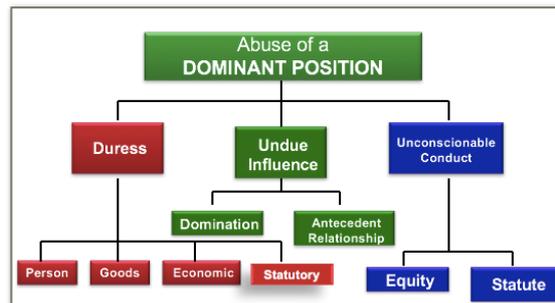


## Topic #7: Avoidance: Undue Influence and Unconscionable Conduct

### Undue Influence

- ✦ Arises when the dominant party uses the influence they have over the weaker party to obtain some benefit that they otherwise would not have obtained.
- ✦ Not all exertions of influence will provide W with a remedy; only that which reaches such a degree that the courts are prepared to classify it as undue will do so.
- ✦ “The improper use of the ascendancy acquired by one person over another 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 and voluntary acts” - *Union Bank of Au v Whitelaw*.



### Undue Influence - Nature and effect

- ✦ Undue influence embraces influence arising from D's ability to dominate/coerce W by virtue of some relationship of confidence/trust between them. As with duress, boundaries are blurred...There are two types of influence recognised:
  - ✦ (1) Through some relationship of trust and confidence (influence is **presumed**)
  - ✦ (2) Through actual coercion or general domination of the will (influence is **express**)
- ✦ **Express (or domination) undue influence**
  - ✦ D's influence deprives W of their "free mind and will"
  - ✦ 'Equitable coercion' as it's very similar to CL duress.
  - ✦ Arises where there is no relationship of trust and confidence
  - ✦ Party alleging undue influence must show that there was express influence though either actual coercion or general domination [*Williams v Bayley*; *Lloyds Bank v Bundy*].
- ✦ **Presumed undue influence**
  - ✦ Arises in cases of 'special relationships' with higher degree of influence (ie doctor, patient)
  - ✦ D breached fiduciary obligation owed to W
  - ✦ In these cases;
    - ✦ 1) There is an automatic and immediate presumption of influence; and
    - ✦ 2) The burden of proof falls on the dominant party to show that the disputed benefit did not result from abusing their position of trust

### Undue Influence as an - Equitable Doctrine

- ✦ Two important consequences
  - ✦ 1) Remedies restricted to those in equity
  - ✦ 2) Focus is on whether D acted without good conscience, rather than the reality of W's consent (although latter will be relevant).
- ✦ **Remedies**
  - ✦ Contract voidable - W has option to affirm or rescind.
  - ✦ No damages
    - Damages may be recoverable if tort/breach of statute (ie contravention of s18 ACL)

### **Domination or Express Undue Influence - Nature**

- ✦ No need for prior relationship between D and W
- ✦ D exerts influence over W such that W can not exercise independent judgment
  - Historically seen as similar to duress
- ✦ Equity intervenes for same reason as CL provides relief in cases duress;
  - Namely as D has pressured W into contract using means considered to be illegitimate
  - 'Equitable coercion' (in conjunction with duress)
- ✦ **Burden of proof**
  - W must show D exerted undue influence
  - One relevant factor will be adequacy of consideration if not adequate – suggests U/I
- ✦ **Case: *Odorizzi v Bloomfield School District (1966) US***

### **Undue Influence Cases - Key elements present**

- Discussion of transaction at unusual or inappropriate time
- Consummation of transaction in unusual place
- Insistent demand to conclude business immediate
- Emphasis on bad consequences of delay
- Use of multiple persuaders
- Absence of third party advisor & claims of no time to consult one

### **Undue Influence - Presumed**

#### **Presumption arises as a result of...**

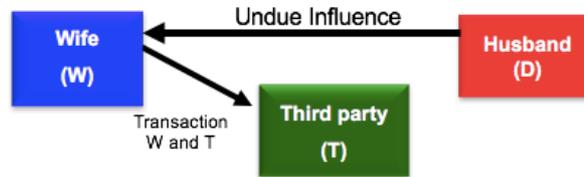
- ✦ Recognised relationships of trust and confidence between the parties
  - Parent and child
  - Solicitor and client
  - Religious advisor and follower
  - Trustee and beneficiary
  - Doctor and patient
  - NOT husband and wife
  - NOT child and parent (*Paul George*)
- ✦ Other relationships of trust and confidence
  - Must be proved in each case - W must demonstrate relationship of trust/confidence existed between the parties and that W actually did repose trust/confidence in D. (ie conflict of interest or relationships of intimacy).
  - Equity's treatment of other relationships of trust/confidence was discussed in following cases..
- ✦ **Case: *Paul George v George as Executor for Hasbie Group***
- ✦ **Case: *Johnson v Buttress (1936) 56 CLR 113***
- ✦ **Case: *Yerkey v Jones (1939) 63 CLR 649***
  - *Special Protection for Married Woman*

### **Undue Influence - Third Parties**

- ✦ UI may also make contract voidable where parties aren't W/D but W and a third party (T).

- ✦ Eg; Husband (D), in order to secure funding for a business venture exerts undue influence on his wife (W) in order to secure her agreement with financial situation (T) guaranteeing a loan made to the business.

### Example: D influences W to contract with T



- ✦ **Case: *Garcia v National Australia Bank (1998) 194 CLR 395***
- ✦ **Case: *Yerkey v Jones (1939) 63 CLR 649***

### Other relationships...

#### Presumption arises as a result of?

- ✦ *Royal Bank of Scotland v Etridge (No 2) [2002] AC 773*
- ✦ Banks should be “put on inquiry in every case where the relationship between the surety and the debtor is non-commercial.”
- ✦ In Australia it’s uncertain - Probably wider than H/W but not as wide as Etridge.

