Overview

Broadly speaking “unconscionability” is an aspect of the rationale of estoppel, mistake, duress, undue influence, relief from penalties and forfeiture – and it is now emerging as a separate substantive doctrine in its own right. In the fullness of time, those other concepts might well be regarded as merely aspects of unconscionability. It is commonly said, of course, that it is a doctrine which is impossible to define [1] and so we have to look to the cases as illustrative of the doctrine’s scope and ambit. We are also helped by the statutory interventions which have taken place in the Trade Practices Act. We may simply say as part of this introduction that “conscience” is something which is understood by most people, even if we would not all describe it in the same way. It might thus provide a tool which will enable us to thin out much of the ever increasing complexity of doctrinal developments which even lawyers specialising in the area of contracts, are hard pressed to understand. [2]

Background to the doctrine of unconscionable bargains

The jurisdiction to grant relief to set aside “catching and unconscientious bargains” was developed in England in the nineteenth century to protect heirs, reversioners and expectants from finance agreements on account of their age and the frailty of their interests. Initially the presumption of unfairness arose simply on account of inadequacy of consideration. The doctrine was later refined to draw the focus away from inadequacy of consideration to the conscience of the defendant, and the classes of disadvantage were broadened. [3]

In Australia , the doctrine was preserved by the High Court in Blomley v Ryan [4]and its scope was further strengthened by the High Court in Commercial Bank of Australia Ltd v Amadio.[5]

The general principle was essentially stated as follows:

Where one party by reason of some condition or circumstance

is placed at a special disadvantage regarding another

and unfair or unconscientious advantage is taken of the opportunity thus created

then the court will set aside the transaction on grounds of “unconscionable conduct”. [6]

Commercial bank of Australia v Amadio (1983) [7]

An elderly Italian couple was approached by their son and his bank manager to execute a guarantee for the son’s benefit. The bank manager, being much involved with the activity of the son, had strong reasons to believe that the son had lied to the parents (who had little business experience and understanding of the English language) about the solvency of his business. The High Court held that the bank manager, knowing of the parents’ “special disability” did not himself take steps to ensure that they understood the nature of the transaction – therefore the bank’s “taking advantage” of the opportunity which presented itself was unconscientious.

In determining as to what amounts to “special disability”, Mason CJ made reference to Blomley v Ryan where Fullagar J had listed the factors which might give rise to equitable intervention – including “lack of assistance or explanation where assistance or explanation is necessary”. Many of the other factors mentioned in Blomley might well be subsumed in this – all those who are infirm, illiterate, drunk or sick etc, might be appropriate candidates for assistance or explanation, as indeed were the parents in Amadio. The court in Amadio drew a distinction between:

procedural unconscionability – the disadvantage suffered by a weaker party in negotiations

substantive unconscionability – refers to the unfairness of terms or outcomes

Most often the former will lead to the latter but not necessarily so. The existence of the former without the latter may be sufficient. The latter without the former may not be sufficient. As with the issue of consideration, it is not for the court to determine whether someone has a good or bad bargain – merely whether they had the opportunity to properly judge what was best in their own interests.

Because unconscionability invariably results from an imbalance in bargaining power, individuals and small companies may well be able to establish that they were subject to unconscionability – large corporations are not so easily accommodated.

The duty imposed on the stronger party is the duty to act reasonably – that is to say that assistance or explanation need only be provided where the stronger party either knows – or ought to know – of the other party’s disadvantage.

Amadio suggests that if the stronger party can show that the transaction was “fair, just and reasonable” then the transaction may not be impugned.

Remedies: – the court may order that

the transaction be set aside in total or in part (would full explanation have led to reduced commitment or none?)

there be an accounting for profits arising from the transaction;

equitable damages be paid – those which are sufficient to avoid the detriment.

It is said that equity intervenes to vindicate the requirements of good conscience. [8] Mason J put it in Amadio – fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct are all species of unconscionable conduct in one sense. Clearly the judge was intending to provide illustrations of what may be regarded as circumstances giving rise to unconscionable conduct in its fullest sense. However, his use of the words - “unconscionable conduct” - as part of the illustration of what amounts to “unconscionable conduct” can appear confusing. What it means is that the extent to which we can provide a code, or list of circumstances in which this will occur – is very limited. What we have to fall back on – as all skilled professionals ultimately have to do – is our own good judgment.

Lawyers require more knowledge of clients’ activities

However, it is our view that “good judgment” in such matters will have to go well beyond the formalities normally associated with the setting up and implementation of legal agreements between parties. Such agreements might well require the legal advisers to have a lot more information about the circumstances, which give rise to such agreements – or indeed information, which is relevant to their clients not entering into, or not continuing such legal agreements. We will be suggesting, is that “legal advice” will have to be grounded in a reasonably detailed knowledge of clients’ business strategies. This might include information about the people or companies with which the clients of lawyers do business and the methods by which such agreements come into place – or do not come into place as the case may be.

Range of situations where problems might arise

One might think of situations where major contractors do business through sub-contractors. For example, the major company manufactures roller blinds, and has a series of sub-contractors to do the installations. The sub-contractors are dependent on the work they get from the main contractor – so do not wish to cause any fuss.

