**EQUITY NOTES**

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<th><strong>UNDUE INFLUENCE AND UNCONSCIENTIOUS DEALING</strong></th>
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| **One:** Is the fraud broader than common law? | Unconscionable conduct is broader than common law ‘actual, intrinsic or presumed from the circumstances’ Chesterfield v Jansen; if someone intentionally does something it may fall under common law. Undue influence must be distinguished from common law ‘duress’.
| **Two:** What type of unconscionable conduct has occurred? | **Categories of unconscionability (formerly equitable fraud)**

1. Exploitation of vulnerability (‘golden thread’)
2. Abuse of a position of trust or confidence
3. Harsh or oppressive instance upon strict legal rights
4. Inequitable denial of obligations
5. Unjust retention of property

**Undue influence or unconscientious dealing**

Undue influence is not found when common law duress is established if there is 1) pressure amounting to compulsion of the will and 2) illegitimacy of the pressure extended.

**Undue influence**

Focus on stronger party, not consent of the weaker party: exploitative, inequitable behaviour. Invoked when one party to the transaction is under a special disadvantage or disability in dealing with the other party and this was sufficiently evident to the other party to make it prima facie unfair or unconscionable for the other party to accept or retain the benefit of the transaction Commercial Bank of Australia v Amadio; Louth v Diprose.

**Requirements:**
1. Existence of a legal disability
2. Knowledge of the disability
3. Exploitation of the disability by another party

**Unjust retention of property**

Focus on weaker party’s consent: when coercive conduct has prevented a party from acting voluntarily or exercising free judgement Johnson v Buttress.

**Requirements:**
1. Quality of consent; that influence/coercive behaviour was used to obtain personal benefit
2. Assent of weaker party which was not free, informed or voluntary Union bank of Australia v Whitelaw

Distinguished from common law ‘duress’ which can be identified by:
1. Pressure amounting to compulsion of the will; and
2. Illegitimate pressure exerted

(Possible to fall into both categories: Thorne v Kennedy)

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| **UNCONSCIENTIOUS DEALING CASES** | Emotional dependence can outweigh business acumen:

**Infatuation and emotional dependence**

Louth v Diprose and Bridgewater v Leahy, even people who might have been described as experienced business people were regarded as being under a special disadvantage due to emotional dependence (in Louth v Diprose a lovestruck solicitor who was in love with a woman who wanted casual relations with him, he gave her many gifts including jewellery, tv paid bills and school fees. The woman had a history of attempted suicide, threatened to kill herself if she did not get some security and stability which was agreed to be a house purchased by him which would later be transferred back into his name. It was not a manipulative threat as she attempted suicide after moving into the house. She started dating someone else and had no intention of returning the home ownership. He claimed he had been exploited. HELD: she unconscientiously taken advantage of his emotional dependence which was a special disability arising from the ‘false atmosphere of crisis’ which she generated whilst aware of his infatuation which was manipulated to her advantage.

**Problem gambling – liability of casinos**

Kakavis v The Crown D alleged that crown took advantage of his gambling addiction; losing $20.5M over 6 months; pathological gambling. Crown offered incentives; a private jet, private room, rebates on losses. Crown looks after ‘high rollers’, however D made the voluntary decision to enter Crown and participate in gambling; pathology did not impose continuous compulsion. HELD no unconscientious dealing; equity does not remedy social concerns, simply private
Three: Was there exploitative behaviour by the stronger party?

<table>
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<th>YES, there was exploitative behaviour; awareness of a disability</th>
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<td><strong>Unconscientious dealing</strong></td>
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<td>No “general obligation of good faith and fair dealing, it is preferable to think of unconscionable conduct in terms of which shocks the conscience, something which is harsh or oppressive in that it involves taking advantage of another’s special disability or disadvantage...not one which is...to be applied...according to...’the reasonable person’, require an element of value judgement”</td>
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<td>Micarone v Perpetual Trustees Australia Ltd</td>
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1. Requires the existence of a legal disability; a general weakness such as;
- Emotions/dealings Louth v Diprose
- Physical incapacity: illness, old age, disability CBA v Amadio
- Intellectual dependency: mental illness, lack of intelligence, stress, drug induced impairments
- Lack of endowments: poverty, illiteracy, lack of education, ignorance, language skills, inexperience in finance Amadio
- A strong desire for a certain outcome Bridgewater v Leahy
- Other factors may be considered Permanent Mortgagees Pty Ltd v Vandenbergh; Kakavis v The Crown Melbourne Ltd

