

EQUITY AND TRUSTS

NOTES 2019

1. Maxims of equity
 2. Undue influence
 3. Unconscionable conduct
 4. Estoppel
 5. Introduction to Trusts
 6. Assignments in equity
 7. Priorities
 8. Fiduciary Duties and Confidentiality
 9. Express trusts
 10. Charitable trusts
 11. Administration of the Trust
 - (a) Appointment, Retirement and Removal of Trustees
 - (b) Powers, Rights and Duties of Trustees
 - (c) Rights of Beneficiaries
 12. Variation and termination of trusts
 13. Remedies for Breach
 14. Tracing
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Maxims of Equity

- The maxims are principles which underlie equity. They are not absolute rules, but may guide decision-making.
- [The] “rules of equity have to be applied to such a great diversity of circumstances that they can be stated in only the most general terms and applied with particular attention to the exact circumstances of each case”: Boardman v Phipps [1967] 2 AC 46.

Maxims include (not an exhaustive list):

1. Equity does not suffer a wrong without a remedy/where there is a right there is a remedy (*ubi jus ibi remedium*)
2. Equity follows the law (*aequitas sequitur legem*)
3. One who seeks equity must do equity.
 1. A party must do or refrain from doing some act which otherwise he could not be constrained to do or omit, to assure fair and just treatment to the other party
4. Equality is equity
 1. Pro rata distribution
5. Those who come to equity must come with clean hands
 1. The primary factor is whether the plaintiff sought to mislead or deceive the other party not whether the defendant relied on the misrepresentation.
 2. Clean hands is not triggered by mere negligence
6. Equity looks to intent, not to form
 1. Inherent nature of the matter
7. Equity looks on that as done which ought to be done
8. Where the equities are equal, the first in time will prevail (*Qui prior est tempore potior est jure*)
 1. Between two equally innocent persons acting in good faith the remedy goes to the first in time
9. Where the equities are equal, the law will prevail
10. Delay defeats equity
11. Equity will not allow the Statute of Frauds to be used as an instrument of fraud
12. Equity aids the vigilant not those who sleep on their rights (*vigilantibus et non dormientibus aequitas subvenit*)
 1. Doctrine of laches: no limitations: the effect of delay not the fact of delay
13. Equity acts in personam not in rem
 1. To act in personam means it acts upon a person's conscience. This is as opposed to acting in rem which is a characteristic of common law where it acts upon the property that is subject to the suit.
14. Equity acts specifically
 1. Not usually compensation or damages but specific relief
 1. Restorative

Equity will not suffer a wrong to be without a remedy

- Equity evolved in conjunction with law, remedying situations of injustice. It can potentially expand remedies to address new situations.

- But courts are reluctant to expand equity beyond the historic categories where relief would be granted.
- Generally, significant changes to the law of equity are the domain of the High Court: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

Equity follows the law

- Equity's primary role is as a curative supplement to the deficiencies of the common law, not as a rival system.
- Equity recognises common law rights and does not say that these interests are not valid
- *AMEV-UDC Finance v Austin*: equity followed and built upon CL

Equity will not assist a volunteer

1. Volunteer = someone who has not given valuable consideration
2. Idea that conscious not bound if nothing of value exchanged.
3. Valuable consideration – something of “real and substantial value” and not “merely nominal or trivial or colourable”: *Re Abbot* [1983] 1 Ch 45.
4. There are exceptions:
 - Complete gifts may be enforced in equity (see assignments).
 - Interests of the beneficiary of a trusts are protected.

Equity acts in personam

- Idea that courts of equity make an order against the person, not against property.
- Relied upon to make orders even where property is outside the jurisdiction of the court.
- But demonstrates the limits of maxims of equity – equity does enforce rights that are proprietary in nature.

“For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which, had they been foreseen, the legislator himself would have excepted.”

