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UNCONSCIONABILITY AND GOOD FAITH IN BUSINESS TRANSACTIONS - 21 OCTOBER 2013

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Introduction

1. This paper will focus on unconscionable conduct in business transactions. This area of statute law is developing rapidly as ss 51AA, 51AB and 51AC of the *Trade Practices Act 1974* (Cth) ***(TPA)***, as superseded by ss 20, 21 and 22 of the *Australian Consumer Law* (***ACL***); and ss 12CA, 12CB and 12CC of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***) have percolated into the litigators' lexicon and the law reports.

A brief recap

2. Equity recognised before and around the time of the introduction of these statutory provisions that businesses could and did engage in unconscionable conduct in their dealings with their customers and other businesses, as *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 itself demonstrated with respect to a bank and guarantor; and *Walton Stores (Interstate) v Maher* (1988) 164 CLR 387, a case of equitable estoppel, demonstrated with respect to a lessor and lessee.

3. The *Trade Practices Revision Act 1986* (Cth) introduced s 52A into the *TPA*. The primary provision of was:

> "*A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable*."

4. Section 51AA (unconscionable conduct within the meaning of the unwritten law) and s 51AB (the old s 52A with amendments – unconscionable conduct in the supply of goods and services of a kind ordinarily acquired for personal, domestic of household use) of the *TPA* were inserted in 1992, on the recommendation of the Trade Practices Commission. Of s 51AA (now s 21), paragraph 41 of the Explanatory Memorandum to the amending Act stated that:

> "*The provision embodies the equitable concept of unconscionable conduct as recognised by the High Court in* Blomley v Ryan (1956) 99 CLR 362 and Commercial Bank of Australia v Amadio (1983) 151 CLR 447."

5. As French J (as he then was) said at first instance in *ACCC v Berbatis Holdings Pty Ltd* (2000) 169 ALR 324; [2000] FCA 2 at [8] that, "[t]his may turn out to have been an unduly narrow selection of case law". His Honour considered (at [20]) that the provision might cover, for example, the equitable doctrine of undue influence and, also considered for possible inclusion equitable estoppel (at [18]) and relief against forfeiture and penalties (at [19]). Gyles J, however, in *GPG (Australia Trading Pty Ltd v GIO Australia Holdings Ltd* (2001) 117 FCR 23 at 77 rejected the inclusion of equitable estoppel. Gummow and Hayne JJ considered that, in deciding the appeal in *ACCC v Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; [2003] HCA 18 at [45], it was unnecessary to decide between the competing views on the breadth of s 51AA. However, as early as 1996, Batt J in *Olex Focas Pty Ltd v Skodaexport Co. Ltd* (1996) 134 FRL 331 was, with respect, correctly, already taking s 51AA beyond such confines. I will return to that case.

6. Section 51AC of the *TPA* was added in 1998. It prohibited unconscionable conduct in connection with the supply or possible supply of goods or services to a person (other than a publicly listed company) or the acquisition or possible acquisition of goods of services from a person (other than a public company) where (initially) those goods or services were valued at less than $3 million.

7. Effective 11 March 2002, the statutory prohibitions on unconscionable conduct, insofar as they relate to financial services, were carved out of the *TPA* and included in the *ASIC Act* as ss 12CA, 12 CB and 12CC, where "financial service" is defined in s 12BAB of the latter Act. Sections 12CA, 12 CB and 12CC have been consistently amended in line with amendments to the *TPA*, including the promulgation of the *ACL*, so that ss 12CB and ss 12CC are today allied provisions to ss 21 and 22 of the *ACL*.

8. The foray of Parliaments into unconscionable conduct has not only lent the remedies available under the *Competition and Consumer Act 2010* (Cth) and the *ASIC Act* to plaintiffs, where equity generally only offered rescission, restitution and injunction. Sections 51AB and 51AC were held to have substantively "enlarged"[1] the traditional notion of 'unconscionable conduct' itself[2] by specifying a wide range of matters to which a court may have regard[3] and, more recently, in the case of s 21(4)(b) and (c) of the *ACL* and s 12CB(4)(b) and (c) of the *ASIC Act*, by expressing Parliament's intention that the prohibition in trade and commerce of unconscionable conduct in connection with the supply or possible supply, and acquisition or possible acquisition, of goods or services (other than to or from a listed public company) is capable of applying to: a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and to the terms and performance of a contract, and not merely to circumstances of its formation. In any event, the current ss 21(4)(a) of the *ACL* and 12CB(4)(a) of the *ASIC* Act state explicitly that that section is not limited by the unwritten law relating to unconscionable conduct.

