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Equitable fraud – Some personal reminiscences and reflections

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Opening Address

Equitable fraud — Some personal reminiscences and reflections*

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I The importance of comparative analysis

I would like to thank the conference organisers for their very kind invitation. It is a great privilege and honour to be amongst such an august gathering of legal scholars.

I would like to begin by noting that the international nature of this Conference is emblematic of the nature of legal discourse today — in particular, the importance of comparative analysis. I have, in fact, dealt with this point elsewhere in the context of the law of remedies.[1] In particular, Singaporean courts often engage in (to borrow the title of the late Lord Goff of Chieveley's justly famous Maccabaean Lecture in Jurisprudence)[2] the 'search for principle' and this entails (in turn and in appropriate instances) the consideration as well as citation of decisions from jurisdictions outside Singapore and England[3] in order to distil the best legal principles available in the relevant area of the common law, regardless of their jurisdictional origin. Such an approach is especially needful in novel areas of the law.[4] Indeed,

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† Judge of Appeal, Supreme Court of Singapore. I am also grateful to Professor Goh Yihan, Dean of the Singapore Management University School of Law, for his very helpful comments and suggestions. However, all errors remain mine alone. Also, all views expressed in this piece are personal only and do not reflect in any way the views of the Supreme Court of Singapore.

1 See Andrew Phang, 'The Law of Remedies: The Importance of Comparative and Integrated Analysis' (2016) 28 SAcLJ 746, 748–51.

2 See Robert Goff, 'The Search for Principle' in *Proceedings of the British Academy* (British Academy 1983) vol 69, 169 (reprinted in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999) 313–29.

3 English law being the foundation of Singapore law as Singapore was a former British colony. And see generally Andrew Phang Boon Leong, *From Foundation to Legacy: The Second Charter of Justice* (Singapore Academy of Law 2006) and the literature cited therein.

4 See, eg (and for a sampling of Singapore Court of Appeal decisions), *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20, [2017] 1 SLR 918 (on the award of damages for genetic affinity as well as the issue of the award of punitive damages in the law of tort); *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] SGCA 26, [2017] 2 SLR 129 (dealing with the issue of punitive damages in contract); *Ochroid Trading Ltd v Chua Siok Lui* [2018] SGCA 5, [2018] 1 SLR 363 (on the issue of contractual illegality and where the majority decision in the UK Supreme Court decision of *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 was not followed); *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] SGCA 50, [2018] 2 SLR 866 (where the Singapore Court of Appeal refused to extend the tort of malicious prosecution to civil proceedings generally and also refused to recognise the tort of abuse of process (and where the majority decisions in the Privy Council decision (on appeal from the Court of Appeal of

beyond the role of the courts in employing comparative analysis in the development of legal principle, it is also desirable that legal scholars also adopt the same approach in their research and writing as well because their scholarship can become only more textured as a result.[5] In this regard, I am glad to note that such an approach is not only exemplified in the make-up of the editorial board of the Journal of Equity but is also adopted by the many learned articles published in that Journal as well. This approach is also evident in the leading textbooks as well. Let me cite just one example. When I was a student many decades ago, I relied heavily upon the 10th edition of Professor Hanbury's *Modern Equity* (or, to be more precise, *Hanbury and Maudsley: Modern Equity*,[6] and which, incidentally, I still have, for old times' sake). I recently obtained the 21st edition by Professors Jamie Glister and James Lee. What struck me in this latest edition — almost 4 decades since I first encountered this brilliant textbook (now titled *Hanbury and Martin: Modern Equity*)[7] — was the Acknowledgements page.[8] *A hundred and thirty-eight* persons were acknowledged and most hailed from a variety of common law jurisdictions including the United Kingdom, Australia, New Zealand, Hong Kong and Singapore. And the book itself contains references to decisions from these jurisdictions as well.[9] In this Conference, there is a similar representation. This is all to the good for the reasons I have just mentioned. It is also true to the very concept of a 'university' itself which, as the very word itself suggests, embodies the need for *unity in diversity*.[10] Long may such an approach continue.

