

MLL405 EQUITY AND TRUSTS

SUMMARISED EXAM NOTES

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TOPIC ONE: The origin and nature of equity and its relationship with the common law.

Equity is:

1. Informed by conscience;
2. In large part, discretionary and remedial; and
3. The result of a long historical developmental process.

In personam – matters against a party.

In rem- matters against property.

Features of equity:

1. Equity corrects the law, but does not overwhelm it;
2. Equity is discretionary; and
3. Equity is informed by conscience.

Equitable maxims serve a purpose as an explanation of the nature of equity and the broad concepts which have influenced the growth of modern equity. They are a summary of a broad themes which underlines equitable concepts and principles – **Corin v Patton**.

1. Equity follows the law;
2. Equity is equality;
3. Equity looks to intent rather than form;
4. Those seeking equity must do equity (equity will only assist those with clean hands);
5. Equity acts in personam;
6. Equity deems to be done what ought to be done; and
7. Equity will not assist a volunteer (and equity will not perfect an imperfect gift). Volunteer is someone who hasn't handed over a consideration.

Three basic relationship principles:

1. Exclusive jurisdiction: Only capable of administering equitable relief.
2. Concurrent jurisdiction: Where both equity and common law recognize the unfairness and are prepared to apply relief: Equity only stepping in when common law would be inadequate.
3. Auxiliary jurisdiction: Provide assistance for the enforcement of legal rights and includes the award of injunctive relief.

Why would we argue a contract is a trust? [From revision lecture].

You want more than what damages is going to offer you. You want the profit. Very remedy driven. Restrictions = Jurisdictional categories i.e. Exclusively equitable – only exclusively equitable remedies. Concurrent – get an equitable remedy if it is established that common law damages are inadequate.

- **Breach of fiduciary duty (exclusively equitable)** - Range of different types of remedies available for breach of an exclusively equitable action:
 - o Compensation;
 - o Accounts of profits for gain – (huge incentive for lots of parties);
 - o Constructive trust - (where the property can be traced);
 - o Personal and proprietary remedies (if the property hasn't been dissipated); and
 - o Compensation for loss – (restratory focused).

Harris v Digital Pulse – Equity is based on a balances assessment of the conscience of the parties rather than a punitive assessment. Vindication is not a basis for providing exemplary damages, and the absence of precedent meant that they couldn't make such an award in this case. When dealing with **breach of confidence**, punitive damages can send a message that a 'deliberate wrongdoing for profit, in contumelious disregard of Digital's rights, is deserving of special condemnation and punishment.'

Giller v Procopets: Agreed with **Harris**, concluding that whilst 'there is an element of the punitive in aggravated compensatory damages, punishment is not their purpose. Rather, they focus upon the effect upon the victim of the manner in which the hurt was inflicted.

TOPIC TWO: Undue influence and Unconscionable conduct.

Undue influence

Undue influence (“UI”) is the improper use by a person of an ascendancy for her or his (or a third party’s) benefit so that the acts of the person influenced are not free, voluntary acts – **Union Bank of Aus v Whitelaw**

- Undue influence focusses on coercion which prevents a party exercising free judgment and acting voluntarily.
- Species of the jurisdiction to deal with fraud in equity – **Symons v Williams**
- UI may exist even though the transferor is perfectly competent to understand and intend what was done – **Union Fidelity Trustee v Gibson**

IS THE UNDUE INFLUENCE PROVED AS A FACT (ACTUAL UNDUE INFLUENCE) OR PRESUMED BY REASON OF THE ANTECEDENT RELATIONSHIP BETWEEN THE PARTIES AND THE PRESUMPTION HAS NOT BEEN REBUTTED (CLASS 2A)

Actual UI – Where coercion or pressure is in fact exercised, but where there is no presumption of UI due to a relationship or surrounding circumstance – **Allcard v Skinner**.

- No person should be allowed to train any benefit arising from her or his fraud or wrongful act – **Barclays Bank**
- **Test:** Cannot be considered a free act, mind of the donor impacted – **Johnson v Buttress**. Mere suspicion will not suffice – **Brunker v Perpetual Trustee Co**
 1. The other party’s capacity to influence the complainant;
 2. The exercise of that influence;
 3. That its exercise was undue; and
 4. This brought about the transaction – **Bank of Credit v Aboody**.
- **Louth v Diprose** – Solicitor conveyed property to GF, he was infatuated with her though. “BF > GF” relationship = actual UI, not one of the presumed categories. GF manipulated his affections.

