
INTERNATIONAL REAL ESTATE SOCIETY CONFERENCE '99
CO-SPONSORS: PACIFIC RIM REAL ESTATE SOCIETY (PRRES)
ASIAN REAL ESTATE SOCIETY (AsRES)
KUALA LUMPUR, 26-30 JANUARY 1999

THE CASE AGAINST UNCONSCIONABLE CONDUCT

*Why the property industry should take notice
of the newest Trade Practices legislation.*

JOHN KEOGH

Property Group
Faculty of Management
University of Western Sydney, Hawkesbury
Phone: 61 2 9852 4221 Fax: 61 2 9852 4185
E-mail: j.keogh@uws.edu.au

KEY WORDS

Trade Practices Act – S.51AC – "unconscionable conduct" – relative strengths of the parties – understanding the documents – undue influence, pressure – unfair tactics – failure to disclose – willingness to negotiate.

ABSTRACT

Section 51AC of the Trade Practices Act became law on 1 July 1998. The new provision mandates the requirement to act in "good faith in business dealings and to avoid unconscionable conduct" such as securing an unfair advantage at the expense of the other party. Manipulating a situation where a party may feel their freedom to make a considered decision is under "pressure" or the use of "undue influence" or "unfair tactics" are all concepts captured by the new provisions in S.51AC including statements as to "future events". This paper examines the situation in real estate practice where agents need to tread warily and highlights examples in some instances where case law indicates guidelines for the future.

Unconscionable conduct by corporations in commercial dealings with consumers has been prohibited by Australia's *Trade Practices Act 1974* ("the Act") since 1992, when S.51AA was expressly inserted in the Act to prohibit unconscionable conduct "within the meaning of the unwritten law".¹ Section 51AA was not inserted to impose a new head of consumer protection law but, rather, to extend the remedies available under the *Trade Practices Act* to unconscionable conduct in so far as the concept of unconscionable conduct is recognised and applied by the courts in common law or equitable jurisdictions.²

In practical terms the introduction of S.51AA provided a powerful mechanism to address the inequities which occur "whenever one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affecting his ability to [protect] his own interests and the other party unconscientiously takes advantage of the opportunity"...³

What constitutes "unconscionable conduct"? The term is not defined in the Act but its nature and effect has been the central issue in a number of significant cases.⁴ Generally, conduct that is unfair, unjust, unscrupulous, unreasonable, harsh or oppressive is capable of being construed as 'unconscionable conduct'. Conduct is deemed to be unconscionable where it can be seen in accordance with the ordinary concepts of humanity to be so unfair and against conscience that a court would intervene [*Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445; ATPR 41-058] or so unreasonable and oppressive so as to affront minimum standards of fair dealing [*Commonwealth v Verwayen* (1990) 170 CLR 394; 95 ALR 321].⁵

Section 51AB of the Act prohibits corporations from engaging in unconscionable conduct "in the supply of possible supply of goods or services"⁶ and invites the court to have regard to the relative bargaining positions of both parties, whether the contract was induced by any undue influence, pressure, or unfair tactics, the amount for which the consumer could have acquired goods or services from another supplier, and whether the consumer was able to understand any of the documents related to the transaction."⁷

Deane J expressed the test for unconscionable conduct in *Amadio*⁸ by reference to the special disability which may disadvantage a weaker party in a transaction. "[Unconscionable conduct exists in] circumstances in which (i) a party to a transaction was under a special disability in dealing with the other with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prime facie unfair or 'uncontentious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable".⁹ Clearly, the focus of the doctrine of unconscionable conduct is the exploitation by one party of another's disadvantages. Where the stronger party takes unfair advantage of the weaker party suffering from a 'special disability' the important issue to be decided is whether the special disability was sufficiently evidenced so that the stronger party ought to have recognised the weaker party's predicament.

In October 1993 the Trade Practices Commission (predecessor to the Australian Competition and Consumer Commission, the ACCC) issued guidelines entitled "Unconscionable Conduct in Commercial Dealings" and identified market practices, presence of negotiation, purpose of conduct and prior dealings between parties as relevant considerations in determining whether a party had acted unconscionably. Whilst "standard form contracts" are often beneficial in minimising the amount of time spent in negotiating and may produce greater certainty, they may provide little or no scope for negotiation on important matters. Use of 'take it or leave it' contracts - whether standard form or not - may lead to unconscionable conduct if, in the particular circumstances, pressure is brought to bear or unfair advantage is taken; the terms of the contract are onerous and the onerous nature is disguised by using fine print, unnecessarily difficult language, or deceptive layout; and - the weaker party is asked to sign the contract without being given an opportunity to consider or to object to such terms, or is given a summary explanation which does not mention them.¹⁰

Special Disability.

