

UNCONSCIONABILITY, UNDUE INFLUENCE AND THE LIMITS OF INTERVENTION IN CONTRACTUAL DEALINGS: *COMMERCIAL BANK OF AUSTRALIA LTD v. AMADIO*¹

Introduction

It is a commonplace of academic legal writing that recent years have shown an increasing judicial willingness to intervene in contractual dealings,² a willingness perhaps most fully articulated by Lord Denning, M.R. in *Lloyds Bank Ltd v. Bundy*³ and by the House of Lords in the leading English case in common law restraint of trade, *A. Schroeder Publishing Co. Ltd. v. Macaulay*.⁴ Such interventions frequently depend upon the equitable doctrines of unconscionability and undue influence as justifying the courts holding contracting parties to standards of behaviour which the courts regard as acceptable.⁵ The limits of intervention in contractual dealings have however been both more precisely and more restrictively defined by recent English and Australian decisions of high authority, specifically the decisions of the House of Lords in *National Westminster Bank v. Morgan*⁶ and of the High Court of Australia in *Commercial Bank of Australia Ltd. v. Amadio*.⁷

The focus of attention will here be upon *CBA v. Amadio*, as the leading Australian case in equitable unconscionability: the High Court's reasoning will however be placed in the context of recent English decisions—both in the equitable jurisdiction and in common law restraint of trade—in order to locate the differences between English and Australian approaches. It will be suggested that the High Court's decision is consistent with traditional doctrine in requiring not merely disadvantage but also unconscionable behaviour of the stronger party in order to found equitable relief, and that the judgments of Gibbs, C.J. and Dawson and Deane, JJ. (Wilson, J. agreeing with Deane, J.) take relatively conservative approaches to the doctrine of unconscionability. The distinction drawn by Mason and Deane, JJ. between the equitable doctrines of undue influence and

¹ (1983) 46 A.L.R. 402 (High Court of Australia).

² Trebilcock, "The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords" (1976) 26 *University of Toronto L.J.* 359 at 359; P. H. Clarke, "Unequal Bargaining Power in the Law of Contract" (1975) 49 *A.L.J.* 229 at 229-230.

³ [1974] 3 All E.R. 757; [1975] 1 Q.B. 326.

⁴ [1974] 1 W.L.R. 1308.

⁵ Richard A. Epstein, "Unconscionability: A Critical Reappraisal" (1975) 18 *J. of Law & Economics* 293 at 293; Christopher Carr, "Inequality of Bargaining Power" (1975) 38 *M.L.R.* 463 at 463.

⁶ [1985] 2 W.L.R. 588 (House of Lords).

⁷ *Supra* fn. 1.

unconscionability—by stressing the consent of the weaker party in undue influence and the behaviour of the stronger party in unconscionability—will be questioned as tending to obscure the boundaries between undue influence and common law duress, and as diverting attention from Equity's fundamental concern with the conscience of the stronger party in a relationship of confidence. It will further be argued, with respect to the doctrine of unconscionability, that the judgment of Mason J. involves a substantial expansion of the range of disadvantages which might allow equitable relief beyond the objective disabilities emphasized by more traditional approaches.

English Decisions in Undue Influence and Inequality of Bargaining Power

The suggestion that the basis of the equitable doctrines of unconscionability and undue influence lay in "inequality of bargaining power" received its most forceful expression in the judgment of Lord Denning, M.R. in *Lloyds Bank Ltd. v. Bundy*,⁸ now specifically disapproved by a unanimous House of Lords in *National Westminster Bank v. Morgan*.⁹

The value of Lord Denning's approach was questioned in the academic literature.¹⁰ With respect to the doctrine of undue influence, Lord Denning's reasoning arguably overemphasized inequality of bargaining power at the expense of the significance of the behaviour of the stronger party in taking advantage of that inequality.¹¹ His Lordship's approach extended the doctrine beyond those situations in which undue influence was to be presumed on the basis of a preexisting relationship of confidence, or where unequal bargaining power resulted in an unfair contract. It may seem that in seeking a common principle underlying the categories of relief Lord Denning failed to recognize that an initial inequality of bargaining power will not necessarily deny free consent to the making of a contract.¹²

The view that inequality of bargaining power may of itself render a contract so unconscionable that it should be set aside appeared to gain support from English decisions as to the common law doctrine of restraint of trade, such as that of the House of Lords in *A. Schroeder Music Publishing Co. v. Macaulay*.¹³ The decision in *Macaulay* was followed in *Clifford Davis Management Ltd. v. WEA Records Ltd.*,¹⁴ and a

⁸ *Supra* fn. 3 at 336-337. Lord Denning's approach received support in Canada, being approved in *McKenzie v. Bank of Montreal* (1975) 55 D.L.R. (3d) 641 *per* Stark, J. at 650, and applied in *Towers v. Afflick* [1974] 1 W.W.R. 714 and in *Pridmore v. Calvert* (1975) 55 D.L.R. (3d) 133. For a discussion of the relevant Canadian authorities, Philip Slayton, "The Unequal Bargain Doctrine: Lord Denning in *Lloyds Bank v. Bundy*" (1976) 22 *McGill L.J.* 94 at 100-103.

⁹ *Supra* fn. 6 *per* Lord Scarman at 600 G-H, 601A.

¹⁰ Sealy, for example, denied that there existed a sufficiently coherent set of common elements in the doctrines to which Lord Denning referred to justify a wider statement of principle. L. S. Sealy, "Undue Influence and Inequality of Bargaining Power" (1975) 34 *C.L.J.* 21 at 23. For a contrary view, B. J. Reiter, "Court, Consideration and Common Sense" (1977) 27 *University of Toronto L.J.* 439 at 458.

¹¹ If it was arguable that Lord Denning's approach found qualified support in the early development of the equitable jurisdiction as directed in a broad sense to the protection of social groups disadvantaged by poverty and ignorance (*Fry v. Lane* (1888) 40 Ch. D. 312; Clarke, *supra* fn. 2 at 230), this justification depended upon viewing such development rather schematically.