II Professor Sheridan's book, *Fraud in Equity: Personal Reminiscences and Some Contemporary Issues*

Turning now to the conference proper, its theme brought immediately to mind Professor Sheridan's seminal text, *Fraud in Equity: A Study in English and*

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the Cayman Islands) of *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2014] AC 366; and the UK Supreme Court decision of *Willers v Joyce* [2016] UKSC 43, [2016] 3 WLR 477 were not followed)); as well as *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44, [2018] 2 SLR 655 (on the availability of '*Wrotham Park* damages' (named after the English High Court decision of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321)). Reference may also be made to *BOM v BOK* [2018] SGCA 83, [2019] 1 SLR 349 (which is discussed in more detail below).

5 See Phang, 'The Law of Remedies' (n 1) 749–50.

6 RH Maudsley (ed), *Hanbury and Maudsley: Modern Equity* (10th edn, Stevens & Sons 1976), and prepared by the late Professor RH Maudsley who had just taken over the work from the late Professor HG Hanbury. The previous (9th) edition had itself been retitled *Hanbury's Modern Equity*, the work up to then being simply titled *Modern Equity*. Professor Jill Martin joined Professor Maudsley in the very next (11th) edition and the book was subsequently retitled *Hanbury and Martin: Modern Equity* in the 16th edition (published in 2001), which title remains till today.

7 See also ibid.

8 See Jamie Glister and James Lee (eds), *Hanbury & Martin: Modern Equity* (21st edn, Sweet & Maxwell 2018) ix.

9 See the Preface to Glister and Lee: ibid vi.

10 cf, albeit in a somewhat different context, Phang, 'The Law of Remedies' (n 1) 757–58.

Irish Law[11] — which happened to be published in the year I was born. Indeed, by a stroke of good fortune, I managed to obtain a copy of this book almost 3 decades ago. It was in fact much the worse for wear but I was nevertheless very glad to have it. Professor Sheridan was the founding dean of the Faculty of Law of the National University of Singapore[12] of which I am not only an alumnus but had also taught at for 18 years. A long-serving administrative staff of the Faculty, the late Mr Young Cheng Wah,[13] who, together with Professor Sheridan, were the only two initial staff members of the Department of Law (as it was first known as),[14] was especially kind; he helped me to get the book personalised.[15] Many years later, I had the privilege to be able to meet with both Professor and Mrs Sheridan at their home in Cardiff, Wales, whilst working on an essay on his life and work.[16]

In my view, *Fraud in Equity* is — particularly when it is viewed at the particular point in time at which it was published — a brilliant work. It was, in fact, an abridged version of Professor Sheridan's doctoral thesis.[17] What is notable is that Professor Sheridan commences the book by pointing to basic difficulties that, in my view, impact the theme of the present Conference as well.

The first difficulty relates to the definition of 'fraud' itself. Indeed, in the opening pages of *Fraud in Equity*, Professor Sheridan observes thus:

> 'Fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the Court.' In *Stonemets* v *Head*, in the course of an amusing judgment in the Missouri Supreme Court, Lamm, J, burst into flower to much the same effect: 'Fraud is kaleidoscopic, infinite. Fraud being infinite and taking on protean form at will, were courts to cramp themselves by defining it with a hard and fast definition, their jurisdiction would be cunningly circumvented at once by new schemes beyond the definition. Messieurs, the fraud-feasors, would like nothing half so well as for courts to say they would go thus far, and no further in its pursuit. Accordingly definitions of fraud are of set

11 See LA Sheridan, *Fraud in Equity: A Study in English and Irish Law* (Sir Isaac Pitman & Sons 1957).

12 Coincidentally the Faculty was established the same year that Sheridan, *Fraud in Equity* (ibid) was published. It was initially established as a Department of Law in 1956.

13 And see Andrew Phang Boon Leong, 'Mr Young Cheng Wah — A Personal Appreciation' (1995) 16 Sing L Rev 23.

14 See also above, n 12.

15 My copy of the book also included a signed offprint of a later article by Professor Sheridan which he referred to in the Preface to the book, Sheridan, *Fraud in Equity* (n 11) v (see LA Sheridan, 'Fraud and Surprise in Legal Proceedings' (1955) 18 MLR 441) — an unexpected 'bonus' for me.

