

# EQUITY & TRUSTS – FINAL NOTES

## OVERVIEW OF TOPICS

1. Introduction to Nature Of Equity & Trusts
2. Undue Influence and unconscionability
3. Estoppel in equity 2019
4. Equitable Estates and Interests
5. Equitable assignment of legal property
6. Assignment of equitable property
7. Fiduciary Obligations
8. Accessorial Liability
9. Tracing and Account of Profits
10. Equitable Compensation
11. Constructive Trust
12. Resulting Trust
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14. Trustees and Beneficiaries

# TOPIC 2 - UNDUE FLUENCE AND UNCONSCIONABLE TRANSACTIONS

## OVERVIEW OF TOPIC

- (1) Introduction
- (2) Undue influence
- (3) Unconscionable transactions
- (4) Defences
- (5) Remedies
- (6) Statutory unconscionability

## EQUITY'S EXERCISE OF ITS JURISDICTION TO SET ASIDE TRANSACTIONS

**In *Brusewitz v Brown* [1923] NZLR 1106 Salmond J observed that:**

- “the mere fact that a transaction is based on an inadequate consideration or is otherwise improvident, unreasonable, or unjust *is not in itself any ground on which this Court can set it aside as invalid* ... The law in general leaves every man at liberty to make such bargains as he chooses ... they are binding on every party to them unless he can prove affirmatively the existence of one of the recognised invalidating circumstances, such as fraud or undue influence.”

**Note:**

- A NZ decision, always cited by the courts
- Looking at equitable grounds, when will equity intervene.

**In *Hartigan v International Society for Krishna Consciousness Inc* [2002] NSWSC 810 at [29]**

- “... it is only in cases of enormity that transactions which according to common law are effective should not be allowed to have their effect. The court does not act idiosyncratically or adduce concepts of unconscionability afresh for each case, but acts in the context of earlier judicial experience; yet each decision is a judgment on the facts to which it relates. An intended donation and an effective transfer of ownership of property are assumptions with which consideration starts; the question at the heart of the court’s power is how the intention was produced, and the advice given to the donor or available to the donor is brought under examination by that question..”

**Note:**

- It is only in cases of enormity, that the transactions affected by common law.

**What is equitable fraud?**

Between equitable fraud and common law fraud, what does this mean without knowing case law?

- Someone who engaged in fraudulent behaviour
- Some sort of deception that has been carried out
- This is common law fraud – actual fraud – deception

**In *Nocton v Ashburton* [1914] AC 932 per Viscount Haldane:**

- "... when fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent... What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience."

**Common law fraud or actual fraud – tort of deceit**

- Based on intentional dishonesty
- Or being recklessly indifferent

**Equitable Fraud**

- There is not necessity to find dishonesty.
- Someone can be honest, not intending to mislead someone, but nevertheless can commit equitable fraud. Why is that?
- Because, equity imposes a higher standard on the good conscience in the parties in the equity court.
- Is not just one thing, but is a combination of equitable doctrines. Group them altogether, you get undue influence and unconscionability and obligations of a fiduciary.
- One thing which combines these, is a party in a stronger dominant position.
- Equity must act according to a higher level of obligation.

**Vitiating of consent**

- Mistake
- Misrepresentation
- Duress
- Breach of fiduciary duty
- Undue influence

- Unconscionable conduct

## DURESS

Traditional CL concept of duress limited to actual or threatened violence to person of pl or family.

- Extended to threats to personal property: Hawker Pacific.
- Extended to economic duress – actual or threatened unlawful conduct deleterious to Plaintiff’s economic interests.
- Duress – “actual or threatened unlawful conduct that is directed at the person or property of the victim, or legitimate commercial & financial interests of that party”.
- ANZ v Karam [2005] NSWCA 344 – duress limited to “threatened or actual unlawful conduct” – but has been questioned.
- If conduct does not amount to duress, agreement may be set aside for undue influence or unconscionable conduct.

## UNDUE INFLUENCE VS UNCONSCIONABILITY

*CBS v Amadio* (per Deane J)

- **Undue influence**, [like] common law duress, looks to the quality of the consent or assent of the weaker 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.

Note:

- Unconscionability looks at the conduct of the stronger party, and taking advantage of a weaker party. This agreement will be undone, as the party was being unconscionable.
- Voluntary and real consent to the agreement.

