



HD APPROVED

EQUITY & TRUSTS

MLP405

COMPREHENSIVE NOTES

-UPDATED FOR 2026-

CONTENTS

UNDUE INFLUENCE & UNCONSCIENTIOUS DEALING

3

UNDUE UNFLUENCE	3
UNCONSCIENTIOUS DEALING	8
FIDUCIARY DUTIES / OBLIGATIONS	10
FIDUCIARY REMEDIES	13
TRACING TRUST PROPERTY	15

EQUITABLE REMEDIES: INJUNCTIONS AND SPECIFIC PERFORMANCE

17

INJUNCTIONS	17
SPECIFIC PERFORMANCE	19

TRUSTS

CATEGORISATION OF TRUSTS	22
FORMALITIES FOR THE CREATION OF EXPRESS TRUSTS	24
TRUSTEE DUTIES	25
BENEFICIARY AND TRUSTEE RIGHTS AND POWERS	29
CERTAINTY REQUIREMENTS FOR EXPRESS TRUSTS	33
CHARITABLE TRUSTS	36

UNDUE INFLUENCE & UNCONSCIENTIOUS DEALING

PRELIMINARY STEP: Identify whether UNDUE INFLUENCE or UNCONSCIENTIOUS DEALING

- **Mention case basis:** '*Thorne v Kennedy (2017)* highlights the difference between undue influence and unconscientious dealing in that way that the latter is due to the disadvantageous position of the weaker party, with the other taking advantage of this'

UNDUE INFLUENCE: *Johnson v Buttress (1936)*

The doctrine of **undue influence** attacks the questionable use of power to influence, and provides a method of overturning a transaction because the plaintiff's will has in some way been overborne and cannot be said to represent an exercise of the plaintiff's free will.

- Focuses on the **QUALITY** of **CONSENT**, or **ASSENT**, of the **WEAKER** party
- **The equitable principle of UNDUE INFLUENCE is generally divided into TWO CATEGORIES:** *Bank of Credit and Commerce International SA v Aboody*
 - Situations where pressure can **actually be established (Category 1)**; and
 - Situations where pressure is **presumed** in all the circumstances (**Category 2A & 2B**).

STEP 1: Is the RELATIONSHIP ACTUALLY INFLUENTIAL in character? (Category 1 from *Barclays v O'Brien (1994)*)

- The court considers facts of the case – no limit to factors to be considered

STEP 2: Is the relationship one of PRESUMPTIVE UNDUE INFLUENCE? (Category 2A from *Barclays*)

STEP 3: Does the relationship have the NECESSARY DEGREE OF TRUST AND INFLUENCE? (Category 2B from *Barclays*)

STEP 4: Is the influence REBUTTABLE?

- Independent advice given? *Bester v Perpetual Trustee (1970)*
- Was the transaction improvident? (Manifestly disadvantageous); *National Westminster Bank v Morgan (1994)*
 - o Was money transferred as gift or investment?
 - If gift: how much did the money represent in relation to total wealth? (*Union Fidelity Trustees v Gibson (1971)*)
 - o Finding transaction provident not in itself proof that transaction did not result from UI – E.g. if lack of independent advice

STEP 1: ACTUAL UNDUE INFLUENCE (CATEGORY 1)

Actual undue influence is based upon coercion of a physical, economic or other form. It must be proven that the **STRONGER PARTY** to a transaction **ACTUALLY COERCED** the **WEAKER PARTY** to **ENTER INTO A TRANSACTION** to their **DISADVANTAGE**. The influence can come from the

person directly or from the surrounding circumstances.

