UNCONSCIONABILITY AND SECTION 52 OF THE TRADE PRACTICES ACT IN BANKING TRANSACTIONS

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Professor David Allan wrote a fine article called "Bankers' Liability for Financial Advice" which appears in the (1987) 16 Melbourne University Law Review 213. I mention this article not only for its intrinsic worth but because it appears immediately after an article "The Appointment of Federal Judges in Australia". I noted that connection while preparing this paper and it made me conscious of my position as a Federal Court judge speaking to an audience as discerning and knowledgeable as this one is. That thought, in turn, reminded of the observation by R.E. Megarry QC, as he then was, in giving The Hamlyn Lecture in 1962. He quoted an Italian author in these terms:

> "A judge does not need superior intelligence. It is enough that he be possessed of an average intellect so that he can understand quod omnes intellegunt. He must, however, be a man of superior moral attainments in order to be able to forgive the lawyer for being more intelligent than he."

So with that spirit of forgiveness, let me begin.

This paper is about unconscionable conduct and s.52 of the Trade Practices Act 1974.

Both s.52 and s.52A have been picked up in the various Fair Trading Acts. The equivalents of s.52 are s.11 (Vic, 1985), s.42 (NSW, 1987), s.56 (SA, 1987), and s.10 (WA, 1987); and the equivalents of s.52A are s.11A (Vic), s.43 (NSW), s.57 (SA) and s.11 (WA). The constitutional limitations on Commonwealth power do not apply to the states, as the formulation of those sections indicate.

WHAT IS UNCONSCIONABLE CONDUCT? WHAT IS S.52 CONDUCT?

Unconscionable conduct is an ancient and well known head of equity. Kitto J. in Blomley v. Ryan (1956) 99 CLR 362 at 415 said:

> "It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because

> illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands."

In more general terms, Mason J. in Commercial Bank of Australia v. Amadio (1983) 151 CLR 447 at 462 said that a transaction will be set aside as unconscionable:

> "whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-a-vis another and unfair or unconscientious advantages is then taken of the opportunity thereby created."

Section 52(1) simply, and devastatingly, provides:

> "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive."

I will focus consideration of unconscionable conduct and s.52 on the fundamental banking transactions - loans, mortgages and guarantees. Before doing that in detail, it is useful to consider both of these precepts of commercial conduct in the context of the present day law of contract in Australia.

Inherent in our system of law as, in most systems, is the fundamental principle pacta sunt servanda: agreements are to be kept. Since the nineteenth century the concept of "freedom of contract" is the basic premise of our law of obligations. Jessel M.R. in Printing & Numerical Registering Co v. Sampson (1875) LR 19 Eq 462 at 465 said:

> "... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract."

And to like effect, Lindley M.R. in Underwood & Son Ltd v. Barker [1899] 1 Ch 300 at 305:

> "If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into."

Of course, the law recognises the "defences" of incapacity, deceit, illegality, misrepresentation, mistake and duress. Most of these operate to negative a voluntary consent to the contract.

The doctrine of sanctity of contract reflected the liberalism and laissez faire economics of the time and it was thought, by some sort of social Darwinism, to conduce to the inefficient falling by the wayside and the efficient prospering, with a beneficial effect on total economic activity and the public good. The supposed prophylactic effect of the sanctity of contract doctrine is reflected in the speech of Lord Bramwell in Salt v. Marquess of Northhampton [1892] AC 1 at 18-19:

> "Whether it would not have been better to have held people to their bargains, and taught them by experience not to make unwise ones, rather than relieve them when they had done so, may be doubtful. We should have been spared the double condition of things, legal rights and equitable rights, and a system of documents which do not mean what they say. But the piety or love of fees of those who administer equity has thought otherwise. And probably to undo this would be more costly and troublesome than to continue it ...."

It is correct to say that "freedom of contract" is still a fundamental principle of contract law today. In Photo Production Ltd v. Securicor Transport Ltd [1980] AC 827, Lord Diplock said at 848:

> "A basic principle of the common law of contract ... is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express terms in the contract itself, and where they do, the statement is determinative; ... But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words."

But times have changed since those of Sir George Jessel and Lord Lindley. The laissez faire ethos has been modified by regulation; some might say too much so. But the fact of the matter is that Adam Smith's "invisible hand" of self interest was chopped off in an industrial accident a long, long time ago. Laws had to be passed to stop businessmen freely contracting with children to work in their factories, businessmen from freely pouring poisons into a deregulated atmosphere, to curtail businessmen's freedom to manipulate markets, cheat consumers, sell unsafe products and to prevent people practising in areas where they were not qualified. Sensible people of business know that freedom is not the same as licence.

We now recognise that self interest cannot be the sole determinant of human conduct. In addition to the significant changes in social attitudes, there has been a concentration in the ownership and control of economic resources including multi-national commercial or trading corporations. This has meant that in many cases any consensus ad idem, the meeting of minds, in the classic contractual sense is a myth. The terms of many commercial agreements are imposed by one party possessing

enormously more bargaining power. This certainly applies in most cases involving loans, mortgages and guarantees. I am quite certain that if a commercial lawyer acting for a financial institution were given a marriage contract, he would immediately say, "in 'for richer or poorer' delete 'poorer'; for 'in sickness and in health' substitute 'during good health'."

Predictability and certainty are matters greatly to be valued in any area of the law, but they are not the sole values in society and both the courts and the legislature have accepted that it is better that contracts be perhaps less certain and consequences less predictable, but fairer.

Apart from disquiet about the underlying fairness of many contracts, the refined technicality and inutility concerning many associated questions is apparent. The inadequacies in the common law in relation to pre-contractual conduct has been substantially overridden by the effect of s.52 of the Trade Practices Act.

