

- + a contract which expressly excludes the operation of Pt 3.2 (s 41). Pursuant to s 41, where a distinct part of the contract has already been fully performed before the frustrating event, that part is treated as a separate contract and is not affected by frustration. OTF, [facts].

Therefore, Pt 3.2 likely [does/does not] apply.

2. Is there money to be recovered

The next issue is whether there is money to be recovered. Under s 36(1), money paid before frustration is recoverable.

Further, under s 36(2), money that was payable but had not yet been paid at the time of frustration ceases to be payable (i.e. the other party needed to have been obliged to pay the money before the time of frustration) OTF, [party] paid/was required to pay [amount]. Thus, [party] may recover that amount/is no longer required to make payment.

However, under s 37, the court may permit a party who incurred expenses before frustration to retain all or part of the money otherwise recoverable under s 36 **where it is just to do so**.

OTF, [party] incurred expenses of [amount] in performing the contract, including [materials, labour, overheads, personal services]. Therefore, the court may allow [party] to retain [amount] as is likely just in the circumstances.

3. Is there a right to recover payment for partial performance

Additionally, as [party] has already partially performed the contract, [he/she] may seek to recover payment for such partial performance. Under s 38, where one party has obtained a valuable benefit from another party's partial performance before frustration, the recipient may be required to pay such amount as is just in all the circumstances.

OTF, [party] may argue that [other party] received the benefit of [work completed/services rendered/property transferred] before the frustrating event. Thus, [party] may seek a just sum for the value of that benefit under s 38.

Therefore, [party] may recover [money paid/expenses incurred/a just sum for valuable benefit received] pursuant to Pt 3.2 of the ACL.

Conclusion:

On balance, it is likely that frustration [is/is not] made out, as [event] rendered the circumstances fundamentally different from what the parties had contracted [for/upon].

If there is a limitation:

However, the limitation of [insert limitation] may likely be satisfied, thereby posing a bar on the frustration of the contract between [party] and [party]. Therefore, the contract is likely to stay on foot, and a breach in the contract would result in [aggrieved party] being able to obtain damages for the harm suffered.

COMMON LAW VITIATING FACTORS

OTF, [P] may attempt to argue that common law vitiating factors were present in the lead up to the contract, thereby [P] entitling [P] to an order of rescission in which the contract between [P] and [D] is set aside.

✿ DURESS

Firstly, [P] may argue that the contract is unenforceable as [he/she] was acting under [D]'s duress when [entering into the contract/modifying the agreement]. Per *Universe Tankships*, duress is concerned with the illegitimate pressure applied by 1 party to induce the other party to enter into a contract.

Form of duress	OTF, [D] [how D induced [P] to enter into the contract]. Thus, [P] may allege that this constitutes [duress to the person/duress to the good/economic duress/emotional duress/third party duress], as it [reasoning].
	<u>Forms of duress:</u>