ELEMENTS: *Johnson v Buttress* (1936)

a) ACTUAL INFLUENCE (threat or proposal) was exercised;

- E.g. physical intimidation, pressure, violence, economic coercion, etc

b) Its exercise INFLUENCED the person to ENTER into transaction;

- requires proof that transaction was the outcome of influence – person influenced **could NOT be considered to have exercised FREE WILL** when entering into transaction

c) Transaction DETRIMENTAL to person influenced

IF NO ACTUAL UNDUE INFLUENCE –

STEP 2: PRESUMED INFLUENCE (CATEGORY 2A) – Presumed undue influence in RECOGNISED RELATIONSHIPS OF RISK

Presumptive undue influence occurs where the parties to the bargain are in a **SPECIAL RELATIONSHIP**, which shows that one party is **SUPERIOR** because the other reposes **TRUST AND CONFIDENCE** in them.

- The presumption applies **AUTOMATICALLY** in the recognised relationships.
- **NOT NECESSARY** to show the defendant had **KNOWLEDGE** the relationship was presumed to be one of influence; *Talbot & Oliver v Shann*
- Mention cases of *Powell v Powell* [2002], *Johnson v Buttress* (1936) and *Union Fidelity Trustee Co of Australia v Gibson* [1971] when defining / explaining category 2A

Recognised relationships:

- **Parent and child** (not from parent to child – may arise from child to parent **only**: *Powell v Powell* (2002))
- **Guardian and ward;**
- **Religious adviser and adherent;** *McCulloch v Fern* [2001]
- **Solicitor and client;** *Haywood v Roadknight* [1927]
- **Trustee and beneficiary**
- **Doctor and patient;** *Dent v Bennett* (1839); *Re CMB*
- **Fiance and fiancée?** No *Thorne v Kennedy* [2017]
- **Husband and wife?** No – b/c it is regarded as natural that one spouse might wish to benefit the other;

If the relationship falls into one of the recognised categories, the plaintiff does not have to prove that undue influence was exercised to make him or her enter into the transaction. The burden of proof shifts to the defendant party to prove the plaintiff entered into the transaction freely; *Royal Bank of Scotland v Etridge* (2002); *Johnson v Buttress* (1936)

Where a **GIFT** passes between one of the above classes to the other, it will be **PRESUMED** to be undue influence.

May be **REBUTTED** where:

- **INDEPENDENT LEGAL ADVICE**; and
- Proof of exercise of **FREE WILL**

If **NO PRESUMED INFLUENCE (CATEGORY 2A)** – see **PROVEN INFLUENCE** next page

IF NO PRESUMED INFLUENCE (CATEGORY 2A) –

STEP 3: PROVEN INFLUENCE (CATEGORY 2B) – Presumed undue influence where a **RELATIONSHIP** of **TRUST** and **CONFIDENCE** is **PROVEN** to exist

Where the relationship between parties does not fall into one of the presumed categories, it is incumbent on the **PLAINTIFF** to **PROVE THE EXISTENCE OF A RELATIONSHIP WHERE INFLUENCE COULD BE EXERTED**; ‘one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part; *Johnson v Buttress (1936)*

- Will occur when parties are in an **ACKNOWLEDGED RELATIONSHIP OF INFLUENCE**

STEP 3.1: WAS THERE A RELATIONSHIP OF INFLUENCE? If circumstances are such that suggest it is a relationship of influence and / or dependency – a presumption arises that the defendant used undue influence to procure the transaction.

Factors that might indicate the existence of a relationship of influence; *Union Fidelity Trustee Co of Australia v Gibson*

Attributes of the donor:

- Standard of intelligence and education;
- Character and personality;
- Age, status of health, experience of lack of it in business affairs.

Interpersonal aspects of the donor-donee relationship:

- Existence of blood relationship;
- Length of friendship or acquaintance;
- Intricacy of existing business affairs between them;
- Period of closeness of relationship.

LOOK AT:

- Dependency;
- Illiteracy;
- Vulnerability;
- Structural inequality
- Differing level of intelligence
- Lack of understanding of business
- Emotional / physical impairment

- Lack of independent legal advice
- Financial status
- Age
- Medical status

See Thorne v Kennedy (2017) (p. 33)

STEP 3.2: CAN THE STRONGER PARTY REBUT THE PRESUMPTION?

