



Contract Law: Text Cases and Materials (11th edn)

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Abstract

This chapter discusses cases of alleged undue influence. Such cases have caused considerable difficulties for the courts in recent years, not in relation to the existence of the doctrine, but to its scope and its relationship with other doctrines, particularly duress, and other cases in which courts have intervened to protect the vulnerable or those who have been exploited by those in a position of influence over them. Recent judicial exposition of undue influence has tended to take place in the context of three-party cases rather than two-party cases, that is to say cases in which a wrong has been committed by a third party and not the defendant. Two leading cases of undue influence are analysed: *Allcard v. Skinner* (1887) 36 Ch D 145 and *Royal Bank of Scotland plc v. Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 and they are used to illustrate the limits of the modern doctrine of undue influence.

Keywords: English contract law, undue influence, three-party case, *Allcard v. Skinner*, *RBS v. Etridge*, relationships of influence, presumption, abuse or exploitation of position of influence

Central Issues

1. Undue influence is a creature of equity and assumes many different forms. Typically, it arises where, as a result of a relationship between the parties, one party has such influence over the other that the latter does not exercise free judgment, independent of the party exercising the influence, in entering into a transaction with that party.

2. While it is often said that there are two categories of undue influence, namely actual and presumed undue influence, these are no more than two different ways of proving undue influence. Undue influence is a single legal concept and does not assume two different forms. In the case of actual undue influence, direct proof is led of the undue influence whereas, in the case of presumed undue influence, the party alleging that undue influence has been exercised relies on an evidential presumption.
3. In order to raise an evidential presumption of undue influence a party is required to establish (i) the existence of a relationship of influence between the parties and (ii) that the transaction is one that is not readily explicable on ordinary motives. Once these two elements are satisfied and the presumption has arisen, the burden of proof switches to the defendant to prove that the party seeking to set aside the transaction was not acting under undue influence when entering into the transaction. This burden is most likely to be discharged where the party seeking to set aside the transaction received fully informed and competent independent advice from a qualified person before entering into the transaction.
4. While undue influence will generally take the form of wrongdoing by the party alleged to have exercised undue influence (in that he or she has taken advantage of, or exploited, the vulnerability of the other party), it would appear that, in an appropriate case, a transaction can be set aside on the ground of undue influence notwithstanding that the actions and the conduct of the person who is said to have exercised undue influence could not be criticized as wrongful.
5. Although cases can be found in the past where undue influence took the form of the application of illegitimate threats, such a case would today most likely be regarded as falling within the doctrine of duress, not undue influence.

p. 656 19.1 Introduction

Cases of alleged undue influence have caused considerable difficulties for the courts in recent years. The difficulties relate, not to the existence of the doctrine, but to its scope and its relationship with other doctrines, particularly duress (on which see Chapter 18) and other cases in which courts have intervened to protect the vulnerable or those who have been exploited (on which see Chapter 20). The very words 'undue influence' give rise to difficulty. What does 'undue' mean? Does it mean 'too much', 'illegitimate' (in the sense in which that word is used in the context of duress), or 'unconscionable'? 'Influence' is not much better. Does it mean 'pressure', 'domination', 'exploitation', 'dependence', or something else? The courts have, until recently, made considerable use of a 'presumption' of undue influence. But what was it that was being presumed? Was it illegitimate pressure, exploitation, or excessive dependence? One of the principal issues of controversy has been whether the focus of undue influence is upon the conduct of the defendant, the state of mind of the claimant, or upon both elements.

19.2 A Summary of the Applicable Principles

While these and other issues have given rise to considerable difficulty for the courts, the Privy Council has recently provided a summary of the applicable principles which could provide a more stable framework for the law going forward. We shall therefore commence our analysis with that summary before highlighting the principal issues which emerge from the summary and these issues will then be further developed as the chapter unfolds. The summary of the applicable principles is to be found in the joint judgment of Lord Briggs and Lord Burrows in *Nature Resorts Ltd v. First Citizens Bank Ltd* [2022] UKPC 10, [2022] 1 WLR 2788, [10]–[15] in the following terms:

- 10 Putting to one side illegitimate threats (which are nowadays better viewed as falling within the doctrine of duress: see *Times Travel (UK) Ltd v. Pakistan International Airline Corpn...* paras 8–9 and 89–90) undue influence is concerned with a situation where, by reason of the relationship between them, one party (B) has such influence over the other (A) that A does not exercise a free judgment, independent of B, in relation to the making of a transaction between A and B (or, in a three-party situation, between A and a third party, C).
- 11 Ever since *Allcard v. Skinner* (1887) 36 Ch D 145, it has been commonplace to divide undue influence into two categories: actual and presumed. But in *Etridge* the House of Lords made clear that undue influence is a single concept. It does not have two different forms. The correct analysis of the two categories is that they refer to different ways of *proving* undue influence. Presumed undue influence refers to where the person alleging undue influence relies on an evidential presumption. Actual undue influence refers to where the person alleging undue influence relies on direct proof (of A's conduct, within a relationship with B, which led to B not exercising a free and independent judgment).
- 12 As *Etridge* also made clear, there are two requirements for establishing the (rebuttable) presumption of undue influence. First, there must be a relationship of influence. This may be established on the facts. But in respect of some relationships there is what is commonly referred to as an irrebuttable legal presumption (but is more appropriately referred to as a legal rule) that the relationship is one of influence (but note not *undue* influence). Examples of such relationships are doctor and patient (*Mitchell v. Homfray* (1881) 8 QBD 587), spiritual adviser and follower (*Allcard v. Skinner*), parent and young child (*Lancashire Loans Ltd v. Black* [1934] 1 KB 380) and, of direct relevance to the facts of this case, solicitor and client (*Wright v. Carter* [1903] 1 Ch 27). The second requirement is that the transaction must not be readily explicable on ordinary motives. The House of Lords preferred this test, which uses the words of Lindley LJ in *Allcard v. Skinner*, to a test of whether the transaction was manifestly disadvantageous which had been put forward by Lord Scarman in *National Westminster Bank plc v. Morgan* [1985] AC 686, 703–707. The underlying idea behind the test is that the nature and/or contents of the transaction must make one conclude, in the context of the relationship of influence, that, absent evidence to the contrary, undue influence has been exercised. A contract between A and B which is substantively very unfair to A stands on one side of the line: a Christmas present by A to B stands on the other side of the line.
- 13 If those two requirements are satisfied, so that there is a presumption of undue influence, the burden of proof shifts and it is for the party seeking to uphold the transaction to rebut the presumption by showing that A was not acting under undue influence (ie that A exercised free and independent judgment) when entering into the transaction. Although neither necessary nor conclusive, the main method of rebuttal is to show that A obtained the fully informed and competent independent advice of a qualified person, most obviously a lawyer: see *Inche Noriah v. Shaik Allie Bin Omar* [1929] AC 127 and *Etridge*.
- 14 In a three-party situation, where there is undue influence by B over A such that A enters into a transaction with C, the transaction will be voidable by A provided that C had notice of the undue influence or that B was acting as C's agent in procuring the transaction. The concept of

notice, and how it applies in this context, was explained in detail in *Etridge*. That the law of agency has a role to play in the context of undue influence was accepted in cases such as *Bank of Credit and Commerce International SA v. Aboody* [1990] 1 QB 923, 972 and *Barclays Bank plc v. O'Brien* [1994] 1 AC 180, 191, 195; see also *Chitty on Contracts*, 34th ed (2021), para 10-139.

- 15 Finally, it should be pointed out that there is no need to classify undue influence as a civil wrong (as opposed to a factor vitiating a transaction) in order to explain why transactions are set aside for undue influence: see Birks and Chin, 'On the Nature of Undue Influence' in *Good Faith and Fault in Contract* (eds Beatson and Friedmann, 1995), pp 57-97. This was clearly explained by Mummery LJ (with whom Pill and Jacob LJ agreed) in *Pesticcio v. Huet* [2004] EWCA Civ 372 at para 20:

'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 ... 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.'

Commentary

Taking these paragraphs in turn, paragraph [10] deals with the relationship between undue influence and duress and it signals that cases of illegitimate pressure should in future be viewed as cases of duress.

p. 658 Paragraph [11] makes an important point in relation to the nature of the two traditional forms which undue influence has assumed, namely actual and ↵ presumed undue influence. The principal point to note is the statement that the difference between these two categories relates to the ways in which undue influence is proved and that there are not two different forms of undue influence. Paragraph [12] then proceeds to highlight the two factors that must be established in order to give rise to the evidential presumption of undue influence, while paragraph [13] outlines the circumstances in which that presumption may be rebutted. Paragraph [14] draws attention to a significant line of authority (discussed further below) where undue influence has been raised in a tri-partite context rather than in the context of a simple bilateral contract and the complexities that have arisen in that three-party context. Finally, paragraph [15] refers to a point of some controversy, namely whether undue influence requires for its existence some wrongful conduct on the part of the defendant (such as exploitation, victimization or abuse of influence) or whether it can be made out without any requirement that the defendant must have acted wrongfully. Lord Briggs and Lord Burrows state, relying on the decision of the Court of Appeal in *Pesticcio v. Huet*, that undue influence need not be classified as a civil wrong but, as we shall see, there is authority which places more emphasis on the need for some wrongdoing on the part of the defendant before a finding of undue influence may be made and so this point may not have been finally and authoritatively established as a matter of English law (see further 19.4). We shall now turn to examine some of these issues in more detail before turning to a consideration of two of the leading cases.

