UPDATE ON CASE LAW DEVELOPMENTS

The Hon P de Jersey AC
Chief Justice

Justice O'Regan and I will provide a synopsis of some of the more interesting recent cases, and do so from a Trans-Tasman perspective. We will, I suppose, adopt a "nation of origin" approach – but we do not depend on numbers, and there is of course no "contest"!

Since the Australian High Court's fairly recent decisions in *Commercial Bank of Australia v Amadio*[1] and *Garcia v National Australia Bank*[2] and somewhat longer ago in *Blomley v Ryan*[3], lenders have been on notice as to potential liability in circumstances of undue influence and unconscionability. What have the last six months thrown up in those areas?

Unconscionability

1. The Full Court of the Federal Court confronted unconscionability in the setting of s 51AA of the *Trade Practices Act* 1974 (Cth)[4] in *ACCC v Samton Holdings Pty Ltd.*[5] Prior to that decision, the greater weight of judicial opinion had favoured a narrow approach to unconscionability under that section.[6] That was the approach established by *Amadio*, where the court formulated these pre-requisites:

> "(i) a party to a transaction was under a special disability in dealing with the other party 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 *prima facie* unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it".[7]

An issue in *Samton* was whether the s 51AA statutory "unconscionability" should be confined to *Amadio* "special disability" cases, or extended more broadly.

The facts? A husband and wife purchased a "lunch bar" run on leased premises. The lease was due to expire. It contained an option to renew for 7 years. The purchasers purported to exercise the option, 16 days late. The landlords wished to resume possession, but agreed to renew the lease in return for

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[1] (1983) 151 CLR 447.
[2] [1998] HCA 48.
[3] (1956) 99 CLR 362.
[4] Which proscribes "conduct that is unconscionable within the meaning of the unwritten law, from time to time".
[5] [2002] FCA 62.
[6] See P Tucker "Unconscionability: The Hegemony of the Narrow Doctrine under the *Trade Practices Act*", pre-proof edition of paper accepted for publication (TPLJ) p. 2.
[7] *Amadio* (1983) 151 CLR 447 at [462] per Mason J. For further commentary see M Lees, "Contract, Conscience, Communitarian Conspiracies and Confucius: Normativism Through the Looking Glass of Relational Contract Theory", [2001] *MULR* 4.

the benefit, of a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he or she should do so.

In this case, the purchaser

> "became party to transactions which, of their very nature, must have been recognized by him as having features of concession, risk and unorthodoxy which a counter party having the capacity to look after his or her own interests would never have dreamed of accepting.[48]

Consequently, the transaction was set aside. The judge noted that the real point was that equity

> "will neither allow advantage to be taken of a person labouring under a disability nor sanction an overbearing of the vulnerable party's judgment by a stronger party's influence. These forces may be at work even though the person affected becomes a willing participant in a transaction which on its face shows no real sign of unfairness."

Misrepresentation by a bank's officers.

6. A factually interesting case determined last year by Queensland's Central Judge illustrates the corporate risk of having undisciplined players within large organizations. In this case - *Pace v Westpac Banking Corporation*[49] - the bank was held liable in damages for the negligent misrepresentation of a bank manager that money to fund a subdivision would likely be forthcoming. This manager's response to inquiries, described by the Judge as "cavalier", was the regrettable Australian vernacular: "no problems."

Two poorly educated labourer brothers of Maltese origin approached Westpac to obtain various loans for the purposes of buying and subdividing land. They always dealt with the same bank manager who approved certain loans which were eventually paid off.[50] On a number of occasions, the manager acted in apparent defiance of instructions from his superiors.[51] When the brothers signed a contract to purchase more land, they made it clear to the manager that they not only needed money to buy the property, but also required further money to develop it[52]. They claimed the manager had assured them that the second loan would be given[53]. It was not, and the brothers sued the bank for breach of contract – contending the manager's statement that the bank would finance the subdivision gave rise to an enforceable contract; and amounted to misleading and deceptive conduct contrary to s 52 *TPA*, and negligent misstatement.

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[48] [2001] NSWSC 1028 at [47].
[49] [2001] QSC 415.
[50] [2001] QSC 415 at [1], [3], [9].
[51] [2001] QSC415 at [13], [21] and [23].
[52] [2001] QSC 415 at [28]-[32].
[53] [2001] QSC 415 at [36].