When the main contractor says, “sign this contract” – and they just sign it without regard to the terms, which it might contain – especially with regard to the allocation of liabilities to the sub-contractor. See a similar problem in Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520

Where landlords are dealing with tenants (especially commercial tenancies)

Where tenders are being sought or responded to. In Hughes Aerospace [9] Finn J held there to be “pre-contractual” obligations based on an estoppel.

Consumer contracts, and those involving a major corporation on the one side, and inexperienced or under-resourced people on the other (such as in the music and sporting industries, modelling agencies, hospitals and nursing homes)

Two Factors in “unconscionability”

Essentially, unconscionability operates in situations where there is unequal bargaining power between parties, and the stronger party “unconscientiously” exploits the weakness or vulnerability of the other party. The most commonly recognised and easily remedied issues where this arises are with regard to the following:

FREEDOM (or lack of it) on the part of the vulnerable party and

INFORMATION which the vulnerable party ought to have access to, but which is either misleading or incomplete.

Both factors may operate independently of, or conjointly with the other, but the absence of either appropriate freedom, or relevant information, may be sufficient to vitiate the arrangement between the parties. It should also be pointed out that often the stronger party to an arrangement will be responsible for exploiting the weakness of the vulnerable party, but it is not necessarily the case that the stronger party brings about the lack of freedom or limits the access to relevant information by the weaker party.

It is often the case in credit arrangements that an intervening third party (for example, the debtor husband) will be most directly responsible for limiting the vulnerable party (the surety wife) in this way. [See later Garcia v National Australia Bank] If the stronger party (the creditor bank) in any way exploits or takes advantage of such limitations placed on the vulnerable party, then any agreements that they might have with such a party are liable to be set aside. This requires that the stronger party to such arrangements must be especially vigilant to ensure that they neither know – nor have reason to believe – that any such factors are operating on the parties with whom they do business.

Freedom

Restrictions placed on a vulnerable party in this situation are often referred to as actual undue influence. [10] Issues related to duress may also be applicable here. Undue influence is where the will of one party is overborne by another (not necessarily the other party to the contract) so that the former does not bring a free will to the decision – either to enter into the arrangement at all – or as to the terms upon which it will be set up. Here, further “explanation” or information will not save the transaction.

If a party to a transaction takes adequate steps to inform the other party, then there may still be an equity to set it aside. If, for example, a creditor leaves it to a third party to obtain the consent from the party with whom they are contracting, and is informed by that third party that the other “knows” what they are doing – the agreement may still be voidable against the creditor. This is because the will of the other may not be independent and voluntary. [11] The judgments on this frequently state that “only independent advice or relief from ascendancy will suffice”.[12] We understand this to mean – independent advice which gives rise to relief from ascendancy – as it is the “relief from ascendancy” which is the all important factor here.

In the area of credit arrangements, where sureties are involved, it is said “to enforce a transaction against a volunteer when that volunteer did not have free will would be unconscionable”. [13] This may well be so, but as we will see shortly, it is not always easy to determine whether someone is in fact a volunteer, or indeed, whether someone’s will has been subject to overbearing influences.

Minister for Industrial Affairs v Civil Tech Pty Ltd [1998][14]

The issues raised in this case were interesting in that the party alleging unconscionable conduct was a contractor (Civil Tech) employed in connection with engineering works to provide sea-based and shore-based installations connected by underwater piping to allow seawater to be pumped to and from a laboratory at the West Beach Research Laboratory. When the contractor was some way into the completion of the installation, it encountered some underwater obstructions, which required additional works to be carried out. There was some discussion about the responsibility for and the extent of the additional cost of the works, which were to be carried out. The net effect of this was that the principal put a proposal for settlement of this matter to the contractor, and informed them that if they were not happy to proceed on that basis, then the contract would be terminated and other contractors would be brought in.

The judgment makes it clear that this all took place at a time when the contractor was “financially extremely vulnerable”. The judges referred to the Amadio principles, particularly to the issue of a party to a transaction “taking unfair advantage of his own superior position or bargaining power, or of the position of disadvantage in which the other party was placed.” The judges found here that the contractor was lulled into a false sense of security by the proposed settlement of the issue, and that the principal “attempted to force a settlement of the issue at a time when the contractor was in no economic position to challenge the principal’s stated position, but was instead threatened with termination of the contract”. It was thus open to the arbitrator to find that the contractor was “in a special situation of disadvantage” such as to justify setting aside the discharge agreement [of their claim against the principal] on the grounds of unconscionability.

We note here that the judge speaks of “special situation of disadvantage” instead of “situation of special disadvantage” which is the way it is commonly referred to in the cases. “Special” should qualify the nature of the disadvantage rather than the particular circumstances of the situation. The special disadvantage here was the financially precarious position of the engineering company – which of course would have a bearing on their situation. It is important that the decision-maker has some quality about them which makes them unable to properly protect their legitimate interests – the “special situation” then provides the opportunity for the unconscientious behaviour by the ascendant party.