Must rebut by showing that it [the entering into the transaction] was the result of the free exercise of the donor's independent will.

Can show this by:

- Best method - prove that they received independent legal advice.
- Also - it helps to show that they received **adequate consideration** (but is not decisive), obviously this cannot apply to gifts since there is no consideration.

Case example; Johnson v Buttress (1936)

STEP 4: IS A THIRD PARTY INVOLVED?

Third parties may also be affected by undue influence. Where undue influence has been exerted over an individual, compelling them to enter into a transaction, the transaction may not only be set aside against the person who exercised the influence, but **also against any third party receiving a BENEFIT from the transaction.**

There are **THREE SEPARATE PRINCIPLES** applicable in this area.

1. Third party agents

- Third party cannot enforce the transaction where the **person who has exercised the influence is the AGENT of the third party.** The agency situation may arise where the third party has entrusted the 'influencing' party with the task of obtaining consent and execution of the document.
- Must establish that the third party has **ACTUALLY REQUESTED the influencing party to ACT ON THEIR BEHALF**—merely sending the documents may be insufficient.
- A third party **MAY NOT GIVE ACTUAL AUTHORITY** to an 'influencing' party, **BUT** may give **OSTENSIBLE AUTHORITY** in circumstances where there is an external representation by the third party that the 'influencing' party is permitted to hold himself out as being associated within the third party's business—and having ostensible authority to act on behalf of the third party; *Bester v Perpetual Trustee Co Ltd*

2. Third party actual / constructive notice

Note: It is unclear post *Garcia v NAB* whether constructive notice remains a ground for third party undue influence in Australia (it forms the foundation of the UK principle) because the High Court disapproved of the emphasis that Lord Browne-Wilkinson gave to the doctrine of notice in this context in the UK House of Lords decision of *Barclays Bank v O'Brien* [1994]

- Where a third party **RECEIVES ACTUAL OR CONSTRUCTIVE NOTICE** that at the time the transaction was executed, it was executed with undue influence – the third party **CANNOT ENFORCE** the transaction – an **EQUITY** will be **RAISED AGAINST THE THIRD PARTY.**
- **ACTUAL NOTICE** exists where the third party receives actual knowledge that undue influence has been exerted. **CONSTRUCTIVE NOTICE** exists where the circumstances should have put the third party on inquiry.

3. Special wives' equity: *Yerkey v Jones* (1939); *Garcia v NAB* (1998) – see more steps next page

- A third party cannot enforce the transaction is where the **guarantor is a wife and the third party bank or financier for the loan to the husband** has not taken the time to **fully and properly explain consequences of the guarantee to the wife.**
- This is the principle which was first established by Dixon J in *Yerkey v Jones* (1939), the validity of which has now been confirmed by the High Court in *Garcia v NAB* (1998)

Two circumstances:

1. **ACTUAL UNDUE INFLUENCE** by the husband

- Nothing but **INDEPENDENT LEGAL ADVICE** or **RELIEF** from ascendancy of husband

will suffice

2. Otherwise, if

- i. **HUSBAND and WIFE** (+ creditor knew they were husband and wife); **and**
- ii. **WIFE DID NOT UNDERSTAND** the effect of the transaction and was a volunteer (gained no benefit); **and**
- iii. Creditor **DID NOT TAKE STEPS TO INFORM WIFE** about transaction (or find a competent stranger to explain it to her again);

Then the wife has **the right to have the transaction set aside** with respect to her.

CAN BE REBUTTED if creditor took steps to inform the wife about the transaction and reasonably believed that the wife knew what she was entering into.

- It is not necessary for the creditor to prove that the wife was independently advised, as long as the creditor is reasonably satisfied as to the wife's comprehension of the transaction.

