THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

FACTORS THAT MAY VITIATE A CONTRACT

Apart from fraud, which was discussed above in relation to misrepresentation, there are a number of events surrounding the formation of a contract which can prevent an enforceable contract coming into being or which can enable the court, at the behest of one of the parties to declare that the contract may be avoided. In this context, three main topics are discussed below, namely Mistake, Duress and Undue Influence.

THE DOCTRINE OF MISTAKE

The discovery of a mistake of fact, by one or more of the parties to a contract, may in certain circumstances enable the court to declare the contract to be *'void ab initio'* that is to say that the contract is of no legal effect whatsoever, at Common Law, from the very outset. Even if a contract is valid at Common Law it may be possible to avoid the contract in Equity, in which case it will be regarded as a *'voidable'* contract. Voidable means that the contract is treated as valid until steps are taken to *'rescind'* the contract, which from that time on is treated as being void and of no effect. Rescission is never available in equity as of right and is subject to the discretion of the court. In particular rescission will not be granted where an innocent third party has gained a right or interest in the subject matter of the contract.

The general rule of contract is that the parties are bound by the terms of their agreement and have to rely on their contractual stipulations for protection from the effect of facts unknown to them. The Doctrine of Mistake is an exception to the general rule. An operative mistake may be common, mutual or unilateral. It is important to distinguish which type of mistake one is dealing with and whether the remedy lies at common law or in equity since the remedies are different.

Idenitical or Common Mistake : In this form of mistake both parties make the same mistake. For example both parties might be unaware that the subject matter of the contract has been destroyed. They have a meeting of minds, a "***consensus ad idem***", but both minds have been misled in the same manner about the same thing.

Two forms of common mistake have definitely been recognised by the common law, "***res sua***" where the purchaser already owns the subject matter of the contract and so an agreement to buy what he already owns does not result in a binding contract and "***res extincta***" where the subject matter has ceased to exist. A third possible form of common mistake as to some quality of the subject matter may be recognised by law, though in light of the cases it is rather unlikely.

In **Copper v Phibbs**,[1] B agreed to lease a fishery from A. Unknown to A & B the fishery already belonged to B. It was Impossible to transfer rights to B under the contract since he already held those rights by virtue of ownership.

Res Extincta : This is the most important example of common mistake. Strictly speaking it is not limited simply to the destruction of the subject matter and applies to any situation where the contract has been deprived of its underlying purpose. Thus in **Strickland v Turner,**[2] a policy was taken out on someone who unknown to the assured and the underwriter had already died. The court held that the plaintiff was entitled to recover the premium as it had been paid wholly without consideration in that he had purchased something which no longer existed. Similarly in **Galloway v Galloway,**[3] a separation deed was declared void because the parties were not in fact married but only mistakenly believed they were. The deed of separation afforded contractual rights to both parties. At the time of the marriage unknown to the defendant his wife was still alive so the marriage was void. The court held that there had been a mutual mistake of fact as to the relationship of the parties and so the separation agreement was void.

Much of the law of mistake concerns contracts for the sale of goods and s6 Sale of Goods Act 1979 deals specifically with statutory mistake. Some discussion of sale of goods is necessary since many of the cases are based on the destruction of goods. However, for present purposes, emphasis will be placed as much as possible on the effect of mistake on charter parties and contracts of carriage.

1 **Copper v Phibbs** (1867) L.R. 2 HL
2 **Strickland v Turner** (1852) 7 Exch 2O8
3 **Galloway v Galloway** [1914] 30 T.L.R. 531

CHAPTER TWO

A useful starting point is the case of **Couturier v Hastie,**[4] which involved a c & f sale of indian corn shipped out of Salonica to buyers in the U.K. The cargo overheated during the voyage and, at some time before the sale was concluded between the buyer and a del credere agent of the seller, was discharged at Tunis by the ship's master. This was lawful since it constituted a dangerous cargo. However from the buyer, the agent and the seller's view point the corn had ceased to exist. The corn was sold off cheaply in Tunis in an attempt to limit losses. A c & f sale contract had thus been made for a cargo of corn that no longer existed at the time of sale. Subsequently problems arose over insurance since the seller was not covered for the loss and the seller sued the del credere agent. A del credere agent is an agent who receives a higher rate of commission than that which is usual in return for a guarantee that his principal will receive due payment for goods sold.

In **Harburg India Rubber Comb Co v Martin,**[5]. a buyer repudiated the contract with the del credere agent and refused to pay. The seller sued the agent for the price. Liability of the agent depended on whether or not the buyer was entitled to repudiate so the case is equally authoritative for a simple sale between buyer and seller. The House of Lords found for the buyer/agent but the reasoning was not based on the doctrine of mistake in that at no point in the judgement is the doctrine of mistake discussed. If the buyer had accepted the cargo and claimed under an insurance policy which had been tendered with the documents he could have successfully recovered from his underwriter. The buyer however wanted corn not a valid insurance claim. The policy appears to have been taken out in the name of the buyer and did not cover the seller. If this had been a simple two party c.i.f. sale the seller would not have had a problem with the policy which would have covered him from shipment until endorsement of documents. Furthermore **Manbre Saccharine v Corn Products** [6] confirmed that a c.i.f. buyer cannot refuse to accept the valid tender of documents and must pay on endorsement. The buyer then has to recover as best he can under the insurance policy.

The House of Lords held in **Couturier v Hastie** that the agent / buyer did not have to pay the seller for the cargo. Subsequent commentators have concluded that the reason for this was that the contract was void because of a common mistake by both parties to the contract, namely that the goods were in existence at the time that the contract was made, whereas this was no longer true. This form of common mistake is classified under the heading 'res extincta'.

What did **Couturier v Hastie** decide? In as much as the buyer did not have to pay the seller, the seller's right to recovery under the contract was adversely affected in some way by the fact that the goods no longer existed when the agreement was made. This can be explained in that in common with s28 Sale of Goods Act 1979 a buyer is only required to be ready and willing to pay the price in exchange for possession of the goods. If there are no goods because they ceased to exist before the contract was concluded the s28 duty to pay does not come into play. P.S.Atiyah's analysis provides three alternative constructions of the case[7] .

1) There might have been an implied condition precedent that the subject matter was in existence, in which case, if it was not neither party would be bound; or
2) The seller might have contracted, or warranted, that the subject matter was in existence, in which case he would be liable for non-delivery and the buyer would not be liable for non-acceptance; or,
3) The buyer might have taken the risk of the subject matter having perished, in which case he would be liable for the price even in the absence of delivery, and the seller would not, of course be liable for non-delivery.

