

THE UNDUE INFLUENCER

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INTRODUCTION

Not many today would disagree that it is the *age of the social media influencer*.

Social media influencers are ubiquitous. Spend any time at all scrolling through social media platforms such as TikTok, Instagram or YouTube and you are bound to come across at least one, if not an endless stream of such personalities. They come in all shapes and forms (persons local and international e.g. Neelofa, Khairul Aming, Cristiano Ronaldo, Kim Kardashian, Andrew Tate; and non-humans e.g. Moo Deng, the pygmy hippopotamus; Jiffpom, a Pomeranian dog; and Miquela a robot/fictional influencer) and engage in all sorts of activities – some promote travelling and travel destinations that the rest of us can only dream about; others sell homemade or commercially made products (e.g. cosmetics, handicraft, food and clothing), and still others act (e.g. skits, parodies, pranks, impersonate celebrities and other personalities), sing and dance. They are the modern-day virtual and real-life celebrities.

But who or what is an ‘influencer’? An ‘influencer’ is ‘a person who is paid by a company to show and describe its products and services on social media, encouraging other people to buy them’ (the Cambridge Online Dictionary).¹ Another online definition of an influencer is ‘[i]n the broadest terms, an influencer is someone who inspires or guides the actions of others. Usually, we think of influencers in terms of marketing — a person who promotes a product, often on social media. ...’.² More generally, the word is defined as ‘someone who affects or changes the way that other people behave’.³

This article aims to discuss (in brief) the role and influence (power to influence) of a typical social media influencer and examine (in some depth) whether such influence, if improperly used on the influencer’s followers with the aim of procuring a contract between the parties (e.g. sale

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¹ ‘Influencer’ (Cambridge Dictionary) <<https://dictionary.cambridge.org/dictionary/english/influencer>> accessed 10 March 2025

² ‘The Age of Influencers’ (Communicate Health, 10 October 2024)

<<https://communicatehealth.com/wehearthealthliteracy/the-age-of-influencers/>> accessed 5 April 2025

³ ‘Influencer’ (Cambridge Dictionary) <<https://dictionary.cambridge.org/dictionary/english/influencer>> accessed 10 March 2025

and purchase of products) and which does result in such a contract, will that contract be voidable for *undue influence*, a recognised vitiating factor in the law of contract.

SOCIAL MEDIA INFLUENCERS/INFLUENCERS AND THEIR (COMMERCIAL) APPEAL (IN BRIEF)

It is undeniable that social media influencers/influencers have a positive direct impact on commerce in Malaysia. According to one online source, statistics show a ‘78% increase in brand engagement when influencers are part of the campaign’⁴ and ‘[b]rands that strategically align with influencers experienced a 40% growth in revenue compared to those relying solely on traditional advertising methods.’⁵ The source also claims that ‘63% of consumers in Malaysia trust influencers’ recommendations over traditional advertisements’ and this is due to the ‘genuine connections between influencers and their audience’.⁶ In other words, there is a relationship of trust between the parties where the followers somehow identify with these influencers (bear in mind that many famous influencers did not start out as celebrities but were merely ordinary people). When a trusted influencer uses and endorses a known product or makes a product and uses it themselves (e.g. cosmetics), their followers naturally are motivated to try that product – think of it as an endorsement from a trusted friend of some product they have tried and liked.

From the above, it is possible and definitely arguable that the relationship between the influencer and their followers is one that can be abused/misused, and thus the question is: is there any role for the vitiating factor of undue influence in this area?

UNDUE INFLUENCE AND CONTRACTS

In general, all contracts must be entered into freely by the relevant parties and the presence of vitiating factors affect the validity of contracts in different ways. Section 10 of the Contracts Act 1950 (Act 136) states:

⁴ MYSense_admin, ‘Influencers in Malaysia: The Impact on Digital Landscape’ (*MYSense*, 4 January 2024) <[⁵ Ibid](https://mysense.com.my/influencers-in-malaysia-the-impact-on-digital-landscape/#:~:text=The%20Power%20of%20Influencer%20Marketing,solely%20on%20traditional%20advertising%20methods.>” accessed 5 April 2025</p></div><div data-bbox=)

⁶ Ibid

What agreements are contracts

10. (1) All agreements are contracts if they are made by the *free consent of parties* competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

(Emphasis is the author's.)

Section 14 of the same Act states that '[c]onsent can be said to be free when it is not caused by ... (b) undue influence, as defined in s 16 of the CA1950.' Undue influence is a vitiating factor in Malaysian contract law and is defined by s 16 of the Act.

