HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION APPELLANT

AND

CG BERBATIS HOLDINGS PTY LTD & ORS RESPONDENTS

Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd
[2003] HCA 18
9 April 2003
P64/2002

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

N W McKerracher QC with E C Gordon for the appellant (instructed by Australian Government Solicitor)

D F Jackson QC with P G Clifford for the first to sixth respondents (instructed by Haydn Robinson)

N C Hutley SC with N Perram for the seventh and eighth respondents (instructed by Julian Johnson)

CATCHWORDS

Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd

Trade practices – Unconscionable conduct – *Trade Practices Act* 1974 (Cth), s 51AA(1) – Where conduct was in a commercial context – Condition for renewal of lease – Required by lessor – Lessees to abandon legal claims against lessor – Whether conduct of lessor unconscionable.

Equity – Unconscionable conduct – Where conduct was in a commercial context – Condition for renewal of lease – Required by lessor – Lessees to abandon legal claims against lessor – Whether unconscientious exploitation of special disadvantage of another – Relevance of inequality of bargaining power to finding of special disadvantage.

Words and phrases – "unconscionable within the meaning of the unwritten law", "special disadvantage".

Trade Practices Act 1974 (Cth), s 51AA(1).

1 GLEESON CJ. The facts are set out in the reasons for judgment of Gummow and Hayne JJ. The case concerns the application of s 51AA of the *Trade Practices Act* 1974 (Cth) ("the Act") to those facts.

2 The specific question is whether the lessors of premises in a shopping centre engaged in conduct that was "unconscionable within the meaning of the unwritten law" in stipulating, as a condition of their consent to a proposed renewal or extension of a lease, in contemplation of its assignment, a requirement that the lessees would abandon certain claims against them. The lessees were in a difficult bargaining position. They had no option to renew their lease. Their prospects of making an advantageous sale of their business depended upon the co-operation of the lessors, which they were not obliged to give. Considered objectively, and with the benefit of hindsight, the claims that the lessees agreed to abandon were of little value (less than $3,000). They regarded them as more valuable, but considered that in the circumstances, they had no choice but to give them up. The principal reason why they had no such choice was that they had no option to renew their lease. They could not offer a purchaser of their business a worthwhile tenure unless the lessors agreed to an extension or renewal of the lease and an assignment. The lessors were willing to give such agreement only on the condition already mentioned.

3 It may be noted that, although the appellant, the Australian Competition and Consumer Commission, claims that the lessors' conduct was unconscionable, the lessees never sought to have the deed they entered into with the lessors set aside. That would have been the last thing they wanted. Whether they might have had cl 14 of the deed set aside, assuming there had been unconscionable conduct on the part of the lessors, is a question that does not arise[1]. The issue is whether the conduct of the lessors was unconscionable. French J held that it was[2]. The Full Court of the Federal Court (Hill, Tamberlin and Emmett JJ) reversed that decision[3]. For the reasons that follow, I consider that the Full Court was correct.

4 It was not contended that the proper course for the lessors to follow, consistently with their obligations under the Act, was simply to have no dealings at all with the lessees, but to allow their lease to expire and to find a new tenant. That would have been an unwelcome (and costly) outcome for the lessees. It

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1 cf *Bridgewater v Leahy* (1998) 194 CLR 457 at 472-474 [50]-[56].

2 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2000) ATPR ¶41-778.

3 *C G Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555.

would be surprising if it were the policy of the Act to require the lessors to take that course, to the minor disadvantage of the lessors and the major disadvantage of the lessees. The practical consequence of the argument for the appellant is that the lessors, having been requested to agree to something they were entitled to refuse, were acting in contravention of the Act by imposing a condition upon their agreement. Yet if that be correct, it seems to mean that the lessors, if well advised, should simply have refused to discuss the matter of a renewal or extension of the lease.