16 See Andrew Phang, 'Founding Father and Legal Scholar — The Life and Work of Professor LA Sheridan' [1999] Sing JLS 335. See also Kevin YL Tan, 'Professor Lionel Sheridan in Conversation' [2018] Sing JLS 1.

17 See Sheridan, *Fraud in Equity* (n 11) v. His thesis supervisor was the late Professor JL Montrose who was, for a very short period of time also Dean of the Faculty of Law at the National University of Singapore (see also Andrew Phang, 'Exploring and Expanding Horizons: The Influence and Scholarship of Professor JL Montrose' (1997) 18 Sing L Rev 15). Indeed, one small omitted section of the thesis was converted into the article referred to above, Sheridan, 'Fraud and Surprise in Legal Proceedings' (n 15) (see Sheridan, *Fraud in Equity* (n 11) v).

> purpose left general and flexible, and thereto courts match their astuteness against the versatile inventions of fraud-doers.'[18]

However, as the learned author immediately proceeds (and correctly, in my view) to observe, '[l]eaving a definition general and flexible is one thing, and having no definition at all is quite another'.[19] Then, as Professor Sheridan also points out, there is the further distinction drawn between fraud in equity on the one hand and fraud in law on the other.[20] The question that then arises is this: What is 'equitable fraud' and how does it operate?

I would, in fact, venture to suggest that the primary difficulty in this last-mentioned regard is that the concept of 'equitable fraud' per se is *too broad as well as vague*. Put simply, it is pitched at *too general a level of abstraction such that it becomes, in substance if not form, simply abstract* (at least too abstract to serve as tangible guidance to lawyers and courts alike).[21] As the basic problem was outlined (albeit in a slightly different context) in the Singapore Court of Appeal decision of *Mühlbauer AG v Manufacturing Integration Technology Ltd*:

> 41 It is important to emphasise, at this juncture, that the use of the general principles of logic and rational argument do *not*, in any way whatsoever, undermine the *legal* principles that are germane to a particular area of the law (in this case, that relating to patents). Indeed, on one view, the legal principles themselves are the product — in part at least — of the process of logic as well as rational argument. It is no surprise, therefore, that the application and/or development of general principles of logic and rational argument must (as we shall see) be *integrated with* the particular legal principles as well. In other words, the general principles of logic and rational argument and the particular legal principles (here, in relation to the patent law) are *complementary* in nature.
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> 42 Turning, then, to the perspective of general principle and logic, there is an irreducible tension between universality and particularity (or, to use equally clear terminology, between generality and specificity; *cf* also the decision of this court in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [28] (in the context of liability in negligence for pure economic loss)). However, as we shall see, this is not a tension that necessarily leads to paralysis or inaction; on the contrary, it (as we shall attempt to demonstrate in a moment) is, in fact, mediated via an *interactive process* that defines what the law and decision-making are all about in the *practical* sphere. Indeed, the unique combination (or, perhaps more appropriately, integration) of the universal and particular, of the general and the specific, and of the normative and the descriptive, produce not only decisions for the case at hand but also precedents for the future.

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18 See Sheridan, *Fraud in Equity* (n 11) 1; and see generally 1–9.

19 ibid.

20 See ibid 3.

21 It is too vague to constitute an appropriate theoretical framework or doctrine. Put simply, it cannot constitute an adequate universal framework that can account for as well as resolve the particular fact situations that may arise. Indeed, the tension between universal and particulars (traceable back to classic Greek philosophy) engenders enormous difficulties of their own (for an (albeit crude) attempt at tackling this particular issue, see Andrew Phang Boon Leong, 'Constructing Theoretical Frameworks' (1988) 30 Mal LR 211 as well as, by the same author, Andrew Phang Boon Leong, *The Development of Singapore Law: Historical and Socio-Legal Perspectives* (Butterworths 1990) 8–13.

