UNCONSCIONABILITY

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A recent High Court ruling has shown that prosecuting a case of unconscionability outside the auspices of the *Trade Practices Act* may be more difficult than previously thought.

The concept of unconscionability in our law is not new. It has been a feature of many cases in Australia over the years, the highlight being the High Court of Australia decision in *Commercial Bank of Australia Limited v Amadio*.[1] The common law notion of unconscionability has been codified in what is now known as section 51AA of the *Trade Practices Act* (the TPA). Some early decisions gave unconscionability quite a wide reading in cases that raised preliminary matters of procedure and related matters (see, for example, *Olex Focas Pty Ltd v Skodaexport Co Ltd*[2] and *HECEC* Australia *Pty Ltd v Hydro-Electric Corporation*[3]).

In light of these cases, there were suggestions that section 51AA might become as widely used in litigation in Australia as section 52 of the TPA.[4] Section 52 prohibits misleading or deceptive conduct and has been described by one leading academic commentator as a 'plaintiff's exocet'[5]. Section 52 has become part of the landscape in litigation involving contractual disputes, trade mark disagreements, passing off claims and other similar matters.

In 1998, the notion of unconscionability was extended to small business. Even though the monetary limit available in relation to such actions is only $3 million, the prospect of increased litigation involving unconscionability was widely anticipated. However, the recent High Court decision in *Australian Competition and Consumer Commission v Berbatis* (*Berbatis*)[6] handed down on 9 April, has caused a rethink on the likelihood of unconscionability becoming more widely used. The case is an indicator of the court's attitude to section 51AC even though it only deals directly with section 51AA (because the litigation was commenced by the Australian Competition and Consumer Commission (ACCC) prior to the availability of section 51AC).

In this article we discuss *Berbatis*, and some other interesting cases in which the concept of unconscionability has been relied on outside the area of the TPA. Despite the willingness of some judges to rely on unconscionability to provide relief or suggest proposed remedies in unusual situations, it is generall believed that the concept of unconscionability will not become as widely used or as effective as section 52 of the TPA.

THE *BERBATIS* CASE

Berbatis Holdings Pty Ltd (Berbatis) was the landlord of a retail shopping centre. A number of the tenants were involved in a dispute with Berbatis. While the litigation remained on foot, the lease of Mr and Mrs Roberts (the Roberts) was due to expire. It did not contain an option to renew. The Roberts had arranged for the sale of their business, but this was entirely dependent upon them obtaining a renewal of their current lease for assignment along with the accrued goodwill of the business. Significantly, Berbatis knew the Roberts were under considerable financial and emotional stress, particularly in light of a family illness.

Berbatis sought to make the renewal of the lease conditional upon the Roberts agreeing to discontinue the litigation. The Roberts agreed to withdraw their litigation as part of the renewal of the lease. The ACCC brought proceedings on behalf of the Roberts, and various others, alleging unconscionable conduct. Justice French at first instance, ([2000] FCA 1376) found that by imposing this condition, Berbatis

had unfairly exploited the particular vulnerability of the Roberts in relation to the sale of their business to achieve ends which Justice French felt were 'commercially irrelevant to the terms and conditions of any proposed new lease'.

The Full Federal Court overturned the decision of Justice French ([2001] FCA 757). In upholding the decision of the Full Court, the majority of the High Court (Chief Justice Gleeson, Justices Gummow, Hayne and Callinan with Justice Kirby dissenting) gave a narrow interpretation of the term 'unconscionability'.

UNCONSCIONABLE CONDUCT OR A HARD BARGAIN?

The majority of the judges of the High Court focused particularly on the difference between the notion of a 'special disability', which they felt would attract protection under the TPA, and in particular, section 51AA, and a 'hard bargain', which the court felt was a commercial reality with which the court should not concern itself. In that context, certain members of the court were possibly suggesting that even in the context of section 51AC, where the notion of unconscionability is given a wider meaning by virtue of specific guidelines, this underlying principle may well prevail, despite those guidelines. The majority held that the conduct of Berbatis 'fell short of a disabling condition or circumstance seriously affecting their ability to make a judgment as to their own best interests'.

