

## Undue influence is distinguished from equitable fraud:

- It has been argued that undue influence does not apply to gifts made by will; *Boyce v Rossborough*
- Undue influence in the probate context was described as conduct that overpowers the will maker so that she makes a will without truly intending or desiring the dispositions it contains. In such cases, the will is not the free and voluntary act of the will maker.
- By contrast, fraud is sufficient on its own to invalidate a testamentary disposition. As explained in *Trustee for the Salvation Army (NSW) Property Trust v Becker*, fraud does not require proof that the will maker will was overborne or that she was coerced. Instead, **fraud involves misleading or deceiving the will maker, whereas undue influence involves coercion that overcomes her free will.**

## Undue influence is distinguished from doctrine of unconscionable dealing:

### *Commercial bank v Amadio*

Mason J distinguished between doctrine of undue influence and unconscionable conduct:

**Undue influence** – the will of innocent party is not independent and voluntary because it is overborne.

**Unconscionable conduct** – the will of innocent party even if independent and voluntary is the result of disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.

## Category 1 protects a party's interest in not being coerced

### 1. Actual Influence (*Category 1 undue influence*)

- First established form of undue influence is actual undue influence.
- If a person has obtained a been through the use of actual pressure including violence and the threat of violence, the transaction may be set aside/cancelled or by constructive trust on the grounds of actual undue influence.
- Coercion does not have to constitute a threat of actual violence, and it **includes economic pressure.**

### *Farriers' Co-operative Executors & Trustees Ltd v Perks*

#### Facts

- Wife transferred her share in a property to her husband following violence and threats of violence.
- Husband subsequently murdered his wife.

#### Held

- Duggan J ordered the transfer to be set aside on the grounds of actual undue influence.

- During the course of his judgment, his honour suggested that case of duress to the person could properly be classified under the heading of actual influence.

- Difference between actual undue influence and presumed undue influence lies in the **onus of proof**.
- Where applicant can prove actual undue influence has been exerted, a **category 1** form of undue influence will arise. i.e. **actual influence**.
- Where relationship is presumed to be a relationship of influence, a **category 2A i.e. presumed influence or 2B i.e. proven influence** form of undue influence arises. Onus of proof in **category 2** of undue influence shifts once presumptive relationship of undue influence is established and recipient of benefit must prove that applicant entered into transaction freely and without coercion.

### *Christodoulou*

Kaye J:

In equity, **a transaction where a donor transfers property to donee (or recipient), is voidable, if shown to be the result of undue influence exercised by recipient over mind of the donor.**

Two categories of cases of undue influence.

1. Category 1: rises where been positively proven that transaction produced by actual influence exercised by recipient over donor.
2. Category 2: Where shown to be an antecedent relationship between donor and donee, which raises presumption that donee has relevant influence over donor. **In such cases court will set aside a voluntary gift – unless it is proven by the donee that the gift was a spontaneous act of donor un exercise of an independent and informed will.**
  - . In this category law has recognised particular relationships which automatically raise a presumption of influence, including:
    - **Doctor and patient**
    - **Solicitor and client**
    - **Guardian and ward** (refers to a legal arrangement where one person (the guardian) is appointed to care for and make decisions on behalf of another person (the ward) who is unable to manage their own personal, financial, or legal affairs due to age (usually a child) or incapacity (such as a disability).
    - **Parent and child** (where the gift is by the child to the parent)
    - **Religious advisor and disciple** (The *religious advisor and disciple* relationship refers to a spiritual connection in which one person (the religious advisor, also called a guru, mentor, or spiritual teacher) guides another (the disciple or follower) in matters of faith, moral conduct, and spiritual development.)

- **Trustee/cestui que trust** (involves one party (the trustee) holding and managing property for the benefit of another (the cestui que trust, also known as the beneficiary).

The types of relationships in which a presumption of undue influence can arise are not fixed or rigid. In general, where there is a relationship between two people that gives the recipient of a gift authority or influence over the person giving the gift, and it would be inappropriate for that influence to go unchecked, the law will presume that any gift made by the donor to the recipient resulted from undue influence.

## Category 2 A and B – protects certain sort of relational interest

### 2. Presumptive Influence (*Category 2A undue influence*)

- Equity presumed that by their very nature certain relationships created a presumption of undue influence as a matter of law. 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, court will presume undue influence; *Barclays Bank v O'Brien* – here there is no need to show that undue influence actually existed because equity presumed it has occurred.
- This automatic presumption of influence will arise in all relationships where there is an inevitable and natural relationship of power/dependency between the dominant party and the weaker party.
- Relationships coming within this category are those where the dominant party, due to emotional, spiritual or intellectual grounds is able to assume position of authority and in control over the weaker party.
- Dominant party then has the onus of disproving the presumption of influence – achieved only where D proves that P exercised free judgement and acted voluntarily despite influential relationship.
- A relationship of presumed influence is not a presumption that undue influence has been exercised only that influence is not a presumption that undue influence has been exercised only that one party has influence over the other.
- Undue influence exists if the ascendant party within a relationship of influence receives a benefit from weaker party – where this occurs benefit is presumed to be a consequence of undue influence; *Johnson v Buttress* by Latham J
- Whenever the relationship between a giver and a recipient is such that the recipient is in a position to dominate or control the giver because the giver places trust and confidence in them, the law will presume undue influence. In this kind of relationship — which can be described as one of dependence — the age or condition of the giver does not matter for the purpose of raising the presumption. Once the presumption arises, the recipient must positively prove that the gift was made freely, voluntarily, and with full understanding by the giver; *Johnson v Buttress*