Relationships of presumed influence (Cat 2A):

Categories – presumed until the contrary is shown – **Johnson v Buttress**

- Parent and child – Not from parent to child – but may arise from child to parent: **Powell v Powell**
- Guardian and ward – **Hylton v Hylton**
- Fiancée and future husband – **Yerkey v Jones** – **Louth v Diprose**
- Doctor and patient – **Dent v Bennett**
- Solicitor and client – **Wright v Carter**
- Religious advisor – **Allcard v Skinner**

Rebut: Where a presumed relationship of influence exists, a burden rests on the **ascendant party** to show that any benefits received from the other party were the **consequence of an independent exercise of judgement** – **Brusewitz v Brown**

- Relationship had to be existent at the same time as the UI – **Demerara Bauxite v Hubbard**.
- From **spouse to spouse** does not raise presumption because naturally each may wish to benefit the other [but Cat 2B could apply]

Relationships of proven influence (Cat 2B):

Relevant factors: Vulnerability, dependence, structural inequality, emotional or physical impairment, financial status, age and medical status, improvidence of the gift (how large is it i.e. a house?), lack of independent legal/financial advice.

- Elements of dominion and dependence as hallmarks for the presumptive relationship of UI – **Johnson v Buttress**.
- *Not all FR’s are ones of influence. In each case, whether a presumptive relationship exists depends upon a meticulous examination of the facts* – **National Westminster Bank v Morgan**

- Qualities of the donor raise presumptions i.e. **page 17**

Rebut: May be rebutted by proof of independent legal advice. *Was the advice sufficient and independent? Did the donor, in light of the advice, act with free will?*

- **Bester v Perpetual Trustee Co Ltd:** Advice given by solicitor inadequate because girl young, inexperienced and merely reading the deed and asking if she had any questions insufficient.

Union Fidelity Trustee v Gibson – The relative strength of character and personality of the donee, the period and closeness of the relationship and the opportunity afforded the donee to influence the donor in her or his affairs = correlative considerations

Johnson v Buttress: Man of less than average intelligence and no capacity for business. B was highly excitable, very stupid and mentally unstable. Dependant, illiterate (therefore clearly dependant on others on explaining various transactions, a widower (emotionally vulnerable), sole asset, depriving his son (extravagant) and depriving himself. **Held:** Against public policy for a stronger assenting party in the relationship to transact with the weaker party when there is no evidence of an independent exercise of judgement by the latter. Could not rebut the presumption because **no independent legal advice was sought** = UI

Brusewitz v Brown: Friend > Friend because of assistance with financial transactions – not okay because most of the property transferred, nature of relationship, insufficient legal advice, some alcoholism, on his dying bed. = UI

Whereat v Duff: Presumption of UI rebutted – intention of old lady, held the intention for a while. Majority held intention does not rebut the presumption of UI & it is relevant how that intention came about. = UI.

UI and third parties: Voidable against third parties who acquire rights under the transaction as well.

1: Where the bank has participated with notice:

The third party is affected in equity where it participates in the transaction with actual or constructive notice of the circumstances giving rise to the impropriety, ie of the actual undue influence exercised, or of the circumstances from which the presumption of undue influence arises: **Yerkey v Jones (1939) Bank of New South Wales v Rogers (1941), Commercial Bank of Australia v Amadio (1983)**

UK POSITION:

- **Barclays Bank v O'Brien** – Did the bank have notice of the existence of the wife? *The Bank knew of existence of close emotional relationship. Wife = TP. Guarantee will be set aside in UK where actual or constructive notice occurs.*
- **Royal Bank of Scotland v Etridge** – *Not necessary or practical that the bank should be required to discover for themselves whether the wife's consent is being procured by the influence of the husband. Must only take reasonable steps.*

2. Where the bank procures or holds out the debtor as its agent to procure the security under the ordinary principles of agency

The third party financier will be affected by the equity if it appoints or holds out the debtor as its agent to procure the security under the ordinary principles of agency: **Alderton v Prudential Assurance Co Ltd.**

3. Special principles historically developed and applied to married women.

Where a 3rd party (such as a bank) 'deals through the husband with the wife' or leave it to the husband to obtain his wife's consent to the suretyship, and in doing so the husband exercises actual UI or makes some material misrepresentation of fact, the bank will be treated as taking subject to the invalidating conduct

- a. Presumptive Influence – Creditor must take steps to inform the wife about the transaction and reasonably believe the wife knows what she is entering into. Independent advice not necessary for creditor, just that the creditor would be satisfied as to the wife's comprehension. Although disputed, Yerkey presumptive influence was upheld in Garcia – 1998.
 - i. **Garcia elements:** *Mainly husband and wife* –
 1. Wife did not understand effect of transaction;
 2. Transaction was voluntary (wife obtains no benefit from entering guarantee);

3. Lender knows trust and confidence exists viz business matters and therefore full explanation may not be given; and
4. Lender does not take steps to explain transaction or discover if a stranger has explained the transaction.

Garcia's want **rescission** (cancellation of the agreement, still have to pay back the money but they don't have to sacrifice their house).

