

Contracts Exam Notes

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ISSUE SPOTTING!

Remember: after you do incorp/interpretation/implied/ whatever REMEMBER TO SEE IF THE CLAUSE BREACHES

Ask: what is it that the person you are advising *actually* wants?

- Do they want to **escape** their contractual obligations? → TERMINATE CONTRACT
 - Incorporation (if a term wasn't included)
 - Breach
 - Repudiation
 - Frustration
 - Non fulfilment of a contingent condition
 - Vitiating factors
 - Unconscionable conduct within trade or commerce
- Do they want to **enforce** contractual rights? Or to **receive damages/compensation**? → STAY IN CONTRACT
 - Interpret/implying (exclusion clauses)
 - Unfair terms of ACL (or consumer guarantees if the quality of something is not up to standards – if there is a \$ and its under \$100,000, then consider CONSUMER GUARANTEES)
 - REPUDIATION

E.G: May be so that the contract has been frustrated/can be set aside/etc, but the person you are asked to advise wants to enforce the contractual obligations; you could address these factors briefly and then say 'however, I will not be addressing this aspect because it does not fall into [X]'s favour, as it would be in their best interests to enforce contractual rights'

BUT IF SOMETHING TOO OBVIOUSLY EXISTS AND YOU CANT FIND ANOTHER ANSWER THAT'S FINE

Blue words: write exactly as it says for the exam.

A.IS THERE A CONTRACT?

Can the contract be set aside because of a **vitiating factor**?

NOTES:

- All three overlap → **consider all 3 doctrines**
- Main concern is unfairness
 - Procedural unfairness – unfairness in the way the contract was brought about
 - Substantive unfairness – unfairness in the terms of the contract
- Judge-made law is generally only concerned w procedural unfairness

Issue Spotting

1. Is there a threat?
2. If yes:
 - a. **UNLAWFUL**? → Duress
 - i. Illegitimate pressure to either physical, threat to goods, economic threat (ie defamation).
 - ii. **EXCESSIVE PRESSURE** can also amount to undue influence (Majority in Thorne) provided it still isn't a legal act
 - iii. Probably knows they're being 'hard done by'
 - b. **LAWFUL**? → Actual undue influence
 - i. May enter contract happily/willingly such is the extent of the stronger party's influence
3. If no:
 - a. **RELATIONSHIP** btwn parties? If YES:
 - i. Presumed undue influence
 - ii. Or if no relationship, but similar to a relationship, could contrast an 'ad hoc relationship' (Johnson v Buttress)
 - iii. Analyse the facts here – *familial connection* or smth weird?
 - b. **If NO relationship → Unconscionable dealing** (conduct of stronger party being unconscionable as weaker party has special disadvantage)
 - c.

DURESS

In this case, there is scope to assess whether [X]'s conduct amounts to the vitiating factor of duress. Duress occurs where one party exerts **illegitimate pressure** on another to force their entry into a contract. If [X] can establish duress, they will be entitled to rescission of the agreement. Additionally, harassment and coercion are addressed under s 50 of the ACL, which provides that:

Statutory responses – s 50 of ACL

Harassment and coercion

1. A person must not use physical force, or undue harassment or coercion, in connection with:
 - a. the supply or possible supply of goods or services; or
 - b. the payment for goods or services; or

- | |
|---|
| c. the sale or grant, or the possible sale or grant, of an interest in land; or
d. the payment for an interest in land." |
|---|

Note: boundaries btwn undue influence + duress are blurred, so **excessive pressure** in cases can be characterized as undue influence too (**Thorne**)!!

I. ILLEGITIMATE PRESSURE?

In order to establish duress, there must initially be a source of illegitimate pressure. While Australian courts remain unsettled regarding whether the illegality of actions is a necessary factor to making out duress, this remains unresolved definitively, and the better view is that duress is most successfully argued when the threat is illegal (Thorne). Here, the illegal pressure is...

- Physical threat – threat to harm the plaintiff or his or her family unless the plaintiff enters into a contract or pays over money is the archetypal example of illegitimate pressure giving rise to duress
 - **Barton**: multiple consecutive threats to murder P unless he executed a deed; threats were credible to the point P hired a bodyguard
- Threat to goods – to destroy goods or threat to unlawfully detain goods
 - **Hawker**: owner asked H to paint helicopter, fell into dispute about price. H insinuated that helicopter wouldn't be returned unless agreement to pay was signed; helicopter was unlawfully held 'hostage'
 - Threat does not need to be express, can be inferred from circumstances
 - 'failure to complain' isn't a bar for a finding of duress
 - Long period after duress of not paying the bill /not complaining doesn't amount to an 'election' to keep the contract afoot
- Economic threat – many forms of economic pressure can exist in modern times
 - **TA Sundell**: threat to breach contract (refusing to deliver iron) was used to force Sundell into a contractual change (raising the price)

II. OPERATE AS 'A' CAUSE INTO X'S ENTRY INTO CONTRACT?

It is sufficient for the threat to simply be a reason for [X]'s entry into the contract, not the sole or predominant reason (Crescendo Management). Given that the pressure exerted on the plaintiff has been made out as illegitimate, the onus of proof lies on [Y] to show that their coercion was not the reason for [X]'s entry into the contract.

- **Barton**: although B had 'compelling business reasons' to enter into the contract, and would've executed the deed anyways without the threats, duress still affected his decision → there is no way discern whether the threat played a role in the innocent party's decision making

III. REMEDIES

If duress has been found, the contract is not immediately void but voidable by the aggrieved party; that is, they may choose to elect or affirm (Barton).