A reminder

9. Before I list some further developments and judicial pronouncements in this area, it is worth keeping in mind that s 20(1) of the *ACL* does not apply to conduct that is prohibited by s 21;[4] whilst s 12CA(1) of the *ASIC Act* does not apply to conduct which is prohibited by s 12CB. Since the prohibitions contained in s 21 of the *ACL* and s 12CB of the *ASIC Act* are incontrovertibly wider than "unconscionable conduct within the meaning of the unwritten law

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[1] *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253; [2000] FCA 1365, Sundberg J at [31].

[2] Picked up, insofar as it occurs in the trade and commerce, by s 20 of the ACL and s 12CA of the *ASIC Act*: see the first instance decision of *ACCC v Berbatis Holdings Pty Ltd* (2000) 169 ALR 324; [2000] FCA 2, in which French J (as he then was) analysed and applied s 51AA of the *TPA* and compared it to ss 51AB and 51AC. See also the High Court decision on appeal: *ACCC v Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; [2003] HCA 18.

[3] See s 22 of the *Australian Consumer Law* and s 12CC of the *ASIC Act*. See also *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2000) 104 FCR 253; [2000] FCA 1365 at [31]; and *ACCC v Allphones Retail Pty Ltd (No. 2)* (2009) 253 ALR 324; [2009] FCA 17, Foster J at [113].

[4] *ACL*, s 20(2).

from time to time",[5] they may be little work for s 20(1) of the *ACL* and s 12CA(1) of the *ASIC Act* to do other than to act as a belt or brace to claims under s 21 and s 12CB. This is the opposite to the history of s 52 of the *TPA* (now s 18 of the *ACL*) vis a vis the more specific prohibitions on misrepresentation, such as in relation to employment and dealings in land.

Major and recent developments

10. The major and more recent developments in statutory unconscionable conduct include to following legislative changes:

    (a) the increase in 2007[6] in the transactional limit on the application of s 51AC of the *TPA* and s 12CC of the *ASIC Act* from $3 million to $10 million, followed its abolition in s 21 of the *ACL* and s 12CB of the *ASIC Act* (although transactions with publicly listed companies are still excluded in each case);

    (b) the abolition of the distinction between consumer and business transactions and the concept of "small business" with the replacement of:

        (i) both ss 51AB and 51AC of the *TPA* with s 21 of the *ACL*; and

        (ii) the old ss 12CB and 12CC of the *ASIC Act* with the current s 12CB and the replication of s 22 of the *ACL* in the new s 12CC in relation to the supply or possible supply of financial services;

    (c) the inclusion in the *ACL* and the *ASIC Act* of interpretive provisions such as the application of ss 21 12CB respectively to a system of conduct or pattern of behaviour (ss 21(4)(b) and s 12CB(4)(b)) referred to earlier; and the scope provided in ss 21(4)(c) and 12BC(4)(c) for the court to consider the terms of a contract and "the manner in which and the extent to which" a contract is "carried out" rather than being limited to considering the circumstances of contract formation where the court is asked to consider conduct "to which a contract relates".

11. Further, there has been somewhat of a flurry of recent judicial pronouncements on the meaning of 'unconscionable conduct' as used in these statutory provisions.

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[5] *ACL*, s 20(1); and *ASIC Act*, s 12CA(1).
[6] *Trade Practices Legislation Act (No. 1) 2007* (Cth), Schedule 3, ss 3, 4, 7 and 8.

