



### Concentrate Questions and Answers Contract Law: Law Q&A Revision and Study Guide (3rd edn)

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## p. 112 7. Improper Pressure

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### Abstract

The *Concentrate Questions and Answers* series offers the best preparation for tackling exam questions. Each book includes typical questions, answer plans and suggested answers, author commentary, and other features. This chapter focuses on the doctrines of undue influence and duress. Between the parties to a contract there are broadly two ways that a contract can be avoided for undue influence: through affirmative proof of undue influence or through raising the presumption of undue influence which is not rebutted. As regards duress, there are two main forms: physical and economic. The more common type is economic duress, which focuses on the illegitimate pressure exerted by the dominant party.

**Keywords:** contract law, undue influence, economic duress, illegitimate pressure, independent advice, coercion

### Are you ready?

In order to attempt the questions in this chapter you must have covered the following areas in your revision:

- The common law doctrine of duress;
- The development of the doctrine of economic duress;
- The equitable doctrine of undue influence;
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The two ways that undue influence can be established: (a) affirmative proof of undue influence; or (b) raising a presumption of undue influence which is not rebutted;

- The effect of duress or undue influence on a contract and the remedies available.

### Key debates

#### **Debate: what must be shown for economic duress to be established?**

At times, inconsistent language used by the courts has created uncertainty. Has this been improved by the Supreme Court in *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 (for example, by focusing on finding ‘highly reprehensible’ behaviour by one party – see [4])?

#### **Debate: lack of clarity on the meaning of ‘undue influence’.**

The majority view is that undue influence is based on a defendant’s wrongdoing; however, a view has also been put forward that undue influence is a ‘claimant-sided’ doctrine.

#### **Debate: relationship between the doctrines of undue influence and duress.**

There is a division in the law between undue influence and duress. Would it be better to merge these two doctrines (in *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [19] Lord Hodge noted the influence of equity on the development of the common law concept of duress)?

#### **Debate: how far protection of consumers is or should be the subject of specific legislation.**

See, for example, the Consumer Rights Act 2015 and the Consumer Protection from Unfair Trading Regulations 2008.

### Question 1

Marjorie, a firm believer in psychic phenomena, was recently devastated by the sudden death of her husband. She was left a sizeable amount of money in her husband’s will, as well as his business, Ghosthunters & Co. She decides to communicate with the spirit of her husband through her long-

standing medium, Spook. Spook tells Marjorie that her husband wishes her to donate £25,000 to the Spirit Appreciation Society Ltd (SAS), a company which publishes a journal entitled *Supernatural Monthly*. Marjorie donates the money by gift under seal.

Meanwhile, Ghosthunters & Co. is facing financial collapse because its main creditor, Banshee, is threatening to call in an overdue loan of £50,000. In return for an extra six weeks to repay the loan, Marjorie agrees to transfer a 33 per cent shareholding in Ghosthunters & Co. to Banshee.

Three months later, Marjorie finds out that Spook is a director of SAS. Moreover, she is becoming worried about the way in which Banshee is using his shareholding to redirect the policy of the business.

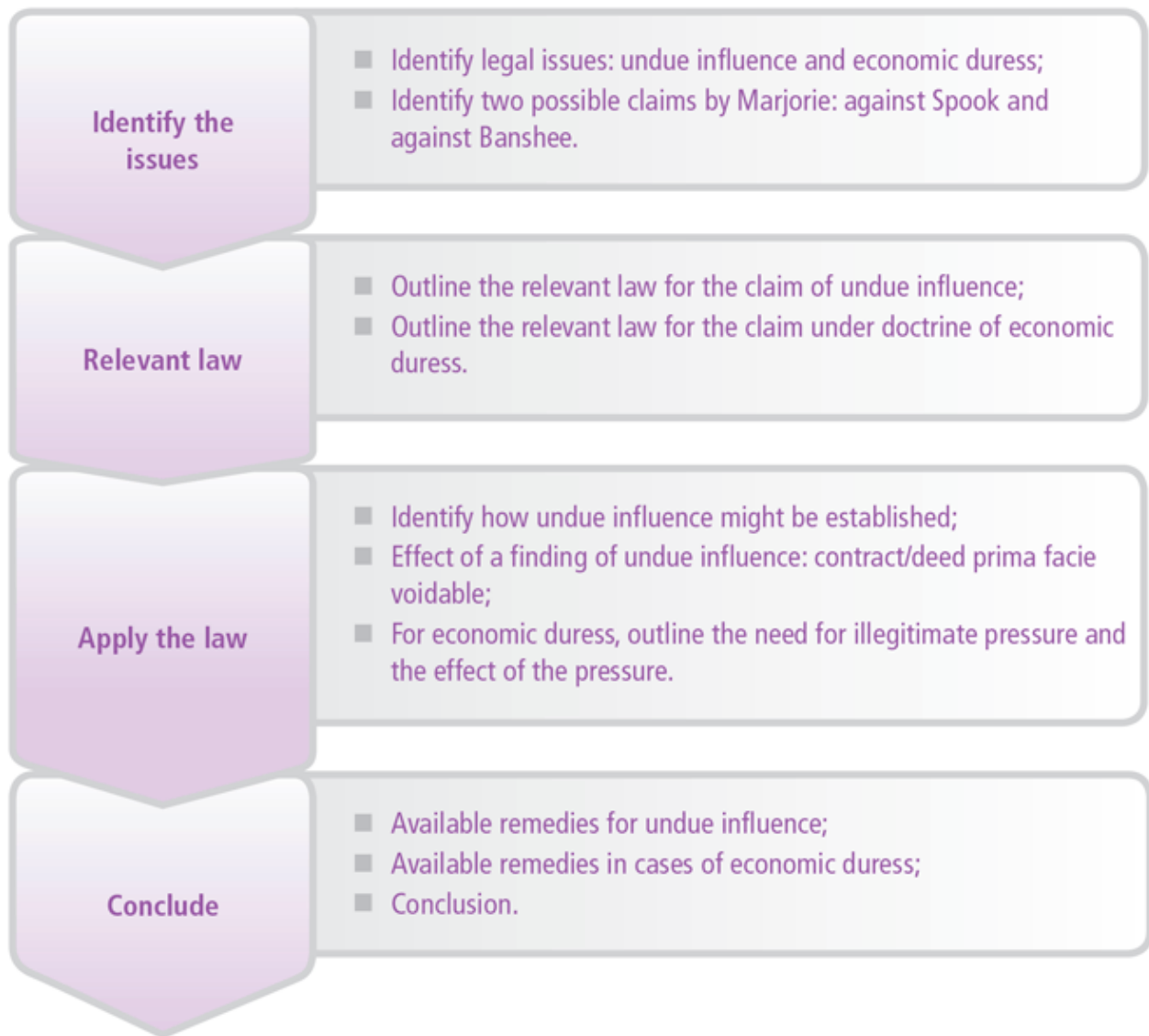
**Advise Marjorie whether she can avoid either transaction on grounds of improper pressure. (Ignore any potential application of the Consumer Protection from Unfair Trading Regulations 2008, SI No. 1277.)**

