

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 8 - Duress and Undue Influence ¹

Section 1. - Introduction

Scope of chapter

8-001

This chapter deals with three further grounds on which a contract may be avoided: duress, undue influence and unconscionable dealing. In outline, a party may be able to avoid a contract for duress where he or she entered it because of a wrongful or illegitimate threat or other form of pressure ² by the other party, normally because the threat or pressure left him or her with no practical alternative. ³ A contract may be voidable for undue influence where one party was subjected to pressure by the other or, more usually, where the other took advantage of the first party's trust and confidence. ⁴ Unconscionable dealing occurs where one party deliberately exploits the other's ignorance or weak position to obtain the other's agreement to a contract which is substantively unfair. ⁵ We will see that there may be some overlap between the three grounds. In particular, some cases that were decided on the basis of undue influence are now better regarded as examples of the more recently-developed "economic" duress, ⁶ while other cases may involve both undue influence and unconscionable dealing. ⁷

Unfair Commercial Practices

8-002

The Unfair Commercial Practices Directive ⁸ requires Member States to prohibit, and to provide "adequate and effective" means to combat, unfair commercial practices. These include "aggressive" commercial practices, which are defined thus:

"A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise." ⁹

However unfair commercial practices within the meaning of the Directive will not necessarily give rise to civil remedies for individual consumers, as the Directive is "without prejudice to contract law and, in particular, to the rules of validity, formation or effect of a contract". ¹⁰ Accordingly the Regulations made in 2008 ¹¹ to implement the Directive prohibit unfair commercial practices, but originally provided that an agreement shall not be void or unenforceable by reason only of a breach of the Regulations. ¹² The question of whether a remedy for unfair commercial practices should be given to individual consumers was referred to the Law Commissions, which concluded that consumers who are the victims of misleading ¹³ or aggressive practice by a trader should have a civil law remedy. ¹⁴ While in some cases a consumer who has been the victim of an aggressive practice might have a remedy under the general law of duress, undue influence or unconscionable dealing, or may have (for

off-premises sales) a right to cancel,¹⁵ and while the Protection from Harassment Act 1997 will sometimes provide protection,¹⁶ there was no effective remedy for many kinds of aggressive practice, in particular for many kinds of high-pressure selling.¹⁷ The remedies should include the right to “unwind the contract” if the consumer acts quickly or, if the consumer waits more than three months or the goods or services supplied have been fully consumed, the right to a “discount”; and damages for further loss unless the trader can show that it used due diligence. Other common law and statutory remedies should not be affected. The Law Commission’s recommendations have now been implemented by the Consumer Protection (Amendment) Regulations 2014,¹⁸ which amend the Consumer Protection from Unfair Trading Regulations 2008. The amendments apply to any contract made on or after October 1, 2014. The new remedies are explained in Vol.II, Ch.38.¹⁹

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1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
 2. See below, paras 8-010—8-011.
 3. See below, paras 8-003—8-056.
 4. See below, paras 8-057—8-107.
 5. See below, paras 8-130—8-143.
 6. See below, para.8-049.
 7. See below, para.8-132.
 8. Directive 2005/29 on unfair commercial practices [2005] O.J. L149/22. A useful summary of the Directive and its impact can be found in Twigg-Flesner (2005) 121 L.Q.R. 386.
 9. Directive 2005/29 art.8.
 10. Directive 2005/29 art.3(1).
 11. Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) and Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276).
 12. Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.29; Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276) reg.29.
 13. On misleading practices see above, paras 7-002 and Vol.II, paras 38–164 et seq.
 14. Law Commission and Scottish Law Commission Report: Consumer Redress for Misleading and Aggressive Practices (Law Com. No.332, Scot Law Com. No.226 (2012)).
 15. See below, Vol.II paras 38–107 et seq. The Law Commissions considered that the withdrawal period is often too short for vulnerable consumers to take action: Report, para.3.50.
 16. The Law Commission pointed out that this “does not usually apply to one-off incidents”: Report, para.3.51.
 17. Report, para.3.72.
 18. SI 2014/870.
 19. See below, Vol.II, paras 38–164 et seq.

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(a) - Introduction

Introductory

8-003

! A contract which has been entered as the result of duress may be avoided by the party who was threatened. It has long been recognised that a threat to the victim's person may amount to duress ²¹; it is now established that the same is true of wrongful threats to his property, including threats to seize his goods, ²² and of wrongful or illegitimate threats to his economic interests, ²³ at least where the victim has no practical alternative but to submit. ²⁴ In each case, the wrongful or illegitimate threat must have had some causal effect on his decision to enter the contract, but the causal requirements may differ between the various kinds of duress. ²⁵

^{1.} See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).

^{20.} Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), pp.192–218.

^{21.} Below, para.8-012.

^{22.} Below, paras 8-013—8-014.

^{23.} Below, paras 8-015 et seq.

^{24.} Below, para.8-032.

^{25.} Below, paras 8-025—8-037.

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(b) - Nature of Duress

Basis of law relating to duress

8-004

It was at one time common to treat the legal rules relating to duress (and frequently also the equitable rules relating to undue influence) as resting on the absence of consent. A party who was subject to duress, or even undue influence, was often said to have had his will “overborne” so that he was incapable of making a free choice, or even of acting voluntarily. Most of the older cases cited in this chapter rest on this assumption; and even many modern decisions use the same kind of language. ²⁶ But the basis of the law relating to these topics has been reconsidered in light of the speeches in the House of Lords in *Lynch v D.P.P. of Northern Ireland*. ²⁷ This case was concerned with the defence of duress in the criminal law, and there are no doubt important differences between the civil and the criminal law on what can constitute duress; but the case contains by far the most extensive analysis of the juridical nature of duress in the law reports, and on this question, there appears to be no difference between the criminal and the civil law. Indeed, two of their Lordships in this case specifically relied upon the analogy of the law of contract. ²⁸ All five members of the House of Lords in *Lynch*’s case rejected the notion that duress deprives a person of his free choice, or makes his acts non-voluntary. ²⁹ Duress does not “overbear” the will, nor destroy it; it “deflects” it. ³⁰ Duress does not literally deprive the person affected of all choice; it leaves him with a choice between evils. ³¹ A person acting under duress intends to do what he does; but does so unwillingly. ³² Lord Wilberforce specifically stated that:

“... duress does not destroy the will, for example, to enter into a contract, but prevents the law from accepting what has happened as a contract valid in law.” ³³

Similarly, Lord Simon of Glaisdale said that in the law of contract:

“Duress again deflects without destroying, the will of one of the contracting parties. There is still an intention on his part to contract in the apparently consensual terms; but there is coactus volui on his side. The contrast is with non est factum. The contract procured by duress is therefore not void: it is voidable—at the discretion of the party subject to duress.” ³⁴

8-005

Notwithstanding these clear declarations of principle, in several important decisions relating to economic duress which post-date the *Lynch* decision the judges spoke of duress as negating true consent and rendering the coerced party’s actions non-voluntary. ³⁵ For example, in *Pao On v Lau Yiu*

Long³⁶ it was accepted by the Privy Council that economic duress might be recognised in principle by the law, but it was insisted that:

“... the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act.”³⁷

However, in *Universe Tankships of Monrovia v I.T.W.F.*, Lord Diplock said that the rationale was that the party's consent was induced by pressure which the law does not regard as legitimate with the consequence that the consent is treated in law as revocable.³⁸ Similarly Lord Scarman, though dissenting in the result, agreed that the real issue is whether there has been illegitimate pressure, the practical effect of which is compulsion or absence of choice:

“The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no practical choice open to him.”³⁹

Subsequent decisions have for the most part applied the test of whether the threat was illegitimate and the victim had no practical choice.⁴⁰

Importance of basis of duress

8-006

No doubt in many circumstances the precise basis of duress will be immaterial; but in other circumstances it will be a matter of the greatest importance. For, so long as the doctrine of duress is treated as resting on an absence of consent or of a voluntary act, it would seem immaterial what has caused the absence of consent, or the act to be involuntary. Duress would be a question of fact, and not of law. Further, absence of consent would logically render a contract void and not voidable. It is clear from *Lynch's* case that all these propositions are inconsistent with the analysis of the nature of duress in the speeches in the House of Lords. Because duress does not destroy the will or the consent of the putative contracting parties, it is not possible to treat the issue as one of pure fact, nor is it immaterial what caused the will to be deflected, or the consent to be distorted. Whether the threat or pressure was illegitimate is a question of law. So, also, because duress does not truly deprive a party of all choice, but only presents him with a choice between evils, it is not possible to inquire simply whether the party relying on duress had “no choice”; the inquiry must necessarily be as to the nature of the choices he was presented with, and in what respect the choices differed from those ordinarily available in the market—where a person also has to choose, between paying the market price and going without. The question whether the doctrine rests on the absence of consent or on the use of illegitimate pressure may also affect questions of causation: on the latter approach, it may not be necessary to show that the threat was an overwhelming cause of the victim entering the contract.⁴¹

Analogy with fraud and mistake

8-007

Both in *Lynch's* case and in *Barton v Armstrong*⁴² the analogy with fraud and mistake has been relied upon by the courts. Thus (as shown by the quotation from Lord Simon's speech in *Lynch's* case, above, para.8-004) duress renders a contract voidable rather than void; and in this respect it operates like fraud, and not like non est factum.⁴³ No doubt there will be extreme cases of duress, as there are extreme cases of fraud or mistake, in which non est factum is available as a plea and in which there is a total absence of consent: for example, if one party seizes another's hand, puts a pen in it and physically forces the other's hand to produce a signature. Equally, the gunman who actually helps

himself to his victim's wallet is stealing it against his victim's consent, and in no sense obtaining it by means of a coerced contract. But (artificial though the distinction may seem in such a case) the gunman who *demand*s and *is given* the wallet by the victim, is obtaining it by duress. As we will see, the analogy with fraud was also used in *Barton v Armstrong* to justify the view that, at least in a case of duress to the person, a contract entered into under duress may be avoided provided that the duress had some effect on the mind of the party threatened, even if he might have entered the contract anyway for other reasons. However, the contract will stand if it can be shown that the threat had no effect on his mind at all. ⁴⁴

Legitimacy of the pressure or threat

8-008

⚠ Once it is accepted that the basis of duress does not depend upon the absence of consent, but on the combination of pressure and absence of practical choice, ⁴⁵ it follows that two questions become all important. ⁴⁶ The first is whether the pressure or the threat is legitimate; the second, its effect on the victim. ⁴⁷

“The legitimacy of the pressure must be examined from two aspects: first, the nature of the pressure and secondly, the nature of the demand which the pressure is applied to support ... Generally speaking, the threat of any form of unlawful action will be regarded as illegitimate. On the other hand, that fact that the threat is lawful does not necessarily make the pressure legitimate.” ⁴⁸

Clearly not all pressure is illegitimate; nor even are all threats illegitimate. In ordinary commercial activity, pressure and even threats are both commonplace and often perfectly proper. Indeed, in one sense, all contracts are made under pressure: every offeror “threatens” that unless the offeree accepts the terms offered, he will not get the benefit of whatever goods or services are on offer. We shall see that the causal link between the pressure or threat and the victim's action is also important, ⁴⁹ but it cannot be said that the force or weight of the pressure or the threats is the decisive factor:

“... for in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act.” ⁵⁰

It therefore becomes essential to distinguish between legitimate and illegitimate forms of pressure. We shall see that whereas threats to the person and threats to commit a crime or tort are always treated as illegitimate, ⁵¹ ⚠ it is possible that in some circumstances a threat to break a contract if a demand is not met may not be regarded as illegitimate, depending on the nature of the demand. ⁵² Conversely, a threat to carry out an action which in itself is lawful but which is coupled with an illegitimate demand may constitute duress. ⁵³


The effect of the threat

8-009

For a contract made after there has been a wrongful or illegitimate threat, the threat must have had some causal effect on the victim's decision to enter the contract. However, the causal requirements differ between the various kinds of duress. ⁵⁴ It is possible that in cases of “economic duress” there is a separate requirement that the victim had no reasonable alternative to agreeing to the contract, although an alternative interpretation is that the absence of a reasonable alternative is merely evidence that the threat had the necessary causal effect. ⁵⁵

1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
20. Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), pp.192–218.
26. Even in *Barton v Armstrong* [1976] A.C. 104, 121, the dissenting speech of Lord Wilberforce and Lord Simon refers to the defence of duress as resting on the absence of true consent; and in several other modern cases courts have continued to use the same kind of language, see Atiyah (1982) 98 L.Q.R. 197.
27. [1975] A.C. 653.
28. The same analysis of the nature of duress is almost universally adhered to in America. For an early example, see Holmes J. in *Union Pacific Ry Co v Public Service Commission of Missouri* (1918) 248 U.S. 67, 70.
29. *Lynch v D.P.P. of Northern Ireland* [1975] A.C. 653: Lord Morris of Borth-y-Gest at 670, 675; Lord Wilberforce at 680; Lord Simon of Glaisdale at 690–691, 695; Lord Kilbrandon at 703; and Lord Edmund-Davies at 709–711.
30. Lord Simon, [1975] A.C. 653, 695.
31. [1975] A.C. 653, 690–691.
32. [1975] A.C. 653, 670, Lord Morris.
33. [1975] A.C. 653, 680.
34. [1975] A.C. 653, 695.
35. See *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705; *Pao On v Lau Yiu Long* [1980] A.C. 614; *Universe Tankships of Monrovia Inc v I.T.W.F.* [1983] 1 A.C. 366; see also *Syros Shipping Co v Elaghill Trading Co* [1981] 3 All E.R. 189.
36. Above, and see below, para.8-017.
37. *Pao On v Lau Yiu Long* [1980] A.C. 614, 636.
38. [1983] 1 A.C. 366, 384.
39. [1983] 1 A.C. 366, 400.
40. e.g. *B. & S. Contracts & Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419; *Vantage Navigation Corp v Suhail and Saud Bahwan Building Materials, The Alev* [1989] 1 Lloyd's Rep. 138. See Beatson, *The Use and Abuse of Unjust Enrichment* (1991), pp.109–117; and the remarks of Lord Goff in *Dimskal Shipping Co SA v ITWF* [1992] 2 A.C. 152, 166, agreeing with McHugh J.A. in *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 N.S.W.L.R. 40, 45-46, that the “overbearing of the will” test is unhelpful.
41. See below, paras 8-025—8-037.
42. [1976] A.C. 104.
43. As to the defence non est factum, see above, paras 3-049—3-056. In *Barton v Armstrong* [1976] A.C. 104 Lord Cross, speaking for the majority, referred to the deeds as void (at 120),

but he had previously referred to “setting aside a disposition for duress” (at 118). The dissenting minority seemed to consider that duress renders a contract voidable.

- [44.](#) Below, para.8-026. There may, of course, be some issues on which the analogy with fraud would be inappropriate and inapplicable, e.g. duress is not necessarily tortious: below, para.8-056.
- [45.](#) *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366, 400; *R. v Attorney-General for England and Wales* [2003] UKPC 22 at [15]. On the absence of practical choice see further below, para.8-032.
- [46.](#) See *Universe Tankships of Monrovia Inc v I.T.W.F.* [1983] 1 A.C. 366, 384, 391, 400.
- [47.](#) See the next paragraph.
- [48.](#) Lord Hoffmann in *R. v Her Majesty's Attorney-General for England and Wales* [2003] UKPC 22 at [16] referring to *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366, 401.
- [49.](#) See below, paras 8-025—8-037.
- [50.](#) *Barton v Armstrong* [1976] A.C. 104, 121, per Lord Wilberforce and Lord Simon dissenting, but not on this point.
- [51.](#)  Threats of armed force between states are non-justiciable and cannot give rise to a defence of duress in English law: *Law Debenture Trust Corp Plc v Ukraine* [2017] EWHC 655 (Comm) at [308].
- [52.](#) See below, paras 8-038—8-045.
- [53.](#) See below, paras 8-046—8-051.
- [54.](#) Below, paras 8-025—8-037.
- [55.](#) See below, para.8-037.

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(c) - Types of Illegitimate Pressure



Types of illegitimate pressure

8-010

Violence to the person, and threats of such violence, have long been recognised as illegitimate forms of pressure. The law therefore allows a party to avoid any promise extorted from him by terror or violence, whether on the part of the person to whom the promise is made or that of his agent. ⁵⁶ Contracts made under such circumstances are said to be made under duress, ⁵⁷ a term derived from the common law, which took a narrow view as to the facts which would establish (as was then thought) the absence of free consent. At common law, duress consisted of actual or threatened violence or imprisonment. ⁵⁸ Courts of equity, however, administered the wider doctrine of undue influence ⁵⁹ which was applied chiefly to cases where some fiduciary relation existed between the parties, but was not in any way limited to them. Equity might therefore grant relief where the compulsion complained of was something less than that required by the common law. Since the Judicature Act 1873 it has been the duty of all courts to administer both doctrines concurrently and cases of coercion must be dealt with in the light of their combined effect. In recent years the courts have recognised that other forms of duress may be grounds for avoiding a contract: firstly, where there was a wrongful threat to seize the claimant's goods and secondly, where there was "economic duress". These developments to some extent blur the traditional distinction between duress and undue influence. In particular, there are cases in which equity will give relief against an agreement entered as the result of an improper threat to bring a prosecution against a member of the claimant's family. Traditionally, relief was given on the ground of actual undue influence, but it is strongly arguable that they are now to be regarded as falling within the doctrine of duress and they are so treated in this chapter. ⁶⁰

8-011

⚠ Duress is a form of constraint on the victim's choice, and it is normally assumed that the constraint involves a threat by the other party to harm the victim in some way. ⁶¹ ⚠ Certainly nearly all the cases, particularly of economic duress, have involved threats. However, in *Borrelli v Ting* ⁶² liquidators urgently needed to conclude a settlement agreement, and agreed to the defendant's terms when as the result of delays caused by the defendant "opposing the scheme for no good reason and in using forgery and false evidence in support of that opposition, all in order to prevent the Liquidators from investigating his conduct ... or making claims against him arising out of that conduct", they could wait no longer. The Privy Council held that the agreement could be avoided on the ground of economic duress. Duress was defined as "the obtaining of agreement or consent by illegitimate means". ⁶³ Lord Saville described the defendant's conduct as unconscionable. ⁶⁴ This decision suggests not only that a constraint caused by actual illegitimate conduct, as opposed to threatened conduct, may amount to duress, ⁶⁵ ⚠ but also that the doctrines of duress and of unconscionable conduct ⁶⁶ may not be clearly separable. However, traditionally, relief on the ground of unconscionability does not depend on the defendant having done anything that is otherwise unlawful or illegitimate.

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1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
 20. Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), pp.192–218.
 56. For the parallel doctrine in cases concerning marriage, see *Scott v Sebright* (1886) 12 P.D. 21; *Griffith v Griffith* [1944] I.R. 35; *H. v H.* [1954] P. 258; *Szechter v Szechter* [1971] P. 286; *Singh v Singh* [1971] P. 226; Davies (1972) 88 L.Q.R. 549; Matrimonial Causes Act 1973 s.12. See also *Re Roberts (deceased)* [1978] 1 W.L.R. 653; *Hirani v Hirani* (1983) 4 F.L.R. 232.
 57. See generally, Beatson [1974] C.L.J. 97.
 58. 1 Roll.Abr. 687; Coke 2 Inst. 482.
 59. See below, paras 8-057 et seq.
 60. See below, para.8-049.
 61.  e.g. Burrows, *Law of Restitution*, 3rd edn (2011), p.255 (“pressurised ... by illegitimate threats”); see also Goff and Jones, *Law of Restitution*, 9th edn (2016), para.10–02., in which the examples seemed to involve threats in one form or another; compare Goff and Jones, *Law of Unjust Enrichment*, 8th edn (2011), paras 10–03—10–04. It is usually said that duress to the person may result from actual physical violence (see below, para.8-012) but it is presumably the threat of repetition which constitutes the constraint.
 62. [2010] UKPC 21, noted [2011] L.M.C.L.Q. 333.
 63. [2010] UKPC 21 at [34].
 64. [2010] UKPC 21 at [32].
 65.  See also *Carter v Carter* (1829) 5 Bing. 406, 130 E.R. 1118, cited by Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), para.10-02
 66. See below, paras 8-130 et seq.

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(i) - Duress of the Person

Form of duress

8-012

⚠ Duress of the person may consist in violence to the person, or threats of violence, or in imprisonment whether actual or threatened. ⁶⁷ ⚠ The threat of violence need not be directed at the claimant ⁶⁸: a threat of violence against the claimant's spouse or near relation suffices ⁶⁹ ⚠ and a threat against the claimant's employees has been held to constitute duress. ⁷⁰ It is suggested that a threat against even a stranger should be enough if the claimant genuinely believed that submission was the only way to prevent the stranger from being injured or worse. ⁷¹

^{1.} See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).

^{20.} Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), pp.192–218.

^{67.} ⚠ For modern examples, see *Friedeberg-Seeley v Klass* (1957) 101 S.J. 275; *Barton v Armstrong* [1976] A.C. 104. But compare *R. v HM Att-Gen for England and Wales* [2003] UKPC 22 (threat to return member of armed forces to his unit lawful). Threats of armed force between states are non-justiciable and cannot give rise to a defence of duress in English law: *Law Debenture Trust Corp Plc v Ukraine* [2017] EWHC 655 (Comm) at [308].

^{68.} See further below, para.8-052.

^{69.} ⚠ *Kaufman v Gerson* [1904] 1 K.B. 591; cf. *Williams v Bayley* (1866) L.R. 1 H.L. 200 (threat to prosecute relation); and see below, para.8-052. See Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), para.10–15.

^{70.} *Royal Boskalis Westminster NV v Mountain* [1999] Q.B. 674 (threat to use employees as human shield); *Gulf Azov Shipping Co Ltd v Chief Idisi (No.2)* [2001] EWCA Civ 505, [2001] 1 Lloyd's Rep. 727 (detention of ship and crew).

^{71.} See further below, para.8-052.

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(c) - Types of Illegitimate Pressure
(ii) - Duress of Goods

Duress of goods

8-013

⚠ It has been said that a threat to destroy or damage property may amount to duress. ⁷² It is now accepted that the same is true of a threat to seize or detain goods wrongfully, though for many years it was thought that such a threat could not amount to duress at common law. It used to be said that the distinction between duress of the person and duress of goods was that:

“... the former is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy ...; but the fear that goods may be taken or injured does not deprive anyone of his free agency who possesses that ordinary degree of firmness which the law requires all to exert.” ⁷³

There is no evidence of any wider equitable rule concerning duress of goods, although it has for many years been well established that money paid in order to get possession of goods wrongfully detained, or to avoid their wrongful detention, may be recovered in an action for money had and received. ⁷⁴ So in *Maskell v Horner* ⁷⁵ tolls were levied on the plaintiff under a threat of seizure of goods. The tolls were in fact unlawfully demanded. Their payment was held to be recoverable as it had been made to avoid seizure of the goods and the plaintiff was entitled to recover the payments he had made under the illegal demand. Lord Reading C.J. said:

“If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods, he can recover it as money had and received.” ⁷⁶

It is nevertheless somewhat difficult to reconcile this rule with the traditional rule that duress of goods would not avoid a contract. A possible solution may be that money paid in this way can only be recovered if it has been paid under protest, without any binding agreement ⁷⁷; otherwise the absurd result must ensue that, although an agreement to pay money under duress of goods can be enforced, any money so paid will be recoverable by the person paying it as money had and received to his use. But there are cases inconsistent with the notion that duress can only be relied upon by someone who acted under protest ⁷⁸; and an alternative view received increasing support. This was that the older cases denying relief are best explained as cases in which the claim was voluntarily compromised by the plaintiff. ⁷⁹ The rule that duress of goods does not invalidate a contract only applied where the duress is in purported execution of legal process, such as distress or execution, brought in good faith.

❗ Where this is the case, an agreement made to secure the release of the goods is a form of submission to legal process, and seizure of goods under legal process brought in good faith can scarcely be regarded as an illegitimate form of pressure.

Recognition of duress of goods

8-014

❗ This argument thus opened the door to a broad concept of duress of goods as a ground of relief in contract law, and the courts have now endorsed duress of goods.⁸¹ ❗ As we shall see, they have also embraced a broader concept of “economic duress”. At least one case that involved duress of goods was decided on this broader ground.⁸²

1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
20. Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), pp.192–218.
72. *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293, 335.
73. *Skeate v Beale* (1840) 11 A. & E. 983, 990; *The Unitas* [1948] P. 205, affirmed sub nom. *Lever Bros & Unilever NV v H.M. Procurator General* [1950] A.C. 536.
74. *Astley v Reynolds* (1731) 2 Str. 915; *Atlee v Backhouse* (1838) 3 M. & W. 633; *Wakefield v Newbon* (1844) 6 Q.B. 276; *Oates v Hudson* (1851) 6 Exch. 346. Money paid to recover goods in the custody of the law is not paid under duress and cannot be recovered: *Liverpool Marine Credit Co v Hunter* (1868) L.R. 3 Ch. App. 479. See generally below, paras 29-097 et seq.
75. [1915] 3 K.B. 106; below, para.29-097.
76. [1915] 3 K.B. 106, 118.
77. *Atlee v Backhouse* (1838) 3 M. & W. 633, 650; *Parker v Bristol & Exeter Ry* (1851) 6 Exch. 702, 705.
78. See, e.g. *Spanish Government v North of England S.S. Ltd* (1938) 54 T.L.R. 852; *T.A. Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 S.R. (N.S.W.) 323; *Universe Tankships of Monrovia Inc v I.T.W.F.* [1983] 1 A.C. 366, 400.
79. See Beatson, *The Use and Abuse of Unjust Enrichment* (1991), pp.105–106; *North Ocean Shipping* [1979] Q.B. 705, 719. On voluntary settlements see further below, para.8-029.
80. ❗ See below, para.8-051; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), paras 10-20–10-21.
81. ❗ *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705; *Dimskal Shipping Co Ltd v I.T.W.F.* [1992] 2 A.C. 152, 165 (limitation to duress of the person now discarded). See further Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), paras 10–30 et seq..
82. *The Alev* [1989] 1 Lloyd's Rep. 138; see Burrows, *Law of Restitution*, 3rd edn (2011), p.265.

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(iii) - Economic Duress

Recognition of economic duress

8-015

Three English cases, and one important Privy Council appeal, first recognised the possibility of the concept of economic duress. In substance this amounts to recognising that certain threats or forms of pressure, not associated with threats to the person, nor limited to the seizure or withholding of goods, may give grounds for relief to a party who enters into a contract as a result of the threats or the pressure. In *Occidental Worldwide Investment Corp v Skibs A/S Avanti*,⁸³ the charterers of two ships secured a renegotiation of the rate of hire, after a slump in market rates, by threatening the owners that they (the charterers) had no substantial assets, and that they would go bankrupt if the rates were not lowered. This threat was strongly coercive because, given the slump in the market, the owners would have had to lay up the tankers if the charterers had returned them, and would then have been unable to pay mortgage charges on the ships—all these facts being well known to the charterers. In fact the charterers' allegations, or threats, that they had no substantial assets and would go bankrupt if the rate of hire were not lowered, were false and fraudulent, and Kerr J. held that the owners were therefore entitled to avoid the renegotiated terms, and withdraw the ships, on the ground of fraud; but he recognised that the economic pressure of the threats might also have given rise to relief on the ground of duress, at least in principle. In the event, however, he denied relief on this ground because the owners' consent or will was not vitiated by the pressures, which were only normal commercial pressures. In light of the discussion of *Lynch's* case, above, para.8-004, this ground of decision seems dubious; the question which the learned judge ought to have asked himself was not whether the owners' consent was negated by the pressure, but whether the pressure was permissible pressure to exert.⁸⁴ Given his finding that the pressure was based on fraud, it would seem that duress should have been a further ground for relief, although in the circumstances it would have been immaterial, given that relief was available for fraud anyhow.

8-016

In *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*⁸⁵ ship-builders who were building a ship under a contract for the plaintiffs, threatened, without any legal justification, to terminate the contract unless the plaintiffs agreed (within a few days) to increase the price by 10 per cent. The owners had chartered the vessel to Shell at very favourable rates and feared that they would lose the charter if the vessel were delivered late, so they reluctantly acquiesced in this demand, but under protest, and without prejudice to their rights. Mocatta J. held⁸⁶ that this amounted to a case of economic duress, and that the plaintiffs would have been entitled, on that ground, to have refused payment of the additional 10 per cent. But he went on to hold that the owners had, by implication, affirmed the contract, or waived their right to avoid it for duress, even though they had not intended to do so; the basis for this part of his decision was that the owners had failed to raise the matter at any further stage, paying the extra instalments, and taking delivery of the ship in due course, and so giving the builders grounds for belief that the owners had affirmed the variation in price.

8-017

The Privy Council case is *Pao On v Lau Yiu Long* ⁸⁷ in which again the allegation was made that a party had secured an amendment to a prior commercial transaction of some complexity, as a result of a threat to break his contract. Here also the Privy Council conceded that economic duress could be recognised in principle, but held that the plea was not made out on the facts. The speech of Lord Scarman emphasised that the defendant in this case had carefully considered his position when faced with the threatened breach of contract, and had concluded that it was in his interests to grant the concession demanded rather than to sue on the original contract. In determining the validity of the plea of duress in such circumstances, Lord Scarman said that:

“... it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it.” ⁸⁸

Lord Scarman did, however, draw attention to American case law which stressed the effectiveness of alternative remedies available to the party allegedly coerced; and it seems clear that it would no longer be regarded as an adequate answer to a plea of duress that the party coerced had a legal remedy which he could in due course have pursued in the courts. The all-important question in practice is whether, having regard to all the circumstances, that remedy is a practical and effective one. If it would have been, the complainant may have difficulty in persuading the court to grant relief. ⁸⁹ If it would not, a case of duress may be made out.

8-018

The fourth case is *Universe Tankships of Monrovia v International Transport Workers Federation* ⁹⁰ in which the defendant trade union had “blackened” the plaintiffs’ ship in port, and refused to release her except on payment of a large sum of money; most of the money was claimed as back pay on behalf of seamen on the ship, but a part of it was a payment for the union’s welfare fund. The Court of Appeal, affirming Parker J., held that the union’s actions constituted duress which would prima facie have justified the shipowners in recovering the money, because the coercive nature of the threat was so powerful, and at common law involved unlawful pressure on various third parties to break their contracts. But the Court of Appeal went on to hold that the union’s conduct was protected by the statutory immunities in the Trade Union and Labour Relations Act 1974, because it was in the course of, or in furtherance of, a trade dispute under that Act. The “trade dispute” defence was disallowed in the House of Lords where the finding of economic duress was not challenged. The decision involves rejection of the defendants’ argument that a plea of duress requires the party guilty of the duress to appreciate that the other party is acting under duress. In effect, this was an attempt to revive, in a slightly different form, the argument that payments made under duress are only recoverable if they are paid under protest; as already seen (above, para.8-013) this view has been rejected in a number of previous cases.

8-019

The doctrine of economic duress is therefore now clearly established and its existence was accepted by the House of Lords in *Dimskal Shipping Co Ltd v I.T.W.F.* ⁹¹ It has been applied in a number of other cases. ⁹² For example, in *B. & S. Contracts & Design Ltd v Victor Green Publications Ltd* ⁹³ the plaintiffs had contracted to erect an exhibition stand for the defendants at Olympia, but their workmen went on strike. To get the work done the defendants agreed to contribute £4,500 to pay off the workmen’s claims. It was held by the Court of Appeal that this promise was made under duress as the defendants had no realistic alternative ⁹⁴ but to promise to pay, given the serious threat to their economic interests.

Relationship between doctrine of consideration and economic duress

8-020

In the first three cases cited in paras 8-015—8-017, the parties were already in a contractual relationship; in these circumstances, a variation of the contract secured by one party as a result of threats to break the contract might until recently have been viewed as invalid on the ground of lack of consideration, irrespective of any issue of economic duress. Thus, in *D & C Builders Ltd v Rees*⁹⁵ the defendants, who owed the plaintiffs some £482, refused to pay anything unless the plaintiffs would accept £300 in full satisfaction of the claim; the plaintiffs (as the defendants knew) were in desperate financial straits, so that recourse to law was not a practicable remedy, and they accepted the £300, giving a receipt in full satisfaction. It was held that this was not a valid surrender of their claim to the balance because of the absence of consideration.⁹⁶ The case could, it is submitted, now be supported on the ground of economic duress. In contrast, in cases in which a promise is made to pay an additional sum to the promisee if the latter will perform its existing contractual duty, but where there is no duress, the law has recently undergone a marked change. In *Williams v Roffey Bros & Nicholls (Contractors) Ltd*⁹⁷ a carpentry subcontractor which had under-priced work on a number of flats was having difficulty in completing it on time. The contractor promised an additional payment for each flat finished. It was held that this promise was enforceable although the subcontractor was only performing its existing obligation; in the absence of duress the “practical benefit” to the contractor, that if the work was finished on time it would avoid liability for liquidated damages under the main contract, constituted consideration. Although in this case the subcontractor made no threat,⁹⁸ the decision suggests that not every case in which a party agrees to make an extra payment in order to obtain the performance originally promised is one of duress, nor perhaps will every agreement secured by a threat to break a contract be voidable. As will be seen later, a “threat” to break a contract which is in fact no more than a statement of the inevitable that will happen unless an extra payment is made may not amount to duress⁹⁹; and even when a breach is not inevitable in that sense, a threat coupled with a demand for extra payment may sometimes be seen as legitimate.¹⁰⁰ Nor does the fact that there was some consideration rule out any question of duress. Where the consideration is only trifling, it is suggested that its inadequacy may be relevant in establishing that the variation of the contract has been secured by improper pressure.