Undue influence

16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3)(a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

...

Section 16 of our Contracts Act embodies English law on undue influence.⁷ However, when Malaysian courts are considering cases of such, naturally the words of the Contracts Act 1950

⁷ Cheong May Fong, *Contract Law in Malaysia* (Student Edition, Sweet and Maxwell 2013) 227

will have to be regarded.⁸ Nevertheless, cases from other jurisdictions (e.g. England and Wales) that are similar to Malaysia can/will be referred to.⁹

According to s 16 of the Act, there are three elements that need to be established for undue influence to taint a contract: (1) a party (the wrongdoer here) was in a dominant position in the relationship relative to the victim, and (2) the wrongdoer used that position to enter the contract/transaction, and

(3) the transaction was an ‘unfair’ one to the victim.¹⁰

There are two classes of undue influence (as originally recognised in English law, see the English case of *Allcard v Skinner*¹¹: actual undue influence and presumed undue influence). Cotton LJ stated¹²:

These decisions may be divided into two classes - First, where the Court has been satisfied that the gift was the result of *influence expressly used by the donee for the purpose*; second, *where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor*. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.

[Emphasis is the author's.]

The English Court of Appeal in *Bank of Credit and Commerce International SA v Aboody*¹³ subdivided the second class (presumed undue influence) into two sub-classes. These are Class 2A and Class 2B. The former (2A) comprises relationships that give rise to the presumption of undue influence (e.g. religious superior and inferior, doctor and patient) and the latter (2B) contains relationships that do not fall into Class 2A but can be shown to become like

⁸ Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (5th edn, LexisNexis 2023) 395

⁹ *Ibid*

¹⁰ *Ibid*

¹¹ (1887) 36 Ch D 145

¹² *Ibid* 171

¹³ [1992] 4 All ER 955

relationships within Class 2A (e.g. husband and wife).¹⁴ This classification was eventually adopted by the House of Lords in *Barclays Bank plc v O'Brien*.¹⁵ It is noteworthy that the United Kingdom's House of Lords in *Royal Bank of Scotland plc v Etridge (No 2)*¹⁶ disagreed with this approach stating (Lord Nicholls and Lord Clyde) that the distinction between actual and presumed undue influence could give rise to confusion.¹⁷

The Two Classes of Undue Influence in Malaysia

The first class i.e. actual undue influence (Class 1) consists of cases where the victim can successfully prove that the wrongdoer (the dominant party) used/exerted undue influence to enter the transaction (a contract or a gift). Section 16(1) of the Contracts Act 1950 applies here. In Class 1 cases, evidence must be adduced to show that at or about the time of the transaction the wrongdoer was in a dominant position relative to the victim and that the wrongdoer used undue influence to obtain the transaction.¹⁸ What would this scenario look like? From *Allcard v Skinner*.¹⁹

First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor.

A case to illustrate this would be *Morley v Loughnan*.²⁰ It is crucial to note that victims must be able to adduce evidence of the above for the case to be considered one of actual undue influence.

What about the requirement of an 'unfair advantage' as mentioned in s 16(1) of the Contracts Act 1950? It would seem that such an unfair advantage needs to be shown as per the statute, but the High Court in *Polygram Records Sdn Bhd v The Search*²¹ held that for actual undue influence an unfair advantage was unnecessary. The High Court followed *CIBC Mortgages plc v Pitt*²², a United Kingdom House of Lords decision on this. Thus, in summary, the position

¹⁴ Ibid 964

¹⁵ [1993] 4 All ER 417

¹⁶ [2001] 4 All ER 449

¹⁷ Cheong May Fong, *Contract Law in Malaysia* (Student Edition, Sweet and Maxwell 2013) 230

¹⁸ Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (5th edn, LexisNexis 2023) 398

¹⁹ (1887) 36 Ch D 145, 181

²⁰ [1893] 1 Ch 736

²¹ [1994] 3 MLJ 127

²² [1994] 1 AC 200

today is for a case of actual undue influence, all that is needed is that the victim proves that the wrongdoer in the dominant position exerted actual undue influence to gain a gift or enter a contract, regardless of whether the transaction is fair or unfair.

