

## TOPIC 2: UNDUE INFLUENCE AND UNCONSCIENTIOUS DEALING

### INTRODUCTION:

Equity does not intervene to protect people from unwise or unreasonable transactions made with well informed free will: *Siwicki v NAB* [2010]

1. **Undue Influence:** Focuses on **coercion** and prevents party from exercising free judgment and acting voluntarily
2. **Unconscientious dealing:** Focuses on party who has knowingly taken advantage of another **party's special disability**

### UNDUE INFLUENCE:

- The unfairness of allowing a party to obtain the benefit of a transaction that has been acquired by some coercion or exertion at the expense of another transacting party
- **According to equity**, it is unfair to allow the party who has exercised the coercion to subsequently claim the benefit of the contract
- **If the common law**, doesn't cover the area, an understanding of its application makes clear the foundation of the equitable principle.

#### 1. Position at Common Law

- a. Under the common law, this area is addressed under the principle of: **Duress**
- b. A contract is voidable at common law if it has been made under duress. The concept of duress is firmly attached to the **conceptualization of contract**. **It must be shown that the coercion actually vitiates consent so that, in effect, no contract exists.**

#### 2. Position in Equity

- a. Equity is not bound by contractual principles, its approach **is not governed by contractual principles**: it considers only the **fairness of the circumstances**.
- b. UI is necessary for the claimant to prove affirmatively that the wrongdoer exerted UI on the complainant to enter into the particular transaction which is impugned. *Barclays Bank plc v O'Brien* [1994]

**AC 180**

The **equitable principle of undue influence is generally divided into TWO**

### CATEGORIES:

#### 1. CATEGORY 1: ACTUAL UNDUE INFLUENCE

- a. Must be established that one party to the transaction **was actually pressured by the other to enter** (actual use of coercion in the form of a threat etc)
- b. Proof that the transaction was **the outcome of such an actual influence of the mind of the donor that it cannot be considered to be the free act of the donor**.
  - i. Wherever the relation between donor and donee is such that the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter, the presumption of undue influence is raised:  
*Johnson v Buttress*

- c. If a person has obtained a benefit by the use of actual pressure including violence or threats of violence, the transaction **may be set aside on the grounds of actual undue influence**
- d. **NOTE:** Under **COMMON LAW**, it must be shown that the coercion has actually vitiated consent. Whereas **EQUITY** must show that such influence existed, that it has been exercised, that the transaction resulted from the influence, and that the transaction was manifestly to their disadvantage.

## 2. **CATEGORY 2: PRESUMED INFLUENCE**

- a. Some transactional relationships are presumed to have arisen from undue influence exerted by one part: **Johnson v Buttress, Powell v Powell [2002]**
- b. In these situations, there is **no need to show that undue influence actually existed**, because **equity presumes it has occurred**
- c. Relationships coming within this category are those where the dominant party due to emotional, spiritual or intellectual grounds are able to assume a position of authority or control over the weaker party (parent/child: **Powell v Powell**, guardian/ward/, priest/penitent, doctor/patient, solicitor/client)

## 3. **CATEGORY 2B: PROVEN INFLUENCE**

- a. Where there has been no actual pressure exerted, and does not come within the category of 'presumed influence', it is possible that the relationship **may still be held to be one of 'influence' where it can be proven that**, it was a relationship of trust and confidence which resulted in **one party being placed in a position of influence over the other**
- b. Can be proven depending upon the **overall character of the individuals involved as well as the circumstances of the relationship**.
  - i. Character of both parties, parties respective intelligence, understanding of business matters, overall nature of relationship, degree of vulnerability and dependence, financial status, improvidence of the gift, lack of independent legal and financial advice
- c. In **Royal Bank of Scotland v Etridge** - HOL held that **presumed influence may arise if it can be shown that:**
  - i. One party had strong trust and confidence in the other so that the other had the power to influence that party's decisions;
  - ii. The transaction entered into by the parties was not readily explicable according to the natural and ordinary motives to which people act
- d. If the plaintiff successfully proves that a relationship is one of influence, the defendant **must prove that any benefit received has been given over as a result of the free, consenting and independent judgment of the plaintiff**.

**The factors that might indicate the existence of a relationship of influence;**

***Union Fidelity Trustee Co of Australia v Gibson***

**a) Attributes of the donor:**

- a. Standard of intelligence and education;
- b. Character and personality;
- c. Age, status of health, experience of lack of it in business affairs.