Non-contractual payments

8-021

So far as the law of duress is concerned, there appears to be no difference between a payment made in pursuance of a contract or a variation of a contract procured under duress, and one made on a noncontractual basis in response to an illegitimate threat. Although in the first situation it is technically the case that the contract or contractual variation must first be set aside, it seems that the definition of duress that applies in the two situations is the same.¹⁰¹

Different approaches to economic duress

8-022

Although the doctrine of economic duress is now firmly established, there remains considerable doubt and some disagreement over the circumstances in which relief will be granted, and how the decisions are best explained. It is evident from the dicta in *Occidental Worldwide Investment Corp v Skibs A/S Avanti*¹⁰² and the decision in the *Pao On* case¹⁰³ that a party who has agreed to a contractual variation cannot always avoid the variation simply because the other party had threatened to break the contract if it was not varied and this threat had some influence on the party seeking relief. Something more must be shown. Those cases referred to the party’s consent being vitiated. Now that the vitiation of consent approach has been discarded,¹⁰⁴ what additional elements have to be shown?

Special causal or other requirements?

8-023

Earlier it was suggested that the critical questions are, first, the nature of the pressure or the threats and, secondly, their effect on the victim. One possible interpretation of the economic duress cases is that, compared to other cases of duress, there are additional requirements that go to the second element, causation. Possibly the claimant needs to show more than that his decision to enter the contract was affected by the illegitimate threat. He might, for instance, have to show that the threat was the overwhelming reason for the variation, or that in an objective sense he had no reasonable alternative—in other words, that any reasonable person in the same predicament would have acted in the same way. These arguments will be rejected. It will be submitted that the necessary causation is established if the claimant shows that, but for the threat, he would not have entered the contract, and that lack of a reasonable alternative should be treated as a matter of evidence rather than as an independent requirement. On the other hand, it would appear that, in contrast to physical duress, it is not sufficient that the economic duress was merely a reason for the victim entering the contract even though he might have concluded the contract for other reasons: the “but for” test must be satisfied.

Legitimacy of the demand

8-024

Another possible interpretation looks to the nature of the pressure or threat. It is arguable that for a contract to be voidable for economic duress, the threat must not only have been wrongful but illegitimate in the sense of being without any commercial or similar justification. It will be suggested that not every threat to break a contract is illegitimate in this sense, and that where the threat is one to breach a contract it will suffice only if it is made in support of a demand that is illegitimate. In the sections that follow we will consider first causation and lack of a reasonable alternative, and then the legitimacy of the demand.

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1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
 20. Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), pp.192–218.
 83. [1976] 1 Lloyd's Rep. 293, noted (1976) 92 L.Q.R. 496.
 84. It might, however, be said that his finding that consent was not negated was tantamount to finding that the pressure was not of sufficient *weight* to constitute duress, see below, para.8-031.
 85. [1979] Q.B. 705.
 86. Relying, inter alia, on *Parker v G.W.R.* (1844) 7 M. & G. 253; *G.W.R. v Sutton* (1869) L.R. 4 H.L. 226; *Close v Phipps* (1844) 7 M. & G. 586; *Fernley v Branson* (1851) 20 L.J.Q.B. 178; *Nixon v Furphy* (1925) 25 S.R. (N.S.W.) 151; *Smith v William Charlick* (1924) 34 C.L.R. 38, 56; and *D & C Builders Ltd v Rees* [1966] 2 Q.B. 617, as to which see below, para.8-020.
 87. [1980] A.C. 614.
 88. [1980] A.C. 614, 635.
 89. See below, para.8-032, where the question whether absence of a reasonable alternative is a separate requirement is discussed.
 90. [1981] I.C.R. 129, reversed [1983] A.C. 366.
 91. [1992] 2 A.C. 152, 159, 160, 162, 165, 170.

- [92.](#) *B. & S. Contracts & Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] Q.B. 833 (carrier refused to perform without extra payment after miscalculating number of cartons it could carry per load); *The Alev* [1989] 1 Lloyd's Rep. 138 (owner demanded "financial assistance" from consignee before it would deliver goods under freight pre-paid bills when charterer had failed to pay hire); *Carillion Construction Ltd v Felix (UK) Ltd* [2001] B.L.R. 1 (sub-contractor threatened to withhold performance if main contractor did not settle contested account); *Cantor Index Ltd v Shortall* [2002] All E.R. (D) (Nov) (payment made under threat to close customer's bets); *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm); *Borrelli v Ting* [2010] UKPC 21 (a case of illegitimate pressure which did not take the form of a threat: above, para.8-011); *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm), [2012] 1 Lloyd's Rep. 501. See also *Alec Lobb Ltd v Total Oil G.B. Ltd* [1983] 1 W.L.R. 87 (varied on other points, [1985] 1 W.L.R. 173); *Dimskal Shipping Co Ltd v I.T.W.F.* [1992] 2 A.C. 152; *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All E.R. 714 (below, para.8-047); *Sapporo Breweries Ltd v Lupofresh Ltd* [2012] EWHC 2013 (QB) (at [55]); *Finance Ltd v Bank of New Zealand* (1993) 32 N.S.W.L.R. 50 (CA, N.S.W.).
- [93.](#) [1984] I.C.R. 419.
- [94.](#) On the question of absence of choice see below, para.8-032.
- [95.](#) [1966] 2 Q.B. 716; see also *T.A. Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Ltd* (1956) 56 S.R. (N.S.W.) 323.
- [96.](#) See above, para.4-118.
- [97.](#) [1991] 1 Q.B. 1. See above, para.4-069.
- [98.](#) See further below, para.8-041. Compare *South Caribbean Trading Ltd v Trafigura Beheever BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep. 128 at [107]–[109] (*Williams* doubted but not applicable because economic duress).
- [99.](#) See below, para.8-041.
- [100.](#) See below, paras 8-038—8-045.
- [101.](#) *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All E.R. 714, 717.
- [102.](#) [1979] Q.B. 705; above, para.8-015.
- [103.](#) [1980] A.C. 614; above, para.8-017.
- [104.](#) See above, paras 8-004—8-009.

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Causation in general

8-025

In all cases of duress it is necessary that the victim's agreement was caused by the duress. ¹⁰⁵ However, it appears that the nature of the causation required differs according to the nature of the duress.

Causation in duress to the person

8-026

In *Barton v Armstrong* ¹⁰⁶ the Privy Council, relying on the analogy of fraud, ¹⁰⁷ held that it was sufficient that the threat was a reason for the victim entering the contract: not only it did not have to be the predominant reason, but the victim was entitled to relief even if he had not shown that he would not have entered the contract without the threat. It would be up to the party who made the threat to show that it had not influenced the victim in any way. ¹⁰⁸

Causation in duress to goods

8-027

In cases of duress to goods, it seems that the threatened seizure must have been a significant cause ¹⁰⁹ of the victim's agreeing to the contract or payment. Thus the victim will not be entitled to avoid the contract if he had an effective alternative remedy, for example to obtain an injunction to prevent the seizure, though it is recognised that a legal remedy may be of no avail if the victim has an urgent need for the goods. ¹¹⁰ The victim will also be unable to avoid the contract if it was a "voluntary settlement" of the other party's claim. The meaning of this is not wholly clear ¹¹¹ but it appears that relief will be denied if the threat was not the reason for the victim agreeing to the other party's demand. Nor is it clear exactly what is meant by "significant cause". Relief will be denied if the threat did not influence the victim at all, so that it was not even "one of the reasons" for the victim agreeing to the other party's demand. ¹¹² On the other hand, it seems unlikely that the courts will apply the analogy of fraud as they do in cases of duress to the person. ¹¹³ Thus the victim will not have the benefit of the reversed burden of proof in the same way as the victim of duress to the person ¹¹⁴ nor that it will suffice that the threat was merely "one reason" for his actions or "present to his mind". ¹¹⁵ It seems likely that the victim must show that, "but for" the threat, he would not have entered the contract. We will see that it has been said that this is the appropriate test of causation in economic duress ¹¹⁶ and, given the similarity of duress of goods and economic duress, the same test of causation seems appropriate.

Causation in economic duress: “but for”

8-028

❗ In *Dimskal Shipping Co SA v I.T.W.F.* ¹¹⁷ Lord Goff said that there may be duress where “the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter the relevant contract”. This dictum indicates that, as cases of duress of goods, ¹¹⁸ the victim will not have the benefit of the reversed burden of proof in the same way as the victim of duress to the person, ¹¹⁹ nor will it suffice that the threat was merely “one reason” for his actions or “present to his mind”. As Mance J. said in *Huyton v Cremer*, ¹²⁰ by “significant cause” Lord Goff meant that what the judge termed the “relaxed view” of causation in the special context of duress to the person does not apply to economic duress. ¹²¹ ❗ Mance J. said:

“... the minimum basic test of subjective causation in economic duress ought ... to be a ‘but for’ test. The illegitimate pressure must have been such as actually caused the making of the agreement, in the sense that it would not otherwise have been made either at all or, at least, in the terms in which it was made. In that sense, the pressure must have been decisive or clinching. There may of course be causes where a common sense relaxation ... is necessary, for example in the event of an agreement induced by two concurrent causes, each otherwise sufficient to ground a claim of relief, in circumstances where each alone would have induced the agreement.” ¹²²

Adopting a “but for” test would place cases of economic duress on a par with cases of negligent or non-negligent misrepresentation. ¹²³ This seems appropriate. Only in the special circumstances of duress to the person, as with cases of fraudulent misrepresentation, should relief be given merely because the threat or fraud had some influence on the mind of the victim.

Voluntary submission

8-029

Confirmation of the need for “but for” causation comes from indications that relief will be denied if the reason for the victim’s agreement was that he was prepared to pay it anyway. This may have been relevant in the *Pao On* case, ¹²⁴ where the actual decision seems to have rested on the fact that the defendants thought that they would lose very little by granting the amendment sought. ¹²⁵

Additional causal elements?

8-030

After the passage quoted in para.8-028 above, Mance J. continued:

“On the other hand it also seems clear that the application of a simple ‘but for’ test of subjective causation in conjunction with an actual or threatened breach of duty could lead too readily to relief being granted.”

Thus it seems that Mance J. considered that there may be other elements to economic duress. ¹²⁶ Whether these relate to causation or to the nature of the threat remains to be discussed.

“Predominant cause” not required

8-031

As mentioned earlier, ¹²⁷ some cases of economic duress applied the test of whether the victim's will was overborne so that he did not consent to the contract. This suggested that relief was only possible if the threat was the overwhelming reason for the victim's decision. However, the "overborne will" test has now been abandoned. ¹²⁸ This, together with Lord Goff's dictum quoted above, suggests that the combination of threat and other pressures need not be overwhelming, "the only reason" the victim entered the contract.

Reasonable alternative

8-032

It is certainly relevant whether or not the victim had a reasonable alternative. The victim's lack of choice was emphasised by Lord Scarman in the *Pao On* ¹²⁹ and *Universe Sentinel* ¹³⁰ cases and has clearly been an important factor in those cases in which relief has been given. ¹³¹ It is not clear whether this is a prerequisite or merely evidential ¹³², but it seems that if the victim had a reasonable alternative to submitting to the other party's demand, he will seldom obtain relief. ¹³³ This is sometimes explicable on causal grounds. Thus a refusal, in breach of contract, to supply goods unless some extra consideration is supplied by the buyer, may lack genuine coercive force where alternative supplies are available in the market. Similarly, where the party claiming relief had adequate time to claim redress at law, and there is no reason to think that this would not protect or compensate him, submission to the threat may simply reflect that party's belief that his best interests would be served by such submission rather than by resort to the courts. The existence of a reasonable alternative may have been relevant in the *Pao On* ¹³⁴ decision itself: Lord Scarman referred in general terms to American case law stressing the importance of examining the alternatives available to the party claiming relief. ¹³⁵ But it is possible to argue that the existence of a reasonable alternative is not be just a matter of proving causation. Cases can be imagined in which the illegitimate demand was the factor which "tipped the balance" and led to the victim agreeing to the demand even though he had an alternative. It is not clear that relief would be available even though "but for" causation was satisfied. It has been said that "economic duress can only provide a basis for avoiding a contract if there was no real alternative". ¹³⁶ This suggests that a plea of duress would fail if a reasonable person would have thought that an alternative was practical, even if the actual victim did not and it is shown that he would not have entered the contract but for the threat.

Reasonable alternative: a matter of evidence

8-033

❗ Mance J. has said that even though it is clear that the innocent party would never have acted as he did but for the threat, relief may be denied if he had "an alternative remedy which any and possibly some other reasonable persons would have pursued", so that he could have resisted the pressure. ¹³⁷

❗ He said where the threatened party had such an alternative, relief will seldom be appropriate. However, the judge also remarked that absence of a reasonable alternative was not "an inflexible third ingredient" (in addition to illegitimate pressure and causation). ¹³⁸ It is submitted that absence of a reasonable alternative is not an absolute requirement but rather very strong evidence of whether the victim was in fact influenced by the threat. ¹³⁹

Gravity of threat

8-034

For similar reasons it is likely that the threat must normally be one of some gravity. This is to some extent implicit in the factors to which attention must be had, as specified by Lord Scarman in the *Pao On* case. ¹⁴⁰ For if attention must be paid to the alternative remedies available to the threatened party

(and their effectiveness), it is evident that minor threats, even if unlawful or improper, can normally give no redress in contract law: the party threatened ought to pursue his other remedies. How serious the threats must be in order to constitute duress may depend on the physical and mental condition of the person threatened. Weakness of intellect or fear, whether reasonably entertained or not, may be relevant factors which should be taken into account.¹⁴¹ However, it is submitted that the seriousness of the threat is also a matter of evidence as to whether the victim was coerced by it (or possibly of whether he had a reasonable alternative, if, contrary to what was submitted above, that is required), rather than an independent requirement.

Protest

8-035

In the *Pao On* case¹⁴² it was said that it was relevant whether or not the victim protested. This again seems to be a question of evidence as whether or not the threat had a coercive effect. It has been accepted for many years that when a payment is made in order to avoid the wrongful seizure of goods, protest “affords some evidence ... that the payment was not voluntarily made”,¹⁴³ but that the fact that the payment was made without protest does not necessarily mean that the payment was voluntary.¹⁴⁴

Independent advice

8-036


Likewise in the *Pao On* case¹⁴⁵ it was said that it is relevant whether or not the victim had independent advice. The relevance of this is perhaps less obvious: access to legal advice, for example, will not increase the range of options available to the victim, and lack of advice therefore cannot be an absolute requirement. However, whether or not the victim appreciated that he had an alternative remedy and what the practical implications of following it would be are relevant to the question of causation.¹⁴⁶


Conclusion on causation in economic duress

8-037


❗ It is submitted that for a contract to be voidable on the grounds of economic duress, the usual rule of causation should apply: the victim must show that “but for” the threat he would not have entered the contract.¹⁴⁷ It is not necessary that the victim shows that the threat was the predominant reason for him entering the contract or that it was particularly coercive. On the other hand, it is insufficient that the economic pressure was merely “a reason” for the victim entering the contract. The question of reasonable alternative is more difficult. The combination of a wrongful threat without which the innocent party would not have agreed to the contract and the absence of any reasonable alternative are clearly very important factors and some writers have argued that they are the ingredients of economic duress.¹⁴⁸ ❗ Others however have argued that other factors not related to causation are more relevant. These will be explored in the next section and, as we shall see, there is some judicial support for this view. As to causation, it is submitted that while the victim will seldom obtain relief unless the threats were of some gravity or if he had a reasonable alternative, this is because without these factors he will fail to convince the court that he would not have entered the contract but for the threat, rather than absence of a reasonable alternative being an independent requirement of economic duress.¹⁴⁹

1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).

- [20.](#) Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), pp.192–218.
- [105.](#) See the speech of Lord Goff in *Dimskal Shipping Co SA v I.T.W.F.* [1992] 2 A.C. 152, 165.
- [106.](#) [1976] A.C. 104.
- [107.](#) cf. above, para.7-039.
- [108.](#) [1976] A.C. 104, 120, 121.
- [109.](#) See the speech of Lord Goff in *Dimskal Shipping Co SA v I.T.W.F.* [1992] 2 A.C. 152, 165.
- [110.](#) *Astley v Reynolds* (1731) 2 Stra. 915, 916.
- [111.](#) See Burrows, *Law of Restitution*, 3rd edn (2011), pp.255–256.
- [112.](#) cf. *Barton v Armstrong* [1976] A.C. 104, above, para.8-026.
- [113.](#) See para.8-026.
- [114.](#) cf. *Barton v Armstrong* [1976] A.C. 104.
- [115.](#) cf. above, paras 7-038—7-039.
- [116.](#) See next paragraph.
- [117.](#) [1992] 2 A.C. 152, 165.
- [118.](#) See previous paragraph.
- [119.](#) But note the contrary authority of *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 N.S.W.L.R. 40.
- [120.](#) *Huyton SA v Peter Cremer GmbH* [1999] 1 Lloyd's Rep. 620, 636; *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm) at [92].
- [121.](#)  See also Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), paras 10–73—10–74. It has been suggested that a defendant who has used both duress and misrepresentation will not be allowed to argue that the “but for” test is not satisfied in relation to one wrong because the claimant would still have entered the contract because of the defendant’s other wrong: *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2017] EWHC 1367 (Ch) at [258].
- [122.](#) [1999] 1 Lloyd's Rep. 620, 636. But see further below, para.8-030.
- [123.](#) See above, para.7-038.
- [124.](#) *Pao On v Lau Liu Long* [1980] A.C. 614, above, para.8-017. Birks, *Introduction to the Law of Restitution* (1985), p.183; compare Burrows, *Law of Restitution*, 3rd edn (2011), p.269.
- [125.](#) [1980] A.C. 614, 635.
- [126.](#) *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep. 620, 637. See also *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293; above, para.8-015 where the plea of duress was rejected on the basis that the owners were subjected only to “normal commercial pressures”.
- [127.](#) Above, para.8-005.

- [128.](#) Above, para.8-005.
- [129.](#) *Pao On v Lau Liu Long* [1980] A.C. 614, 635. See also Halson (1991) 107 L.Q.R. 649.
- [130.](#) “The classic case of duress is, however, not the lack of will to submit but the victim’s intentional submission arising from the realisation that there is no practical choice open to him”: [1983] 1 A.C. 366, 400.
- [131.](#) e.g. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705; *B. & S. Contracts & Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419; *The Alev* [1989] 1 Lloyd’s Rep. 138. cf. *Adam Opel GmbH v Mitras Automotive UK Ltd* [2007] EWHC 3252 (QB), [2007] All E.R. (D) 272 (Dec) (in circumstances, injunction not a adequate alternative to nullify pressure caused by threat to refuse to deliver supplies: at [33]); *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm), [2010] 2 Lloyd’s Rep. 653 (if did not perform, victim would face having very large claims which were unsecured: see at [94]).
- [132.](#) See Beatson, *The Use and Abuse of Unjust Enrichment* (1991), pp.122–126.
- [133.](#) *Huyton SA v Peter Cremer GmbH* [1999] 1 Lloyd’s Rep. 620, 638.
- [134.](#) [1980] A.C. 614.
- [135.](#) For examples, see *Tristate Roofing Co of Uniontown v Simon* (1958) A.2d. 333, 335; *Gallagher Switchboard Corp v Heckler Electric Co* (1962) 229 N.Y.S. 2d. 623, 630.
- [136.](#) Sir John Donaldson M.R. in *Hennessy v Craigmyle & Co Ltd* [1986] I.C.R. 461, 468.
- [137.](#)  *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd’s Rep. 620, 638. The objective approach to whether there was a reasonable alternative is criticised in Goff and Jones, 9th edn (2016), paras 10-75 and 10-77; and the authors point out that in fact the courts seem quite ready to accept that the victim had no real alternative: Goff and Jones, 9th edn (2016), paras 10-75 and 10-77.
- [138.](#) *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd’s Rep. 620, 638. In *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] B.L.R. 530, para. 638, Dyson J. said “compulsion on, or lack of practical choice for, the victim” was one of “the ingredients of actionable duress”; but it is suggested that he did not mean lack of practical alternative to be an absolute requirement, since (also at [31]) he listed “whether the victim had any realistic practical alternative but to submit to the pressure” as one a range of factors to be taken into account: see below, para.8-045.
- [139.](#) This was accepted in *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm) at [92].
- [140.](#) *Pao On v Lau Yiu Long* [1980] A.C. 614; above, para.8-017.
- [141.](#) *Scott v Sebright* (1866) 12 P.D. 21.
- [142.](#) *Pao On v Lau Yiu Long* [1980] A.C. 614.
- [143.](#) *Maskell v Horner* [1915] 3 K.B. 106, 120.
- [144.](#) See below, para.29-117.
- [145.](#) *Pao On v Lau Yiu Long* [1980] A.C. 614; above, para.8-017.
- [146.](#) *Hennessy v Craigmyle & Co Ltd* [1986] I.C.R. 461; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), para.4-025.

[147.](#) Contrast N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), paras 4-011—4-014, who favours applying the *Barton* test (see above, para.8-026).

[148.](#)  Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), p.225.

[149.](#) See also N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), paras 4-020 and 4-024—4-030.

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Threat to commit an unlawful act

8-038

As already indicated, it is clear that not all threats can be regarded as improper or illegitimate, and it is necessary in the law of duress to distinguish between legitimate and other forms of pressure or threats. Prima facie it is thought to be clear that a threat to commit an unlawful act will constitute an improper threat for the purposes of the law of duress. ¹⁵¹ Certainly a threat to commit a crime or a tort as a means of inducing the coerced party to enter into some contract must prima facie be improper. ¹⁵² However, this may not be true of every threatened wrong, particularly a threat to break a contract.

Threat to break a contract

8-039

When the threatened wrong is a breach of contract it seems that the victim will not necessarily be entitled to relief even if he would not have agreed "but for" the threat and possibly ¹⁵³ even if he had no reasonable alternative. The decisions in *Occidental Worldwide Investment Corp v Skibs A/S Avanti* ¹⁵⁴ and *Pao On v Lau Liu Long* ¹⁵⁵ suggest that something more than this is required. It is possible that in cases where the threat is one of breach of contract, some additional factor is required. As we saw earlier, one possible "additional factor" is that the combination of the threat and commercial pressures were overwhelming, but that "causal" approach was rejected. ¹⁵⁶ An alternative possibility is that the additional factor that may be required is that the threatened breach of contract must be regarded as "illegitimate pressure", and that in some circumstances a threat of a breach of contract may be regarded as not illegitimate.

Can a threatened breach be "legitimate"?

8-040

This possibility is suggested by American cases. Where unexpected difficulties arise in the performance of a contract (even if they do not amount to frustrating circumstances) it is often commercially reasonable for one party to claim extra remuneration, or some other extra-contractual concession, as the price of his continuing with performance. In these circumstances, a threat to break the contract unless the extra consideration is forthcoming may well be regarded as a legitimate form of commercial pressure ¹⁵⁷ where the unanticipated difficulty means that he is genuinely unable to perform without an extra payment, and possibly also if the threatening party acts in the bona fide belief that he is entitled to some extra payment or if the demand is in some sense "fair". We will consider these three possibilities in turn.

Statement of the inevitable is not a threat

8-041

A genuine inability to perform without the promised payment might have been significant in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* ¹⁵⁸ had the subcontractor demanded extra payment. On the facts there was no duress because no threat was made: the initiative for the extra payment came from the contractors. ¹⁵⁹ If, however, the subcontractors had said that without extra payment, they would be unable to perform, and the main contractors had then promised the extra payment, it seems unlikely that the main contractors could have avoided the promise to pay extra on the ground of duress. There are a number of ways in which this result could be explained. One is that a party who truthfully states that, without the extra payment or concession demanded, he will be unable to perform is not making a threat; he is simply stating a fact. ¹⁶⁰ This is not a matter of the words used; the courts have recognised that a threat may be implicit. ¹⁶¹ Thus where an agreement is entered into not because of a threatened breach of contract but through fear of prosecution, it was said that:

“... not only is no direct threat necessary, but no promise need be given to abstain from a prosecution. It is enough if the undertaking were given to prevent a prosecution and that desire were known to those to whom the undertaking was given.” ¹⁶²

A “veiled threat” has been held to constitute duress. ¹⁶³ But if it is genuinely the case that the party will be forced to default if he is not paid extra, for instance because he will inevitably become bankrupt, he cannot be regarded as making a threat because he is powerless to prevent his default. ¹⁶⁴ It would seem appropriate to uphold any variation that the other party agrees or extra payment that he makes in such circumstances. ¹⁶⁵ However, this is quite a narrow exception. It may be the case that it is not impossible for the party to perform without the extra payment but doing so will cause him very severe hardship.

Bad faith

8-042

❗ Another approach is to say that a demand made in bad faith is illegitimate and may amount to duress. ¹⁶⁶ There is some judicial support for the good or bad faith of the party exerting the pressure being relevant. ¹⁶⁷ One difficulty, however, is to know what is meant by good faith or bad faith. It seems correct to say that a party who exploits the other's position to demand a payment that is unrelated to the contract, and to which he knows he has no legal or moral right, is guilty of economic duress. ¹⁶⁸ However, a demand may constitute economic duress even though the demand is related to the contract, and it is not necessary that the threatening party was deliberately exploiting the victim's position. ¹⁶⁹ One interpretation is that a party is in bad faith unless he honestly believes that his demand is legally justified, but it is not evident that every claim which is known not to have a legal basis should be treated as made in bad faith; nor conversely that any claim that is honestly made should be acceptable however little legal justification for it there may be. If the claim is genuinely made, the other party may of course agree to it because it seems fair rather than because of the threat, but that will not necessarily be the case: the threat may still be a “but-for” cause of the victim's agreement. ¹⁷⁰ ❗ If a party makes a claim that it knows to be bad, any compromise that results may lack consideration, ¹⁷¹ so that the compromise is unenforceable on that ground. Provided however that there is other consideration, in some situations—for example, when a claim is made by a party who has been confronted with unexpected difficulty or expense not amounting to frustration ¹⁷²—it might be argued that the claim should not be regarded as illegitimate for the purposes of duress even though the party knows that there is no legal basis for it but honestly believes that the demand is justifiable in commercial terms. On existing authorities, however, it seems that good faith in this sense does not preclude a finding of economic duress. ¹⁷³ Similar circumstances may have obtained in the *North Ocean Shipping* case, ¹⁷⁴ yet it was held that there was economic duress. Thus the role of good faith or bad faith in economic duress is uncertain. While one judge has expressed the view that good or bad faith is irrelevant, ¹⁷⁵ other judges have said that the good or bad faith of the party making the

threat may be a relevant factor. ¹⁷⁶

Fairness of the demand

8-043

⚠ In the cases, some of the demands appear to have been made in order to rectify an apparent imbalance in the existing contract; others appear to have been unrelated to any such factor. Where the demand is recognised by the “victim” as fair, that may lead to the conclusion that he was not really influenced by the threat so much as by a desire to help out the other party, and thus the necessary causal link will be missing. ¹⁷⁷ ⚠ But if it is clear that the threat did have a significant influence, it does not seem that the fact that the demand might rectify an imbalance in the contract will make the demand legitimate. In *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* ¹⁷⁸ the plaintiffs miscalculated the number of cartons of the defendants’ goods that they could carry on a trailer load for delivery to a retail chain and, when they discovered the truth, stated that they would not carry any more cartons without an extra payment. The defendants were heavily reliant on the contract with the retail chain and were unable to find an alternative carrier, so they agreed; but later they refused to pay the extra charges. Tucker J. held that their consent had been vitiated by duress. ¹⁷⁹ Although the mistake was the plaintiffs’ and unknown to the defendant, it seems likely that the latter did get the benefit of cheaper rates than normal for the goods to be carried. Nor would an evaluation of the “fairness” of the changed contract be consistent with the courts’ normal approach. ¹⁸⁰

Conclusion on legitimacy of threat to break contract

8-044


It is thus difficult to state with confidence whether a threat of a breach of contract will ever be regarded as legitimate and, if so, in what circumstances. It is submitted that deliberate exploitation of the victim’s position with a view to gaining some advantage, particularly one unrelated to the contract and to which the threatening

party knows he is not entitled, is clearly illegitimate. ¹⁸¹ At the other end of the scale, an apparent threat should not be treated as illegitimate if it was really no more than a true statement that, unless the demand is met, the party making it will be unable to perform. The difficult case is that of the party who has a genuine belief that he is entitled to the amount demanded. It is submitted that, by analogy to the cases in which it has been held that there is consideration for a compromise of a claim which is in fact bound to fail if the party making the claim honestly and reasonably believed in its validity, ¹⁸² a party who honestly and not unreasonably believes that he has a legal claim is not acting in bad faith by demanding what he thinks is due. A court should hesitate to find that the demand was illegitimate. It is also suggested that a demand made in good faith in the sense that the party demanding has a genuine belief in the moral strength of his claim—for example, because he has encountered serious and unexpected difficulties in performing and will suffer considerable hardship if his demand is not met; or to correct an acknowledged imbalance in the existing contract—may in some circumstances also be treated as legitimate. Here the behaviour of the victim, for example whether he protests, will be relevant. First, as argued earlier, ¹⁸³ it will go to causation: if the victim pays without protest, that may be evidence that he was not influenced by the threat. But secondly, payment without protest may leave the demanding party believing that the justice of his demand is admitted, whereas it will be harder for him to prove that he was acting in good faith if he ignores the victim’s protests.