	+ Duress to the person: where there is some threat of physical harm to the victim (<i>Barton v Armstrong</i>) E.g.: I'll kill you if you don't sign the contract + Duress to the good: Where the threat is to the property of the victim (<i>Hawker Pacific v Helicopter Charter Pty Ltd</i>) E.g.: I won't return your helicopter if you don't sign + Economic duress: Threat to the victim's commercial or financial position → Often arises in relation to breach the contract unless there is a contract variation (<i>Universe Tankships</i>) - The usual context for alleged economic duress is a threat to not perform an existing contract unless the victim pays more money or agrees to enter into a contract varying the terms of the existing contract E.g.: I won't supply unless you pay double the price + Emotional duress: possible category, however not decided (<i>Thorne</i>) + Third party duress: Where the victim enters into a contract under duress by a third party, the contract can be set aside if the other contracting party had actual or constructive knowledge of the duress In order to make out that this alleged [form of duress] was present leading up to the [entering into the contract/modifying the agreement], [P] must establish the elements of causation and illegitimate pressure as established in <i>Universe Tankships</i>.				
1 Pressure inducing entry into the contract (Causation)	Firstly, the illegitimate pressure must have induced the victim to enter into the contract (i.e. the victim felt <i>compelled</i> to enter into the contract). OTF, [P] may argue that such causation to enter into the contract is evinced by [facts]. <u>Possible considerations:</u> <table border="1" data-bbox="288 1025 1520 1680"> <thead> <tr> <th data-bbox="288 1025 1019 1077">Causation present</th><th data-bbox="1019 1025 1520 1077">Causation not present</th></tr> </thead> <tbody> <tr> <td data-bbox="288 1077 1019 1680"> + Protest: ○ However, there does not have to be protest for the pressure to be seen to induce entry into the contract ○ Even if the victim did not protest, this will not negate causation → 'The victim's silence will not assist the bully' (<i>Universe Tankships</i> - Lord Scarman) + Absence of independent advice + Taking timely action to set aside the contract + Other reasonable alternative courses of action that were open to the plaintiff: Did they have no other practical or realistic alternative other than entering into the contract? ○ The option of suing/litigating/taking the matter to court should be considered but not necessarily be viewed as a reasonable alternative </td><td data-bbox="1019 1077 1520 1680"> + Pressure may have been a factor in P's decision but not necessarily the sole/only factor (<i>Crescendo; Barton v Armstrong</i>): D may seek to analogise with <i>Crescendo</i>, where although the bank had applied illegitimate pressure in withholding the funds, the pressure did not cause the company to execute the mortgage. CM signed the mortgage for commercial reasons that had nothing to do with the illegitimate pressure from WP. Similarly, [D] may argue that [P] signed the contract for other reasons such as [insert reason]. </td></tr> </tbody> </table> <u>Economic duress:</u> Here, [D] may argue that causation is not present, as there were alternative courses of action that were open to [P] at the time of the agreement, such as suing for breach of contract. However, [P] may argue that while the option of [suing/litigating/taking the matter to court] should be considered, it should not necessarily be viewed as a reasonable or practical alternative, as legal proceedings are rather expensive, can lead to uncertain outcomes, and take a long time Thus, on balance, it may likely be found that [D]'s [duress] was the causation that induced [P] into entering into the contract, as [P] would unlikely have entered into the agreement without such	Causation present	Causation not present	+ Protest: ○ However, there does not have to be protest for the pressure to be seen to induce entry into the contract ○ Even if the victim did not protest, this will not negate causation → 'The victim's silence will not assist the bully' (<i>Universe Tankships</i> - Lord Scarman) + Absence of independent advice + Taking timely action to set aside the contract + Other reasonable alternative courses of action that were open to the plaintiff: Did they have no other practical or realistic alternative other than entering into the contract? ○ The option of suing/litigating/taking the matter to court should be considered but not necessarily be viewed as a reasonable alternative	+ Pressure may have been a factor in P's decision but not necessarily the sole/only factor (<i>Crescendo; Barton v Armstrong</i>): D may seek to analogise with <i>Crescendo</i>, where although the bank had applied illegitimate pressure in withholding the funds, the pressure did not cause the company to execute the mortgage. CM signed the mortgage for commercial reasons that had nothing to do with the illegitimate pressure from WP. Similarly, [D] may argue that [P] signed the contract for other reasons such as [insert reason].
Causation present	Causation not present				
+ Protest: ○ However, there does not have to be protest for the pressure to be seen to induce entry into the contract ○ Even if the victim did not protest, this will not negate causation → 'The victim's silence will not assist the bully' (<i>Universe Tankships</i> - Lord Scarman) + Absence of independent advice + Taking timely action to set aside the contract + Other reasonable alternative courses of action that were open to the plaintiff: Did they have no other practical or realistic alternative other than entering into the contract? ○ The option of suing/litigating/taking the matter to court should be considered but not necessarily be viewed as a reasonable alternative	+ Pressure may have been a factor in P's decision but not necessarily the sole/only factor (<i>Crescendo; Barton v Armstrong</i>): D may seek to analogise with <i>Crescendo</i>, where although the bank had applied illegitimate pressure in withholding the funds, the pressure did not cause the company to execute the mortgage. CM signed the mortgage for commercial reasons that had nothing to do with the illegitimate pressure from WP. Similarly, [D] may argue that [P] signed the contract for other reasons such as [insert reason].				

