

1 Equity

Equity ‘qualifies, moderates and reforms the rigour, harshness and edge of the law’ *Dudley v Dudley* = supplements the general law

Maxims of equity

Some examples in *Corin v Patton*:

1. Equity will not suffer a wrong without a remedy
2. Equity follows the law
3. He who seeks equity must do equity
4. He who comes to equity must come with clean hands

The Judicature System

The significant feature of the administration of Equity in N.S.W. until 1972 was that Equity was administered as a body of law distinct from the CL, by a distinct Equity jurisdiction of the Supreme Court of N.S.W.

- s. 24 (1): gave all branches of the court power to administer equitable remedies
- s. 24 (2) and (3): enabled equitable defences to be pleaded and equitable relief to be given on such defences
- s. 24 (4): required all branches of the court “to recognise and take notice of all equitable estates, titles, and rights and all equitable duties and liabilities”
- s. 24 (5): prohibited the use of the “common injunction” within the court (however: the equitable grounds that might have provided the ground for such an injunction prior to the passing of the Act may be relied on by way of defence in the proceedings)
- s. 24 (6): provided the Court with a general power to “recognise and give effect to” all legal claims, estates, titles, rights, duties and liabilities existing by the CL or by custom or created by Statute.
- In conclusion: Judicature Act in s.24 provided a new joint, concurrent procedure for both CL and Equity.

2 Undue Influence

- Where one person is in a position of influence over another, equity will presume that any transfer from the subordinate to the dominant party has been brought about by the exercise of undue influence
- Equity will strike the transaction down unless the dominant party can show that it was a product of the free and independent will of the other.
- Must prove: The party who takes the benefit knows that the weaker party is acting under the influence of the influential party – *Allcard v Skinner*

Class 1: Actual Undue Influence

- No relationship of influence – must prove actual undue influence occurred
- Must prove that alleged wrongdoer asserted undue influence on the complainant to enter the particular transaction
- Can be established if there has been improper conduct, cheating and generally some personal advantage by a donee/transferee in some close and confidential relationship to the donor/transferor (donee/donor – voluntary gift) *Allcard v Skinner*

4 elements (*Bank of Credit v Aboody*):

1. Dominant party has capacity to influence the other.
2. That influence by one party is actually exercised
3. The exercise of influence is undue.
4. The transaction is the result of the exercise of the undue influence.

Class 2: Presumed Undue Influence

Where the plaintiff only has to show that there was a relationship of trust and confidence between the complainant and the wrongdoer, and the relationship was of such a nature that it is fair to presume that the relationship was used by the wrongdoer in procuring the claimant to enter into the relationship.

Class 2A: Recognised relationships of influence giving rise to presumption of influence

Parent and child

- Applies to anyone in a position of parental authority over another, includes guardians.
- Onus to prove is on the parents *Lamotte v Lamotte* (1942)
- Undue influence was said to arise not only where a person exerted influence to secure a benefit, but also where a person of imperfect judgement was placed under the direction of someone possession greater experience *Bullocks v Lloyds Bank Ltd* [1955]

Solicitor and Client

- Relationship of solicitor and client need not be continuous over a period and may exist even though the client uses another solicitor for other business at that or some other time.
- ‘Where the relationship of confidence exists it is incumbent on the person in whom the confidence is reposed to satisfy the Court that he has put himself ‘at arm’s length’ to his client’.
- Onus – on solicitor *Verduci v Golotta* [2010]

Doctor and Patient

- Substantial benefit received from doctor by patient, is presumed to be undue influence.
- Onus on doctor to rebut the presumption: *Bar-Mordecai v Hillston* [2004]

Spiritual Adviser and worshipper

- Covers anyone who stands in the position of spiritual adviser to worshipper.