### Caution!

■ Although there is a considerable degree of overlap between the doctrines of duress and undue influence (see, for example, *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40, particularly at [19]), you should be careful not to confuse the requirements/terminology of undue influence—which often refers to trust, confidence, etc.—and economic duress, which emphasizes illegitimate pressure, the effect of the pressure, and calculated threats of damage.

■ Marjorie acts in two capacities: undue influence is arguably more relevant when Marjorie deals with Spook as a private client; economic duress is arguably more relevant to the arm's-length business transaction between Marjorie and Banshee.

## Diagram answer plan



## Suggested answer

There are two main issues affecting Marjorie and each will be addressed separately.<sup>1</sup>

<sup>1</sup> Identify the two issues affecting Marjorie and address each separately.

## Marjorie v Spook

Marjorie's dealings with Spook are as a private client and raise the possibility of undue influence. Marjorie might argue that her deed of donation to SAS is voidable for undue influence. Undue influence can be established in two ways: by affirmative proof of undue influence, or by raising a presumption of undue influence which is not rebutted. This distinction emphasizes a shifting onus of proof<sup>2</sup> resulting from, for example, the proximity of the parties' relationship and the nature of the transaction.

<sup>2</sup> Having identified the types of undue influence, then note the effect on the burden of proof.

↶ Dealing first with affirmative proof of undue influence, the Court of Appeal in *Allcard v Skinner* (1887) 36 Ch D 145 defined undue influence as:

some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating and generally, though not always, some personal advantage gained.

As Spook arguably tricked Marjorie for the purposes of personal gain, it would seem to fall within this definition.<sup>3</sup> In particular, Marjorie's recent bereavement and her belief in psychic phenomena are presumably known to Spook, and are likely to make her susceptible to Spook's suggestions (see *Lyon v Home* (1868) LR 6 Eq 655 and *Nottidge v Prince* (1860) 2 Giff 246). If Spook was unaware of Marjorie's belief in psychic phenomena the difficulty of proof might be increased, at least on a defendant-sided analysis of undue influence.

<sup>3</sup> State and apply the law.

If undue influence is established, the deed is prima facie voidable although the right to rescind may be lost if the victim waits too long before seeking relief.<sup>4</sup> If fraud is involved, it is generally thought that time runs from discovery of the fraud (eg *Leaf v International Galleries* [1950] 2 KB 86); an alternative opinion suggests that time runs from when the pressure ceases to operate on the mind of the victim.<sup>5</sup> On the present facts<sup>6</sup>, these tests are effectively contemporaneous as both would require Marjorie to unearth Spook's underhand dealing. However, if SAS has spent the donation in the meantime, Marjorie may be unable to recover her money (see *Allcard v Skinner*) and damages are generally not available in this area (although compare *Mahoney v Purnell* [1996] 3 All ER 61).<sup>7</sup>

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<sup>4</sup> This paragraph demonstrates using IRAC for each issue, not just for a complete answer. This sentence identifies the issue.

<sup>5</sup> State the legal rule.

<sup>6</sup> Apply the law.

<sup>7</sup> Reach a conclusion on the point.

Marjorie might alternatively claim that a presumption of undue influence has arisen.<sup>8</sup> Marjorie could argue that her relationship with Spook fell into a category which *automatically* assumes that the requisite degree of trust and confidence existed between the parties, as the first step in generating a presumption of influence. However, it might be unlikely that a medium would be expected to put the interests of his/her client first in such a relationship. Marjorie may draw an analogy with *Allcard v Skinner* where the relationship of religious leader and 'disciple' fell into this category, but the decision in *Nottidge v Prince* suggests that this argument is unlikely to succeed for a medium–client relationship. Marjorie's second argument is that, *de facto*, the level of trust and confidence that she placed in Spook should raise a presumption of *influence*. On the facts, given Marjorie's fragile emotional state and firm belief in psychic phenomena, she may well have placed great reliance on the guidance of Spook, her long-standing medium. In such circumstances, Marjorie could argue that Spook occupied a clear position of dominance that would *presumably* enable him to *influence* the will of his client.

<sup>8</sup> Address all of the alternatives raised by the facts.

↵ If Marjorie can establish either such relationship, the court will apply the test set out by the House of Lords in *Royal Bank of Scotland v Etridge (No. 2)* [2001] UKHL 44, [2001] 4 All ER 449 to determine whether there should be a presumption of *undue* influence.<sup>9</sup> The court will need to be convinced that the resulting transaction was in some way 'wrongful', not readily explicable by the relationship of the parties. Does the gift of £25,000 raise such suspicions? Alternatively, does Spook's undisclosed directorship at SAS suggest an element of underhand dealing which, if known, *might*

have dissuaded Marjorie from making the gift (see *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555, [2003] 1 P & CR 12)? These arguments appear likely to succeed on the facts,<sup>10</sup> so a presumption of undue influence will be levelled against Spook as regards Marjorie's gift to SAS.