> 43 To elaborate, when an argument is pitched at too high a level of abstraction, it will probably attract no controversy (and may even achieve consensus) but, because it is at such a 'rarefied' level, it is actually unhelpful in most cases (for example, virtually all persons will agree that it is desirable to 'do good', but, of course, once we descend into the *specifics* (*ie*, what 'doing good' means to each person), the opposite extreme will be reached, with little (if any) agreement amongst all concerned). Indeed, such an approach is *especially* unhelpful in cases involving *patent*s, simply because, in many cases (such as this), a necessary step involved in the court's decision entails a *comparison* of the competing patents. At this point, *specific details* must *necessarily* come into play. However, it is also acknowledged that the court cannot go to the other extreme in focusing only on the trees and missing the wood. This is, however, unlikely to happen in practice because the court must perforce come to *an overall conclusion*, and that would entail gathering together all the relevant (and *specific*) details *and analysing* them in the context of the applicable legal rules and principles *before* arriving at an *overall conclusion*. Here, we see the *interaction* between the universal and the particular, between generality and specificity, as well as between the descriptive and the normative. It is *not* something which can be reduced to a mechanistic formula simply because life in general and the decisions of courts (as a consequence) in particular are too complex to admit of a rigid formulaic approach. However, that does not mean that there are no *general principles* that ought to guide the court. As already mentioned, there are, of course, the general principles of logic and argumentation. More importantly, each area (as well as sub-area) of the law will also embody general legal rules and principles which are to be applied to the facts at hand. In the specific sphere of patent law, we would think that, in addition to the general legal rules and principles (embodied in ss 13, 14 and 15 of the Act; see also generally [15]–[25] above), the court would *also need to apply* those rules and principles (as well as those relating to general logic and argumentation) to the *specific claims which are contained within the patent(s) concerned*. Indeed, these claims constitute the specific factual matrix as well as context which the court takes into account in arriving at its decision. Again, however, it is of the first importance to emphasise that this is an *interactional* process that is not susceptible of mechanical application. Put crudely, it entails *an exercise of judgment by the court concerned in applying the general principles of law as well as logic to the facts concerned, and as understood in the context in which they occur*.[22]

What is required — not only in practice but also (I would suggest) in theory as well — is a *delineation of the various categories (in the form of legal doctrines) of which equitable fraud is, so to speak, an umbrella that captures, as it were, the rationale as well as spirit of these doctrines*. Indeed, that is *precisely what the law has, in fact, done*. We find the concept of equitable fraud *permeating the entire equitable landscape — constituting the foundational spirit of a number of equitable doctrines*, ranging from fraudulent misrepresentation to breach of trust to secret trusts as well as the use of a statute as an instrument of fraud, not to mention the doctrines of undue influence and unconscionability. Indeed, Professor Alastair Hudson observes, in his treatise entitled *Equity and Trusts*,[23] as follows:[24]

> It would not be an exaggeration to suggest that many of the principles of equity are aimed at the avoidance of fraud, or the avoidance of the results of fraud. Many of

22 [2010] SGCA 6, [2010] 2 SLR 724, [41]–[43], especially [43] (emphasis in original).
23 Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2017).
24 ibid 28.

> the doctrines considered in this book will be orientated around the avoidance of fraud, whether by trustees, or in the doctrine of *Rochefoucauld v Boustead*[25] ... or in the operation of secret trusts ... Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC*[26] set out his view that the operation of the trust centres on the prevention of any unconscionable (as opposed to strictly 'fraudulent') act or omission. The notion of fraud here is different from that under, for example, the tort of deceit. This indicates the increasing breath of equitable doctrine beyond the category simply of straightforward fraud.

In *Fraud in Equity* itself, many of the aforementioned categories are, in fact, discussed — for example, fraudulent misrepresentation, breach of fiduciary duty, undue influence, unconscionable bargains as well as statute as an instrument of fraud. By way of a slight digression, the precise nomenclature adopted in the book itself may appear a little odd to the modern reader,[27] but one must bear in mind the fact that this book was published more than 6 decades ago and, as already mentioned, viewed through the lenses of that particular point in time, this work was a truly pathbreaking one. More importantly, I hope to have also demonstrated that some of the more *general* issues that were raised in that book continue to be current even today.

