

TOPIC TWO: UNDUE INFLUENCE AND UNCONSCIENTIOUS DEALING

PRESSURE AS UNFAIRNESS AT LAW AND IN EQUITY

According to the common law, where the pressure is sufficient, it cannot truly be said that both parties freely consented to the transaction. 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 has a concurrent jurisdiction with equity in an area, it is important to be aware of its application in order to understand the equitable principle.

The position at common law: duress

- A contract is voidable at common law if it has been made under duress.
- Duress could be established only if actual or threatened physical violence or an unlawful constraint of the contracting party could be proven.
- Obviously this approach was limited; it failed to give due weight to other forms of illegitimate conduct or of threats that could have a coercive effect.
- In many situations, the coercion upon an individual to enter into a bargain was not sufficient to constitute duress because it did not amount to a threat of 'actual violence'.
- ***Undue Influence arose out of the deficiencies of the common law of duress.

UNDUE INFLUENCE

Equity is not bound by contractual principles, and consequently its approach is not governed by contractual principles: it considers only the fairness of the circumstances.

Undue influence covers situations where an agreement has been obtained by certain kinds of improper pressure, including those traditionally thought not to amount to duress at common law because no element of violence to the person was involved.

The equitable principle of undue influence is generally divided into two categories:

- situations where pressure can actually be established
- situations where pressure is presumed in all the circumstances.

Where one person is in a position of influence over another, equity will presume that any transfer from the subordinate to the dominant party has been brought about by the exercise of undue influence by the latter, and will strike that transaction down unless the dominant party can show that it was a product of the free and independent will of the other. In Stivactus v Michaletos (No 2), the principle of undue influence was described as follows:

In such a case, the evidence is ordinarily directed to establishing three things: that the defendant had influence over the plaintiff; that he exercised that influence so that what was done was, to the relevant extent, the result of that influence rather than the will of the plaintiff; and that his position or otherwise the circumstances were such that the influence, and the exercise of it, were 'undue' to the extent that equity should intervene.

As Deanne J put it in Commercial Bank of Australia Ltd v Amadio (1983):

Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party. Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.

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Union Bank of Australia v Whitelaw

- Establishes that undue influence is when a person improperly uses a position of power for his or her, or a third persons benefit.
- The influence must have an effect on another person, rendering their acts involuntary.
- There is a strong focus on the quality of consent rather than the unconscientious conduct of the stronger party.

The improper use by the ascendant person (the stronger party) of that ascendancy for the benefit of themselves or someone else so as the acts are not voluntary.

*Importantly, there does not have to be intent. The stronger party can be completely innocent- they do not have to be conscious that they are taking advantage and they do not have to be motivated by self interest.

Undue influence is the improper use by the ascendant person of such ascendancy for the benefit of himself or someone else, so that the acts of the person influenced are not, in the fullest sense of the word, his free voluntary acts.

The primary focus of undue influence is the quality of the consent rather than the unconscientious conduct of the stronger party.

Undue influence can also be invoked in cases in which the party exercising the influence is not the recipient of the benefit of the transaction but instead that benefit goes to another party. What must be shown is that the party who takes the benefit knows that the weaker party is acting under the influence of the influential party.

Actual undue influence

A person has obtained a benefit through the use of actual pressure; including violence and the threat of violence, the transaction may be set aside on the grounds of actual undue influence.

- Burden of proof → Applicant must prove that actual undue influence has been exerted, so that the applicant was coerced to enter into a transaction and thus actual undue influence should arise.
- The sort of evidence one would need would be actual violence (duress at common law), a threat of violence or to a lesser extent, economic duress (strong family loyalties, commercial pressures etc.)

If a person has obtained a benefit through the use of actual pressure, including violence and the threat of violence, the transaction may be set aside on the grounds of actual undue influence. In Farriers Co-operative Executors & Trustees Ltd v Perks, a wife transferred her share in a property to her husband following violence and threats of violence. The husband subsequently murdered his wife. Duggan J ordered the transfer to be set aside on the grounds of actual undue influence. During the course of his judgement, his Honour suggested that cases of duress to the person could properly be classified under the heading of actual influence.

The difference between actual undue influence and presumed undue influence lies in the onus of proof. Where an applicant can prove that actual undue influence has been exerted, so that the applicant was coerced to enter into a transaction, a category 1 form of undue influence will arise. By contrast, where the relationship is presumed to be a relationship of influence a category 2A or 2B form of undue influence will arise. Actual undue influence requires proof that the transaction was the outcome of such an actual influence over the mind of the disponor that it cannot be considered to be the free act of the disponor. The source of power to practise such influence or domination over the disponor may not arise from an antecedent relationship, but may arise in the particular situation, or by the deliberate contrivance of the donee: Johnson v Buttress (1936) 56 CLR 113 at 134.

