

70517 EQUITY AND TRUSTS

MODULE 2: EQUITY AND THE LAW OF OBLIGATIONS

QUESTION: When will a Court of Equity refuse to enforce an otherwise valid contract?

UNDUE INFLUENCE

HOW IS UNDUE INFLUENCE DISTINGUISHED FROM DURESS AT COMMON LAW

- At common law, a contract can be vitiated for duress – meaning that the person seeking to avoid the contract claims that their consent was forced from them by illegitimate pressure (e.g., threats of violence or other harm).
- Equity permits vitiation of contracts for a broader range of more subtle forms of pressure.
- Undue influence arises when one person exerts such ascendancy and influence over a weaker person's decision-making, that the weaker person who relies upon them cannot be taken to have exercised their own free will.
- But see the difference of opinion between the majority and **Gordon J in *Thorne v Kennedy***: how important is it to show that the weaker party has not exercised free will?

ACTUAL UNDUE INFLUENCE (Category 1)

Described as a 'species of equitable fraud'. It arises where one person can be shown to have actually exercised ascendancy over another and this influence procured the challenged transaction.

Examples:

- ***BCCI SA v Aboudy* [1990] 1 QB 923**: A man procured his wife's signature to security documents, by telling her to do so, deliberately concealing the contents of the documents.
- ***Coldunell Ltd v Gallon* [1986] 1 QB 1184**: overbearing son pressed his parents into providing a guarantee of his business debts.

In an actual undue influence case, the **burden of proof** lies on the person seeking to set aside the transaction to prove that there was actually undue influence.

PRESUMED UNDUE INFLUENCE (Category 2A)

Established relationships (include):

- Parent over child
- Solicitor over client
- Trustee over beneficiary

- Doctor over patient
- Religious leader over adherent to the faith

These relationships are presumed to manifest one party being dominant, knowledgeable, influential and the other party being dependent upon that party to make decisions for them.

PRESUMED UNDUE INFLUENCE (Category 2B)

The relationship of the parties is not one of those established categories but it can be proven on its own facts to be a relationship in which one party exerts dominance over the other. To establish that relationship was one of dominance: *Johnson v Buttress (1936)*

- Step 1: Prove that the relationship is one in which one party exerts dominance over the other.
- Step 2: Any transaction whereby the weaker party benefits the stronger is now presumed to have been secured by undue influence unless the stronger party proves otherwise.

<i>Johnson v Buttress (1936) HCA 41</i>	
<i>Facts</i>	- Elderly, illiterate and intellectually impaired man became dependent upon his wife's friend, after his wife's death. - He transferred his only asset – a house – to the friend, in appreciation for her kindness to him. He had no independent advice. - After his death, his son sought to have the sale set aside for undue influence, and succeeded, because the son could demonstrate the relationship of dependency, and the friend could not demonstrate that the transaction was the act of a person able to exercise independent judgment in the matter.

In a presumed influence case, the **burden of proof** rests on the person seeking to prove that the transaction was not obtained by undue influence.

Consequence of a successful undue influence defence – Challenged contract will be rescinded – the parties will 'undo' the transaction. i.e., price paid for transaction will be returned.

UNDUE INFLUENCE AND THIRD PARTIES

A third party who takes property from a person who obtained it from a weaker party by undue influence is liable to recognize the weaker party's right to rescind the original transaction, unless the third party can demonstrate that they are a bona fide purchaser for value, without notice of the undue influence.

- So for example – If V agrees to sell property to A as a consequence of A's undue influence over V, and then A sells the property to B, B will be liable to recognize V's equity to have the sale set aside, unless B is a bona fide purchaser for value of the property at law.

Typical scenario – the Bank Guarantee

1. A wants to borrow from B (the Bank).
2. Bank wants security for the loan (e.g. a mortgage over property).
3. V is the owner of property.
4. A procures V's consent to giving a guarantee of A's debts, secured by a mortgage over V's property in favour of Bank.
5. If A exercised undue influence over V, the mortgage may be set aside, unless Bank can establish Bank had no notice of the undue influence.

Bank guarantees – Special Equity of Wives

Both cases involved a bank guarantee given by a wife for debts owed by her husband. In both cases, the guarantees were set aside. Court was careful to say that there is no presumption of undue influence between a husband and wife.

Yerkey v Jones (1939) 63 CLR 649

Affirmed in Garcia v National Australia Bank Ltd (1998) 194 CLR 395

- Since wives are presumed to 'repose trust and confidence in [their] husbands in matters of business', a bank taking a voluntary guarantee from a wife to secure her husband's debts will be taken to have notice that she may not have given informed consent.