Of the inadequacy of the common law, the position has been rightly summarised by Terry:

> "There can be little argument with the proposition that the unwieldy body of doctrine associated with pre-contractual representations does not represent the finest achievement of the common law. The arbitrary distinction between contractual and non-contractual representations, the inadequacy of the remedies for misrepresentation, and the diverse array of contractual and extra-contractual devices utilised in an attempt to exclude or prevent liability arising in respect of conduct antecedent to the contract, all conspire to defeat one party's legitimate expectations. It is in this area that s.52 of the Trade Practices Act 1974 (Cth.) assumes particular significance ... In conjunction with the availability of damages (under s.82) and ancillary orders (under s.87) to a person who has suffered loss or damage by reason of the misleading or deceptive conduct, s.52 provides an attractive alternative to the unsatisfactory and restrictive rules of the common law." (A. Terry "Disclaimers and Misleading Conduct" (1986) 14 ABLR 478.

The High Court has in a series of cases in recent years radically altered the law of contract in Australia. Legione v. Hateley (1982-3) 152 CLR 406 gave the imprimatur to promissory estoppel and, in Walton Stores (Interstate) Ltd v. Maher (1988) 62 ALJR 110, extended the doctrine to a non-contractual relationship, and further held that it could support a cause of action. In the jargon, promissory estoppel could be a sword as well as a shield.

Those cases support the view that equity will come to the aid of a plaintiff who has acted to his detriment on the basis of a basic assumption, on the footing that the other party had played such a part in the adoption of the assumption that it would be

unconscionable to allow him to ignore it. Brennan J.'s observations (at 62 ALJR 127) make it clear that silence after awareness of the assumption or expectation of the plaintiff and after knowledge that reliance on it may cause detriment, would be regarded as an inducement to continue to act so as to make it unconscionable for the defendant to retreat therefrom should detriment result. Waltons Case also has dealt a severe blow to the bargain theory of consideration.

What is important to recognise from Waltons Case, for present purposes, is that before promissory estoppel comes into play, there must be a degree of blameworthiness on the party estopped; and presumably whether conduct is unconscionable is to be judged by the standard of the reasonable man. In other words, mere inequality of bargaining power, or a general "unfairness" is not enough.

The majority decision in Trident General Insurance Co Ltd v. McNiece Bros Pty Ltd (1988) 80 ALR 574 departed from the "fundamental" principle of contract law that only a party to a contract may sue upon it and that consideration must move from the promissee. Attempts by Lord Denning to achieve these results (eg. in Smith and Snipes Hall Farm Ltd v. River Douglas Catchment Board [1949] 2KB 500 at 514-5; Midland Silicones Ltd v. Scruttons Ltd [1962] AC 446 at 488-492) resulted in the rebuke from Viscount Simonds, in the latter case at 467-8 that:

> "... heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal from some abstract kind of justice, to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent."

And in Pavey & Matthews Pty Ltd v. Paul (1987) 162 CLR 221, recovery by a contractor of a reasonable sum on a claim for quantum meruit for work done under an oral and unenforceable contract was held, somewhat surprisingly, not to amount to a direct or indirect enforcement of the oral contract. And in Australia & New Zealand Banking Group Ltd v. Westpac Banking Corporation Ltd (1988) 62 ALJR 292 at 295, the High Court commented that the basis of the action for money had and received for the recovery of an amount paid under fundamental mistake of fact should now be recognised as lying in restitution or unjust enrichment and not in implied contract.

Professor P.D. Finn summarised the present position in his paper "Commercial Law and Morality":

> "Contract law is in evolution, if not to some, in revolution. The unconscionable dealings doctrine is resurgent (Commercial Bank of Australia Ltd v. Amadio (1983) 151 CLR 447; Westpac Banking Corporation v. Clemesha, SC of

> NSW, 29 July 1988, Cole J.); consideration is under siege (Waltons Stores (Interstate) Ltd v. Maher (1987-88) 164 CLR 387); privity has taken a mortal blow (Trident General Insurance Co Ltd v. McNiece Bros Pty Ltd, (1988) 62 ALJR 508); the mistake rules are being revitalised with their limits as yet unsettled (Taylor v. Johnson (1983) 151 CLR 422; Easyfind (NSW) Pty Ltd v. Paterson (1987) 11 NSWLR 98). The implication and interpretation of contractual terms seem set fair for some reappraisal (See Sir Anthony Mason and S.J. Gageler, "The Contract", in P.D. Finn (ed.) Essays on Contract, 18-21, Law Book Co, 1986; see also Castlemaine Tooheys Ltd v. Carlton and United Breweries Ltd (1987) 10 NSWLR 468; Australian Coarse Grains Pool Pty Ltd v. Barley Marketing Board, SC of Qld 22 Feb 1988, Kelly S.P.J. (appeal reserved)); relief against forfeiture is in a state of expansive uncertainty (McArthur v. Stern (1986) 5 NSWLR 538 (on appeal to the High Court); has the last word yet been said on penalties? (Amev-UDC Finance Ltd v. Austin (1986) 60 ALJR 741.) The doctrine of "good faith" in contract performance is now squarely upon contract's agenda (see H.K. Lucke, "Good Faith and Contractual Performance" in Essays on Contract, supra, and contrast the attitudes taken in Amman Aviation Pty Ltd v. Commonwealth of Australia (1988) 80 ALR 35 and in Qantas Airways Ltd v. Dillingham Corporation, SC of NSW, 8 April, 1987, Rogers J.); and we have the impact, direct and indirect, of the Trade Practices Act, 1974 and its State equivalents with which to contend."

THE NATURE OF THE CHANGE

The concepts "unconscionable conduct" and "misleading and deceptive conduct" reflect an important shift in the ideology informing legal doctrine. Moreover, the tendency has been to articulate changes by resort to standards of conduct expressed in wide and abstract terms. The terms are value dominant. The change has been from specific distinct rules of behaviour to broad precepts. The heterodoxy of which Viscount Simonds spoke, consisting in a zeal for an abstract kind of justice, shows some signs of being embraced in Australia.