The House of Lords merely decided that the contract could not be construed in the third of the above three ways but the House did not decide, as it was not called upon to decide, whether the proper interpretation was of the first or second types above. If the buyer had sued the seller for failure to deliver the goods this would have been answered. Both 1) and 2) are compatible with s28 S.O.G.A.

Confusion has arisen from a fourth interpretation placed on **Couturier v Hastie** by some text book writers and subsequently by the draftsmen of the Sale of Goods Act 1893. Naturally therefore Cheshire & Fifoot contend that 1-3 do not apply.

4 **Couturier v Hastie** (1856) 5 H.L.C 673.
5 **Harburg India Rubber Comb Co v Martin [1902]** 1 K.B 778
6 **Manbre Saccharine v Corn Products** [1919] 1 K.B. 198
7 P.S.Atiyah :The Sale of Goods 9th Ed. p88

Fourth Construction : Cheshire and Fifoot contend that the contract was void for common law mistake in that if one has a contract of sale for goods which do not exist at the time of the contract, in circumstances where both parties believe the goods exist then the contract is void for common law mistake resulting from a fundamental misapprehension of both parties. Again s28 Sale of Goods Act is satisfied, but is not required in any case since there is now no contract.

Version 1 Distinguish the notion of a condition precedent from a condition simpliciter in the first version of events. A condition precedent is an arrangement whereby the contractual duties of the parties do not come into play unless and until the required event occurs. In effect there is no contract if the event does not occur. Neither party has to perform anything and so clearly the buyer does not have to pay but neither does the seller have to furnish the goods. There is no contract for either party to breach. A condition of a contract by contrast is a term of the contract that must be fulfilled by the party on whom the condition is imposed. If breached the innocent party has the right to repudiate the contract and claim damages or alternatively he may elect to waive the breach and claim damages for the breach.

Express conditions precedent include *'subject to certificate as to quality'*, [8] or '*a clean government bill of health*', .[9] and '*an import or export licence being available'*. [10] **Charles v Alexander** [11] shows that the contract is treated as initially binding but that it is regarded as non-enforceable if the condition precedent is not met, provided the person responsible for procuring the certificate or licence exercises best endeavours as in **Pund v Hardy.**[12] In **McRae v Commonwealth Disposals Commission**,[13] the assertion by the defendants to counter a claim for non-delivery, that the contract was subject to an implied condition precedent was rejected on the facts.

Version 2 If there is an express or implied term to the effect that the goods are in existence when the contract is made the seller, who is in breach of the term, cannot sue the buyer for the price but the buyer can sue the seller for breach of contract for non delivery of the goods resulting from a breach of the term. The term is a warranty. It places the risk of a total pre-contractual destruction of the subject matter firmly on the seller and leaves no room for the doctrine of mistake to vitiate the contract and the seller's responsibility under the contract. Recognising an express warranty presents no problem. Similar statutory implied terms are common in Marine insurance where the assured warrants a certain state of affairs "*a peine*" of rendering the policy void. How might one recognise an implied warranty and in what circumstances might such a warranty be implied in a contract ?

In **McRae v Commonwealth Disposals Commission** the court found on the facts of the case that there was an implied warranty that the goods were in existence. The Commission made a contract purporting to sell the plaintiff a shipwrecked tanker which was supposed to be laying on a reef. It was later discovered that neither the shipwreck nor the reef existed but the plaintiff expended a large sum preparing for a salvage operation and sued the Commission to recover his outlay. The court held that implicit in the contract was a promise that the ship and the reef existed.

Similarly in **Associated Japanese Bank v Credit du Nord S.A**.[14] a crook purported to sell the plaintiff four machines valued in excess of £lm and then leased them back. This is quite similar to raising finance by way of mortgage on property. The arrangement was guaranteed by the defendants. When the fraudster defaulted on the repayments the plaintiff sued the defendant on the guarantee. It was held alternately that the guarantee contract was either void for mistake) version 43 or for breach of a condition precedent that the goods existed, version 1. It is respectfully submitted that Steyn J. erred in the judgement. What was being guaranteed was not the machines but the risk of non performance of the duty to repay. The seller's duty and the buyer's risk always existed. The seller reneged on his duty, the very eventuality the guarantee was supposed to provide protection against. Ideally both banks should have verified the existence of the goods.

8 **The Julia** [1949] A.C. 293
9 **Re Anglo Russian M.T. & J.B**. [1917] 2 K.B. 679
10 **Provimi Hellas v Warinco** [1978] 1 Lloyds Rep 373
11 **Charles v Alexander** (1950) 84 Lloyds Rep 89
12 **Pund v Hardy** [19561 A.C. 588.
13 **McRae v Commonwealth Disposals Commission** (1951) 84 C.L.R.
14 **Associated Japanese Bank v Credit du Nord S.A**. (1988) 3 All E.R 902

Under insurance principles the subject matter and the risk, though often coincidental are not synonymous. They are distinct and separate as illustrated by **Hewitt Bros v Wilson**.[15] On this basis there was no mistake. Steyn J's decision that there was an express or implied condition precedent that the machines were in existence before the guarantee contract came into being is a decision of fact as to the construction of the contract. If there was an express condition precedent the decision is unimpeachable. If not, then the finding is to be regretted since to avoid such an interpretation in future contracts of guarantee to be enforceable would require a clear statement to the effect that the guarantee is intended to cover fraudulent sellers. Even In insurance law valid policies against fraud are routinely taken out. The duty of absolute good faith, uberrimae fidei is rightly placed on the assured but the fraud is not perpetrated by the assured so there is no breach of the duty. In this instance the plaintiff found himself in a worse position than he would have done under an Insurance policy. The result is anomalous in that if the fraudster had made the arrangements in respect of actual goods and then disposed of them there would not have been a breach of implied condition precedent, a mistake or frustration and the guarantee would have been enforced. Furthermore, under **Amalgamated Investment and Property Co. Ltd. v John Walker & Sons Ltd.**[16] it is made clear that a mistake must exist before the contract is concluded and a later disposition would be yet one more reason for preventing the Doctrine of Mistake applying in such a situation.

If the plaintiff had sued the fraudster would the sale have been void at common law ? It is submitted that following **McRae's** Case there should be breach of an implied warranty that the goods exist as in version 2 so that the fraudster could not escape liability. It was a unilateral mistake not a common mistake between buyer and seller. The fraudster could not rely on his wrong doing. An action for fraudulent misrepresentation would also lie in tort against the fraudster. The buyer could have the contract avoided for fraud.[17]

Both **McRae**'s Case and the **Associated Japanese Bank** Case can however be distinguished from Couturier v Hastie in that these were not cases of res extincta. The subject matter had never existed as opposed to having existed at one time but subsequently ceased to exist

Griffiths CJ in his minority judgement in **Goldsborough, Mort & Co Ltd v Carter** [18] found that the contract at issue in that case contained an implied condition that both at the time of making the contract or before the time of performance the subject matter was or would be in existence and would continue to exist when the time of performance arrived.

