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VITIATING factors in contract law raise difficult and interesting questions. Lawful act duress has been subject to detailed scrutiny in *Times Travel (UK) Ltd. v Pakistan International Airline Corp* [2021] UKSC 40, [2021] 3 W.L.R. 727, albeit the decision has been subject to criticism (see Morgan [2022] C.L.J. 16). The decision of the Supreme Court of Canada in *Heller v Uber Technologies* 2020 S.C.C. 16 shone some light on unconscionable bargains (see Hunt [2021] C.L.J. 25). Now it was the turn of undue influence in *Nature Resorts Ltd. v First Citizens Bank Ltd.* [2022] UKPC 10, [2022] 1 W.L.R. 2788.

Unfortunately, the Privy Council's approach arguably raises almost as many questions as it answers. The Privy Council's primary decision is that there was no basis for departing from the Court of Appeal's decision that any presumption of undue influence would, on the facts, have been rebutted. Much more interesting, however, are the brief observations made regarding the presumptions which may be engaged in the doctrine of undue influence. The decision of the majority was given by Lord Briggs and Lord Burrows J.J.S.C.; Lady Arden J.S.C. dissented on a point concerning companies legislation, not discussed further in this note.

The appeal concerned the sale of shares in the appellant company, Nature Resorts Ltd. ("NRL"), which owned the Culloden Estate in Tobago. The purchasers agreed to buy 75 per cent of the shares in NRL from the sole shareholder, Mr. Dankou. To facilitate this purchase, they obtained a loan from the Respondent bank. The terms included that the bank would have the security of a mortgage over the Culloden Estate. The bank instructed a lawyer, Richard Wheeler, to prepare the documents relating to the mortgage and the charge over the shares. The purchasers defaulted on their loan, and the bank decided to exercise its power of sale under the mortgage. NRL sought to set aside the deed of mortgage on the basis of undue influence exercised by Wheeler over Dankou, one of the issues being whether it should be presumed that Wheeler abused the professional relationship between himself and Dankou (and NRL), procuring the transaction under challenge. This claim failed before the High Court of Justice of Trinidad and Tobago, and likewise before the Court of Appeal of Trinidad and Tobago. The High Court had held that there was no presumption of undue influence; the Court of Appeal held that there was such a presumption, but it had been rebutted. The Privy Council dismissed NRL's appeal, holding that the Court of Appeal was justified in finding that any presumption of undue influence had been rebutted; the Privy Council further held that the High Court had been right in the first place that there was no presumption which needed rebutting.

There are four main points to note. The first is the approach to situations where the law traditionally presumes a relationship of influence of one individual over another: what, before *Royal Bank of Scotland Plc v Etridge (No. 2)* [2001] UKHL 44, [2002] 2 A.C. 773, would have been referred to as "Class 2A cases". The Privy Council noted that the first instance court had found that the solicitor Wheeler had no relationship of influence over Dankou, notwithstanding the fact that solicitor and client is the classic example of a relationship conclusively presumed to be one of influence.

The Privy Council declined to give a firm view on the point, considering that it "raises difficult questions" (at [29]). It did, however, cite the extra-judicial writing of Sir Kim Lewison, "Under the Influence" (2011) 19 Restitution Law Review 1, 9–10, where the author questions the continued utility of such a conclusive presumption. Lewison notes the change in societal norms since the principle was established (how much influence do GPs have over their patients nowadays?). He indicates that there could be two bases for an irrebuttable presumption: where there is no possibility that evidence would lead to a departure from the position as presumed, or where there is some policy justification sufficient for not grappling with the facts. Lewison finds neither basis to be satisfied.

It is respectfully submitted that this reasoning is unanswerable, and the Privy Council should have said so. Over 50 years have passed since Milsom observed that it is an increasingly detailed scrutiny of facts which is the hallmark of legal development (S.F.C. Milsom, "Law and Fact in Legal Development" (1967) 17(1) University of Toronto Law Journal 1). A legal doctrine which requires the courts to ignore the true factual position requires careful justification. The conclusive presumption of undue influence is not only unjustified, it is actively unhelpful. At present, the law provides for a conclusive presumption that certain relationships give rise to influence, within a wider rebuttable presumption that certain types of transaction are tainted by undue influence. Given that *Etridge* tells us that what the courts should be looking for is whether there has been undue influence, this is needlessly over-complicated.

The second point to note is the Privy Council's consideration of the nature of undue influence. The key factor is that the party exercises "free judgment" (at [10]). Undue influence does not need to be classified as a civil wrong (at [15], approving Birks and Chin's analysis in "On the Nature of Undue Influence" in J. Beatson and D. Friedman (eds.), *Good Faith and Fault in Contract* (Oxford 1995)). However, it is unclear whether the Privy Council endorses the whole of Birks' and Chin's controversial approach that undue influence relates to excessive dependence by the claimant upon the defendant. The Privy Council approved at [15] the explanation of Mummery L.J. in *Niersmans v Pesticcio* [2004] EWCA Civ 372, [2004] W.T.L.R. 699, in which it was

made clear that the justification for the doctrine of undue influence is not "a dishonest or wrongful act by the defendant", but rather 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" (at [20]). With respect, this is closer to a restatement of the content of the doctrine rather than an explanation of the basis of it. Further, the language of "victim" suggests that poor conduct is still relevant. Birks and Chin themselves accepted (p. 82) that the language of being a victim implies some degree of wickedness.

A third significant aspect of the Privy Council's decision is its *obiter* observations about the approach to undue influence in three-party cases. The Court of Appeal found that there was a transaction which called for an explanation: NRL obtained no benefit from the mortgage, whilst taking on risk that the estate could be sold. The Privy Council took a different approach. Just because a solicitor provides advice in relation to a transaction which turns out to be disadvantageous does not mean that the transaction should be vulnerable to being set aside for undue influence (at [26]). Even where a solicitor is acting for both parties in a transaction, the lawyer-client relationship should not necessarily lead to a presumption of undue influence in circumstances where the lawyer has no interest in the transaction beyond his usual fees. The Privy Council stated that

> where the other party to the transaction is not the solicitor obtaining some benefit from the client but is rather a third party, an ordinary commercial transaction such as a mortgage, entered into by a person engaged in business, should rarely be regarded as one that is not readily explicable on ordinary motives, merely because it is, or turns out to be, disadvantageous. (at [27])

The transaction would not call for explanation. Whilst the Privy Council makes some general statements and explains the result on the facts, an explanation of the principles would have been helpful.

Finally, the decision of the Privy Council provides a useful illustration of rebuttal of a presumption of undue influence, without the provision of independent legal advice. The Court of Appeal had found any presumption of undue influence by Wheeler to be rebutted. Dankou did not have independent legal advice, but he was an experienced businessman, and would have understood the nature of the transaction into which he was entering. Once again, the Privy Council's reasoning is light. It noted that, just because a person understands the nature of a transaction does not mean that they are free from undue influence (at [23]). This pointed in the opposite direction to its decision on this issue. However, the Privy Council's approach is justified: an experienced

businessperson may not need legal advice in order to be free of undue influence.

The Privy Council's decision provides less assistance to contract lawyers than it might have done. As an apex court, the Privy Council has a role in the elucidation of principle. It is not clear why it was content briefly to engage in the *obiter* issue of the rebuttable presumption of undue influence, but to shed no light on the irrebuttable presumption of a relationship of influence. It would have been better were the Privy Council to have expressed clear views on the latter, and better still were they to have indicated that there is no longer a place for an irrebuttable presumption of influence arising from certain relationships, as Lewison has argued.

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