

## TOPIC 14: COMMON LAW VITIATING FACTORS

### Duress

[P] may seek to have the contract set aside on the basis on duress to [person / goods / economic].

### Pressure inducing entry to contract (causation)

Per the first element stated by Lord Scarman in *Universe Tankships*, [P] will argue that when [FACTS], [D] applied pressure to induce him / her to enter / modify the contract in a way that subordinated his / her will.

This is evidenced by...

- [P]'s protesting
- the fact that [P] did not enjoy any independent advice (*Thorne*)
- [P]'s timely taking of action to set aside the contract
- [P]'s lack of a reasonable alternative course of action (*Universe Tankships*)

**ANALOGIES (IMPORTANT FOR CAUSATION):** The facts are analogous to / can be distinguished from...

- **DURESS TO PERSON:** *Barton v Armstrong*, where D sought to coerce P into executing a deed by threatening to have him murdered
- **DURESS TO GOODS:** *Hawker Pacific*, where it was found that P only signed a document releasing D from liability because he needed to get his helicopter back.
- **ECONOMIC DURESS** (Need to distinguish between duress and negotiation):
  - *Universe Tankships*, where UT had no practical choice but to pay ITWF so that their ship could be released which was needed with “the most urgent commercial necessity”
  - *Crescendo*, where no duress was found because the mortgage was signed
    - to keep the company afloat and the directors were happy to do so to maintain trading

- Before the pressure from westpac was applied

**COUNTER:** [D] might contend that...

- [P] would have signed the contract anyway. However, the pressure need not be the sole factor in [P]'s decision (*Crescendo*).
- [P] could have refused and sued for damages, although this might have been expensive, time consuming and uncertain.

### Illegitimate pressure?

It must first be determined whether the pressure applied by [insert party] was illegitimate. This involves considering both the nature of the pressure and the nature of the demand (*Universe Tankships, Lord Scarman*).

#### **Threat of unlawful action:**

If the pressure involved a threat of unlawful action, such as [insert specific threat], this will generally be considered illegitimate. For example, in *Crescendo Management v Westpac, McHugh J* held that pressure will be illegitimate if it involves unlawful threats or amounts to unconscionable conduct.

Here, [insert facts showing unlawful threats or misconduct], which may support a finding of illegitimacy.

#### **Threat of breach of contract:**

[Insert party] threatened to [insert breach or modification], which may be illegitimate depending on the circumstances. It is generally harder to establish duress when the pressure relates to a party's commercial or financial interests, especially where there may be a rational commercial basis for the threat.

[Insert facts showing whether the pressure was used to secure a legitimate commercial advantage or was excessive/coercive].

#### **Threat of lawful action:**

Pressure may also be illegitimate where the threat is technically lawful, but used for an improper purpose (e.g. *Universe Tankships; Thorne v Kennedy*). For example, a threat to do

something legally allowed, like [insert lawful action threatened], may still be illegitimate if it is disconnected from the demand or unconscionably used. In this case [threat] is disconnected from the demand/unconscionably used because [facts]

In *Thorne v Kennedy, Nettle J* acknowledged that even lawful threats can be illegitimate depending on the power imbalance and context.

Here, [insert relevant lawful threat and surrounding context], which may or may not cross the threshold of unconscionability.

### **Conclusion:**

Considering the nature of the pressure ([insert]) and the demand made ([insert]), the pressure is likely [insert conclusion – e.g. illegitimate or not] given that [insert reason – e.g. it was excessive, unjustified, connected/unconnected to demand, commercial necessity, etc.].

### **Undue Influence**

[P] will seek to have the contract set aside on the basis of UI.

#### **Established in Fact:**

First, [P] will argue that [D] exerted actual UI upon him/her when [FACTS] such that his/her will was “substantially subordinated” (*Thorne*).

NOT CLEAR: However, in contrast to *Thorne*, [P] likely only relied on [D] to a lesser degree because [FACTS].

The High Court in *Thorne v Kennedy* confirms that undue influence can still be established on the facts (*plurality at [31]*) where the judgmental capacity of the party seeking relief must be ‘markedly sub-standard’ as a result of the effect upon the person's mind of the will of another.”

Here, [insert weaker party]'s decision-making ability appears to have been significantly constrained by [insert stronger party]'s influence. Factors indicating a lack of free agency include:

- [P] is not a free agent
- [P] lacks financial equality with [D]
- [P] relies on [D] for all things
- independent advice was received? (*Thorne* ignored it > further indicating undue

influence)

- there has been no time for careful reflection
- the agreement was offered on a basis that it was not subject to negotiation
- the emotional connectedness in the relationship between [P] and [D] indicates reliance

Additionally, the fact that [insert weaker party] signed the agreement despite independent legal advice not to, and where the agreement was unfair or one-sided, strengthens the case for undue influence (*plurality at [56]*):

“It can be an indicium of undue influence if a pre-nuptial or post-nuptial agreement is signed despite being known to be grossly unreasonable... even for agreements of this nature.”