	pressure. If the court is satisfied that illegitimate pressure is established, the onus is on [D] to show that the pressure made no contribution to P's [decision] (<i>Crescendo</i>).
2 Illegitimate pressure	However, it is insufficient that [D]'s pressure induced [P] to enter into the contract. It also needs to be established that the pressure was illegitimate. When determining whether the pressure is legitimate, 2 things needs to be considered: 1. The nature of the pressure (which in many but not all cases will be decisive) 2. The nature of the demand made: Is there a justifiable connection between the pressure and the demand? (<i>Universe Tankships</i>) Threat of unlawful action: OTF, [P] may argue that the pressure that [D] placed onto [P] was illegitimate, as it consisted of unlawful threats of [threats] (<i>Crescendo</i>). In determining whether the pressure was legitimate, the court would consider the nature of the pressure and the nature of the demand made (<i>Universe Tankship</i>). Here, it is evidenced that D's [threat] is a threat of unlawful law action because [it is a threat to a person/property]. Further, [D]'s demand of [demand] is directly connected to this illegitimate pressure ○ However, threat of breach of contract may or may not be illegitimate E.g.: Contractual modification to pay more Threat of lawful action (?): ○ Fiance threatens to call off wedding if pre-nuptial agreement is not signed (<i>Thorne</i>) ○ Blackmailer threatens to report crime to the police (Lord Scarman in <i>Universe Tankships</i>) OTF, [D] may argue that the pressure that [D] placed onto [P] was lawful, as the action of [threatened action] is not illegal. However, [P] may counter that even threats of lawful action can possibly be illegitimate, depending on the nature of the demand (<i>Universe Tankships</i>). Thus, while [threatened action] is not illegal, [P] may contend that the nature of the demand made is illegitimate, as there is not a justifiable between the pressure and the demand (<i>Universe Tankships</i>). While, as it is unresolved as to whether a lawful threat can be illegitimate pressure (<i>Thorne</i>), on balance, it is likely to be found that [D]'s pressure will amount to illegitimate pressure. Economic duress: + OTF, [D] may argue that rather than illegitimate pressure, [conduct] was [legitimate negotiating strategies that resulted in a valid contract/a valid compromise or settlement of a claim]. + OTF, [P] may argue that the pressure that [D] placed onto [P] was illegitimate pressure that results in the right to rescind the contract Thus, on balance, it may likely be found that [D]'s pressure of [pressure] will be found to be [illegitimate/legitimate], thereby satisfying [P]'s claim of duress in [entering into the argument/varying the terms of the agreement], and entitling [him/her] to a right to rescind the contract.
❁ UNDUE INFLUENCE	
Alternatively, [P] may seek to rely on an argument of undue influence (UI) in order to establish [his/her] right to rescind the contract. Generally, UI involves a party entering into a contract under the influence of the other party, such that they aren't entering into it due to their own free will. ○ Applies to contracts with consideration, as well as gift Thus, for [P] to demonstrate that UI is present OTF, [he/she] must firstly establish that there was UI in fact, or arising by presumption (<i>Thorne</i>).	