19.2.1 Actual Undue Influence

Actual undue influence may be established where the claimant relies on direct proof of conduct on the part of the defendant which led to the claimant not exercising a free and independent judgment in entering into the transaction with the defendant (*Nature Resorts Ltd v. First Citizens Bank Ltd*, [11]). The conduct of the defendant will often arise out of the relationship between the claimant and the defendant but it may also arise from conduct that is not based on any particular relationship between the parties. Conduct which may amount to the actual exercise of undue influence can take different forms, such as bullying, harassment, domination, or control. Until recently, cases of actual undue influence often took the form of the application of illegitimate pressure by the defendant. A leading example is provided by the decision of the House of Lords in *Williams v. Bayley* (1866) LR 1 HL 200. The plaintiff's son gave the defendant bankers promissory notes upon which he had forged the plaintiff's signature. When the defendants discovered what had taken place they met with the plaintiff and during the course of the meeting they informed him that they had it within their power to prosecute his son. A solicitor was present with the plaintiff during the meeting but he left in protest when the plaintiff was asked to meet his son's debts. The plaintiff then agreed to enter into a mortgage to pay off the debts of his son, which he later sought to set aside. The House of Lords held that the plaintiff was entitled to set aside the mortgage in equity. Lord Chelmsford stated (at p. 214) that the agreement had been 'extorted from the father by undue pressure'.

However, were the facts of *Williams* to recur today it would seem more likely that the case would be treated as one of duress, not undue influence (*Pakistan International Airline Corporation v. Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101, [9] and [90] and *Nature Resorts Ltd v. First Citizens Bank Ltd*, [10]). But there would appear to be no formal necessity to plead a case involving the application of illegitimate pressure case as one of duress; it could, as in *Williams* itself, still be pleaded as a case of actual undue influence ↵ (*Libyan Investment Authority v. Goldman Sachs International* [2016] EWHC 2530 (Ch), [136]) but it is unlikely that a claim involving the application of illegitimate pressure would succeed as an undue influence claim if it would fail had it been pleaded as a duress case (*KSH Farm Ltd v. KSH Plant Ltd* [2021] EWHC 1986 (Ch), [622]).

Although there would appear to be no formal necessity to rely on the doctrine of duress in cases which involve the application of illegitimate pressure, it would appear likely that in practice the lead given by the Supreme Court will be followed and such cases will in future be pleaded as one of duress rather than undue influence. If the law does develop in this direction, will claimants ever seek to rely on actual undue influence? It is suggested that they will but they are likely to do so in cases where the undue influence takes the form of subtler forms of impropriety than the application of illegitimate pressure or threats (see *Royal Bank of Scotland plc v. Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [93], and [103]), 19.3).

One advantage which actual undue influence offers to claimants over a claim based on presumed undue influence is that there is no requirement in cases of actual undue influence that the claimant establish that the transaction is one that calls for an explanation or that it is manifestly disadvantageous. In *CIBC Mortgages Ltd v. Pitt* [1994] 1 AC 200, 209 Lord Browne-Wilkinson stated:

Actual undue influence is a species of fraud. Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he did not freely and knowingly enter into is entitled to have that transaction set aside as of right. No case ... 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. A man guilty of fraud is no more entitled to argue that the transaction was beneficial to the person defrauded than is a man who has procured a transaction by misrepresentation. The effect of the wrongdoer's conduct is to prevent the wronged party from bringing a free will and properly informed mind to bear on the proposed transaction which accordingly must be set aside in equity as a matter of justice.

The fact that the transaction need not call for explanation in cases of actual undue influence is consistent with the approach taken in cases of duress, where it is no defence to a claim to set aside a contract on the ground of duress that the transaction into which the claimant has entered was not one that called for an explanation. But the fact that the requirement does not apply to cases of presumed undue influence makes it important to be able to distinguish clearly between cases of actual and presumed undue influence. The differentiating factor would appear to be that in cases of actual undue influence the claimant must do more than prove the existence of a relationship of influence between the parties; he or she must provide direct proof that the defendant exercised that influence in such a way as to prevent the claimant from exercising a free and independent judgment in deciding to enter into the transaction with the defendant. Where such direct proof is lacking the claimant must rely on the presumption of undue influence and it is to that issue that we now turn.

19.2.2 Presumed Undue Influence

As Lord Briggs and Lord Burrows observed in *Nature Resorts Ltd v. First Citizens Bank Ltd*, [12], there are two requirements which must be satisfied before the presumption of undue influence can arise. First, there must p. 660 have been a relationship of influence, or of ↵ trust and confidence, between the parties. Prior to the decision of the House of Lords in *Royal Bank of Scotland plc v. Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 (19.3) it was customary to sub-divide cases of presumed undue influence into two groups. The first group consisted of a class of relationships in which the law presumed that one party was in a position to exercise influence or dominion over the other. These relationships included parent and child, guardian and ward, doctor and patient, solicitor and client, trustee and beneficiary, and religious adviser and disciple. The second group consisted of cases in which the claimant proved that, on the facts, a relationship of influence existed between the parties. Cases in this second group were inevitably fact specific because they depended upon a finding that, *in the particular case*, a relationship of influence existed between the parties. However the future of this second category is doubtful after the decision of the House of Lords in *Etridge* (see 19.3).

The second element in a presumed undue influence case is that there must be something about the transaction which 'calls for an explanation'. This requirement has been expressed in different ways. In *Allcard v. Skinner* (1887) 36 Ch D 145 (19.3) Lindley LJ stated that the gift must have been 'so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act'. In *National Westminster Bank plc v. Morgan* [1985] AC 686 Lord Scarman stated that the transaction must be 'manifestly disadvantageous' to the person seeking to set it aside. As a result of the

decision of the House of Lords in *Etridge* (19.3) it would appear that the former test is the one that is to be applied in future cases (a point confirmed by Lord Briggs and Lord Burrows in *Nature Resorts Ltd v. First Citizens Bank Ltd*, [12]).

19.2.3 Rebutting the Presumption of Undue Influence

Once the claimant has satisfied the court that the presumption of undue influence has arisen, the court must then consider whether the presumption has been rebutted. The factors relevant to the rebuttal of the presumption have been summarized (Treitel, *The Law of Contract* (15th edn, Sweet & Maxwell, 2020, edited by Edwin Peel), para 10-030) as follows:

The presumption of undue influence is rebutted if the party benefiting from the transaction (A) shows that it was ‘the free exercise of independent will’. The most usual way of doing this is to show that the other party (B) had independent advice before entering into the transaction. But the mere fact that independent advice was given will not of itself save the transaction. The advice must be competent and based on knowledge of all the relevant facts. It has been suggested that the independent adviser must also approve the transaction, and that his advice must be followed. This may be necessary where the influence is particularly strong, or where a very large gift is made; but it is not necessary in every case. There is indeed no invariable rule that independent advice is necessary to save the transaction; but A would lack elementary prudence if he did not ensure that such advice was given.

The principal method that is employed in practice when seeking to rebut the presumption is to show that the party subject to the influence had been given ‘the fully informed and competent independent advice of a qualified person’ prior to entering into the transaction (*Nature Resorts Ltd v. First Citizens Bank Ltd*, [13]).

p. 661 However, there is no rule of law to the effect that this is the only way in which the presumption can be rebutted. The presumption can be rebutted in diverse ways, as was illustrated by the facts of ↵ *Nature Resorts Ltd v. First Citizens Bank Ltd*. The Privy Council there held that the lower courts had been entitled to conclude that the presumption had been rebutted on the ground that the party seeking to set aside the transaction, by virtue of his considerable commercial experience, had understood the nature of the transaction into which he was entering such that the decision to enter the transaction was the product of free and independent judgment even though independent advice had not been taken before entering into the transaction.

19.2.4 Three Party Cases

Recent judicial exposition of undue influence has tended to take place in the context of three-party cases rather than two-party cases, that is to say cases in which a ‘wrong’ has been committed by a third party and not the defendant. The word ‘wrong’ has been used deliberately because one of the leading cases, *Barclays Bank plc v. O’Brien* [1994] 1 AC 180, did not, in the event, involve undue influence at all (assuming for present purposes that undue influence can be said to amount to a wrong): it was a misrepresentation case. The facts of *Barclays Bank plc v. O’Brien* were as follows. Mr O’Brien negotiated an overdraft with Barclays for a company in

which he had an interest. It was agreed that Mr O'Brien would guarantee the company's indebtedness and that his liability would, in turn, be secured by a second charge on the matrimonial home. The bank manager asked the branch at which the security documents were to be signed to ensure that the O'Briens were 'fully aware of the nature of the documentation to be signed and advised that if they are in any doubt they should contact their solicitor before signing'. These instructions were not complied with and Mrs O'Brien was given no explanation of the effect of the documents before she signed them, nor was she advised of the need to take independent advice. When the company's indebtedness rose to £154,000, the bank demanded that Mr O'Brien honour the guarantee. When he failed to do so, the bank sought to enforce the charge which Mrs O'Brien had signed and to obtain possession of the house. Mrs O'Brien sought to defend the claim on the ground that she had been induced to sign the charge by the undue influence of her husband and by his misrepresentation that the charge was limited to £60,000 and that its duration was to be confined to a short period of time. The claim based on undue influence was rejected in the Court of Appeal and was not pursued in the House of Lords, where the claim to set aside the transaction was based on the misrepresentation of Mr O'Brien, of which it was argued, in the event successfully, that the bank had constructive notice so that it could not enforce the charge against Mrs O'Brien.