A range of factors


8-045



⚠ However, it is doubtful whether either the good faith of the party making the threat or the apparent fairness of his demand provides a touchstone by which to determine whether a threatened breach of

contract which influenced the victim and which left him no reasonable alternative amounts to economic duress. In analogous doctrines, such as undue influence, the courts have refused to lay down precise limits to the doctrine.¹⁸⁴ This is with good reason: the facts with which they are presented can vary widely. We can expect the courts to maintain the same fluid approach to economic duress. It is clear that the threat must be made, as opposed to a warning being given.¹⁸⁵ The threat must influence the victim, at least to the extent that he would not have entered the contract from which he seeks relief “but for” the threat.¹⁸⁶ He will seldom have a remedy if he had a reasonable alternative.¹⁸⁷ The threat must be “illegitimate”, and this normally¹⁸⁸ requires that the threat is of a breach of contract or other civil wrong.¹⁸⁹ But threat of a breach of contract which caused him to enter the contract or variation agreement may not suffice: he may have to show more than these facts, and what the additional facts will be is not rigidly defined. The degree of commercial pressure that combined with the threat to influence him, the good faith or bad faith of the party making the threat and possibly even the fairness of the latter’s demand may all be taken into account.¹⁹⁰  In other words, the courts take into account a range of factors. As Dyson J. has said:

“In determining whether there has been illegitimate pressure, the courts take into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressure of normal commercial bargaining.”¹⁹¹

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1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
 20. Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), pp.192–218.
 150. See Beatson, *The Use and Abuse of Unjust Enrichment* (1991), pp.117–129; Burrows, *Law of Restitution*, 3rd edn (2011), especially pp.267–268.
 151. In *Dimskal Shipping Co SA v ITWF, The Evia Luck* [1992] 2 A.C. 152 the House of Lords held that the question of whether economic pressure amounted to duress was prima facie a matter for the proper law of the contract, so that whether the conduct was lawful or not fell to be determined by the proper law of the contract rather than by that of the place where the threat was made. In *Royal Boskalis Westminster NV v Mountain* [1999] Q.B. 674, 689, 730 it was said that, nonetheless, counsel had been correct to concede, in the light of *Kaufman v Gerson* [1904] 1 K.B. 591, that some forms of duress are so shocking that English law would not enforce a contract made under such duress irrespective of whether the threat would be acceptable, and the contract valid, under the governing law. See below, para.30-368.
 152. See the American Restatement of Contract, para.176(1).
 153. See above, para.8-037.
 154. [1976] 1 Lloyd’s Rep. 293; above, para.8-015.
 155. [1980] A.C. 614; above, para.8-017.
 156. See above, para.8-031.
 157. See, e.g. *Goebel v Linn* (1882) 11 N.W. 284; *Linz v Schuck* (1907) 67 A. 286. There is a sense

- in which the *Pao On case* [1980] A.C. 614 also resembles these cases inasmuch as the variation obtained by the alleged duress was needed to put right what was an obvious commercial omission or mistake in the original contract.
- [158.](#) [1991] 1 Q.B. 1; above, para.8-020.
- [159.](#) But see further below, para.8-043.
- [160.](#) Birks, *An Introduction to the Law of Restitution* (1985), p.183. cf. *Biffin v Bignell* (1862) 7 H. & N. 877, where it was held to be no duress to warn the promisor that the probable consequence of her failure to agree would be her continued detention in a lunatic asylum.
- [161.](#) See Birks [1990] L.M.C.L.Q. 342, 346.
- [162.](#) *Mutual Finance Co Ltd v John Wetton & Sons Ltd* [1937] 2 K.B. 389, 395. Thus in *Williams v Bayley* (1866) L.R. 1 H.L. 200 a father executed a mortgage to a banker, who insisted on this course as he had it in his power to prosecute the father's son for forgery. There was no direct threat of a prosecution, but the mortgage was executed in return for the delivery up of the documents forged. It was held that the mortgage was unenforceable in equity as the father was not a free and voluntary agent since he knew that unless he undertook the liability his son would be prosecuted.
- [163.](#) *B. & S. Contracts & Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419.
- [164.](#) Posner (1977) 6 J.L.S. 411 makes the telling point that if a party will become bankrupt unless he is promised extra, it is very much in the promisor's interest to be able to make a binding promise to pay the extra amount in order to get the work finished, even though the promisor has no practical choice.
- [165.](#) Halson (1991) 110 L.Q.R. 649.
- [166.](#) Birks at p.183; also [1990] L.M.C.L.Q. 342, 347.
- [167.](#) e.g. *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] B.L.R. 530 at [131]; *Adam Opel GmbH v Mitras Automotive UK Ltd* [2007] EWHC 3252 (QB), [2007] All E.R. (D) 272 (Dec) (no good faith belief that entitled to compensation demanded).
- [168.](#) Compare *B. & S. Contracts and Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419, where the difficulty faced by the threatening party (a strike by its workers) was not related to the contract and may have been one it should have dealt with. See also *Adam Opel GmbH v Mitras Automotive UK Ltd* [2007] EWHC 3252 (QB), [2007] All E.R. (D) 272 (Dec) (claim so unreasonable that genuine belief would count for little: at [34]).
- [169.](#) *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705.
- [170.](#)  But compare Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), paras 10-62–10-63.
- [171.](#) Mance J. in *Huyton v Cremer* [1999] 1 Lloyd's Rep. 620, 637. This follows from cases such as *Wade v Simeon* (1846) 2 C.B. 528; 135 E.R. 1061: above, para.4-051.
- [172.](#) cf. below, Ch.23.
- [173.](#) See Birks and Chin, *Good Faith and Fault in Contract Law* (1995), pp.57–97, 62. See also *Huyten SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep. 620, 637.
- [174.](#) [1979] Q.B. 705; above, para.8-016.
- [175.](#) Kerr J. in *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293, 335.

- [176.](#) *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep. 620, 637, though Mance J. described the argument that a threatened breach of contract may not represent illegitimate pressure if there was a reasonable commercial basis for the threat as "by no means uncontentious"; *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] B.L.R. 530 at [131], where Dyson J. said: "In determining whether there has been illegitimate pressure, the courts take into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith ...". The relevant passage is quoted in full below, para.8-045.
- [177.](#)  The attitude of the main contractors in *Williams v Roffey* [1991] 1 Q.B. 1 may be explained by the fact that the subcontractors appear to have under-priced the job. cf. Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), para.10-64.
- [178.](#) [1989] Q.B. 833.
- [179.](#) He also held that there was no consideration for the payment; but after the decision in *Williams v Roffey & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1, the presence or absence of consideration may depend on whether or not there was duress: see above, para.8-020.
- [180.](#) For a helpful discussion of "fairness" in this context, see Burrows, *Law of Restitution*, 3rd edn (2011), pp.274–275.
- [181.](#) "[A] threat to break a contract will generally be regarded as illegitimate, particularly where the defendant must know that it would be in breach of contract if the threat were implemented": *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm), [2010] 2 Lloyd's Rep. 653 at [92], Christopher Clarke J.
- [182.](#) e.g. *Cook v Wright* (1861) 1 B. & S. 559, 569; above, para.4-053.
- [183.](#) See above, para.8-035.
- [184.](#) See below, para.8-057.
- [185.](#) See above, para.8-041.
- [186.](#) See above, para.8-028.
- [187.](#) See above, para.8-033.
- [188.](#) For possible exceptions see below, para.8-046.
- [189.](#) See above, para.8-011; but see the next paragraph.
- [190.](#)  cf. Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), paras 10-62–10-63.
- [191.](#) *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] B.L.R. 530 at [131]. Dyson J.'s statement was accepted as correct by both sides in the later case of *Carillion Construction Ltd v Felix (UK) Ltd* [2001] B.L.R. 1, also before Dyson J.

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Threat to commit otherwise lawful act

8-046

⚠ Threatening to carry out something perfectly within one's rights will not normally amount to duress; for instance, a party who relies on his existing contractual rights to drive a hard bargain is not, on that ground alone, guilty of economic duress. ¹⁹² But there can be no doubt that even a threat to commit what would otherwise be a perfectly lawful act may be improper if the threat is coupled with a demand which goes substantially beyond what is normal or legitimate in commercial arrangements. It was at one time suggested that it could not be unlawful to threaten to exercise one's legal rights, no matter what the motive. ¹⁹³ But such a principle is too widely stated. There are, for example, many cases where a man who has a "right", in the sense of a liberty or capacity to do an act which is not unlawful, but which is calculated seriously to injure another, will be liable to a charge of blackmail if he demands money from that other as the price of abstaining, e.g. from disclosing discreditable incidents in the victim's life. ¹⁹⁴ Although it is, in general, true to say that a contract is not rendered voidable by reason of the fact that pressure has been lawfully applied so as to compel the promisor to accept its terms, ¹⁹⁵ it is unlikely that a court would refuse to entertain an action at the suit of one who had paid money under a threat amounting to blackmail, or to set aside any agreement entered into as the result of such a threat. ¹⁹⁶ ⚠ In American law there are many illustrations of other threats to commit acts lawful in themselves which have been held to amount to duress when coupled with unreasonable demands. ¹⁹⁷ For instance, a threat (lawfully) to dismiss an injured employee unless he accepted a manifestly low settlement for his injuries has been held to be unlawful duress. ¹⁹⁸ It seems probable that a similar decision would be reached on such facts by an English court. On the other hand, care must be taken in treating threats lawful in themselves as amounting to duress, for otherwise threats commonly used in business (e.g. of lawful strikes ¹⁹⁹) would fall into the category of economic duress.



8-047

⚠ In *CTN Cash and Carry Ltd v Gallaher Ltd* ²⁰⁰ ⚠ the plaintiffs had ordered goods from the defendants, who delivered them by mistake to the wrong warehouse, from which they were stolen. The defendants, honestly but wrongly believing that the goods were at the plaintiffs' risk, invoiced them. The plaintiffs initially refused to pay but did so after the defendants threatened to withdraw the plaintiffs' credit facilities, which, it was said, would seriously jeopardise the plaintiffs' business. The defendants had the right to withdraw credit facilities at any time. The plaintiffs later sought repayment. The Court of Appeal upheld the trial judge's decision that no case of economic duress had been made out. Steyn L.J., with whom the other members of the Court agreed, said that the combination of the facts that: (i) the defendants were entitled to refuse to enter into any future contracts with the plaintiffs for any reason; and (ii), critically, that the defendants bona fide thought that the plaintiffs owed the sum in question, was sufficient to distinguish cases in which a plea of economic duress had succeeded. The fact that the defendants were in a sense in a monopoly position was irrelevant, the control of monopolies being a matter for Parliament. Although there are cases in which the courts

have accepted that a threat of a lawful action coupled with a demand for payment may be illegitimate,²⁰¹ it would be a relatively rare case in which “lawful act duress” could be established in a commercial context.²⁰²  In *R. v Attorney-General for England and Wales*²⁰³ the Privy Council held that a confidentiality agreement signed by a member of the SAS under threat of being returned to his original unit if he did not sign was not voidable for duress: the threat was not unlawful, as the Crown had the right to transfer any member of the SAS to another unit, and the demand could be justified on the ground that the Ministry of Defence was reasonably entitled to regard anyone unwilling to accept the obligation of confidentiality as unsuitable for the SAS.²⁰⁴

Threat not to contract

8-048

 It is not clear whether a threat not to enter into a contract unless the threatener’s terms are met could ever amount to improper pressure, for example where the threatener’s terms are extortionate. There are a number of salvage cases in which extortionate demands have been made to rescue a vessel (or those on board) and the contracts so entered into have been set aside, or refused enforcement.²⁰⁵ But these cases may rest upon the principle of maritime law that a duty to rescue human life is imposed on putative rescuers, so that the threat not to rescue may be unlawful. Other cases can be put in which a threat not to act, or not to contract, may be lawful in itself, and yet may be strongly coercive, for example where the threatener is in a monopoly position. However, there are Commonwealth authorities which hold that a person who is under no duty to enter into a contract with another is entitled to set his own terms, even though these may seem extortionate and the other party may have little choice but to comply.²⁰⁶ 

Threat to prosecute

8-049

A threat to prosecute may itself be an unlawful threat if the charge is known to be false and the threat is made for malice or other improper motive. Such a threat would amount to a threat to commit the tort of malicious prosecution.²⁰⁷ Consequently, a contract made as a result of such a threat would, it seems, be a clear case of a contract entered into as a result of duress, and if the other conditions are satisfied, would be voidable for that reason. Even at common law such action could constitute duress as to the person because the result of the prosecution could be the imprisonment of the threatened party, and this was sufficient to constitute duress as to the person²⁰⁸; in equity, an even broader view was taken, though most of the equitable cases were dealt with as instances of undue influence. Thus in *Williams v Bayley*,²⁰⁹ a father executed a mortgage to a banker, who insisted on this course as he had it in his power to prosecute the father’s son for forgery. There was no direct threat of a prosecution, but the mortgage was executed in return for the delivery up of the documents forged. It was held that the mortgage was unenforceable in equity as the father was not a free and voluntary agent since he knew that unless he undertook the liability his son would be prosecuted. A threat to prosecute, even when perfectly proper in itself, in the sense that a prosecution would be justified, may amount to an improper threat for the purposes of the law, if it is coupled with a demand for restitution or for a promise of restitution or other contractual undertaking.²¹⁰ In *Mutual Finance Co Ltd v John Wetton & Sons Ltd*²¹¹ a guarantee was obtained from a family company under an implied threat to prosecute a member of the family for the alleged forgery of a previous guarantee. The persons seeking to enforce the guarantee knew that at the time it was given the father of the alleged forger was so ill that the shock of the prosecution of his son was likely to endanger his life. The guarantee was held to be invalid on the basis of actual undue influence. It is submitted that today the wider equitable rule will prevail, so that a contract will be voidable if obtained by a threat of criminal prosecution or other lawful imprisonment, if the threat amounts to the use of illegitimate pressure.

Stifling a prosecution

8-050




An agreement obtained by threats to prosecute for a criminal offence may also be invalid on the ground that it involves the stifling of a prosecution for the offence.²¹² In such a case, it is not sufficient for the party seeking to avoid the contract to show that his promise induced the other party to abstain from criminal proceedings.²¹³ He must go further and show that it was an express or implied term of the contract that there should be no prosecution.²¹⁴ An agreement of this nature is not only voidable on the ground of duress, but may be void as being contrary to public policy.²¹⁵ Money paid in pursuance of an illegal agreement is ordinarily irrecoverable; but the presence of duress may enable the party threatened to plead that he was not in *pari delicto*, and so he may recover his money by an action for money had and received.²¹⁶ The law will permit the compromise of a claim for damages, though made the subject of a criminal prosecution, in certain limited circumstances.²¹⁷ It is, however, submitted that a plea of duress might still be admitted to an action on a compromise of this nature if it were shown that it was arrived at by an illegitimate threat of a criminal prosecution. The modern trend seems to be to discourage the making of such contracts whenever serious crime is involved. If a contract is made without the matter being reported to the police there is a strong probability that the transaction will be held to amount to the stifling of a prosecution. And if the contract is made after the matter is reported to the police then there is a danger that it will amount to a conspiracy to pervert the course of justice.²¹⁸ To make a valid contract in such circumstances, it should be made absolutely clear that the innocent party is only compromising his *civil* claim for damages, and is neither threatening to report the matter to the police, nor to prosecute, nor offering not to do so.

Threat to institute civil proceedings

8-051

Since recourse to law is the remedy for redress provided by the law itself, it is obvious that *prima facie* a threat to enforce one's legal rights by instituting civil proceedings cannot be an unlawful or wrongful threat. Consequently a contract which is obtained by means of such a threat must *prima facie* be valid, and cannot be impeached on grounds of duress.²¹⁹ So an ordinary bona fide compromise is clearly a valid contract even though exacted under threats to bring (or defend) legal proceedings, or to appeal from a judgment already given. Even a threat to bring proceedings where there is no ground of action in law is *prima facie* not an unlawful threat, at least where the threat is made bona fide, and is not manifestly frivolous or vexatious.²²⁰ On the other hand, the malicious institution of some forms of legal process or other civil proceedings is, at least in limited circumstances, a tort,²²¹ and a threat to institute proceedings which would constitute a tort will therefore *prima facie* constitute a threat to do something unlawful; consequently a contract entered into as a result of such a threat may be voidable on grounds of duress. It is not clear whether a threat to institute civil proceedings which is not unlawful in itself could ever constitute duress for present purposes, if it is coupled (for instance) with a wholly unjustified demand, or if it is made in special circumstances (for instance) in which the defendant has a particular fear of the publicity which may follow from a claim. In principle there seems no reason why such a threat should not amount to duress in appropriate circumstances, but for obvious reasons these are likely to be rare.²²²

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1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
 20. Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), pp.192–218.
 192. *Alec Lobb Ltd v Total Oil G.B. Ltd* [1983] 1 W.L.R. 87 (varied on other points, [1985] 1 W.L.R. 173).
 193. *Allen v Flood* [1898] A.C. 1; *Ware and De Freville v Motor Trade Association* [1921] 3 K.B. 40; *Hardie and Lane Ltd v Chilton* [1928] 2 K.B. 306; *Chapman v Honig* [1963] 2 Q.B. 502; cf. *Quinn v Leathem* [1901] A.C. 495.
 194. *Thorne v Motor Trade Association* [1937] A.C. 797, 822; *Universe Tankships of Monrovia Inc v I.T.W.F.* [1983] 1 A.C. 366, 401.

195. *Hardie and Lane Ltd v Chilton* [1928] 2 K.B. 306; *Eric Gnapp Ltd v Petroleum Board* [1949] 1 All E.R. 980.
196.  *Norreys v Zeffert* [1939] 2 All E.R. 187; *United Australia Ltd v Barclays Bank Ltd* [1941] A.C. 1, 29; *Universe Tankships of Monrovia Inc v I.T.W.F.* [1983] A.C. 366, 401. In *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2017] EWHC 1367 (Ch) Warren J. (at [252]) said that the words of this paragraph to this point represented an “accurate albeit incomplete summary” of the law. In that case it was held that even though the defendant had not threatened actions that were unlawful, the pressure it had applied was illegitimate: at [262].
197. See Restatement of Contracts, para.176(2).
198. *Mitchell v C.C. Sanitation Co* (1968) 430 S.W. 2d. 933; cf. the somewhat similar facts in *Arrale v Costain Engineering Ltd* [1976] 2 Lloyd’s Rep. 98, though there was no real duress in this case.
199. Threats of unlawful strikes are usually protected by the statutory immunities governing acts done in the course of furtherance of a trade dispute: see Trade Union and Labour Relations Consolidation Act 1992. But coercive threats falling outside these immunities will often constitute unlawful duress, see, e.g. *Universe Tankships of Monrovia Inc v I.T.W.F.* [1983] A.C. 366, above, para.8-018.
200.  [1994] 4 All E.R. 715; *Marsden v Barclays Bank Plc* [2016] EWHC 1601 (QB). Compare *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm), [2012] 1 Lloyd’s Rep. 501, where the owners had earlier broken the charter by failing to provide the chartered ship; they then refused to provide a replacement vessel unless the charterers waived any claim for damages. It was held that the agreement to waive claims voidable for economic duress. It is submitted that despite the discussion of conduct which is not itself unlawful at [36], this is a case in which not only had the owner’s committed a wrongful act already but their threat to provide a replacement only if the charterers gave up their rights to damages was itself a threat of a wrongful act, i.e. refusing to provide the charterers with a full remedy for the initial breach.
201. e.g. *Thorne v Motor Trade Association* [1937] A.C. 797.
202.  *Marsden v Barclays Bank Plc* [2016] EWHC 1601 (QB) at [35]. The threat, if not wrongful, must at least be immoral or unconscionable. There is nothing unconscionable in the owner of goods let on hire purchase threatening to repossess them when the hirer is in default and has not applied for relief against forfeiture: *Alf Vaughan & Co Ltd v Royscot Trust Ltd* [1999] 1 All E.R. 856.
203. [2003] UKPC 22.
204. [2003] UKPC 22 at [17]–[18].
205. See *Akerblom v Price* (1881) 7 Q.B.D. 129; *The Rialto* [1891] P.175; *The Port Caledonia and the Anna* [1903] P.184; *The Crusader* [1907] P.196. See now Merchant Shipping Act 1995 s.224, which provides for the Salvage Convention 1989 (contained in Sch.11 to the Act) to have the force of law. The Convention provides in art.7:

“Annulment and modification of contracts

A contract or any terms thereof may be annulled or modified if—

(a)


the contract has been entered into under undue influence or the influence of

danger and its terms are inequitable; or

(b)

the payment under the contract is in an excessive degree too large or too small for the services actually rendered.”

Article 13 sets out criteria for fixing the proper reward.

- [206.](#)  See, e.g. *Smith v William Charlick Ltd* (1924) 34 C.L.R. 38; *Morton Construction v City of Hamilton* (1961) 31 D.L.R. (2d) 323. See Goff and Jones at 9th edn (2016), paras 10-71–10-72.
- [207.](#) *Duke Cadaval v Collins* (1836) 4 A. & E. 858; *Flower v Sadler* (1882) 10 Q.B.D. 572.
- [208.](#) *Smith v Monteith* (1844) 13 M. & W. 427; *Mutual Finance Co Ltd v John Wetton & Sons Ltd* [1937] 2 K.B. 389, 395.
- [209.](#) (1866) L.R. 1 H.L. 200.
- [210.](#) *Kaufman v Gerson* [1904] 1 K.B. 591.
- [211.](#) [1937] 2 K.B. 389.
- [212.](#) *Williams v Bayley* (1866) L.R. 1 H.L. 200; *Windhill Local Board v Vint* (1890) 45 Ch. D. 351; *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch. 173; see also Criminal Law Act 1967 s.5(1), (5) and below, paras 16-044—16-046.
- [213.](#) *Flower v Sadler* (1882) 10 Q.B.D. 572; *Barnes v Richards* (1902) 71 L.J.K.B. 341.
- [214.](#) *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch. 173 but the modern trend seems somewhat against this restricted view: see *R. v Panayiotou* [1973] 1 W.L.R. 1032.
- [215.](#) See below, para.16-046; *Keir v Leeman* (1846) 9 Q.B. 371.
- [216.](#) *Smith v Cuff* (1817) 6 M. & S. 160; *Davies v London and Provincial Marine Insurance Co* (1878) 8 Ch. D. 469. The same is generally true of fraud: *Atkinson v Denby* (1862) 7 H. & N. 934; *Shelley v Puddock* [1980] Q.B. 348.
- [217.](#) *Keir v Leeman* (1846) 9 Q.B. 371, 395; *Fisher & Co v Apollinaris Co* (1875) L.R. 10 Ch. App. 297; see also Criminal Law Act 1967 s.5(1), (5), and below, paras 16-044—16-046. See also Hudson (1980) 43 M.L.R. 532.
- [218.](#) See *R. v Panayiotou* [1973] 1 W.L.R. 1032.
- [219.](#) *Powell v Hoyland* (1851) 6 Exch. 67; *Ex p. Hall* (1882) 19 Ch. D. 580.
- [220.](#) Decisions upholding the validity of compromises in such cases usually turn on the existence of consideration and have been dealt with above (paras 4-047 et seq.); although the presence of consideration is not conclusive that there is no duress (see above, para.8-020) it seems clear that a bona fide compromise could not be attacked on grounds of duress any more than on grounds of want of consideration.
- [221.](#) See, e.g. *Roy v Prior* [1971] A.C. 470.
- [222.](#) An example of a threat to take legal proceedings which in the circumstances amounted to

improper pressure, and thus actual undue influence, is *Drew v Daniel* [2005] EWCA Civ 507, [2005] 2 F.C.R. 365.

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(g) - Parties to Duress

By whom suffered

8-052

Earlier, it was submitted there may be duress to the person when the threat is not to injure the party who makes the promise but a third person. ²²³ It was at one time said that the duress must be suffered by the party who enters into the contract, so that duress against a principal debtor would be no defence to an action on a bond against a surety. ²²⁴ But there is no modern authority to this effect, and it does not seem likely that a surety who gave an indemnity as the result of threats of violence to the principal debtor would be liable. Similarly, if an agent enters into a contract for his principal, from the same fear of the inconvenience which may arise to the principal from the latter being kept in confinement as would affect the mind of the principal himself, such a contract will be voidable on the ground of duress. ²²⁵ So, too, duress to a wife will avoid a contract given under its influence by her husband, ²²⁶ duress to a child will avoid a contract obtained by means thereof from a parent, ²²⁷ and even duress to a more remote relative will suffice if a contract is entered into under its influence. ²²⁸ Threats against the claimant's employees have been held to constitute duress. ²²⁹ Duress to a stranger was formerly thought to be ineffective, ²³⁰ and would no doubt be exceedingly rare. But if A takes B as a hostage and threatens to shoot him unless C signs a written agreement placed in front of him by A, it does not seem likely that the agreement would be held binding merely because B is a stranger to C. There are old cases holding that a contract made by a person in consideration of the discharge of a third party from illegal arrest is unenforceable as a mere nudum pactum. ²³¹ In modern times it is possible that a court would find consideration in such circumstances (for the promisor would not have made the promise unless he regarded the release of the third party as a benefit to him) but would hold the promise voidable for duress.

Duress exercised by third party

8-053

Where it is sought to avoid a contract on the ground of duress exercised, not by the party seeking to enforce the agreement, but by some third person, the party seeking to avoid the contract must prove that the other party knew of the duress, ²³² or had constructive notice of it or had procured the making of the contract through the agency of the party who exercised the duress. ²³³

^{1.} See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).

^{20.} Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), pp.192–218.

- [223.](#) Above, para.8-012.
- [224.](#) Roll.Abr. 687, pl. 7; Bacon Abr. Duress (B); *Huscombe v Standing* (1607) Cro.Jac. 187. And see Vol.II, para.45-032.
- [225.](#) *Cumming v Ince* (1847) 11 Q.B. 112.
- [226.](#) *Kaufman v Gerson* [1904] 1 K.B. 591.
- [227.](#) *Williams v Bayley* (1866) L.R. 1 H.L. 200.
- [228.](#) *Seear v Cohen* (1881) 45 L.T. 589; *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch. 173.
- [229.](#) *Royal Boskalis Westminster NV v Mountain* [1999] Q.B. 674 (threat to use employees as human shield); *Gulf Azov Shipping Co Ltd v Chief Idisi (No.2)* [2001] EWCA Civ 505, [2001] 1 Lloyd's Rep. 727 (detention of ship and crew).
- [230.](#) 1 Roll.Abr. 687, pl. 6.
- [231.](#) *Smith v Monteith* (1844) 13 M. & W. 427; *Pole v Harrobin* (1782) 9 East 416n.
- [232.](#) *Kesarmal s/o Letchman Das v Valliappa Chettiar (N.K.V.) s/o Nagappa Chettiar* [1954] 1 W.L.R. 380. In the case of a bill of exchange, the onus of proof is shifted by s.30(2) of the Bills of Exchange Act 1882, but this has been held not to apply where the holder seeking to enforce the instrument is the person to whom it was originally delivered and in whose possession it remains: *Talbot v Von Boris* [1911] 1 K.B. 854; *Hasan v Willson* [1977] 1 Lloyd's Rep. 431 (fraud).
- [233.](#) These propositions are based on the cases of misrepresentation and undue influence, see above, paras 7-024 et seq. and below, paras 8-108 et seq.

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(h) - General Effect of Duress



Contract under duress is voidable ²³⁴

8-054

Despite earlier doubts, ²³⁵ it now seems clearly established that a contract entered into under duress is voidable and not void ²³⁶; consequently a person who has entered into a contract under duress may either affirm or avoid such contract after the duress has ceased ²³⁷; and if he has voluntarily acted under it with a full knowledge of all the circumstances he may be held bound on the ground of ratification, ²³⁸ or if, after escaping from the duress, he takes no steps to set aside the transaction, he may be found to have affirmed it. ²³⁹

Right to rescind cannot be excluded

8-054A

 The right to rescind an agreement reached under duress cannot be excluded by the terms of the agreement. ²⁴⁰ 

Counter-restitution of benefits

8-055

In some circumstances a person may not be able to avoid a contract he has entered into under duress unless he is able to restore the benefits he has received under the contract, at least in substantially the same form, or make an adequate monetary allowance. The position is the same as in cases of misrepresentation or undue influence ²⁴¹; there are not separate rules for duress at common law and other grounds on which a contract may be avoided in equity. ²⁴² The court will:

“... give ... relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state there were in before the contract.” ²⁴³

However, the prime concern is to prevent unjust enrichment of the party who made the threat; that he should not be prejudiced is a secondary consideration and whether counter-restitution in any form will be required will depend on the circumstances of the case. ²⁴⁴ Thus where the agreement was a compromise under which all documents relating to the agreement were to be and had been destroyed, which (if the agreement were avoided) would benefit the party seeking to avoid and prejudice the other parties, it would not necessarily be impossible to avoid the contract for alleged


duress even though pecuniary relief could not adequately restore the other parties' position.²⁴⁵ It is submitted that counterrestitution or at least pecuniary compensation will normally be required where the transaction to be set aside involved an exchange from which the victim obtained some benefit.²⁴⁶ In contrast, where the promise that it is sought to avoid was merely one to pay an additional sum for a benefit already due under an existing contract,²⁴⁷ there should be no requirement of counter-restitution.²⁴⁸

Damages for duress

8-056

As previously stated,²⁴⁹ modern authorities have relied upon the analogy of fraud in adumbrating the law relating to duress. In particular, it now seems clear that a person may affirm a contract which would have been voidable for duress. In these circumstances it may be a matter of some importance to consider whether duress may constitute a tort, like fraud, so that damages may be obtained, either in addition to, or in lieu of, rescission of a contract entered into as a result of the duress. The leading authority on the tort of intimidation (or duress) is *Rookes v Barnard*²⁵⁰ where the defendants conspired together to threaten to break their contracts of employment with the plaintiff's employer if he did not terminate the plaintiff's contract of employment. They were held liable to the plaintiff on the ground that a threat to break a contract was a sufficient unlawful act for the purpose of the tort of intimidation, at least where the intimidation is of a third party. Since it now appears clear that a threat to break a contract may, in appropriate circumstances, constitute unlawful duress in the law of contract, so that a variation of the contract thereby obtained may be voidable as a matter of contract law, it would seem that the doctrines of duress and intimidation are based on similar principles.²⁵¹ (It is, of course, also clear that a threat to commit a crime or a tort may equally constitute both duress in contract law, and intimidation in tort law.) If this is correct, it may be that, even where a person has affirmed a contract which is voidable for duress, damages could still be recovered in tort. In *Universe Tankships of Monrovia v I.T.W.F.*²⁵² Lords Diplock and Scarman expressed differing views on the point. The question was not considered in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*,²⁵³ even though this case is a firm authority for holding that duress renders a contract voidable and not void. Yet it is arguable that this conclusion makes it all the more necessary to recognise that damages may be recovered for duress; for otherwise (as indeed was held in this case) the plaintiff who has lost his right to avoid will be left without any remedy for a wrongful act.

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1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
 - ^{20.} Burrows, *Law of Restitution*, 3rd edn (2011), Ch.5; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), Ch.10; Virgo, *Principles of the Law of Restitution*, 3rd edn (2015), pp.192–218.
 - ^{234.} This paragraph was accepted as stating the law correctly in *Capital Structures Plc v Time & Tide Construction Ltd* [2006] EWHC 591, [2006] B.L.R. 226 at [18]. Acquiescence is presumably also a bar, as it is in cases of misrepresentation and undue influence: see below, para.8-101.
 - ^{235.} Lanham (1966) 29 M.L.R. 615. In *Barton v Armstrong* [1976] A.C. 104, 120, the majority of the Privy Council spoke of the contract as being void “so far as concerns” the plaintiff, but they were not adverting to this point. Indeed, the analogy with fraud which was relied upon by the majority supports the view stated in the text. See above, para.8-007 n.43.
 - ^{236.} See *Lynch v D.P.P. of Northern Ireland* [1975] A.C. 653, 695; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705.
 - ^{237.} *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705. See also *Pao On v Lau Yiu Long* [1980] A.C. 614.
 - ^{238.} *Ormes v Beadel* (1860) 2 De G.F. & J. 333.

- [239.](#) As in *North Ocean Shipping Co Ltd v Hyundai Construction Ltd* [1979] Q.B. 705, in which this passage was cited. See further below, para.8–101. In *Royal Boskalis Westminster NV v Mountain* [1999] Q.B. 674, 730, Phillips L.J. expressed some difficulty in saying that a contract has been avoided on the grounds of duress if it is governed by a foreign law which would afford no right of avoidance but where the duress was so unconscionable that English law would override the proper law of the contract (see above, para.8-038 n.149). However, he considered that English law would not recognise the effects of the contract (at 731).
- [240.](#)  *Borrelli v Ting* [2010] UKPC 21, [2010] Bus. L.R. 1718 at [40]. Compare the right to rescind for fraud, Vol.I, para.7-143.
- [241.](#) See above, paras 7-123—7-128 and below, paras 8-102—8-107.
- [242.](#) *Halpern v Halpern (No.2)* [2007] EWCA Civ 291, [2008] Q.B. 195 at [70]–[73].
- [243.](#) *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1279.
- [244.](#) *Halpern v Halpern (No.2)* [2007] EWCA Civ 291 at [75]–[76]. For a case of fraudulent misrepresentation in which the judge seems to have taken the view that rescission was no longer possible because it was not possible to return the parties to their original position, see *Crystal Palace FC (2000) Ltd v Dowie* [2007] All E.R. (D) 135 (Jun) at [210]–[218].
- [245.](#) *Halpern v Halpern (No.2)* [2007] EWCA Civ 291, [2008] Q.B. 195; reversing [2006] EWHC 1728 (Comm), [2006] 3 All E.R. 1139.
- [246.](#) Compare Carnwath L.J.’s example of work being done that was not needed: [2007] EWCA Civ 291 at [74]. It may be that counter-restitution is not required if criminal fraud is used merely as a defence: see above, para.7-117 n.527. It is possible that the same approach, which seems to be based on the *ex turpi causa* rule (see below, paras 16-174 and 16-185), would be applied in cases of duress where the duress amounts to a crime.
- [247.](#) As in, e.g. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705; see above para.8-016.
- [248.](#) See Burrows, *Law of Restitution*, 3rd edn (2011), pp.261-262, giving other examples also.
- [249.](#) Above, para.8-007.
- [250.](#) [1964] A.C. 1129.
- [251.](#) See *Universe Tankships of Monrovia Inc v I.T.W.F.* [1983] 1 A.C. 366, 385, 400. But cf. Lord Reid in *J. T. Stratford & Son Ltd v Lindley* [1965] A.C. 269, 325, where some doubt is thrown on the possible assimilation of two-party duress cases (where A coerces B) with three-party cases (where A coerces B who acts so as to cause loss to C). The reason for Lord Reid’s doubts is that in the two-party case, unlike the three-party case, the plaintiff has a choice not to submit to the coercion, but to pursue his legal remedies. But this doubt seems to be disposed of by Lord Scarman’s judgment in *Pao On v Lau Yin Long* [1980] A.C. 614 (above, para.8-017), where it is stressed that the question turns on the effectiveness of the remedy which the coerced party has. Damages for intimidation were recovered in a case of duress by threatened breach of contract in *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm), [2010] 2 Lloyd’s Rep. 653; see at [119]–[121]. See also *Berezovsky v Abramovich* [2011] EWCA Civ 153, [2011] 1 W.L.R. 2290 at [5] (“the essential ingredients of the tort of intimidation are: (1) a threat by the defendant to do something unlawful or ‘illegitimate’; (2) the threat must be intended to coerce the claimant to take or refrain from taking some course of action; (3) the threat must in fact coerce the claimant to take such action; (4) loss or damage must be incurred by the claimant as a result”); Clerk & Lindsell on Torts, 21st edn (2014), para.24-69.
- [252.](#) [1983] A.C. 366, 385, 400. See Carty and Evans [1983] J.B.L. 218, 223–225. In *Dimskal Shipping Co SA v I.T.W.F.* [1992] 2 A.C. 152, Lord Goff followed Lord Diplock’s analysis that economic duress is not a tort per se.