Returning to the present, it seems to me that the advancement of legal knowledge and analysis in relation to equitable fraud must therefore take place in the context of *specific doctrines* that have the regulation of equitable fraud as their underlying basis and rationale. Indeed, the papers to be presented at today's Conference advance knowledge in the area of equitable fraud by examining some of the more salient as well as topical areas of equitable fraud in the manner and spirit to which I have just referred. I note that they all deal with contemporary issues of the first importance today — including bribes in equity and undue influence. There is also an interesting comparison of trusts and companies as well as a study of the jurisdictional interface between equity and the common law — reminding us, in the process, that equity often (and necessarily) interacts as well as interfaces with other areas of the law as well. Last but not least, the Conference concludes with a study of yet another important interface — specifically, the influence that statute can bring to bear on the development of the doctrines of estoppel. It is a sumptuous legal 'feast' which we all look forward very much to.

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25 [1897] 1 Ch 196 (CA) (where it was held that the Statute of Frauds (1677) (29 Car 2 c 3) does not prevent the proof of a fraud and that it was, in fact, a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself).

26 [1996] AC 669 (HL).

27 This appears particularly to be the case in relation to the categorisation of what today we term the 'doctrine of unconscionability'. Indeed, the various topics are spread out in three different chapters (in Sheridan, *Fraud in Equity* (n 11) pt II under the general rubric of 'Inequality of Parties and Unconscionable Bargains') where they would traditionally be discussed within the same chapter today (see ch IV ('Taking Advantage of Weakness and Necessity'), ch VII ('Unconscionable Bargains'), and ch VIII ('Catching Bargains with Expectants')). However, as already noted, these chapters must be viewed at the time they were written (*over 6 decades* ago). It should also be noted that this is a very difficult topic and that the Singapore Court of Appeal has only very recently attempted to grapple with this doctrine in a case that will be mentioned in the briefest of fashions below (in the concluding part of the present piece).

III A recent case

I would like to conclude with a very brief reference to a very recent judgment of the Singapore Court of Appeal which dealt, inter alia, with two rather difficult issues relating to the doctrine of unconscionability. I mention this particular case briefly because it also illustrates the *general challenges* that face doctrines that come under the umbrella of equitable fraud — in particular, the challenge of placing reasonable constraints on the doctrine concerned whilst simultaneously developing it in accordance with principle and the facilitation of its practical application. It further illustrates the importance of comparative analysis which I referred to right at the outset of this address. This is the decision in *BOM v BOK*[28] (which I note has in fact been referred to briefly by Professor Bigwood in his paper for this Conference with regard to the doctrine of undue influence).[29]

One of the issues in *BOM* was whether the narrow doctrine of unconscionability[30] or the broad doctrine of unconscionability[31] should be adopted in the Singapore context. In a nutshell, the court held that the narrow doctrine should be adopted instead, albeit with some slight modifications.

The second issue was whether there ought to be an *umbrella* doctrine of unconscionability that subsumed within itself undue influence and even economic duress as well. Again, in a nutshell, the court held that whilst this issue did not arise directly for decision given its endorsement of the *narrow* doctrine of unconscionability to begin with, it would nevertheless (on the assumption that there was indeed a broad doctrine of unconscionability) *not* recognise such an umbrella doctrine.

You will notice that I have said very little — if anything — about this case. Constraints of time constitute one important factor. The other is that, having delivered the decision on behalf of the court, I should not obviously comment on it. That is a task best left to more learned commentators such as yourselves.[32]

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28 *BOM* (n 4).

29 See Rick Bigwood, 'Undue Influence as Constructive Fraud' (2019 Journal of Equity Annual Conference, Singapore, 14 February 2019).

30 As exemplified by seminal English decisions such as *Fry v Lane* (1888) 40 Ch D 312 (Ch); and *Cresswell v Potter* [1978] 1 WLR 255 (Ch).

31 As exemplified by, most popularly perhaps, the High Court of Australia decision of *The Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14, (1983) 151 CLR 447 (*Amadio*).

