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Undue Influence in the Commercialization of University Research

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Abstract: The subject of the commercialization of University's Research often associated with issues like roles and functions of the office technology transfer, incentives for researchers, licensing procedures, mechanism of commercialization like spin-offs and start-ups. The main purpose of this study is to provide some explanations of the principle of undue influence as gentle legal precautions for researchers in the context of commercialization of university research based on some decided English cases. Questions as to what extent researchers in universities are aware of their vulnerability when giving consent to terms and provisions in the commercial contracts like licensing agreements as well as on students part in circumstances where the assignment of student IP rights are concern or issues of undue influence are rarely exposed and debated in the context of technology transfer in universities.

Key words: Undue influence, law, ip policy, commercialization, university technology transfer, Malaysian university

INTRODUCTION

Malaysia for instance, the economic crisis that happened in 2008 push the government to cut research budget to the research universities in Malaysia. As the result many of the research universities in Malaysia for instance should find alternative fund and budget to fund their research in the future. This force becomes more stressful for the research universities in Malaysia given that commercialization process continue to be new and childhood in Malaysia (Hirwani *et al*., 2011a). There are 5 research universities in Malaysia and that is Universiti Kebangsaan Malaysia (UKM), Universiti Malaya (UM), Universiti Putra Malaysia (UPM), Universiti Sains Malaysia (USM) and Universiti Teknologi Malaysia (UTM).

Commercialization of the university's research started out in United States whenever in those days the government has cut the money to the university because of the cold war and that led the government deficit budget at that time (Hussain *et al*., 2011a). When US introduced Bayh Dole Act, 1980 this act has made a long of changes as well as encourages the commercialization process of most university in US. This act helps the university to acquire fund from the government faster and in addition help the patent application. Then in 1986, Federal Technology Transfer has been introduced to govern and control the invention that have commercial value at the market can be commercialized (Rahm, 1994). Implicit in this view is usually that the role of academics is shifting. In lieu of concentrating on blue-skies analysis, academics have emerged increasingly to become eager to link the worlds of science and also technology within an entrepreneurial way by commercializing the technologies that arise from their research (Clark, 1998; Shane, 2005; Etzkowitz *et al*., 2000). As the result many of the research universities should find alternative fund and budget to fund their research in the future. The changing role of

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universities have extended from knowledge production to capitalisation of knowledge with the objective of improving regional or national economic performance as well as the university's financial advantage and that of its faculty (Etzkowitz *et al*., 2000; Nowotny *et al*., 2001, 2003; Shane, 2005; Smith, 2007). These changes are made by the policy makers so that, it can evaluate and monetize research funding (Slaughter and Leslie, 1997). Moreover, they have set up many support systems for this (Guston, 1999; Jacob *et al*., 2003; Mian, 1997b. Goldfarb and Henrekson (2003) have mentioned this top down principle from the government and bottom up from the individual to implement this.

The role of academia in fostering technology transfer and economic growth is now considered a key element of national S and T policies (Nowotny *et al*., 2001, 2003). There also must be special incentives and rewards system to sustain this commercialization process (Lach and Schankerman, 2003). There are many initiatives that have been introduced by the government to promote research from universities. As a result, the government has raised research funding under 9th Malaysia Plan (2006-2010) at 1.5% rather than 0.49% in the 8th Malaysian Plan. Many countries are undertaking university reforms with a view to increase commercialization of the results of publicly funded research (Lehrer and Asakawa, 2004; Slaughter and Leslie, 1997; Zhao, 2004). A number of studies have highlighted the involvement of academics in commercialization activity and indicated that the distinction between science and entrepreneurship is increasingly blurred (Owen-Smith and Powell, 2003). Academic entrepreneurship has often been used to describe the involvement of university scientists in forming startups related to their inventions (Lockett *et al*., 2005; Shane, 2004; Stuart and Ding, 2006).

Why undue influence: It should be note here that commercialization of the university's research involves elements of undue influence. Rory introduced that influence was among the list of important ethical conflicts by outlining a number of the areas by which he believed the commercialization of research are going to have its largest impact (Hirwani *et al*., 2011b).

