Courts will refuse to enforce a contract essay

Courts will refuse to enforce a contract, which has come into existence whereby an individual has been induced to enter into it by means of pressure brought to bear upon them, so as to influence their own independent judgement. For quite some time the only tool the courts had to deal with these instances was the common law concept of duress, which was based upon threats made to a contracting party. Treitel more admirably than many other authors explains to us the development of duress from the original, narrow and restrictive definition at common law towards the person, to a more equitable position2.

This was indeed necessary as it is widely recognised that it is the more " subtle and insidious forms of pressure" 3 that exist in our modern climate. And so like many of the other equitable doctrines of the law of contract, the doctrine of undue influence developed as a counterweight to a strict common law doctrine. As Poole outlines, " The doctrine of undue influence [allows] a contract to be set aside where there has been a wrongful exercise of influence by one party over another" 4, it is the decision making process that has been undermined, or " where judgement has been abdicated in areas relevant to the transaction in question" 5.

Although equity has provided us with a possible means of considering other necessary forms of pressure and coercion, and undue influence is hailed as an " extensive remedy" 6, I am hesitant to associate it with a panacea. There is plenty to consider in the doctrine, and many questions to be asked, not least a primary question which Poole raises immediately; " What sort of influence will the courts view as being wrongful? " There are two types or classes of undue influence to consider; actual and presumed.

In both cases, the essence of the defence is that one of the parties to a contract has been in such a position of influence over the other that there is a danger that the person subject to the influence has been led into making a disadvantageous agreement. The difference between the two categories is that there are certain relationships where it is presumed that the influence will exist. Where no such presumption arises, " the party seeking to avoid a contract must prove the exercise of some form of illegitimate pressure resulting in a transaction from which [they] now [wish] to escape" 7.

The distinction and classification of actual and presumed undue influence made by Slade LJ in Bank of Credit and Commerce International SA v Aboody [1990] 1 QB 923 was adopted and approved by the House of Lords in Barclays Bank v O'Brien [1993] 4 All ER 983 The relationships where undue influence is presumed include parent/child, doctor/patient, solicitor/client and others, but significantly, and in the case of Lisa and Mark, does not include husband and wife. The relationships are ones where one places their trust and confidence in another and so is liable to suggestions without seeking independent advice.

In Lloyds Bank Ltd v Bundy [1974] 3 All ER 757 the relationship was that of banker and customer, and it was held to be a presumption of undue influence when after years of reliance by Mr Bundy on the bank, the bank failed to provide advice on a business transaction. I will come back to the matters concerning our couple's Miser Bank later, but first I wish to concentrate on the relationship between Lisa and Mark, and consider the issue of undue influence by her husband. As stated the type of relationship

between Lisa and Mark does not lend itself to automatic presumed undue influence.

Lord Scarman identifies that, “ There are plenty of confidential relationships which do not give rise to the presumption of undue influence (a notable example is that of husband and wife: see Bank of Montreal v Stuart [1911] AC 120)”. 8 It is added that there are other specific types of relationship, a class 2B confidential relationship between parties where undue influence can be presumed, as in the relationship in Lloyds Bank Ltd v Bundy above. What is required in this specific relationship according to Koffman and MacDonald is a position where one party has “ surrendered relevant decision making… and there exists] a trust and confidence which leads one party to rely [implicitly and solely] on the other party… a reliance upon, and trust in, disinterested advice”. 9 Lisa and Mark are partners in the restaurant business, and although it is indicated that she has a ‘ preference’ to stay at home and look after the children, can this be said to qualify in the surrender of relevant decision making? Also in Morgan we are informed that it is not enough for there to have been only presumed undue influence: the resulting agreement must also be to the manifest disadvantage of the person influenced.

I will return to the ‘ specific relationship’, classified in Aboody as Class 2B after further examination of the category of actual undue influence which covers situations falling outside the presumption. Here the burden of proof is on the person alleging influence, and as was recognised in Aboody that it can occur between husband and wife. The nature of the influence is in essence the same as presumed undue influence, whereby the person influenced must

have acted out of their trust in the influencer, without seeking or obtaining advice from anywhere.

Birks and Yin observe undue influence as " too much influence... Where there is too much influence on one side there is insufficient autonomy on the other, it is that... which the relief is founded. " In the case of Allcard v Skinner [1887] 36 Ch D 145, Lindley LJ described 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. " The existence of actual undue influence requires no presumptions of relationship whether type or specific.

All that is needed to be shown by the person relying on the plea is that someone, usually the other party had induced the transaction for their own benefit and had the capacity to influence the complainant. If the influence was exercised and the exercise was undue and brought about the transaction, then we have actual undue influence. There are no stronger words in any case than the ones I opened with above to indicate this, than the despairing words of a father, whose fears over the safety of his son had clearly been exploited by ruthless bankers taking an unfair advantage of the situation.

In relation to Mark and from the information available, this situation of actual undue influence does not seem to apply even though the House of Lords in CIBC Mortgages Plc v Pitt [1993] 4 All ER 433 " emphatically rejected" 10 the requirement that the transaction be of a manifest disadvantage. Of this issue Lord Browne-Wilkinson stated, " A claimant... was not under any further

burden of proving that the transaction induced... was manifestly disadvantageous but was entitled as of right to have it set aside against the person exercising the undue influence... 11 Certainly Lisa is no Mrs Aboody; the partnership she has with her husband expresses greater interest and involvement than marrying into a family run business. A strong financial link is also present between the couple as joint owners of their home and indication of " their" bank, the Miser Bank. Mark discusses with Lisa the purchase of a second restaurant and has already spoken to their bank with a view to obtaining a loan of i?? 200, 000 which he states would be no problem following some formalities which are not elaborated upon.