<sup>9</sup> To this point the presumption is of *influence only*, so it must be established that the transaction is one that 'calls for explanation' to establish a presumption of *undue* influence.

<sup>10</sup> Reach a conclusion on how the law will be applied on the facts of your question.

To rebut this presumption, essentially Spook must prove that Marjorie's actions were 'voluntary'. This can take two forms: spontaneity of action or proper independent advice. Here there is no evidence of any independent advice.<sup>11</sup> That Spook's true role in the transaction was concealed suggests that Marjorie was unable to make a full, free, and informed estimate of the expediency of the transaction (see *Inche Noriah v Sheik Allie Bin Omar* [1929] AC 127). Alternatively, Spook might argue that Marjorie acted *spontaneously*, free of any undue pressures at that moment. The majority decision in *Re Brocklehurst's Estate, Hall v Roberts* [1978] Ch 14 suggests that people should be free to do as they wish with their money and property, that friendship and eccentricity are human characteristics, meaning that courts should not interfere with such transactions in the absence of fraud or trickery (see also *R v Attorney-General for England and Wales* [2003] UKPC 22, [2003] EMLR 24). Here, as Marjorie appears to have been deceived, Spook will struggle to rebut the presumption of undue influence in the absence of proof that Marjorie made the gift with full knowledge of the facts.

<sup>11</sup> These two sentences involve Identifying the legal issue, stating the relevant Rule and Applying the law, dealing with the third element of presumed undue influence, ie can the presumption be rebutted?

If Marjorie successfully establishes undue influence her primary remedy is that of rescission.<sup>12</sup> She must not delay unduly in seeking legal redress. However, if the money has been spent there may be an issue (see *Allcard v Skinner*, although see also the more relaxed approach adopted in *Cheese v Thomas* [1994] 1 All ER 35; *Halpern v Halpern (No. 2)* [2007] EWCA Civ 291, [2007] 3 All ER 478).

<sup>12</sup> When advising a party, do not forget to address possible remedies.

### Marjorie v Banshee

In relation to Banshee,<sup>13</sup> Marjorie is attempting to avoid the contract in her capacity as proprietor of Ghosthunters Ltd. As the transaction involves arm's-length commercial dealing, the doctrine of economic duress is particularly appropriate.

<sup>13</sup> Address the second issue, which requires consideration of the doctrine of duress.

Courts will not lightly infer economic duress. The *type* of pressure exerted is usually key: even when acting under overwhelming pressure, an absence of choice will not negate consent in law unless it is of a kind that is regarded as illegitimate (see *Barton v Armstrong* [1976] AC 104 at 121).

Illegitimate pressure<sup>14</sup> often involves an unlawful threat by the dominant party to cause damage to the economic interests of the other party. In *Universe Tankships Inc. of Monrovia v ITWF* [1983] 1 AC 366, Lord Scarman identified two aspects of illegitimate pressure: the nature of the pressure and the nature of the demand which the pressure was applied to support. So, pressure which appears lawful might still be considered illegitimate if exerted for unconscionable reasons.

<sup>14</sup> The requirement of illegitimate pressure must be identified, explained, and applied.

Did Banshee apply illegitimate pressure to Marjorie (as in, for example, *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] QB 833) by threatening to do something which may be construed as unconscionable, knowing the severe consequences which this will visit upon Marjorie's business (eg *ITWF*)? The question whether Banshee is threatening to break an existing contract (eg *North Ocean Shipping Co. Ltd v Hyundai Construction Co. Ltd* [1979] QB 705) deserves closer attention.<sup>15</sup> There is nothing to suggest that Banshee does not have the right to call in the debt. If so, it is doubtful whether the doctrine of economic duress is applicable. Thus in *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [29] Lord Hodge was of the opinion that it is generally not duress to threaten to do something which is lawful. In that case Times Travel (UK) Ltd (TTL) was a small family-owned travel agency based in Birmingham. Its business consisted almost entirely of the sale to the Pakistani community in Birmingham of flight tickets to Pakistan. At the relevant time, Pakistan International Airlines Corp (PIAC) was the only airline offering direct flights to Pakistan from the UK. The contractual arrangements between the parties, particularly as to commission, was not straightforward. Ultimately disputes arose between PAIC and its agents (including TTL) over commission. A trade association, APTA, was formed to represent the agents in these disputes and some of the agents brought legal action. In September 2012, PAIC lawfully gave notice to terminate all of its contracts with agents in the UK. In September 2012, PIAC also lawfully reduced TTL's ticket allocation from 300 to 60 tickets. This reduction had a major negative impact of



TTL, one which could ultimately put it out of business. However, PIAC offered its agents (including TTL) a new, revised agreement. Indeed counsel for PIAC accepted that the termination notices were designed to get agents to agree to the new contracts. The new agreement changed the terms as to commission but crucially for present purposes required agents to release PIAC from claims for commission calculated on the old basis. Ultimately TTL signed this new agreement as, unless it did so, it would no longer be able to sell PIAC tickets and would almost inevitably go out of business. Subsequently, TTL sought to avoid this agreement on the ground that it was procured by economic duress but the Supreme Court ultimately held that there was no economic duress not least as PIAC genuinely believed it was not liable to the commission claimed under the earlier agreement.

<sup>15</sup> Expand upon matters most relevant to the facts of the question.

Conversely, if Banshee is wrongfully calling in the loan (eg prematurely) this may amount to illegitimate pressure, especially if he knows of Marjorie's plight and/or the court is willing to regard his acquisition of a 33 per cent shareholding as being morally reprehensible (see *D & C Builders v Rees* [1966] 2 QB 617 and *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 715), although the precise relevance of whether or not a claim was made bona fide by the creditor is unclear following *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 (see, for example, Lord Burrows at [133]).