Basic legal issues university's research society should comprehend

Commercial agreement/contract: The general rule to interpret ambiguity; How can scientists interpret an official business agreement if it is uncertain and we have valid reason to imagine that its draftsman did not have a very deep knowledge of the appropriate law? When a serious ambiguity occurs a court can not remedy the issue where the good and informed reader could see that there was but one interpretation that would make any sense. Two meanings are possible even perhaps plausible but the court cannot just give up. All it could do is to find the interpretation that best accords with business common sense (The House of Lords in Mannai Investments Co., Ltd. v. Eagle Star Life Assurance Co., Ltd., (1997) 3 All ER 352). And in doing that the court do not as made the decision in Oxonica Energy Ltd. v. Neuftec Ltd. (2008) EWHC 2127 (Pat), (2008) All ER (D) 27 (Sep) be overly swayed by consideration that it is doing violence to the natural meaning of the language if as Lord Hoffmann pointed out in the later case, it would form that it was the researcher of the study who did the violence. It was there held by the majority that in writing any claim (whether sounding in rescission for undue influence or otherwise), the draftsman ought to be taken to have meant Any claim sounding in rescission (whether for undue influence or otherwise). In the recent English case of Oxonica Energy Ltd. v. Neuftec Ltd. (2008) EWHC 2127 (Pat), (2008) All ER (D) 27 (Sep), the judge stated that is the modern approach to the interpretation of commercial documents and it was explained by Lord Hoffmann in Investors Compensation Scheme v. West Bromwich Building Society (1997) UKHL 2 (1998) 1 WLR 896, 912-913. He further concluded as follows:

> That the drafting of this commercial contract warns us very strongly not to put too much weight on detailed semantic and syntactical analysis of words (if it) is going to lead to a conclusion that flouts business commonsense (per Lord Diplock in Antaios Compania Naviera SA v. Salen Rederierna AB (1985) AC 191, 201, cited by Lord Hoffmann in Investors Compensation Scheme)

Furthermore, the judge highlighted the statement made by Hoffmann LJ (as he then was) said in Cooperative Wholesale Society Ltd. v. National Westminster Bank Plc (1995) 1 EGLR 97 at 99F as follows:

> This robust declaration does not however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business commonsense. But language is a very flexible instrument and if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement

Speaking of a poorly drafted and ambiguous contract, Lord Bridge in Mitsui Construction Co., Ltd. v. A-G of Hong Kong (1986) 33 BLR 14 said that poor drafting itself provides:

> No reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language that they have used interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing the court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusiness like intention if the language used whatever it may lack in precision is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis

MATERIALS AND METHODS

The methodology used in this study is by examining previous research and literature related to the implementation of online legal marketing for commercialization Malaysia of university research in Malaysia. As has been mentioned before, the commercialization Malaysia of university research is still new and at infancy state. From the literature, we find that there are still many issues that require more understanding about the commercialization in Malaysia. Using this approach and mechanism will helps us to develop an in-depth, relevant understanding of poorly understood phenomenon.

Policies for managing undue influence examples at some universities: Several universities plainly indicate within their intellectual property policy concerning the significance and avoid the undue influence. Stanford Policy for instance, expressly supplies that the demands of the office of technology licensing includes make licensing choices based upon OTL's judgment regarding technology transfer to achieve public benefit without the need of undue influence from internal or external parties. Macquarie University further stipulates as its intellectual property policy in trying to get assignment, the university has an obligation to fully inform the student of the nature as well as purpose of the university policy on student IP assignment and alternative courses of action open to the student should there be an impasse over the assignment process. The university is very aware that neither duress nor undue influence is put on to the student in the process of enrolment and its accompanying procedures. Its interesting to note that so as to comprehend the meaning of undue influence along the way of obtaining the IP assignment from the student, the student's supervisor under Macquarie University possesses an important role to play in this process. Original the supervisor must her/himself be familiar with the university's policies surrounding Intellectual property and its protection. Secondly, it is the supervisor's responsibility to be aware of any would be value while in the intellectual property produced by the student and bring this to the attention of the university by way of the Deputy Vice Chancellor (research) (by established procedures such as via an invention disclosure form). Because the student will have assigned this intellectual property to the university, the student's supervisor is the University's representative on the spot who is in the best position to advise both the student and the university of appropriate action. For example, it is essential that particular intellectual property that might have commercial value and that is registrable is registered by the university before any public disclosure (publication) takes place. Once intellectual property is published it cannot be safeguarded and therefore ceases to be property it has no commercial value (to the university and therefore to the student or any other party involved including the supervisor). Universiti Kebangsaan Malaysia (UKM) has also recently reviewing a policy of intellectual property for students. Even though, there is no express cautious provision on undue influence, the UKM Student IP (Supplementary) does state in clause 5 that:

