THORNE v. KENNEDY (B14/2017)

Court appealed from: Full Court of the Family Court of Australia

Date of judgment: 26 September 2016

Special leave granted: 10 March 2017

The parties to this appeal are the appellant wife ("the wife") and the deceased husband's personal representatives ("the husband's representatives").

The wife seeks to set aside orders of the Full Court of the Family Court of Australia which held that a Financial Agreement dated 20 November 2007 ("the November Agreement") between herself and her husband was binding and that it prevented her from seeking a property settlement and spousal maintenance under the *Family Law Act* 1975 (Cth) ("the Act").

The wife, then aged 36 and the husband, then aged 67 met over the internet in mid-2006. At the time that they met, the wife was not living in the country of her birth and her English language skills had been informally acquired. She had no children and no assets of any substance. The husband however was an Australian property developer with assets worth at least $18 million. He was divorced from his first wife, and had adult children.

Following their courtship, the wife travelled to Australia with the husband in February 2007 and moved into his penthouse. On 26 September 2007, with their wedding scheduled for 30 September 2007, the wife and the husband signed a Financial Agreement ("the September Agreement"). It provided that the wife was to receive a total payment of $50,000 plus CPI in the event of a separation after at least 3 years of marriage. There were some other provisions of a testamentary nature which provided for the wife to receive a penthouse worth up to $1.5M, a Mercedes and a continuing income in the event of the husband's death "prior to either party signing a Separation Declaration following separation".

The husband had made it clear to the wife from very early on that he wanted to protect his wealth for his children and that, if they were to get married, she would have to sign a legal agreement to that effect. The wife however did not learn the terms of the September Agreement until days before the wedding, when she attended at an appointment (arranged by the husband) at a solicitor's office to sign it. By that stage her parents and sister had travelled to Australia for the wedding and were also staying at the husband's home. The husband had also told the wife that if she failed to sign the September Agreement, the wedding would be off. When presented with the draft September Agreement, the wife's only concern was with the testamentary provisions - not about the separation provisions. The wife's solicitor advised her orally and then in writing not to sign the Agreement for several reasons including that it was all in the husband's favour and not in hers. After some minor changes to the September Agreement requested by the wife's solicitors were agreed to by the husband's, the wife nevertheless signed it and then in November signed the second Agreement, revoking the first but otherwise in the same terms.

On 16 June 2011 the husband signed a Separation Declaration after the couple had been cohabiting for about 4.5 years. The wife then commenced proceedings in the Federal Circuit Court, seeking orders that both Agreements be declared not to be binding and/or to be set aside. In their place she sought orders for a property settlement and spousal maintenance. The husband died on 19 May 2014 (part way through the hearing) and the husband's representatives were then substituted for him in the proceedings. In March 2015 the Federal Circuit Court made orders that neither Agreements were binding and it set them both aside. The Federal Circuit Court held that the wife had "*signed the Agreements under duress born of inequality of bargaining power where there was no outcome to her that was fair and reasonable*".

On 26 September 2016 the Full Court of the Family Court (Strickland, Aldrige and Cronin JJ) allowed the appeal of the husband's representatives. Their Honours found that both Agreements were binding on the parties. They further held that there had *not* been duress, undue influence or unconscionable conduct on the husband's part which had induced the wife to enter into the agreements thus rendering them void or voidable.

A central issue in the appeal is whether the principles of law and equity for determining the validity of contracts are any different under the Act (in their application to Financial Agreements), given the statutory and public policy context in which they operate in accordance with the obligations of mutual support inherent in a marriage relationship.

The grounds of appeal are:

- That the Full Court erred in law in failing to find the Financial Agreements were not binding and should be set aside on the ground of duress;

- That the Full Court erred in law in failing to find the Financial Agreements were not binding and should be set aside on the ground of undue influence;

- That the Full Court erred in law in failing to find the Financial Agreements were not binding and should be set aside on the ground of unconscionable conduct in circumstances where the husband took unconscionable advantage in securing the Appellant's signature to them.

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