McCulloch v. Fern [2001] NSWSC 406

- Mrs M (P's wife), elderly woman, met the Ferns – leaders of the Church triumphant movement.
- Befriended Mrs M, and eventually she became their follower to the extent that she moved into a property that she helped pay off by the proceeds of the sale of her own home.
- She was restricted from communicating with her family. She died.
- Mr M took action in SC. He successfully argued under 2A the presumption of undue influence.

Hartigan v International Society for Krishna Consciousness Inc [2002] NSWSC 810

- P donated her farm, her sole asset, to the organisation.
- D sold the farm later and used the funds to fund their own debts.
- Bryson J – held that he found no conscious intent by D to defraud the P, but that is not necessary. P was acting under the influence of the D, giving away her only property.
- Court's approach in cases of gifts in cases of religious advisers, there must be exacting standards to see whether it should stand.
- It may be unconscionable to accept and rely on a gift that was understood by the donor with intention to make the gift by religious belief.

Trustee and Beneficiary

- Test – justify the propriety of dealings with its beneficiaries
- Onus on any trustee to justify the propriety of dealings with its beneficiaries, and the weight of authority supports the application of the presumption once the relationship of trustee and beneficiary is shown
- Does not mean that dealings between trustees and beneficiaries cannot be allowed to stand where they can be shown to have resulted from the exercise of a free and independent will on the part of the beneficiaries *Whereat v Duff*

Class 2B: Proof of other relationship of influence giving rise to presumption of influence

- Must argue that on their own facts those particular relationships, although not presumptive, still deserve the protection of the presumption.
- *Union Fidelity Trustee Co of Australia v Gibson* [1971] per Gillard J: If not recognised category of relationship, Plaintiff can prove relationship of such influential nature presumption apply

Case law:

- *Brusewitz v Brown* [1923]: 60 year old transferred asset to regular companion in return for \$100, would have been adequate if he had a normal life expectancy – he was an alcoholic so had a short expectancy.
- *Janson v Janson* [2007]: voluntary transfer by old, blind, man of his house to his nephew. Nephew held power of attorney. Presumption of undue influence arose and nephew was unable to rebut the presumption.
- *Watkins v Coombes* (1922): 69 year old transferred property to 2 close friends in return for the promise that they would look after her. HC held transaction should be set aside because she was completely under the dominion of her friends who failed to rebut the presumption and that she had been removed from their influence.

Johnson v. Buttress (1936):

- Donor was widowed, unable to read or write. Relied on niece for advice
- He transferred to her his house as a gift, his only asset. He did not have any independent advice but was known to be appreciative of the kindness shown to him from time to time by the donee
- HC held that a presumption of undue influence arose which the D had failed to rebut – presumption 2B – not established relationship niece and uncle
- His condition and inferior mental faculties made the habitual guidance and support of someone essential to him and raised the presumption of undue influence.
- Dixon J at 134 – *The party in the position of influence cannot maintain beneficial title to property of substantial value made over to him or her by the other as a gift, unless that parties satisfies the court that he or she took no advantage of the donor and that the gift was the independent and well-understood act of a person in a position to exercise free judgement.*
- D must prove that the transaction was the independent and well understood by the P in a position to exercise proper judgement.

Louth v. Diprose (1992):

- D became infatuated with L. Purchased house for her in her name. Her distress was largely manufactured.
- D was able to have transaction set aside. He was found to be under a **special disability**.
- The special disability extended to his extraordinary vulnerability in the false atmosphere of crisis which she had manufactured. She was aware of his special disadvantage and manipulated it to her advantage.