> Where a student chooses to assign his IPR to UKM in compliance with Clause 4(2) of this policy, the student must sign a UKM student deed of assignment. The student may consult with an independent legal advice about the nature and effect of a UKM student deed of assignment and after obtaining such advice, the independent legal advisor must sign a Notice Relating to Independent Legal Advice

In Virginia Commonwealth University, staff and also members of all research committees and entities inside the office of the Vice President for research are asked to give consideration to areas of potential undue influence and exclude or perhaps abstain themselves from their role/vote if such a possibility exists. Concern over having been subjected to undue influence may be reported to the chairperson or director of the committee or research entity. The report may also be made in writing to the Vice President for research. Otherwise, there can be occasion where another staff or member of a research entity suspects that a fellow staff or member is subject to undue influence for purposes of favoring a particular individual or group. Such suspicion ought to be reported towards the chairperson or director of the research entity or directly to the Vice President for research in writing.

Legal protection

Meaning of undue influence: Undue influence in Malaysia is statutorily recognized in Section 16 of

Contracts Act, 1950 which was originated from English Law. This section states undue influence as follows: 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. 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 where he holds a real or apparent authority over the otheror where he stands in a fiduciary relation to the other or where he makes a contract with a person whose mentalcapacity istemporarily or permanently affected by reasonof age, illness or mental or bodily distress. 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 beunconscionable, 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. The concept of undue influence in Section 16 above is similar to the general principles of undue influence. The concept operates when one party dominates the will of another and uses his position to obtain an unfair advantage for himself also exist under the general principles of English law in the case of Allcard v. Skinner (1887) 36 Ch.D 145. Zakaria Yatim J in interpreting Section 16 in the case of Malaysian French Bank Bhd v. Abdullah Bin Mohd Yusof and Ors ((1991) 2 MLJ 475 at (477)) said:

> Under Section 16 of the Contracts Act 1950, a contract is said to be induced by undue influence where the relations subsisting between the parties to the contract 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. A person is deemed to be in a position to dominate the will of another where that person holds a real or apparent authority over the other. 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 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. In order to establish undue influence, the third and fourth defendants have to prove that the other party to the contract that is the plaintiff was in a position to dominate their will and that the other party had obtained an unfair advantage by using that position

Lindley LJ in Allcard v. Skinner said:

> What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimized by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of equity have never set aside gifts on the ground of the folly, imprudence or want of foresight on the part of donors. The courts have always repudiated any such jurisdiction. Huguenin v. baseley (1807) 14 Ves 273 is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud (Emphasis added)

The above statements show that the doctrine of undue influence is based upon the principle that it seeks to prevent a person from being victimized by other people rather than to save him from the consequences of his own folly. The court will not set aside the transaction simply because of something which appears to the court to have been foolish or unnecessary or unreasonable or excessive. This principle prevents the improper conduct by one party over the other that results in the victimized party entering into a contract without free and informed consent.