Gibbs J. said of the words of s.52, in Parkdale Custom Built Furniture Pty Ltd v. Puxu Pty Ltd (1982) 149 CLR 191 at 197:

> "The words of s.52 have been said to be clear and unambiguous: (Hornsby Building Information Centre Pty Ltd v. Sydney Building Information Centre Ltd (1978) 140 CLR 216 at 225). Nevertheless they are productive of considerable difficulty when it becomes necessary to apply them to the facts of particular cases. Like most general precepts framed in abstract terms, the section affords little practical guidance to those who seek to arrange their activities so that they will not offend against its provisions."

The same criticism applies with even greater force to the application of the principle of unconscionable conduct.

In the Commercial Law Quarterly December 1987, Mr Geoff Sutherland, a partner of Dibbs, Crowther & Osborne, speaking on recent developments in banking, commenced:

> "Bankers in Australia have tended to become bitter and twisted about some of the consumer legislation which has been enacted in recent years. Sydney bankers developed nervous twitches about the Contracts Review Act (NSW) some years ago, and more recently the various Credit Acts and the introduction of s.52A of the Trade Practices Act have led to national banking dyspepsia.
>
> The widespread neurotic behaviour and symptoms of paranoia were not assisted by decisions in Australia such as Amadio."

Notwithstanding the changes which I have outlined in the approach by the High Court to the Law of Contract and to the changes that have been introduced by s.52 and its State equivalents, the present position is capable of calm appraisal, and a tolerable modus vivendi is perfectly possible for persons of today's world of commerce.

UNCONSCIONABLE CONDUCT AND SECTION 52

Unconscionability and s.52 conduct are distinct and independent concepts, but they are not necessarily mutually exclusive in their operation. If a transaction is impeached for unconscionability, it may be set aside in whole or in part. Section 52 conduct can, by s.87, lead to the same result.

The question of whether a transaction affected by unconscionable conduct is void or merely voidable is beyond the scope of this paper, but it is not a sterile inquiry: see Clarke "Unequal Bargaining Power in the Law of Contract" (1975) 49 ALJ 229 at 233. The impact on third parties is again the concern.

An important distinction has to be drawn between unconscionable conduct in dealings leading to a contract, and the contract itself. A contract whose terms are harsh, or which is improvident from the viewpoint of one party to it, is not on that account unconscionable in equity. Implicit in the concept of unconscionability is fault or blameworthiness on the part of one of the parties such that good conscience will not permit that party to retain the benefit of his blameworthy conduct.

Professor Peden in The Law of Unjust Contracts, 1982 at 138 referred to the distinction as procedural unconscionability and substantive unconscionability. The former comprehends "unfairness in the bargaining process and the method of making the contract"; the latter refers to "unfair substantive terms of the contract and the overall unjust results of the transaction". I am concerned here only with procedural unconscionability.

I will not deal with the Contracts Review Act 1980 (NSW) except to note it is another area of concern to banks. Cases decided under it illustrate the importance of obtaining independent legal advice; Clemesha v. Westpac Banking Corporation & Anor NSW Supreme Court, 29 July 1988 and Commonwealth Bank of Australia v. Cohen (1988) ASC para 55-681 and European Asian Bank of Australia Ltd v. Lazzetch (1987) ASC para 55-564; Borg-Warner Acceptance Corporation Australia Ltd v. Diprose (1987) NSW Conveyancing Reports 55-364 and European Asian Bank of Australia Ltd v. Kurland (1985) 8 NSWLR 192.

Decisions under the Contracts Review Act are of national significance because of the similarity between ss.7 and 9 of the Contracts Review Act and s.52A of the Trade Practices Act.

UNCONSCIONABILITY

I commenced by quoting Kitto J. in relation to Unconscionable Conduct in Blomley v. Ryan (1956) 99 CLR 362 at 415.

To the factors mentioned by Kitto J., Fullagar J. added age, sex and lack of assistance or explanation where assistance or explanation is necessary. Dawson J. in Amadio, added unfamiliarity with the English language, referring to Carello v. Jordan [1934-35] QSR 294. Fullagar J. in Blomley v. Ryan observed at 405 that circumstances adversely affecting a party which may induce a court of equity to set aside a transaction are various and cannot be satisfactorily classified.

Sex, as a disadvantage, might have a present day sensitivity.

The two crucial features of the principle are:

(i) a special disadvantage of one party vis-a-vis another and,
(ii) an unconscientious use of that advantage.

Prior to Blomley v. Ryan, there were a few cases in Australia involving banks taking security from women pressured into providing securities principally for their husband's debts: Bank of Victoria Ltd v. Mueller [1925] VLR 642 (decided in 1914) and Harrison v. The National Bank of Australasia Ltd (1928) 23 Tas LR 1.

The requirement that one party was at a disadvantage has to be shown not just generally but in the sense that his ability to judge the transaction and to protect his interest was seriously affected. As to the taking advantage by the stronger party of that weakness, it has to be shown either that the stronger party was responsible for it, or, perhaps more commonly, when it knew (or ought reasonably to have known) that the person was unable or was seriously affected in his ability to judge for himself, exploited that advantage.

In Commercial Bank of Australia Ltd v. Amadio (1983) 151 CLR 447, a mortgage guarantee was by majority set aside unconditionally. The judgment of Gibbs C.J., was based on the general duty of disclosure to a guarantor as stated in Hamilton v. Watson (1845) 12 Cl & Fin 109; 8 ER 1339 and Goodwin v. National Bank of Australasia Ltd (1968) 117 CLR 173. Mason, Wilson and Deane JJ., were of the view that it was prima facie unconscientious for the bank to rely on the mortgage guarantee and the bank had not discharged the onus of showing that the guarantee should not be set aside (applying Blomley v. Ryan). Dawson J. dissented.

Of the duty of disclosure to a guarantor, Gibbs C.J. said, at 454:

> "A contract of guarantee is not uberrimae fidei. The principles governing the extent to which a creditor is bound to make disclosure to a surety were stated in Hamilton v. Watson (1845) 12 Cl & Fin 109; 8 ER 1339. Lord Campbell there said that, unless questions are particularly put by the surety, a creditor taking a guarantee is not bound to make disclosure of material facts (at 119; 1344 of ER). He continued: '... I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires.'"