## Unconscionable Conduct

- ✦ As a ground for granting relief, unconscionable conduct, like duress and undue influence is concerned with the abuse of a dominant position by one contracting party (D) over a weaker contracting party (W).
- ✦ **Relief** will be granted where:
  - at the time D and W entered into a contract or other transaction, W was under, or suffering from, a special disability or disadvantage in relation to D that adversely affected W’s ability to make sensible judgements about their own best interests;
  - D was aware, or wilfully ignorant, of this situation; and
  - D took unfair advantage of it in a manner that amounted to victimising W.
- ✦ All these elements must be present. Equity will not provide relief merely because a person has been foolish or suffered warship etc. **Steps for UC to be present include;**
  - Special disability or disadvantage
  - Knowledge
  - Taking advantage
  - Examples

### Unconscionable Conduct - (1) **Special Disability/Disadvantage**

- ✦ W suffered some ‘special disability’ or ‘special disadvantage’ at time contract was made that disable them from looking after their own best interests
- ✦ This must exist visa-avid D so that it puts W at a disadvantage when dealing with D
- ✦ **Case: *Blomley v Ryan (1956)***

### **What amounts to 'special disability or disadvantage'?**

- ✦ “The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other.” - *Fullagar J in Bromley v Ryan*

### **Special Disability/Disadvantage is Generally found where?**

- ✦ **(1)** At time of transaction, W suffering 'special disability/disadvantage' in relation to D.
- ✦ **(2)** D knew or ought to have known of this situation
- ✦ **(3)** D took unfair advantage of it.
  - Most commonly age, illiteracy and lack of education have been held, to constitute such a disability. This form of 'disability' arose for consideration in the following case.
- ✦ **Case: *Davey and Anor v Challenger Managed Investments Ltd [2003]***
  
- ✦ Two modern cases? *Blomley v Ryan* and *CBA v Amadio* BUT they are not definitive...
- ✦ “Unconscionable conduct, as a coherent basis for relief, had, at its root, the protection of the vulnerable from exploitation by the strong ... Equitable relief for unconscionable conduct is based on a principle, not a rule. The applications or exemplifications of the principle are impossible to describe fully. Care should be exhibited in dwelling over technically or textually on individual expressions of the general principle of normative values, rooted in Equity's remedying of injustice. That said, the expression of the underlying general principle by Mason J and Deane J in *Amadio* ...are enduring” (*Paciocco v Australia and NZ Banking Group Ltd*)

### **Unconscionable Conduct - (2) Knowledge**

- ✦ Must also be established D had actual/constructive knowledge of W's special disadvantage; mere inadvertence/indifference to W's circumstances generally insufficient.

### **Unconscionable Conduct - (3) Taking Advantage**

- ✦ Further necessary for D to have exploited their position; in effect to victimise W.

### **Unconscionable Conduct - (4) Examples**

#### **Old age, language difficulty or lack of business acumen**

- ✦ Diminished capacity in understating traction resulting from old age, language difficulty, lack of business acumen or illiteracy may amount to special disadvantage. Especially so when it leads to dependency on D, for whose benefit W enters into transaction with D, or a third party (T).
- ✦ **Case: *Commercial Bank of Au v Amado (1983)***

#### **Emotional Dependency**

- ✦ Special disability/disadvantage can be created by W's love for, or emotional dependency on D, being so great that it compromises their ability to make sensible decisions.
- ✦ Infatuation alone is insufficient (last case)
- ✦ *Critical Factor*: was weaker party's in lactation created an emotion dependency the dominant party was able to manipulate.
- ✦ **Case: *Louth v Diprose (1992)*** (similar results in *Truran v Cortorillo*).
- ✦ **Case: *Macintosh v Johnson (2013)***

## **Gambling addiction**

- ✦ Can a pathological interest in gambling ever be a special disadvantage?
- ✦ In doing so the court discussed in general terms in the nature of equitable relief on this ground.
- ✦ **Case: *Kakavas v Crown Melbourne Ltd***

## **Unconscionability: General Law - Australian Consumer Law (ACL)**

### **ACL: s20 and 21**

- ✦ A person, must not in trade or commerce, engage in conduct that is 'unconscionable'.
- ✦ s. 20 - prohibition of general law UCC in trade or commerce
- ✦ s. 21 - prohibition of UCC in trade or commerce in connection with supply/acquisition of goods or services other than to/from non-listed companies

## **ASIC**

- ✦ Provision mimicking the ACL

## **State and Territory Legislation such a Retail Leases (Vic)**

- ✦ *Contract Review Act (NSW)*

## **Unconscionability: Equity**

- ✦ Concerned with knowing exploitation by one party of another's position of special disadvantage.
- ✦ The effect...
  - Contract VOIDABLE at W's option - terminated *ab initio*
  - Substantial restitution must be possible

## **Grounds to be set aside**

- ✦ For a transaction (be it contractual or otherwise) to be set aside there must be a combination of two elements:
  - transaction must be harsh and oppressive in some way as far as W is concerned; and
  - this must be attributable to abuse by D of dominant position he/she occupies in relation to W.

### Harsh and Oppressive Transaction

- ✦ A transaction will not be set aside unless it is harsh and oppressive to W.
- ✦ Note: same thing as being unduly/unfairly favourable to D. This is because situations can arise (of which the following cases are examples) in which W incurs potential liability to D in exchange for D conferring a benefit on a third party (C).
- ✦ In such a case, contract may be improvident from W's perspective without being unduly favourable to D because of the benefit it has conferred on C.

### Abuse of Position

- ✦ In addition, some form of unacceptable behaviour/sharp practice, must exist on D's part, takes advantage of weakness in W's position and which explains contract's unfairness.