BASICALLY – Generally, in situations where there is **RECEIPT** and **RETENTION** by a **THIRD PARTY** (i.e. bank) that has arisen from **THEIR CUSTOMER'S UNDUE INFLUENCE** – Will be held unconscientious where:

- Where bank participated **WITH NOTICE**
- Where bank procures or holds out the debtor as its **AGENT** to procure the security under the ordinary principles of agency: *Alderton v Prudential Assurance Co (1933)*

STEP 5: HAS INFLUENCE BEEN REBUTTED?

The stronger party rebuts the presumption by showing that the entering into the transaction was the result of the free exercise of the donor's independent will. Generally, where the plaintiff lacks business acumen, has a limited understanding of English or poor literacy, it will be very difficult to prove that the plaintiff has exercised free judgment.

i. **Independent Legal Advice**

- The question remains whether the weaker party, in entering into the transaction, did so of his or her own free will, in particular, free from the effects of any influence exercised by the stronger one.
- Must show that the plaintiff received independent advice before entering into the transaction. The advice must, however, be fully informed, focusing upon the consequences of entering into a transaction, including the wisdom of entering into it, and a full explanation of the legal effect of the transaction; *Bester v Perpetual Trustee (1970)*
- **Note:** There is no rule of law that states that, where a relationship of influence exists, the donor must have independent legal advice; *Union Fidelity v Trustee Co of Australia v Gibson (1971)*.

ii. **Manifest disadvantage**

- If a party enters into an agreement or makes a gift which, objectively, is contrary to their own best interest, it can be said to be improvident; *Trevenar v Ussfeller*
- Transactions that can be characterised as inexplicitly large gifts, or sales for inadequate

consideration, or that dispose of the majority of the plaintiff's assets are likely to be called 'improvident'.

iii. Adequate consideration

- Adequate consideration constitutes a significant factor in the overall assessment of whether the relationship itself is one of proven influence. It helps to show that they received **adequate consideration** (but is not decisive); obviously this cannot apply to gifts since there is no consideration; Johnson v Buttress (1936)

STEP 6: REMEDIES

Once **undue influence** is established, the traditional relief sought is rescission in equity so that the parties can be placed, as far as possible, into the position they were in prior to the tainted transaction; Amadio; Louth v Diprose; Bridgewater v Leahy

MORE INFO RE SPECIAL WIVES EQUITY ('SWE'):

STEP 1: FIRST LEG – Discuss the Origins of the First Leg of the Principle: Established in Yerkey v Jones

Is there a Husband and Wife Situation?

- Has the Bank dealt through the husband with the wife?
- Has the bank left it to the husband to obtain his wife's consent to 'suretyship'?

Once established, has:

- The husband exercise actual undue influence?
- The husband made some material representation of the fact?

Mention: Notice is not the basis of Bank's liability

STEP 2: SECOND LEG – Examine whether SWE will apply in other situation (aside from Actual Undue Influence), where:

- Surety did not understand the effect of transaction
- Transaction was voluntary (surety obtained no gain from contract)
- Lender, with notice that surety is wife of debtor, is taken to understand that the husband may not have provided adequate explanation of circumstances
- Lender took no steps to explain to wife

Note: WILL NOT APPLY WHERE WIFE IS CO-BORROWER AND MORTGAGEE (Page 27)

UNCONSCIENTIOUS DEALING: Louth v Diprose; Commercial Bank of Australia v Amadio

Equity will intervene to set aside a transaction under the doctrine of unconscionable conduct (Unconscientious Dealing will be established) where the **STRONGER** transacting party has exploited a **KNOWN WEAKNESS** by proceeding with a transaction that they **KNOW** is **NOT BENEFICIAL** to the **WEAKER PARTY**.

Types of transactions set aside include:

- Gifts - Louth v Diprose;
- Contracts of sale – Blomley v Ryan; and
- Guarantees – Amadio (a guarantee and mortgage were set aside).