What need not be disclosed under the general duty is catalogued in O'Donovan and Phillips, The Modern Contract of Guarantee (1985) Law Book Co at 119-121.

In some cases, the general duty of disclosure owed to a guarantor, the obligation under s.52, and the need not to take unconscientious advantage of a disadvantaged guarantor might each be independent sources of a duty to disclose, but the latter two sources may call for a wider disclosure than the first.

Mason J. in Amadio, at 463, noted that the narrowness of a bank's duty to disclose to its intending surety:

> "... has no bearing on the availability of equitable relief on the ground of unconscionable conduct. A bank, though not guilty of any breach of its limited duty to make disclosure to the intending surety, may none the less be considered to have engaged in unconscionable conduct in procuring the surety's entry into the contract of guarantee."

In this context it is useful also to refer to the observations of Blackburn J. in Lee v. Jones (1864) 17 CB (NS) 482; 114 ER 194 where he said at 503-4; 202-3 respectively:

> "But I think, both on authority and on principle, that, when the creditor describes to the proposed sureties the transaction proposed to be guaranteed (as in general a creditor does), that description amounts to a representation, or at least is evidence of a representation, that there is nothing in the transaction that might not naturally be expected to take place between the parties to a transaction such as that described. And, if a representation to this effect is made to the intended surety by one who knows that there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he makes the representation, and that, if it were known to him, he would not enter into the contract of suretyship, I think it is evidence of a fraudulent representation on his part."

The several approaches to the facts, and the different conclusions in Amadio bear scrutiny.

In Amadio, at their son's request, an Italian couple aged 76 and 71, unfamiliar with written English, signed a mortgage over their house and a guarantee unlimited as to time and amount, to secure loans to the son's company. The document was presented for immediate signature in the kitchen of their house without independent advice. The company was insolvent. The features "not naturally to be expected" according to Gibbs C.J., were that the bank and the company had been selectively dishonouring cheques so as to give the appearance of solvency, and had agreed that the overdraft was to be reduced and cleared within a short time. These features were not disclosed to the prospective mortgagors. The Amadios had been told by their son that the mortgage was limited to $50,000.00 and for six months. The bank officer had corrected Mr Amadio's mistaken view as to the term when the instrument was signed. The headnote of the Commonwealth Law Reports which recites "the bank was aware that they had been misinformed about the contents of the instrument they were executing" is therefore somewhat misleading.

Gibbs C.J., having found a failure of the general duty of disclosure to a guarantor by a creditor, did not have to decide whether there was a special disadvantage in the Amadios. He said the bank and the respondents did not meet on equal terms but that circumstance alone does not call for the intervention of equity. What is necessary is the taking of an unfair advantage of his own superior bargaining power or the position of disadvantage in which the other party was placed. In the absence of misrepresentation, whether expressly by the son or by non-disclosure of the unusual circumstances by the bank, "there is no need to resort to the rules as to unconscientious bargaining and

if misrepresentation is not established the bank made no unfair use of its position."

As Mr M. Cope says in "The Review of Unconscionable Bargains in Equity" (1983) 57 ALJ 279:

> "All the commentators on the doctrine of unconscionability state that the plaintiff in these cases has to establish that he was incapable of protecting himself or that his capacity in that respect was seriously impaired."

Mason J. at 464 said:

> "There are a number of factors which go to establish that there was a gross inequality of bargaining power between the bank and the respondents, so much so that the respondents stood in a position of special disadvantage vis-a-vis the bank in relation to the proposed mortgage guarantee.",

suggesting that a pronounced difference in bargaining power itself may constitute the necessary "special disability". The bank knew all; the Amadios had a mistaken view as to their liability and as to the prosperity of their son's company, and as a consequence were unaware that the transaction was quite improvident.

In this context one might note the words of Lord Scarman in National Westminster Bank PLC v. Morgan [1985] AC 686 at 708, where he said:

> "And even in the field on contract I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task - and it is essentially a legislative task - of enacting such restrictions upon freedom of contract as are in its judgment necessary to relieve against the mischief: ... I doubt whether the courts should assume the burden of formulating further restrictions."

Mason J. later acknowledged that "some" difference in bargaining power does not necessarily attract the principle, and that the disabling condition or circumstance has to be "one which seriously affects the ability of the innocent party".

Mason J. said at 464:

> "By way of contrast to the bank, the respondents' ability to judge whether entry into the transaction was in their own best interests, having due regard for their desire to assist their son, was sadly lacking."

The unconscientious use found by Mason J. depended on the conclusion that the bank knew or "should have been aware of the

possibility" that the Amadios had not had an adequate or accurate explanation of the intended transaction, let alone the possible or probable consequences of it.

Deane J. (with whom Wilson J. agreed) said at 474 that the jurisdiction to relieve extends to:

> "circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was 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."

The "most important" factor for Deane J. in finding the relevant disability was their "lack of knowledge of and understanding of the contents of the documents". The result was that "they lacked assistance and advice where assistance and advice were plainly necessary if there were to be any reasonable degree of equality between themselves and the bank".

As to whether the special disability was sufficiently evident to the bank as to make it prima facie unfair or unconscientious for the bank to procure execution of the document, Deane J. concluded that when the bank officer corrected Mr Amadio as to the duration of the guarantee/mortgage, "the stage had been reached at which the bank, through (its officer), was bound to make a simple enquiry as to whether the transaction had been properly explained to Mr and Mrs Amadio."

Dawson J. said at 489:

> "What is necessary for the application of the principle is exploitation by one party of another's position of a disadvantage in such a manner that the former could not in good conscience retain the benefit of a bargain."

In his view, nothing done by the bank amounted to exploitation by the bank.