Version 3 This is the equivalent of buying a mere hope or expectation or a 'spes'. Strictly speaking this is not a purchase of goods at all. The buyer buys the right to receive the outcome of a venture whether it is a success or a failure. Such contracts are possible but rare in respect of international sales of goods and the court clearly found that it did not apply in Couturier v Hastie. The risk undertaken by a buyer in such circumstances can be insured against by virtue of **Inglis v Stock** [19] which held that an interest in an adventure is an insurable interest. Thus under Construction Rule s1 Marine Insurance Act 1906 a policy can be taken out 'lost or not lost' where a buyer bears the risk of cargo at sea and where he does not know and is not deemed to know whether or not the cargo is still in existence.

A contract with an express formula to account for varying quantities to be paid at a particular rate are not uncommon. This type of arrangement will only work by implication in respect of severable contracts where the degree of variation in the quantity supplied does not significantly alter the nature of the contract. Something akin to this occurred in **Goldsborough, Mort & Co Ltd v Carter.**[20] There was a contract to buy about 4,000 sheep said to be pastured on land at a fixed price per head of stock. Only 890 healthy animals were recovered from a round up following a sever drought and cold winter rain. The contract was held to be "for as many head of stock as were available at a fixed price per animal" and an action for short delivery failed.

15 **Hewitt Bros v Wilson** [1915] 20 Commercial Cases 241
16 **Amalgamated Investment and Property Co. Ltd. v John Walker & Sons Ltd** [1976] 3 All E.R. 509
17 See **Derry v Peek** later when unilateral mistake is discussed.
18 **Goldsborough, Mort & Co Ltd v Carter** (1914) 19 C.L.R. 429
19 **Inglis v Stock** (1855) 10 App Cas 263
20 **Goldsborough, Mort & Co Ltd v Carter** (1914) 19 C.L.R. 429

Version 4 : Treitel in his book The Law of Contract 6th Ed pp218 - 219 disagrees with Cheshire and Fifoot's interpretation. If a contract is void, as asserted by Cheshire and Fifoot, then neither party can sue on the contract. Treitel points out that nowhere in the judgements of the case are the words 'void' or 'mistake' employed. The judgement speaks merely of an implied term that the goods exist. This is now acknowledged by Cheshire, Fifoot and Furmston, The Law of Contract 12th Ed. Page 232. Version 4 cannot therefore be regarded as the ratio decidendi of Couturier v Hastie, though of course in as much as it forms the ratio of later cases it cannot b~ ignored.

Collateral Contracts and the Doctrine of Mistake : An express or implied collateral contract that runs alongside the principal contract can in certain circumstances be used as a way of evading the doctrine of Mistake. The terms of the collateral contract of guarantee, contract No2, are that A will contract with B, the main contract or contract Nol, providing B warrants that the goods are in existence. The result is similar to that in **McRae** except that the warranty is a separate contract as opposed to being an integral part of the contract of sale itself.

In **Strongman (1945) Ltd v Smock,**[21]. an architect commissioned builder to modernise premises. At that time, due to post war government restrictions this type of work required a government licence which the architect undertook to procure. The architect refused to pay the builders and claimed the contract was illegal and void because he had not procured the licence. The court held that there was a collateral contract that the architect would obtain a licence. Whilst recovery was not possible under the illegal contract which was void the plaintiff builders were able to recover damages for breach of the collateral contract. The same principal could be applied to **McRae** type scenario as an alternative way of recovering In that the Commission could be deemed to have breached a collateral contract guaranteeing that the vessel existed. The plaintiff was expressly told by the defendant that he would get a licence. Whether a collateral contract would be implied in the absence of an express undertaking is less certain.

The major problem is in anticipating which construction will be adopted by the court. This is hard to predict. The cases provide some guidelines but the courts have often come up with surprises catching the parties to the contract unawares. This cannot be good for businessmen who need to be able to order their affairs and decide how much risk they wish to take and makes insurance difficult. The more specific the parties are in their contracting the better, yet at the same time to turn simple business affairs into an art requiring the services of lawyers is not desirable either. A clearer, simpler and more certain legal regime would be beneficial and would facilitate trade and confidence in the legal mechanisms forced upon the business community by the courts and the legislature.

What amounts to destruction of the subject matter ? : It would appear that in order to apply the common law doctrine of common mistake requires that the subject matter completely ceases to exist before the contract was made. In **Barrow, Lane & Ballard Ltd v Phillip Phillips & Co Ltd**.[22] the defendant contracted for 700 bags of nuts said to be in a warehouse. 109 bags had in fact disappeared, possibly stolen and another 450 subsequently disappeared as well. At the time of the contract there were only 591 available for delivery and ultimately only 151 bags remained available for delivery. The contract was held to be avoided under s6 S.O.G.A.. The 700 bags were regarded as indivisible by Wright despite the fact that the buyers paid for the portion of the consignment that they actually received. The seller's sued for the outstanding sum for the part of the consignment the buyer refused to pay for. The claim failed since the contract was avoided. Presumably the subject matter of the contract had perished from a commercial point of view. It is not clear whether the buyer could or should then have returned the rest of the consignment to the seller and the seller should have reimbursed the buyer. Was only the outstanding part of the contract avoided ? If so the contract was in fact severed.

Deliberate destruction of the subject matter by the seller cannot amount to mistake. In **Goodey v Garriock**[23] a seller who sold a cargo to another person could not claim the contract was void for mistake. Contrast **Couturier v Hastie** where the ship's master, with good reason, sold the goods on. Similarly, regarding

21 **Strongman (1945) Ltd v Smock** [1955] 2 Q.B. 525.

22 **Barrow, Lane & Ballard Ltd v Phillip Phillips & Co Ltd** [1929] 1 K.B. 574

23 **Goodey v Garriock** [1972] 1 Lloyds Rep 369

frustration and force majeure where in **The Marine Star,**[24] a seller made a commercial choice to use the original cargo and vessel to fulfil another contract.

Any contract for the sale of goods and any charterparty can be affected by the Doctrine of Mistake. The following observation by Steyn J is instructive. **Associated Japanese Bank (International) Ltd v Credit du Nord S.A**.[25] *"Logically, before one can turn to the rules as to mistake ... one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary. Only if the contract is silent on the point is there scope for invoking mistake."*

Warranties : Avoiding the problem. A party can insert an express term in a contract that the other party warrants that the subject matter is in existence at the time of the contract. This may operate as a collateral contract according to **Strongman v Sinock**.[26] This avoids any uncertainty as to whether or not the courts will imply such a term.