Where the victim cannot prove successfully that the dominant party exerted undue influence, they can attempt to bring the case within Class 2: presumed undue influence. Here, the court will presume undue influence if the victim can show that the wrongdoer was in a dominant position in relation to the victim at the relevant time, and what resulted was an unfair (or unconscionable) transaction.²³ Once the victim has successfully established the above, the burden will shift to the wrongdoer to prove that there was free consent on the victim's part in entering the transaction.²⁴

The Requirement of 'Dominance'

This requirement is of paramount importance. The Privy Council in *Ragunath Prasad v Sarju Prasad*²⁵ held that the victim must **first** establish that the wrongdoer was in a dominant position in their relationship and this applies whether actual or presumed undue influence is relied upon. If this is not established, the victim cannot move on.²⁶ The question then is: how can the victim prove that the wrongdoer was in fact in a dominant position? Section 16(2) is helpful here as the subsection provides that in certain situations, the court will **deem** that the wrongdoer is in a dominant position:

(2) In particular and without prejudice to the generality of the foregoing principle, a person is *deemed* to be in a position to dominate the will of another —

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

[Emphasis is the author's.]

²³ Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (5th edn, LexisNexis 2023) 400

²⁴ *Ibid*

²⁵ AIR 1924 PC 60 (PC, India)

²⁶ Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (5th edn, LexisNexis 2023) 401

Section 16(2)(a) is of relevance to situations that concern social media influencers/influencers (and this will be the focus). Thus, in a situation where a follower of an influencer has entered an unfair transaction with the influencer and seeks to set the transaction aside for undue influence, this hurdle must be overcome first, whether the victim seeks to establish actual or presumed undue influence. The victim will need to show that the wrongdoing influencer held a real or apparent authority over him/her or establish that the influencer and they (the victim) stood in a fiduciary relationship at the relevant time. We will return to this shortly.

Once the above is settled, if the case is one of actual undue influence, then the victim will need to prove to the court that undue influence was actually exerted (*Allcard v Skinner* (1887)) and if that can successfully be done, the transaction is voidable and can be set aside. However, if the case is one of presumed undue influence, then what must follow is that the victim must prove that the transaction was an unfair one.

The Requirement of ‘Unfair Advantage’

For cases of presumed undue influence, this is the second element: the wrongdoer gained an ‘unfair advantage’ over the victim. It is to be noted that the courts may not be easily swayed here. In *Saw Gaik Beow v Cheong Yew Weng*²⁷ the court stated that

... even if a bargain may appear to be harsh, courts are not inclined to intervene unless it can also be demonstrated that the transaction was to the manifest disadvantage of the person subjected to the dominating influence. The foundation of the principle to grant equitable relief of this kind is not inequality of bargaining power but the prevention of victimization by one party of another.

The High Court in *Polygram Records Sdn Bhd v The Search*²⁸ used the term ‘unconscionable’ in this context. Other terms which have been used to describe the transaction are ‘an agreement, hard and unequitable in itself²⁹ and an ‘immoderate and irrational’ transaction.³⁰ However, where the transaction is a gift (as opposed to a contract), there is no requirement for it to be

²⁷ [1989] 3 MLJ 301, 308

²⁸ [1994] 3 MLJ 127, 157

²⁹ *Ormes v Beadel* (1860) 2 Giff 166, [174]

³⁰ *Bank of Montreal v Stuart* [1911] AC 120 (PC, Canada), 137

unfair for the presumption of undue influence to be raised.³¹³²

EFFECT OF UNDUE INFLUENCE ON A TRANSACTION

Section 20 of the Act states:

Power to set aside contract induced by undue influence

20. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just.

Undue influence will make a contract or a transaction *voidable* i.e. the contract/transaction is (still) valid but can be set aside at the option of the victim. This simply means that the victim can choose to rescind the contract/transaction or affirm it. It is to be noted that there are bars to rescission i.e. certain events that can stop a party from rescinding a contract e.g. delay in rescinding the transaction, and third-party rights.

SOCIAL MEDIA INFLUENCERS AND UNDUE INFLUENCE

With the above summary of the law in Malaysia stated, we now turn our attention to the issue of influencers and undue influence. Consider this hypothetical (but possible/probable) scenario: Mr X is a well-known social media influencer who speaks and educates on general health and nutrition. He has recently launched a line of homemade supplements that is supposed to improve skin health. He boasts a following of over 10 million followers, many of whom have been following him since he first started out. Claiming to have tried and tested the supplements, he shows off his own complexion and healthy-looking skin as a result of consuming such and offers it for sale to his followers at an exclusive price. Mr A, a long-time follower and fan of Mr X considers the product and the skin health of the one claiming to endorse it and purchases a 30-day trial regime, paying what might be more than compared to other over-the-counter products. Assuming the supplement is less than effective or worse, it inflames Mr A's skin causing an allergic reaction (or other skin ailments), can Mr A demand his money back i.e. can Mr A rescind the contract? Aside considerations of other areas of law (e.g. criminal law or consumer law), what can contract law offer to the victim? One answer

³¹ *Rosli bin Darus v Mansor @ Harun bin Hj Saad* [2001] 4 MLJ 206

³² Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (5th edn, LexisNexis 2023) 422

may lie in the doctrine of undue influence.