There were three steps to the reasoning of the House of Lords in *O'Brien*. First Mrs O'Brien had to demonstrate that she was entitled to set aside 'the transaction' as against her husband. It is here that undue influence enters the arena as one of the possible grounds on which a wife may be entitled to set aside a transaction against her husband. The other ground, and the ground that was actually in issue in *O'Brien*, was misrepresentation. Secondly, the bank must have been put on notice of the possibility of wrongdoing on the part of the husband. Thirdly, once put on notice, the bank had to take certain steps to ensure that the agreement of the wife to the charge was properly obtained. It is not necessary to enter into the details of the second and third elements of this analysis because they have largely been overtaken by the decision of the House of Lords in *Etridge*. It suffices for the present purpose to note that the basis on which the claimant was held to be entitled to set aside the charge as against the defendant bank was not that the bank had committed a wrong but simply that it had notice that someone else had committed a wrong and had failed to take

p. 662 sufficient steps to ↵ ensure that the claimant was given adequate advice before deciding whether or not to enter into the transaction.

The leading case on undue influence is now the decision of the House of Lords in *Royal Bank of Scotland plc v. Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773 (19.3). It is a three-party case and it re-examines *Barclays Bank v. O'Brien*. It is, however, important to see the operation of undue influence at work in a standard two-party case. Thus we shall commence our analysis with the case of *Allcard v. Skinner* (1887) 36 Ch D 145, which, in the words of Lord Nicholls in *Etridge* ([8]), is 'a case well known to every law student'. We shall then turn to *Etridge* itself.

19.3 Two Leading Cases

Allcard v. Skinner

(1887) 36 Ch D 145, Court of Appeal

In 1868, the plaintiff was introduced by her 'spiritual director and confessor', Rev D Nihill, to the defendant, who was the lady superior of the sisterhood of St Mary at the Cross. In July of the same year, the plaintiff became an associate of the sisterhood, and at that time promised to devote her property to the service of the poor. She subsequently became a postulant, and then a novice, before, in 1871, she joined the sisterhood. On becoming a sister the plaintiff became subject to the rules of the sisterhood. These rules demanded her implicit obedience to the lady superior, whose voice was stated to be 'the voice of God', and they also stated that she must not 'seek advice of any entern without the Superior's leave'. She also took a vow of poverty, which required her to give away all her property. Although there was no requirement that she give her property to the sisterhood, it was found that there was an expectation to that effect. The plaintiff left the sisterhood in 1879 and revoked her will under which she had left her property to the sisterhood. In 1885 the plaintiff sought to recover certain items of property which she had transferred to the sisterhood. Her claim was rejected by the Court of Appeal, affirming the decision of Kekewich J. Although she was able to show that the property had been transferred while she was under the undue influence of the defendant, it was held, Cotton LJ dissenting on this point, that her claim was barred by virtue of her delay after leaving the sisterhood in bringing proceedings (and for this purpose the majority found it unnecessary to decide whether the appropriate label for the defence was acquiescence, laches, or affirmation). The extracts which follow are concerned solely with the ground on which the plaintiff was entitled to bring her claim and not with the scope of the defences.

Cotton LJ

The question is—Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? 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 ...

The question is whether the case comes within the principle of the second class, and I am of opinion that it does. At the time of the gift the Plaintiff was a professed sister, and, as such, bound to render absolute submission to the Defendant as superior of the sisterhood. She had no power to obtain independent advice, she was in such a position that she could not freely exercise her own will as to the disposal of her property, and she must be considered as being ... 'not, in the largest and amplest sense of the term—not, in mind as well as person—an entirely free agent'. ... In my opinion, even if there were evidence that she had, before she joined the sisterhood, advice on the question of how she should deal with her property, that would not be sufficient. The question is, I think, whether at the time when she executed the transfer she was under such influences as to prevent the gift being considered as that of one free to determine what should be done with her property. ...

Lindley LJ

I have examined the evidence with care in order to see whether any pressure was put upon the Plaintiff in order to induce her to give her property to the sisterhood, or whether any deception was practised upon her, or whether any unfair advantage was taken of her, or whether any of her money was applied otherwise than bona fide for the objects of the sisterhood, or for any purpose which the Plaintiff could disapprove. The result of the evidence convinces me that no pressure, except the inevitable pressure of the vows and rules, was brought to bear on the Plaintiff; that no deception was practised upon her; that no unfair advantage was taken of her; that none of her money was obtained or applied for any purpose other than the legitimate objects of the sisterhood. ... The real truth is that the Plaintiff gave away her property as a matter of course, and without seriously thinking of the consequences to herself. She had devoted herself and her fortune to the sisterhood, and it never occurred to her that she should ever wish to leave the sisterhood or desire to have her money back. In giving away her property as she did she was merely acting up to her promise and vow and the rule of the sisterhood, and to the standard of duty which she had erected for herself under the influences and circumstances already stated ...

There is no authority whatever for saying that her gifts were invalid at law. It is to the doctrines of equity, then, that recourse must be had to invalidate such gifts, if they are to be invalidated. The doctrine relied upon by the Appellant is the doctrine of undue influence expounded and enforced in *Huguenin v. Baseley* (1807) 14 Ves 273 and other cases of that class. These cases may be subdivided into two groups, which, however, often overlap.

First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor. ... The evidence does not bring this case within this group.

The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue

influence on his part. In this class of cases it has been considered necessary to shew that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made ...

I have not been able to find any case in which a gift has been set aside on the ground of undue influence which does not fall within one or other or both of the groups above mentioned. Nor can I find any authority which actually covers the present case. But it does not follow that it is not reached by the principle on which the Court has proceeded in dealing with the cases which have already called for decision. They illustrate but do not limit the principle applied to them.

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. *Huquenin v. Baseley* (1807) 14 Ves 273 is itself a clear authority to this effect. 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.

As no Court has ever attempted to define fraud so no Court has ever attempted to define undue influence, which includes one of its many varieties. The undue influence which Courts of Equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence. But the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far ... In this particular case I cannot find any proof that any gift made by the Plaintiff was the result of any actual exercise of power or influence on the part of the lady superior or of Mr Nihill, apart from the influence necessarily incidental to their position in the sisterhood. Everything that the Plaintiff did is in my opinion referable to her own willing submission to the vows she took and to the rules which she approved, and to her own enthusiastic devotion to the life and work of the sisterhood. ...

Nevertheless, consider the position in which the Plaintiff had placed herself. She had vowed poverty and obedience, and she was not at liberty to consult externs without the leave of her superior. She was not a person who treated her vows lightly; she was deeply religious and felt bound by her promise, by her vows, and by the rules of the sisterhood. She was absolutely in the power of the lady superior and Mr Nihill. A gift made by her under these circumstances to the lady superior cannot in my opinion be retained by the donee. The equitable title of the donee is imperfect by reason of the influence inevitably resulting from her position, and which influence experience has taught the

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Courts to regard as undue. Whatever doubt I might have had on this point if there had been no rule against consulting externs, that rule in my judgment turns the scale against the Defendant. In the face of that rule the gifts made to the sisterhood cannot be supported in the absence of proof that the Plaintiff ↵ could have obtained independent advice if she wished for it, and that she knew that she would have been allowed to obtain such advice if she had desired to do so. I doubt whether the gifts could have been supported if such proof had been given, unless there was also proof that she was free to act on the advice which might be given to her. But the rule itself is so oppressive and so easily abused that any person subject to it is in my opinion brought within the class of those whom it is the duty of the Court to protect from possible imposition. The gifts cannot be supported without proof of more freedom in fact than the Plaintiff can be supposed to have actually enjoyed.

Where a gift is made to a person standing in a confidential relation to the donor, the Court will not set aside the gift if of a small amount simply on the ground that the donor had no independent advice. In such a case, some proof of the exercise of the influence of the donee must be given. The mere existence of such influence is not enough in such a case; ... But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift ... in this case there was in fact no unfair or undue influence brought to bear upon the Plaintiff other than such as inevitably resulted from the training she had received, the promise she had made, the vows she had taken, and the rules to which she had submitted herself. But her gifts were in fact made under a pressure which, whilst it lasted, the Plaintiff could not resist, and were not, in my opinion, past recall when that pressure was removed. When the Plaintiff emancipated herself from the spell by which she was bound, she was entitled to invoke the aid of the Court in order to obtain the restitution from the Defendant of so much of the Plaintiff's property as had not been spent in accordance with the wishes of the Plaintiff, but remained in the hands of the Defendant.