- Held not to apply to a **de facto relationship**: *State Bank of New South Wales Ltd v Hibbert*
- Applied to a guarantee given by **parents and siblings** of the borrower: *State Bank of New South Wales Ltd v Layoun*
- Held not to apply to **parents guaranteeing** adult child's business loans: *Watt v State Bank of New South Wales Ltd*
- Held not to apply to **guarantee given by aged parent to child**: *Permanent Mortgagees Pty Ltd v Vandenburg* - Held: No extension of special equity relationship to mother/son relationship.

Remedies – Have the offending transaction **rescinded** and the parties returned to the status quo. A court of equity will grant this form of relief even when it cannot restore the parties precisely to the state they were in before the transaction – *Cheese v Thomas*.

Unconscionable conduct – Special disability as opposed to UI (the quality of the consent or assent of the weaker party). It is possible that the same facts can give rise to a valid claim for UI and Unconscionability – *Louth v Disprose*.

Turner v Enderver:

There are 3 elements to unconscientious dealing:

- (1) The existence of a special disability: information imbalance, emotional attachment, lack of business expertise etc;
- (2) The stronger party is aware of the existence of the disability
- (3) The stronger party exploits the disability to obtain an identifiable benefit.

Stronger party must show that his conduct has been fair, just and reasonable – *Fry v Lane*.

Poverty or need of any kind, sickness, age, sex, infirmity of body or mind, or explanation where assistance or explanation is necessary – *Blomley v Ryan*.

Financial need – *Moreland Finance Corp v Luke*: D's & P finance company – leasing agreement – poor reliability of the vehicle – D's little option to choose that vehicle, would have lost their home if they didn't – the **desperate financial position** was the special disadvantage **but** financial need will not always constitute special disadvantage

Lack of knowledge and/or experience: *Nichols v Jessup*: Only where it involves a D that is "ignorant of property rights, unintelligent and muddle headed, and that her judgement in the business matter was likely to be swayed by wholly irrelevant considerations.

Need for independent advice: *State Bank of NSW v Watt* – Not in itself a special disadvantage BUT it is if it was imperative – *Bridgewater v Leahy*.

Inadequacy of consideration/improvidence of transaction: *Amadio*: Signed into a mortgage thinking it was only for 50,000 lasting 6 months but was unlimited which had not been explained will

Emotional dependency: *Louth v Diprose* – ED is the genesis of special disadvantage. D held the house on constructive trust and had taken advantage of the emotional infatuation of the P.

Knowledge of the stronger party for the exploitation:

- Statements of weaker party revealing misunderstanding – *Commonwealth Bank of Australia v Amadio*: The bank manager was aware that the respondents were Italians, that they were of advanced years and that they did not have a good command of English
- Knowledge of improvidence of transaction: Banks duty to inquire – *Elkofair v Permanent Trustee*: While the bank didn't know of the extent of the special disadvantage, the absence of any financial information was sufficient to put the respondent on notice of the appellants lack of capacity to meet the repayment obligations under the mortgage.

- Knowledge stemming from longstanding relationship: **NAB v Nobile** – Trusted their son but also because they relied upon the bank and its manager – Similar to **Amadio**
- Knowledge of relationship between guarantor and debtor – unlikely to be sufficient to establish knowledge that the wife was under a special disadvantage – **Warburton v Whitely**: unless a creditor leaves it to the debtor husband to procure the execution of a guarantee and takes no steps to ensure that the wife understands the liability she is undertaking

Note: Kakavis v The Crown Melbourne Ltd - No unconscientious dealing. Crown did not exploit because did not knowingly take advantage of a special disability. Allowing entrance did not constitute exploitation.

Exploitation of special disadvantage:

- The stronger party bears the burden of proving that by taking advantage of the transaction it is not behaving unconscionably – **Blomley v Ryan**. Proof that independent legal advice had been given to the weaker party will go a way towards establishing that no conscientious dealing took place and that the stronger party's actions are not impugned – **ANZ v Barry**.
- If the weaker party has been independently advised in respect of the transaction, it is difficult to see how the stronger party acts unconscionably in seeking to enforce it – **ANZ v Alirezai**.

Defences – Show that no unfair advantage was taken of the plaintiff. Adequacy of consideration may be a relevant factor – **Bridgewater v Leahy**.

Remedies – Setting aside (rescission) of the transaction impugned – **ANZ v Dzienciol** or specific performance Must be proportional to the benefit derived from the transaction – **Wilby v St George**. A court will not grant relief that unjustly enriches the plaintiff.

TOPIC THREE: Fiduciary relationships

1: **Is the relationship fiduciary?** There are well-established categories of fiduciary relationships, frequent categories of fiduciary relationships and circumstantial categories of fiduciary relationships (ie relationships which are proven to be fiduciary in the specific circumstances).

