

# THE EQUITABLE DOCTRINE OF UNCONSCIONABLE DEALING AND THE ELDERLY IN AUSTRALIA

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*As the overall population ages, it will be necessary to reappraise the effectiveness of legal doctrines and legislation from the perspective of the elderly claimant. The purpose of this article is to evaluate the current operation of the equitable doctrine of unconscionable dealing by a review of recent cases involving elders decided in the High Court, the Federal Court and, in particular, the State Supreme Courts. It will be argued that despite the attempts of the High Court to read the criteria for unconscionable dealing broadly, lower courts have tended overall to interpret and apply the criteria strictly. Therefore, there has been an ongoing tension between laissez-faire attitudes and equity's role to protect vulnerable persons with the result that it is questionable whether the doctrine has been used consistently and adequately to protect elders who suffer from a special disadvantage.*

## I INTRODUCTION

In Australia,<sup>1</sup> as in other Western countries,<sup>2</sup> there is strong evidence that the population is living longer, with the result that the overall population is ageing. One consequence of this demographic trend has been the realisation that aspects

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<sup>1</sup> In 2001, 12.4 per cent of the population was aged 65 years or older and 3 per cent were 80 years or older. It is estimated that by the middle of the 21st century, 26.1 per cent of the population will be over 65 and 9.4 per cent of the population will be over 80 years: The Australian Bureau of Statistics ('ABS'), *Australian Social Trends 2002*, ABS Catalogue No 4102.0 (2000) 2. Women outlive men, particularly in the age group 85 years and older. In the 12 month period to June 2001, there were more than twice as many women than men in that age group: ABS, *Population by Age and Sex, Australian States and Territories*, ABS Catalogue No 3201.0 (2001) 7. The age of 65 years has been used for defining elders. Generally, this has been the age of retirement and when people are able to apply for the aged pension: see Juliet Cummins, 'Guaranteeing Someone Else's Debts: Submission to the NSW Law Reform Commission's Issue Paper 17' (2001) 1, fn 1. However, this serves as an indicator only. There are cases (which will be discussed or referred to) where the person entered into the transaction before reaching 65, but challenged the transaction in their elder years: for example, *Tarzia v National Australia Bank Ltd* [1996] ANZ ConvR 379; *State Bank of New South Wales v Layoun* (2001) NSW ConvR ¶55-984 or challenged the transaction when close to pensionable age: see *National Australia Bank Ltd v Nobile* (1988) 100 ALR 227; *Australia and New Zealand Banking Group Ltd v Petrik* [1996] 2 VR 638. Sometimes the case has been brought after the death of the older person: see the interesting facts in *Adenan v Buise* [1984] WAR 61.

<sup>2</sup> For a consideration of similar social trends in the United Kingdom see the results of the Office for National Statistics, *Census 2001* (2002) National Statistics Online - Census 2001 <[http://www.statistics.gov.uk/census2001/demographic\\_uk.asp](http://www.statistics.gov.uk/census2001/demographic_uk.asp)>; and for the United States see Department of Health and Human Services, Administration on Aging, *The National Elder Abuse Incidence Study* (1998) <<http://www.aoa.dhhs.gov/abuse/report/default/htm>>.

of the legal system which directly impact upon elders need to be reviewed. Accordingly, there has been a growing interest in the analysis of legal doctrines and legislation which elders may wish to utilise to set aside a variety of transactions.<sup>3</sup> In this regard, the doctrines of undue influence *inter vivos*<sup>4</sup> and testamentary undue influence<sup>5</sup> have received some important academic attention. While the doctrine of undue influence *inter vivos* is important for setting aside gifts, transfers or contracts, it is by no means the only avenue available to elders. In Australia, unconscionable dealing<sup>6</sup> is regarded as a key equitable doctrine.<sup>7</sup> Indeed, it has been suggested by some commentators that courts in Australia have embraced the doctrine of unconscionable dealing so strongly that undue influence *inter vivos* has become less relevant in this jurisdiction.<sup>8</sup> However, notwithstanding the importance of unconscionable dealing and several seminal cases where elders were involved,<sup>9</sup> commentators have generally disregarded its

<sup>3</sup> For a historical perspective on age and the law see L Bonfield, 'Was there a 'third age' in the preindustrial English past? some evidence from the law' in J Eckelaar and D Pearl (eds), *An Aging World: Dilemmas and Challenges for Law and Social Policy* (1989) 37. For the overall Australian context see Cummins, above n 1; Juliet Cummins, 'Relationship debt and the aged: welfare vs commerce in the law of guarantees' (2002) 27 *Alternative Law Journal* 63.

<sup>4</sup> This is particularly the case in the United States; see Mary Quinn, 'Undoing Undue Influence' (2000) 24 (2) *Generations* 65. In relation to Australia see Cummins, above nn 1, 3.

<sup>5</sup> Some recent and interesting research in the United States include: Lawrence Frolik, 'The Biological Roots of the Undue Influence Doctrine: What's Love got to do with it?' (1996) 57 *University of Pittsburgh Law Review* 841; Lawrence Frolik, 'The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence: Are We Protecting Older Testators or Overriding Individual Preferences?' (2001) 24 *International Journal of Law and Psychiatry* 253.

<sup>6</sup> In this article, reference to 'unconscionable dealing' will be made in accordance with the nomenclature of the High Court in *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474 (Deane J); *Bridgewater v Leahy* (1998) 194 CLR 457, 477 (Gaudron, Gummow and Kirby JJ). However, the doctrine also has been labelled 'unconscionable conduct': *Bridgewater v Leahy* (1998) 194 CLR 457, 477 (Gaudron, Gummow and Kirby JJ); 'unconscientious dealing': Anthony J Duggan, 'Unconscientious Dealing' in Patrick Parkinson (ed), *The Principles of Equity* (2nd ed, 2003) [501]; 'catching bargains': RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, 2002) ch 16; 'the doctrine of unconscionability': G Dal Pont and D Chalmers, *Equity and Trusts in Australia and New Zealand* (2nd ed, 2000) ch 9; 'unconscientious bargains': M Cope, *Duress, Undue Influence and Unconscientious Bargains* (1985) ch 7.

<sup>7</sup> See generally Cummins, above nn 1, 3.

<sup>8</sup> See Sir Anthony Mason, 'The Place of Equity and Equitable Doctrines in the Contemporary Common Law World - An Australian Perspective' (1994) 110 *Law Quarterly Review* 238, 249; Paul Finn, 'Equitable Doctrine and Discretion in Remedies' in WR Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo, *Restitution: Past, Present and Future* (1998) 251, 257. However, it would be premature to dismiss the importance of undue influence *inter vivos* in the light of the fact that Australian case law shows that elders have pleaded undue influence *inter vivos* either in alternative to unconscionable dealing or exclusively. See, eg, *Tessman v Costello* [1987] 1 Qd R 283; *Briggs v Scott* (1990) 14 Fam LR 31; *Scott v Briggs* (1991) 14 Fam LR 661; *Baburin v Baburin* [1990] 2 Qd R 101; *Baburin v Baburin (No 2)* [1991] 2 Qd R 240; *Ryan v Tooth* (Unreported, Supreme Court of New South Wales, Bryson J, 24 September 1993); *Stivactas v Michaletos* [No 2] (1993) Aust Contract Reports ¶90-031; *Le Boursicot v Coulthard* (1997) Aust Contract Reports ¶90-082; *Archer v Archer* [2000] NSWCA 314 (Unreported, Handley, Beazley, Fitzgerald JJA, 7 November 2000); *Mitchell v 700 Young Street Pty Ltd* [2001] VSC 116 (Unreported, Cummins J, 23 April 2001); *Wilby v St George Bank* (2001) 80 SASR 404; *Natgrass v Natgrass* [1999] WASC 77 (Unreported, Commissioner Buss QC, 25 June 1999).

<sup>9</sup> *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Bridgewater v Leahy* (1998) 194 CLR 457.

relevance for the elderly,<sup>10</sup> including healthy and mentally alert elders.<sup>11</sup> Therefore, it is timely to review the doctrine of unconscionable dealing from the perspective of the elderly.

The article is divided into four parts. Part II outlines the essential elements of unconscionable dealing, briefly examines the historical background of the doctrine, including its historical application to elders, and highlights the kinds of situations where the doctrine has been raised in recent times. In Part III, bilateral relationships involving gifts, transfers and sales will be considered. It will be argued that elders are required to show that they suffer from a special disadvantage and the other party's knowledge of that disadvantage. Age itself is not adequate proof of the plaintiff's special disadvantage; and even coupled with other disabling conditions, it may not be sufficient to satisfy the first criterion for unconscionable dealing. However, it appears that if the court is satisfied that special disadvantage has been established, it is likely that it will assume that knowing advantage-taking has been proved. Part IV considers the situation where elders act as guarantors and/or provide security for the liability of relatives, particularly adult children and caregivers. Again, it will be shown that some elders have not been able to set aside the transaction despite their considerable age. Moreover, it will be argued that sometimes it can be difficult for elders to prove knowingly taking advantage. An outcome which is favourable to the elder will often be dependent upon whether the court considers that the financial institution was obliged to take steps to ensure that the elder understood the nature and effect of the transaction. In Part V, some concluding remarks are made, including possible trends in the development of unconscionable dealing in the future.

In order to understand the modern relevance of the doctrine and contemporary trends, the article will review recent cases decided in the High Court, the Federal Court and, in particular, the State Supreme Courts because these lower courts initially and predominantly deal with this kind of claim. It must be emphasised that the focus of the article is the meaning, application and effectiveness of the doctrine of unconscionable dealing in cases involving elderly claimants rather than simply how the doctrine applies to guarantees. Unconscionable dealing has been pleaded in situations which have not involved the elder acting as a guarantor and this article will examine such situations. Nevertheless, elders have pleaded the

<sup>10</sup> The doctrine of unconscionable dealing has received considerable academic attention, see, eg, M Ellinghaus, 'In Defence of Unconscionability' (1969) 78 *Yale Law Journal* 757; Nyuk Yin Chin, 'Unconscionable Dealings in Commerce' [1987] *Commercial Law Quarterly* 19; Mark Sneddon, 'Unconscionability in Australian Law: Development and Policy Issues' (1992) 14 *Loyola Los Angeles International and Comparative Law Journal* 545; Tina Cockburn, 'The Boundaries of Unconscionability and Equitable Intervention: *Bridgewater v Leahy* in the High Court' (1999) 8 *Australian Property Law Journal* 23. A few exceptions where aged adults have been considered or touched upon in the context of unconscionable dealing and/or family arrangements are: Mindy Chen-Wishart, *Unconscionable Bargains* (1989); Michael Trebilcock and Steven Elliot, 'The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (2001) 45; Cummins, above nn 1, 3.

<sup>11</sup> Indeed, it has been shown that even healthy elders may fall prey to financial abuse generally and when making gifts, entering into contracts or acting as guarantors: see, eg, Carolyn Dessin, 'Financial Abuse of the Elderly' (2000) 36 *Idaho Law Review* 203; R Smith, 'Fraud and Financial Abuse of Older Persons' [2000] 11 *Current Issues in Criminal Justice* 273; Office of the Public Advocate (WA), *Safeguarding the Financial Interests of Vulnerable Seniors* (1999).

doctrine in a large number of third party guarantee cases and the issue will be treated extensively in Part IV. The article does not deal with other doctrines (such as undue influence) or legislation based on legislative notions of unconscionable dealing.<sup>12</sup> The equitable doctrine of unconscionable dealing has been pleaded by elders as a separate or additional basis for setting aside a transaction or defending a claim for specific performance in many recent cases. In the light of both the complexity and volume of these cases, the nature, application, and effectiveness of the doctrine ought to be considered and evaluated in its own right.

## II UNCONSCIONABLE DEALING - AN OVERVIEW

It is necessary to set out the criteria for the doctrine, to describe briefly its historical antecedents with special reference to cases concerned with elders and sketch the kinds of situations where the doctrine has been pleaded in recent decades.

### ***A The Elements of Unconscionable Dealing***

There will be unconscionable dealing when a plaintiff is able to show that he or she suffered a special disadvantage of which the defendant was aware; and that it would be unconscionable for the defendant to take the benefit of the transaction.<sup>13</sup> There are two major criteria for the equitable doctrine of unconscionable dealing: (1) the weaker party's special disadvantage; and (2) the stronger party's knowingly taking advantage of that special disadvantage.

#### **1 Special Disadvantage or Disability**

Traditionally, the cornerstone of unconscionable dealing has been the weaker party's special disadvantage. The disadvantage must be special in the sense that it is insufficient to show that there was a difference in the bargaining position of the parties.<sup>14</sup> Moreover, courts have not simply set aside an imprudent transaction or onerous obligation.<sup>15</sup> The disadvantage must be one which 'seriously affects the ability of the innocent party to make a judgment as to his own best interests'.<sup>16</sup> It is impossible to outline exhaustively the kinds of disabilities which may establish special disadvantage, but they may include:

... 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.<sup>17</sup>

<sup>12</sup> See, eg, *Contracts Review Act 1980* (NSW) s 9; *Credit Act 1984* (Vic) s 147(2); *Trade Practices Act 1974* (Cth) pt IVA.

<sup>13</sup> Meagher, Heydon and Leeming, above n 6, [16-010]; Duggan, above n 6, [501].

<sup>14</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J); cf Lord Denning MR in *Lloyds Bank Ltd v Bundy* [1975] QB 326.

<sup>15</sup> See, eg, *Wilton v Farnworth* (1948) 76 CLR 646, 649 (Latham CJ).

<sup>16</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J).

<sup>17</sup> *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J). However the kinds of factors which will prove unconscionable dealing will vary according to the circumstances of the case and the era in which the doctrine was pleaded. In *Baker v Monk* (1864) 46 ER 968, 964, the Court considered the gender and marital status of the complainant. It is unlikely that these factors would be considered important today.

In *Commercial Bank of Australia Ltd v Amadio*,<sup>18</sup> a majority of the High Court appeared to add an additional possible disadvantage - reliance on someone who actively misleads in relation to matters which are crucial in the transaction. In that case, elderly Italian parents relied on their son's positive representations about the position of his company and failed to make their own enquiries about the financial status of the company.<sup>19</sup>

As the case law has shown, the party's special disadvantage may not only arise from one single weakness, but from the combination of several factors which may have led the party to fail to make a judgment in his or her best interests.<sup>20</sup> For example, in *Amadio* the plaintiffs sought to set aside a guarantee on the basis of a disability profile comprising their age, limited knowledge of English, lack of business experience, their misunderstanding of the true state of their son's business and a lack of understanding of the documentation which they signed.<sup>21</sup>

However, in another case involving an elder, the High Court appeared to lessen the importance of the criterion. In *Bridgewater v Leahy*,<sup>22</sup> the facts, briefly stated, were that in 1985, Bill York, aged 81 years, made a will under which he left his home, car and cash to his widow and his residuary estate to his four daughters subject to an option in favour of his nephew, Neil York, to purchase certain land for \$200,000. This price was considerably undervalued. In 1988, one year before his death, Bill contracted to sell the land to the nephew and the nephew's wife for \$696,811 and simultaneously signed a deed of forgiveness for \$546,811. The nephew paid the remaining \$150,000 some time later and the sale was completed. After Bill York's death, both the will and the 1988 transaction were contested by the widow and the daughters. The 1988 transaction was challenged, inter alia, on the basis of unconscionable dealing. Both the trial judge and the Queensland Court of Appeal held that the transaction had not been procured by unconscionable dealing. In particular, neither the trial judge nor a majority of the Court of Appeal found that there was evidence of a special disadvantage because Bill York intended and understood what he was doing.<sup>23</sup> A minority of the High Court, Gleeson CJ and Callinan J, agreed that there was 'ample evidence, to the effect that Bill York was not under any special disability, in the sense in which that expression was explained in *Amadio*'.<sup>24</sup> They held that Bill York understood the value of the land in question and the effect of the transaction on himself and his family. He demonstrated a firm intention that Neil York, who had worked on the farm for many years, ought to obtain his pastoral interests.<sup>25</sup> In contrast, a majority of the High Court, Gaudron, Gummow and Kirby JJ, held that Bill

<sup>18</sup> (1983) 151 CLR 447 (*Amadio*).

<sup>19</sup> *Ibid* 464-6 (Mason J); 476 (Deane J).

<sup>20</sup> *Ibid*; Dal Pont and Chalmers, above n 6, 261-2. Therefore, in *Blomley v Ryan* (1954) 99 CLR 362, where the defendant raised unconscionable dealing as a defence to a claim for specific performance of a contract, a majority of the Court considered that the age, education and alcoholism of the defendant amounted to a special disadvantage.

<sup>21</sup> (1983) 151 CLR 447, 477 (Deane J).

<sup>22</sup> (1998) 194 CLR 457 (*Bridgewater*).

<sup>23</sup> *Ibid* 466, 471-2.

<sup>24</sup> *Ibid* 471.

<sup>25</sup> *Ibid*.