12. In *Tonto Home Loans Australia Pty Ltd* (2011) 15 BPR 29,699; [2011] NSWCA 389, the New South Wales Court of Appeal considered the conduct of a mortgage originator (the appellant) *vis a vis* borrowers who were victims of a fraudulent broker. The appeal was dismissed. Allsop P (as the Chief Justice of the Federal Court then was), with whom Bathurst CJ and Campbell JA agreed, found that the loan and mortgage documents were unjust within the meaning of the *Contracts Review Act 1980* (NSW) but that the appellant had not acted unconscionably in contravention of ss 12CB or 12CC of the *ASIC Act* or ss 51AB or 51AC the *TPA*. His Honour summarised the relevant law as follows (at [291], omitting citations):

> *"Aspects of the content of the word "unconscionable" include the following: the conduct must demonstrate a high level of* ***moral obloquy*** *on the part of the person said to have acted unconscionably…; the conduct must be irreconcilable with what is right or reasonable...; factors similar to those that are relevant to the [*Contracts Review Act 1980 *(NSW)] are relevant…; the concept of unconscionable in this context is wider than the general law and the provisions are intended to build on and not be constrained by cases at general law and equity…; the statutory provisions focus on the conduct of the person said to have acted unconscionably… It is neither possible nor desirable to provide a comprehensive definition. The range of conduct is wide and* ***can include bullying and thuggish behaviour, undue pressure and unfair tactics, taking advantage of vulnerability or lack of understanding, trickery or misleading conduct****. A finding requires an examination of all the circumstances"* (emphasis added).

13. In *Violet Home Loans Pty Ltd v Schmidt* (2013) 93 ACSR 205; [2013] VSCA 56, the Court of Appeal of Victoria (Warren CJ, Cavanough and Ferguson AJJA) also considered an appeal by a mortgage originator in a case that also involved a borrower and a fraudulent intermediary. The Court agreed (at [58]) with Hargrave J in *Director of Consumer Affairs Victoria v Scully (No. 3)* [2012] VSC 444 at [31] that:

> *"[T]he conduct in question must be more than negligent. It will usually involve some deliberate wrongdoing, although there may be cases where recklessness will suffice. For example, cases involving wilful blindness. Ultimately, as the cases demonstrate, each case must depend on its own circumstances and the*

court must make a value judgement as to whether to characterise the conduct with "the opprobrium of unconscionability"".

14. In *Scully (No. 3)*, as the Court of Appeal noted, Hargrave J rejected a contention by the Director that "moral obloquy" is not required. Before distinguishing the facts from those in *Tanto*, the joint reasons proceeded to state (at [59]) that:

"*In our view,* ***little is to be gained by a close factual analysis of the myriad of cases that have considered whether particular conduct was unconscionable. While there are sometimes factual similarities between the cases, inevitably there are differences****. Similarly, we do not find it of assistance to consider whether conduct is unconscionable simply because of the type of lending that is involved, for example, asset based lending. Rather, the task requires a more synthesised approach which takes into account all of the facts relevant to the impugned conduct and determines whether, in all the circumstances, that particular is unconscionable*" (emphasis added).

15. In August this year, the Full Court of the Federal Court handed down its decision in *ACCC v Lux Distributors* [2013] FCAFC 90. That case involved the conduct of a direct seller of vacuum cleaners to whom s 74(a) of the *ACL* applied to mandate that the seller "clearly advise the person that the dealer's purpose is to seek the person's agreement to a supply of the goods or services concerned". Having found that the respondent's representatives had gained entry into the homes of three elderly women under the guise of a "free maintenance check" of their old vacuum cleaners when the real purpose was to sell them a new one, thereby contravening s 51AB of the *TPA* and s 21 of the *ACL*, Allsop CJ (at [23]) observed that:

"***The task of the court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers****. The content of those values is not solely governed by the legislature, but the legislature may illuminate, elaborate and develop those norms and values by the act of legislating, and thus standard setting. The existence of State legislation directed to elements of fairness is a fact to be taken into account. It assists the court in appreciating some aspects of the publicly recognised content of fairness, without in any way constricting it.* ***Values, norms and community expectations can develop and change over time. Customary morality develops "silently and unconsciously from one age to another", shaping law and legal values****:* Cardozo, The Nature of the Judicial Process (Newhaven, Yale University Press, 1921) pp 104-105. *These*

laws of the States and the operative provisions of the ACL reinforce the recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure. These considerations are central to the evaluation of the facts by reference to the operative norm of required conscionable conduct" (emphasis added).

16. This statement harks back to French J's statements in *Berbatis* (at [25]) that ss 51AB and 51AC (and thus, now, ss 21 and 22 and 12CB and 12CC):

"*[P]rescibe a standard rather than a rule. The boundaries of its application are normative rather than logical. There is a qualitative difference between their operation and that of the prohibition on misleading or deceptive conduct imposed by s52 of the Act even allowing for normative controls on the application of that section within its logical boundary. The categories of unconscionable conduct for the purposes of s51AB and s51AC will never be closed albeit the circumstances of the application of the standard prescribed in each of them is confined by the language of each section*".

