

# Commercial Law 70327

Examination Notes

Summer 2018

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# Australian Consumer Law

## Unconscionable conduct

### Elements of unconscionability

1. One party must be at a special disadvantage: *Amadio; Louth*
2. Other party must know that the special disadvantage exists: *Garcia; Amadio*
3. Other party must have taken an unconscientious advantage of the party with the special disability: *Amadio; Louth*

### S20: Within the written law

#### **S20 – Unconscionable conduct within the meaning of the written law:**

(1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the written law from time to time.

(2) This section does not apply to conduct that is prohibited by section 21.

- This section does not apply to conduct prohibited by section 21
- Purpose of this section is to:
  - Widen the range of remedies available to the victim of unconscionable dealing.
  - Enables the ACCC to investigate UC and, if necessary, bring legal action on behalf of the person who has been treated unconscionably.
  - However, the words are perfectly general and the courts have not yet settled on what constitutes unconscionable conduct under 'the unwritten law'.

### Blomley v Ryan (1956)

- **FACTS:**
  - HC held sale of land procured from a drunken landowner was unconscionable
  - Purchaser was aware that landowner Ryan had a drinking habit
  - During his bouts of drinking, purchaser had Ryan sign a contract of sale
  - Ryan later sought to withdraw from the agreement
- Fullagar J set out circumstances that give rise a special disadvantage: 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 when it is necessary
  - However, the existence of indicia suggesting a special disadvantage will be insufficient if no real disadvantage exists: *Luong & Anor v Du* [2013] – plaintiffs had difficulties with English language but this did not give rise to a special disadvantage as they understood the transaction and the need for legal advice

- Concerned with the conduct of the stronger party, rather than the quality of the consent of the weaker party – the stronger party must be aware of the weakness and knowingly choose to exploit it for their own advantage
- If the person has no actual knowledge of that situation but A is aware of the possibility that that situation may exist or is aware of the facts that would raise that possibility in the mind of any reasonable person, the result will be the same. Aka “wilful blindness, possibility of a stronger party purposefully closing its eyes to any special disadvantage”

### **Commercial Bank of Australia v Amadio (1983)**

- **FACTS:**
  - Regarded as leading Australian decision on unconscionable conduct
  - Amadio was a builder, his company had serious financial difficulties
  - His friend, Mr Virgo, was a banker and would often help him by increasing his overdraft and getting him to selectively dishonour cheques
  - By March 1977, Amadio owed \$193,000
  - Amadio spoke to his parents to see if they could provide security for \$50K for up to 6 months
  - “Special disadvantage”: they were not fluent in English, were elderly, lacked business experience and depended heavily on their son
  - A guarantee and mortgage was to be held over the Amadios’ investment property
  - Virgo visited the couple under the belief Amadio had properly explained the nature of the guarantee and mortgage; Amadios signed the documents without reading them
  - Mr Amadio believed that the guarantee would only operate for 6 months – Virgo corrected him but they did not seem to understand him
  - Amadio’s business went into liquidation; bank sought to enforce guarantee
  - HC majority found that Amadios could not be bound by the mortgage and guarantee
- Three elements of unconscionable conduct existed here:
  - “Special disadvantage”: poor English, advanced age, lack of business experience and high level of dependence on their son
  - Virgo, the stronger party, knew of the Amadios’ special disadvantage
  - Virgo sought to take unfair advantage by being aware but still going ahead with the transaction
- This knowledge may be ‘constructive’ – that is, the party should have drawn the conclusion of a special disadvantage through their knowledge of the facts or circumstances of the case.

### **Louth v Diprose (1992)**

- HC held that Diprose, who was infatuated with Louth, was unconscionably taken advantage by her after she manufactured a false atmosphere of crisis
- The appellant was aware of the disability and had deliberately created it.
- Demonstrates how a combination of a special vulnerability that has developed over time and a deception may give rise to an unconscionable transaction

- Sets the basis for finding that a special disadvantage may be situational rather than constitutional – the specific circumstances between the parties give rise to the special disadvantage rather than some peculiar weakness inherent in the weaker party.
- “Emotional disadvantage”

### **Kakavas v Crown Melbourne Limited (2013)**

- The courts will not extend protection due to “special disadvantage” to those who simply make unwise and extravagant financial decisions
- More so, where the stronger party conducts itself reasonably and with no perceptible dishonesty, it is difficult to argue that the weaker party has been treated unconscionably

