

## 2. UNCONSCIENTIOUS DEALING

### Undue Influence v Unconscionable Conduct

- What is the distinction? Undue influence focuses on an absence of consent- it focuses on the weaker party. UD focuses on the stronger party. The stronger party has exploited a recognised vulnerability
- Equity acknowledges real inequality – v - formal equality in law
- Special disability outlined:
- CBA v Amadio: 'the jurisdiction ...(extends) generally to circumstances in which (i) a party to a transaction was under a special disability (special disadvantage – arguable whether the same) in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them, and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or unconscientious that he procure or accept the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances existed an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable.'
  - Reverse onus once P has shown the transaction was the product of disadvantage / inequality.
- 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 unconscientiously taking advantage of that position.
- Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party (willingly, informed voluntary consent?) ... 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.
- So, UI provides relief because of the impaired volition (will) of the party
- But exploitation of a special disadvantage of a party provides relief because of the impaired judgment of the party when he entered the transaction

### Essential elements:

- A. special disability (of weaker party)
  - B. knew or likely to have known of disability (active or constructive knowledge by stronger party)
  - C. using disability unconscionably (stronger party unconscionably takes advantage of disability)
- A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power.
    - Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiation to forfeit their disadvantages, or neglect their own interests.

- Unconscientious exploitation of another's inability or diminished ability to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence.
  - Taking advantage of superiority = not the same as exploiting / taking advantage of special disability.
- The underlying equitable principle may be invoked 'whenever one party by reason of some condition or circumstance' is placed at a special disadvantage of which unfair and unconscientious advantage is taken by the other party: **Commercial Bank of Australia v Amadio** (462).
- The special disadvantage will be sufficiently evident to the other party if the other party knows facts which would raise the possibility of the special disadvantage in the mind of a reasonable person: **Commercial Bank of Australia v Amadio** (467 468, 479).
- Where such circumstances are shown to exist, the onus is on the other party to establish that the transaction was fair, just and reasonable: **Commercial Bank of Australia v Amadio** (474).- there is a defence to it

1. Did one party take advantage of a bargaining position that was superior to another party's?\*
- and
2. If 'Yes': did the taking of that advantage, in all the circumstances of the transaction, constitute an unconscientious exploitation of the other party's diminished ability to preserve their own interests?
  - Was the weaker bargaining position of the other party the result of a diminished ability to conserve their own interests?
    - If 'No', there is no culpable (ie unconscientious) exploitation of the weaker party.
    - If 'Yes': did the stronger party to the transaction know, or ought the stronger party have known, that the party in the weaker bargaining position was weaker because they suffered from a diminished ability to conserve their own interests?
      - If 'No', there was no unconscientious exploitation of the weaker party.
      - If 'Yes', and the stronger party continued to the conclusion of the transaction, they have unconscientiously exploited the weaker party, and the weaker party will be entitled to have the transaction set aside.

## 1. SPECIAL DISABILITY

- The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-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.
  - Blomley v Ryan (1956) 99 CLR 362 Fullagar J (at 405)
- Presence of characteristics relevant but not sufficient
- Must amount to a disadvantage relative to the other party

- The special disadvantage need not have been created by the party taking the benefit of the transaction: *Louth v Diprose* (629).
- The special disadvantage alleged must be one 'which seriously affects the ability of the innocent party to make a judgment as to his own best interests'; mere difference in bargaining power is insufficient: *Commercial Bank of Australia v Amadio* (462). The 'essence of such weakness is that the party is unable to judge for himself'. It should affect their capacity, in that it is an impairment.

