

EQUITY AND TRUSTS NOTES

Contents

WHAT IS EQUITY?.....	5
HISTORICAL BACKGROUND.....	5
MAXIMS OF EQUITY.....	6
JUDICATURE REFORMS.....	7
EFFECT OF JUDICATURE REFORMS.....	7
UNCONSCIONABLE D/T AND UI.....	8
INTRODUCTION TO FRAUD.....	8
VITIATING FACTORS IN CONTRACT FORMATION.....	9
UNDUE INFLUENCE.....	10
ACTUAL UNDUE INFLUENCE.....	10
PRESUMED UNDUE INFLUENCE.....	11
REBUTTING THE PRESUMPTION OF UI.....	12
UI AND THIRD PARTIES.....	13
GUARANTEES.....	13
UI CASES.....	14
UNCONSCIONABLE DEALINGS/TRANSACTIONS.....	17
PRESUMPTION OF UNCONSCIONABLE DEALINGS.....	17
UNCONSCIONABLE TRANSACTION CASES.....	18
DEFENCES FOR UI AND UNCONSCIONABLE DEALINGS.....	20
REMEDIES FOR UI AND UNCONSCIONABLE DEALINGS.....	21
ESTOPPEL.....	22
TYPES OF ESTOPPEL.....	22
CL/EQUITABLE ESTOPPEL.....	23
ESTOPPEL BY REPRESENTATION.....	23
PROPRIETARY ESTOPPEL.....	24
PROMISSORY ESTOPPEL.....	25
ELEMENTS OF EQUITABLE ESTOPPEL.....	26
REMEDIES.....	27
CASES.....	28
PART PERFORMANCE.....	39
OVERVIEW.....	39
DIFFERENCE FROM ESTOPPEL.....	39

ELEMENTS	40
REMEDIES.....	41
EQUITABLE ESTATES/INTERESTS	44
PROPERTY.....	44
CREATING EQUITABLE INTERESTS.....	45
NATURE OF EQUITABLE INTERESTS	45
CREATING EQUITABLE INTERESTS.....	46
LEGAL AND EQUITABLE TITLE.....	46
INDICIA OF PROPRIETARY INTERESTS IN EQUITY	47
RIGHTS OF Bs IN AN UNADMINISTERED ESTATE	48
OTHER EQUITABLE INTERESTS	48
CASES	49
PROPERTY.....	50
LEGAL PROPERTY.....	50
EQUITABLE PROPERTY	50
TYPES OF DEALING WITH PROPERTY	50
1) ASSIGNMENT	51
QUESTIONS BEFORE ASSIGNMENT	52
EXAMPLES OF PROPERTY NOT ASSIGNABLE	55
EQUITABLE ASSIGNMENT OF PROPERTY	57
LEGAL ASSIGNMENT.....	54
EQUITABLE ASSIGNMENT	54
EQUITABLE ASSIGNMENT OF LEGAL PROPERTY	57
1) FOR CONSIDERATION BUT FAILS WRITING.....	57
2) VOLUNTARY BUT FAILS WRITING.....	57
3) LEGAL PROPERTY UNASSIGNABLE AT LAW.....	58
EQUITABLE ASSIGNMENT OF EQUITABLE PROPERTY	59
REQUIREMENTS FOR ASSIGNING EP.....	59
1) ASSIGNMENT	59
2) DIRECTIONS TO A TRUSTEE BY BENEFICIARY.....	59
3) AGREEMENT TO ASSIGN	60
4) DECLARATION OF TRUST.....	60
RIGHTS OF EQUITABLE ASSIGNEE	60
EQUITABLE ASSIGNMENT OF FUTURE PROPERTY	61
CASES	62
FIDUCIARY OBLIGATIONS	76
CHECKLIST	76