[253.](#) [1979] Q.B. 705, above, para.8-016.

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(a) - Introduction

Equitable doctrine of undue influence

8-057

The equitable doctrine of undue influence is a comprehensive phrase covering cases in which a transaction between two parties who are in a relationship of trust and confidence may be set aside if the transaction is the result of an abuse of the relationship. The transaction may be set aside if the claimant shows that the other party obtained it by abusing the relationship; this, as we shall see, is often termed “actual undue influence”, but it is better to refer to such cases as ones in which undue influence is actually (or directly) proved. ²⁵⁵ A transaction may also be set aside in the absence of direct proof if claimant shows the existence of a relationship of trust and confidence with the other party, and that the transaction is one that “calls for explanation”. ²⁵⁶ Then there will be an evidential presumption ²⁵⁷ that the transaction was the result of undue influence and unless the presumption is rebutted, the transaction may be set aside. ²⁵⁸ The doctrine extends to cases of coercion, domination, or pressure outside those special relations, though such cases will often now come within the doctrine of duress. ²⁵⁹ As was said by Lord Chelmsford L.C.: “[t]he courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise”. ²⁶⁰ Although most of the cases in which undue influence has been successfully pleaded relate to gifts and guarantees, ²⁶¹ the same principles apply to purchases at an undervalue or sales at an excessive price. ²⁶² The difference between a gift and a contract that “calls for explanation” is for this purpose only a matter of degree. ²⁶³ The rules may also apply to contracts which are not obviously disadvantageous to the complainant in terms of under- or over-value, at least where undue influence actually is shown ²⁶⁴ and probably where proof rests on a presumption, because (it will be submitted) a transaction may not involve a sale at under- or over-value yet still be one that calls for an explanation.

Basis of doctrine

8-058

At common law, the presence of duress was (as has been seen) traditionally justified on the ground that the duress prevented the party constrained from forming a full and independent resolution to contract. Cases treated as falling within the doctrine of undue influence included cases of coercion that are now seen as ones of duress, and were treated in the previous section, ²⁶⁵ but the equitable doctrine was much wider than this. In equity, however, the application of the doctrine of undue influence was intended rather to ensure that no person should be allowed to retain the benefit of his own fraud or wrongful act. The equity view was well expressed in *Allcard v Skinner* ²⁶⁶:

“This is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play.”

Equity therefore acts on the conscience of the donee, not primarily on want of a true consent on the part of the donor. As a result, the equitable doctrine extends not only to cases of coercion, but to all cases “where influence is acquired and abused, where confidence is reposed and betrayed”.²⁶⁷ It has been said that:

“... the question is not whether [the party influenced] knew what she was doing, had done or was proposing to do, but how the intention was produced.”²⁶⁸

Traditional explanations of undue influence frequently refer to the “conscience of the recipient”,²⁶⁹ and modern cases often use similar phrases. Thus it has been said that “[t]he court of equity ... sets aside transactions obtained by the exercise of undue influence because such conduct is unconscionable”.²⁷⁰ In a recent House of Lords case, actual undue influence was described as “a species of fraud” and from this was drawn the conclusion that the complainant need not show that she was “manifestly disadvantaged” by the transaction concerned.²⁷¹ And in the latest decision of the House of Lords, Lord Nicholls (whose opinion was supported by all their Lordships) referred variously to “the taking of unfair advantage”,²⁷² “misuse” of influence,²⁷³ “abuse of trust and confidence”²⁷⁴ and a “connotation of impropriety”.²⁷⁵ However, there is some disagreement or ambiguity over the circumstances in which the conscience of the stronger party (normally the defendant) will be engaged.

When the stronger party’s conscience is engaged

8-059

⚠ There is some difference of opinion, both judicial and academic,²⁷⁶ ⚠ as to when the conscience of the stronger party (normally the defendant) will be engaged. It is certain that a transaction may be avoided if it is proved that the defendant obtained it by exploiting his relationship with the claimant to put emotional pressure on the claimant²⁷⁷; or if he used the fact that the claimant was willing to follow his suggestions without question to “prefer his own interests”.²⁷⁸ However transactions that were manifestly one-sided—the cases have involved gifts—have been set aside when the defendant seems merely to have done no more than acquiesce in receiving the gift without ensuring the claimant took independent advice or putting it to him that it might leave him with inadequate means of support.²⁷⁹ It has been pointed out²⁸⁰ that in the leading case of *Allcard v Skinner*, Lindley L.J. put the matter in terms of protecting the victim from fraud:

“The principle must be examined. What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction ... It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.”²⁸¹

Cotton L.J., in contrast, put the matter in terms of a public policy to ensure that the claimant acted spontaneously²⁸²:


“These decisions may be divided into two classes—First, where the Court has been




satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

Bowen L.J.'s view was less clear, as he referred to both public policy and "fair play". ²⁸³ Certainly, some more recent cases have put emphasis on the claimant's consent, not the defendant's conduct. In *Pesticcio v Huet*, Mummery L.J. said:

"Although undue influence is sometimes described as an "equitable wrong" or even as a species of equitable fraud, the basis of the court's intervention is not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim, if the transaction is not satisfactorily explained by ordinary motives ²⁸⁴: ... The court scrutinises the circumstances in which the transaction, under which benefits were conferred on the recipient, took place and the nature of the continuing relationship between the parties, rather than any specific act or conduct on the part of the recipient. A transaction may be set aside by the court, even though the actions and conduct of the person who benefits from it could not be criticised as wrongful." ²⁸⁵

That case also involved a gift. ²⁸⁶ Thus it is not wholly clear whether influence is to be treated as "undue" only where at the time of the transaction ²⁸⁷ the defendant has engaged in some form of fraud or improper behaviour (which may be proved directly or through a presumption arising from the nature of the relationship between the parties and "a transaction requiring explanation"); or whether there may be undue influence simply because the claimant was not allowed to exercise a free will or given independent advice. It is submitted, however, that in the light of the decision of the House of Lords in

Royal Bank of Scotland v Etridge (No.2) ²⁸⁸  that there are not two classes of undue influence, actual and presumed, but merely two methods of proving undue influence (by direct proof or by use of a presumption that arises when there is a relationship of trust and confidence between the parties ²⁸⁹

 and a transaction between them that "requires explanation" ²⁹⁰ ) to insist that undue influence is limited to cases of wicked exploitation would involve at least a substantial re-working of the authorities. ²⁹¹ 

Unconscionable conduct and the resulting transaction

8-060

It is submitted that the decisions may be reconciled by taking into account the nature of the transaction. If the transaction is obviously one-sided, like a substantial outright gift to the defendant, and particularly if it is one that will have serious effects for the claimant, for example, leaving him with very limited resources, ²⁹² and if there was a relationship of trust and confidence between the parties, the presumption of undue influence will arise. The defendant will not rebut the presumption by showing that he did nothing wrong. In cases of presumed undue influence it has long been accepted that the transaction may be set aside even though it is accepted that the defendant acted with

propriety.²⁹³ Unconscionability in such a case consists either in the defendant seeking to retain the benefit received now that it appears that the claimant did not enter the transaction freely, or perhaps in failing to point out to the claimant that the transaction was not to her advantage and ensuring that she took proper independent advice.²⁹⁴ Conversely, if the transaction is not one that requires explanation, it will not be voidable unless the claimant actually shows that the defendant used influence. In a case in which the defendant did not exert emotional pressure or resort to misrepresentation or nondisclosure to obtain the transaction, but merely “decided for” the claimant, who simply followed the advice, the exercise of influence is unlikely to be held to be undue unless the defendant “preferred his own interests”. If the defendant was seeking to make an arrangement that would be to the claimant’s advantage, the exercise is unlikely to be undue.²⁹⁵ Thus in a case in which the wife simply signed whatever her husband put in front of her, it was said that the husband’s influence was not “undue” because the transaction appeared at the time to be to her advantage: the husband was seeking to obtain for her an interest in a property which at the time was worth more than the amount charged, as he “was getting on”.²⁹⁶ In either type of case it is immaterial that the person to whom the gift or promise is made derives no personal benefit from it.²⁹⁷

Classes of undue influence

8-061

In *Allcard v Skinner* Cotton L.J. classified the cases into two:

“First, where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the court in holding that the gift was the result of a free exercise of the donor’s will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.”²⁹⁸

In *Barclay’s Bank Plc v O’Brien*²⁹⁹ Lord Browne-Wilkinson adopted a classification previously set out by the Court of Appeal,³⁰⁰ labelling cases of actual undue influence as Class 1 and of presumed undue influence as Class 2. Class 2 was subdivided into cases in which there is a relationship between the parties such that it is presumed as a matter of law that undue influence had been used (Class 2A) and those in which for the presumption to arise it must be proved on the facts the existence of a relationship under which the complainant generally reposed trust and confidence in the defendant (Class 2B). However, in the subsequent House of Lords case of *Royal Bank of Scotland v Etridge (No.2)*³⁰¹ both these classifications and the statements about when a presumption of undue influence will arise were criticised. In particular, it was pointed out that no presumption that the influence was undue will arise unless the transaction between the parties is one that is not readily explicable by ordinary motives.³⁰² Further, Lord Hobhouse and Lord Scott criticised the “so-called Class 2B presumption” in particular.³⁰³ And Lord Nicholls, whose opinion was supported by all their Lordships, remarked that the custom of distinguishing between cases of actual undue influence and presumed undue influence “can be confusing”.³⁰⁴ The question is more one of proof. The claimant may prove undue influence directly. Even if he does not do this, if nonetheless he shows that he placed trust and confidence in the other party in relation to the management of his affairs, and that the transaction in question is one that calls for explanation, that “will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof” and the transaction will be liable to be set aside.³⁰⁵ The “presumption” “is descriptive of a shift in the evidential onus on a question of fact”.³⁰⁶

“The combination of a relationship in which a wife entrusts financial decisions to her husband and a transaction which is sufficiently disadvantageous to her to call for explanation may shift the evidential burden to the party relying on the transaction, but when the principal participants have given oral evidence, the issue for the Court is whether on the totality of the evidence, including any appropriate inference, it finds that the transaction was in fact brought about by undue influence.” ³⁰⁷

It is presumably this which caused Lord Clyde in the *Etridge* case to doubt the utility of distinguishing between actual and presumed undue influence. ³⁰⁸

Manifest disadvantage not essential

8-062

In *National Westminster Bank Plc v Morgan* Lord Scarman, giving the only full speech in the House of Lords, stated that relief for undue influence rests “not on some vague ‘public policy’ but specifically the victimisation of one party by the other”. ³⁰⁹ The House, reversing the Court of Appeal, ³¹⁰ held that the presumption that undue influence was used only arises if the transaction is “manifestly disadvantageous” to the person influenced. ³¹¹ Although most of the transactions which have been set aside were obviously one-sided, ³¹² this decision seemed to represent a narrowing of the doctrine. For instance, in the Court of Appeal in *National Westminster Bank Ltd v Morgan* there had been some discussion of the position of the client who is induced by his solicitor to sell his house to the solicitor at a fair price but who regrets the sale for other reasons. ³¹³ But as will be explained in the following three paragraphs, subsequent cases show that manifest disadvantage is not a necessary ingredient of any case of undue influence. In cases where undue influence has actually been shown, it has been rejected. ³¹⁴ In cases in which there is not just a relationship of trust and confidence but a fiduciary relationship, it is not needed. ³¹⁵ In cases in which the claimant cannot prove undue influence directly, and relies on the presumption of undue influence, the House of Lords have held that the test of manifest disadvantage should not be applied. Rather, the presumption will only arise if there is the necessary relationship of trust and confidence and “a transaction that cannot be explained by ordinary motives”. ³¹⁶

Undue influence actually proved

8-063

In cases where undue influence has actually been shown, the party influenced is entitled to a remedy without more, unless the right to rescind has been lost ³¹⁷; it is not necessary to show that the transaction was manifestly disadvantageous to him or her. ³¹⁸

Cases of abuse of confidence

8-064

In a case in the Court of Appeal after *Morgan* it was pointed out that even if undue influence would not be a ground for upsetting a transaction that was not manifestly disadvantageous to the claimant, if the parties were in a fiduciary relationship the client might be able to obtain relief on the more limited ground of abuse of confidence. ³¹⁹ This applies only between solicitor and client, principal and agent, trustee and beneficiary and persons in similar positions. ³²⁰ In these cases it is not necessary for the party seeking relief to show that the transaction is manifestly disadvantageous to him. ³²¹ The cases are:

“... founded on considerations of general public policy, viz. that in order to protect those to whom fiduciaries owe duties as a class from exploitation by fiduciaries as a class, the

law imposes a heavy duty on fiduciaries to show the righteousness of the transactions.”³²²


Abuse of confidence is outside the scope of this chapter.³²³





“Manifest disadvantage” replaced by “transaction requiring explanation”

8-065

The existence of the cases referred to in the last paragraph, and the fact that the House of Lords in *Morgan* was apparently not referred to them, seems to have led to that decision being the subject of some doubt in the later case of *CIBC Mortgages Plc v Pitt*.³²⁴ (The actual decision in that case was that manifest disadvantage need not be shown in cases of actual undue influence.³²⁵) Lord Browne-Wilkinson, in a judgment with which the other members of the House agreed, pointed out the difficulty of reconciling *Morgan* with the abuse of confidence cases. He stated that “the exact limits of *Morgan* may have to be examined in the future”.³²⁶ But in the *Etridge* case the House of Lords held that the presumption of undue influence does not arise until it has been shown, first, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant; and secondly, that the transaction is not readily explicable by the relationship of the parties. The House held that the phrase “manifest disadvantage” should be abandoned because it had been misunderstood. Lord Nicholls said that in cases in which a wife had given a guarantee of the debts of her husband's business, in particular, it had sometimes led to the conclusion that such a guarantee was always manifestly disadvantageous because the wife undertakes a serious financial obligation and in return she personally receives nothing. This view was too narrow, and the better test to apply is that stated by Lindley L.J. in *Allcard v Skinner*.³²⁷ Thus for a presumption to arise that undue influence has been exercised, it is not sufficient for the complaining party to show the existence of a confidential relationship. It must also be shown that the transaction cannot, in Lindley L.J.'s words, “reasonably [be] accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary men act”.³²⁸

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1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
 - ²⁵⁴. See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; Chen-Wishart (2006) 59 C.L.P. 231.
 - ²⁵⁵. See below, para.8-061.
 - ²⁵⁶. *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [10]: see below, para.8-090.
 - ²⁵⁷. See below, para.8-061.
 - ²⁵⁸. The right to rescind may be lost in various ways, see below, para.8-101.
 - ²⁵⁹. e.g. *Williams v Bayley* (1866) L.R. 1 H.L. 200; see above, para.8-049.
 - ²⁶⁰. *Tate v Williamson* (1866) L.R. 2 Ch. App. 55, 61. See also *Winder* (1940) 3 M.L.R. 97; and see *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [6].
 - ²⁶¹. See below, para.8-109.
 - ²⁶². *Tufts v Sperry* [1952] 2 T.L.R. 516, 526.
 - ²⁶³. *Wright v Carter* [1903] 1 Ch. 27, 52.

- [264.](#) Below, para.8-062.
- [265.](#) *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [8]; see above, para.8-049.
- [266.](#) (1887) 35 Ch. D. 145, 190.
- [267.](#) *Smith v Kay* (1859) 7 H.L.C. 750, 779.
- [268.](#) Lord Eldon L.C. in *Huguenin v Baseley* (1807) 14 Ves. 273, 300.
- [269.](#) e.g. *Allcard v Skinner* (1887) L.R. 36 Ch. D. 145, 190.
- [270.](#) *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876, 883–884, per Millett L.J. The other members of the court did not consider the question.
- [271.](#) Lord Browne-Wilkinson in *CIBC Mortgages Ltd v Pitt* [1994] 1 A.C. 200, 209. See further below, para.8-062. The analogy with fraud may also be relevant to causal issues: see below, para.8-072.
- [272.](#) *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [8].
- [273.](#) [2001] UKHL 44 at [9].
- [274.](#) [2001] UKHL 44 at [10].
- [275.](#) [2001] UKHL 44 at [32]. See also, e.g. *National Commercial Bank (Jamaica) Ltd v Hew* [2003] UKPC 51 at [28]–[33] (Lord Millett); *R. v Att-Gen for England and Wales* [2003] UKPC 22 at [21] (Lord Hoffmann).
- [276.](#)  For a useful summary of the debate see Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), paras 11-08—11-11.
- [277.](#) See below, para.8-067.
- [278.](#) See below, para.8-068.
- [279.](#) This has led for a call for undue influence cases to be re-classified as “plaintiff-sided”, the core of the doctrine being that the complainant’s dependency led to the impairment of her decision, rather than that the defendant took advantage. See Birks and Chin, *Good Faith and Fault in Contract Law* (1995), pp.57-97, who at p.59 cite dicta by the Australian High Court in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 C.L.R. 447, 461, 474 to similar effect. Contrast N. Enonchong, *Undue Influence and Unconscionable Dealing*, 2nd edn (2012), para.7-006. Chen-Wishart (2006) 59 C.L.P. 231 and in Burrows and Rodger, *Mapping the Law* (2006) 210 prefers a “relational” analysis which looks to both the defendant’s conduct and the claimant’s ability to make independent decisions. See also Bigwood (2005) 25 O.J.L.S. 231.
- [280.](#) Lewison [2011] R.L.R.1.
- [281.](#) (1887) L.R. 36 Ch. D. 145, 182-183.
- [282.](#) (1887) L.R. 36 Ch. D. 145, 170.
- [283.](#) (1887) L.R. 36 Ch. D. 145, 190.
- [284.](#) At this point Mummery L.J. referred to *Allcard v Skinner* (1887) 36 Ch. D. 145 at 171.
- [285.](#) [2004] EWCA Civ 372 at [20].

- [286.](#) See also *Hammond v Osborn* [2002] EWCA Civ 885, [2002] W.T.L.R. 1125, a case of gift in which it was held that the donor had not made an informed judgment. It was accepted that the recipient was not guilty of any reprehensible conduct. It appears that the exercise of undue influence consisted of failing to draw the donor's attention to the size of the gift he was making and to ensure that he obtained independent advice.
- [287.](#) The undue influence must have existed at the time of the transaction that is impugned: *Thompson v Foy* [2009] EWHC 1076 (Ch), [2009] 22 E.G. 119 (C.S.) at [114].
- [288.](#)  [2001] UKHL 44, [2002] 2 A.C. 773. See Vol.I, para.8-061.
- [289.](#)  See Vol.I, paras 8-073 et seq.
- [290.](#)  See Vol.I, paras 8-065 and 8-090 et seq.
- [291.](#)  See Beale, *Defences in Contract* (2017), Ch.5, where it is argued that while the primary purpose of the doctrine may be to prevent "tyranny, trickery and fraud", those are not requirements. First, exploitation may be passive. Secondly, the defendant's behaviour need not be dishonest: it can consist of a failure to ensure that the claimant was properly informed, was thinking through the consequences and was acting free of the defendant's influence. Thirdly, the transaction need not always be apparently to the claimant's disadvantage at the time.
- [292.](#) As in *Hammond v Osborn* [2002] EWCA Civ 885.
- [293.](#) e.g. *Cheese v Thomas* [1994] 1 W.L.R. 173; *Chen-Wishart* (1994) 110 L.Q.R. 173, 175; *Hammond v Osborn* [2002] EWCA Civ 885; *The Times*, July 18, 2002; *Scott* [2003] L.M.C.L.Q. 145.
- [294.](#) Compare *Hammond v Osborn* [2002] EWCA Civ 885, [2002] W.T.L.R. 1125, a case of gift in which it was held that the donor had not made an informed judgment. It was accepted that the recipient was not guilty of any reprehensible conduct. It appears that the exercise of undue influence consisted of failing to draw the donor's attention to the size of the gift he was making and to ensure that he obtained independent advice. It has been argued that the approach of the court in this case was inconsistent with the *Etridge* case: *Scott* [2003] L.M.C.L.Q. 145; but the explanation given in the text above is preferred. See also *Macklin v Dowsett* [2004] EWCA Civ 904, [2004] All E.R. (D) 95 (Jun) at [10]; *Turkey v Awadh* [2005] EWCA Civ 382, [2005] 2 F.C.R. 7 at [11] ("no need to show ... either misconduct or that the deal was disadvantageous"). See also *Goodchild v Bradbury* [2006] EWCA Civ 1868; *Gorjat v Gorjat* [2010] EWHC 1537 (Ch) at [147] ("where one person has acquired a measure of ascendancy over the other or one of the parties is vulnerable and reliant and where the transaction is not readily explicable by ordinary motives ... it must be proved that the donor knew and understood what he was doing").
- [295.](#) e.g. *Royal Bank of Scotland Plc v Chandra* [2011] EWCA Civ 192. See further below, para.8-071.
- [296.](#) *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876, 883-884, per Millett L.J. The other members of the court did not consider the question.
- [297.](#) *Ellis v Barker* (1871) L.R. 7 Ch. App. 104; *Allcard v Skinner* (1887) L.R. 35 Ch. D. 145; *Bullock v Lloyds Bank Ltd* [1955] Ch. 317. The doctrine is not limited to transactions which are in favour of, or which have been instigated by, the individual on whom reliance has been placed: *Naidoo v Naidu*, *The Times*, November 1, 2000.
- [298.](#) (1887) L.R. 36 Ch. D. 145, 171.
- [299.](#) [1994] 1 A.C. 180, 189–190.
- [300.](#) In *Bank of Credit and Commerce International SA v Aboody* [1990] 1 Q.B. 923, 953.

- [301.](#) [2001] UKHL 44, [2002] 2 A.C. 773.
- [302.](#) [2001] UKHL 44 at [22]–[23]; below, para.8-090.
- [303.](#) See below, paras 8-083—8-089.
- [304.](#) [2001] UKHL 44 at [17].
- [305.](#) [2001] UKHL 44 at [14]. The question is whether undue influence has been proved, either by direct evidence or by inference: *Annulment Funding Co Ltd v Cowey* [2010] EWCA Civ 711 at [50].
- [306.](#) [2001] UKHL 44 at [16]. See also the speeches of Lord Clyde (at [92]) and Lord Hobhouse (at [98]).
- [307.](#) *Royal Bank of Scotland Plc v Chandra* [2010] EWHC 105 (Ch), [2010] 1 Lloyd's Rep. 677 at [121], David Richards J. (The decision was affirmed [2011] EWCA Civ 192.)
- [308.](#) [2001] UKHL 44 at [92]; and see further below, para.8-084.
- [309.](#) [1985] A.C. 686, 705.
- [310.](#) [1983] 3 All E.R. 85.
- [311.](#) [1985] A.C. 686, 704, relying on a Privy Council decision on the Indian Contracts Act, *Poosathurai v Kannappa Chettiar* (1919) L.R. 47 Ind. App. 1. As Nourse L.J. put it in *Goldsworthy v Brickell* [1987] Ch. 378, 401: "... the presumption is not perfected and remains inoperative until the party who has ceded the trust and confidence makes a gift so large, or enters a transaction so improvident, as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which men act. Although influence might have been presumed beforehand, it is only then that it is presumed to have been undue."
- [312.](#) As Lord Nicholls put it in *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 77 at [12]: "[I]n the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous."
- [313.](#) [1983] 3 All E.R. 85, 90.
- [314.](#) See next paragraph.
- [315.](#) See below, para.8-064.
- [316.](#) See below, paras 8-073—8-096.
- [317.](#) See below, paras 8-101 et seq.
- [318.](#) *CIBC Mortgages Ltd v Pitt* [1994] 1 A.C. 200, overruling *Bank of Credit and Commerce International SA v Aboody* [1990] 1 Q.B. 923 on this point; *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773, at [12], [156].
- [319.](#) *Bank of Credit & Commerce International SA v Aboody* [1990] 1 Q.B. 923, 943. See Snell's Principles of Equity, 32nd edn (2010), paras 8-022 and 9-007—9-012.
- [320.](#) [1990] 1 Q.B. 923, 943.
- [321.](#) In a leading case Lord Parmoor, delivering the judgment of the Privy Council, said that relief will be given "unless the person claiming to enforce the contract can prove, affirmatively, that the person standing in such a confidential position has disclosed, without reservation, all the information in his possession and can further show that the transaction was, in itself, a fair one": *Demara Bauxite Co Ltd v Hubbard* [1923] A.C. 673, 681–682.

- [322.](#) Lord Browne-Wilkinson in *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200, 209.
- [323.](#) See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Ch.14.
- [324.](#) [1994] 1 A.C. 200.
- [325.](#) Above, para.8-062.
- [326.](#) [1994] 1 A.C. 200. For criticism of the requirement see Capper (1998) 114 L.Q.R. 479, 487 and numerous further comments cited at (1998) 114 L.Q.R. 479, n.44. In *Barclays Bank v Coleman* [2000] 1 All E.R. 385, 400, Nourse L.J., delivering the only full judgment, said that Slade L.J. in the Court of Appeal in *National Westminster Bank Ltd v Morgan* [2000] 1 All E.R. 385, had stated the law as it stood at the time accurately; and that not every transaction in which an unfair advantage is obtained is necessarily manifestly disadvantageous. While in that case the House of Lords had held that manifest disadvantage is required in Classes 2A and 2B, this “may not remain essential indefinitely”. For the time being at least this prediction seems to have been inaccurate at least in substance, as the test is now more demanding.
- [327.](#) *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773, per Lord Nicholls at [21]–[29]. See also the speech of Lord Scott at [156]–[158].
- [328.](#) *Allcard v Skinner* (1887) L.R. 36 Ch. D. 145, 185.

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(b) - Direct Proof of Undue Influence

“Actual” undue influence

8-066

If there is no special relationship, of the kind to be mentioned below, between the parties, or if there is such a relationship but the transaction that is challenged is not one that “requires explanation”, the onus is upon the person seeking to avoid the transaction to establish that undue influence was used. ³²⁹ In *Bank of Credit and Commerce International SA v Aboody* Slade L.J., delivering the judgment of the Court of Appeal, said:

“... we think that a person relying on a plea of actual undue influence must show that (a) the other party to the transaction ... had the capacity to influence the complainant; (b) the influence was exercised; (c) its exercise was undue; (d) that its exercise brought about the transaction.” ³³⁰

It seems that undue influence may be proved by showing one of various forms of conduct.

Coercion or actual pressure

8-067

Undue influence may be proved by showing that there was coercion by the donee; these cases are probably now better viewed as cases of illegitimate pressure ³³¹ and, accordingly, they were treated in the previous section. Although there are few modern cases on the point, it seems that undue influence may be proved by showing that the defendant used his relationship with the claimant to put pressure on the claimant. ³³² Many of the old cases on this point have concerned spiritual “advisers”, who have used their expert knowledge of the next world to obtain advantages in this. ³³³ In *Morley v Loughnan* ³³⁴ executors recovered from the defendant large sums of money obtained by him from their testator during the last seven years of his life, on the ground that they had been obtained by undue influence in the guise of religion, it being held unnecessary to decide whether there was a fiduciary or confidential relationship between the defendant and the testator. ³³⁵ There have also been cases where an employee obtained complete control over an employer of weak understanding, ³³⁶ and where an older man acquired a strong influence over a younger one, inducing him to execute securities for debts contracted by them in their career of mutual dissipation. ³³⁷ The transactions were set aside. In *CIBC Mortgages Plc v Pitt* there was a finding of actual undue influence which seems to have rested largely on the pressure that the husband placed upon the wife. ³³⁸ But there may have been some change in what pressure wives are expected to have to withstand. In *Royal Bank of Scotland v Etridge (No.2)* Lord Nicholls said:

“Statements or conduct by a husband which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances should not, without more, be castigated as undue influence.” ³³⁹

Independent and informed judgment

8-068

However, “importunity and pressure ... [are] neither always necessary nor sufficient”. ³⁴⁰ Undue influence may also be shown by proving that the stronger party exercised such a degree of domination or control over the mind of the weaker party that the latter’s independence of decision was substantially undermined. ³⁴¹ The critical question is whether the complainant was allowed to exercise an independent and informed judgment. ³⁴² In *Bank of Montreal v Stuart* the wife succeeded in establishing undue influence even though the husband had put no pressure on her because none was needed, as “she had no will of her own ... she was ready to sign and do anything he told her to do”. ³⁴³ In *Bank of Credit and Commerce International SA v Aboody*, ³⁴⁴ the wife trusted her husband in business matters and signed documents he put before her without question. Although there was also evidence that he bullied her and that she signed because she wanted peace, the Court of Appeal did not rely on these facts; it considered that if the husband had intentionally exploited her trust to get the wife to sign manifestly disadvantageous documents without explaining them to her, that would constitute undue influence. ³⁴⁵ As now in cases where undue influence is actually proved it is not necessary to prove that the transaction was manifestly disadvantageous in order to obtain relief, ³⁴⁶ it seems that a party who is shown to have exploited another’s trust to get them to enter transactions without proper consideration or explanation will be held to be exercising undue influence, without more; the influenced party’s mind is still “a mere channel through which the will of [the influencing party] operates”. ³⁴⁷ As Lord Nicholls put it:

“In cases of this ... nature the influence one person has over another provides scope for misuse without any specific acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree to a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests.” ³⁴⁸

There is a close parallel between these cases of “actual” undue influence and cases in which undue influence may be presumed. In each case the capacity to influence the complainant exists because of the trust and confidence that the complainant had in the other party, at least in relation to the transaction in question. The fact that the confidence has been abused may be *presumed* from the fact that the complainant has entered a transaction that is not readily explicable by the relationship of the parties ³⁴⁹; but if it is shown that the particular transaction was the result of the complainant simply following the other party’s suggestions, and the latter did not allow the complainant to exercise his or her own free and informed judgment but furthered his own interests, ³⁵⁰ that will amount ³⁵¹ to actual undue influence. ³⁵² Manifest disadvantage is merely powerful evidence that undue influence has been exercised. ³⁵³

Misrepresentation and non-disclosure as forms of undue influence

8-069

There may also be actual proof of undue influence in the form of misrepresentation or non-disclosure. Lord Nicholls in the *Etridge* case said that:

“[W]hen a husband is forecasting the future of his business, and expressing his hopes or fears, a degree of hyperbole may be only natural. Courts should not too readily treat such exaggerations as misrepresentations.” ³⁵⁴

But Lord Nicholls continued:

“... inaccurate explanations of a proposed transaction are a different matter. So are cases where a husband, in whom a wife has reposed trust and confidence for the management of their financial affairs, prefers his interests to hers and makes a choice for them both on that footing. Such a husband abuses the confidence he has. He fails to discharge the obligation of candour and fairness he owes a wife who is looking to him to make the major financial decisions.” ³⁵⁵

This does not mean that an unintentional failure by the husband to disclose a relevant fact to the wife amounts to proof of undue influence ³⁵⁶; but a deliberate suppression of information because the husband knows that, if disclosed, it will deter the wife from giving the guarantee will involve an abuse by him of her confidence. ³⁵⁷

Bribery as a form of undue influence

8-069A

⚠ It has been said that bribery may also be a form of “actual” undue influence. ³⁵⁸ ⚠

Disregard of the victim’s interests

8-070

The House of Lords has held that in order to show actual undue influence, or rather if undue influence is actually shown to have been exercised, ³⁵⁹ it is not necessary to show that the transaction was “manifestly disadvantageous” or “one that called for an explanation”. ³⁶⁰ In *CIBC Mortgages Plc v Pitt* ³⁶¹ Lord Browne-Wilkinson said that actual undue influence was a species of fraud, and the victim is entitled to have the transaction set aside as of right. He continued:

“No case decided before [*National Westminster Bank Plc v Morgan*] ³⁶² was cited (nor am I aware of any) in which a transaction proved to have been obtained by actual undue influence has been upheld nor is there any case in which a court has even considered whether the transaction was, or was not, advantageous.”

