

TOPIC 1: INTRODUCTION TO EQUITY/ HISTORY & NATURE OF EQUITY

A. What is equity?

History and Nature of Equity

- “Equity” refers to that body of law that derives from the specific jurisdiction established and exercised by the English High Court of Chancery before 1873.
- As a general introductory remark, it can be said that Equity supplements the general law, although when compared to Common Law, Equity adopts a different approach to administering justice: Equity focuses on flexibility and good conscience as opposed to CL’s rigid enforcement of strict legal rights.

B. The nature of equity

- Describing the nature of Equity, Lord Cowper in *Dudley v. Dudley* (1705) Prec Ch 241 at 244; 24 ER 118 at 119, said that:
 - “... equity ... qualifies, moderates and reforms the rigour, harshness and edge of the law. [T]he office of equity [is] to support and protect the common law from shifts and crafty contrivances against the justice and the law. Equity therefore does not destroy the law, nor create it, but assist it.
 - e.g specific performance may be ordered when common law damages are inadequate. Contract for sale of rare ming dynasty vase, seller changed mind. Or in real estate no plot of land is the same. Court of equity prevails over common law and may provide specific performance rather than a monetary compensation.
 - Equity supplements the general law by intervening in cases where the CL is in some respect deficient.

C. General comparison between equity & common law:

- equity was established to fill blanks in the common law, to take away the harshness, rigour and sometimes unreasonable inflexibility of the common law
- **Substantive distinctions** = real distinctions of substance
 - Institutions
 - common law = contract = it is established if you have offer, acceptance, consideration
 - equity = trust = the splitting of ownership of property into two titles/rights = the legal right held by the person that is registered and

the equitable owner = the owner of the equitable interest that is unregistered that prevails over the legal owner

- Remedies
 - common law = damages = monetary compensation
 - equity = specific performance, or undo the contract that is legally valid e.g undue influence of promisor, unconscionable disadvantage of disability

- **Procedural aspects**

- Juries
 - common law = juries
 - equity = no jury
- Pleadings

D. History of equity

The history of Equity is divided generally into 3 stages:

- a) Medieval period
- b) Formative period
- c) Systemization period

- a) Medieval period

- During this medieval period of Equity there was **no conflict** between the Court of Chancery and the traditional courts of CL. In many cases, the Lord Chancellor and other members of the Chancery office sat together
- However, during the 14th Century a more clear separation between common law and equity began forming.
 - common law judges opted for a strict enforcement of legal rights
 - equity judges were exercising equitable jurisdiction able to overturn common law proceedings and awards

In many cases, the Lord Chancellor and other members of the Chancery office consisted of the king's tenants-in-chief and such other persons as he chose to appoint.

However, during the 14th Century a more clear separation between law and equity began forming. This occurred mainly because of the formation of the three common law courts:

- 1) King's Bench – civil and criminal cases involving the Crown
- 2) Common Pleas – Civil suits between subjects of the Crown
- 3) Exchequer – taxation disputes

The court of Chancery emerged as a court whose doctrines supplemented the common law where it was defective or offered no remedy.

b) Formative period

- the separation between CL and equity which began to materialise in the medieval period developed harder and further
- historical significance = 1529 when Henry the 8th appointed sir Thomas moore as chancellor, subsequently trained lawyers became law chancellors. Before the law chancellors they were mainly drawn from the clergy, only trained lawyers from that point on would be appointed as chancellors (more systematic analysis of precedent, more orderly and legitimate development of equitable principles rather than individualistic, moralistic, canonical, ad hoc intuitive development of equitable principles)
- Hypothetical example: rental agreement reached between landlord and tenant under contract –
 - landlord right can reject tenant for non payment of rent. tenant.
 - tenant can't pay rent asks landlord for leniency.
 - landlord agrees orally to suspend rent for 3 mths (plans for next 3 months without rent)
 - landlord changes his mind wants to stick to contract
 - at common law tenant is ejected there is breach of contract must forfeit lease
 - equity = promissory estoppel he may have access to the promise upon which he relied on reasonably that it would be now unconscionable to break. Common injunction can suspend of stay legal proceedings or if common law judgment has already been given it can suspend the execution of the judgment and provide a remedy against the defendant
- equity and cl both apart of the legal system = experienced friction e.g *The Earl of Oxford's case* (1615) Mich 13 Jac 1; 21 ER 485, per Lord Ellesmere LC:
 - chief justice on common law side fought against the chancellor
 - the concept of unconscionability is the pivotal concept in equity

“The Cause why there is a Chancery (equity court) is, for that Mens Actions are so diverse and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act and not fail in some Circumstances.

The Office of the Chancellor is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law...”

“... when a Judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in Judgment, but for the hard Conscience of the party...”

c) Systemization period

- 3rd and final period of the evolution of equity marked by the classification of the equity rules and principles e.g
- the chancery started to transform itself
- As such, in search for justice, equity’s concern with considerations of certainty in the law and the doctrine of precedent has supplanted its earlier more robust and flexible approach.
- There was recognition that equity and common law are complementary systems (as opposed to rival).
- *Cook v. Fountain* (1676) – it was rejected the idea that equity is subjective or intuitive, the proper basis was unconscionability and conscience but not in an intuitive, abstract, individualistic way. –
- *Re Diplock’s Estate* [1948] – reference to the legitimate ancestry of equity – which is founded in history and in practice, precedents (it is not ad hoc). The rules and remedies of equity are not frozen in the past they evolve. The central focus has always been the concept of unconscionability which triggers in equity principles and makes available remedies that overcome common law transactions.
- *Cowcher v. Cowcher* [1972]
 - “[t]his does not mean that equity is past childbearing; simply that its progeny must be legitimate – by precedent out of principle.”

E. The Maxims of equity

- these maxims are short summary statements of broad themes which underlie equitable concepts and principles
- they give us a historical understanding of where the rules came from
- are historical references
- judges when having to contemplate a new modern solution to fit current social realities may consult maxims in order to extend a legitimate equitable principle to provide a specific modern solution for the administration of justice

Penn v. Lord Baltimore (1750) & *Baker v. Archer-Shee* (1927)

- (i) Equity will not suffer a wrong without a remedy – equity gives you remedies where cl is unable to e.g ming vase

Equitable remedies evolved to meet the deficiencies in the common law.