BACKGROUND	76
NATURE AND ELEMENTS.....	78
WHO IS A FIDUCIARY? – RECOGNISED CATEGORIES	77
OTHER RELATIONSHIPS	79
SCOPE OF A FIDUCIARY DUTY	80
LIABILITY OF 3 rd PARTIES FOR BREACH OF FD	81
KNOWING INDUCEMENT	82
TWO LIMBS OF <i>BARNES v ADDY</i>	82
DEFENCES.....	85
REMEDIES.....	86
CASES	87
TRUSTS	100
GENERALLY.....	100
FOUR ESSENTIAL ELEMENTS (INDICIA)	100
IDENTIFYING TRUSTS.....	101
TYPES OF TRUSTS	102
DISTINCTIONS FROM OTHER LEGAL RELATIONS.....	103
DISTINCTION FROM POWERS OF APPOINTMENT.....	104
IDENTIFYING POWERS OF APPOINTMENT (BARE/TRUST).....	104
TESTS FOR CERTAINTY OF OBJECTS	104
CAPACITY.....	118
TRUST CASES	105
EXPRESS TRUSTS.....	106
THE 3 CERTAINTIES: INTENTION	107
THE 3 CERTAINTIES: SUBJECT MATTER.....	108
THE 3 CERTAINTIES: OBJECT	109
IDENTIFYING POWERS OF APPOINTMENT (BARE/TRUST)	110
TESTS FOR CERTAINTY OF OBJECTS	111
COMPLETE CONSTITUTION AND WRITING	112
VARIATION	116
FAILURE	117
CHARITABLE TRUSTS	134
GENERALLY.....	134
WHAT IS ‘CHARITABLE’?.....	135
FOUR HEADS OF CHARITY	136
REQUIREMENT FOR PUBLIC BENEFIT	138
MIX OF CHARITABLE AND NON CHARITABLE PURPOSES.....	139

ENFORCEMENT	140
GIFTS TO UNINCORPORATED ASSOCIATIONS	141
PURPOSE TRUSTS	143
CASES	144
.....	144
RESULTING TRUSTS	152
AUTOMATIC: NON-DISPOSAL OF BENEFICIAL INTEREST	153
PRESUMED RT: PURCHASE MONEY TRUSTS	153
UNEQUAL CONTRIBUTIONS TO PURCHASE.....	153
REBUTTING THE PRESUMPTION OF RT	155
PRESUMPTION OF ADVANCEMENT	154
REBUTTING THE PRESUMPTION OF ADVANCEMENT.....	154
ILLEGALITY AND THE RESULTING TRUST.....	154
FUTURE OF RESULTING TRUSTS	156
CASES	157
CONSTRUCTIVE TRUSTS	159
NATURE OF CTs	160
REMEDY OR INSTITUTION	160
DEVELOPMENT IN IMPOSITION OF CTs	161
CATEGORIES OF CT (WHERE COURT WILL IMPOSE CT)	162
BORDERLINE CATEGORIES OF CT	166
THIRD PARTIES AND CTs.....	166
CASES	166
ADDITIONAL TRUST NOTES	122
APPOINTMENT	122
RULES OF CONSTRUCTION FOR COURT TO INFER TRUST	124
ACCEPTANCE AND DISCLAIMER OF TRUST	125
CEASING TO BE TRUSTEE	125
DUTIES OF TRUSTEES	127
POWERS OF TRUSTEES.....	130
LIABILITY OF TRUSTEES	131
RIGHTS OF BENEFICIARIES	132
TRACING.....	185
REMEDIES.....	188
ACCOUNT OF PROFITS.....	188
EQUITABLE COMPENSATION	189

UI CASES

Johnson v Buttress (1936) 56 CLR 113

Facts:

- Old illiterate man, emotionally volatile and dependent on his wife
- Wife died, even more unstable, began spending time with wife's friend Mrs Johnson
- Dependent on her to manage his business affairs, trusted her, donated his Maroubra rental property to her, and the son challenged his deceased father's gift to Mrs Johnson

Held:

- Relationship of influence/confidence existed and D failed to rebut the presumption
 - He was illiterate, not intelligent, dependent on her and emotionally unstable
 - No consent or advice of any quality was given to the deceased
- If a relationship of influence is proven, stronger party cannot take a substantial gift unless it is an independent and well-understood act of person exercising free judgment.
 - Equity considers how the intention to enter the transaction was procured – was it by undue influence or made independently?
- Equity can only set aside alienation of property where it is outcome of actual influence over the mind of a person that it cannot be considered their free act/judgement
- Dixon J affirmed the two types of undue influence – actual and presumed
 - Dixon J. Where actual UI is alleged: *facts must be proved showing transaction was the outcome of such as actual influence over Ps mind that it cannot be considered a free act*
- Latham CJ described a number of dif relationship where undue influence may arise (however, these are not closed categories; as long as relationships of influence exist, equity can intervene).
 - Parent/child
 - Guardian/ward
 - Trustee/beneficiary
 - Solicitor/client
 - Physician/patient
- This principle applies to both gifts and contract. In contract, adequacy of consideration becomes an important factor in determining whether to set aside the contract.