The other party can limit the effect on him of such an express term by introducing a force majeure olause into the contract. Such a clause will provide protection against an implied term that the subject matter is in existence. However, where the original subject matter envisaged by the him is not available there may be a duty to provide an alternative and the force majeure clause will only apply if there is no available market from which to obtain an alternative, as expounded in **Fairclough Dodd and Jones v Vantol J.H**.[27]

Mistake and Misrepresentation. If a party misrepresents that the subject mattter is in existence at the time of the contract he may be liable under **Hedley Byrne v Heller,**[28] in circumstances where he knew or should have known that the subject matter no longer existed. **McRae v Commonwealth Disposals Commission** pre-dated **Hedley Byrne v Heller** and judicial recognition of recovery of damages for pure economic loss. There appears to be no reason why such an action could not succeed especially now that **Henderson v Merrett**[29] has affirmed concurrent liability in contract and in tort. Similarly the Misrepresentation Act 1967 may apply. Both actions require a misrepresentation. Could the courts imply a representation for the purpose of a tort action and in what circumstances might one be implied ?

Common Mistake as to Quality. A possible interpretation of **Bell v Lever Bros** [30] suggests that a there is a wider class of common mistake not dependant on res extincta or res sua. Even if this is so, all attempts to avoid the contract on this basis have failed with the possible exception of **Associated Japanese Bank v Credit du Nord** which where the contract was held void by Steyn J. either because a condition precedent as to the existence of the goods being guaranteed or because of a common mistake as to the fundamental basis of the contract in that there were no goods to guarantee. The alternative explanations weakens the authority of the case in respect of common mistake as to quality. Furthermore as discussed earlier it is to be regretted that the court treated the guarantee as relating in some way to the goods, which did not exist, as opposed performance of the duty to repay the capital raised on the security of the goods. Regarding common mistake as to quality it is submitted that there is little to distinguish the facts of the case from earlier decisions where the elusive unexplained factors required by **Bell v Lever Bros** were absent and application of the doctrine was rejected by the courts. The significance therefore of common mistake as to quality is not that great in respect of international trade contracts.

In **Bell v Lever Bros** the defendant employed the plaintiff at £8,000 p/a in 1923 as a manager of the Niger Company which Lever Bros had a controlling interest in. The contract of employment was renewed for a further 5 years in 1926. In 1929 the Niger Company was amalgamated with another company and the defendant was made redundant. The defendant had engaged in speculation amounting to breach of his contract of employment and this would have entitled the company to terminate his contract without paying

24 **The Marine Star** [1993] 1 Lloyds Rep 329
25 **Associated Japanese Bank (International) Ltd v Credit du Nord S.A**. [1988] 3 A.E.R. 902
26 **Strongman v Sinock**
27 **Fairclough Dodd and Jones v Vantol J.H**. [1957] 1 W.L.R. 136
28 **Hedley Byrne v Heller** [1964] A.C. 465
29 **Henderson v Merrett**
30 **Bell v Lever Bros** [1932] A.C 161

the £30,000 redundancy that was agreed between the defendant and the plaintiff. At the time of negotiating the redundancy the defendant had forgotten about the speculative dealings and the plaintiff did not know of the dealings at all. When the plaintiff discovered about the defendant's activities the plaintiff brought an action for rescission of the redundancy contract and return of the money. The House of Lords held there was no operative mistake.

The case may have decided that there is no wider species of common mistake, or that whilst common mistake may embrace a common mistakes as to quality the circumstances ~ the case were insufficient to justify its application. If such a wider species exists then it is unclear what circumstances would justify its application. The following cases indicate that there is no wider class of common law mistake as to the qualities of the subject matter of a contract and that Common Mistake is restricted to questions regarding the existence or ownership of the subject matter at law.

In **Solle v Butcher** [31] A agreed to let a flat for £250 per annum to B. Both parties were wrongly under the impression that it was decontrolled and not subject to the Rent Acts. The Rent Acts did in fact apply. The plaintiff only needed to pay the lower rate of £140 per annum. He sued to recover the excess rent he had paid. The court held that the mistake was as to the qualities possessed by the property not to the existence of the property itself. The contract was not void. The plaintiff could not recover the excess rent.

In **Leaf v International Galleries Ltd** [32] the plaintiff bought an oil painting of Salisbury Cathedral and accepted it as a genuine Constable on the representation of the defendant seller. 5 years latter when he tried to sell the painting it was discovered that it was not in fact a Constable. A claim for rescission for innocent misrepresentation was time barred. The court held that the mistake was one as to quality and did not afford a remedy at common law.

Frederick Rose v William H Pim [33] Relying on the defendant's opinion that feveroles is simply another word for horse beans the plaintiff ordered and took delivery of a consignment of horse beans from the defendant. When the customer rejected the goods the plaintiff sought to avoid the contract with the defendant. The court held that he ordered and received horse beans. The common though mistaken belief of the parties that horse beans are synonymous with feveroles was one of quality and did not invalidate the contract.

Common Mistake in Equity : Equity follows the law in the case of res sua and res extincta In that the court can refuse specific performance or set aside the contract. Equity can give relief wherever an agreement between the parties is the result of a common mistake of a material fact. The court may grant ancillary relief or otherwise impose conditions on the parties to do justice to the case.

In **Huddersfield Banking Co Ltd v Henry Lister & Co Ltd** [34] Mortgagees of a mill and its fixtures concurred in a court order for the sale of 35 looms on behalf of trustees in bankruptcy under the mistaken belief that the looms were not fixtures. The looms had in fact been wrongfully severed from the land and were in fact fixtures and belonged to the bank. Since third parties had not yet acquired an interest in the looms the court was prepared to set the agreement aside. In **Solle v Butcher** the court set aside a lease in equity on the ground of a common mistake of fact. The plaintiff was given the option of surrendering the lease or remaining in possession and paying the full rent.

Where a document (contract) does not accurately record an agreement the court may be prepared to rectify the document if there was a prior common intention, the intention of the parties did not change and the existence of the mistake was clear.[35]. It is not the contract which is rectified but merely the document that inaccurately purports to record the Intentions of the parties to the agreement.

Mutual Mistake : This is where both parties make a mistake, but it is a different mistake as where one party agrees to sell his car, the seller believing that he is offering his old Skoda for sale while the buyer believes he is being the seller's new B.M.W.