Undue Influence established <u>in facts</u>	OTF, [P] may attempt to prove that in the particular circumstances, the contract was entered into as a result of [D]'s influence (<i>Thorne</i>), For undue influence to be established in fact, the weaker party must prove that the stronger party actually exercised a controlling influence over them such that the plaintiff was not exercising their own free agency in entering into the transaction. OTF, [P] may argue that [his/her] consent in entering into the agreement was heavily influenced by [D], such that [P] had substantially subordinated [his/her] will to [D] rather than 'freely] and independently making the decision. [Facts]. <u>Possible considerations</u> (<i>Thorne</i>): + Independent legal advice: P signed agreement contrary to independent legal advice → Whether there was any time for careful reflection + Whether the transaction is disadvantageous (adequacy of consideration) + P's vulnerability and reliance on the defendant + P's social/emotional state + The relative financial positions of the parties + No opportunity for P to negotiate nor carefully consider the contract. + Whether the agreement was offered on a basis that it was not subject to negotiation + The emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement + The nature of the parties' relationship				
Undue Influence arising by <u>presumption</u>	Alternatively, [P] may argue that there exists an UI arising by presumption. Under this category, UI is presumed where there is a "relationship of influence". Specifically, if a relationship of influence is found to have existed between the parties prior to a contract, then there is a presumption that the plaintiff was unduly influenced by the defendant. Deemed relationship of influence: OTF, the relationship between [P] and [D] is one of [relationship]. Per [case law], the law recognizes that UI arises in such [relationships] in nature, and thus [P] is presumed to be in a 'relationship of influence'. <table border="1" data-bbox="296 1126 1489 1644"> <thead> <tr> <th>Deemed relationship of Influence (Not exhaustive)</th><th>NOT presumed</th></tr> </thead> <tbody> <tr> <td> + Parent → child: - Can apply to adult children(>18), although depends on the particular parent-adult child relationship as to whether the presumption applies - Ultimately depends on whether the child is still under the parental control → unlikely apply to a mature adult child who is no longer under parental influence + Guardian → ward + Religious advisor → disciple (<i>Hartigan v Krishna</i>) + Solicitor → client (<i>Westmelton v Archer and Schulman</i>) + Doctor → patient </td><td> + Husband and wife + Fiance and fiancée (rejected in <i>Thorne v Kennedy</i>) + Financial advisor and client + Teacher and student + Child and parent </td></tr> </tbody> </table> Thus, there will be a presumption that the contract was entered into under influence (without free will) due to the relationship between the parties being that of a [relationship] (<i>Hartigan</i>). Relationship of influence proven in fact: OTF, the relationship between [P] and [D] is one of [facts]. Although this is not a recognised deemed relationship of influence, the categories are not closed and thus a relationship of influence may nevertheless be established in fact. Per <i>Johnson v Buttress</i>, there will be a relationship of influence in fact where there is evidence that the plaintiff placed confidence and trust in the defendant and relied on them for guidance. In proving this element, the onus is on [P] as the weaker party to prove that a presumption of influence should arise.	Deemed relationship of Influence (Not exhaustive)	NOT presumed	+ Parent → child: - Can apply to adult children(>18), although depends on the particular parent-adult child relationship as to whether the presumption applies - Ultimately depends on whether the child is still under the parental control → unlikely apply to a mature adult child who is no longer under parental influence + Guardian → ward + Religious advisor → disciple (<i>Hartigan v Krishna</i>) + Solicitor → client (<i>Westmelton v Archer and Schulman</i>) + Doctor → patient	+ Husband and wife + Fiance and fiancée (rejected in <i>Thorne v Kennedy</i>) + Financial advisor and client + Teacher and student + Child and parent
Deemed relationship of Influence (Not exhaustive)	NOT presumed				
+ Parent → child: - Can apply to adult children(>18), although depends on the particular parent-adult child relationship as to whether the presumption applies - Ultimately depends on whether the child is still under the parental control → unlikely apply to a mature adult child who is no longer under parental influence + Guardian → ward + Religious advisor → disciple (<i>Hartigan v Krishna</i>) + Solicitor → client (<i>Westmelton v Archer and Schulman</i>) + Doctor → patient	+ Husband and wife + Fiance and fiancée (rejected in <i>Thorne v Kennedy</i>) + Financial advisor and client + Teacher and student + Child and parent				