2: **What are the nature and scope of the fiduciary duties and have those duties been breached on the facts?** The established fiduciary duties are proscriptive in nature and are twofold involving (1) a duty to avoid a conflict of interest and (2) Duty to Account for any profit.

3: **What is the appropriate relief for the breach?** Fiduciary remedies (discussed in topic 4 include: an account of profit, equitable compensation and a constructive trust where the property can be traced.

Fiduciary obligations

The **arm's length** principle (ALP) is the condition or the fact that the parties to a transaction are independent and on an equal footing. Such a transaction is known as an "**arm's-length** transaction".

The relationships in which fiduciary obligations generally arise are those where the parties are not dealing with each other at arms-length. The fundamental obligation of the fiduciary is to act in the interests of the other party to the relationship.

Hodgkinson v Simms

- **Vulnerability** – *expectation of weaker party that stronger party will look after interests*
 - Important indicator – absence of vulnerability on the part of a beneficiary has been used to preclude the finding of a FR – **Paul Dainty Cort Pty Ltd v National Tennis Centre Trust**
 - **Hospital Products** – not FR because no position of disadvantage or vulnerability requiring equitable protection & an arms-length commercial transaction.
- **Features of trust, loyalty and confidentiality**
 - Subjective test – high expectations do not necessarily lead to equitable remedies – **Re Goldcorp Exchange Ltd**
 - **LAC Minerals**: Held: (Maj) Confidential relationship had been breached but no fiduciary relationship existed. Relationship was commercial in nature. Parties able to protect themselves with a confidentiality agreement so there was an absence of trust and confidentiality. Self imposed vulnerability is not protected.
- **Representative capacity**

- Unilateral power to affect insufficient

2 prominent explanatory theories:

1. The undertaking theory
2. Trust and confidence theory – *Day v Mead*

- **Commercial relationships:** The absence of a commercial context in which parties have bargained with each other at arms length = indicator of FR
 - In many situations, it is inappropriate to impose a fiduciary relationship upon a standard, arms length commercial relationship – *Hospital Products Ltd v USSC*.
 - Mason J – every transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a FR
 - Arise in the course of negotiations towards a cooperative business venture whether it is envisaged that the parties will become partners or will formalise their cooperation legally in some other way – *United Dominions Corp Ltd v Brian Pty Ltd*
 - Banker and customer has been found FR – *Commonwealth Bank v Smith*

US Surgical Corp v Hospital Products: Sold USSC demonstration models as HPI's own products.

- HC: The arrangement was a commercial one entered into by the parties at arms-length and on an equal footing & as it was intended that both USSC and HPI would profit from the distributorship arrangement it could not be said that HPI was under an obligation not to profit from its position.
- COA: it was an implied term of the contract between USSC and HPL that HPL would not do anything inimical to the market for USSC products in Australia and that it would not set up a rival business. On that basis, McLelland J at first instance and the COA held that Blackman and HPL owed FD to USSC
- Fiduciary obligations will exist in a relationship where one party is bound to act in the interests of the other or in their joint interests in the case of a joint venture or partnership joint venture or partnership and correspondingly is not free to have regard to his or her own interests or to the interests of a third party
- **John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd:** Held: **No fiduciary relationship existed between JAC and WCT.** Their Honours felt that the existence of fiduciary obligations faced a 'fundamental difficulty' – that being that the contract had evolved over time and was subject to recipient responsibilities which imposed contractual but not equitable responsibilities and fiduciary responsibilities should not conflict with this.

Established categories of fiduciary relationships: *LAC Minerals LTD v International Corona Resources* – the categories of relationships giving rise to FD are not closed nor do the traditional relationships invariably give rise to fiduciary obligation.

Joint ventures: Generally owe FD towards each other but not always.

- **UDC v Brian** – UDC claimed all the financial borrowings, but joint venture; the fact that the 3rd party was also a lender did not stop the third party from holding the position of a participating and partner with the remaining JV – each party was under a duty to refrain from gaining an advantage in connection with the project – *position of vulnerability existed here*
 - Held: Participants did owe fiduciary duties towards each other and this included a duty to refrain from obtaining any collateral advantage. UDC in breach by including the collateralisation clause without knowledge and informed consent of other joint venture participants.
- **LAC Minerals LTD v International Corona Ltd** – The respondent was not in a position of vulnerability unlike in UDC – exploratory drilling in the property adjacent revealing the land that LAC minerals had was likely to have similar mineral deposits.
- **Chirside v Fay** – Issue was whether the pre-contractual JV relationship was fiduciary in nature – No fiduciary obligations

Partnerships – Determined by the character of the undertaking which may be ascertained from any express agreement- *Chan v Zacharia*. Fiduciary relationship – so strong better partners – *Birtchnell v ET*

- Can arise prior to the execution of the partnership agreement – *UDC v Brian*