## UNDUE INFLUENCE – GENERAL PRINCIPLES

- (1) Where one person is in a relationship or position of influence over another, equity presumes that any transfer by the weaker to the stronger party may have been brought about by the influence of the stronger party.
- (2) The doctrine is directed to transfer of property which cannot be explained on grounds of “friendship, charity or other ordinary motives on which people ordinarily act. – National Westminster Bank Plc v MORGAN [1985] AC 686, 708
- (3) Not about whether transaction was intended – examines how intention produced and whether it was produced as a result of influence from a relationship. Bank of NSW v Rogers (1941) 666 CLR 42, 54.

## Basis of jurisdictions:

### *CBS v Amadio* (per Deane J)

- **Undue influence**, [like] common law duress, looks to the quality of the consent or assent of the weaker 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.

### Undue Influence – Consent

#### *Thorne v Kennedy* [2017] HCA 49 at [32]:

- “It is not necessary for a conclusion that a person’s free will has been substantially subordinated to find that the person seeking relief was reduced entirely to an automaton or that the person became a “mere channel through which the will of the defendant operated”. Questions of degree are involved. But, at the very least, the judgmental capacity of the party seeking relief must be “markedly sub-standard” as a result of the effect upon the person’s mind of the will of another”.

### Two categories in undue influence

- (1) Class 1: Actual influence
- (2) Class 2: Presumed influence

*Allcard v Skinner* (1887) 36 Ch D 145, 171 per Cotton LJ: “The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising there from being abused.”

## CLASS 1: ACTUAL INFLUENCE

### *Johnson v Buttress* (1936) 56 CLR 113, 134 per Dixon J

- “The source of power to practise such a domination may be found ... in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction was the outcome of an actual influence over the mind of the alienor that it cannot be considered his free act.”

### Actual Influence requires evidence of undue influence

#### 4 Elements:

1. Capacity to influence;
2. Influence was exercised;
3. Influence was ‘undue’;
4. Results in entry into transaction.

**See cases:**

- *Johnson v Buttress* (1936) 56 CLR 113, 134 per Dixon
- *Farmers Co-Operative Executors & Trustees Ltd v Perks* (1989) 52 SASR 399

**Farmers Co-Op v Perks (1989)**

- Executor of estate of deceased wife sought declaration that transfer of land to husband void due to undue influence.
- Long history of serious domestic violence on property in remote part of SA.
- Evidence established that transaction resulted from actual undue influence.
- "...not only did the defendant have the capacity to influence the deceased, but he did exercise such influence &.... It was undue in the sense that it was used to obtain an unfair advantage for the defendant to the detriment of his wife. Finally, the exercise of that undue influence brought about the transaction".

**CLASS 2: PRESUMED INFLUENCE**

***Johnson v Buttress* (1936) 56 CLR 113, 134 per Dixon**

**Principle**

- "But the parties may antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected. When they stand in such a relation, *the party in the position of influence cannot maintain his beneficial title to property* of substantial value made over to him by the other as a gift, **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."

**Elements per *Johnson v Buttress*:**

1. There is a relationship between the parties;
2. The party in the position of influence;
3. Cannot maintain his beneficial title to property as a gift;
4. Unless he shows that he did not take advantage of the donor.
5. The gift must be an independent and well-understood act;
6. Of a man who was in position to exercise free judgement.

***Thorne v Kennedy* [2017] HCA 49 at [34]**

- "Common experience gives rise to a presumption that a transaction was not the exercise of a person's free will if (i) the person is proved to be in a particular relationship, and (ii) the transaction is one, commonly involving a "substantial benefit" to another, which cannot be explained by "ordinary motives", or "is not readily explicable by the relationship of the parties":

### **Presumption that a transaction was not the exercise of a person's free will:**

1. The person is proved to be in a particular relationship;
2. The transaction is one commonly involving a substantial benefit to another;
3. Which cannot be explained by ordinary motives; or
4. Is not readily explicable by the relationship of the parties.

