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A Reformulated Test for Unconscionability

It is perhaps not every day that a court makes a finding that nearly all of the vitiating factors apply in a single case. Yet, in the unusual case of *BOM v BOK* [2018] SGCA 83, the Singapore Court of Appeal found that the respondent's declaration of trust (DOT) for his infant son could be set aside on the bases of misrepresentation, mistake, undue influence and unconscionability. It is to be noted that duress was not pleaded by the respondent. With the court finding for the respondent on so many grounds, it is perhaps surprising that this case reached the apex court of Singapore. What may be even more unusual about this case, is that the first appellant was in fact legally-trained and had practised as an advocate and solicitor some years before the events of this case.

Apart from its interesting facts, this case is significant for its rejection of a "broad" doctrine of unconscionability, the existence of which has been a matter of some debate in English law, and which has been accepted in Australia (see *Commercial Bank of Australia Ltd v Amadio* (1983) 151 C.L.R. 447; (1983) 46 A.L.R. 402). It also proposes a new test for the doctrine of unconscionability that is narrower than *Amadio*, based on the requirements in *Cresswell v Potter* [1978] 1 W.L.R. 255. The test for unconscionability in English law has been a matter of some debate, with *Cresswell v Potter* and *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 W.L.R. 87; [1983] 1 All E.R. 944 adopting different approaches (see Nelson Enonchong (2018) 34 J.C.L. 211). This modern formulation by a Commonwealth apex court provides a comprehensive test for the "narrow" doctrine of unconscionability, and offers the common law a practical alternative test for unconscionability.

The case also provides an extensive historical analysis of the roots of the narrow doctrine of unconscionability which can be traced to the English cases of *Fry v Lane* (1888) [page 401] 40 Ch. D. 312; [1886–90] All E.R. Rep 1084 and *Cresswell v Potter*. The court, after having analysed the historical basis of the narrow doctrine, raised the possibility that the expansion of the narrow doctrine of unconscionability (to form the broad doctrine of unconscionability) was historically flawed inasmuch as it proceeded from a non-existent doctrine of unconscionability (which was in fact a type of undue influence).

The respondent in this case was a man of means, having inherited considerable wealth from his parents. A week after his mother was killed, and while in an acute state of grief, his wife (the first appellant), a former practising lawyer, drafted the DOT providing that both of them would hold all of the respondent's assets on trust for their infant son. The respondent initially refused to sign the DOT, but relented after a string of events, where: 1) his father-in-law, a senior legal practitioner, assisted the first appellant in persuading him to sign the DOT; 2) the first appellant untruthfully represented to him that the trust would take effect only upon his death; and 3) the first appellant threatened to kick him out of their house if he did not comply. The Singapore Court of Appeal found that the first appellant had made

a misrepresentation to the respondent that the DOT would be effective only upon his death, until which time he was free to deal with his assets. The court also held that the DOT had a completely different legal effect from what the respondent thought it had, adding that the seriousness of the consequences warranted a finding of mistake and the setting aside of the DOT.

The court found that the first appellant had taken advantage of the respondent's acute sense of loneliness in a time of grief to pressure him into signing the DOT, impairing his free will and constituting actual undue influence. Finally, the court held that the respondent's grief impaired his mental state to the extent that it constituted an infirmity, which the first appellant knew about and took advantage of. Further, the absence of independent advice and the fact that the transaction was at an undervalue weighed heavily in favour of a finding of unconscionability, leading the court to hold that the DOT was by no means fair, just and reasonable, and therefore, was unconscionable. While the DOT could have been set aside on any of these bases, the court paid a considerable amount of attention to the doctrine of unconscionability. With respect to the law on unconscionability, the court began its analysis of the concept of "unconscionability" by recognising that there are at least two different legal meanings of the term: "unconscionability" *as a rationale* and *as a doctrine*. The court explained (at [122]) that "unconscionability" *as a rationale* is a general underlying justification for other legal doctrines which prohibit the taking of unfair advantage of another in a position of weakness, e.g. in the context of the doctrines of undue influence and duress. "Unconscionability" *as a doctrine*, on the other hand, refers to a specific legal doctrine with legal criteria that may be applied by the courts. The court noted that *as a rationale*, "unconscionability" raises few objections, but *as a doctrine*, it was too general and vague to achieve certainty and predictability. We note that there is potentially a third meaning of "unconscionability" which was not mentioned by the court, which is "unconscionability" as an element (of other doctrines).