	OTF, [P] may P argue that this test is satisfied as [facts]. Accordingly, a presumption of influence may likely arise in fact. Rebutting the presumption: As there is a presumption that [P] entered into the contract under the UI of [D], UI will be made out unless the presumption can be rebutted by the stronger party, namely [D]. Here, the onus is on the party with the influence (i.e. [D]) to rebut the presumption and prove that the transaction was the result of the plaintiff's full and free exercise of will and informed judgement. Independent advice: + Present: [D] may argue OTF that [P] received independent advice, which is indicative of [him/her] acting independently. [D] may contend that as [P] was given competent advice by [insert person], who was independent and well-informed, coupled with the fact that [P] had adequate time to reflect on that advice, [P] entered into the contract with D on free will. However, [P] may counter that while independent advice is an important factor, it is not always decisive as per <i>Thorne</i>. + Lack of independent advice: [P] may argue OTF that [his/her] entering into the contract with [D] was under the UI of [D], indicative on the fact that [he/she] had not acquired any independent advice from a third party who could have provided impartial and competent advice concerning the matter. However, [D] may counter as per <i>Westmelton</i> that whilst independent advice is an important factor, the presumption may still be rebutted without independent legal advice. Thus, the fact that [P] did not have independent advice is not fatal to [D]'s rebutting of the presumption. Inadequacy of consideration: OTF, [D] may argue that as [D] gifted [P] the [gift], there is a clear inadequacy of consideration by [P], which points away from UI. However, [P] may counter that this factor is not decisive, and a transaction need not be disadvantageous for a contract to be set aside, nor advantageous for presumption of undue influence to be rebutted. Rather per <i>Thorne</i>, consideration should be given to the 'ordinary motives' or the relationship between the parties. OTF, [facts indicating motive]. • The undue influence may come from the party to the contract, or from a third party: If it comes from a 3P, then the contract may be rescinded if the contracting party has notice of the undue influence
Conclusion: UI made out: Thus, as there is likely [a presumption of UI arising from a deemed relationship/the facts/UI established in facts], and the presumption is unlikely to be rebutted, [D] may likely be found to have unduly influenced [P] to enter into the contract. Accordingly, [P] may be entitled to a right of rescission of the contract. UI not made out: Thus, while there is likely [a presumption of UI arising from a deemed relationship/the facts/UI established in facts], the presumption is likely rebutted. Thus, [D] may likely be found to not have unduly influenced [P] to enter into the contract, and [P] may unlikely be entitled to a right of rescission of the contract.	
❁ UNCONSCIONABLE DEALING	
[P] may also argue under the equitable doctrine of unconscionable dealing. Per <i>Amadio</i>, 'looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so'. Thus, for the doctrine of unconscionable dealing to operate and [P] to be entitled to rescission, the two elements as demonstrated in <i>Amadio</i> must be satisfied.	
1 Special Disadvantage	As the first element of unconscionable dealing (UD), a party to a transaction must have been under a special disadvantage in dealing with the other party (<i>Amadio</i>).