## **UNDUE INFLUENCE - CATEGORIES**

There are two classes of presumed undue influence:

1. Class 2A – recognised classes of relationships where influence is presumed;
2. Class 2B – other relationships proved on the evidence

## **CLASS 2A: RECOGNISED RELATIONSHIPS**

### **Recognised relationships**

- The classes are not closed – **Thorne v Kennedy [2017] HCA 49;**
- Parent and child – **Bullocks v Lloyds Bank Ltd [1955] Ch 317;**
- Guardian and ward;
- Solicitor and client;
- Doctor and patient – **Bar-Mordecai v Hillston [2004] NSWCA 65;**
- religious leader and follower – **Allcard v Skinner (1887) 36 Ch D 145 at 171; McCulloch v. Fern [2001] NSWSC 406; Hartigan v International Society for Krishna Consciousness Inc [2002] NSWSC 81.**
- trustee & beneficiary?
- fiance and fiancée – **Thorne v Kennedy [2017] HCA 49.**

### **Common features**

A first named person is reasonably expected to advise and give guidance to the other, in and for the purposes of such relationship, solely in the interests of and for the benefit of the other.

### **Thorne v Kennedy [2017] HCA 49 at [36] – fiancé & fiancée**

- “Common experience today of the wide variety of circumstances in which two people can become engaged to marry negates any conclusion that a relationship of fiancé and fiancée should give rise to a presumption that either person substantially subordinates his or her free will to the other”.

## **CLASS 2B: PROVEN RELATIONSHIPS**

### Proven relationships

- Requires evidence of relationship of ascendancy/dominion
- Does not require evidence of victimisation/intent
- Does not require evidence of a disability or incapacity

### Proven relationships – some examples

#### 1. *Johnson v Buttress* (1936) 56 CLR 113

- Elderly man of limited intelligence dependent on others

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

- Pl (21 yrs old) advised by t/ee co. & uncles to settle inherited fortune on trust for uncles

#### 3. *Union Fidelity Trustee Co of Australia v Gibson* [1971] VR 573

- Mature woman with business experience lent money secured by mortgage & forgave debt in gratitude for financial advice services

### CLASS 2B: PRESUMED – REBUTTING THE PRESUMPTION

The defendant must prove that the transaction was:

- “the independent and well-understood act of a man in a position to exercise a free judgement based on information as full as that of the donee” – *Johnson v Buttress* (1936) at 134 per Dixon J.

Held:

- Trusting party knew & understood what she was doing; and
- Was acting independently of any influence arising from ascendancy.

### How to rebut the presumption

Must prove that there was:

1. Independent advice – *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSWLR 30;
2. Proving transaction “not improvident” – *Johnson v Buttress* (1936)

<i>John v Buttress</i> (1936)	
<b>Facts</b>	<ul style="list-style-type: none"><li>- J. Buttress ('Rocker') – 67 yrs old, unable to read or write, intellectual disability, no business experience – depended on his wife.</li><li>- Mrs Johnson – relative of wife – befriended JB during illness &amp; after death of his wife.</li><li>- 1931 – JB transferred Maroubra property to J – transfer prepared by J's solicitor but JB received no independent advice.</li><li>- After death of JB, his son applied to have transfer set aside.</li></ul>

<b>L e g a l Issues</b>	<ul style="list-style-type: none"> <li>- PI had proved that relationship was one of UI → What was evidence?</li> <li>- Onus shifted to def to show 'Rocker' able to exercise independent judgment, free of influence, in making transfer.</li> <li>- As def unable to discharge burden, transfer set aside.</li> </ul>
<b>Judgement per Dixon J</b>	<ul style="list-style-type: none"> <li>- "When they stand in such a relation, the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him by the other as a gift, unless he satisfies the court that he took no advantage of the donor, but that the gift was the <u>independent and well-understood act</u> of a man in a position to exercise a <u>free judgment</u> based on information as full as that of the donor."</li> </ul>
<b>Thorne v Kennedy [2017]</b>	
<b>Facts:</b>	<ul style="list-style-type: none"> <li>- Kennedy travelled to Middle East to meet Thorne, an Eastern European woman with no substantial assets.</li> <li>- Thorne moved to Australia to marry Kennedy, a very wealthy property developer. Her family joined her.</li> <li>- Kennedy insisted on a pre-nuptial agreement.</li> <li>- Thorne received independent legal advice not to sign &amp; that it was "the worst agreement that [the solicitor] had ever seen".</li> <li>- Thorne nevertheless signed the pre-nuptial &amp; a pos-nuptial agreement.</li> </ul>
<b>P r i m a r y Judgement</b>	<ul style="list-style-type: none"> <li>- "... it was open to the primary judge to conclude that Ms Thorne considered that she had no choice or was powerless other than to enter the agreements. In other words, the extent to which she was unable to make "clear, calm or rational decisions" was so significant that she could not aptly be described as a free agent".</li> </ul>
<b>Factors for HC Decision</b>	<p>Factors [at 60]:</p> <ul style="list-style-type: none"> <li>(i) Whether agreement offered on basis not subject to negotiation;</li> <li>(ii) Emotional circumstances in which agreement was entered including explicit or implicit threat to end marriage;</li> <li>(iii) Whether time for careful reflection;</li> <li>(iv) Nature of parties' relationship;</li> <li>(v) Relative financial positions of parties;</li> <li>(vi) Independent advice that was received &amp; whether time to reflect on that advice.</li> </ul>