31 **Solle v Butcher** [1950] 1 K.B. 671
32 **Leaf v International Galleries Ltd** [1950] 2 K.B 86
33 **Frederick E.Rose Ltd v William H Pim Jnr & Co Ltd** [1953] 2 Q.B. 450
34 **Huddersfield Banking Co Ltd v Henry Lister & Co Ltd** [1895] 2 Ch 273
35 See **Earl v Hector Whaling Ltd** [1961] 1 Lloyd's Rep 459

Mutual Mistake at law : The rule is that if from the evidence a reasonable man would infer that in the example given above the contract was to sell the Ford Sierra then the court will notwithstanding Y's mistake hold the contract binding upon the parties to buy and sell, respectively, the Ford Sierra. In **Wood v Scarth**[36] the defendant offered in writing to let a public house to the plaintiff for £63 per annum. After an interview with the defendant's clerk the offer was accepted. The defendant had intended that a premium of £500 was to be paid as well but this had not been made clear by the clerk. The plaintiff believed that no premium was payable. The court held that the contract stood as it was with no premium payable.

Scott v Littledale [37] The plaintiff and defendant contracted for the sale of 100 chests of Congou tea then lying in bond 'ex the ship Star of the East'. The sale was by sample which the defendant sellers believed to be a sample of Congou tea as referred to in the agreement (which was a lower value tea) but in fact and by mistake was the sample of a totally different tea (worth much more money). The court held that this mistake did not entitle the defendant to avoid the contract. The defendant had contracted to provide a tea of the same quality as the sample.

It does not matter what the parties themselves actually intended. What counts is what a reasonable man would infer from their conduct. Where it is impossible to impute any agreement to the parties the court declares that no contract arises as where the evidence is so conflicting that mere speculation would have to be indulged in to infer a contract.

In **Scriven Bros v Hindley**,[38] acting on the plaintiff[1]s instruction an auctioneer offered a number of bales of hemp and tow for sale and placed samples on view before the sale. The catalogue did not explain the difference in the nature of the commodities and whilst the samples were marked with the number of the lots it was not specified which was hemp and which was tow. The defendant was the successful bidder for the tow though he thought he was bidding for hemp. The auctioneer realised the defendant was mistaken in some way but merely thought his mistake was in respect of the value of tow. The plaintiff sued to recover the amount of the defendant's bid. The court held that the action failed. There was no binding contract. The parties had never been 'ad idem' that is to say of the same mind. There was no consensus or agreement. The plaintiff had intended to sell tow. The defendant had intended to buy hemp.

In **Raffles v Wichelhaus** [39] the defendant agreed to buy 125 bales of Surat Cotton, ex The Peerless from Bombay. Two vessels of the same name sailed from Bombay, one in October the other in December. The defendant intended to buy from the first vessel to set sail and the plaintiff thought he was selling the cargo from the second vessel. The court held there was no binding contract between the parties as the defendant meant one ship and the plaintiff meant the other.

Mutual Mistake in Equity : In **Preston v Luck** [40] the court held that in respect of mutual mistake equity follows the common law. The court decides what was agreed by the parties. There is no room for the agreement to be set aside. Indeed, if the court finds that there has been an agreement to buy and sell a property it may even grant specific performance. In **Tamplin v James** [41] bought a public house at an auction. He thought that land besides the pub which had been used by the publican was part of the property he had bought whereas in fact it was the subject of a separate lease. His mistake did not entitle him to relief. On this basis a party cannot normally obtain rescission or rectification or resist specific performance on the ground of a mutual mistake, though relief may in exceptional circumstances be available if the occasion warrants it.

In **Paget v Marshall,**[42] the plaintiff wrote to the defendant offering to rent him a part of a block of 3 four storey houses for £500 per annum. The defendant wrote accepting the offer A lease was executed as above. The plaintiff then contended that he had always intended to keep the 1st floor of one of the houses as a shop. The court held that the plaintiff was entitled to have the lease annulled on the grounds of mistake or to have

36 **Wood v Scarth** [1855] 2 K & J 33 & [1958] 1 F & F 293
37 **The Star of the East : Scott v Littledale** [1858] 8 E & B 815
38 **Scriven Bros v Hindley & Co**. [1913] 3 K.B 564
39 **The Peerless : Raffles v Wichelhaus** (1864] 2 H & C 906
40 **Preston v Luck** [1884] 27 Ch.D 497
41 **Tamplin v James** (1880) 15 Ch.D 215
42 **Paget v Marshall** [1884] 28 Ch.D 255

the lease rectified to exclude the floor which he had intended to retain for his own use.

Misleading descriptions could qualify a party for relief as in **Swaisland v Darsely,**[43] though following **Riverlake Properties v Paul,**[44] it may be that the other party must be aware of the petitioner's mistake. If this is the case it is really more like unilateral mistake except that the mistake is negligently induced rather than the result of a deliberate fraud.

Unilateral Mistake. A unilateral mistake occurs where one of the parties to a contract makes a mistake as to an essential ingredient of the contract where the other is aware of that mistaken belief or is deemed to have constructive knowledge of it in the light of the circumstances. The usual case is one of mistake as to identity, usually induced by the other party. A mere self induced mistake as to the quality of a bargain or the fitness of goods for a particular purpose is not relevant for present purposes. The basic rule is caveat emptor, let the buyer beware.

Unilateral Mistake at Common Law. There is a rebuttable presumption is that in spite of the unilateral mistake a contract has been concluded between the parties since the offer was accepted by the person it was made to. In **Lewis v Averay,**[45]. the plaintiff advertised a car for sale. A rogue first telephoned and then called about the car. He introduced himself as 'Richard Green' the famous actor who starred as Robin Hood. They agreed a price of £450 for the car. When the rogue offered a cheque in payment the plaintiff hesitated. The rogue produced a Pinewood Studio admission pass with Richard Green on it and a photograph of the rogue. The plaintiff handed over the car and log book. The cheque bounced and the rogue sold the car to the defendant who bought in good faith in ignorance of the fraud. The plaintiff sued the defendant for conversion. The court held that the contract between the rogue and the plaintiff was voidable, not void. Thus unless the plaintiff avoided the contract before the car was resold the rogue was able and in fact did pass good title to the defendant.

The presumption is rebuttable if the offeror can show that at the time the offer was made he regarded the identity of the offeree as vitally important and that he intended to deal with some other person than the acceptor and that the latter knew this (not difficult if he is a rogue). It is very difficult to determine whether circumstances justify the rebuttal of the prima facie presumption that a person intends to contract with the one to whom he addresses his offer. Each case must be decided on its facts. The question is this. Has it been shown sufficiently in the particular circumstances that contrary to the prima facie presumption a party was not contracting with the physical person to whom he uttered the offer but with another individual whom he believed to be the person present physically ? The answer is a question of fact. Unilateral mistake does not appear to have caused any problems for charter parties and contracts of carriage.