York's emotional dependency upon the nephew placed him in a position of disadvantage.<sup>26</sup> The fact that he had demonstrated a strong intention to preserve the pastoral holdings and to transfer property to Neil was no answer to whether there had been an unconscionable dealing. Indeed they pointed out that Neil York had initiated the sale undervalue.<sup>27</sup>

The decision of the majority of the High Court in *Bridgewater* has been subject to considerable academic criticism.<sup>28</sup> Commentators have pointed out that the approach of the majority of the Court either undermined the need for proof of a special disadvantage or, at the very least, broadened the kinds of situations which would constitute a special disadvantage.<sup>29</sup> For example, Duggan has described the case as 'borderline'<sup>30</sup> commenting that:

Unconscientious dealing depends on a finding of disadvantage, but the majority judgment is not clear about what A's [Bill York's] disadvantage was. The judgment could be read as suggesting that A was disadvantaged because of his relationship with B [Neil York]. The trouble is that this sounds like undue influence and the courts below had specifically rejected allegations of undue influence on B's part. Alternatively, the judgment could be read as inferring A's disadvantage from the 'grossly improvident' nature of the transaction. If so, the case is an unusual one. Courts are generally reluctant to draw such inferences in the absence of additional supporting evidence.<sup>31</sup>

An alternative interpretation of the case could be that the Court considered that Bill York's special disadvantage was not simply his age and frailty, but the difficult circumstances which he faced. For this elder, the only way that he could achieve the goal of preserving the economic viability of the pastoral holdings was to transfer significant parts of the property to his nephew. Therefore, an important issue is how courts have dealt with the special disadvantage criterion in cases involving elders after *Bridgewater*.

## **2 Knowledge and Unconscientious Exploitation**

If the court is satisfied that a special disadvantage has been proved, it is then necessary to show that the stronger party knew of the disadvantage and unconscientiously took advantage of this to obtain a beneficial bargain or transaction.<sup>32</sup> In this regard, three issues have warranted special consideration.

<sup>26</sup> Ibid 492-3.

<sup>27</sup> Ibid 493.

<sup>28</sup> See, eg, Anne Finlay, 'Can We See the Chancellor's Footprint?: *Bridgewater v Leahy*' (1999) 14 *Journal of Contract Law* 265; Joachim Dietrich, '*Bridgewater v Leahy*: unconscionability and the flexibility of equitable remedies in the High Court' (1999) 73 *Australian Law Journal* 112; Gino Dal Pont, 'The Varying Shades of "Unconscionable" Conduct - Same Term, Different Meaning' (2000) 19 *Australian Bar Review* 135, 144-6; Cockburn, above n 10; Ross McKeand, 'Economic Duress - Wearing the Clothes of Unconscionable Conduct' (2001) 17 *Journal of Contract Law* 1, 9-10.

<sup>29</sup> See, eg, Keand, above n 28, 9-10.

<sup>30</sup> Duggan, above n 6, [505].

<sup>31</sup> Ibid.

<sup>32</sup> See Meagher, Heydon and Leeming, above n 6, [16-010]; Duggan, above n 6, [513].

*(a) Knowledge*

It is crucial to show that the stronger party knew of the disadvantage, otherwise it would not be possible to characterise the conduct of the stronger party as equitable fraud, exploitation or victimisation.<sup>33</sup> Therefore, the weaker party will have to show that the stronger party knew or ought to have known of the special disadvantage. This is an objective test which was stated and applied forcefully by a majority of the High Court in *Amadio*. In that case, Mason J (as he then was) pointed out that it was unnecessary for the stronger party to have actual notice of the disadvantage. He observed that:

... 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.<sup>34</sup>

Therefore, the weaker party must show that for a reasonable person in the stronger person's position, there was a possibility that the weaker party's entry into the transaction was compromised by the weaker person's disadvantage, resulting in an inability to make a judgment in his or her best interests.<sup>35</sup>

It has been suggested that *Amadio* extends the knowledge requirement to willful ignorance or willfully shutting one's eyes to the obvious, but no further.<sup>36</sup> Otherwise, it is argued that the adoption of constructive notice relaxes the knowledge requirement and effectively dispenses with it altogether.<sup>37</sup> However, it is equally arguable that the majority of the Court in *Amadio* adopted a broad test in order to ensure that well-advised parties who suspected (even slightly) that a person may lack sophisticated language skills or critical information could not raise actual knowledge of disadvantage as a means of protecting the transaction. In any event, as will be shown in relation to guarantees,<sup>38</sup> a narrow or broad application of the knowledge requirement can dramatically affect the accessibility of the doctrine by guarantors. In *Amadio* itself, a minority of the Court held that only proof of actual knowledge would be sufficient.<sup>39</sup>

*(b) Exploitation or Unconscionable Acceptance of a Benefit*

Exploitative conduct will not only include an active manipulation or misuse<sup>40</sup> of the weaker party's disadvantage, but also a passive acceptance of a benefit.<sup>41</sup> This

<sup>33</sup> See *Hart v O'Connor* [1985] AC 1000, 1028.

<sup>34</sup> (1983) 151 CLR 447, 467.

<sup>35</sup> Dal Pont and Chalmers, above n 6, 269.

<sup>36</sup> Duggan, above n 6, [513].

<sup>37</sup> *Ibid*; see also P D Finn, 'Equity and Contract' in P D Finn (ed) *Essays in Contract* (1987) 104, 141 and the comments of DeBelle and Wicks JJ in *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1, 115.

<sup>38</sup> See Part IV below.

<sup>39</sup> (1983) 151 CLR 447, 459-60 (Gibbs CJ); 489-90 (Dawson J).

<sup>40</sup> Chen-Wishart, above n 10, 71-9 lists active victimisation as including creating and exacerbating the disability, fraud, creating a misapprehension, pressure, dissuading the person from obtaining advice and the use of influential intermediaries.

<sup>41</sup> See *Hart v O'Connor* [1985] AC 1000, 1024; Chen-Wishart, above n 10, 80-2.

was emphasised in the High Court decision in *Bridgewater*<sup>42</sup> where the majority found that even if there had been no evidence that the stronger party actively initiated a transaction entitling the stronger party to purchase property for nearly \$550,000 less than the market value (and it was clear that a majority of the High Court considered such evidence did exist in the instant case):<sup>43</sup>

The equity to set aside the deed may be enlivened not only by the active pursuit of the benefit it conferred but by the passive acceptance of that benefit.<sup>44</sup>

However, the Court did not indicate whether passive acceptance of a benefit will more easily constitute exploitative conduct when the donor, transferor or guarantor is elderly and demonstrates a naïve willingness to give assets to or security for the liabilities of friends or caregivers.

### (c) *The Stronger Party's Conduct*

The High Court has stressed that the conduct of the stronger party is central to a determination on whether there has been unconscionable dealing. The kind of conduct which will be scrutinised will depend on the circumstances of the case and the nature of the transaction subject to dispute. For example, a court may consider whether: the stronger party actively enhanced the disadvantage;<sup>45</sup> the stronger party made a bona fide attempt to explain the transaction to the weaker party;<sup>46</sup> the weaker party was encouraged or discouraged from seeking independent advice;<sup>47</sup> or the stronger party actively manipulated the emotional dependence of the weaker party.<sup>48</sup>

The High Court has compared and contrasted unconscionable dealing with undue influence *inter vivos*, highlighting important characteristics of both doctrines. In *Amadio*,<sup>49</sup> Deane J pointed out that:

The two doctrines are ... distinct. Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party ... 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.<sup>50</sup>

<sup>42</sup> (1998) 194 CLR 457.

<sup>43</sup> *Ibid* 493 (Gaudron, Gummow and Kirby JJ).

<sup>44</sup> *Ibid*.

<sup>45</sup> For example, providing alcohol to an alcoholic: *Blomley v Ryan* (1956) 99 CLR 362.

<sup>46</sup> *Wilton v Farnworth* (1948) 76 CLR 646.

<sup>47</sup> See, eg, *Westwill Pty Ltd v Heath* (1989) ASC ¶ 55-948.

<sup>48</sup> *Louth v Diprose* (1992) 175 CLR 621.

<sup>49</sup> (1983) 151 CLR 447.

<sup>50</sup> *Ibid* 474. See also Meagher, Heydon and Leeming, above n 6, [15-035]; Anthony J Duggan, 'Undue Influence' in Patrick Parkinson (ed), *The Principles of Equity* (2nd ed, 2003) [1132]; cf Chen-Wishart, above n 10, 91-2; Rick Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions Part II' (2000) 16 *Journal of Contract Law* 191, 221.



The distinction made in *Amadio* was further endorsed by the High Court in *Bridgewater*.<sup>51</sup> Gleeson CJ and Callinan J (dissenting) held that as Bill York had displayed an independent attitude and a capacity to make a free decision, there was no exploitative conduct and the claim based on unconscionable dealing ought to fail.<sup>52</sup> However, a majority of the Court held that the finding of the trial judge and the Court of Appeal, that Bill York had the capacity to enter into the transaction and that he knew what he was doing, did not deal with the allegation that his disadvantaged position had been exploited.<sup>53</sup> Unconscionable dealing was an equitable principle which could be used to set aside a gift even where a party was competent and understood what he was doing.<sup>54</sup> The question was not whether there was capacity to make the gift and understanding, but whether the stronger party had taken advantage of the weaker party's disadvantage. In this case, unconscionable conduct was established because Neil York had initiated the transfer of valuable property, knowing that Bill York wished to preserve his rural interests and relied on Neil York to do so. Although Bill York had exercised independent judgment, Neil York had taken advantage of the weaker party's emotional attachment and economic dependency on him.<sup>55</sup> Accordingly, while intellectual deficiencies may constitute a special disadvantage which can be exploited by a stronger party, the absence of such intellectual deficiencies will not answer a claim based on unconscionable dealing.

The treatment of exploitative conduct by the majority in *Bridgewater* has elicited strong criticism. For example Dal Pont has observed:

It is difficult to find any evidence of conduct on behalf of the nephew which comes close to meriting the description unconscionable. One wonders whether the majority would have decided any differently had the idea for the transaction come *solely* from the deceased. If so, what the court is saying is that sowing the seed in the mind of another person as to what he or she could do with his or her property can of itself amount to exploitation even though the course which the transferor chooses to adopt also serves his or her ends - a remarkable conclusion.<sup>56</sup>

The High Court assumed exploitation essentially on two matters: the fact that Neil York initiated the 1988 transaction and the fact that transaction itself was clearly undervalued. Inadequacy of consideration has been a sound basis for demonstrating both disadvantage and exploitation of that disadvantage.<sup>57</sup> However, it must be emphasised that unconscionable dealing is concerned with procedural rather than substantive unconscionability.<sup>58</sup> The Court may have unnecessarily blurred the distinction when it found exploitative conduct.

<sup>51</sup> (1998) 194 CLR 457, 478 (Gaudron, Gummow and Kirby JJ).

<sup>52</sup> *Ibid* 472.

<sup>53</sup> *Ibid* 491 (Gaudron, Gummow and Kirby JJ).

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid* 493.

<sup>56</sup> Dal Pont, above n 28, 145-6. Note also Dietrich, above n 28, 116-17.

<sup>57</sup> See, eg, *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J).

<sup>58</sup> Duggan, above n 6, [503].

### **3 Onus of Proof and Rebuttal of the Factual Presumption**

The weaker party bears the onus of proving that there was a special disadvantage of which the stronger party was aware and exploited.<sup>59</sup> If the weaker party satisfactorily establishes a prima facie case that the transaction was unconscionable, the burden of proof shifts to the stronger party to establish that the transaction was fair, just and reasonable.<sup>60</sup> In order to do so, the stronger party may seek to show that the transaction was not improvident or that there was adequate consideration.<sup>61</sup> Alternatively, the stronger party may argue that the weaker party was in fact independently advised, thereby trying to establish either that the weaker party's disadvantage was adequately redressed by independent advice or that there was no advantage taken of that party's disadvantage.<sup>62</sup> However, it has been pointed out that simply urging a person to take independent advice will not be sufficient to redress the special disadvantage, but may be adequate to show that there was no advantage-taking on the part of the stronger party, even where the advice was inadequate.<sup>63</sup>

## **B The Historical Origins of Unconscionable Dealing**

### **1 Historical Origins**

The historical origins of the doctrine of unconscionable conduct are dealt with elsewhere and it is not the purpose of this article to explore this in depth.<sup>64</sup> However, there are two historical aspects of the doctrine which deserve noting. First, the origin of unconscionable dealing was the traditional 'catching bargain' where the Court of Chancery protected heirs and family wealth from the fraudulent exploitation of weakness resulting in a clearly 'bad bargain'.<sup>65</sup> Catching bargains were developed initially to respond to the exploitation of youth (such as when a young man raised money for the payment of debts)<sup>66</sup> rather than old age. Later, there was a second limb under which it was open to plaintiffs other than heirs or expectants to claim that a bargain had been obtained by the defendant unconscientiously taking advantage of the plaintiff's special

<sup>59</sup> Meagher, Heydon and Leeming, above n 6, [16-010]; Duggan, above n 6, [514]; Dal Pont and Chalmers, above n 6, 258.

<sup>60</sup> *Louth v Diprose* (1992) 175 CLR 621, 632 (Brennan J).

<sup>61</sup> Duggan, above n 6, [514]. In *Amadio* (1983) 151 CLR 447, Deane J pointed out, at 475, that: 'In most cases where equity courts have granted relief against unconscionable dealing, there has been an inadequacy of consideration moving from the stronger party'.

<sup>62</sup> Duggan, above n 6, [514].

<sup>63</sup> *Ibid.*

<sup>64</sup> Cope, above n 6, [224]-[45]; L Sheridan, *Fraud in Equity: A Study in English and Irish Law* (1957) ch 8; J Barton, 'The Enforcement of Hard Bargains' (1987) 103 *Law Quarterly Review* 118. For a short but helpful discussion see W Cornish and G de N Clark, *Law and Society in England 1750-1950* (1989) 219.

<sup>65</sup> Cope, above n 6, [227].

<sup>66</sup> *Fry v Lane* (1888) 40 Ch D 312, 321 (Kay J). Important cases involving young men in financial difficulties included *Earl of Chesterfield v Janssen* (1751) 28 ER 82; *Miller v Cook* (1870) LR 10 Eq 641; *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484.

disadvantage.<sup>67</sup> This jurisdiction was exercised in England in the 19th century<sup>68</sup> and formed the basis for the modern doctrine of unconscionable dealing in Australia.<sup>69</sup>

Secondly, while the roots of unconscionable dealing can be found in the Court of Chancery in the 17th and 18th centuries, its application was curtailed by the rise of the classical theory of contract in the 19th century. One of the principal characteristics of classical contract theory was the assumption that the contract was the product of the autonomous will and intention of the parties. Consequently, obligations and liabilities between the parties were derived from the will of the parties.<sup>70</sup> Another related characteristic was the growing importance of the doctrine of caveat emptor which Atiyah has described as 'the apotheosis of nineteenth-century individualism.'<sup>71</sup> Each party to the contract was required to rely on his or her own judgment, and neither party owed any obligation or duty to provide information or to disabuse the other of any misapprehension. Moreover, it was not considered the function of courts to intervene in 'bad bargains.'<sup>72</sup> This laissez-faire attitude affected the implementation of the doctrine of unconscionable dealing, leading to its decline in England. Nevertheless, the doctrine continued to be pleaded in the 19th century and was carefully applied by a judiciary unwilling to intervene without clear evidence of fraud or wrongdoing.

## 2 Age and Unconscionable Dealing in the 19th century

The application of the doctrine to elders in the 19th century presaged trends in the 20th century. While the statements in modern cases may seek to more accurately describe (but not prescribe) the kinds of special disadvantage which may attract the doctrine of unconscionable dealing,<sup>73</sup> it was evident that courts in the 19th century were willing to determine that a variety of factors, including the age of the alleged weaker party, contributed to the overall special disadvantage of that

<sup>67</sup> Cope, above n 6, [225]; George W Keeton and LA Sheridan, *Equity* (2nd ed, 1976) 227. Sometimes the situation was interpreted as being analogous to that of an expectant heir where assets in probate were concerned: see *James v Kerr* (1889) 40 Ch D 449. It has been pointed out that such plaintiffs did not receive the same favourable treatment as heirs and expectants: Cope, above n 6, [225].

<sup>68</sup> It has been pointed out that the English cases are centred in the 19th century: Meagher, Heydon and Leeming, above n 6, [16-005]. However, there are some tentative signs that the doctrine may be undergoing a moderate renaissance in that country: *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 151 (Nourse LJ). For recent cases involving elders where unconscionable dealing has been pleaded as an alternative to undue influence note: *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221; *Hadjiconstantinou v Charalambous* (Unreported, Chancery Division, Rimer QC, 12 November 1993); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1999] *Lloyd's Law Reports (Professional Negligence)* 496.

