

## CASE NOTE:

*Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153;  
[2003] HCA 18.

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### INTRODUCTION

The High Court decision in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others*<sup>1</sup> did not question the validity of s51AA, but focused on its construction and application to the facts of the case. Section 51AA of the *Trade Practices Act 1974* (Cwth) ('s51AA') states:

- (1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of unwritten law, from time to time, of the States and Territories.
- (2) This section does not apply to conduct that is prohibited by section 51AB or 51AC.'

The High Court upheld the decision of the Full Federal Court who had held the facts of the case did not amount to unconscionable conduct. However, what remains of interest is that the High Court did not reverse the findings of the primary judge, French J, who expanded the notion of unconscionability in s51AA from cases where 'constitutional disadvantage' arises from a person's health or lack of understanding<sup>2</sup>, to include 'situational disadvantage' based on a party's legal and financial position.<sup>3</sup>

Depending on the facts of future cases involving s51AA, such an expansion of unconscionable conduct has 'as much potential to interrupt corporate and commercial dealings as the expansion of indicia

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<sup>1</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153; [2003] HCA 18.

<sup>2</sup> *Blomley v Ryan* (1956) 99 CLR 362 at 405 per Fullagar J; *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

<sup>3</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) ATPR ¶41-778 at 41,197.

<sup>4</sup> Horrigan, B. 'Unconscionability Breaks New Ground - Avoiding and Litigating Unfair Client Conduct after the ACCC Test Cases and Financial Services Reforms' (2002) 7 *Deakin Law Review*, 73 at 76.

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of statutory unconscionability and ACCC test cases on its scope.<sup>4</sup>

## FACTS<sup>5</sup>

A number of companies, including Berbatis, owned a shopping centre in Western Australia and had been in litigation with the tenants in relation to their leases. Mr and Mrs Roberts (the lessees) were among the tenants in dispute with Berbatis.

The Roberts needed to sell their business due to emotional and financial pressures arising from the need to care for their sick daughter. As their lease had almost expired, their prospects of selling were poor without a renewal option. Essentially, the successful sale of their business depended on the willingness of Berbatis to renew the lease.

In negotiations, Berbatis indicated that any renewal of the lease was contingent on the lessees withdrawing their present and future litigation relating to lease disputes against Berbatis. This request by Berbatis, coupled with their awareness of the Roberts' emotional and financial stress, led the ACCC to commence proceedings against Berbatis for breach of s51AA.

## BACKGROUND

In holding the actions of Berbatis to be unconscionable the primary judge, French J, stated: 'unfair exploitation of disadvantage amounting to unconscionable conduct may occur when an owner uses its bargaining power to extract a concession from the tenant that is commercially irrelevant to the terms and conditions of any proposed new lease.'<sup>6</sup> He indicated that the explanatory memorandum definition of unconscionability in s51AA<sup>7</sup> may have been interpreted based on 'an unduly narrow selection of case law'<sup>8</sup> and explained that unconscionability had a primary meaning as the central principle underlying much of equity as well as a secondary meaning as a distinct ground of relief usually categorised under a 'special disadvantage'.

<sup>5</sup> The facts are taken from: *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 159-160; [2003] HCA 18 at [21]-[28] per Gummow and Hayne JJ.

<sup>6</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) ATPR ¶41-778 at 41,197.

<sup>7</sup> Explanatory Memorandum, *Trade Practices Legislation Amendment Act 1992* (Cth), cl41; Second Reading Speech: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2408.

<sup>8</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) ATPR ¶41-778 at 41,195-41,196. Referring to: *Blomley v Ryan* (1956) 99 CLR 362 and *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 as the primary cases interpreting unconscionability.

Justice French expanded this secondary meaning from the traditional *Amadio*<sup>9</sup> sense, finding that:<sup>10</sup>

- (i) 'Special disadvantage' could include '*situational disadvantage*', arising from parties' legal, informational and financial circumstances.<sup>11</sup>
- (ii) The particular *matrix of circumstance* led them to be under a 'special disadvantage' in the situational sense.<sup>12</sup>
- (iii) That the lessees were in a *vulnerable position* vis-à-vis Berbatis because they needed a new or extended lease to maximise the sale price. They needed to sell so they could look after their sick daughter and were unable to look after their own financial interests because of their preoccupation with their daughter's sickness. Berbatis and its agents knew all of this, and so making an extension or renewal of the lease conditional on the lessees' abandonment of genuine claims in ancillary proceedings against Berbatis, amounted to extracting an irrelevant commercial concession from parties effectively 'over a barrel' and hence was exploitative.<sup>13</sup>

The Full Federal Court (Hill, Tamberlin and Emmett JJ) reversed that decision<sup>14</sup>, stating that the tenants had not suffered from a '*vulnerable position*'. The Full Federal Court drew a distinction between parties adopting 'an opportunistic approach to strike a hard bargain' and those who act unconscionably within the meaning of s51AA.<sup>15</sup>

The Full Federal Court stated that as the Roberts had sought legal advice 'it can not be said that the Roberts' wills were so overborne that they did not act independently or voluntarily ... the Roberts had a choice ... they made that choice of abandoning their claims ... there may have

<sup>9</sup> *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

<sup>10</sup> For a discussion see: Horrigan, B. *Unconscionability breaks new grounds - how the ACCC test cases affects banks - October 2001*. Allens Arthur Robinson Publications Website; (accessed 30 July 2003) <<http://www.aar.com.au/pubs/baf/banking2.htm#Unconsc>>.