	Thus, [P] must prove that [he/she] was under a special disadvantage in dealing with [D] in a way that seriously affected [his/her]'s ability to safeguard [his/her] own best interests, with the consequence that there was an absence of equality between them. OTF, [P] may argue that this is satisfied as [how P is disadvantaged]. <u>Possible considerations:</u> Circumstances which may create a special kind of disability (Fullagar J in <i>Blomley v Ryan</i>): + Poverty/Need of any kind + Sickness + Age + Sex - However, gender has not been recognised by the courts as a special disability + Infirmary of body or mind + Drunkenness: Drunkenness is not, generally, a special disadvantage (<i>Blomley</i>) - If it was known that the other party was “seriously affected by drink”, and that the contract was obtained by “drawing him [or her] into drink” there may be a special disadvantage (<i>Blomley</i>) + Mental incapacity: can be a special disadvantage (<i>Blomley</i>). + Illiteracy or lack of education: Lack of knowledge or experience in matters of business can be a special disadvantage - <i>Amadio</i>: limited grasp of written English, lack of understanding of mortgage's contents - <i>Stubblings</i>: serious lack of commercial comprehension and “bleak” means to repay the loan + Lack of assistance or explanation where assistance or necessary is necessary + <i>“The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other”</i> <u>Unequal bargaining position:</u> Here, [D] may argue that mere unequal bargaining power or position on its own does not equate to a special disadvantage (<i>Berbatis</i>). However, [P] may argue that similarly to <i>Amadio</i>, where there is a gross inequality of bargaining power, a special disadvantage may be found. OTF, [facts]. <u>Emotional dependence:</u> Emotional dependence may (or may not) constitute a special disadvantage in the circumstances (<i>Louth; Mackintosh, Thorne</i>). However, per <i>Mackintosh</i>, such emotional independence must be more than foolish action. Special: Notably, it is insufficient that [P] is subject to a [disability/disadvantage], as the disadvantage must also be “special” (<i>Amadio</i>). + Thus, [D] may argue that the disability of [P's disability] on its own is not enough to constitute a special disadvantage. + Here, [P] may argue that there is something further happening OTF, namely [special disadvantage], and this seriously affects the ability of the [P] to make a judgement as to [his/her] own best interests as [facts]. - o E.g.: limited education or lack of understanding - <i>Amadio</i> Thus, on balance, it is likely that [P] will be found to have a special disadvantage of [special disadvantage].
2 Knowingly taking advantage	Additionally, the special disability must have been sufficiently evident to the stronger party to make it prima facie unfair or ‘unconscientious’ that they procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which the procured or accepted it (<i>Amadio</i>). In other words, [D] must have knowingly taken advantage of [P]'s special disability. Knowledge: OTF, [P] may argue that [D] has [actual/constructive] knowledge of [his/her] [disadvantage/disability], as [facts].

	Actual knowledge: Thus, this clearly satisfies the knowledge requirement, as [D] has actual awareness and knowledge of [P]’s circumstances. Constructive knowledge: Here, [D] may argue that [he/she] was unaware of [P]’s circumstances. However, [P] may counter that the facts still suggest that [D] had constructive knowledge, as [he/she] ‘ought to have known’ about the special disability (<i>Thorne</i>), and that a RP would have been ‘aware of the possibility that that situation may exist’ on such facts (<i>Amadio</i>; <i>Kakavas</i>) Thus, this likely satisfies the knowledge requirement, as constructive knowledge may likely be sufficient for the purposes of UD. Unconscious exploitation: ○ <i>Amadio</i>: The branch manager had sufficient knowledge of Mr and Mrs Amadio’s special disability: He knew that they were elderly, that they didn’t have a good grasp of written English, that they didn’t read the document, that they hadn’t received advice or guidance from anyone other than Vincenzo who was the dominant member of the family → The bank manager didn’t ask them whether they understood the document, and too readily accepted that Vincenzo had explained the transaction to them. Despite such [knowledge/circumstances], [D] still proceeded with the agreement. Thus, [P] may argue that this is unconscious exploitation of [P]’s disability that amounts to UD. Active unconscious exploitation: Despite this knowledge, [D] actively [pressured/induced/encouraged/persuaded/rushed] [P] into entering the transaction by [facts]. Thus, [P] may contend that [D] did more than merely accept the benefit of the transaction: [he/she] actively took advantage of [P]’s inability to make a worthwhile judgment as to their own interests. Thus, [P] may contend that [D]’s conduct amounts to active unconscious exploitation of [P]’s special disadvantage, supporting a finding of unconscionable dealing (<i>Amadio</i>). + Commercial transactions: However, [D] may argue that [he/she] merely engaged in ordinary commercial bargaining and did not take advantage of any disability. Further, in the relevant arm’s-length commercial transaction, unconscionability generally requires a sufficiently predatory exploitation of a known special disadvantage (HC in <i>Kakavas</i>). OTF, [facts]. Thus, active exploitation may not be established. Passive unconscious exploitation: [P] may argue that while [D] did not actively induce [P]’s special disadvantage, [he/she] knowingly accepted the benefit of the transaction despite being aware, or having sufficient notice, of [P]’s inability to make a worthwhile judgment as to [his/her] own interests, thereby constituting passive exploitation. Thus, similarly to how the branch manager turned a blind eye to the disadvantages in <i>Amadio</i>, [D] may likely be found to have unconsciously exploited [P]’s disability. Therefore, on balance, it is likely [D] will be taken to [have had/have not had] knowledge of [P]’s special disadvantage, making it unconscionable for [him/her] to have proceeded with the agreement despite awareness of such advantage. Accordingly, UD is [likely/unlikely] satisfied.
Rebuttal	While the elements of UD are likely to be satisfied, [D] may seek rebuttal of the claim. Thus, at this stage, the onus is on [D] to demonstrate that the transaction was ‘fair, just and reasonable’. Independent Advice: + Present: [D] may argue OTF that [P] received independent advice, which is indicative of [him/her] acting independently. [D] may contend that as [P] was given competent advice by [insert person], who was independent and well-informed, coupled with the fact that [P] had adequate time to reflect on that advice, [P] entered into the contract with D on free will.