Rebutting the Presumption

Adequacy of Consideration

- If it can be shown that the transaction was a sale at full value then, generally, no further proof will be required of the propriety of the transfer (*Amadio*)
- Will not suffice where the transaction is otherwise improvident, as in the case where a person deprives himself of his only home, or where the value is superficial (*Brusewitz v Brown*)

Independent Advice

- Even where the advice is ignored (*Brusewitz v Brown*)
- Advice must be substantive: advisee must get all material facts and make inquiry.
- If a party has directed one party to independent advice, it can help discharge the burden
- No rule of law that says the donor must have independent advice at the time of making the gift in order to rebut the presumption *Union Fidelity Trustee Co of Australia v. Gibson* [1971]
- Presumption required the donee to prove that the gift was the result of a free exercise of independent will on the part of the donor *Inche Noria v Shaik Allie Bin Omar* [1929]

Yerkey v Jones (1939)

- Where a wife provides security for her husband's debt as a result of the actual undue influence of her husband, the creditor will be unable to enforce the security unless the wife received independent advice.
- HC affirmed still good law *Garcia v. National Australia Bank*

Bester v. Perpetual Trustee Co Ltd [1970]

- Street J said that solicitor was most careful to read the document through to the P and to invite questions of her — Must look at the content of the advice
- Held it was not independent advice, as it does not concern the P being given the opportunity to consider all her options. It was merely advice on the trust itself, not whether that was in fact the best choice itself.
- Advice must also be adequate. The advisor must be informed of all material facts and must have the opportunity of making further enquiries.

Lack of Improvidence (not having foresight)

- Adequate consideration on the facts
- Risk /benefit to guarantor/guarantee
- *Union Fidelity*: Forgiveness of a \$15,000 debt held to be not improvident and therefore stood.

Undue Influence extends to third parties

Bridgeman v Green (1757):

- Court examined a situation where dominant parties had taken advantage of a party to obtain property, which they then gifted, to third parties.
- The re-gifting did not make the property immune to equity's reach.
- There was no consideration - the property was not obtained by the third party for value.

Bullock v Lloyd's Bank [1955]: Deed set aside, father didn't act dishonestly, but such a settlement could only be justified if executed under the advice of a competent advisor capable of surveying the whole field.

Bank of NSW v. Rogers (1941): Undue influence could not only operate on Defendant, but every volunteer claiming under defendant unless no notice.

3 Unconscionable Transactions

- Equity will interfere to set aside a contract where it would be **against conscience** for the party maintaining the bargain to be allowed to succeed.
- ‘Whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscionable advantage is then taken of the opportunity thereby created’ *Amadio* (1983) at 474 per Deane J
- Not enough to show that one party possessed some special disadvantage over the other. The power must in fact be **exploited by the dominant party**.

Elements to be established

- a. Special Disadvantage
- b. Knowledge
- c. Unconscionable Exploitation of the Disadvantage

Blomley v Ryan (1956):

- Man in late 70’s challenged the enforceability of a contract to sell his grazing property
- Contract had been signed a day after a visit to the property by the purchaser and his agent, at a time when the vendor was engaged in one of his drinking binges.
- Purchasers brought bottle of rum to negotiations. Contract price was \$25K when the property was worth over \$33K. Man received no independent advice.
- Held: Contract should be set aside.
- Equity would set a contract aside where it was ‘disadvantageous’ to the party affected and had been obtained by ‘drawing him to drink’ or by otherwise taking unfair advantage of condition.
- Fullagar J – situations giving rise to special disadvantage (at 405); adversely affecting a party include poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance is necessary.

Commercial Bank of Australia v. Amadio (1983)

- Amadio’s reliant on son who falsely told them he was seeking limited guarantee.
- Bank manager present at Amadio’s home when Amadio’s signed document.
- Later discovered their liability was unlimited. The bank relied on the son’s advice that he had explained the transaction to his parents.
- Special disadvantage – elderly, lack of business experience, lack of English language skills.
- HC held: Mortgage set aside on the ground that the Amadio’s were in a position of disability in relation to the bank and that their lack of knowledge and understanding of the contents of the mortgage and the circumstances in which the document was signed, particularly the lack of any assistance and advice where assistance and advice were plainly necessary, was sufficient to make it ‘unconscientious’ of the bank to rely on the guarantee.
 - Deane J at 474: *Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.*