That is, it is a relationship of influence, dominance and control over another.

Commercial Bank v. Amadio (1983) 151 CLR 447 at 461 per Mason J:

In **UI**, the will of the subordinate party is not independent and voluntary because it is overborne. In **unconscionable conduct**, will of the subordinate party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of other party taking advantage of that disadvantage unconscionably.

Bridgwater v. Leahy, per Gaudron, Gummow and Kirby JJ:

“Each doctrine may be seen as a species of that genus of equitable intervention to refuse enforcement of or to set aside transactions which, if allowed to stand, would offend equity and good conscience. However, there are conceptual and practical distinctions between them.”

UNCONSCIONABLE DEALINGS/TRANSACTIONS

- Does not concern any pre-existing relationship between the parties
 - Looks at the transaction = parties' personal characteristics (special disability) and bargaining process between them (inequality of bargaining power)
- Elements (**Amadio; ACCC v Berbatis; Wilton v Farnworth**):
 - 1) One party is under special disability/disadvantage
 - Must affect their capacity to judge own interests so that there is inequality of bargaining power (**Amadio**)
 - EG: poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary (**Blomley v Ryan**)
 - EG: infatuation and emotional dependence (**Louth v Diprose**)
 - 2) Other party has knowledge of SD
 - Actual knowledge OR ought to have known from facts (**Hart v O'Connor; Amadio** – *watched building being built from other store*)
 - 3) Other party unconscionably exploits the SD
 - Unconscionable for the stronger party to secure assent to agreement in circumstances – look at facts (**Louth; Amadio**)

PRESUMPTION OF UNCONSCIONABLE DEALINGS

- After Ps special disability is proven (by elements above) there is a presumption Ds knowledge led to an unconscionable dealing
 - Evidentiary onus then shifts to D to prove it was not (**Louth v Diprose**)
- Rebutting the Presumption
 - 1) Adequacy of Consideration
 - Not a complete defence, but carries certain weight in court's evaluation of facts
 - Inadequacy of consideration paid for the transaction was described as a "major, perhaps decisive factor" (**Blomley**)
 - 2) Independent Advice
 - Doesn't always save a transaction but absence may be fatal (**Lloyds Bank**)
 - Quality (**Bester**) + fullness of advice in circumstances (**Inche Noriah**)
 - 3) Improvidence of the transaction
 - In both **Amadio** and **Louth v Diprose** the weaker party could not afford the benefit they were seeking to transfer
 - 4) Other relevant steps taken to remedy disadvantage

5) Detriment

- Representee's conduct in reliance must cause detriment (***Je Maintiendrai; Grundt v Great Boulder; Thompson v Palmer***)
 - Likely detriment is not sufficient – must be actual detriment – must be flowing directly from reliance (***Cth v Verwayen***)
 - Must be 'material', 'significant' or 'substantial' (***Walsh; Hawker Pacific***)

6) Unconscionability

- Must be unconscionable in circumstances for representor to deny the assumption and fail to avoid the detriment (***Vella v Wah Lai; Argot Unit Trust***)
 - Main difference between CL/equitable estoppel by representation

REMEDIES

- Remedy to best do justice between parties – what is necessary to prevent detriment resulting from unconscionable conduct (***Silovi; Walsh v Walsh***)
 - Discretionary – nothing is available as of right (***Giumelli*** – *pecuniary damages given instead of ownership/trust over property*)
 - Flexible – can be granted on terms – variety of different remedies exist
- Strong debate over Equitable Remedies
 - Traditional View = *minimum equity* (***Waltons; Verwayen***)
 - Current View = no minimum equity = look at ALL relevant circumstances of case and then determine appropriate remedy (***Delaforce; Giumelli; Tadrous***)
 - Minimum equity is just a principle to be considered in the equitable award of a remedy (***Delaforce v Simpson; Walsh***)
 - PURPOSE OF REMEDY = relieve against detriment suffered and not necessarily make good an expectation (***Mobil Oil v Lyndel; Argot Unit***)
 - ALTHOUGH often make good in proprietary cases
 - Must balance (***Walsh***):
 - Injustice to representor
 - Detriment to relying party
 - Potential impact on 3rd parties
- **NOTE**: enforcement of promise/representation is usually the remedy for proprietary estoppel (IE. get promised property) whereas minimum equity is for promissory
- Constructive trust should be considered remedy of last resort (***Giumelli***)