“Equity, in its true and genuine meaning, is the soul and spirit of all law; positive law is construed, and rational law is made by it. In this, equity is synonymous with justice in that, to the true and sound interpretation of the rule.” Blackstone (1765)

Undue Influence

5. Undue influence focuses upon the relationship that existed between the parties, and asked whether the nature of the relationship impaired the quality of consent given.
6. The onus is on the party seeking to set aside the contract to show dominant ascendancy over the weaker party. *Commercial Bank v Amadio*
7. Undue influence is concerned with the quality of the consent given by one party to a transaction
 - a. The purpose of looking at the quality of the consent is to ascertain whether the weaker party has been ‘forced, tricked or misled’ into parting with the property - *Commercial Bank of Australia Ltd v Amadio*

CATEGORIES OF UNDUE INFLUENCE

- Where there is a *special relationship* between the parties to the transaction
 - There arises a rebuttal presumption of undue influence

- Where there is *no special relationship* *hard to prove/uncommon
 - Actual (or express) undue influence
 - Proving the nature and extent

PRESUMED UNDUE INFLUENCE

Cases dealing with presumed undue influence involve the **existence of a special relationship between the parties to the transaction.**

Establishing presumed undue influence

1. Establish the special relationship
 - a. Prove Class 2A or 2B presumed undue influence
2. Rebut the presumption (the *onus has shifted to the stronger party*)

• **CASES 2A UNDUE INFLUENCE**

Benefit has to flow from the weaker party to the stronger party. If the undue influence of the stronger party is established, then the transaction will be set aside.

Where it can be presumed any transaction made favouring the stronger party was brought by the undue exercise of that party's influence.

- 1) Parent and child: *Lancashire Loans v Black*
- 2) Guardian and ward: *Hylton v Hylton*
- 3) Solicitor and client: *Westmelton v Archer & Shulman*
- 4) Doctor and patient: *Bar-Mordecai v Hillston*
- 5) Religious leader and follower: *Allcard v Skinner*

• **CASES 2B UNDUE INFLUENCE**

In these instances, while there is no presumed special relationship, such as in Class 2A relationships, it can nevertheless be established in the circumstances that there is a weaker party and a stronger party and that the latter exerted influence over the former.

These arise 'where it is proved that the party benefiting from the transaction occupies or assume towards another a position naturally involving an ascendancy or influence over that other, or a dependency or trust on the latter's part – *Janson v Janson*

- It can be shown that there is a weaker party and a stronger party and that the latter exerted influence over the former.

- Evidence relates to issues of fact
- Extreme age, mental or physical disability, illiteracy, poor education, lack of business knowledge & expertise and how these matters influence the relationship between parties are considerations to determine whether a relationship gives rise to the presumption of undue influence. - *Tulloch (decd) v Braybon (No 2)*

UNDUE INFLUENCE AND THIRD PARTIES

- Undue influence can arise in a situation where the dominant party is not the direct recipient of some benefit, but rather through the involvement of a third party.
- Undue influence involving third parties can arise in the following situations:
- Where there is a relationship of undue influence between A (the dominant party) which results in a transfer of property or conferral of some benefit from B to C (a third party);

- This is where a dominant party influences a weaker party to make a gift to a third party or undertake obligations for the third party
 - *Verduci v Golotta* - where the client borrowed money from the solicitor's father. The loan and the mortgage were set aside.
- Undertake obligations to a third party which will be to the benefit of the stronger party.
 - Where there is a relationship of undue influence between A (the dominant party) and B (the weaker party) which results in B undertaking obligations to C (a third party) which will be for the benefit of A, an example being where B acts as a guarantor of A's loan from C

REBUTTAL OF UNDUE INFLUENCE

The special relationship is to be established by the weaker party. The stronger party has to rebut the presumption. It is not enough for the stronger party to show that the weaker party understood the transaction. It has to be shown that the intention to make the transfer had nothing to do with the stronger party.

Hodson v Hodson

There is a presumption of undue influence until the age of emancipation.

Tillet v Varnell Holdings

Independent advice

Not required by law, but **difficult to rebut the presumption without it.**

Where the stronger party can show that the weaker party received independent advice, the presumption may be rebutted. However, if legal advice is given to the weaker party in the presence of the stronger party, it is not regarded as 'independent' legal advice.

Anderson v Anderson

Proof of independent advice will be taken into account by the courts. Proof of such advice is insufficient to show that the subsequent transaction was untainted. Whether the independent advice overrode any undue influence will be a question of fact.