2. Knowledge and exploitation of the disability by another party

**Objective TEST** P’s disadvantage must have been “sufficiently evident to D”; imputed by actual (knew) or constructive knowledge (ought to have known) Amadio

**Constructive knowledge of disability**

That they ought to have known about the disability Amadio
- If P makes a statement, D should enquire about the special disadvantage Amadio
- If no enquiry, then they should ensure P obtains independent legal advice Geelong Building Society v Thomas
- Inadequacy of consideration/improvidence of transaction: even without the knowledge of a special disadvantage in the weaker party, the requisite knowledge and need to make an inquiry can be derived from inadequacy of consideration or improvidence of the transaction Micarone v Perpetual. The improvidence is often immediately noticeable on the face of the transaction; the inability to make a judgement in P’s best interests Amadio this is of particular importance in determining liability ANZ v Dzienciol

- Long standing relationships if the weaker party has a long-standing relationship with the stronger party then it can strengthen the argument of constructive knowledge NAB v Noble
- Other considerations Expertise/knowledge (eg bank manager or partner) Amadio If creditor leaves the debtor to procure execution of guarantee (eg husband of wife) and creditor doesn’t take steps to ensure this party understands liability or is independently advised, the creditor may be held to have been constructively aware Atkins v NAB

3. taking advantage of this disability

Eg inadequate consideration, unfair bargain, unfair terms of the transaction such as undervaluing of contracts and gifts given

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**Prenuptial agreements and pressure to sign**

**RECENT CASE Thorne v Kennedy** woman met man online, to marry, moved from middle east. He was wealthy, flew her family across for the wedding. A week before the wedding made her sign a prenuptial agreement which was not fair and equitable as he was very wealthy. Separated after 4 years. She was at a special disadvantage which he created by bringing her to the country, keeping her there for many months in a state of belief that he would marry her with preparations for the wedding, when she had ceased to have any other option he put her under pressure to sign the prenuptial agreement with the pressure of him refusing to marry her unless she agreed to the terms; he was aware/a reasonable person would be aware of her special disadvantage. This is a case of plurality in undue influence as discussed later Thorne v Kennedy.

**Intoxication**

*Blomley v Ryan* Facts: Action sought for specific performance of grazing property. The pl (R) was the person who was trying to enforce the contract which may be unconscionable. The doctrine of unconscionable bargain was used as a sort of defence in this case. Man (78) was uneducated, binge drinker for many years which effected some sort of brain damage

After one of his binge drinking session, he agreed to sell grazing property. At this point he was slightly under the influence. Plaintiff sought specific performance to enforce the contract and the defendant argued unconscionable bargain
The other party will have been exploited when disadvantage is suffered by taking advantage through inadequate consideration and/or unfair terms Kakavas v Crown Melbourne Ltd.

Rebuttal of unconscientious dealing

- **Independent advice** the court is unlikely to enforce an unconscionable bargain entered by a party at a serious disadvantage without the benefit of independent advice Amadio.
- If the weaker party has been independently advised, it is difficult to see how the stronger party acts unconscionably Australia and New Zealand Banking Group Ltd v Abuzarzi.
- The advice must have been given by someone entirely independent from the stronger party Aboody v Ruan.
- **Adequate consideration** provides strong evidence that there was no exploitation Amadio; Blomley.
- Inadequate consideration may be important as supporting the inference that a position of disadvantage existed and showing that an unfair use was made of the occasion Blomley v Ryan.

**NO, the behaviour was merely influential/coercive:**

**Undue Influence**

**Category one: ACTUAL undue influence arising DIRECTLY of relationships or situations**

Johnson v Buttress:
1. This requires the use of coercion through capacity to influence P (threat, blackmail, bullying or proposal);
2. Proof that a BENEFIT received was the DIRECT result of influence over the mind of the person;
3. The influence caused the act to not be done voluntarily; cannot be considered to have been made freely.

**Category two: PRESUMPTION of influence of relationships**

Deemed relationships
1. Must have proven influence falling into one of the categories;
   - Parent to child (not spouses); still under control of parents Kerr v West Australian Executor & Agency Co Ltd
   - Ward to guardian Hylton v Hylton
   - Follower to religious leader Allcard v Skinner
   - Client to solicitor Powell v Powell; RBS v Etridge
   - Patient to doctor Deav v Bennett; Bar-Mordecai v Hilston
   - Fiduciary relationships;
     - Trustee and beneficiary Ellis v Barker; Union Fidelity Trustee v Gibson
     - Principal and agent O'Sullivan v Management Agency Ltd
   - Man, and fiancée (not always certain) Louth v Diprose
   - Principal and Attourney

*The onus is on the plaintiff to prove their existence
2. Must have received a benefit

EG if a patient gave a doctor a significant gift, it may be undue influence if the patient had not sought independent legal advice; the doctor can rebut the presumption of undue influence by demonstrating informed voluntary conduct through the client’s receiving of independent legal advice. The recipient of the gift does not have to have acted inequitably, the question of undue influence is the voluntariness of the donation.