Bowen LJ

... it is of essential importance to keep quite distinct two things which in their nature seem to me to be different—the rights of the donor, and the duties of the donee. ... As to the rights of the donor in a case like the present I entertain no doubt. ... In the present instance there was no duress, no incompetency, no want of mental power on the part of the donor. It seems to me that, so far as regards her rights, she had the absolute right to deal with her property as she chose. Passing next to the duties of the donee, ... it is plain that equity will not allow a person who exercises or enjoys a dominant religious influence over another to benefit directly or indirectly by the gifts which the donor makes under or in consequence of such influence, unless it is shewn that the donor, at the time of making the gift, was allowed full and free opportunity for counsel and advice outside—the means of considering his or her worldly position and exercising an independent will about it. 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 ... [The] Plaintiff ... had vowed in the most sacred and solemn way absolute and implicit obedience to the will of the Defendant, her superior, and she was bound altogether to neglect the advice of externs—not to consult those outside the convent ... the Plaintiff, so long as she was fettered by this vow—so long as

she was under the dominant influence of this religious feeling—was a person entitled to the protection of the rule. Now, was the Defendant bound by this rule? I acquit her most entirely of all selfish feeling in the matter. I can see no sort of wrongful desire to appropriate to herself any worldly benefit from the gift; but, nevertheless, she was a person who benefited by it so far as the disposition of the property was concerned, although, no doubt, she meant to use it in conformity with the rules of the institution, and did so use it.

p. 666 **Commentary**

Allcard is an interesting case for a number of reasons. First, the judges distinguish between actual and presumed undue influence. *Allcard* itself is a case of presumed undue influence. Nevertheless, the judges did give brief consideration to the scope of actual undue influence. Thus Lindley LJ stated that actual undue influence extends to cases of ‘overreaching’ and ‘cheating’. Secondly, it is not easy to identify the basis upon which the Court of Appeal concluded that this was a case of presumed undue influence. There are passages from the judgment of Lindley LJ which suggest that ‘victimization’ is the basis of a finding of undue influence. This suggests that the search is for some wrongdoing on the part of the defendant. But this rationalization is difficult to reconcile with his conclusion that there was nothing to suggest that any gift made by the plaintiff was the result of the actual exercise of power or influence by the Mother Superior. This tends to suggest that the basis for the finding that this was a case of presumed undue influence had more to do with the position of the plaintiff than the behaviour of the defendant (see further 19.4.2). Thus Professors Birks and Chin (‘On the Nature of Undue Influence’ in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1995), at p. 68) suggest that:

in presuming the undue influence the Court of Appeal was not presuming recourse to threats, express or implied, either by the Mother Superior or by the clergyman who had been the co-founder of the convent. The plaintiff had been under a spell compounded of her enthusiasm for the sisterhood and devotion to its rules, which included an obligation to seek advice only within the order. Her weakness consisted in her impaired capacity *vis-à-vis* the head of the order to judge her own best interests. She was excessively dependent or, if ‘dependent’ is a shade wrong, she was excessively spell-bound. Either way, her autonomy was impaired to an exceptional degree.

But a plaintiff- or claimant-sided version of *Allcard* is not without its own difficulties. As Professor Chen-Wishart has observed ([2006] *Current Legal Problems* 231, 238), *Allcard* cannot ‘realistically support a claimant-sided story’ given that there was ‘ample finding that the nun knew what was expected of her before she joined the sisterhood’ and that ‘everything she did was referable to her own willing submission and enthusiastic devotion to the life and work of the sisterhood’. We may view the plaintiff as being misguided in her devotion to the sisterhood but should the law characterize her as someone who was unable to manage her own affairs (given that any inability appeared to relate only to her dealings with the sisterhood) or patronisingly take away her freedom to dispose of her property as she sees fit or deny to her the ability to give expression to her faith by donating her wealth to the religious order of which she was an adherent?

Thirdly, it would appear that the critical factor was that the plaintiff did not have access to external, independent advice. In the absence of such independent advice there was nothing to free the plaintiff from her overwhelming sense that she was bound to give away all her property. Had she had independent advice, been free to act on it, and had nevertheless decided to give away her property, it is unlikely that the Court of Appeal would have held that the transaction could be set aside. The key element here may not be the giving of independent advice (since the plaintiff would in all probability not have accepted the advice in the light of her devotion to the sisterhood) but of proof that she was free to act on that advice. But here we encounter the problem of how to demonstrate that she was free to act on any independent advice that she was given.

p. 667 **Royal Bank of Scotland plc v. Etridge (No 2)**

[2001] UKHL 44, [2002] 2 AC 773, House of Lords

The House of Lords heard eight appeals. Each case arose out of a transaction in which a wife charged her interest in her home in favour of a bank as security for her husband's indebtedness or the indebtedness of a company through which he carried on business. In seven of the appeals the bank sought to enforce the charge signed by the wife. The wife raised a defence that the bank was on notice that her concurrence in the transaction had been procured by her husband's undue influence. In the eighth appeal the wife claimed damages from a solicitor who advised her before she entered into a guarantee obligation under the undue influence of her husband. Given the range of cases before the House of Lords it is not possible to include within the extracts the application of the legal principles to the facts of the cases. In the extracts that follow, the excerpts are confined to the analysis employed by their Lordships of undue influence itself. Their analysis of the other issues is noted in the commentary, and further extracts from the speech of Lord Nicholls are to be found in the online resources which support this book.

Lord Bingham of Cornhill

3. ... While the opinions of Lord Nicholls and Lord Scott show some difference of expression and approach, I do not myself discern any significant difference of legal principle applicable to these cases, and I agree with both opinions. But if I am wrong and such differences exist, it is plain that the opinion of Lord Nicholls commands the unqualified support of all members of the House.

Lord Nicholls of Birkenhead**Undue influence**

6. The issues raised by these appeals make it necessary to go back to first principles. Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress. Originally this was narrow in its scope, restricted to the more blatant forms of physical coercion, such as personal violence.
7. Here, as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced', in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (*Huguenin v. Baseley* 14 Ves 273, 300). If the intention was produced by an unacceptable

means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.

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8. Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage ...
9. In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree 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. He abuses the influence he has acquired. In *Allcard v. Skinner* (1887) 36 Ch D 145, a case well known to every law student, Lindley LJ, at p. 181, described this class of cases as those in which it was the duty of one party to advise the other or to manage his property for him ...
10. The law has long recognised the need to prevent abuse of influence in these 'relationship' cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted 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: see Treitel, *The Law of Contract*, 10th edn (1999), pp. 380–381. For example, the relation of banker and customer will not normally meet this criterion, but exceptionally it may: see *National Westminster Bank plc v. Morgan* [1985] AC 686, 707–709.
11. Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.
12. In *CIBC Mortgages plc v. Pitt* [1994] 1 AC 200 your Lordships' House decided that in cases of undue influence disadvantage is not a necessary ingredient of the cause of action. It is not essential that the transaction should be disadvantageous to the pressurised or influenced person, 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.

Burden of proof and presumptions

13. Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.
14. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is *prima facie* evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn ...
16. Generations of equity lawyers have conventionally described this situation as one in which a presumption of undue influence arises. This use of the term 'presumption' is descriptive of a shift in the evidential onus on a question of fact. When a plaintiff succeeds by this route he does so because he has succeeded in establishing a case of undue influence. The court has drawn appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff. The use, in the course of the trial, of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position. These cases are the equitable counterpart of common law cases where the principle of *res ipsa loquitur* is invoked. There is a rebuttable evidential presumption of undue influence.
17. The availability of this forensic tool in cases founded on abuse of influence arising from the parties' relationship has led to this type of case sometimes being labelled 'presumed undue influence'. This is by way of contrast with cases involving actual pressure or the like, which are labelled 'actual undue influence'. ... This usage can be a little confusing. In many cases where a plaintiff has claimed that the defendant abused the influence he acquired in a relationship of trust and confidence the plaintiff has succeeded by recourse to the rebuttable

evidential presumption. But this need not be so. Such a plaintiff may succeed even where this presumption is not available to him; for instance, where the impugned transaction was not one which called for an explanation.

18. The evidential presumption discussed above is to be distinguished sharply from a different form of presumption which arises in some cases. The law has adopted a sternly protective attitude towards certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where, moreover, substantial gifts by the influenced or vulnerable person are not normally to be expected. Examples of relationships within this special class are parent and child, guardian and ward, trustee and beneficiary, solicitor and client, and medical adviser and patient. In these cases the law presumes, irrebuttably, that one party had influence over the other. The complainant need not prove he actually reposed trust and confidence in the other party. It is sufficient for him to prove the existence of the type of relationship.
19. It is now well established that husband and wife is not one of the relationships to which this latter principle applies ... there is nothing unusual or strange in a wife, from motives of affection or for other reasons, conferring substantial financial benefits on her husband. Although there is no presumption, the court will nevertheless note, as a matter of fact, the opportunities for abuse which flow from a wife's confidence in her husband. The court will take this into account with all the other evidence in the case. Where there is evidence that a husband has taken unfair advantage of his influence over his wife, or her confidence in him, 'it is not difficult for the wife to establish her title to relief' ...

Independent advice

20. Proof that the complainant received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all the circumstances. In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is about to do. But a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case.

Manifest disadvantage

21. As already noted, there are two prerequisites to the evidential shift in the burden of proof from the complainant to the other party. First, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant.

Second, that the transaction is not readily explicable by the relationship of the parties.

