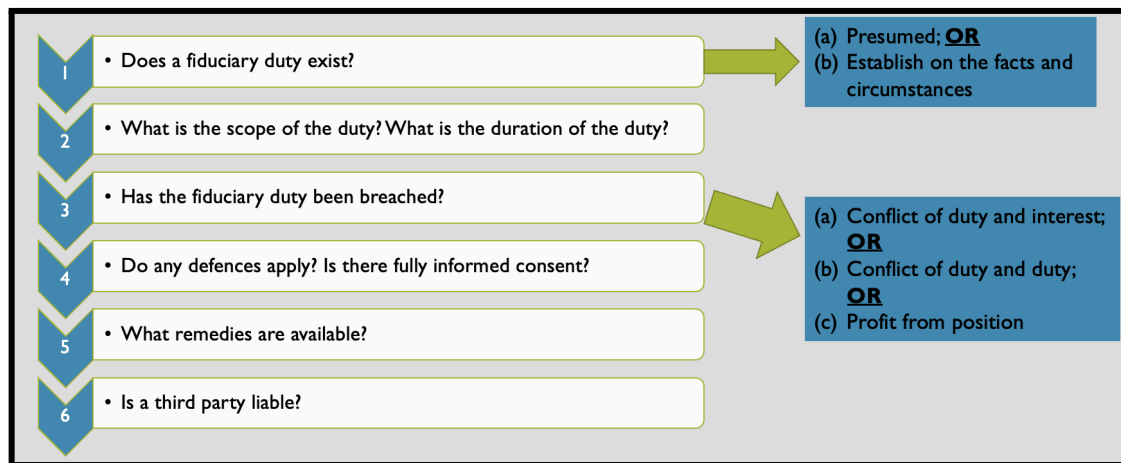


Unconscionable Bargain
To establish an unconscionable bargain, it must be determined whether (<i>plaintiff</i>) had a special disadvantage which “seriously affected the ability of (plaintiff) to make a judgement as to his own best interests” (<i>Amadio</i>).
Element 1: Special Disadvantage
The special disability must seriously affect the capacity of the weaker party to protect their own interests (<i>Bridgewater v Leahy</i>). ❖ Relevant considerations include illness, ignorance, education, intelligence, business inexperience, impaired faculties, financial need, age, sex (<i>Blomley v Ryan</i>). ➢ Most factors on their own will not constitute a special disadvantage. ■ Age alone is insufficient to establish a special disadvantage. ❖ Emotional disadvantage (<i>Bridgewater v Leahy</i>; <i>Louth v Diprose</i>).
Element 2: Breach
The defendant knew or ought to have known of the special disadvantage either through actual or constructive knowledge (<i>Bridgewater v Leahy</i>; <i>Stubbings</i>). ❖ The disability/disadvantage must be sufficiently evident (<i>Amadio</i>). ❖ The defendant exploited the plaintiff's disadvantage by way of inadequate consideration or unfair terms (<i>Kavakas Stubbings</i>).
Defences
Defendant may seek to uphold the transaction by establishing that bargain is fair, just and reasonable (<i>Amadio</i>). ❖ Independent advice ❖ Adequate consideration
Remedies
No more than necessary to prevent unconscionable conduct -> (Maxim: ‘he or she who seeks equity must do equity’) ❖ Rescission (<i>Bridgewater v Leahy</i>) ➢ Partial rescission - may be appropriate with conditions - but the defendant must come with clean hands. ❖ Monetary remedies - Equitable compensation ; Account of profits ; Constructive trust ❖ Defence to specific performance
Case Examples - Unconscionable Bargains
Blomley v Ryan • B entered into a contract to purchase a farm from R. R was 78 and suffering the effects of prolonged and excessive consumption of alcohol. • When R sought to resile from the sale B sought specific performance Held: Contract set aside - “Jurisdiction is invoked “whenever one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affecting ability to conserve his or her interests and the other party unconsciously takes advantage of the opportunity thus placed in his hands”: at 415 (Kitto J)
Amadio • Italian migrants in their 70's, had limited English skills, little formal education and limited (Mr A) or no (Mrs A) business experience. • Vincenzo appeared successful but was in significant debt. V asked his parents to guarantee account. V told parents \$50,000 for six months. • Bank manager visited Mr and Mrs A and obtained signatures on mortgage – no explanation. • Vincenzo company went into liquidation – bank relied on security. • Mr and Mrs A alleged unconscionability on part of bank so could not rely on security. Held: Unconscionable conduct by bank – security could not be relied upon • Special disability ◦ Advanced age, little formal education, limited English, limited business experience • Unconscientious taking of advantage ◦ Sufficiently evident ◦ Proceeded with the transaction anyway • Transaction not fair, just and reasonable: no independent advice Remedy: Mortgage set aside
Bridgewater v Leahy • Bill York, a grazier, died April 1989 aged 85 having lived on property near Roma all his life • Bill and brother Sam co-owned property on which grazing partnership conducted • In April 1985 will, Bill granted option to nephew Neil to purchase grazing property and partnership interests for \$200,000 (at time of will valued at \$695,000) • In 1988 at Neil's suggestion, Bill sold substantial part of pastoral interests to Neil for effectively \$150,000 ◦ Contract price = \$696,811 (value of property) but deed of forgiveness forgave balance of \$546,811 Held: Neil engaged in unconscionable conduct ❖ Bill special disadvantage – Neil took benefit of grossly improvident transaction ❖ Deed of forgiveness set aside – remitted to Supreme Court to determine how much Neil should pay.