## UNDUE INFLUENCE OF THIRD PARTIES

*A gift to, or transaction with, a third party can also be set aside on the basis of the undue influence of another.*

- *Bank of New South Wales v Rogers* (1941) 65 CLR 42
- *Cockburn v GIO Finance Ltd (No 2)* (2001) 51 NSWLR 624

## Legal Principle

- A 3<sup>rd</sup> party who receives property transferred as result of UI must return property (or traceable proceeds) unless good faith purchaser for value & w/out notice.

### ***Bk of NSW v Rogers (1941)***

- “creditors cannot improve their security, taken from persons to whom they have given credit, by instigating or inducing them to obtain further security for their debts from near relations or persons under their influence & not in a situation to resist their importunity” (per Starke J).

#### Note:

- If it is a gift, then there is no consideration. Equity will not consider someone who is a volunteer.
- What if the third party is not a volunteer, and provided consideration?
- A circumstances, such as a husband persuades their wife to guarantee a loan from the bank to the Husband’s business, this agreement resulted in the husband’s undue influence over the wife. Nevertheless, bank has given the loan.
- Result of the case, depends on the notice of the bank.
- If the bank has taken advantage with notice of the circumstances giving rise to undue influence, then it can be set aside because of the bank.

### **Bank of NSW v Rogers**

#### Facts:

- R resided with her uncle, whose advice she followed w/out question in business matters.
- Induced to charge almost all her property in favour of bank as security for uncle’s debts.
- Bk manager knew that R lived with uncle & her property not likely to be redeemed.
- From relationship, presumption of UI that was not rebutted (eg no independent advice).
- Bank had notice of relationship & so onus placed on it to prove giving of charge was free, voluntary & well-understood act of R.

## UNDUE INFLUENCE – RULE IN YERKEY V JONES

No Presumption of influence of husband over wife, but limited to equity recognised in two situations related to guarantee/securities:

1. Where the wife is induced to enter into the guarantee by the exercise of actual undue influence (in which case independent advice is irrelevant) or
2. Where the wife’s agreement to a voluntary arrangement for no gain is obtained by the husband where she does not understand the nature of the transaction or effect of documents. (independence advice will be critical)

**It is thus unconscionable for the lender to rely on security where:**

- Wife is a volunteer
- Wife executes security as a result of the actual undue influence, or did not understand the effect of the security
- Lender knows of 'wife' or borrower's relationship, & is taken to understand that borrower may not have accurately explained transaction.
- Lender has not taken sufficient steps to explain security to wife, or does not reasonably believe they have been explained to her independently.

**Cases**

- *Yerkey v Jones* (1939) 63 CLR 649
- Applied in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395

<b>Garcia v NAB (1998)</b>	
<b>Facts:</b>	<ul style="list-style-type: none"><li>- PI &amp; husband were guarantors of loan by NAB to husband's company.</li><li>- PI executed mortgage over share of matrimonial home to secure repayment of debts to NAB.</li><li>- PI obtained divorce &amp; applied for declaration that guarantee &amp; mortgage void as guarantee not sufficiently explained.</li></ul>
<b>Judgement</b>	<ul style="list-style-type: none"><li>- Where no actual UI, analysis "depends upon the surety being a volunteer &amp; mistaken about the purport &amp; effect of the transaction, &amp; the creditor being taken to have appreciated that because of the trust &amp; confidence between surety &amp; debtor the surety may well receive from the debtor no sufficient explanation of the transaction's purport &amp; effect. To enforce the transaction against a mistaken volunteer when the creditor, the party that seeks to take the benefit of the transaction, has not itself explained the transaction, &amp; does not know that a third party has done so, would be unconscionable..."</li></ul>

**Rule in Garcia v NAB**

- It may be unconscionable to enforce a security provided by a wife as surety (guarantor) to secure husband's debt where wife did not understand transaction.
- Lender must either take steps itself to explain transaction or reasonably believe transaction explained by competent, independent, & disinterested stranger.