22. Lindley LJ summarised this second prerequisite in the leading authority of *Allcard v. Skinner*, 36 Ch D 145, where the donor parted with almost all her property. Lindley LJ pointed out that where a gift of a small amount is made to a person standing in a confidential relationship to the donor, some proof of the exercise of the influence of the donee must be given. The mere existence of the influence is not enough. He continued, at p. 185: 'But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift' ...
24. ... The second prerequisite, as expressed by Lindley LJ, is good sense. It is a necessary limitation upon the width of the first prerequisite. It would be absurd for the law to presume that every gift by a child to a parent, or every transaction between a client and his solicitor or between a patient and his doctor, was brought about by undue influence unless the contrary is affirmatively proved. Such a presumption would be too far-reaching. The law would be out of touch with everyday life if the presumption were to apply to every Christmas or birthday gift by a child to a parent, or to an agreement whereby a client or patient agrees to be responsible for the reasonable fees of his legal or medical adviser. The law would be rightly open to ridicule, for transactions such as these are unexceptionable. They do not suggest that something may be amiss. So something more is needed before the law reverses the burden of proof, something which calls for an explanation. When that something more is present, the greater the disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be regarded as rebutted.
25. This was the approach adopted by Lord Scarman in *National Westminster Bank plc v. Morgan* [1985] AC 686, 703–707. He cited Lindley LJ's observations in *Allcard v. Skinner* 36 Ch D 145, 185, which I have set out above. He noted that whatever the legal character of the transaction, it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the parties' relationship, it was procured by the exercise of undue influence ...
26. Lord Scarman attached the label 'manifest disadvantage' to this second ingredient necessary to raise the presumption. This label has been causing difficulty. It may be apt enough when applied to straightforward transactions such as a substantial gift or a sale at an undervalue. But experience has now shown that this expression can give rise to misunderstanding. The label is being understood and applied in a way which does not accord with the meaning intended by Lord Scarman, its originator.
27. The problem has arisen in the context of wives guaranteeing payment of their husband's business debts. In recent years judge after judge has grappled with the baffling question whether a wife's guarantee of her husband's bank overdraft, together with a charge on her share of the matrimonial home, was a transaction manifestly to her disadvantage.
28. In a narrow sense, such a transaction plainly ('manifestly') is disadvantageous to the wife. She undertakes a serious financial obligation, and in return she personally receives nothing. But that would be to take an unrealistically blinkered view of such a transaction. Unlike the

relationship of solicitor and client or medical adviser and patient, in the case of husband and wife there are inherent reasons why such a transaction may well be for her benefit.

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. A wife's affection and self-interest run hand-in-hand in inclining her to join with her husband in charging the matrimonial home, usually a jointly-owned asset, to obtain the financial facilities needed by the business. The finance may be needed to start a new business, or expand a promising business, or rescue an ailing business.

29. Which, then, is the correct approach to adopt in deciding whether a transaction is disadvantageous to the wife: the narrow approach, or the wider approach? The answer is neither. The answer lies in discarding a label which gives rise to this sort of ambiguity. The better approach is to adhere more directly to the test outlined by Lindley LJ in *Allcard v. Skinner* 36 Ch D 145, and adopted by Lord Scarman in *National Westminster Bank plc v. Morgan* [1985] AC 686, in the passages I have cited.
30. I return to husband and wife cases. I do not think that, in the ordinary course, a guarantee of the character I have mentioned is 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. Wives frequently enter into such transactions. There are good and sufficient reasons why they are willing to do so, despite the risks involved for them and their families. They may be enthusiastic. They may not. They may be less optimistic than their husbands about the prospects of the husbands' businesses. They may be anxious, perhaps exceedingly so. But this is a far cry from saying that such transactions as a class are to be regarded as prima facie evidence of the exercise of undue influence by husbands.
31. I have emphasised the phrase 'in the ordinary course'. There will be cases where a wife's signature of a guarantee or a charge of her share in the matrimonial home does call for explanation. Nothing I have said above is directed at such a case.

A cautionary note

32. I add a cautionary note. ... It concerns the general approach to be adopted by a court when considering whether a wife's guarantee of her husband's bank overdraft was procured by her husband's undue influence. Undue influence has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused. 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. Similarly, when 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 misstatements.
33. 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 both of them on that

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footing. Such a husband abuses the influence 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.

Lord Clyde

92. I question the wisdom of the practice which has grown up, ... of attempting to make classifications of cases of undue influence. That concept is in any event not easy to define. ... It is something which can be more easily recognised when found than exhaustively analysed in the abstract. Correspondingly the attempt to build up classes or categories may lead to confusion. The confusion is aggravated if the names used to identify the classes do not bear their actual meaning. Thus on the face of it a division into cases of 'actual' and 'presumed' undue influence appears illogical. It appears to confuse definition and proof. There is also room for uncertainty whether the presumption is of the existence of an influence or of its quality as being undue. I would also dispute the utility of the further sophistication of subdividing 'presumed undue influence' into further categories. All these classifications to my mind add mystery rather than illumination.
93. There is a considerable variety in the particular methods by which undue influence may be brought to bear on the grantor of a deed. They include cases of coercion, domination, victimisation and all the insidious techniques of persuasion. Certainly it can be recognised that in the case of certain relationships it will be relatively easier to establish that undue influence has been at work than in other cases where that sinister conclusion is not necessarily to be drawn with such ease. English law has identified certain relationships where the conclusion can *prima facie* be drawn so easily as to establish a presumption of undue influence. But this is simply a matter of evidence and proof. In other cases the grantor of the deed will require to fortify the case by evidence, for example, of the pressure which was unfairly applied by the stronger party to the relationship, or the abuse of a trusting and confidential relationship resulting in for the one party a disadvantage and for the other a collateral benefit beyond what might be expected from the relationship of the parties. At the end of the day, after trial, there will either be proof of undue influence or that proof will fail and it will be found that there was no undue influence. In the former case, whatever the relationship of the parties and however the influence was exerted, there will be found to have been an actual case of undue influence. In the latter there will be none ...

Lord Hobhouse of Woodborough

(1) Presumed undue influence

103. The division between presumed and actual undue influence derives from the judgments in *Allcard v. Skinner*. Actual undue influence presents no relevant problem. It is an equitable wrong committed by the dominant party against the other which makes it unconscionable

for the dominant party to enforce his legal rights against the other. It is typically some express conduct overbearing the other party's will. It is capable of including conduct which might give a defence at law, for example, duress and misrepresentation. ... Actual undue influence does not depend upon some pre-existing relationship between the two parties though it is most commonly associated with and derives from such a relationship. He who alleges actual undue influence must prove it.


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104. Presumed undue influence is different in that it necessarily involves some legally recognised relationship between the two parties. As a result of that relationship one party is treated as owing a special duty to deal fairly with the other. It is not necessary for present purposes to define the limits of the relationships which give rise to this duty. Typically they are fiduciary or closely analogous relationships ... Such legal relationships can be described as relationships where one party is legally presumed to repose trust and confidence in the other—the other side of the coin to the duty not to abuse that confidence. But there is no presumption properly so called that the confidence has been abused. It is a matter of evidence. ... Thus, at the trial the judge will decide on the evidence whether he is in fact satisfied that there was no abuse of confidence. It will be appreciated that the relevance of the concept of 'manifest disadvantage' is evidential. It is relevant to the question whether there is any issue of abuse which can properly be raised. It is relevant to the determination whether in fact abuse did or did not occur. It is a fallacy to argue from the terminology normally used, 'presumed undue influence', to the position, not of presuming that one party reposed trust and confidence in the other, but of presuming that an abuse of that relationship has occurred; factual inference, yes, once the issue has been properly raised, but not a presumption.
 105. The Court of Appeal in *Aboody* [1990] 1 QB 923 and Lord Browne-Wilkinson [in *O'Brien*] classified cases where there was a legal relationship between the parties which the law presumed to be one of trust and confidence as 'presumed undue influence: class 2(A)'. They then made the logical extrapolation that there should be a class 2(B) to cover those cases where it was proved by evidence that one party had in fact reposed trust and confidence in the other. It was then said that the same consequences flowed from this factual relationship as from the legal class 2(A) relationship. ...
 107. In agreement with what I understand to be the view of your Lordships, I consider that the so-called class 2(B) presumption should not be adopted. It is not a useful forensic tool. The wife or other person alleging that the relevant agreement or charge is not enforceable must prove her case. She can do this by proving 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. Although the general burden of proof is, and remains, upon her, she can discharge that burden of proof 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. Evidentially, the opposite party will then be faced with the necessity

to adduce evidence sufficient to displace that conclusion. Provided it is remembered that the burden is an evidential one, the comparison with the operation of the doctrine *res ipsa loquitur* is useful.

Lord Scott of Foscote

Undue influence

151. Undue influence cases have, traditionally, been regarded as falling into two classes, cases where undue influence must be affirmatively proved (Class 1) and cases where undue influence will be presumed (Class 2). The nature of the two classes was described by Slade LJ in *Bank of Credit and Commerce International SA v. Aboody* [1990] 1 QB 923, 953:

‘Ever since the judgments of this court in *Allcard v. Skinner* ... clear distinction has been drawn between (1) those cases in which the court will uphold a plea of undue influence only if it is satisfied that such influence has been affirmatively proved on the evidence (commonly referred to as cases of “actual undue influence” ... “Class 1” cases); (2) those cases (commonly referred to as cases of “presumed undue influence” ... “Class 2” cases) in which the relationship between the parties will lead the court to presume that undue influence has  been exerted unless evidence is adduced proving the contrary, eg by showing that the complaining party has had independent advice.’

152. This passage provides, if I may respectfully say so, an accurate summary description of the two classes. But, like most summaries, it requires some qualification.
153. First, the Class 2 presumption is an evidential rebuttable presumption. It shifts the onus from the party who is alleging undue influence to the party who is denying it. Second, the weight of the presumption will vary from case to case and will depend both on the particular nature of the relationship and on the particular nature of the impugned transaction. Third, the type and weight of evidence needed to rebut the presumption will obviously depend upon the weight of the presumption itself ...
154. The onus will, of course, lie on the person alleging the undue influence to prove in the first instance sufficient facts to give rise to the presumption. The relationship relied on in support of the presumption will have to be proved.
155. In *National Westminster Bank plc v. Morgan* [1985] AC 686, 704 Lord Scarman, referring to the character of the impugned transaction in a Class 2 case, said: ‘it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence’. Lord Scarman went on:

‘In my judgment, therefore, the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it.’

With respect to Lord Scarman, the reasoning seems to me to be circular. The transaction will not be ‘wrongful’ unless it was procured by undue influence. Its ‘wrongful’ character is a conclusion, not a tool by which to detect the presence of undue influence. On the other hand, the nature of the transaction, its inexplicability by reference to the normal motives by which people act, may, and usually will, constitute important evidential material.