Eg. Prenuptial agreement? Not all of them will be set aside. Look at context; whether agreement was offered on basis of not being up for negotiation, emotional circumstances in which agreement was entered including threats to end marriage or engagement, time for

Held: It should have been evident to the plaintiff that the defendant wasn’t able to do business. Knowing about the disability and continuing with the transaction was unconscionable. Therefore, the action for specific performance was refused.

No evidence of independent advice (signed in office of purchaser’s solicitor – not someone looking after the interest of the defendant)

A gift (inaequality of consideration/improvidence of transaction) and grief Williams v Maalouf A gift of all assets was improvident; P must have been affected by special disadvantage at the time of the gift. P was suffering grief from mother’s death resulting in emotional dependence on D (a friendly work colleague)

**Bridgewater v Leahy** elderly grazier, experienced in business, wanted nephew to continue to work the property and made generous provision for him to obtain the property at ~1/7 of the value; it was clearly improvident however the intention was for the nephew to continue running the farm on which he had worked for years and could reasonably be assumed to be experienced enough. It was the land owner’s idea, he had an examination and was held to be of sound mind and had not sought legal advice. The reason this was accepted was because it was the owner’s idea; he was not passive, his strong emotional attachment to the land and the legacy of the farm was not exploited; it was a sale at an undervalue but by a man who ‘knew his life was nearly over’. Being vulnerable does not mean someone is being exploited.

**Mortgage for son**

**CBA v Amadio** FACTS: An Italian migrant in 70’s with limited English, limited formal education and limited business experience. A son appeared successful, but in fact in significant debt – bank selectively honouring cheques – bank increased overdraft I parents gave security – A son asked parents to guarantee. A son told parents guarantee only for 50k – but was not so limited. Bank manager visited home and obtained signatures – no explanation. After A son went into liquidation bank tried to claim house

Held: Unconscientious conduct. (1) special disability – advantaged age, little formal education, limited English/business experience; (2) unconscientious taking of advantage – sufficiently evident, proceeded with the transaction; (3) transaction not fair, just and reasonable: no independent advice – remedy: mortgage set aside

**Spina v Permanent custodians Ltd** son was mother’s Attourney, she set aside mortgage and her house was her house was her only asset, she took no benefit and there was no existence of independent legal advice
careful reflection, nature of the parties' relationship, financial position of parties and independence advice received and the time to reflect on that advice Thorne v Kennedy

A relationship of influence not listed?

**Category two b: PROVING relationship of influence on facts**

Plaintiff needs to prove existence of a 'special relationship' to take way consent of vulnerable party Lloyd's Bank v Bundy elements;

1. **Reliance on guidance/advice of D**

Factors according to Johnson v Buttress:
- Vulnerability/dependence (including habitual reliance on other people)
- Structural inequality
- Physical or mental impairment
- Financial stress
- Age/medical status
- Impropriety of the gift (value)
- Lack of independent legal advice/inadequate advice
- Illiteracy/ Lack of education
- Poverty
- Ignorance of business affair

Prove there was a relationship of trust and confidence Janson v Janson

2. D is aware of P's reliance (eg long association)

3. Benefit is received by D (eg selling product over valuation)

4. Good faith/trust in relationship

**REBUTTAL OF PRESUMPTIONS of undue influence**

1. Defendant must prove that it was not a relationship of influence; that P entered into the transaction after “full, free and informed thought” Zamet v Hyman

Court considerations:
- **BEST REBUTTAL:** Had P sought independent legal advice of consequences; assessment of risk, surrounding facts and predictive ability devoid of commercial wisdom; an informed decision to proceed RBS v Etridge; Bester v Perpetual Trustee Co Ltd
  - No requirement for the advice to be followed unless decisions to disregard the advice was a result of undue influence Re Coomer
  - This proves the plaintiff entered into the transaction freely exercising an independent will, showing they did so having received independent advice Haskew v Equity Trustees
  - However, lack of independent advice will not vitiate transaction where had it been obtained it would not have altered the outcome because an independent advisor would likely have recommended the course adopted. Linderstrom v Barnett
  - Quality of the advice; to have legal significance the advice must be given by a person who has expertise, informed of material facts and is requested to give advice. Including consequences of a guarantee and available assets RBS v Etridge
  - The existence is not conclusive; the court must decide whether the transaction was the product of a free and independent mind Inche v Omar
  + The advisor must be entirely independent of the dominant party otherwise the advice is not good Johnson v Buttress (cannot act for both P & D)

**Permanent mortgagees Pty Ltd v Vandenbergh** mortgage was made by elderly mother for son, set aside because she was elderly, without a partner, no close friends or confidants.

