

# UNDUE INFLUENCE IN EQUITY

## INTRODUCTION

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"Equity gives relief on the ground of undue influence where an agreement has been obtained by certain kinds of improper pressure which were thought not to amount to duress at common law because no element of violence to the person was involved" (GH Treitel, *The Law of Contract*, p377).

A person who has been induced to enter into a transaction (eg, a gift, contract or guarantee) by the undue influence of another (the wrongdoer) is entitled to set that transaction aside as against the wrongdoer. The effect of undue influence, like duress, is to make the contract voidable.

Such undue influence is either actual or presumed. In *Barclays Bank v O'Brien* [1993] 4 All ER 417, the House of Lords adopted the following classification of undue influence chosen by the Court of Appeal in *BCCI v Aboody* [1989] 1 QB 923:

## CLASS 1: ACTUAL UNDUE INFLUENCE

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In these cases it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned. For example, see:

*Williams v Bailey* (1866) LR 1 HL 200.

Undue influence was described by Lindley LJ in *Allcard v Skinner* (1887) as "... some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating and generally, though not always, some personal advantage gained."

The House of Lords held in *CIBC Mortgages v Pitt* [1993] 4 All ER 433, that there is no further requirement in cases of this kind that the transaction must be shown to be to the manifest disadvantage of the party seeking to set it aside (disapproving *BCCI v Aboody* (1989) on this point).

## CLASS 2: PRESUMED UNDUE INFLUENCE

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In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter the impugned transaction.

In class 2 cases therefore, there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice.

Note that it must also be shown that the transaction was manifestly disadvantageous to the party alleged to be influenced (*National Westminster Bank v Morgan* [1985] 1 All ER 821, below).

Such a confidential relationship can be established in two ways:

## **CLASS 2A**

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Certain relationships as a matter of law raise the presumption that undue influence has been exercised.

The relationships where undue influence is presumed have been held to be: parent & child (*Wright v Vanderplank* (1855)); solicitor & client (*Wright v Carter* (1903)); doctor & patient (*Mitchell v Homfray* (1881)); trustee & beneficiary (*Ellis v Barker* (1871)); and religious adviser & disciple (*Roche v Sherrington* (1982)). For a case example see:

*Allcard v Skinner* (1887) 36 Ch D 145.

The relationship of husband and wife does not, as a matter of law, raise a presumption of undue influence within class 2A (*Midland Bank v Shepherd* (1988)). Nor does the rule apply between employer and employee (*Matthew v Bobbins* (1980)).

## **CLASS 2B**

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If the complainant proves the existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence.

In a class 2B case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned.

The relation of banker and customer will not normally give rise to a presumption of undue influence, but it can do so in exceptional cases if the customer has placed himself entirely in the hands of the bank and has not been given any opportunity to seek independent advice. See:

*Lloyd's Bank v Bundy* [1974] 3 All ER 757

*National Westminster Bank v Morgan* [1985] 1 All ER 821

## **MANIFEST DISADVANTAGE**

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With both of the above presumptions (class 2A and 2B), the transaction must be to the 'manifest disadvantage' of the party claiming undue influence. See:

*National Westminster Bank v Morgan* [1985] 1 All ER 821

*BCCI v Aboody* [1989] 1 QB 923

*Barclays Bank v Coleman* (2000) The Times, January 5.

## **UNDUE INFLUENCE AND THIRD PARTIES**

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Undue influence is now regularly invoked by wife-sureties where their relationship with the bank-creditor is manipulated when the debtor-husband acts as intermediary. For example, a husband persuading his wife to guarantee his company's overdraft with a bank, using the matrimonial home, of which she is joint owner, as security for the debt. In such situations the creditor may be 'tainted' by the undue influence of the intermediary. If a bank entrusts certain duties to a debtor-husband who, as intermediary, is capable of exerting some influence over his wife, the position is as follows:

1. If the transaction is one which is (a) on its face not to the financial advantage of the party seeking to set it aside, and (b) if there is a substantial risk of its having been obtained by undue influence, then the third party will have constructive notice of undue influence giving the right to set aside the

transaction. The creditor must take reasonable steps to ensure that the wife's consent was properly obtained. See:

*Barclays Bank v O'Brien* [1993] 4 All ER 417.

2. However, if the transaction is not of this kind, but is on its face capable of benefiting the party who seeks to set it aside, the third party will not have constructive notice of any undue influence which may in fact have existed. See:

*CIBC Mortgages v Pitt* [1993] 4 All ER 433.

## **REBUTTING THE PRESUMPTION**

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The presumption of undue influence is rebutted if the party benefiting from the transaction shows that it was "the free exercise of independent will", even if no external advice was given or even though it was not taken (*Inche Noriah v Shaik Allie bin Omar* [1928] All ER 189). However, the most usual way of rebutting the presumption is to show that the other party had independent advice before entering into the transaction. Case examples include:

*Re Craig* [1970] 2 All ER 390

*Re Brocklehurst* [1978] 1 All ER 767.

Where a bank seeks to enforce its security against a wife who claims to have been induced by her husband's undue influence or misrepresentation to charge the matrimonial home by way of security, the principles which apply in determining whether the bank is able to rely on the fact that the wife received legal advice before entering into the charge to rebut the presumption of undue influence and imputed or constructive notice thereof and whether the bank ought to have been put on inquiry to ascertain whether the wife was subject to her husband's undue influence, were given by the Court of Appeal in:

*Royal Bank of Scotland v Etridge (No 2)* [1998] 4 All ER 705.

## **REMEDIES**

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The remedy in cases of undue influence is rescission. Damages are not available, but see below.

### **RESCISSION**

Where rescission is ordered, the whole transaction will be set aside. See:

*TSB Bank v Camfield* [1995] 1 All ER 951

*Dunbar Bank v Nadeem* [1998] 3 All ER 876.

Bars to rescission:

#### ***(i) IMPOSSIBILITY OF RESTITUTION***

However, the fact that *restitutio in integrum* is impossible will not be a bar to rescission:

*O'Sullivan v Management Agency & Music Ltd* [1985] 3 All ER 351

*Cheese v Thomas* [1994] 1 All ER 35

*Mahoney v Purnell* [1996] 3 All ER 61.

#### ***(ii) DELAY***

Delay defeats equity. For example, see:

*Allcard v Skinner* (1887) 36 Ch D 145.

**SEVERANCE**

It may be possible for the court to sever from an instrument affected by undue influence the objectionable parts leaving the part uncontaminated by undue influence enforceable. See:

*Barclays Bank v Caplan and Another* (1997) The Times, December 12.

**DAMAGES**

Damages are not available for undue influence, but if a bank has broken a duty of care to a wife-surety damages may be available in negligence under *Hedley Byrne v Heller* (1964).