

BRIDGEWATER v LEAHY – A BRIDGE TOO FAR?

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I INTRODUCTION

Decisions of superior appellate courts, particularly those from the senior court in a jurisdictional hierarchy, such as the High Court of Australia (which of course sits at the top of a number of judicial hierarchies), can be judged and critiqued on a number of bases. First, was the best decision reached on the facts as established on the evidence brought at trial and as interpreted in the trial court and by any intermediate appellate court? Secondly, do the judgments given present a coherent and reasoned account of the extant legal materials to be considered in reaching a conclusion as to what law is to be applied? Thirdly, was the law as stated applied properly to the facts as established and interpreted to reach the decision actually made? Fourthly, if the statement of law in the decision interprets or advances the law as previously understood – which will usually be the case in an ultimate appellate court – then is that statement a coherent fit with what has gone before in the law? In my view, an important matter in this fourth question is whether the statement can be justified morally. Law is fundamentally coercive – and it seems to me that a legitimate exercise of coercion requires a clear moral justification. I do not by saying this mean that the law must be in pursuit of some social or economic policy in order to be justified. That too many people these days think that that is what is meant by calling for moral justification in law is simply a tragedy in my humble view. I believe justification in law is a matter of justice, and in particular what has become generally known in modern debate as corrective justice.¹ I have been asked to identify and discuss the worst case decided by the High Court of Australia in the past quarter century. I have no idea whether I have achieved this apparently objective standard by choosing *Bridgewater v Leahy*.² I have not read all the cases handed down by the High Court over the past 25 years. Further, I am not versed in a broad enough span of legal knowledge to be able to make that assessment even if I had read all the Court's decisions. But I have long regarded *Bridgewater v Leahy*, a case I have considered in teaching a range of private law subjects over the years since it was decided – equity, contract law and restitution law – as a troubling case. I think fundamentally it is a case where a serious injustice was done to the defendants, and where the law of unconscionable bargain was stretched almost to breaking point. I feel emboldened in my intuitive view by the fact that the case was heard by a total of nine judges, of whom four held for the defendants and five for the plaintiffs. That there is something very difficult about the case then cannot be doubted. That split in the numbers alone should warn us of that. Indeed, in the High Court itself two judgments were given and the plaintiffs won by a bare majority of one. A reading of the two judgments side by side leaves one feeling very much as if a kind of parallel universe experience is upon us. Whether or not one agrees with my assessment that this is the worst High Court decision of recent times, I hope that by the close of this paper you will agree that it is at least a very worrying decision!

I shall proceed as follows. In Part II I outline the facts and history of the case. In Part III I make observations about the parties to the litigation from a perspective in corrective justice. In Part IV I shall comment on what the High Court's decision does

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¹ See for a statement of my basic position, RB Grantham and CEF Rickett, 'A Normative Account of Defences to Restitutionary Liability' [2008] CLJ 92.

² (1998) 194 CLR 457.

to the law of unconscionable bargain. Almost seventeen years ago, in *Attorney-General v Equiticorp Industries Group Ltd (In Statutory Management)*,³ McKay J, speaking for himself and the other members of the New Zealand Court of Appeal, Richardson and Henry JJ, memorably stated:⁴

It is not enough for a party to cry 'equity' and expect to be compensated. One must identify the relevant principle of equity on which a claim can be properly founded.

I will suggest that in *Bridgewater v Leahy* the principle that underlies this warning has not been heeded. The law falls into disrepute if our superior courts *of law* cease to be concerned with rights adjudication and morph into simple and oftentimes simplistic dispute resolution. As lawyers, we use the language of rights and duties because these things matter. The judge after all is justice ensouled!⁵ But to qadis sitting under palm trees these things matter little. What matters appears to be some notion of despatching disputes as efficiently as possible. In my view, there is a little too much of the qadi under the palm tree in the majority decision in the High Court in *Bridgewater v Leahy*. That will be my concern in this fourth Part. Part V is a short conclusion.