**UNCONSCIONABLE TRANSACTIONS**

**General Principles**

'Unconscionable dealing' concerns the situation where one party to a transaction is under a 'special disability' in dealing with the other, which disability was sufficiently evident to the other to make it prima facie unconscionable for the other to take the benefit of the transaction.

- *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474 per Mason J
- *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392

**Thorne v Kennedy [2017] HCA 49 at [17]**

- “Although undue influence and unconscionable conduct will overlap, they have distinct spheres of operation. One difference is that although one way in which the element of special disadvantage for a finding of unconscionable conduct can be established is by a finding of undue influence, there are many other circumstances that can amount to a special disadvantage which would not establish undue influence. A further difference between the doctrines is that although undue influence cases will often arise from the assertion of pressure by the other party which might amount to victimisation or exploitation, this is not always required”.

**Elements as per Dean J at 474-475 in Amadio.**

1. Plaintiff under ‘special disability’ or special disadvantage’ in dealing with the defendant with consequence of absence of reasonable equality between them; and
2. Disability sufficiently evident to defendant to make it prima facie unfair to accept assent of weaker party to transaction.
3. Exploitation of the disability

**ELEMENTS OF UNCONSCIONABLE TRANSACTIONS**

**Element 1 – plaintiff under special disability or special disadvantage**

**Commercial Bank of Australia v. Amadio (1983) 151 CLR 447 at 462 per Mason J.**

- It is a disabling condition which is “one which seriously affects the ability of the innocent party to make a judgment as to his own best interests when the other party knows or ought to know of the existence of that condition or circumstance and its effect on the innocent party.”

What constitutes special disability or special disadvantage?

**Blomley v Ryan (1956) 99 CLR 327, 386 per Fullagar J.**

- "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. Among them are 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. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other."

**Element 2 – Actual or Constructive Knowledge**

**Amadio (1983) 151 CLR 447 at 462-3 per Mason J, and at 474 per Deane J**

- In the absence of direct knowledge, the test is “whether there were such facts known as would raise in the mind of any reasonable person a very real question as to the other party’s ability to make a judgement as to what was in his best interests.”

**Thorne v Kennedy [2017] HCA 49 at [38].**

- It is “generally necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage”:

**Kakavas v Crown Melbourne Limited (2013) 250 CLR 392**

- The High Court made it clear that mere inadvertence or constructive notice in the property law/priorities sense is not enough. ‘Wilful ignorance’ may however be sufficient.
- The High Court said that it was necessary to show that the defendant had a “predatory state of mind”.

**Element 3 – Exploitation of the Disadvantage**

Proof of exploitation is required, although if the plaintiff proves disability and knowledge, there is a presumption of exploitation and the onus will shift on to the defendant to rebut it:

- *Louth v Diprose* (1992) 175 CLR 621, 623 per Brennan J.
- *Blomley v Ryan* (1956) 99 CLR 362.

**Rebutting the presumption**

- showing transaction not improvident or unfair
- steps taken to remedy disadvantage, **such as independent advice.**

<b>Commercial BA v Amadio</b>	
<b>Facts</b>	<ul style="list-style-type: none"><li>- Pl’s son was builder with large overdraft from bank.</li><li>- Bank selectively dishonored cheques drawn on overdrawn a/c to maintain appearance of solvency.</li><li>- Bank informed son would increase permitted overdraft on condition his parents signed guarantee &amp; mortgage over their home to secure indebtedness of son’s company. Parent agreed.</li><li>- Branch manager visited parent’s home to obtain signatures.</li><li>- Parents elderly &amp; poor command of written English.</li><li>- Under impression guarantee limited to \$50,000 &amp; 6 months duration.</li><li>- Son’s business failed &amp; bank sought to enforce guarantee.</li></ul>
<b>Reasoning – Actual Knowledge</b>	<ul style="list-style-type: none"><li>- “... if A having actual knowledge that B occupies a situation of special disadvantage in relation to an intended transaction, so that B cannot make a judgment as to what is in his own interests, takes unfair advantage of his (A’s) superior bargaining power by entering into that transaction, his conduct in so doing is unconscionable.</li><li>- And if, instead of having actual knowledge of that situation, A is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person, the result will be the same”.</li></ul>

