

**EQUITY SAMPLE**  
**70517**

## **PART 2 - Doctrine of UNCONSCIONABLE TRANSACTIONS**

- Unconscionable dealing is a doctrine which focuses upon the existence of a special disadvantage in one party to a transaction.
- Purpose is to provide relief in situations where one party to a transaction has actively taken advantage of the weakness of another.
- If the other party to the transaction takes 'unconscientious advantage' of that special disadvantage, the transaction may be set aside.
- Does not turn on pre-existing relationship between parties, but looks at personal characteristics and the bargaining process between them.
- Equitable doctrines CAN SET ASIDE valid contracts at law.

### **Key Cases:**

*Commercial Bank of Australia v Armadale*

*ACCC v Berbatis*

*Wilton v Farnworth*

*Blomley v Ryan* - sets out the different aspects of what amounts to a special disadvantage or disability

### **2.1 Elements to be Established (from Blomley v Ryan)**

#### **1. Special Disadvantage**

Some characteristic 'which seriously affects the ability of the innocent party to make a judgment as to his own best interests' (Armadio)

#### **2. Knowledge**

Must demonstrate ACTUAL or CONSTRUCTIVE knowledge.

If the "guilty" party doesn't know that the "weaker" party has a special disadvantage, the case will fail.

Has to be proven that the other KNEW of the disadvantage.

#### **3. Unconscionable Exploitation of the Disadvantage**

A special disadvantage and a knowledge of the disadvantage does not equal U/C conduct, the party must have actually taken advantage of it.

### **2.2 Defences**

1. (1) Provision of Independent Advice
2. (2) Lack of Improvidence
3. (3) Laches - as in *Bester v Perpetual Trustee*.
4. (4) Acquiescence - *Allcard v Skinner*

5. most likely ground for defense is to rebut the argument that the transaction was unfair or that the special disadvantage was exploited.

3. IE. To show that the special disadvantage was not exploited: show the presence of assistance provided to the weaker party.

### **2.3 Remedies**

- (i) Rescission - Cheese v Thomas.
- (ii) Equitable Compensation - Hartigan
- (iii) Remedial Constructive Trust - McCulloch v Fern

### **2.4. Relationship between Undue and Unconscionable.**

*“Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party... 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 of good conscience that he should do so” - Deane J, Amadio.*

*“Although unconscionable conduct.. bears some resemblance to the doctrine of undue influence, there is a difference between the two.*

*In the latter (undue influence) the will of the innocent party is not independent and voluntary because it is overborne.*

*In the former (unconscionable conduct) the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position’ - Mason J, Amadio.*

- Must be a relationship of influence to find Undue Influence.

### **1 and 2: SAMPLE ANSWERS: Undue Influence and Unconscionable Transactions**

- Step 1: Determine the different causes of action, the different parties.
- Step 2: Look at whether its undue influence or unconscionable, or both
- Step 3: Identify the Issue
- Step 4: State the relevant law
- Step 5: Apply the law to the facts
- Step 6: Conclude

#### **Go through Undue Influence: (\*\*must be a special relationship)**

Equity recognizes, where the common law does not, that party's to a transaction may not have equal bargaining power. Equity can set aside

a transaction where it can be shown that the relationship between the parties was tainted by inequality, unfairness or actual abuse. There may be the existence of either Actual Undue Influence, or Presumed Undue influence. This will turn on the facts.

a. Actual Undue Influence?

- (i) To establish Actual Undue Influence, Party A must show that the transaction occurred as a direct result of influence expressly used so that it cannot be considered a free and voluntary act.
- (ii) Look to the existence of violence or threats, improper use of influence to obtain a benefit (*Johnson v Buttress*)

b. Presumed Undue Influence?

- (a) The second class of presumed undue influence requires the existence of a special relationship of influence.
- (b) May be Class 2A or Class 2B?
- (c) A relationship of special influence will arise where the party in receipt of a benefit or contractual advantage is in a relationship which gives authority or influence over the other, from the abuse of which the subservient party should be protected.
- (d) Look at whether one of the following exists:
- (e) Parent & Child (*Lancashire Loans Ltd v Black*; *Lamotte v Lamotte*, *Bullock v Lloyds Bank*)
- (f) Guardian & Ward (*Hylton v Hylton*)
- (g) Solicitor & Client (*Westmelton v Archer & Shulman*; *Verduci v Golotta* [2010] NSWSC 506)
- (h) Doctor & Patient (*Bar-Mordecai v Hillston*)
- (i) Religious Leader & Follower (*Allcard v Skinner*; *McCulloch v Fern* [2001] NSWSC 406)
- (j) It may be class 2B, to be determined on the facts

As the relationship in this case is not a presumed (deemed) relationship of influence, it will be necessary for Party A to prove the relationship of influence on the facts. The elements of a special relationship of influence from *Lloyds Bank v Bundy* are:

1. reliance upon guidance and advice
2. awareness of the reliance by the dominant party
3. a benefit being received by the adviser
4. some element of confidentiality in the relationship.