HOW TO REBUT A PRESUMPTION OF UNDUE INFLUENCE

Relevant factors (although none will be determinative – depends on the facts of the case):

- Adequate consideration has been given (price paid for transaction)
- Transaction is not improvident in some other respect
- The weaker party has taken the benefit on independent expert advice

HOW IS 'UNDUE INFLUENCE' DISTINGUISHED FROM THE EQUITABLE DOCTRINE VITIATING CONTRACTS FOR 'UNCONSCIONABLE DEALING'?

Undue influence focuses on the quality of the consent given by the weaker party.

Unconscionable dealing focuses on the conduct of the stronger party, taking advantage of the other party's 'special weakness'.

- Several arguments can we run on the same facts, i.e:
 1. X exerted undue influence over V.
 2. X took unconscionable advantage of V's special weakness.

3. X breached a statutory obligation not to engage in unconscionable conduct.
 - See *Family Law Act 1975 (Cth)*, s 90KA (family law agreements assessed according to the ‘principles of law and equity . . .’)
 - See also *Australian Securities and Investment Commission Act 2001 (Cth)* ss 12CA-12CC, considered in *ASIC v Kobelt* [2019] HCA 18.

UNCONSCIONABLE DEALING

Key Australian HC cases:

<i>Blomley v Ryan</i> (1956) 99 CLR 362	
<i>Facts</i>	- Purchaser plies the vendor (a known alcoholic) with rum to procure a contract for sale of his land on terms favourable to the purchaser. - Vendor refuses to complete the contract, and the purchaser sues for specific performance of the contract. - See Fullagar J’s reasons (Sourcebook p 156)
<i>Issue</i>	- The vendor pleads that the contract was obtained by unconscionable dealing and succeeds in having the contract rescinded.
<i>Decision</i>	See Fullagar J’s reasons (Sourcebook p 156): - Common law looks to consent – was there consent to the contract? - Equity looks to the conscience of the party seeking to enforce the contract – have they behaved unconscientiously, in taking advantage of a known special weakness of the other. - Intoxication alone is not sufficient to vitiate a contract. - But knowingly taking advantage of another’s intoxication to procure an advantageous deal is sufficient to – • Cause a court of Equity to refuse the equitable remedy of specific performance (and leave the party to their remedy in contract); OR • Rescind the contract entirely.

What kinds of special disadvantage (Fullagar gave a non-definitive list in above)

- “. . . 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. It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain.” Even if a bargain is objectionably reasonable, it may still be able to be set aside if some special disadvantage was taken advantage of. It is not necessary to show that the bargain was impecunious to be able to use this doctrine.

Cases since *Amadio*...

<i>Louth v Diprose (1992) 175 CLR 621</i>	
<i>Facts</i>	- A majority set aside a gift of real estate from a solicitor who was besotted with the woman to whom he gave the gift. - She had created a sense of crisis, and played on his desire to look after her. - Held that this was impecunious gift (house) for him to make given that he had a family to look after - But note the strong dissent... Court was split

<i>Bridgewater v Leahy (1998) 194 CLR 457</i>	
<i>Facts</i>	- An inter vivos sale of farming land by an uncle to a nephew was set aside after the uncle's death (by majority). - The estate argued that the nephew had taken advantage (passively) of the uncle's chauvinistic desire to keep the farm in the family (rather than let city-bound daughters sell it off after his death). - The nephew had agreed to buy the farm, but only at a serious undervalue. - In <i>ASIC v Kobelt</i>, Edelman J described this case as a 'high water mark' in the broader view of unconscionability.
<i>Decision</i>	- Set aside and nephew forced to pay full price

<i>Kakavas v Crown Melbourne (2013) 250 CLR 392</i>	
<i>Facts</i>	- HCA rejected an argument that a casino took unconscientious advantage of a problem gambler, by allowing him to continue to play (and to lose).
<i>Decision</i>	- The court held that the plaintiff must establish that the defendant acted with a 'predatory state of mind'; that there had been 'victimization' and 'exploitation' of the plaintiff. It was not enough to show that one commercial party was inadvertent to the best interests of the other.

<i>Thorne v Kennedy (2017) 263 CLR 85</i>	
<i>Issue</i>	- Question for the court: Should a disadvantageous pre-nuptial agreement be set aside?
<i>Decision</i>	- What was the special disadvantage of the bride? - How was the husband's conduct unconscientious? - She did receive independent legal advice that she should NOT sign the agreement because it was highly disadvantageous to her, but she signed anyway. Why did this not defeat her claim?