- Where money has been paid under duress or pursuant to a contract procured by duress, it can be recovered in restitution provided the contract is first rescinded by the victim (**TA Sundell**)
- Duress does not require to deprive the person of any free agency or ability to decide; they are usually able to assess alternatives and make a choice
- Given that the boundaries between undue influence and duress are blurred, 'excessive pressure' in cases can be characterized as undue influence too

UNDUE INFLUENCE

Undue influence can be made out when one party holds a position of dominance or influence over the other in a transaction, and the stronger party exercises such ascendancy that the weaker party's will is 'impaired' (*Thorne*).

TWO FORMS:

1. Actual undue influence (an established threat)
2. Presumed undue influence (nature of the relationship)

In this case, it is necessary to determine whether Y's improper use of ascendancy over X through exerting undue pressure may constitute amount to [ACTUAL UNDUE/PRESUMED] influence. [ASK, ARE THEY IN A RELO? OR IS THERE A THREAT? THEN STATE WHETHER ITS ACTUAL OR PRESUMED AND CONTINUE W ANALYSIS].

ACTUAL UNDUE INFLUENCE

Actual undue influence arises when there has been an improper use of ascendancy over another through undue pressure.

Here, the facts indicate that [X] is the stronger party here, due to: [LIST WHY THEY'RE STRONGER]. They also indicate that as the stronger party, [X] has exerted undue influence over [Y] by [STATE ACTIONS THAT THEY HAVE DONE]. In order to be successfully made out, it must be established that the pressure deprived [Y] of free choice by causing them to substantially subordinate their will to that of the [OTHER/STRONGER/Y] party (*Thorne*). Notably, there are **varying degrees** to this and therefore the facts must be assessed.

Facts to consider to discern the 'degree' of influence:

- Really high bar → person must be completely POWERLESS
- The judgemental capacity of the person must be 'markedly sub-standard' as a result of the will of the stronger party
- *Thorne*: factors of financial inequality, no permanent status in Australia, reliance on K, emotional preparation for marriage, did not even think not marrying was an *option*
 - primary judge said she left behind 'her life and minimal possessions... if the relationship ended, she would have nothing. No job, no visa, no home, no place, no community'
 - wedding was all planned, relatives had been flown out + no guarantee for them to go home, he created the urgency of the signed documents and the haste surrounding them
 - the extent of which she was unable to make 'clear, calm or rational decisions' was so significant she **was not a free agent**

Factors considered in *Thorne*:

- (i) whether the agreement was offered on a basis that it was not subject to negotiation;
- (ii) the emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement
- (iii) whether there was any time for careful reflection
- (iv) the nature of the parties' relationship
- (v) the relative financial positions of the parties; and
- (vi) the independent advice that was received and whether there was time to reflect on that advice

PRESUMED UNDUE INFLUENCE

Presumed undue influence arises where there exists a relationship of influence between the parties.

TWO FORMS:

1. Relationship of influence
2. Ad-hoc relationship

Presumption/relationship of influence

If a relationship of influence is found, the court presumes undue influence unless the stronger party can rebut the presumption through showing that the transaction was done in the exercise of the weaker party's free will. The

court presumes that certain categories of relationships have an inherent quality of influence, and in this case, [X] and [Y] fall into the category of: (per Latham CJ in Johnson)

- Solicitor-client
- Guardian-ward
- Physician-patient (can't be any, needs to be X's parent/physician)
- Parent-child (regardless of age, presumption rebutted easier if older)
- Trustee and beneficiary
- Religious advisor-disciple

Fiance-fiance does NOT give rise to presumption (*Thorne*) as court says there are too many circumstances of ppl being married today to give rise to this

'Ad-hoc' relationship (no recognized class)

Undue influence may arise from pre-existing relationships where one party assumes a position naturally involving 'ascendancy or influence' over the other and the weaker party has 'dependency or trust' (Johnson).

1. Where it is shown that one party is in a position of significant influence or dominance over another by virtue of their relationship, and
 - a. *Johnson*: B was elderly, illiterate, at a loss for guidance and support due to his wife's death, came to heavily rely on Ms J for many day-to-day things
 - b. Consider → both party's standard of intelligence, equipment, character, source of reliance
2. The weaker party enters into a contract which benefits the stronger party
 - a. Involves a 'substantial benefit' to another that can't be explained through 'ordinary motives' (Johnson) – giving gifts
 - b. *Johnson*: transfer of entirety of land to Ms J
3. If someone from this type of relationship receives a substantial gift from the weaker party, they cannot automatically keep it but must prove that:
 - a. They did not exploit the relationship; and
 - b. The gift was freely and knowingly made, with the donor understanding the situation as clearly as the recipient
 - i. A person in a position of influence has a duty, similar to a fiduciary duty – they must only use their influence for the benefit of the weaker party and not for themselves
 - ii. *Johnson*: she couldn't justify the transfer based on evidence and hence contract was set aside

UNCONSCIONABLE DEALING

Given that [X] was under a special disadvantage, they may be able to argue for a case of unconscionable dealing. On its face, the doctrine is likely to succeed if X's special disadvantage/disability is proven to impair their 'ability to make a judgement as to... [their] own best interests' (Amadio). [X] must also prove that the [Y/STRONGER PARTY] had knowledge or notice of their special disadvantage, and they decided to induce the dealing or passively accept it regardless of this knowledge.

Elements to be argued:

- 1) Weaker party was under a 'special disadvantage'
- 2) The stronger party has knowledge of the special disadvantage
- 3) The stronger party is unable to show the transaction was fair, just, and reasonable

I. SPECIAL DISADVANTAGE?

There is a non-exhaustive list of what may constitute to a special disadvantage, from 'poverty, 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' (Fullagar J in Blomley).

- *Blomley* – drunkenness and age