Actual Undue Influence

Although this is a possibility, it may be more difficult for Mr A/the victim to make his case out to the court under actual undue influence. As per s 16 of the Contracts Act 1950, Mr A would have to show that Mr X is in a dominant position and that Mr X *did in fact exert* undue influence to obtain the transaction/contract. In respect of the second element, it has already been seen what this might look like i.e. ‘some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor’ (*Allcard v Skinner*). Arguably a social media influencer who is constantly in the public eye would not readily be involved in (obvious) coercion, overreaching, cheating etc. Thus, this may be a difficult obstacle to overcome for the victim. In the (rare) case there is compelling evidence of such, the first step still needs to be established i.e. that the influencer is in a dominant position relative to the victim.

According to s 16(2), there are a few situations where the court/law will deem the dominance of the wrongdoer i.e. where the wrongdoer holds a real or apparent authority over the victim, or where the wrongdoer stands in a fiduciary relation to the victim. There is also a third way (see s 16(2)(b)) but it is suggested that the discussion for this article be limited to the situations in s 16(2)(a).

Section 16(2)(a)

(i) Wrongdoer holds a real or apparent authority over the victim: unfortunately, the Contracts Act 1950 does not state the scope or define what is meant by holding ‘a real or apparent authority’ over the victim. Dr Syed Ahmad Alsagoff writes ‘[i]f a person has an authority over the other contracting party, it is expected that he would not abuse that authority to gain an undue advantage from the other.’³³ He then goes on to cite some examples, one of them being a senior officer being deemed to have authority over a junior officer.³⁴ The author of this article opines that one way of understanding those words is that the words ‘where he holds a real or apparent authority over the other’ should not be taken in isolation as forming a class but rather those

³³ Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (5th edn, LexisNexis 2023) 406

³⁴ Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (5th edn, LexisNexis 2023) 406

words should be read with the following words in s 16(2)(a) i.e. ‘or where he stands in a fiduciary relation to the other’ as collectively referring to fiduciary relationships (see for example Tan Sri Dato’ Seri Visu Sinnadurai and Low Weng Tchung, *Law of Contract* (5th edn, LexisNexis 2023) at p 448 where the discussion on the scope of s 16(2)(a) is on fiduciary relationships; see also Cheong May Fong, *Contract Law in Malaysia* (Student edn, Sweet & Maxwell Asia 2013) at p 244 where she writes that s 16(2) provides for two categories i.e. where category (a) covers a person holding a real or apparent authority over the other or where there is a fiduciary relationship). This then brings us to an important question: are influencers and their followers in a fiduciary relationship? If the answer is yes, then the influencer will be deemed to be in a position of dominance (s 16(2)(a)), and all that is left is for the victim to adduce evidence of the exertion of undue influence by the wrongdoer (as discussed above) on the victim to obtain the transaction. So, to *fiduciary relationships* we now turn.

(i) *Wrongdoer stands in a fiduciary relation to the victim*: it is to be noted that the discussion in this part will also apply when presumed undue influence is discussed later in the article, as dominance of the wrongdoer is also a prerequisite for presumed undue influence.

A fiduciary relationship can be defined as ‘a relationship of confidence and trust’.³⁵ An example of such a relationship (parent and child) can be found in Illustration (a) to s 16. The Illustration reads as follows:

(a) *A* having advanced money to his son, *B*, during his minority, upon *B*’s coming of age, obtains, by misuse of parental influence, a bond from *B* for a greater amount than the sum due in respect of the advance. *A* employs undue influence.

