

**Law of Contract 2004 Exam**  
**Question 2**  
**High Distinction**

Anne is trying to rescind the contract of the guarantee with Mark. She might argue on two grounds. Unconscionability and Undue Influence.

**Unconscionability**

Anne can argue that under Case law, her situation is similar to that in *Garcia v National Australia Bank* because she is a volunteer “defacto” wife who signed the contract of guarantee for her partner without understanding the document or the risk, totally trusting her partner’s business judgment and ability.

The difficulty in her argument is that she is not a wife to Simon, therefore despite their relationship, *Garcia* may not apply. However, Anne can argue that the case applies to situations where volunteer partners which she is one, signs a contract guaranteeing the other partner’s debt (payment) without understanding it, there is no authority stating that it does not equally apply to “de facto” wives.

Besides, she is a volunteer partner who does not get any direct benefit from the contract, and she does not understand any business risk as she is not in business herself (the shares and bonds are from her father). So the situation would arguably suit that in *Garcia*. Therefore the Court [may] accept her argument and rescind the contract on the grounds of Unconscionability. So, Anne’s \$150,000 can not be taken away by Mark’s company “Prime Buildings.”

If the above agreement fails because of the fact that Anne is not a real wife, she may also bring an action of Unconscionability under the Fair Trading Legislation against Prime Buildings (PB).

Because PB is a corporation (Pty Ltd), Anne can sue under the Trade Practices Act 1974 (Cth) (referred to as TPA) for Unconscionability. S51AC of the TPA prohibits unconscionable conduct by (or towards, which is not relevant here) a corporation in relation to business transactions, which applies here because arguably the contract of guaranteeing payment for alteration of the ship can be considered a business transaction.

Anne has to argue that the conduct of PB (Mark) was unconscionable. In determining this, the Court would look at the factors listed in s51AC(3) of the TPA, which only assists the Court in determining whether a conduct is unconscionable, but are not to control it (*Australian Corporation v Simple Hoknead*).

Anne can argue subsections (c) and (d) of s51AC(3) of TPA that she did not understand the document at all(c) and that there was arguably undue influence exerted on her by Mark (d) because Mark is a brother (acting like a father) to her partner Simon (see detailed discussion below in undue influence). The fact that only two factors (c) and (d) are satisfied in this situation may be sufficient to prove that Mark (PB) was unconscionable.

However, it largely depends on the Court's decision because 2 factors in s51AC(3) may not be enough.

If the Courts as the above argument suggests, finds that PB was acting unconscionably when contracting with Anne, Anne is entitled to, under s82 of the TPA, any loss or damages caused by PB's conduct. However, from the facts she can not prove any loss or damages suffered. She just wants rescissions. Under s87 of TPA the Court is at its discretion as to whether or not to order rescission of the guaranteeing contract between PB and Anne, in this case since there is no damages it is likely for the Court to order rescission of the contract. So Anne saves her \$150,000.

### **Undue Influence**

If Anne fails in suing for Unconscionability in both ways discussed above, she can also sue for undue influence (from Mark) in order to rescind the contract between her and PB. She may argue that because there is a prior relationship of confidence between Mark and Simon (the brotherhood and the stronger relationship caused by the death of their parents and the age difference) and therefore arguably, there is a prior relationship of confidence between herself and Mark because Mark is a very close relative to her boyfriend Simon and the special confidence between Simon and Mark extends to her.

She could argue that although she is not related to Mark (confidential relationship does not necessarily exist only between relatives *Johnson v Buttress* she trusted Mark (as given in the facts) and that is an important reason why she signed the contract. Therefore it is very likely for the Court to find that a prior relationship of confidence exists between Anne and Mark. So that undue influence is presumed (*Johnson v Buttress*).

Then the burden shifts to Mark to prove that the contract was the product of exercise of Anne's free will. Generally he may do so by proving that independent advice has been obtained by Anne as to the risk and nature of the contract. However in this case, he is not able to do so because Anne did not know anything about this sort of business dealing (as in the facts). Therefore Mark can not rebut the presumption of undue influence and the Court is likely to order rescission of the contract between Anne and Mark's company (PB) on the grounds of undue influence.

If Anne can rescind the contract of guarantee on any grounds discussed above, she does not have to pay the \$150,000 to PB.