

# Equity and Trusts- MLL405

## Unconscionable influence and Unconscientious Dealing (rescinding contract): Topic 2

### Undue Influence

- Arose out the deficiencies of the common law of duress. The coercion upon an individual to enter into a bargain was not sufficient to constitute duress- but there was still a disadvantage to the party who was pressured to enter into a contract.
  - Equity evolved undue influence
  - Not just influence that impugns the relationship, influence must unduly overbear the other party.
  - Also not just inequality in the relationship, there is always inequality.
    - **Must be issue of abusing that inequality.**
  - Even if party understands contract- still can be unduly influenced
- Equity is not bound by contractual principles and consequently approach not governed by contractual principles: considers only fairness of the circumstances.

*Barclays Bank plc v O'Brien* [1994] AC 180

- 1. Actual Influence** (established and clear influence on the facts)
  - a. If an applicant cannot demonstrate a class 2A or class 2B relationship existed, they must actually satisfy the court that the transaction arose as a result of Actual Influence (UI).**
    - i. This requires detailed evidence about the negotiations the relationship the conduct of the other party
  - b. Necessary (for weaker party) to prove that one party actually coerced (pressured) the other party to enter into a bargain to their disadvantage.**
    - i. The coercion does not have to constitute a threat of actual violence and it includes economic pressure of other forms of pressure.
    - ii. Pressure can come from person directly or surrounding circumstances.
- 2. Presumptive influence** (in all the circumstances)
  - a. Presumed influence (CLASS 2A): automatically arises where a special relationship of influence exists on the facts (only need to show that relationship of trust and confidence exists between the parties.**
    - i. No need to show that undue influence exists as presumed.
      1. Once a presumption is raised it is up to the defendant (dominant party) to rebut it; Etridge (No 2)
        - a. The defendant must prove that the plaintiff exercised free judgment and acted voluntarily despite the influential relationship.

- i. E.g. showing plaintiff had independent advice and full information.
    - ii. Not competent if under age (not *sui juris*)
    - iii. **Presumption alone is not a ground for relief**- it absolves the claimant from the burden of proving influence but:
      - 1. Does **not: Absolve burden to establish the transaction which resulted in loss** and they seek to set aside.
  - b.** Rebut the nature of the relationship
  - ii. A relationship which are akin to fiduciary relationships generally raise a presumption of influence.
    - 1. One party is superior because other reposes trust and confidence in them
  - iii. **Arises out of particular relationships:** (NOT CLOSED LIST- Gibson)
    - 1. Parent-child (not child parent- strict authority structures)
    - 2. Guardian- ward
    - 3. Priest (religious leader)- penitent (follower)
    - 4. Doctor- patient
    - 5. Solicitor- client
    - 6. Administrator-legatee
    - 7. Trustee-beneficiary
    - 8. Fiancé- fiancée
- b. Proven Influence (CLASS 2B):** No actual pressure exerted in a relationship and not within one of the relationships of 'presumed influence' ^, can still be a relationship of influence when:
- i. In the circumstances, and given the overall nature & characteristics of the parties it was a de facto existence of a **relationship of trust and confidence which resulted in one party being placed in a position of influence over the other.**
    - 1. Depends on an examination of the overall character of the individuals and circumstances of the relationship.
      - a. Power imbalances- from strong to weak; and
      - b. Unlikelihood of weaker party conferring a benefit by gift or contract
    - 2. Examples:
      - a. Dependency
      - b. Illiteracy
      - c. Age
      - d. Drunkenness
    - 3. **If plaintiff successfully establishes-** the defendant must prove that any benefit received has been given over as a result of: (*Johnson v Buttress*)
      - a. Free,
      - b. Consenting; and
      - c. Independent judgment of the plaintiff

- i. Plaintiff knew the terms and consequences of the bargain.
  - ii. Requires examination of overall character of the plaintiff.
    - 1. E.g. if poor literacy- difficult to prove free judgment
- 4. In the absence of evidence disproving UI, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer
  - a. Without having to prove that the wrongdoer exerted actual UI or otherwise abused such trust and confidence in relation to the particular transaction impugned.