<sup>69</sup> In early English cases, courts held that proof of the poverty and/or ignorance of a party would be sufficient evidence of a serious disadvantage in relation to another: Cope, above n 6, [259]. Note, eg, *Evans v Llewellyn* (1787) 29 ER 1191; *Fry v Lane* (1889) 40 Ch D 312, 322 (Kay J). However, it is clear that even during that period, the finding of unconscionable dealing was not limited to those important indicators.

<sup>70</sup> P Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 406-7.

<sup>71</sup> *Ibid* 464.

<sup>72</sup> *Ibid* 304.

<sup>73</sup> Note the classic statements about special disadvantage in *Blomley v Ryan* (1954) 99 CLR 362, 405 (Fullagar J), 415 (Kitto J).

party. Accordingly, there were a number of cases in the 19th century in which elders sought, sometimes successfully, to have a transaction set aside on the basis of unconscionable dealing. Elders or the elder's representative would raise unconscionable dealing in relation to gifts, sales to relatives at undervalue<sup>74</sup> or where an elder acted as a surety.<sup>75</sup> Sometimes elders also would convey, sell or transfer property in an attempt to secure alternative living arrangements or care<sup>76</sup> or to obtain payment of an annuity.<sup>77</sup>

Legal historians have drawn attention to the fact that in the 19th century old age did not confer any kind of special legal status on the elderly.<sup>78</sup> The aged were autonomous adults who were expected to act in their own interests. The lack of an automatic or prima facie special legal status for the elderly was important in relation to proof of a special disadvantage in the doctrine of unconscionable dealing. Unlike young heirs and expectants, elders were not given separate or special treatment. It was incumbent on the elder (or the elder's representative) to show that in the circumstances of the case, age represented a significant disadvantage. However, in general terms, old age in itself was not sufficient evidence of a special disadvantage because a person's ability to preserve his or her own interests was not automatically impaired with age.<sup>79</sup> For example, despite the fact that the elder in *Harrison v Guest*<sup>80</sup> was infirm and in a poor state of health, the Court assumed that he was able to protect his interests and had the mental capacity to do so.<sup>81</sup>

Therefore, it was imperative that the elder (or the elder's representative) showed that there was an inequality between the parties.<sup>82</sup> In some cases, old age was a factor considered significant by courts.<sup>83</sup> However, old age only became important if the weaker party suffered further infirmities which could be attributed to old age or an additional disabling condition which, together with old age, amounted to a significant weakness and inequality vis-à-vis the other party. In *Baker v Monk*,<sup>84</sup> not only was the age of the elder important, but also her gender, marital status, humble circumstances, slender education and lack of independent assistance.<sup>85</sup> Courts set aside transactions where, for example, the

<sup>74</sup> *Filmer v Gott* (1774) 2 ER 156; *Taylor v Obee* (1816) 146 ER 198; *Clarke v Malpas* (1862) 54 ER 1067; *Clarke v Malpas* (1862) 45 ER 1238; *Rees v De Bernardy* [1896] 2 Ch 437.

<sup>75</sup> *Owen and Gutch v Homan* (1853) 10 ER 752.

<sup>76</sup> *Harrison v Guest* (1855) 43 ER 1298; *Harrison v Guest* (1860) 11 ER 517.

<sup>77</sup> *Pope v Roots* (1774) 1 ER 628; *Mortimer v Caper* (1782) 28 ER 1051; *Longmate v Ledger* (1860) 66 ER 67; *Baker v Monk* (1864) 46 ER 968.

<sup>78</sup> For considerations of the lack of a special legal status for the elderly see Bonfield, above n 3, 37; Linda Whitton, 'Ageism: Paternalism and Prejudice' (1997) 46 *DePaul Law Review* 453, 458-9.

<sup>79</sup> Consider *Lewis v Pead* (1789) 30 ER 210.

<sup>80</sup> (1855) 43 ER 1298.

<sup>81</sup> *Ibid* 1303. The House of Lords also found that there was no fraud proved: *Harrison v Guest* (1860) 11 ER 517.

<sup>82</sup> For a statement of principle see *Wood v Abrey* (1818) 56 ER 558, 560 (Sir John Leach); *Fry v Lane* (1888) 40 Ch D 312, 321 (Kay J).

<sup>83</sup> See, eg, *Baker v Monk* (1864) 46 ER 968, 969-70 (Knight Bruce LJ); 970-1 (Turner LJ); *Rees v Bernardy* [1896] 2 Ch 437, 444 (Romer J); *Owen and Gutch v Homan* (1853) 10 ER 752, 767 (Lord Cranworth).

<sup>84</sup> (1864) 40 ER 968.

<sup>85</sup> *Ibid* 969-70 (Knight Bruce LJ).

elder was in difficult financial circumstances,<sup>86</sup> bed-ridden or in a poor state of health,<sup>87</sup> had a feeble intellect,<sup>88</sup> was considered eccentric,<sup>89</sup> had little or no education<sup>90</sup> or, in the case of sales, was given a grossly inadequate consideration.<sup>91</sup> The lack of independent advice could enhance proof of special disadvantage.<sup>92</sup>

It was not sufficient for the weaker party to establish a special disadvantage. It was necessary to show that the stronger party dealt with the elder in such a way to indicate that the stronger party knowingly took advantage of the elder's weakness. However, in some cases, the fulfillment of the criteria was assumed from the facts of the case without explicit or mechanical articulation or application of the criteria.<sup>93</sup> Nevertheless, it was clear that a failure to provide significant information as to the value of property which was subject to the transaction,<sup>94</sup> a speedy conclusion of the transaction,<sup>95</sup> misinformation about legal rights<sup>96</sup> or grossly inadequate consideration<sup>97</sup> could constitute unconscionable conduct. Moreover, in respect to the kind of knowledge required, the decision in *Owen and Gutch v Homan*<sup>98</sup> remains instructive. The Court made it clear that it was unnecessary to prove actual knowledge of the weaker party's disadvantage. In that case an elder whose memory was impaired due to a serious accident, acted as surety for her nephew. The Court held that the bank ought to have realised that the elder would not have known her nephew's financial affairs and should have suspected that he would have deceived her. In a statement which presaged the decision in *Amadio*,<sup>99</sup> Lord Cranworth LC enunciated an objective and broad test for knowing advantage-taking.<sup>100</sup>

Finally, however, it must be emphasised that courts did not always apply the doctrine of unconscionable dealing consistently. This was due, in part, to the confusion between undue influence *inter vivos* and unconscionable dealings in

<sup>86</sup> *Clarke v Malpas* (1862) 54 ER 1067; *Clarke v Malpas* (1862) 45 ER 1238.

<sup>87</sup> *Filmer v Gott* (1774) 2 ER 156; *Clarke v Malpas* (1862) 54 ER 1067; *Clarke v Malpas* (1862) 45 ER 1238; *Owen and Gutch v Homan* (1853) 10 ER 752.

<sup>88</sup> *Longmate v Ledger* (1860) 66 ER 67.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Baker v Monk* (1864) 46 ER 968.

<sup>91</sup> *Clarke v Malpas* (1862) 54 ER 1067; *Clarke v Malpas* (1862) 45 ER 1238.

<sup>92</sup> *Filmer v Gott* (1774) 2 ER 156; *Longmate v Ledger* (1860) 66 ER 67; *Baker v Monk* (1864) 46 ER 968; *Owen and Gutch v Homan* (1853) 10 ER 752.

<sup>93</sup> See, eg, *Filmer v Gott* (1774) 2 ER 156, where the Court considered that in the light of the elder's infirmities and the circumstances leading to the execution of the conveyance that a fraud had been perpetrated. Note also: *Taylor v Obee* (1816) 146 ER 198; *Longmate v Ledger* (1860) 66 ER 67.

<sup>94</sup> *Rees v De Bernardy* [1896] 2 Ch 437, 444.

<sup>95</sup> See, eg, *Clarke v Malpas* (1862) 54 ER 1067; *Clarke v Malpas* (1862) 45 ER 1238; *Rees v De Bernardy* [1896] 2 Ch 437, 444.

<sup>96</sup> *Rees v De Bernardy* [1896] 2 Ch 437, 445.

<sup>97</sup> See, eg, *Clarke v Malpas* (1862) 54 ER 1067; *Clarke v Malpas* (1862) 45 ER 1238; *Reed v Buck* (1884) 10 VLR 33.

<sup>98</sup> (1853) 10 ER 752.

<sup>99</sup> (1983) 151 CLR 447, 467 (Mason J); 479 (Deane J). Both judges referred to and relied on the statement of Lord Cranworth in *Owen and Gutch v Homan* (1853) 10 ER 752, 767.

<sup>100</sup> (1853) 10 ER 752, 767.

some cases<sup>101</sup> and the growing importance of will theory,<sup>102</sup> leading to the reluctance of courts to interfere with the express intention of an individual. The latter trend was evident in *Harrison v Guest*,<sup>103</sup> where an ill elderly man conveyed a small copyhold property to the defendant on the basis that he would be cared for in alternative accommodation. The elder died less than six weeks after the conveyance. It was alleged that the result was that the elder received a grossly inadequate consideration. The Court refused to interfere and set aside the conveyance, finding that the elder perfectly understood the nature of the transaction and had decided not to seek independent advice.<sup>104</sup> The Court assumed that evidence of the elder's contractual competency and intention showed that there was no special disadvantage. However, as it has been pointed out above, the fact that the weaker party understood and intended to enter the transaction does not necessarily meet the contention that the transaction was an unconscionable dealing. Rather, the central issue is how that intention was produced<sup>105</sup> and whether in fact the stronger party knowingly took advantage of the weaker party. It is arguable that illness and infirmity coupled with an urgent desire to obtain care and accommodation was a special disadvantage which was unconsciously exploited by the defendant in that case.

In the modern era, such attitudes to age and special disadvantage and the divergent approaches to advantage-taking, have all had a considerable impact upon the success of elders pleading the doctrine.

### **C Elders and Unconscionable Dealing in the Modern Era**

While in England the doctrine of unconscionable dealing declined in modern times,<sup>106</sup> Australian litigants continued to plead it.<sup>107</sup> The jurisdiction in relation to elders suffering special disadvantage was further re-invigorated by the decisions of the High Court in *Amadio*<sup>108</sup> and *Bridgewater*.<sup>109</sup> In both cases, the Court was asked to set aside transactions made by elderly persons who suffered other infirmities or disabilities in addition to their age. In the former, a majority of the Court held that a guarantee could be set aside, while in the latter, a deed and transfer disposing of significant assets were set aside.

It is impossible to list definitively the kinds of situations in modern times where unconscionable dealing has been pleaded by elders or their representatives.

<sup>101</sup> For a possible illustration of this trend see *Taylor v Obee* (1816) 146 ER 198, where both taking advantage of a disability and a relationship of trust and confidence led the Court to set the transaction aside.

<sup>102</sup> Atiyah, above n 70, 213.

<sup>103</sup> (1855) 43 ER 1298.

<sup>104</sup> *Ibid* 1300. On appeal, the House of Lords found that there was no actual fraud proved: *Harrison v Guest* (1860) 11 ER 517.

<sup>105</sup> This was appreciated well before the decision in this case: see *Huguenin v Baseley* (1807) 33 ER 526, 536 (Lord Eldon) quoted with approval in *Bridgewater* (1998) 194 CLR 457, 491 (Gaudron, Gummow and Kirby JJ).

<sup>106</sup> Meagher, Heydon and Leeming, above n 6, [16-005].

<sup>107</sup> See, eg, *Harrison v The National Bank of Australasia Ltd* [1928] Tas LR 1; *Wilton v Farnworth* (1948) 76 CLR 646; *Blomley v Ryan* (1956) 99 CLR 362; *Louth v Diprose* (1992) 175 CLR 621.

<sup>108</sup> (1983) 151 CLR 447.

<sup>109</sup> (1998) 194 CLR 457.

However, there have been several recurrent situations. First, there are transactions which can be described as 'bilateral' in the sense that generally only two parties are involved in the transaction; an elder deals directly in relation to the assets with the second party. The transaction may be a gift or a transfer (supported by valuable consideration) to that party or a contract (such as a contract for sale of assets) with that party. For example:

- (a) elders may simply make a gift of substantial assets (sometimes unaware of the value of the assets) to relatives, friends or carers;<sup>110</sup>
- (b) elders may be dependent on a person, such as a child or caregiver, for their daily needs and may give money or property to that child or caregiver;<sup>111</sup>
- (c) elders may enter to an arrangement to transfer property to a relative or caregiver (or a company controlled by that relative or caregiver) in order to ensure that they secure accommodation and care in their retirement;<sup>112</sup>
- (d) elders may sell or exchange property. Unconscionable dealing may become a defence for a decree for specific performance of the sale or exchange;<sup>113</sup> or
- (e) elders may transfer property because they feel obliged to compensate a relative for working in the family business<sup>114</sup> or in order to ensure that the business continues.<sup>115</sup>

Secondly, unconscionable dealing has been frequently pleaded by elders or their representatives in cases where elders have provided a guarantee and/or security

<sup>110</sup> *Adenan v Buise* [1984] WAR 61; *Shoutov v Yalisheff* (1987) NSW ConvR ¶55-353; *Cousins v Cousins* [1991] ANZ ConvR 245; *Baburin v Baburin* [1990] 2 Qd R 101; *Baburin v Baburin [No 2]* [1991] 2 Qd R 240; *George as Executor of the Estate of the Late Habsie George v Paul George Pty Ltd* (Unreported, Supreme Court of New South Wales, Santow J, 29 February 1996); *Paul George Pty Ltd v George as Executor of the Estate of the late George* (1999) NSW ConvR ¶55-892; *Koh v Chan* (1997) 139 FLR 410; *Ferrari v Ferrari* [2000] WASC 30 (Unreported, Master Sanderson, 17 February, 2000).

<sup>111</sup> *Natrass v Natrass* [1999] WASC 77 (Unreported, Commissioner Buss QC, 25 June 1999).

<sup>112</sup> *Benson v Heath & Registrar of Titles* [1984] ANZ ConvR 687; *Mitchell v 700 Young Street Pty Ltd* [2001] VSC 116 (Unreported, Cummins J, 23 April 2001); *Urane v Whipper* (2002) NSW ConvR ¶55-992. For a complex set of arrangements in which a mother financially assisted a daughter to extend a property and then purchased a property in her own name in which she and her daughter could reside see: *Bruinsma v Menczer* (Unreported, Supreme Court of New South Wales, Santow J, 16 November 1995). Note also the facts in *Gordon v Carr* (Unreported, Supreme Court of New South Wales, McClelland CJ in Eq, 8 December 1995) and *Lane v Jurd* (Unreported, Supreme Court of New South Wales, McClelland CJ in Eq, 13 May 1996) which were decided under the *Contracts Review Act 1980* (NSW).

<sup>113</sup> *Richardson v Otto* [1938] QLR 30; *Blomley v Ryan* (1956) 99 CLR 362; *Vella v Larson* [1980] ANZ ConvR 408; *Cain v Layfield*; *Barber v Layfield* [1983] ANZ ConvR 180; *Simpson v Highfields Preparatory and Kindergarten School Ltd* (1986) NSW ConvR ¶55-318; *Westwill Pty Ltd v Heath* (1989) ASC ¶55-948; *Bayne v Karaliamis* [2001] ANZ ConvR 181. In a complex probate case, an elder sought to have an agreement between herself and another beneficiary to sell property of the deceased set aside drawing on the principles in *Amadio: Jelaca v Jelaca* [2000] NSWSC 869 (Unreported, Bergin J, 5 September 2000).

<sup>114</sup> See, eg, the *Archer* litigation: *Archer v Archer* [1999] NSWCA 24 (Unreported, Priestley, Meagher and Powell JJA, 23 February 1999); *Archer v Archer* [1999] NSWCA 286 (Unreported, Mason P, 19 July 1999); *Archer v Archer [No2]* [1999] NSWCA 500 (Unreported, Windeyer J, 27 May 1999); *Archer v Archer* [2000] NSWCA 314 (Unreported, Handley, Beazley and Fitzgerald JJA, 7 November 2000); *Archer v Archer No 2* [2000] NSWCA 315 (Unreported, Windeyer J, 9 November 2000).

<sup>115</sup> *Bridgewater* (1998) 194 CLR 457.

to a third party, normally a financial institution, generally to assist a family member, friend or caregiver.<sup>116</sup> Although the guarantee or security has been granted directly to a financial institution, there have been three persons involved, because the debt or liability which the elder has assumed has been created by the family member, friend or caregiver. Therefore, both the underlying matrix of facts and the applicable law are generally more complex than in bilateral cases. Courts have had to consider, for example, whether the financial institution was aware of the elder's special disadvantage or the extent to which (if at all) it was incumbent on the financial institution to disclose information concerning the debtor's financial status to the elder.

