In a rare case, Mrs Justice Rose considered in detail the relationship between bankers and commercial investors and whether certain banking transactions should be rescinded, on the basis they were procured by the exercise of undue influence or further to an unconscionable bargain.

Mrs Justice Rose’s judgment in The Libyan Investment Authority v Goldman Sachs International [2016] EWHC 2530 (Ch) sets out a helpful summary of how the law in these areas operates with regards commercial investors, and highlights that the courts are reluctant to be prescriptive with regard to when it will be appropriate to hold that there has been undue influence, such that the outcome in a particular case will necessarily be heavily dependent on the facts. The starting point remains that the courts will seek to uphold freedom of contract and commercial certainty unless it is clearly demonstrated in a particular case that it would not be fair to do so.

The English courts have, in recent years, considered a variety of arguments on behalf of investors involved in disputes with their bankers concerning the enforceability of rights and obligations in investments where those investors have suffered often very significant losses following the market disruption of the 2007/2008 financial crisis, or have otherwise not made the returns for which they had hoped. The starting point for the court in all such cases is to consider whether grounds have been made out by the investor to justify deviating from the general public policy that contractual terms should be upheld and commercial certainty should be protected.
Arguments relying on undue influence are more commonly seen in the context of dealings with individuals and alleged exploitation in a family setting rather than a commercial setting (e.g. bank transactions where a spouse alleges undue influence by their partner or where a child alleges undue influence by their parent or the other way around). This case is by no means the first time an investor has sought to rely on undue influence or analogous arguments outside that context, including arguments concerning breach of fiduciary obligations, abuse of confidence, breach of the fair dealing rule, or exploitation of vulnerability arising from the trust and confidence placed by an investor in his or her banker – see for instance JP Morgan Chase Bank and Others v Springwell Navigation Corporation [2008] EWHC 1186 (Comm). However, it has been some time since such points have been dealt with by the courts in such detail in the context of commercial investors.

The arguments raised by The Libyan Investment Authority (LIA, a sovereign wealth fund) were that it should be permitted to rescind a number of leveraged synthetic derivative trades on which LIA had paid Goldman Sachs approximate premiums of US$1.2 billion. LIA sought rescission of the transactions and repayment of the premiums paid on the basis that Goldman Sachs had allegedly procured the transactions by the exercise of undue influence. LIA claimed that Goldman Sachs had taken advantage of it as a naïve and unsophisticated investor and had pushed it to enter into the transactions. Further, LIA contended that the transactions constituted unconscionable bargains. Goldman Sachs contested the claim.

Mrs Justice Rose commenced her analysis of the legal position with a reminder that, generally speaking, the law will not intervene to save people from making improvident bargains – she quoted Lord Hoffmann’s statement in the Privy Council decision in Union Eagle Ltd v Golden Achievement Ltd [1997] AC 514 to the effect that the notion that the court’s jurisdiction to grant a party relief from the consequences of its contract is unlimited and unfettered must be rejected as a “beguiling heresy”.

Undue Influence

Mrs Justice Rose then went on to consider the doctrine of undue influence. One of the key themes which emerges from her analysis of the case law is that the courts repeatedly warn against trying to ‘over define’ the relevant elements of the doctrine and the situations when equity will intervene to displace a deal that has been done. As a starting point:

- **The law will not assist someone if they have made their own decision (even if that decision turns out to have unfortunate consequences):** Equity will not step in to save persons from the consequences of their own folly.
- **However, the law will assist someone who is victimised...** Equity will intervene in circumstances where it is "right and expedient to save [someone] from being victimised by other people" (per Lindley LJ in Allcard v Skinner (1887) 36 Ch Div 145).
- **... where that victimisation has served in effect to negate 'free will'** (which underlies the starting point of the relevant public policy protection, of freedom of contract):
  - The claim that there has been undue influence is not necessarily immediately negated even if the victim made a decision of their own. It is not necessary to show that the victim’s will or intention was completely overborne in order for the claim to succeed (Hewett v First Plus Financial Group [2012] EWCA Civ 312).
  - The critical question is whether and how the victim’s decision-making process was influenced: did the relevant persuasion or advice "[invade] the free volition of the donor to accept or reject the persuasion or advice or withstand the influence"? (per Ward LJ in Drew v Daniel [2005] EWCA Civ 507).
  - The court will look at how the party’s intention to enter into the transaction was secured. If the intention to transact was procured by "an unacceptable means" the law will not permit the transaction to stand. The means that are used will be regarded as unacceptable "whenever the
Undue influence can be **actual** (where there are specific instances of unconscionable conduct), or **presumed** (based on circumstances that have arisen – this is a rebuttable evidential presumption, and requires the existence of a protected relationship between the parties).