With these statements in mind, how do I advise a client?

17. If, as the Court of Appeal has said, "little is to be gained by a close factual analysis of the myriad of cases"; and if, as Allsop CJ and French J have said, the provisions now contained in ss 21 and 22 and ss 12CB and CC prescribe " a standard rather than a rule" which is a "normative standard of conscience"; and if one must search for and find "moral obloquy" or "moral turpitude"[7] in the conduct of a prospective defendant, how does one advise a client whether conduct is unconscionable with the meaning of these Acts?

18. The phrase "moral obloquy" is worth considering. First, it is not a phrase used in the legislation. Rather, it has rapidly become part of an accepted judicial definition of the phrase "unconscionable conduct" where no statutory definition exists. The phrase is consistent with the ecclesiastic origins of equity, where most, if not all, Lord Chancellors before Sir Francis Bacon were either monks or priests acting, not only as the King's secretary, but as the Keeper of the King's Conscience. Nevertheless, references to morality, personal or communal, can with respect, run the risk of perpetuating the age-old criticism of equity that it lends itself too readily to idiosyncratic notions of fairness.

[7] *ispONE Pty Ltd v Telstra Corporation Ltd* [2013] FCA 823 at [19].

19. I regularly speak to colleagues and instructors who wish to "run by me" a client's circumstances to see if, in my opinion, a claim of unconscionable conduct is, at the minimum, arguable. In doing so, it is easy, after asking a few questions and expressing a view, by way of purported "explanation", that one develops, over time a "gut feeling" for what may constitute unconscionable conduct. But such an explanation simply evokes the old adage that equity varies according to the length of the Chancellor's foot. More personally, however, it is unlikely to enlighten the colleague or instructor and tends to guarantee further calls (which, from a practise development point of view, is not necessarily a bad thing).

20. However, I prefer to approach a set of facts by looking for one or more mechanisms which, in my opinion, are more instructive and which tend to underlie unconscionable conduct. There is a saying in science that every explanation is a description but not every description is an explanation. An explanation is a description of a mechanism. By looking for the operation of a few 'mechanisms' within the facts of a case, I find that I can better identify possible unconscionable conduct and explain why that conduct may qualify as such.

21. The first mechanism is dishonesty: conduct which intended and likely to lead another person into error. Fraud is always unconscionable, so any material dishonesty is always a safe indicator of unconscionable conduct. The "ruse" of the vacuum clearner salesmen in *ACCC v Lux* was decisive in the Full Court's decision. That said, s 18 of the ACL and other provisions dealing with misleading and deceptive conduct or misrepresentation may be easier to prosecute than an unconscionability claim.

22. The second mechanism I look is 'abuse'. "Obloquy" is defined by the Shorter Oxford Dictionary as "Abuse, calumny, slander… disgrace" but, ironically, it is not 'abuse' in that sense that I refer to. Rather, the mechanism that I look for is abuse in the sense of "ab-" or "mis-" use of a legal right, title or position; of a

relationship or even a situation[8] of trust, confidence or power; or of another's age, infirmity, a disability, a mistake or ignorance. It is the same meaning of "abuse" that is found in the causes of action of 'abuse of process'[9] and 'abuse of public office'.

23. The third mechanism, and perhaps the most difficult, is oppression: where the enforcement of a strict legal right would cause such overwhelming hardship to the other party that it ought not be enforced. This may be a sub-set of abuse but, because of the difficulty and rarity of its application, is something I consider separately, when dishonesty and abuse are not evident.

24. These mechanisms are not a product of my idiosyncratic analysis. Instances and examples of them are expressed or implied in one form or another in the list of factors in ss 22 and 12CC (particularly when read with s 18), including:
    (a) the relative strengths of the bargaining positions ((a) – abuse of power);
    (b) compliance with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier ((b) – abuse of legal rights);
    (c) whether the customer was able to understand any documents ((c) – abuse of a relationship or situation of trust and confidence, including the circumstances of another's special disadvantage);
    (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer..((d) – abuse of relationship of trust and confidence);
    (e) the extent to which supplier unreasonably failed to disclose any intended conduct of the supplier which might affect the interests of the customer or any risks to the customer from that conduct ((i) – deception or misrepresentation by silence); and
    (f) the extent to which the customer and supplier acted in good faith ((l)).