II FACTS AND LITIGATION HISTORY

William (Bill) York was a grazier who had lived all his life in western Queensland and who died aged 85 in 1989. In 1985 he had made a will leaving his house, car and bank account credits to his widow, and his residuary estate to his four daughters, but subject to an option to purchase his pastoral holdings, his interest in a grazing partnership, livestock and machinery for \$200,000 in favour of his nephew Neil York. In 1985 the value of the land which was the subject of the option was \$695,000. After Bill's death, his widow and four daughters challenged the validity of the option on the grounds of undue influence and unconscionable conduct. This claim was rejected in the Supreme Court of Queensland by de Jersey J (as he then was) and a grant of probate was made. de Jersey J held that at the time of executing the will, Bill had full testamentary capacity and was not acting under influence or pressure from the donee of the option Neil. Indeed, de Jersey J found that Bill and Neil had had a long working relationship over many years and that in particular Bill did not want his landholding broken up on his death.

In 1988 Neil had purchased various properties from Bill (which had they not been purchased then would have fallen into the residue at Bill's death). These properties were purchased at an undervalue. de Jersey J also held that they had not been acquired by either undue influence or unconscionable conduct on the part of Neil. Neil had been in a farming partnership with his father Sam York and his uncle Bill. After 1981, Neil had taken over the day-to-day running of the partnership, although Bill continued to have an active role in its financial affairs.

Bill depended on Neil and was worried that Neil might start to focus on working his own land rather than that of the partnership. Bill accordingly encouraged Neil to sell his own land, which Neil did. Neil suggested to Bill that Bill sell him part of the land which was subject to the option under the will for \$150,000, being the amount Neil had available in cash from the sale of his own property. The value of the land at issue in 1988 was \$696,811. Bill agreed to the sale. The land was co-owned by Sam,

³ [1996] 1 NZLR 528.

⁴ Ibid 537.

⁵ Aristotle, *Nicomachean Ethics* 11132a22. For discussion of this metaphor see Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, 2012).

Neil's father, who agreed to transfer his interest in it to Neil for no consideration. The sale transaction between Neil and Bill was handled by the same solicitor who had drawn up Bill's will in 1985. The solicitor did not suggest that Bill obtain independent legal or other advice but did have him examined by a doctor who advised that Bill was of sound mind and capable of making decisions. At the solicitor's suggestion the sale was structured in the following way: the land was sold to Neil and his wife Beryl for \$696,811 with a deed forgiving the amount between the full sale price and the \$150,000 actually paid (being \$546,811). Upon Bill's death in 1989, the widow and four daughters also challenged the 1988 transaction and sought to set aside the deed of forgiveness, *but not the entire sale transaction*. Their claim was made in this way because, had the entire 1988 transaction been set aside, the widow and the daughters would have been in a worse position unless they could indeed obtain an order varying the terms of the will. Neil and his wife had paid \$150,000 for land which was part of the property included in the option in Bill's will. Had it reverted to Bill's estate, Neil would have been able to purchase it *and* the rest of the residuary property for a total of \$200,000, whereas he would have had to pay \$200,000 for the remaining residuary property without the sold land, thus in effect inflating the total price paid for the property which had been the subject matter of the option at the time the will was executed from \$200,000 to \$350,000. By challenging the deed of forgiveness, and alleging that the sale had been at a serious undervalue, the widow and daughters hoped to increase the amount to be paid over by Neil, by way of exercise of the option and (it can be assumed) the \$546,811 difference in value, quite dramatically. In the Supreme Court, de Jersey J also dismissed this claim in respect of the 1988 transaction, rejecting assertions of both undue influence and unconscionable conduct.

The widow and daughters then appealed to the Queensland Court of Appeal. At this point the claim in respect of the will was abandoned, and the focus became the deed of forgiveness. The Court of Appeal, by a majority (Macrossan CJ and Davies JA; Fitzgerald P dissenting), rejected the appeal, holding that the 1988 transaction had not been procured by unconscionable conduct and in addition that there had been no breach of fiduciary duty owed by Neil to Bill. The High Court of Australia granted special leave to appeal.