In conclusion, although exercising an existing contractual right to call in an overdue loan seems reasonable, Lord Scarman in the *ITWF* case suggested that a lawful demand coupled with an 'illegitimate motive' might be illegitimate. Here, for instance, is Banshee's real motive the procurement of a 33 per cent shareholding? Such a situation does not come within the two categories of cases, identified by Lord Hodge in *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40, where lawful act duress has to-date been found.

Assuming illegitimate pressure has been identified, was Marjorie coerced by this pressure?<sup>16</sup> Did it cause Marjorie to enter the contract? Did she have any reasonable options other than to transfer her shareholding to Banshee? Could she have brought an action for breach of contract and would her business have survived in the meantime? Did she enter voluntarily into a compromise agreement; that is, extending the time for repayment in return for a 33 per cent shareholding? Could she have refinanced the debt from another source? If not, her lack of any practicable available alternatives may suggest that the illegitimate pressure was a significant cause inducing her into the contract (in *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 causation and lack of reasonable alternatives were treated as separate requirements). Even though Marjorie seemed to accept the new arrangement, in *ITWF* Lord Scarman recognized that protest by the weaker party at the time the pressure was exerted is not always relevant if the pressure is so great as to make protest pointless.

- <sup>16</sup> Consider all of the elements of the doctrine, ie look at the effect of the illegitimate pressure.

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### Looking for extra marks?

- Marjorie may have an action in misrepresentation (eg **Misrepresentation Act 1967, s. 2(1)**, or breach of a duty of care—*Cornish v Midland Bank plc* [1985] 3 All ER 513), although difficulties in establishing the factual basis of any statements relying upon the interpretation of psychic phenomena may make this problematic unless she can establish actual fraud.
- *North Ocean Shipping* suggests that time runs quickly against a party seeking rescission on grounds of economic duress. Marjorie waited some time before seeking legal advice, but could retain her right to rescind if, for example, she felt unable to question the shareholding transfer until the existing debt repayment was resolved.

### Question 2

Ron is a retired lorry driver who has set up his own distribution service. His first customer was Cottonvalue plc, a company with a nationwide network of retail outlets. Cottonvalue plc wanted to use Ron to deliver stationery to all its outlets in the north of England. A contract was signed for Ron to deliver a ‘minimum 1,000 boxes of stationery’ for Cottonvalue plc over a period of 12 months, beginning on 1 January. No maximum figure for deliveries was specified. The stationery was to be packed in specially selected boxes, of one size only, incurring a delivery charge of 50p per box irrespective of the distance travelled within the designated area. Both parties expected Ron to be called on to deliver far more than the ‘minimum’ specified in the contract.

Ron relied on the projected profits to take out a bank loan to upgrade his existing fleet of lorries. Unfortunately, midway through the contract, Cottonvalue expressed its wish to renegotiate the delivery charge, threatening immediate withdrawal unless the delivery charge was reduced to 40p. Ron agreed as the prospect of losing Cottonvalue’s custom is unthinkable.

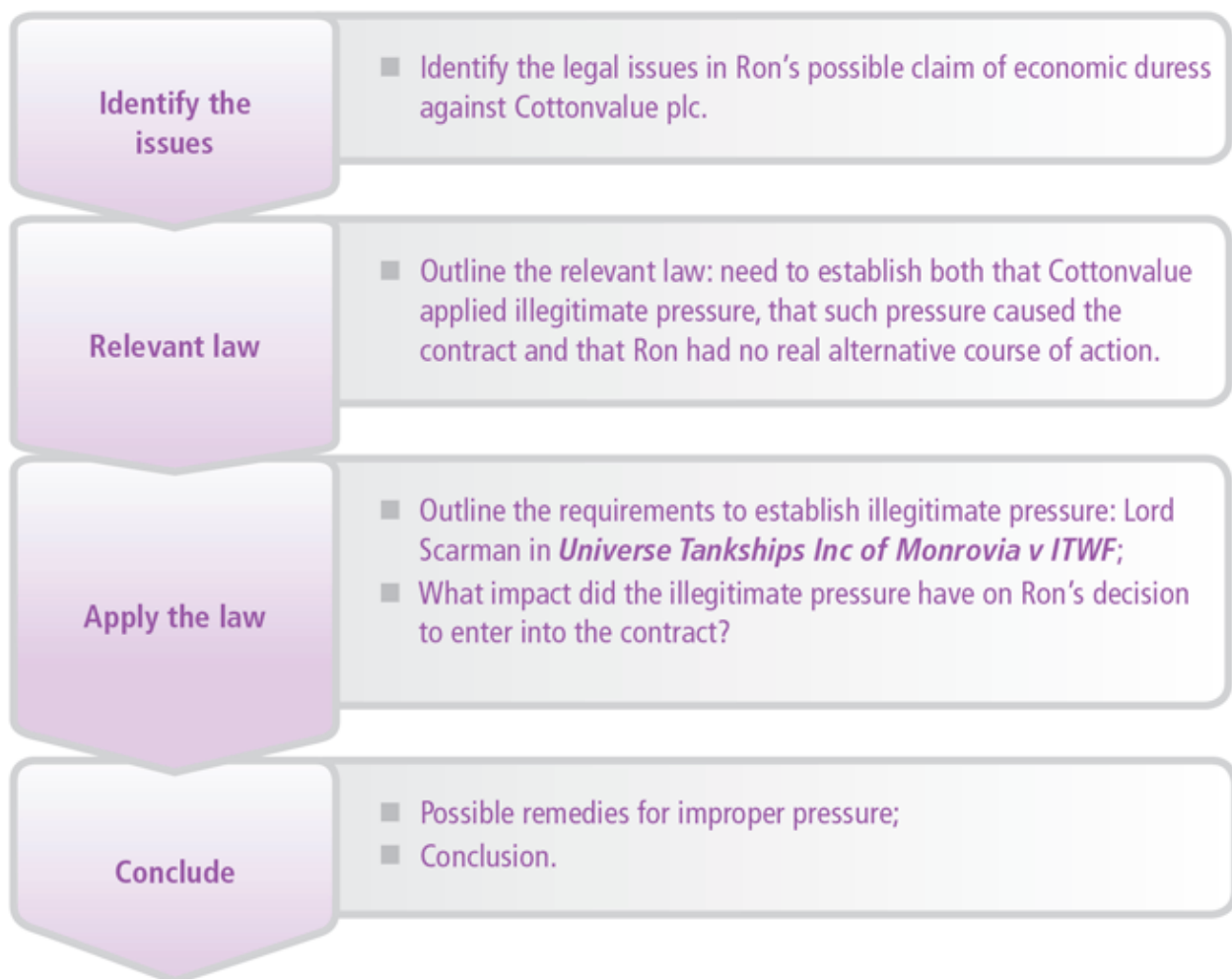
**At the end of the year, Ron asks you for advice as to whether he can reclaim the lost 10p on every delivery he made on the ground that the contractual modification was voidable for improper pressure.**

