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Equity and Trusts – Topic 2 – Undue Influence and Unconscientious Dealing

Undue Influence

General

- Regularly there must be quality of consent and independent will when entering into a contract
- However, even a complete understanding of the transaction in question does not preclude the possibility that **the will of the person entering it might have been overborne by another's influence**
- There are **two types** of undue influence...
 - o **(1) Actual Undue Influence**
 - o **(2) Presumed Undue Influence**

Key Features

1. It is **automatically presumed in certain types of relationships**
2. The nature of the relationship has to be **appropriately influential** as demonstrated by the weaker party
3. The **influence must actually be proved** because relationship cannot give rise to a presumption

(1) Actual Undue Influence

General

- If an applicant cannot demonstrate a class 2A or class 2B relationship (above) existed they must actually satisfy the court that the transaction arose as a result of undue influence
- This requires detailed evidence about the negotiations the relationship the conduct of the other party

(2) Presumed Undue Influence

General

- Class 2A: Automatically arises if the relationship is one of a **special class**
- Class 2B: If the relationship is not one of the special class, **evidence that the relationship was nevertheless suitably influential** – the de facto existence of a relationship **under which the claimant reposed trust and confidence in the wrongdoer**
- As per Latham CJ in *Johnson v Buttress*, a **non-exhaustive list** (*Union Fidelity Trustee Co of Australia v Gibson* [1971] VR 573) of **special classes** is as follows...
 - o (1) Parent/Child
 - o (2) Guardian/Ward
 - o (3) Solicitor/Client
 - o (4) Doctor/Patient
 - o (5) Religious Leader/Follower
 - o The following factors may also give rise to other classes of relationships that do not fall into the aforementioned list of 'special classes'...
 - Extreme age – young or old
 - Disability – mental or physical
 - Illiteracy
 - Poor education
 - Lack of business knowledge or experience
- **NOTE Power Imbalance:** The benefit must flow from the weaker party to the stronger

What About Husband and Wife?

- The reason for **excluding** the relation of a husband and a wife from the category in which the presumption applies is to be found in the consideration that there is nothing unusual or strange in a wife from motives of affection or even prudence conferring a large proprietary or pecuniary benefit upon her husband: *Yerkey v Jones*

TEST per *Johnson v Buttress*

- The facts must be proved showing that **the transaction was the outcome of such an actual influence over the mind of the alienator that it cannot be considered his free act unless he satisfies the court that he took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee**
- Wherever the relation between donor and donee is such that **the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter, the presumption of UI is raised**

Rebuttal

General

- Where a relationship of influence is established, it may be rebutted if **the defendant can prove that the plaintiff exercised free judgment and voluntarily entered into the bargain**
- In order to prove this, the defendant must show that **the plaintiff knew the terms and consequences of the bargain which in turn, requires a detailed examination of the overall character of the plaintiff and often, this can involve stereotyping**
 - o Instances in which the presumption can be rebutted include...
 - (a) Rebutting the presumption by legal/independent advice
 - (b) Prove that there was a lack of improvidence

(a) Rebutting the Presumption by Legal/Independent Advice

- This will only be relevant if the person entered into the transaction believing it to be something else
 - o If the transaction was entered into voluntarily but without reading specific provisions and would have been capable of comprehending it, the lack of independent legal advice will generally not change anything
 - o The advice must relate specifically to the transaction, that is, it must provide a clear account of the salient features of the transaction
- **NOTE:** The independent advice (does) have to be acted upon as a condition of the rebuttal: See *Powell v Powell* (1900) 1 Ch 243

In order to rebut the presumption by legal advice...

- (1) There must have been a **full explanation** of the nature and ramifications of the transaction given by an independent and qualified person to the person entitled to the benefit of the presumption; and
- (2) There must be **proof** that the explanation so given enabled the person entitled to the benefit of the presumption to enter into the transaction as **"the result of the free exercise of her will"**
- (3) As per *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127, the requisite legal advice...
 - o **Must be given with a knowledge of all relevant circumstances; and**
 - o **Must be such as a competent and honest adviser would give if acting solely in the interest of the donor**

***Bester v Perpetual Trustee Co Ltd* [1970] 3 NSW 30**

Facts

- The plaintiff, having inherited a substantial estate, entered into an irrevocable settlement
- The effect of the settlement was to put her assets beyond reach
- She received a modest annual income
- The plaintiff sought to rescind many years later

