

LAWS5006 – Finals Summary

UNDUE INFLUENCE

CATEGORIES OF UNDUE INFLUENCE

Issue 1A: Presumed undue influence

ISSUE: whether undue influence should be presumed from an antecedent relationship of trust and confidence giving one person a position of ascendancy over another – *Johnson v Buttress*

1. Relationship falls into an established category of undue influence – *Johnson v Buttress*
 - Parent and child
 - *In loco parentis* relationship may satisfy – *Bank of NSW v Rogers*
 - Doctor and patient
 - Solicitor and client
 - Religious undue influence
 - Trustee and beneficiary
 - NOT marital relationship/fiancées – *Thorne v Kennedy*
2. Relationship of influence can be proved on the particular facts
 - Presumption of undue influence may be raised if relationship existing between parties is such that one party was in a position to exercise dominion over the other by reason of trust and confidence reposed in them – *Johnson v Buttress*
 - More than mere confidence or influence, relationship must involve dominion and ascendancy by one person over the will of the other & correlative dependence – *Anderson v McPherson*
 - Consider history of weaker party relying on stronger party, vulnerability of weaker party – *Johnson v Buttress*

Issue 1A(i): Some element of the transaction calls for explanation

Some element of the transaction in question must call for explanation to raise undue influence presumption – *Johnson v Buttress*

- ‘Element’ not reasonably accounted for on ground of friendship, relationship, charity, other ordinary motives
- Benefits flowing from weaker to stronger party (contract is not reciprocal)

Issue 1B: Actual undue influence

ISSUE: whether, **in fact**, undue influence was brought to bear in a **particular transaction**

If no presumption of undue influence raised, onus is on weaker party to prove stronger party exerted undue influence to induce entry into the transaction

Johnson v Buttress

- Consider whether:
 - Influence was exercised
 - Exercise was undue (adequacy of consideration)
 - Exercise induced the transaction – causal link between exercise of influence & weaker party entering the transaction

Issue 2: Onus of proof

If presumption of undue influence raised, onus placed on the stronger party to rebut the presumption the transaction was entered into as the result of undue influence – *Allcard v Skinner*

Stronger party to PROVE the decision to transact was **freely made**

- A transaction freely made if it was made in a **pure, voluntary, well-understood** act of the mind – *Johnson v Buttress*
- Evidentiary significance per *Allcard v Skinner*; *Johnson v Buttress*:
 - Whether independent (legal) advice received
 - Whether consideration was adequate
- Evidence required to discharge burden balanced against vulnerability of the weaker party – *Johnson v Buttress*
- For a **gift**: presumption rebutted if D can prove the gift was a spontaneous act of the donor in circumstances which enabled them to exercise independent will – *Allcard v Skinner*

Issue 3: Actual or constructive notice to a third party

Where A enters into a contract with B as a result of the undue influence of C, A may rescind the contract between A & B if B had sufficient notice of the circumstances

- Third party beneficiary must have **actual or constructive notice** of the special relationship existing between the stronger and weaker party to be tainted by undue influence – *Bank of NSW v Rogers*
- Actual knowledge: 3rd party actually knew the transaction obtained by undue influence
- Constructive knowledge: 3rd party had knowledge of facts sufficient to put them on notice of the **possibility** the transaction obtained by undue influence – *Bank of NSW v Rogers*
 - Constructive knowledge requires 3rd party to make enquiries into whether undue influence has been exercised
 - 3rd party bears onus of proving the transaction was entered into freely

Issue 4: Consequences of undue influence

Exercise of undue influence renders the contract **voidable** → notes on RESCISSION at page 11

YERKEY V JONES PRINCIPLE

Engaged where: wife (potentially spouse) acts as guarantor of her husband's (spouse's) debt – *Yerkey v Jones*

ELEMENTS per *Garcia v National Australia Bank*

1. Wife did not understand the purport/effect of the transaction
2. Transaction was voluntary (wife obtained no net gain from performance of the contract)
3. Lender is taken to have understood that, as a wife, the surety may repose trust and confidence in her husband in matters of business & therefore to have understood that her husband may not have fully or accurately explained the purport and effect of the transaction; and yet [PRESUMED]
4. Lender did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her

Application

- HCA left open possibility of applying the principle to other close relationships – “long term and publicly declared relationships short of marriage between members of the same or opposite sex” (obiter) – *Garcia v NAB*
- Principle extended to all vulnerable parties in personal relationships – *Agripay v Byrne* (lower Qld court)