Example: At common law, a borrower forfeited mortgaged land if there was a failure to repay the loan in full on the due date. Equity then responded to this by recognising the equity of redemption, which allowed the borrower to reclaim the land when the loan was repaid, even if repayment occurred after the due date.

- (ii) Equity follows the law – it begins after law, it needs the law to supplement it. It recognises legal interests e.g trusts

Reflects the fact that equity's primary role is as a curative supplement to the deficiencies of the common law, *not* as a rival system. Equity recognises common law rights, estates, interests and titles and does not say that such common law interests are not valid.

- (iii) He who seeks equity must do equity

Plaintiffs in equity must fulfil their legal and equitable obligations before seeking a remedy – equity's version of the golden rule 'do unto others as you would be done by'.

Example: *Verduci v Golotta* – a mortgage that was entered into as a result of undue influence could be set aside in equity, but only on the condition that the borrower repaid the sum borrowed together with reasonable interest.

- (iv) He who comes to equity must come with clean hands

A plaintiff in equity must not be guilty of some improper conduct, or else relief will be denied. Equity is not solely concerned with preventing unconscientious conduct by a defendant, but also requires conscientious behaviour by the plaintiff.

- (v) Equity aids the vigilant and not the tardy (delay defeats equity)

In seeking equitable relief, a plaintiff must act promptly and diligently. Equity will not allow defendants to remain for too long in position of not knowing whether equitable relief will be ordered against them, it would be unconscientious to do so.

- (vi) Equality is equity

Equity's aim is to distribute profits and losses in proportion to the claims and liabilities of the parties concerned.

- (vii) Equity will not assist a volunteer

- “Like other maxims of equity, it is not a specific rule or principle of law. It is a summary statement of a broad theme which underlines equitable concepts and principles. Its precise scope is necessarily ill-defined and somewhat uncertain.” *Corin v. Patton*
- A volunteer is a person who has not given valuable consideration – consideration need not be paid or executed. Valuable consideration is ‘a consideration... that has a real and substantial value and not one which is merely nominal or trivial or colourable’. However, this value need not be adequate in the sense of it being reasonably equivalent to the value of what was promised or given by the defendant.

(viii) Equity looks to the intent rather than to the form

Example: A failure to complete a contract on the date stipulated, time not being of the essence by express provision or implication, will not result in a breach justifying termination. Equity will permit completion to take place within reasonable time after the stipulated date.

(ix) Equity looks on that as done which ought to be done

Most often in contract law and is the basis of specific performance. – the agreement is specifically enforceable and thus this is why this maxim exists.

(x) Equity acts in personam – the cl acts in rem = if there is a common law breach someone’s property is at risk. But in equity *penelaw v Baltimore* – it recognises personal rights – it binds the conscience of the parties, but now it also acts in rem (proprietary rights)

Shows that equity is chiefly concerned with rectifying the morally blameworthy conduct of the defendant himself. In equity, remedies are attached to the person of the defendant (not the property e.g. the defendants assets).

F. The judicature system

(a) Equity and CL *before* the Judicature Acts

- The system of separate courts of common law and equity was abolished with the introduction of the judicature system.
- common law and equity existed as 2 separate courts, jurisdictions and procedures, they coexisted but they did not intersect very much
- if a common law claim found a writ in equity, you had to wait until the common law proceedings had finished (couldn’t stay proceedings, make interim injunctions)

(b) Classification of the equitable jurisdiction

Can be said to fall within 1 of 3 equitable jurisdictions:

1 – The exclusive jurisdiction – matters in which equity has an exclusive cognizance because no relief can be obtained at common law (e.g. obligations arising under trust).

2 – The concurrent jurisdiction - matters in which both equity and common law courts have jurisdiction to make orders (e.g. enforcement of a contract through specific performance vs damages).

3 – The auxiliary jurisdiction – exercised when a person goes to equity ‘merely in order to obtain its assistance in proceedings which they are taking or about to take in courts of law’.

(c) The administration of Equity in N.S.W. before the Judicature system

- Legal procedure on a civil basis in N.S.W. was established by the Charter of Justice in 1824. Until 1972 was that Equity was administered as a body of law distinct from the CL, by a distinct Equity jurisdiction of the Supreme Court of N.S.W.

(d) Division between Equity & CL before the Judicature system

- (i) the courts of CL refused to entertain actions brought *solely* for relief against infringements of purely *equitable* rights, titles and interests, where the infringement was not tortious nor in breach of contract; and
- (ii) those equitable rights, titles and interests could *not* be relied on as constituting a defence to a CL claim.

(e) The Judicature Act (1873) and concurrent procedure

- The relationship between legal and equitable procedures was worked out at length in s. 24 of the *Judicature Act (1873)*

s. 24(1): gave all cl & equity branches of the court power to administer equitable remedies. A single court system only one entry and exit. One court with different divisions, no separate courts.

s. 24(2) and (3): enabled equitable defences to be pleaded and equitable relief to be given on such defences

s. 24(4): required all branches of the court “to recognise and take notice of all equitable estates, titles, and rights and all equitable duties and liabilities”

s. 24(5): prohibited the use of the “common injunction” within the court (however: the equitable grounds that might have provided the ground for

such an injunction prior to the passing of the Act may be relied on by way of defence in the proceedings)

s. 24(6): provided the Court with a general power to “recognise and give effect to” all legal claims, estates, titles, rights, duties and liabilities existing by the CL or by custom or created by Statute.

s. 25(11): stated that in cases where “there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same subject matter, the Rules of *Equity shall prevail*.”

(f) The Judicature system in Australia

- The present statutory equivalents of ss. 24 and 25 in the English Judicature Act of 1873 are found in NSW legislation in:
 - the *Supreme Court Act 1970* ss 57-64 and
 - the *Law Reform (Law and Equity) Act 1972*
- ⇒ s. 5 of the *Law Reform (Law and Equity) Act* reads as follows: “In all matters in which there was immediately before the commencement of this Act or is any conflict or variance between the rules of equity and the rules of Common Law relating to the same matter, the *rules of equity shall prevail*.”

