

## UNCONSCIONABILITY - PRINCIPLES IN BRIEF

**David H Denton, S.C.**

**David H Denton, S.C.** has a national commercial law practice as a Senior Counsel in all States and in Fiji.

He has a keen interest in commercial arbitration and mediation, and in all aspects of company law, especially insolvency and shareholder disputes; planning and environmental tort matters.

He is a Certified Arbitrator and an experienced nationally accredited Mediator and holds (or has held) the following positions:

- President of the Commercial Bar Association
- Adjunct Professor, Victoria Law School, College of Law & Justice, Victoria University Melbourne
- President of the Australian Institute for Commercial Arbitration
- Chairman of the 'Law Hawks', In-House Legal Coterie, Hawthorn Football Club.

He is a member of chambers in Melbourne at *Chancery Chambers*; in Brisbane at *Sir Harry Gibbs Chambers*; in Cairns at *Macrossan Chambers*; and, in Hobart at *Michael Kirby Chambers*.

1. For conduct of one party to be unconscionable, the party alleging unconscionability will need to be under some special disability giving rise to a disadvantage vis-a-vis it and the other party, of which disadvantage that other party must have known or been aware and taken advantage. The principles do not appear to be in doubt, although as the judgments from ***Blomley v Ryan*** (1956) 99 CLR 362 and ***Commercial Bank of Australia Ltd v Amadio*** (1983) 151 CLR 447 show, their application to particular circumstances may not always result in unanimous conclusions that a party has or has not acted unconscionably.

### ***Blomley v Ryan* (1956) 99 CLR 362**

2. The defendant (intellectually incapacitated by alcohol at the time) sold his grazing property to the plaintiff (at an apparent undervalue). Against the plaintiff's claim for specific performance of the agreement the defendant sought to have it set aside. Taylor J (at first instance) found for the defendant.

3. On appeal to the full court:

McTiernan J, in the circumstances of the case, noted (at p392, [30]) that "The respondent was clearly the weaker side. His weakness was of the kind spoken of by Lord Hardwicke in defining the fraud characterised as taking surreptitious advantage of the weakness, ignorance or necessity of another. The essence of such weakness is that the party is unable to judge for himself.....There is a strong presumption upon these facts that they took advantage of their relatively superior strength and made undue use of it. And by such unconscientious behaviour procured the purchase of the property at a great undervalue....."

4. Concluding at pp399-400, [61]:

*.....It is a proper inference from the evidence, and I apprehend it was made by the learned judge, that the respondent was not sufficiently in possession of what threads of intellect he retained to protect his interests during the negotiations or while the contract was being concluded. E F. Bloomed and Stemm were well aware of this disability and weakness on the respondent's side. Rogers failed to protect the respondent by giving him any appropriate advice. The relative position of the contracting parties, the haste with which E F. Blomley and Stemm proceeded to bind the respondent by a contract, the enormous discrepancy between the price and the market value of the property and the other inequalities in the contract raise a strong presumption that they procured this bargain by behaviour which is within the category of constructive fraud. The bargain is unfair to the point of being a hard bargain. The parties were not on equal terms. Stemm and E F. Blomley took an extremely unfair advantage of the condition and circumstances of the respondent, the facts of the case make it analogous to the cases cited by the learned judge in which relief was given under the same category of fraud.*

5. Fullagar J, dismissing the plaintiff's appeal noted at p405, [9]:

*..... 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 is 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-a-vis the other. It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain.....*

6. Kitto J, dissenting from the view that the plaintiff in this case had acted unconscionably, noted however at p415, [8] that the relevant principles apply "....whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands", noting further (at pp428-429, [29]) in regard to their application to the case at hand:

*.....The essence of the ground we have to consider is unconscientiousness on the part of the party seeking to enforce the contract: and unconscientiousness is not made out in this case unless it appears, first, that at the time of entering into the contract the defendant was in such a debilitated condition that there was not what Sir John Stuart called " , , a reasonable degree of equality between the contracting parties"; Longmate v. Ledger (1860) 2 Giff 157, at p 163 (66 ER 67, at p 69), and secondly, that the defendant's condition was sufficiently evident to those who were acting for the plaintiff at the time to make it prima facie unfair for them to take his assent to the sale. If these two propositions of fact were established the burden of proving that the transaction was nevertheless fair would lie upon the plaintiff: Earl of Aylesford v. Morris (1873) LR 8 Ch484, at p490; Permanent Trustee Co. Ltd.v. Bridgewater (1936) 36 SR (NSW) 643, at pp 651, 652; 53 WN 250. If the burden were not discharged the defendant*

would be entitled to hold the judgment appealed from, since in that event it would be right to draw the conclusion that, as was said in *Evans v. Llewellyn* (1787) 1 Cox 333 (29 ER 1191),.. though there was no actual fraud, it is something like fraud, for an undue advantage was taken of his situation" (1787) 1 Cox 333, at p 340 (29 ER 1191, at p 1194). The fact that the defendant's condition was the result of his own self-indulgence could make no difference, for, as is shown by *Cooke v. Clayworth* (1811) 18 Ves Jun 12 (34 ER 222), the principle applied is not one which extends sympathetic benevolence to a victim of undeserved misfortune: it is one which denies to those who act unconscientiously the fruits of their wrongdoing.

**Commercial Bank of Australia Ltd v Amadio** (1983) 151 CLR 447

7. Mr and Mrs Amadio, gave a mortgage to secure their son's debt to the Bank. The Amadio's were old and did not speak or read English well. They had no opportunity to obtain independent advice. They did not read the mortgage, nor was it explained to them by the relevant Bank officer.
8. Gibbs CJ, dissenting from the majority on his view of the circumstances, noted (at pp459-460, [18]):

*In my opinion it should not be held that this was the case of an unconscientious bargain of the kind which equity would set aside, even in the absence of fraud, misrepresentation or undue influence. Of course, the bank and the respondents did not meet on equal terms, but that circumstance alone does not call for the intervention of equity. as Lord Denning M.R. clearly illustrated in *Lloyds Bank v. Bundy* (1975) QB 326, at p 336. A transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his own superior bargaining power, or of the position of disadvantage in which the other party was placed The principle of equity applies "whenever one party to a transaction is at a special disadvantage in dealing with the other party because*

*illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands": Blomley v. Ryan (1956) 99 CLR 362, at p 415, per Kitto J., and see at pp. 405-406, per Fullagar J. In the present case it is true that the respondents were elderly, did not have a complete mastery of the English language and had had no formal education. However, the bank did not take unfair advantage of any of those disabilities, if disabilities they were. The evidence shows, as Wells J. found, that the bank relied on Vincenzo Amadio to explain the transaction to his parents, and he in fact persuaded them to enter into it. He was experienced in business matters, and well able to understand and explain the effect of the memorandum of mortgage. Of course, he did not give his parents a true explanation of the effect of the guarantee, and the bank did not disclose those matters which it should have disclosed. If one ignores the effect of the misrepresentation by Vincenzo Amadio and the non-disclosure by the bank there is simply no evidence that the bank made unfair use of its position. In other words, if misrepresentation (whether express or by non-disclosure) is established, there is no need to resort to the rules as to unconscientious bargains, and if misrepresentation is not established the bank made no unfair use of its position.*

9. Mason J, finding that the bank had acted unconscionably, notes the principles throughout the course of his judgment:

At p461, [2]-[3]:

*.....But relief on the ground of "unconscionable conduct" is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage, e.g., a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink. Although unconscionable conduct in this narrow sense*

*bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.....*

*Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest.*

10. After referring to Fullagar J and Kitto J in **Blomley v Ryan**, continuing at p462, [6]:

*It is not to be thought that relief will be granted only in the particular situations mentioned by their Honours, It is made plain enough, especially by Fullagar J., that the situations mentioned are no more than particular exemplifications of an underlying general principle which may be invoked whenever one party by reason of some condition of circumstance is placed at a special disadvantage vis-a-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created I qualify the word "disadvantage" by the adjective "special" in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance 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 of its effect on the innocent party.*

- and noting the circumstances in the present case (at p 464, [13]):