This case is interesting in that the party subject to unconscientious behaviour was a commercial entity, and not the standard aged, sick, infirm etc. It is also interesting to consider why the matter was not argued on the more familiar basis in situations of this type, of economic duress.

Lack of pertinent information

The second situation where someone is likely to raise the question of unconscionability involves those situations where there is a failure to explain adequately and accurately the transaction or arrangement. [15] Or where there is a lack of proper information about the effect of the transaction or arrangement. The need for this “special advice or assistance” will stem from the particular circumstances of the vulnerable party. If a party to a transaction takes adequate steps to inform the other party, then there may be no equity to set it aside. [16] Whilst it is often the case that advice or information from the stronger party may well be sufficient – it is invariably the case that advice from a competent and disinterested stranger would be better. If, after this, there is still actual misunderstanding then that cannot give rise to an equity to set it aside. [17]

The disadvantaged party here may well be acting in accordance with what they believe to be their free will. However, the “will” must not only be independent and voluntary – but the fact that it is so must not result from any disadvantageous position which they find themselves in. With credit transactions, the “volunteer” may be in all respects a willing party to it the transaction, but the stronger party must take reasonable steps to ensure that the exercise of that will has not been obtained as the result of incomplete or misleading information. [18]

The problem category- emotional dependence

We mentioned earlier the observation of Mason CJ in Amadio, reflecting the well-known observations from Blomley v Ryan – that “lack of assistance or explanation where assistance or explanation is necessary” will give rise to problems of this sort. We noted that “many of the other factors mentioned in Blomley might well be subsumed in this – all those who are infirm, illiterate, drunk or sick etc, might be appropriate candidates for assistance or explanation, as indeed were the parents in Amadio”. Clearly if someone is drunk – then they should not make large gifts or enter into contracts until they sober up. People who are illiterate or infirm also need some special assistance to ensure that they are both fully informed of what they are doing – and are acting with a free will. However, the recent cases of “emotional dependency” give rise to issues which are not so easily resolved – and which may have the effect of seriously limiting one’s contractual rights or rights of ownership.

Diprose v Louth [1992] [19]

In this South Australian case, a solicitor – Louis Diprose – was rather fond of Mary Louth. He obviously desired a more intimate relationship with her than she wished for. However, she was content to continue with his friendship, although he was from time to time “difficult”. She would try to meet with him publicly rather than at her home to avoid those embarrassing moments. Eventually, he determined to transfer a house into her name to provide her with some security – and did so. A few years later – when things did not work out as he wished – he determined to get his house back. The matter was argued before the court largely on the grounds of constructive trust – that Mary had promised to return the house to him if he asked for it back. On this ground the trial judge King CJ found that the evidence which Louis had given had “not been truthful”.

However, on the other issue – that of unconscionability – which had hardly been argued before the court – the judge determined that Mary had been scheming and manipulative – that she had taken advantage of Louis’s “emotional dependency” – and that during these years – as often happens with men who are in love – he had lost his reason and transferred the house to her. However, when he “regained his reason” – round about the time Mary thwarted his intentions – “the scales fell from his eyes” – and he wanted his house back.

The judge found in this case that Louis was in a situation of special disadvantage, which arose, from his emotional dependence upon Mary. She had unconscionably exploited that disadvantage and deprived him of a substantial asset – a house. The judge determined that the agreement could not stand and that the house was to be transferred back to Louis.

The problem with this analysis of course, is that although Louis was by all accounts “a little strange” – at the time he conveyed the house to Mary, he was a solicitor in practice in Adelaide – and presumably had all the access to independent advice and information which he could have needed. There was nothing to suggest in any way that his will was overborne – and indeed Mary and members of her family suggested to him that what he was proposing was most extraordinary, and to their way of thinking “not sensible”. However, he was strong-willed and he went ahead with the conveyance.

What we have to ask ourselves is what we would have done at the time, had Louis approached us to draft the appropriate documents? Clearly these types of cases will involve a person who wishes in effect to make “a gift” of some sort. Now if we ask ourselves why it is that a person would make a gift to another, the most obvious explanation is that they are fond of that person – that they love or care for that person – that they have a special emotional relationship with that person. However, when judges begin to view an emotional relationship as an emotional dependency – and then categorise that element as a special disability or disadvantage – it then becomes a vitiating factor in the arrangement.

In other words, the very factor which enables us to make sense of the activity – in human terms – becomes the very factor which makes it difficult or impossible – in legal terms. In passing it is worth saying that there is very little support from the transcript of the trial to support the view that Mary was being manipulative or scheming – and a great deal of evidence to suggest that it was in fact Louis who was scheming -–this has been further detailed in our separate article on this topic.

Bridgewater v Leahy [1998] [20]

The situation here was that of an elderly uncle, aged 84, who had worked over the years to build up his estate, and who was concerned to pass a significant proportion of it onto his nephew who had worked with him for many years to build it up. The uncle’s main disappointment in life was that he had not had a son of his own and he looked upon his nephew as his “adopted son”. The uncle had determined to pass the property to his nephew in his will, but the nephew had approached him to see if he would transfer it to him inter-vivos – which he did. The uncle executed a transfer of the land to the nephew for full value – some $696,811, and then executed a deed of forgiveness for some $546,811 of the purchase price – leaving him to pay just $150,000 of the balance – which was the amount he could afford to raise for it.

