

Introduction to Equity

Tuesday, 5 July 2022 12:26 PM

What is equity?

Equity acts as a corrective to the common law, in a supplementary way
Equity acts in a specific and nuanced way compared to the common law's generalist/universalist approach
The underpinning principle of equity is conscience

The role of conscience in equity

Cases and conscience

Amadio: obtaining signature on guarantee without explaining document, while knowing the As' age and limited English

Waltons: W's silence that induced M to carry out works under the impression that contract will be signed, while knowing that W will not sign the contract

Thorne: undue pressure placed by K on T to sign agreement, right before wedding after entire family comes to Australia

Key themes

Is the idea of 'conscience' normative?

Theme	Explanation	Cases
Procedural vs substantive unconscionability	Is equity more concerned with the conscionability of procedures or outcomes? <ul style="list-style-type: none">• Cases indicate slightly more about procedural unconscionability but substance is still relevant	<i>Amadio</i> : bank's unfair procedure to get signature AND transaction resulted in As' extensive liability for no return <i>Waltons</i> : W's inducement through silence > outcome of 60% of building completed in accordance with W's standards <i>Thorne</i> : T under time and situational pressure to sign AND outcome of gross inequality
Commercial vs domestic context Freedom of contract and individualism vs egalitarianism	Should equity still intervene to uphold conscience in commercial contexts/transactions? <ul style="list-style-type: none">• There was concern that <i>Waltons</i> judgment would affect commercial uncertainty and freedom of contract• Perhaps equity facilitates commercial transactions	<i>Amadio</i> : domestic arrangement of parents guaranteeing son's loan that occurred in family home; also commercial because involvement of bank <i>Waltons</i> : commercial parties acting for commercial gain <i>Thorne</i> : domestic arrangement between fiancés
Relative power of the parties Individual disadvantage vs structural	Does equity have a role to play in ameliorating power disparity between parties? Is equity an effective tool for addressing structural inequality	<i>Amadio</i> : disadvantage of age and linguistic skills -> individualistic or structural? <i>Waltons</i> : is there structural inequality because W was more wealthy than M? Note: judgment focusses on

disadvantage	or does it reinforce it?	unconscionable inducement as opposed to power relations <i>Thorne</i> : gender and migration status as vulnerabilities -> individualistic or structural? Note: judgment focusses on time and situational pressures as opposed to power relations
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Fiduciary Relationships

Saturday, 16 July 2022 5:21 PM

Introduction

Difficult to define fiduciary

Established/presumptive fiduciary relationship categories:

- Vertical
 - Trustee-beneficiary
 - Lawyer-client
 - Agent-principal
 - Director-company
- Horizontal
 - Business partners

Why would you want to establish a relationship as fiduciary?

- Remedies like constructive trust available for breach of fiduciary duty
- Highest degree of responsibility placed on the fiduciary
- Protected by strict duties

Finding a fiduciary relationship

Hospital Products: AU distributor for US company

Two approaches to finding a fiduciary relationship

1. Mason J dissenting: A has **undertaken** to act for B in a way that affects B's interests legally or practically
 - *Grimaldi*: A's undertaking causes B to have a reasonable expectation that A will act in their best interest in relation to an aspect of the relationship
 2. Dawson J: B is in a position of **disadvantage or vulnerability** that causes them to rely on A's power
- These approaches are not mutually exclusive, critical point is where the emphasis lies

Mason J: fiduciary relationships can exist between contractual parties

UDC v Brian: third joint venturer not paid bc mortgage between other two parties

Horizontal fiduciary relationship found in a joint venture

'relationship of **mutual trust and confidence**'

In a commercial setting

Fiduciary relationship could exist among **prospective** joint venturers

More emphasis

Fiduciary duties

No conflict and no profit rules

- Applied strictly: no significant possibility of conflict (*Boardman*), no unauthorised profit (*Regal*)
- Proscriptive: negative! (*Breen*)

BUT applied narrowly: duties attach primarily to the protection of financial interests

- Cf Canada: dr-patient, parent-child aren't established fiduciary relationship categories in Australia
- Therefore, courts sometimes revert the process of finding breach of fiduciary duties by first asking whether there are any financial interests, before deciding whether there is a fiduciary relationship

Can be overcome with informed consent

Regal: board members made personal profit from shares bought in another company

No profit rule is strict

No profit rule does not depend on:

- Fraud
- Absence of bona fides
- Any damage to the plaintiff

Profit was based on knowledge gained through the course of management as directors