G. The “Fusion Fallacy” Theory

- A debate has originated concerning the true effect of the legislative reforms with regard to Equity & Common Law under the Judicature system
 - a) administrative only fusion
 - b) substantive fusion
- (b)** Administrative only fusion – according to equity purists the effect of the judicature act was to bring about only an administrative fusion between cl and equity. It only took away the administrative separation between cl and equity that used to exist when one entered the legal system, just, quick and cheap.
 - the nature of the complaint still determines the remedy available to it, if it’s a cl complaint you must get a cl remedy same with equity. Maintain that cl and equity have not and cannot mix. To mix them we will miss out on the opportunity to ease the rigours of the cl
 - nothing in the words of the act encourage or envision the fuse between cl and equity

- s 25(11) provides that equity prevails

- *Salt v. Cooper* (1880) per Sir George Jessel MR:

“It has been sometimes inaccurately called ‘the fusion of Law and Equity’; but it was not any fusion, or anything of that kind; it was the vesting in one tribunal the administration of Law and Equity in every cause, action, or dispute which should come before that tribunal. That was the meaning of the Act. ...”

- *Felton v. Mulligan* (1971) 124 CLR 367 at 392, Windeyer J referred with approval to the statement in the classic text Ashburner on Equity [2nd ed., p.18] that “the two streams of jurisdictions, though they run in the same channel, run side by side and do not mingle their waters.”
- In *O’Rourke v. Hoeven* [1974] 1 NSWLR 622 at 626, Glass JA said that the effect of the Supreme Court Act 1970 (NSW) was “not a fusion of the two systems of principle but of the Courts which administer the two systems”.

(c) Substantive fusion

- the judicature reforms did more than bring about administrative fusion, they fused substantively common law and equity. Law and equity is also fused, by having mixed substantively their doctrines and remedies. If you have a complaint against a tortfeasor e.g negligence common law remedy in damages, irrespective of cause of cl action cl or equity you can get any remedy- cl or equity
- the distinction that cl could not touch and did not have the power to handle equitable remedies that distinction no longer exists a cl judges can mix and match the two regardless of the wrong
- In *United Scientific Holdings Ltd v. Burnley Borough Council* [1978] Lord Diplock said:

“[T]o perpetuate the dichotomy between rules of equity and rules of common law, which it was a major purpose ... of the Judicature Act 1873 to do away with, is, in my view, conducive of erroneous conclusions to the ways in which the law of England has developed in the last hundred years... The waters of the confluent streams of law and Equity have surely mingled now.”
- Criticism against the “substantive fusion” theory

Bank of Boston Connecticut v European Grain and Shipping Ltd (The Dominique) [1989] per Lord Brandon.

GR Mailman & Associates Pty Ltd v. Wormald (Aust) Pty Ltd (1991)

Meagher JA described the view of Lord Diplock as “so obviously erroneous as to be risible”.

MCC Proceeds Inc v. Lehman Brothers International (Europe) [1998] 4

All ER 675, at 691 per Mummery LJ.

- **Support for the “substantive fusion” theory**

A-G v. Wellington Newspapers Ltd [1988] 1 NZLR per Cooke P:

“As law and Equity are now mingled ... it does not seem to me to matter whether the duty can be classified as equitable or not. The full range of remedies deriving historically from either CL or Equity should be available. They include injunction, damages and account of profits.”

Aquaculture Corp v New Zealand Green Mussel Co [1990] 3 NZLR per Cooke P.

(d) “Fusion fallacy” defined

- they believe that there was a new administration of the pre-existing different jurisdictions of equity, it is a fallacy to assume that a new body of law was created
- “The fusion fallacy involves the administration of a remedy, for example common law damages for breach of a fiduciary duty, not previously available either at law or in equity, or the modification of principles in one branch of the jurisdiction by concepts which are imported from the other and thus are foreign, for example by holding that the existence of a duty of care in tort may be tested by asking whether the parties are in fiduciary relations.
- Those who commit the fusion fallacy announce or assume the creation by the Judicature system of a new body of law containing elements of law and equity but in character quite different from its components. The fallacy is committed explicitly, covertly, and on occasion with apparent inadvertence. But the state of the mind of the culprit cannot lessen the evil of the offence.” MGL (p.54):

(e) Examples of fusion fallacies:

- if you breach a fiduciary duty you are liable for an equitable remedy
- Compensation for breach of fiduciary obligations
 - *Day v. Mead [1987]* 2 NZLR 443
 - *Duke Group v Pilmer (1999)* SASR 64; [1999] SASC 97 – fiduciary duties by financial advisers were breached to the investors – they lost

their money the financial advisers raised contributory negligence as a defence. if believe in administrative fusion you can't raise a cl defence in equity. But they applied cl to equity = substantive fusion.

- *Pilmer v Duke Group (2001)* 180 ALR 249.

In the judgment of the High Court, reference is made to the existence of “severe conceptual difficulties in the path of acceptance of notions of contributory Negligence as applicable to diminish awards of equitable compensation for breach of fiduciary duty.”

- **Common Law Damages in Equity?**

- *Seager v. Copydex (No 1)* [1967] 2 All ER 415
- *Attorney-General v. Wellington Newspapers Ltd* [1988] 1 NZLR 129
- *Aquaculture Corp v New Zealand Green Mussel Co* [1990] 3 NZLR
- *Digital Pulse v Harris (2002)* NSWSC 33
 - harris and other was an employee of digital pulse
 - an employees they owed a contractual duty under their contract of employment and fiduciary duties (of trust, confidence and loyalty owed to employer) and duties under the trade practices act
 - they secretly diverted for their own interests they breached several of those duties
 - the question was under which duties should digital pulse pursue justice against them?
 - contract = contractual, equity = fiduciary
 - judge allowed company to choose, equitable remedy was chosen unlimited remedy
 - the conduct of the defendant was so bad that \$10,000 punitive damages were awarded as well (cl) – not given in equity = penalty
 - it was appealed to CA

Harris v. Digital Pulse [2003] NSWCA 10 per Mason P at [154], addressing the question of “fusion fallacy”, stated his entire agreement with the following remarks of Professor Tilbury (Principles of Civil Remedies, Vol. I, Butterworths, Sydney, 1990, at pp. 11-12):

- CJ spiegelman, Heydon – held that equity and cl are doctrinally extinct bodies administered in the same court. The only thing that changed was the administration and not the substance
- Mason P provides that substantive fusion – not only should it be based on the act