It appears that a large majority of the cases pertaining to unconscionable dealing and elders have concerned elders providing guarantees to support family members or the businesses operated by family members. While this application

<sup>116</sup> For examples of cases where the doctrine of unconscionable dealing has been pleaded exclusively or in addition to other doctrines such as undue influence see: *Harrison v The National Bank of Australasia Ltd* [1928] Tas LR 1; *Amadio* (1983) 151 CLR 447; *Outlook Credit Union Co-operative Ltd v Popovic* (1987) Q ConvR ¶54-269; *Tessmann v Costello* [1987] 1 Qd R 283; *White v Ormsby* (1988) ASC ¶55-665; *National Australia Bank Ltd v Nobile* (1988) 100 ALR 227; *Melverton v Commonwealth Development Bank of Australia* (1989) ASC ¶55-921; *Farnham v Orrell* (1989) NSW ConvR ¶55-443; *Robinson v ANZ Banking Group Ltd* (1990) ASC ¶55-979; *Morelend Finance Corporation (Vic) Pty Ltd v Luke* (1991) ASC ¶56-095; *Ashton v Melbourne Money Pty Ltd* (1992) ANZ ConvR 95; *Australia and New Zealand Banking Group Ltd v Barry* [1992] 2 Qd R 12; *Salerno v Saunders* (1993) 173 LSJS 362; *Burt v Australia & New Zealand Banking Group Ltd* (1994) ATPR (Digest) ¶46-123; *Tzefrios v Politis* (1994) ANZ ConvR 32; *Burke v State Bank of New South Wales* (1994) 37 NSWLR 53; *Crisp v Australia and New Zealand Banking Group Ltd* (1994) ATPR ¶41-294; *Schrader v Glasson* (1995) NSW ConvR ¶55-748; *National Australia Bank Ltd v Liakopoulos* (Unreported, Supreme Court of Victoria, Hansen J, 24 March 1995); *Re Lisciandro v Official Trustee in Bankruptcy* (1995) ATPR 41-436; *Lisciandro v Official Trustee in Bankruptcy* (1996) 69 FCR 180; *Tarzia v National Australia Bank Ltd* [1996] ANZ ConvR 379; *National Australia Bank Ltd v Winskill* (Unreported, Supreme Court of New South Wales, Dunford J, 15 November 1996); *Varthalis v Commonwealth Bank of Australia* (1996) 7 BPR 14,766; *Australia and New Zealand Banking Group Ltd v Petrik* [1996] 2 VR 638; *Jacobs v Shugg* (Unreported, Supreme Court of Victoria, O'Bryan J, 24 May 1996); *Jedda Investments Pty Ltd v Krambousanos* (1997) 72 FCR 138; *State Bank of New South Wales Ltd v Burke* (1997) 8 BPR 15,511; *HG & R Nominees Pty Ltd v Fava* [1997] 2 VR 368; *Citibank Savings Ltd v Nicholson* (1997) 70 SASR 206; *Australia and New Zealand Banking Group Ltd v Gianchino* (Unreported, Supreme Court of Victoria, Byrne J, 24 August 1998); *Janesland Holdings Pty Ltd v Simon* (2000) ANZ ConvR 112; *State Bank of New South Wales v Sullivan* [1999] NSWSC 596 (Unreported, James J, 14 July, 1999); *Sholl Nicholson Pty Ltd v Chapman* [2001] VSC 430 (Unreported, Balmford J, 12 November 2001); *Choules v Siglin* [2001] WASC 234 (Unreported, Master Bredmeyer, 31 August 2001); *Wilby v St George Bank* (2001) 80 SASR 404; *Ribchenkov v Suncorp-Metway Ltd* (2000) 175 ALR 650; *State Bank of New South Wales v Layoun* (2001) NSW ConvR ¶55-984. For a situation where elderly parents provided security for a new business venture with relatives and in which they had a share see: *Commonwealth of Australia v McGlynn* (1995) ANZ ConvR 81; *Page v Commonwealth of Australia* (Unreported, Supreme Court of New South Wales Court of Appeal, Gleeson CJ, Priestley and Meagher JJA, 6 October 1995). On some occasions the transaction is structured so that the elder is the mortgagor and the adult children are the guarantors, but with the clear intent that the funds borrowed would be used for the benefit of the adult children: see for example *Allaway v Saunders* (Unreported, Supreme Court of Victoria, Harper J, 29 August 1995); *Roberts v Goldenberg* [1997] ANZ ConvR 405 where the elder based her claim on the *Contracts Review Act 1980* (NSW). In *Mitchell v 700 Young Street Pty Ltd* [2001] VSC 116 (Unreported, Cummins J, 23 April 2001), the elder not only transferred property to a company controlled by her son and herself, but also guaranteed the company's liabilities in respect to alternative accommodation for her and his family. In *Radin v Commonwealth Bank of Australia* [1998] FCA 1361 (Unreported, Lindgren J, 23 October 1998), the mother and the adult son were the co-purchasers and co-mortgagors in respect of a property in which they lived. The son was the sole borrower from the financial institution.



of the doctrine seems far removed from its historical origins and the protection of youthful heirs, it is explicable in part by the seminal decision of the High Court in *Amadio*.<sup>117</sup> In that case, Mason J criticised the pleadings by the elders for overlooking a claim based on undue influence, which the facts clearly disclosed.<sup>118</sup> He feared that the statement of claim would 'find its way into the precedent books.'<sup>119</sup> As a result of the pleading and the Court's decision based on unconscionable dealing rather than undue influence, the Court re-invigorated the doctrine by making it clear that not only did the doctrine apply to guarantees, but also that aged-parents could successfully set aside a guarantee under it. It has been pointed out that since *Amadio*, guarantors have commonly pleaded unconscionable dealing by the financial institution rather than undue influence based on the financier's notice of the debtor's wrongdoing.<sup>120</sup> Certainly, the extensive case law involving elders indicates that elders and their advisers have relied on unconscionable dealing to set aside guarantees, albeit with varying success.<sup>121</sup>

In order to understand the modern application of the doctrine of unconscionable dealing in the context of elders, Part III will deal with gifts, transfers and contracts which do not involve elders acting as guarantors and Part IV will consider those cases where elders or their representatives have sought to set aside guarantees.

### III GIFTS, TRANSFERS AND SALE CONTRACTS

Other than those cases where elders act as guarantors, the main situations where elders have pleaded unconscionable dealing have involved gifts, transfers of property (particularly under a care arrangement) and sale contracts. Generally, courts have shown similar attitudes, notwithstanding the legal and practical differences between gifts, transfers and sales.

#### ***A General Attitudes to Gifts, Transfers and Sales***

It has been well established that the doctrine of unconscionable dealing may be used successfully to have gifts (or voluntary dispositions) or sales of property set aside. Indeed, at one stage it was opined that in regard to gifts, such transactions would be set aside automatically unless the donee was able to show that the donor understood the transaction and consented to it freely.<sup>122</sup> However, that view has not found favour and it will be necessary to show that the gift is vitiated by some

<sup>117</sup> (1983) 151 CLR 447.

<sup>118</sup> *Ibid* 464.

<sup>119</sup> *Ibid*.

<sup>120</sup> Duggan, above n 6, [506].

<sup>121</sup> See the cases listed in above n 116.

<sup>122</sup> *Hoghton v Hoghton* (1852) 51 ER 545.

legal impediment such as unconscionable dealing.<sup>123</sup> In *Wilton v Farnworth*,<sup>124</sup> the High Court set aside a deed of gift under which a deaf, poorly educated and eccentric man transferred his share in his deceased wife's estate to his stepson, unaware of its value. Rich J enunciated the position of the High Court:

It has always been considered unconscientious to retain the advantage of a voluntary disposition of a large amount of property improvidently made by an alleged donor who did not understand the nature of the transaction and lacked information of material facts such as the nature and extent of the property particularly if made in favour of a donee possessing greater information who nevertheless withheld the facts.<sup>125</sup>

Unconscionable dealing has also been raised as a defence against a purchaser seeking an order for specific performance, particularly in contracts for the sale of land.<sup>126</sup> Generally a major focus for plaintiffs seeking to set the contract aside has been whether the consideration was adequate. It has been well-established that inadequacy of consideration is not necessary to prove unconscionable dealing because the detriment suffered by the weaker party does not have to be evident on the face of the contract.<sup>127</sup> Conversely, inadequacy of consideration is insufficient to establish a basis for setting a contract aside under the doctrine, unless the inadequacy of consideration is so gross as to constitute clear evidence of unconscionable dealing.<sup>128</sup> Therefore, in most cases inadequacy of consideration will be coupled with additional circumstances manifesting a disability in order to support a claim of special disadvantage. It may also indicate that the stronger party took advantage of the weaker party, showing that the transaction can be truly described as improvident.

The categories of transfers of property to secure accommodation and care on the one hand or compensation to a relative for working in a family in a business on the other, have not been separately treated or identified by courts. However, as shown above they existed historically,<sup>129</sup> and as will be shown below, these particular kind of cases have become more prevalent in recent times.

### **B Special Disadvantage**

The approach of courts to elders and gifts, transfers and sales has been broadly consistent with previous case law. However, overall the cases indicate that proof

<sup>123</sup> Nevertheless, it remains the case that it may be easier to set aside a substantial gift than a business transaction: Duggan, above n 6, [504].

<sup>124</sup> (1948) 76 CLR 646; note also Meagher, Heydon and Leeming, above n 6, [16-020], [16-030]; Duggan, above n 6, [504].

<sup>125</sup> (1948) 76 CLR 646, 655; note also Latham CJ at 649.

<sup>126</sup> *Blomley v Ryan* (1956) 99 CLR 362; Meagher, Heydon and Leeming, above n 6, [20-095]; Samantha Hepburn, 'Specific Performance' in Patrick Parkinson (ed), *The Principles of Equity* (2nd ed, 2003) [1727]; Dal Pont and Chalmers, above n 6, 878-9.

<sup>127</sup> *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J); *Amadio* (1983) 151 CLR 447, 475 (Deane J); Meagher, Heydon and Leeming, above n 6, [16-020]; Duggan, above n 6, [511].

<sup>128</sup> *Clark v Malpas* (1862) 45 ER 1238, 1239; *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J); Cope, above n 6, [261].

<sup>129</sup> See Part II(B).

of a special disadvantage has appeared to be more difficult to satisfy than knowing advantage-taking. It is clear that old age in itself will not be sufficient.<sup>130</sup> It is incumbent upon elders to show either a disability which results from age or disabilities which may exist unassociated with their age. There have been several cases involving gifts and sales where a special disadvantage has been found due to afflictions or problems associated with age such as mental impairment or Alzheimer's disease<sup>131</sup> or physical weakness and reliance resulting in emotional dependency.<sup>132</sup> Additional disabilities have included alcoholism,<sup>133</sup> such as where the vendor was an alcoholic during a drinking bout (encouraged by the contractor),<sup>134</sup> or a person with a history of alcoholism combined with poor memory and ill health,<sup>135</sup> poor understanding of spoken and written English,<sup>136</sup> lack of commercial experience,<sup>137</sup> and lack of understanding of the family business.<sup>138</sup>

However, it cannot be assumed that old age coupled with such disabilities will automatically satisfy the criterion of special disadvantage. There have been cases where courts have either decided that age with physical illness unaccompanied by significant intellectual impairment<sup>139</sup> or old age with apparent mental capacity<sup>140</sup> did not constitute a special disadvantage. For example, where elders have transferred property to adult children and caregivers or arranged to share

<sup>130</sup> For example in *Cousins v Cousins* (Unreported, Supreme Court of New South Wales Court of Appeal, Kirby P, Priestley and Meagher JJA, 18 December 1990), Kirby P held that a 74 year old woman had no evident disability at the time of the transaction. The transaction in this case was structured as a sale of land, but was a gift in the sense that the donors provided funds for the purchase. The donors remained residing in a house on the land.

<sup>131</sup> *Nattrass v Nattrass* [1999] WASC 77 (Unreported, Commissioner Buss QC, 25 June 1999) [27]-[43]; *George as Executor of the Estate of the Late Habsie George v Paul George Pty Ltd* (Unreported, Supreme Court of New South Wales, Equity Division, Santow J, 29 February 1996) 21, 23; *Paul George Pty Ltd v George as Executor of the Estate of the late George* (1999) NSW ConvR ¶55-892, 56,973-5. For a general consideration of mental infirmity in the context of unconscionable dealing see Chen-Wishart, above n 10, 36-7. Although some of the cases which Chen-Wishart discusses involve elders, it is clear that it was the mental or cognitive impairment, rather than age which attracted the operation of the doctrine.

<sup>132</sup> *Bridgewater* (1998) 194 CLR 457. This was a case where the transaction was structured as a sale, but was in substance mainly a gift. There was a sale of property amounting to \$696, 811 combined with a deed of forgiveness for all but \$150,000.

<sup>133</sup> *Adenan v Buise* [1984] WAR 61, 69 (Burt CJ and Kennedy J). In this case, the deceased, a man aged 61 years and an alcoholic transferred assets to his son, the appellant, as a result of the appellant's unconscionable conduct. However the transaction was not set aside in this case because the respondent, who had been a housekeeper for the deceased, had also participated in the wrongdoing.

<sup>134</sup> *Blomley v Ryan* (1956) 99 CLR 362.

<sup>135</sup> *Benson v Heath & Registrar of Titles* [1984] ANZ ConvR 687. In relation to ill health see *Vella v Larson* (1980) ANZ ConvR 408; *Westwill Pty Ltd v Heath* (1989) ASC ¶55-948, 58,623-58,624 (Duggan J).

<sup>136</sup> *George as Executor of the Estate of the Late Habsie George v Paul George Pty Ltd* (Unreported, Supreme Court of New South Wales, 29 February 1996, Santow J) 21; *Paul George Pty Ltd v George as Executor of the Estate of the late George* (1999) NSW ConvR ¶55-892; *Koh v Chan* (1997) 139 FLR 410, 456 (Murray J).

<sup>137</sup> *Westwill Pty Ltd v Heath* (1989) ASC ¶ 55-948, 58,624 (Duggan J).

<sup>138</sup> *Baburin v Baburin* [1990] 2 Qd R 101, 111 (Kelly SPJ).

<sup>139</sup> *Cousins v Cousins* (1991) ANZ ConvR 245, where a 75 year old man who could no longer carry on a grazing business, was frail and was showing the first signs of Parkinson's disease.

<sup>140</sup> *Ferrari v Ferrari* [2000] WASC 30 (Unreported, Master Sanderson, 17 February 2000) [26], where an 81 year old woman was alleged to suffer from dementia and had a history of cognitive impairment, cardiac failure and Parkinson's disease. The Court found that there was no evidence presented by the defendants to substantiate the claim of incapacity on her part.

accommodation with them in order to secure care and accommodation during their retirement, courts have considered that such elders have exhibited a capacity to care for their own interests, particularly if the elder has displayed some mental alertness or an understanding of complex transactions.<sup>141</sup> Therefore, courts have held that there was no evidence of special disadvantage, notwithstanding the old age of the weaker party<sup>142</sup> and additional conditions such as depression and helplessness caused by bereavement<sup>143</sup> or an inability to read or speak English fluently.<sup>144</sup> In contrast, where mental impairment can be shown objectively, it is more likely that the transfer will be set aside by the court. In *Urane v Whipper*,<sup>145</sup> the elderly plaintiff had been very ill requiring constant care, having suffered two severe strokes. The elder sought the assistance of his daughter who insisted that she could not care for him at his old residence and that they needed new accommodation in which both could reside. The elder and his daughter used the proceeds of sale of their respective properties to purchase a suitable residence in the daughter's name alone. The elder reluctantly signed a deed of family arrangement under which the daughter permitted her father to reside in the new premises as long as his health permitted. The father had no interest in the property<sup>146</sup> and had not been given the benefit of independent advice.<sup>147</sup> The domestic arrangement did not run smoothly and the parties argued. The elder was admitted to a nursing home. He claimed that the purchase of the new property and the deed of family arrangement were procured, inter alia, by unconscionable conduct. Although the Court appreciated that the daughter was motivated by a concern for her father, it found that the transaction was unconscionable. In this regard, the plaintiff's medical problems indicated that he suffered from a clear special disadvantage including his 'mental confusion, spatial disorientation, planning problems, incontinence, inability to care for himself, inability to live on his own, loss of memory and delusions and misapprehensions concerning his children'.<sup>148</sup> The elder had no choice but to accept the arrangement. The fact that the elder did not receive independent advice also contributed to the Court's decision.<sup>149</sup>

Another example where it can be difficult for a claimant to prove special disadvantage without evidence of mental incapacity (or a disability which

<sup>141</sup> See, eg, *Bruinsma v Menczer* (Unreported, Supreme Court of New South Wales, Santow J, 16 November 1995) [69].

<sup>142</sup> In *Shoutov v Yalishreff* (1987) NSW ConvR ¶55-353, 57, 195 Bryson J did not appear to directly deal with this issue, but held that there was no evidence of exercise of a 'superior bargaining power'.

<sup>143</sup> *Mitchell v 700 Young Street Pty Ltd* [2001] VSC 116 (Unreported, Cummins J, 23 April 2001) [5].