This left some $350,000 in the estate which would go to his wife and his four daughters and their families under his will. The uncle had explained to his executor that he felt that he had dealt with his daughters fairly, in that he had assisted one of them to set up in business with a hairdressing salon, and had assisted another with the purchase of a house.

The uncle explained that it was his wish that the lands, which he had developed, be kept intact after his death, and be properly managed and developed. None of his daughters, or their husbands appeared interested in doing this, so the uncle looked to his nephew to take on this role. Immediately before executing the transfer and release, the uncle was examined by a doctor who found him to be of sound mind and capable of making decisions about his personal and business affairs.

After his death a year or so later, the family commenced action to have the transfer and deed of forgiveness set aside on the grounds of unconscionable conduct. Gleeson CJ and Callinan J found there to be no unconscionable conduct. However, Gaudron, Gummow and Kirby JJ found that the uncle’s “strong emotional dependence upon, or attachment to his nephew, placed him in a position of special disadvantage, giving rise to unconscionability”.

The judges in the majority in this case emphasised the important conceptual differences between undue influence and unconscionability - emphasised by Mason J in Amadio, and which we have outlined above. The latter involving the attempted enforcement or retention of a benefit, when dealing with a person under a special disability, in circumstances which are unconscionable, which means that it would offend equity and good conscience.

A common factor which appeared to have influenced the judges in both this case and that of Diprose v Louth was that by making a substantial gift to another, the donor removed from his estate substantial assets which would otherwise have been available to other members of the family. One has to admit to the compelling logic of the judges by observing that property once given away is not available to be given away again. But we might ask – so what?

The majority also pointed out in Bridgewater that the effect of the inter vivos transfer, was to “put beyond recall” by the uncle, the land which was the subject of the transfer, “for a seriously inadequate consideration”. Again, this observation by the judges is nearly correct – but could hardly have been unintended by the uncle.

Also, if we consider the very mechanism, which he adopted, it emphasised the fact that he was well aware of the financial consequences of his actions. In point of fact, the transfer of the land was NOT subject to seriously inadequate consideration. The actual transfer was affected for full value - $650,000. It was actually the “deed of forgiveness” which acted in effect as a subsequent gift by the uncle to the nephew of a sum of money which was to be allowed against the purchase price.

I would incline to the view that the use of this mechanism by the solicitor concerned was in fact quite astute. He could easily have effected a transfer of the land for the amount which was to be paid - $150,000 – which would have amounted to a transfer at a substantial undervalue – or for a “seriously inadequate consideration” – but he obviously advised against doing this. The transfer at full value – combined with the deed of forgiveness – made it clear beyond a shadow of a doubt that the uncle knew precisely what the value of the property was – and also emphasised his desire to make a gift equivalent to part of the value to his nephew. The solicitor also conducted an interview with the uncle where he discussed the “fairness” of what he was doing with regard to the interests of the other members of his family, and the solicitor made contemporaneous notes of that conversation, which he got the uncle to sign. He also ensured that the uncle had a medical examination by a competent doctor to attest to his soundness of mind and his ability to make decisions with regard to his business interests.

However, the court made much of the fact that the uncle was not in receipt of “independent legal advice”. The solicitor in this case was acting for both the uncle and the nephew. The trial judge suggested that “a prudent solicitor should actively have canvassed with [the uncle] the issue of his taking independent legal advice from another solicitor who was not acting also for [the nephew]. However the judge thought that if he had done so the outcome would likely have been the same. However, the High Court took the view – with some support from Re Levey (1984) that the court does not allow any person to take advantage of any known weakness of the vendor. The issue is whether the party had “the opportunity” of professional advice as to the effect of what he was doing. This denial of the opportunity to have “the assistance of a disinterested legal adviser” rather than speculation as to what might have followed had it been pursued – is the element in unconscientious conduct – in respect of which equity intervenes to deny the entitlement of the disponee.

I can only say that the court appears to be skating on rather thin ice here. The “known weakness” appears to have a perfectly rational explanation – he thought a great deal of the nephew and had an interest in him continuing with his work on the land. There is no suggestion that the uncle was “denied the opportunity” for independent advice. I think the form in which the transfer and deed of forgiveness were made out, demonstrates very clearly that the uncle knew precisely what he was doing – and that it was the outcome of a very deliberate and reasoned choice.

Transformation of the old rules of contract law?

For those of us brought up in the good old days of “caveat emptor”, our lecturers said that a party to a contract could look after their own interests, but had no obligation to the other party - beyond the duty not to actively mislead the other party. That “consideration” must be present but that it did not need to be “adequate” consideration. That “intention” to contract was to be determined “objectively”. That obligations did not arise until the “meeting of minds” had occurred, whereby the parties became contractually bound to each other. And of course, “privity of contract” meant that only those who were party to the contract could be obligated by it, or obtain rights in respect of it.