There are also other well-known types of fiduciary relationships, and examples include trustee – beneficiary, and solicitor – client.³⁶ The fiduciary notion is one rooted in Equity and contains certain characteristics – trust and confidence between the fiduciary and the beneficiary³⁷ (or principal). Here, the party who is the fiduciary undertakes to act in the interest of the beneficiary or principal where the beneficiary/principal is vulnerable to the actions of the

³⁵ Ibid 407

³⁶ *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd* [1994] 1 MLJ 495, 505

³⁷ Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (5th edn, LexisNexis 2023) 408

fiduciary.³⁸ A landmark Malaysian case on fiduciary relationships (and their extent, if any) is the Court of Appeal's decision in *Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd*³⁹, and in this case, it was stated that Parliament and judges have declined to define what a fiduciary relationship is and thus to demarcate the parameters of such a relationship.⁴⁰ The Court of Appeal stated at p 294 of the report:

Judicial restraint in attempting a definition is exemplified by the following remark of Frankfurter J in *Securities & Exchange Commission v Chenery Corp* (1943) 318 US 80 at p 85:

To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?

The flexible approach adopted by the courts when according recognition to a particular relationship as being fiduciary in nature is, of course, one of judicial impression dependent upon the fact pattern of a given case. Flexibility of approach is the hallmark of equity, for when we deal with the principles governing equitable intervention, we enter a domain comprising not rigid rules but broad and liberal doctrines that are aimed at achieving a just result according to the facts of a particular case.

Equity has, in keeping with the purpose of its origin, therefore refrained from laying down any strict rules for determining whether a particular relationship is fiduciary in nature or gives rise to fiduciary obligations, leaving the development of its jurisprudence to a case by case basis. The maxim 'the categories of fiduciary relations are never closed' exemplifies the approach that a court of equity adopts in this sphere of human activity. ...

The main question to be considered is thus: can an influencer and their followers potentially be a type of fiduciary relationship today? The answer to this question will arguably have wide ramifications in modern times. This shall now be examined.

What are the characteristics of a fiduciary relationship? In *Tengku Abdullah ibni Sultan Abu Bakar*, the Court of Appeal quoted Wilson J in the case of *Frame v Smith*⁴¹ where Her Ladyship

³⁸ Ibid

³⁹ [1996] 2 MLJ 265

⁴⁰ *Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd* [1996] 2 MLJ 265, 293

⁴¹ (1987) 42 DLR (4th) 81

stated (at p 99) that there were three characteristics of fiduciary relationships.⁴²

Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- (1) the fiduciary has scope for the exercise of some discretion or power.
- (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) the beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.

The Court of Appeal in *Tengku Abdullah ibni Sultan Abu Bakar* then continued to state that.⁴³

A review of the authorities reveals that the characteristics referred to by Wilson J are present in the well-established categories of relationships in which the duty has been held to arise. These include the relationships of spiritual adviser and penitent, doctor and patient, agent and principal, solicitor and client, company directors, partners and joint venturers. It is noteworthy that the fiduciary doctrine has even been extended to those in negotiation for a partnership or a joint venture.

In general, relationships that are considered to be fiduciary in nature will fall within s 16(2)(a) where the fiduciary will be deemed to be in a position to dominate the other party's will. This group has been called **Class 2A** for the purposes of the law of undue influence.⁴⁴ However, it is noteworthy that, as pointed out by Dr Syed Ahmad Alsagoff,⁴⁵ not all fiduciary relationships (in the sense that those relationships give rise to a duty of disclosure) come within s 16(2)(a). These will not trigger the deeming provision, and one example given is the relationship between an agent and his/her principal.⁴⁶ In addition, there are other types of relationships

⁴² *Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd* [1996] 2 MLJ 265, 299

⁴³ *Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd* [1996] 2 MLJ 265, 300

⁴⁴ *Barclays Bank plc v O'Brien & Anor* [1993] 4 All ER 417

⁴⁵ Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (5th edn, LexisNexis 2023) 410

⁴⁶ *Ibid*

which are generally not fiduciary in nature (e.g. husband – wife) but can be fiduciary in particular circumstances, and in such circumstances, the law will deem that one party *is* in a position to dominate the will of the other party under s 16(2)(a) (this second group is called **Class 2B**⁴⁷); but for this to happen (Class 2B), one party/the victim must prove that they placed/reposed trust and confidence in the wrongdoer. Only then will the deeming provision apply.

Examples of Class 2A relationships are parent – child, guardian – ward, solicitor – client, doctor – patient, and trustee – beneficiary. Here, all the victim needs to prove to the court is that the victim and the wrongdoer are in such a relationship.⁴⁸ Clearly, these are time-tested, established relationships, as opposed to the influencer of today with their followers. It arguably follows that such a relationship does not fall within Class 2A (at least, not yet). What about Class 2B? This class is potentially very wide as any type of relationship can fall within it to trigger s 16(2)(a). As stated earlier, a classic example of a Class 2B relationship is that of husband and wife (see for example the case of *Southern Bank Bhd v Abdul Raof bin Rakinan* [2000] 4 MLJ 719). Another case that fell within this category, and which will now be discussed, was *Polygram Records Sdn Bhd v The Search* [1994] 3 MLJ 127 which concerned a rock group and their manager.

