not "believe that [the wife] would have understood the legal document/s she signed in 2007". However, apart from the obvious limitations of that opinion, when she was cross-examined about this, that opinion was shown to be nowhere near as definitive as it might have seemed at first blush. For example, this exchange occurred during her cross-examination by senior counsel for the trustees:

> And do you suggest that it was beyond [the wife's] understanding or capacity to understand that this agreement affected her legal rights?---I think that's a fair comment.
>
> That is, that even if told by a solicitor that the document would affect her legal rights, she would not understand those words?---I think she would understand if she was told that – perhaps not using the words "legal rights" but "This will affect your future." If she was told something along those lines, it's possible.
>
> If it were the case that [the wife] was aware when she saw her lawyer that the purpose of seeing the lawyer was to sign an agreement which would set out the financial arrangements between she and her partner, she would understand that, would she not?---I guess she would.
>
> And she would be able to understand, wouldn't she, if told, that this document had a – I was going to use the word "deleterious", but perhaps I should use the word – it had a significant damaging effect upon her potential rights?---She would understand that.
>
> If she were told not to sign the document, she would certainly understand that, wouldn't she?---Yes. She would.
>
> And if she were offered an explanation as to why, then, depending on the nature of the explanation, she would be capable of understanding that, would she not?---I would think so.
>
> If she were, for example, told that if she signed the document and the marriage broke down, that is, she separated within three years, she would get nothing, she would be able to understand that?---Possibly, yes.
>
> And she would be able, surely, to understand, if she were told, that if she didn't sign the agreement, the law in this country might provide her with something. She would understand that. Yes?---Yes.
>
> If she were told that if she separated after three years marriage but there were no children, she would only get $50,000 cash, she would understand that, would she not?---Well, I'm saying possibly. What I found, if I may comment, is that when the discussion continues a little longer than normal, that [the wife's] attention span tends to wane. So if it were short – if it

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were short sentences with a response coming after short sentences, I think that's possible.

And if she were told that when she got married, her husband would give her not less than $4000 a month, that would be something she would be well capable of understanding. Yes?---I would imagine so.

And that she would get 25 per cent of, that is, a quarter of, the income from a development, she would understand that?---Yes.

Did [the wife] at all speak to you about the circumstances in which she had signed the agreement?---No.

Did you inquire of her at all in terms of what had passed between she and a solicitor that she had seen in relation to the agreement?---I honestly can't recall. I'm pretty sure that I would have asked that – that question.

But you don't have a recollection of what- - -?---No. I don't have a recollection of that. It was my job at that point to establish her language proficiency.

And language proficiency with somebody of the ability of [the wife] depends, does it not, upon the simplicity of the explanation that's being given- - -?---Yes.

- - - the simplicity of the discussion that's taking place?---Yes.

And it depends, does it, upon an interchange between [the wife] and whoever is offering an explanation?---Yes.

One would anticipate, wouldn't one, that [the wife] might, if she didn't understand something, say so?---She might.

(Transcript 27.1.15, page 29, lines 1 – 47, page 30, lines 1 – 20)

…

Right. Now, in those circumstances, the terms of the agreement that you have read, if simply explained, would have been well within her understanding?---Yes. If simply explained.

So the answer is yes – qualification if simply explained?---Yes. If simply explained.

But simple propositions such as, "Don't do it", "It's a bad agreement", "You shouldn't sign", she would have understood, in any event?---Yes, I would have put it even more simply than that. But yes.

(Transcript 27.1.15, page 32, lines 7 – 15)

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148. This is to be compared with the evidence of the wife's solicitor as referred to by her Honour. The solicitor, who of course had the advantage over the expert of actually being present at the time, and being able to assess whether the wife understood the agreements and the advice that she was being given, stated categorically that she was not concerned regarding the wife's ability to understand (transcript 27.1.15, page 89, lines 17 – 18); she did not think that the wife "was having any difficulty understanding [her]" because of the manner in which she engaged with her in answering questions and in providing information (transcript 27.1.15, page 89, lines 24, 25 – 26, 29); further, in discussing the agreement she "paraphrased what all of the provisions meant … [putting] them in common language" (transcript 27.1.15, page 89, lines 36, 38).

149. The wife in her written summary of argument also sought to rely on other evidence given by the expert, but it is readily apparent that not only this evidence, but her evidence generally, was qualified, and in some respects, speculative. Indeed, that is understandable given the circumstances of her involvement, and what she was able to do and report on.

150. In these circumstances we are not persuaded that her Honour erroneously decided this issue, and plainly there can be no basis to suggest that if her Honour had considered the claims of undue influence and/or unconscionability, that would have met with success because of any alleged lack of understanding by the wife of the terms of the agreement or the advice given.

151. This ground also has no merit.

Ground 8

152. No written or oral submissions were made in support of this ground, and we do not propose to speculate as to the basis of this contention.

Conclusion as to the Notice of Contention

153. Having found no merit in any of the grounds, our determination that the appeal should be allowed stands.

Disposition of the Appeal

154. In allowing the appeal we need to consider whether we are able to re-determine the matter ourselves, or whether we should remit it for rehearing.

155. No submissions as to this were made by either party, but in his Amended Notice of Appeal the husband sought that orders (1), (2) and (3) made by the trial judge be set aside and this court make a declaration that the financial agreement dated 20 November 2007 is binding on the parties. We assume that why a declaration is not sought in relation to the first agreement, is that if the second agreement is valid and enforceable, then the first agreement is

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terminated under the terms of the second agreement, leaving only that agreement to be declared binding.