5 Although he was concerned to make the point that ss 51AB and 51AC of the Act have a wider operation than s 51AA, senior counsel for the appellant argued the case on the basis that the relevant form of unconscionable conduct in question was "the knowing exploitation by one party of the special disadvantage of another." He said that, by special disadvantage, he meant "a disabling circumstance seriously affecting the ability of the innocent party to make a judgment in [that party's] own best interests." Applied to a case such as the present, that approach is consistent with what the Act calls the unwritten law concerning unconscionable conduct, bearing in mind that the Act also allows for development of the law from time to time. It is also consistent with the legislative history of s 51AA. In the Second Reading speech when the legislation was introduced, it was said[4]:

> "Unconscionability is a well understood equitable doctrine, the meaning of which has been discussed by the High Court in recent times. It involves a party who suffers from some special disability or is placed in some special situation of disadvantage and an 'unconscionable' taking advantage of that disability or disadvantage by another. The doctrine does not apply simply because one party has made a poor bargain. In the vast majority of commercial transactions neither party would be likely to be in a position of special disability or special disadvantage, and no question of unconscionable conduct would arise. Nevertheless, unconscionable conduct can occur in commercial transactions and there is no reason why the Trade Practices Act should not recognise this."

6 The Explanatory Memorandum referred to the decisions of this Court in *Blomley v Ryan*[5] and *Commercial Bank of Australia Ltd v Amadio*[6]. Those decisions were considered more recently in *Bridgewater v Leahy*[7].

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4 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2408.

5 (1956) 99 CLR 362.

6 (1983) 151 CLR 447.

7 (1998) 194 CLR 457.

7 These decisions mark out the area of discourse involved, and explain the approach of the appellant, which was accepted by the respondent. It was also the approach taken by French J, and by the Full Court. In the context of s 51AA, with its reference to the unwritten law, which is the law expounded in such cases as those mentioned above, unconscionability is a legal term, not a colloquial expression. In everyday speech, "unconscionable" may be merely an emphatic method of expressing disapproval of someone's behaviour, but its legal meaning is considerably more precise.

8 In *Blomley v Ryan*[8], Fullagar J, after pointing out that the circumstances of disability or disadvantage that can be involved in unconscionable conduct are of great variety and are difficult to classify, gave, as examples, "poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary." The common characteristic of such circumstances is that they place one party at a serious disadvantage in dealing with the other.

9 In the present case, French J said that the lessees suffered from a "situational" as distinct from a "constitutional" disadvantage, in that it did not stem from any inherent infirmity or weakness or deficiency. That idea was developed somewhat in a joint judgment, to which French J was a party, in *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd*[9], where it was said that, under the rubric of unconscionable conduct, equity will set aside a contract or disposition resulting from the knowing exploitation by one party of the special disadvantage of another, and then it was said:

> "The special disadvantage may be constitutional, deriving from age, illness, poverty, inexperience or lack of education: *Commercial Bank of Australia Ltd v Amadio*. Or it may be situational, deriving from particular features of a relationship between actors in the transaction such as the emotional dependence of one on the other: *Louth v Diprose*; *Bridgewater v Leahy*".

10 While, with respect to those who think otherwise, I would not assign the facts of *Bridgewater v Leahy* to such a category, the reference to emotional dependence of the kind illustrated by *Louth v Diprose*[10] as a form of special disadvantage described as "situational" rather than "constitutional" is understandable and acceptable, provided that such descriptions do not take on a

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8 (1956) 99 CLR 362 at 405.

9 (2002) 117 FCR 301 at 318.

10 (1992) 175 CLR 621.

life of their own, in substitution for the language of the statute, and the content of the law to which it refers. There is a risk that categories, adopted as a convenient method of exposition of an underlying principle, might be misunderstood, and come to supplant the principle. The stream of judicial exposition of principle cannot rise above the source; and there is nothing to suggest that French J intended that it should. A problem is that the words "situation" and "disadvantage" have ordinary meanings which, in combination, extend far beyond the bounds of the law referred to in s 51AA; and, it may be added, far beyond the bounds of what was explained to Parliament as the purpose of the section.