The essence of a special disability is whether or not the disability affects the weaker party's ability to judge what is in its best interests. In *Amadio*¹¹ Mason J. highlighted the effect of unconscionable conduct on the independent will of an innocent party:

"Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worthwhile judgment as to what is in his best interest."

Dean J. in *Commonwealth v Verwayen*¹² observed that unconscionable conduct will often involve the use of or insistence upon a legal entitlement in order to take advantage of another person's vulnerability in a way that is unreasonable or oppressive. Protection from unconscionable conduct, in this sense, involves protection against victimisation.

Knowledge of the weaker party's special disability is a crucial element in determining whether or not the commercial advantage taken was 'unconscientious'. Consequently, mere disparity in bargaining power would not be considered a special disability. In *Lisciandro v Official Trustee*¹³ a 63 year old illiterate immigrant who relied on others to assist him to understand documents he was asked to sign was not able to avoid a guarantee he gave at the request of a co-director because the company to which the guarantee was given had no reason to suspect that any unconscionable behaviour had occurred. Generally, factors contributing to a special disability are found in disabilities of a personal nature such as illiteracy or lack of education; infirmity of body or mind from health or age; poverty or need of any kind; ignorance of material facts known to the other party; lack of assistance or explanation where considered necessary and disability through intoxication or drugs at the relevant time in the transaction.

The Introduction of Section 51AC.

As a result of the Australian Government Fair Trading Inquiry which commenced in 1996¹⁴ the Government felt compelled to address the claims levied against the actions of landlords and big business by small business operators. In April 1998 Section 51AC was inserted in "Part IV A - Unconscionable Conduct" of the *Trade Practices Act 1974*. In so doing the Government enacted a provision against unconscionable conduct that is broader than the existing equitable doctrine of unconscionability. According to one leading observer the full scope of that power could take the law of unconscionability in a new direction:

"Section 51AC is structured in a similar way to the existing Section 51AB which deals with unconscionable conduct in consumer transactions. This would suggest that, as in the case of Section 51AB, Section 51AC will not be limited to unconscionable conduct as that term is understood according to existing principles of common law or equity. Rather, the section may apply where conduct is considered to be unconscionable according to ordinary concepts of morality, rather than strict legal principles. There is a view that Section 51AC stands alone from Section 51AA and as such is a clear direction to the Court to develop a new branch of the law of unconscionability."¹⁵

Section 51AC effectively extends the operation of S.51AB by inviting the court to have regard to a further six factors which are not mentioned in S.51AB of the Act. "In addition, the list goes significantly beyond the factors to which a court must have regard under the *Contracts Review Act 1980* (NSW) in determining whether a contract or a provision of a contract is unjust".¹⁶ The obvious observation is that "unconscionable conduct" is freed from its equitable limitations and is assessed having regard to the wider criteria listed in the factors to which the court may have regard in considering whether the conduct in a particular case is unconscionable within the meaning of the section.¹⁷

Future property transactions.

There is little doubt that S.51AC will have major implications for real estate dealings between retail landlords and their small business consumers. The ACCC has already signalled its intention to test the powers of S.51 of the Act in the retail shopping centre arena by instituting its own proceedings in the Federal Court against the owners of Farrington Faye Shopping Centre at Leeming, Perth in Western Australia alleging that in 1996 and early 1997 the owners implemented a strategy whereby they refused to grant renewals, variations or extensions of leases to three tenants unless those tenants withdrew from legal proceedings before the Western Australian Commercial Tenancy Tribunal against the landlord and agreed not to pursue their legal rights against the landlord.

Orders sought by the ACCC against the landlord, its directors and the landlord's Asset Manager included: declarations that the tenants were subject to unconscionable conduct in contravention of the Act; injunctions preventing the repetition of similar

conduct; the publishing of public apologies, and the institution of corporate compliance programs to minimise the possibility of such conduct recurring.¹⁸

According to Wilson,¹⁹ Section 51AC will not only impact upon the retail industry it will also impact on all areas of contract. For example, it will impact upon contracting arrangements in the building industry, contracts for the sale of land, leases, whether they be retail, industrial or commercial, and consulting agreements.