*There are a number of factors which go to establish that there was a*

*gross inequality of bargaining power between the bank and the respondents, so much so that the respondents stood in a position of special disadvantage vis- a-vis the bank in relation to the proposed mortgage guarantee. By way of contrast to the bank, the respondents' ability to judge whether entry into the transaction was in their own best interests, having due regard to their desire to assist their son, was sadly lacking.*

11. Concluding then (at p467, [22]) as to the knowledge required:

*As we have seen, 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 or position by entering into that transaction, his conduct in so doing is unconscionable. 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.*

12. Deane J notes the basis of unconscionability at pp474-475, [13]:

*..... 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. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogued. In *Blomley v. Ryan* (1956) 99 CLR, at p 405, Fullagar J. listed some examples of such disability: "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" As Fullagar J. remarked, the common characteristic of such adverse circumstances "seems to be that they have the effect of placing one party at*

*a serious disadvantage vis-a-vis the other'*

13. After considering the circumstances of the present case (at p476, [16]-[17]) he concludes at pp476-477, [18]:

*It is apparent that Mr. and Mrs. Amadio, viewed together, were the weaker party to the transaction between themselves and the bank. Their weakness may be likened to that of the defendant in Blomley v Ryan of whom McTiernan J. said (1956) 99 CLR, at p 392:*

*"His weakness was of the kind spoken of by Lord Hardwicke" (in Earl of Chesterfield v. Janssen (1751) 2 Ves Sen, 125, at pp 155-156 (28 ER 82, at p100)) "in defining the fraud characterised as taking surreptitious advantage of the weakness, ignorance or necessity of another. The essence of such weakness is that the party is unable to judge for himself."*

*That weakness constituted a special disability of Mr. and Mrs. Amadio in their dealing with the bank of the type necessary to enliven the equitable principles relating to relief against unconscionable dealing. Put more precisely, the result of the combination of their age, their limited grasp of written English, the circumstances in which the bank presented the document to them for their signature and, most importantly, their lack of knowledge and understanding of the contents of the document was that, to adapt the words of Fullagar J. quoted above, they lacked assistance and advice where assistance and advice were plainly necessary if there were to be any reasonable degree of equality between themselves and the bank.*

14. As with Mason J, he then considers the advantaged party's knowledge of the disadvantaged's disability (at p477, [19]):

*The next question is whether the special disability of Mr. and Mrs. Amadio was sufficiently evident to the bank to make it prima facie unfair or "unconscientious" of the bank to procure their execution of the document of guarantee and mortgage in the circumstances in which that execution was procured .....*



15. Concluding that the Bank had the requisite knowledge and noting (at p479, [23]) that:

..... The case is one in which "willful ignorance is not to be distinguished in its equitable consequences from knowledge" (per Lord Cranworth LC., *Owen and Gutch v. Homan* (1853) 4 HLC, at p 1035 (JO ER, at p 767)). Mr and Mrs Amadio's disability and the inequality between themselves and the bank must be held to have been evident to the bank and, in the circumstances, it was prima facie unfair and "unconscientious" of the bank to proceed to procure their signature on the guarantee/mortgage. With that conclusion, the onus is cast upon the bank to show that the transaction was "in point of fact fair, just, and reasonable" (*Fry v. Lane* (1888) 40 ChD, at p 321).

16. Wilson J agreed with Deane J.

17. Dawson J, like Gibbs J finding that the Bank had not acted unconscionably, reiterates the principles thus at p489, [22]:

*The respondents sought to invoke the equitable jurisdiction which is raised "whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands" · Blomley v. Ryan (1956) 99 CLR 362, at p 415, per Kitto J. In that case, Fullagar J. (1956) 99 CLR, at p 405 said that the circumstances adversely affecting a party which may induce a court of equity to set aside a transaction are various and cannot be satisfactorily classified To those mentioned by Kitto J. he added age, sex and lack of assistance or explanation where assistance or explanation is necessary.*

*Perhaps in the context of this case should be added unfamiliarity with the English language. See Carello v. Jordan (1935) QSR 294. What is necessary for the application of the principle is exploitation by one party of another's position of disadvantage in such a manner that the former could not in good conscience retain the benefit of the bargain.*

**David H Denton, S.C.**

**Chancery Chambers**