11 One thing is clear, and is illustrated by the decision in *Samton Holdings* itself. A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power. Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests.

12 In *Amadio*, Mason J[11] said that the point of using the qualifying word "special" before "disadvantage" in this context is "to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests". It was the inability of a party to judge his or her own best interests that was said by McTiernan J in *Blomley v Ryan*[12], and again by Deane J in *Amadio*[13], to be the essence of the relevant weakness.

13 The adjective "special" was also used by Kitto J in *Blomley v Ryan*[14] when he referred to the "well-known head of equity" invoked in that case. He 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."

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11 (1983) 151 CLR 447 at 462.

12 (1956) 99 CLR 362 at 392.

13 (1983) 151 CLR 447 at 476-477.

14 (1956) 99 CLR 362 at 415.

14 Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position. There may be cases where both elements are involved, but, in such cases, it is the first, not the second, element that is of legal consequence. It is neither the purpose nor the effect of s 51AA to treat people generally, when they deal with others in a stronger position, as though they were all expectant heirs in the nineteenth century, dealing with a usurer[15].

15 In the present case, there was neither a special disadvantage on the part of the lessees, nor unconscientious conduct on the part of the lessors. All the people involved in the transaction were business people, concerned to advance or protect their own financial interests. The critical disadvantage from which the lessees suffered was that they had no legal entitlement to a renewal or extension of their lease; and they depended upon the lessors' willingness to grant such an extension or renewal for their capacity to sell the goodwill of their business for a substantial price. They were thus compelled to approach the lessors, seeking their agreement to such an extension or renewal, against a background of current claims and litigation in which they were involved. They were at a distinct disadvantage, but there was nothing "special" about it. They had two forms of financial interest at stake: their claims, and the sale of their business. The second was large; as things turned out, the first was shown to be relatively small. They had the benefit of legal advice. They made a rational decision, and took the course of preferring the second interest. They suffered from no lack of ability to judge or protect their financial interests. What they lacked was the commercial ability to pursue them both at the same time.

16 Good conscience did not require the lessors to permit the lessees to isolate the issue of the lease from the issue of the claims. It is an everyday occurrence in negotiations for settlement of legal disputes that, as a term of a settlement, one party will be required to abandon claims which may or may not be related to the principal matter in issue. French J spoke of the lessors using "[their] bargaining power to extract a concession [that was] commercially irrelevant to the terms and conditions of any proposed new lease." A number of observations may be made about that. Parties to commercial negotiations frequently use their bargaining power to "extract" concessions from other parties. That is the stuff of ordinary commercial dealing. What is relevant to a commercial negotiation is whatever one party to the negotiation chooses to make relevant. And it is far from self-evident that when a landlord is considering a tenant's request to renew a lease, the existence of disputes between the parties about the current lease is commercially irrelevant to a decision as to whether, and on what terms, the landlord will agree to the request. The reasoning of French J appears to involve a judgment that it was wrong for the lessors to relate the matter of the lessees' claims to the matter

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15 cf *Snell's Equity*, 30th ed (2000) at 621-622.

of their request for a renewal of the lease. Why this is so was not explained. It formed a crucial part of the reasoning of French J and, in my view, cannot be sustained.

17 Reference was earlier made to counsel's submission that there was here a disabling circumstance affecting the ability of the lessees to make a judgment in their own best interests. In truth, there was no lack of ability on their part to make a judgment about anything. Rather, there was a lack of ability to get their own way. That is a disability that affects people in many circumstances in commerce, and in life. It is not one against which the law ordinarily provides relief.