¹² *Alec Lobb (Garages) Ltd v. Total Oil (GB) Ltd.* [1985] 1 W.L.R. 173 *per* Dillon, L.J. at 182-183.

¹³ *Supra* fn. 4.

¹⁴ [1975] 1 W.L.R. 61.

similar result was reached in *O'Sullivan v. Management Agency & Music Ltd.*¹⁵ In *Clifford Davis Ltd. v. WEA Records Ltd.* Lord Denning, M.R. appealed to Lord Diplock's judgment in *Macaulay* to support his wider emphasis upon inequality of bargaining power as applied to equitable doctrines in *Lloyds Bank Ltd. v. Bundy*,¹⁶ holding the common factor in the cases to be that "the parties . . . had not met on equal terms."¹⁷

The validity of so treating the concept of "inequality of bargaining power", defined with respect to the common law doctrine of restraint of trade, as closely analogous to the equitable doctrines of unconscionability and undue influence must be doubted. Such an approach assumes that a principle developed in the common law ought to be applicable to equitable doctrines, the jurisdictional origins and historical development of which are different.¹⁸ That such a doctrinal equivalence exists seems unlikely given that the doctrine of restraint of trade involves attention to the fairness of a restrictive provision between the parties as a matter of public policy,¹⁹ and has as its philosophical basis an assumed public interest in competition,²⁰ while the equitable doctrine of unconscionability looks to the conduct of the parties to the transaction in the interest of protecting the weaker. At least with respect to undue influence, the reasoning of the House of Lords in *National Westminster Bank v. Morgan* provides no support for such a transfer of principles applicable with respect to restraint of trade at common law into the equitable jurisdiction in undue influence.²¹ It is in any case clear that the doctrine of common law restraint of trade, as defined in *Macaulay*, itself requires not merely inequality of bargaining power but the further element of an abuse of that inequality to gain an unfair result.²²

National Westminster Bank v. Morgan: The Appeal to the House of Lords

The majority in *Lloyds Bank Ltd. v. Bundy* (Cairns, L.J. and Sir Eric Sachs, Lord Denning agreeing in the alternative) had reached a result not on the basis of Lord Denning's principle of "inequality of bargaining power", but on the narrower ground that the appellant bank had breached a duty consequent upon its relationship of confidence with to the respondent, and that the case could therefore be decided upon the doctrine of undue influence as defined in *Allcard v. Skinner*.²³ The approach of the majority was followed by a differently constituted Court of Appeal (Dunn & Slade, L.J.J.) in *National Westminster Bank v. Morgan*.²⁴ The

¹⁵ [1984] 3 W.L.R. 448.

¹⁶ *Supra* fn. 3.

¹⁷ *Supra* fn. 14 at 64, 65.

¹⁸ An assumption that perhaps itself further illustrates that approach which Meagher, Gummow & Lehane castigate as the "fusion fallacy": R. P. Meagher, W. M. C. Gummow & J. R. F. Lehane, *Equity: Doctrines and Remedies*, Butterworths, 2nd ed., 1984, pp. 46-47.

¹⁹ Sealy, *supra* fn. 10 at 24.

²⁰ G. H. Treitel, *The Law of Contract*, Stevens, 6th edn., 1983, pp. 341-342.

²¹ *Supra* fn. 6 per Lord Scarman at 600G.

²² *Supra* fn. 4 per Lord Diplock at 1315. This requirement is confirmed in *Alec Lobb (Garages) Ltd. v. Total Oil (GB) Ltd.*, where Dillon, L.J. explicitly rejected the proposition that "relief will now be granted in equity in such a case as the present if there has been unequal bargaining power, even if the stronger has not used his strength unconscionably", *supra* fn. 12, per Dillon, L.J. at 181.

²³ (1887) 36 Ch. D. 145 per Cotton, L.J. at 171.

²⁴ [1983] 3 All E.R. 85, per Slade, L.J. at 93, and especially per Dunn, L.J. at 90, 89, following Sir Eric Sachs as to the nature of a "confidential" relationship, and holding the basis of setting aside a transaction within a relationship where undue influence was presumed to be in public policy.

appeal from this decision to the House of Lords, where four of their Lordships (Lord Keith, Lord Roskill, Lord Bridge and Lord Brandon) approved the judgment of Lord Scarman, has resulted in a restatement of the principles governing undue influence which is likely to be of fundamental importance in English law.

Their Lordships recognize the flexibility of traditional equitable doctrine in its historical development and potential application, Lord Scarman reaffirming that "there is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence", and holding that the court "in the exercise of this equitable jurisdiction is a court of conscience" determining the unconscionability of a transaction "upon the particular facts of the case".²⁵ The effect of the decision is however that Lord Denning's concept of "inequality of bargaining power" can no longer be regarded as an available path of development within English law. Thus Lord Scarman explicitly disapproves Lord Denning's approach, holding that the doctrine of undue influence was sufficiently developed within the equitable jurisdiction not to require the support of a principle of inequality of bargaining power, and that such a principle "by its formulation in the language of the law of contract is not appropriate to cover transactions of gift where there is no bargain".²⁶

Lord Scarman approves Sir Eric Sachs' formulation in *Lloyds Bank v. Bundy* of the nature of the relationship necessary to give rise to a presumption of undue influence,²⁷ although his Lordship holds that to the extent that Sir Eric Sachs substituted an emphasis upon public policy for a specific requirement of detriment as basing a finding of undue influence he was in error.²⁸

In the Court of Appeal the bank had argued that no presumption of undue influence could arise, since the transaction involved no disadvantage to Mrs. Morgan. Both Dunn and Slade, L.J.J. rejected this argument, holding that the presumption of undue influence will in itself justify the setting aside of a transaction even when that transaction is not clearly of disadvantage to the party seeking relief.²⁹ This reasoning was open to criticism as too widely framed, in that (as Dunn L.J. recognized in the course of his judgment) the reported cases on undue influence had all involved transactions in fact disadvantageous to the weaker party.³⁰

In approaching this issue in the House of Lords, Lord Scarman holds that Cotton, L.J. in *Allcard v. Skinner*³¹ ought not to be understood "to have treated as irrelevant the fact that [the] transaction was manifestly disadvantageous".³² His Lordship reaffirms that before a transaction can be set aside on the basis of undue influence, it must be shown to be wrongful as of manifest and unfair disadvantage to the person seeking

²⁵ *Supra* fn. 6 at 602B-D.