### **Conclusion:**

In this case, on the balance, [insert weaker party] was likely unduly influenced as they were not exercising genuine independent judgment, but were instead acting under significant pressure or dependency created by [insert stronger party].

### **Presumption of relationship of influence:**

As [P] and [D] are [RELATIONSHIP], which is a deemed relationship of influence [CASE], [P] will argue that a rebuttable presumption arises from this alone.

–Includes (not exhaustive):

- Parent and child
- Guardian and ward
- Religious advisor and disciple (e.g. *Hartigan v Krishna*)
- Solicitor and client (e.g. *Westmelton v Archer and Schulman*)
- Doctor and patient

but not:

- Husband and wife
- Fiancé and fiancée (rejected in *Thorne v Kennedy*)
- Financial adviser and client
- Teacher and student
- Child and parent

### **Relationship of influence proven in fact:**

[P] will argue that he/she placed confidence and trust in [D] and relied on them for guidance, which created a relationship of influence in fact (Johnson), as evidenced by **[FACTS]**.

**STRONG RELIANCE:** The facts are analogous to Johnson, where Mr Buttress was found to be under UI when he gifted his property to Johnson despite the lack of presumption of relationship influence because he...

- was illiterate
- was ignorant of affairs
- had no experience in business affairs
- was unstable in his attachments
- turned to Johnson for guidance and support after his wife's death
- relied and depended upon Johnson

**MID RELIANCE:** The facts are analogous to *Hartigan*, where H was found to have been unduly influenced by a religious organisation when she signed over her house in an attempt to give up all of her worldly possessions because she was usually susceptible.

**NO RELIANCE:** The facts are analogous to *Westmelton*, where a solicitor reducing his bill in return for a share in his client's company was not put aside because the company had more expertise in commerce and finance than most solicitors would have.

### Rebutting the presumption:

[D] may rebut the presumption of UI by showing that [P] entered into the contract with full, free and informed consent (*Westmelton*). This is evidenced by the fact that...

- [P] considered the agreement at length
- [P] sought independent advice
- [P] took their time before signing the agreement

### **Conclude:**

On balance, it is likely that UI is (not) made out. > GO TO RESCISSION

### Unconscionable Dealing:

**Note:** Don't forget to discuss statutory unconscionability.

[P] will seek to have the contract set aside on the basis that he/she suffered a special disability which was knowingly exploited by the [D] when [FACTS] (*Amadio*).

According to *CBA v Amadio (Deane J)*, the doctrine applies where the stronger party seeks to enforce, or retain the benefit of, a transaction with a person under a special disadvantage, in circumstances where it would be against equity and good conscience to do so.

The test, also from *Amadio*, requires two elements:

Per *CBA v Amadio*, the test requires:

1. A special disadvantage impairing **[Plaintiff]’s** ability to act in their own best interests; In this case, P’s [situation] impairs their ability to act in their own best interest due to [reason]
2. D knew or ought to have known of that disadvantage and exploited it due to [reason]. It is evident that the disadvantage has been exploited due to [facts]

### 1) Special Disadvantage:

The disadvantage must be “special” – it must seriously impair the person’s ability to safeguard their own interests (*Mason J in Amadio*). Examples include poverty, age, infirmity, illness, drunkenness, lack of education, language barriers, emotional dependence, or absence of explanation or assistance when needed (*Blomley v Ryan*).

#### Special disability (*Blomley*):

- Poverty or need of any kind
- Physical/mental illness (*Blomely*)
- Old age (*Amadio*; *Blomely*)
- Drunkenness (*Blomely*)
- Illiteracy or lack of education (*Amadio*; *Blomely*)
- Limited English (*Amadio*)
- Lack of assistance or explanation where assistance or explanation is necessary

- Undue influence (Thorne)

In this case, [insert facts showing relevant disadvantage].

[If emotional dependence is relevant:] Emotional dependence has been recognised as a special disadvantage in some cases (*Louth v Diprose*; *Thorne v Kennedy*), particularly where the dependence makes the party unable to assess their own interests.

However, a mere inequality in bargaining power is insufficient (*ACCC v Berbatis Bros*).