## Commercial Bank of Australia v Amadio

- elderly parents
- company was heavily, and chronically indebted (despite son assuring them otherwise)
- son sought loan, but bank wouldn't allow without guarantee. He convinced parents for bank to put charge on their property for their loan...
- in exchange for an unlimited (in amount and duration) guarantee as to both the present and future indebtedness of the company, to greatly, but only benefit to company = temporarily, increase the company's overdraft limit.
- **What is the disability: information imbalance- they didn't know what the bank knew, dependency on the son as they couldn't speak English and communicate independently with the bank.**
  - **The bank knew the disability (actual or constructive)**
  - **They went ahead with it- that was exploiting it. Maybe wouldn't have been exploitative had independent advice been given**

## The Decision

- The inevitable conclusion is that the plaintiff was guilty of unconscionable conduct by entering into the transaction without disclosing such facts as may have enabled the plaintiffs to form a judgment for themselves and without ensuring that they obtained independent advice.
  - Bank didn't explain – came over to house in a social way – didn't discharge duty of providing full advice.
- The circumstances required that the plaintiffs be acquainted with the true financial position of the company and thereby enabled to make an informed decision ... [the defendant's representative] was obliged either to ensure that the plaintiffs understood what they were doing or to advise them to seek independent advice and allow them the opportunity to do so.
- Deane J: The result of the combination of the plaintiff's age, their limited grasp of written English, the circumstances in which the defendant 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 ... they lacked assistance and advice were plainly necessary if there were to be any reasonable degree of equality between themselves and the defendant.

## Gibbs CJ

- The agreement between the defendant and the debtor company that upon the plaintiff's giving the guarantee to the defendant for the company's debts, the company's overdraft limit would be raised instantaneously and then reduced three weeks later (this was not disclosed to the plaintiffs); and
- The defendant and debtor company were regularly engaged in 'selective dishonour' of the debtor company's cheques so as to create a facade of prosperity for the company despite its

actual insolvency which the defendant ought to have known or suspected would have deceived the plaintiffs (this, also, was not disclosed to the plaintiffs)

Mason J:

- special disadvantage created by 'reliance on' and 'confidence in' their son
- But for this confidence they would not have provided guarantees
- 'The inevitable conclusion is that the plaintiff was guilty of unconscionable conduct by entering into the transaction without disclosing such facts as may have enabled the plaintiffs to form a judgment for themselves and without ensuring that they obtained independent advice' (at 468)

Wilson J:

- 'The circumstances required that the plaintiffs be acquainted with the true financial position of the company and thereby enabled to make an informed decision ... [the defendant's representative] was obliged either to ensure that the plaintiffs understood what they were doing or to advise them to seek independent advice and allow them the opportunity to do so' (at 469)
- Doesn't extend to advising whether they should enter into the transaction – just the consequences if they do.

Deane J:

- 'The result of the combination of the plaintiff's age, their limited grasp of written English, the circumstances in which the defendants presented the documents to them for their signature, and, most importantly, their lack of knowledge and understanding of the contents of the document was that ... assistance and advice were plainly necessary if there were to be any reasonable degree of equality between themselves and the defendant' (at 477)
- Not just inequality
  - Exploited disadvantage
- Compare HoL in *Lloyds Bank v Bundy* [1975] QB 326 per Lord Denning MR
- Similarly rejected in *National Westminster Bank plc v Morgan* [1985] 1 AC 686 in England

## Louth v Diprose

- **What's the special disability? Diprose was infatuated with Louth.**
- male solicitor infatuated with the female defendant who by contrast was 'quite indifferent' to him
- atmosphere of crisis (wife faced eviction, so husband provided money for the house. She also contemplated suicide)
- Trial: King CJ: ordered transfer of title to the plaintiff (husband had made gift to the wife)
- Appeal to Full Court SASC dismissed
- The HCA (6:1) dismissed the appeal. It held that the purported gift of money to the plaintiff had to be set aside because the plaintiff was in a position of special disadvantage in relation to her, and the defendant had exploited the plaintiff's emotional dependence on her.
- HCA: emotional attachment constituted special disadvantage in that it impaired his judgment

Deane J:

- 'special disability' was created by absence of equality – but inequality not in itself a special disadvantage

Toohey J (diss.):