In *Polygram Records*, the plaintiffs were Polygram Records, and the defendants were ‘The Search’, a rock group. The parties entered a written agreement (the first contract) on 7 October 1984. The first contract was signed by Eric Yeoh (he was then the artiste and repertoire manager of the plaintiffs). The contract was for a two-year period with an option for two further periods of one year each, exercisable by the plaintiffs. Later, on 12 June 1985, the parties entered a second agreement (the second contract), and this was supposedly because there were some changes in The Search’s composition. One major modification in the second contract was that the option period was extended to two additional periods of 24 months each, but The Search claimed that they did not know about this. No copy of the second contract had been given to The Search until sometime in 1987. The Search eventually became dissatisfied with their existing arrangements with Polygram and at the end of 1987, The Search made the recording of an album under a new company (called Go-Search). Go-Search did the recordings and another company (Pacific Music Corp (M) Sdn Bhd) did the distribution. Later, in 1988, the plaintiffs sued the defendants for breach of contract and Pacific Music Corp was also sued for

⁴⁷ *Barclays Bank plc v O’Brien & Anor* [1993] 4 All ER 417

⁴⁸ Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (5th edn, LexisNexis 2023) 411

inducing The Search to breach their contract with the plaintiffs (Pacific was made the sixth defendant). Among the counterclaims made by The Search was that both contracts (the first and second contracts) were voidable for undue influence. The issue before the court was whether at the time The Search began recording for Go-Search they were under a contract with Polygram (either the first or/and the second contracts). The plaintiffs argued that at the relevant time (i.e. when The Search began recording for Go-Search), the group was still bound by either the first or second contract. However, the defendants stated that at the relevant time, the first contract had either been rescinded or had lapsed, and the second contract was unenforceable. Concerning the first contract, the defendants contended that it was, inter alia, voidable for misrepresentation and/or undue influence but the High Court disagreed and found that the group understood the nature of the contract, its duration and their obligations. The court also found no impropriety on Eric Yeoh's part to gain any unfair advantage under this contract.⁴⁹ In any event, due to other reasons, the court held that the first contract was not in force at the time when the group recorded for Go-Search.⁵⁰

The defendants (again) raised the argument that the second contract was, inter alia, tainted by undue influence, and to show this, the defendants' arguments included that they were unfamiliar with business matters, the special relationship between Eric Yeoh and them gave rise to the presumption of undue influence, the defendants did not get independent legal advice and had relied on Eric when they executed the second contract.⁵¹ The defendants claimed that there was a fiduciary relationship between Eric and them. The High Court, in addressing the point, discussed s 16 of the Contracts Act 1950 and certain common law cases like *Barclays Bank plc*⁵² and held that the situation fell within Class 2B (as there was no special relationship between the parties) so that the defendants needed to prove by evidence that they reposed trust and confidence in Eric Yeoh (and that this was a question of fact for the court's determination).⁵³ Here, the High Court found on the facts that there had been a close relationship between the group and Eric, which gave rise to a presumption of undue influence; and since Eric was the plaintiffs' employee, the presumption also arose against the plaintiffs.⁵⁴ The burden then shifted to the plaintiffs to disprove the existence of undue influence

⁴⁹ *Polyram Records Sdn Bhd v The Search* [1994] 3 MLJ 127, 147

⁵⁰ *Ibid* 151

⁵¹ *Polyram Records Sdn Bhd v The Search* [1994] 3 MLJ 127, 152

⁵² [1993] 4 All ER 417

⁵³ *Polyram Records Sdn Bhd v The Search* [1994] 3 MLJ 127, 153-154

⁵⁴ *Ibid* 155

(as in s 16(3) of the Contracts Act 1950), and on the facts, the court found that the plaintiffs failed to do so. The court then went on to examine whether the defendants had suffered a manifest disadvantage/could prove that the contract was unconscionable, but held that the defendants failed here because the second contract was in all respects (except for the duration of the contract) similar to the first contract. In addition, although the duration differed, this, in itself, did not render the contract manifestly disadvantageous. On the whole, the defendants' allegation of undue influence failed.⁵⁵