In each circumstance the court is likely to examine the relative strengths of the bargaining power between the parties to determine whether as a factor to be considered under S.51AC(3)(a) of the Act, one party could be said to be "taking advantage" of the other party. This situation could arise for example, where a retail landlord was exerting commercial pressure on a lessee ('business consumer') to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the landlord [see S.51AC(3)(a)]. It could also arise where a real estate corporation is marketing property through the auction system and engages in unconscionable conduct by exerting undue influence or pressure on a vendor or intending purchaser to lower the reserve price or increase the bidding price based on an expectation of success [see S.51AC(1)(a)].

Dee notes that "when a contract is grossly one-sided a court may infer that a position or disadvantage existed and/or that it was unfairly exploited".²⁰ 'One-sidedness' could include the appearance that the legal rights or remedies of the weaker party were excluded or that the weaker party has agreed to, read, or understood terms, when this is not so. Too often the stronger party will attempt to disclaim misrepresentation through the use of procedural documents or obtain an acknowledgment from the weaker party that goods or premises have been inspected when the opportunity to do so was not adequately provided. The harsh or unreasonable conduct complained of manifests itself in many facets of the property industry. It is evident in commercial leases when unreasonable demands in respect of refurbishment are included in the lease contract; for example, the necessity for the repainting of the leased premises by the lessee every 2 to 3 years when clearly the need for such frequent repainting is unwarranted. It is also evident in some of the practices adopted by lessors to deal with the late payment of rent; for example, the imposition of unreasonable penalty rates of interest in these circumstances.

Redressing breaches of S.51AC

We are yet to see how the remedies for breaches of S.51AC will work in practice but a business consumer who suffers loss or damage by the actions of another will, as a matter of right, have recourse to the remedies available within S.82 (damages) and S.87 (injunctions and wide-ranging discretionary orders). However, a breach of the new S.51AC will not constitute a criminal offence. The discretionary orders available to the court allow a contract to be varied or voided (*ab initio* or *from a certain date*). The court may refuse to allow any provision of a contract to be enforced or order the refund of money or the return of property. Ultimately the court can order the payment of money to compensate for the loss or damages suffered and direct the land titles office to amend the registered interests held in land.

ENDNOTES

- 1 "51AA (1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable
2 within the meaning of the unwritten law, from time to time, of the State and Territories.
3 See the "outline" Part IV A - Unconscionable Conduct in Miller RV (1998) "Annotated Trade
4 Practices Act" (19th Edition) LBC Information Services.
5 See the statements of the High Court in *Blomley v Ryan* (1956) 99 CLR 362. The quotation is from
6 the judgment of Kitto J (at415).
7 *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR
8 447; *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445; *Commonwealth v Verwayen* (1990) 170
9 CLR 394; 95 ALR 321; *Louth v Diprose* (1992) 175 CLR 621; *Atkins v National Australia Bank*
10 (1994) 34 NSWLR 155.
11 See the examination of the word 'unconscionable' in *Butterworths Australian Legal Dictionary*
12 (1997).
13 "51AB (1) A corporation shall not, in trade or commerce, in connection with the supply or possible
14 supply of goods or services to a person, engage in conduct that is in all the circumstances,
15 unconscionable!"
16 See S.51AB (2) of the Act.
17 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447
18 Supra at 461.
19 See the paper presented by Bill Dee, Director Liaison, Australian Competition and Consumer
20 Commission "Unconscionable Conduct in Business Transactions" Property Council of Australia
Shopping centre Conference, Sydney 1998.
11 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447
12 (1990) 170 CLR 394 at 441
13 (1995) ATRP 41-436
14 The Inquiry culminated in 1997 with a report entitled "Finding the Balance Towards Fair Trading in
15 Australia".
16 Wilson, L. "Trade Practices - Unconscionable Conduct" Property Council of Australia, Shopping
17 Centre Conference, 18 May 1998, Sydney.
18 Ibid
19 See the paper by Bill Dee (ACCC) Note 10.
20 See Bill Dee's conference paper at Note 10.
See Wilson, L. at note 15.
See Bill Dee's conference paper at Note 10.