²⁶ *Supra* fn. 6 at 600 G-H, 601A. Indeed, his Lordship goes further, to doubt even with respect to the law of contract "whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power", given the fact of legislative intervention.

²⁷ *Supra* fn. 3 at 341, Lord Scarman approving a passage at 347.

²⁸ *Supra* fn. 6 at 601C.

²⁹ *Supra* fn. 24 *per* Dunn, L.J. at 90, *per* Slade, L.J. at 92.

³⁰ Gregory Mitchell, "Undue Influence and Relationships of Confidence" (1984) *New Law Journal* 540 at 542.

³¹ *Supra* fn. 23 at 171. This passage was relied upon in the judgment of Slade, L.J. in the Court of Appeal, *supra* fn. 24 at 92.

³² *Supra* fn. 6 at 597C-E.

to avoid it.³³ His Lordship finds support for this requirement of disadvantage in the judgment of Lindley, L.J. in *Allcard v. Skinner*,³⁴ and further in two decisions of the Privy Council, *Bank of Montreal v. Stuart*³⁵ and *Poosauthurai v. Kannappa Chettiar*.³⁶

The decision nonetheless leaves unresolved the question of the extent of disadvantage which will be necessary before the courts will set aside a transaction for undue influence: early authority suggests that where the possibility of undue influence arises, the court will be astute to recognize such disadvantage, and will tend toward setting the transaction aside for the slightest of detriment to the weaker party.³⁷ The issue of the range of disadvantage which would found relief did not arise on the facts of *National Westminster Bank v. Morgan*, where there was no evidence of any disadvantage in a transaction which allowed Mrs Morgan to refinance the mortgage on the family home and avoid its sale on the application of the previous mortgagee.

The importance of the decision lies not only in its rejection of Lord Denning's principle of "inequality of bargaining power" as the basis of undue influence, but further in the House of Lords having committed itself to a traditional account of the basis of the equitable doctrine. In taking such an approach to undue influence, the House of Lords would seem to have returned English law to the relatively conservative approach to equitable doctrine which is the starting point—if not, perhaps, for Mason, J. the outer limit—in *CBA v. Amadio*.

Australian Developments in the Doctrine of Unconscionability: *CBA v. Amadio*

The decision of the High Court in *CBA v. Amadio*³⁸ raises the relation between the established equitable doctrines of unconscionability and undue influence and the emphasis in English decisions—at least those prior to the appeal to the House of Lords in *National Westminster Bank v. Morgan*—upon inequality of bargaining power, although the decision of the High Court ultimately turns upon the application of the former. The Amadios—an elderly couple of Italian origin who had lived in Australia for some forty years, without formal education and without a

³³ *Id.* at 597G-598A. Lord Scarman holds that "whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence."

³⁴ *Supra* fn. 23 at 182-183, cited *id.* at 598.

³⁵ [1911] A.C. 120 *per* Lord Macnaghten at 137, cited *id.* at 599B-C.

³⁶ (1919) L.R. 47 IA 1 *per* Lord Shaw of Dumferline at 4, holding that "It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid", cited *id.* at 599F-H.

³⁷ *Cocking v. Pratt* (1749) 1 Ves. Sen. 400, Belt's Suppl. 176; *Ashburner's Principles of Equity*, 2nd ed. (1933): Legal Books, 1983, p. 304. A modern formulation consistent with this view is Sir John Salmond's classic description of the jurisdiction in undue influence in *Brusewitz v. Brown* [1923] N.Z.L.R. 1106 at 1109-1110: "Where there is not merely an absence or inadequacy of consideration for the transfer of property, but there also exists between the grantor and the grantee some special relation of confidence, control, domination, influence, or other form of superiority, such as to render reasonable a presumption that the transaction was procured by the grantee through some unconscientious use of his power over the grantor, the law will make that presumption, and will place on the grantee the burden of supporting the transaction by which he so benefits, and of rebutting the presumption of its invalidity."

³⁸ *Supra* fn. 1.

complete mastery of English³⁹—signed a contract of guarantee with the appellant bank securing the debt of a land development company controlled by their son, mortgaging as security a block of shops. When the son's company failed, the bank sought to exercise its power of sale under the mortgage. The majority of the High Court (Dawson, J. dissenting) held that the mortgage ought to be set aside.

The Duty to Disclose Unusual Circumstances in a Contract of Guarantee: Gibbs, C.J.

Gibbs, C.J. reached this result by looking to the circumstances of the contract of guarantee, following *Goodwin v. National Bank of Australasia*⁴⁰ in holding that the principal creditor in taking a guarantee is under a duty to disclose any features of its dealings with the debtor which have the effect that the position of the debtor "is different from that which the surety would naturally expect, particularly if it affects the nature or degree of the surety's responsibility".⁴¹ Gibbs, C.J. pointed to the failure of the bank to comply with its obligations in this respect. Specifically, Gibbs, C.J. found the bank in breach in its failure to disclose to the Amadios the circumstances of its having made itself a party to the selective dishonouring of cheques "in an endeavour to maintain the facade of prosperity that the company, although insolvent, had erected", and further held that the bank's failure to disclose such circumstances amounted to an implied misrepresentation that they did not exist.

Undue Influence and Unconscionability: Mason and Deane, JJ.