<sup>144</sup> *Shoutov v Yalishreff* (1987) NSW ConvR ¶55-353.

<sup>145</sup> (2002) NSW ConvR ¶55-992.

<sup>146</sup> *Ibid* 58,177.

<sup>147</sup> *Ibid* 58,179.

<sup>148</sup> *Ibid*.

<sup>149</sup> *Ibid*. A similar approach to mental capacity and independent advice can be seen in *Benson v Heath & Registrar of Titles* (1984) ANZ ConvR 687, where an elder transferred property without receiving adequate consideration on the understanding that the first defendant would settle his bank debt and provide him with care in his old age. The elder was an alcoholic with a poor memory and in failing health who had not been provided independent advice. He was unable to make necessary repairs to the property. The Court held that plaintiff suffered from a special disadvantage of which the first defendant had taken advantage.

affected comprehension and understanding) is where the elder transfers property to a relative because the elder feels obliged to compensate that relative for working in the family business. In *Archer v Archer*,<sup>150</sup> the mother, concerned about her husband's ill health, reluctantly transferred land to her son who worked in partnership with his parents. Later she claimed that the transfer ought to be set aside on the basis of, inter alia, unconscionable dealing. However, the mother was unable to satisfy the first criterion of special disadvantage, notwithstanding the absence of independent advice. A majority of the New South Wales Court of Appeal held in separate judgments that there was no evidence of a special disadvantage. Handley J held that the mother had not shown that she was unable to judge what was in her best interests. The fact that she signed the transfer because she was concerned about her husband's ill health and was aware of his strong desire that the son obtain the property, did not constitute a special disadvantage which the son exploited.<sup>151</sup> He pointed out that:

It was not unconscionable for Trevor [the son] to persuade Mr Archer, and directly or indirectly Mrs Archer, that his moral claims on their bounty should be recognised by an immediate gift ... so long as they fully understood what they were doing and freely entered into the transaction.<sup>152</sup>

Fitzgerald J held that while the mother's concern for her husband and his wishes placed her in an initial position of special disadvantage vis-à-vis her son, she later affirmed her execution and delivery of the documentation. At this later time, her decision was not affected by any position of special disadvantage.<sup>153</sup> Only Beazley JA considered that mother was in a situation of disadvantage at all times and that the transfer was improvident.<sup>154</sup>

In regard to sales, where evidence of inadequate consideration can be an important indicator of special disadvantage and advantage-taking, inadequate consideration and old age have not been sufficient to prove special disadvantage. In these cases, the courts have considered that the elder was able to protect his or her own interests and that, despite the sometimes considerable undervalue, the transaction was the result of the independent will of the elder.<sup>155</sup> It does not appear that lack of independent advice or an independent valuation of the property coupled with age and inadequate consideration, will necessarily suffice either.<sup>156</sup> In contrast, elders have been more successful where they have been able to present additional factors combined with old age and gross undervalue such as

<sup>150</sup> [2000] NSWCA 314 (Unreported, Handley, Beazley and Fitzgerald JJA, 7 November 2000).

<sup>151</sup> *Ibid* [69]-[76].

<sup>152</sup> *Ibid* [71].

<sup>153</sup> *Ibid* [241]-[242].

<sup>154</sup> *Ibid* [153]-[169].

<sup>155</sup> *Simpson v Highfields Preparatory and Kindergarten School Ltd* (1986) NSW ConvR ¶55-318; *Bayne v Karaliamis* (2001) ANZ ConvR 181. In *Cain v Layfield; Barber v Layfield* (1983) ANZ ConvR 180, the Court held that while the elder had not been provided with independent advice as the same solicitor acted for the vendor and the purchaser, the elder had capacity and the sale was not for a gross undervalue.

<sup>156</sup> *Simpson v Highfields Preparatory and Kindergarten School Ltd* (1986) NSW ConvR ¶55-318; *Cain v Layfield; Barber v Layfield* (1983) ANZ ConvR 180.

alcoholism,<sup>157</sup> lack of business experience,<sup>158</sup> or an illness which affected their memory or capacity to protect their interests.<sup>159</sup> If the elder can show that he or she suffered from an illness or condition which affected his or her capacity or memory, then courts have raised lack of independent advice as another factor indicating both special disadvantage and unconscientious advantage-taking.<sup>160</sup>

### C Knowledge and Advantage-taking

Generally, if special disadvantage is proved, it has not been difficult to establish that the donee, transferee or contractor had knowledge of the special disadvantage. In regards to gifts and transfers, the donee or transferee generally has been a family member,<sup>161</sup> a company of which the family member has been the controlling mind,<sup>162</sup> or a caregiver who has directly dealt with the donor.<sup>163</sup> In relation to sale cases, courts have been willing to assume that contact with the elder and a general understanding of the elder's circumstances has given the stronger party sufficient familiarity with the elder's situation,<sup>164</sup> including where a company, through its agent, negotiated the transaction with an elder.<sup>165</sup> The kind of factors which have indicated taking advantage of the elder in the contracting process have included actively dissuading the elder taking steps to seek independent advice from a solicitor,<sup>166</sup> knowledge that the sale price was well below the value of the property,<sup>167</sup> hastily entering into the transaction without fully inspecting the property,<sup>168</sup> and deliberately refraining from making inquiries about whether the elder was fit to discuss a business transaction.<sup>169</sup>

However in *Koh v Chan*,<sup>170</sup> a case concerning property purchased by parents and subject to a partnership deed between them and their children, Murray J applied a knowledge requirement which appeared stricter than the approach in *Amadio*. In that case, it was established that the elderly parents lacked the capacity to read English and could not understand the deed without translation.<sup>171</sup> Notwithstanding these facts, the Court held that the deed would not be set aside on the basis of unconscionable dealing because the son did not know that the deed

<sup>157</sup> *Blomley v Ryan* (1956) 99 CLR 362.

<sup>158</sup> *Westwill Pty Ltd v Heath* (1989) ASC ¶55-948, 58, 624 (Duggan J).

<sup>159</sup> *Vella v Larson* (1980) ANZ ConvR 408; *Benson v Heath & Registrar of Titles* [1984] ANZ ConvR 687; *Westwill Pty Ltd v Heath* (1989) ASC ¶55-948, 58,620-2, 58,624 (Duggan J).

<sup>160</sup> *Vella v Larson* (1980) ANZ ConvR 408; *Benson v Heath & Registrar of Titles* [1984] ANZ ConvR 687; *Westwill Pty Ltd v Heath* (1989) ASC ¶55-948.

<sup>161</sup> *Bridgewater* (1998) 194 CLR 457 (nephew); *Baburin v Baburin* [1990] 2 Qd R 101; *Baburin v Baburin* [No 2] [1991] 2 Qd R 240 (sons).

<sup>162</sup> *George as Executor of the Estate of the Late Habsie George v Paul George Pty Ltd* (Unreported, Supreme Court of New South Wales, Equity Division, 29 February 1996, Santow J) 21; *Paul George Pty Ltd v George as Executor of the Estate of the late George* (1999) NSW ConvR ¶55-892.

<sup>163</sup> *Nattrass v Nattrass* [1999] WASC 77 (Unreported, Commissioner Buss QC, 25 June 1999). In this case the caregiver was the elder's former daughter-in-law.

<sup>164</sup> See, eg, *Vella v Larson* (1980) ANZ ConvR 408; *Benson v Heath & Registrar of Titles* (1984) ANZ ConvR 687; *Westwill Pty Ltd v Heath* (1989) ASC ¶55-948.

<sup>165</sup> *Westwill Pty Ltd v Heath* (1989) ASC ¶55-948, 58,625 (Duggan J).

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> *Benson v Heath & Registrar of Titles* (1984) ANZ ConvR 687, 690.

<sup>169</sup> *Vella v Larson* (1980) ANZ ConvR 408, 410.

<sup>170</sup> (1997) 139 FLR 410.

<sup>171</sup> *Ibid* 456.

would not be read to the parents in their native language.<sup>172</sup> Yet surely the son's actual knowledge of his parent's disability, coupled with knowledge of the language of the document, made him aware they were at a severe disadvantage, obliging him to warn them to seek appropriate translation and legal advice in their own language before execution of the documents. It was reasonable for him to suspect that in the light of the close relationship between the parties, the parents may not seek a translation of the documents.

### D Comment

Notwithstanding the fundamentally different nature and effect of the gifts, transfers and sales discussed, there are three trends. First, proof of old age is insufficient in itself to persuade a court to intervene and set such transactions aside. Implicitly, courts opine that age does not impair a person's capacity to care for his or her own interests. Therefore, as in the 19th century, additional conditions or factors must be shown to establish special disadvantage.

Secondly, proof of a condition of special disadvantage appears to be the major hurdle confronting elders in these cases. In the event that special disadvantage on the facts is proved, courts have found generally that the stronger party knowingly took advantage of the elder's special disadvantage, by virtue of a close personal relationship with the elder or, at the very least, the commercial negotiations leading up to the transaction.

Thirdly, notwithstanding the recent 'bilateral' decision in *Bridgewater*<sup>173</sup> in which the concept of special disadvantage was apparently broadened, courts have applied the criterion rigorously.<sup>174</sup> It appears that the courts have assumed that evidence of mental capacity and an intention to enter into the transaction is an answer to a claim based on unconscionable dealing, whereas the majority of the High Court in *Bridgewater*<sup>175</sup> has made it clear that it is not.<sup>176</sup> Courts have not considered that persons who were very elderly, frail and suffering from some kind of illness or bereavement were necessarily suffering from a special disadvantage, if the elderly person demonstrated a clear intention to enter into the transaction.<sup>177</sup>

<sup>172</sup> Ibid.

<sup>173</sup> (1998) 194 CLR 457.

<sup>174</sup> See, eg, *Murphy v Overton Investments Pty Ltd* [2002] FCA 801 (Unreported Emmett J, 15 June 2000) [235]-[7]. In that case an elderly couple leased premises at a retirement village. The Court accepted that they were at a disadvantage in the sense that they were unaware of how maintenance fees were actually calculated, but they were not at any special disadvantage in the sense that the operator of the retirement village unconscientiously used a superior position or bargaining power. On appeal in *Murphy v Overton Investments Pty Ltd* (2001) ATPR ¶41-819, Branson J (43,005-6) and Nicholson J (43,009) agreed. Gyles J (43,024-5) pointed out that there were some authorities which indicated that 'an imbalance of information, together with other factors' may constitute a disadvantage, citing cases both concerned with the equitable doctrine of unconscionable dealing and s 51AA of the *Trade Practices Act 1974* (Cth). He decided that it was not appropriate to express a view on this, but observed at 43,026 that: 'If the argument were restricted to unconscionable conduct in relation to the transaction itself, I would not interfere'.

<sup>175</sup> (1998) 194 CLR 457, 491 (Gaudron, Gummow and Kirby JJ).

<sup>176</sup> However, Chen-Wishart, above n 10, 91 points out that the defective consent explanation for unconscionability has had support, although she acknowledged that the concept of consent is an inappropriate rationale when the mental disability is extreme.

<sup>177</sup> See, eg, *Mitchell v 700 Young Street Pty Ltd* [2001] VSC 116 (Unreported, Cummins J, 23 April 2001); *Bayne v Karaliamis* (2001) ANZ ConvR 181.

Indeed, it appears that courts have not considered that the decision in *Bridgewater* has in anyway significantly affected the importance or rigour of the criterion. For example, in *Urane v Whipper*,<sup>178</sup> Windeyer J expressly stated that the decision did not make

... any change to the requirement, clearly established in *Amadio*, that unconscionable conduct requires the obtaining of an advancement or benefit from a person with a special disability as a result of that disability.<sup>179</sup>

Some judges have assumed that the decisions of the majority of the High Court in *Bridgewater* and *Amadio* are consistent,<sup>180</sup> while others have not discussed the case, relying on the statement of principles in *Amadio* instead.<sup>181</sup>

However, the dissenting judgment of Beazley JA in *Archer v Archer*<sup>182</sup> stands in sharp contrast because Her Honour not only referred to *Bridgewater*, but was also clearly influenced by the way that the majority of the High Court took into account the elder's emotional attachment to and practical dependency on his nephew.<sup>183</sup> It will be recalled that in *Archer v Archer*, a wife, who had concerns about her husband's health and the ongoing operation of the family business, reluctantly transferred land to her son. A majority of the Court of Appeal held that the mother did not suffer from a situation of special disadvantage either at the time of execution of the documentation<sup>184</sup> or at the time of the implementation of the transaction.<sup>185</sup> However, Beazley JA held that the husband's wish to transfer the property to the son together with the wife's concerns about his health placed her in a position of special disadvantage.<sup>186</sup> As the son had actively sought the transfer of the property and had attempted to thwart his mother's objections for his own advantage,<sup>187</sup> it was unnecessary for Her Honour to consider passive acceptance. Moreover, the transaction was improvident not only because it was a gift, but also because it was the mother's major property holding. In the event that the husband predeceased the wife, she became dependent upon her husband's testamentary generosity for financial security.<sup>188</sup> Although it was open to the mother to apply for consideration under the *Family Provision Act 1982* (NSW),<sup>189</sup> this was 'a far less advantageous position to be in than having property in one's own right.'<sup>190</sup> In addition, the mother had not received independent advice.<sup>191</sup>

<sup>178</sup> (2002) NSW ConvR ¶55-992.

<sup>179</sup> *Ibid* 58, 179.

<sup>180</sup> *Nattrass v Nattrass* [1999] WASC 77 (Unreported, Commissioner Buss, 25 June 1999) [135]; *Mitchell v 700 Young Street Pty Ltd* [2001] VSC 116 (Unreported, Cummins J, 23 April 2001).

<sup>181</sup> See, eg, *Sholl Nicholson Pty Ltd v Chapman* [2001] VSC 430 (Unreported, Balmford J, 12 November 2001).

<sup>182</sup> [2000] NSWCA 314 (Unreported, Handley, Beazley and Fitzgerald JJA, 7 November 2000).

<sup>183</sup> See the discussion in Part II(A).

<sup>184</sup> *Ibid* [76]-[9] (Handley JA).

<sup>185</sup> *Ibid* [240]-[1] (Fitzgerald JA).

<sup>186</sup> *Ibid* [158]-[63].

<sup>187</sup> *Ibid* [157].

<sup>188</sup> *Ibid* [164]-[9].

<sup>189</sup> For a helpful discussion of the legislation see GL Certoma, *The Law of Succession in New South Wales* (3rd ed, 1997) ch 12.

<sup>190</sup> *Archer v Archer* [2000] NSWCA 314 (Unreported, Handley, Beazley and Fitzgerald JJA, 7 November 2000) [168] (Beazley JA).

<sup>191</sup> *Ibid* [169].



The dissenting judgment of Beazley JA in *Archer v Archer* demonstrates a recognition that the profile of a person's special disadvantage ought to take into account not only that person's innate disabilities, but also the particular situation in which that person finds himself or herself. A stronger person who actively makes demands (such as the son in *Archer v Archer*) may take advantage of the limited practical options which the elder has or believes that he or she has. Therefore, although an elder may be competent and understand the effect of the transaction, he or she may act from a situation of special disadvantage.

Nevertheless, concerns that *Bridgewater* would undermine the rigour and significance of the criterion of special disadvantage appear unwarranted. Overall, courts have continued to apply the criterion of special disadvantage with reference to the earlier High Court decision in *Amadio*. Indeed, it is strongly arguable that in regard to arrangements to secure accommodation, courts have not been sufficiently sensitive to the special disadvantage and difficult circumstances that elders find themselves. Elders have transferred property to adult children and caregivers in order to secure care and accommodation during their retirement. Elders generally seek such care because of an incapacity to live on their own and care for themselves. Therefore, it is arguable that there is an inequality between the parties and that elderly people in such circumstances could demonstrate a special disadvantage. However in these kinds of cases, elders have had an initial difficulty establishing that they have a special disadvantage (rather than the issue whether a relative or caregiver had knowledge of the disadvantage). Courts have considered that mentally alert elders who have taken steps to secure care and accommodation have exhibited an ample capacity to care for their own interests; and in some cases the courts have been influenced by evidence indicating that an adult child was attempting to assist the elder in very difficult circumstances,<sup>192</sup> without acknowledging that these circumstances are often the unwelcome result of age and exhibit a disadvantage which the stronger party may be able to exploit.

#### IV THIRD PARTY GUARANTEES AND MORTGAGES

Elders seeking to set aside a contract of guarantee or a security in support of a guarantee, must show that the elder suffered from a special disadvantage which the financial institution knowingly exploited or passively accepted.<sup>193</sup> Therefore, the elder must prove wrongdoing on the part of the financial institution, notwithstanding the involvement of the debtor in the negotiation, framing or

<sup>192</sup> See, eg, *Mitchell v 700 Young Street Pty Ltd* [2001] VSC 116 (Unreported, Cummins J, 23 April 2001). In *Bruinsma v Menczer* (Unreported, Supreme Court of New South Wales, Santow J, 16 November 1995), it is strongly arguable that the actions of the mother in providing funding for the purchase of a property in her own name in which the daughter could reside was beneficial to them both. The daughter was able to live where she wished, while the mother hoped to have the constant care and companionship of the daughter in her old age.