UNCONSCIONABLE CONDUCT

ELEMENTS per Deane J in *Commercial Bank of Australia v Amadio*

1. In entering into a transaction, one party is under **special disability** in dealing with the other, with the consequence that there is an **absence** of any **reasonable degree of equality** between them

- Non-exhaustive list of special disabilities per *Blomley v Ryan*:
 - Poverty
 - Need of any kind
 - Sickness
 - Age
 - Sex
 - Infirmity of body or mind
 - Drunkenness
 - Illiteracy
 - Lack of education
 - Lack of assistance or explanation where it was necessary
 - Business disadvantage/inequality of bargaining power not a special disability – *ACCC v CG Berbatis* – businesspeople able to make decisions to protect their own financial interests
 - Gambling addiction a possibility (high bar given facts of the case)– *Kakavas v Crown Melbourne*
 - Emotional dependence/infatuation – *Louth v Diprose*
 - Distinguished by recent cases – *McIntosh v Johnson*
 - Something more than mere infatuation & consequent foolish judgment required to amount to special disability
 - Emotional dependence applied in *Thorne v Kennedy* in addition to lack of financial equality, lack of permanent resident status, reliance and lack of English
- Special disability must seriously affect ability of weaker party to make a judgment as to his/her own best interests – *Blomley v Ryan*; *CBA v Amadio*

2. Stronger party **knew** of the special disability

- Actual (not constructive) knowledge of the special disability required – *Kakavas v Crown Melbourne*
- Wilful ignorance may be included in actual knowledge

3. Stronger party **exploits** that disability **unconscientiously** in order to obtain weaker party's consent to the transaction

- Stronger party's knowledge of the special disability makes it *prima facie unconscientious* for them to procure/accept weaker party's consent to the impugned transaction [PRESUMPTION] – *CBA v Amadio*, Deane J
- Stronger party TO PROVE: the transaction was **fair, just and reasonable** – *CBA v Amadio*, Deane J
- Consider whether stronger party takes unconscionable advantage of weaker party's powerlessness and vulnerability – *Thorne v Kennedy*

Consequence:

Court may determine partial nullification of the transaction – *CBA v Amadio*

Unconscionable conduct renders the contract **voidable** → notes on RESCISSION at page 11

Distinguished from undue influence

- Focus is on conduct of the stronger party, rather than quality of the weaker party's consent
- Even if weaker party's will was independent & voluntary, transaction may be unconscionable if that will formed in situation where stronger party took unconscionable advantage of weaker party

STATUTORY REGULATION OF UNCONSCIONABLE TRANSACTIONS AND UNFAIR CONTRACTS

CONTRACTS REVIEW ACT

APPLICATION

- S6(1) – Crown, public or local authority or a corporation may not be granted relief
- S6(2) – a person may not be granted relief so far as the contract was entered into in the course of/for the purpose of a trade, business or profession carried on by the person/proposed to be carried on (other than farming) wholly/principally in NSW
- Sale of a business not considered to be in the course of/for the purpose of a trade, business or profession

SUBSTANCE

- s7 – where Court finds a contract/provision thereof to have been unjust in the circumstances relating to the contract at the time it was made, Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of:
 - a) Refuse to enforce any/all of the provisions
 - b) Order the contract void in whole/part
 - c) Vary in whole/part any provision of the contract
- S9 – matters to be considered in determining whether a contract/provision is unjust in the circumstances – see legislative extracts
 - S9(2) – matters for consideration
 - S9(1) – Court to consider public interest & circumstances of the case
 - Consider P's knowledge/business experience/receipt of independent advice – *West v AGC (Advances)*
 - Consider both substantive & procedural injustice – unfairness of terms/methods used in formation – *West v AGC*
 - More than just making a bad bargain – *Baltic Shipping v Dillon*
- S4 – unjust includes unconscionable, harsh or oppressive

THE AUSTRALIAN CONSUMER LAW

Issue 1: Application

JURISDICTION

- S131 of the *Competition and Consumer Act* – the ACL applies as a law of the **Commonwealth** to the **conduct of corporations**
- S1(a) of the ACL – Schedule applies to the extent provided by Part XI of the CCA
- S28 of the *Fair Trading Act (NSW)* – the ACL applies as **NSW law** (when the Corporations power isn't engaged; the CCA takes precedence per s109 of the Constitution)
- S32(1) of the *Fair Trading Act (NSW)* – the ACL applies to and in relation to:
 - a) Persons carrying on business within NSW
 - b) Bodies corporate incorporated/registered in NSW
 - c) Persons ordinarily resident in NSW
 - d) Persons otherwise connected with NSW
- S32(2) – subject to ss(1), the ACL extends to conduct and other acts, matters and things, occurring or existing outside or partly outside NSW
- S1(b) of the ACL – Schedule applies to the extent provided by an application law