The Court held the assurances of the manager did not give rise to any binding contract: many essential features of a contract were missing (eg. no amount of money, or other terms were agreed upon).[54] However, the brothers established the bank misled them. The manager knew or ought to have known that they would rely on the advice or assurance he gave as to the bank's preparedness to lend.[55] It was reasonable for the brothers to do so, they relied on the assurance, and loss was a foreseeable outcome.

Damages were calculated as the difference between the amount spent on the land and paid to the bank, and its residual market value.

Securities

7. The financial community has developed sophisticated financial products, some of which are not easy of comprehension, especially for those of us who only occasionally trespass into this field. One such creature is the "high yield equity note".

Under the Macquarie Bank's system[56], an investor, paid for the note 85-90% of the market value of the specified underlying shares. For the term of the note – usually three months – interest was paid. The investor authorised Macquarie to purchase the "underlying shares" on maturity of the note. If their value then exceeded the price of the note, the investor received back his price plus interest. If less, the investor received that lesser sum and interest. The issue arose whether these notes (so-called HYENAs) could be advertised save by prospectus,[57] per Chapter 6D of the *Corporations Act* 2001 (Cth). Macquarie sought an exemption under s 741, which was refused, on the basis of ASIC's view that the HYENAs were "securities" under s 92(3). Macquarie sought review by the Administrative Appeals Tribunal.[58]

The Tribunal held the notes were not securities under s 92(3), so that the prospectus requirement did not apply. The Tribunal appears to have concluded the notes were not debentures, noting they were given outside the ordinary course of banking business[59], with repayment not by reference to a fixed debt, but regulated by an external consideration, the value of the underlying shares. Neither were the notes "securities" under s 92(3)(e): they did not involve options to acquire shares. That was because any "acquisition" was not at the invitation of the investor, but unilaterally ordained by Macquarie.

The Tribunal did express its sympathy for ASIC's proposition that because of the complex hybrid character of HYENAs, they were the sort of security which should be regulated by prospectus to

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[54] [2001] QSC 415 at [38].
[55] [2001] QSC 415 at [42] – [44].
[56] [2001] AATA 868 at [24] – [27].
[57] [2001] AATA 868 at [24] – [27].
[58] *Macquarie Bank v ASIC* [2001] AATA 868.
[59] [2001] AATA 868 at [23].

As a general rule, Hodgson JA held that all significant creditors, including contingent creditors, should be given an opportunity to join in funding recovery claims.[80] Nevertheless, in circumstances where all that the creditors have established is that they were not asked, and that they would have considered a request on its merits but not necessarily gone ahead with the contribution, then the Court is entitled to exclude these creditors from the proceeds.[81]

Accordingly, in this case, as the other creditors knew about the litigation but failed to contribute towards its funding, the benefit of the proceeds of the litigation should be directed to the creditors who did. Furthermore, given the precarious nature of the litigation and the amount spent, the creditors who contributed should be entitled to the proceeds of the litigation.[82]

Hodgson JA offered this helpful analysis of the application of s 450/s 564 in such a case:

> "I accept that it is not the object of the section to encourage litigation for the sake of litigation, or for the private benefit of creditors who provide the indemnity or the funds. In my opinion, there are two public purposes involved in the encouragement of pursuit of claims by liquidators, namely to benefit creditors and shareholders generally, and to recover property from wrong-doers and thus discourage misconduct in relation to corporations.
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> In my opinion, both purposes may be advanced by the grant of an advantage of 100 per cent of the recovered funds to supporting creditors in appropriate cases. Plainly, such a benefit can support the objective of recovering property from wrong-doers. In my opinion also, the grant of a 100 per cent advantage in cases where recovery turns out to be relatively small can also support the objective of benefiting creditors generally, by encouraging the support of litigation in cases where there is a prospect of a large recovery which would inure for the benefit of all creditors, but which may in certain eventualities result only in a small recovery. Of course, if a 100 per cent advantage is too readily granted in such cases, this could unduly encourage the settling of claims for less than their reasonable value; but this risk can be taken into account when settlements are approved, as well as in applications by supporting creditors to be given an advantage."[83]

[80] [2001] NSWCA 223 at [106].
[81] [2001] NSWCA 223 at [102].
[82] [2001] NSWCA 223 at [110].
[83] [2001] NSWCA 223 at [91]-[92].