There are two features of Amadio that banks might find worrying. First, that a relevant special disadvantage might be established primarily on a lack of knowledge or information. Secondly, while establishing that there has to be unfairness or unconscientious conduct on the part of the bank (which implies knowledge or awareness by it), the majority concluded that it was unfair for the bank to proceed when it ought to have been aware that the Amadios had not received accurate and adequate advice.

In the chronology of events, it was not possible for the son to have explained the document to his parents, because he himself

had not read it before it was presented to the parents; and he was the only source of advice to them. The bank knew both of these facts, and must also have known that the transaction was improvident from the viewpoint of the parents. The bank had positive knowledge that the parents had misapprehended the term of the mortgage/guarantee, and knew that the document was executed unread by either parent. The unconscientious conduct, on analysis, therefore was permitting the parents to proceed without their having the opportunity of adequate advice.

This prompts the question, to what extent is a bank its customer's keeper?

After Amadio, prudence, if nothing else, dictates that financial institutions urge on their mortgagors and guarantors the obtaining of truly independent advice.

The position in Canada is not dissimilar: Buchanan et al v. Canadian Imperial Bank of Commerce (1980) 125 DLR (3rd) 394, a judgment of the Court of Appeal, British Colombia. So too, in New Zealand: Nichols v. Jessup (1986) 1 NZLR 226.

Nobile v. National Bank of Australia (1987) 9 ATPR para 40-787 is an application of Amadio to the particular facts in that case. Once again there was a degree of judicial divergence, but again there was no independent advice. It seems that there is an onus on banks.

In Creswell v. Potter (1978) 1 WLR 255 at 259, Vice-Chancellor Megarry said:

> "Nobody, of course, can be compelled to obtain independent advice: but I do not think that someone who seeks to uphold what is, to him, an advantageous conveyancing transaction can do so merely by saying that the other party could have obtained independent advice, unless something has been done to bring to the notice of that other party the true nature of the transaction and the need for advice."

If advice is urged but is declined, it seems to me that the unconscionable conduct principle does not apply. As earlier indicated, unconscionability relates to the conduct and not to the transaction. It may be that legislation permitting the rewriting of harsh or oppressive contracts may assist, but equity will not.

Some of the older cases, such as Harrison v. Guest (1866) 6 De GM & G 424, 43 ER 1298, had held that it was sufficient if the weaker party was pressed to obtain advice and there was an opportunity for it.

Similarly, more recent cases in England such as Coldunell Ltd v. Gallon (1986) QB 1184 (an undue influence case) have held that a lender cannot be expected to do more than properly and fairly

point out to a guarantor the desirability of obtaining independent advice (and, they add, requiring the documents to be executed in the presence of a solicitor).

The Court of Appeal in Bank of Baroda v. Shah (1988) 3 All ER 24 held that there was no obligation on a bank to ensure the defendants received independent legal advice before they executed a security over property.

In both cases solicitors were acting for the party concerned, although there was a dispute in the Bank of Baroda's case as to the solicitor's authority to act. It was held that banks were entitled to assume proper advice had been given. To require more "would be to put on commercial lenders a burden which would severely handicap the carrying out of an extremely common transaction of every day occurrence for banks and other commercial lenders."

In Legione v. Hateley (supra), Justices Mason and Deane seem to confirm (at 447) that equity is not concerned to relieve from contractual obligations simply because on has, as it turns out, made a "bad bargain". And, whilst that case (and to an extent Trident Insurance) refer to notions of "unjust enrichment", they appear to use such principles to support or strengthen the exercise of a jurisdiction based upon unconscionability of conduct.

P.H. Clarke observed in "Unequal Bargaining Power in the Law of Contract" (1975) 49 ALJ 229:

> "... the general rule is that the courts will not grant relief to a party merely because a contract operates harshly or oppressively against him or because he bears most of the risks involved while the other party receives most of the benefit. In the South Australian Railways Commissioner v. Egan (1973) 130 CLR 506; 47 ALJR 140, for example, the High Court still regarded the contract as enforceable despite it being, in the words of Menzies J., '... perhaps the most wordy, obscure and oppressive contract that I have ever come across ...' from which '... not one oppressive provision which could be found was omitted ...'. Relief will only be given where there is the additional element of misconduct on the part of the other contracting party."

These observations predate Amadio; I think they are still relevant.

If a transaction is improvident from the weaker party's point of view, it is only unconscionable for the stronger party to proceed with the transaction without affording to the other party the genuine opportunity for independent advice. If in the face of that independent advice, for reasons of natural affection for instance, or with it if the advice is misplaced, or if the weaker party declines the opportunity genuinely afforded to secure

independent advice, then the conduct of the stronger party cannot in my view be characterised as unconscionable.

SECTION 52A

The Swanson Committee to review the Trade Practices Act 1974 recommended in 1976 that a provision be introduced into the Trade Practices Act prohibiting, as a civil matter only, unconscionable conduct or practices. The present government, in 1984, proposed a section on unconscionable conduct dealing with all transactions, both consumer transactions and purely commercial ones. This proposal of a broad coverage was rejected, and s.52A as enacted is limited to conduct in connection with the supply of goods or services ordinarily acquired for personal, domestic or household use or consumption, that is to say consumer transactions.

Relief from unconscionable conduct in commercial transactions is available under the general law. Some banking transactions will, however, come within s.52A; for example, many home loans and personal loans.

Section 52A, with its limitation to consumer transactions, does permit a useful role for the Trade Practices Commission in the area of unconscionability towards consumers, but I see no compelling reason for the restriction. Small businesses frequently suffer similar disabilities to natural persons, and similar disparity of bargaining power.

In those areas in which it has application, it is to be noted that s.52A does not define unconscionability, although s.52A(2) contains non-exhaustive catalogue of a number of matters to which the court should have regard.

SECTION 52 OF THE TRADE PRACTICES ACT AND THE STATE CLONES

The duty under s.52 is independent of contract and tort and renders obsolete much of the general common law regulating the giving of advice in commercial transactions.