In order to distil the general *rationale* of "unconscionability" into a legally workable *doctrine*, the court revisited the old debate about the "narrow" and "broad" doctrines of unconscionability. In this regard, the court identified *Fry v Lane*, as applied in *Cresswell v Potter*, as [page 402] exemplifying the narrow doctrine, and the Australian case of *Amadio* as exemplifying the broad doctrine. It criticised and rejected the broad doctrine (at [133]) for affording the courts too much scope to undo the agreements of parties on a subjective basis, noting that the *Amadio* formulation was "dangerously close" to the principle of "inequality of bargaining power" laid out in *Lloyd's Bank v Bundy* [1975] Q.B. 326; [1974] 3 All E.R. 757. However, the court also noted that previous attempts to modernise the narrow doctrine as laid out in *Fry v Lane* had seemed to result in what was, in substance, the broad doctrine. In particular, the court took the view (at [139]) that the English formulation in *Alec Lobb* was, in substance, no different from the broad doctrine of unconscionability as laid out in *Amadio*.

The court then conducted an extensive analysis of the historical roots of (what it identified as) the narrow doctrine of unconscionability. Whilst its precise historical origins are not clear, the court observed that the narrow doctrine of unconscionability appears to have emerged sometime during the 18th century in the context of improvident transactions

where there did not exist a relationship of trust and confidence between the parties. The court then proceeded to raise (at [145(b)]) the following points: 1) the narrow doctrine of unconscionability is not a separate doctrine, but it is another way of describing (what we would today refer to as) class 1 undue influence; 2) if the first point is true, then the narrow doctrine of unconscionability is redundant and we should simply refer to it as class 1 undue influence; and 3) “the expansion of the narrow doctrine of unconscionability was historically flawed inasmuch as it proceeded from a non-existent doctrine of unconscionability” (the latter doctrine being class 1 undue influence). That said, the court concluded (at [152]) that their hypothesis (i.e. that the narrow doctrine of unconscionability is coincident with or identical to class 1 undue influence) remained, for the time being, a hypothesis and that, in the meantime, the law relating to unconscionability in the Singapore context “is the *narrow* doctrine of unconscionability” (emphasis in original) as modified by the court.

In spite of its hypothesis that the narrow doctrine of unconscionability was redundant, the court went on to modify the test in *Cresswell v Potter*. It laid out (at [141]–[144]) a two-limbed reformulated test for the narrow doctrine of unconscionability, with the first requiring the claimant to show that they were suffering from an infirmity that the other party exploited in procuring the transaction. Such an infirmity was not confined to “poverty” and “ignorance” but would include any infirmity which was of sufficient gravity as to have acutely affected the claimant’s ability to conserve their own interests. The infirmity must also have been, or ought to have been, evident to the other party procuring the transaction. Upon satisfaction of the first limb, the second limb of the reformulated test then places the burden on the defendant to demonstrate that the transaction was fair, just and reasonable.

We note that while *BOM v BOK* deals with an outright gift by way of a DOT, and not a contract, the court’s reasoning on unconscionability should nevertheless apply with equal force to contracts. English law appears to draw no distinction between the applicability of the vitiating factors to outright gifts, DOTs and contracts (with the important exception of the law of mistake), with a number of English cases applying the doctrine of undue influence to outright gifts (see *Cheese v Thomas* [1994] 1 W.L.R. 129; [1994] 1 All E.R. 35, and *Popowski v Popowski* [2004] EWHC 668 (Ch.); [2004] 2 P. & C.R. DG10). [page 403]

The *ratio decidendi* of the case may be somewhat tricky to extract. There are two ways to view the court’s comments on unconscionability; first, that the court’s finding on the narrow doctrine of unconscionability was its ratio and the undue influence subsumation hypothesis obiter dicta that lays the groundwork for a later repudiation of the present test. Secondly, the court may be thought to have reserved the position that there may be no such thing as a doctrine of unconscionability, ruling that a contract may be set aside on a set of principles tentatively called the narrow doctrine of unconscionability but which could well be part of class 1 undue influence. In such a case, it may be argued that the finding of unconscionability in the present case was obiter, since otherwise the court would be basing its judgment on the doctrine of unconscionability, whilst simultaneously questioning the existence of such a doctrine. In any case, regardless of whether *BOM v BOK* is binding, Singapore courts are likely to adopt this formulation by the apex court in subsequent cases.

The modified test for unconscionability under Singapore law may be usefully compared with the existing English law test for unconscionability, as laid out in *Alec Lobb*. The key differences between the reformulated test in *BOM v BOK* and the *Alec Lobb* formulation lie in 1) the requirements relating to infirmities/serious disadvantage (first factor); 2) the threshold for transactional imbalance (second factor); and 3) the issue of unconscionable conduct (third factor).