<sup>193</sup> See, eg, Duggan, above n 6, [506].

execution of the transaction.<sup>194</sup> This is in marked contrast to the doctrine of undue influence *inter vivos* where the debtor's wrongdoing is imputed to the financial institution by either the principle of agency<sup>195</sup> or the doctrine of notice.<sup>196</sup>

### **A Special Disadvantage**

Proof of special disadvantage remains a significant criterion to satisfy. For example, Bryson J stated in relation to a case where a mother provided an unlimited guarantee and mortgage over her home in 1978 and then a second unlimited guarantee in 1987 to support financial accommodation to her son and daughter-in-law:<sup>197</sup>

People have the right to enter into transactions in those circumstances if they choose to do so; many people do chose to do so, and unless her age is associated with some relevant infirmity, her age has nothing to do with her right to undertake obligations and does not diminish her freedom.<sup>198</sup>

His Honour held that the fact that the mother was advanced in years and that she derived no benefit from the transaction was not sufficient evidence to sustain a claim based on unconscionability.<sup>199</sup> Consequently, it will be necessary to show that there was an additional disabling condition which contributed to the special disadvantage.

Therefore, consistent with the transactions discussed in Part III, proof of old age will not be sufficient to set aside a contract of guarantee or a security given in support of a guarantee.<sup>200</sup> Physical incapacity or mental ill health together with age may not constitute a special disadvantage<sup>201</sup> unless the physical incapacity or mental ill health affects the elder's ability to understand the nature and effect of

<sup>194</sup> Cf an authority which appears to go against the general trend, *Salerno v Saunders* (1993) 173 LSJS 362. In that case, Burley J considered that the doctrine of unconscionable dealing could not be applicable to a case where the defendants' son arranged for the documents to be executed at the office of a Justice of the Peace. He held (at 365) that there was no position of disadvantage between the contracting parties because there had been no direct dealing between the plaintiff and the defendants. It had not been demonstrated that 'the plaintiff was tainted by the alleged unconscionable conduct on the part of the defendants' son.' See also the complex case *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1, 115-22 where a majority of the South Australian Supreme Court (DeBelle and Wicks JJ) pointed out that the loan application had been made through two finance brokers and the mortgagee's agent. The majority of the Court found, on the facts, that the mortgagee had no actual or constructive knowledge of the alleged disadvantage.

<sup>195</sup> *Bank of Credit & Commerce International SA v Aboody* [1990] 1 QB 923, 973 (Slade J).

<sup>196</sup> *Barclays Bank plc v O'Brien* [1994] 1 AC 180; *Bank of New South Wales Ltd v Rogers* (1941) 65 CLR 42.

<sup>197</sup> *Burt v Australia & New Zealand Banking Group Ltd* (1994) ATPR (Digest) ¶46-123.

<sup>198</sup> *Ibid* 53,598. Note also *Amadio* (1983) 151 CLR 447, 490 (Dawson J).

<sup>199</sup> *Ibid*.

<sup>200</sup> See, eg, *Wilby v St George Bank* (2001) 80 SASR 404.

<sup>201</sup> In *Outlook Credit Union Co-operative Ltd v Popovic* (1987) Q ConvR ¶55-269, the elder was in ill health and his knowledge of written English was poor. Although aspects of the Court's finding on special disadvantage appear ambiguous, it is clear (at 57,848) that the Court was influenced by medical evidence which indicated that he was not senile at the relevant time and that he had a reasonable capacity to understand what was happening. See also *Iessman v Costello* [1987] 1 Qd R 283; *Burt v Australia & New Zealand Banking Group Ltd* (1994) ATPR (Digest) ¶46-123; *Mitchell v 700 Young Street Pty Ltd* [2001] VSC (Unreported, Cummins J, 23 April 2001); *Sholl Nicholson Pty Ltd v Chapman* [2001] VSC 430 (Unreported, Balmford J, 12 November 2001).

the transaction.<sup>202</sup> There have been cases where elders (or their representatives) have successfully argued that their poor knowledge and understanding of English constituted or contributed to their special disadvantage<sup>203</sup> because they had little understanding or had a misunderstanding of the transaction.<sup>204</sup> Elders have also pleaded lack of commercial experience as a special disadvantage with varying success, depending on whether there had been independent legal advice and whether they were able to judge for themselves whether to enter into the mortgage.<sup>205</sup> Finally, the absence of independent advice will not, together with old age, constitute a special disadvantage.<sup>206</sup> However, courts may find that a special disadvantage exists where in addition to old age and lack of independent advice, there is evidence of a disability, such as lack of business experience,<sup>207</sup>

<sup>202</sup> See, eg, *Ashton v Melbourne Money Pty Ltd* (1992) ANZ ConvR 95.

<sup>203</sup> See, eg, *Nikolovski v National Australia Bank Ltd* (1993) ASC ¶56-204; *Lisciandro v Official Trustee in Bankruptcy* (1995) ATPR ¶41-436; *Lisciandro v Official Trustee in Bankruptcy* (1996) 69 FLR 180. Note also *State Bank of New South Wales v Layoun* (2001) NSW ConvR ¶55-984 where the claimants were not elders at the time of the transaction but were respectively aged 73 and 65 at the time of the trial; and *Varthalis v Commonwealth Bank of Australia* (1996) 7 BPR [97597] where elders raised, inter alia, unconscionable dealing in relation to an all monies clause.

<sup>204</sup> See, eg, *Lisciandro v Official Trustee in Bankruptcy* (1995) ATPR ¶41-436. However, there have been several cases where language skills have been raised, but the court has not been satisfied on the facts that the elder suffered a special disadvantage because the elder was astute, appeared to understand the general effect of the transaction or had entered into similar transactions previously. For example in *Tarzia v National Australia Bank Ltd* [1996] ANZ ConvR 379, 381, the Court decided that although the elders were like Mr and Mrs Amadio (*Amadio* (1983) 151 CLR 447) because they did not have a strong grasp of English, there were additional factors which clearly distinguished the case, including the fact that they had executed mortgages previously and on one such occasion the mortgage had been explained in Italian to them. For other interesting cases raising these issues see: *Outlook Credit Union Co-operative Ltd v Popovic* (1987) Q ConvR ¶54-269; *National Australia Bank Ltd v Liakopoulos* (Unreported, Supreme Court of Victoria, Hansen J, 24 March 1995); *National Australia Bank Ltd v Nobile* (1988) 100 ALR 227; *Jedda Investments Pty Ltd v Krambousanos* (1997) 72 FCR 138; *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1. Lack of formal education may be a factor which contributes to special disadvantage, but only if the elder demonstrates that he or she did not understand the nature and effect of the transaction: *Varthalis v Commonwealth Bank of Australia* (1996) 7 BPR [14,766]. Note also *Commonwealth Development Bank Ltd v Kerr* [2001] QSC 234 (Unreported, Dutney J, 11 May 2001) in which the Court took into account paucity of education to reject a claim for summary judgment.

<sup>205</sup> *Jedda Investments Pty Ltd v Krambousanos* (1997) 72 FCR 138; *Commonwealth Development Bank Ltd v Kerr* [2001] QSC 234 (Unreported, Dutney J, 11 May 2001). In contrast, in *Janesland Holdings Pty Ltd v Simon* (2000) ANZ ConvR 111, 121, Crispin J found that a combination of age, a limited knowledge of English and lack of business experience did not place the mortgagors in a disadvantageous position. They had entered into mortgages previously, received some legal advice and were able to judge for themselves whether to enter into the mortgage. They were aware of the risk and decided to take it. See also *National Australia Bank Ltd v Hall* (1993) ASC ¶56-234 where an elder raised lack of business experience in respect to a claim under the *Contracts Review Act 1980* (NSW).

<sup>206</sup> See, eg, *White v Ormsby* (1988) ASC ¶55-665; *Burt v Australia & New Zealand Banking Group Ltd* (1994) ATPR (Digest) ¶46-123; *Mitchell v 700 Young Street Pty Ltd* [2001] VSC 116 (Unreported, Cummins J, 23 April 2001). One case which may represent the converse approach is *Choules v Siglin* [2001] WASC 234 (Unreported, Master Bredmeyer, 31 August 2001) (at [24]) where Master Bredmeyer appeared to accept that the elder had not received an explanation of the mortgage from the solicitor who had prepared the mortgage; and had not been told to seek independent advice. However, the Master ultimately decided that the lender did not take unconscientious advantage of her because she was not considered by the Court as inexperienced in mortgage matters.

<sup>207</sup> Note *Harrison v The National Bank of Australasia Ltd* [1928] Tas LR 1, 8.

education<sup>208</sup> or language difficulties.<sup>209</sup>

However, the application of the special disadvantage criterion in third party guarantee cases has differed from its application in the 'bilateral' cases discussed above. First, where the transaction is a standard refinancing transaction, which ensures that there is a new incoming mortgagee and that action will not be taken to exercise power of sale over the elder's home, courts have considered that the elder may not suffer a special disadvantage, although the elder may have had insufficient understanding of commercial matters generally or the nature of the refinancing transaction.<sup>210</sup> Indeed, refinancing transactions are generally considered advantageous to elders, notwithstanding their age or any disabilities which may afflict them.<sup>211</sup>

Secondly, while physical illness, mental deficiencies and lack of critical skills such as language skills, are the predominant kinds of disabilities which courts have considered in determining whether there is a special disadvantage, a minority of courts have interpreted the nature of special disadvantage broadly. As discussed previously, the majority of the High Court in *Amadio* acknowledged that the elders in that case were disadvantaged not only because of their age, language difficulties and lack of commercial experience, but also because they had been actively misled by their son about the commercial viability of his company.<sup>212</sup> Accordingly, some courts have taken into account misinformation, demonstrated lack of understanding of the transaction and sometimes the absence of independent advice as evidence of a special disadvantage. There may be active misrepresentations by the debtor which, together with the age of the elder and any other disability, may constitute a special disadvantage,<sup>213</sup> or a general misunderstanding about the transaction or the overall circumstances underpinning it. For example, in *State Bank of New South Wales v Sullivan*,<sup>214</sup> James J held that although the elder was not subject to disabilities often encountered in the cases (such as illness, lack of knowledge of the English language, illiteracy or lack of business experience) he was in a position of special disadvantage 'by reason of lack of information and misinformation about the transaction'.<sup>215</sup> In particular, the elder was unaware that the company, whose indebtedness he would guarantee, was in serious financial difficulties. In this regard, the Court made it clear that neither the debtor nor the bank had made appropriate information available to the elder.<sup>216</sup> Elders may also misunderstand

<sup>208</sup> *Farnham v Orrell* (1989) NSW ConvR ¶55-443.

<sup>209</sup> In *Ribchenkov v Suncorp-Metway Ltd* (2000) 175 ALR 650, [70]-[1], Spender J found that it would be unconscionable for the bank to claim further advances when the bank was on notice that the elder knew little English and required independent advice and had made no arrangements in this regard before the advances were made available.

<sup>210</sup> Consider *Wilby v St George Bank* (2001) 80 SASR 404.

<sup>211</sup> *Allaway v Saunders* (Unreported, Supreme Court of Victoria, Harper J, 29 August 1995) 3-4; note also *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1, 113, 128-9 (DeBelle and Wicks JJ).

<sup>212</sup> *Amadio* (1983) 151 CLR 447, 464-6 (Mason J), 476 (Deane J), 469 (Wilson J).

<sup>213</sup> *Liscianro v Official Trustee in Bankruptcy* (1995) ATPR 41-436, 40-901 (Kiefel J).

<sup>214</sup> [1999] NSWSC 596 (Unreported, James J, 14 July 1999).

<sup>215</sup> *Ibid* [327].

<sup>216</sup> *Ibid* [328]-[9].

or be misinformed about the extent<sup>217</sup> or amount of liability.<sup>218</sup> In another case, an elder who was under the incorrect impression that her son's business was going well and that the guarantee would be limited to six months, was considered to be suffering a special disadvantage because she was unable to make an informed and real choice about whether to provide a mortgage over her home.<sup>219</sup> However, while it is clear that guarantors may be relieved from unlimited liability because they did not believe that they had assumed that liability, the cases are inconclusive as to whether such a misunderstanding will contribute to a characterisation of special disadvantage. For example, in *National Australia Bank Ltd v Winskill*,<sup>220</sup> Dunford J did not definitely decide that a genuine belief that liability was limited (together with other factors) constituted special disadvantage<sup>221</sup>

Alternatively, as will be shown below,<sup>222</sup> when discussing the second criterion, a minority of courts have constructed the notion of transactional special disadvantage on the particular facts of the case. The courts have found that the financial institution has been burdened by an obligation to assist the elder by providing a thorough and extensive explanation of the nature and effect of the transaction, including the potential risks involved. For example, in *National Australia Bank Ltd v Nobile*,<sup>223</sup> the Court held that one group of elders were at a special disadvantage vis-à-vis the bank because the guarantee had been required by the bank, the assets of the elders would be totally or almost totally exhausted, if the elders were required to meet the liability, and substantial advances had already been made to the debtor, so that the bank was clearly achieving and protecting a secured status.<sup>224</sup> Moreover, the bank was aware of these factors, but took no steps to explain the relevant parts of the document to them.<sup>225</sup>

Thirdly, in regard to *Bridgewater*,<sup>226</sup> the overall trend appears that it has been even less influential in third party guarantee cases than the 'bilateral' cases above.<sup>227</sup>

<sup>217</sup> *Melverton v Commonwealth Development Bank of Australia* (1989) ASC ¶55-921; *Commonwealth Development Bank Ltd v Kerr* [2001] QSC 234 (Unreported, Dutney J, 11 May 2001).

<sup>218</sup> See, eg, *Varthalis v Commonwealth Bank of Australia* (1996) 7 BRR [14,766]; *Australia and New Zealand Banking Group Ltd v Petrik* [1996] 2 VR 638.

<sup>219</sup> *Melverton v Commonwealth Development Bank of Australia* (1989) ASC ¶55-921, 58,489. Note also *Jedda Investments Pty Ltd v Krambousanos* (1997) 72 FCR 138 where the fact that elders did not understand the effect of a caveat together with their limited language skills and business experience constituted a special disadvantage. Cf *Robinson v ANZ Banking Group Ltd* (1990) ASC ¶55-979, 55,896, where Hodgson J found that while the *Amadio* principle did not apply because he considered that the plaintiffs (who were in their early sixties) were not advanced in age and had showed reasonable intelligence, he conceded in respect of a claim under the *Contracts Review Act 1980* (NSW) that it was reasonable for them to assume that their liability under the mortgage would only arise if there was a shortfall after the security given by their son was realised.

<sup>220</sup> (Unreported, Supreme Court of New South Wales, Dunford J, 15 November 1996).

<sup>221</sup> *Ibid* 5-6. Note also *Crisp v Australia and New Zealand Banking Group Ltd* (1994) ATPR ¶41-294 where the Court observed (at 41, 941) that the bank did not make it clear that the mortgage extended far beyond security for an overdraft.

<sup>222</sup> See below Part IV(B)(2).

<sup>223</sup> (1988) 100 ALR 227.

<sup>224</sup> *Ibid* 252.

<sup>225</sup> *Ibid*.

<sup>226</sup> (1998) 194 CLR 457.

<sup>227</sup> See above Part III.

There have been several cases after *Bridgewater* where courts have referred to or applied *Amadio* while *Bridgewater* has not even been cited.<sup>228</sup> This can be explained, in part, by the clear fact that *Bridgewater* was itself a 'bilateral' case, whereas the facts of *Amadio* concerned elderly parents giving a guarantee. Moreover, what is equally significant is that those cases evidencing a broad notion of special disadvantage were either decided before *Bridgewater*,<sup>229</sup> or applied a notion of special disadvantage referring to *Amadio*, without even considering the possible impact of *Bridgewater*. In *State Bank of New South Wales v Sullivan*,<sup>230</sup> James J acknowledged that lack of information or misinformation could constitute a special disadvantage.<sup>231</sup> His Honour did not even refer to the majority decision in *Bridgewater* in his discussion of this issue. Instead, he pointed out that *Amadio* envisaged that a special disadvantage could take a variety of forms.<sup>232</sup>

Nevertheless, there is one important exception to the overall trend. In *Micarone v Perpetual Trustees Australia Ltd*,<sup>233</sup> a complex financial case, two sets of parents had mortgaged significant assets to secure their adult children's liabilities under a series of loans. A refinancing was sought and the parents agreed, notwithstanding the overall effect of increasing their financial liability. On default of the monies owing, the mortgagee sought possession of the properties; and the parents sought relief, inter alia, for unconscionable dealing. While at first instance, the trial judge found in favour of the parents on this point,<sup>234</sup> on appeal a majority of the Full Court of the Supreme Court of South Australia found that the mortgagee was not guilty of unconscionable conduct.<sup>235</sup> In a joint judgment, Debelle and Wicks JJ held that despite disabilities such as age, emotional attachment to the children, limited language capacity and misrepresentations, the parents did not suffer a special disadvantage because they had enough business experience to understand the general nature and effect of the transactions.<sup>236</sup> In contrast, Olsson J (dissenting) considered that the parents did suffer from a special disadvantage, even though they may have understood the nature of mortgages. He adopted a broader concept of special disadvantage, clearly mindful of the approach of the majority of the High Court in *Bridgewater*.<sup>237</sup> He commented:

It is a serious mistake simply to seek to distil out an alleged level of understanding of a party of the technical structure and nature of a transaction;

<sup>228</sup> *State Bank of New South Wales v Sullivan* [1999] NSWSC 596 (Unreported, James J, 14 July 1999); *Janesland Holdings Pty Ltd v Simon* (2000) ANZ ConvR 111; *State Bank of New South Wales v Layoun* (2001) NSW ConvR ¶55-984; *Choules v Siglin* [2001] WASC 234 (Unreported, Master Bredmeyer, 31 August 2001).

