
The purpose of this tutorial is:

- To understand that the parties to a contract must have voluntarily entered into the arrangement.***
- To see how the common law protects people who suffer from particular disadvantages and who are unfairly taken advantage of when entering into a contract.***

Exercise 11.1

- . 1) What are the three types of duress recognised by the courts?

Duress to person, duress to goods, economic duress

- 2) What is the effect of a person entering into a contract under duress? What is the result on the contract?

Duress occurs when illegitimate pressure (such acts or threats) is applied that forces a party to enter into a contract.

The effect of such acts or threats is that the innocent party is deprived of their free will.

As a result, consent of the party is considered not to have been voluntary.

- . If duress occurs, the contract is voidable at the option of the innocent party.

- . 3) In ***Barton v Armstrong*** (Parker and Box page 264) what points did the court make about duress to person, with regards to the duress as a motivating factor?

Barton alleged that he entered into the contract as a result of death threats made against him by Armstrong and others and sought to have the contract set aside as a result of duress.

On appeal, the Privy Council held in favour of Barton and set aside the contract.

2 points emerged from this case: The threat need only be one of the reasons for entering the contract (contributing

- . factor) and the onus is on the person who made the threat to show that it had no effect (inducement)
- . 4) Who may make the threat and to whom may it be made under duress to person?

The threat can be made to the contracting party or their immediate family, by the other party or someone acting on

- . their behalf.
- . 5) In which case did Kerr J make clear that duress to goods was sufficient to set aside a contract?

The Sibeon and The Sibotre

[1976] 1 Lloyd's Rep 293. Kerr J did state that where there exists coercion of the will so

- . as to vitiate consent, it should be possible to set the contract aside. However, commercial pressure was not enough
- . 6) Does the victim of a threat to person or goods need to protest or resist in order to succeed in claiming duress?

No. The effect of such acts or threats is that the innocent party is deprived of their free will.

- . As a result, consent of the party is considered not to have been voluntary.

- . 7) What is 'economic duress'?

Economic Duress occurs when actual or threatened advantage is taken of a contracting party's economic

circumstances.

Factors:

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Whether the person alleged to have been coerced protested;

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Whether there was an alternative course of action (such as an adequate legal remedy) open to him at the time of the alleged coercion;

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Whether he received independent advice; and

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- . Whether after having entered into the arrangement, he took any avoiding action.

- . 8) What was the approach that should be taken in determining whether a party is under duress according to McHugh JA in ***Crescendo Management v Westpac Banking Corporation*** (Parker and Box page 264)?

The proper approach, according to McHugh JA, is to ask: (1) 'whether the pressure applied induced the victim to enter into the contract' and (2) then ask 'whether the pressure went beyond what the law considers legitimate'.

- . For economic duress to be proved the pressure applied must be illegitimate.

Read the summary of ***Universal Tankships of Monrovia v International Transport Workers Federation*** and the comments on ***Smith v William Charlick Ltd*** from Parker and Box, page 265 and answer the following question:

9) Give examples of what would constitute 'illegitimate pressure' and what would amount to overwhelming, but not illegitimate business pressure.

See also ***Simply No-Knead (Franchising) Pty Ltd*** and ***Allphones (Retail) Pty Ltd v Hoy Mobile Pty Ltd*** on this point

Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But ... even

overwhelming pressure, not amounting to unconscionable or unlawful conduct

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will not necessarily constitute...

duress". E.g. pressures a person who has an interest in the goods into a contract. (Parker and Box, pages 275 – 276)

Exercise 11.2

Read Parker and Box, pages 265-270 and answer the following questions, citing case names as examples where possible.

- . 1) Define the term 'undue influence'.
- . 2) What are the two recognised types of undue influence?
- . 3) What is a 'special' or 'fiduciary' relationship'? Give some examples.
- . 4) What does 'presumed' undue influence mean? Which party bears the onus of proof if there is presumed undue influence?

Presumed undue influence occurs where there is a fiduciary (special) relationship between the parties.

Where such a relationship exists, the presumption arises that it has taken place.

- . The onus is on the dominant party to prove that the weaker party was not unduly influenced.

5) In the absence of a special/fiduciary relationship, which party bears the onus of proving that the undue influence occurred? If there is no special relationship, the victim of undue influence can still avoid the contract on proof of undue influence.

The difference is that where there is alleged actual undue influence, the onus is on the party alleging the undue

. influence.

Read the summaries and comments on ***Westmelton (Vic) Pty Ltd v Archer and Shulman*** and ***Garcia v National Australia Bank Ltd*** and answer the following question:

6) What are the factors that the court considers in determining whether a contract should be set aside due to undue influence?

If there is no special relationship, the victim of undue influence can still avoid the contract on proof of undue influence.

The difference is that where there is alleged actual undue influence, the onus is on the party alleging the undue influence.

Exercise 11.3

Answer the following problem question using the IRAC method. Remember to state the relevant rules and cite cases where relevant.

Maria is very old and religious. Maria has been ill for some time and believes that she does not have long to live. She decides to move into the Knights Templar Retirement Home and is visited there by Paul, her local priest, who advises Maria on all religious matters.

Paul tells Maria that it is easier for a camel to pass through the “Eye of a Needle” than it is for a rich person to go to heaven (i.e., that it is much easier for a poor person and very unlikely that a wealthy person to go to heaven).

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Immediately after this he asks Maria to donate all her wealth on her death to the Knights Templar Retirement Home. She agrees to do so.