Mason and Deane, JJ., with whom Wilson, J. agreed, by contrast held that the contract of guarantee ought to be set aside on the basis of the equitable doctrine of unconscionability. Mason, J. is at pains to require more than mere inequality of bargaining power and an apparently unfair bargain as the basis of equitable intervention. While not in terms disapproving the reasoning of *A. Schroeder Music Publishing Co. Ltd. v. Macaulay*⁴² and of *Clifford Davis Management Ltd. v. WEA Records Ltd.*,⁴³ Mason, J. nonetheless observes with respect to entry into standard form contracts, when one party's "bargaining power is greatly superior", that to establish grounds for equitable relief "it is necessary for the plaintiff . . . to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances".⁴⁴

With respect to equitable unconscionability, Mason, J. explicitly "disavow[s] any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties", holding that in order to justify the court's intervention "the disabling condition or circumstance" must be such that it

³⁹ *Id.*, per Gibbs, C.J. at 411.

⁴⁰ (1968) 117 C.L.R. 173.

⁴¹ *Supra* fn. 1 at 409.

⁴² *Supra* fn. 4.

⁴³ *Supra* fn. 14.

⁴⁴ *Supra* fn. 1 at 413.

seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.⁴⁵

The judgments of both Mason and Deane, JJ. recognize that the equitable doctrines of undue influence and unconscionability have similarities, Mason, J. observing that the two doctrines share a common doctrinal base. Thus, Mason, J. notes that the equitable grounds to set aside a contractual transaction arise from the Court's refusal to allow a transaction to be enforced when "to do so would be inconsistent with equity and good conscience",⁴⁶ and further holds that the doctrines of undue influence and unconscionability both represent

particular exemplifications of an underlying general principle which may be invoked whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis a vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created.⁴⁷

Both Mason and Deane, JJ. distinguish unconscionability from undue influence by reference to the focus of the Court's scrutiny, the Court in applying the former doctrine looking to whether the conduct of the stronger party is consistent with good conscience, and in the latter looking to whether the decision of the weaker party resulted from a voluntary exercise of will.

Hence Mason, J. holds that undue influence is based upon the failure of voluntariness of the weaker party's consent, as "the will of the innocent party is not independent and voluntary because it is overborne". On the other hand, his Honour's formulation of the doctrine of unconscionability holds both the objective disadvantage of the weaker party and a manipulation of that disadvantage by the stronger party to be necessary.⁴⁸ The consent of the weaker party results from the unfair use by the stronger party of the inequality of the parties: "the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position".⁴⁹

Mason, J.'s emphasis upon the unconscientious behaviour of the stronger party is wholly consistent with Australian authority, finding authoritative support in the judgments of Fullagar and Kitto, JJ. in *Blomley v. Ryan*.⁵⁰ This formulation of the distinction between undue

⁴⁵ *Id.* at 412. Such a formulation is largely consistent with earlier Canadian authority, Davey, J.A. observing in the leading Canadian case of *Morrison v. Coast Finance* (1966) 54 W.W.R. 257 at 259 that "the material elements" required to establish unconscionability are "proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger", and further requiring "proof of substantial unfairness of the bargain obtained by the stronger".

⁴⁶ *Supra* fn. 1 at 412.

⁴⁷ *Id.* at 413.

⁴⁸ *Id.* at 412, 413.

⁴⁹ *Id.* at 412.

⁵⁰ (1956) 99 C.L.R. 362 *per* Fullagar, J. at 405, *per* Kitto, J. at 415; *cf.* *Watkins v. Combers* (1922) 30 C.L.R. 180 *per* Isaacs, J. at 194, holding that undue influence will lie where "the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid."

influence and unconscionability is also consistent with the view taken by Davey, J.A. in the leading Canadian case of *Morrison v. Coast Finance*.⁵¹

For Deane, J., undue influence and unconscionability are similarly to be distinguished by the direction of the Court's attention:

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.⁵²

Deane, J.'s formulation of the test for unconscionability again postulates an interaction between a special disability of the weaker party and the behaviour of the stronger party, locating that unconscionability in the attempt to retain the benefit of such abuse.

It remains that unconscionability as much as undue influence depends initially upon a disadvantage or vulnerability of the weaker party.⁵³ Further, while Mason and Deane, JJ. see the voluntariness of will of the weaker party as the basic issue in undue influence, such a criterion seems difficult of application, and raises some questions of equitable principle. It is clearly not possible to look to the will of the weaker party in isolation, and in practice the courts in seeking to determine the reality of the weaker party's consent tend to look as much to the conduct of the stronger as to the vulnerability of the weaker.

Moreover, the emphasis of Mason and Deane, JJ. upon the voluntariness of will of the weaker party strongly reflects the preoccupation of the law of contract with the voluntariness of consent, most fully evidenced in the doctrine of common law duress. The requirement in contract of *consensus ad idem* has the consequence that a contract is vitiated by actual or threatened violence to the person of the contracting party, by the threat to break a contract unless a higher price is paid, or indeed by "economic duress" in a wider sense.⁵⁴ The test of duress at common law asks whether the threat made interfered with the free exercise of will by the coerced party: hence in *Barton v. Armstrong* in the NSW Court of Appeal Mason, J.A. looked to the effect of duress in coercing the

⁵¹ *Supra* fn. 45, *per* Davey, J.A. at 259, holding that "a plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscionable use of power by a stronger party.

⁵² *Supra* fn. 1 at 423.

⁵³ Other common elements may be suggested with respect to the application and the legal consequences of the two doctrines. Hardingham suggests that both doctrines will require an awareness on the part of the stronger party of the weaker party's disadvantage, and may apply although the transaction is not clearly disadvantageous to the weaker party, the latter to be discussed below. Hardingham further argues that in order to retain the benefit of the transaction, in both cases the stronger party must ensure that the weaker had the opportunity form an independent judgment. I. J. Hardingham, "Unconscionable Dealing" in: P. D. Finn (ed.), *Essays in Equity*, Law Book Co., 1985, p. 18.