It has to be said that the recent cases in Australia on “unconscionability” seem to be very far removed from the “rules” of contract law as stated in the previous paragraph. Indeed, one might wonder whether unconscionability is in fact part of contract law at all – or whether – like the law of negligence, it is the beginning of a whole new area of “obligations”. One might look very carefully at the judgments in the recent cases of Walton’s Stores and Garcia, and find little if anything in the discussions of the High Court judgments, which look remotely, like the discussions of the old rules of contract law.

Promissory estoppel - Walton’s stores (1988) [21]

Mr Maher owned commercial premises in Nowra, which they proposed to replace with new premises, which Walton’s were to lease. Negotiations proceeded and Walton’s solicitors drafted an agreement specifying that the new premises were to be ready by 15 January 1984. On 7 November Maher’s solicitor spoke to Walton’s solicitor pointing out that the final agreement would have to be reached “in the next day or two otherwise it will be impossible for Maher to complete” the rebuilding on time. Walton’s solicitor then forwarded a fresh set of documents incorporating a number of amendments. The covering letter stated that, whilst he had no formal instructions from Walloons, he believed that Walton's approval was forthcoming and that he would advise the following day if Walton’s did not agree to any of the amendments. 4 days later hearing nothing, Maher’s solicitors returned the documents duly signed “by way of exchange”. Maher then proceeded with the demolition and rebuilding work, a fact known to Walton’s manager in Nowra. In the meanwhile Walton’s who was reviewing its retailing policy told its solicitors to “go slow” on the Maher contract. Eventually in mid January, Walton’s solicitor notified Maher that it was pulling out of the deal. Maher successfully sued for damages.

In this case, the High Court utilised the idea of unconscionability to derive new legal rights in the absence of a pre-existing legal relationship (as no contract was ever formally concluded). Prior to Walton’s the traditional view was that promissory estoppel could operate to limit the extent to which one could enforce one’s legal (contractual) rights. However, by a series of somewhat rhetorical questions, Mason CJ and Wilson J in Walton’s laid the foundation for a series of remarkable developments in the modern Australian law of obligations. “But what is the logic in allowing promissory estoppel to operate where there is a pre-existing legal relationship between the parties, but not in the absence of such a relationship?” The promise operates in the first situation by altering an existing legal relationship – and by creating a new legal relationship in the second. One would have thought that the creation of a new legal relationship was a seriously different matter from the modification of an existing relationship. The driving force for the creation of this “new relationship” had little if anything to do with the traditional rules of contracting enumerated above. It was based merely on

the impossibility of avoiding injustice by other means. In other words, the promise is enforced in circumstances where departure from it is unconscionable.

Brennan J took the view that equitable estoppel is a source of legal obligation. It is binding in conscience on the party estopped.

"The element which both attracts the jurisdiction of the court and shapes the remedy is unconscionable conduct on the part of the person bound by the equity... the court goes no further than is necessary to prevent unconscionable conduct. A definitive definition cannot be given of unconscionable conduct."

We bear in mind that the issue for discussion here was merely “an assumption or expectation as to the legal relationship”. As Brennan J went on to point out, a similar point failed in Attorney General (Hong Kong) v Humphrey's Estate Ltd (1987) because there was a “subject to contract” clause which defeated the expectation. It may well be pointed out that all parties have “expectations” prior to their entering into contractual relationships – and it was the function of the old rules of contracting which specifically helped us to distinguish between “expectations” on the one hand and “contractual rights” on the other. If the law is now developing to protect those “expectations” in the pre-contractual phase, then what criteria can we use to identify “pre-contractual” rights? Unconscionability might appear to be a very uncertain guide, especially in the light of the discussion which follows.

Risk management

Clearly Walton’s represents a very serious development in the law of unconscionability. There is no suggestion in the judgments that Mr Maher was aged, infirm, or lacked the capacity to understand business or legal relationships. Indeed the judgments in Walton’s make it clear that Mr Maher’s solicitors were very much involved on his behalf in both the negotiations, and the drawing up of the draft agreement. Where is the difficulty then in coming to the view that his solicitors would undoubtedly have advised him that the risk of proceeding, in the absence of a formal or written agreement, remained with Mr Maher until he was in receipt of the documentation executed by Walton’s Stores? Why should Walton’s be required to act in the interest of Mr Maher, when they no doubt had enough on their hands in terms of working out their new retailing policy? As Mason CJ and Wilson J pointed out - the mere refusal to exchange contracts could not in itself be seen as unconscionable. The defendant should not have remained silent – they should either have gone ahead with the exchange, or informed the plaintiff that it remained undecided about proceeding. Silence was encouragement to the plaintiffs to proceed. As Brennan J stated

"Once the plaintiffs commenced this work it was incumbent on the defendant to take action to avoid the risk of the plaintiffs suffering detriment. It is unconscionable for the defendant to later seek to withdraw, leaving the plaintiffs to bear that detriment."

One might take the view that it is this element of “risk management” which is the most important aspect of unconscionability. Clearly the Court took the view that Walton’s not only had to manage their own risks, but had also to attend to the risks to which Mr Maher was exposed. One might well ask whether this is a fair imposition to place on businesses which are in negotiations with each other. It might well have been the case that if Walton’s had informed Mr Maher that they were engaging in a “review of their retailing policy” that this would have been valuable information to other predatory competitors with whom they had to compete.