Presumed undue influence

The relationships in which influence is presumed include:

Parent and Child	Applies to anyone in a position of parental authority over another, and thus includes guardians. It is presumed to continue until the emancipation of the child, which is not presumed from the attainment of any age, nor from the evidence of independence and capability on the part of the child if the child remains obedient to the parent's wishes.
Solicitor and Client	This is not necessarily permanent and will often relate only to one or two matters. It is also a commercial relationship in which the solicitor can expect to receive some financial reward. The relationship of solicitor and client need not be continuous over a period and may exist even though the client uses another solicitor for other business at that or some other time.
Trustee and beneficiary	Always included in list of presumptive relationships, although the presumption may seem inappropriate in cases where there is no personal relationship between trustee and beneficiary. That does not mean however, that dealings between trustees and beneficiaries cannot be allowed to stand where they can be shown to have resulted from the exercise of a free and independent will on the part of the beneficiaries.
Doctor and patient	The influence of the attendants over the sick in their care

Priest and penitent	Not restricted to ordained ministers of established religions, and seems just as likely to apply to fringe sects as to mainstream religions. In <i>Allcard v Skinner</i> , it was noted that: But the influence of one mind over another is very subtle and of all influences religious influence is the most dangerous and most powerful, and to counteract it Courts of Equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there have been no proof of the actual exercise of such influence and the Courts have done this on the avowed ground of the necessity of going to this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible.
Fiance and Fiancee	Does not arise in transactions between husband and wife largely because that relationship is one which gifts from one to the other, even of quite substantial pieces of property, are not uncommon. That does not mean however, that in particular circumstances a relationship of control and dominance could not exist, giving rise to a presumption of influence by a husband over his wife. The presumption has been held to apply to transactions between couples engaged to be married, at least in respect of gifts from the woman to the man (<i>Lovesy v Sith (1880)</i>).

Where it can be proven that there is a relationship of trust and confidence of 'such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction, the court will presume undue influence; *Barclays Bank v O'Brien*.

Burden → Burden rests with the ascendant party (stronger party) to show that any benefits received are the consequence of an independent exercise of judgment.

- Equity presumes that, by their very nature, certain relationships created a presumption of undue influence as a matter of law.
- A relationship of presumed influence is not a presumption that undue influence has been exercised, only that one party has influence over the other.

Proven undue influence

Where there has been no actual pressure exerted in a relationship and, the relationship does not come within one of the category of 'presumed influence' relationships, it is possible that the relationship may still be held to be one of 'influence' where it can be proven that, in the circumstances, it was a relationship of trust and confidence which resulted in one party being placed in a position of influence over the other. Whether a relationship can be proven to be one of influence will depend upon a careful examination of the overall character of the individuals involved as well as the circumstances of the relationship. If a plaintiff successfully proves that a relationship is one of influence, the defendant must then prove that any benefit received has been given over as a result of the free, consenting and independent judgment of the plaintiff.

A relationship which is not, by its very nature, presumptively deemed to constitute a relationship of influence may nevertheless, in the particular circumstances, be proven to constitute a relationship of influence.

In *Royal Bank of Scotland plc v Etridge (No 2)*, the H.O.L held that a relationship of presumed influence may arise if it can be shown that:

- One party had strong trust and confidence in the other so that the other had the power to influence that party's decisions; and
- The transaction entered into by the parties was not readily explicable according to the natural and ordinary motives pursuant to which people act.

Relevant factors to prove undue influence:

- vulnerability
- dependence
- structural inequality
- Intelligence
- Understanding of business
- emotional or physical impairment
- financial status
- age and medical status
- improvidence of the gift
- lack of independent legal/financial advice

Burden → Once this can be established and a proven relationship of influence is held to exist, any benefit that the ascendant party receives within that relationship will be deemed to be one of influence; the onus then lies on the recipient of the benefit to disprove the existing influence.

- A relationship which is not, by its very nature, presumptively deemed to constitute a relationship of influence may nevertheless, in particular circumstances, be proven to constitute a relationship of influence.
- The circumstances in which a relationship becomes one of influence cannot be consisely defined- lloyds Bank v Bundy

Johnson v Buttress

Facts-

- Buttress dies and the son seeks to set aside a transfer made in his life time.
- He gifted his land and cottage and was reliant on others to transact his business, he could not read or write.
- He was held to be very stupid ad mentally unstable.
- He proceeds to live with a woman, Mary Johnson and transfers his property to her. He then moved onto the property living in a tent.

Held-

- The court held that there was proven undue influence.
- He went to her for her advice on business matters, her kindness and her assistance.
- The age and capacity of Buttress and the unfair nature of the transaction contributed to the tranfer of land.

Smaller cases;

Union Fidelity Trustee of Australia v Gibson

- Miss Dunn who had considerable business experience released the defendant from having to pay mortgage repayments.
- She was held to be acting under the influence of a relationship of proven influence. Noting that Where a substantial sum is gifted to a business friend rather than a blood relative, the transaction will be treated suspiciously.

Janson v Janson

- Held that the voluntary transfer by an old, deaf, almost blind bachelor to his nephew of his only asset (house he had lived in for most of his life) was the product of undue influence.
- A relationship of prove undue influence existed between the uncle and nephew that could not be rebutted.

Defences to Undue Influence

Independent Legal Advice

- The provision of independent legal advice is not the only method of showing that the weaker party exercised independent judgment, however it is regarded as the most accurate.
- The advice must be fully informed, including the wisdom entering into it, and a full explanation of the legal effect of the transaction.
- The advice must e clear, properly translated and directed at the particular transaction in issue.
- It is important for the legal advisor to consider the motivation and justification for a gift, as well as any alternative conduct and to provide advice which has the appropriate emancipating effect upon the recipient- Ribchenkov v Suncorp Metway Ltd

Brusewitz v Brown

Facts-

- Alcoholic who had liver disease.
- A personal friend would visit him and look after his personal affairs.
- There was a transfer to her of his house in return for an annuity (allowance to live by).
- Inadequate legal advice was given to client.

Held-

- The advice was insufficient and thus could not be held as a rebuttal to the proven undue influence.
- To rebut the influence, the advice must be fully informed.
- The legal advisor must be privy to all of the facts relating to the transaction.