Held per Street J

- "...The present relationship is very close to if not indeed within the scope of the traditional relations. But whether within or without the traditional relations the present facts involve a degree of confidence equivalent thereto ... Indeed the very presence in the circumstances surrounding this deed of the paternal element that pervades the discussions between all concerned is consistent with and corroborates the existence of the special relationship of influence"
- "...Could not fairly be described as meeting the degree of independent advice that that the plaintiff as a person subject to a relationship of influence was entitled to receive. The solicitor was ... most careful to read this document through and to invite questions of the plaintiff. But it was not textual advice upon the engrossment which was of prime importance in this regard, rather,. It was advice upon the more general topic of whether a settlement should be entered into at all, and, if so, the general nature of the settlement, which in my view ought to have been provided for the plaintiff"

(b) Lack of Improvidence

- Generally, it will be very difficult to prove that the plaintiff had exercised free judgment where they are improvident; for instance...
 - o The plaintiff lacks business acumen
 - o Has a limited understanding of English or poor literacy
- Cases...
 - o **Union Fidelity Trustee v Gibson** [1971] VR 573: Applicant executor sought to set aside a discharge of mortgage GBP 15,000
 - o **Bester**: Tied up the applicant's property, denied her control over her assets, removed power of revocation, removed the right to resort, and to intervene on the actions of the trustee
 - o **National Westminster Bank Plc v Morgan** (1985) 1 AC 686: 'manifestly disadvantageous transaction'

Allcard v Skinner [1887] 36 Ch D 145

Facts

- Allcard sought return of her property 5 years after leaving sisterhood
- She barred relief on basis of **laches** and **acquiescence**
 - o The essential element of laches is that there has been an unreasonable delay by the plaintiff in bringing the claim
- Delay after the applicant is free of the influence and is aware of the possibility of setting aside the transaction
 - o CF **Bester**: A 20 year delay

Held per Street J

- "...an act or a course of conduct subsequent to becoming aware of the initial invalidity of the transaction which act or course of conduct has such significance that as in law or equity to amount to a conscious and deliberate affirmation of the original transaction"

Undue Influence of Third Parties

General

- 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 of law...
 - o (a) Third Party Agents
 - o (b) Third Parties and Actual/Constructive Notice
 - o (c) *Yerkey v Jones* and *Garcia*: Special Wives Equity

(a) Third Party Agents

- The first is that **the 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**
- **It must be established that the third party has actually requested the influencing party to act on their behalf—merely sending the documents may be insufficient**
 - o A third party may not give actual authority to an 'influencing' party, but rather, 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

(b) Third Party Actual/Constructive Notice

- The second is where a **third party receives actual or constructive notice that at the time the transaction was executed, it was executed with undue influence**; where this occurs the third party cannot enforce the transaction; an equity will be raised against the third party
 - o **Actual Notice:** Exists where the third party receives actual knowledge that undue influence has been exerted
 - o **Constructive Notice:** Exists where the circumstances should have put the third party on inquiry
 - **NB:** 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 – see below) 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] 1 AC 180

(c) Yerkey v Jones and Garcia: Special Wives Equity

- The third situation in which 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 explain the full consequences of the guarantee to the wife**
- This is the principle which was first established in *Yerkey v Jones* (1939) 63 CLR, the validity of which was confirmed in *Garcia v NAB* (1998) 155 ALR 614
- The essence of the *Yerkey* principle is...
 - o (1) If a married woman's consent to become a surety for her husband's debt is procured by the husband; and
 - o (2) Without understanding its effect in essential respects; and
 - o (3) She executes an **instrument of surety-ship which the creditor accepts without dealing directly with her personally**The wife has a **prima-facie right to have it set aside**
- The principle has been **recognised as having two 'limbs'**

First Limb of Yerkey

- First, where the consent of the wife to the instrument of surety-ship is procured through actual undue influence by the husband, the wife will be entitled to set aside the instrument against the creditor unless the creditor can prove that the wife received independent legal advice
 - o In this context, actual influence must be established by the wife; undue influence will not simply be presumed from the marriage relationship
 - o There is no need to prove that the creditor knew of circumstances surrounding the actual influence—proof that the creditor received constructive knowledge of the marriage relationship is sufficient