“But the further conclusion, inherent in the fluvial metaphor and explicit in the ‘fusion fallacy’, that in a fused jurisdiction it is

impossible, for all time, to have a 'fused law' is both a non-sequitur and hard to justify in principle and policy. It is a non-sequitur because the proposition that the Judicature Acts do not authorize fusion of principles, cannot lead to the conclusion that such a fusion is prohibited. In short, there is no fallacy. Fusion can, and does, take place independently of the Acts. Indeed, constant administration alone suggests such an interaction of the rules of law and of equity as to make fusion of principle inevitable. Further, it is submitted that, both in principle and in policy, it is desirable that the jurisdictional origins of rules of law become less and less important as those rules are adapted to changing social realities by courts in fused jurisdictions, where the relationship of those rules inter se and their overall purposes in the legal system as a whole can be better appreciated. After all, what can be done with rules is much more important than where they came from."

TOPIC 2: UNDUE INFLUENCE & UNCONSCIONABLE TRANSACTIONS

A. Introduction- equity's jurisdiction to set aside transactions:

1. *Brusewitz v Brown* NZ Salmond J:

- In order for the Court to set aside a transactions as invalid he must prove affirmatively the existence of fraud or undue influence, unconscionability
- the mere fact that a transaction is based on an inadequate consideration or is improvident, unreasonable or unjust is not enough = the transaction still binds both parties

2. *Hartigan v International Society for Krishna Consciousness Inc*:

- the court does not adduce concepts of unconscionability afresh for each case, but acts in the context of earlier judicial experience; yet each decision is a judgments on the facts to which it relates
- e.g 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

CAN HAVE BOTH undue influence & unconscionable conduct:

= *Verduci v Golotta* – mortgage voidable where a solicitor's client borrowed money from the solicitor's father

B. UNDUE INFLUENCE

Example: focuses on the parties and asks whether the nature of that relationship impaired the quality of consent that was given

1. General principles:

- Directed to transfers 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 AC*
- Not about whether transaction was intended – examines **how** intention produced: *Bank of New South Wales v Rogers*
- Basis of jurisdiction is “the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the

alienor's will or freedom of judgment in reference to such a matter”:

Johnson v Buttress (1936) 56 CLR

2. Categories:

1) **Actual** (where there is no special relationship)

- *Allcard v Skinner* per Cotton LJ: “The first class of cases (**actual**) 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.

ELEMENTS: *Johnson v Buttress* per Dixon J & *Bank of Credit and Commerce International SA v Aboody*

The person seeking equitable relief must establish that:

1. the other party to the transaction had the capacity to influence the complainant;
2. that the influence was exercised (by dominant party);
3. that its exercise was ‘undue’;
4. that its exercise brought about the transaction

*once undue influence has been established the onus is upon the other party to rebut the presumption that the transaction was entered into by the other party as a result of the influence

Example of situations:

- “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.” *Johnson v Buttress*
- a case of undue influence could be established if there has been some:
 - ⇒ unfair and improper conduct
 - ⇒ coercion from outside
 - ⇒ overreaching
 - ⇒ form of cheating
 - ⇒ some personal advantage by a donee in some close and confidential relation to the donor

- actual undue influence is hard to prove e.g forced resignation – SA magistrate resigned during a meeting with the chief magistrate, argued that it was procured via actual undue influence of chief magistrate. court held: rejected this on the basis that the magistrate as a person who had a long career as a lawyer and magistrate was not in the position of being the victim of actual undue influence *Frederick v state of south Australia*
- *Farmers Co-Operative Executors & Trustees Ltd v Perks* – listed 2 lec is in presumed undue influence in textbook

2) Presumed undue influence – *Johnson v Buttress Dixon J*

gives rise to a presumption (that can be rebutted) that the transaction was obtained as a result of undue influence by the stronger party in the relationship over the weaker party

- involves the existence of a special relationship between the parties to the transaction (on the grounds of public policy and to prevent the relations which existed between the parties and the influence arising there from being abused *Allcard v Skinner* per Cotton LJ) - and
 - “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.” *John v Buttress per Dixon J*

It is broken into two categories:

- 1) recognised relationships 2A–
- 2) presumed – proven relationships 2B

2A) Class 2A Presumed – Recognised relationships:

Elements:

It can be presumed that any transaction made favouring the stronger party was brought about by the undue influence exercise of that party's influence (p 289 for unlisted cases)

- parent and child (a parent's age and ill health may give rise to parent being influenced by child)
- guardian and ward
- solicitor and client
- doctor and patient
- religious leader and follower

* if on the facts the plaintiff is in a recognizable relationship of influence, the presumption arises automatically and the onus shifts to the defendant to rebut the presumption that the influence led to entry into the impugned transaction

Some 2A cases:

1) Parent & Child:

- *Lamotte v Lamotte [1942]* - Parent still dominates over a child unless the dominant person disproves it. Emancipation is not presumed at any age.
- *Bullocks v Lloyds Bank Ltd* - Plaintiff inherited money before she turned 21 and she settled the money (created a trust over the money) in favour of her father and brother without receiving independent advice. Held that there was undue influence as there was no receipt of independent legal advice – parent child (weaker child to stronger parent) transaction was undue influence.
- *McNally v GIO Finance; Cockburn v GIO finance (2001)* – 19yo boy took out a mortgage over the property purchased with the money he got as compensation for an accident. Kid was quadriplegic but the father convinced the boy to take out the mortgage to pay off the father's business debt. Held that the child was in a relationship of presumed influence and none of the rebuttals were proven and therefore, the transaction (money from son to father) was set aside.

2) doctor & patient

- *Bar-Mordecai v Hillston* – 36 year old doctor was treating a 72 year old woman and her husband. Shortly after the husband's death, the doctor was in a sexual relationship with the woman and moved in with her. 4 years later she purchased a doctor's practice for him for a substantial amount of money. Arguing that the parties were also in a de facto relationship will not guarantee

success. Any substantial gift obtained by a doctor from a patient is presumed to be a result of undue influence – doctor must rebut the onus (he didn't) as such transaction is set aside.