18 In the course of their reasoning on the contentions advanced by the appellant, and in distinguishing between driving a hard bargain and unconscionable conduct, the members of the Full Court, in a single sentence, remarked that it could not be said that the will of the lessees was overborne, or that they did not act independently and voluntarily. In the context, I would not understand that to indicate that their Honours thought that unconscionability required duress. It was simply an observation of fact as to part of the context in which the issue of unconscionability arose.

19 The conclusion of the Full Court of the Federal Court was correct. The appeal should be dismissed with costs.

20 GUMMOW AND HAYNE JJ. This appeal from the Full Court of the Federal Court (Hill, Tamberlin and Emmett JJ)[16] turns upon the application of Pt IVA of the *Trade Practices Act* 1974 (Cth) ("the Act") to a dispute concerning the renewal of a lease of premises in a shopping centre on terms that required the tenants to withdraw pending legal proceedings against the landlords. The Full Court reversed the decision of the primary judge (French J)[17] and found against the tenants.

The facts

21 The shopping centre is known as "Farrington Fayre" and is located at Farrington Road, Leeming in Western Australia ("the Centre"). The first to fourth respondents ("Berbatis Holdings", "GPA", "P & G Investments" and Mr Atzemis) ("the owners") are the registered proprietors as tenants in common of the land on which the Centre stands. The business of the Centre is conducted by the owners as partners. The fifth respondent (Mr Berbatis) is a director of Berbatis Holdings and the sixth respondent (Ms Heijne) is a director of P & G Investments. The seventh and eighth respondents ("Sullivan Property" and Mr Sullivan), who were separately represented, were respectively a company engaged to provide services as asset manager and a director thereof. At all relevant times, Mr Sullivan advised the owners respecting negotiations concerning leases with the tenants at the Centre.

22 The Centre comprises some 26 leased premises. Mr and Mrs Roberts in their capacity as trustees of the Roberts Family Trust leased shop 14 at which they conducted a business styled "Leeming Fish Supply". Mr and Mrs Roberts had purchased the fish and chip shop business with effect from 1 October 1989. The previous owner had conducted the business for approximately two and a half years and Mr and Mrs Roberts took an assignment of the remainder of the lease. Thereafter, in June 1992, they exercised a five year option, with the result that the term of the lease was extended until 14 February 1997.

23 For approximately five years, Mrs Roberts had been the proprietor of small businesses in the United Kingdom, including a florist and a fruit and vegetable shop. She also had managed a number of other businesses over some 15 years. After moving to Australia, she had been involved in management roles

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16 *C G Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555.

17 *Australian Competition & Consumer Commission v C G Berbatis Holdings Pty Ltd* (2000) ATPR ¶41-778.

in a number of companies. She gave evidence of her belief that she had "very good business management experience".

24 In 1990, a number of tenants at the Centre, including Mr and Mrs Roberts, became concerned at some of the charges levied under the terms of their leases. Legal advice was sought and a "fighting fund" was established. In January 1996, proceedings were instituted by Ms Donna Clark, who operated at the Centre a business styled "Gifts R Us", and other tenants against the owners in the Commercial Tribunal of Western Australia ("the Tribunal"), a body established under the *Commercial Tribunal Act* 1984 (WA). The Tribunal has jurisdiction conferred by s 24 of the *Commercial Tenancy (Retail Shops) Agreements Act* 1985 (WA) ("the Commercial Tenancy Act") to hear and determine various disputes under that statute. The Roberts (and other tenants) held a "retail shop lease" to which the Commercial Tenancy Act applied.

25 On 13 December 1996, the Tribunal delivered a decision in a "test case" in which one of the tenants, John Hender Real Estate Pty Ltd ("Hender"), was partially successful. The owners and the tenant both filed appeals in the District Court of Western Australia. Thereafter, by consent, an order was made in the District Court quashing the Tribunal decision and remitting the matter for rehearing. On 1 April 1997 (whilst the Roberts were in negotiations with the owners respecting renewal of their lease), Hender commenced proceedings in the Supreme Court of Western Australia claiming declarations and damages against the owners in relation to matters similar to those the subject of the proceedings which had been brought in the Tribunal. The Supreme Court proceedings were settled in November 1998 on terms which involved repayments to tenants up to a maximum of $3,898 for any one tenant. Had the Roberts participated in the settlement, they would have been entitled to $2,429.50 by way of refund of management fees and $356.93 in respect of variable outgoings.