### Caution!

- Economic duress cannot be established unless the stronger party has applied *illegitimate* pressure, that pressure caused the contract and the weaker party had no reasonable alternative but to submit. All of these aspects must be addressed in your answer.
- Your answer must show that, to succeed, Ron will need to establish that: (a) Cottonvalue plc exerted illegitimate pressure; (b) the pressure caused the contract modification; and (c) Ron had no reasonable alternative but to agree to the renegotiation.

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### Diagram answer plan



## Suggested answer

Ron might try to avoid the modified contract on the ground of economic duress.<sup>1</sup> A court will not set aside a contract merely because ‘normal commercial pressure’ has been exerted by the dominant party (*Barton v Armstrong* [1976] AC 104). Ron will have to provide evidence that the pressure which Cottonvalue exerted was of a type characterizable as ‘illegitimate’, that this caused Ron to agree to the contract renegotiation and that Ron had no real alternative but to agree to the new terms.

<sup>1</sup> Identifying the cause of action and the elements that will need to be established sets out the structure of your answer.

## Illegitimate Pressure

In *Universe Tankships Inc. of Monrovia v ITWF* [1983] 1 AC 366, Lord Scarman identified two aspects of illegitimate pressure:<sup>2</sup> the nature of the pressure and the nature of the demand which the pressure was applied to support. This distinction demonstrates that pressure which appears lawful might still be considered illegitimate if exerted for unconscionable reasons. Therefore, *even if* Cottonvalue was contractually entitled to threaten withdrawal, Ron might try to argue that the pressure was not legitimate. However, such an argument seems difficult to make following *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [29] where Lord Hodge started with the general proposition that it is usually not duress to threaten to do something which you have the right to do.

<sup>2</sup> Make sure that your answer addresses both aspects.

Illegitimate pressure usually involves a threat by the dominant party to do something which would cause damage to the economic interests of the other party unless some demand is met. One example might be a threatened breach of an *existing* contract. However, additional evidence would be required as such threats are not necessarily illegitimate per se. For instance, in *Atlas Express Ltd v Kafco (Importers & Distributors) Ltd* [1989] QB 833, it was the manner in which the plaintiff exerted the pressure which was crucial—in particular, compelling a renegotiation of an existing contract purely for the plaintiff’s benefit, leaving the communication of the threat to an innocent third party, timing its communication to correspond with his own absence, and judging the precise moment when the pressure would be heightened by the defendant’s realization that only the plaintiff was in the position to meet his needs (eg *Carillion Construction Ltd v Felix (UK) Ltd* [2001] BLR 1). In such situations, it is clear that the dominant party intends to apply the pressure and has sufficient knowledge of the weaker party’s predicament to predict the impact of that pressure (eg *D & C Builders v Rees* [1966] 2

QB 617). Here, has Cottonvalue threatened to break an existing contract? Are there any facts which suggest that this threat is illegitimate? Does Cottonvalue recognize that Ron is relying upon the contract to service his existing indebtedness to his bank? Is Cottonvalue itself not in financial difficulty? If so, this might suggest that the pressure is illegitimate.<sup>3</sup>

<sup>3</sup> Where there is insufficient detail in the question for you to speculate further, you can reach a tentative conclusion.

Clearly, hard bargaining is an everyday incident of normal business relationships (see *Barton v Armstrong* [1976] AC 104). Ron was not obliged, it seems, to upgrade his existing fleet of lorries; that is, it does not seem to be a condition of his contract with Cottonvalue. It might be argued that a predicament of one's own making should not be used to label normal commercial pressure as something which is unconscionable, whereas if Cottonvalue was aware of Ron's financial state, and the serious economic consequences of withdrawing from the contract, this might suggest a contrary finding. Pressure might be regarded as illegitimate *because* it represents an intentional, bad-faith threat of damage to the other party's economic interest (see *B & S Contracts & Design Ltd v Victor Green Publications Ltd* [1984] ICR 419 and *Al Nehayan v Kent* [2018] EWHC 333). Remove this intent and economic duress may become all the harder to establish. However, the relevance of good/bad faith is unclear following *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 (see, for example, Lord Burrows at [133]).

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### Effect of Illegitimate Pressure

The next question is what impact any illegitimate pressure had on Ron's decision to enter into the contract.<sup>4</sup> In *The Evia Luck* [1992] 2 AC 152 Lord Goff said the illegitimate pressure must be a 'significant cause' in inducing a party to enter into a contract. Various factors have been identified as being of importance: the protest of the weaker party, the unavailability of any other course of action (eg legal remedy), the lack of independent advice, and the attempted subsequent avoidance of the contract by the weaker party (see, generally, *Pao On v Lau Yiu Long* [1980] AC 614 at 635). There has been some debate as to whether a lack of effective choice is a separate requirement or part of the test of causation.<sup>5</sup> In *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 the Supreme Court regarded a lack of a reasonable choice as a separate requirement for cases of economic duress. In any case the unavoidable and serious consequence of non-submission forms a crucial part of the requirements for economic duress. For example, in *Vantage Navigation Corp. v Suhail & Saud Bahwan Building Materials, The Alev* [1989] 1 Lloyd's Rep 138, the plaintiffs implicitly threatened non-delivery of the defendants' cargo, perhaps even to jettison or sell it, unless a contribution was made towards paying the increased port and discharge costs. The cargo was aboard a ship thousands

of miles away. The defendants needed the cargo to be delivered on time. A wait-and-see approach was not a realistic course of action, especially as other sources of purchase were out of the question. Economic duress was thereby established.

<sup>4</sup> Dealing with the next element of your answer, as identified in your opening paragraph.

<sup>5</sup> Demonstrate knowledge of a debate about a possible third requirement.

What should Ron have done at the time of the threat? Perhaps he should have refused to renegotiate? The answer, in turn, might depend upon whether Ron had already delivered the 'minimum' quantity of goods specified in the contract. If this had occurred then Cottonvalue would have a contractual right to employ other transport agencies to deliver their goods, leaving Ron with no remedy (indeed, as suggested previously, it may be difficult to demonstrate illegitimate pressure in such a case). Conversely, if the 'minimum' had not yet been delivered Ron could, in theory, claim damages if Cottonvalue did not continue to employ his services until the minimum delivery had been fulfilled. But is this practical? The facts suggest that legal action is 'unthinkable'. Cottonvalue are threatening a complete withdrawal, with the clear implication that it might not employ Ron again. This would affect Ron when he considers his existing indebtedness to his bank.

Moreover, how would damages have been assessed?<sup>6</sup> Would it include damages for the 'expectation' that more boxes would be delivered by Ron? In truth, an available remedy in damages does not seem to have unduly influenced the courts in duress cases (eg *Atlas Express Ltd v Kafco (Importers & Distributors) Ltd*). Perhaps this is because litigation is a protracted affair often requiring considerable financial resources over a long period of time—Ron appears devoid of spare cash and needs to negotiate a solution immediately.

<sup>6</sup> This complex point requires speculation; keep such discussions brief.

Finally, if Ron can successfully plead economic duress he should be advised to proceed quickly.<sup>7</sup> Economic duress makes a contract voidable, allowing the victim the option of rescission. However, this right can be lost through lapse of time. The question is whether a court would have expected him to institute legal proceedings against Cottonvalue at an earlier date. The basic principle<sup>8</sup> as applied in *North Ocean Shipping Co. Ltd v Hyundai Construction Co. Ltd [1979] QB 705* is that a victim of duress must seek rescission as soon as possible after the original pressure has ceased to operate. In *North Ocean*, there was no evidence that, had the plaintiffs sought to reclaim their additional payment

immediately, the defendants would have stopped the ship's construction. Here, was it appropriate for Ron to wait until the year has passed before seeking rescission of the modified payment schedule? He might argue that the pressure continued throughout the year. Without such evidence Ron's chances look bleak,<sup>9</sup> as Cottonvalue will presumably contend that *both* parties had a vested interest in ensuring the legality of the contract modification and would therefore welcome a clear ruling as quickly as possible. Whatever else, case law suggests that in business transactions *both* parties must be able to ascertain what their enforceable contractual rights are as quickly as possible so that they can take appropriate contingency measures in their subsequent dealings with each other. In Cottonvalue's situation, if the reduction in delivery charge had been unenforceable, alternative distributors might have been sought *after* Ron had fulfilled his minimum obligations but *before* the year had passed.

<sup>7</sup> The advice here is clear.

<sup>8</sup> Explain the law.

<sup>9</sup> Your conclusion must answer the question set, offering advice to Ron in relation to the contract and improper pressure.

### Looking for extra marks?

- Additional marks might be gained in identifying factual similarities with *Atlas Express*.
- A very good answer might link the absence of consideration and the presence of duress, referring to *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1. See also *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm), [2005] 1 Lloyd's Rep 128, and *Adam Opel GmbH v Mitras Automotive (UK) Ltd* [2008] EWHC 3205 (QB).
- To further explore the causation issue, see *Huyton SA v Peter Cremer GmbH* [1999] 1 Lloyd's Rep 620 and *Kolmar Group AG v Traxpo Enterprises Pty Ltd* [2010] EWHC 113 (Comm).



### Question 3

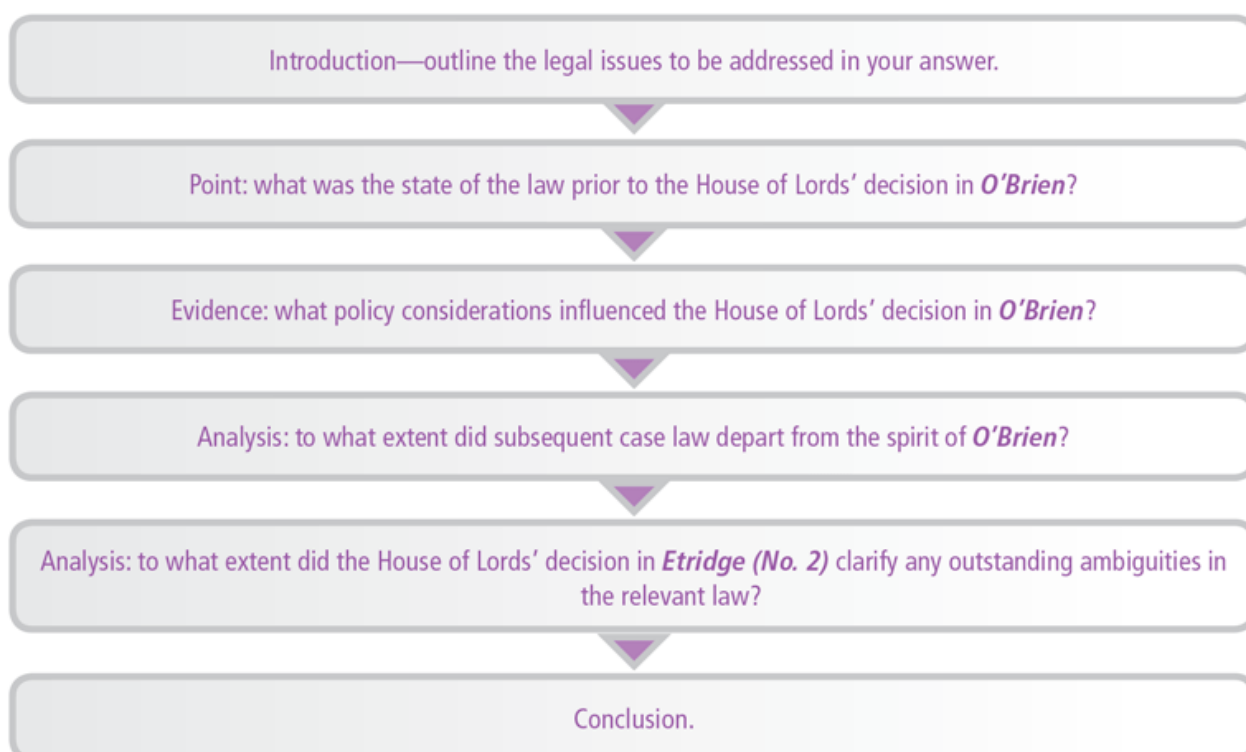
↩ The decisions of the House of Lords in *Barclays Bank plc v O'Brien* [1994] 1 AC 180 and *Royal Bank of Scotland v Etridge (No. 2)* [2001] UKHL 44, [2001] 4 All ER 449, have established a clearer, more coherent set of rules that strike an appropriate balance between the rights of creditors and those of wives who have been unduly influenced by their spouses.

To what extent do you agree with this statement?

### Caution!

■ Note that the House of Lords' decision in *O'Brien* was never intended to offer a definitive exposition of the law. Rather, it represented a framework of principle which lower courts should adapt and modify, in accordance with the facts presented to them. The unpredictability of subsequent case law suggested that greater clarity and specificity was required, culminating in the *Etridge (No. 2)* decision.

### Diagram answer plan





## Suggested answer

The House of Lords' landmark decisions in *Barclays Bank plc v O'Brien* [1994] 1 AC 180 and *Royal Bank of Scotland v Etridge (No. 2)* [2001] UKHL 44, [2001] 4 All ER 449, offer important guidance to banks and other financial institutions on how to deal, for example, with wives acting as sureties for their husbands' debts, as well as those who secure joint advances with their husbands. When a bank lends money to a debtor-husband who has exerted undue influence over his wife to get her, for example, to allow the use of the matrimonial home as security for the loan, the courts have always recognized the possibility that any ensuing transaction entered into between the wife and the bank (the surety transaction) might be voidable for undue influence. Until 1994, there was considerable confusion regarding the specific conditions that were needed to justify judicial intervention on behalf of a wife. In particular, the courts appeared to adopt any one of three possible approaches, making it very difficult to predict the outcome.<sup>1</sup>

<sup>1</sup> This introduces and contextualizes a discussion of the law pre-*O'Brien* and relates it directly to the essay question.

### Pre-*O'Brien*

First, there was the 'special equity theory' (see *Turnbull & Co. v Duvall* [1902] AC 429), that seemed to reinforce the nineteenth-century attitude towards wives as well as their role and importance in marriage. Similarly, in *Yerkey v Jones* (1939) 63 CLR 649 Dixon J emphasized the importance of the creditor actually proving that the wife understood the transaction she was entering into, effectively treating a wife more like a child than an independent-thinking adult. The second approach was termed the 'agency' theory: a bank that 'left everything to the husband' might be tainted by any undue influence exerted by the husband over his wife (eg *Barclays Bank plc v Kennedy* [1989] 1 FLR 356). However, the use of agency principles appears artificial: banks rarely appoint a husband formally as their agent. Finally, a line of Court of Appeal decisions from 1985 demonstrated a greater acceptance of notice as being pivotal to the determination of a creditor's liability (eg *Coldunell Ltd v Gallon* [1986] QB 1184 and *Midland Bank plc v Shephard* [1988] 3 All ER 17). Briefly, if the creditor should have realized the possibility of the husband using unfair means to procure his wife's signature, the creditor might be tainted by such impropriety. This latter approach was eventually adopted by the House of Lords in *O'Brien*, specifically focusing attention on the *nature* of the transaction and the consequential risk of impropriety.<sup>2</sup>

<sup>2</sup> An effective summary of the position pre-*O'Brien* leads neatly into the discussion of the case law following that decision.

### **O'Brien and its Aftermath**

In *O'Brien* the House of Lords stated that where the creditor had notice, actual or constructive, of possible impropriety between husband and wife, reasonable steps had to be taken to ensure that the wife's consent had been properly obtained. Two types of transactions were distinguished. First, if the wife acted as surety for her husband's business debts, it seemed the creditor would be put on notice if the transaction was financially disadvantageous and there was a substantial risk that the wife's signature had been inequitably procured by her husband. Secondly, where the transaction simply involved a joint advance to a husband and wife then, unless there were special circumstances known to the creditor, the creditor would not be fixed with constructive notice of any impropriety between the spouses.

The House of Lords also recommended that the husband and wife be interviewed separately, avoiding the problem faced by the interviewer in *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 where the husband's hysterics at a joint meeting clearly affected the wife. It would be sufficient if the creditor insisted that the wife attend a private meeting (in the absence of her husband) with a representative of the creditor at which she was told of the extent of her liability, warned of the risk she was running, and urged to take independent advice.