3) Spiritual adviser and worshipper

- *Allcard v Skinner* – women entered a covenant and gave her property to the sisterhood
 - Allcard had entered a protestant religious order which required a vow of poverty to be taken by members of it sisterhood. She transferred substantial property holdings to the mother superior for her to hold on trust for the general purposes of the sisterhood, and made a will leaving everything to sisterhood.
 - After 8 years as a sister Allcard left the sisterhood. She revoked her will but made no demand for the return of property until a further 5 years had elapsed. She approached her brother a barrister he said to leave it where it was, she then approached a solicitor – he told her to retrieve her property. Despite that advice she did nothing for a further 4 yrs.
 - although the gift to the sisterhood was result of presumed undue influence CA held that Allcard's claim to have it returned was defeated by confirmation, estoppel, acquiescence and/or laches.
 - there is far more than inactivity and delay on part of Allcard, there is conduct amount to confirmation of her gift
- *Hartigan v International Society for Krishna Consciousness Inc* - religious leader and follower. The court set aside a gift of land made by Harrigan funds to the hare Krishna movement they sold her farm to a 3rd party to pay off their personal debts. plaintiff was completely impoverished. despite admitting that no one person could be identified by evidence as a spiritual adviser who directly or indirectly suggested that she make the donation, the transaction was set aside. She couldn't get farm back, (3rd party was innocent, without notice), she got monetary compensation for the loss of her property
- *McCulloch v Fern* – plaintiff's wife made a substantial gift to the church in the 1990's. The transaction was set aside
- *Heartinger v International Society for Krishna Consciousness, Inc.* – plaintiff donated farm (only asset) then the church sold it to a third party to pay off its own debts. Plaintiff was impoverished. Held that there may have been no intention but not necessary, transaction was set aside (monetary compensation).

2B) Class 2B Proven relationships – undue influence

- If the parties do not fall within a 2A relationship nevertheless a special relationship can be established on the particular facts and circumstances of their relationship
- these arise where it is ‘proved that the party benefitting from the transaction occupies or assumes towards another person a position naturally involving an ascendancy or influence over the other or a dependency or trust on the latter’s part *Janson v Janson*

Elements:

- evidence of relationship of ascendancy/ dominion (e.g. relied upon in the past that places a high level of trust in the party, stronger if family member or old friend, presumption will arise more readily).
- does not require evidence of victimisation/ intent
- does not require evidence of a disability or incapacity
- e.g. friend and carer of elderly man/woman (isn’t recognised as 2A)

Cases:

- *Johnson v Buttress* – limited capacity, old age, illiterate
 - a man 67 yrs old and Johnson a distant relative by marriage
 - Buttress had limited capabilities, entirely illiterate, inexperienced in business and less than average intelligence
 - regarded as unstable in his affections and in informing his attentions
 - while he was living with Johnson (niece of late wife’s stepsister) he and she went to solicitor and he executed a transfer of his property (without value, as a gift) at Maroubra to her entirely
 - rent paid by tenants of the property was his sole source of income
 - at the time buttress understood that he was dealing and parting with his property however nothing was said to direct his attention to the fact that he was divesting himself of the whole of his property without obtaining an equivalent benefit and it wasn’t suggested that the advice he received in the office of Johnson’s solicitor was independent advice

court held:

- HC set aside transaction on grounds of undue influence
- majority took view that such a presumption arose in light of the nature of the particular relationship between the parties *per Dixon J:*

- 1) in this case it was the man’s illiteracy, his ignorance of affairs and his strangeness in disposition and manner that provide for the suggested relation

- 2) thereby these circumstances considered with the character and capacity of buttress lead to the conclusion that an antecedent relation of influence existed
- 3) This throws upon Mrs Johnson the burden of justifying the transfer by showing that it was the result of the free exercise of the donor's independent will (which she failed to rebut)

- *Bester v Perpetual Trustee Co Ltd* - young, inexperienced

- Bester (young woman) was encouraged to make a settlement of a substantial inheritance received from her father. Effect of this document was to put the assets which comprised her inheritance beyond her control and provide her with only a modest annual income from the property (a trust)
- at time of settlement Bester was 21 – without parental guidance, possessed extremely limited business experience
- was influenced by 3 much older men- representative from trustee company and 2 uncles one of whom was the solicitor who drafted the deed of settlement
- Bester: sought to rescind settlement
- held : paternal element pervaded the discussions between all corroborates the existence of the special relationship of undue influence. No fraud but no independent advice. She acted as quickly as she could after she found out – discretion of the court.

- *Union Fidelity Trustee Co of Australia v Gibson*

- *Janson v Janson*

- Aged 92 profoundly deaf and almost blind Eric Janson claimed that his gift by way of registered transfer to his nephew of virtually his only asset should be set aside on ground of undue influence
- his nephew took on the role of Eric's carer from age of 65, Eric came to rely on him to a substantial degree, nephew looked after maintenance of Eric's property and drove him where he needed to go
- his nephew became his general power of attorney

issues:

- whether a presumption of undue influence by Richard arises in Eric's favour either because of the nature of their agent–principal relationship under the general power of attorney from Eric to Richard; or, alternatively, because of the position of influence by Richard over Eric or the dependence or trust on Eric's part; and

- if so, whether Richard has failed to rebut the presumption.

held:

- Two circumstances, in particular weigh against the conclusion that the presumption is rebutted.
- First the transfer was improvident so far as Eric was concerned. Eric finally, irrevocably and absolutely placed virtually his only asset and lifetime home beyond all recall when he executed the transfer. It is true that he thereby shed responsibility for payment of rates and maintenance, but the voluntary transfer of his title to his nephew was a grossly disproportionate response.
- Secondly, in entering into the transaction Eric did not have independent, competent and sufficient advice to protect him from undue influence. Independent legal advice, had it been obtained, should have drawn to his attention, so that he understood, precisely what he was doing, the alternatives available to him, the comparative advantages of the alternatives, and that he nevertheless preferred to transfer his interest to Richard.