In this case, LIA contended there had been actual undue influence, by each of:

- **Alleged improper inducements offered by Goldman Sachs:**
  - It was alleged that the extensive and lavish corporate hospitality offered to LIA personnel and the employment of an LIA director's family member as an intern at the bank constituted improper inducements which gave rise to influence.
  - There was a legal dispute with regards whether an inducement (as opposed to a threat) can constitute influence in any event. As a point of principle, Mrs Justice Rose agreed with LIA that the fact that an inducement or bribery is actionable in other ways does not mean that inducements amounting to bribes cannot also be a form of actual undue influence.
  - However, having considered the facts in detail, she concluded that, in this case, the inducements did not give rise to the influence alleged.

- **Alleged breach by Goldman Sachs of duties arising out of the nature of the relationship, to act with candour or fairness towards LIA:**
  - Mrs Justice Rose gave detailed consideration to the law which applied in circumstances where a relevant 'protected relationship' might be said to arise (although this, ultimately, will be a fact-dependent issue), and, once arisen, what obligations and duties are imposed on the stronger party as a result of the protected relationship (essentially being duties to behave with candour and fairness).
  - LIA's case in this regard was that a protected relationship arose because it had at relevant times been seriously lacking in sophistication as regards financial dealings. It argued that Goldman Sachs had taken unfair advantage of LIA's lack of sophistication. This necessitated detailed consideration by Mrs Justice Rose of the level of sophistication at the LIA – and she determined that it was the sophistication of the people who made relevant decisions to enter into the trades which was relevant. Having considered the evidence in detail, she was not persuaded that the arguments on lack of sophistication were made out.
  - LIA also argued that the relationship was otherwise out of the ordinary. However, after scrutinising the relationship, Mrs Justice Rose concluded that many banks and financial institutions were eager to do business with the LIA. The fact that Goldman Sachs was prepared to go the extra mile when competing for this business did not mean that the relevant line had been crossed - from a strong, cordial business relationship between a buyer and a seller of financial services to the kind of relationship of trust and confidence which would give rise to additional duties on the part of the bank.
  - Despite finding that no protected relationship arose, Mrs Justice Rose went on to consider (and reject) the arguments and evidence relied on by LIA with regards the alleged breaches by Goldman Sachs of duties of candour and fairness. These arguments were based on LIA having fundamentally misunderstood the nature of the trades and Goldman Sachs allegedly having
Despite finding no relevant protected relationship, Mrs Justice Rose considered whether the transactions still "called out" for an explanation (being the second limb of the test for presumed undue influence). Her considerations included a review of the bank's profits on the trades, how they were priced, and whether they were "suitable" for the LIA to make. She found there was nothing about the nature of the trades which would raise a presumption (even had a relevant protected relationship existed) that they were the result of undue influence.

**Unconscionable bargain**

Mrs Justice Rose also evaluated LIA's argument that there had been an unconscionable bargain. In doing so, she considered *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221, which confirms that the basis for such a claim is:

- **Impropriety:** There must be some impropriety in the conduct of the stronger party and the terms of the transaction which "shocks the conscience of the court", such that it is against equity and good conscience that the stronger party should be allowed to retain the benefit of a transaction unfairly obtained.

- **Unfair advantage taken of a disadvantaged position:** One party has to have been at a serious disadvantage to the other (whether through poverty, ignorance, lack of advice or otherwise, so that circumstances existed of which unfair advantage could be taken).

- **Morally culpable behaviour:** The weakness of one party has to have been exploited by the other in some morally culpable manner.

- **Overreaching or oppressive result:** The resulting transaction must be not merely hard or improvident, but overreaching or oppressive.

Given her detailed review of arguments and evidence to make her findings on the undue influence claims, Mrs Justice Rose held that it followed without further discussion that the claim to set aside the trades as an unconscionable bargain failed in this particular case.

Even where there is an actual or apparent inequality between an investor and its bank with regards knowledge and understanding of particular products, and even where the bank has invested significant effort in procuring transactions, this will not necessarily be enough for a court to find that it would be unfair to hold the investor to its bargain. It is clear that evidence about the investor's actual understanding of the transactions that it was entering into, and the internal processes that the investor went through when entering into transactions, is key. However, the overriding principle guiding the English court’s approach is freedom of contract and holding parties to the bargains they have made unless there is good reason not to do so.