	However, [P] may counter that while independent advice is an important factor, it is not always decisive as per <i>Thorne</i>. - Comprehensive legal advice may assist in showing that: - The person was not under a special disadvantage (the weaker party was able to judge and safeguard their own best interests) - No unfair advantage was taken of any special disadvantage; or - The transaction was fair, just, and reasonable - Independent legal advice did not preclude a finding of unconscionable conduct in <i>Thorne</i>: “The fact that Ms Thorne was willing to sign both agreements despite being advised that they were “terrible” serves to underscore the extent of the special disadvantage under which Ms Thorne laboured, and to reinforce the conclusion that in these circumstances, which Mr Kennedy had substantially created, it was unconscientious for Mr Kennedy to procure or accept her assent” (Gordon J) → The fact that Ms Thorne obtained independent legal advice but still signed the agreement only <u>underscores and reinforces</u> the special disadvantage + Lack of independent advice: [P] may argue OTF that [his/her] entering into the contract with [D] was under the UD of [D], indicative on the fact that [he/she] had not acquired any independent advice from a third party who could have provided impartial and competent advice concerning the matter. However, [D] may counter as per <i>Westmelton</i> that whilst independent advice is an important factor, the presumption may still be rebutted without independent legal advice. Thus, the fact that [P] did not have independent advice is not fatal to [D]’s rebutting of the UD claim. Inadequacy of Consideration: OTF, [D] may argue that as [D] gifted [P] the [gift], there is a clear inadequacy of consideration by [P], which points away from UD. However, [P] may counter that this factor is not decisive, as adequacy of consideration is merely one circumstance to be considered and is neither required nor determinative of equitable intervention (<i>Blomely; Louth; Thorne</i>).
Conclusion: UD made out: Thus, as there is likely UD arising [D]’s exploitation of [P]’s [special disadvantage], and the UD is unlikely to be rebutted, the agreement between [P] and [D] may likely be found to amount to UD. Accordingly, [P] may be entitled to a right of rescission of the contract. UI not made out: Thus, while there is likely UD arising [D]’s exploitation of [P]’s [special disadvantage], the claim may likely be rebutted. Thus, [D] may likely be found to not have UD with [P], and [P] may unlikely be entitled to a right of rescission of the contract.	
❁ YERKEY PRINCIPLE - IMPROPRIETARY BY A THIRD PARTY	
RED FLAG: Non-commercial guarantees OTF, [P] may argue that [he/she] entered into the contract as a result of improper conduct by [third party] due to [unconscionable dealing/duress/undue influence] on [third party]’s side. Thus, given [P] can show that the contract with [D] is tainted by third party impropriety, the contract between [P] and [D] may be set aside (<i>Amadio</i>). It is now a standard banking practice for banks to obtain a certificate of independent advice for non-commercial guarantees	
BASES FOR RELIEF	
Unconscionabl e dealing	Where [P]’s special disadvantage results from a relationship with a third party, [D] will be held to have acted unconscionably if [D] <u>knowingly exploited that special disadvantage</u> (<i>Amadio</i>)
Notice of duress	Where [P] enters into a contract under duress by a [3P], the contract may be set aside against [D] if D had <u>actual or constructive knowledge of the duress</u>