As noted above, the High Court split on their decision. The majority (Gaudron, Gummow and Kirby JJ) allowed the appeal. The deed of forgiveness was held to be an unconscionable bargain. Bill was under a special disability, it was said, because he had in effect an emotional dependence on Neil. There was closeness in the relationship between Neil and Bill and a 'tendency for the older man to fall in with the wishes of the younger ...'⁶ Their Honours stated:

The position of disadvantage which renders one party subject to exploitation by another such that the benefit of an improvident disposition by the disadvantaged party may not in good conscience be retained may stem from a strong emotional dependence or attraction.⁷

The relationship between Bill and Neil meant that, when Neil raised the question of using the proceeds of sale of [his own land], they were meeting on unequal terms. Neil took advantage of this position to obtain a benefit through a grossly improvident transaction on the part of his uncle.⁸

The finding of unconscionable bargain meant that their Honours now had to consider the appropriate relief, given that the plaintiffs were seeking to have the deed

⁶ (1998) 194 CLR 547, [114].

⁷ Ibid, [115].

⁸ Ibid, [123].

of forgiveness set aside, but not the entire transaction, as indicted above. The matter was remitted back to the Supreme Court of Queensland to determine how much more in the overall context than the \$150,000 he paid Neil would have paid for the land. Some account had to be taken of Bill's unchallengeable decision to benefit Neil under his will.

The minority was made up of Gleeson CJ and Callinan J. Their Honours' position was expressed thus:

Here there are concurrent holdings of fact in the courts below, based upon 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*.⁹ It may be acknowledged that the requisite capacity for judgment goes beyond an understanding of the salient features of the transaction. However, it is relevant to observe that it cannot properly be concluded that Bill York was unaware of any of those features, much less that they were concealed from him. It was argued for the [plaintiffs] that Bill York may not have appreciated the value of the land in question. This is most unlikely. That was a subject of close and abiding interest to him, and the argument has no foundation in the evidence. Nor is there any reason to doubt that he appreciated the significance of the transaction, both for himself and for his family. His justification of his conduct, when he was challenged by his daughter in November 1988,¹⁰ indicates both independence of mind and determination.¹¹

[T]he findings in the below establish Bill York's independence of mind and capacity for judgment when he entered into the 1988 transaction, a transaction which can only be understood in a wider context, including the provisions of the 1985 will, and Bill York's long and firmly held intention that Neil York should succeed to his pastoral interests. The findings deny the existence of any special disability in Bill York, and they acquit Neil York of unconscientious conduct. It is not a sufficient answer to these concurrent findings of fact to suggest that the members of the courts below failed to address the correct issues. The issues were squarely before them and, in particular, the principles in *Amadio* were considered.¹²

Although it was not necessary for them to do so, their Honours examined the matter of relief if an unconscionable bargain were established. Their view was that the entire transaction would have to be set aside. The deed of forgiveness could not be severed from the sale. They stated:

There would be no practical justice as between the estate of the late Bill York, on the one hand, and Neil and Beryl York on the other, in severing the 1988 transaction and simply setting aside the forgiveness of debts. That would produce practical, and substantial, injustice. In this connection, the nature of the proceedings has to be emphasised. *It is impossible to accept that, if Bill York had commenced proceedings during his lifetime, and succeeded, a court of equity would have granted such relief.*¹³

The proper relief would have been to set aside the entire transaction and make an order for accounts. ... *[It must be] remembered that the equity which the [plaintiffs] assert is that of the late Bill York.*¹⁴

⁹ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 337.

¹⁰ *Bridgewater v Leahy* (1998) 194 CLR 547, [18].

¹¹ *Ibid*, [42].

¹² *Ibid* [47].

¹³ *Ibid*, [53] (emphasis added). The italicised part is important in the context of the observations made in the text herein immediately following the heading 'The Parties – Where is the Injustice?'

¹⁴ *Ibid*, [54] (emphasis added).

Gleeson CJ and Callinan J continued with some highly critical comments on the majority's proposed relief:

The course now proposed by the majority in this Court involves sending the matter back to the Supreme Court of Queensland to determine an appropriate allowance, against the debt of \$586,811 which would result from setting aside the deed of forgiveness, which ought to be made on a basis related to the rights the [plaintiffs] would have had under the Succession Act. This proposal was not advanced by either side in argument in this Court or in the courts below. Its implications have not been the subject of submissions, and they are unclear to us.