However, the complainant may have to show that the other party at least “preferred his own interests”. ³⁶³ This phrase several times formed part of Lord Nicholls’ description of “actual undue influence” in the *Etridge* case. ³⁶⁴ It certainly seems sufficient that the defendant took advantage of the claimant’s willingness to trust him to prefer his own interests. Nor in such a case does it seem to matter that the transaction was not unfair to the claimant in purely financial terms: relief may be given even though, for example, the claimant obtained a reasonable price for property they were selling if the sale was disadvantageous to them, and advantageous to the defendant, in some other way. ³⁶⁵ It is also clear that the defendant need not have derived any personal advantage from the transaction. ³⁶⁶

Must the defendant have preferred his own interest?

8-071

What is less clear is whether relief can be given even if the defendant thought he was acting in the victim's interests. In a case in which the wife simply signed whatever her husband put in front of her, it was said that the husband's influence was not "undue" because the transaction appeared at the time to be to her advantage: the husband was seeking to obtain for her an interest in a property which at the time was worth more than the amount charged, as he "was getting on". Millett L.J. said:

"The court of equity is a court of conscience. It sets aside transactions obtained by the exercise of undue influence because such conduct is unconscionable." ³⁶⁷

The law on this point is not wholly clear. Certainly undue influence has been found when the defendant had not behaved improperly, sought to trick or take advantage of the claimant; but the court found that the transaction was manifestly disadvantageous to the claimant. ³⁶⁸ In the context of parties who trust the other to the extent that they sign without question, there seem to be two possible approaches, reflecting the uncertainty as to the basis of the doctrine of undue influence, to which reference was made earlier. ³⁶⁹ One approach is that the influence that has been proved to exist may be treated as undue if the transaction was clearly unwise for the claimant, ³⁷⁰ whether or not the defendant stood to benefit from it; but that if the transaction was not clearly unwise, the influence will have been exercised "unduly" only if the defendant preferred his own interests. The other possibility is that the fact that the claimant was deprived of the opportunity to make an independent and informed judgment in itself makes the influence undue. In support of this approach it may be argued that though the other party was not dishonest in the sense of intending to harm the complainant's interests, in fraud cases it is no defence that there was no intent to injure; it suffices that the statement was known to be untrue or was made recklessly. ³⁷¹ A parallel approach might apply in cases in which the complainant was deprived of the opportunity to make up his or her own mind as to the risk and benefits involved. The critical case would be one in which the defendant made the decision without reference to the complainant's wishes, or without giving him full information, when at the time the transaction appeared to be one that was for the complainant's benefit but subsequently it turned out badly for the complainant and the claimant now wishes to set it aside. In other words, denying the complainant the chance to decide for himself might amount to actual undue influence. ³⁷² However, on the balance of recent authorities it seems unlikely that a court will find it proved directly that the defendant exercised "undue" influence in such a case unless he has at least preferred his own interests. ³⁷³

Causation

8-072

As in cases of fraud, the fraud must have induced the contract, so actual undue influence must have influenced the contract. ³⁷⁴ However, the analogies with fraud and duress suggest that the undue influence need only be "a significant reason" for the complainant entering the contract, ³⁷⁵ rather than, for instance, the principal reason. What was less clear until recently was whether, as has been held in some fraud cases, ³⁷⁶ provided that the undue influence had some effect, it does not matter that the complainant would have entered the contract in any event. In *Bank of Credit and Commerce International SA v Aboody* ³⁷⁷ it was said that it would not be appropriate for the court to exercise its jurisdiction to set aside the contract "where the evidence establishes that on the balance of probabilities the complainant would have entered the contract in any event". But in *UCB Corporate Services Ltd v Williams* ³⁷⁸ the Court of Appeal held that, as undue influence is a species of fraud, it is no answer that the person influenced would have entered the transaction anyway: it is the fact that she has been deprived of the opportunity to make a free choice that founds her equity to set aside the transaction. The proposition in *Aboody's* case was said to be:

"... flatly inconsistent with Lord Browne-Wilkinson's statement of principle ³⁷⁹ ... that a victim of undue influence is entitled to have the transaction set aside 'as of right'. The words 'as of right' seem ... to admit of only one meaning; viz., regardless of other


considerations.”³⁸⁰

Presumably it would follow also that the same presumption applies as in fraud, so that it will be for the stronger party to show that the undue influence had no impact at all on the complainant’s decision.³⁸¹

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1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
 - ^{254.} See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; Chen-Wishart (2006) 59 C.L.P. 231.
 - ^{329.} *Allcard v Skinner* (1887) L.R. 36 Ch. D. 145, 181.
 - ^{330.} [1990] 1 Q.B. 923, 967.
 - ^{331.} Birks and Chin, *Good Faith and Fault in Contract Law*, pp.63–65; Capper (1998) 114 L.Q.R. 479, 484, 493. An example of actual undue influence that seems to have amounted to illegitimate pressure is *Drew v Daniel* [2005] EWCA Civ 507, [2005] 2 F.C.R. 365. Ward L.J. pointed out that in all cases of undue influence, “the critical question is whether or not the influence has invaded the free volition of the donor to accept or reject the persuasion or withstand the influence” (at [36]).
 - ^{332.} An example seems to be *Coldunell Ltd v Gallon* [1986] Q.B. 1184; see at 1196.
 - ^{333.} *Norton v Relly* (1764) 2 Eden 286; *Nottidge v Prince* (1860) 2 Giff. 246; *Lyon v Home* (1868) L.R. 6 Eq. 655.
 - ^{334.} [1893] 1 Ch. 736.
 - ^{335.} It is such cases that Lord Nicholls may have had in mind when he said that undue influence includes “cases where a vulnerable person has been exploited”: *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [11].
 - ^{336.} *Bridgeman v Green* (1755) 2 Ves.Sen. 627; *Re Craig* [1971] Ch. 95. Whether there was actual influence depends on the individual involved, not on whether a normal person would be influenced: *Re Brocklehurst’s Estate* [1978] Ch. 14, 40.
 - ^{337.} *Smith v Kay* (1859) 7 H.L.C. 750. The position in relation to a will alleged to have been procured by undue influence is different: see *Edwards v Edwards* [2007] W.T.L.R. 1387; *Hubbard v Scott* [2011] EWHC 2750 (Ch); *Wharton v Bancroft* [2011] EWHC 3250 (Ch).
 - ^{338.} See the finding of the trial judge recounted in the Court of Appeal (1993) 66 P.&C.R. 179, 182 (affirmed [1994] 1 A.C. 200).
 - ^{339.} *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [32]. cf. *Hurley v Darjan Estate Co Plc* [2012] EWHC 189 (Ch), [2012] 1 W.L.R. 1782 at [40] (fact that wife signed in the heat of the moment to keep the husband happy did not mean her consent was not free and informed; cf. the claim of undue influence made in *Barclays Bank v O’Brien*, which failed before the Court of Appeal and was not pursued: [1993] Q.B. 109, 113–117).
 - ^{340.} *Royal Bank of Scotland v Etridge (No.2)* [1998] 4 All E.R. 705, 712. See also *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876, 883.
 - ^{341.} *Bank of Montreal v Stuart* [1911] A.C. 120.
 - ^{342.} “The donor may be led but she must not be driven; and her will must be the offspring of her own volition, not a record of someone else’s”: *Thompson v Foy* [2009] EWHC 1076 (Ch), [2010] 1 P.

& C.R. 16 at [101].

343. [1911] A.C. 120, 136-137. In *Royal Bank of Scotland v Etridge (No.2)* [1998] 4 All E.R. 705, 712, Stuart-Smith L.J. said that this would today be more readily classed as a Class 2B case. If there is a sufficient relationship for Class 2B (below, para.8-083) and also a transaction calling for explanation, it will be in the weaker party's interest to plead the case as Class 2B as it then is up to the other party to rebut the presumption of undue influence; but actual undue influence remains an attractive alternative if there is doubt about the nature of the relationship or the need for an explanation of the transaction.
344. [1990] 1 Q.B. 923, 967.
345. The court held that manifest disadvantage was essential to a plea of actual undue influence. As on the facts it did not consider the transactions to be manifestly disadvantageous, it refused relief.
346. *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200, overruling *Bank of Credit & Commerce International SA v Aboody* [1990] 1 Q.B. 923.
347. *Bank of Credit and Commerce International SA v Aboody* [1990] 1 Q.B. 923, 969, referring to the observations of Jenkins and Morris L.JJ. in *Tufton v Sporni* [1952] 2 T.L.R. 516, 530, 532.
348. *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [9]. See the discussion in *McGregor v Michael Taylor & Co* [2002] 2 Lloyd's Rep. 468, where at [24]–[27] these are described as “trust me” cases.
349. *McGregor v Michael Taylor & Co* [2002] 2 Lloyd's Rep. 468, at [21]; see further below, para.8-090.
350. See above, para.8-060 and below, para.8-070.
351. Subject to the point to be discussed in paras 8-070—8-071.
352. *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [17]: “such a plaintiff may succeed even where this presumption was not available to him; for instance where the impugned transaction was not one which called for an explanation.”
353. *Royal Bank of Scotland v Etridge (No.2)* [1998] 4 All E.R. 705, 713; cf. [2001] UKHL 44, [2002] 2 A.C. at [104].
354. *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [32].
355. [2001] UKHL 44 at [33].
356. *Royal Bank of Scotland Plc v Chandra* [2010] EWHC 105 (Ch), [2010] 1 Lloyd's Rep. 677 (affirmed [2011] EWCA Civ 192).
357. [2010] EWHC 105 (Ch) at [131]; see also at [140]. In *Hewett v First Plus Financial Plc* [2010] EWCA Civ 312 a husband's concealment from his wife of an affair with another woman amounted to undue influence. Compare *Davies v AIB Group (UK) Plc* [2012] EWHC 2178 (Ch) (held at [113]–[114] that no undue influence: husband made full disclosure of the entire transaction and all of the relevant documents so as to put wife's solicitor in the position to tender full and informed advice to her). A question is whether knowledge of the surety's solicitor should be imputed to her. The general rule is that, subject to any statutory variation, a solicitor's knowledge is treated as that of his client (see *AIB v Martin and Gold Unreported*, March 15, 1999, Jacob J), but in *Davies v AIB Group (UK) Plc* [2012] EWHC 2178 (Ch) at [116], without deciding the issue, Norris J. thought that some caution might be required in the context of undue influence arguments: “A principle of attributing the knowledge of an agent to the principal does not really assist in identifying how an intention to enter a transaction was produced—freely or under undue influence.”

- [358.](#)  *Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch) at [167]–[168], Rose J. As bribery had not been established, the “difficult legal question” was left open.
- [359.](#) See above, para.8-061.
- [360.](#) *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200; *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [12], [156]. In *Thompson v Foy* [2009] EWHC 1076 (Ch), [2010] 1 P. & C.R. 16, Lewison J. said that the *Etridge* case decided that “Disadvantage to the donor is not a necessary ingredient of undue influence ... However, it may have an evidential value, because it is relevant to the questions whether any allegation of abuse of confidence can properly be made, and whether any abuse actually occurred” (at [99]).
- [361.](#) [1994] 1 A.C. 200, 209.
- [362.](#) [1985] A.C. 686; above, para.8-062.
- [363.](#) See above, para.8-060.
- [364.](#) See [2001] UKHL 44, [2002] 2 A.C. 773 at [9] (quoted above, para.8-068 at n.341) and [32].
- [365.](#) For an example of a transaction which was unwise but not unfair in terms of value, see *Liddle v Cree* [2011] EWHC 3294 (Ch) at [86].
- [366.](#) *Allcard v Skinner* (1887) L.R. 36 Ch. D. 145 (where the property went to the Order, not to the Mother Superior).
- [367.](#) *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876, 883–884. The other members of the court did not consider the question.
- [368.](#) *Cheese v Thomas* [1994] 1 W.L.R. 129, decided before the decision of the House of Lords in *Etridge*: the case was one of presumed undue influence.
- [369.](#) Above, para.8-059.
- [370.](#) In practice, in such a case the transaction will require explanation (see below, para.8-090) and the claimant will rely on the presumption of undue influence, as in *Hammond v Osborn* [2002] EWCA Civ 885, [2002] W.T.L.R. 1125 (see above, para.8-060 n.287). Despite the obviously disadvantageous transaction (a very large gift which left the donor with limited means of support), the case has been criticised on the ground that the defendant did nothing wrong in (after considerable hesitation) accepting the gift: Lewison (2011) 19 Rest L.R. 1.
- [371.](#) Above, para.7-051.
- [372.](#) Compare N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), paras 9-004–9-005 (wrong-doing required, though not proof of any specific act); Chen-Wishart (2006) 59 C.L.P. 231, 265 (“an improvident outcome is practically indispensable even in class I coercion cases”; “substantive unfairness is of the essence of undue influence”).
- [373.](#) See above, para.8-060. Compare the situation where the transaction was one sided, when it will require explanation and thus the claimant will rely on the presumption: see further below, para.8-073.
- [374.](#) See above, para.7-035.
- [375.](#) See above, paras 7-037 and 8-027–8-028.
- [376.](#) See above, paras 7-039 and 8-026.

- [377.](#) [1990] 1 Q.B. 923, 971.
- [378.](#) [2002] EWCA Civ 555 at [86].
- [379.](#) *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200, 209.
- [380.](#) [2002] EWCA Civ 555 at [91].
- [381.](#) This is the rule suggested by the statement in *Bank of Credit and Commerce International SA v Aboody* [1990] 1 Q.B. 923, 971, quoted in this paragraph. For the rule in fraud cases see above, para.7-039.

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(c) - Presumed Undue Influence

Presumption of influence from certain relationships

8-073

If the parties were at the time of the transaction in one of certain types of relationship with each other, it is presumed that one party had influence over the other; and if it is shown that a transaction between them was one “not readily explicable by the relationship” between them, it will be presumed (or inferred) ³⁸² that the transaction was the result of an abuse of the influence, unless the presumption is rebutted. ³⁸³ It is not necessary for the complainant to “prove that he actually reposed trust and confidence in the other party”, ³⁸⁴ or that the other party dominated the relationship. These are the cases that Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* ³⁸⁵ referred to as “Class 2A cases”. ³⁸⁶ Once the transaction has been shown to be one requiring explanation, the onus is on the party taking the benefit to justify that it was free from undue influence.

Relationship of influence shown on facts

8-074

Outside the recognised relationships, if the plaintiff proves that at the time of the transaction “requiring explanation”, a confidential relationship in fact existed between the parties, the presumption of undue influence will arise. ³⁸⁷ That at least has been the traditional view. These are the cases labelled by Lord Browne-Wilkinson as “Class 2B”. ³⁸⁸ But the decision of the House of Lords in *Etridge* ³⁸⁹ has cast doubt on the existence of this class as a separate category. This is explored below. ³⁹⁰

^{1.} See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).

^{254.} See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; Chen-Wishart (2006) 59 C.L.P. 231.

^{382.} See below, para.8-076.

^{383.} *Allcard v Skinner* (1887) 36 Ch. D. 145, 181; *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [18].

^{384.} *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [18].

^{385.} [1994] 1 A.C. 180.

[386.](#) See above, para.8-061.

[387.](#) *Tufts v Sperry* [1952] 2 T.L.R. 516, 522; *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326.

[388.](#) In *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180: see above, para.8-061.

[389.](#) *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773.

[390.](#) See below, para.8-084.

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Volume I - General Principles

Part 2 - Formation of Contract

Chapter 8 - Duress and Undue Influence ¹

Section 3. - Undue Influence ²⁵⁴

(c) - Presumed Undue Influence

(i) - Relationships Giving Rise to Presumption of Influence

Presumption of influence

8-075

Certain types of relationship give rise to a presumption that one party had influence over the other. This does not by itself give rise to a presumption that undue influence has been used by the stronger party, but if there is a transaction between the parties that cannot, in the words of Lindley L.J. in *Allcard v Skinner*, ³⁹¹ “reasonably [be] accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary men act”, ³⁹² then a presumption does arise. Unless the stronger party raises sufficient doubt to rebut the presumption, the transaction will be set aside.

Nature of presumptions

8-076

It will be seen that in this class of case there may be two separate presumptions. The first arises from the nature of the relationship. It is simply a presumption that one party had influence over the other, and it is said to be “irrebuttable”. ³⁹³ It is not, however, a presumption that undue influence has been exercised and it is not sufficient for the transaction to be set aside, even if the stronger party offers no evidence. A presumption or inference that there was undue influence arises, as we have just seen, only when also there is a transaction that “calls for explanation”. ³⁹⁴ This second presumption is not only rebuttable but was said in *Etridge*’s case to be merely an “evidential presumption”. ³⁹⁵ This appears to mean that if the stronger party provides a reasonable explanation of the transaction or gives evidence that, on the balance of probabilities, casts doubt on whether the transaction did result from undue influence, the weaker party will succeed only if he or she can show, again on the balance of probabilities, that it was: the overall burden remains on the party seeking to set aside the transaction. ³⁹⁶

Dominating influence unnecessary

8-077

Despite the fact that in *Morgan* Lord Scarman had referred to a “dominating influence”, ³⁹⁷ in cases of presumed undue influence it is immaterial whether one party has acquired a dominating influence over the mind of the other party ³⁹⁸.

“It is enough to show that the party in whom the trust and confidence is reposed is in a

position to exert influence over him who reposes it.” ³⁹⁹

These cases depend:

“... on the concept that once the special relationship has been shown to exist, no benefit can be retained from the transaction unless it has been positively established that the duty of fiduciary care has been entirely fulfilled.” ⁴⁰⁰

Parent and child

8-078

In the earliest cases in which benefits conferred by children upon their parents were set aside, the relief seems to have been extended on the ground of actual fraud. ⁴⁰¹ Now, however, it is well established that the child reposes trust and confidence in the parent, ⁴⁰² even though the child may have attained his majority not long before. ⁴⁰³ If a gift is made to a parent shortly after the child reaches the age of majority, the parent will be required to show that the child was acting independently of his influence. ⁴⁰⁴ This presumption can continue even after marriage, ⁴⁰⁵ although the duration of the presumption is a question of fact and degree in the circumstances of each particular case. Family arrangements, however, are treated more leniently:

“Transactions between parent and child may proceed upon arrangements between them for the settlement of property, and of their rights in property in which they are interested. In such cases the court regards the transactions with favour.” ⁴⁰⁶

But even so, if the parent gets a disproportionate advantage, the arrangement is likely to be set aside. ⁴⁰⁷ As between an adult child and elderly or senile parents, no presumption of influence over the parents arises, but it may be possible to establish a case of undue influence on the facts. ⁴⁰⁸

Guardian and ward

8-079

The presumption also applies to dealings between guardian and ward, ⁴⁰⁹ and the fact that the guardianship has legally terminated will not necessarily mean that the influence ceases, provided that there is still some control over the ward's property or actions. ⁴¹⁰ Persons in loco parentis are also subject to the same surveillance by the court, such as uncle and niece, ⁴¹¹ stepfather and stepdaughter, ⁴¹² stepmother and stepdaughter, ⁴¹³ elder and younger brother, ⁴¹⁴ and even an executor and beneficiary, ⁴¹⁵ where the relationship confers a power analogous to that of parental control.

Solicitor and client

8-080

⚠ Any gift or sale by a client to his solicitor will be regarded with considerable suspicion by the court. ⁴¹⁶ The relationship between solicitor and client is not only sufficient to raise a presumption of undue influence should the client enter a manifestly disadvantageous transaction with the solicitor ⁴¹⁷ ⚠; as mentioned earlier, the solicitor is subject to the stricter regime of abuse of confidence. ⁴¹⁸ The solicitor

must show the utmost good faith in his dealings with his client,⁴¹⁹ and must not make any benefit for himself at his client's expense.⁴²⁰ Even if the benefit is an indirect one, as where a gift is made to the solicitor's wife⁴²¹ or son,⁴²² and even if the relationship of solicitor and client has technically ceased,⁴²³ the presumption will apply where the influence still continues between them.⁴²⁴

Other instances possibly within Class 2(A)

8-081

The presumption applies to certain transactions between fiancé and fiancée.⁴²⁵ It also applies to the relationship of medical man and patient,⁴²⁶ trustee and cestui que trust,⁴²⁷ to a religious adviser and a person to whom he gives advice,⁴²⁸ and between a person who has given a power of attorney and the person to whom it was given.⁴²⁹ In contrast, it has been held that the relationship between husband and wife is not within Class 2A.⁴³⁰

Value of the presumption

8-082

In *Etridge*, Lord Nicholls stated that, in the relationships listed above, “the law presumes, irrebuttably, that one party had influence over the other”.⁴³¹ Of course it does not follow that any transaction between parties in such a relationship will be set aside, even if it is not “readily explicable by the relationship between the parties”.⁴³² The ascendant party may be able to rebut the presumption that he or she used undue influence.⁴³³ But further, it is clear from the preceding paragraphs that it is not always possible to state with certainty when there will be a presumption of influence; indeed a test which states that there is a confidential relationship between, say, a parent and child,⁴³⁴ if the parent's influence continues appears to be circular. Lord Clyde disputed “the utility of the further sophistication of sub-dividing ‘presumed undue influence’ into further categories”.⁴³⁵ Lord Nicholls further endorsed Treitel's view that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type, without apparently noting that Treitel was referring only to what used to be called “Class 2B” cases.⁴³⁶ These statements might be taken as hints that in future the courts will abandon altogether the separate category of “presumed influence” and simply ask in each case whether the relationship was one of trust and confidence or of domination, or at least treat the fact that a case falls within Class 2A as raising no more than a rebuttable presumption that there was a relationship of trust and confidence between the parties.

1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).

254. See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; Chen-Wishart (2006) 59 C.L.P. 231.

391. (1887) L.R. 36 Ch. D. 145, 185.

392. This test is to be used instead of asking whether the transaction was “manifestly disadvantageous” to the weaker party: above, paras 8-062—8-065.

393. per Lord Nicholls in *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [18]; but see Lord Clyde at [93].

394. [2001] UKHL 44, [2002] 2 A.C. 773 at [14]; above, para.8-065.

395. [2001] UKHL 44, [2002] 2 A.C. 773 at [16], [93] (semble), [104] and [153].

- [396.](#) Compare a legal presumption under which the burden of proof would shift to the stronger party to prove on the balance of probabilities that there was no undue influence. Before *Etridge* [2001] UKHL 44 there seems to have been little discussion of the exact nature of the presumption in undue influence cases. See further below, para.8-090.
- [397.](#) *National Westminster Bank Ltd v Morgan* [1985] A.C. 686, 707.
- [398.](#) *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326.
- [399.](#) *Goldsworthy v Brickell* [1987] Ch. 378, 404.
- [400.](#) *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326, per Sir Eric Sachs at 346.
- [401.](#) *Glissen v Ogden* (1731) 2 Atk. 258; *Young v Peachy* (1741) 2 Atk. 254; *Cocking v Pratt* (1749) 1 Ves. Sen. 400.
- [402.](#) *Wright v Vanderplank* (1855) 2 K. & J. 1.
- [403.](#) *Archer v Hudson* (1844) 7 Beav. 551; *Berdoe v Dawson* (1865) 34 Beav. 603; *Powell v Powell* [1900] 1 Ch. 243; *London and Westminster Loan & Discount Ltd v Bilton* (1911) 27 T.L.R. 184.
- [404.](#) *Bainbrigge v Browne* (1881) 18 Ch. D. 188; *Bullock v Lloyds Bank Ltd* [1955] Ch. 317; *Re Pauling's Settlement Trusts* [1964] Ch. 303, 336.
- [405.](#) *Lancashire Loans Ltd v Black* [1934] 1 K.B. 380.
- [406.](#) *Baker v Bradley* (1855) 7 De G.M. & G. 597, 620; *Hartopp v Hartopp* (1855) 21 Beav. 259; *Jenner v Jenner* (1860) 2 De G.F. & J. 359; *Hoblyn v Hoblyn* (1889) 41 Ch. D. 200. cf. *Bullock v Lloyds Bank Ltd* [1955] Ch. 317.
- [407.](#) *Hoghton v Hoghton* (1852) 15 Beav. 278; *Turner v Collins* (1871) L.R. 7 Ch. App. 329.
- [408.](#) *Avon Finance Co Ltd v Bridger* [1985] 2 All E.R. 281. A very full survey of the doctrine of undue influence as applied to the elderly will be found in Burns (2003) 23 Legal Studies 251.
- [409.](#) *Hylton v Hylton* (1754) 2 Ves.Sen. 547; *Taylor v Johnston* (1882) 19 Ch. D. 603.
- [410.](#) *Hatch v Hatch* (1804) 9 Ves. 292.
- [411.](#) *Archer v Hudson* (1844) 7 Beav. 551.
- [412.](#) *Kempson v Ashbee* (1874) L.R. 10 Ch. App. 15.
- [413.](#) *Powell v Powell* [1900] 1 Ch. 243.
- [414.](#) *Sercombe v Sanders* (1865) 34 Beav. 382; cf. *Glover v Glover* [1951] 1 D.L.R. 657.
- [415.](#) *Grosvenor v Sherratt* (1860) 28 Beav. 659.
- [416.](#) For the analogous principles governing testamentary dispositions to solicitors, see *Wintle v Nye* [1959] 1 W.L.R. 284.
- [417.](#)  *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [18]; *AKB v Willerton, OH v Craven* [2016] EWHC 3146 (QB), [2017] 4 W.L.R. 25 at [30]
- [418.](#) Above, para.8-064.
- [419.](#) See above, paras 7-087—7-088; *Moody v Cox and Hatt* [1917] 2 Ch. 71.

- [420.](#) *Turrell v Bank of London* (1862) 10 H.L.C. 26; *Wright v Carter* [1903] 1 Ch. 27.
- [421.](#) *Liles v Terry* [1895] 2 Q.B. 679.
- [422.](#) *Barron v Willis* [1902] A.C. 271.
- [423.](#) *Demerara Bauxite Co Ltd v Hubbard* [1923] A.C. 673; *McMaster v Byrne* [1952] 1 All E.R. 1362.
- [424.](#) In *Markham v Karsten* [2007] EWHC 1509 (Ch), [2007] All E.R. (D) 377 it was said that the relationship of solicitor and client between two parties to a transaction should not be irrelevant merely because they were also in another well-recognised relationship in which influence, or the reposing of trust and confidence, might arise. On the contrary, the influence which was presumed to exist between solicitor and client might be strengthened if they were also in a marriage or domestic partner relationship. Nor was it correct to confine the presumption of influence, as between solicitor and client, to transactions of a legal rather than domestic nature. See at [35]–[36].
- [425.](#) *Cobbett v Brock* (1855) 20 Beav. 524; *Lovesy v Smith* (1880) 15 Ch. D. 655; *Re Lloyds Bank Ltd* [1931] 1 Ch. 289. Contrast *Zamet v Hyman* [1961] 1 W.L.R. 1442. Gifts between engaged couples may now also be set aside, if the marriage does not take place, under the Law Reform (Miscellaneous Provisions) Act 1970.
- [426.](#) *Mitchell v Homfray* (1881) 8 Q.B.D. 587; *Radcliffe v Price* (1902) 18 T.L.R. 466.
- [427.](#) *Ellis v Barker* (1871) L.R. 7 Ch. App. 104; *Beningfield v Baxter* (1866) 12 App. Cas. 167.
- [428.](#) *Huguenin v Baseley* (1807) 14 Ves. 273; *Lyon v Home* (1868) L.R. 6 Eq. 655; *Allcard v Skinner* (1887) L.R. 36 Ch. D. 145. It has been rightly pointed out that it is dangerous to assume that every relationship of this type, or of the other types just listed, will give rise to the presumption, as the relationship between the parties may not be confidential: Cartwright, *Unequal Bargaining* (1991), p.178. See further below, para.8-086.
- [429.](#) *Hackett v Crown Prosecution Service* [2011] EWHC 1170 (Admin) at [54].
- [430.](#) See below, para.8-089. Nor is the relationship between a social landlord's agent and a tenant under a contractual periodic tenancy: *Birmingham City Council v Beech* [2014] EWCA Civ 830, [2014] H.L.R. 38 at [65].
- [431.](#) *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [18].
- [432.](#) [2001] UKHL 44 at [21].
- [433.](#) See above, para.8-059 and below, para.8-093.
- [434.](#) Above, para.8-078.
- [435.](#) *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [92].
- [436.](#) [2001] UKHL 44 at [10], referring to Treitel, *The Law of Contract*, 10th edn (1999), pp.380-381.

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(ii) - Confidential Relationship Shown on Facts in earlier Decisions

Confidential relationship shown on facts

8-083

An inference of undue influence may also arise if on the facts it is shown that the parties were in a confidential relationship although one would not be presumed to exist as a matter of law, and that the parties have entered a transaction that is “not otherwise readily explicable”. ⁴³⁷ The cases in this section treated this as a separate category of presumed undue influence. In the light of the opinions expressed by the House of Lords in the *Etridge* case ⁴³⁸ this analysis may no longer be correct. It seems that these cases must now be viewed simply as instances of the kind of evidence that, combined with a transaction “not readily explicable by the relationship of the parties”, may be sufficient to raise an inference that the transaction was procured by undue influence and, unless the other party displaces this inference, should be set aside. ⁴³⁹

Confidential relationship shown on facts: a separate class?

8-084

In *Barclays Bank Plc v O'Brien* ⁴⁴⁰ Lord Browne-Wilkinson had said that in this type of case:

“... if the complainant proves the de facto 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 2(B) case therefore, in the absence of evidence disproving due 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.”

In *Etridge* Lord Hobhouse said that it was difficult to apply this statement literally. First, it would seem to treat the husband as a “‘wrongdoer’ without saying why when it is expressly postulated that no wrongdoing may have occurred”. ⁴⁴¹ This seems to refer to the point that the presumption of undue influence (which now requires a transaction not explicable by ordinary motives) is no more than a way of proving that undue influence did occur. ⁴⁴² Secondly, Lord Hobhouse remarked that Lord Browne-Wilkinson referred to the complainant reposing trust and confidence *generally*, whereas a wife:

“... may be happy to trust her husband to make the right decision in relation to some matters but not others; she may leave a particular decision to him but not other decisions.” ⁴⁴³

He considered, and understood the other members of the court to agree, that “the so-called Class 2B presumption should not be adopted”. The wife must prove her case by showing that she was the victim of an equitable wrong. This wrong may be an overt wrong, such as oppression; or it may be the failure to perform an equitable duty, such as a failure by one in whom trust and confidence is reposed not to abuse that trust by failing to deal fairly with her and have proper regard to her interests. She may discharge the burden of proof that rests on her by establishing a sufficient *prima facie* case to justify a decision in her favour on the balance of probabilities, the court drawing appropriate inferences from the primary facts proved. ⁴⁴⁴ Lord Scott spoke in rather similar terms ⁴⁴⁵; and what Lord Hobhouse said was consistent with the remarks of Lord Clyde. ⁴⁴⁶ It does not seem inconsistent with what was said by Lord Nicholls, ⁴⁴⁷ who endorsed Treitel’s view that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type. ⁴⁴⁸

8-085


Thus it seems that cases in which a presumption of undue influence may arise because of the combination of a confidential relationship shown on the facts and a transaction not explicable otherwise should no longer be regarded as a separate category. Those facts are merely ways of proving that undue influence was used. Thus for a wife to be able to have a transaction between her and her husband set aside, she will have to show, for example, that her husband took “unfair advantage of his influence ... or her confidence in him”. ⁴⁴⁹ This is not quite the same as what is required for a case of “actual” undue influence: that would need direct proof that he exerted undue pressure or took advantage of her confidence. But the dividing line is thin. If, for example, a wife shows that in respect a class of transactions including the particular transaction in question, she did not question her husband’s decision in any way and simply signed what he put in front of her, she has established a case of actual undue influence, at least if she also shows that he preferred his own interests to hers. ⁴⁵⁰ She need not show that the transaction was not readily explicable by their relationship. ⁴⁵¹ In such a case, what is the relevance of the transaction being disadvantageous to her? It seems that showing that the transaction was one that “calls for an explanation” ⁴⁵² is no more than a piece of evidence that may be used to show that her husband did indeed abuse her trust when the evidence would otherwise fall short. The cases in what was formerly termed Class 2B must now be taken merely as examples of the kind of circumstances in which a combination of the nature of the relationship and the resulting transaction may provide sufficient evidence of undue influence for the complainant to succeed unless the other party can somehow rebut the evidential inference.

Relationships that may be confidential

8-086

❗ The relevant type of confidential relationship may arise in “all the variety of relations, in which dominion is exercised by one person over another”, ⁴⁵³ or where the complaint proves that he or she reposed trust and confidence in the wrongdoer. The classic statement is that of Lord Chelmsford in *Tate v Williamson* ⁴⁵⁴:

“Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relationship existed.”