The view taken by Lindley LJ in Allcard v. Skinner above has been cited with approval as the general principle underlying undue influence in numerous cases. Knox J for example, in Clarke and Ors v. Prus said: The question is whether he was victimized not whether he was foolish. The main concern of the principle laid down by Lindley LJ above is on how the transaction was entered into rather than the substance of the transaction itself. The problem of lack of independence is apparent from the words of Lord Eldon L.C. in Huguenin v. Baseley; the question is not whether she knew what she was doing had done or was proposing to do but how the intention was produced. Lord Evershed M.R. in Zamet v. Hyman stated that a surety entered the transaction with an independent judgment after full free and informed

thought. Lord Hobhouse in Banco Exterior Internacional v. Mann also made an interesting point: A person may be fully informed as to the content of the document and its legal effect and yet be acting under the undue influence of another when she signs it. It should also be stressed that the doctrine of undue influence extends not only to cases of coercion but to all cases where influence is acquired and abused where confidence is reposed and betrayed and to cases in which there is danger that there may have been influence but proof of it is likely to be difficult.

Recently, Blackburne J. in Naidoo and another v. Naidu and others held that the doctrine is not so confined to transactions which are in favour of or which have been instigated by the individual on whom reliance has been placed. He stated:

> The vice of the transaction lies in the abuse of a position of trust. Provided the transaction is with someone in whose favour the wrongdoer could have personal reasons for wanting the complainant to deal, the doctrine is capable of applying

He further illustrated that it makes no difference that the transaction originates with the third party rather than with the wrongdoer if by reason of the relationship of trust and confidence between complainant and wrongdoer and the existence of dealings between them at the time it was entered into has been abused in procuring the complainant to enter into the transaction.

Types of undue influence: There are two types of undue influence. Cotton LJ in Allcard v. Skinner classified them as follows: 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 Bank of Credit and Commerce International SA v. Aboody, Slade LJ described the two fold classification of undue influence as:

Class 1: Actual undue influence: In these cases, it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned.

Class 2: Presumed undue influence: In these cases, the complainant only has to show in the first instance that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In class 2 cases therefore, there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned; once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely for example, by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, Viz.:

Class 2A: Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.

Class 2B: Even if there is no relationship falling within class 2A if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence.

In a class 2B case, therefore in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned.

Burden of proof: As a general principle, Jenkins LJ in Tufton v. Sperni stated that a person who in the eye of the law is capable of managing his own affairs is bound by any disposition he chooses to make however, damaging to himself it may be. Similarly as noted earlier, Lindley L.J. in Allcard v Skinner clearly stated that the courts are not concerned with protecting a person from his own foolish acts. Lord Denning in Lloyds Bank Ltd. v. Bundy viewed that a customer who signs a bank guarantee or a charge cannot get out of it. He said: No bargain will be upset which is the result of the ordinary interplay of forces. In the New Zealand Supreme Court case of Brusewitz v Brown, Salmond J stated:

> The mere fact that a transaction is based on inadequate consideration or is otherwise improvident, unreasonable or unjust is not in itself any ground on which this Court can set it aside as invalid. The law in general leaves every man at liberty to make such bargains as he pleases and to dispose of his own property as he chooses

In Australian case of Henderson and Another v. Radio Corporation Pty. Ltd. Manning J expressed himself in this way:

> Statements that the court of equity will interfere without proof of damage or upon it being established merely that the defendant has committed an actionable wrong are also erroneous. Equitable relief will only be granted where the Plaintiff establishes that he has suffered or is likely to suffer irreparable damage

The above shows that the claimant must prove his case within one of the two categories of undue influence for the court to set aside the transaction. This sentiment was also reflected in the recent case of Royal Bank of Scotland Plc v. Etridge (No. 2) where Stuart Smith LJ emphasized that:

> Legitimate commercial pressure brought by a creditor however, strong coupled with proper feelings of family loyalty and a laudable desire to help a husband or son in financial difficulty may be difficult to resist. But they are not enough to justify the setting aside of the transaction unless they go beyond what is permissible and lead the complainant to execute the charge not because however, reluctantly she is persuaded that it is the right thing to do but because the wrongdoer's importunity has left her with no will of her own