Much arcane learning of the kind in Hedley Byrne & Co Ltd v. Heller & Partners Ltd [1964] AC 465 and MLC v. Evatt (1968) 122 CLR 556 and their progeny, has effectively been overtaken by the breadth, simplicity and strength of an action under s.52.

Such an action may encompass negligent advice because s.52 does not require an intent to mislead or deceive on the part of the corporation. It can encompass advice given honestly and reasonably. This is an important point of distinction from unconscionable conduct. In Yorke v. Lucas (1985) 158 CLR 661, Mason A.C.J., Wilson, Deane and Dawson JJ. said at 666:

> "It is, of course, established that contravention of that section does not require an intent to mislead or deceive and

> even though a corporation acts honestly and reasonably, it may nonetheless engage in conduct that is misleading or deceptive or is likely to mislead or deceive: Hornsby Building Information Centre Pty Ltd v. Sydney Building Information Centre Ltd (1978) 140 CLR 216 at 228; Parkdale Customs Built Furniture Pty Ltd v. Puxu Pty Ltd (1982) 149 CLR 191 at 197."

The High Court suggested that, where it is apparent that a corporation is not the source of the information but is merely passing it on for what it is worth without asserting any belief in its truth or accuracy, it was very much to be doubted that the conduct would be misleading or deceptive.

In Cunningham v. National Australia Bank (1987) 77 ALR 632, a case dealing with status reports, Jenkinson J. refused an application for orders restraining the sale by a mortgagor until trial. That case, like almost every case in this area, depends on the facts. The bottom line in this area is that if the facts can be attended to, the law will generally look after itself.

The applicants had asked their bank, the National Australia Bank Ltd, to get a credit check on a company whose banker was Westpac Banking Corporation. The advice from Westpac was that the company had a satisfactory account and that it met all its commitments. The National Australia Bank manager added his comment, "That is as good a report as you will get". In reliance on that communication, the applicants decided to enter into a contract to sell certain produce and later borrowed money for the purpose of carrying out the contract. The purchasing company failed in performance of the contract and the applicants alleged that the statements by the officers of the National Australia Bank constituted misleading conduct in breach of s.52, and claimed damages in respect of those breaches. They sought orders to restrain the sale under the mortgage until trial of the proceedings.

Jenkinson J. found that nothing that was said by officers of the National Australia Bank Ltd amounted to a representation that the company was financially sound. He sat at 639:

> "[N]o reasonable person would think that what was said amounted to a representation by National Australia Bank Ltd, or by any of its officers, that [the company] was financially sound, or that it met its commitments, or that it had a satisfactory account. The actual words were representations as to what Westpac Banking Corporation had said, and any confidence as to [the Company's] financial soundness which those words might reasonably have engendered was engendered by the representations of Westpac Banking Corporation.
>
> The comment [by the officer of the National Australia Bank] ... may be thought to be ambiguous .... Whatever it meant,

> there is nothing to suggest that the comment was inaccurate or misleading."

Section 52 can have a serious impact on the enforceability of mortgages and guarantees. Such securities are, of course, normally required when loans are made to private companies. Glandore Pty Ltd v. Elders Finance & Investment Co Ltd (1984) 4 FCR 139; 57 ALR 186 was such a case. Morling J. dealt with an interlocutory application to restrain a mortgagee's sale. Glandore is illustrative of the use s.52 can have in avoiding or modifying the rule in Inglis v. Commonwealth Trading Bank of Australia (1972) 126 CLR 161, namely, that generally a court will not interfere on an interlocutory basis to deprive a mortgagee of the benefit of his security, except upon terms that an equivalent safeguard is provided to him by means of the mortgagor bringing in an amount sufficient to meet what the mortgagee claims to be due.

Relief pursuant to s.87 of the Trade Practices Act 1974 in the principal proceedings was claimed. Collateral agreements were alleged. In the circumstances, Morling J. granted an interlocutory injunction, on terms which included the payment of interest, but did not require the bringing in of the full amount claimed by the mortgagee.

Glandore demonstrates that s.52 conduct may have the effect of impeaching the mortgagee's title, or a claim for variation pursuant to s.87 might have the effect of excepting the full application of the rule in Inglis. Jenkinson J. said in Cunningham at 638:

> "If the claim for damages were so connected with the mortgages or any of them as to impeach the mortgagee's title, in the sense in which that concept is expounded in relation to equitable set off, then it may be that the relief sought could be granted free of the condition that the amount secured be paid into court. It may be, also, that a claim for variation, pursuant to s.87 of the Trade Practices Act 1974, of the contract of which the mortgage is part, or with which the mortgage is closely connected, ... is one which ought, in some circumstances, to free the court from compliance with the rule. Neither exception to the rule is disclosed in this case, in my opinion."

See also in this context, Eltran v. Westpac Banking Corporation (1987) 14 FLR 541 and Graham v. Commonwealth Bank of Australia (1988) 10 ATPR para 40-908.

Mr Terry has argued (Misleading or Deceptive Conduct in Commercial Negotiations (1988) 16 ABLR 189) that, like s.52A, s.52 should have its operation restricted to non-commercial contracts.

> "In the commercial context there are sound policy reasons in the demands of certainty and convenience for preferring the sanctity of the written contract to the uncertain operation of s.52. This philosophy has received expression in recent years in deliberate policy initiatives excluding commercial contracts from the scope of legislative inroads into the sanctity of contract: the exclusion of commercial contracts from the scope of the unconscionability provisions of the Contracts Review Act 1980 (NSW) and s.52A of the Trade Practices Act are the obvious examples .... It is not surprising that there is clearly a body of opinion within the Federal Court that the application of s.52 to the private negotiations of sophisticated commercial enterprises requires a reappraisal, and it would not be surprising if in the future there is a more general shift in judicial attitude within the Court to a more restrictive interpretation of s.52 in such cases." (At 207).

I believe that the tendency will be for s.52A to extend to all transactions, rather than the ambit of s.52 to be narrowed.