[8] See *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 at 553C-D per Mahoney JA.
[9] See *Williams v Spautz* (1991) 172 CLR 509, Mason CJ, Dawson, Toohey and McHugh JJ at 523 regarding the tort of abuse of process.

25. But the list of factors in s 22 of the *ACL* and s 12CC of the *ASIC Act* are not exhaustive. In my view, what lies at the heart of unconscionable conduct is the three mechanisms I have touched upon above: deception, abuse and oppression. Deception largely speaks for itself and is also fully covered by s 18 of the *ACL* (previously s 52) and s 12DA of the *ASIC Act*. Abuse and oppression require some further explanation.

'Abuse'

26. I do not take the Court of Appeal's remarks about the futility of close factual analysis of case law to mean that it is pointless to refer to previous decisions. I do not think, with respect, that that was meant at all. Whilst there is no doubt that the High Court has repeatedly directed the legal profession to start with the relevant statutory provision and not case law, such that references to cases on the tort of deceit in statutory misleading and deceptive conduct appeals have in the past met with a sharp rebuke, Parliament's use of the phrase "unconscionable conduct" necessarily conjures up doctrines and principles developed by courts of equity over centuries. Whilst ss 21(4)(a) and 12CB(4)(a) expressly provide that ss 21 and 12CB cannot be limited by the case law, nor, logically, can the case law be limited by those provisions insofar as those provisions are intended to build upon, and are broader than, the "unwritten law" by reason of the factors to which courts may have regard set out in ss 22 and 12CC of the respective Acts.

27. So we should remind ourselves that equity arose because the common law and statutes could, if applied strictly in certain circumstances, lead to injustice. This is the essence of equitable fraud and fraud on the statute. The archetypal example of this is the trust. Legal title to property is bestowed upon a trustee by a settlor for a purpose: to manage and/or dispose of the property and its income for the benefit of the beneficiaries. Thus, if a trustee asserts his or her legal title for a different or "alien" purpose[10] – usually for the benefit of the trustee, the trustee's family or friends – then the trustee is "abusing" his or her legal title. This mechanism of 'abuse' therefore involves a comparison between the

[10] See *Williams v Spautz* (1991) 172 CLR 509 at 523.

purpose for which a person enjoys a legal right, title or interest, or is taken into a relationship or situation of trust, confidence or power, with the purpose for which that legal right, title or interest, or relationship or situation is actually asserted or used.

28. The upshot of this is that frequently, but for the provisions we are discussing here, unconscionable conduct is "lawful" conduct. It does not breach the letter of the common law, whether of contract or property, nor (other) statute. The Courts of Kings Bench, Exchequer and Common Pleas had nothing to say about a defalcating trustee because in law, that person was dealing with his or her own property.[11]

29. This should not be startling. On the contrary, it is the very reason for equity. In *Olex Focas Pty Ltd v Skodaexport Co. Ltd*, an interlocutory injunction case, Batt J had to consider whether to restrain the defendant from calling up the entire sum the subject of two bank guarantees in circumstances where, prima facie, the plaintiffs had performed their obligations under the contract with the defendant; the plaintiffs had largely repaid to the defendant amounts secured by the guarantees, notwithstanding that the defendant had not performed its obligation and had caused delays; and the defendant had the option of calling up only part of the guaranteed sum but had nevertheless purported to call up the full amount.

30. Batt J found that in calling up the guarantees for the full amount, there was an arguable case that the defendant had acted unconscionably and he issued an injunction. He said (at 357-358):

> "***Even if one is acting within one's rights one may still engage in unconscionable conduct: Stern v McArthur [(1988) 165 CLR 489] (at 527). It must therefore follow that even if one believes, wrongly, that one is acting within one's rights, one can thereby engage in unconscionable conduct***.

[11] I frequently tell clients in unconscionability cases that the task for them is more difficult than other cases because the law, either contract or property law, is, *prima facie* at least, against them.