If it is deemed that there Party A entered the contract under Undue Influence, the contract may be set aside.

### DEFENSES:

The presumption of undue influences can be rebutted by contrary evidence. The 'stronger' party must show that the transaction was the result of independent and informed judgement, after 'full, free and informed thought' (Zamet v Hyman)

#### 1. Look for?

Independent Advice - however mere presence of I/A will not be conclusive, and the nature and quality of advice are taken into account. (Inche Noriah v Shaik Allie bin Omar)

The 'stronger' party must show that the transaction was the result of independent and informed judgement.

### **Then: Go through Unconscionable Transaction**

To establish an unconscionable transaction it is necessary to show that one party was at a special disability, that this disability was known by the other party and that the other party unconscientiously taken advantage of that party at a special disadvantage (Amadio)

#### Show:

- Special Disability.

The Claimant must show that at the time of the transaction he suffered from a disadvantage which seriously affected his ability to make a judgement in his best interests. (Amadio, Blomley v Ryan)

The Claimant must show that their disability seriously affected their capacity to judge or protect their interests.

#### 2. Knowledge: Show that the defendant had knowledge of this disadvantage. Turns on the facts.

- the disability must be 'sufficiently evident' to the defendant.
- Both actual and constructive knowledge will be sufficient. (Amadio)

#### 3. Exploitation of Disability

- (i) advantage of the disability must be taken - ie. inadequate consideration or unfair terms.

**Any Defenses? Rebuttals?**

3. The defendant must establish that the transaction was fair, just and reasonable in order to rebut it.
4. Consider: adequacy of consideration and independent advice.

**Remedies**- discuss.

## PART 3 -

## EQUITABLE ESTOPPEL

Equitable Estoppel or representation of **future conduct** occurs where the Relying Party acted upon an assumption as to the future conduct of the Representor

The effect of Equitable Estoppel is to prevent the Representor from acting inconsistently with his representation without taking steps to ensure the Relying Party does not suffer detriment as a result of his inconsistent conduct.

Equitable Estoppel can be divided into **Proprietary** Estoppel (representation deals with interest in land) and **Promissory** Estoppel (all other Equitable Estoppel which doesn't relate to land).

### Cases:

- (a) Walton Stores v Maher
- (b) Jordan v Money
- (c) Central London Property Trust v High Trees House Ltd

### 3.1 Proprietary Estoppel

operates where the Representor is an owner of land who induces the Relying Party to believe that the Relying Party has or will have an interest in the land.

- If the Relying Party then acted to his detriment in reliance of being granted that interest in the land, the Representor will be required to either 'make good' of that assumption (give the Relying Party interest in the land) or compensate him accordingly

### 3.2 Promissory Estoppel

Promissory Estoppel operates where the Representor induces the Relying Party to believe that certain contractual rights within their contracts will not be enforced.

- (b) If the Relying Party changed his position in reliance on that representation, the Representor will not be allowed to enforce those rights.
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### Modern Equitable Estoppel:

Equitable Estoppel is the result of bringing together the two significant forms of estoppel that existed in equity - promissory and proprietary.

Walton Stores v Maher combined the two estoppels and created the broader principal of 'promissory estoppel'



### **3.3 Elements of Equitable Estoppel**

The elements from *Walton Stores v Maher*

1. **ASSUMPTION OR EXPECTATION:** The plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them, and in the latter case, that the defendant would not be free to withdraw from the expected legal relationship
2. **INDUCEMENT:** the defendant has induced the plaintiff to adopt that assumption or expectation
3. **RELIANCE:** the plaintiff acts or abstains from acting in reliance on the assumption or expectation
4. **KNOWLEDGE OR INTENTION:** the defendant knew or intended him to do so
5. **DETRIMENT:** the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled
6. **FAILURE TO AVOID DETRIMENT:** the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.

Further to add:

1. Needs to be a promise or a sufficiently clear and unambiguous representation  
"Unconscionability is usually difficult to establish when the representation is ambiguous or unclear" - *Australian Crime Commission v Gray*
2. The promise or representation can either be express or implied.
  - *Legione v Hately* - 'the requirement that a representation as to existing fact or future conduct must be clear, does not mean that the representation must be express'

#### 3.4 Relief based upon equitable estoppel

- Relief is based upon the expectation that the promise or representation generated (*Giumelli v Giumelli*)
- the courts have made it clear that the orders to be granted are generally based upon avoiding the relying party from suffering detriment (*Walton Stores, Commonwealth v Verwayen*)
- 'It is intended that relieve against detriment suffered and not to make good an expectation' - *Mobil Oil v Lyndel Nomi*