26 Section 10(1) of the Commercial Tenancy Act stated:

> "Notwithstanding any other written law, a retail shop lease shall be taken to grant to the tenant a right to assign the lease, subject only to a right of the landlord to withhold consent to an assignment on reasonable grounds."

The retail shop lease held by Mr and Mrs Roberts for the fish shop was for a term to expire on 14 February 1997. The Roberts had made it known to the manager of the Centre that they were anxious to sell their business and that if they could negotiate a new lease term, which they could then assign to the purchaser, that would assist them. A purchaser, Mr Holland, on 28 October 1996, signed an offer to purchase the business for $65,500, subject to a lease of the premises being assigned to his satisfaction.

27 Mrs Roberts estimated at approximately $50,000 the alleged overpayments which she and her husband were interested in recovering from the owners. The owners required the inclusion in a proposed deed of assignment of cl 14 whereby the Roberts and Mr Holland would discharge the owners from all claims arising from any act or omission by the owners prior to the proposed assignment date and Mr and Mrs Roberts would consent to the dismissal of any current legal proceedings against the owners. Mrs Roberts' solicitor advised her on 2 December 1996 not to sign a document including cl 14. French J made a finding[18]:

> "In the event, after consideration, Mrs Roberts decided that she had little option but to sign the documents. Her lease was due to expire on 14 February 1997. There was no prospect of renewal and without that she would have no business to sell. She believed she had no choice but to sign the deed as it was. She then decided to sign the deed and did so. She felt extremely upset and angry that [the managing agent] and the owners had, in her view, put her in a situation where she had no choice but to give up her legal rights."

28 The settlement of the sale took place on 2 December 1996. Mr Holland took possession of the business and subsequently traded in a "viable position". Notwithstanding the provisions of cl 14, the Roberts did not withdraw from the then current litigation against the owners and continued to contribute to the costs involved.

The ACCC litigation

29 In subsequent litigation instituted in the Federal Court on 3 April 1998, the Australian Competition and Consumer Commission ("the ACCC") alleged that the imposition by the owners of conditions requiring withdrawal by Mr and Mrs Roberts of their participation in the pending legal proceedings as a condition of the grant of a new lease contravened Pt IVA of the Act. A case also was presented under Pt V of the Act, in particular s 52, of misleading or deceptive conduct. This related to alleged representations made in the course of negotiations with the Roberts that the owners would not require them, as a condition of obtaining a new lease, to withdraw from the legal action against the owners. In particular, disputed evidence was given respecting a conversation with Mrs Roberts in October 1996. French J was not prepared to find that the representations had been made so the claim of contravention of s 52 failed. The ACCC's case also included allegations respecting the treatment of other tenants but French J held that no case of contravention of s 51AA or s 52 was made

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18 (2000) ATPR ¶41-778 at 41,184.

out[19]. The Full Court and this Court have been concerned only with the position of the Roberts.

30 With respect to the Roberts, French J granted declaratory relief that the various respondents, either directly or as parties knowingly concerned, had contravened s 51AA of the Act; the conduct declared to be unconscionable within the meaning of the section was the requirement as a condition of the grant of a new lease to Mr and Mrs Roberts that they release the owners of the Centre from various claims arising under their existing lease. His Honour also ordered that the individual, as distinct from the corporate, respondents attend a trade practices compliance seminar conducted by a specialist in trade practices law where the unconscionable conduct provisions of the Act, and in particular s 51AA, were addressed. His Honour declined to order the injunctive relief sought by the ACCC.