She was not emotionally dependent on son but because of her age and few close relationships, the relationship with some was important to her and characterized by trust. Son invoked the bonds of that relationship and preyed on that trust to mortgage her home to accommodate his financial exigencies. Held to be unconscientious.

**UNDUE INFLUENCE CASES**

Client to solicitor legal advice should explain consequences of a guarantee (eg loss and bankruptcy), discuss the guarantor's available assets, negotiation; if someone still proceeds following the advice then they are exercising free will RBS v Etridge

**Examples of proven relationships of influence**

Johnson v Buttress Low intelligence, illiterate, D looked after P for years, P's wife died, emotionally dependent, low intelligence, no business knowledge. P transferred only asset of land to D; held man was vulnerable. Although no pressure from D for P to transfer the land, the antecedent relationship and P did not know he was permanently parting with property, he did not seek independent legal advice to rebut the influence thus couldn't be rebutted; son could bring action.

Gifts when given to someone other than blood relative there is suspicion – eg financial advisor and estate agent releasing client from making mortgage repayments Union Fidelity Trustee of Australia v Gibson

Old age, blind, deaf man transfer to nephew transferred house (last asset) to nephew without legal advice. The proof that the complainant placed trust and confidence in D relation of the management of their financial affairs is enough to prove influence Janson v Janson

Divorced middle aged woman wanted companionship, started online dating whilst she was living in the Middle East, met a wealthy developer. A week before the wedding he told her wanted to marry her on the condition she signs a prenuptial agreement to pass assets to his children. He had flown her entire family from the Middle East.

Terms of prenuptial agreement included maintenance money and free accommodation during marriage. If separating within three years of marriage she would get nothing, if separation is after without children $50k would be paid to her, if he died whilst they're living together then she gets a penthouse and car.

This is all explained by an independent lawyer but as the marriage was looming, she signed the agreement with the pressure of her family being in the country for the wedding. She is aware that $4000 per month is not a lot considering her...
husband. Eg husband needs to use matrimonial home as security for mortgage to secure loan for husband's business using prenuptial agreement to set aside and for $100,000. It is a proven relationship of influence. The woman's decision to sign the agreement rather than to take the advice of solicitor was due to undue influence; the circumstances took away her voluntary will. She was powerless to make any other decision besides signing the agreement, there was inequality of bargaining power; reliance included visa status, reliance, emotional connection to the relationship, motherhood and marriage and the 'publicness' of the impending wedding event; she was also subject to a special disadvantage (unconscious dealing) in entering into the agreements as she was powerless, she was also under pressure by the urgency and haste created by the man.

NOT ALL PRENUPTUAL AGREEMENTS WILL BE SET ASIDE (Look at presumptive relationship notes) Thorne v Kennedy

Third parties

Mortgage to secure loan for husband's business using house as security wife signed three guarantees to the bank. The business went under, lost the house as the bank enforced security. Couple divorced. Wife had own business but husband-controlled finances, so she signed all guarantees. As it was clear that there would be relationship tension if she didn’t sign there if influence; need to determine if there is trust and pressure (see case notes) Garcia v NAB

Building on this; This is based on trust and confidence, not on notions of subservience or inferior economic position of women or vulnerability to exploitation because of emotional involvement, it is based on trust and confidence between marriage partners when partners will leave all business decisions to one spouse with little consultation between the parties Yerkey v Jones

Mother and son joint tenants registered on title, mother moves to WA to be with son, purchased with son’s inheritance and further amount mortgaged (signed by both), son has financial difficulties without telling the mother, extends the mortgage and bank was aware of the close relationship between mother and son, that the mother relied on the son and she had received no legal advice, the house was looking as being repossessed. This relationship was held to be equivalent to husband/wife, held to be unconscientious dealing and not undue influence because of the information imbalance between them – she was taken advantage of Permanent Mortgagees Pty Ltd V Vandenbergh