Garcia v National Australia Bank [22]

In this case the bank had accepted a surety from Mrs Garcia to support a loan which the bank proposed to make to Mr Garcia’s business, in which Mrs Garcia was both a director and a shareholder. A significant part of the discussion in this case centred on the decision of Yerkey v Jones [23] – which was suggestive of a presumption that married women are under a “special disadvantage” in business dealings with their spouses, and therefore have a prima facie right to set aside any surety given for their husbands’ debts, and which have been obtained in circumstances where it can be established that they were not fully or adequately informed of the risks involved.

Broadening of principle to avoid discriminatory categories

Both the High Court in Garcia (and in many other cases) and the Australian Law Reform Commission in their recent report [24] have made frequent reference to the fact that the old rules as stated in Yerkey v Jones were “an example of gender bias” where women were automatically regarded as suffering from some “disability”. Clearly this is unacceptable, and there was much discussion in Garcia about the extent to which the principle involved here should be more broadly expressed to encompass all people who are involved in relationships of dependency. The majority said that it was not necessary for them to decide whether same sex relationships and de facto relationships were intended to be also covered by this principle. Kirby was more confident that they should be so covered by the principle. He stated at some considerable length, that the discriminatory aspects of Yerkey should be removed, and that the concepts of the law should be re-stated in more general terms.

Constructive notice, he pointed out, will arise where there are facts sufficient to put the credit provider on enquiry – as to the POSSIBILITY of wrongdoing by the debtor – and it fails to inquire. There is a relationship which is known (or ought to be known) to credit provider. This may arise in any situation where there is cohabitation, or other long-term relationship.

Credit provider’s responsibilities

In Garcia, Kirby took the view that the credit provider must take “reasonable steps” to ensure that the surety has entered into obligation freely, and in knowledge of the true facts. The credit provider must avoid being fixed with “constructive notice” of any defect. To avoid this, the credit provider should:

warn the surety of the amount of the potential liability

warn the surety of the risks involved to the surety’s interests

advise the surety to take independent legal [financial?] advice – this should be done at a meeting at which the principal debtor is not present.

ensure that independent financial advice is taken - where influence is probable and the risks are large. Only if this is done will the credit provider be safe – says Kirby.

Relationships of dependency - Garcia v National Australia Bank(1998)

We have seen above how the more recent statement of the High Court in Garcia v National Australia Bank (1998) suggests that unconscionability depends on an overriding of one’s will – or else depends on access to appropriate information with regard to the existence and extent of risks, where there is a relationship of dependency. But even the Garcia case, itself gives rise to serious concerns.

The more modern view might well be that with emancipation comes responsibility. If the bank should have enquired as to whether Mrs Garcia’s shareholding and directorship gave her “any real benefit” then presumably the same questions would have to be asked of all people involved in the running of family companies – not just women, of course. And if Mrs Garcia should have been sent off to obtain independent financial or legal advice, then again, the same would have to apply to all others involved in the running of family companies. But as the vast majority of companies in Australia are “small companies” one might well infer that a good many of them involve members of the same family in the running of them. No doubt a good many of them give either personal guarantees in respect of their business loans, or put up their personal property in support of them. One understands that this is in fact a means by which banks encourage people to “have a stake” in their entrepreneurial activities, and no doubt this encourages a great many of them to use their loans wisely – and in connection with business risks which they will understand much better than many of their bank managers. If this is so, then legal rules which require each of the family members involved in such businesses to have “independent advice” could be criticised on the basis that the lawyers are simply placing too many obstacles in the way of business expansion.

Mrs Garcia was, by all accounts, an articulate and well-informed woman. She ran her own business, in addition to her involvement in the business of her husband, in which she was both a director and a shareholder. When she attended at the bank to sign the forms relating to the surety, she certainly gave the impression that she knew what she was doing. Although she later claimed that she did not know the full extent of the risk which she was undertaking, one might well question whether she had anyone to blame but herself. She could easily have asked for further explanations if any were needed, or indeed she could have approached her own accountants or lawyers which she must have certainly used in the setting up of her other business interests, or for the completion of tax returns in respect of them. The court clearly accepted that despite the fact that she was both a director and shareholder of her husband’s company, that “she derived no real benefit from it”. This might well be true, but it is difficult to see what questions the bank could have asked of her, when arranging the surety to elicit this fact. Might she not have objected to questioning along the lines of “do you really benefit financially from this arrangement” – and if so prove it to us.

How pro-active must one become to avoid unconscionability?

In some of the more recent cases on unconscionability, we certainly have to question the appropriateness of language, which refers to the so-called stronger and vulnerable parties. If the apparently stronger party has to act “responsibly” in the interests of the vulnerable party, then how is this to be accomplished? As we have already seen, Mr Maher in Walton’s Stores had his own legal advisers, who were intimately involved in the discussions with Walton’s.