Upon the sad day of her death Maria’s son Raymond finds out

what happened and now wants to challenge Maria's legal transfer of her property to the knights Templar Retirement Home.

Advise Raymond whether the transfer of Maria's property is likely to be set aside.

The issue is to determine whether the contract that existed between Maria and the Knights Templar Retirement Home was created on the basis of duress or undue influence.

Duress occurs when illegitimate pressure (such acts or threats) is applied that forces a party to enter into a contract.

The effect of such acts or threats is that the innocent party is deprived of their free will. As a result, consent of the party is considered not to have been voluntary. If duress occurs, the contract is voidable at the option of the innocent party.

Undue influence also examines the reality of agreement when some influence or pressure had played a part in obtaining assent. It occurs in the formation of a contract or in other dealings, such as gifts or transfers of property without adequate consideration. There are two kinds of undue influence: presumed and actual. To establish presumed undue influence, a special or fiduciary relationship had had to occur.

It can be argued that a fiduciary relationship existed between Maria and the priest. A fiduciary relationship occurs when there is no exhaustive list of relations giving rise to a presumption of undue influence. The established categories include a religious minister and devotee.

As demonstrated in the case of
Johnson v Buttress
(1936) 56 CLR 113,

it was found that a fiduciary relationship existed between the parties. Such a relationship arises whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part. The plaintiff won.

Furthermore, Raymond is entitled to the property that was transferred to the Retirement Home. Paul unduly influenced Maria to transfer the property to the Retirement Home with her fully understanding her actions

Exercise 11.4 Unconscionable conduct (Parker and Box, pages 270-273)

- 1) In your own words, briefly explain Denning L's summary of unconscionable conduct.

Lord Denning summarised by referencing the fact that the parties were not meeting on equal terms, and concluded that the common thread running through the cases was 'an inequality of bargaining power'.

Taken advantage of weaker power

The leading case on unconscionable conduct in Australia is ***Commercial Bank of Australia Ltd v Amadio***. Read the summary on page 272 of Parker and Box (plus other material if necessary) and answer the following questions:

- 1) In a few short sentences, briefly explain the facts of this case in your own words.

An elderly Italian migrant couple, Mr. and Mrs. Amadio stood as guarantors against their son's loan for his construction business from the Commercial Bank of Australia. The bank manager, Mr. Virgo, who was in close communication with the son, Vincenzo Amadio, had better understanding of

the business reality and knew that the son had probably misrepresented facts in a bid to get his parents to stand as guarantors. Subsequently, when Vincenzo Amadio's business failed, the bank was required to enforce the guarantee by mortgaging the building owned by the Amadio's. The court held the bank enforcement to this agreement is unconscionable. Parents do not read English, unable to protect themselves, the bank should have known the parents are in disadvantage, unfair to allow the contract to be upheld.

. 3) What are the 4 elements that the High Court set out which must be proven to set aside a contract due to unconscionable conduct?

- . The plaintiff was in a position of special advantage
- . Special advantage substantially affected plaintiff's ability to protect themselves
- . Defendant knew, or ought to have known, of the plaintiff's disability and took advantage of it.
- . The actions of the defendant were unconscionable

4) What should a party, such as a bank, do to ensure that a contract is not set aside due to unconscionable conduct?

In the case of Commercial Bank of Australia Ltd v Amadio, the bank's conduct was found to be unconscionable. The mortgage and guarantee were set aside accordingly. The Amadio's were under a special disability, which the bank were aware of. It was the bank's awareness of the disability that made its conduct unconscionable.

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Now answer the following problem question using the IRAC method. You must examine the elements of unconscionable conduct from *Amadio's* case in your answer.

Mark wishes to purchase a particular item. He investigates the

price being charged for the item and discovers that there has been a recent price rise from \$500 to \$900. He then happens to visit a shop where the price of the item is \$500 and Mark realises that the shop owner is not aware of the recent price increase. Mark buys the item knowing that the retailer has overlooked or has not yet become aware of the price increase.

Does Mark's behaviour constitute unconscionable conduct?

The issue is to determine whether Mark operated under unconscionable conduct when he bought the item for \$500 rather than \$900.

In the case of

Lloyds Bank Ltd v Bundy, Lord Denning summarised unconscionable conduct by referencing the fact

that the parties were not meeting on equal terms, and concluded that the common thread running through the cases was 'an inequality of bargaining power'. As the store owner was unaware of the price increase, it can be said that Mark and the owner were on unequal bargaining ground.

There are four elements that must be proven to set aside a contract of unconscionable conduct. First, the plaintiff as in a position of special advantage. Second, special advantage substantially affected plaintiff's ability to protect themselves. Third, defendant knew, or ought to have known, of the plaintiff's disability and took advantage of it. Fourth, the actions of the defendant were unconscionable.

In the case of Commercial Bank of Australia Ltd v Amadio, the bank's conduct was found to be unconscionable. The Amadio's were under a special disability, which the bank were aware of. It was the bank's awareness of the disability that made its conduct unconscionable. The outcome of this case can be applied to the situation of Mark and the store owner. Mark was aware of the store owner's disability and took advantage of it.

If the store owner was aware of the price increase and decided not to act on it, then Mark's purchase would have been found conscionable. However, it

cannot be determined whether the store owner was aware or not.

In conclusion, if the store owner was unaware of the price increase, Mark would have been operating under unconscionable conduct, and therefore the contract set aside.

In Garcia case, married women have business. Divorced, bank force the guarantee of she had. She given no independent advice. The court refuses the bank to enforce the guarantee.