<sup>229</sup> See, eg, *National Australia Bank Ltd v Nobile* (1988) 100 ALR 227.

<sup>230</sup> [1999] NSWSC 596 (Unreported, James J, 14 July 1999).

<sup>231</sup> *Ibid* [327].

<sup>232</sup> *Ibid* [326].

<sup>233</sup> (1999) 75 SASR 1.

<sup>234</sup> *Ibid* 110-11, 119, 126-7 (discussion of the trial judge's judgment by Debelle and Wicks JJ).

<sup>235</sup> *Ibid* 107-29 (Debelle and Wicks JJ). The facts were complicated by the fact that it was argued that the disability was known to the mortgagee through its agent.

<sup>236</sup> *Ibid* 113 (Debelle and Wicks JJ).

<sup>237</sup> *Ibid* 39. His Honour cited *Bridgewater* (1998) 194 CLR 457, 489-90 (Gaudron, Gummow and Kirby JJ) during his discussion.

and to argue from that that there was no special disadvantage because *the plaintiffs* were, by reason of that understanding, able to make an informed decision. Such an approach, in a case such as this, ignores the importance and significance of the *overall* complex of factors which went to constitute the *prima facie* disadvantage of each of *the plaintiffs*, when the situation was viewed as a totality.<sup>238</sup>

Like Beazley JA in *Archer v Archer*,<sup>239</sup> Olsson J considered that special disadvantage had to be understood by reference to the circumstances of the case; and that an intention to enter into a transaction was no answer to allegations of unconscionable dealing.<sup>240</sup>

### **B Knowledge and Advantage-taking**

In the event that the elder establishes special disadvantage, satisfying the second criterion for unconscionable dealing can be even more problematical for the elder than establishing special disadvantage. There are two broadly divergent approaches adopted by courts when assessing whether there has been knowing advantage-taking. Many courts have applied a narrow knowledge test, while others focus on whether the conduct of the financial institution is unconscientious. Nevertheless it appears that overall, more courts have applied a narrow knowledge test so that it will be difficult for elders to establish unconscionable dealing. In this regard, it is important to highlight that a narrow knowledge approach was applied in *Amadio* by Gibbs CJ<sup>241</sup> and Dawson J.<sup>242</sup> It will be recalled that Mason, Wilson and Deane JJ held that it was not necessary for a stronger party to have actual notice of the special disadvantage. It was sufficient to show that the stronger party was aware of facts which would raise that possibility in the mind of the reasonable person.<sup>243</sup> The bank manager was aware of several factors such as age, lack of language skills and commercial inexperience which strongly suggested that the elders may not have understood the risks involved. In contrast, Dawson J applied a stricter approach, endorsing the view of the trial judge that neither the conduct of the parties nor personal characteristics of the parents, placed the bank on notice that it ought to take steps to explain the documents to them. He pointed out that there was nothing unusual in the fact that the elders had nothing to gain from the guarantee and this did not constitute evidence of advantage-taking.<sup>244</sup> In this regard, Gibbs CJ displayed a

<sup>238</sup> *Ibid* (emphasis added).

<sup>239</sup> [2000] NSWCA 314 (Unreported, Handley, Beazley and Fitzgerald JJA, 7 November 2000), [158]-[69] (Beazley JA).

<sup>240</sup> *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1, 38-40.

<sup>241</sup> (1983) 151 CLR 447, 459-60.

<sup>242</sup> *Ibid* 489-90.

<sup>243</sup> *Ibid* 466-77 (Mason J); 477-9 (Deane J); 468-9 (Wilson J); note also Meagher, Heydon and Leeming, above n 6, [16-010].

<sup>244</sup> (1983) 151 CLR 447, 489-90.

similar attitude,<sup>245</sup> but decided in favour of the elders on other grounds.<sup>246</sup>

### **1 A Narrow Knowledge Based Approach - No Exploitive Conduct or Passive Acceptance**

There are a number of cases where elders have not been able to satisfy the knowledge criterion. Courts have found that the financial institution had no knowledge of the special disadvantage or specific facts which would place the financial institution on inquiry that the elder suffered a special disadvantage.<sup>247</sup> The implicit assumption in all such determinations has been that the financial institution or lender has no prima facie obligation to enquire into the kind of person put forward to guarantee the liabilities of the debtor or even the relationship of the debtor and guarantor. As Mahoney JA pointed out in *Younan v Beneficial Finance Corporation Ltd*:<sup>248</sup>

... I do not think that this Court is bound to hold, or should hold, that there is under the general law a duty upon a creditor, even in the broad sense, to seek out the details of the position of a guarantor where there is, on the material in the ordinary course available to it, nothing to indicate a 'special disability' or the like.<sup>249</sup>

As there was no need to enquire, the financial institution has been able to plead a lack of knowledge of an elder's special disadvantage, even if the elder does suffer a series of disabilities which may constitute a special disadvantage. Therefore, in some cases, courts have simply decided that there was no actual or constructive knowledge of the disability.<sup>250</sup> In other cases, courts have carefully considered the nature and extent of the financial institution's knowledge. For example, a financier may have known that the proposed guarantor was elderly

<sup>245</sup> *Ibid* 459-60.

<sup>246</sup> *Ibid* 456-8. His Honour found in favour of the elders on the doctrinally separate basis of a financier's duty of disclosure where there are unusual or unexpected circumstances in relation to the debtor's financial situation. He held that the bank had entered into unusual arrangements with the company and had tried to create a façade of prosperity. It had been agreed that within a short time the overdraft limit would be reduced below the existing debt, and then cleared altogether. Therefore the debtor was only given temporary respite while the bank markedly improved its security. The bank had not merely dishonoured cheques, but selectively dishonoured them. Failure to disclose amounted to a misrepresentation about a material aspect of the transaction. See also John Phillips and James O'Donovan, *The Modern Contract of Guarantee* (3rd ed, 1996) 123-30.

<sup>247</sup> See, eg, *National Australia Bank Ltd v Liakopoulos* (Unreported, Supreme Court of Victoria, Hansen J, 24 March 1995); *National Australia Bank Ltd v Winskill* (Unreported, Supreme Court of New South Wales, Dunford J, 15 November 1996); *Melverton v Commonwealth Development Bank of Australia* (1989) ASC ¶55-921; *Lisciandro v Official Trustee in Bankruptcy* (1995) ATPR ¶41-436; *Lisciandro v Official Trustee in Bankruptcy* (1996) 69 FLR 180; *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1. In *Outlook Credit Union Co-operative Ltd v Popovic* (1987) Q ConvR ¶54-269, the Court considered that the defence to the recovery of monies under a guarantee had been poorly made out and that there had been a failure to show knowledge or wilful ignorance. This appears to be a narrower test than placing the financial institution on enquiry.

<sup>248</sup> (1995) ANZ ConvR 213.

<sup>249</sup> *Ibid* 217. See also the comments of Phillips J in *HG & R Nominees Pty Ltd v Fava* [1997] 2 VR 368, 404 and DeBelle and Wicks JJ in *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1, 121-2.

<sup>250</sup> See, eg, *National Australia Bank Ltd v Winskill* (Unreported, Supreme Court of New South Wales, Dunford J, 15 November 1996); *Outlook Credit Union Co-operative Ltd v Popovic* (1987) Q ConvR ¶54-269; *Tessman v Costello* [1987] 1 Qd R 281.



and a widow (which was considered inadequate to establish special disadvantage), but was unaware that the elder was suffering from a serious illness. Thus, the financier was not aware of the facts constituting the special disadvantage and did not unconscientiously take advantage of the elder's special disadvantage.<sup>251</sup>

Moreover, as there was no need to enquire about the guarantor, it has been held that there was no reason why it was unconscionable for a bank to take a guarantee from a person closely related to the customer, as this was considered a normal situation in which guarantees were given.<sup>252</sup> Accordingly, although there may be evidence that the elder and the debtor shared a common surname, address and solicitor, this may not place the financier on notice that there may be either any special disadvantage or impropriety.<sup>253</sup> In another case, the fact that a bank's practices required that an elderly parent providing a secured guarantee should be told to obtain independent advice, did not constitute an acknowledgement of a special disadvantage.<sup>254</sup> Even if there is a formal preemptory explanation by the bank to the elders which is unsatisfactory, this will not constitute actual or constructive notice of a special disadvantage.<sup>255</sup>

In determining that the financial institution did not have sufficient knowledge to constitute advantage-taking, courts have not simply considered knowledge of the elder's special disadvantage. Courts have widened the factors by which they will exonerate the financial institution, also pointing out that: the financial institution did not have information about the debtor's financial situation and was not involved in the debtor's financial dealings;<sup>256</sup> or did not anticipate the financial difficulties which the debtor would ultimately face.<sup>257</sup> In so doing, courts have readily compared and contrasted the facts of the case before them and the position of the bank in *Amadio*, finding that the financial institution in the instant case was not so intimately involved with the debtor as the bank in *Amadio*.<sup>258</sup>

<sup>251</sup> *Sholl Nicholson Pty Ltd v Chapman* (Unreported, Supreme Court of Victoria, Balmford J, 12 November 2001) [43], [50], [78]. Sometimes this view has been expressed loosely as in *Commonwealth Bank of Australia v McGlynn* (1995) ANZ ConvR 81, 85, where Giles J said that when the mortgagee sent the mortgage documents directly to the parents as mortgagors for execution, the mortgagee 'had no reason to think that advantage was being taken of the mortgagors.

<sup>252</sup> *Burt v Australia & New Zealand Banking Group Ltd* (1994) ATPR (Digest) ¶45-123, 53-598 (Bryson J). Note also *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1, 120 (Debelle and Wicks JJ).

<sup>253</sup> In *Roberts v Goldenberg* [1997] ANZ ConvR 405, which was a case where an elder claimed that a mortgage was unjust under the *Contracts Review Act 1980* (NSW), McLelland CJ held (at 8, in the unreported version, Supreme Court of New South Wales, 3 February 1997) that knowledge of such factors did not constitute notice of any impropriety.

<sup>254</sup> *Burt v Australia & New Zealand Banking Group Ltd* (1994) ATPR (Digest) ¶46-123, 53-598 (Bryson J).

<sup>255</sup> *National Australia Bank Ltd v Winskill* (Unreported, Supreme Court of New South Wales, Dunford J, 15 November 1996).

<sup>256</sup> *Choules v Siglin* [2001] WASC 234 (Unreported, Master Bredmeyer, 31 August 2001) [25].

<sup>257</sup> *Tarzia v National Australia Bank Ltd* [1996] ANZ ConvR 379, 382.

<sup>258</sup> *Choules v Siglin* [2001] WASC 234 (Unreported, Master Bredmeyer, 31 August 2001) [24]-[5]; *Tarzia v National Australia Bank Ltd* [1996] ANZ ConvR 379, 382; *Micarone v Perpetual Trustees Australia Ltd* (1999) SASR 1, 109 (Debelle and Wicks JJ).

The narrow knowledge-based approach both manifests and reinforces a restrictive attitude towards guarantees made by elders. If the court finds that the knowledge requirement has not been satisfied, there is no further need for it to investigate the conduct of the financial institution or impose an obligation on the financial institution to redress the special disadvantage or alleged advantage-taking. The contract is considered to be a purely commercial transaction, despite the age and infirmity of the elder and the possible improvidence of the transaction (such as where it involves the elder's sole major asset). The failure to advise elders to seek independent advice<sup>259</sup> or the evident lack of independent advice will not sway the court's decision in favour of the elder.<sup>260</sup>

## **2 Knowledge Leading to Unconscionable Conduct**

In contrast, in those cases where courts have considered the knowledge requirement to be satisfied, they have found that the financial institution was aware or ought to have been aware of the guarantor's specific disability.<sup>261</sup> The underlying view is that the financial institution not only had sufficient knowledge of the special disadvantage, but that it took advantage of it. Therefore, the financial institution owed an obligation to the elder to explain the nature and effect of the documents, to supply additional information or disabuse the elder from misunderstandings about the transaction. Applying such an approach to the facts before them, some courts have relied on the approach of Mason, Wilson and Deane JJ in *Amadio*.<sup>262</sup> However, it is evident that the High Court's identification of passive acceptance of a benefit in *Bridgewater*<sup>263</sup> has been neither seriously considered nor applied by the courts. Yet, it is arguable that there would be situations which could be classified as passive acceptance, such as where elders spontaneously offer to guarantee the debts of a relative or caregiver without the request of the debtor or financial institution. However, as indicated above,<sup>264</sup> there has been little discussion or reference to *Bridgewater* in the third party guarantee cases.

Courts may hold that the financial institution had sufficient knowledge in several ways. Sometimes courts will simply decide that the financial institution had

<sup>259</sup> *Janesland Holdings Pty Ltd v Simon* (2000) ANZ ConvR 111, 118 (Crispin J).

<sup>260</sup> See, eg, *White v Ormsby* (1988) ASC ¶55-665, 58-031. In *Sholl Nicholson Pty Ltd v Chapman* [2001] VSC 430 (Unreported, Balmford J, 12 November 2001) the Court noted (at [77]) that the elder was offered the opportunity for independent advice.

<sup>261</sup> A helpful case in this regard is *Ashton v Melbourne Money Pty Ltd* [1992] ANZ ConvR 95 which was concerned with constructive knowledge of a person's contractual incapacity due to mental illness. The guarantor acted oddly and was rather eccentric. The Court applied, *inter alia*, the approach of the High Court to constructive knowledge in *Amadio* and held (at 101) that the employee of the lender was 'aware of facts that would have raised the possibility in the mind of any reasonable person that [she] was not capable of understanding other than simple requests or directions, and certainly not capable of making judgments on any matter involving property'. For a discussion of eccentric conduct and knowledge of disability see Chen-Wishart, above n 10, 46-7, 64.

<sup>262</sup> See, eg, *Jedda Investments Pty Ltd v Krambousanos* (1997) 72 FCR 138, 145-7; *State Bank of New South Wales v Sullivan* [1999] NSWSC 596 (Unreported, James J, 14 July 1999) [304]-[45]. Note also the comments by Chen-Wishart, above n 10, 27.

<sup>263</sup> (1998) 194 CLR 457, 493 (Gaudron, Gummow and Kirby JJ).

<sup>264</sup> See above Part III(A).

knowledge without presenting a thorough explanation of why this is so on the facts. In *State Bank of New South Wales v Layoun*,<sup>265</sup> the Court held that the parents had limited language skills which made it difficult for them to protect their own interests. The Court held that this was known or ought to have been known to the bank (particularly as the bank alleged that the documentation was signed in its office);<sup>266</sup> and it was imprudent for the bank to assume that the debtor somehow ensured that the parents understood what they were doing. The Court considered that the evidence did not support that conclusion.<sup>267</sup> What was crucial was that the Court considered that there was sufficient information available to the bank to place it on notice that the parents required some assistance understanding the transaction; and the Court assumed that the bank bore an obligation to do so.

Another basis for finding that the claim for unconscionable dealing has been proved, is to define special disadvantage by reference to misinformation and to establish that the financial institution had an intimate, or at least a better knowledge, of the debtor's true liabilities or financial position than the guarantor. In *Jedda Investments Pty Ltd v Krambousanos*,<sup>268</sup> the Full Federal Court held that it was evident to the lender that the debtors, the elderly guarantors and the solicitor advising them misunderstood the effect of the transaction. An appropriate description of what the mortgage was securing, had not been supplied by the lender. Accordingly, the elders entered into a guarantee, under which their liability was excessive, without exercising judgment as to what was in their best interests.<sup>269</sup> While in *Jedda Investments v Krambousanos*, the lender was responsible for the misunderstanding of the elders, in *State Bank of New South Wales v Sullivan*,<sup>270</sup> the Court was convinced that although the bank was not directly responsible for the misinformation, it ought to have taken steps to ensure that the elder had an opportunity to act in his best interests. In that case, an elder provided a mortgage to cover the liabilities of the company of his former de facto wife's son. The Court found that, although he was not subject to readily recognisable disabilities, he lacked appropriate information about the transaction and the financial status of the company;<sup>271</sup> and that the bank was aware or ought to have been aware that he was ignorant of the serious financial state of the company.<sup>272</sup> The Court found that the bank had not provided crucial information about the company's financial position to the elder.<sup>273</sup>

Courts may define special disadvantage and knowingly taking advantage by considering a wide range of facts and drawing wide inferences which together not only satisfy the criteria for unconscionable dealing, but also effectively

<sup>265</sup> (2001) NSW ConvR ¶55-984.