EK Nominees Pty Ltd v Woolworths Ltd [2006] NSWSC 1172

Similar to Austotel but successful estoppel claim

Facts:

- Negotiations for lease by Woolworths for premises owned by EK (owner of property).
- Reached an agreement in principle i.e. essential terms were reached (unlike in Austotel).
- BUT agreement in principle subject to execution of formal lease.
- Thereafter EK spent a lot, all with the encouragement of Woolworths.
- Woolworths knew of all expenditure to develop property.
- Had represented that they had got the approval of board and that the approval would be valid for 12 months.
- BUT that period of 12 months had not expired when Woolworths without any warning withdrew from the agreement in principle leaving EK in position where it incurred significant expenditure (similar to Mahers in Walton Stores case).
- Issue: whether necessary for the P to have assumed that Woolworths bound to proceed with the lease or that it was sufficient that they believe that a contract would eventuate so that they would enter?

Held:

- In this case, the estoppel argument was upheld
- White J identifies key considerations in establishing equitable estoppel:
 - There must be reasonable reliance on pre-contractual representations
 - Facts must demonstrate unconscionable conduct by one party
- Unconscionability arose because Woolies knew of EK Nominees' expenditures, it encouraged these expenses, and such expenses were for the benefit of both parties.
- EK Nominees reasonably relied on Woolies' conduct in thinking it would not resile from the lease.

Summer Hill Business Estate

Caution and careful scrutiny before using equitable estoppel in cases involving sophisticated business matters.

Barnes v Addy (1874)

Barnes and Addy is the famous articulation of the principle of third party constructive trustees.

Lecture Facts: Barnes v Addy – person left property on trust for his 4 children. There was an appointment of three trustees, Mr Addy (who in time, married one of the beneficiaries). The shares that were left, were the shares of Mrs Addy (the executor's wife) and her sister. By the time of the relevant events, Mr Addy was the sole trustee of the will. Mr Barnes (who was the husband of the other beneficiary) had many arguments with Mr Addy, and so Mr Addy retired, and just let Mr Barnes be the trustee. Mr Addy's solicitor instructed against it, but Mr Addy thought that Mr Barnes would take care of the family. So Mr A's lawyer sent deed to Mr B. Mr B, then took the shares, sold them, put them into his company and lost them all. Mrs Barnes then argued FRAUD to everyone! She said that Mr A was fraudulent, the solicitor was fraudulent (etc. etc. etc. – she tried to turn the finger on everyone). The issue turned to whether the solicitors could be liable for breach of duty in what they did, by way of assisting the fraudulent design of Mr B. Did they assist in Mr B's fiduciary duty? In the CA Lord Selbourne famously said – "it's equally important to maintain the doctrine of trust...and not to strain it beyond its due and proper limits." Etc.

Held: that the solicitors could not be made liable for the loss on the basis that no funds had passed through their hands and there was nothing fraudulent or dishonest in their involvement in the matter. The action against the solicitors was dismissed on the basis that they had no knowledge of, or any reason to suspect, a dishonest design in the transaction, and that they did not receive any trust property.

In the Court of Appeal, Lord Selborne famously said (at 251):

"... But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

The Bell Group Ltd (CAN 008 666 993) (in liq) and ors v Westpac Banking Corporation (CAN 007 457 141) and ors (No 9) (2008) 70 ACSR 1

Facts:

- Bell Companies had unsecured banking facilities with Australian banks
- Bond held 75% of shares in Bell Group. Australian banks sought repayment of its debts and it became apparent that the Bell group couldn't pay.
- The banks negotiated with the group to restructure financing. They signed refinancing agreements, which had the effect of subordinating Bond's interest to the banks.
- Liquidators alleged that Bell's directors and the banks knew that the company was insolvent. They argued that the banks knowingly participated in the directors' breach of fiduciary duties.

Held:

- Owen J at 4748 said that a 3rd party is taken to have knowledge when it has:
 - Actual knowledge;
 - It deliberately shuts its eyes to the breach;
 - It abstained calculatingly from making inquiries;
 - It had knowledge of facts that would indicate to a reasonable person that there is a breach.
- These 4 types of knowledge are from *Baden* (called the 'Baden scale of knowledge').