156. Lord Browne-Wilkinson in *CIBC Mortgages plc v. Pitt* [1994] 1 AC 200 pointed out, plainly correctly, that if undue influence is proved, the victim’s right to have the transaction set aside will not depend upon the disadvantageous quality of the transaction. Where, however a Class 2 presumption of undue influence is said to arise, the nature of the impugned transaction will always be material, no matter what the relationship between the parties. ... It is, in my opinion, the combination of relationship and the nature of the transaction that gives rise to the presumption and, if the transaction is challenged, shifts the onus to the transferee ...
161. For my part, I doubt the utility of the Class 2B classification. Class 2A is useful in identifying particular relationships where the presumption arises. The presumption in Class 2B cases, however, is doing no more than recognising that evidence of the relationship between the dominant and subservient parties, coupled with whatever other evidence is for the time being available, may be sufficient to justify a finding of undue influence on the balance of probabilities. The onus shifts to the defendant. Unless the defendant introduces evidence to counteract the inference of undue influence that the complainant’s evidence justifies, the complainant will succeed. In my opinion, the presumption of undue influence in Class 2B cases has the same function in undue influence cases as *res ipsa loquitur* has in negligence cases. It recognises an evidential state of affairs in which the onus has shifted.
162. In the surety wife cases it should, in my opinion, be recognised that undue influence, though a possible explanation for the wife’s agreement to become surety, is a relatively unlikely one. *O’Brien* itself was a misrepresentation case. Undue influence had been alleged but the undoubted pressure which the husband had brought to bear to persuade his reluctant wife to sign was not regarded by the judge or the Court of Appeal as constituting undue influence. The wife’s will had not been overborne by her husband. Nor was *O’Brien* a case in which, in my opinion, there would have been at any stage in the case a presumption of undue influence.

Commentary

The decision of the House of Lords is one of enormous significance for banks and, to a lesser extent, solicitors called upon to advise non-commercial parties who agree to become guarantors. The practical significance of the case lies principally in the practical guidance given to banks and solicitors in relation to the procedures to be adopted in such cases. Our principal interest, by contrast, is in the analysis of undue influence. A number of points can be made.

The first is that their Lordships declined to provide a comprehensive definition of undue influence. The emphasis was very much on the facts and circumstances of the individual case (see, for example, [13]). Thus relationships are ‘infinitely various’ ([10]) and no description of the relevant factors is ‘perfect’ or ‘all embracing’ ([11]). The focus of the doctrine seems to be rather more on the defendant than the claimant. Thus influence must not be ‘abused’ ([6]) and undue influence is said to have ‘a connotation of impropriety’ ([32]). But it may be ‘impropriety’ in an attenuated form, as *Allcard v. Skinner* suggests, where the ‘impropriety’ apparently took the form of not ensuring that the plaintiff had access to independent advice before she decided to give away all her property.

Secondly, their Lordships affirmed the continued existence of a distinction between cases of actual and presumed undue influence (with the apparent exception of Lord Clyde at [92]). Lord Nicholls seemed to conceive of actual undue influence in terms of ‘improper pressure or coercion’ so that there was ‘much overlap with the principle of duress’ ([8]) but this aspect of the judgment must be re-considered in the light of *Pakistan International Airline Corporation v. Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101, [9] and [90] and *Nature Resorts Ltd v. First Citizens Bank Ltd* [2022] UKPC 10, [2022] 1 WLR 2788, [10] where, as noted earlier in this chapter, it was observed that such ‘pressure or coercion’ cases should in future be regarded as cases of duress rather than actual undue influence). Lord Hobhouse, for his part, defined actual undue influence in broader terms (see [103]) when he said that it was an ‘equitable wrong’ which typically consisted of ‘some express conduct overbearing the other party’s will’. The importance of the distinction between actual and presumed undue influence should not, however, be over-stated. As Lord Briggs and Lord Burrows observed in *Nature Resorts Ltd v. First Citizens Bank Ltd* [2022] UKPC 10, [2022] 1 WLR 2788, [11] they are simply two different ways in which undue influence can be proved.

Thirdly, the speeches contain much by way of discussion of presumed undue influence, although they seem to raise more questions than they answer. First, they affirm that the presumption is a rebuttable evidential presumption (see [16]). Secondly, the future of what was referred to as ‘the class 2B presumption’ is now very doubtful. Lord Hobhouse stated that ‘it should not be adopted’ ([107]), Lord Scott doubted its utility ([161]), and p. 676 Lord Clyde was ← generally hostile to the use of presumptions ([92]). However, the presumption still has a role to play in ‘class 2A cases’ and, indeed, Lord Nicholls stated that, in certain relationships, the law presumes ‘irrebuttably’ that one party had influence over the other (see [18]).

Fourthly, ‘manifest disadvantage’ as a control device has been replaced by the test originally adopted by Lindley LJ in *Allcard v. Skinner* (1887) 36 Ch D 145, 185, namely that the gift must have been so large that it cannot be accounted for on the grounds of friendship, relationship, charity, or other ordinary motives on which ordinary men act. This was certainly the view of Lord Nicholls ([29]) and it has subsequently been affirmed by Lord Briggs and Lord Burrows in *Nature Resorts Ltd v. First Citizens Bank Ltd* [2022] UKPC 10, [2022] 1 WLR 2788, [12] (although note that Lord Hobhouse referred to manifest disadvantage without apparent

criticism (at [104])). But it may be that this change will have little effect in practice. It is a change of label rather than substance. The courts are simply seeking a label to denote a transaction or a gift which calls for an explanation.

Fifthly, it was confirmed that the relationship of husband and wife does not give rise to a presumption of undue influence ([19]).

Sixthly, it is not entirely clear what it is that is being presumed. Is it dependence? Is it exploitation? The answer would appear to be that there are different presumptions and that they operate in different ways. Thus certain relationships give rise to a presumption of influence and, as Lord Nicholls points out, that presumption may be irrebuttable ([18]). But this does not appear to be the same thing as the presumption of undue influence. In order to raise the presumption of undue influence it is necessary to prove both the nature of the relationship between the parties and that the transaction is one that is not explicable by ordinary motives on which ordinary people act (see [21] and *Nature Resorts Ltd v. First Citizens Bank Ltd*, [12]). Once these two elements have been proved the law then presumes that undue influence has been exercised, unless the presumption is rebutted. This latter presumption is better described as a 'factual inference' (see [104]). Thus Lord Hobhouse states that it is the relationship of trust and confidence that is presumed and that 'there is no presumption properly so called that the confidence has been abused' ([104]). While the court may be willing to draw a 'factual inference' that abuse has taken place in certain cases, it is not the case that the law 'presumes' that abuse has taken place.

The effect of *Etridge* is to make it much more difficult for wives to establish that they have been the victims of undue influence by their husbands, at least at the trial of the action (different considerations appear to apply at the interlocutory stage, where the courts are less likely to strike out the claim as unarguable on a ground that relates to what has taken place between the husband and the wife). This is evidenced by the application of the law to the facts of the various cases in the speech of Lord Scott ([194]–[374]). At the trial of the action judges are encouraged to examine the facts of the case in order to decide, *on the facts*, whether or not undue influence has been exercised. Thus Lord Scott stated ([219]) that in a case 'where there has been a full trial ... the judge must decide on the totality of the evidence before the court whether or not the allegation of undue influence has been proved'. Where the allegation takes the form of actual undue influence, the wife must prove that she has been the subject of threats or other forms of wrongdoing by her husband. On the other hand, where she relies on the presumption of undue influence the judge must first of all decide whether or not the presumption has been triggered and, for that to happen, the wife must prove that a relationship of trust and confidence exists between the parties and that the transaction is one that is not explicable by ordinary motives on which ordinary people act. Wives are likely to find it difficult to prove the conditions necessary to trigger the operation ↵ of the presumption. This is so for two reasons. First, the relationship between husband and wife does not ordinarily trigger the presumption. However, it is not impossible. In one of the appeals in *Etridge* the husband and wife were Hasidic Jews and the wife's upbringing and education 'prepared her to expect and to accept a position of subservience and obedience to the wishes of her husband' ([283]). In this case Lord Scott considered that the Court of Appeal had been correct to conclude that the presumption of undue influence arose on the facts of the case. Secondly, in the ordinary case, a guarantee by a wife of her husband's debts can be accounted for on the ground of their relationship and so does not give rise to an inference of undue influence. It is not a transaction that calls for an explanation or is inexplicable by reference to the ordinary motives on which ordinary people act.

p. 677

Turning now to the circumstances in which the bank is put on inquiry that there is potential wrongdoing by the husband (or party in a similar position), the threshold adopted by the House of Lords is a low one (the passages from the speech of Lord Nicholls on this issue can be found in the online resources).

Essentially, the bank is put on inquiry whenever a wife offers to stand surety for her husband's debts or the debts of his business, even in the case where she is a shareholder and participates in the running of the company (but where the advance is made to the husband and wife jointly the bank is not put on inquiry unless the bank is aware that the loan is being made for the husband's purposes, as distinct from their joint purposes; see [48]). The same principle applies to unmarried couples, whether heterosexual or homosexual, where the bank is aware of the relationship (see [47]). The bank can also be put on inquiry where there is a relationship between the parties but that relationship is not sexual (see, for example, *Credit Lyonnais Bank Nederland NV v. Burch* [1997] 1 All ER 144). This extension potentially gives rise to difficulty in terms of defining the limits of the circumstances in which the bank is put on inquiry. Lord Nicholls therefore concluded (at [84]) that the bank is put on inquiry in 'every case where the relationship between the surety and the debtor is non-commercial'. In all non-commercial cases the creditor must take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety. The line between commercial and non-commercial sureties may be indistinct at the margins. Lord Nicholls gave as examples of commercial sureties cases where the guarantor is being paid a fee or is guaranteeing the debts of another company in the same group (see [88]). But in the vast majority of cases the distinction between a commercial and a non-commercial surety should not create difficulties in practice.