Royal Bank of Scotland v Etridge

- For independent advice to have the effect of rebutting the presumption of undue influence, the advice should be particularly thorough and address all aspects of the transaction at hand - *Janson v Janson*
- The adviser must be fully informed of all material facts - *Brusewrtiz v Brown*
- Advice from a solicitor acting for both sides is not independent in the eyes of the court. - *Anderson v Anderson*
- Proof of such advice is insufficient to show that the subsequent transaction was untainted.
- Whether the independent advice overrode any undue influence will be a question of fact - *Royal Bank of Scotland v Etridge*
- In *Bester* the independent advice failed to inform Bester adequately, she still had no real understanding of the effect of the transaction at all. The presence of independent advice therefore did not rebut the presumption in this case.

Lack of improvidence

Another way of showing that there was no undue influence is if the stronger party is able to show that the transaction did not cause excessive loss to the weaker party. If a transaction is not improvident for the weaker party (it does not cause excessive loss), it is more plausible that it was entered into freely.

It is up to the weaker party to establish undue influence. The position of guarantors is unique. In such instances, if a relationship can be established between the lender and the guarantor.

Union Fidelity Trustee Co of Australia

General equitable defences

Laches or delay is a good defence. This is available to the stronger party/defendant.

1. This doctrine may prevent relief being given where it appears that, after the influence has been removed, the weaker party has not taken any steps to set aside the transaction.
2. This is based on equitable grounds – it would be unjust to allow recession of a contract once it has seemingly been accepted by the weaker party for an extended period of time.

Allcard v Skinner

- The net result was that although there was undue influence on her when she gifted the property, her delay to take steps to have it returned was met successfully, with the defences of confirmation, estoppel and acquiescence and/or laches.
- The crucial aspect for laches to apply is the question of how long the applicant delayed asking for it back, after she was freed from the undue influence.

Undue influence and third party guarantees

Bank of NSW v Rogers.

3. Rogers had acted as guarantor for her uncle's business by pledging her property for a loan that the uncle was receiving from the Bank.
4. The uncle's business was faring poorly and ultimately failed. The Bank attempted to call on the guarantee provided by Rogers.
5. The presumption of the exertion of undue influence by the uncle over the niece was not successfully rebutted.
6. Similarly, the Bank's attempts to call on the guarantee failed on the basis that it had failed to show that Rogers had obtained independent advice before she agreed to be a guarantor.

Yerkey v Jones principle

- [I]f a married woman's consent to become a surety for her husband's debt is procured by the husband and without understanding its effect in essential respects she executes an instrument of suretyship which the creditor accepts without dealing with her personally she has a prima facie right to set it aside.
 - When a wife becomes a surety for her husband's debt, but has no idea what she is signing herself up for, the bank has to explain it to her or she has the right to set it aside.

The relationship of husband and wife is not one in which it is presumed that the husband has influence over the wife.

In cases where a wife confers a benefit upon her husband voluntarily, a presumption of undue influence does not arise.

Garcia

- This principle was confirmed in *Garcia v National Australia Bank*. (1998) – HCA
 - In this instance, the full implications of the guarantees that the wife was signing to assist her husband's business were never explained to her by the NAB.
 - The High Court held that although no undue influence was found to have been exerted by the husband, they were of the view that the NAB had been unconscientious in that the surety did not attend the purport and effect of the transactions.

- Secondly, the transaction was voluntary in that the surety (wife) obtained no gain.
- Thirdly, as a lender the Bank ought to have known and foreseen that the husband may not have explained the full implications of the transactions to the wife.
- Lastly, the NAB did not explain the nature and implications of the transactions to her.

REMEDIES

- The principle remedy for undue influence is rescission of the contract – the defendant has to account for any profits gained from the transaction - *Mahoney v Purnell*
- Account of Profits, Equitable compensation and Remedial constructive trusts can also be granted.

Unconscionable conduct

Pursuant to the doctrine of unconscionability, equitable relief is given where there has been an abuse of power possessed by one party over the other by virtue of the others position of special disadvantage.