⁵⁴ *Barton v. Armstrong* [1973] 2 N.S.W.L.R. 598, reversed on appeal to the Privy Council, [1976] A.C. 104; Treitel, *op. cit.*, pp. 310-311; Jack Beatson, "Duress as a Vitiating Factor in Contract" (1974) 33 *C.L.J.* 97. That the threat to break a contract unless a price higher than that contracted for is paid may constitute duress was decided in *Sundell & Sons v. Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 S.R. (N.S.W.) 323; the extension to "economic duress" is exemplified by *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.* [1979] 1 L1 Rep. 89 *per* Mocatta, J. at 98-100; *Pao On v. Lau Yiu Long* [1980] A.C. 614.

plaintiff's "assent to an agreement", while Jacobs, J.A. (dissenting) held that in order to establish duress the plaintiff must show that as a result of the threat made "he was not a free agent who could decide to enter or not to enter into the particular agreement or any agreement just as he thought fit".⁵⁵

It is arguable that the approach of Mason and Deane, JJ., in so stressing the Court's scrutiny of the voluntariness of will of the weaker party as the distinguishing feature of undue influence, involves a potential blurring of the boundaries of equitable and contractual reasoning, and deflects attention from the equitable principle behind undue influence as a concern with the breach by the stronger party of a duty of confidence arising from the nature of his relationship with the weaker. While common law duress is concerned simply with the reality of consent to entry into contractual relations, the equitable jurisdiction in undue influence is ultimately based not simply in the failure of the will of the weaker party, but in the conduct of the stronger as amounting to equitable fraud.⁵⁶ In this sense undue influence and unconscionability share a common philosophical basis—distinct from that of common law duress in its emphasis upon the reality of consent to entering contractual relations—in Equity's concern to hold the stronger party to behaving in accordance with good conscience.

Where the two doctrines of undue influence and unconscionability are perhaps to be distinguished is with reference to the existence of a previous relationship between the parties going to the quality of the weaker party's consent. The doctrine of undue influence presumes the unreality of the weaker party's consent given an *antecedent* relationship of influence which justifies the weaker party's reliance upon the stronger to act in the weaker's best interests, the presumption being rebuttable by evidence of the exercise of independent judgment.⁵⁷ By contrast, the jurisdiction to relieve against unconscionable transactions does not depend upon a previous relationship of confidence between the parties but is founded rather on the nature of the *present* transaction between the parties as a taking advantage by the stronger party of the weaker, evidencing "fraud presumed or inferred from the circumstances or conditions of the parties contracting: weakness on the one side, usury on the other, or extortion or advantage taken of that weakness".⁵⁸

The Elements of Unconscionability: Mason, Deane, JJ.

It remains that the elements of disadvantage within the facts of *Amadio* upon which Mason and Deane, JJ. rely in order to justify equitable intervention are not, with respect, wholly consistent with the

⁵⁵ Cheshire & Fifoot, *Law of Contract*, 4th Aust. edn. (ed. J. G. Starke & P. F. P. Higgins), Butterworths, 1981, p. 305; *Barton v. Armstrong*, *supra* fn. 54 (N.S.W. Court of Appeal) *per* Mason, J.A. at 617, *per* Jacobs, J.A. at 611.

⁵⁶ *Earl of Chesterfield v. Janssen* (1751) 2 Ves. Sen. 125 *per* Lord Hardwicke, L.C. at 157; *Symons v. Williams* (1875) 1 V.L.R. (Eq.) 199 *per* Barry, J. at 216, holding that "undue influence is only one of the instances of fraud . . . still it is in all cases bottomed in fraud"; Meagher, Gummow & Lehane, *op. cit.*, p. 368.

⁵⁷ *Supra* fn. 23 *per* Lindley, L.J. at 181; Malcolm Cope, "The Review of Unconscionable Bargains in Equity" (1983) 57 *A.L.J.* 279 at 286-287; Sealy, *supra* fn. 10 at 22.

⁵⁸ *Supra* fn. 56 *per* Lord Hardwicke, L.C. at 157.

terms of the previous authority to which their Honours refer, and particularly with the requirement in previous Australian cases that the party seeking relief is subject to some objective disability of which the other party took unconscionable advantage.

Deane, J.'s judgment would seem in some respects a traditional application of the unconscionability doctrine to the particular disadvantages of the Amadios. His Honour finds the special disability of the Amadios in "the result of the combination of their age, their limited grasp of written English, the circumstances in which the bank presented the document to them for signature, and, most importantly, their lack of knowledge and understanding of the contents of the document".⁵⁹ It is arguable that to the extent that the "weakness" to which Deane, J. refers includes situational factors, it is wider than the disabilities instanced in *Blomley v. Ryan*,⁶⁰ upon which his Honour relies. The consequence of these factors is, his Honour holds, that the Amadios "lacked assistance and advice where assistance and advice were plainly necessary if there were to be any reasonable degree of equality between themselves and the bank".⁶¹

Further, Deane, J. explicitly rejects the view that there must be "inadequacy of consideration moving from the stronger party" for unconscionability to lie.⁶² Here again, Deane, J. follows *Blomley v. Ryan*.⁶³ Although that case involved an unsuccessful claim for specific performance, Fullagar, J. there referred also to the parallel equitable jurisdiction to set transactions aside, observing that "it does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain", although inadequacy of consideration may support an "inference that a position of disadvantage existed" and suggest "that an unfair use was made of the occasion".⁶⁴ Deane, J.'s approach may be compared with that of the House of Lords in *National Westminster Bank v. Morgan*,⁶⁵ directed to the doctrine of undue influence rather than to the wider doctrine of unconscionability. It seems that with respect to unconscionability the objective disadvantage of one party will be sufficient to found relief in combination with the unconscionable behaviour of the other, Equity not requiring proof of actual loss suffered by the disadvantaged party: by contrast, it remains necessary to establish at least some disadvantage in a transaction in order to raise a presumption of undue influence.