- 'It was the respondent [Diprose] who continued to seek her out. She did not mislead him in regard to her position; she did not hold out any false hopes to him. They were both adults; each had been married before (the respondent twice) and the respondent was a practicing solicitor who must have appreciated fully the consequences that the law would ordinarily attach to the gifts he made to the appellant, including the money involved in the purchase of the Tranmere house. It was the respondent's idea to buy the house, not the appellant's' (at 651)
- 'it is apparent from ... the evidence generally, he bought the house for her in the clear realisation that she would never marry him ... the respondent did not commit himself by one impulsive and hasty act, he had plenty of time to consider what he was doing and what he did took place over a month' (at 653)

Deane J:

- 'the special disability arose not merely from the respondent's infatuation. It extended to the extraordinary vulnerability of the respondent in the false 'atmosphere of crisis' in which he believed that the woman with whom he was 'completely in love' and upon whom he was emotionally dependent was facing eviction from her home and suicide unless he provided the money for the purchase of the house. The appellant was aware of that special disability. Indeed to a significant extent she had deliberately created it. She manipulated it to her advantage to influence the respondent to make the gift of the money to purchase the house' (at 638)
1. a relationship can be a source of special disadvantage – not just emotional dependence but manipulation of the situation
  2. difficult to assess when the relationship is a source of special disadvantage – what is 'normal' (what is the baseline)?

## 2. Knowledge

- Actual or constructive knowledge
- Amadio – constructive knowledge
- Louth – actual knowledge
- Blomley v Ryan
  - Elderly sheep farmer sold property at significant undervalue to grazier through store manager as agent
  - Ryan – drank heavily, drank prior to and during negotiations of sale
  - Held: actual knowledge found (son knew of drunkenness and took advantage of it).
  - Drunkenness caused disadvantage (not incapacity)
  - Highly improvident sale was evidence of exploitation

## 3. Unconscionable exploitation

- Exploitation requires taking advantage
- Unfavourable does not mean inherently unfair
- Basis for setting aside: obtaining consent
- CBA v Amadio – guarantee
- Louth v Diprose - \$58,000 gift
- Blomley v Ryan – landholding sold at price 'strikingly disproportionate' to market value

## DEFENCES

- A. Was there a special disadvantage?
  - May discount special disadvantage.
  - Louth v Diprose – infatuation as special disadvantage
- B. Did the stronger party have knowledge of the special disadvantage?
  - Actual or constructive knowledge
- C. Did the stronger party unconscionably exploit the special disadvantage?
  - Independent advice – depends on quality – eg Blomley v Ryan: same solicitor for purchaser and vendor
  - Improvidence itself not unconscionable (but my guide) – was there any benefit (was there anything in it for the guarantors)? Judged against total interest.
    - CBA v Amadio, Louth v Diprose: parties could not afford benefit transferred
  - Did they act unconscionably or was it just a commercial advantage?

## Remedies

- Avoidance (of the contract)
- Resist action for specific performance (if stronger party is seeking to enforce the contract specifically)
- Rescission (of the contract)
  
- Ultimately returning to the position before the transaction.

## Statutory Unconscionability

- Australia Consumer Law
- S 20: ‘a person must not in trade or commerce engage in conduct that is unconscionable within the meaning of the unwritten law (CL) from time to time.’
- Refer to Amadio: special disability; knowledge; taking advantage
  
- ACCC v Berbatis
  - Shop lease increased. D knew Ps needed money for sick daughter.
    - Court found = just commercial.
  - Gleeson CJ: ‘A person is not in a position of relevant disadvantage, constitutional, situational or otherwise, simply because of inequality of bargaining power. Many perhaps even most contracts are made between parties of unequal bargaining power, and good conscience does not require parties to a contractual negotiation to forfeit their advantages or neglect their own interests.’
  
- Compare: ACCC v Sampton Holdings
  - FFC: The disadvantage under which Rinaldi and Executive Bloodstock laboured had arisen from a combination of considered commercial judgment (the decision to borrow heavily in order to purchase the business) and Mr Robert’s oversight in neglecting to exercise the option in good time. These factors did not impair the Rinaldi’s ability to make a decision about the best course of action in the circumstances. At least in the case of an experienced business person, there must, in our opinion, be something more than commercial vulnerability (however extreme) to elevate disadvantage into special disadvantage.