

## MLL405 – Equity & Trusts - 2018

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## Undue influence and unconscious dealings

### Undue influence:

- The doctrine of undue influence attacks the questionable use of power to influence, and provides a method of overturning a transaction because the plaintiff's will has in some way been overborne and cannot be said to represent an exercise of the plaintiff's free will.
  - **Johnson v Buttress**

### Categories of undue influence:

- There are two categories of influence:
  - **Bank of Credit and Commerce International SA v Aboody**
- The two categories are:
  - Situations where pressure can **actually** be established; and
  - Situations where pressure is **presumed** in all the circumstances.

### The approach to undue influence:

- Is the relationship one of presumptive undue influence
  - **Category 2A from Barclays Bank v O'Brien**
- Does the relationship have the necessary degree of trust and influence?
  - **Category 2B from Barclays Bank v O'Brien**
- Is the relationship actually influential in character?
  - The court considers facts of the case – no limit to factors to be considered
- Is the influence REBUTTABLE?
  - Independent advice given?
    - **Bester v Perpetual Trustee**
  - Was the transaction improvident? (Manifestly disadvantageous);:
    - **National Westminster Bank v Morgan**
  - Was money transferred as gift or investment?
    - If gift: how much did the money represent in relation to total wealth?
      - **Union Fidelity Trustees v Gibson**
  - Finding transaction provident not in itself proof that transaction did not result from UI
    - E.g. if lack of independent advice

### Actual undue influence (Category 1)

- Actual undue influence is based upon coercion of a physical, economic or other form. It must be proven that one party to a transaction actually coerced the other party to enter into a transaction to their disadvantage. The influence can come from the person directly or from the surrounding circumstances.
- In cases of actual undue influence, **four elements** must be proved
  - **Johnson v Buttress**
- Elements
  - capacity to influence;
  - the influence was exercised;
  - its exercise was undue (**Daniel v Drew**); and
  - its exercise results in entry into transaction
- Case examples; **Watkins v Combes; Daniel v Drew**

### Presumed influence: (category 2A – Presumed undue influence in recognised relationships of risk

- Presumptive undue influence occurs where the parties to the bargain are in a special relationship, which shows that one party is superior because the other reposes trust and confidence in them.
  - The presumption applies automatically in the recognised relationships.
  - Not necessary to show the defendant had knowledge the relationship was presumed to be one of influence.
    - Talbot & Oliver v Shann
- Recognised relationships:
  - Parent and child.
    - West v Public Trustee [1942]
    - Child and parent – parent naturally want to see their children better off; might make gift or enter improvident transaction.
  - Religious adviser and disciple.
    - McCulloch v Fern [2001]
  - Solicitor and client.
    - Haywood v Roadknight [1927]
  - Doctor and patient.
    - Dent v Bennett (1839)
    - Re CMB
  - Fiance and fiancée.
    - Page v Horne (1848).
    - Zamet v Hyman [1961]
  - Husband and wife?
    - No – b/c it is regarded as natural that one spouse might wish to benefit the other.
    - Bar-Mordecai v Hillston
- If the relationship falls into one of the recognised categories, the plaintiff does not have to prove that undue influence was exercised to make him or her enter into the transaction. The burden of proof shifts to the defendant party to prove the plaintiff entered into the transaction freely.
  - Royal Bank of Scotland v Etridge.
  - Johnson v Buttress

### Proven influence (category 2B)

- Presumed undue influence where a relationship of trust and confidence is proven to exist.
- Where the relationship between parties does not fall into one of the presumed categories, it is incumbent on the plaintiff to prove the existence of a relationship where influence could be exerted; 'one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part.
  - Johnson v Buttress
- If the relationship of influence exists between the parties, a presumption arises that the defendant used undue influence to procure the transaction. It is then up to the defendant to rebut the presumption.
- **Category 2B**
- A relationship that is not in a recognised category as above, nevertheless, the circumstances are such that it is a relationship of influence and/or dependency.
- What might you look at?
  - dependency
  - illiteracy
  - etc.
- How does the stronger party rebut the presumption?