Mason, J.'s approach raises greater difficulties. In particular, his Honour's view is not easily reconcilable with the traditional formulation of unconscionability as focussing upon objective disadvantages—typically of social condition—in justification of equitable intervention.⁶⁶ Thus in

⁵⁹ *Supra* fn. 1 at 425.

⁶⁰ *Supra* fn. 50 per McTiernan, J. at 392.

⁶¹ *Supra* fn. 1 at 425.

⁶² *Id.* at 423.

⁶³ *Supra* fn. 50.

⁶⁴ *Id.* per Fullagar, J. at 405.

⁶⁵ *Supra* fn. 6.

⁶⁶ In *Cresswell v. Potter* [1978] 1 W.L.R. 255 at 257, Megarry, J. suggests that the categories of disadvantage ought to be widened to allow for changing social conditions: but his expanded categories of "a member of the lower income group" and "less highly educated" remain essentially objective.

Wilton v. Farnworth the weaker party was not only unaware of the extent of his inheritance, but somewhat deaf and apparently slow-witted.⁶⁷ In *Blomley v. Ryan* the kind of disadvantages giving rise to equitable intervention are instanced by Fullagar, J. as

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".⁶⁸

Kitto, J. similarly treats the disabilities necessary to establish unconscionability as objective in nature, referring to the weaker party's disadvantage as resulting from "illness, ignorance, inexperience, impaired facilities, financial need or other circumstances [which] affect his ability to conserve his own interests".⁶⁹

In defining the nature of the Amadios' disadvantage, Mason, J. recognizes their "age and lack of business experience" and their lack of command of written English.⁷⁰ His Honour holds, however, that the primary importance of these factors was in encouraging reliance on the son.⁷¹ Mason, J. places particular emphasis upon the circumstances of the transaction in further observing that "the situation of special disadvantage in which the respondents were placed was the outcome of their reliance on and their confidence in their son",⁷² a view which would seem to imply that such disadvantage may be available in the nature of the transaction itself rather than depending upon any objective physical or social disability of the weaker party.

While such reliance upon a third party might well found a claim against that third party in undue influence—and although elderly parents relying upon their son may well be particularly vulnerable to that son or to a third party dealing with that son—it is by no means clear that such reliance is equivalent to the objective disabilities referred to above as traditionally basing the equitable doctrine of unconscionability. Nor is it easy to see how a remedy granted on this basis is to be distinguished from a remedy granted on the basis of undue influence.

On the facts of *Amadio*, the emphasis upon the disadvantage of the weaker party as resulting from the circumstances of the transaction—most importantly, from the parents' reliance on their son—would seem to have allowed a just result. Mason, J. is, moreover, circumspect in his approach, not seeking to take the logic of such an approach to its full extension. It is however arguable that if unconscionability is to be established upon the basis of disadvantages of the weaker party evident

⁶⁷ (1948) 76 C.L.R. 646.

⁶⁸ *Supra* fn. 50 per Fullagar, J. at 405. The disabilities to which Fullagar, J. refers are objective in nature, given that one ought here to see the reference to the "lack of assistance or explanation where assistance or explanation is necessary" as a gloss of the categories previously defined rather than as founding an independent ground of unconscionability, since such a criterion requires that one first establish in what circumstances assistance will in fact be necessary.

⁶⁹ *Id. per* Kitto, J. at 415.

⁷⁰ *Supra* fn. 1 at 416; further, at 414 Mason, J. points not only to the "special disadvantage" of the Amadios as the "outcome of their reliance on and their confidence in their son", but also to their Italian origin, their advanced years, their limited command of written English and their lack of "experience of business in the field or at the level in which their son and the company engaged."

⁷¹ *Id.* at 416.

⁷² *Id.* at 414.

within his dealings with the stronger party—to which objective disadvantages of age, education or social situation are simply contributing elements—then such an approach would at least potentially allow relief wherever a transaction is on its face unfair to the plaintiff, with his disadvantage then being referenced to the circumstances in which the transaction impeached took place.

Alternatively, the disadvantage upon which Mason, J.'s reasoning is founded may be, as Hardingham argues, the simple fact of the Amadios' "mistake": mistake with respect to their liability under the guarantee, as to their son's company's financial strength, and as to the likely result of their entering the arrangement.⁷³ Again, the significance of any or all of these errors in relation to the traditional elements of equitable unconscionability is problematical. Such reasoning would, however, be consistent with the High Court's approach in *Taylor v. Johnson*⁷⁴—a case involving a transaction entered into under a unilateral mistake—as invoking the equitable jurisdiction to set aside a contract founded upon an unconscionable use of legal advantage where the origin of that advantage lies in the mistake of one party.

The Bank's Constructive Notice: Mason, Deane JJ.

The majority, Mason and Deane, JJ., Wilson, J. concurring, place emphasis upon the circumstances which would have fixed the bank with constructive knowledge of the possibility or indeed of the likelihood that the Amadios had been misled by their son. In developing this reasoning, the majority appear to find the element of unconscionability in the bank's having proceeded—given such constructive knowledge—with the transaction without confirming that the Amadios in fact understood the transaction, or seeking itself to offer the Amadios advice as to the wisdom of the transaction, or suggesting that the Amadios seek independent advice.

Mason, J. points to the bank manager's having—if not knowledge of the possibility that "the respondents' entry into the transaction was due to their inability to make a judgment as to what was in their best interests, owing to their reliance on their son", and that the son may not have accurately explained the transaction to the parents—at least awareness of facts "such as to raise in the mind of any reasonable person a very real question as to the respondents' ability to make a judgment as to what was in their own best interests".⁷⁵ The result, his Honour holds, is that

the bank was guilty of unconscionable conduct by entering into a transaction without disclosing such facts as may have enabled the respondents to form a judgment for themselves and without ensuring that they obtained independent advice.⁷⁶

Deane, J. also refers to those circumstances—in particular, to the manager's discovery that the Amadios were misinformed as to the duration of the guarantee—which ought to have indicated to the manager and hence to the bank the "vulnerability" of the Amadios and "the disability which

⁷³ *Supra* fn. 53 at 9.