Second Limb of Yerkey

- *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 409: It will be seen that the analysis of the second kind of case identified in *Yerkey v Jones* is **not one which depends upon any presumption of undue influence of the husband over the wife**
- The second limb of the *Yerkey* principle will arise where, in the absence of actual undue influence, the wife fails to fully appreciate the effect of the instrument of surety-ship
 - o In this situation, the wife may set the instrument aside against the creditor unless the creditor took steps to inform the wife about the transaction and reasonably believed that the wife knew what she was entering into
 - o 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
- *Norian v Euroasia (Pacific) Pty Ltd* [2009] VSCA 290: The second limb of *Yerkey v Jones* is limited to contracts of guarantee where a wife gratuitously stands as a surety for her husband

Yerkey v Jones (1939) 63 CLR 649

NOTE: Decision reaffirmed by *Garcia v National Australia Bank* 1998) 194 CLR 395

Yerkey imposes responsibilities on creditors to guard against UI by ensuring the availability of independent advice

Held per Dixon J

- Where the Guarantor is the wife of the debtor and husband has used his influence to procure guarantee
- The wife need not prove actual or constructive notice of UI
- At 675: "The reason for excluding the relation of a husband and a wife from the category in which the presumption applies is to be found in the consideration that there is nothing unusual or strange in a wife from motives of affection or even prudence conferring a large proprietary or pecuniary benefit upon her husband"
- At 675: The elements that support raising the presumption of UI are...
 - o (1) "The mere existence of an opportunity of obtaining ascendancy or confidence and of abusing it"
 - o (2) Combined with circumstances where it is not "natural to expect the one party to give property to the other"

Unconscientious Dealing

This doctrine is sourced in two origins...

- (1) Equity
- (2) Statute

(1) Equitable Unconscientious Dealing

General

- Equity acknowledges real inequality
- Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two
 - o In the latter the will of the innocent party is not independent and voluntary because it is overborne
 - o In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other unconsciously taking advantage of that position
- Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party; it provides relief because of the impaired volition of the party
- Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so; exploitation of a special disadvantage of a party provides relief because of the impaired judgment of the party when he entered the transaction
- **NB:** A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, **simply because of inequality of bargaining power**
 - o Unconscientious exploitation of another's inability or diminished ability to conserve his or her own interests is **not to be confused with taking advantage of a superior bargaining position**

Jurisdiction

The jurisdiction of the doctrine was spelt out in *CBA v Amadio* (1983) 151 CLR 447: "The jurisdiction ...(extends) generally to circumstances in which...

- (i) A party to a transaction was under a **special disability** in dealing with the other party with the consequence that there was an **absence of any reasonable degree of equality between them**; and
- (ii) That **disability was sufficiently evident** to the stronger party to make it prima facie unfair or unconscientious that he procure or accept the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it

Where such circumstances existed an **onus is cast upon the stronger party to show that the transaction was fair, just and reasonable**"

Elements

This doctrine has three elements...

- (a) Special disability
- (b) Knew or likely to have known of disability
- (c) Using disability unconscionably

Template

- (1) Did one party take advantage of a bargaining position that was superior to another party's?
- (2) **IF YES:** Did the taking of that advantage, in all the circumstances of the transaction, **constitute an unconscientious exploitation** of the other party's diminished ability to preserve their own interests?
- (3) Was the weaker bargaining position of the other party **the result of a diminished ability to conserve their own interests?**
 - **IF NO:** There is no culpable (i.e. unconscientious) exploitation of the weaker party
 - **IF YES:** Did the stronger party to the transaction know, or ought the stronger party have known, that the party in the weaker bargaining position was weaker because they suffered from a diminished ability to conserve their own interests?
 - **IF YES:** And the stronger party continued to the conclusion of the transaction, they have unconscientiously exploited the weaker party, and the weaker party will be entitled to have the transaction set aside

(a) Special Disability

- *Blomley v Ryan* (1956) 99 CLR 362 Fullagar J (at 405): The **circumstances adversely affecting a party**, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified; for instance...
 - **Imbalance of information: See *Amadio***
 - **Infatuation: See *Louth v Diprose***
 - **Special emotional dependency: *Bridgewater v Leahy* (1998) 158 ALR 66**
 - Poverty or need of any kind
 - Sickness
 - Age
 - Sex
 - Infirmary of body or mind
 - Drunkenness
 - Illiteracy or lack of education
 - Lack of assistance or explanation where assistance or explanation is necessary
- *Blomley v Ryan* (1956) 99 CLR 362 Fullagar J (at 405): The common characteristic seems to be that they **have the effect of placing one party at a serious disadvantage vis-a-vis the other**; it **does not appear to be essential** in all cases that **the party at a disadvantage should suffer loss** or detriment by the bargain
 - Presence of characteristics not sufficient
 - **Must amount to a disadvantage relative to the other party**