31 An appeal to the Full Court succeeded and in place of the relief granted by the primary judge the Full Court ordered that the application be dismissed with costs.

Part IVA of the Act

32 Before considering the issues which arise on the appeal, it is convenient to return to Pt IVA of the Act. Part IVA was added by s 9 of the *Trade Practices Legislation Amendment Act* 1992 (Cth) ("the 1992 Act"). Part IVA since has been amended, by the *Trade Practices Amendment (Fair Trading) Act* 1998 (Cth), in particular by the insertion of s 51AC (headed "Unconscionable conduct in business transactions"). Section 51AC(3) lists in pars (a)-(k) various circumstances to which regard may be had in determining whether there has been a contravention of that section and does not rely simply upon "the unwritten law". At the relevant time for this litigation, Pt IVA comprised ss 51AA-51AB. Section 51AA stated:

> "(1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.
>
> (2) This section does not apply to conduct that is prohibited by section 51AB."

The latter provision forbade corporations, in trade or commerce, from engaging in conduct in connection with the supply or possible supply of goods or services

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19 (2000) ATPR ¶41-778 at 41,199-41,200.

to a person which, in all the circumstances, was unconscionable. It is accepted that the conduct complained of in this litigation, whilst in trade or commerce, was not conduct prohibited by s 51AB. The result was that the dispute turned entirely upon s 51AA(1).

33 The remedies for contravention of Pt IVA were found in Pt VI of the Act. Injunctive relief might be granted under s 80 and other orders made under s 87. Section 82 did not allow recovery of damages in respect of contravention of Pt IVA but some pecuniary remedies would appear to have been available under par (d) of s 87(2). The powers to prohibit payment or transfer of money or other property by order under s 87A applied to Pt IVA proceedings. The provisions in s 76 for the recovery of pecuniary penalties did not apply. Standing to institute and maintain proceedings was conferred upon the ACCC by various provisions, in particular by ss 80 and 87.

34 The validity of s 51AA was called into question before the primary judge[20]. Full argument was heard by his Honour on the matter and the validity of the provision was upheld[21]. In this Court, no question arises respecting the validity of s 51AA. Rather, the issues concern the construction of the provision and its application to the facts concerning the Roberts.

The construction of s 51AA

35 The Full Court drew a distinction between parties adopting "an opportunistic approach to strike a hard bargain" and those who act unconscionably within the meaning of the section[22]. Their Honours added[23]:

> "*It cannot be said that the Roberts' wills were so overborne that they did not act independently and voluntarily.* Unfortunately for the Roberts, the owners were under no obligation to renew or extend their lease. The Roberts had the choice of either maintaining their legal claims against the owners and losing the opportunity to sell their business or abandoning their claims and gaining the opportunity to sell their business. They made

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20 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (1999) 95 FCR 292.

21 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491.

22 (2001) 185 ALR 555 at 571.

23 (2001) 185 ALR 555 at 571.

that choice of abandoning their claims. That may have been a hard bargain, but it was not an unconscionable one." (emphasis added)

36 The ACCC submits that the Full Court was in error to construe s 51AA as requiring that the will of the individual in question be so overborne as to deny to what was done the nature of an independent and voluntary act. That submission should be accepted. What was said by the Full Court reflects notions associated with common law duress and the defence of *non est factum* rather than unconscionable conduct[24].

37 Counsel for the owners did not seek to uphold this approach to the construction of the section. Counsel for all respondents submitted, and counsel for the ACCC did not really demur, that the litigation had been pleaded and conducted on the footing that the expression "engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories" was to be understood with reference to the equitable doctrine expounded, in particular, by this Court in *Commercial Bank of Australia Ltd v Amadio*[25]. The respondents submitted that the result in the Full Court should be upheld and that the application should have been dismissed by the primary judge because the facts found fell short of circumstances which would attract the operation of the principles expounded in *Amadio*. The ACCC submitted to the contrary but the submissions for the respondents should be accepted.