In relation to the steps to be taken by the bank once it has been put on inquiry, Lord Nicholls provided the banks with guidance at [79] of his speech. One point to note is that the bank is not required to meet with the wife and explain to her the nature of the transaction before she enters into it. It suffices for the bank to satisfy itself that the wife has been advised by her own solicitor. In many ways the obligations imposed on solicitors are more onerous than those imposed on banks. This leads us to the final issue which relates to the role of solicitors. As Lord Nicholls observed at [52] many of the difficulties that have arisen in this area 'stem from serious deficiencies, or alleged deficiencies, in the quality of the legal advice given to wives'. He concluded that independent legal advice for wives had been a 'fiction' and a 'charade'. The guidance given by Lord Nicholls in [65] and [74] is clearly designed to provide more effective protection for wives by ensuring, as far as possible, that they have access to reliable, independent advice before they decide whether or not to act as guarantors of their husband's debts. Whether that protection will prove to be effective in the real world is, of course, another matter.

p. 678 19.4 The Post-*Etridge* Cases

The cases post-*Etridge* continue to exhibit some uncertainty as to the basis of the doctrine of undue influence. Three cases in particular are worthy of note. The first two (*R v. Attorney-General for England and Wales* [2003] UKPC 22 and *National Commercial Bank (Jamaica) Ltd v. Hew* [2003] UKPC 51) are decisions of the Privy Council, while the third (*Pesticcio v. Huet* [2004] EWCA Civ 372, [2004] All ER (D) 36 (Apr)) is a decision of the Court of Appeal. The former two cases incline towards a defendant-oriented conception of undue influence, whereas the latter very much supports a claimant-oriented perception. There is a risk in setting up the cases in this

way that the impression is given that the courts must choose either a claimant-sided version of undue influence or a defendant-sided version. However, there is no necessary need to restrict the choice in this way. It is possible to conclude that both elements are relevant and that the task of the court is in all cases to weigh the evidence before it when deciding whether or not undue influence has been established on the facts. We shall now turn to consider each case in turn.

19.4.1 *R v. Attorney-General for England and Wales*

The first case is the decision of the Privy Council in *R v. Attorney-General for England and Wales* [2003] UKPC 22. The appellant, known simply as 'R', was a member of the SAS and, during the Gulf War of 1991, he was a member of the Bravo Two Zero patrol that was dropped behind enemy lines in Iraq in order to find Scud missiles and cut communication lines. After the war was over there was considerable concern within the SAS, and the Ministry of Defence more generally, about books written by former members of the SAS in which they gave an account (the accuracy of which was contested) of their experience as members of the Bravo Two Zero patrol. The Ministry of Defence decided to respond to this state of affairs by requiring existing SAS members to sign a confidentiality contract under which the soldiers covenanted, inter alia, not to 'disclose without express prior authority in writing from MOD any information, document or other article relating to the work of, or in support of, the United Kingdom Special Forces which is, or has been in my possession by virtue of my position as a member of any of those Forces'.

The appellant signed the contract but shortly afterwards left the Army, having applied for premature voluntary release. He returned to his native New Zealand and in 1998 he entered into a contract with New Zealand publishers for the publication of his own account of life as a member of the Bravo Two Zero patrol. The New Zealand publishers offered the UK rights to Hodder & Stoughton, who passed a copy of the manuscript on to the Ministry of Defence. The Attorney-General, on behalf of the Crown, then commenced proceedings in the High Court of New Zealand, in which he sought an injunction to restrain publication of the book, damages, and an account of profits. The New Zealand Court of Appeal refused to grant an injunction to restrain publication of the book, but made an order for an account of profits and an assessment of damages. The appellant appealed to the Privy Council.

p. 679 The appellant defended the Crown's claim for damages and an account of profits on a number of grounds, one of which was that the confidentiality contract had been obtained ↵ as a result of the exercise of undue influence. The Privy Council, by a majority, rejected his claim. Lord Hoffmann, giving the judgment of the majority, stated:

21. The subject of undue influence has recently been re-examined in depth by the House of Lords in *Royal Bank of Scotland plc v. Etridge (No 2)* [2002] AC 773. Their Lordships summarise the effect of the judgments. Like duress at common law, undue influence is based upon the principle that a transaction to which consent has been obtained by unacceptable means should not be allowed to stand. Undue influence has concentrated in particular upon the unfair exploitation by one party of a relationship which gives him ascendancy or influence over the other.
22. The burden of proving that consent was obtained by unacceptable means is upon the party who alleges it. Certain relationships—parent and child, trustee and beneficiary, etc—give rise to a presumption that one party had influence over the other. That does not of course in itself involve a presumption that he unfairly exploited his influence. But if the transaction is one which cannot reasonably be explained by the relationship, that will be prima facie evidence of undue influence. Even if the relationship does not fall into one of the established categories, the evidence may show that one party did in fact have influence over the other. In such a case, the nature of the transaction may likewise give rise to a prima facie inference that it was obtained by undue influence. In the absence of contrary evidence, the court will be entitled to find that the burden of proving unfair exploitation of the relationship has been discharged.
23. The absence of independent legal advice may or may not be a relevant matter according to the circumstances. It is not necessarily an unfair exploitation of a relationship for one party to enter into a transaction with the other without ensuring that he has obtained independent legal advice. On the other hand, the transaction may be such as to give rise to an inference of undue influence even if the induced party was advised by an independent lawyer and understood the legal implications of what he was doing.

This summary is important for a number of reasons. First, it attempts to draw an analogy between undue influence and common law duress. Secondly, there is an emphasis on ‘unacceptable means’ and ‘unfair exploitation’ which suggests that the focus of attention is upon the conduct of the defendant rather than the state of mind of the claimant. Thirdly, the presumption to which certain relationships give rise is that ‘one party had influence over the other’; it is not a ‘presumption that he unfairly exploited his influence’.

For the purposes of the hearing, their Lordships were content to assume that the Army was able to exercise influence over the appellant. The vital question was whether ‘the nature of the transaction was such as to give rise to an inference that it was obtained by an unfair exploitation of that relationship’. On this point Lord Hoffmann concluded (at [24]):

p. 680

Like the Court of Appeal, their Lordships do not think that the confidentiality agreement can be so described. As in the case of duress, their Lordships think that the finding that it was an agreement which anyone who wished to serve or continue serving in the SAS could reasonably have been required to sign is fatal to such a conclusion. The reason why R signed the agreement was because, at the time, he wished to continue to be a member of the SAS. If facing him with such a choice was not illegitimate for the purposes of duress, their Lordships do not think that it could have been an unfair exploitation of a relationship which consisted ↵ in his being a member of the SAS. There seems to their Lordships to be some degree of contradiction between R's claim, in the context of duress, that he signed only because he was threatened with return to his unit and his claim, for the purposes of undue influence, that he signed because of the trust and confidence which he reposed in the Army or his commanding officer.

The issue which troubled the majority was 'the absence of legal advice'. But the lack of independent advice, while 'a matter for regret', did not result in the transaction being one in which the Ministry of Defence had unfairly exploited its influence over the appellant. The majority concluded that there had been no such exploitation. The appellant did not contend that he did not understand the nature of the transaction into which he had entered. Further, the absence of legal advice did not affect the fairness of the transaction. The most that the appellant could say was that a 'lawyer might have advised him to reflect upon the matter and ... that might have led to his not signing at all' but that was a decision which he could have made without a lawyer's advice. The appellant's attempt to invoke undue influence therefore failed.

Lord Scott dissented in relation to the application of the principles of undue influence to the facts of the case. He drew heavily upon the decision of the Court of Appeal in *Allcard v. Skinner* (1887) 36 Ch D 145 (19.3) and continued:

41. Are these principles ones that should be applied to the contract in the present case? I think they are. The appellant was not, of course, an unworldly man in a secluded religious order. He was a soldier in a highly trained and efficient fighting unit. The essence of efficiency in a military unit is obedience to orders. The Armed Services operate on a hierarchical basis. Each rank looks to the rank or ranks above for direction and, having received that direction, is expected to comply with it. It is, in my opinion, entirely artificial to draw sharp distinctions between orders from senior officers that are military orders breach of which will be an offence under military law and may attract court martial sanctions and 'orders' from senior officers couched as requests or as recommendations. It has become a music-hall joke for a sergeant-major to say to the troops under him 'I want three volunteers; you, you and you'. The hierarchical culture of the Armed Services and the deference and obedience to senior officers, both commissioned and non-commissioned, which is part of that culture are the essential background to the circumstances in which the appellant was asked to sign the contract in the present case. ...
44. The circumstances in which the contract in the present case came to be signed by the appellant were the subject of evidence at trial and the trial judge, Salmon J, formed a number of important conclusions:
- (1) The judge concluded that the appellant signed because he had been ordered to do so. An analysis of the 'order' that disqualifies it from constituting a military order and regards it, no doubt correctly, merely as a recommendation or a direction is, in my opinion, of no more than marginal significance if the possibility of undue influence is being considered. What is important is how the appellant regarded it. The appellant regarded it as an order.
 - (2) The judge found that 'the defendant was not told the terms of the contract before signing [and] was not offered any legal advice' (para 39).
 - (3) He found, also, that the appellant was not permitted to show the contract to a legal adviser (para 139). The weight of this finding is not diminished by evidence from the senior officer in command of the Regiment to the effect that soldiers would have been permitted to show the contract to approved legal advisers if they had asked. What is important is the perception of the appellant, and, as to that, Salmon J's finding stands.
45. In my opinion, the relationship between the appellant and his senior officers and the circumstances, as found by the judge, in which the contract came to be signed by the appellant produced a classic 'relationship' case in which undue influence should be presumed. No evidence was introduced to rebut that presumption. Legal advice was not available to the appellant. As in *Allcard v. Skinner*, where no suggestion of fraud or indeed any impropriety was made against the lady superior to whom the plaintiff had transferred her assets, no such suggestion has been, or could be, made against any of the appellant's senior officers who play a part in the story. It is the relationship, produced by the background to which I have referred, between a soldier and that part of the Armed Services of which he is a member, that introduces the potentially vitiating element into the contract. If the Ministry of Defence wants to impose contractual obligations on soldiers by which they will be bound

when they leave the service, it must, in my opinion, at the least make available to them independent legal advice. Fairness, in my view, requires it and I think the law requires it. In this case it was not done. I would have allowed the appeal.