ACCC v Radio Rentals

ELEMENTS: *CBA v Amadio*

- A is under a **special disadvantage or disability**
 - A party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and;
- B had **knowledge** of A's disadvantage; and
- B **proceeds to exploit that disadvantage unconscientiously** in order to obtain A's consent to the transaction
 - That disability was sufficiently evident to the stronger party to make it prima facie unfair or 'uncontentious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstance in which he procured or accepted it.
- Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable.

SPECIAL DISADVANTAGE OR DISABILITY

There is no fixed list as to what constitutes a special disadvantage. What is required is some characteristic which *seriously affects the ability of the innocent party to make a judgement as to his own best interests.*

CBA v Amadio

- The special disadvantage may be **constitutional**, deriving from age, illness, poverty, inexperience or lack of education. *ACCC v Samton Holdings*
- It may be **situational**, deriving from particular features of a relationship between the actors in the transaction such as the emotional dependence of one on the other. *ACCC v Samton Holdings*

What is required is that it have the effect of placing one party at a disadvantage vis-à-vis the other. *Anderson v McPherson*. However, the mere existence of one or more of these characteristics in a party to a transaction will not automatically amount to a special disadvantage in all cases. *ACC v Berbatis*.

It will not be a special disadvantage if the party was able to make rational decisions and capable of making a judgement as to his or her best interests.

Anderson v McPherson

- *Anderson v McPherson (No 2)*
 - ‘It is clear that a person could be ill, or poor, or even ‘affected by delusion’ but still be perfectly capable of making a judgement as to his or her own best interests. Nor will a person even in a greatly inferior bargaining position necessarily lack capacity to make a judgement about that persons own best interests.’

KNOWLEDGE

- Requires actual rather than constructive knowledge.
- May be sufficient if the stronger party is aware of facts that would have raised the possibility in the mind of a reasonable person: *Amadio*.

It is clear that the defendant must have known or ought to have known of the special disadvantage of the other party. The requirement of knowledge is necessary because the defendant cannot be said to have acted unconscientiously if he or she had no knowledge of the plaintiff’s special disadvantage. *CBA v Amadio*

If A has actual knowledge and takes unfair advantage of this disadvantage, his conduct in so doing is unconscionable

Additionally, If A is aware of the possibility that the situation may exist or is aware of the facts that would raise that possibility in the mind of any reasonable person, the result will be the same.

CBA v Amadio

Was the disability sufficiently evident to the stronger party to make it prima facie unfair or unconscientious that he procure or accept the weaker party’s assent to the impugned transaction in the circumstances in which he procured or accepted it.

CBA v Amadio

The concept of constructive knowledge is relevant in the context of priority disputes between owners of competing interests in property is not within the concept of knowledge in relations to the application of equitable doctrines.

It is rare for knowledge to pose much difficult for an applicant, as the circumstances will normally be so clear that the knowledge of the other party is **easily established**.

UNCONSCIENTIOUS EXPLOITATION OF THE DISADVANTAGE

A special disadvantage and the other party’s knowledge of it, does not make a transaction unconscionable. It is the exploitation by the stronger party of the weakness that he or she knows exists in the other in order to procure consent to a traction that makes it unconscionable.

CBA v Amadio

The stronger party must exploit the weakness that he or she knows to exist in the other in order to procure consent to a transaction. Inequality of bargaining power will often be a factor taken into account in assessing whether the stronger party has taken advantage of the weaker party’s special disability.

However, a transaction may still be unconscionable even if it is not improvident (negligent). *Turner v Windever*

Inequality of bargaining power is a factor here ('predatory mindset'), but more is generally required.

PREDATORY NATURE: The law is not to protect you from your own folly

REMEDIES

- A party who is successful in raising the doctrine of unconscionability will usually seek to avoid the transaction.
- He or she may do so by means of resisting the stronger party's action for specific performance of the contract (*Blomley v Ryan*) or he or she may seek the return of property by rescission of the impugned transaction
- However, as in *CBA v Amadio*, the option of imposing conditions upon an order for rescission was discussed and in *Schipp v Cameron*, equitable compensation was ordered.