Notice of undue influence	Where [P] is under undue influence proved in fact or presumed undue influence of a [3P], the transaction will be considered <u>tainted</u> if [D] had actual or construction knowledge of that influence
<i>Yerkey</i> principle	Where a wife guarantees the husband's debts and is under undue influence of her husband or did not understand the transaction, the transaction may be set aside (<i>Yerkey v Jones</i> ; affirmed in <i>Garcia</i>) ○ The principle may also apply to other relationships other than husband - wife ○ Can be overcome by legal advice
Australian Consumer Law	Unconscionable conduct under the ACL

RESCISSION

As [vitiating factor] is likely made out OTF, [P] may be entitled to an election between the remedy of rescission or affirmation of the contract. For rescission, this remedy will result in the contract between [P] and [D] being set aside both prospectively and retrospectively, as if the contract was never entered into at all.

Plaintiff did not suffer loss:

While [D] may argue that P did not suffer any loss as [facts] and therefore making rescission not available, this argument will unlikely be made out, as the suffering of loss is not a requirement of the remedy of rescission.

✿ COMMON LAW APPROACH

Under common law, rescission is only available if precise restoration of the parties' pre-contractual position is available. Therefore, for a court to allow the contract to be rescinded, [P] must show that both [him/her] and [D] can be able to be restored to their original pre-contractual position.

- Parties can be restored to their pre-contractual position where their obligations under the contract remain executory and nothing is done yet under the contract, or

Precise restoration not possible:

OTF, [D] may argue that such precise restoration to the pre-contractual position is impossible, as [the subject matter of the contract has been used up/the contract has already been executed].

Thus, precise restoration would unlikely be achievable, and [P] may unlikely be entitled to rescind the contract under the common law approach.

Contract involves the payment of money/transfer of goods or property:

OTF, [P] may argue that such precise restoration to the pre-contractual position is [possible/impossible], as the contract between the parties was for the [sale of goods/transfer of property/payment of money], in which the [goods/property/money] [has not/has] [been used up in any way/been partially used up]. Thus, the courts may [still be likely/be unlikely] to be able to order a return, which likely restores the parties to the position they were in before the contract was entered into.

✿ EQUITABLE APPROACH

However, [P] may argue that even though the parties are unable to be fully restored to their pre-contractual position, [P] still has the right to rescind the contract under equity. Per *Alati*, for rescission at equity to apply, it is sufficient that the parties can be substantially restored to their pre-contractual position.

OTF, it may likely be found that the parties [can/cannot] be substantially restored to the pre-contractual positions, as [stock had been used up/ business had deteriorated]. However, the equitable approach allows the court to make appropriate adjustments to achieve substantial restoration. Here, the parties may be mostly restored to their pre-contractual position if the court ordered that [possible order].

While this is not the precise and exact position the parties were in before entering into the contract, it is mostly restored in substance. As the equitable rule prevails over the common law, [P] may likely be awarded rescission in this case.

Possible considerations: