



# Law of Contract II

## JDOC1002

Duress, Undue Influence,  
Unconscionability – Pt 2



# Undue influence

- ▶ Equitable doctrine
- ▶ Contract voidable and may be set aside by weaker party:
  - ▶ where it was procured by the influence of another person as a result of the weaker party placing trust and confidence in the latter
  - ▶ such that the weaker party cannot be said to have exercised a free and independent will in entering into the transaction
- ▶ See *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773



# Undue influence

- “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”:
  - *Nature Resorts Ltd v First Citizens Bank Ltd* [2022] UKPC 10 at [10] per Lord Briggs and Lord Burrows



# Undue influence

- ▶ Difference between duress and undue influence
- ▶ Undue influence doctrine applies to both gifts and contracts



# Undue influence – categories

- ▶ Two categories:
  - ▶ Actual undue influence
  - ▶ Presumed undue influence
- ▶ Two categories reflect different ways of proving undue influence
  - ▶ Actual undue influence: direct proof of undue influence by pl
  - ▶ Presumed undue influence: pl relies on evidential presumption



# Presumed undue influence

- Raising the presumption – two elements to be satisfied:
  - Relationship of influence (trust and confidence reposed by one party on another)
  - Transaction must not be readily explicable on ordinary motives
- See *Nature Resorts v First Citizens Bank* at [12]



# Established categories of relationship of influence

- Established categories:
  - trustee and beneficiary
  - solicitor and client
  - doctor and patient
  - religious adviser and advisee
  - parent and child
  - guardian and ward
- See *Etridge* at [18]; *Nature Resorts* at [12]; *Johnson v Buttress* (1936) 56 CLR 113
- Irrebuttable presumption (or legal rule) of influence [but not of undue influence]



# Transaction not readily explicable

- ▶ Earlier test: whether transaction gives rise to “manifest disadvantage” for weaker party
- ▶ Preferred test under *Etridge* and *Nature Resorts*: whether transaction readily explicable by relationship of the parties and by ordinary motives
  - ▶ Whether transaction calls for explanation





# Effect of presumption and rebutting the presumption

- ➡ Shift in burden of proof on stronger party to show that weaker party not acting under undue influence (ie they exercised free and independent judgment)
- ➡ What evidence is required to rebut presumption?
- ➡ Eg: weaker party received independent legal advice
  - ➡ But not always conclusive, nor always necessary
  - ➡ See *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127
- ➡ Stronger evidence needed where weight of presumption strong on facts



# Example of presumed undue influence

- ➡ *Allcard v Skinner* (1887) 36 Ch D 145

- ➡ Facts:

- ➡ 1871: pl joined sisterhood of St Mary at the Cross

- ➡ Requirements for obedience to “lady superior” (def)

- ➡ Vow of poverty, property transferred to sisterhood

- ➡ 8 years later: left sisterhood

- ➡ Issue:

- ➡ Could gifts be set aside for undue influence?



# Example of presumed undue influence

## ► Eng CA:

- There was undue influence
- No explicit pressure but pl was “absolutely in the power” of the lady superior
- Not shown that pl acted freely in disposing of property



# Sub-categories of presumed undue influence?

- ➡ *Barclays Bank plc v O'Brien* [1994] 1 AC 180 per Lord Browne-Wilkinson:
  - ➡ Class 1: actual undue influence
  - ➡ Class 2A: presumed undue influence – established categories of relationships
  - ➡ Class 2B: presumed undue influence – where relationship of trust and confidence established by pl on facts



# Sub-categories of presumed undue influence?

- Rejection of utility of class 2B analysis:
  - *Etridge* per Lord Hobhouse, Lord Scott, Lord Clyde
  - *Li Sau Ying v Bank of China (HK) Ltd* (2004) 7 HKCFAR 579
  - Focus should not be on raising presumption but simply for pl to prove on facts the undue influence (ie actual undue influence)
- But compare *Nature Resorts* at [12], [13] per Lord Briggs and Lord Burrows



# Actual undue influence

- ▶ “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)”:
  - ▶ *Nature Resorts* at [11]
- ▶ Not necessary to prove transaction disadvantageous to weaker party



# Third parties exercising undue influence

- ➡ Eg A contracts with B because of undue influence of C (over A)
- ➡ A can rescind as against B if:
  - ➡ B has notice of undue influence, or
  - ➡ C was acting as B's agent, or
  - ➡ B is a volunteer (ie where B provided no consideration)
- ➡ See *Bainbridge v Brown* (1881) 18 Ch D 188



# Third parties exercising undue influence

- Notice: actual or constructive
- Constructive notice:
  - B has notice of risk of undue influence; and
  - B fails to take reasonable steps to bring home to A the implications (including risks) of the transaction





# Third parties exercising undue influence

- ▶ Two step analysis:
  - ▶ Whether B is put on notice (put on inquiry)?
  - ▶ If so, whether B took reasonable steps to bring A to understanding of implications of transaction?
- ▶ When is B put on notice?
  - ▶ Where B has knowledge of facts indicative of impropriety (*Bank of New South Wales v Rogers* (1941) 65 CLR 42), or
  - ▶ Where B is aware that relationship between A and C is a non-commercial one (in circumstances where A is providing security for benefit of C) (*Etridge*)



# Third parties exercising undue influence

- ➡ *Royal Bank of Scotland plc v Etridge (No 2)*  
[2002] 2 AC 773
- ➡ Facts:
  - ➡ A number of cases heard together
  - ➡ Wife contracting with bank to charge her interest in home as security for husband's indebtedness
- ➡ Issue: can wife set aside contract against bank?



# Third parties exercising undue influence

- ▶ House of Lords – whether there was undue influence by husband:
- ▶ Husband-wife relationship not established category of presumed undue influence
- ▶ Proof that wife placed trust and confidence in husband and that wife confers substantial advantage to husband not sufficient for court to draw inference of undue influence
  - ▶ Conferring advantage for husband's business readily explicable



# Third parties exercising undue influence

- ▶ HL – whether bank had constructive notice (of any undue influence):
- ▶ Bank put on notice where surety given by wife for husband's indebtedness
- ▶ Bank must take reasonable steps to bring home to wife risks of giving surety
  - ▶ Bank explaining transaction and risks in separate meeting with wife, or
  - ▶ Bank requiring wife obtain independent legal advice and solicitor confirms that they have duly advised wife



# Third parties exercising undue influence

- *Li Sau Ying v Bank of China (Hong Kong) Ltd* (2004) 7 HKCFAR 579
- Facts:
  - Appellant (Catherine Li) platonic/business friends with Mr Li
  - 1994: loans/mortgages taken out by appellant in favour of Mr Li
  - 1996: replaced by mortgage with the Bank (loan now in favour of company owned by Mr Ip – business associate of Mr Li)
- Issue:
  - Could the 1996 mortgage be rescinded as against the Bank for undue influence of Mr Li?



# Third parties exercising undue influence

- CFA (Lord Scott):
  - Not established category of presumed influence
  - Appellant did place trust and confidence in Mr Li (but no undue influence in procuring 1996 mortgage)
  - Also Bank not put on inquiry
  - In any event, Bank had taken reasonable steps to explain transaction to appellant



# Third parties exercising undue influence

- *Nature Resorts Ltd v First Citizens Bank Ltd* [2022] 1 WLR 2788
- Facts:
  - Dankou owned company (Nature Resorts Ltd): sought to develop eco-resort
  - Paler and James to buy 75% of shares in company from Dankou
  - Company granted mortgage over property to def (bank) to secure loan to Paler and James
  - Wheeler (lawyer) engaged by both bank and Dankou/Paler/James
- Issue:
  - Could mortgage be rescinded against the bank for undue influence of Wheeler?



# Third parties exercising undue influence

## ➤ UKPC:

- No presumption of influence between Wheeler (lawyer) and Dankou/Nature Resorts: Wheeler only acted for Dankou on share sale and not mortgage with bank
- In general, where solicitor advises client on mortgage given to third party (where no benefit to solicitor), mortgage is readily explicable on ordinary motives [as between solicitor and client]
- Any presumption of undue influence was rebutted on facts as Dankou was an experienced businessman and understood implications of mortgage





# Basis of doctrine of undue influence

- ▶ Two views:
- ▶ Undue influence based on wrongful conduct of def (unfair exploitation of position of influence to procure pl's assent)
  - ▶ *R v Attorney-General for England and Wales*  
[2003] UKPC 22
  - ▶ *National Commercial Bank (Jamaica) Ltd v Hew*  
[2003] UKPC 51



# Basis of doctrine of undue influence

- Undue influence based on will or independent judgment of pl being impaired because of their trust and confidence in def
  - *Pesticcio v Huet* [2004] EWCA Civ 372
  - *Nature Resorts Ltd v First Citizens Bank Ltd* [2022] 1 WLR 2788
  - *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447