**b) Interpersonal aspects of the donor-donee relationship:**

- a. Existence of blood relationship;
- b. Length of friendship or acquaintance;
- c. Intricacy of existing business affairs between them;
- d. Period of closeness of relationship.

**INDEPENDENT LEGAL ADVICE (REBUTTAL)**

1. It is an accurate method of showing that the weaker party exercised **independent judgment: *RBS v Etridge***
2. Advice must be fully informed, and give a full explanation of the legal effect of the transaction: ***Bester v Perpetual Trustee***
3. Advice must be clear, properly translated and directed at the particular transaction in issue

**UNDUE INFLUENCE AND THIRD PARTIES**

- Third parties may also be affected by undue influence.
- Where undue influence has been exerted over an individual, compelling them to enter into a transaction, the transaction may not only be set aside against the person who exercised the influence, but also **against any third party receiving a benefit from the transaction**

**There are THREE SEPARATE PRINCIPLES applicable in this area**

**1. THIRD PARTY AGENTS**

1. The third party cannot enforce the transaction where the person who has exercised the influence is the agent of a third party.
2. The agency situation may arise where the third party has entrusted the 'influencing' party with the task of obtaining consent and the execution of the document.
  - a. **An agency relationship may be established in circumstances where the financier has entrusted the debtor with the task of obtaining the surety's.**
3. It must be established that the third party **has actually requested the influencing party to act on their behalf: merely sending the documents may be insufficient**
4. A third party may not give actual authority to an 'influencing party', but rather, give ostensible authority in circumstances where there is an external representation by the third party that the influencing party is permitted to hold himself to be associated within the third party's business – and having ostensible authority to act on behalf of the third party: ***Bester v Perpetual Trustee Co Ltd***
5. Where it is established that a transaction is tainted by undue influence, it will be voidable against the party who exercised the

influence as well as third parties who acquire rights under the transaction.

## 2. THIRD PARTY ACTUAL/CONSTRUCTIVE NOTICE

1. This scenario is where a third party receives actual or constructive notice that at the time the transaction was executed, **it was executed with undue influence.**
2. **Where this occurs, the third party cannot enforce the transaction.**
3. The TP is affected in equity so long as they participate in the transaction with actual or constructive notice of the circumstances giving rise to the impropriety, ie of the actual undue influence exercised, or the circumstances from which the presumption of undue influence arises: ***Yerkey v Jones, Bank of NSW v Rogers (1941)*** **An equity will be raised against a third party.**
4. **ACTUAL NOTICE** exists where the third party receives actual knowledge that undue influence has been exerted.
5. **CONSTRUCTIVE NOTICE** exists where the circumstances should have put the third party on inquiry.
  - a. In ***O'Brien***, the Court held that the creditor should have been **reasonably expected to take steps to bring home to the wife the full consequences of the transaction** that they were about to enter
  - b. It is unclear post ***Garcia v NAB*** whether constructive notice remains a ground for third party undue influence in Australia because the High Court disapproved of the emphasis that Lord Browne-Wilkinson gave to the doctrine of notice in this context in the UK House of Lords decision of *Barclays Bank v O'Brien* [1994] 1 AC 180.
  - c. In ***Barclays*** the English COA noted that TP creditor would not be affected with constructive notice if **adequate and independent legal advice had been given to the wife**
  - d. **The Bank bears no business inquiring into 'personal relationships'** or personal motives of persons wanting to provide financial assistance and that, **provided the bank was assured that the guarantor knew what he or she was doing, no further inquiry is necessary:** ***Banco Exterior Internacional v Thomas***

## 3. SPECIAL WIVES EQUITY: ***Yerkey v Jones/ Garcia***

1. The third situation in which a third party cannot enforce the **transaction is where the guarantor is a wife and the third party bank or financier for the loan to the husband has not taken the time to explain the full consequences of the guarantee to the wife.**
2. This is the principle which was first established by Dixon J in ***Yerkey v Jones (1939) 63 CLR***, the validity of which has now been confirmed by the High Court in ***Garcia v NAB (1998) 155 ALR 614***

The 'special wives' equity established in *Yerkey* and upheld in *Garcia* will result in transactions being set aside against third-party creditors