### 3. Independent Legal advice

- a. Independent legal advice may rebut influence.
  - i. It will **only be relevant if the person entered into the transaction believing it to be something else.**
- b. Advice must relate specifically to the transaction.
  - i. There must have been a full explanation of the nature and ramifications of the transaction given by an independent and qualified person to the person entitled to the benefit of the presumption; and
    - 1. Evidence advice enabled a person to enter into the transaction was a result of the free exercise of will.
    - 2. Proof that advice provided not sufficient- must be:
      - a. **Independent**
      - b. **Competent and complete**
      - c. **Prove to pressured or unduly influenced**
- c. **If the transaction was entered into voluntarily but without reading specific provisions and would have been capable of comprehending it, the lack of independent legal advice will generally not change anything.**

#### For advice to rebut presumption- *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127

- Independent advice had to fulfil two conditions:
  - 1. Must be given with a knowledge of all relevant circumstances, and
  - 2. Must be such as a competent and honest adviser would give if acting solely in the interest of the donor not the donee.

#### **Does the independent legal advice have to be actually acted on, for rebuttal?**

- Plaintiff (weak party) must actually act on the independent advice- for an independent advice rebuttal to be valid; *Powell v Powell* (1900) 1 Ch 243

#### *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSW 30- **Solicitor not independent**

- Plaintiff was 21 with no business experience. Defendants were much older.

- P inherited a great deal of money, but got into a deed where she would get an income but her assets were taken away. P sought to remove deed years later.

HELD: (Street J)

- **Presumed influence** with all the characteristics of undue influence.
- Solicitors advice was not sufficient as meeting the degree of independent advice required to rebut the presumption of undue influence.
  - Solicitor read through advice and invited questions **but did not provide advice on importance of whether a settlement should be entered** into at all, and, if so, the general nature of the settlement.

#### 4. Relief

- a. Equity only grants relief once it is proved that the bargain into which the plaintiff entered was actually disadvantageous to them and it was therefore unfair that they be held to it.
- b. Third parties can have a beneficial contract set aside where it can be proved that they are tainted by undue influence.
  - i. Third parties such as banks and credit providers must be very careful to ensure suspicion of influence is queried and appropriate standards complied with when high risk of influence.
- c. **Usual equitable relief sought is recession**
  - i. Parties can be placed, as far as possible into the position they were in prior to the tainted transaction.

#### *Johnson v Buttress* (1936)56 CLR 113- **Undue Influence of taking property**

- B was 67, illiterate, low intelligence and lacked business experience. B had a good relationship with J. J took B to solicitor and had B's property transferred to her.
- B got no independent legal advice- after transfer of property, B moved in with J.
- After his death his administrator of his transfer of property took to court for undue influence and to get the property transfer set aside.

HELD: (Dixon J)

- Not a 'special class' (2A)- But nature 2B relationship class.
  - B's illiteracy, his ignorance of affairs, and his strangeness in disposition and manner that provide the foundation for the suggested relation.
  - The improvident and the unfair nature of the transaction,
  - The want of proper advice,
  - The retention of the rent of the property transferred, and
  - The various testamentary dispositions
- Considering the circumstances of the case, a **relationship of influence exists**- which meant J had the burden of showing that B exercised free independent will.
  - **J failed to prove B not unduly influenced.**
- The first and most important consideration affecting the question is the standard of intelligence, the equipment and character of Buttress.
  - An error to treat the subject's capacity and influence as separate elements.

#### 5. Laches- Relief for stronger party due to weaker party's delay in action

- Laches may provide relief where the **weaker party has not taken steps to see the transactions set aside** after the undue influence has been removed.

#### *Allcard v Skinner* [1887] 36 Ch D 145

- Church took property and kept it when S left the church.
  - Delay after the applicant is free of the unduly influence and aware of the possibility of setting aside the transaction.

HELD: Street J

- **Barred relief on basis of laches and acquiescence- delay too long.**
  - Even though In *Bester* a 20 year delay
- Conduct has such significance that as in law or equity to amount to a conscious and deliberate affirmation of the original transaction.

### 6. Lack of improvidence (Lacking foresight)

- **If transaction does not cause massive loss to one side-** more likely contract entered into freely.
  - E.g. Gifts always involve a loss.
- Court will examine loss in relation to total holdings to see whether transaction was improvidence or improvident.
  - Applicant must show 'manifestly disadvantageous transaction': *National Westminster Bank plc v Morgan* (1985) 1 AC 686

#### *Union Fidelity Trustee v Gibson* [1971] VR 573

- Applicant executor sought to set aside mortgage. Gift was a substantial amount of money and was improvident.
  - Tied up the applicant's property, denied her control over her assets, removed power of revocation, removed the right to resort, and to intervene on the actions of the trustee

HELD:

- Applicant **only needs to show undue influence**, **actual effect** of undue influence is **not relevant** to the relief itself.
- Contracts can be set aside if provide real benefits.