MISREPRESENTATIONS AND SILENCE

In Taco Co of Australia Inc v. Taco Bell Pty Ltd (1982) 42 ALR 177, Deane and Fitzgerald JJ. said at 202:

> "Irrespective of whether conduct produces of is likely to produce confusion or misconception, it cannot, for the purposes of s.52, be categorised as misleading or deceptive unless it contains or conveys, in all the circumstances of the case, a misrepresentation."

Lockhart J., in particular, has since asserted the primacy of the words of the section. In Henjo Investments Pty Ltd v. Collins Marrickville Pty Ltd (1988) 79 ALR 83, Lockhart J., with whom Burchett and Foster JJ. agreed, said that it was erroneous to approach s.52 on the assumption that its application is confined exclusively to circumstances which constitute some form of representation. He has suggested that in each case it is necessary to examine the conduct whether representational in character or not, and ask the question whether the impugned conduct of its nature constitutes misleading or deceptive conduct. This will often but not always be the same question as, whether the conduct involves a misrepresentation.

In Rhone-Poulenc Agrochimie SA v. UIM Chemical Services Pty Ltd (1986) 12 FCR 477, Bowen C.J. said at 489, that conduct will usually only be misleading or deceptive if it contains or conveys, in all the circumstances of the case, a misrepresentation. At 504, Lockhart J. expressed the view that conduct under s.52 generally, though not always, consists of misrepresentations.

This refocusing on the words of the section is useful. Conduct will usually be representational (including representation by silence). If conduct conveys a misrepresentation, that is sufficient to make it misleading conduct: but it is not necessary, before conduct is misleading, that it be found to be misrepresentational.

As to silence, French J. in "S.52: A Lawyers' Guide" (April 1989) 62 ALJ 250 at 259, expressed it this way:

> "The tension between the language of s.52 and well-established common law concepts is brought out in relation to the characterisation of silence as misleading or deceptive conduct. In the tort of deceit silence plays a role constrained by the limitation that subject to three qualifications mere silence or passive failure to disclose the truth is not actionable, however deceptive in fact. The qualifications are:
>
> 1. Failure to disclose the whole truth may make the residue false.
> 2. Active concealment of a fact may amount to a false statement that the fact does not exist.
> 3. Where a statement believed to be true is later found to be false, the failure to correct it may amount to misrepresentation.
>
> Silence in each of these cases has the effect of conveying a misrepresentation. But that attribute is not necessary to the characterisation of silence as misleading or deceptive for the purposes of s.52. Where it gives rise to or is likely to give rise to erroneous inferences it is misleading or deceptive or likely to mislead or deceive ....
>
> In my opinion it is reasonably open to argument that the existence of a duty to disclose is merely one, <u>but not the only basis</u>, upon which silence may be characterised as misleading or deceptive. That view is derived from the consideration of the absolute character of the prohibition and the acceptance of an objective test for the characterisation of conduct contravening it." (My emphasis).

PREDICTIONS

A promise or prediction may convey representations of past or existing fact such as the following:

(i) the promisor intends to perform the promise.
(ii) the predictor believes and has reasonable grounds for believing that the prediction will be fulfilled.

The representations which can be implied will vary according to the nature of the promise or prediction and the circumstances of the case.

In the case of a statement of predictive opinion by an expert, there may be an implied representation that the expert has undertaken careful and diligent enquiry to reach that opinion.

This aspect is of some distinct relevance in the light of the ocean of litigation involving loans in foreign currencies, and the depreciation of the value of the Australian dollar.

Recognising the difficulty that may attach to proving lack of reasonable grounds for an unperformed promise or unfulfilled prediction, the legislature introduced s.51A into the Act in 1986. That section provides:

> "(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
>
> (2) For the purposes of the application of sub-section (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.
>
> (3) Sub-section (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead." (My emphasis)

Every representation with respect to any future matter is thereby misleading unless there are reasonable grounds for making it at the time that it is made. The onus of showing the existence of such grounds lies on the representor.

I suspect that the importance of these aspects of s.51A has not been fully appreciated by the business world, or by commercial lawyers.

DISCLAIMERS

Liability for contractual negligence can be excluded by an appropriate exclusion clause. In Darlington Futures Ltd v. Delco Australia Pty Ltd (1986) 68 ALR 385, the High Court held the clause in that case effective to limit liability.

In Brisbane Unit Development Corporation Pty Ltd v. Robertson [1983] 2 Qd R 105, a clause in the contract recited an acknowledgment that they had not relied on any representations by the vendor etc other than as set out in the contract. The purchasers alleged pre-contractual representations. It was held

that, in the absence of fraud, the clause protected the vendor. The view was followed in Dorotea Pty Ltd v. Christos Doufas Nominees Pty Ltd [1986] 2 Qd R 91.

In Dorotea Pty Ltd v. Vancleve Pty Ltd (1987) 75 ALR 629, the Full Court of the Federal Court said, at 632:

> "[certain paragraphs] ... of the defence and cross-claim plead as a defence to the claim a term of the contracts whereby the applicant acknowledged that it had not relied on any representations by the appellant or its agents in entering into the contract. Such a term, if decisions of the Supreme Court such as Dorotea Pty Ltd v. Christos Doufas Nominees Pty Ltd [1986] 2 Qd R 91 and Brisbane Unit Development Corp Pty Ltd v. Robertson [1983] 2 Qd R 105 correctly state the law, is effective to bar reliance on innocent misrepresentation under the general law. The term is not effective, or course, to bar reliance on s.52."