- Therefore, breach

Boardman: board members made personal profit from shares purchased

No conflict rule is strict

- Majority: the fact that there was a *possibility* of conflict was enough to impose a liability here
- Lord Upjohn dissenting: **real and substantial possibility of conflict**
 - **This is the view adopted in Australian jurisprudence**

Does not matter that the trust benefitted from the purchases

Breen: doctor-patient breast implant

No fiduciary relationship between a doctor and patient

No positive duty on fiduciary to act in the other party's best interest

- Therefore, no positive duty to provide medical records to patient
- Instead, negative duty in the form of no profit and no conflict rules
 - Here, no profit or conflict arose

Kirby J dissenting in Court of Appeal: fiduciary relationships have been created by judges, they arise where one party has a role to act in the service or interest of another, who is specially vulnerable to harm

- Therefore, fiduciary relationships can protect personal interests, not just economic ones

BUT the doctor's entire rationale for not handing the documents without a release was to prevent being sued -> is this not a financial interest?

Critique

Congalan (support of proscriptive approach)

Australian approach is correct, key obligation of fiduciary is one of loyalty

- No conflict and no profit rules reflect a correct understanding of this
- Canadian approach is moralistic, but fiduciary law is amoral, it only assists the exercise of non-fiduciary duties

Prophylactic function, deterrent function

- This is why the duties must be so strict
- Most fiduciaries have other duties too, fiduciary duties prevent fiduciaries from breaching other duties as well, such as exercising prudence

Gover (indigenous people owed fiduciary duties)

Toohey J in *Mabo*: there is a fiduciary duty owed by Australian government to indigenous people in the land rights context

- Vulnerability approach: government exercised power to take away indigenous land, rendering indigenous people vulnerable to government power
- Undertaking approach: misguided policies of taking indigenous to reserves etc.

Stolen generation context?

In NZ and Canada, fiduciary duties guide the governments' dealings with indigenous peoples

- In Australia, the HCA has not accepted that the government owes relational or consultative obligations to indigenous peoples -> this facilitates unilateralism
- We need fiduciary duties to extend to the Australian government in its dealings with indigenous people -> Toohey J *Mabo*

Zhou (support of Canadian view)

Could fiduciary law deal with the harm of sexual assault?

- In Australia, viewed as personal rather than purely financial interest, therefore fiduciary law not available, cf Canada

Rationale?

- Better remedies under equity, more generous and flexible
- Fiduciary law can get around statutes of limitations (no longer a barrier in Victoria due to law reform)
- Better than tort
- Sexual assault is about power and vulnerability!

Introduction to the Trust

Thursday, 21 July 2022 6:19 PM

What is a trust?

“an **obligation enforceable in Equity** which rests upon a person (the trustee) as owner of some specific **property** (the trust property) to deal with that **property** for the **benefit of another person** (the B) or for the advancement of certain purposes”

Trusts can create layers of interest/title

- Trustee may have **legal or equitable interest** in the **property**, but the beneficiary has **beneficial interest** in the property
- Trustee has **equitable liability** to hold the **property** for the beneficiary's benefit -> **fiduciary obligation**

The trust is an equitable obligation, it is **not a legal person in and of itself**

The same person cannot be both the only trustee and the only beneficiary of the trust

- Rationale: how can one person owe an equitable obligation to themselves in relation to a property that they already have?

Categories of trusts

Express, constructive and resulting

When the trust takes effect

- Testamentary: trust takes effect when settlor dies
- *Inter vivos*: trust takes effect while settlor is alive

Format of trust

- Written, oral
- Complex, simple

Beneficiaries

- Unascertained beneficiaries
- Ascertained beneficiaries

Extent of trustee's powers

- **Fixed trusts**: trustee has no discretion over how to divide property between beneficiaries, this is all fixed by the trust document/settlor
 - Beneficiaries/objects of a fixed trust have an **equitable proprietary** interest in trust assets, **from the moment the trust takes effect** -> **their portion of the trust property forms part of beneficiaries' estate, accessible to beneficiaries' creditors**
 - Beneficiaries have an **equitable chose in action** -> personal right to complain to the Court about the administration of the trust
- **Discretionary trusts/trust powers**: beneficiary's acquisition of interest in the trustee property **depends on the trustee's discretion**
 - Beneficiaries **do not** have an equitable proprietary interest until the trustee distributes that property, till then, beneficiaries only have an **expectancy**
- **Mere powers**: trustee has discretion over both *how* to distribute and *whether* to distribute trust property; anything not distributed can go back to the settlor or be taken by the taker in default
 - Beneficiaries do not have an equitable proprietary interest until the trustee distributes that property, till then, beneficiaries only have an **expectancy**
 - Beneficiaries have an **equitable chose in action** -> personal right to complain to the Court about the administration of the trust
- Regardless of amount/extent of discretion, trustees' discretions still need to be exercised *properly*