Rebutting the presumption (applies for both 2A & 2B)

- The defendant must prove that the transaction 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 21one”: *Johnson v. Buttress* (1936) CLR Dixon J.
- if rebut successfully = no liability
- It can be rebutted using 2 arguments:
 1. independent legal advice – requires more than procedural advice, requires substantive advice as to one’s rights and options before that person chooses which option that person goes with
 2. lack of improvidence

* Must not rebut the relationship but must rebut the intention/cause of the transaction. The reason why the transaction was made was due to an independent reason.
- 1. INDEPENDENT LEGAL ADVICE: is an argument that the stronger party can make to rebut the presumption

in order to rebut the presumption independent advice should:

- 1) be particularly thorough and address all aspects of the transaction at hand including advice as to the propriety of the transaction *janson v janson*
- 2) adviser must be fully informed of all material facts relevant to the transaction *jenyns v public curator qld*
- 3) advice from a solicitor acting for both parties is not independent advice *powell v powell*
- 4) if legal advice is given to the weaker party in the presence of the stronger party it will mean that the advice is not independent legal advice

- *Bester v. Perpetual Trustee Co Ltd NSW* –
 - facts above – the onus was upon the trustee company to show that the influence had not hindered bester in the free exercise of her own will in making the settlement

- It sought to do so on basis that she had received advice from a disinterested solicitor prior to signing the deed – had read the doc and asked if she had any question she responded no
- court held – solicitor did not offer textual advice, only whether a settlement should be entered into at all. Judge allowed settlement deed to be set aside

2. PROVING TRANSACTION WAS NOT “IMPROVIDENT” *Johnson v. Buttress*

- if the stronger party can show that the transaction does not cause excessive loss to the other then it is more plausible that it was entered into freely
- if contractual transaction represents a substantial part of the plaintiff’s assets – *Johnson v buttress*, *hartigan* etc particularly where no power to recall it is available it may be regarded as an improvident transaction
- if give full market value for purchase of property might work in the defendant’s favour – the transaction was not improvident *Johnson v buttress*, *clark v malpas*
- with a gift = the court examines the extent of that gift vis-à-vis his/her total holdings in order to assess providence = lack of consideration for transaction value
 - *Bester v perpetual trustee co ltd* – judge found that the settlement was improvident as it tied up Bester’s property and effectively removed any control she might have over it. The fact that the weaker party to the relationship intended to make the gift it is not enough to rebut the presumption of undue influence
 - *Clark v Malpas (1862)* – Illiterate man sold his property for much less than it was worth.
 - The fact that it was sold for a gross undervalue was a factor in considering whether the transaction was improvident.
 - Hypothetically if the full value of the property was given, this may work in the defendant’s favour of showing that the transaction was not improvident. - *Johnson v. Buttress*

3) UNDUE INFLUENCE OF 3RD PARTIES

- A gift to or transaction with a third party can be set aside can also be set aside on the basis of the undue influence of another, third party gets a benefit
- situations may include:

1) Gift - Equity does not assist a volunteer (3rd party is a volunteer)

- If a third party has received a benefit as a gift due to undue influence, you can obtain/recall that gift, without having to prove that the third party had knowledge or notice of the undue influence - *Bridgeman v Green 1757*
 - even if the third party gives it to someone else/innocent it will still have to be recalled and is polluted by the undue influence

2) Transfer of property and/or conferral of property

- Where there is a relationship of undue influence between A (the dominant party) and B (the weaker party) which results in the transfer of property or conferral of benefit from B to C (third party) or
 - *Verduci v Golotta* – the court set aside a loan and mortgage in circumstances involving a solicitor- client relationship where the client borrowed money from the solicitor’s father.

3) undue influence and 3rd party guarantees

- where there is a relationship of undue influence between A (the dominant party) and B (the weaker party) which results in B undertaking obligations to C (a third party) which will be for the benefit of A e.g where B acts as a guarantor of A’s loan from C
- a guarantee may be set aside in 2 circumstances:

1) AGENCY

- Where the financier/ lender has used the defendant as its agent to procure the guarantee – *Berge v Bank of New South Wales*

And/or

2) NOTICE

- Where the third party (lender/ creditor) had actual or constructive notice of the circumstances, which would lead a court to find undue influence - *Bank of New South Wales v Rogers*

Notice Test: *Bank of New South Wales v Rogers*

1. it is necessary for roger (the guarantor) to prove that gardiner procured the securities to be given to the bank by undue influence AND
2. that the bank through its manager had notice either actual or constructive that the securities were obtained by such means (on facts below bank knew that a relationship of confidence and trust existed between gardiner and rogers)

3. if both of those circumstances are established the bank has the onus of justifying the retention of the securities. It must show that the giving of them was the free and well understood act of Rogers

Bank of New South Wales v Rogers Facts:

- rogers was a mature woman of sound intelligence although lacking in business experience. She had lived with her uncle since parent's death and relied upon his advice in commercial matters
 - to assist his business venture which was in trouble rogers put forward the bulk of her property as security for a loan to gardiner from Bank of NSW
 - gardiner's business collapsed, bank moved to recover from rogers under the contract of guarantee she had made with it
 - rogers sought to set aside the contract on grounds of undue influence
 - **court held**: a presumption of undue influence arose from the relationship which existed between gardiner and his niece and that finding was not successfully rebutted. the transaction was blatantly improvident to rogers and she had not received independent advice prior to making it.
- 4) **Wife as guarantor** – Yerkey v Jones principle (where the guarantor is the wife of the debtor and the husband has used his influence over his wife to procure her agreement to the contract of guarantee with the creditor.
- if a husband procures his wife to become surety for his debt (if she consents but doesn't understand its effect) and it appears that circumstances existed which, if they alone had been the parties to the transaction, would make it liable to be set aside as against the husband, then the guarantee or security may be invalidated also against the creditor if he relied upon the husband to obtain it from his wife and had no independent ground for reasonably believing that she fully comprehended the transaction and freely entered into it.
 - the wife does not need to prove that the bank had actual or constructive notice of the undue influence. The behavior of the husband is sheeted home to the bank, independent of agency or notice.
 - Majority of HC in *Garcia v National Australia Bank Ltd* – has reaffirmed this principle

C. UNCONSCIONABLE TRANSACTIONS

Example: a situation where one party to a transaction is under a special disadvantage that was knowingly exploited by the other in securing the deal. Focuses on conduct of stronger party.

