

What would you do if you got ripped-off in a beauty centre? (Part II)

(Relevant to AAT Examination Paper 6: Fundamentals of business law)

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The scenario¹

Jenny was lured by a magazine advertisement to join an \$888 weight loss programme with a beauty centre. Whenever she went for a treatment, she was repeatedly pressurized by the beauty consultants to upgrade her plan. She was forced to listen to their requests while she was naked on the massage bed or confined to a weight loss machine. These highly trained consultants have irresistible and persuasive skills and they do not take no for an answer. Within a month, Jenny upgraded her \$888 basic plan to a \$188,888 diamond plan and was heavily in debt to her credit card as a result. Jenny wants to know whether there are any legal grounds on which she can set aside the whole weight loss contract in addition to the unconscionable contract (as discussed in Part I²).

Undue influence

Legal definition

There was a contract between Jenny and the beauty centre for Jenny to buy the Diamond programme for \$188,888. The first thing to do is to analyze whether there are any vitiating factors which would allow Jenny to set aside the contract. Looking at the facts in the scenario, undue influence seems to be the most obvious possible factor.

There is no exhaustive list or precise definition as to what amounts to undue influence.³ Undue influence applies where a contract has been obtained by certain kinds of improper pressure which fall short of duress.

The courts have distinguished undue influence into three classes: Class 1 – Actual undue influence; Class 2A – Presumed undue influence (the relationship category approach); and Class 2B – Presumed undue influence (the de facto relationship approach)⁴.

¹ This scenario is totally fictional, and any resemblance to any actual event is coincidence

² The details of the scenario and the discussions on the Law of Unconscionable Contract can be found in T/Dialogue of April 2009 p.26

³ In *Lloyd's Bank v Bundy* [1974] 3 All ER 757, Lord Denning held inequality of bargaining power itself would amount to undue influence but this conclusion had been expressly rejected in *National Westminster Bank v Morgan* [1985] 1 All ER 821, Lord Scarman held unequal bargaining power is only one of the considering factors for determining the existence of undue influence.

⁴ In *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, the court distinguished undue influence into class 1 and class 2 and the court had further subdivided class 2 undue influence into class 2A and 2B in *Barclays Bank plc v O'Brien* [1994] 1 AC 180. However, in the case of *Royal Bank of Scotland plc v Etridge (No.2)* [2001] UKHL 44 [2002], the court had criticized whether those classifications were necessary.

Class 1 – Actual undue influence

Actual undue influence is described as dominance preventing the exercise of free will. It is necessary for the victim to prove affirmatively the wrongdoer had actually exerted undue influence on her to enter into the contract.⁵

In our case, Jenny was confined on a massage bed and bombarded by repeated requests and repetitive persuasions by a crowd of beauty consultants. This conduct may amount to “dominance” considering the home advantage of the salespeople, and their knowledge of the products being sold. When they refused to take “no” as an answer and it amounted to “prevent exercise free will”.

However, if Jenny really brought the matter to the court, the beauty centre would definitely deny those facts. Without an independent witness at the scene, I cannot evaluate the chance of success in proving her claim of actual undue influence.

Class 2 – Presumed undue influence

To succeed in a Class 2A or Class 2B claim, there must be a fiduciary relationship between the beauty centre and Jenny and the beauty centre must either exercised actual dominance⁶ or abuse of a relationship⁷ and the transaction must be manifestly disadvantageous to her⁸.

Class 2A – Presumed undue influence

For Class 2A to succeed, Jenny has to show that there was a relationship of trust and confidence between her and the beauty centre within the “special relationship category”⁹ such as a doctor (known as the dominant party) and a patient¹⁰ (known as the subservient party). If such special relationship existed, then the exertion of undue influence is automatically presumed. The beauty centre has the burden to submit evidence to rebut such a presumption.

However, I do not think a connection between the beauty consultants and a customer would

⁵ *Williams v Bailey* (1866) LR 1 HL 200

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⁷ *Goldsworthy v Brickell* [1987] Ch 378

⁸ According to *National Westminster Bank v Morgan* [1985] 1 All ER 821 and *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, the court required the transaction must be “manifest disadvantage” to the claimant. This requirement was rejected by Lord Browne-Wilkinson in *CIBC Mortgages plc v Pitt* [1994] 1 AC 200 but the “manifest disadvantage” requirement apparently reaffirmed in the case of *Barclays Bank v Coleman* 1 All ER 385 by Nourse LJ.

⁹ This special category also included parent and child (*Lancashire Loans Co v Black* (1933)), solicitor and client (*Wright v Carter* (1903)), trustee and beneficiary (*Benningfield v Baxter* (1886)), religious advisor and believers (*Roche v Sherrington* (1982)) but not husband and wife (*Midland Bank v Shepherd* (1988)).

¹⁰ *Mitchell v Homfray* (1881) 8 Q.B.D. 587

fall into the special relationship category under class 2A unless the beauty consultants relied on some sort of professional qualification¹¹ so as to earn Jenny's confidence.

Class 2B – Presumed undue influence

For Class 2B, where the relationship of the parties does not fall within the special relationship categories, then Jenny has to establish a de facto relationship with the beauty centre under which Jenny reposed trust and confidence in the beauty consultants so as enable them to take unfair advantage of her.¹²

If Jenny could have established a relationship under which Jenny generally regained trust and confidence in the beauty consultants then the presumption would be raised and the burden of proof would shift. The onus would be on the beauty centre to prove the non-existence of undue influence.

However, it does not take a sophisticated person to realize that those so-called “beauty consultants” are in fact salespersons aimed at earning commission and meeting their sales quota. In absence of other evidence, it might not be easy for Jenny to argue that she regained trust and confidence on such a customer and salesperson relationship. Therefore, in my view, Jenny would be unlikely to succeed in her Class 2B claim.

Effect of undue influence

If Jenny has been induced to enter the upgraded weight-loss contract by undue influence then the effect would render the contract voidable and Jenny would be entitled to rescind the contract within a reasonable time, as such rescission is an equitable remedy in which could be defeated by undue delay.¹³

Conclusion

According to the facts of the scenario, neither Class 2A nor 2B – Presumed undue influence could have arisen from the relationship between Jenny and the beauty centre. Hence, the burden is on Jenny to prove on the balance of probabilities that the beauty consultants exerted undue pressure to force her to enter the Diamond programme contract for the claim of a Class 1 – Actual undue influence to operate. It is uncertain whether or not the claim would succeed, as this would depend upon the evidence from both sides.

¹¹ Such as a qualification of a registered dietitian

¹² *Lloyd's Bank v Bundy* [1974] 3 All ER 757

¹³ *Allcard v Skinner* (1887) 36 Ch D 145