Nevertheless, the “presumption” of undue influence does not arise merely because the relationship between the parties can be described as fiduciary (as, for instance, that of principal and agent). It arises only where the fiduciary relationship is of a particular kind which, in the opinion of equity judges, is such as to raise the presumption. ⁴⁵⁵ For example, the relationship of bank manager and customer is not normally a confidential one in the relevant sense ⁴⁵⁶ ; but when an elderly farmer, without consulting his solicitor, charged his property to his bank by way of guarantee of the debts of his son’s company, and it was obvious that he was relying upon the bank manager for advice, a confidential relationship arose. As the manager neither explained the company’s position fully nor suggested that the farmer get independent advice, the charge was set aside. ⁴⁵⁷

Relationship may arise from transaction

8-087

It has been held that a confidential relationship may arise from the circumstances of the very transaction in question, e.g. if the defendant has advised and assisted the claimant over it and the claimant has relied on the defendant for that. ⁴⁵⁸

Examples

8-088

The existence of a relationship of trust and confidence may be inferred from the fact that one party has entered an excessively onerous transaction at the request of the other (in the case in question, a junior employee with no stake in the business had at her employer’s request given a second charge over her flat and an unlimited all monies guarantee of the employer’s business debts). ⁴⁵⁹ But in such an extreme case the plaintiff may be able to set aside the transaction on the basis of unconscionability. ⁴⁶⁰ So, too, where a young man in financial difficulties sought the advice of a more experienced relative, who himself purchased the young man’s property at a third of its proper price, ⁴⁶¹ where a young woman granted a mining lease to her uncle and to the son of her father’s executor, being advised to do so by the executor in whom she placed “the greatest confidence”, ⁴⁶² and where a member of a committee set up to establish a Moslem cultural centre in London was induced by a fellow member to buy the latter’s house from him for the purpose at a price which greatly exceeded its market value, ⁴⁶³ the transactions were set aside on the ground that the defendants had failed to rebut the presumption of undue influence.

Husband and wife

8-089

The presumption of influence does not apply between husband and wife. ⁴⁶⁴ In *Barclays Bank Plc v O’Brien* ⁴⁶⁵ the House of Lords recognised “a special tenderness of treatment afforded to wives” because in many cases:

“... the wife demonstrates that she placed trust and confidence in her husband in relation to her financial affairs ⁴⁶⁶ and therefore raises a presumption of undue influence”


and because “sexual and emotional ties ... provide a ready weapon for undue influence”. ⁴⁶⁷ In contrast, in *Etridge’s* case the Members of the House were at some pains to emphasise that the courts should not be too ready to find undue influence as between husband and wife. Lord Nicholls said that:

“... statements or conduct by a husband which do not pass beyond the bounds of what

may be expected of a reasonable husband in the circumstances should not, without more, be castigated as undue influence.” ⁴⁶⁸

Lord Scott said that in the surety wife cases, while there are cases in which the husband abused his wife’s confidence in him, for example by over-estimating his prospects, misrepresenting his intentions or subjecting her to excessive pressure, “it should ... be recognised that undue influence, though a possible explanation for the wife’s agreement to become a surety, is a relatively unlikely one”. ⁴⁶⁹

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1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
 - ²⁵⁴. See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; Chen-Wishart (2006) 59 C.L.P. 231.
 - ⁴³⁷. The cases at one time referred to as falling within Class 2(B): see above, para.8-061.
 - ⁴³⁸. See above, para.8-061.
 - ⁴³⁹. “To speak of ‘trust and confidence’ in vacuo as it were, does not assist very much ... Whatever label is put upon the relationship, it must be one as a result of which it can be said, or inferred, that the donee has acquired influence over the donor ... in relation to some general aspect of the donor’s affairs”: *Morley v Elmaleh* [2009] EWHC 1196 (Ch) (at [598]). See also *Thompson v Foy* [2009] EWHC 1076 (Ch), [2010] 1 P. & C.R. 16 at [100].
 - ⁴⁴⁰. [1994] 1 A.C. 180, at 189-190.
 - ⁴⁴¹. *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [105].
 - ⁴⁴². See above, para.8-061.
 - ⁴⁴³. [2001] UKHL 44, [2002] 2 A.C. 773 at [105].
 - ⁴⁴⁴. [2001] UKHL 44 at [107].
 - ⁴⁴⁵. [2001] UKHL 44 at [158]–[162].
 - ⁴⁴⁶. [2001] UKHL 44 at [92].
 - ⁴⁴⁷. In particular, [2001] UKHL 44 at [19].
 - ⁴⁴⁸. [2001] UKHL 44 at [10], referring to Treitel, *The Law of Contract*, 10th edn (1999), pp.380-381.
 - ⁴⁴⁹. [2001] UKHL 44 at [19].
 - ⁴⁵⁰. See above, para.8-071.
 - ⁴⁵¹. See above, para.8-062.
 - ⁴⁵². *Etridge’s case* [2001] UKHL 44, Lord Nicholls at [17].
 - ⁴⁵³. *Huguenin v Baseley* (1807) 14 Ves. 273, 286, per Sir S. Romilly arguendo; *Smith v Kay* (1859) 7 H.L.C. 750, 779; *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326.
 - ⁴⁵⁴. (1866) L.R. 2 Ch. App. 55, 61.

- [455.](#) *Smith v Kay* (1859) 7 H.L.C. 750, 771; *Re Coomber* [1911] Ch. 723.
- [456.](#)  *National Westminster Bank Plc v Morgan* [1985] A.C. 686; cf. *Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch) at [167]–[278] and [427]. If a bank takes it upon itself to explain the nature or effect of a guarantee to a customer, it will be liable for negligently misstating that nature or effect; and it was suggested that in some circumstances a bank might be under a duty to explain the nature of a guarantee to a guarantor before it is executed: *Cornish v Midland Bank Plc* [1985] 3 All E.R. 513.
- [457.](#) *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326. See also *Re Craig* [1971] Ch. 95; *Horry v Tate & Lyle* [1982] 2 Lloyd's Rep. 416.
- [458.](#) *Turkey v Awadh* [2005] EWCA Civ 382, [2005] 2 F.C.R. 7, referring to *Macklin v Dowsett* [2004] EWCA Civ 904, [2004] All E.R. (D) 95 (Jun). In that case the defendant, who was impecunious, had made an arrangement to give up his rights to land for a small sum unless he completed building a bungalow on the land within three years, which he was very unlikely to be able to do.
- [459.](#) *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All E.R. 144, especially at 154 and 158. See Chen-Wishart [1997] C.L.J. 60, 65–66.
- [460.](#) See below, para.8-132.
- [461.](#) *Tate v Williamson* (1866) L.R. 2 Ch. App. 55.
- [462.](#) *Grosvenor v Sherratt* (1860) 28 Beav. 659.
- [463.](#) *Tufton v Sporni* [1952] 2 T.L.R. 516.
- [464.](#) *Hoes v Bishop* [1909] 2 K.B. 390. See also *Grigby v Cox* (1750) 1 Ves.Sen. 517; *Nedby v Nedby* (1852) 5 De G. & Sm. 377; *Barron v Willis* [1899] 2 Ch. 578, 585; *Mackenzie v Royal Bank of Canada* [1934] A.C. 468; *Midland Bank Plc v Shephard* [1988] 3 All E.R. 17. But cf. *Cresswell v Potter* [1978] 1 W.L.R. 255n and *Backhouse v Backhouse* [1978] 1 W.L.R. 243, below, para.8-132.
- [465.](#) [1994] 1 A.C. 180.
- [466.](#) Compare *Society of Lloyd's v Khan* [1998] 3 F.C.R. 93.
- [467.](#) *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180, 190. In *Barclays Bank Plc v Rivett* (1997) 29 H.L.R. 893 it was the wife who had influence over the husband.
- [468.](#) [2001] UKHL 44 at [32].
- [469.](#) [2001] UKHL 44 at [160]–[162].

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(c) - Presumed Undue Influence
(iii) - A Transaction not Explicable by Ordinary Motives

Transaction not explicable by ordinary motives

8-090

As explained earlier, it is not sufficient in order to raise or inference that undue influence has been used that the parties were in the type of relationship in which influence of one over the other is presumed. It must also be shown that the transaction in question was, in the words of Lindley L.J. in *Allcard v Skinner*:

“... not reasonably to be accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary men act.” ⁴⁷⁰

This need not be shown if undue influence may be proved in other ways, ⁴⁷¹ but in all cases in which there is no direct proof, the combination of a relationship in which influence exists and a transaction that “that cannot be explained by ordinary motives” ⁴⁷² seems now to be taken as evidence that undue influence was used, and it will be sufficient to move the evidential burden of disproving undue influence to the other party.

Manifest disadvantage not the test

8-091

In *Etridge* ⁴⁷³ the House of Lords said that the “manifest disadvantage” test should be abandoned in favour of the test stated in the previous paragraph. The point seems to be that a transaction that is clearly disadvantageous to the complainant may not “call for an explanation”. Thus even if the parties are in a confidential relationship, the fact that the weaker party has made a gift of moderate size to the other will not raise any presumption that undue influence was used. ⁴⁷⁴ More importantly, as between husband and wife, even a transaction that is in a narrow sense disadvantageous to the wife, such as a guarantee of her husband's business debts, will not necessarily raise the presumption: it may be explicable in terms of their relationship. In other words the question is not simply, was the transaction disadvantageous to the complainant but was it one that, given their relationship, “calls for explanation”. ⁴⁷⁵ Moreover:

“... the weight of the presumption will vary from case to case and will depend both on the nature of the relationship and on the particular nature of the impugned transaction.” ⁴⁷⁶

“A transaction calling for an explanation, which is not forthcoming”

8-092

In *Mortgage Agency Services Number Two Ltd v Chater* the court said:

“In our judgment the correct legal test is that set out by Lord Nicholls at paragraph [14] in *Etridge* ... In so far as the passage cited from Lord Scarman's speech in *Morgan* suggests a higher test, we prefer the reformulated test given by Lord Nicholls. We detect a possible distinction between a transaction explicable *only* on the basis that undue influence had been exercised to procure it (Lord Scarman) and one which called for an explanation, which if not given would enable the court to infer that it could only have been procured by undue influence (Lord Nicholls).” ⁴⁷⁷

In *Turkey v Awadh*, ⁴⁷⁸ in which *Mortgage Agency Services Number Two Ltd v Chater* does not appear to have been cited, the Court of Appeal held that a presumption of undue influence does not arise merely because the transaction called for an explanation. It must be one that cannot be explained by ordinary motives (as had been said by Lord Scott in *Etridge*'s case ⁴⁷⁹); or, as the trial judge (Judge Cooke Q.C.) had put it:

“... whether, given the circumstances and the nature of the transaction, it says to the unbiased observer that absent explanation it must represent the beneficiary taking advantage of his position.” ⁴⁸⁰

As Buxton L.J. put it:

“If on the evidence the transaction cannot so be explained — that is to say, the transaction calls for an explanation and that explanation is not forthcoming — the burden then shifts to the claimant to show that in fact, and despite the terms and nature of the agreement, he did not in truth abuse the position that he held.” ⁴⁸¹

The transaction must be looked at in its context and to see what its general nature was and what it was trying to achieve for the parties. ⁴⁸² The judge's decision that, although neither party had given thought to the value of the property, the transaction was otherwise explicable by the circumstances (the transaction had family elements) was upheld. Thus, if there is an explanation, no presumption arises in the first place. This would mean that the complainant, in order to show that there is a “transaction not explicable by ordinary motives” would have to show that it was not so explicable even in the circumstances of the case, for example, even though the complainant might be expected to want to provide for his family. This appears to be what Lord Nicholls intended, for in discussing the position as between husband and wife ⁴⁸³ he says that a guarantee of the husband's business debts is not:

“... in the ordinary course ... to be regarded as a transaction which, failing proof to the contrary, is explicable only on the basis that it has been procured by the exercise of undue influence by the husband.” ⁴⁸⁴

What may be expected as between husband and wife

8-093

As between husband and wife, it seems that with the change from requiring “manifest disadvantage” to that treating a transaction that is “not readily explicable by their relationship” as evidence that, combined with a relationship of trust and confidence, may suffice to raise an evidentiary presumption, may have been accompanied by a change of attitude towards what will satisfy this criterion. Earlier cases had suggested that a charge executed by a wife to secure her husband’s business debts would be manifestly disadvantageous, even though she would benefit if the business were to thrive.⁴⁸⁵ In *Etridge*’s case Lord Nicholls discussed at some length the “husband and wife” cases.⁴⁸⁶ He said that it is not correct to take the narrow approach of saying that every guarantee of a husband’s bank overdraft by the wife is manifestly disadvantageous to her:

“Ordinarily, the fortunes of husband and wife are bound up together. If the husband’s business is the source of the family income, the wife has a lively interest in doing what she can to support the business.”⁴⁸⁷

In Lord Nicholl’s view, *in the ordinary course* [emphasis in the original], a guarantee of this kind is not to be regarded as explicable only on the basis of undue influence by the husband and thus prima facie evidence of undue influence. However, that applies only “in the ordinary course”:

“There will be cases where a wife’s signature of a guarantee or charge of her share in the matrimonial home does call for explanation.”⁴⁸⁸

8-094

On one view of the previous law, wives who have signed guarantees of their spouses’ business debts, and others in a similar position, will in future find it less easy to rely on the presumption of undue influence. However, it must be remembered that Lord Nicholls was discussing the facts necessary to give rise to an evidential presumption of undue influence. If the wife proves that the husband used undue influence (for example by showing that she left all such decisions to him and signed whatever he put in front of her), she does not need to rely on the presumption. Even though in practice questions are unlikely to arise if the transaction is innocuous, she may avoid the transaction without having to show that it was disadvantageous “either in financial terms or in any other way. However, in the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous. The issue is likely to arise only when, in some respect, the transaction was disadvantageous either from the outset or as matters turned out”.⁴⁸⁹

Surety cases that call for explanation

8-095

In *Bank of Credit and Commerce International SA v Aboody* the Court of Appeal held that the question whether there was what was then termed manifest disadvantage:

“... must depend on two factors, namely (a) the seriousness of the risk of enforcement to the giver, in practical terms, and (b) the benefits gained by the giver in accepting the risk.”⁴⁹⁰

The Court of Appeal refused to interfere with the trial judge’s findings that, as the wife would receive substantial benefits if the business survived, and at the relevant times it had “more than an equal chance” or “at least a reasonably good chance of surviving”, the transactions were not manifestly disadvantageous to the wife. Conversely, if the chances of the business surviving are not good or if the marriage is already in difficulties and were it to founder the wife would be left without her only

substantial asset, the transaction may be manifestly disadvantageous.⁴⁹¹ But the disadvantage must:

“... be obvious as such to any independent and reasonable persons who considered the transactions at the time with knowledge of all the relevant facts.”⁴⁹²



This approach seems compatible with that of the House of Lords in *Etridge's* case. If a wife gives a guarantee for a business that seems to be thriving, the transaction will be explicable by ordinary motives.⁴⁹³ But a presumption will arise if the complainant who was induced to guarantee or execute a charge to secure the other party's business debts is merely an employee with no stake in the business⁴⁹⁴; indeed some such transactions have been so one-sided that they “shock the conscience of the court” and may be set aside as unconscionable bargains.⁴⁹⁵

Examples from other contracts

8-096

⚠ In the context of contracts generally, as opposed to guarantees, it is not easy to say what will be treated as “not reasonably to be accounted for on ... ordinary motives” for the purposes of establishing an inference that undue influence has been used. Certainly, a sale at undervalue will suffice⁴⁹⁶ ⚠; and so will a transaction which brings the weaker party significant benefits if the benefit is obviously outweighed by the risks involved.⁴⁹⁷ It has been held that vesting a large sum of money to which a successful personal injury claimant has recently become absolutely entitled in the settlor's solicitor upon a bare trust for the settlor (but subject to charging and other powers vested in the solicitor) cannot readily be accounted for by ordinary motives.⁴⁹⁸ ⚠

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1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
 - ^{254.} See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; Chen-Wishart (2006) 59 C.L.P. 231.
 - ^{470.} (1887) L.R. 36 Ch. D. 145, 185.
 - ^{471.} *Etridge's case* [2001] UKHL 44, Lord Nicholls at [17]; above, para.8-061.
 - ^{472.} See below, paras 8-091—8-092.
 - ^{473.} [2001] UKHL 44, [2002] 2 A.C. 773 at [29], [156].
 - ^{474.} See *Etridge's case* [2001] UKHL 44, [2002] 2 A.C. 773 at [24], [104], [156]. In *R. v Att-Gen for England and Wales* [2003] UKPC 22 the majority held that the confidentiality agreement signed by the service man did not require explanation because it was an agreement that anyone wishing to service in the special forces could reasonably be asked to sign (at [24]).
 - ^{475.} [2001] UKHL 44 at [30], [158]. See further below, para.8-093.
 - ^{476.} [2001] UKHL 44, per Lord Scott at [153]. On what is required to rebut the presumption see further below, para.8-093. A confidentiality clause signed by a soldier does not call for explanation: *R. v Att-Gen for England and Wales* [2003] UKPC 22.
 - ^{477.} [2003] EWCA Civ 490 at [30].
 - ^{478.} [2005] EWCA Civ 382, [2005] 2 F.C.R. 7.

- [479.](#) [2001] UKHL 44 at [220].
- [480.](#) [2005] EWCA Civ 382 at [20]–[22].
- [481.](#) [2005] EWCA Civ 382 at [15]; applied in *Hart v Burbidge* [2014] EWCA Civ 992 (a gift case) at [35].
- [482.](#) [2005] EWCA Civ 382 at [32].
- [483.](#) See next paragraph.
- [484.](#) *Etridge* 's case [2001] UKHL 44 at [30].
- [485.](#) *Turner v Barclays Bank Plc* [1997] 2 F.C.R. 151, 165. In *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180, 199 Lord Browne-Wilkinson said quite simply that the charge to secure the husband's business debts was on the face of it "not to her financial advantage" because she had no direct pecuniary interest in the business, but there the question was whether the creditor was put on constructive notice of possible misrepresentation or undue influence and it seems that, as between the stronger and weaker party, more must be shown in order to raise the presumption of undue influence. See above, para.8-091 and compare below, para.8-117.
- [486.](#) [2001] UKHL 44 at [28]–[31].
- [487.](#) [2001] UKHL 44 at [28].
- [488.](#) [2001] UKHL 44 at [30]–[31].
- [489.](#) [2001] UKHL 44 at [12]. See above, para.8-062. It should also be noted that Lord Nicholls, at [44], pointed out that a much lower threshold is required in order to put a third party, such as a bank, to whom the wife has given a guarantee or charge, "on inquiry": see below, para.8-115.
- [490.](#) [1990] 1 Q.B. 923, 965. In *National Westminster Bank Plc v Morgan* [1985] A.C. 686 the charge was not manifestly disadvantageous as it was the only way to save the matrimonial home from repossession by another creditor.
- [491.](#) See the Court of Appeal decision in *Etridge* 's case [1998] 4 All E.R. 705 at 716.
- [492.](#) *Bank of Credit and Commerce International SA v Aboody* [1990] 1 Q.B. 923, 965.
- [493.](#) See above, para.8-093.
- [494.](#) *Steeple v Lea* [1998] 1 F.L.R. 138.
- [495.](#) *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All E.R. 144, 152. See further, below, para.8-132.
- [496.](#)  *Mahoney v Purnell* [1996] 3 All E.R. 61. In contrast, in *Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch) the profits made by Goldman Sachs were not excessive given the nature of the trades and the work that had gone in to winning them, and so no presumption was raised (at [427]).
- [497.](#) *Cheese v Thomas* [1994] 1 W.L.R. 129. It has been argued that a transaction under which the complainant parted with property at full market value may still be manifestly disadvantageous if it was not one that a party in similar situation would ordinarily be expected to have made, such as to sell the family land: Birks and Chin, *Good Faith and Fault in Contract Law* (1995), pp.57–97, at 83; but cf. para.8-062 above.
- [498.](#)  *AKB v Willerton, OH v Craven* [2016] EWHC 3146 (QB), [2017] 4 W.L.R. 25 at [30]. On the steps that should be taken to show the settlor was not unduly influenced, see below, para.8-100

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(d) - Rebutting the Presumption

Rebutting the presumption

8-097

In order to rebut the presumption of undue influence, evidence must be adduced to satisfy the court "that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing". ⁴⁹⁹ The most usual, though not the only, way of rebutting the presumption is to prove that the claimant had competent and independent advice, ⁵⁰⁰ and the position of the defendant is stronger if the claimant's action was taken in accordance with, than if it was taken in spite of, such advice. Sometimes to show that the complainant had independent advice will be the only way of rebutting the inference of undue influence, ⁵⁰¹ but circumstances may establish the fact that the claimant's will was freely exercised although no independent advice was given or although such advice was disregarded. ⁵⁰² Conversely, proof of outside advice does not necessarily show that there was no undue influence: it is a question of fact to be decided on the evidence. ⁵⁰³

Duty of confidence

8-098

In cases falling within the second of the two categories referred to in *Allcard v Skinner* ⁵⁰⁴ it is not to the point to attempt to "rebut the presumption" of undue influence by evidence that the donor's will was exercised free of domination. In cases of this kind what needs to be established is that the duty of confidence has been fulfilled. What constitutes fulfilment of that duty depends on the facts of the particular case, but in general the duty requires that the person liable to be influenced should be enabled to form an independent and informed judgment. ⁵⁰⁵ Where the case involves the giving of advice by a legal or other confidential adviser this no doubt means that the advice must be fairly and disinterestedly offered, and must also be reasonable and adequate advice in the circumstances. In other cases the question may not be so much as to any advice given by the defendant, but as to the availability of advice from other sources. ⁵⁰⁶ In some cases, such a duty may be held to require disclosure of material facts, and no real question arises of undue influence in the literal sense. ⁵⁰⁷

Independent advice

8-099

On the subject of independent advice there have been varying statements of judicial opinion. In *Re Coomber*, ⁵⁰⁸ it was said that it is sufficient if an independent adviser sees that the donor understands what he is doing and intends to do it; he need not advise him to do it or not to do it. On the other hand, in *Powell v Powell*, ⁵⁰⁹ it was said:


“The solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one which it is right and proper for the donor to make under all the circumstances, and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists.”

In *Royal Bank of Scotland v Etridge (No.2)* the Court of Appeal took a similar view,⁵¹⁰ but in the House of Lords, Lord Nicholls expressly disagreed.⁵¹¹ It is not for the solicitor to veto the transaction.⁵¹² The decision whether to proceed is the


decision of the client, not the solicitor. Only in exceptional cases where it is glaringly obvious that the complainant is being grievously wronged is the solicitor to be expected to decline to act further.

Adequacy of advice

8-100

 It has been said that the independent adviser should ensure that the party entering the transaction understands it even where there has been no misrepresentation by the other party. It appears that if the solicitor does not have the relevant information or ask the relevant questions, the advice may be treated as inadequate and the presumption will not be rebutted. The Judicial Committee of the Privy Council considered this question in *Inche Noriah v Shaik Allie Bin Omar*,⁵¹³ where there was a gift of almost the whole of her property by an aged Malay widow to her nephew. The Board was of the opinion that independent advice might be effective even though it was not shown that the advice was taken; but then it must be given:

“... with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.”⁵¹⁴

In the instant case, the gift was set aside, for although the widow had received independent advice from a solicitor, he did not know at the time that the gift comprised almost all of her property, nor did he advise her that she could equally well have benefited her nephew by will.⁵¹⁵ 

1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).


254. See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; Chen-Wishart (2006) 59 C.L.P. 231.

499. *Inche Noriah v Shaik Allie Bin Omar* [1929] A.C. 127, 135. In order to rebut the presumption it is not sufficient to show that C understood what he or she was doing and intended to do it: *Curtis v Pulbrook* [2009] EWHC 782 (Ch) at [143], citing Snell's Equity, 31st edn (2005), para.8-30. At this stage, whether or not there was manifest disadvantage is irrelevant: *Smith v Cooper* [2010] EWCA Civ 722, [2010] 2 F.C.R. 551 at [65].

500. *Morley v Loughnan* [1893] 1 Ch. 736, 752; *Re Coomber* [1911] 1 Ch. 723; *Inche Noriah v Shaik Allie Bin Omar* [1929] A.C. 127.

501. *Inche Noriah v Shaik Allie Bin Omar* [1929] A.C. 127 PC.

502. [1929] A.C. 127, 135; *Re Estate of Brocklehurst* [1978] Ch. 141.

- [503.](#) *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 A.C. 773 at [20]. The Court of Appeal should interfere with the trial judge's findings on this point only if the judge went wrong in principle: *Curtis v Curtis* [2011] EWCA Civ 1602 at [14].
- [504.](#) See above, para.8-059.
- [505.](#) *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326, 342.
- [506.](#) cf. *Hammond v Osborn* [2002] EWCA Civ 885, *The Times*, July 18, 2002, a case of gift in which it was held that the donor had not made an informed judgment. It was accepted that the recipient was not guilty of any reprehensible conduct. It appears that the exercise of undue influence consisted of failing to draw the donor's attention to the size of the gift he was making and to ensure that he obtained independent advice.
- [507.](#) *English v Dedham Vale Properties Ltd* [1978] 1 W.L.R. 93. See above, para.8-069.
- [508.](#) [1911] 1 Ch. 723.
- [509.](#) [1900] 1 Ch. 243, 247. See also *Barron v Willis* [1902] A.C. 271; *Wright v Carter* [1903] 1 Ch. 27.
- [510.](#) *Royal Bank of Scotland v Etridge (No.2)* [1998] 4 All E.R. 705, 715.
- [511.](#) [2001] UKHL 44, [2002] 2 A.C. 773 at [59]–[63]. Lord Nicholls said that *Powell v Powell* [1900] 1 Ch. 243 was an extreme case and Farwell J.'s statement "cannot be regarded as of general application".
- [512.](#) Or, in a case where the client is offering a guarantee to a third party bank (see below, para.8-109) by declining to confirm to the bank that he has explained the documents to the wife and the risks that she is taking upon herself. Lord Nicholls did not accept the view of the Court of Appeal that the availability of legal advice is insufficient to prevent the bank being fixed with constructive notice if the transaction is "one into which no competent solicitor could properly advise the wife to enter". *Etridge* was of course a "three-party" case but in this context, Lord Nicholls did not draw a distinction between two and three-party cases.
- [513.](#) [1929] A.C. 127.
- [514.](#) [1929] A.C. 127, 136.
- [515.](#)  In the context of a personal injury trust under which the claimant's solicitor is to be trustee (see above, para.8-096 n.487a), it has been said that, with a settlement of £1 million or more where its in-house trust corporation is to be a trustee, to ensure that the claimant is not unduly influenced a separate partner in the firm should instruct Chancery Counsel of not less than five years' standing to advise the claimant: *AKB v Willerton, OH v Craven* [2016] EWHC 3146 (QB), [2017] 4 W.L.R. 25 at [31]. cf. below, para.8-120.

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Affirmation. ⁵¹⁶

8-101

A transaction entered into as the result of undue influence is voidable and not void. The right to rescind on the ground of undue influence may be lost either by express affirmation of the transaction by the victim, ⁵¹⁷ by estoppel or by delay amounting to proof of acquiescence. ⁵¹⁸ Although there can normally be no affirmation until the party knows he has the right to rescind, it has been doubted whether this is a hard and fast rule: "the whole of the circumstances must be looked at to see whether it is just that the complaining beneficiary should succeed". ⁵¹⁹ Estoppel requires a clear and unequivocal representation that the claimant would not seek to set the agreement aside, intended to be acted on and in fact acted on by the other party to his detriment or in such a way that it would be inequitable to allow the claimant to go back on his representation. ⁵²⁰ In either case, to be of any value, the affirmation must take place after the influence has ceased:

"The right to property acquired by such means cannot be confirmed in this court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and an absolute release from the undue influence by means of which the frauds were practised." ⁵²¹

Lapse of time in itself does not seem to constitute a bar to relief, ⁵²² but it will provide evidence of acquiescence if the victim fails to take any steps to set aside the transaction within a reasonable time after he is freed from the undue influence. ⁵²³ And where he has himself failed to commence proceedings in this way during his lifetime, his personal representatives cannot do so after his death. ⁵²⁴

Restitution

8-102

A complainant who has received no benefit under the contract may simply have it set aside. ⁵²⁵ If the complainant has received a benefit ⁵²⁶ and rescinds, she must make restitution ⁵²⁷ and it has been said that her right to rescission is "conditional on her making counter-restitution". ⁵²⁸

Impossibility of restitution not necessarily a bar

8-103

It is thought that, as between the parties, the fact that property transferred can no longer be returned

as such to the complainant (for example, because an innocent third party has acquired rights over it) is not necessarily a bar to rescission on the grounds of undue influence. Instead, the defendant may be required to make counterrestitution by a monetary equivalent.⁵²⁹ This is suggested by the cases discussed in the next two paragraphs.

Account of profits with allowance

8-104

Thus, a transaction entered into as a result of undue influence can be rescinded even though it has been fully executed, and even though restitutio in integrum is no longer fully possible, so long as the court can do substantial justice by ordering an account of profits with, if necessary, an allowance for work done by the defendant. Where a series of contracts between a young singer and his manager and agent was set aside after the singer had achieved worldwide success, it was held that the defendant could be made liable to account for all the profit made from the contracts, but subject to a reasonable allowance for his work under the transactions in question. This allowance could include a reasonable element of profit, but not so much as might have been obtained by the defendant if the plaintiff had been properly advised by independent advisers at the outset.⁵³⁰

Equitable compensation

8-105

It has been held that if restitutio in integrum is no longer possible, and the defendant does not retain any profits for which he may be made to account, the claimant may still be given "compensation in equity". In *Mahoney v Purnell*⁵³¹ May J. held that equitable compensation under *Nocton v Lord Ashburton*⁵³² is also available in such circumstances and the plaintiff could recover the value of what he had transferred, giving credit for what he had received. The judge described this as the practical equivalent of awarding damages, though it should be noted that equitable compensation will not include compensation for consequential losses.⁵³³ Doubt has been expressed whether equitable compensation is available in every case of undue influence, or only those in which there is a fiduciary relationship of a narrower sort, such as between solicitor and client or beneficiary and trustee.⁵³⁴ In *Bank of Credit and Commerce International SA v Aboody*⁵³⁵ Slade L.J. treated such cases as different to normal cases of undue influence⁵³⁶ and said that cases such as *Tate v Williamson*⁵³⁷ did not draw a sufficiently clear distinction between the two types of case; but there is no sign that May J. saw the case before him to be anything other than one of presumed undue influence. However, it has been argued persuasively that "equitable compensation" in this context should be understood as referring to pecuniary restitution of any unjust enrichment, which is appropriate in cases of undue influence. The case shows not that equitable compensation may be given when restitution is impossible, so much as that rescission need not be prevented by the fact that property cannot be returned in specie; as between the parties it may be effected in money.⁵³⁸

Sharing of loss

8-106

Conversely, where as the result of undue influence the claimant has contributed to the purchase of property which as a result of the transaction being set aside has to be sold, and the property does not fetch the price paid for it, the claimant is not entitled to the return of the full contribution he made. The principle is to prevent unjust enrichment of the other party and the sum obtained on sale of the property should be shared in the same proportions as the parties' original contributions to the purchase.⁵³⁹

Change of position

8-107

It has been noted that the decision described in the last paragraph might be viewed as a form of change of position defence to even monetary restitution; and that in *Allcard v Skinner*⁵⁴⁰ the possibility of such a defence was recognised by all three Lords Justices, in that they considered that the complainant would have been able, had she taken steps in time, to recover from the religious order to which she had made her gifts only such sums as remained unspent in its hands.⁵⁴¹

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1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
 - ²⁵⁴. See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; Chen-Wishart (2006) 59 C.L.P. 231.
 - ⁵¹⁶. This paragraph in the 28th edition was cited with approval in *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] B.L.R. 530 at [146].
 - ⁵¹⁷. *Mitchell v Homfray* (1881) 8 Q.B.D. 587; *Morse v Royal* (1806) 12 Ves. 355.
 - ⁵¹⁸. *Allcard v Skinner* (1887) 36 Ch. D. 145; *Turner v Collins* (1871) L.R. 7 Ch. App. 329. See below, paras 28-137—28-143.
 - ⁵¹⁹. *Goldsworthy v Brickell* [1987] Ch. 378, 412 (Nourse L.J.) and 416 (Parker L.J.). Nourse L.J. considered that the defence might have succeeded on the basis that by the time of the alleged act of affirmation, the complainant had consulted solicitors. cf. *Lloyds Bank Plc v Lucken*, heard with the *Etridge* case, [1998] 4 All E.R. 705, 738, 751.
 - ⁵²⁰. *Goldsworthy v Brickell* [1987] Ch. 378, 410–411. In *Habib Bank Ltd v Tufail* [2006] EWCA Civ 374, [2006] All E.R. (D) 92 (Apr) Lloyd L.J. drew a distinction between affirmation, which requires knowledge of the right to rescind (at [19]) and acquiescence. Acquiescence can operate rather like promissory estoppel, though in *Goldsworthy v Brickell* [1987] Ch. 378 at 409, Nourse L.J. had pointed out that promissory estoppel is normally concerned with the giving up of rights under a contract whose validity is not in dispute, and its requirements are more formalised than those of acquiescence. Thus if before she seeks to avoid the contract the victim of undue influence or misrepresentation indicates that she will perform it, and the other party acts on that representation to its detriment, the victim will lose the right to avoid the contract, at least if the representation was made after she knew of the facts giving her the right to avoid (at [22]; Lloyd L.J. doubted whether the supposed further requirement that her representation be intended to be acted on added anything). If, as on the facts of the case, the other party cannot show that the representation (on the facts, that solicitors had been instructed to sell the mortgaged property) led it to act differently, it cannot rely on acquiescence (at [25]) and the victim may still be entitled to avoid the contract. The case was one in which a mortgage to a bank had been entered into as the result of misrepresentation by a third party of which the bank had constructive notice (see below, paras 8-109 et seq.) but the same principle applies in a two-party case like *Goldsworthy v Brickell*.
 - ⁵²¹. *Moxon v Payne* (1873) L.R. 8 Ch. App. 881, 885.
 - ⁵²². *Hatch v Hatch* (1804) 9 Ves. 292; *Re Pauling's Settlement Trusts* [1964] Ch. 303.
 - ⁵²³. *Allcard v Skinner* (1887) L.R. 36 Ch. D. 145; cf. *Bullock v Lloyds Bank Ltd* [1955] Ch. 317.
 - ⁵²⁴. *Wright v Vanderplank* (1855) 2 K. & J. 1; *Mitchell v Homfray* (1881) 8 Q.B.D. 587.
 - ⁵²⁵. cf. *TSB Bank Plc v Camfield* [1995] 1 W.L.R. 430 (misrepresentation), above, para.7-126.
 - ⁵²⁶. It seems likely that in this context “benefit” refers to something received directly under the

contract to be set aside or one inextricably linked with it (as in the case cited in the next note) rather than to, e.g. a benefit received by a wife through the successful operation of her husband's business for a period before the creditor sought to enforce the charge in question given by the wife.