Obligations of the bank

Royal Bank of Scotland v Etridge
1. A bank must take appropriate steps to bring the wife’s attention to the risks of standing as surety
2. A bank will satisfy this requirement if it insists that the wife attends a private meeting with a representative of the bank, at which she is told of the extent of

- Inexperienced practitioner read the deed and asked the client if they had questions; this is not sufficient; the focus is on whether P understands what they are signing; this is critical in determining whether the contract was entered to by free will subject to the relationship of influence Bester v Perpetual Trustee Co Ltd
- Not obtaining legal and financial advice does not mean that the legal advice is inadequate Dominic v Riz
  + Advice must be meaningful; terms of transaction must be explained as well as its proprietary and alternatives.
  + The advice - solicitor – must be fully informed on the material facts; nature, value and extent of assets of donor esp if the donor’s only asset.
- Righteousness of the transaction; would a right-minded person enter into it? Spong v Spong
- Whether full disclosure by D to vulnerable party was made to inform judgement before transaction was completed Bank of Credit and Commercial International SA v Aboody
- Improvisation of the deed;
  - Unfairness of clauses on P
  - Absence of a power of revocation and the size of a gift compared to the donee’s total assets Bester v Perpetual Trustee Co Ltd
  - Are the provisions particularly onerous? (Has P been taken advantage of?)
- Adequacy of consideration; whether full value has been paid. This is NOT a complete rebuttal, but it is an important consideration in contracts Johnson v Buttress
- Unreasonable delay between P becoming aware of the facts and taking legal action can be prejudicial and may be a satisfactory rebuttal Allcard v Skinner

Category Three: Third parties

Even when a party is not privy to the contract it is when a third party obtains the benefit of a transaction tainted by undue influence, the third party will be affected by the equity unless it was taken through an intermediate bona fide purchaser for value without notice. Bank has a duty to take the weaker party (such as wife) aside and discuss transactions.

Agency and notice are separate grounds

A third-party financier will be affected by equity if it appoints debtor as its agent to procure security under agency Alderton v Prudential Assurance Co Ltd AGENCY may be established when bank or other financier entrusts the debtor to obtain security.

No agency? The entrusting of the debtor by the creditor to obtain guarantee from surety with other factors may constitute notice of a relationship Bank of Credit and Commerce v Aboody; Contractors Bonding v Snee

a) When a bank has participated with notice of undue influence
1. When a bank is aware, or should have been aware of the facts of the relationship that there was a situation of influence between the parties; with actual or constructive notice of the circumstances giving rise to the impropriety Yerkey v Jones
2. Participated with this knowledge or presumed knowledge Yerkey v Jones; State Bank of NSW v Layoun
b) When a bank acts as a debtor is an agent of the banks and procures security
1. Bank holds the debtor as its agent to obtain security under ordinary principles of agency, this is a question of fact Alderton v Prudential Assurance Co Ltd

c) Special wives equity – consenting on behalf of a partner or other person

DOES NOT USUALLY APPLY TO MORTGAGES because the wife receives a benefit; the asset, the house.

Eg husband needs to use matrimonial home as security for a loan; wives may agree to keep the peace, but bank must be satisfied that wife has had independent legal advice.

1. when a third-party deals through the husband with the wife; leaving the obtaining of consent for a deal from the wife up to the husband. This is actual undue influence and making material misrepresentations of fact, the banks will be treated as taking subject to invalidating the conduct bank will be liable Yerkey v Jones; Garcia v NAB
2. Even if no undue influence, knowledge of relationship is enough; if it does not take the wife aside to discuss without husband present *Dominic v Riz* or ensure the wife has had independent legal advice; equity ensures close attention is paid to ensure abuse of confidence and position of advantage is not experienced by wife, who is a volunteer as surety *Yerkey v Jones; Garcia v NAB*

3. A guarantee given by a wife may also be set aside when;

- The surety did not understand the purport and effect of the transaction
- The transaction was voluntary in the sense that surety obtained no gain from contract
- Performance of which was guaranteed
- The lender, with notice that the surety was then the wife of the debtor, is taken to have understood that, as a wife the surety may repose trust and confidence in her husband in matters of business and therefore to have understood that the husband may not fully and accurately explain the purpose and effect of the transaction to his wife; and
- The lender itself did not take steps to explain the transaction to the wife or find out that a stranger had explained it to her
- Will not apply if the wife is not a surety but a co-borrower and mortgagee; wife experiences the benefit of the house