The court's reluctance to interfere to set aside the transaction unless there has been sufficient evidence of actual or presumed undue influence has also been echoed in recent cases. In Macklin and others v. Dowsett, it was held that the evidence did not establish either of the elements necessary to raise a presumption of undue influence and the equity could now rescue a person from his own folly. Similarly in Johnson, v. EBS Pensioner Trustees Ltd. and another Parker J stressed that:

> When one comes to examine allegations of undue influence (whether actual or presumed) it is important to keep in mind what is the basis for the intervention of equity in such cases. The court has no jurisdiction to interfere with transactions (whether gifts or contracts) simply on the basis that they were ill-advised or were entered into with an inadequate understanding of their economic or legal effects

One commentator has correctly pointed out that undue influence and duress involve one party exerting influence or putting pressure on the other party to persuade him to contract and only one party on whom the pressure has been applied will be able to use it as a reason for obtaining remedy. It is then in the power of that pressurized party to decide whether or not to invoke the remedy. The study shows that in order to succeed with the allegation of undue influence, the claimant has to prove his case within one of the two groups of undue influence.

Essence of independent advice: The purpose of in search of independent tips is to guarantee that the vulnerable party enters a transaction after full, free and well informed thought. In cases of assignment of student IP or scientists are uncertain of their IP rights in a licensing agreement for instance, it is recommended that they seek an independent legal advice. First and foremost, Farwell J in Powell v. Powell pointed out that the solicitor does not discharge his duty by satisfying himself simply that the donor understands and wants to carry out the particular transaction. In Wright v. Carter. Stirling LJ said that a solicitor would fail in his duty if he neglected to inform himself of the circumstances in which the transaction was taking place. In the Court of Appeal's case of Credit Lyonnais Bank Nederland NV v. Burch and Naidoo v. Naidu. It was stressed that it was not more than enough that the wife understands the legal effect of the transaction and intends to enter into it. In Burch, the statement made by Lord Eldon LC said in Huguenin v. Baseley. The question is not whether she knew what she was doing had done or proposed to do but how the intention was produced was referred to. In case Burch, the solicitor's duty was to satisfy himself that his client was free from improper influence. It was stated that:

> His duty is to satisfy himself that the transaction is one which his client could sensibly enter into if free from improper influence and if he is not so satisfied to advise her not to enter into it and to refuse to act further for her if she persists. He must advise his client that she is under no obligation to enter into the transaction at all and if she still wishes to do so that, she is not necessarily bound to accept the terms of any document which has been put before her but (where this is appropriate) that he should ascertain on her behalf whether less onerous terms might be obtained

It follows that if the solicitor was not satisfied that the transaction was one which his client should enter it was his duty to advise her not to enter into it and to refuse to act further for her in the implementation of the transaction if she persisted.

He would then be obliged to inform the other parties that he had seen his client and given her certain advice

and had declined to act for her any further. The wife therefore would have an option since she was under no obligation to enter into the transaction at all. Vaisey J in Bullock v. Llyods Ltd. stated that the solicitor should explain:

> First that she could do exactly as she pleased and secondly that the scheme put before her was not one to be accepted or rejected out of hand but to be discussed, point by point with a full understanding of the various alternative possibilities

CONCLUSION

Vital points have been identified as follows. First, policy makers at universities must be aware of the possibility of undue influence being taken by students when they assign their IP rights to the university Hirwani *et al.* (2011b). Second, researchers in fact are left unknown of their legal protections when they involve in the technology transfer process therefore, this study highlights situations in which researchers at universities are vulnerable and their vulnerability are subject to undue influence when signing agreements related to the process of technology transfer. Thirdly, as long as there is a contractual relationship between researchers and other parties, the law considers whether there is a freedom to contract on the part of both parties when entering into a particular contract. In the context of technology transfer, the fund providers for researchers in university for instance might have some dominant power over the researcher. This results, the latter to enter into a particular contract in the process of technology transfer by some kind of undue influence which is not on a volunteer basis. Finally, perhaps the policy maker at universities will have to engage an independent legal advisor to advise the researcher on the nature of a contract that will be entered into to avoid possible liabilities.

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