This action was commenced in 1991, after the [plaintiffs'] proceedings under the Succession Act were dismissed for want of prosecution.¹⁵ It was for the [plaintiffs] to bring such evidence at first instance as was necessary to enable the court to grant appropriate relief. No reason has been shown why the [plaintiffs] could not have led the evidence necessary for a determination of the appropriate relief, assuming an allowance of the kind now proposed to be a necessary condition of relief. There is no occasion for a fresh round of litigation. If the evidence necessary to enable this Court to grant appropriate equitable relief is missing, that is an additional reason for dismissing the appeal.¹⁶

There is a footnote to be added to the story. In a paper published in an edited collection of essays, Chief Justice de Jersey indicated that:¹⁷

The difficulty of the complex exercise remitted to the Supreme Court is confirmed by the subsequent history of the claim. The judge to whom the case was committed ... convened a number of directions hearings with counsel for the parties. They did not produce any consensus as to what was the real issue, or the detail for any practicable means for its examination, and the parties eventually settled the claim out of court.

III THE PARTIES – WHERE IS THE INJUSTICE?

We will focus here on the 1988 transaction. It is important to note who the parties to the proceeding in respect of that transaction were, and the nature of the complaint made. Bill's estate was a party, represented by the executor of the will, being the Kevin Leahy referred to as the first defendant in the case name. Mr Leahy was Bill's son in law, and was married to one of the five plaintiffs. The second defendants were Neil York and his wife Beryl. The plaintiffs were, as already indicated, Bill's widow and four daughters, one of whom, Mrs Bridgewater, also gave her name to the case.

A plaintiff must establish a claim against a relevant defendant for a case to proceed. So, it is perfectly reasonable to ask: what did the defendant do that, it was alleged, caused loss? The impugned transaction was between the second defendants Neil and Beryl and the deceased Bill, and the closest the latter came to being a party to the proceeding was through the co-defendant executor Kevin Leahy! In the High Court, the majority pointed out that for relief to be granted it had to be founded in equity since Bill had not suffered any lack of understanding and there was no claim in non est factum. It is of course a truism to say that equity acts in personam and that a finding that the transaction was an unconscionable bargain would create in Bill a personal equity allowing him to have the transaction set aside as voidable. So if Neil

¹⁵ See below, n 17-18.

¹⁶ *Bridgewater v Leahy* (1998) 194 CLR 457, [55], [56].

¹⁷ The Hon P de Jersey AC, Chief Justice, 'Discretion and Remedies' in Charles EF Rickett (ed), *Justifying Private Law Remedies* (Hart, 2008) 70, 75.

and Beryl were the correct defendants, only Bill could have been the correct plaintiff (but for a statutory provision allowing otherwise as a matter of procedure). Bill would be the sufferer of the wrong done by Neil and Beryl, and it would be perfectly just for Bill to have sought relief for the wrong suffered from the doer of the wrong. This is the correlativity between plaintiff and defendant that corrective justice demands – Bill's loss is corrected by requiring the doer of the harm Neil to restore Bill to his position before the harm was committed. This all assumes of course that a harm has been committed. The evidence relied upon by de Jersey J and the majority in the Queensland Court of Appeal established, so their Honours held, that no wrong had been done by Neil and, it is suggested, that Bill was not in fact interested in asserting against Neil that the latter had done him, Bill, any harm at all. Indeed, it appears that the contrary was the true position. As de Jersey J pointed out:

[T]he will did reflect, in a rational way, Bill's wish to achieve the goal, probably very important to him, of retaining the properties as an integrated farming business. ... [B]y this will he did what he wanted to do, unfair as it may have been to Stella [his widow] and his daughters. ... [In respect of the land transactions in 1988] I conclude that the doctor's examination of Bill gives sufficient independent assurance of Bill's capacity and independence in the matter. I am also satisfied that had Bill been independently advised by another lawyer, the end result would likely have been the same.¹⁸

Now it is quite clear that the widow and daughters had some reason to be unhappy with both the dispositions under Bill's will and the 1988 land sale to Neil, since the evidence established a home in which Bill appeared to have been something of a despot. de Jersey J made some comments that reveal his awareness of this:

There is no doubt in my mind that in view of the size of his estate, Bill could have treated Stella and his daughters more generously. That he did not do so is consistent, however, with the fairly ungenerous way he treated them throughout his life. ... Bill provided only very basic accommodation for his wife and daughters. He was remarkably frugal. He did not even give birthday presents. His treatment of his wife and daughters in this will was therefore consistent with the general approach ... One must remember that this is not a 'testator's family maintenance' application.¹⁹

The last observation is crucial. If the complaint was that Bill had not adequately looked after his immediate family members, but had favoured his nephew Neil ('In light of Bill's enormous affection for Neil, Neil's life-long dedication to those particular properties, and Bill's determination to keep Neil in the partnership ...', it is hardly surprising that Bill would wish to pass the properties to Neil – especially regarding him, as he did, as the 'son' he had always wanted but never had': per de Jersey J) over them, the proper defendant in respect of such a complaint by the plaintiffs would have been Bill or his estate, and not Neil and Beryl. Indeed, the plaintiffs had in fact instituted in January 1990, shortly after Bill's death, a family provision application (or as de Jersey J called it a 'testator's family maintenance' application) under Part 4 of the *Succession Act 1981* (Qld), but this had been struck out by the Supreme Court of Queensland in May 1991 for want of prosecution.²⁰

The plaintiffs were in fact only permitted to claim that the undue influence and/or unconscionable conduct exercised by Neil (if established) upon Bill would allow *them* to have the 1988 transaction set aside or otherwise dealt with in such a way as

¹⁸ *Bridgewater, O'Neill, Ashton, Leahy and York v Leahy* (Unreported, Supreme Court of Queensland, de Jersey J, 23 August 1995).

¹⁹ *Ibid.* Moreover, that Bill was not entirely without a generous heart and giving attitude to his daughters is illustrated in para [113] of the majority judgment in the High Court.

²⁰ (1998) 194 CLR 457, [81]-[82].

ultimately to increase the amount of their inheritance, by virtue of s49 of the Succession Act 1981 (Qld). Gleeson CJ and Callinan J pertinently observed:

The standing of the [plaintiffs] to bring these proceedings depends upon s 49 of the Act. This is an action which, so far as is presently relevant, is brought to vindicate an equity of the late Bill York. Prima facie, it is the executor of the will (Kevin Leahy) who would have had the standing to bring the proceedings. Section 49(2) permits another person, or other persons, to bring actions in the exercise of the powers of a personal representative, with the consent of the court. It was held in the courts below that, if the [plaintiffs] otherwise succeeded, this would be a proper case for such consent. However, *the fact that it is the [plaintiffs] who have sued should not be permitted to obscure the position that what is at issue is an equity claimed on behalf of the late Bill York and, because of his death, his estate. It is not a personal equity of any of the [plaintiffs] which is involved.* They cannot, for example, claim any relief which is superior to that which would be appropriate if the action had been commenced by Kevin Leahy in his capacity as personal representative of the estate of Bill York. Furthermore, *in relation to the primary claim for relief advanced on behalf of the [plaintiffs], it is instructive to consider the response the late Bill York would have received if, during his lifetime, he had approached a court of equity seeking to set aside only that part of the 1988 transaction which involved the forgiveness of debt.*²¹