#### **ANALOGIES:**

#### **MADE OUT:**

- *Louth*, where the gift of money to buy a new house was set aside due to D's infatuation with L and his extraordinary vulnerability to her false atmosphere of crisis.
  - Homelessness
  - Threat of suicide
  - *Louth* appeared to actively manipulate
- **NOT MADE OUT:** *MacKintosh*, where mere infatuation and consequent foolishness were held insufficient to justify repayment of money on the basis of unconscionable conduct.
- **MADE OUT:** *Thorne*, emotional dependence was made out because Thorne believed that signing the agreement would ensure that the relationship continued.
  - Thorne expected a future life with Kennedy
  - Prospect of motherhood

#### **Knowledge and Unconscientious Advantage:**

The second element requires that the defendant either knew or ought to have known of the special disadvantage and took advantage of it in a way that was unconscientious (*Amadio*; *Thorne v Kennedy*).

Knowledge may be actual or constructive – it is enough that a reasonable person in the defendant's position would have appreciated the plaintiff's disadvantage (*Amadio*, Mason CJ).

In this case, [insert facts showing the defendant's knowledge or failure to inquire].

## Rebuttal – Was the transaction fair, just and reasonable?

If both elements are made out, the burden shifts to the defendant to show that the transaction was fair, just and reasonable.

Relevant factors include:

- Whether **independent advice** was received (*Amadio; Thorne v Kennedy*). While helpful, independent advice is not conclusive if the plaintiff is still unable to act on it.
- Whether the plaintiff had **adequate time** to reflect and decide freely.
- Whether the terms were **substantively fair**, though inadequacy of consideration alone is not determinative (*Blomley v Ryan*).

## Inadequacy of Consideration

It may be argued that the transaction is marked by inadequate consideration moving from [D], which may support a finding of unconscionable dealing (*Blomley v Ryan*).

Here, **[insert facts showing that the benefit provided to P was disproportionately small compared to what D received]**. This imbalance may reinforce the argument that [P] was not in a position to protect their own interests and that [D] took unfair advantage of the situation.

However, it must also be recognised that a transaction may still be unconscionable even where consideration is adequate. The presence or absence of adequate consideration is only one factor to be weighed in the broader inquiry.

In this case, **[insert factors of fairness]**.

**[Conclude based on facts:]** On these facts, it is likely that a court would **[set aside / uphold]** the transaction on the grounds of unconscionable dealing.

## Third party impropriety

[P] may argue the contract with [D] ought to be set aside as a result of the improper conduct of [3P] because **[CHOOSE FROM BELOW]**...

## Unconscionable dealings

... unconscionable dealings occurred when [3P] knowingly exploited a special disability of [P] – namely [DISABILITY FACTS] – in order to compel them to enter the contract with [D] (*Amadio*). If this can be proven, a rebuttable presumption of UD arises.

## Notice of undue influence

... [D] was aware that [P] was being unduly influenced by [3P] (*Rogers*). This is evidenced by [FACTS OF INFLUENCE AND KNOWLEDGE]. As such, the transaction has been ‘infected’ (*Rogers; Mason J in Amadio*) and should be rescinded.

**ANALOGY:** The facts are analogous to / can be distinguished from *Rogers*, where a niece’s security for her uncle’s overdraft was set aside because there was a relationship of influence which the bank manager had knowledge of.

## Yerkey principle

... the Yerkey principle can be evoked as the contract is for a guarantee of [3P]’s debts and

- it appears OTF that [P] was being unduly influenced by [3P] because [FACTS]; OR
- [P] did not understand the transaction

**ANALOGY:** The facts are analogous to / can be distinguished from *Garcia*, where G’s guarantee of her husband’s debts was set aside as...

- G didn’t understand the transaction and thought it was “risk proof”
- G had no financial interest in the fortunes of that company and obtained no real benefit from entering the contract

## Actual or constructive knowledge:

[D] must have had actual or constructive knowledge of [3P]’s duress / UD / UI / Yerkey

## Conclusion

Go to rescission

## TOPIC 15: RESCISSION

If a vitiating factor is found, [P] will have the right to rescind the contract, meaning that he/she will be discharged from [LIST SEPARATE OBLIGATIONS]. However, no damages will be available as the contract is set aside ab initio.

- Discharged from obligations both accrued and future
- Able to recover money paid / assets transferred

### Common law rescission:

Rescission is available if the case meets the requirement of restitutio in integrum. In this case, [P] will contend that common law rescission is available as it is possible to restore the parties precisely to their original positions. This would be achieved by [FACTS] (Alati).

**ANALOGY:** The facts are analogous to / can be distinguished from Alati, where a contract entered into due to a fraudulent misrepresentation could not be precisely restored because