Presumably they had informed Mr Maher that there were risks associated with his proceeding with the development of the property in advance of the completion of the documentation by Walton’s. The High Court judges in this case stated that Walton’s should have informed Mr Maher that there was a risk that they might not proceed with the development. However, one might well incline to the view that this fact was so self evident (given that the NSW Conveyancing Act s54A stated that contracts for the sale or lease of land had to be evidenced in writing) that if Mr Maher really had to be informed of this, then it was the duty of his own solicitor to provide him with this warning - rather than to expect Walton’s solicitors to do it. Or were Walton’s expected to inform Mr Maher that they were reconsidering their retailing policy? One might well take the view that if in fact such considerations were indeed taking place, that Walton’s might wish this to remain commercial in confidence information which they might not want to disclose to anyone.

Business people may want to hold to the more traditional view to the effect that you do not have a contract – until you have a contract. The suggestion that one party can impose contractual-like obligations upon another unwilling party – or at least shift part of your risk onto them – unless they act in some unspecified manner to prevent you from doing so – not only offends against the traditional rules by which commercial agreements have been established, but also offends against common sense.

Economic freedom - balance of principles

On the one hand we have the desirability of protecting “vulnerable” persons from the loss of their assets, often involving the only major asset in which they have an interest – the family home. This must be balanced against “economically sterilising” those assets. This was clearly recognised – principally by Kirby, in Garcia. Any judicial response which imposes upon lenders an unrealistic standard would also be tantamount to judicial divestiture of a person’s (married woman’s) capacity to execute a guarantee. It may also encourage borrowers to escape from their lawful obligations, and thus act as a disincentive to providers of capital. Kirby took the view that the rules stated in Amadio were too narrow. He said that he favours the formulation laid down by Lord Browne-Wilkinson in O’Brien. The expanded version of that statement by Kirby was to the effect that:

"Where a credit provider knows - or ought to know of relationship - involving emotional dependence on the part of a surety to the debtor - or where the surety reposes trust and confidence in the debtor - if the surety obligation has been procured by undue influence – misrepresentation – or other legal wrong – then the surety obligation will not be enforceable."

Relief from Forfeiture where one party is seeking to terminate for breach

In appropriate circumstances equity has traditionally granted relief against the unjust forfeiture of proprietary interests at the suit of a contract breaker on grounds of unconscionability on the part of the terminating party in seeking forfeiture. Some of the factors that the courts take into account in providing such a relief are:

whether the breach was serious or wilful

whether the terminating party contributed to the breach

the magnitude of the loss to the party in breach resulting from forfeiture

whether the terminating party will receive a “windfall” (unjust enrichment)

whether the purchaser has gone into possession in a case involving sale of land.

Stern v McArthur (1988) [25]

The sellers under a contract of sale of land providing for payment by instalments over 13 years asserted (after 10 years) the right to terminate it for breach, relying on an express right to terminate for “defaults in the observance ... of any obligation”. The buyers had, after regular payments of instalments for 8 years, fallen into arrears and became liable to pay the balance, which they had failed to do as required. The buyers had built a house on the land and lived in it. At the time of termination all arrears of instalments had been paid or tendered, and the buyers were seeking to pay the balance of the purchase price.

Sellers claimed recovery of the land, forfeiture of the deposit, and the retention of instalments as security for any loss on resale. At the time of termination, the value of the land had appreciated greatly. Sellers offered to make allowance for any improvements made to the land but none in respect of the “windfall” benefit resulting from the increase in value of the land.

The High Court held that the seller’s insistence on forfeiture of the land in these circumstances was unconscionable - allowing the buyers an order of specific performance of the contract of sale.

Legislative provisions

In the area of unconscionability, there have been recent legislative amendments to the Trade Practices Act, which have given important statutory force to the common law provisions.

The point of the legislation here was to

a) clarify the application of the common law to certain areas

b) bring the matter within the ACCC which would ensure compliance within those areas

c) ensure that the remedies provided by ss 80 (injunctions), 87 (other orders) of the TPA were available for infringements of the unconscionability provisions – but not 82 (damages).

The Act specifically refers

51AA - to conduct that is unconscionable “within the meaning of the unwritten law, from time to time, of the States and Territories”. This specifically incorporates the common law into the interpretation of the statutory terms. The use of the words “from time to time” is interesting in that it incorporates the common law of unconscionability, not just as it was at the time that the amendments were introduced, but as it might be further developed by the courts. It is of course unusual for a statute to merely adopt the common law on an issue, without either codifying or amending it in some way. This statutory adoption of the common law principles was presumably intended to encapsulate the Amadio doctrine. Clearly it would now incorporate further developments in this area, and may lead to a somewhat wider effect.

51AB and 51AC – refer to specific issues, which the courts should consider under these sections. It is thought that it was not intended that various and distinct meanings of unconscionability should develop – the common law definition – the 51AB definition etc - as this would obviously lead to great confusion. The sections refer to issues, which are most appropriate in the light of the relationships with which they are dealing, and which are fairly obvious issues in those circumstances.

Trade Practices Act 1974 (Cth).

S 51 AA(1): (1992)

A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

Whilst the substance of the law is not altered by these provisions, the wider remedies provided by the Act go beyond those otherwise available in equity.