In reaching this conclusion, the High Court observed that for an action to be 'unconscionable', the weaker party must be in a position of 'special disadvantage,' that is exploited by the stronger party. While acknowledging that the Roberts were at a 'distinct disadvantage', the majority felt there was nothing 'special' about it. All members of the majority were inclined to view the transaction as an example of a difficult commercial decision arising out of an inevitable disparity of bargaining power. In this regard, the family illness, and the imminent sale of the business were insufficient to demonstrate the relevant disadvantage.

The majority agreed that having one's will overborne is not a necessary element in establishing special disadvantage. Chief Justice Gleeson found that the Roberts did not suffer from an inability to make a judgment, but an inability to get their own way resulting from their unequal bargaining position—a common disability the courts will ordinarily not relieve. In this context, it is interesting to note that in finding for the ACCC at first instance, Justice French described the disadvantage of the Roberts as 'situational' (arising from an intersection of legal and commercial circumstances) as opposed to 'constitutional' (arising from an inherent weakness or infirmity). While accepting that special disadvantage could be situational, Justice Gleeson urged caution in the use of this category, warning against such a description taking on a life of its own, in substitution for the language of the statute.

In their joint judgment, Justices Gummow and Hayne held that the facts fell short of circumstances that would constitute unconscionability. To sustain a complaint of unconscionable conduct, it would be necessary in their view for the applicant to establish that the special disadvantage resulted in a loss of the weaker party's capacity to make a judgment about their best interests. Additionally, they rejected the view of Justice French that the withdrawal of litigation required by Berbatis was commercially irrelevant on the basis that the judgment as to what constitutes a

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relevant point of negotiation is for the parties involved to decide.

Justice Callinan similarly found that no special disadvantage arose out of the disparity of bargaining power on the facts, given that in his view, 'there were no circumstances seriously affecting the ability of Mr and Mrs Roberts to make a judgment as to where their best interests lay'.

IN DISSENT...

Justice Kirby had raised concerns during argument before the High Court that a wide interpretation of unconscionability might amount to driving a 'herd of elephants through the marketplace'. In view of Justice Kirby's strong support for the protection of small business and individuals, rather than the competitive process, it is not surprising that he ruled in favour of the ACCC. He held that the conduct was unconscionable within the meaning of the TPA in so far as the Roberts were clearly unable to assess their rights and interests as a result of the overbearing conduct of Berbatis. Justice Kirby took a subjective view in holding in favour of the applicant in this case and his decision can be interpreted as one highly influenced by the relevant facts rather than the law. He preferred to rely on the findings of the trial judge rather than trying to weave a more expansive definition of unconscionability into section 51AA.

CONCLUSION

Having hoped for a broader interpretation of the unconscionability provision, the ACCC expressed disappointment with the result. It is interesting that earlier judgments of both the Victorian Supreme Court and the Federal Court in which the concept of unconscionability in the context of section 51AA had been given a wider interpretation, were not considered by the High Court. The narrow view of the majority will clearly send a very negative signal to small business, consumers and those supporting a more expansive role in this area for the ACCC. The provisions of the TPA dealing with small business (in particular, section 51AC) may be seen at risk.

The recent Dawson Report on the TPA does not consider the provisions of section 51AC in any detail. However, it does recommend that 51AC should be amended to prohibit the unilateral variation of contracts, or the presentation of 'take it or leave it' contracts. The Government is yet to comment in response to these recommendations.

SOME OTHER OBSERVATIONS

Two Victorian cases, *Air New Zealand Limited & Anor v Leibler & Ors* [1999] 1 VR 1 and *Edensor Nominees Pty Ltd v Anaconda Nickel Ltd* [2001] VSC 502 provide some further examples of when unconscionability has been used successfully outside the context of the TPA in cases to obtain various remedies.

In the *Leibler* case, the facts were briefly these. Leibler was the managing director of Jetset Travel and Technology Holdings Pty Ltd (Jetset), in which he and his family held a 90 per cent interest. Air New Zealand Ltd (Air NZ) and Jetset had been in commercial relationships for many years and eventually Air NZ undertook to acquire an interest in Jetset. The negotiations proceeded, and were eventually concluded. The area of interest with respect to the case before the court was clause 11.09 of the Shareholders' Agreement. This clause provided, in effect, that in the event the shares were to be offered for sale, they would be offered in the first instance to the other holder of shares. In this regard, the clause specifically prevented Leibler and his family from selling their interest in Jetset to a competitor (such as Qantas). However, due to an error

by Air NZ's solicitors, this clause was deleted, rather than amended.