CONDUCT IN TRADE OR COMMERCE

- S2 of the ACL – trade or commerce means:

- a) Trade or commerce within Australia; or
 - b) Trade or commerce between Australia and places outside Australia
- And includes any business of professional activity (whether or not carried on for profit)

Issue 2: whether there was unconscionable conduct in the meaning of the unwritten law

- S20(1) – a person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time
- Apply the *Amadio* test of the general law – *ACCC v CG Berbatis*

Consequence: access to suite of ACL remedies – see notes on page 12

Issue 3: whether there was unconscionable conduct in connection with goods or services

- S21(1) – a person must not, in trade or commerce, in connection with:
 - a) Supply or possible supply of goods or services to a person; or
 - b) The acquisition or possible acquisition of goods or services from a person;
 Engage in conduct that is, in all the circumstances, unconscionable
- S21(3)(a) – Court must not have regard to any circumstances not reasonably foreseeable at the time of the alleged contravention
- S21(4)(a) – it is the intention of Parliament that the section not limited by unwritten law relating to unconscionable conduct
- S21(4)(c) – in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of
 - i. The terms of the contract
 - ii. The manner in which and the extent to which the contract is carried out
 And is not limited to consideration of the circumstances relating to the formation of the contract
- S22 – non-exhaustive list of matters court may have regard to in connection with determination of contravention under s21 – see legislative extracts at

Consequence: access to suite of ACL remedies – see notes on page 12

UNFAIR CONTRACT TERMS

- S23(1)(a)-(b) – term of a consumer contract/small business contract is void if the term is unfair and the contract is a standard form contract
- S23(2) – contract may continue to be binding if it can operate without the unfair term
- S23(3) – definition of consumer contract
- S23(4) – definition of small business contract
- S24(1) – a term of a consumer or small business contract is unfair if:
 - a) It would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
 - b) It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - c) It would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on
- Consider the whole nature of the contract and the particular term as balanced against other terms, such as the contract price – *Jetstar Airways v Free*
- S25 – examples of unfair terms
- S27(1) – if a party to a proceeding alleges a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise
- S250(1) – Court may declare that a term of a consumer contract is an unfair term on application by a party to the contract (a), or the regulator (b)

- S71(1) of the *Fair Trading Act (NSW)* – an application for a declaration under s250 of the ACL may be made only by the Secretary or, with the leave of the Supreme Court, by a party to a consumer contract that is a standard form contract

MISTAKE

COMMON MISTAKE

Issue 1: whether the contract is subject to an implied condition such that, upon failure of the condition subject to common mistake, the contract fails and is void at common law

- Once parties have **objectively** agreed with sufficient certainty and in the same terms on the same subject matter, contract effective unless it is void for the failure of some condition on which exercise of the contract depends – *Solle v Butcher*
- There was no implied condition the oil tanker existed in *McRae v Commonwealth Disposals Commission*, as the Commission had expressly promised the tanker existed

Consequence: contract **void** at common law

Sale of Goods Act – section 11

Contract for the sale of specific goods void whether, without the knowledge of the seller, the goods have perished at the time when the contract is made

Issue 2: whether the contract is voidable on the basis of common mistake

1. Parties under fundamental common misapprehension as to facts or their relative and respective rights – *Solle v Butcher*
2. Party seeking to set aside the contract is not at fault – *Solle v Butcher*
3. Circumstances render it unconscionable for the party seeking to uphold the contract to have it enforced – *Svanosio v McNaramara*
 - Some aspect of unfairness/fraud/misrepresentation
 - Fraud includes unconscionable conduct (where it would be unconscionable for D to enforce the contract according to its terms) – *Taylor v Johnson*

Consequence: contract voidable and may be rescinded IN EQUITY – see notes at page 11

MUTUAL MISTAKE

1. On an objective view of parties' dealings & surrounding circumstances, did one party have the 'right' understanding of the bargain? – *Goldbrough Mort v Quinn*
 - If there is an objectively 'right' understanding, parties have a contract on those terms & the case becomes one of unilateral mistake
2. If there is no objectively 'right' understanding of the bargain, the contract is void – *Raffles v Wichelhaus*

UNILATERAL MISTAKE

ELEMENTS – *Taylor v Johnson*

1. One party enters into a contract under a **serious mistake** about its content in relation to a **fundamental matter**
2. Other party is **aware** the first party is entering into the contract under that mistake
 - Actual knowledge or wilful ignorance – *Taylor v Johnson*