The difference between the analysis of Lord Scott and that employed by the majority appears to lie in the fact that Lord Scott focused on the nature of the relationship between the parties, whereas the majority placed greater emphasis on the need for some wrongdoing on the part of the Ministry of Defence. While the majority were prepared to assume that the Army was able to exercise influence over the appellant, they found that the facts of the case 'did not give rise to an inference that [the transaction] was obtained by an unfair exploitation of that relationship'. Lord Scott, by contrast, had regard to the nature of the relationship between the appellant and the Army and, from that relationship, was prepared to infer the existence of undue influence without the need to identify specific wrongdoing on the part of the Army. In his view the nature of the relationship between the parties imposed certain obligations on the Army, for example to provide independent legal advice, and their failure to discharge these obligations, should, in his opinion, have entitled the appellant to succeed with his undue influence claim.

19.4.2 *National Commercial Bank (Jamaica) Ltd v. Hew*

The second case is the decision of the Privy Council in *National Commercial Bank (Jamaica) Ltd v. Hew* [2003] UKPC 51. Lord Millett there described the doctrine of undue influence in the following terms:

p. 682

29. Undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them. ...
30. Thus the doctrine involves two elements. First, there must be a relationship capable of giving rise to the necessary influence. And secondly the influence generated by the relationship must have been abused.
31. The necessary relationship is variously described as a relationship 'of trust and confidence' or 'of ascendancy and dependency'. Such a relationship may be proved or presumed. Some relationships are presumed to generate the necessary influence; examples are solicitor and client and medical adviser and patient. The banker-customer relationship does not fall within this category. But the existence of the necessary relationship may be proved as a fact in any particular case. ...
33. But the second element is also necessary. However great the influence which one person may be able to wield over another equity does not intervene unless that influence has been abused. Equity does not save people from the consequences of their own folly; it acts to save them from being victimised by other people: see *Allcard v. Skinner* (1887) 36 Ch D 145, 182.
34. Thus it must be shown that the ascendant party has unfairly exploited the influence he is shown or presumed to possess over the vulnerable party. It is always highly relevant that the transaction in question was manifestly disadvantageous to the person seeking to set it aside; though this is not always necessary: see *CIBC Mortgages plc v. Pitt* [1994] 1 AC 200. But 'disadvantageous' in this context means 'disadvantageous' as between the parties. Unless the ascendant party has exploited his influence to obtain some unfair advantage from the vulnerable party there is no ground for equity to intervene. However commercially disadvantageous the transaction may be to the vulnerable party, equity will not set it aside if it is a fair transaction as between the parties to it.

Once again we can see the emphasis placed on the conduct of the party who is alleged to have exercised the undue influence. It does not suffice to prove that a relationship of trust and confidence existed between the parties. Nor does it suffice to demonstrate that the transaction was a disadvantageous one for the party seeking to set it aside. It must be demonstrated that there was some advantage-taking on the part of the party who is seeking to uphold the agreement. The nature of that advantage-taking is described in various terms by Lord Millett. Thus he refers to 'abuse' (at [30]), 'victimisation' (at [33]), and 'exploitation' (at [34]). From this case, together with *Etridge* and *R v. Attorney-General for England and Wales*, it can be inferred that undue influence is defendant-sided in its emphasis so that some form of wrongdoing on the part of the party alleged to have exercised undue influence would appear to be an indispensable element of an undue influence claim (albeit the wrongdoing can assume different forms).

This emphasis on wrongdoing has not been universally welcomed. Professor Birks ((2004) 120 *LQR* 34) sounded a warning in relation to the difficulties that were likely to arise from an insistence on wrongdoing in all cases. In particular, while the emphasis on wrongdoing may open the prospect of the award of compensatory damages in an undue influence claim, it may also shut out the possibility of relief in the case

where the claimant cannot establish wrongdoing on the part of the defendant. *Allcard v. Skinner* (19.3) may well come into this category (notwithstanding Lord Millett's citation of *Allcard* in support of his analysis in *Hew* at [33]). This is important where the claimant seeks relief in the form of rescission of the contract. In such a case, why does the claimant have to prove some element of wrongdoing on the part of the defendant? There is no such requirement in the law of misrepresentation where, as has been noted (see 17.4.1), an innocent misrepresentation gives rise to a right to ↵ rescind and innocent misrepresentation is not a wrong which attracts compensatory damages. Similarly, Professor Birks asserted that not all cases of undue influence can be regarded as cases of wrongs. He therefore maintained that English law should continue to recognize a category of 'innocent undue influence' (that is to say the claimant is subject to too much influence in the sense that his volition is impaired but there is no advantage-taking by the defendant). He concluded (at p. 37) as follows:

As with misrepresentation, undue influence may be a wrong in aggravating circumstances. That is largely unexplored territory. It is certainly not always a wrong. A party who makes no claim to shift a loss from himself to another but merely requires that other to return to the *status quo* does not need to find and prove those extra facts. A misrepresentee can rely for that same limited purpose on an innocent misrepresentation whether because the representation really was innocent or because he does not need to and does not choose to prove the aggravating facts. The same applies to one whose autonomy is impaired by the fact that another has excessive influence over him. It would be odd if, in triggering rescission and return to the *status quo*, relational paralysis were less potent than misrepresentation.

19.4.3 *Pesticcio v. Huet*

This point was taken up in clear terms by Mummery LJ in our third case, which is the decision of the Court of Appeal in *Pesticcio v. Huet* [2004] EWCA Civ 372, [2004] All ER (D) 36 (Apr). Mummery LJ (at [20]) objected to the defendant-sided conception of undue influence in the following terms:

The insistence of [counsel] that Maureen [the person alleged to have exercised undue influence over her brother] had ‘done nothing wrong’ is an instance of the ‘continuing misconceptions’ mentioned by Sir Martin Nourse in *Hammond* about the circumstances in which gifts will be set aside on the ground of presumed undue influence. 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: *Allcard v. Skinner* (1887) 36 Ch D 145 at 171. 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. The presumption arising from the trust and confidence of their relationship made it unnecessary, for example, for Bernard [the party seeking to set aside the deed of gift] to prove that Maureen actually had influence over him in relation to the gift of the house, let alone that she in fact exercised undue influence or applied improper pressure to obtain the Deed of Gift.

19.4.4 Conclusion

Where do we stand in the light of these cases? The judgment of Lord Briggs and Lord Burrows in *Nature Resorts Ltd v. First Citizens Bank Ltd* [2022] UKPC 10, [2022] 1 WLR 2788, [15] lends support to the approach adopted by Mummery LJ in *Pesticcio* but it does ↵ so without giving any consideration to the judgments of Lord Hoffmann in *R v. Attorney-General for England and Wales* and of Lord Millett in *National Commercial Bank (Jamaica) Ltd v. Hew*, both of which are decisions of the Privy Council and therefore of equal standing to the decision in *Nature Resorts Ltd*. In these circumstances it cannot be said that English law unequivocally recognises that undue influence is not a civil wrong and that it can exist even in the case where it cannot be said that the defendant has acted wrongfully (although cases continue to be found in which it is recognized that it is possible for undue influence to exist in the absence of wrongdoing: see, for example, *In re Naidoo, decd* [2023] EWHC 500 (Ch), [2023] 1 WLR 2162 at [30]).

The vast majority of undue influence cases will involve some advantage-taking on the part of the defendant in connection with a relationship of influence that exists between the claimant and the defendant (albeit that the advantage-taking will assume different forms). But we should not exclude the possibility that, exceptionally, a claimant may be able to demonstrate that he or she was so dependent upon the defendant that a finding of undue influence can be made, even in the absence of specific wrongdoing on the part of the defendant. In other words, undue influence may require a court to focus attention on the claimant’s state of mind and the conduct of the defendant. That is to say it may require a court to consider the nature of the relationship that existed between the claimant and the defendant and to analyse the appropriateness of the transaction, the claimant’s motivation, and the defendant’s behaviour in the context of that relationship (M Chen-Wishart, ‘Undue Influence: Beyond Impaired Consent and Wrongdoing Towards a Relational Analysis’ in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law* (Oxford University Press, 2006) p. 201).

Further Reading

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