From the above case discussion, it is possible to argue that the relationship between an influencer and their follower(s) can potentially fall within **Class 2B** because, as explained above, the class is potentially very wide (wide enough to include influencers and their followers) and if this occurs, s 16(2)(a) will be triggered i.e. the influencer will be deemed to be in a position of dominance in relation to the follower(s). This author opines that so long as the victim/follower(s) of the influencer can prove to the court (on the balance of probabilities) that they placed/reposed trust and confidence in the influencer, the relationship can fall within **Class 2B**. This is neither inherently impossible nor improbable seeing the reach influencers can have over their devoted followers on things like the purchasing of products and services, lifestyle practices (fitness, diet fads, holiday destinations, etc.) and even food/meal choices (what to eat, where to eat etc.). If this is shown, then the influencer will be deemed to be in a position of dominance, and all that is left for the victim/follower to succeed is to prove that the influencer *did in fact exert* undue influence to obtain the transaction/contract. Once this is done, the transaction/contract can be set aside/rescinded for actual undue influence. The remedy of rescission will of course be subject to any applicable bars to rescission (e.g. laches, a bona fide purchaser for value without notice, etc.).

A final point on actual undue influence is whether it must (also) be shown that the transaction is 'unfair' or the dominant party has obtained an 'unfair advantage' as per s 16(1) of the Contracts Act 1950.

16.(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

Although it seems clear that the requirement is necessary (as it is stated in s 16(1)), the High

⁵⁵ *Polyram Records Sdn Bhd v The Search* [1994] 3 MLJ 127, 158-159

Court in *Polyram Records Sdn Bhd v The Search*⁵⁶ has held that in cases of actual undue influence, it is not necessary for the victim to prove that the dominant party had obtained an unfair advantage.⁵⁷

Presumed Undue Influence

What about presumed undue influence? If the victim/follower cannot prove to the court that undue influence was *actually* exerted, then presumed undue influence assumes importance for them to succeed in their claim.

For a follower of the influencer/victim to bring about the presumption of undue influence, they must prove two things to the court: (i) that the influencer/wrongdoer was in a dominant position in relation to the victim (as per s 16(2) of the Contracts Act 1950) and (ii) that the transaction was an unfair transaction (or an unconscionable one, or it was to the manifest disadvantage of the victim).⁵⁸ The first element (dominance) has already been discussed at some length in the paragraphs above and the same legal principles apply to presumed undue influence. The difference between presumed and actual undue influence is in the second element i.e. to raise a presumption of undue influence, the victim must show the court that the transaction is manifestly disadvantageous (see above for a brief discussion on this element). If both (i) and (ii) are met, s 16(3) will then apply i.e. the burden of proving that the contract/transaction was *not* induced by undue influence shifts onto the influencer/wrongdoer. Possible examples of unconscionable transactions/contracts here would include influencers selling dangerous/toxic products⁵⁹ ⁶⁰, and alleged scams involving influencers.⁶¹

On the whole, to answer the question posed at the beginning of the article, it is at least arguable that if a social media influencer improperly uses their influence on their followers with the aim of procuring a contract between them (e.g. sale and purchase of products) and which does result in such a contract, that contract can be declared voidable for undue influence, and thus, be set

⁵⁶ [1994] 3 MLJ 127

⁵⁷ Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (5th edn, LexisNexis 2023) 399-400

⁵⁸ Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia* (5th edn, LexisNexis 2023) 400

⁵⁹ Fernando Fong, '[Watch] Toxic Beauty: Influencer's Apology Can't Erase Mercury Scandal' (*TRP*, 6 March 2025) <<https://www.therakyatpost.com/news/malaysia/2025/03/06/watch-toxic-beauty-influencers-apology-cant-erase-mercury-scandal/>> accessed 28 June 2025

⁶⁰ Sivanisvarry Morhan, 'Sue influencers who promote harmful cosmetics, public told' (*The Sun*, 24 April 2024) <https://thesun.my/malaysia-news/sue-influencers-who-promote-harmful-cosmetics-public-told-KG12368929#google_vignette> accessed 28 June 2025

⁶¹ 'Resigned to life behind bars if it comes to that, says social media influencer Kim Seri' (*The Star*, 18 December 2024) <<https://www.thestar.com.my/news/nation/2024/12/18/resigned-to-life-behind-bars-if-it-comes-to-that-says-social-media-influencer-kim-seri>> accessed 28 June 2025

aside (be rescinded).

Before ending, permit this author to engage in a relatively brief discussion on whether it is possible that a social media influencer can be considered a fiduciary today, in light of their growing and powerful level of influence over their followers.