The lack of an adequate link between the plaintiffs and Neil and Beryl is clearly indicated in the italicised parts of this paragraph of the dissenting judgment. These plaintiffs were suing these defendants *only* by virtue of a procedural provision in the Succession Act: its procedural nature is revealed by the fact that the plaintiffs' case had to be understood and analysed as if it were Bill's case! We can look at the matter in this way. As between the plaintiffs on the one hand and Neil and Beryl on the other, what duty was owed and breached by Neil and Beryl to the plaintiffs? Such an analysis would be to make this look rather like a *White v Jones*²² type claim, where the unfortunate heirs who have missed out proceed against the testator's solicitor alleging, as they must, that the solicitor has breached a duty owed to them, the heirs, and not the testator/client, that has caused them loss. If such a duty can indeed be established then a link of correlativity is established between the deprived heir and the solicitor, and corrective just demands a remedy. But is the *Bridgewater v Leahy* situation at all analogous? I think not. It certainly cannot be made to fit the *White v Jones* model without severely distorting the law of unconscionable bargain. And the danger of not appreciating the point – that the plaintiffs in the case are not the plaintiffs in substance but only in process – is that matters which are irrelevant to the legal issue between the defendants and the plaintiffs in substance impinge in an improper way in the determination of the legal issue. For example, the fact that Bill may not have looked after his wife and daughters in a way which would be approved of by society in general or by the judges in particular is not a relevant consideration to either Bill's position or Neil's and Beryl's position in respect of the issue between them. That Bill was a less than perfect husband and father is not a factor that is relevant to both parties to the proceeding. It is not a correlative matter. This observation is important because the majority judges in *Bridgewater v Leahy*, in holding that the deed of forgiveness was tainted by unconscionable conduct, made reference to Bill's husbanding and fathering without appearing to see this as marginal at best and irrelevant at worst. Indeed, in the majority judgment, the matter makes a very early appearance in the third paragraph, well before the issue in the case is identified. Quite frankly, so what if Bill was not the model husband and father? And so what if he was disproportionately generous to Neil?

²¹ Ibid, [27] (emphasis added). See also the majority judgment at [80].

²² [1995] AC 207. See also *Hill v Van Erp* (1997) 188 CLR 159.

The minority judgment in the High Court is replete with constant warnings about the need for vigilance in understanding the positions of the parties in respect of the claim that Bill had an equity as against Neil. Some of the examples of that have been cited in Part II of this paper. The majority judgment, on the other hand, seems focussed for the most part on the (irrelevant) relationship between Bill and his family, and the improvident bargain. This latter point is worthy of some comment. It is true that the improvidence of a bargain might well put a court on notice that all is not right, but it should be remembered that the task of the court is not to rewrite the bargain according to its notion of what might be more provident. Rather, the court must ask whether the party who was being in effect improvident had his wits about him, knew and properly intended what he was doing, and was in no way a victim of pressure or influence which extended beyond that to be normally expected in ordinary dealings between people. As Salmond J said in *Brusewitz v Brown*, the ‘law in general leaves every man at liberty to make such bargains as he pleases, and to dispose of his own property as he chooses. However improvident, unreasonable, or unjust such bargains or dispositions may be, they are binding on every party to them’.²³ Too great a focus on the improvidence of the transaction can result in a denial of this essential freedom.

IV THE LAW OF UNCONSCIONABLE BARGAINS – RIGHTS ADJUDICATION OR DISPUTE RESOLUTION?

In my view, the judgment of the minority in the High Court is to be preferred. Had that been the judgment of the entire Court, *Bridgewater v Leahy* would not have been my candidate as the worst High Court decision. While it might be tempting to suggest that the difference between the two judgments boils down to nothing more than a difference on the facts, I have tried to indicate that I believe more important matters are at stake. What the minority judgment achieved, in my view, was not only the articulation of the correct understanding of the non-correlative position between the parties, but also the application of the law correctly to that circumstance. At heart, the issue was between Bill and Neil, not the plaintiffs and Neil. As far as Neil’s possible liability was concerned, it was only Bill’s position that mattered. The majority judgment adopted an approach that made something of a mockery of the need for correlativity if private law is to make sense and be justified. Constant introduction of the less than perfect relationship between Bill and his family, and too fixed a focus on the improvidence of the 1988 transaction meant that rights adjudication was thrown over for dispute resolution. Unfortunately this is all too often the case when equitable doctrines are in play. Furthermore, it too often extends beyond matters of liability to matters of relief, as it did clearly in the majority’s judgment in *Bridgewater*.²⁴

The result in *Bridgewater v Leahy* is not flattering to the status of equity jurisprudence in Australia, nor is it cognisant of the idea of the parties having rights that ought to be taken seriously! That judging is about finding a principled legal solution to a problem about the vindication of rights and duties is what the rule of law is about – not an appeal to some intuitions about what is fair and just resulting in nothing more than an asserted settlement of the dispute by the qadi under the palm tree – that is what the rule of man is all about! In *Bridgewater* there seemed to be a good many more palm trees to sit under in Canberra than in Brisbane!