- [527.](#) *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876; see also *Midland Bank Plc v Greene* [1994] 2 F.L.R. 827.
- [528.](#) *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876, 884.
- [529.](#) Burrows, *Law of Restitution*, 3rd edn (2011), pp.287–288.
- [530.](#) *O'Sullivan v Management Agency Ltd* [1985] Q.B. 428, following the authorities relating to setting aside contracts for misrepresentation, above, paras 7-123 et seq.
- [531.](#) [1996] 3 All E.R. 61.
- [532.](#) [1914] A.C. 932 (a case of a mortgagee suing his solicitor, see para.7-087).
- [533.](#) See para.7-088 n.402.
- [534.](#) See Heydon (1997) 113 L.Q.R. 8, 9.
- [535.](#) [1990] 1 Q.B. 923, 943.
- [536.](#) See para.8-064.
- [537.](#) (1866) L.R. 2 Ch. App. 55.
- [538.](#) Birks [1997] R.L.R. 72. See also above, para.7-128.
- [539.](#) *Cheese v Thomas* [1994] 1 W.L.R. 129. The focus should be on the property transactions, not the entire relationship between the parties: *Smith v Cooper* [2010] EWCA Civ 722, [2010] 2 F.C.R. 551 at [101].
- [540.](#) (1887) 36 Ch. D. 145.
- [541.](#) Chen-Wishart (1994) 110 L.Q.R. 173, 177–178; *Allcard v Skinner* (1887) 36 Ch. D. 145, 164, 171, 186.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 8 - Duress and Undue Influence ¹

Section 3. - Undue Influence ²⁵⁴

(f) - Undue Influence by a Third Party

Undue influence by a third person

8-108

⚠ Where one party seeks to avoid a contract on the ground of undue influence by a third person, it must appear either that the third person was acting as the other party's agent, or that the other party had actual or constructive notice of the undue influence. ⁵⁴² ⚠

Undue influence over a surety

8-109

In a number of cases a recurring situation has arisen. ⁵⁴³ In the typical case, a husband has wanted to borrow money from a creditor that has refused to proceed without having a guarantee secured by a charge over the matrimonial home, or similarly a charge without a personal guarantee, from the wife. The wife's consent has been secured by undue influence ⁵⁴⁴ or misrepresentation ⁵⁴⁵ by the husband. Can the creditor enforce the guarantee? In some cases it was held that if the creditor had "left it to the husband" to get the wife's signature, the husband was acting as agent for the creditor ⁵⁴⁶ and it was therefore responsible for his misconduct.

Constructive notice: Barclays Bank v O'Brien

8-110

In *Barclays Bank Plc v O'Brien*, a case where the husband had secured his wife's signature by misrepresentation, the Court of Appeal ⁵⁴⁷ expressed the view that the "agency" approach referred to in the previous paragraph was often artificial on the facts. It held that it was not just in cases in which the debtor was acting as the agent of the creditor in the true sense that the creditor would be unable to enforce the guarantee if the debtor had procured the surety's signature by misrepresentation. If the relationship between the debtor and a surety who charged property to secure the debt was one in which influence by the debtor over the surety and reliance on the debtor by the surety were natural and probable features, as in the case of husband and wife, and this was known to the creditor, a special rule applied. If the debtor procured the surety's consent by misrepresentation or undue influence, or the surety lacked an adequate understanding of the nature and effect of the transaction, and the creditor, whether by leaving it to the debtor to deal with the surety or otherwise, failed to take reasonable steps to try to ensure that the surety entered the transaction with adequate understanding and that the consent was a true and informed one, the creditor may not enforce the security given by the surety. ⁵⁴⁸

8-111

In the House of Lords ⁵⁴⁹ this approach was rejected: there is no special theory in equity to protect wives. ⁵⁵⁰ The surety cannot set aside the transaction simply on the ground that she did not fully understand it. ⁵⁵¹ However, the appeal of the Bank was dismissed on the ground that it had constructive notice of the husband's misrepresentation. Lord Browne-Wilkinson, delivering the only full speech in the House of Lords, pointed out that there is a substantial risk that the wife may act as surety when the transaction is not to her advantage because of some legal or equitable wrong by the husband. Where the creditor is aware that the debtor and the surety are husband and wife, and the transaction is on its face not to the financial advantage of the surety as well as of the debtor, the creditor will be fixed with constructive notice of any undue influence, misrepresentation or other legal wrong by the debtor unless it has taken reasonable steps to satisfy itself that the surety has entered into the obligation freely and with knowledge of the true facts. ⁵⁵² It is the combination of the fact that the parties are husband and wife and that the transaction is on its face not to the wife's advantage that should put the creditor on notice. ⁵⁵³

8-112

⚠ Lord Browne-Wilkinson said that where the creditor is aware that the debtor and the surety are husband and wife, and the transaction is on its face not one which is to the financial advantage of the surety as well as of the debtor, the creditor will be fixed with constructive notice of any undue influence, misrepresentation or other legal wrong by the debtor unless it has taken reasonable steps to satisfy itself that the surety has entered into the obligation freely and with knowledge of the true facts. ⁵⁵⁴ The creditor should explain to the surety the amount of her potential liability and of the risks involved, and advise her to seek independent legal advice before entering the guarantee ⁵⁵⁵ ⚠; and this should be done in a personal interview, as written warnings are often not read and are sometimes intercepted by the debtor. ⁵⁵⁶ The interview should not be attended by the husband. As in *O'Brien's* case the bank's clerk, in disregard of her instructions, had not warned the wife of the risks involved nor recommended her to take legal advice before getting her to sign the documents charging the matrimonial home, the bank could not enforce the charge. If the bank has notice of facts rendering misrepresentation or undue influence not just possible but probable, it must insist that the wife actually is separately advised. ⁵⁵⁷

Etridge's case

8-113

The decision in *Barclays Bank v O'Brien*, and the many other decisions that followed it, ⁵⁵⁸ must be read in the light of the subsequent decision of the House of Lords in *Royal Bank of Scotland v Etridge (No.2)*, ⁵⁵⁹ and in particular the speech of Lord Nicholls, which gained the support of all their Lordships. ⁵⁶⁰ Reference to this case has already been made in relation to what amounts to undue influence. ⁵⁶¹ The decision on constructive notice, and what steps the lender should take to avoid being fixed with constructive notice, is of equal importance.

Basis of the constructive notice rule

8-114

Lord Nicholls said that the decision in *Barclays Bank Plc v O'Brien*:

“... is not a conventional use of the equitable doctrine of constructive notice ... ⁵⁶² The law imposes no obligation on one party to check whether the other party's concurrence was obtained by undue influence. Rather, *O'Brien* envisages that the steps taken by the bank will reduce, or even eliminate, the risk of the wife entering into the transaction under any misapprehension or as a result of undue influence by her husband. The steps are not

concerned to discover whether the wife has been wronged by her husband in this way.⁵⁶³
The steps are concerned to minimise the risk that such a wrong may be committed.”⁵⁶⁴

O'Brien concerned suretyship transactions, which (outside commercial suretyship) is a one-sided transaction, so that the decision is aimed “at a class of contracts which has special features of its own”.⁵⁶⁵

When the bank is put on inquiry

8-115

The bank is put on inquiry (strictly speaking not an accurate description of what the bank is required to do but now the accepted terminology⁵⁶⁶) by a combination of two things: a non-commercial relationship between the surety and the lender (see below, para.8-116) and a transaction which on its face is to the disadvantage of the surety (see below, para.8-117). The threshold that must be crossed before the bank is put “on inquiry” is deliberately set at a low level:

“... much lower than is required to satisfy a court that, failing contrary evidence, the court may infer that the transaction was procured by undue influence.”⁵⁶⁷

The test stated by Lord Browne-Wilkinson⁵⁶⁸ is to be taken to mean simply that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts.⁵⁶⁹

Relationships giving rise to notice

8-116

The same rule applies whether a husband stands surety for his wife's debts or one of an unmarried couple for the other's debts, provided the bank is aware of the relationship. Cohabitation is not essential.⁵⁷⁰ It also applies where the bank knows that the parties are parent and child; knowledge of the relationship means that the bank must take reasonable steps to ensure that the child “knows what she is letting herself into”.⁵⁷¹ And, as the principle should apply to any other relationship where trust and confidence are likely to exist,⁵⁷² there is no rational cut-off point:

“... the only practical way forward is to regard banks as ‘put on inquiry’ in every case where the relationship between the surety and the debtor is non-commercial.”⁵⁷³

Transaction not on its face to the advantage of the surety

8-117

⚠ The bank is put on inquiry whenever a wife offers to stand surety for her husband's debts.⁵⁷⁴ The bank is not put on inquiry if the money is advanced jointly to the couple, unless the bank is aware that the loan is being made for the husband's purposes.⁵⁷⁵ Thus in *CIBC Mortgages Plc v Pitt*,⁵⁷⁶ which was heard with *O'Brien's* case, the loan appeared on its face to be a normal one for the joint benefit of husband and wife and therefore the creditor was not fixed with constructive notice of the undue influence used by the husband to secure the wife's agreement.⁵⁷⁷ But if one party becomes surety for a company whose shares are held by both, the bank is put on inquiry, even if they have equal shareholdings or if the surety is also a director or secretary of the company.⁵⁷⁸ ⚠

Reasonable steps

8-118

As to the steps that the lender should take to avoid being fixed with constructive notice of any undue influence that has occurred, Lord Nicholls stated in *Etridge* that for past transactions, the bank should have taken steps:

“... to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice.” ⁵⁷⁹

For the future, however, Lord Nicholls said in *Etridge* that a bank will satisfy the requirements if it insists that the wife attend a private meeting with a representative of the bank at which she is told of the extent of her liability as surety, is warned of the risk she is running and is urged to take independent legal advice. ⁵⁸⁰ In exceptional cases the bank should insist that she be separately advised. ⁵⁸¹

Advice from a solicitor

8-119

In several of the cases subsequent to *O'Brien* (the facts of many of which occurred before the House of Lords' decision in that case), the creditor had not itself advised the wife ⁵⁸² but had relied on a certificate from a third party, typically a solicitor employed by the husband or by the creditor itself, that the wife had been given an explanation. If the wife has actually received such an explanation, this would go beyond what *O'Brien's* case required in the normal case in that the wife actually receives advice. ⁵⁸³ In *Etridge*, Lord Nicholls said that if the bank (or other lender) prefers that the task be undertaken by an independent legal advisor, it will normally be enough to rely on a confirmation from a solicitor, ⁵⁸⁴ acting for the wife, ⁵⁸⁵ that he has advised the wife appropriately. ⁵⁸⁶ However, if the bank knows that the solicitor has not duly advised the wife, or knows facts from which it ought to have realised the wife has not received appropriate advice, the position will be different. ⁵⁸⁷

Steps the solicitor should take

8-120

Lord Nicholls then set out in some detail the steps the solicitor should take:

“[64]

... As a first step the solicitor will need to explain to the wife the purpose for which he has become involved at all. He should explain that, should it ever become necessary, the bank will rely upon his involvement to counter any suggestion that the wife was overborne by her husband or that she did not properly understand the implications of the transaction. The solicitor will need to obtain confirmation from the wife that she wishes him to act for her in the matter and to advise her on the legal and practical implications of the proposed transaction.

[65]

When an instruction to this effect is forthcoming, the content of the advice require a

solicitor before giving the confirmation sought by the bank will, inevitably, depend upon the circumstances of the case. Typically, the advice a solicitor can be expected to give should cover the following matters as the core minimum. (1) He will need to explain the nature of the documents and the practical consequences these will have for the wife if she signs them. She could lose her home if her husband's business does not prosper. Her home may be her only substantial asset, as well as the family's home. She could be made bankrupt. (2) He will need to point out the seriousness of the risks involved. The wife should be told the purpose of the proposed new facility, the amount and principal terms of the new facility, and that the bank might increase the amount of the facility, or change its terms, or grant a new facility, without reference to her. She should be told the amount of her liability under her guarantee. The solicitor should discuss the wife's financial means, including her understanding of the value of the property being charged. The solicitor should discuss whether the wife or her husband has any other assets out of which repayment could be made if the husband's business should fail. These matters are relevant to the seriousness of the risks involved. (3) The solicitor will need to state clearly that the wife has a choice. The decision is hers and hers alone. Explanation of the choice facing the wife will call for some discussion of the present financial position, including the amount of the husband's present indebtedness, and the amount of his current overdraft facility. (4) The solicitor should check whether the wife wishes to proceed. She should be asked whether she is content that the solicitor should write to the bank confirming he has explained to her the nature of the documents and the practical implications they may have for her, or whether, for instance, she, would prefer him to negotiate with the bank on the terms of the transaction. Matters for negotiation could include the sequence in which the various securities will be called upon or a specific or lower limit to her liabilities. The solicitor should not give any confirmation to the bank without the wife's authority.

[66]

The solicitor's discussion with the wife should take place at a face-to-face meeting, in the absence of the husband. It goes without saying that the solicitor's explanations should be couched in suitably non-technical language. It also goes without saying that the solicitor's task is an important one. It is not a formality.

[67]

The solicitor should obtain from the bank any information he needs. If, the bank fails for any reason to provide information requested by the solicitor, the solicitor should decline to provide the confirmation sought by the bank."

Conflicts of interest

8-121

The solicitor may also act for the husband or the bank but, in advising the wife, he is acting for her alone (and therefore his knowledge is not imputed to the bank ⁵⁸⁸). He must consider whether there is any conflict of interest and whether it would be in the best interests of the wife for him to accept instructions from her. If at any stage there is a real risk that other interests or duties may inhibit his advice to the wife he must cease to act for her. ⁵⁸⁹

The bank and the solicitor

8-122

The bank should check directly with the wife the name of the solicitor she wishes to act for her, telling her that it will require written confirmation from the solicitor that he has explained to her fully the nature of the documents and their practical implications, so that she is not able later to dispute that he is bound by the documents she has signed. It must also send to the solicitor the necessary financial information. ⁵⁹⁰ If the solicitor is already acting for the husband and wife the wife should be asked if she would prefer a different solicitor to advise her. ⁵⁹¹ If in exceptional circumstances the bank suspects that the wife is being misled by her husband or is not entering the transaction of her own free will, it must inform the solicitor of the facts giving rise to the suspicion.

Procedure

8-123

It will be for the wife or other surety to show that the bank had notice of the non-commercial relationship between her and the debtor, and that the transaction was, on its face, not to her advantage. The burden will then be on the bank or other lender to show that it has taken sufficient steps to prevent it being fixed with constructive notice. ⁵⁹²

Need the party guilty of undue influence be a party to the transaction?

8-124

In at least one case the bank was treated as having constructive notice of the wife's right to set aside the charge *as against the husband*. ⁵⁹³ It is clear, however, that it makes no difference that the husband is not a party to the charge:

“The transferor wife is seeking to resile from the very transaction she entered into with the bank, on the ground that her apparent consent was procured by the undue influence or other misconduct, such as misrepresentation, of a third party (her husband).” ⁵⁹⁴

Replacement mortgages

8-125

Where a mortgage granted by a wife to a bank was voidable against the bank because the bank had constructive notice of undue influence by the husband, a replacement of the mortgage may also be voidable against the bank even if at the time the replacement mortgage was given there was no undue influence, at least where the replacement mortgage is taken as a condition of discharging the original mortgage. ⁵⁹⁵ It does not matter that the new agreement is a fresh contract rather than a variation of the old one, provided that the replacement mortgage is between the same parties. ⁵⁹⁶ However, it seems that the replacement mortgage must be inseparable from the original mortgage, in the sense that the replacement mortgage was granted before the grantor became aware that she had a right to avoid the original one, and was granted in order to discharge it. ⁵⁹⁷

Loss of right to avoid by inconsistent action. ⁵⁹⁸

8-126

Like the right to avoid a contract for undue influence by the other party, the surety's right against the lender may be lost. One way in which this may occur is by the surety acting inconsistently with her

right to avoid the charge. In *First National Bank Plc v Walker*⁵⁹⁹ the husband and wife had charged their jointly owned home to the bank as security for a loan to the husband's business. Subsequently they divorced and the wife applied for ancillary relief. A property adjustment order was made in her favour, ordering the husband to convey his interest in the property to the wife. Clause 4 stated that nothing in the conveyance should prejudice the charge to the bank. Shortly afterwards the wife served a defence to possession proceedings by the bank, alleging that the charge was voidable by reason of the bank's actual or constructive notice of undue influence by the husband. The Court of Appeal held that the wife, by taking the transfer of her husband's interest, had lost her right to pursue the defence to the property proceedings, as this would be inconsistent with her having taken the conveyance. To pursue it would be an abuse of process or (per Morritt V.C.⁶⁰⁰) estoppel, approbation and reprobation, affirmation or release might apply. The reasoning employed in the Court of Appeal, that the wife's claim to set aside the charge because of the undue influence of the other joint and several debtor is secondary to and parasitic on the existence of such a claim against the other debtor, and that she lost her right by acting as against him in a way that was inconsistent with avoidance, may not have survived the decision in *Etridge's* case that the wife's right to avoid the charge is because of the bank's constructive notice by a third party. But it seems that the right to avoid may be lost by acting in such a way as against the surety itself.⁶⁰¹

Jointly-owned homes

8-127

It is only the surety against whom the charge may not be enforceable. If the property charged is owned jointly by husband and wife, then even though the charge may not be enforceable against the wife, it may be against the husband; and the result may be that the court will still order the property to be sold⁶⁰² in order to realise the husband's share.⁶⁰³

Other cases



8-128

This doctrine of constructive notice should avoid the need for the somewhat strained approach used in a number of earlier cases to the effect that the creditor, by "leaving it to the debtor" to get the surety's signature, was appointing the debtor as its agent and was therefore in no better position than the debtor would have been.⁶⁰⁴ There may still be cases in which the creditor is responsible for the husband's actions because it can be said, "without artificiality", that the husband was acting as agent of the creditor, but "such cases will be of very rare occurrence".⁶⁰⁵ The agency argument may still apply also in cases not involving sureties. In *O'Sullivan v Management Agency Ltd*⁶⁰⁶ it was held that where a person in a fiduciary relationship procures by undue influence contracts to be entered into with companies under his control and direction, the companies will be affected by the doctrine of undue influence even though they themselves were not in fiduciary relationships. In such a case it is immaterial that the undue influence is exercised in order to obtain a benefit for third parties rather than for the person himself exercising the undue influence.


Volunteers

8-129

Alternatively, it may suffice to set aside the contract if the person against whom relief is sought gave no consideration, i.e. he was merely a volunteer.⁶⁰⁷ It is not possible to avoid the contract as against a bona fide purchaser for value without notice.⁶⁰⁸ It is clear that a gift made to a person who has exercised no influence will not be set aside because there is in the same instrument a gift to a person within the suspect relationships, unless the instrument as a whole can be said to have been executed as a result of undue influence.⁶⁰⁹

1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).
254. See N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), Pt II; Chen-Wishart (2006) 59 C.L.P. 231.
542.  See *Bank of Credit and Commerce International SA v Aboody* [1990] 1 Q.B. 923, 973; *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180, discussed in the paragraphs that follow; *Chancery Client Partners Ltd v MRC 957 Ltd* [2016] EWHC 2142 (Ch), [2016] Lloyd's Rep. F.C. 578.
543. For a wide-ranging study of the problem, see Fehlberg, *Sexually Transmitted Debt* (1997).
544. e.g. *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200.
545. *Kings North Trust Ltd v Bell* [1961] 1 W.L.R. 119; *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180.
546. See *Coldunell Ltd v Gallon* [1986] Q.B. 1184.
547. [1993] Q.B. 109.
548. Considerable reliance was placed on *Turnbull & Co v Duval* [1902] A.C. 429 PC.
549. [1994] 1 A.C. 180. In Scotland a similar result has been reached but via the different route of recognising a duty of good faith by the creditor towards the cautioner: *Smith v Bank of Scotland* 1997 S.L.T. 1061. In Australia, the problem has been approached through the doctrine of unconscionability (below, para.8-130): see Tjio (1997) 113 L.Q.R. 13. The *O'Brien* case has not been followed: *García v National Australia Bank Ltd* [1998] 155 A.L.R. 614 High Ct.
550. *Turnbull & Co v Duvall* [1902] A.C. 429 PC was doubted.
551. *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180, 195.
552. [1994] 1 A.C. 180, 196.
553. Compare *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200, heard at the same time as *O'Brien* [1994] 1 A.C. 180: see below, para.8-117.
554. *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180, 196.
555.  This much is required for "guarantees for personal and micro-enterprise lending" by the Lending Code, 2nd edn (2011, rev. October 2014 and September 2015), paras 67-75. (This replaces the Banking Code, which was first adopted by banks and building societies (as the Code of Banking Practice) in March 1992.) The code also provides that unlimited guarantees or security should not be taken from an individual (other than to support a customer's liabilities under a merchant agreement): para.71. On July 21, 2016, the Lending Standards Board published a new Standards of Lending Practice, which come into force on October 1, 2016. The Standards of Lending Practice replace the Lending Code. The Standards of Lending Practice apply to personal customers and cover loans, credit cards and current account overdrafts. The new Standards represent a move away from the Lending Code, which was focused more on compliance with provisions than customer outcomes. New Standards of Lending Practice for Business Customers were published on March 28, 2017 and became effective on July 1, 2017. They replace the micro-enterprise provisions of the Lending Code. See further below, para.34-219. Until July 2017, the existing protections of the Lending Code continued to apply to micro-enterprises (Standards of Lending Practice, p.3). The issue of guarantees provided by individuals is dealt with in a separate document issued by the Lending Standards Board, *The Standards of Lending Practice for personal customers: Account maintenance and servicing* (September 2016), Pt 8.

- [556.](#) [1994] 1 A.C. 180, 198.
- [557.](#) [1994] 1 A.C. 180, 197.
- [558.](#) For a survey of many of the post-*O'Brien* cases see Fehlberg (1996) 59 M.L.R. 675.
- [559.](#) [2001] UKHL 44, [2002] 2 A.C. 773. This case and seven other appeals were heard together.
- [560.](#) See [2001] UKHL 44 at [3], [91], [100] and [192].
- [561.](#) See above, paras 8-061 et seq.
- [562.](#) [2001] UKHL 44 at [39].
- [563.](#) Thus the solicitor is not expected to satisfy himself that the wife is free from undue influence: see the criticism of statements made in *Etridge* in the Court of Appeal and applied in the conjoined case of *Kenyon-Brown v Desmond Banks & Co* ([2001] UKHL 44 at [181]–[182], per Lord Scott) and the decision of the House in the latter case (see at [90] and [374]).
- [564.](#) [2001] UKHL 44 at [41]. Compare the speech of Lord Scott, who though he said (at [192]) that he agreed fully with Lord Nicholls, said that the bank is to take steps to ensure that the wife understands the nature and effect of the transaction: see at [147], [164]–[165] and [191]. In contrast, Lord Hobhouse said that while comprehension was essential, the purpose was also to protect the wife's vulnerability to undue influence. He disagreed with Lord Scott if he meant that a belief by the bank that the wife understood the nature and effect of the transaction was sufficient. That was not the effect of Lord Nicholls' scheme (see at [111]).
- [565.](#) [2001] UKHL 44 at [43].
- [566.](#) *Etridge* 's case [2001] UKHL 44, per Lord Nicholls at [44].
- [567.](#) [2001] UKHL 44 at [44]. For what will raise an inference that undue influence has been used, see above, paras 8-090—8-095.
- [568.](#) See above, para.8-112.
- [569.](#) [2001] UKHL 44 at [44].
- [570.](#) *Etridge* 's case [2001] UKHL 44 at [47]. Lord Browne-Wilkinson had said that the rule applied to cohabitantes: [1994] 1 A.C. 180, 198.
- [571.](#) *Etridge* 's case [2001] UKHL 44 at [84]. See also *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180, at 198; *Avon Finance Co Ltd v Bridger* (1979) [1985] 2 All E.R. 281 (vulnerable elderly parents providing security for the debts of their adult son).
- [572.](#) [2001] UKHL 44 at [82].
- [573.](#) [2001] UKHL 44 at [87]. The creditor is all the more put on notice when the wife is not known to the creditor and is put forward as a surety by the husband: *Mahon v FBN Bank (UK) Ltd* [2011] EWHC 1432 (Ch) at [50].
- [574.](#) [2001] UKHL 44 at [44].
- [575.](#) [2001] UKHL 44 at [48]; cf. *Allied Irish Bank Plc v Byrne* [1995] 2 F.L.R. 325. Similarly, the third party is unlikely to be put on constructive notice when the agreement will confer a joint tenancy on the wife: *Darjan Estate Co Plc v Hurley* [2012] EWHC 189 (Ch), [2012] 1 W.L.R. 1782 at [34]; where the claimant gets the direct benefit in the form of an interest in land, the creditor will assume that she has an interest in the business (at [36]).
- [576.](#) [1994] 1 A.C. 200.

577. And see *Society of Lloyds v Khan* [1998] 3 F.C.R. 93 (Lloyds not put on notice when wife agreed to be a Name, which enabled her to undertake a risk in return for reward); *Mortgage Agency Services Number Two Ltd v Chater* [2003] EWCA Civ 490, [2004] 1 P. & C.R. 4 (joint loan to mother and son).
578.  *Etridge* 's case [2001] UKHL 44 at [49]. See also *Mahon v FBN Bank (UK) Ltd* [2011] EWHC 1432 (Ch) at [51] ("where the wife's interest and/or involvement is substantive rather than titular, if she is an active participant in managing the company's affairs and is rewarded by remuneration for her work and/or dividends or interest for her investment, the loan may well be equated with a joint loan; but ... where the financial arrangements with the bank are negotiated by the husband and the wife plays no part in those negotiations but is asked to become surety for the debts of her husband or the business, the bank should be aware of the vulnerability of the wife and of the risk that her agreement might be procured by undue influence or misrepresentation on the part of the husband, and is 'put on inquiry'"). Nor is a bank excused from making enquiry when the wife is the husband's partner in the business, especially if there is a change in the nature or scale of the lending: *O'Neill v Ulster Bank Ltd* [2015] NICA 64 at [17].
579. [2001] UKHL 44 at [50], referring to the steps described by Lord Browne-Wilkinson in *O'Brien* 's case [1994] 1 A.C. 180, 196–197 and referred to above, para.8-112. In *Royal Bank of Scotland Plc v Chandra* [2010] EWHC 105 (Ch), [2010] 1 Lloyd's Rep. 677 (affirmed [2011] EWCA Civ 192) the "past transaction" rule was applied to a contract which was in train when the *Etridge* case was decided and was completed a few weeks later (see at [175]).
580. [2001] UKHL 44 at [50].
581. [2001] UKHL 44 at [50].
582. In *Royal Bank of Scotland v Etridge (No.2)* [1998] 4 All E.R. 705, 720, Stuart-Smith L.J. doubted if banks would be willing to do this even after *O'Brien*'s case, as it "is likely to expose the bank to greater risks than those from which it wishes to be protected".
583. *Royal Bank of Scotland v Etridge (No.2)* [1998] 4 All E.R. 705, 720, Stuart-Smith L.J.
584. In *Barclays Bank Plc v Coleman*, one of the cases heard with *Etridge*, the Court of Appeal had held that the bank was justified in relying on a certificate given by a legal executive to the effect that the wife had received advice, provided that the advice was independent and was given with the authority of the legal executive's principal ([2001] Q.B. 20 at [78]). The House of Lords dismissed the appeal, Lord Scott saying that the bank were entitled to believe that the solicitors would not entrust such a task to a legal executive with insufficient experience to carry out the task properly ([2001] UKHL 44 at [292]).
585. Thus the bank cannot rely on a confirmation from a solicitor who was not acting for the wife: *National Westminster Bank Plc v Amin* [2002] UKHL 9, [2002] 1 F.L.R. 735.
586. As Lord Hobhouse put it at [120]: "[T]he central feature is that the wife will be put into a proper relationship with a solicitor who is acting for her and accepts appropriate duties towards her". Lord Scott said that the bank could not assume that because a solicitor was acting for the wife, the solicitor's instructions extend to advising her on the transaction: see at [168] and the decision in the conjoined case of *UCB Home Loans Corp v Moore* at [90], [127] and [307]. If a solicitor is acting for the wife, the bank does not have to give express instructions on the steps to be taken or that legal advice must be provided to the wife independently, provided the solicitor confirms that she has received independent advice: *Bank of Scotland v Hill* [2002] EWCA Civ 1081, [2002] E.G.C.S. 152. In *Kapoor v National Westminster Bank Plc* [2010] EWHC 2986 (Ch) it was held that the wife had received independent legal advice, and the bank was entitled to rely on the solicitor's certificate that she had received that advice, despite fact that the wife had ignored the bank's suggestion to consult a different solicitor than the one advising her husband.
587. *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44 at [51]–[57].

- [588.](#) *Etridge 's case* [2001] UKHL 44 at [77]. See also *Midland Bank Plc v Serter* [1995] 3 F.C.R. 711 ; *Halifax Mortgage Services Ltd v Stepsky* [1995] 3 W.L.R. 701; *Barclays Bank Plc v Thomson* [1997] 4 All E.R. 816.
- [589.](#) [2001] UKHL 44 at [74]. Lord Hobhouse, at [100], said that the guidance given by Lord Nicholls should be applied to past as well as future transactions, because it represented a reasonable response to being put on inquiry.
- [590.](#) *Etridge 's case* [2001] UKHL 44 at [79]. Lord Hobhouse (at [114]) pointed out that this may require the husband's consent, and if he will not give it, this would be a clear indication to the bank and the solicitor that something may be amiss and that it ought not to rely on the wife being bound.
- [591.](#) [2001] UKHL 44 at [79].
- [592.](#) *Barclays Bank Plc v Boulter* [1999] 1 W.L.R. 1919. Lord Hoffmann, delivering the only full judgment, said that enough facts must be pleaded to give rise to the presumption of constructive notice; but it would not be adequate to rely on inferences derived from statements tucked away in documents that were pleaded. However the Court of Appeal should be slow to intervene in the decision that an arguable defence had been raised: *National Westminster Bank Plc v Kostopoulos*, *The Times*, March 2, 2000.
- [593.](#) *TSB Bank Plc v Camfield* [1995] 1 W.L.R. 430 (a case of misrepresentation).
- [594.](#) *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2001] 3 W.L.R. 1021, per Lord Nicholls at [39]. See also the speech of Lord Scott at [144]–[146]; *Banco Exterior Internacional SA v Thomas* [1997] 1 W.L.R. 221, 229, per Sir Richard Scott V.C.; *Prosch* [1997] 1 R.L.R. 71.
- [595.](#) *Yorkshire Bank Plc v Tinsley* [2004] EWCA Civ 816, [2004] 1 W.L.R. 2380 at [19].
- [596.](#) [2004] EWCA Civ 816 at [19]–[20].
- [597.](#) [2004] EWCA Civ 816 at [24], [32] and [39]. Compare *Wadlow v Samuel* [2007] EWCA Civ 155, [2007] All E.R. (D) 370 (Feb), where the relationship of trust and confidence had ceased by the time of the second agreement and the claimant had been advised on it.
- [598.](#) The right may also be lost by acquiescence, which is a form of inconsistent action: see above, para.8-101.
- [599.](#) [2001] 1 F.C.R. 21.
- [600.](#) [2001] 1 F.C.R. 21 at [55].
- [601.](#) See *Walker* [2001] 1 F.C.R. 21 at [35], per Morritt V.C. The Vice Chancellor said that the wife's right to claim ancillary relief on the footing that the mortgage was valid, which would have the effect that each party shares the liability equally and the equity of redemption is reduced by the amount of the liability, was inconsistent with her right to avoid the charge, since that would throw the entire liability to the bank onto the husband and increase the value of the equity of redemption by a sum equal to the wife's share of the liability.
- [602.](#) Under Trusts of Land and Appointment of Trustees Act 1996 s.14.
- [603.](#) See *First National Bank Plc v Achampong* [2003] EWCA Civ 487, [2004] 1 F.C.R. 18, noted by Thompson [2003] Conv. 314.
- [604.](#) See above, paras 8-109—8-110.
- [605.](#) *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180, 195.
- [606.](#) [1985] Q.B. 428.