To my mind the first defendant's conduct based on its legal rights, or on its perception of its legal rights, so far as that conduct relates to the mobilisation or procurement advance guarantees is, according to ordinary human standards, quite against conscience. I am bound to say that I regard it as unconscionable… in demanding the full amount of guarantees securing advances, the greater part of which had been re-paid" (emphasis added).

31. Batt J in *Olex Focas Pty Ltd v Skodaexport Co. Ltd* was quoted with approval a few months ago by Pagone J in *ispONE Pty Ltd v Telstra Corporation Ltd* [2013] FCA 823, a case in which the defendant was restrained by interlocutory injunction from relying on its strict contractual rights to terminate the supply of telecommunication services to the plaintiff, a wholesaler of such services to about 100 retailers with some 70,000 fixed line/internet and some 210,000 prepaid mobile customers. Pagone J found (at [20]) that, having regard to the factors listed in s 22 of the *ACL*, there was an arguable case of unconscionable conduct in contravention of s 21. His Honour did not determine, and did not consider it necessary to determine at the interlocutory stage, whether there was "moral turpitude" on the part of Telstra for the purposes of the injunction.

32. In *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149, the Court of Appeal (Beazley, Ipp and Basten JJA) considered the law of duress and its relationship with the law of unconscionable conduct. In altering the existing taxonomy, the Court opined (at [66]) that:

"*The vagueness inherent in the terms "economic duress" and "illegitimate pressure" can be avoided by treating the concept of "duress" as limited to threatened or actual unlawful conduct. The threat or conduct in question need not be directed to the person or property of the victim, narrowly identified, but can be to the legitimate commercial and financial interests of the party. Secondly, if the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence (actual or presumptive) or unconscionable conduct based on an unconscientious taking advantage of his or her special disability or special disadvantage, in the sense identified in Amadio. Thirdly, where the power to grant relief is engaged because of a contravention of a statutory provision such as s 51AA, s 51AB or s 51AC of the Trade Practices Act, the Court may be entitled to take into account a broader ranger of circumstances than those considered relevant under the general law*".

33. So, having established that unconscionable conduct may be and, frequently will be, conduct which is otherwise lawful, what are the kinds of abuses I look for?

34. I have already referred to cases in which defendants have been found to "abuse" their strict legal rights. In *Olex Focas Pty Ltd v Skodaexport Co. Ltd* Batt J looked at the purpose for which the guarantees had been issued and how they were being used by the defendant. It is clear that his Honour considered that *Skoda* was using its strict legal rights to put pressure on the plaintiffs to obtain a better result in their dispute, which had gone to arbitration.

35. Further, as mentioned, it was alleged that *Skoda*'s own conduct had substantially caused the delays and other matters which *Skoda* relied on to call up the guarantees. A court of equity will be far more ready to restrain the assertion of contractual and other legal rights by a party where that party's own conduct has contributed to another's inability to comply with its legal obligations. This can be seen most clearly in relief against forfeiture and penalty cases such as *Stern v MacArthur* (1988) 165 CLR 489 and *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315.[12] In *Stern* (at 502-503), Mason CJ stated that equity intervenes only where the vendor [in a sale of land contract] has, by the vendor's conduct, caused or contributed to a circumstances rendering it unconscionable for the vendor to insist upon its legal rights. Althought Mason CJ was in the minority on the outcome in *Stern*, his reasoning was approved by Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ in *Tanwar* (at 328).

36. An early example of abuse of a relationship of trust and confidence is *Johnson v Buttress* (1936) 56 CLR 113, an undue influence case. In that case, a woman and family friend accepted a transfer of a house from an elderly and simple man who was emotionally lost and in need of friendship and care after the death of his wife. The house was his only substantial asset. Having set out the kinds of relationships in which equity will presume that a transfer has been the subject of undue influence (solicitor from client; doctor from patient; parent from child),

[12] Note the discussion by the plurality on the meaning of "unconscionable conduct" at 324-330.

Dixon J also observed (at 134) that a relationship of trust and confidence can be proven as a matter of fact. He said that in such circumstances, the recipient of a transfer carries the burden of justifying the transaction. Dixon J added (at 134-135) that the doctrine and burden:

> "…applies whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part. One occupying such a position falls under a duty in which fiduciary characteristics may be seen. It is his duty to use his position of influence in the interest of no one but the man who is governed by his judgment, gives him dependence and entrusts him with his welfare".