Offer, Acceptance and Mistake : Under the rules of acceptance of a contract if A means his offer is available for acceptance by B then C cannot accept the contract. In **Boulton v Jones,**[46]. the defendant operated a credit set off system with Brocklehurst a leather dealer. On January 13th the defendant ordered a quantity of leather hose off Brocklehurst by mail. In the meantime Brocklehurst sold his stock and business to his foreman Boulton. Bolton received and processed the order. Some time after consuming the leather Jones received an invoice from Bolton. Jones thought that he had already paid for the goods because Brocklehurst owed him money and he had set off the bill against the debt and quite naturally did not want to pay twice for the same thing. Bolton brought an action to enforce the contract. The court held that Jones intended to contract with Brocklehurst and Boulton was not entitled to step into his place.

Cheshire & Fifoot[47] question whether or not the reason of the court was based on mutual or unilateral mistake and doubt the outcome. However, if there was no contract mistake does not have to be invoked at all. The nub of the question was not ownership of the property or a suit for conversion. Bolton apparently knew that Jones wished only to deal with Brocklehurst. Whatever the appearance, if C knows that the offer from A is not intended for C but for B then C cannot accept.

43 **Swaisland v Darsely** (1861) 29 Beav 430
44 **Riverlake Properties v Paul** [1975] Ch 133
45 **Lewis v Averay** [1972] 1 Q.B. 198
46 **Boulton v Jones** [1875] 2 fl & N 564
47 Cheshire & Fifoot, The law of Contract p253

Contrast this with the situation where A addresses an offer to C because he had cause to believe that C is wealthy whereas he is in fact poor. Here there are no grounds for avoiding the contract. In **King's Metal Norton v Edridge,**[48]. the plaintiff, metal producers, received an order for brass wire rivets from Hallam. The letter heading showed factories with large chimneys and gave a list of depots and agencies in Belfast, Lille and Ghent. In fact Hallam was a rogue called Wallis. The plaintiff traded with Hallam & Co for a while and were paid by cheques drawn on Hallam & Co. Eventually they received no payment on a dispatch and found the goods had been sent to Edridge's Metal Works of Birmingham on good faith and without notice of defect of title. King's Norton sued for damages for conversion. The court held that the plaintiffs had contracted with the person they intended to contract with and title had passed so the claim failed. If there had been a real Hallam & Co and the plaintiff had known of them the result would have been different as in **Phillips v Brooks**.

Terms of the Contract and Unilateral mistake. For a unilateral mistake to be operative the mistake by one party must be as to the terms of the contract itself. In **Hartog v Colin & Shield,**[49] the defendant, by mistake, offered to sell the plaintiff 30,000 Argentine hare skins at a price per pound. The usual practice was to sell skins at a price per piece and the other party knew this. The plaintiff accepted the offer and sued for damages when the defendant refused to deliver. The court held that the plaintiff's action failed. The plaintiff must have realised that the defendant had made a mistake.

A mere error of judgement as to the quality of the subject matter however, will not suffice to render the contract void for unilateral mistake. In **Smith v Hughes,**[50] the defendant, having inspected a sample of oats offered by the plaintiff, counter offered to buy the oats at a price. He later refused to take delivery on the basis that he thought he was buying old oats whereas the oats were new. The plaintiff had not claimed that the oats were old though the plaintiff knew that the defendant thought they were old. The court held that the defendant's passive acquiescence in the plaintiff's self deception did not entitle the defendant to avoid the contract.

Unilateral Mistake in Equity and Rectification. Equity follows the common law and admits in appropriate cases that the contract is a nullity and will formally set It aside or refuse specific performance. Furthermore rectification will be made in appropriate circumstances. In **Roberts v Leicestershire County Council,**[51] the plaintiff submitted a tender for work on a school to be completed within 78 weeks from date of instruction to commence work. The tender was accepted but the defendant put 30 months as the agreed period in the subsequent contract. If the plaintiff had tendered for 30 months he would have put in a higher price. The defendant did not point out the change in time scale to the plaintiff. The court held that the period of time in the contract could be rectified.

48 **King's Metal Norton Co Ltd V Edridge. Merrett & Co Ltd**. (1897] 14 T.L.R. 98.
49 **Hartog v Colin & Shield** [1939] 3 All.E.R. 566
50 **Smith v Hughes** [1871] L.R. 6 Q.B. 597
51 **Roberts (A) & Co. Ltd. v Leicestershire County Council** (1961) Ch 555

Self Assessment Questions

1) What is meant by saying the parties entered into a contract under a 'common mistake'?

2) How do common mistakes affect the enforceability of a contract?

3) What is the effect of a mistake as to quality made by both parties?

4) Discuss equity's treatment of common mistake.

5) When if ever is a contract void on the grounds that one party has entered into it under a mistake as to the identity of the other? Is there a valid distinction between **Ingram v Little** and **Lewis v Averay**?

6) When if ever is a contract void on the ground that one party intended his offer to be accepted by a specific person and another person has purported to accept the offer?

7) Jim had 3 pictures including a) one of Salisbury Cathedral by Constable. b) one of Salisbury Cathedral by another artist and c) a picture of a different church painted by Constable.

   Jim believed mistakenly that picture c) was of Salisbury Cathedral by Constable and that the other two were worthless. Fred believed that picture b) was of Salisbury Cathedral by Constable and that the other two were worthless.

   Jim wrote to Fred offering to sell him 'my picture of Salisbury Cathedral by Constable for £50,000'. Fred replied 'I accept'. Discuss.

   What difference if any would it make if none of the pictures were Constables?

8) With regard to mistaken identity in connection with the formation of a contract distinguish a void from a voidable contract.

9) Michael advertises his van for sale. A man comes to see it and offers to buy it for £I.000. Michael asks him if he intends to pay cash. The man produces a cheque book and says' You certainly need not worry about taking a cheque from me. bearing in mind who I am'. Michael looks puzzled so the man explains that he is Major Mick Killip of Ratscombe Park. Major Killip is. Michael knows. the husband of a member of the Royal Family. By checking in the gossip column of the 'Daily Post' Michael discovers that Major Killip lives at Ratscombe.Park.

   Michael accepts the man' cheque and lets him take the van. The cheque is dishonoured and by the time the van has been sold to Fred and the rogue had disappeared. Advise Michael.

10) Welsh Clay Co. supplied clay to potteries on a cash only basis. Grogshops bought all their clay from W.C.C. on a regular basis and maintained a credit balance of about £5.000 with the firm to ensure that there was always sufficient money to cover their orders. Grogshops telephoned an order for £2.000 worth of clay from W.C.C. which was taken by Jeremy the dispatch manager for the past 10 years: W.C.C. had in the meantime sold their business to their workforce. A fortnight later Grogshops having used up all the clay placed an order for more clay only to be told that they must pay for the last order first. Grogshops protested that W.C.C. should still be holding a credit of £3,000 on Grogshops behalf and asked what the problem was. Jeremy informed him that the firm was now owned by Welsh Clay Workers Cooperative.

