

UNDUE INFLUENCE

1. Is there a presumption of Undue Influence? Class 2B

On the facts it does not appear A meets a presumed recognised category of undue influence under 2A, but he may be able to prove that he was in relationship of influence under 2B (Apparent Relationships), that should get the benefit of the presumption: *Union Fidelity v Gibson*

2. Is there an apparent relationship that befalls 2B?

- Does the party getting the benefit of the transaction occupy a position naturally involved in ascendancy or influence or trust? ***Janson v Janson***
- “Where there is a relationship where the ascendant party unduly influences the other party into entering a transaction, the court looks to the quality of the consent of the party, and how the intention to consent was produced” - ***Johnson v Buttress***
- Category 2B prevents such a relationship being unconscionably abused
- Indicia espoused in ***Johnson v Buttress***:
 - A. A Relationship exerting dominion and ascendancy**
 - B. In matters of business he had to be instructed**
 - Independent Advice? “As to the merits of what he was doing to his own interests”
 - Was it brought to his attention?
- It appears that there is a presumption of undue influence, as the indicia in *Johnson v Buttress* are satisfied.

3. Can the presumption of undue influence be rebutted? (Defences)

- Look at the categories:
 - Independent Advice
 - Improvidence
- Was the gift “*the independent and well-understood act of a man in a position to exercise free judgment based on information as full as that of the donee*” – Dixon J p 134 in ***Johnson v Buttress***:
 - 1. He proposed the transaction
 - 2. All the proper documents were signed ‡ memorandum of transfer: where did he get it?
 - 3. Heavier because he is illiterate (*Johnson v Buttress* p120)
 - 4. There was no consideration
 - 5. There was no independent advice/opportunity?
 - 6. Time?
 - 7. Did the know all of the facts?
 - 8. Was it in their best interests?
 - 9. Was the plaintiff removed from the influence at the time of the transaction?
 - 10. Other assets?

4. Is Undue Influence established?

UNCONSCIONABLE CONDUCT

1. What are the elements to be satisfied?

- Where one party possesses a disadvantage visible to another who acknowledges it and continues to exploit it for their benefit: **Commercial Bank v Amadio per Deane J**
- **Blomley v Ryan** sets out the various circumstances which may induce a court of equity to intervene at 405:

a) Is there a special disadvantage/disability?

- Are any of the disabilities inherent in **Blomley v Ryan** above evident on the facts?
 - *“Poverty, sickness, age, sex, infirmity of mind, illiteracy, drunkenness, lack of assistance or explanation....all of which have the effect of placing one party at a serious disadvantage vis a vis another”*
- Is one party at a serious disadvantage vis-à-vis the other?
- Is this special disadvantage such that it could “seriously affect the judgment of innocent party regarding his own best interests”? (**Commercial Bank v Amadio**)

b) Is there knowledge of the disability? (Constructive or Actual)

- **Blomley v Ryan:**
 - *“in the absence of such the test is whether there were such facts known that would arise in the mind of the person a very real question as to the other parties ability to make a judgement as to what was in his best interests”*
 - On the facts, it appears that there is knowledge of Barry’s illiteracy, insofar as Peter helped him sign the documents.
 - Knowledge: **Commercial Bank v Amadio**

c) Was there Unconscionable Exploitation of the disadvantage to procure the transaction?

- **Louth v Diprose:** “Exploitation is a conscious act, they need to know about it in order to exploit it”
 - Knew the real risks and did not alert to the true facts of the case before he signed the guarantee (**Amadio per Mason, Wilson & Deane**)
 - This may be enough to establish this element and make it prima facie unlawful for the transaction to be honoured: **Commercial Bank v Amadio**

2. Can the Defendant rebut the presumption?

- Onus shifts to the Defendant to prove that no special disadvantage exists
 - **Laches?** Undue delay as in **Bester v Perpetual Trustee Co**
 - **Acquiescence?** Court may prevent you from trying your case where you took too long to bring it forward (**Allcard v Skinner**)

3. The transaction with a third party may be set aside on the basis of A's earlier undue influence

- “Whoever receives the gift outside the original parties within which undue influence is played out, takes it tainted and infected...partitioning amongst friends will not purify the gift” (***Bridgeman v Green***)
 - “Does the third party have actual or constructive knowledge of the circumstances or facts that would lead the court to finding undue influence?” (***Bank of NSW v Rogers***)
 - Did the Bank have notice of A's earlier influence? If so, he takes the transaction as third party infected with A's undue influence: ***McNally v GIO***

Remedies available

- Rescission: ***Cheese v Thomas***
- Equitable Compensation: ***Hartigan v Krishna***

FIDUCIARY OBLIGATIONS

1. Is there a Fiduciary Relationship?

(i) Does the relationship befall one of the presumed categories? (These create a presumption of fiduciary as in ***Hospital Products v USSC***),
o Employee/Employer: ***DPC Estates v Grey and Consul Development***, OR

(ii) “Is the relationship between the two parties one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person is vulnerable to abuse by the fiduciary of his position” (***Hospital Products v USSC***)

- Do the facts purport existence of a fiduciary relationship?

2. On the balance of probabilities, is there a breach of fiduciary duty (Scope)?

(1) It is necessary to look to the obligations set out in the original contract/agreement – this is a fact based enquiry

(2) What conduct runs counter to this?

(3) Does the use of the fiduciary relationship give the fiduciary a special discretion or power?

(4) It is important to ask “for what purpose and whose interests the powers are held” (*C-Shirt v Barnett* per Lehane J)

“Vulnerability is important indicia but it is not the touchstone”

2A. Is the conduct of Freddy of particular application to a proscriptive fiduciary Duty?

(a) **Duty of Confidentiality**: “The continuing duty to preserve the confidentiality of the information imparted during the fiduciary relationship’s subsistence”: ***Prince Jefri Bolkiah v KPMG*** per Lord Millett

(b) **“Overriding Duty of Undivided Loyalty”**: per Lord Millett in ***Prince Jefri Bolkiah v KPMG***

(c) **Duty Not To Profit**: ***Boardman v Phipps, Chan v Zachariah***

(d) **Duty Not To Conflict**: ***Keech v Sandford, Chan v Zachariah***