*Narain v Euroasia (Pacific) Pty Ltd; Elkofari v Permanent Trustee*

**Relationships other than married people:**

- Does not apply to defacto relationships *State Bank of New South Wales Ltd v Hibbert; Hillston v Bar Mordecai*
- Applies to guaranteeing adult child’s business loans *Watt v State Bank of NSW*
- Does not apply to guarantee given from aged parent to child; no extension of special equity relationship, is not synonymous with husband and wife as there is a different level of trust and confidence and measures of dependency. The marriage *Permanent Mortgagees Pty Ltd v Vandenbergh*

**Rebuttal**

Defacto relationships do not hold enough trust and confidence to be influential enough *State Bank of NSW v Hibbert*

Applies to guarantee given by parents and siblings of borrower in NSW as there is sufficient trust and confidence *State Bank of NSW v Layoun*

*4. Remedies*  

**Unconscionable conduct remedies**
- **Equitable rescission** may be appropriate fully or partially to restore parties to their original positions *Bridgewater v Leahy.* The below are influenced by the adequacy of consideration *Bridgewater v Leahy*
  - The transaction may be set aside
  - Constructive trust if land and the property has been registered
  - Remedial award
  - Specific performance

*her liability as surety, warned of the risk she is running, and urged to take independent legal advice.**

3. In exceptional cases, the bank – to be safe – must insist that the wife is separately advised;

4. If so the solicitor should explain the reason for his involvement (to counter any allegation of undue influence or failure to understand the transaction and its implication) and obtain the wife’s agreement to his so acting for and advising her.

5. This explanation and, if the wife agrees, the advice given should be at a face to face meeting, in the absence of the husband, and in suitably non-technical language. Before giving advice, the solicitor should obtain from the bank any information needed.

6. The solicitor need not act only for the wife, as cost and the familiarity of a family solicitor are important factors. The solicitor’s legal and professional duties assumed when accepting instructions to advise the wife are owed to her alone.

7. before acting the solicitor should consider whether there is any conflict of duty or interest and what is in the best interest of the wife. The solicitor is not the bank’s agent and in the ordinary case the bank is entitled to proceed on the assumption that the solicitor has done the job properly, and

8. The course minimum advice to be given and involvement of the solicitor is;
  - To explain the nature of the documents and practical consequences for the wife if she signs them (she could lose her home and could be made bankrupt)
  - To explain the seriousness of risk involved;
    a. an explanation of the purpose, amount and principle terms of the new facility
    b. the explanation that the bank may increase the facility or charge in terms or grant a new facility without reference to her
    c. an explanation of her liability under the guarantee
  - Discussion of the wife’s means, value of property being charged and whether she or her husband have any other assets with which to make repayment if the transaction fails

- To explain that the wife has a choice which involves discussion of both husband and wife’s present financial circumstances including indebtedness and facilities
- To ascertain whether the wife wishes to negotiate with the bank (eg as to the order of call upon securities and/or a specific lower limit for her exposure) and, if so, whether she wishes to do so directly or through the solicitor; and
- To check whether the wife wishes to proceed and, if so, to obtain her authority to write to the bank confirm the explanation she has been given.
Monetary remedies may be established when property has been sold
- Equitable compensation
- Account of profits
- Constructive trust Hartigan v International Society for Krishna Consciousness

**Undue Influence Remedies**

**Actual undue influence remedies**
- Most common is rescission of the contract/transaction (if *Restitution in integrum* is possible; return parties to their positions prior to the contract) when influence is proved as fact

**Acknowledged relationships of influence remedies**
- Rescission of the contract is possible when presumption of undue influence cannot be rebutted by proof of independent legal advice Johnson v Buttress; Union fidelity trustee co of Australia v Gibson;
- Proof that P placed trust and confidence in D in relation to the management of P’s financial affairs and a transaction which calls for explanation is usually sufficient Janson v Janson

**Proven relationship of influence remedies**
- The transaction may be set aside

**Third parties remedies**
- The mortgage may be set aside; the bank loses Garcia v NAB
  - If transaction is not rescinded, the court may order a constructive trust, account of profits or compensation O’Sullivan v Management Agency and Music Ltd
  - Compensation may be ordered, and quantum will be the difference between price paid by dominating party and market value (eg $100K property, $5k compensation = $95k) O’Sullivan v Management...
  - An account of profits may be awarded subject to an allowance of skill and labour and this is most appropriate when property earns income (eg farm)
  - When a constructive trust may be ordered, allowances for skill and labour may be awarded as he who seeks equity must do equity.