a) General Principles

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

- *Louth v Diprose (1992) CLR* – the intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimization.
- *Attorney General (NSW) v World Best Holdings Ltd* - unconscionability requires a high level of moral obloquy (disgrace)

b) Elements

- I. Plaintiff is under a ‘special disability’ or ‘special disadvantage’. (A)
- II. The other party (B) had Actual or constructive knowledge (possibly willful ignorance) and
- III. Unconscientious exploitation of the disadvantage - B exploited that disadvantage unconscientiously in order to obtain A’s consent to the transaction and
- IV. Rebutting the presumption

I. Plaintiff is under a ‘special disability’ or ‘special disadvantage’. (A)

- There is no fixed list of what constitutes a special disadvantage
- A situation of inequality power imbalance is not enough it requires something stronger. What is required is some characteristic 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. *Commercial Bank of Australia v Amadio* Mason 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. (not exhaustive list) 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.“ *Blomley v Ryan* per Fullagar J

- emotional dependence and infatuation *louth v diprose (facts below)*- the special disability arose not merely from diprose’s infatuation. it extended to the extraordinary vulnerability of diprose in the false ‘atmosphere of crisis’ in which he believed the woman he was completely in love with and whom he was emotionally dependent on was facing eviction and going to commit suicide unless he provided the money

- *Commercial bank of Australia ltd v Amadio Facts:*
 - son’s failing business
 - her arranged to obtain further finance from commercial bank of Australia to a total value of \$270 000
 - in order to receive this increase on his company’s overdraft son needed a guarantee
 - he approached his parents (the amadios) who were elderly Italian migrants with a limited grasp of English
 - he told them that he needed them to execute a contract of guarantee in favour of the bank that would be limited to \$50,000 and 6 mths operation. Amadios agreed
 - bank manager arrived at amadio’s home – to execute a deed of mortgage over that property its terms were not limited to any time period or amount, Amadios were unsure as to the nature and extent of their liability under the contract
 - bank manager was aware of the hopeless state of the son’s business, but didn’t make inquiries as to whether parents appreciated the situation, nor did he suggest they receive independent advice
 - amadios executed the deed and bank sought to recover against them when their business collapsed

issue: amadios sought to avoid the contract on basis of unconscionability

court held: that the Amadio’s were at a special disadvantage for a number of reasons

- 1) Their grasp of written English was limited
- 2) they relied on their son for he management of their business affairs and believed that he and amadio builders were prosperous and successful
- 3) they were approached in their kitchen by the bank and were presented with a complicated and lengthy document for their immediate signature
- 4) they had received no independent advice
- 5) son misled them regarding the extent and duration of their potential liability under it
- 6) apart from indicating that the guarantee/mortgage was unlimited in point of time the bank manager made no personal attempt to explain it to them

- *Louth v Diprose*
 - gift of \$58, 000 from diprose to louth so that she could purchase a house to live in
 - diprose was romantically infatuated with louth and despite her disinterest they remained in contact over the course of 7 years
 - they had sexual intercourse twice in the early months
 - louth made it clear she did not possess similar feelings for diprose and had relations with other men
 - the parties did not live together but when louth moved to Adelaide he followed her
 - diprose provided her with financial assistance and help to her generally
 - she rented a house at a reduced rate from her sister & brother in law
 - they separated she was told she would have to pay a more realistic rate of rent
 - she told diprose she would commit suicide if she was forced to move from the house
 - after this convo diprose made the gift of money to her despite the fact that the sum comprised most of his own holdings and he had children of his own to support
 - **issue:** diprose brought an action to claim the beneficial interest in property that louth had purchased with the money he gave her
 - **court held:** found in his favour on the ground that the transaction should be set aside as unconscionable:
 - 1) the special disability arose not merely from diprose's infatuation it extended to the extraordinary vulnerability of diprose in the false 'atmosphere of crisis' in which he believed the woman he was completely in love with and whom he was emotionally dependent on was facing eviction and going to commit suicide unless he provided the money
 - 2) knowledge -Louth was aware of that special disability – to a certain extent she had deliberately created it.
 - 3) exploitation - she manipulated it to her advantage to influence diprose to make the gift of the money to purchase the house

II. The other party (B) had Actual or constructive knowledge (possibly willful ignorance) and

- 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.” *Commercial Bank of Australia v. Amadio* per Mason J, and per Deane J.

- Examples of actual knowledge:
 - *Amadio* = bank had actual knowledge of the commercial risk that the guarantee posed to the amadios and must have also known of the amadio's inability to fully comprehend this risk due to their poor language skills, advanced age and misrepresentations by their son whom they clearly reposed a high level of trust
 - *Louth v diprose* = it was beyond doubt that louth was aware of the infatuation of diprose, his dogged pursuit of her affections for 7 years.
 - *Blomley v Ryan* = drunkenness as a characteristic causing weakness which was known and exploited

facts:

- ryan was an elderly sheep farmer who sold his property at a significant undervalue to Blomley a neighbouring grazier
 - negotiations were conducted by blomley and his agent
 - the court found that ryan had a well known fondness for liquor and both blomley and his agent knew of his regular drinking indulgence in bouts
 - the agent sold him rum through his store
 - at time of negotiations Ryan had been heavily drinking for days
 - agent and grazier – claimed that they hadn't notice anything untoward despite witnesses claiming he looked old and sick
 - court greeted their ignorance with extreme disbelief at negotiations and found that they had actual knowledge
 - they had produced a bottle of rum at negotiations – they had indicated their knowledge of Ryan's fondness for drink and had actually assisted him to reach the intoxicated state under which he made the unfavourable transaction
- **held:** court refused to grant specific performance on ground that the contract was unconscionable. Actual knowledge of his drunkenness and drinking habits- bringing rum to the deal showed this knowledge and under which the transaction was agreed upon.