32 Since this Welcome Address was delivered, several comments were in fact published and include the following: see Rick Bigwood, 'Knocking Down the Straw Man: Reflections on *BOM v BOK* and the Court of Appeal's "Middle-Ground" Narrow Doctrine of Unconscionability for Singapore' [2019] Sing JLS 29; Debby Lim and Jonathan Muk, 'Consciously Uncoupling: Court of Appeal Becomes Conscious to Unconscionability in BOM v BOK' *Law Gazette* (Singapore, March 2019) <https://lawgazette.com.sg/feature/consciously-uncoupling-unconscionability> accessed 28 May 2019; as well as Vincent Ooi and Walter Yong, 'A Reformulated Test for Unconscionability' (2019) 135 LQR 400. Reference may also be made to the observations by Nettle and Gordon JJ on *BOM* (n 4) in a joint judgment in the recent High Court of Australia decision of *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, (2019) 368 ALR 1 (*ASIC v Kobelt*). This case related to *statutory* unconscionability pursuant to s 12CB of the Australian Securities and Investments Commission Act 2001 (Cth) and where, as the learned judges noted that the unwritten law had 'a significant part of play in ascribing meaning to the term

I do thank you once again for your kind invitation and wish the Conference every success and all a pleasant and fruitful stay in Singapore.

"unconscionable" under s 12CB(1)' (*ASIC v Kobelt* (n 32) [144]). Both Nettle and Gordon JJ (together with Edelman J, who delivered a separate judgment) were in the minority insofar as the final decision on the facts of the case was concerned; in relation to *BOM* (n 4), they observed thus (*ASIC v Kobelt* (n 32) [153]):

> The doctrine of unconscionability was recently criticised by the Court of Appeal of Singapore for its vagueness and generality [in *BOM* (n 4) [121]–[125]]. The Court applied a distinction [in *BOM* at [140]–[142]] between 'broad' and 'narrow' unconscionability in an effort to address this issue. The utility of such distinctions, however, is questionable. Certainly, in any given case, a conclusion as to what is, or is not, against conscience may be contestable: so much is inevitable given that the standard is based on a broad expression of values and norms [citing *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50, (2015) 236 FCR 199 [304]]. However, efforts to address the 'indeterminacy' [citing *Commonwealth v Kojic* [2016] FCAFC 186, (2016) 249 FCR 421 [58]] of the doctrine by way of further distillations, categorisations or definitions may risk 'disappointment, ... a sense of futility, and ... the likelihood of error' [citing *Paciocco v Australia and New Zealand Banking Group Ltd* at [304]]. This is because evaluating whether conduct is unconscionable 'is not a process of deductive reasoning predicated upon the presence or absence of fixed elements or fixed rules' [citing *Paciocco v Australia and New Zealand Banking Group Ltd* at [304]]. Instead, at least in the Australian statutory context, what is involved is an evaluation of business behaviour (conduct in trade or commerce) in light of the values and norms recognised by the statute [citing *Paciocco v Australia and New Zealand Banking Group Ltd* at [304]]. The problem of indeterminacy is addressed by close attention to the statute and the values derived from it, as well as from the unwritten law [citing *Commonwealth v Kojic* at [58]].

It should be noted that this was the only reference to *BOM* (n 4) in this case and that the observations just referred to tend to suggest a 'broad' doctrine of unconscionability. More importantly, perhaps, they miss, with respect, the point to the effect that the attempt to distinguish the narrow doctrine of unconscionability as stated in *BOM* (n 4) [144] from the broad doctrine in *Amadio* (n 31) is effected through *practical application that is accompanied by a focus that entails such application being made through the lens of cases exemplifying the narrow doctrine* (such as *Fry* (n 30) and *Cresswell* (n 30)) — *and whose starting point thereby distinguishes the narrow doctrine subtly but significantly from the broad doctrine, and which represents a middle ground based on practical application rather than theoretical conceptualisation*. Indeed, a close reading of that part of the judgment of Nettle and Gordon JJ dealing with the *application* of the law to the facts of that case demonstrates precisely the approach that was stated in *BOM* (n 4) [144].