<b><i>Louth v Diprose (1992)</i></b>	
<b>Facts</b>	<ul style="list-style-type: none"> <li>- Diprose (a solicitor) was infatuated with Louth, who was largely indifferent to him.</li> <li>- Louth lived in rented accommodation (Adelaide), but threat that this would be discontinued. She threatened suicide.</li> <li>- Diprose gave \$58,000 to purchase the house &amp; Louth registered as proprietor.</li> <li>- The parties fell out, &amp; Diprose sought to recover the house.</li> </ul>
<b>Held: Elements of Unconscionability</b>	<ul style="list-style-type: none"> <li>- 'Special disadvantage' (SD) – “the relationship between the resp. &amp; the appellant at the time of the impugned gift was plainly such that the resp. was under a special disability in dealing with the appellant”.</li> <li>- Knowledge – the appellant was aware of that SD.</li> <li>- Exploitation of special disadvantage – “She manipulated it to her advantage to influence the resp. to make a gift of the money to purchase the house”.</li> <li>- “The case was one in which the appellant deliberately used that love or infatuation and her own deceit to create a situation in which she could unconscientiously manipulate the resp. to part with a large proportion of his property”.</li> </ul>
<b>Questions to ask</b>	<ul style="list-style-type: none"> <li>- New application of established equitable doctrines: emotional dependency in form of infatuation.</li> <li>- Nature of appellate review of findings of fact.</li> <li>- Do you think equity should intervene in decisions made in context of intimate relationship to give property?</li> <li>- What brake is there on too much intervention in personal relationships?</li> </ul>

<b><i>Kakavas v Crown Melbourne (2013)</i></b>	
<b>Facts</b>	<ul style="list-style-type: none"> <li>- K, a 'high roller', lost \$20.5m at Crown Melbourne.</li> <li>- Although addicted to gambling, he appeared to Crown e/ees to be capable of making his own decisions.</li> <li>- Pl subject to NSW excluding him from casinos &amp; consequence was that winnings from Vic were forfeited to state.</li> <li>- K unaware of consequences of order.</li> <li>- Casino was aware of order but did not appreciate significance when paying out winnings</li> <li>- <b>High Court held that K was not under a 'special disadvantage'.</b></li> <li>-</li> </ul>

<b>Reasoning</b>	<p>Did casino have sufficient knowledge of K's condition?</p> <ul style="list-style-type: none"> <li>- "Equitable intervention to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party requires proof of a <u>predatory state of mind</u>. Headlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose".</li> <li>- "Inadvertence, or indifference, falls short of the victimisation or exploitation with which the principle is concerned".</li> <li>- Arguably "predatory state of mind" is more exacting knowledge requirement than standard applied in <i>Amadio</i>.</li> </ul>
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<b><i>Thorne v Kennedy</i> [2017] at [64]-[65]</b>	
<b>A p p l i e d elements to facts</b>	<ul style="list-style-type: none"> <li>- The findings by the primary judge that Ms Thorne was subject to undue influence – powerless, with what she saw as no choice but to enter the agreements – point inevitably to the conclusion that she was subject to a <u>special disadvantage</u> in her entry into the agreements.</li> <li>- Ms Thorne's special disadvantage was <u>known</u> to Mr Kennedy. Her special disadvantage had been, in part, created by him. He created the urgency with which the pre-nuptial agreement was required to be signed and the haste surrounding the post-nuptial agreement and the advice upon it.</li> <li>- Mr Kennedy <u>took advantage</u> of Ms Thorne's vulnerability to obtain agreements which, on Ms Harrison's uncontested assessment, were entirely inappropriate and wholly inadequate.</li> </ul>

## DEFENCES

1. **Laches:** an unreasonable delay in instituting proceedings by reason of which there has been substantial detriment to the defendant which renders it unjust that the claim be allowed to proceed: *Barker v Duke Group Ltd* (in liq) (2005) 91 SASR 167.
2. **Acquiescence:** like laches, but refers to standing by in a way which suggests that they agree to or have accepted the other person's conduct – appears as if they have abandoned their rights by reason of seeing the violation of rights in progress but not interfering: *Orr v Ford* (1989) 167 CLR 316.
3. **Unclean hands**