37. That is to say, where a person accepts a relationship of trust and confidence, and is given dependency and trust, he or she must not abuse that relationship by accepting gifts and otherwise acting for their own benefit rather than that of the dependant. See also *Spong v Spong* (1914) 18 CLR 544; *Louth v Diprose* (1992) 175 CLR 621; and *Bridgewater v Leahy* (1998) 194 CLR 457.

38. A variation on this theme is where a lender abuses the trust and confidence existing or presumed to exist between a husband and wife to obtain from the latter security for a loan to the former without proving a full explanation of the transaction and the security to the guarantor: see *Yerkey v Jones* (1939) 63 CLR 649 and *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.

39. *ACCC v Lux Distributors* [2013] FCAFC 90 did not involve a relationship of trust and confidence of the kind found in *Johnson v Buttress* but there was, arguably, a *situation* of trust and confidence that arose on the facts and which was abused by the salesmen. Allsop CJ found (at [65]) that:

> "*The primary purpose of each representative [of the respondent] was to sell a vacuum cleaner, not to carry out a free maintenance check. The initial deception, the ruse, was critical to the creation of the opportunity to sell and was the launching pad for all that followed. The deception tainted all the conduct thereafter*".

40. So the first mechanism I would look, and which Allsop CJ found, for is present: deception. This appears decisive to Allsop CJ, combined with the fact that the

events the subject of the initial complaint were part of a "course of conduct or pattern of behaviour" within the meaning of s 21(4)(b) and not, like *Johnson v Buttress*, a one-off transaction.

41. But the second mechanism is also present. The purpose for which the elderly women in *Lux* permitted the salespersons to enter the security and privacy of their homes was to conduct a free maintenance check on her existing vacuum cleaner. The *Lux* salespersons abused that invitation because they entered the woman's home for different, alien, purpose, namely, to sell them a new machine.

Oppression

42. In *Olex Focas Pty Ltd v Skodaexport Co. Ltd* (at p356), Batt J adopted, as an instance of the notion unconscionable conduct, the principle that

> "that people should not, by an appeal to strict legal rights, cause hardship to others by violating their reasonable expectations".

43. An early instance of the application of that principle was *Dowsett v Reid* (1913) 15 CLR 695, where the High Court, perhaps for the first time, considered an "unfair and unconscionable bargain" (according to the catch words) or a "hard bargin" (Barton J at at 708). In that case the High Court (Griffith CJ and Barton J, Higgins J dissenting) declined to exercise the Court's discretion to grant specific performance of a lease which required the defendant to "clear fit for plough 300 acres… and ringbark 2,389 acres"[13] in addition to paying rent.

44. Griffith CJ and Barton J found that the defendant had completely misjudged the contract and that its enforcement would cause great hardship. The Court awarded modest damages in lieu of specific performance.

45. Oppression may also be the operating mechanism in relief against penalty cases. This equitable jurisdiction arose where bonds, drawn up in lieu of contracts at a time when most people were illiterate and which were enforceable on presentation to the common law courts, were so presented by unscrupulous

[13] At 696.

plaintiffs and so enforced those courts notwithstanding that the promisor had paid on the bond but simply failed to get the bond in and destroyed.

Abuse and oppression in business relationships

46. Some of the cases I have referred to by way of example are not business relationship cases. But they are valid examples because, in my view, there is no doubt that dishonesty can arise in business relationships. Further, relationships and situations of trust and confidence can and do arise in business and can be abused, notwithstanding the myth that business people will be more capable of, and diligent to, protect their own interests.

47. For example, the law of undue influence presumes a relationship of trust and confidence between a solicitor and her client. Further, it is open for a plaintiff to prove for the purposes of the doctrine of undue influence that, as a matter of fact, a relationship of trust and confidence existed between any two people. Having established the existence of such a relationship, whether by presumption or proof, any substantial benefit received by the repository of the trust and confidence will be unconscionable and liable to be disgorged. And, as in the case of *ispONE Pty Ltd v Telstra Corporation Ltd* (at [21] – prior to consideration of issues of balance of convenience at [[22]-[23]), it may be that the insistence upon strict legal rights by one party will be so catastrophic for the other that a court will intervene, at least on an interlocutory basis. In many cases, that may be all that is required to save a defendant and resolve the dispute.

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