Our attention is now focussed upon Mark exercising undue influence upon Lisa, not as a contracting party, but as a third party. Consideration must be shown with reference to Mark's domination and influence over Lisa; and also as this involves, as guarantor, Lisa's share of the jointly owned matrimonial home, we must now move on to consider the Miser Bank, and raise the prominent issue of whether or not the bank can be affected by any undue influence of Mark as a third party.

In Aboody the dictum of Slade LJ paved the way for the subsequent House of Lords decision four years later in O'Brien. In the obiter of Slade LJ he explained the two distinct additional requirements needed before a bank could be affected by a third parties undue influence on his wife. In these Mark would either need to act as the bank's agent to obtain the execution of the charge, or the Miser Bank itself had actual or constructive notice of the facts giving rise to Lisa's claim.

If we judge Mark as the dominant party it would need to be shown that he procures Lisa’s signature, as in the case of Avon Finance Co. Ltd v Bridger [1985] 2 All ER 281 where a majority of the court decided the case on a combination of both the agency and notice issues. Unless there is other evidence available to suggest Mark and Phil, or any other Miser bank employee have conspired to procure Lisa’s signature, finding an agency relationship between creditor and debtor seems, as it is in most cases difficult to establish.

Also having regard to the comments of Slade LJ in Aboody and the authority of Williams v Bayley [1866] I concede that the efforts to prove actual undue influence will not succeed. I cannot “ prove affirmatively” 12 these issues, especially as Lisa has seems less than reposed in Mark’s trust and confidence in relation to their financial affairs. Lisa it is known has sought ‘ advise on financial issues’ in the past, it may have been on her own initiative, which is unclear.

And so we must now turn towards the aforementioned presumed undue influence, in particular the one formed from a specific relationship. With Lisa leaving ‘ the running of the business to Mark’ and applying the comments in Bundy; in addition to observing that it was Mark who made the decision to expand, and it was Mark who first made contact with the bank and presumable set up the meetings, then on this rationale I am inclined to accept that there exists the required ‘ trust and confidence’, and along with this a natural ‘ surrendering’ of ‘ relevant decision making’ whether consciously or not.

But how does this coincide with the inclusion of manifest disadvantage? We have been informed in Pitt that it will be maintained, but as indicated in Koffman and MacDonald, its inclusion became increasingly difficult to reconcile with cases “ dealing with the potential for abuse of certain types of relationship. “ 13 In Barclays Bank plc v Coleman and another [2000] All ER 385 the Court of Appeal agreed with the criticism but of course were bound by the decision in Morgan.

But in doing so interpreted manifest disadvantage extremely widely, having “ no disposition to enlarge its significance” and advising us that “… the House of Lords have signalled that it may not continue to be a necessary ingredient indefinitely… “ 14 Many authors anticipated the Lords removing the requirement when the opportunity arose. The Royal Bank of Scotland v Etridge [2001] 4 All ER 449 was a seminal case in this legal area for a number of reasons.

Firstly there was great criticism of the manifest disadvantage rule, Lord Nicholls outlined two situations: the blinkered approach of the manifestly disadvantageous wife who undertakes a serious financial obligation for no personal gain, and the wider view similar to the circumstances in Lisa and Mark when the finance may be needed to start or expand a new or promising business. Lord Nicholls briefly asks us to consider which approach to adopt in deciding whether a transaction is disadvantageous to the wife, before abruptly answering neither.

He tells us “ The answer lies in discarding a label which gives rise to this sort of ambiguity. “ 15 Once it is established that Lisa has placed her trust and

confidence in Mark, Tim or Phil and that she is not the sort to enter into that sort of transaction without undue influence, then there will be a reversal of proof towards the dominant party. Under the constructive notice rule established in the O'Brien case, all Lisa would need to show is that she was a wife living with her husband, and the transaction was not on its face to her financial advantage.

Assessing the financial advantage has been rather careless of the bank and as in the case of Bank of Scotland v Bennett [1999] 1 FCR 641, as their attitude of ' no problem' and the probable input from family friend Phil to the extent that the " business is one which the husband (but not the wife) has a direct financial interest" 16 towards. The burden is then on the bank to show that it took reasonable steps to satisfy itself that consent was properly obtained.

Phil although a family friend has failed in his duties as a representative of the Miser Bank to inform Lisa of the risks involved in the transaction, and notwithstanding his knowledge of her meeting with Tim, he has failed to urge Lisa to take independent legal advice, and he has compounded the issue by urging her to sign the guarantee agreement. As in the Bundy case Phil had ' crossed the Line'17 and in his professional capacity, which would make the bank a contracting party, a presumption of undue influence can be implied automatically, as per Norse LJ in Goldsworthy v Brickell [1987] 1 All ER 853.

With respects to Tim, Lord Scott informs us in Etridge " that the duty of a solicitor in every case is dependent on his instructions... [and do not] ... justify the bank in assuming that the solicitor's instructions extend to

advising [Lisa] about the nature and effect of the transaction. Further responsibilities of independent legal advisors are only evident in relation to the actions and required conduct of the bank. As in a recent case in the Court of Appeal in May 2002, Parker LJ confers that [similarly] a least requirement would be that Phil contact Tim or make enquiries into their legal representation.

Regarding the presumptions of undue influence by Mark and Phil towards Lisa, it is worthy to note from Inche Noriah v Shaik Alliebin Omar [1928] All ER 189 that these presumptions can be rebutted if the person benefiting from the transaction shows that it was “ the free exercise of independent will”. As Lisa has been ill-informed on no less than at least three occasions, Mark and Phil can not rely on this. However the most usual way as in the case of Re Brocklehurst [1978] 1 All ER 390 is to show that the other party had independent advice before entering into the transaction.