STEP 1: WAS THERE A SPECIAL DISABILITY? Aka one party ('**WEAKER PARTY**') of the contract is under a **SPECIAL DISABILITY** compared with the other party ('**STRONGER PARTY**')

The special disability must be one which 'seriously affects the ability of the innocent party to make a judgment as to his own interests'; Amadio

Special disability will be made up of a number of factors, as in Amadio where the disabling factors included the elderly couples age, lack of English and lack of assistance and advice.

Consider –

- Emotional dependence/attachment; Louth v Diprose
- Lack of knowledge/education/English; Amadio
- 'Psychological factors' have recently come into sharper focus; Louth v Diprose; Bridgewater v Leahy
- Poverty
- Sickness
- Age
- Sex
- Infirmities
- Drunkenness (Blomley v Ryan)
- Emotional dependence (Louth v Diprose; Bridgewater v Leahy)
- Illiteracy
- Lack of education; Amadio
- Lack of assistance; Amadio
- Infatuation?
- But gifts bestowed in conditions of romantic attachment are not necessarily always tainted (it is common)
 - Facts must present evidence over a course of time of weakness of the donor

- o Circumstances of relationship highly individual and difficult to predict how court will weigh them
- o Note the extreme situation required in Louth v Diprose
- o Was the infatuation (i.e. special disadvantage) appreciated / known?
- Not necessary transaction be detrimental to the plaintiff; Amadio
- o However, inadequacy of consideration may be relevant; Blomley v Ryan

STEP 1.2: DID THE DISABILITY PLACE HIM IN A POSITION OF SPECIAL INEQUITY? (and that it is a special not a mere inequality e.g. unequal bargaining power)

STEP 2: THE STRONGER PARTY WAS AWARE OF THE SPECIAL DISABILITY: Amadio

The defendant actually knew, or should have known, of the plaintiff's disadvantage.

- **No difficulty when defendant had ACTUAL NOTICE**
 - Louth v Diprose - woman knew her boyfriend solicitor was infatuated by her and even manufactured an air of emotional crisis
 - Blomley v Ryan - Vendor farmer was drunk - purchasers knew it
- **CONSTRUCTIVE NOTICE – defendant may have sufficient facts to suggest the plaintiff might be at risk of exploitation**
 - Amadio – Actual knowledge not essential - reasonable person in the shoes of the bank manager should have known that there was a real question that the parents were relying on their son and not capable of acting in their own interests

STEP 3: THE STRONGER PARTY EXPLOITED THE DISABILITY TO OBTAIN AN IDENTIFIABLE BENEFIT

If the plaintiff can establish the first two elements an inference arises that the defendant has exploited the plaintiff's position of disadvantage – took unconscientious advantage of the disability.

The onus of proof is then on the defendant **'to show that the transaction was fair, just and reasonable'** (Amadio), or no advantage was taken (Louth v Diprose).

- Passive acceptance of a benefit because the plaintiff is in a position of special disadvantage satisfies the 'exploitation' requirement; Bridgewater v Leahy

STEP 4: WAS THERE INDEPENDENT LEGAL ADVICE? – if so, no exploitation

The usual method of demonstrating that the defendant did not exploit the situation is to show that the **plaintiff received independent advice** (Amadio). Where it can be established that the weaker party has acted with fully informed and independent legal advice, that advice will constitute a complete defence to an action in unconscientious dealing.

FIDUCIARY DUTIES / OBLIGATIONS

Fiduciary obligations are obligations that equity places on one party to a relationship to ensure loyal performance of the duties that relationship entails.

In considering whether an honest fiduciary should be held liable for breach of fiduciary duty (on the basis that the fiduciary has appropriated an opportunity which in conscience was that of the principal), should look very carefully at **all the facts and establish that:**

1. The matter comes within the **SCOPE** of the duty
2. The **CONDUCT** of the fiduciary constituted the **BREACH** and the principal has **NOT CONTRIBUTED** to the belief of an implied consent.