<sup>11</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) ATPR ¶41-778 at 41,196-41,197.

<sup>12</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) ATPR ¶41-778 at 41,197.

<sup>13</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) ATPR ¶41-778 at 41,197.

<sup>14</sup> *CG Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555; [2001] FCA 757.

<sup>15</sup> *CG Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555 at 571; [2001] FCA 757 at [81].

<sup>16</sup> *CG Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555 at 571; [2001] FCA 757 at [81].

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been a hard bargain, but it was not an unconscionable one.’<sup>16</sup> Accordingly, the Full Federal Court decided the insistence by a landlord that a commercial lessee discontinue litigation against the landlord as a precondition to the renewal of a lease did not constitute unconscionable conduct under s51AA.<sup>17</sup> Interestingly, the Court did not discuss the new concept of ‘situational’ disadvantage.

## THE HIGH COURT DECISION

By a 4:1 majority (Gleeson CJ, Gummow, Hayne and Callinan JJ, with Kirby J dissenting), the High Court upheld the decision of the Full Federal Court.<sup>18</sup> The majority of the High Court held that although the lessees were at a distinct commercial disadvantage, there was nothing ‘special’ (in the *Amadio*<sup>19</sup> context) about this disadvantage; that is, ‘big bank versus financially naïve aged couple with poor English skills’.<sup>20</sup>

The lessees were simply faced with a choice between two options which were highlighted in the Full Federal Court decision and confirmed in the High Court decision:<sup>21</sup>

- (i) they could renew the lease and withdraw from litigation or, alternatively,
- (ii) they could choose to continue proceedings against *Berbatis*, in which case the lease would not be renewed and there would be no sale of the business.

The majority of the High Court therefore concluded that the lessees chose on commercial grounds to renew the lease and were not subject to s51AA. This decision was based on their reasoning that a person is not

<sup>17</sup> *CG Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555 at 571; [2001] FCA 757 at [82].

<sup>18</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 158, 170, 200; [2003] HCA 18 at [19] per Gleeson CJ, at [64] per Gummow and Hayne JJ and at [191] per Callinan J.

<sup>19</sup> *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

<sup>20</sup> For a discussion see: McConvill, J and Bagaric, M. ‘The Yoking of Unconscionability and Unjust Enrichment in Australia’ (2002) 7 *Deakin Law Review*, 225.

<sup>21</sup> *CG Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555; [2001] FCA 757. *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 168-169 per Gummow and Hayne JJ, at 195-197 per Callinan J; [2003] HCA 18 at [59]-[61] per Gummow and Hayne JJ, at [167]-[177] per Callinan J.

<sup>22</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 157 per Gleeson CJ; [2003] HCA 18 at [11] per Gleeson CJ referring to *ACCC v Samton Holdings* (2002) 189 ALR 276 as illustrating this principle. Callinan J at 199, [186] states that in most business transactions there are ‘superior resources, skill, judgment, timing or indeed simply luck on one side ... is rarely likely to be equal’, therefore it will be difficult to identify situational disadvantage in commercial transactions.

at a disadvantage just because of an inequality of bargaining power.<sup>22</sup> Gleeson CJ highlighted the fact that the lessees suffered from no lack of ability to judge or protect their financial interests. All the people involved in the transaction were business people, concerned to advance or protect their own financial interests. What the lessees lacked was the ability to pursue both competing interests at the same time and 'that is a disability that affects people in many circumstances in commerce, and in life. It is not one against which the law ordinarily provides relief.'<sup>23</sup>

Kirby J dissented, declaring that the Full Federal Court had applied an 'excessively narrow legal criterion'<sup>24</sup>, and agreed with French J who had observed that: 'the elements of inequality, disadvantage or disability on the one hand and the unfair conduct of the stronger party taking advantage of them on the other are not to be weighed up as though independent. It is conduct in context which has to be judged.'<sup>25</sup>

Based on the facts, Kirby J stated:

'Although the illness was not that of the tenants themselves, it was an illness that was bound to play a part in the Roberts' decisions. It was part of the circumstances that placed them in a serious "situational" disadvantage and inequality vis-à-vis the owners. The differentiation of the case of the Roberts from the other tenants, is thus explained, in large measure, by reference to the Roberts' vulnerability caused by their need to sell their business because of their personal circumstances.'<sup>26</sup>

Kirby J held that while it was true that Berbatis, as owners of the centre were not obliged to extend the lease 'in such a way as to protect their goodwill and thus afford the Roberts a sellable business ... this fact masks the realities of the economic and litigious positions in which the Roberts and the owners respectively found themselves.'<sup>27</sup>

## CONCLUSION

Arguably the majority of the High Court took a restrictive approach in applying s51AA to the facts of *Australian Competition and Consumer*

<sup>23</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 158; [2003] HCA 18 at [17] per Gleeson CJ.