## REMEDIES

### **A party who succeeds may resist order for specific performance**

- e.g. *Blomley v Ryan*, *CBA v Amadio*

*Alternatively*, a party may seek other equitable relief:

1. Seek order for **rescission** e.g. *Johnson v Buttress* (unless *restitutio in integrum* no longer possible)
2. **Equitable compensation** when rescission no longer possible
  - e.g. *Hartigan v Society for Krishna Consciousness* (or account of profits if sale to third party)
3. **Constructive trust**
  - e.g. *McCullough v Fern*; *Louth v Diprose*

## STATUTORY UNCONSCIONABILITY

- The Australian Consumer Law, set out in sch 2 of the *Competition and Consumer Act 2010* (Cth) also covers unconscionable conduct at ss 20-22A in relation to acts by corporations in 'trade or commerce'. Mirror state and territory consumer law covers the acts of natural persons.
- Financial services and products are regulated by ss 12CA, 12CB, 12CC of the *Australian Securities and Investments Commission Act 2001* (Cth).
- Statutory unconscionability applies only to business or professional activity.
- **Remedies** – ch 5- injunctions, damages, ancillary orders including voiding or variation of contracts, return of money/ property; compensation.
- See *ACCC v Berbatis Ltd* (2003) 214 CLR 51
- See also *Contracts Review Act 1980* (NSW) – unjust contracts.

## ACCC V BERBATIS (2003)

- Landlord of shopping centre refused to consent to a renewal of tenant's lease unless tenant abandoned legal claims against landlord.
- HC held that inequality of bargaining power was not unconscionable conduct for purpose of statutory provision.
- Gleeson CJ – decisions on 'special disadvantage' under *Amadio* doctrine 'marked out area of discourse involved'.
- Gummow & Hayne JJ – left open whether s 20 ACL confined to cases of equitable unconscionability.

# TOPIC 3 – EQUITABLE ESTOPPEL

## OVERVIEW

1. What is Estoppel?
2. Nature of Estoppel
3. Categories of estoppel at common law
4. Equitable estoppel
5. Proprietary estoppel
6. Promissory estoppel

## WHAT IS ESTOPPEL?

### Definition

The verb is “estop”, which comes from Late latin *stappare* (to stop up) through Middle English *estoppen*. The noun form “estoppel” is based on the Old French *estoupail*, which meant a stopper plug.

- Where a court finds that a party has done something warranting a form of estoppel, that party is said to be estopped from making certain related arguments or claiming certain related rights. The

defendant is estopped from presenting the related defense or the plaintiff is estopped from making the related argument against the defendant. Lord Coke, stated, “It is called an estoppel or conclusion, because a man’s own act or acceptance stoppeth or closet up his mouth to allege or plead truth” [litteon 352a]

**Note:**

- Legal context of estoppel – party set to be estopped from making certain related arguments or claiming certain related rights.
- Basis of all estoppel, is preventing from someone acting inconsistently

**NATURE OF ESTOPPEL**

**Circumstances giving rise to Estoppel**

Both the common law and equity have long recognised that in certain circumstances a defendant may be prevented, or “estopped”, from denying a particular state of affairs, or in some circumstances, from denying a plaintiff an interest or right which the defendant has encouraged or permitted the plaintiff to assume would be his.

**Different forms of estoppel at Common law**

There are different forms of estoppel at common law and in equity depending upon **the nature of the defendant’s conduct or representation** or the **nature of the assumption** upon which the plaintiff has relied.

**Equitable estoppel is different to CL Estoppel**

- Equitable estoppel derives from a substantive set of rights.
- Basically, the defendant’s conduct which allegedly founds, may give rise to a cause of action. May give the plaintiff a new source of rights.
- Start an action on equity estoppel, whereas common law estoppel is only a defence.
- Therefore, the famous metaphor – the shield in common law and the sword in equity.