- [607.](#) *Bridgeman v Green* (1755) *Wilm.* 58, 65; *Huguenin v Baseley* (1807) 14 *Ves.* 273.
- [608.](#) *Cobbett v Brock* (1855) 20 *Beav.* 524, 528; *O'Sullivan v Management Agency Ltd* [1985] *Q.B.* 428.
- [609.](#) *Wright v Carter* [1903] 1 *Ch.* 27.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 8 - Duress and Undue Influence ¹

Section 4. - Unconscionable Bargains and Inequality of Bargaining Power

Equitable relief against unconscionable bargains

8-130

⚠ There are a number of well-established areas of the law where equitable relief is available against harsh or unconscionable bargains, such as in the law relating to penalties, ⁶¹⁰ forfeitures ⁶¹¹ and mortgages; there are also many legislative interferences with freedom of contract designed to protect those who enter into harsh or unconscionable bargains. ⁶¹² ⚠ But it remains doubtful in modern law to what extent there is any general equitable principle entitling the courts to interfere with freedom of contract on the ground that the contract (or a part of it) is, in all the circumstances of the case, a harsh and unconscionable bargain. ⁶¹³ Until recent years, the legacy of nineteenth-century ideology in favour of freedom of contract has restricted the development of possible residuary principles of unconscionability, but there were for a time some signs of a possible resurgence of a broader equitable approach to unconscionable bargains. ⁶¹⁴ Subsequently, the courts have shown a determination to adhere firmly to principles of freedom of contract, particularly in commercial contracts between businessmen. ⁶¹⁵ However, it is clear that relief is possible in certain cases of unconscionable advantage taking and the real question is the scope of the principles involved, particularly that of relief against unconscionable bargains with persons suffering from some form of bargaining disadvantage. ⁶¹⁶ The recent decision of the Privy Council in *Borrelli v Ting* ⁶¹⁷ shows that unconscionable conduct which takes the form of illegitimate actions (such as forgery and fraud) that are not threats but that nonetheless constrain the victim's choice can amount to economic duress. ⁶¹⁸ In contrast, the unconscionable conduct that is discussed in this section does not involve actions that are otherwise wrongful.

Salvage cases

8-131

Reference has been made above (para.8-048) to the power of the court to set aside unconscionable contracts for salvage services rendered to a vessel in distress. When these cases were first decided they may have been based upon some broader principle permitting the overriding of unconscionable contracts, but now they are more usually treated as an exceptional category.

Unconscionable bargains with poor and ignorant persons. ⁶¹⁹

8-132

⚠ Another principle of equity which can be traced back to the old equitable rules permitting intervention for the protection of expectant heirs ⁶²⁰ ⚠ has been used in modern times to justify a substantial broadening of this jurisdiction. The old equitable principle was reviewed and restated in *Fry v Lane* ⁶²¹ where it was held that the court could set aside a purchase at a considerable

undervalue from “a poor and ignorant man” who had received no independent advice. Here the property being sold consisted of reversionary rights, so the case fell squarely within the old principles about expectant heirs, but little stress was laid upon the nature of the property in the judgment in this case; indeed it was expressly said that the principle extended to a sale of property in possession. In two more modern decisions, on somewhat similar facts, it was held that the court could set aside a contract by a separated wife by which she gave up her rights in the matrimonial home in consideration of an indemnity against liability on the mortgage. In the first of these cases ⁶²² Megarry J. held that the requirements of “poverty” and “ignorance” referred to in *Fry v Lane* were satisfied because the wife was a “member of the lower income group” and “less highly educated” (than whom, does not appear). In the second, ⁶²³ Balcombe J. was willing to follow Megarry J.’s decision, though the question did not strictly arise, where the wife “was certainly not wealthy”, and was also not “ignorant”, but in fact “an intelligent woman”. These generous interpretations of the meaning of vague words like “poverty” and “ignorance” appear, on their face, to open the door to the possibility of relief in a substantial number of contracts where the terms are exorbitant or unconscionable, and the party aggrieved did not have independent advice, and since there have been a number of cases in which relief on the ground of unconscionability has been considered ⁶²⁴ and some in which it has been granted. Thus the Privy Council has set aside the renewal of a lease, on very unfavourable terms, granted by a plaintiff who was “somewhat slow” and who was put under pressure by the lessee while the plaintiff’s usual advisor was away. ⁶²⁵ In *Crédit Lyonnais Bank Nederland NV v Burch* ⁶²⁶ the defendant had given a guarantee and charged her flat to secure the borrowings of her employer’s company, in circumstances in which the transaction was manifestly disadvantageous to her. The case was decided on the ground that the bank had constructive notice of undue influence by the employer, but both Nourse and Millett L.JJ. suggested that it might have been argued that she had a direct right, as against the bank, to set aside the transaction on the grounds of unconscionability. The bank had only explained the nature of the transaction without giving the defendant adequate information as to the risks and should have known she had not taken independent advice. ⁶²⁷

Scope of the doctrine

8-133

The doctrine of unconscionable bargains seems to be limited in three ways. The first is that the bargain must be oppressive to the complainant in overall terms; the second that it may only apply when the complainant was suffering from certain types of bargaining weakness; and the third that the other party must have acted unconscionably in the sense of having knowingly taken advantage of the complainant. ⁶²⁸ These points will be discussed in turn. ⁶²⁹

An oppressive bargain

8-134

❗ The modern cases in which relief has been granted or said to be available have all involved transactions which were substantively unfair in that the complainant was parting with property for much less than it was worth, ⁶³⁰ or getting nothing out of the transaction. ⁶³¹ “The resulting transaction has been, not merely hard or improvident, but overreaching and oppressive” so that its terms, together with the conduct of the stronger party, “shock the conscience of the court”. ⁶³² In *Boustany v Piggott* ⁶³³ the original lease had reserved a rent of \$833 per month and imposed an obligation of repair on the lessee; the new lease which was set aside at the instance of the lessor imposed no such obligation, while the rent was fixed at \$1,000 per month for a 10-year period and the lease was renewable for a further 10 years at the same rent. In *Portman Building Society v Dusaugh* ⁶³⁴ the Court of Appeal refused relief because the bargain was improvident but not so extravagantly so that it was difficult to explain in the absence of some impropriety. ⁶³⁵ Thus it is doubtful whether English courts would follow dicta in Australia ⁶³⁶ to the effect that inadequacy of consideration is not essential. ⁶³⁷ It is equally doubtful whether the doctrine would be applied as it has been in the United States ⁶³⁸ to a single harsh term such as a limitation of liability clause, unless the contract was oppressive overall. ⁶³⁹ ❗

The complainant's circumstances

8-135

⚠ As noted earlier, ⁶⁴⁰ the traditional requirement that the complainant be “poor and ignorant” ⁶⁴¹ received a broad interpretation in some of the modern cases; and in one case ⁶⁴² the majority of the Court of Appeal were prepared to say that relief could have been given to a young employee who had charged her flat to secure her employer's debts without discussing the requirement. ⁶⁴³ Commonwealth cases have allowed relief in a broad variety of “disabling” circumstances. In *Blomley v Ryan* ⁶⁴⁴ Fullagar J. listed as examples:

“... poverty or need of any kind, 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.”

And in *Commercial Bank of Australia v Amadio* ⁶⁴⁵ Deane J. said that the jurisdiction is established:

“... as extending generally to circumstances in which ... a party to a transaction was under a special disability in dealing with the other party with the consequences that there was an absence of any reasonable degree of equality between them.”

It is submitted that English law can give relief in an equally wide range of circumstances, provided that:

“... one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken.” ⁶⁴⁶ ⚠

However, apart from the salvage cases referred to earlier, there is little authority supporting the grant of relief where the claimant's “serious disadvantage” consists only of the difficult circumstances in which he finds himself. ⁶⁴⁷

Unconscionable conduct

8-136

A contract will not be set aside merely because the aggrieved party did not have independent advice and the consideration was inadequate. It must also be shown that the other party engaged in unconscionable conduct or an unconscientious use of power. ⁶⁴⁸ He must have behaved:

“... in a morally reprehensible manner ... which affects his conscience ... The classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible, welladvised ... person would have accepted.” ⁶⁴⁹

If there has been no equitable fraud, victimisation, taking advantage, overreaching or other unconscionable conduct, relief will not be granted. ⁶⁵⁰ Thus in *Hart v O'Connor* ⁶⁵¹ the vendor was of unsound mind, but this was not apparent to the purchaser and the vendor appeared to be advised by a solicitor who had proposed the terms of the bargain. The Privy Council held that the contract could

not be set aside on the grounds of insanity unless the vendor's incapacity was known to the purchaser,⁶⁵² nor as unconscionable because the purchaser had acted with complete innocence. In the words of Lord Brightman, there must be "procedural unfairness" as well as "contractual imbalance", though:

"... contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence or some other form of victimisation."⁶⁵³

In *Boustany v Piggott*⁶⁵⁴ Lord Templeman, delivering the judgment of the Privy Council, agreed in general terms with the submissions of counsel for the appellant:

(1)

there must be unconscionability in the sense that objectionable terms have been imposed on the weaker party in a reprehensible manner;

(2)

"unconscionability" refers not only to the unreasonable terms but to the behaviour of the stronger party, which must be morally culpable or reprehensible;

(3)

unequal bargaining power or objectively unreasonable terms are no basis for interference in equity in the absence of unconscionable or extortionate abuse where, exceptionally and as a matter of common fairness, "it is unfair that the strong should be allowed to push the weak to the wall";

(4)

a contract will not be set aside as unconscionable in the absence of actual or constructive fraud or other unconscionable conduct; and

(5)

the weaker party must show unconscionable conduct, in that the stronger party took unconscientious advantage of the weaker party's disabling condition or circumstances.⁶⁵⁵

Unconscionable conduct may be inferred

8-137

In *Crédit Lyonnais Bank Nederland NV v Burch*⁶⁵⁶ Millett L.J. pointed out that it would be necessary to show that the bank had imposed the objectionable terms in a morally objectionable manner, but said that impropriety might be inferred from the terms of the transaction itself in the absence of an innocent explanation.⁶⁵⁷ The same point may be made another way. If the transaction is manifestly oppressive, it seems that the defendant may be found guilty of "unconscionable conduct" within the meaning of the doctrine if he did no more than consciously take advantage of the claimant's willingness to enter it.⁶⁵⁸

Absence of independent advice

8-138

The traditional statements of the rule on unconscionable bargains also state that the complainant must have acted without independent advice. However, it is submitted that the absence of such advice is not essential. In *Crédit Lyonnais Bank Nederland NV v Burch* ⁶⁵⁹ Millett L.J. said that the fact that the complainant had been offered independent advice would not necessarily save a transaction which was so harsh that no competent advisor could have recommended it. In *Boustany v Piggott* ⁶⁶⁰ a lawyer called on to prepare the documents had pointed out that their terms were disadvantageous but did not refuse to proceed with execution of the document; the Privy Council refused to interfere with the trial judge's finding that the transaction was unconscionable. It may be suggested that an oppressive transaction will only be saved by independent advice if the advisor explains fully to the complainant why the transaction is so disadvantageous and that she is under no obligation to agree to it, or to agree to the terms offered; and (in an extreme case) refuses to act on her behalf if she persists in going ahead. ⁶⁶¹

Burden of showing fair, just and reasonable

8-139

Once the conditions for relief are met, the burden shifts to the stronger party to show that the transactions are fair, just and reasonable. ⁶⁶² In practice, this will mean showing either that, in the particular circumstances, the transaction was not in fact oppressive; or that the complainant was fully aware of what she was doing. This will normally come back to the question of whether she had received proper independent advice.

Commonwealth and American developments

8-140

It has already been stated that Commonwealth courts appear to be more in favour of a possible general doctrine of unconscionability. ⁶⁶³ There is a good deal of Canadian authority, ⁶⁶⁴ and in Australia the courts seem prepared to give relief in a wide range of circumstances provided that advantage has been taken, ⁶⁶⁵ and to apply the criteria liberally. ⁶⁶⁶ In America an even broader doctrine of unconscionability is now a well-established principle of the law entitling courts to refuse to enforce contracts, or contractual clauses, which are harsh, exorbitant or unconscionable. The principle is partly statutory, deriving from s.2-302 of the Uniform Commercial Code, but is widely applied by American courts as a matter of common law where the Code is inapplicable. ⁶⁶⁷ A distinction is generally drawn in American law between "procedural unconscionability" and "substantive unconscionability". ⁶⁶⁸ The former can be invoked where some element of oppression or wrongdoing (in a broad sense) has occurred in the process of making the contract: this enables courts to use doctrines like duress and undue influence as merely illustrative of a broader principle requiring that undue advantage or surprise should not be taken of a party; so matters like illiteracy, lack of knowledge of the English language, general inability to comprehend a complicated document, etc. may be treated as matters of procedural unconscionability. Substantive unconscionability, by contrast, goes to the actual substance of the contract and its terms. In practice substantive unconscionability covers excessively wide exclusion clauses on the one side, and grossly exorbitant or excessive prices, on the other. The leading commentary on the Uniform Commercial Code states that:

"Most parties who assert 2-302 [sic. the Code section dealing with unconscionability] and most of those who have used it successfully in reported cases have been consumers. Most of these successful consumer litigants have been poor or otherwise disadvantaged. ... The courts have not generally been receptive to pleas of unconscionability by one merchant against another." ⁶⁶⁹

Some courts have held the doctrine applicable in cases involving petrol station operators ⁶⁷⁰ and franchisees; others have refused. ⁶⁷¹

Unfair terms in consumer contracts

8-141

With the implementation of Council Directive 93/13 on Unfair Terms in Consumer Contracts, ⁶⁷² English law has moved slightly closer to the concept of “substantive unconscionability”, since art.3 of the Directive defines a contractual term which has not been individually negotiated as unfair (and therefore not binding on the consumer):

“... if, contrary to the requirements of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

Thus the Regulations ⁶⁷³ implementing the Directive apply to harsh clauses in standard form consumer contracts ⁶⁷⁴; and, for contracts made on or after October 1, 2015, ⁶⁷⁵ Pt 2 of the Consumer Rights Act 2015 applies the same test to terms in consumer contracts even if the term was negotiated with the trader. ⁶⁷⁶ But it will not cover the cases of sales at undervalue which have formed the core of unconscionable bargain cases in England since under the Directive, and under both the Regulations and the Consumer Rights Act 2015, the adequacy of the price cannot be reviewed. ⁶⁷⁷

Consumer Credit Act 1974

8-142

Under the Consumer Credit Act 1974, a credit agreement which is the result of an unfair relationship may be reopened. ⁶⁷⁸ When the Act still provided for relief against extortionate credit bargains, ⁶⁷⁹ there was some disagreement as to whether the principles of unconscionability apply to this jurisdiction. ⁶⁸⁰ The new provisions were considered necessary because few cases met the high threshold set previously. ⁶⁸¹

Inequality of bargaining power

8-143

A possible principle which is closely related to the broad idea of unconscionability, but slightly narrower in scope, is that of inequality of bargaining power. In *Lloyds Bank Ltd v Bundy*, ⁶⁸² Lord Denning M.R. stated the single general principle, which, in his view, underlay many of the cases discussed in this chapter. He considered that the thread running through the cases was the concept of “inequality of bargaining power”:

“By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.” ⁶⁸³


In *National Westminster Bank Plc v Morgan* Lord Scarman questioned (the other Law Lords all concurring) whether there was any need in the modern law to erect a general principle of relief against equality of bargaining power. ⁶⁸⁴ It is certainly unlikely that mere inequality of bargaining power, even when this leads to the exertion of considerable pressure, will be recognised as a ground

for setting aside a contract. Even Lord Denning would not have given relief when the pressure was “the result of the ordinary interplay of forces”.⁶⁸⁵ And unless and until a general doctrine along the lines suggested by Lord Denning is recognised, it seems that a contract will only be set aside if it falls within one of the recognised categories of “victimisation” such as duress, undue influence or unconscionable advantage taking.

1. See Cartwright, *Unequal Bargaining* (1991), Part III; N. Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2006).

610. See below, paras 26-178 et seq.

611. See below, para.26-205.

612.  See in particular the Unfair Contract Terms Act 1977, below, paras 15-062 et seq. Unfair Terms in Consumer Contracts Regulations 1999 or Consumer Rights Act 2015 Pt 2, below Ch.38, and Consumer Credit Act 1974 ss.140A–140C (inserted by ss.19–22 of the Consumer Credit Act 2006; the provisions on extortionate credit bargains, former ss.137–140, have been repealed by s.70 and Sch.4 of the 2006 Act): see below, para.39-212.

613. See Waddams (1976) 39 M.L.R. 369; Reiter (1981) 1 O.J.L.S. 347.

614. See, e.g. dicta of Lord Simon of Glaisdale in *Shiloh Spinners Ltd v Harding* [1973] A.C. 691, 726; Lord Diplock in *A. Schroeder Music Publishing Co v Macaulay* [1974] 1 W.L.R. 1308, 1315; *Burmah Oil Co v Bank of England*, *The Times*, July 4, 1981 (no relief for mere unfair bargain—there must be an unconscionable bargain—a bargain whose very terms reveal conduct which shocks the conscience of the court); and *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 W.L.R. 173, in which the Court of Appeal did not rule out a broad doctrine of unconscionability, though it held that no unconscientious conduct had occurred. See also cases cited below, para.8-132.


615. See, e.g. *Photo Productions Ltd v Securicor Transport Ltd* [1980] A.C. 827; *The Chikuma* [1981] 1 W.L.R. 314; *Multiservice Bookbinding Ltd v Marden* [1979] Ch. 84; for a slightly earlier dictum to the same effect, see Lord Radcliffe in *Bridge v Campbell Discount Co Ltd* [1962] A.C. 600, 626; and, in the particular context of unconscionability, below, para.8-143.

616. See below, paras 8-133 et seq.

617. [2010] UKPC 21.

618. See above, para.8-011.

619. Bamforth [1995] L.M.C.L.Q. 538.

620.  e.g. *Aylesford v Morris* (1873) L.R. 3 Ch. App. 484. See Treitel, *Treitel on The Law of Contract*, 14th edn (2015), para.10–044; Burrows, *Law of Restitution*, 3rd edn (2011), 302.

621. (1888) 40 Ch. D. 312. See also *Wood v Abrey* (1818) 3 Madd. 417; *Longmate v Ledger* (1860) 2 Giff. 157; *Clark v Malpas* (1862) 4 De G.F. & J. 401; *Baker v Monk* (1864) 4 De G.J. & S. 388; *Prees v Coke* (1870) L.R. 6 Ch. App. 645; *James v Kerr* (1888) 40 Ch. D. 449; *Rees v De Bernardy* (1896) 2 Ch. 437; cf. *Harrison v Guest* (1860) 8 H.L.C. 481.

622. *Cresswell v Potter* [1978] 1 W.L.R. 255n (decided in 1968).


623. *Backhouse v Backhouse* [1978] 1 W.L.R. 243.

624. See *Multiservice Bookbinding Ltd v Marden* [1979] Ch. 84; *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 W.L.R. 87; *Hart v O'Connor* [1985] A.C. 1000. Unconscionability

- was not found on the facts in *Pye v Ambrose* [1994] N.P.C. 53. The Multiservice and Alec Lobb cases draw on a line of authority relating to mortgages: see Bamforth [1995] L.M.C.L.Q. 538, 546. A plea of unconscionability was rejected on the facts in *Jones v Morgan* [2001] EWCA Civ 995, *The Times*, July 24, 2001.
625. *Boustany v Piggott* (1995) 69 P. & C.R. 298; see also *Watkin v Watson-Smith*, *The Times*, July 3, 1986.
626. [1997] 1 All E.R. 144, noted Chen-Wishart [1997] C.L.J. 60; Hooley and O'Sullivan [1997] L.M.C.L.Q. 17; Tijo (1997) 113 L.Q.R. 10.
627. [1997] 1 All E.R. 144, 151, 152–153.
628. *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB), per Blair J. at [36] (“one party has to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive”).
629. In *Irvani v Irvani* [2000] 1 Lloyd's Rep. 412, 424, Buxton L.J., delivering the only full judgment in the Court of Appeal, said that this paragraph (in the 28th edition of this work) accurately sets out the limitations on the doctrine of unconscionability. The doctrine is quite distinct from that of undue influence, which: “is concerned with the prior relationship between the contracting parties, and whether that was the motivation or reason for which the bargain was entered into”. (In Australia it seems that the courts may be abandoning this distinction: see *Bridgewater v Leahy* [1998] HCA 66, [1998] 158 A.L.R. 66 High Ct.) In *Bank of Credit and Commerce International SA v Ali (No.1)* [2000] I.R.L.R. 398 the Court of Appeal (Buxton L.J. dubitante) held that equity can give relief against a release of a claim on the ground of unconscionability where the release was procured by the other party's deliberate concealment of facts, if that party knew or believed that the party giving the release could not discover the facts and the releasing party had not in fact known of them. In the House of Lords ([2001] UKHL 8, [2002] 1 A.C. 251), the case was decided upon other grounds, but there is a suggestion by Lord Nicholls (at [32]–[33]) that in extreme cases, unconscionability might have a part to play: see above, paras 6-007 and 7-180.
630. *Cresswell v Potter* [1978] 1 W.L.R. 255n; *Backhouse v Backhouse* [1978] 1 W.L.R. 243; *Watkin v Watson-Smith*, *The Times*, July 3, 1986; *Boustany v Piggott* (1995) 69 P. & C.R. 298.
631. *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All E.R. 144.
632. *Alec Lobb Ltd v Total Oil (Great Britain) Ltd* [1983] 1 W.L.R. 87, 94–95, per Peter Millett Q.C. sitting as a Deputy High Court Judge (reversed in part [1985] 1 W.L.R. 173); see also *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All E.R. 144, 152–153; *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB) at [39], citing this paragraph.
633. (1995) 69 P. & C.R. 298.
634. [2000] 2 All E.R. (Comm) 221.
635. [2000] 2 All E.R. (Comm) 221, 228. See also in *Liddle v Cree* [2011] EWHC 3294 (Ch) at [91].
636. *Blomley v Ryan* (1956) 99 C.L.R. 362, 405; *Commonwealth Bank of Australia v Amadio* (1983) 151 C.L.R. 447, 475. But in the latter case (which was one of a guarantee, so that the complainant would not expect to receive anything) Deane J. said that the transaction might be unfair, unreasonable and unjust although there was no inadequacy of consideration.
637. cf. the suggestion in *Langton v Langton* [1995] 2 F.L.R. 890 that the jurisdiction to set aside contracts on the ground of unconscionability does not extend to gifts, as this would mean that in the case of all gifts by poor and ignorant persons without independent advice, an onus would be placed on the recipient to show that the gift was fair, just and reasonable. Note that Capper (1998) 114 L.Q.R. 479 argues that “transactional imbalance” is not a precondition of relief but only evidential (at 491). He thus argues that unconscionability and undue influence can be

assimilated.

[638.](#) See below, para.8-140.

[639.](#)  cf. *Multiservice Bookbinding Ltd v Marden* [1979] Ch. 84. It is arguable that if the effect of a clause in the contract is that the bargain is worth a great deal less to the claimant than he thought, this may make the bargain oppressive: see Beale, *Defences in Contract* (2017), Ch.5.

[640.](#) Above, para.8-132.


[641.](#) e.g. *Fry v Lane* (1888) 40 Ch. D. 312.

[642.](#) *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All E.R. 144.

[643.](#) See Hooley and O'Sullivan [1997] L.M.C.L.Q. 17, 23.

[644.](#) (1956) 99 C.L.R. 362, 405.

[645.](#) (1983) 151 C.L.R. 447, 474. In that case the complainants were elderly immigrants with limited knowledge of written English.

[646.](#)  *Alec Lobb Ltd v Total Oil (Great Britain) Ltd* [1983] 1 W.L.R. 87, 94–95, per Peter Millett Q.C. sitting as a Deputy High Court Judge (reversed in part [1985] 1 W.L.R. 173) (emphasis supplied). In *Barclays Bank Plc v Schwartz*, *The Times*, August 2, 1995 Millett L.J. observed that a person whose illiteracy or inability to speak English is taken advantage of may, in an appropriate case, be able to have the contract set aside on the grounds of unconscionability. It is arguable that relief may be given when the claimant's "bargaining weakness" took the form of not knowing of a clause in the contract he was signing, or not appreciating its possible effect: relief can then be given if the result is that the deal is worth a great deal less to the claimant than he thought, and if the other party deliberately took advantage of the claimant's ignorance or lack of understanding. This form of bargaining weakness seems to fall within Fullagar J.'s words in *Blomley v Ryan* (1956) 99 C.L.R. 362, 405, quoted in the text of the paragraph, which included "lack of assistance or explanation where assistance or explanation is necessary": see Beale, *Defences in Contract* (2017), Ch.5.

[647.](#) See Burrows, *Law of Restitution*, 3rd edn (2011), 306–307.

[648.](#) *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 W.L.R. 173, 182.

[649.](#) *Multiservice Bookbinding Ltd v Marden* [1979] Ch. 84, 110.

[650.](#) *Hart v O'Connor* [1985] A.C. 1000; *Boustany v Pigott* [1993] N.P.C. 75 PC; *Westpac Banking Corp v Paterson* [2001] FCA 1630, [2001] 187 A.L.R. 168 (Federal Ct of Australia); *Portman Building Society v Dusaugh* [2000] 2 All E.R. (Comm) 221.

[651.](#) [1985] A.C. 1000.

[652.](#) Overruling *Archer v Cutler* [1980] 1 N.Z.L.R. 386. But the New Zealand court has rejected this approach to unconscionability: *Nichols v Jessup (No.2)* [1986] 1 N.Z.L.R. 237; see Bamforth [1995] L.M.C.L.Q. 538, 550.

[653.](#) *Hart v O'Connor* [1985] A.C. 1000, 1018. Lord Brightman's language seems to reflect American terminology, below, para.8-140. It is interesting to contrast the justification offered in *Redgrave v Hurd* (1881) 20 Ch. D. 1, 13, for rescission for innocent misrepresentation; it is moral fraud to insist on keeping the contract now you know the representation is false. cf. *Rooney v Conway* [1982] 5 N.I.J.B.

[654.](#) (1995) 69 P. & C.R. 298, 303.

- [655.](#) Lord Templeman's statement of the law was adopted by Buxton L.J. in *Irvani v Irvani* [2000] 1 Lloyd's Rep. 412, 424, delivering the only full judgment in the Court of Appeal.
- [656.](#) [1997] 1 All E.R. 144.
- [657.](#) [1997] 1 All E.R. 144, 153, referring to *Multiservice Bookbinding Ltd v Marden* [1979] Ch. 84, 110 and *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 W.L.R. 87, 95.
- [658.](#) This certainly seems to have been the case in some of the older authorities such as *Evans v Llewellyn* (1787) 1 Cox Eq. Cas. 333, see Devenney and Chandler [2007] J.B.L. 541. In *Liddle v Cree* [2011] EWHC 3294 (Ch) the court found that no unconscionable advantage had been taken (at [92]).
- [659.](#) [1997] 1 All E.R. 144.
- [660.](#) (1995) 69 P. & C.R. 298.
- [661.](#) cf. above, para.8-099.
- [662.](#) *Aylesford v Morris* (1873) 8 Ch. App. 484, 490–491.
- [663.](#) See generally Bamforth [1995] L.M.C.L.Q. 538, passim. In *Irvani v Irvani* [2000] 1 Lloyd's Rep. 412, 425, Buxton L.J., delivering the only full judgment in the Court of Appeal, said that he agreed with this paragraph in saying that the Commonwealth cases “do or may go beyond the limits of present English authority”.
- [664.](#) See, e.g. *Black v Wilcox* (1976) 30 D.L.R. (3d) 192; *Paris v Machnik* (1972) 30 D.L.R. (3d) 723; *Morrison v Coast Finance* (1965) 55 D.L.R. (2d) 710; and other cases cited in Waddams, *Law of Contracts*, 6th edn (2010), para.518 and Enman (1987) 16 Anglo-Am.L.R. 191.
- [665.](#) *Blomley v Ryan* (1956) 99 C.L.R. 362.
- [666.](#) *Commonwealth Bank of Australia v Amadio* (1983) 57 A.L.J.R. 358; *Hardingham* (1984) 4 O.J.L.S. 275; *Bridgewater v Leahy* [1998] H.C.A 66, [1998] 158 A.L.R. 66 *High Ct*; but see *Westpac Banking Corp v Paterson* [2001] FCA 1630, [2001] 187 A.L.R. 168 *Federal Ct* (complainant's disadvantage must be sufficiently evident to other party to make it unconscionable for it to accept complainant's apparent assent). The decision in *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180 has not been followed: *Garcia v National Australia Bank Ltd* [1998] 155 A.L.R. 614 *High Ct*.
- [667.](#) See Farnsworth, *Contracts*, 4th edn (2004), §4.28.
- [668.](#) Leff (1967) 115 Un. Pennsylvania L.R. 485.
- [669.](#) White & Summers, *Uniform Commercial Code*, 5th edn (2000), para.4–2, though see also para.4-9.
- [670.](#) cf. *Alec Lobb Ltd v Total Oil G.B. Ltd* [1983] 1 W.L.R. 87.
- [671.](#) See Farnsworth, *Contracts* 4th edn (2004), 323–324.
- [672.](#) See below, Vol.II, paras 38-192 et seq.
- [673.](#) Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083).
- [674.](#) e.g. the “add-on” clause in *Williams v Walker Thomas Furniture Co* (1965) 121 U.S. App. D.C. 315, 350 F.2d 445.
- [675.](#) On the replacement of the Regulations by the Act on from this date, see below, Vol.II, paras 38-334 et seq.

- [676.](#) See below, Vol.II, para.38-359.
- [677.](#) 1999 Regulations art.4(2) and reg.6(2); Consumer Rights Act 2015 s.64. See below, Vol.II, paras 38-224 et seq. and 38-363 et seq.
- [678.](#) Consumer Credit Act 1974 ss.140A–140C, inserted by ss.19–22 of the Consumer Credit Act 2006; see below, Vol.II, para.38-212.
- [679.](#) The provisions on extortionate credit bargains, former ss.137–140 of the 1974 Act, have been repealed by s.70 and Sch.4 of the 2006 Act.
- [680.](#) cf. *Davies v Directloans Ltd* [1986] 1 W.L.R. 823, 831 and *Shahabina v Gyachi*, *Unreported* 1989, cited in Bamforth [1995] L.M.C.L.Q. 538, 559.
- [681.](#) See below, Vol.II, para.38-212.
- [682.](#) [1975] Q.B. 326; see too *Arrale v Costain Engineering Ltd* [1976] 2 Lloyd's Rep. 98; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69, 78–79; *Langdale v Danby*, *The Times*, November 24, 1981.
- [683.](#) [1975] Q.B. 326, 339. See also *A. Schroeder Music Publishing Co v Macaulay* [1974] 1 W.L.R. 1308, 1315.
- [684.](#) [1985] A.C. 686, 708. With respect, the question is not so much whether there is any need for a principle of this character as whether there may not be a need for a residuary principle to catch cases which may otherwise slip through the various statutory protections.
- [685.](#) *Lloyd's Bank v Bundy* [1975] Q.B. 326, 336.