    If Grogshops wanted their money back they would have to consult the previous owners and that Grogshops must pay for the clay they had received from W.C.C. Discuss.

CHAPTER TWO

DURESS AND UNDUE INFLUENCE

An agreement may be the result of some **improper** pressure exerted by one party over the other. If the pressure is **IMPROPER** the law will interfere.

Duress : Duress at common law allows a contract to be avoided because it renders it **VOIDABLE.** This means' that a party can avoid the contract at anytime before an innocent party gains an interest in the subject matter of the contract, without notice of the defective title. This must be contrasted with the situation where a contract is void "ab initio" which prevents an innocent third party ever getting title in the subject matter of the contract under the Nemo Dat Rules. Up to date Duress has meant actual violence or threats of violence to the person, that is to say threats to produce fear of loss of life or bodily harm.

1) The threat must be illegal, for example a threat to commit a crime or tort. It is not duress to threaten lawful imprisonment or to prosecute for a crime which has in fact been committed or to sue for civil wrong. But compare **Lloyds v Bundv**.
2) A contract is not invalidated by duress of goods.

Economic Duress. Contracts made because of threats to the other party's interests. In **North Ocean S.S. v Hyundai Construction Ltd.**[52] (1979) A agreed to build a tanker for B. A then refused to c6mplete unless B promised to pay a further 10%. B had made a profitable contract to charter the tanker on completion and so had agreed to pay the increased instalments. The court held that the extra payment could be recovered on the grounds of economic' duress since the threat not to complete was wrongful and coercive of B's will. In order to render the contract voidable

1) The threat must amount to a coercion of will. which vitiates consent. **Pao On v Lau Yiu Long.**[53] The claimant promised not to sell shares in FC for one year. Later they threatened not to perform this contractual undertaking unless FC's majority shareholder promised to indemnify the claimant against any loss the claimant might suffer if the shares fell in value. The majority shareholders gave this guarantee thinking that the risk was small and because they wanted to avoid adverse publicity. Therefore their will had not been coerced and their claim to avoid the guarantee failed.
2) The threat must be wrongful ie. illegitimate. **Williams v Roffey.**[54] a building contractor engaged the claimant,. a carpenter. to carry out work on 27 flats for £20.000. It became clear that the contract price was too low and that the carpenter could not complete the work without extra finance. The defendant promised to pay the carpenter an additional £10,000. The carpenter completed the work but the defendant refused to pay the extra money asserting that 'under the rule in **Stilk v Myrick**[55] that there was no consideration for the extra payment.

The court held that the defendant had to pay the extra and stated the following propositions

a) If A had entered into a contract with B to do work for / or supply goods or services to. B in return for payment by B. and
b) at some stage before A had completely performed his obligations under the contract B had reason to doubt whether A would or would be able to complete his side of the bargain. and
c) B thereupon promised A an additional payment in return for A's promise to perform his contractual obligations on time. and
d) as a result of giving his promise. B obtained in practice a benefit or obviated a disbenefit. and
e) B's promise was not given as the result of economic duress or fraud on the part of A. then the benefit to B was capable of being consideration for B's promise. so that the promise would be legally binding.

A contract variation is essentially a new contract. The consideration in **Williams v Roffey** amounted out of the benefit to B in avoiding the consequences of a penalty clause which would have resulted if A had not completed the contract. The distinction between the use of a penalty clause as an intentional weapon to force another party to make an additional payment for the performance of an outstanding pre-existing contract duty, amounting to economic duress and a similar state of affairs based on poor business judgement but without any intention to exert economic duress must be very fine!

52 **North Ocean S.S. v Hyundai Construction Ltd (Atlantic Baron)** (1979)
53 **Pao On v Lau Yiu Long** (1980)
54 **Williams v Roffey**
55 **Stilk v Myrick**

Contrast **William v Roffey** with **D and C Builders v Rees.**[56] In the latter case a builder was contracted to build an extension to a house. When the work was completed the customer refused to pay the whole price, saying to the builder 'take this cheque as full payment or you'll get nothing'. The builder took the cheque and sued for the balance. Held : The householder's conduct amounted to blackmail. She knew that the builder was strapped for cash and that if he didn't take the money offered he would be in severe financial difficulty. She claimed that the builder was estopped from claiming the full balance of the money. The court held that those wishing to rely on Equitable principles must come to court with clean hands. As a economic blackmailer she had to pay the balance since it would be inequitable to allow her to rely on the promise she had wrought out of the builder by economic duress.

What is Undue Influence?

This is an equitable concept. It is a situation where one party is in a position to dominate or unduly influence the will of another and, if this is the case, the party should be able to avoid the contract.

In **Alicard v Skinner,**[57] it was said to be: 'some unfair & improper conduct. some coercion from outside. some overreaching, some form of cheating & generally though not always, some personal advantage obtained by the guilty party".

Cases relating to undue influence generally fall into one of two categories. Those where a person alleging the undue influence has to prove it and those cases where the relationship between the parties gives one of them 'an ascendancy over the other so that equity presumes that undue influence has been exercised. In the latter case it is up to the stronger party to rebut the presumption by showing, for example, that the other party has had independent advice. In **BCCI v Aboody,**[58] the Court of Appeal adopted the following classifications:

Class 1: actual undue influence

Class 2: presumed undue influence. which is subdivided into two categories Class 2A - where a special relationship exists Class 2B - where there is no special relati6nship recognised in class IA, but the victim can prove that there is a relationship of trust between the parties'

Actual Undue Influence : The person claiming undue influence has to prove it. It must be shown that the one party exerted influence over the other and this resulted in a contract, which would not otherwise have been made. [59]

Presumed Undue Influence : These are cases where there is a special relationship between the parties & undue influence is presumed. The dominant party then has the burden of disproving this.