Allocation of power

Settlor cannot dictate to trustee how to run the trust after the trust is formed, **unless a power to do so is reserved**

Beneficiaries cannot dictate to the trustee as to how they will exercise their discretion that they may be given under the trust

- *Saunders*: where all beneficiaries are legally competent and ascertained, they can agree to end the trust
 - Can get around this by adding other beneficiaries

History, functions and nature of the trust

History

Trusts in medieval use largely as a circuitous device:

- To avoid feudal dues payable on death
- To have a choice to inheritance (because no wills at that point)
- To give wealthy married women *some* control over family property (e.g. wealthy women's family property could be held on trust for them, rather than automatically moving to their husband)

Functions of the trust

Romantic view?

Trust is relevant for:

- Death
- Bankruptcy/protection from creditors
- Reduce tax

Large-scale investment

- Unit trusts
 - Trustee company holds large amounts of property
 - Public can acquire unit trusts, each unit represent a fraction of the beneficial interest in the whole trust fund
 - Beneficiaries can trade the units
- Why?
 - Experts oversee administration, ordinary people can buy in
 - Investors are exposed to a range of assets/markets -> spread and minimise risk

Separation of management and enjoyment

Charity, four heads, must be for the public benefit (*Pemsel*):

1. Advancement of religion
 2. Advancement of education
 3. Relief of poverty
 4. Other purposes beneficial to the community
- BUT:
 - Charitable trusts get a lot of tax benefits
 - The definition of 'charity' is subject to considerable debate
 - Social welfare/structural change > charity tax breaks

Solicitors' trust accounts

- Solicitors will hold some of clients' funds

Testamentary trusts -> wills/inheritance

- Can hold property on trust for an heir until a set time (i.e. they become an adult)
- Can also provide for successive interests, perpetuity period in Vic is 80 years

Protective trusts -> discretionary trusts can protect the beneficiary's property from their creditors

- Exist to protect assets from creditors -> blame it on the trustee's discretion
- s 39 *Trustee Act 1958* (Vic): if beneficiary is bankrupt, they are only left with a mere expectancy -> helps protect them
- *Bankruptcy Act*: cannot move funds with **intention** of avoiding creditors

Superannuation trusts

- Superannuation fund holds the money on trust for employees

Security device

- Trust can function like a mortgage

Trust created by statute

- E.g. *Aboriginal Lands Act 1970* (Vic)

Preservation of family wealth -> discretionary

- Can split income, thereby taking advantage of every family member's tax-free threshold
 - Richardson: discretionary family trusts prevent billions of dollars from going into the tax system
- Settlor *in name* is usually someone unrelated to the family, like a family accountant. They will only put in a nominal fund to the settled sum
 - *True* settlor will likely be in the background as appointer or something
 - Rationale: settlor *in name* is an excluded person, cannot receive money or exercise control; this also minimises tax

Excluding trustee liability

Two ways: exclusion clause and s 67

Cl 8.2 exclusion clause: trustee not liable for any breach of trust unless the breach is dishonest -> **is wide exclusion of liability inconsistent with the fiduciary role of the trustee?**

- *Armitage v Nurse*: clause that excluded trustee liability unless fraudulent, upheld by Court
 - Exclusion clauses valid as long as they do not touch the "**irreducible core**" of the trusteeship -> if so, will be read down
 - Irreducible core:
 - Trustee performs duties for the benefit the beneficiary
 - Act **honestly and in good faith**
 - **Can exclude obligations to act with due diligence, skill, care or prudence**

s 67 *Trustee Act*: Court has discretion to excuse a trustee who has committed a breach of trust, **if they've acted honestly and in good faith**

Critiques

Richardson:

- 78% of trusts discretionary
- 2 billion per annum lost through trusts
- Primary purpose is tax avoidance

Jaffey: the trust has two dimensions, property and obligation

Cotterrell: Marxist critique of the trust

- The trust obscures the beneficiaries' wealth and assets and power
- This thereby legitimises capitalism by perpetuating an image of equality