Subsequent case law demonstrated a willingness to embrace the spirit of *O'Brien*, without being restricted by specific rules of interpretation. In *Goode Durrant Administration v Biddulph* (1994) 26 HLR 625 the creditor was put on notice in a simple joint advance transaction (the loan financing a joint venture) because of the significant disparity between the wife's potential gain and the scale of her liability. As the creditor had done nothing to advise the wife, the transaction was tainted by the husband's undue influence. Unfortunately, this broad approach was not always beneficial to the wronged wife. For example, in dealing with the actions of the bank, it seemed acceptable for the wife to be advised by the husband's solicitor (eg *Bank of Baroda v Rayarel* [1995] 27 HLR 387). The bank was entitled to rely on the professional integrity of the solicitor and his/her ability to resolve conflicts of interest properly (eg *Banco Exterior Internacional v Mann, Mann and Harris* [1995] 1 All ER 936). Case law reinforced the view that once advice had been given by a solicitor the bank was relieved of any further responsibilities, irrespective of whether the nature and type of advice that the wife received was appropriate to her needs and circumstances (see *Midland Bank plc v Massey* [1995] 1 All ER 929). It seemed that the best policy for banks to adopt was to leave everything to the solicitor; a state of affairs that was beneficial to the banks as it apparently exonerated them of any culpability in most circumstances.<sup>3</sup>

<sup>3</sup> Such sentences create a cohesive argument across an answer.

**Etridge (No. 2)**

The House of Lords' decision in *Etridge (No. 2)* attempted to address some of the deficiencies in the prevailing case law.<sup>4</sup> It discarded notions of financially disadvantageous transactions, set out much clearer guidelines on the procedures that banks and independent advisers should adopt, and, in particular, extended the principles to incorporate all 'non-commercial' debtor/surety relationships. Importantly, whilst accepting that the banks could rely upon the good sense and expertise of a solicitor, the Law Lords stressed that if the creditor withheld information from the solicitor or knew that no competent solicitor could ever advise the wife to enter such a transaction, the availability of legal advice would be insufficient for the creditor to avoid being fixed by constructive notice of any legal impropriety perpetrated by the husband-debtor upon his wife. Subsequently, the general need for the creditor to take reasonable steps to ensure that the nature of the risks arising from the transaction has been brought home to the wife by the independent adviser was re-emphasized by the Court of Appeal in *First National Bank plc v Achampong* [2003] EWCA Civ 487, [2004] 1 FCR 18, strongly suggesting that the creditor must actually confirm that the independent adviser covered all of the essential points.

<sup>4</sup> Address the second decision from the essay to deal with the requirements of the question.

**An Appropriate Balance?**

In conclusion,<sup>5</sup> the House of Lords stressed the need to retain a sense of balance in this area. Courts need to ensure that people can access equity tied up in their matrimonial homes and that financial institutions are not too hindered by the law that they become unwilling to accept such security. Moreover, the law cannot operate in a social vacuum. Views that wives are subservient to their husbands are anachronistic today. However, there must be a clear legal safety net for circumstances where a husband possesses the business acumen and experience and the wife tends to follow her husband's advice in such matters. Courts recognize that some wives place confidence and trust in their husbands in relation to financial affairs, potentially raising the presumption of undue influence between spouses. Certainly, the House of Lords' decisions warn creditor institutions that, unless they follow the correct procedures, the ensuing financial transactions may become unenforceable as against wives.

<sup>5</sup> Remember that the question requires some conclusion to be reached on this point.

However, the *Etridge* decision does have a sting in its tail. Their Lordships made clear that the standard surety transaction in which a wife agrees to act as guarantor for her husband's business debts does not necessarily create a presumption of undue influence that would taint the creditor.

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More evidence will be required to demonstrate that the husband used unfair means to procure his wife's agreement ↵ (eg some form of misrepresentation). Equally, a court will not be so quick to characterize the ensuing transaction as *wrongful*, and therefore voidable, as it is natural that a wife might support her husband's business; that is, in the absence of any suspicious facts, there is no presumption of undue influence (per Lord Nicholls in *Etridge*). This suggests that a wife will struggle without clear evidence that the disparity between the husband's gain and the wife's potential loss is disproportionately large. Such an approach may tend unfairly towards the protection of creditors in such circumstances. Consequently,<sup>6</sup> while it may be possible to argue that the decisions of the House of Lords in *O'Brien* and *Etridge*, among others, have established a clearer, more coherent set of rules, it is not necessarily the case that these strike an appropriate balance between the rights of creditors and of wives unduly influenced by their spouses.

<sup>6</sup> Conclusion is clear and concise in demonstrating how the answer addressed the question.

### Looking for extra marks?

■ Interestingly, in both cases, the Law Lords did not merely direct their attention to wives but also to other types of relationship (eg unmarried cohabitantes) whether heterosexual or homosexual, or any other relationship where the prospect of undue influence by the debtor was foreseeable (eg *Avon Finance Co. v Bridger* [1985] 2 All ER 281).

## Taking things further

■ Bigwood, R., 'Undue Influence in the House of Lords: Principles and Proof' (2002) 65 MLR 435.

Examines ***Royal Bank of Scotland v Etridge (No. 2)* [2001] UKHL 44, [2001] 4 All ER 449**, and requirements for a presumption of undue influence.

■ Chandler, A., 'Economic Duress: Confusion or Clarity' [1989] LMCLQ 270.

Examines *illegitimate pressure and coercion in relation to duress*.

■ Chen-Wishart, M., 'The O'Brien Principle and Substantive Unfairness' (1997) 56 CLJ 60.

Considers ***Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144**, and the concept of unfairness.

■ O'Sullivan, D., 'Developing O'Brien' (2002) 118 LQR 337.

Considers the impact of **Etridge** for wives seeking to establish undue influence.

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