156. There are of course two topics to address, namely the fate of the agreements, and the issue of the costs of the trial. In relation to the first topic, we are disposed to re-determine the matter ourselves for the following reasons (not in any order of importance).

157. First, there is the time that has passed since the orders were made by the trial judge. Secondly, it is not apparent that there is a need for further evidence to be presented by either party, given that the evidence at first instance was not capable of establishing the elements of s 90K(1)(b) or (e), and in any event, the husband has passed away, and thus there could be no further evidence from him. Thirdly, there is the time and further expense that would be involved in remitting the matter for re-hearing. Fourthly, the issue to be considered lends itself to a re-determination given that it would involve applying the law to the unchallenged facts as found by her Honour.

158. As to the second topic, plainly it would be inappropriate to remit that for rehearing, but in order to re-determine it, we would need to have submissions from the parties as to what order, if any, should be made, given the outcome of the appeal against the orders that neither agreement is binding upon the parties, and that both agreements be set aside. Unfortunately, neither party provided those submissions to us in the context of the appeal. We will return to this after we have re-determined what should occur in relation to the agreements.

159. The issue that needs to be addressed now is simply stated, namely whether, applying the correct test, the wife entered into the agreements under duress, such that they should be set aside. We have already dealt with the issues of undue influence and unconscionability when addressing the Notice of Contention.

160. The test, as referred to above, is whether there is "threatened or actual unlawful conduct". Further, if it is said that pressure has been applied on the other party, that pressure needs to be "illegitimate" or "unlawful", and it is not necessarily sufficient if it is "overwhelming" or there is "compulsion" or an "absence of choice".

161. Here, the evidence relied on by the wife to establish duress is in summary as follows:

a) From the moment the parties met the husband expressed to the wife that he would provide for her and look after her for life if she came to Australia and married him.

b) The husband made it clear that the wife would need to sign a document prior to marrying that acknowledged his wealth was his and it would go to his children.

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c) The wife was at all times financially and emotionally dependent on the husband having permanently left and cut her ties with Country B, and being in Australia on a limited visa.

d) Just prior to the wedding, the husband arranged an appointment for the wife with a solicitor for the purpose of the wife obtaining legal advice about the financial agreement prepared by the husband's solicitor.

e) Before seeing the solicitor, the husband told the wife that if she did not sign the agreement the wedding would be off, and he told the wife and the solicitor that the agreement was non-negotiable.

f) The wife's parents and her sister had arrived in Australia for the wedding.

g) The husband drove the wife and her sister to the appointment with the solicitor and waited outside.

h) At the meeting with the solicitor, the wife became aware for the first time of the contents of the agreement and had information about the husband's financial position.

i) The solicitor provided her advice to the wife, and it was to the effect that the agreement was no good and she should not sign it. That verbal advice was followed up with detailed written advice by the solicitor, and at a subsequent appointment the solicitor went through that written advice with the wife.

j) Despite the legal advice, the wife signed the agreement and the wedding went ahead.

k) As to the second agreement, the wife's position had not changed, in that she was still entirely dependent upon the husband, and similar conditions were in place. The wife saw the same solicitor and was given the same advice, but despite that, proceeded to sign this agreement.

162. It is not apparent to us from that evidence what is the "threatened or actual unlawful conduct" of the husband. Or put another way, what pressure he applied that was "illegitimate" or "unlawful".

163. There is no doubt that the wife was reliant on the husband both financially and emotionally, and she looked to him to provide for and to care for her, but the husband met that expectation, and the wife accepted it. Thus, that cannot be seen as an element of illegitimate or unlawful pressure.

164. Certainly, the husband imposed conditions, but as her Honour found, the wife was "keen to acquiesce". In other words, the wife was well aware from the outset that the husband's wealth was his, and that he intended it to go to his children. She was also well aware that a document needed to be signed to protect the husband's and his children's position.

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165. In relation to the agreements specifically, the fact that the husband required an agreement before entering the marriage cannot be a basis for finding duress. Nor can the fact that a second agreement was required. Further, and as we have referred to above, the wife's concern was not as to what would happen to her financially whilst the husband was alive, but as to what would happen if he died. That was her focus, and that was dealt with to her satisfaction in the agreements.

166. Again, as we have emphasised above, it was not in fact the case that the agreements were non-negotiable. Changes were made by the wife through her solicitor, and they were accepted by the husband.

167. However, the real difficulty for the wife in establishing duress is that she was provided with independent legal advice about the agreements, she was advised not to sign them, but she went ahead regardless.

168. We are not persuaded that the wife entered into either agreement under duress, and we are content to find that they are both valid and enforceable. However, once we have found that the second agreement is valid and enforceable, there is no need to bother with the first agreement because, as referred to above, the second agreement terminated the first.

169. As to whether either agreement is binding, again we only need concern ourselves with the second agreement. To be binding, s 90G of the Act must be satisfied, and in particular there needs to have been independent legal advice provided to both parties about specific matters. We have found that that was the case, and accordingly, we are also content to declare the second agreement binding on the parties.

170. To return to the costs of the trial, in order to determine what order we should make we need to have the submissions of the parties, and we will provide for that in our orders.

COSTS OF THE APPEAL

171. At the conclusion of the hearing we sought submissions from the parties as to costs depending on the result of the appeal.

172. Both parties sought that they have the opportunity to present written submissions on the question of costs, and we are content to provide for this in the orders that we propose.

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I certify that the preceding one hundred and seventy-two (172) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court delivered on 26 September 2016.

Associate:

Date: 26 September 2016

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