⁷⁴ (1983) 57 A.L.J.R. 197; *id.* at 6-7.

⁷⁵ *Supra* fn. 1 at 416, 417.

⁷⁶ *Loc. cit.*

adversely affected them", and hence to have put the bank on inquiry "as to whether the transaction had been properly explained" to them, his Honour holding in consequence that "the bank cannot shelter behind its failure to make that inquiry".⁷⁷

The Elements of Unconscionability: Gibbs, C.J., Dawson, J.

Gibbs, C.J. and Dawson, J. take similar approaches to the elements of unconscionability as Mason and Deane, JJ. Both Gibbs, C.J. and Dawson, J. hold that these elements were not available on the facts of *Amadio*, although as noted above Gibbs, C.J. held that the guarantee ought to be set aside on another ground.

Gibbs, C.J. shares with Mason and Deane, JJ. the view that unconscionability is formed not by inequality of bargaining power alone, but by the abuse of an unfair advantage, by the fact that "the party seeking to enforce the transaction has taken unfair advantage of his own superior bargaining power, or of the position of disadvantage in which the other party was placed".⁷⁸ Although recognizing the Amadios' age, their lack of formal education and their limited language skills in English, Gibbs C.J. finds that there was no taking advantage of "any of those disabilities, if disabilities they were" by the bank as stronger party in the transaction, that "if one ignores the effect of the misrepresentation by Vincenzo Amadio and the non-disclosure by the bank there is simply no evidence that the bank made unfair use of its position".⁷⁹

Dawson, J. holds that in order to invoke the equitable jurisdiction what is necessary is "exploitation by one party of another's position of disadvantage in such a manner that the former could not in good conscience retain the benefit of the bargain".⁸⁰ To this extent, Dawson, J.'s view of the nature of unconscionability is substantially consistent with that of Mason and Deane, JJ. The difference in their result arises not in equitable principle, but in that Dawson, J. holds that there was in fact no evidence of a special disability on the part of the Amadios such as to allow the starting point for relief in unconscionability. Dawson, J. thus holds that "the age of the respondents did not amount to an infirmity and the fact that English was not their first language did not signify any incapacity to understand sufficiently", and hence "afford[ed] no foundation for the conclusion that the respondents were in any position of disadvantage which was used by the bank for its benefit".⁸¹ While recognizing that the son had misled his parents, Dawson, J. finds that the deception was not one for which the bank had any responsibility: "if that reliance [upon the son] was misplaced that does not convert the occasion into one of exploitation on the part of the bank".⁸²

⁷⁷ *Id.* at 426.

⁷⁸ *Id.* at 411.

⁷⁹ *Loc. cit.*

⁸⁰ *Id.* at 435.

⁸¹ *Loc. cit.*

⁸² *Loc. cit.*

Amadio's Case and Undue Influence

The corollary of the common elements shared by the equitable doctrines of undue influence and unconscionability is that both doctrines are likely applicable in common fact situations, as Mason, J. recognizes.⁸³ Indeed, it is arguable that had the pleadings taken a different course *Amadio's Case* may itself have been decided upon the basis of an argument in undue influence. It is this possibility that would seem to lie behind Mason, J.'s comment that while the respondent's statement of claim had alleged undue influence on the part of the bank, "it does not, as it might have done, allege undue influence on the part of the respondents' son Vincenzo, with notice on the part of the bank".⁸⁴

While the influence of the son upon the parents on the facts of *Amadio* falls outside the established categories where a presumption of undue influence lies given proof of the relationship, beyond those categories such a presumption may arise in the circumstances of a particular case,⁸⁵ having been held to be available between son and elderly father in *Spong v. Spong*⁸⁶ and between uncle and niece in *Bank of NSW v. Rogers*.⁸⁷ The onus of proof would then have shifted to the bank to rebut the inference that the transaction was occasioned by undue influence.⁸⁸

Further, even if no presumption of undue influence had arisen, it would likely have been available to the Amadios on the facts to prove affirmatively the existence of a relationship between themselves and their son such as to establish undue influence. If such were established, the reasoning of *Lancashire Loans v. Black*⁸⁹ would then be apposite as to the situation of the bank as a third party to the transaction aware of its circumstances. In that case a young woman—although in fact married and of age—was allowed a remedy in undue influence when she charged a reversionary interest to the appellant moneylenders as security for her mother's debt, signing the relevant documents at the request of her mother and without independent legal advice. The Court of Appeal (Scrutton, Lawrence & Greer, L.J.J.) held that in so far as the moneylenders were aware of the circumstances of the transaction between mother and child, they were in no stronger a position than the mother, and the transaction could be set aside against them.

That a third party may not retain the benefit of a transaction entered into by undue influence of which he has notice is confirmed in *O'Sullivan v. Management Agency & Music Ltd*, where Fox, L.J. cites *Bridgeman v. Green* to the effect that "whoever receives [the gift] must take it tainted and infected with the undue influence and imposition of the person procuring the gift", and extends the principle to those who take for value but with notice, holding that where the third party "had notice of the undue influence [and] if the benefit to him derived from undue influence, the

⁸³ *Id.* at 412.

⁸⁴ *Id.* at 414.

⁸⁵ John R. Peden, *The Law of Unjust Contracts*, Butterworths, 1982, p. 16.

⁸⁶ (1914) 18 C.L.R. 544.

⁸⁷ (1941) 65 C.L.R. 42.

⁸⁸ Sealy, *supra* fn. 10 at 22.

⁸⁹ [1934] 1 K.B. 380.

transaction is . . . assailable, even if some consideration is given".⁹⁰ Given the appellant bank's notice in *Amadio* of the relationship between the Amadios and their son, it would seem that on a similar reasoning the bank would likely have been unable to claim to be a bona fide purchaser where the mortgage was created through the exercise by the son of undue influence.