²³ [1923] NZLR 1106, 1109 (approved by Millett LJ in *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 153.)

²⁴ See for a full discussion of why correlativity matters in the award of remedies, see Ernest j Weinrib, ‘Two Conceptions of Remedies’ in Charles EF Rickett (ed), *Justifying Private Law Remedies* (Hart, Oxford, 2008), 3.

There are doctrinal problems with the majority judgment as well. In particular, for the doctrine of unconscionable bargain, the outer limits of the requirement for special disability appear to have been seriously muddled. A fine study of that matter already exists.²⁵ Putting the point bluntly: the notion of emotional dependence used by the majority is simply too slippery. Emotional dependence requires by definition a relationship. It can be used to turn what might be generally regarded as quite normal and healthy relationships, as the relationship between Bill and Neil seemed to be, into relationships of suspicion and doubt. In fact, this focus on emotional dependence seems to sit more properly in the doctrine of undue influence, which as its name implies is about influence exercised with a relationship. But to suggest that an emotionally dependent person is not simply susceptible to greater influence (which may be undue) but is a person with a special disability is quite frankly insulting. I believe I am emotionally dependent on my wife, but that does not make me disabled in a way that infects any transactions I might have with my wife in such a way as to give rise to an equity against her! A second doctrinal problem with the majority's judgment follows from the emphasis placed on the improvidence of the transaction. As I have already suggested, that factor causes a warning light to go on that the circumstances surrounding the making of the transaction call for closer scrutiny – unconscionable bargain is a doctrine about the process by which a transaction is completed, where a person under a special disability is actively exploited or passively victimised by the other party;²⁶ it is not a doctrine about 'substantively or objectively unequal outcome[s]'.²⁷ Unconscionable bargain is a legitimate doctrine of the private law. It is a fundamental requirement of any transaction that both parties should have adequate judgmental capacity.

V CONCLUSION

I have written in this journal before on unconscionable bargains.²⁸ I said this:

[The doctrine's] best justificatory principle constrains the range of factors judges can appeal to in deciding in any case whether there has been an unconscionable bargain. The fact that some judges might fail to appreciate the constraints upon them, and might be minded to declare unconscionable some bargains that do not exhibit these requirements, is certainly a cause for concern. But it does not threaten the juridical legitimacy of the concept itself. What it does is point out that those judges take rather more liberties than they ought.²⁹

Bridgewater v Leahy is I think a case where the majority in the High Court did indeed take rather more liberties than they ought to have done in coming to their decision. In some respects this is a result, as I have argued, of a failure to recognise the fundamental correlativity called for in the plaintiff/defendant relationship.³⁰ In other

²⁵ Anne Finlay, 'Can We See the Chancellor's Footprint?: *Bridgewater v Leahy*' (1999) 14 JCL 265.

²⁶ *O'Connor v Hart* [1985] 1 NZLR 159 (JCPC).

²⁷ Joachim Dietrich, '*Bridgewater v Leahy*: unconscionability and the flexibility of equitable remedies in the High Court' (1999) 73 ALJ 112, 116. See further on the notion of unconscionable bargain. Don Holborrow, '*Nicholls v Jessup*: Unconscionability in New Zealand After *O'Connor v Hart*' (1989) 19 VUWLR 57.

²⁸ Charles Rickett, 'Unconscionability and Commercial Law' (2005) 24 UQLJ 73.

²⁹ *Ibid*, 81.

³⁰ What is often lacking is a theory of private law: see, for example, Weinrib, above n 5.

respects, it is a result of the misunderstood but beguiling nature of equitable doctrines – the word ‘unconscionable’ is taken to carry with it an idea that it does not have in the relevant legal materials. And in still further respects, many judges appear to believe that they are indeed justice ensouled in a manner and to an extent that Aristotle would never have understood.³¹

³¹ See, for a discussion of another case from the High Court that exhibits this problem, see Rickett, above n 27, 90-92 (discussing *Australian Competition and Consumer Commission v Berbatis* (2003) 214 CLR 51). For a very full and important discussion of the issue of justice in private law, see Allan Beever, *Forgotten Justice* (Oxford University Press, 2013) (forthcoming).