S51AA does not extend the equitable concepts of unconscionable conduct but merely extends the remedies available under the Act to unconscionable conduct to the extent that the concept is already part of the general law.

Conduct which falls under S51AB or 51AC is excluded from the application of 51AA by virtue of 51AA(2).

S 51 AB(1): (1992)[26]

Prohibits a corporation in trade or commerce in connection with the supply or possible supply of goods or services, of a kind ordinarily acquired for personal, domestic or household use or consumption from engaging in conduct that is unconscionable. The relevant factors which the court may have regard to are:

(a) the relative strengths of the bargaining positions of the corporation and the consumer;

(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;

(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer, by the corporation or a person acting on behalf of the corporation, in relation to the supply or possible supply of the goods or services; and

(e) The amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

The list is not intended to be complete or exhaustive –

S 51 AC(1): (1998)

A Corporation must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company)

(c) engage in conduct that is, in all the circumstances, unconscionable.

This provision, introduced in July 1998 was designed to assist small businesses in commercial transactions, and apply only to transactions concerning subject matter at a price of up to $1m. For example, listed companies are not covered.

Like section 51AB, AC also contains an extensive catalogue of issues, which the courts may take into account in determining whether conduct is unconscionable. They include the extent to which the supplier or acquirer hides business risks from the other party and the extent to which the parties acted in good faith.

(3) ss (a)-(e) are virtually the same as those in S 51AB above –

the extent to which the suppliers conduct to the business consumer was consistent with their conduct in similar transactions with other like business consumers: ACCC v Leelee Pty Ltd & anor [1999] FCA 1121.

(g) the requirement of any applicable industry code

(h) the requirement of any other industry code if the business consumer acted on the reasonable belief that the supplier would comply with that code.

(i) the extent to which the supplier unreasonably failed to disclose to the business consumer

any intended conduct of supplier that might affect the interests of the business consumer

any risks to the business consumer arising from the supplier’s intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer)

(j) the extent to which the supplier was willing to negotiate the terms and conditions of any contact for the supply of goods or services with the business consumer

(k) the extent to which the supplier and the business consumer acted in good faith.

Other legislative provisions:

Contracts Review Act 1980 (NSW)

It applies in NSW and refers to “unjust contracts” –

The Act applies to consumers and excludes business contracts – does not protect the small business person – as is done under the TPA and FTA

S7 where the court finds a contract to be unjust – it is to avoid the unjust consequences by

refusing to enforce the provision – by declaring the contract to be void – by varying the contract – by requiring the execution of an instrument re land –

The court may have regard to the public interest and all the circumstances of the case including

– inequality of bargaining power – the negotiations – whether it is reasonably practical to vary provisions – whether the conditions are unreasonably difficult to comply with or unnecessary to protect the legitimate interests of the parties – whether any party (other than a corporation) was not reasonably able to protect their interest (or their representatives) – issues such as age, physical or mental capacity – economic circumstances – whether the contract is in writing – the intelligibility of language used – whether recourse was had to independent advice – whether an accurate explanation was provided – whether undue influence, pressure or unfair tactics were used.

May well be cases under the CRA which may assist our definition of what amounts to unconscionability.

Endnotes

[1] Mason CJ in Commercial Bank of Australia v Amadio (1983) 151 CLR 447 at 461

[2] Seddon and Ellinghaus, Cheshire and Fifoot’s Law of Contract (7th Australian ed), Butterworths, Sydney, 1997, pp 906-909

[3] Meagher, Gummow & Lehane, Equity:Doctrines and Remedies (3rd ed), Butterworths, Sydney, 1992

[4] (1956) 99 CLR 362

[5] (1983) 151 CLR 447

[6] (1983) 151 CLR 447 at 461 per Mason CJ

[7] (1983) 151 CLR 447 -

[8] Commonwealth v Verwayen (1990) 170 CLR 394 per Deane J at 446

[9] Hughes Aerospace

[10] Garcia v National Australia Bank Limited [1998] 194 CLR 395 per Gaudron, McHugh, Gummow and Hayne JJ at 405 discussing Yerkey

[11] Commercial Bank of Australia v Amadio (1983) 151 CLR 447 per Mason J at 461

[12] Dixon J in Yerkey cited at Garcia p 405 and by Kirby in Garcia at 421

[13] Yerkey v Jones (1939) 63 CLR – cited Garcia – p 408

[14] Minister for Industrial Affairs v Civil Tech Pty Ltd [1998] 70 SASR 394

[15] Garcia p 405 discussing Yerkey

[16] Garcia p 407 citing Dixon Yerkey at 685

[17] Garcia p 407 citing Dixon Yerkey at 685

[18] Yerkey v Jones (1939) 63 CLR – cited Garcia – p 408

[19] [1992] 175 CLR 621

[20] [1998] 194 CLR 457

[21] (1988) 164 CLR 387

[22] [1998] 194 CLR 395

[23] (1939) 63 CLR 649

[24] Australian Law Reform Commission Report No 69 Women and the Law -Part 11 – “Developments in Industry Practice”.

[25] (1988) 62 ALJR 589

[26] See corresponding provision in the Fair Trading Act (SA) 1987 s57.

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