In Clark Equipment Aust Ltd v. Covcat Pty Ltd (1987) 71 ALR 367, the Full Court of the Federal Court was concerned with the effect of a clause in a lease agreement to the effect that the lessee, before signing the agreement, had examined the goods and, relying on his own skill and judgment, had satisfied himself that they were reasonably fit for the purpose for which he required them. The agent of the lessee had said that, when he signed the acknowledgment, he did not consider that it applied to the rate or speed at which the machine would cut trees. Of the effect of such a clause, Sheppard J. said at 371:

> "Be that as it may, a vendor of goods may not successfully rely on an exemption clause such as that in question here in answer to a cause of action under s.52 of the Trade Practices Act. That is because the conduct of a respondent in making representations is antecedent to the contract in which the exemption clause is contained. The effect the representations have in inducing a purchaser to enter into a contract will usually be spent before or at the instant the contract is signed.
>
> Parties may agree that statements and representations made antecedently to their entering into a contract are not to form the basis of any remedy in the event of there being a subsequent disagreement. Except in cases of fraud, the common law will give effect to their contract. But the remedy conferred by s.52 of the Trade Practices Act will not be lost, whatever the parties may provide in their agreement. If a vendor of goods has engaged in misleading or deceptive conduct, the law makes him accountable for loss and damage suffered as a result of his unlawful conduct. That conduct will usually have been committed, as in this case, prior to the signing of any contract. If, as a result of the conduct, a person is induced to enter into a contract and suffers loss, an action to recover it lies. The terms

> of the contract are irrelevant. As Wilcox J. said in Petera Pty Ltd v. EAJ Pty Ltd (1985) 7 FCR 375 at 378: 'Whatever may be the effect of cl.19 [the exemption clause in that case] in relation to an action brought in contract, in which reliance is placed upon an alleged warranty or condition not included in the contract of sale, that clause should not be allowed to defeat a claim based upon s.52. To permit such a clause to defeat such a claim would be to accept the possibility that a vendor might exacerbate his deception, as by actively misleading a purchaser as to the existence or nature of such an exclusion, and thereby ensure that he would escape liability.' I refer also to Byers v. Dorotea Pty Ltd (1986) 69 ALR 715; [1987] ATPR 40-760, per Pincus J. at 48,230."

Wilcox J. in Collins Marrickville Pty Ltd v. Henjo Investments Pty Ltd (1987) 72 ALR 601 collected a number of relevant cases, and then said at 613:

> "If in fact the misleading conduct of the respondent has induced an applicant to enter into an agreement, that inducement is not negated because, in the agreement itself, the applicant says to the contrary. Of course, the fact that the applicant so says may bear upon the question whether he or she should be believed in asserting that the misleading conduct was an inducement; although in the case of a printed exclusion clause this may be of little moment. And, once it is found as a fact that the conduct induced the transaction, the Act itself gives a remedy. There may be scope for the introduction into this area of the law of the concept of disclaimer, as suggested in the editorial comment and in the article by Terry: 'Disclaimers and Deceptive Conduct', 1986 Australian Business Law Review, pp.478-512, to which the second comment refers; although it would seem that it must always remain a question of fact whether the disclaimer has succeeded in negating the misrepresentation; see Hutchence v. South Sea Bubble Co Pty Ltd (1986) 64 ALR 300 at 338."

On the appeal in the Collins Marrickville Case, (1988) 79 ALR 83, Lockhart J. said at 99:

> "There are wider objections to allowing effect to such clauses. Otherwise the operation of the Act, a public policy statute, could be ousted by private agreement. Parliament passed the Act to stamp out unfair or improper conduct in trade or in commerce; it would be contrary to public policy for special conditions such as those with which this contract was concerned to deny or prohibit a statutory remedy for offending conduct under the Act."

Of these clauses, Professor Allan said in Bankers' Liability (supra), at 248:

> "... contracts are concerned with promises, and such statements are not promissory; ... it is not the function of contract to tell lies and, if the defendant wishes to avoid liability for misrepresentation, he should ensure either that he does not misrepresent facts or that the plaintiff is indeed warned to make his own judgment and not to rely on the word of the defendant. It would be an abuse of contract to expect it to found an estoppel in these circumstances."

These disclaimers are to be contrasted with statements which accompany the representations; eg., "No reliance can be placed on the correctness of the odometer reading of this vehicle".

In cases of that sort, and the label cases, it is a question of assessing whether the conduct, in all the circumstances, was misleading. There is, moreover, the requirement in an applicant to prove inducement. Deeds of Acknowledgment such as in Keen Mar Corporation Pty Ltd v. Labrador Park Shopping Centre Pty Ltd (Full Court of the Federal Court, 9 March 1989, unreported), may have some evidentiary value in this respect, but they will be very carefully scrutinised.

LESSONS FOR BANKS AND THEIR ADVISERS

Professor Allan has counselled against preaching. Heeding that advice, I will simply note that lending institutions are presently reviewing staff instructions, operational manuals, and recording methods. A mere cosmetic overhaul will not suffice.

In those cases where a creditor is seeking security or a guarantee from a third party in circumstances where the principal debtor might be expected to have influence over that third party (such as spouses or parents), the creditor should insist that the third party have independent advice. A failure so to do was fatal in Kings North Trust Ltd v. Bell [1986] 1 WLR 119; see also Avon Finance Co Ltd v., Bridger [1985] 2 All ER 281; cf. Coldunell Ltd v. Gallon [1986] 2 WLR 466. If the bank uses the debtor as its agent, it is fixed with the agent's conduct.

Lenders seeking security from third parties should deal directly with the third parties (or their independent solicitors); in particular, they should avoid dealing through the debtor.

The difficulties revealed by this kind of litigation have prompted lenders to insist on a certificate from a solicitor certifying that the borrower has received independent advice.

The September 1988 edition of the Queensland Law Society publication, Proctor, gave this warning:

> "The Council has noted that the practice of lenders requiring certificates from the solicitor for the borrower prior to making an advance is becoming more prevalent.

> Particular examples that have come to the attention of the Conveyancing Committee include:
>
> A. ...
> B. A certificate that the solicitor for the borrower has explained to the borrower, and that the borrower is aware of and understands the terms and conditions of the mortgage.
>
> ...
>
> The Council views the growing reliance by lenders on the certificate given by borrowers' solicitors with the greatest concern. Practitioners should exercise extreme caution in completing any such certificate. If necessary a practitioner should consider amending a certificate to ensure that it accurately represents the position as certified."

It may be that litigation by customers of banks will shift from the banks to the solicitor's insurers.

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