<sup>266</sup> *Ibid* 58,078-9.

<sup>267</sup> *Ibid* 58,080-1; cf cases where advice inter alia from the debtor to the guarantor appeared to satisfy the court: *Tarzia v National Australia Bank Ltd* [1996] ANZ ConvR 379; *Sholl Nicholson Pty Ltd v Chapman* [2001] VSC 430 (Unreported, Balmford J, 12 November 2001) [77].

<sup>268</sup> (1997) 72 FCR 138.

<sup>269</sup> *Ibid* 148-50.

<sup>270</sup> [1999] NSWSC 596 (Unreported, James J, 14 July 1999).

<sup>271</sup> *Ibid* [327].

<sup>272</sup> *Ibid* [343].

<sup>273</sup> *Ibid* [333]-[8].

prescribe an obligation on the financial institution to take steps to disabuse or better inform the elder. In *Farnham v Orrell*,<sup>274</sup> a 75 year old aged pensioner provided her home as security for her daughter and son-in-law's business liabilities. The Court found that, on the balance of probabilities, the elder would not have entered into the transaction or would not have gone ahead without independent advice, if she had known the true risks involved. The lender ought to have ensured that she had reasonable knowledge of those risks.<sup>275</sup> The factors which placed the lender on alert included: the age of the elder; the fact that the elder was a pensioner; the influence of her daughter and son-in-law; the inability of the elder to make the payments required under the guarantee; the precarious situation of the debtors; and the real probability that the elder could lose her home.<sup>276</sup> In this case, knowledge of these facts, combined with the mortgage, constituted unconscionable conduct.

In *National Australia Bank Ltd v Nobile*,<sup>277</sup> referred to previously, the Federal Court also constructed a notion of disadvantage which automatically imposed an obligation to advise on the financial institution. In that case, Mr and Mrs Martinelli guaranteed the indebtedness of a company of which their son and daughter-in-law were directors and shareholders. Although Mr and Mrs Martinelli were Italian, the Court did not find that the special disadvantage related to language difficulties. Instead, Neaves J<sup>278</sup> held that there were three reasons why the elders were at a special disadvantage vis-à-vis the bank, of which the bank was clearly aware: the guarantee was required from the elders by the bank; if the elders were required to discharge the liability, their assets would be totally or almost totally exhausted; and the guarantee related to some very large advances which had already been made. The bank had taken no action to explain the documentation to them.<sup>279</sup> In this case, the overall improvidence of the transaction imposed an obligation on the bank to provide an explanation. As the bank had not done so, it had knowingly exploited the elders' special disadvantage.

Finally, an approach which so far has had little support, is to suggest that the basis for unconscionable dealing could be redrawn to find that a guarantee has been induced by unconscionable dealing where there is 'a call upon a blood relationship so as to impose an irresistible moral burden'.<sup>280</sup> In *Tzefrios v Polites*,<sup>281</sup> Nathan J held that it was 'almost shameless' for a sister to call upon her sibling to pledge property for her advantage.<sup>282</sup> Moreover, there was no commercial benefit to the sibling and there was no reasonable probability that the sibling would be able to meet the obligation.<sup>283</sup> Arguably, this general view could

<sup>274</sup> (1989) NSW ConvR ¶55-443, 58-219. Hodgson J considered that both at general law and under the *Contracts Review Act 1980* (NSW) the guarantee ought to be set aside.

<sup>275</sup> *Ibid* 58-218-9.

<sup>276</sup> *Ibid*.

<sup>277</sup> (1988) 100 ALR 227.

<sup>278</sup> *Ibid* with whom Davies J (241) and Spender J (253) concurred.

<sup>279</sup> *Ibid* 252.

<sup>280</sup> *Tzefrios v Polites* (1994) ANZ ConvR 32, 36 (Nathan J).

<sup>281</sup> (1994) ANZ ConvR 32.

<sup>282</sup> *Ibid* 36.

<sup>283</sup> *Ibid* 36-7.

be applied to situations where an elderly parent guaranteed an adult child's liabilities, particularly where the elder was unable to meet the payments required and/or the elder's only major asset was used as security for the loan. However, it has been rejected on the basis that people do enter into guarantees where commercial commonsense would preclude them from doing so. In such cases, 'their conduct should usually be interpreted as an expression of their economic liberty and not as a ground for them to escape their obligations'.<sup>284</sup>

### C Comment

Overall, in recent years it has been difficult for elders to have guarantees set aside. Consistent with cases concerning gifts, transfers and sales, evidence of old age and conditions incidental to old age may not be enough to convince a court that the elder suffers from a special disadvantage. Moreover, while a minority of courts have applied a broad approach to the criterion of special disadvantage, the possible potential of the *Bridgewater*<sup>285</sup> decision appears to have been generally overlooked. Elders have also faced the prospect of two inconsistent approaches to knowingly taking advantage; and the strong possibility that the courts will apply the narrow knowledge-based approach articulated by Gibbs CJ and applied by Dawson J in *Amadio*.<sup>286</sup> So far, the High Court's concept of passive acceptance in *Bridgewater*, has been neither utilised nor explored by courts in third party guarantee cases.

Therefore, it is not surprising that a few courts, seriously troubled by the enforcement of guarantees against very elderly parents, have moved beyond the question of unconscionable dealing and have sought to rely on other doctrines, such as undue influence and the special equity identified in *Yerkey v Jones*,<sup>287</sup> which was re-affirmed in *Garcia v National Australia Bank Ltd.*<sup>288</sup> It will be recalled that in *Garcia*, a majority of the High Court held that where a wife was a volunteer and did not understand the nature and effect of a guarantee, she would be able to have it set aside unless the financier took steps to inform her about the transaction or had ascertained that it had been explained to her.<sup>289</sup> So far, the High Court has restricted the special equity principle to wives, although some members of the Court suggested that the principle may extend to 'long term and publicly declared relationships short of marriage between members of the same or

<sup>284</sup> *Ryan v Tooth* (Unreported, Supreme Court of New South Wales, Bryson J, 24 September 1993) 45. Although the comments of Bryson J were in the context of undue influence, he opined (at 43) that the approach of Nathan J (inspired by US law) and the various Courts in the United States were 'not readily applicable in other places, particularly in New South Wales, where community standards and values of which a decision on unconscionability is a judicial interpretation may well differ from those of the community in one of the American States ...' Note also *Tessman v Costello* [1987] 1 Qd R 283, 293 (Williams J) and *Wilby v St George Bank* (2001) 80 SASR 404, 414 (Perry J with whom Doyle CJ and Bleby J agreed).

<sup>285</sup> (1998) 194 CLR 457.

<sup>286</sup> (1983) 151 CLR 447, 459-60 (Gibbs CJ); 489-90 (Dawson J).

<sup>287</sup> (1939) 63 CLR 649. For a discussion of the rule see Duggan, above n 50, [1123]-[8].

<sup>288</sup> (1998) 194 CLR 395 (*Garcia*). For a consideration of the position in the United Kingdom see *Barclays Bank plc v O'Brien* [1994] 1 AC 180; *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449.

<sup>289</sup> (1998) 194 CLR 395, 408-9 (Gaudron, McHugh, Gummow and Hayne JJ); 440-3 (Callinan J).

opposite sex'.<sup>290</sup> However, the Court did not consider whether the concept of the special equity would be further extended to elderly guarantors. Nevertheless, in *State Bank of New South Wales v Layoun*,<sup>291</sup> Levine J considered that *Garcia* could apply to older parents who, by the time the case came to court were respectively aged 73 and 65 years of age. In that case, they successfully pleaded both *Amadio* and *Garcia*. Levine J held that a 'factual departure' from the facts of *Amadio* and *Garcia* did not necessarily render the principles inapplicable.<sup>292</sup> The principles were applicable 'on a "case by case basis"<sup>11293</sup> and the case before His Honour warranted the protection afforded by the special equity in *Garcia*. Interestingly, the Court neither cited nor discussed the decision in *Bridgewater*.

## V CONCLUSION

The modern High Court decisions in *Amadio*<sup>294</sup> and *Bridgewater*<sup>295</sup> not only demonstrated the continued importance of the doctrine of unconscionable dealing generally, but the doctrine's potential in cases concerning elders respectively acting as guarantors or donors/sellers. In both cases, the High Court not only found that there was unconscionable dealing, but adopted a broad approach to unconscionable dealing, reflecting its equitable origins. However, it ought not be overlooked that in both cases the High Court was also tightly split over the applicability of the doctrine to the facts of each case. Indeed, despite the majority decisions in both cases, an analysis of the doctrine as applied in cases involving elders in lower courts shows that its implementation has remained heavily influenced by the attitudes displayed in the minority judgments in these cases; and constrained by the 19th century contractual and historical context in which it developed. There have been four indicators of this trend.

First, concerns expressed by academic commentators that the decision in *Bridgewater* could weaken or effectively undermine special disadvantage as a criterion appear unfounded. Courts have applied the special disadvantage criterion rigorously and have required clear evidence that the elder suffered special disadvantage before judicial intervention was warranted.

Secondly, although the High Court has established that age is an indicator of special disadvantage,<sup>296</sup> it is clear that elders will be unable to set aside gifts, transfers, sales or guarantees simply on the basis of old age,<sup>297</sup> unless other disabilities, which either result from old age or are unassociated with age, are

<sup>290</sup> Ibid 404 (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>291</sup> (2001) NSW ConvR ¶155-984. Note also the comments in *Australia and New Zealand Banking Group Ltd v Barry* [1992] 2 Qd R 12, 23-4 (Derrington J).

<sup>292</sup> Ibid 58,081-2.

<sup>293</sup> Ibid 58,082.

<sup>294</sup> (1983) 151 CLR 447.

<sup>295</sup> (1998) 194 CLR 457.

<sup>296</sup> *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J).

<sup>297</sup> See, eg, *Bayne v Karaliamis* (2001) ANZ ConvR 181; *Wilby v St George Bank* (2001) 80 SASR 404.

evident. It is still assumed that the elderly as adults are able to and ought to be able to protect their own interests. Moreover, this will be the case even where the effects of age have placed the elder in the unenviable position of seeking care or selling a property he or she can no longer care for.

Thirdly, it will be recalled that in *Amadio*<sup>298</sup> and in *Bridgewater*,<sup>299</sup> a majority of the High Court drew a distinction between undue influence, which is concerned with the quality of the consent of the weaker party, and unconscionable dealing which ultimately focuses on the unconscionable conduct of the defendant. Notwithstanding that a majority of the High Court in *Bridgewater* made it clear that the doctrine of unconscionable dealing may even apply to situations where the weaker party has the capacity to enter the transaction and understands what he or she is doing, it remains easier to establish a case of unconscionable dealing where the elder lacks mental capacity or understanding due to mental illness, alcoholism or poor English language skills. This has unduly limited the application of the doctrine because the courts have focused on the mental capacity and understanding of the elder as establishing special disadvantage rather than the defendant's active exploitation or passive advantage-taking of the elder's special disadvantage which includes the personal circumstances which the elder faces. Two notable exceptions to this trend are the dissenting judgment of Beazley JA in *Archer v Archer*<sup>300</sup> and the dissenting judgment of Olsson J in *Micarone v Perpetual Trustees Australia Ltd.*<sup>301</sup> In both judgments, special disadvantage was determined not only by reference to the characteristics respectively of the donor or the mortgagors, but the overall circumstances.

Fourthly, despite the flexible and broad approach to knowingly taking advantage in *Amadio*, there have been many guarantee cases involving elders where a strict or narrow approach to the financial institution's knowledge of the special disadvantage has been applied. In these cases, courts have opined that a financial institution owes no duty to enquire into the kind of person put forward as a guarantor or the relationship of the debtor and the guarantor. Therefore, knowledge of a potential special disadvantage either does not occur or occurs on a haphazard basis. If the court decides that the knowledge requirement has not been satisfied, there is no necessity to investigate the conduct of the financial institution. The contract of guarantee will be an enforceable commercial transaction untrammelled by age, infirmity, the elder's relationship to the debtor, the lack of independent advice or the transaction's overall improvidence. However as discussed previously, a broad approach to knowingly taking advantage has operated contemporaneously in other cases.

What the case law has shown is that there has been a constant and unresolved tension between *laissez-faire* commercialism on the one hand and equity's

<sup>298</sup> (1983) 151 CLR 447, 461 (Mason J), 474 (Deane J), 468 (Wilson J).

<sup>299</sup> (1998) 194 CLR 457, 478 (Gaudron, Gummow and Kirby JJ).

<sup>300</sup> [2000] NSWCA 314 (Unreported, Handley, Beazley and Fitzgerald JJA, 7 November 2000) [143]-[63].

<sup>301</sup> (1999) 75 SASR 1, 35-40.

protection of vulnerable persons against unconscionable conduct on the other. A valuable feature of the equitable jurisdiction has been the insistence that courts ought to examine carefully the particular facts of the case when deciding whether intervention is warranted. However, the different outcomes in the cases considered cannot be attributed simply to contrasting factual situations. To a considerable degree, the interpretation and scope of the doctrine has been dependent upon the attitude of each judge to the kind of evidence which will satisfy the key criteria of special disadvantage and knowingly taking advantage.

For all these reasons it is highly questionable whether the doctrine has consistently protected elders suffering from disabilities. For example, elders who transfer valuable assets for the purpose of entering loose arrangements for accommodation and care, may not be able to set aside the transfer under the doctrine when the arrangement becomes unworkable. Elderly parents who provide their single most valuable asset, the family home, as security for an adult child's liabilities, may be bound by the contract of guarantee, notwithstanding their age and any associated disabilities, their close personal relationship with the debtor, the lack of independent advice and the potential improvidence of the transaction. It is submitted that the lower courts need to reconsider sensitively the application of unconscionable dealing to elder cases, taking into account the broader approaches demonstrated by the High Court in *Amadio* and *Bridgewater*. Otherwise, the doctrine of unconscionable dealing may have only a limited application and effectiveness in cases concerning elders.

There are tentative signs that the doctrine of unconscionable dealing may be undergoing a noteworthy transition at least where elderly guarantors are involved. However, this transition has not been the result of the High Court's latest decision concerning elders in *Bridgewater*. Rather, significant advances in the law of undue influence and the spousal guarantees have focused attention on the need for guarantors to be appropriately informed of the likely financial risks and their potential liability. Although these developments have occurred in respect to wives under a separate equitable doctrine, it appears that some courts when examining the doctrine of unconscionable dealing have considered that elderly guarantors ought to be similarly protected. There have been suggestions that the special equity principle (reaffirmed in *Garcia*)<sup>302</sup> ought to apply equally to elders.<sup>303</sup> Alternatively, there have been several recent cases where courts have considered that the doctrine of unconscionable dealing ought to be more flexibly interpreted, particularly from the perspective of the elderly guarantor. Accordingly, there have been cases where courts have either interpreted the criteria for unconscionable dealing broadly<sup>304</sup> or found that there was advantage-taking as the circumstances of the case imposed an obligation on the financial

<sup>302</sup> (1998) 194 CLR 395.

<sup>303</sup> *State Bank of New South Wales v Layoun* (2001) NSW ConvR ¶55-984. Consider also *Australia and New Zealand Banking Group Ltd v Barry* (1992) 2 Qd R 12, 23-4 (Derrington J).

<sup>304</sup> See *State Bank of New South Wales v Sullivan* [1999] NSWSC 595 (Unreported, James J, 14 July 1999).



institution to explain the nature and effect of the transaction to the elder.<sup>305</sup> However, it must be emphasised that it remains unclear whether these cases signal a change of direction or whether they represent mere aberrations. There have been several recent cases where courts have not seen any need to afford elderly guarantors any special protection at all.<sup>306</sup>

<sup>305</sup> *Jedda Investments Pty Ltd v Krambousanos* (1997) 72 FCR 138; *State Bank of New South Wales v Layoun* (2001) NSW ConvR ¶155-984.

<sup>306</sup> *Tarzia v National Australia Bank Ltd* [1995] ANZ ConvR 379; *HG & R Nominees Pty Ltd v Fava* [1997] 2 VR 368; *Janesland Holdings Pty Ltd v Simon* (2000) ANZ ConvR 111; *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1.