Conclusion: The Significance of *Commercial Bank of Australia Ltd. v. Amadio*

It is difficult to be sure of the significance of *Amadio* for the future development of the doctrines of unconscionability and undue influence in Australian law. That the decision represents a major development in the area is undeniable. It poses the fundamental questions which need to be approached in the application of the doctrines. It does not, however, fully resolve these issues, and may ultimately be most important as an indication of their continued difficulty for the courts.

In part, the difficulties with the reasoning of *Amadio* reflect the likelihood that the case might better have been approached as raising issues of undue influence and of the situation of third parties taking with actual or constructive notice of that undue influence. Yet, given the course of the pleadings and the nature of the issues raised in the lower courts, the case had to be approached in the High Court within the wider category of unconscionability.

It is clear that the High Court has decisively rejected any suggestion that equitable relief will be available upon the basis of inequality of bargaining power alone. All the judgments continue to require that the weaker party seeking to have a transaction set aside must demonstrate not only disadvantage, but also unconscionable behaviour in extracting the bargain by the stronger party, behaviour such that equity will not allow the stronger party to retain the benefit of the contract. Such a requirement now finds support across the three doctrines of unconscionability, undue influence and common law restraint of trade: it is in accordance with the approach of the High Court in *Blomley v. Ryan*⁹¹ as to unconscionability, is consistent with the traditional approach to undue influence as reaffirmed in England by the House of Lords in *National Westminster Bank v. Morgan*,⁹² and is consistent with the trend of English decisions as to restraint of trade as defined by *A. Schroeder Publishing Co. v. Macaulay*⁹³ and confirmed by *Alec Lobb (Garages) Ltd. v. Total Oil (GB) Ltd.*⁹⁴

Mason and Deane, JJ. recognize the common elements in the equitable doctrines of undue influence and unconscionability, seeking to distinguish the two by the direction of the Court's attention, in the former to the voluntariness of the will of the weaker party, in the latter to the conduct of the stronger party as not consistent with good conscience. It

⁹⁰ *Bridgeman v. Green* (1757) Wilm. 58 at 65, cited *O'Sullivan v. Management Agency & Music Ltd.*, *supra* fn. 15 *per* Fox, L.J. at 472.

⁹¹ *Supra* fn. 50.

⁹² *Supra* fn. 6.

⁹³ *Supra* fn. 4.

⁹⁴ *Supra* fn. 12.

has been suggested here that such a view of undue influence tends to obscure the distinction between undue influence and common law duress. Further, it has been argued that such a distinction does not sufficiently recognize the basis in equitable principle of the doctrine of undue influence, as holding the stronger party to standards of good conscience in situations where the relationship between the parties — presumed or proved to be a relationship of influence — imposes obligations of trust.

Gibbs, C.J., Dawson, J. and Deane, J. (Wilson, J. concurring with Deane, J.) all take relatively conservative approaches to the doctrine of unconscionability, emphasising the objective disabilities of the weaker party. Deane, J. finds such disabilities available in the age of the Amadios, their lack of formal education, their limited language skills, and concludes that the bank had taken unconscionable advantage of those disabilities in the circumstances in which it presented the guarantee for signature, given its actual or constructive knowledge of the role of the son in the transaction. Gibbs, C.J. and Dawson, J. hold that the bank had made no unfair use of the disadvantages of the Amadios: Dawson, J. further holds that the bank was not responsible for the Amadios having been misled by their son, and so denies equitable relief. Although denying a remedy in equity, Gibbs, C.J. allows relief at common law, holding the guarantee not binding on the basis of an implied misrepresentation of a material part of the transaction by the bank, originating in the bank's undisclosed dealings with the son.

The judgment of Mason, J. however raises fundamental issues for the future development of unconscionability, appearing to expand the range of disadvantages which might found unconscionability beyond objective disabilities of the kind upon which the cases traditionally turn. Mason, J.'s reasoning seems to suggest that, at least where there is some element of previous disadvantage, then reliance upon a third party resulting from that disadvantage, or even the fact of unilateral mistake of which the stronger party seeks to take advantage, may allow relief in unconscionability.

At its furthest extension, such reasoning would suggest that the Court might allow equitable relief in unconscionability where the disadvantage upon which the party seeking relief relies is based in the circumstances of the transaction which he seeks to have set aside: the factors which made the transaction in some sense unfair in the Court's view would themselves constitute such disadvantage.⁹⁵ This is, of course, to extend the reasoning beyond that of Mason, J. in *Amadio*, where on the facts there existed evidence of previous disadvantage.

It may be that *Commercial Bank of Australia Ltd. v. Amadio* illustrates the difficulty of developing a doctrine of unconscionability that is at once cohesive and sufficiently flexible to hold parties to the requirements of conscience in their contractual arrangements. *Amadio's*

⁹⁵ Cf. *Brusewitz v. Brown*, *supra* fn. 37, *per* Sir John Salmond at 1109-1110, observing that "the mere fact that a transaction is based on an inadequate consideration or is otherwise improvident, unreasonable or unjust is not in itself any ground on which this Court can set it aside as invalid"; *Campbell Discount Co. v. Bridge* [1962] A.C. 600 *per* Lord Radcliffe, warning against the danger of expanding the doctrine of unconscionability to the point of becoming "a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other."

Case has, however, clearly advanced the doctrine of unconscionability beyond the point at which Sheridan observed—with disturbing frankness—that

probably the only safe generalization is that the court considers each case on its individual merits to see whether one party has taken advantage of the weakness or necessity of the other to an extent which strikes the judge as being a greater advantage than the current morality of the ordinary course of business men allows.⁹⁶

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⁹⁶ L. A. Sheridan, *Fraud in Equity*, Pitman, 1957, p. 73, quoted in Bradley E. Crawford, "Comments [Unconscionable Transactions]", (1966) 44 *Can. Bar. Rev.* 142 at 142.