**When assessing s20 unconscionable conduct, refer to the below three cases that were decided under s51AA TPA:**

### **Australian Competition and Consumer Commission v C G Berbatis (2003)**

- Even though a disadvantage exists, it must be a "special disadvantage" meeting the requirements of *Amadio*
- FACTS:
  - A majority of the HC found the harsh dealings of a landlord did not amount to unconscionability
  - Landlords owned the shopping centre
  - Roberts family were fish and chip shop tenants, who along with other tenants, sued the landlords over \$50,000 worth of overpayments they had made
  - Roberts had encountered difficulties, wanted to sell their business as well as their daughter being very sick
  - Their lease was expiring; found a purchaser who was willing to buy it provided they had a lease in place
  - This was communicated to the landlords who suggested they would agree on the basis the tenants sign a new lease with a cl 14 which stipulated any claim in relation to overpayments be dropped
  - Australian Competition and Consumer Commission (ACCC) acted on behalf of Roberts to sue Berbatis and other defendants in the Federal Court
  - First case was decided in favour of ACCC; on appeal, the Full Court of the Federal Court found in favour of the defendants and this was affirmed on appeal to the HC
  - Majority of HC found that though Roberts were under a disadvantage, it was not a special disadvantage as required under the *Amadio* test; it was commercially prudent for the landlords to want litigation to be resolved prior to agreeing to a new lease

### **Australian Competition and Consumer Commission v Samton Holdings (2002)**

- FACTS:



- Lessee had an option to renew in his lease, but failed to do so within reasonable time
- As such, landlord required him to pay \$70K in order to renew his lease
- Lessee argued landlord's conduct was unconscionable under s51AA TPA
- Full Court of the Federal Court found: mere existence of unequal bargaining power did not amount to a special disadvantage
- Just because one party may be in a stronger commercial position or because a party may feel compelled to agree to a term because it may feel unable to resist, does not automatically lead to a finding of unconscionability
- Both the cases of *Samton Holdings* and *Berbatis* demonstrate the increasing willingness of the courts to regard inequality of bargaining power as akin to special disadvantage

### Australian Competition and Consumer Commission v Zanok Technologies [2009]

- FACTS:
  - Zanok provided IT training for a fee to jobseekers on the understanding that it would employ them afterwards
  - Company was aware that many of these jobseekers were individuals in Australia on temporary visas – they required employment in order to remain in the country
  - When jobseekers had completed their training, Zanok reneged on their promise
  - Edmonds J in the Federal Court stated: the unconscionable conduct that arose was Zanok's 'promise that in return for a fee, the applicant would receive training and guaranteed employment in circumstances where Zanok knew or ought to have known that these jobseekers were temporary residents and anxious to find skilled employment to assist with their applications for permanent resident status'
- This conduct constituted more than just taking advantage of a superior bargaining position but 'involved an unconscientious exploitation of another's inability or diminished ability to conserve his or her own interests'

### SS21 & 22: In connection with goods or services

#### **S21 – Unconscionable conduct in connection with goods or services:**

##### **(1) A person 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);

Engage in conduct that is, in all circumstances, unconscionable.

##### **(2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:**

- (a) Institutes legal proceedings in relation to the supply or possible supply, or in

- relation to the acquisition or possible acquisition; or
- (b) Refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

**(3) For the purpose of determining whether a person has contravened subsection (1):**

- (a) The court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
- (b) The court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

**(4) It is the intention of the Parliament that:**

- (a) This section is not limited by the unwritten law relating to unconscionable conduct; and
- (b) This section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
- (c) In considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:
  - (i) The terms of the contract; and
  - (ii) and the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

**S22 – Matters the court may have regard to for the purposes of s21:**

**(1)** To determine whether a supplier has acted unconscionable with the supply of goods/services, the court may have regard to:

- (a) The relative strengths of the bargaining position of the supplier
- (b) Whether the customer was required to comply with conditions not reasonably necessary for the protection of interests of the supplier
- (c) Whether the customer was able to understand any documents
- (d) Whether any undue influence, pressure or unfair tactics were used
- (e) The amount and circumstances the customer could have acquired goods elsewhere
- (f) The extent to which the suppliers conduct towards the customer was consistent with the suppliers conduct in similar circumstances.
- (g) The requirements of any applicable industry code
- (h) The requirements of any other industry code
- (i) The extent to which the supplier unreasonably failed to disclose to the customer
  - (i) Any conduct that might affect interests of customer
  - (ii) Any risks from this intended conduct
- (j) If there is a contract between supplier and customer
  - (i) Extent supplier is willing to negotiate terms and conditions
  - (ii) The terms and conditions
  - (iii) The conduct of the supplier and customer in complying with the terms an conditions

- (k) Whether the supplier has a contractual right to vary unilaterally the terms and conditions
- (l) The extent to which the supplier acted in good faith.

**Note: s22(2) has same factors listed for then the customer/acquirer has contravened s21.**