<sup>24</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 170; [2003] HCA 18 at [66] per Kirby J.

<sup>25</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) ATPR 41-778 at 41,196.

<sup>26</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 179; [2003] HCA 18 at [95] per Kirby J.

<sup>27</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 177; [2003] HCA 18 at [88] per Kirby J.

<sup>28</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153; [2003] HCA 18.

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As stated by Gleeson CJ:

‘Unconscientious exploitation of another’s inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence.’<sup>29</sup>

Though it would appear that this decision makes it harder to find unconscionable conduct in landlord-tenant dealings, it is argued that it is not necessarily impossible.<sup>30</sup>

Irrespective of the interpretation of s51AA to the facts of *Berbatis*, Gleeson CJ states that, “‘situational’ rather than “‘constitutional’ <disadvantage> is understandable and acceptable, provided that such descriptions do not take on a life of their own, in substitution for the language of the statute, and the content of the law to which it refers.’<sup>31</sup> Such an acceptance of the notion of ‘situational disadvantage’ as well as ‘special disadvantage’ has the potential to ‘interpret unconscionable conduct more liberally.’<sup>32</sup>

As stated by Kirby J, ‘Having regard to the history and purposes of that provision <s51AA>, and the language of its expression, I could not accept the proposition that s51AA has a limited operation ... It has a capacity to expand and apply to new circumstances as the unwritten law evolves “from time to time”.’<sup>33</sup>

Though the majority of the High Court did not believe that the lessees in *Berbatis*<sup>34</sup> fell into the category of ‘situational disadvantage’, the High Court’s acceptance of French J’s expansion of unconscionable conduct from ‘constitutional disadvantage’ to ‘situational disadvantage’ has provided a wider scope for other types of unconscionable dealings in future commercial transactions.

Accordingly, stronger parties to a commercial transaction may have to

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<sup>29</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 157; [2003] HCA 18 at [14] per Gleeson CJ.

<sup>30</sup> For a discussion see: Horrigan, B. *Unconscionability breaks new grounds - how the ACCC test cases affects banks - October 2001*. Allens Arthur Robinson Publications Website; (accessed 30 July 2003)  
<<http://www.aar.com.au/pubs/baf/banking2.htm#Unconsc>>.

<sup>31</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 156-157; [2003] HCA 18 at [10] per Gleeson CJ.

<sup>32</sup> Maddock, Lonie & Chisholm. ‘ACCC Unsuccessful in Expanding Unconscionable Conduct Laws’ *Retail Industry Update*, February 2002.

<sup>33</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 185; [2003] HCA 18 at [116] per Kirby J.

<sup>34</sup> *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 156-157; [2003] HCA 18.

ask themselves some key questions to ascertain whether their actions can be characterised as unconscionable under s51AA. In his article<sup>35</sup>, Professor Horrigan suggests the following questions:

- (1) Are you in a stronger bargaining position?;
- (2) Is that simply a result of the ordinary commercial context (eg normal landlord-tenant dynamics)?;
- (3) Above and beyond that, however, do you also have the other party at a special disadvantage which is personal (eg illiteracy, drunkenness, or other clear need for advice) or situational (eg arising from the matrix of legal, financial, informational or other circumstances)?;
- (4) Are you making an offer, giving an instruction, extracting a concession, or exercising a right which effectively leaves the other party with no option other than to comply?; and

Is what you are doing the best or only realistic commercial course open to you (ie can you justify your conduct independently on a commercial basis, as distinct from having an ulterior motive or knowing that the transaction really cannot pass the so-called "smell test" in substance)?

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*Berbatis*<sup>37</sup> shows it is not an easy task for a lessee to characterise a stronger party's actions as unconscionable. This difficulty is due to the number of checkpoints that must be satisfied and the need for a real situation of 'special disadvantage' and not simply a normal commercial vulnerability. *Berbatis*<sup>38</sup> does, however, provide an alternative argument in such commercial dealings where the matrix of circumstances permits.

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35 Horrigan, B. 'Unconscionability Breaks New Ground - Avoiding and Litigating Unfair Client Conduct After the ACCC Test Cases and Financial Services Reforms' (2002) 7 *Deakin Law Review*, 73.

36 Horrigan, B. 'Unconscionability Breaks New Ground - Avoiding and Litigating Unfair Client Conduct After the ACCC Test Cases and Financial Services Reforms' (2002) 7 *Deakin Law Review*, 73 at 95.

37 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 156 -157; [2003] HCA 18.

38 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (2003) 197 ALR 153 at 156 -157; [2003] HCA 18.