Examples of Class 2A relationships have included:

Doctor & patient	
Solicitor & client	**Wright v Carter**[60]
Parent & Child	**Powell v Powell**[61]
Trustee V Beneficiary	**Bennington v Baxter**[62]
Religious advisor & follower	**Allcard v Skinner**

These categories may be added to from time to time. One that has been accepted by the courts is where one person enjoys a special position of trust & confidence with the other & that other has made an unexplained & substantial gift to him. [63]

56 **D & C Builders v Rees** (1966) 2 Q.B. 617
57 **Alicard v Skinner** (I887) 36 Ch D 145
58 **BCCI v Aboody** [1990] 1 Q.B. 923
59 **Williams v Bayley** (1886) LR 1 HL 2000 and **Lloyds Bank v Bundy** [1974] 3 All ER 757
60 **Wright v Carter [1903] 1 Ch** 27
61 **Powell v Powell [1900] 1 Ch 243**
62 **Bennington v Baxter [1886] 12 CA**
63 See **Re Craig** [1970] 2 All ER 390 and contrast with **Re Brocklehurst** [1971]

Examples of Class 2B relationships include:

a. The position between banker & client

Generally there is no presumption of undue influence in the relationship between banker and client. Accordingly the client alleging this will have to prove it. **Williams v Bayley.**[64]

Where it can be shown that the bank has crossed the line from normal banking practice into the area of confidentiality, then the court needs to examine the facts to see if the duty owed by the bank has been broken. **Lloyds Bank v Bundy.**[65]

National Westminster Bank v Morgan [1985] AC 686 In this case Lord Scarman stressed that the bank must have crossed the line form normal banking transactions into an area of confidentiality but there must also have been a transaction 'which is to the manifest disadvantage of the person influenced'.

b. The position between husband & wife : It has been established that no presumption of undue influence exists. it must be proved. **Midland Bankv Shephard.**[66]

In **Barclays Bank v Obrien,**[67] the idea that wives should be accorded special treatment was rejected. Lord Browne-Wilkinson said that if the doctrine of notice was correctly applied there was no need for this and ordinary principles could be applied. He said there were 3 types of notice:

- Actual notice concerning the actual information possessed by the party
- Constructive notice which a party should have had if he had made the appropriate investigations
- Imputed notice where the party is deemed to have the knowledge of his agents.

He said that in cases where spouses were involved and one was standing as surety for another the creditor was put on constructive notice of the spouse's rights. To avoid this the creditor was expected to take steps to advise the wife of the risk she was taking and recommend independent advice.
Royal Bank of Scotland v Etridge,[68] The court suggested that the best way to comply with this was to insist that the wife had a separate meeting with the bank. in which the nature of the transaction was clearly explained to her & she was warned of the possible risks. She should also be advised to take independent legal advice. [69]

c. Other relationships : The House of Lords stated that the principles laid down in **Barclays Bank v O'Brien** would apply to others in a close relationship where one of the partners was acting as a guarantor for a loan.

CIBC Mortgages v Pitt.[70] The contention in **BCCI v Aboody** that manifest damage had to be shown was not necessary in cases where undue influence had actually been proved. It was only necessary where undue influence was presumed.

O'Brien and Aboody seemed to establish the following points:

1 If a wife stood surety for her husband's debts she had to be seen separately clearly told about the transaction warned of the risks & told to seek independent advice. If these steps were complied with then the institution would not be fixed with constructive notice of the wife's rights.

2 For a wife to succeed in a claim she has to show actual undue influence not presumed or misrepresentation by the husband. plus the lack of independent advice.

3 If a husband & wife applied jointly for a loan there was no such constructive notice fixed on the creditor.

It appeared that after O'Brien that a bank had to take cautious steps where a loan was being guaranteed to avoid being fixed with constructive notice of a partners undue influence or misrepresentation.

64 **Williams v Bayley** [1886] LR l HL 200
65 **Lloyds Bank v Bundy** [1975] QB 326
66 **Midland Bankv Shephard** [1987] 3All ER 17
67 **Barclays Bank v OBrien** [1993] 4 All ER 417
68 **Royal Bank of Scotland v Etridge [1998] T.L.R. 17/8/98**
69 See also **Davies v Norwich Union Life Insurance Society [**1998] LTL 4/1/98
70 **CIBC Mortgages v Pitt** [1993] 4 A11 ER 433

In cases of presumed undue influence the onus is on the dominant person to establish that no abuse of his position took place & this burden is best established by showing that the subservient partner took independent financial advice.[71]. A bank may be able to delegate responsibility to others involved in a case e.g. solicitor, **Massey v Midland Bank.**[72] In **Bank Melli v Samadi Rad,**[73] this view was challenged and the judge stated that the solicitor should be an independent one.

Undue influence is an important concept which has been developed in recent years. It has been used in domestic cases where one party has influenced the will of another, but it appears that the courts are reluctant to extend it further at the present time & have limited its use to guarantors of a loan.

SUMMARY OF UNDUE INFLUENCE

Actual Undue Influence : The plaintiff must prove that the transaction was affected by undue influence e.g. BCCI v Aboody.

Presumed Undue Influence : Recognised relationships Class 2A : The burden will be on the defendant to disprove the influence. Recovery under this head requires transaction to be to manifest disadvantage of plaintiff Nat West Bank v Morgan.

Presumed Undue Influence: Other relationships Class 2B : Once it is shown that person is in a dominant position any disadvantageous transaction will be presumed to have been affected by undue influence. Can be bank manager / client or Husband / wife

Undue Influence & Third Parties : This should be dealt with by the doctrine of notice.[74] If a surety has been affected by undue influence (or misrepresentation) by a third party e.g. the wife's husband, the creditor will only be affected if he or she had actual or constructive notice. The creditor will be protected by advising the surety of the risks involved and the need to take independent advice. The creditor is entitled to assume a solicitor will give proper advice.[75]. The same principle of notice applies to actual undue influence by a third party. [76]

S**elf** Assessment Q**uestions**

1) What are the necessary ingredients for a successful claim in economic duress.

2) A threatens to break his contract with B if B does not pay him more money. B pays up. Can B seek repayment of the extra money?

3) When will the courts give relief against transactions entered into under undue influence?

4) What happened in Lloyds Bank v Bundy?

5) Mr and Mrs Black have banked with the Middleshire Bank for may years. They have a joint account and Mrs Black has a separate investment account. Mr Black's business is doing badly and he wishes to increase his overdraft facility with the bank. The bank alleges to this on the basis that Mrs Black signs a guarantee and charges various share certificates as security. The bank manager prepares the instruments for Mrs Black to sign but does not advise her of the nature and effect of the guarantee and charge. Mrs black inherited the share certificate from an elderly uncle and being ignorant in matters of finance has always looked to the bank manager for financial advice.

   Mr Black's business fails and Mrs Black wants to have the charge instrument and the guarantee set aside. Advise her.

6) Explain why there was no economic duress in **Williams v Roffey** and contrast it with the case of **D and C Builders v Rees.**

71 See **Banco Exterior International v Mann** [1995] 1 All ER 936 ; **Massey v Midland Bank plc** [1995] I AII ER 929 ; **TSB plc v Camfield** [1995] 1 All ER 951

72 **Massey v Midland Bank** plc [1995] 1 All ER 929

73 **Bank Melli v Samadi Rad** [1995]

74 see **Barclays Bank plc v O'Brien**

75 **Royal Bank of Scotland v Ettridge (no2)** 1998

76 **CIBC Mortgages plc v P.H** 1993.