Fiduciary Duties



Element 1: Fiduciary Duty

A fiduciary duty arises where the relationship is **presumed** to give rise to fiduciary duties. A presumed relationship arises between a:

- ❖ The relationship between **trustee and beneficiary** is the archetypal fiduciary relationship as trustees can exercise considerable control over the interests of the beneficiaries under the trust (*Keech v Sandford*).
- ❖ Director & Company
- ❖ Agent & Principal
- ❖ EPOA
 - Commences on incapacity or as provided
 - Powers limited by fiduciary and statutory duties (see eg POAA)

Element 2: Scope and Duration

The **scope** of the duty is ... and ... has undertaken to act with respect to ...

Fiduciary duties generally exist for the **duration** of the relationship between the parties.

Element 3: Breach

- ❖ Conflict of Duty and Interest
 - Does the fiduciary have a private interest that comes within the scope/duration of the FD owed so that the duties and interest conflict?
- ❖ Conflict of Duty and Duty
- ❖ No Profit Duty

Defences

- **Fully Informed Consent:** Full and complete disclosure of all relevant information to the transaction (including material the fiduciary may have deliberately refrained from acquiring) which may impact upon the principal's decision
- **Laches:** Laches operates where a plaintiff's delay in the commencement of his or her action for equitable relief makes it unjust to grant equitable relief
- **Acquiescence:** The defence results from inaction; from a plaintiff's refraining from seeking relief (*Galaxidis v Galaxidis*)
- **Estoppel:** See lecture notes on this.
- **Waiver and Release:** Plaintiff waives their right or remedy or releases the defendant from any claim in equity (*Foran*).
- **Analogy with statute:** maxim equity follows the law (*Twigg v Twigg*)
- **Set-Off:** Amount due must be in respect of the subject matter of the originating claim (differs to a counter claim which may have no connection with the originating claims).
- **Change of Position:** Breaching fiduciary or third party has incurred expenses or liability in reliance on being entitled to that benefit.
- **Unclean Hands:** Maxim; not a blanket rule but can be pleaded as defence.

Remedies

The court aims to identify the fiduciary's 'gain' or the principals 'loss' as a result of the breach.