Justice Hansen at first instance found as a matter of fact that Leibler was aware of the deletion, and, importantly, aware that it was a mistake. Leibler took no action to bring the deletion to the attention of Air NZ, despite consensus existing that a clause to that effect should be reflected in the contract.

Air NZ sought, and received rectification of the contract. In granting this remedy, it was found that Leibler (and others) had acted unconscionably. Significantly, the court held that the unconscionability arose not through executing the document, which did not reflect the consensus of the parties, but in seeking to rely on the terms of the contract, which were not a reflection of that consensus.

The matter was appealed to the Supreme Court of Victoria Court of Appeal, where the President of the Appeals Court, Justice Winneke, and Justices of Appeal Phillips and Kenny together dismissed the appeal. In this regard, their Honours noted (at 4) that the 'appellants ought to have drawn the mistake to attention and, not having done so, had acted unconscionably'. This conclusion was strongly based on the context of the negotiations between the parties, and the level of trust between them after years of dealing.

The *Edensor* case involves an extremely complex set of facts surrounding the acquisition by Anaconda Nickel Ltd (Anaconda) of control of Centaur Mining and Exploration Ltd (Centaur) (with Joseph Gutnick as chairman) through the purchase of various interests in Edensor Nominees Pty Ltd (Edensor). Settlement of the sale of assets between Anaconda and Edensor was set for 4 September 2000. However, Anaconda reconsidered the sale, and there was evidence to suggest it did not intend to proceed with the sale, but wished to prevent Edensor negotiating with any competitor. Anaconda therefore continued to conduct itself as if the sale was to be settled on 4 September. At the last minute, Anaconda sought to extend the date for settlement, and, it was alleged, made certain representations to Mr Gutnick that the deal would proceed in six months, and that he should relinquish control of the board. Mr Gutnick testified that he did this because he trusted Mr Forrest, of Anaconda.

Anaconda then withdrew from the sale in a manner which Edensor claimed was unlawful, asserting that Anaconda should be estopped from non-completion of the sale, and alleging misleading and deceptive conduct within the meaning of sections 51A and 52 of the TPA.

Justice Warren found that an action in estoppel was sustainable on the basis that representations made by Mr Forrest were relied upon by Mr Gutnick, and that Edensor acted to its detriment in reliance on these representations. In particular, the court found that the conduct of Anaconda made it unconscionable for it to renege on representations made to Mr Gutnick, and through him, to Edensor.

CONCLUSIONS

These cases show a willingness on the part of some courts to import notions of unconscionability in commercial transactions that would clearly be outside the $3 million benchmark currently set in relation to section 51AC of the TPA. So far the ACCC has not been able to mount a very significant case under that provision.

The Dawson Report, in its review of Part IV of the TPA, did not examine the impact of unconscionability because it felt it was outside its terms of reference. But, as readers will no doubt be aware, the Dawson Report has also rejected a rewriting of section 46 of the TPA (the misuse of market powers section) which small business believes should be widened to provide them with relief in cases involving unfairness (such as predatory pricing). The Dawson Report did, however, suggest that the ACCC should prepare useful guidelines on its interpretation of the unconscionable conduct provisions of the TPA.

Perhaps the ACCC will run one or two more test cases in this area. But, for the moment, apart from unusual fact situations such as those illustrated in the *Leibler* and *Edensor* cases discussed above, it is unlikely that the concept of unconscionability under section 51AA of the TPA will raise the kind of difficulties that section 52 of the TPA does for many businesses.

REFERENCES

1. (1983) 151 CLR 447.

2. [1998] 3 VR 380 3 (1999).

3. ATPR 46-196.

4. See Baxt and Archibald, 'Consumer and Business Protection: Its Role in a Pro Competition Statute', in Hanks and Williams *Trade Practices Act: A 25 Year Stocktake* (2001) Federation Press at 171.

5. See Pengilley, 'Section 52 of the Trade Practices Act: A Plaintiff's New Exocet', (1987) 15 *ABLR* 247; see also French, 'A Lawyers' Guide to Misleading and Deceptive Conduct', (1989) 63 *ALJ* 250.

6. 197 ALR 153.

7. See for example *Boral Masonry Ltd v ACCC* 195 ALR 609 *and Melway Publishing Pty Ltd v Robert Hicks Pty Ltd Vas Auto Fashions Australia* (2001) 178 ALR 253.

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