With respect to the first factor (i.e. the requirements relating to infirmities/serious disadvantage), the court in *BOM v BOK* refined the “infirmity” requirement such that it would have to be of sufficient gravity as to have acutely affected the claimant’s ability to conserve their own interests. This can be contrasted with the *Alec Lobb* formulation, which requires “a serious disadvantage ... so that circumstances existed of which unfair advantage could be taken”.

With respect to the second factor (i.e. the threshold for transactional imbalance), the *Alec Lobb* formulation requires the claimant to prove that “the resulting transaction must have been, not merely hard or improvident, but overreaching and oppressive”, whereas the reformulated test in *BOM v BOK* places the burden on the defendant to prove that the transaction was fair, just and reasonable. In this respect, it would appear that the threshold for transactional imbalance is higher for the claimant under the *Alec Lobb* formulation than under the reformulated test in *BOM v BOK*.

With respect to the third factor (i.e. the issue of unconscionable conduct), the reformulated test in *BOM v BOK* requires that the infirmity of the claimant must have been, or ought to have been, evident to the other party procuring the transaction. The *Alec Lobb* formulation proposes that the “weakness of the complainant” must have been “exploited by the other [party] in some morally culpable manner”. The court in *BOM v BOK* took the view that this requirement of moral reprehensibility was intended by the court in *Alec Lobb* merely to emphasise that the defendant’s conduct had to be more than the mere taking advantage of the claimant in a situation of inequality of bargaining power. It then concluded that the *Alec Lobb* formulation is, in substance, no different from that [page 404] in *Amadio*, which allows for constructive knowledge of the special disability of the claimant.

All things considered, it appears that it would be easier to prove unconscionability under the *Alec Lobb* formulation for the first factor; under the *BOM v BOK* formulation for the second factor; and equally difficult to prove unconscionability under both formulations (if we adopt the argument of the court in *BOM v BOK* on this point). Notably, Professor Enonchong has taken an opposing view on the third factor (in respect of the knowledge element); he argues (see Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 2nd edn (2012), at para.17-003), that, in the absence of actual knowledge affecting the defendant’s conscience, he finds it difficult to justify the relief provided by the doctrine of unconscionability. Professor Enonchong lists numerous cases pre-dating *Fry v Lane* which refer to unconscientious behaviour in support of his position (see at paras 17-002 to 17-004).

With great respect to Professor Enonchong, we find ourselves agreeing with the court in *BOM v BOK*. References to “moral reprehensibility” or “fraud” in the older cases do not

in themselves point towards a requirement of actual knowledge. Equity does not often insist on actual knowledge as a precondition for intervening. An analogy may be drawn from the equitable doctrine of knowing receipt where the knowledge requirement has been extensively analysed. In *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch. 437; [2000] 4 All E.R. 221, the court eschewed categorisations of knowledge (including the “classical” division between actual and constructive knowledge), and instead prescribed a single test of knowledge for knowing receipt, i.e. that “the recipient’s state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt”.

When compared with *Alec Lobb* and *Amadio*, the test prescribed by the Singapore Court of Appeal in *BOM v BOK* represents a *via media* in that it is stricter than the *Amadio* test, which does not require the infirmity of the claimant to be of “sufficient gravity as to have acutely affected the claimant’s ability to conserve his own interests”, but less strict than the *Alec Lobb* test, which requires the resultant transaction to be “overreaching and oppressive”. If one agrees with Professor Enonchong’s interpretation of *Alec Lobb* as requiring actual knowledge, then the *Alec Lobb* test would be even stricter relative to the *BOM v BOK* test, which allows for constructive knowledge.

Turning to the court’s historical examination of unconscionability, the argument that this narrow doctrine of unconscionability was “what we have come to term today as Class 1 undue influence” (at [145(b)]) needs to be read in context. It would appear that the court was not referring to the original doctrine relating to improvident heirs, but instead to the general relief from unconscionable bargains that had developed from the original doctrine. The earliest available reported case of unconscionability appears to be *Fairfax v Trigg* (1677) Rep. t. Finch 314; 23 E.R. 172, which involved an expectant heir who was heavily indebted and under pressure from his creditors. It is difficult to find any suggestion of pressure applied by the defendant in *Fairfax v Trigg* that would have impaired the claimant’s free will. Thus, it is unlikely that this was a case of class 1 undue influence. [page405]

However, moving on from the cases involving improvident heirs, one does find cases, such as *Fry v Lane*, where the narrow doctrine of unconscionability does look remarkably similar to that of class 1 undue influence. Thus, the court may indeed be right to question whether the narrow doctrine of unconscionability did exist as an independent doctrine before its expansion to form the broad doctrine of unconscionability.

This case lays out a carefully-reasoned test for unconscionability by an apex Commonwealth court that may be usefully considered by courts in other jurisdictions. In particular, it provides a *via media* between the *Amadio* and *Alec Lobb* tests.

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