- ❖ Account of profits – where the fiduciary has profited.
- ❖ Equitable compensation - breach = loss to the principal)
- ❖ Claim for interest (*Hungerfords v Walker*)
- ❖ Injunction (+/- LCA damages)
- ❖ Exemplary damages/Lord Cairns Act damages (*Harris v Digital Pulse Pty Ltd*)
- ❖ Equitable lien
- ❖ Constructive trust (*Chan v Zacharia*)

Third Party Liability

- ❖ **Trustee de son tort**
 - "If one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong – ie a trustee de son tort" (*Mara v Browne*)
 - Someone acts as trustee when not actually appointed to the position.
- ❖ **Recipient Liability**

Beneficiaries		
Remedies to Breach of Trust		
A breach of trust occurs where an act or omission occurs in contravention of trustee's duties. Further, where acting in excess of powers or failing to exercise powers reasonably, in good faith and for purposes for which intended. Trustees must act unanimously so are jointly and severally liable. ❖ Personal remedies include account of profits, equitable compensation, injunction/ ❖ Proprietary remedies include following and tracing.		
Following and Tracing		
Where a trustee has breached their duties in dealings with trust property, beneficiaries may pursue the trust property into different forms by tracing (<i>Boscawen</i>). ❖ Following and tracing are processes which can lead to a remedy – but are not, themselves, a right or a remedy (<i>Foskett</i>).		
Prerequisites for Tracing		
The three requirements to establish an entitlement to trace in equity includes (<i>Re Diplock</i>): (1) There must be equity to trace. There must be an equitable proprietary right that they are trying to secure. The modern view is that tracing does not necessarily require the existence of a fiduciary relationship (<i>RnD Funding</i>). ❖ Examples ➢ Beneficiaries of trusts (fixed and discretionary) ➢ Persons with a proprietary interest subsequent on breach of fiduciary duty ➢ Mistaken payment giving rise to constructive trust ➢ Owners of stolen money or property (<i>Black</i>). ➢ Legatee under an unadministered estate (<i>RnD Funding</i>). ➢ Holders of interest as an equitable charge or equitable mortgagee (<i>RnD Funding</i>). (2) The property must be traceable and identifiable. ❖ It must not be dissipated. For example, where a trustee sells trust property and then uses the process of sale to purchase food which is eaten or a holiday which is enjoyed or gambling (<i>Re Diplock</i>). ❖ When the payment goes into an overdraft account, it destroys the possibility for tracing because an overdraft account is a debit account (<i>Re Global Finance Group</i>). (3) Tracing must not produce inequitable results, which means it cannot be used against a bona fide purchaser for value without notice (<i>Re Diplock</i>). ❖ The purchaser must not have notice of the equitable proprietary rights ie: ➢ actual notice; and ➢ constructive notice (<i>Grimaldi</i>).		
A. Tracing into Unmixed Funds		
Retention of the Asset	❖ If a trustee retains a trust asset in its original and identifiable form then it may be recovered from the trustee together with the increase in its value or income which it has earned (<i>Scott</i>). ❖ If the value of the asset has increased as a result of the trustees' own effort, then some allowance must be made for this (<i>Docker</i>).	
	❖ If the proceeds of sale of trust property are used to acquire other property, the property purchased or the value of the property sold may be recovered. ❖ Beneficiaries can elect to treat an asset purchased with trust property as part of the fund – including property that has increased in value (OR bring personal claim against trustee for breach of trust which may be enforced by equitable lien over new property) (<i>Scott</i>). ❖ Beneficiaries can exercise a right to trace trust property even though it has changed its nature.	
B. Tracing into Mixed Funds		
Mixture of Trust Property with the Trustee's Own Property	Where trust funds are mixed in the trustee's own bank account, equity presumes that the trustee is honest and spends their own money first (<i>Hallet's Case</i>). The trustee has the onus of distinguishing the trustee's own assets from trust assets (<i>Re Tilley's Will Trusts</i>). ❖ It applies to all forms of property including mortgages (<i>Re French Caledonia</i>) or shares (<i>Brady</i>). ❖ The presumption of honesty is limited to the extent of the trustee's own \$ in account at time of mixing. ➢ If the trustee's withdrawal exceeds personal funds the presumption of honesty is defeated. No presumption that trustee intended to repair breach with next deposit: <i>Lofts v MacDonald</i> [1974] 3 ALR 404 ❖ The "lowest intermediate balance rule" provides that the trust's claim is limited to lowest intermediate balance of mixed fund between the date of mixing and the day the claim was made (<i>James Roscoe</i>). ➢ In <i>James Roscoe</i>, the balance in account varied from \$25 to \$300. The recovery was limited to \$25.	