SOCIAL MEDIA INFLUENCERS – AN EXTENSION OF THE FIDUCIARY CONCEPT?

It is submitted that based on the following statements from various cases, a social media influencer can be considered to be a modern-day fiduciary in the proper context. From *Tengku Abdullah*⁶² the court stated that both Parliament and the courts have not defined what a fiduciary relationship is and so the concept is capable of being expanded to meet modern day situations. This is because equity, from where the fiduciary concept sprung up, is flexible.⁶³ Gopal Sri Ram JCA (as he then was) in *Tengku Abdullah's case* stated, at 295:

Whether a particular set of circumstances ought to attract a fiduciary duty is a question of judicial policy. *It depends upon the standard of commercial morality that the courts of a particular jurisdiction may choose to impose upon parties to a transaction, having regard to the cultural background and circumstances of the society in which they function.* And as in so many other areas of the law, the views which our courts entertain may differ from those expressed by the courts of other jurisdictions in respect of the circumstances in which a fiduciary duty may be declared to exist. For this reason, our courts may impose a fiduciary duty in circumstances in which the courts of another jurisdiction may decline to find the existence of such a duty. Often, the standards imposed may be the same as those in other jurisdictions. But it is open to our courts to find the existence of a fiduciary duty in order to reflect our own standards which, in particular cases, may prove to be higher than those imposed by judges in other jurisdictions. This is a necessary consequence of the policy differences of which we spoke a moment ago.

(Emphasis is the author's.)

Pausing here to consider the above quote, the part in italics can be interpreted to mean that the local courts have discretion in deciding whether a particular relationship is fiduciary, bearing in mind the societal context. Thus can it not be argued that with the potential quality and amount of influence that social media influencers today have over large segments of society (according

⁶² [1996] 2 MLJ 265 (CA) 293

⁶³ [1996] 2 MLJ 265 (CA) 294

to one website⁶⁴, as at the beginning of 2025, the top influencer in Malaysia has a whopping 8.5 million followers, and the second with 7.7 million followers!) such relationships would be prime candidates for the ‘fiduciary’ label? There have been reports of people allegedly being scammed or cheated by others considered as ‘influencers’ (see above for examples) and it is unknown how many other like cases go unreported.

As quoted earlier in the article, Wilson J in *Frame v Smith*⁶⁵ provided guidance on some of the primary characteristics of a fiduciary relationship. These are reproduced here for the convenience of the reader:

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.

The first characteristic is present in social media influencer–follower relationships. As mentioned earlier and shown by real-life reports, influencers potentially wield a lot of influence i.e. power over their followers. The second is also present – note that the phrase used by Wilson J is ‘beneficiary’s legal or practical interests’. ‘Practical interests’, according to Wilson J, are ‘the beneficiary’s vital non-legal interests’⁶⁶ and these can encompass financial well-being or the beneficiary’s pecuniary interests (as discussed by Wilson J). If such interests can be financial or pecuniary, surely it can be argued to also include physical well-being or health. This may bring to the mind of the reader cases where followers of influencers have had their health (and/or pockets) affected allegedly due to the influencer’s products or services. The third and final element is the element of vulnerability which arises due to the follower not being able to stop/control the influencer from exercising their influence (power) and the follower having inadequate legal or practical remedies against the wrongdoer.⁶⁷ The foregoing raise compelling

⁶⁴ Admin, ‘10 Best Social Media Influencers in Malaysia to Follow in 2025’ (*Newnormz*, 5 January 2025) <<https://www.newnormz.com.my/10-best-social-media-influencers-in-malaysia-to-follow-in-2025/#:~:text=1.,top%20spot%20on%20this%20list.>> accessed 24 July 2025

⁶⁵ (1987) 42 DLR (4th) 81, 99

⁶⁶ Ibid

⁶⁷ Ibid

arguments in favour of influencers being recognised as fiduciaries to reflect modern realities.

CONCLUSION

Although it is true that there may be other areas of law rising to meet this modern day issue (e.g. a claim in misrepresentation and/or fraud under the Contracts Act 1950 (ss 18 and/or 17 respectively), the tort of negligent misstatement, provisions relating to fraud under the Penal Code, etc.) equity should follow suit in providing an extra level of protection for vulnerable segments of society through the modernisation of the fiduciary concept – after all, the number of followers on social media does not seem to be ebbing in anyway. The fiduciary concept is flexible both as an offense and a defence and thus should neither be underestimated nor considered a relic.