III. Unconscientious exploitation of the disadvantage - B exploited that disadvantage unconscientiously in order to obtain A's consent to the transaction

- Proof of exploitation is required (going through with the transaction), 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

Examples of unconscientious exploitation:

- *Commercial bank of Australia Ltd v Amadio* – the amadio’s special disadvantage was knowingly used to procure them into signing a contract of guarantee which was not limited by time or extent of liability to secure a loan for their son who was in serious financial trouble
- *Louth v Diprose per Brennan J.* – infatuated Diprose made a gift of \$58,000 to louth so that she could buy a house. Finding of actual knowledge led to court to its acceptance of the portrayal as louth as a woman who manipulated the situation by the creation of an atmosphere of crisis.
- *Blomley v Ryan* – drunken ryan sold his entire landholding to blomley at a price ‘strikingly disproportionate’ to the estimated market value

IV. Rebutting the presumption

1. relief may be denied if a party can raise an equitable defence such as laches, or other equitable misconduct that amounts to a failure to come to equity with clean hands
 2. steps taken to remedy disadvantage
 3. Nature of disability will determine the justice – e.g if does not speak English did you get an interpreter? Etc...
- 1) showing transaction not improvident or unfair –
 - not improvident: the adequacy of consideration, where the transaction is a gift or guarantee contract there is no obvious benefit to the party giving so improvidence must be at against their total interests
 - if transaction for full market value =can prove not improvident
 - in both *Commercial Bank of Australia v Amadio* and *Louth v Diprose* the weaker party could ill afford the benefit they were seeking to transfer, by guarantee and gift respectively. The other party in each case failed to establish a defence of lack of unconscientuous exploitation
 - 2) not unfair: arguing where there was independent advice that the weaker party consented freely e.g 3rd party advised/pointed to independent legal advice, did they go?, was it adequate legal advice?
 - *Commercial Bank of Australia v Amadio* - arguing where there was independent advice that the weaker party consented freely
 - *Blomley v Ryan* –the same solicitor acted for both the vendor and purchaser, the state of ryan and behavior of blomley and the improvidence of the deal would be unlikely to be of no consequence even if independent advice had been given

- *Wilton v Farnworth* Wilton was a minor, deaf, poorly educated and dull witted. Transferred his inheritance from his wife's estate to his step son. It was set aside because he was old and poorly educated.
- *Bridgewater v Lee* – Farming property when to the vendor's nephew and his nephew's wife in addition to a debt that they owed him, he gave them the house. He was 84 and vulnerable therefore was an exploitation of a disadvantage. He forgave their debt to him but also gave everything to them and as such was at a disadvantage.

D. GENERAL EQUITABLE DEFENCES

a. Laches/delay

- is 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)*
- Take too long – the court will not assist you. Must be vigilant and not tardy.
- the crucial determinant of whether laches will apply to block relief is not the length of the delay per se. It is the delay after the applicant is freed from the influence and is aware of the possibilities of setting aside the transaction that really matter *Bester v Perpetual trustee co ltd* – a delay of many years while the plaintiff seeks resources in order to bring his action will not constitute a bar to relief especially when those financial difficulties stem from the improvidence of the gift.
 - example: Allcard had entered a protestant religious order which required a vow of poverty to be taken by members of it sisterhood. She transferred substantial property holdings to the mother superior for her to hold on trust for the general purposes of the sisterhood, and made a will leaving everything to sisterhood.
 - After 8 years as a sister Allcard left the sisterhood. She revoked her will but made no demand for the return of property until a further 5 years had elapsed. She approached her brother a barrister he said to leave it where it was, she then approached a solicitor – he told her to retrieve her property. Despite that advice she did nothing for a further 4 yrs.
 - although the gift to the sisterhood was result of undue influence CA held that Allcard's claim to have it returned was defeated by confirmation, estoppel, acquiescence and/or laches.
 - there is far more than inactivity and delay on part of Allcard, there is conduct amount to confirmation of her gift

b. Acquiescence

- is 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*
- You agree with what has happened. You won't be allowed to take action when you have behaved in a way that displays that you have accepted what has happened

c. Unclean hands

- A person must have done the right thing himself. Equity will not assist someone who has done something wrongly.

E. REMEDIES (REFER TO, 2 LAST PGS IN SUBJECT GUIDE)

1. A party who succeeds may resist order for specific performance e.g. *Blomley v Ryan, CBA v Amadio*
 - An order of the court directing a party to a contract to perform obligations due by that party under the contract. Equity will not order specific performance where there would be an adequate remedy at common law, such as damages. Traditionally, land has been regarded as unique and consequently, a contract for the sale of land will invariably be considered appropriate for relief by way of specific performance, whereas goods which are readily obtainable on the market will ordinarily be compensable by an order for damages.
2. *Alternatively*, a party may seek other equitable relief:
 - 1) Seek order for **rescission** (see ch 27 Radan & Stewart) e.g. *Johnson v Buttress*
 - A party to a contract or gift may disaffirm the transaction. The purpose of rescission is to put the parties back into the position they were in before the transaction was entered into: *restitutio in integrum*. Rescission is not ordered by the court: the court adjudicates on the validity of the plaintiff's act of rescission. The party seeking rescission must be prepared to do equity and make any necessary restitution.
 - 2) **Equitable compensation** when rescission no longer possible e.g. *Hartigan v Society for Krishna Consciousness*
 - Equitable compensation is an order to pay a sum of money for breach of a purely equitable obligation (e.g. breach of trust) assessed on the basis that the obligation is personal and absolute in nature; requiring the

defendant to put the plaintiff back into the position in which he or she would have been had there been no breach. Common law considerations of causation, remoteness and foreseeability are irrelevant. The relevant inquiry is whether the loss would have happened had there been no breach. *Re Dawson (Dec'd) (1966) 84 WN (Pt 1) NSW*. A plaintiff must make an election between equitable compensation and an account of profits where there are alternative remedies available

- account for profits - Where the equitable breach was a breach of a fiduciary duty, then the courts of equity have jurisdiction to order the fiduciary to account to the plaintiff for the profit made as a result of the breach

3) **Constructive trust** e.g. *McCullough v Fern*

- converts legal owner of property to legal trustee of property, legal owner loses everything
- *McCullough v Fern* – gave all their money to a religious sect run by the defendant and his wife, their property was transferred to them, but when the plaintiff took the case forward he was successful in having a constructive trust imposed on the property that they had conveyed to the defendants
- The term ‘constructive trust’ is used in two different ways. The first is in reference to a trust imposed by the court regardless of the intention of the parties requiring a party to hold property for the benefit of another if it would be unconscionable for the party holding title to assert his common law rights and so deny the interest claimed by another. A constructive trust also be imposed on third parties who knowingly receive trust property or assisted in a breach of trust or fiduciary duty. In the latter case, the third party defendant is made liable as if he were a trustee, although there may be no property in his possession made the subject of the trust.