Common law estoppel	Equitable Estoppel
Common law estoppel by representation remains restricted to statements of <i>existing</i> fact.	Equitable estoppel <b>differs</b> from common law forms of estoppel in a number of ways but two differences are of particular significance: <ol style="list-style-type: none"> <li>1. equitable estoppel is a substantive source of rights: in other words, the defendant’s conduct which founds the estoppel may also give the plaintiff a cause of action to enforce a right or interest against the defendant, whereas common law estoppel remains defensive only, (a ‘<i>shield</i>’ and not a ‘<i>sword</i>’), and</li> <li>2. equitable estoppel may arise from statements of <i>future</i> intention.</li> </ol>
<b>There are also differences in remedies between CL and Equitable estoppel</b>	

<b>CL:</b> relief available is quite narrow: e.g.: court orders requiring the representor to make good the representation: usually by denying the party the opportunity to present a case on the basis that the facts are other than as represented (“all or nothing”)	<b>Eq:</b> court may <b>fashion an appropriate</b> remedy on the basis of the equity required to do justice between the parties: the prevention of unconscionable insistence on strict rights (reverse the detriment or fulfil the expectation).
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**NOTE:**

- At common law, estoppel has narrow relief
- At Equity, estoppel can rely on different causes of action.
- In equity, the potency of estoppel, allows to commence actions and claims for remedies, which you cannot do at common law.

**MODERN EXPRESSION OF EQUITABLE ESTOPPEL IN AUSTRALIA**

**Waltons Stores v Maher (1988) 164 CLR 387**

- Major development, HC (majority), recognised a form of equitable estoppel by representation that is both.
  - i. A cause of action, and
  - ii. Available in cases involving representations as to intention and other future matters
    - i.e. merging → promissory estoppel with equitable proprietary estoppel.

<b>Waltons Stores v Maher (1988) 164 CLR 387</b>	
<b>Facts</b>	<ul style="list-style-type: none"> <li>- Walton stores negotiated to lease land from the Mahers</li> <li>- There was a condition that the Mahers demolish the existing building and build a new one as per Walton’s specifications.</li> <li>- Maher’s solicitors prepared an agreement which included some modifications, sent it to Walton’s solicitors which said they would let them know by tomorrow if they disagreed with the modifications.</li> <li>- No further communication was made.</li> <li>- Maher signed the contract, gave it to Walton, who delayed signing the contract, even through he knew Maher began demolishing the building and building the new one.</li> <li>- Finally, when the building was already 40% completed, Walton backed out and refused to sign.</li> </ul>
<b>Issue</b>	Equitable estoppel

<b>Held</b>	<ul style="list-style-type: none"> <li>- Both promissory and proprietary estoppel are based on the unconscionability of encouraging an assumption and that departing from it to the detriment of another, they are now merged.</li> <li>- For estoppel to found an action, the party sued must have acted unconscionably and to the detriment of the party suing. Because unconscionability is the basis of the estoppel action, it is an essential requirement that has to be established.</li> <li>- <b>When is conduct unconscionable?</b> <ul style="list-style-type: none"> <li>○ <b><i>Failure to fulfil a promise does not of itself amount to unconscionable</i></b> conduct. Nor does mere reliance on an executory promise where the promisor changes his position amount to unconscionable conduct. Something more is required.</li> <li>○ The fact that having created an assumption that a contract will come into existence or that a promise will be performed or not insisted upon and then remaining silence, while knowing that the other party was relying on the assumption to establish unconscionable conduct.</li> </ul> </li> <li>- Walton was aware of Maher's actions (in demolishing the old building and starting to build the new one) and yet did nothing to correct the assumption or to stop Maher from continuing even though it had taken the decision not to lease the premises.</li> <li>- Walton's behaviour was unconscionable and that as a result of that behaviour Maher had suffered detriment while relying upon the assumption that Waltons had created – and, that relying upon the assumption was, in the circumstances, reasonable.</li> <li>- Thus, equitable estoppel arises for Maher.</li> </ul>
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**NOTE:**

- There is a debate whether there is a single equitable.
- Or is there a distinct estoppel one being, equitable proprietary or promissory estoppel.
- These two strands, whether as a result of the majority of decision, in fact we only have a single equitable estoppel
- There is no distinction between the two.
- Reignited debate – which is the interpretation of the Walton case.
  - Debate of a fused estoppel, either because of judicial fusion or administrative fusion.
  - There is not a single estoppel which combines common law and equitable.
  - There is no single fuse of common law and equitable estoppel.
  - Within equitable estoppel, is there two separate equitable? Or should they be merged.
- Whether the promissory estoppel and equitable proprietary estoppel have fused in the interpretation of the Walton Case.

**However, unification or fusion of Equitable and CL estoppel has not been achieved:**

- Commonwealth v Verwayen (1990) 170 CLR 394; 95 ALR 321