38 The parties, correctly, accept that the term "unconscionable" is not used in s 51AA in any sense which is at large or reflects an ordinary or natural meaning in general usage. That is plain from the identification in s 51AA of "the meaning" given by "the unwritten law, from time to time". The identification thus made is the principles of law and equity expounded from time to time in decisions respecting the common law of Australia. It is now settled that there is but one Australian common law and the reference in the section to "the unwritten law ... of the States and Territories" must be read in that way[26]. French J held that the phrase in question "can only be taken as a reference to the common law

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24 *Barton v Armstrong* [1976] AC 104 at 118-119; *Bridgewater v Leahy* (1998) 194 CLR 457 at 475-476 [65], 477-478 [73], 491-492 [118]-[119]; *"R" v Her Majesty's Attorney-General for England and Wales* [2003] UKPC 22 at [15]-[16].

25 (1983) 151 CLR 447.

26 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Lipohar v The Queen* (1999) 200 CLR 485; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

of Australia, a single body of judge-made law"[27], and the contrary has not been suggested in submissions to this Court.

39 French J also said[28]:

> "The concept of unconscionability is arguably to be found at two levels in the unwritten law. There is a generic level which informs the fundamental principle according to which equity acts. There is the specific level at which the usage of 'unconscionability' is limited to particular categories of case. The Explanatory Memorandum [to the Bill for the 1992 Act] suggests that it is the latter sense that was intended – defined by reference to *Blomley v Ryan*[29] and *Commercial Bank of Australia [Ltd] v Amadio*[30]."

The relevant passage in the Explanatory Memorandum said of s 51AA that it embodied "the equitable concept of unconscionable conduct as recognised by the High Court" in those two cases[31].

40 The reference by his Honour to the use in s 51AA of the term "conduct that is unconscionable within the meaning of the unwritten law" as identifying particular categories of case should be accepted as indicating the proper construction of s 51AA. The argument on the present appeal of all parties appeared to proceed on that footing. However, there then arises the question as to which particular manifestations of equity's concern with unconscientious or unconscionable conduct are reached by s 51AA. The issue is an important one because s 51AA does more than re-enact for application in trade and commerce the general law principles concerned. Contravention of s 51AA attracts particular remedies under the Act which may not otherwise be available and provides, as this case illustrates, for litigation to be instituted and conducted by a public body, the ACCC.

41 In *The Commonwealth v Verwayen*[32], Deane J referred to the use of the terms "unconscientious" and "unconscionable" in "areas where equity has

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27 (2000) 96 FCR 491 at 502.

28 (2000) 96 FCR 491 at 502.

29 (1956) 99 CLR 362.

30 (1983) 151 CLR 447.

31 (2000) 96 FCR 491 at 495.

32 (1990) 170 CLR 394 at 446.

traditionally intervened to vindicate the requirements of good conscience". Later, in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[33], Gleeson CJ observed that, whilst it may be appropriate to identify as "unconscientious" engagement in conduct enjoined by injunction:

> "that leaves for decision the question of the principles according to which equity will reach that conclusion. The conscience of the [defendant], which equity will seek to relieve, is a properly formed and instructed conscience."

His Honour added that the real task was to decide what a properly formed and instructed conscience would have to say about the conduct sought to be enjoined.

The term "unconscionable"

42 The term "unconscionable" is used as a description of various grounds of equitable intervention to refuse enforcement of or to set aside transactions which offend equity and good conscience. The term is used across a broad range of the equity jurisdiction. Thus, a trustee of a settlement who misapplies the trust fund and the fiduciary agent who makes and withholds an unauthorised profit may properly be said to engage in unconscionable conduct. The relief given by equity against the imposition of monetary penalties and the forfeiture of proprietary interests has been said to reflect the attitude of equity to overreaching and unconscionable dealing[34], as well as to accident, mistake and surprise[35]. The remedy of rescission may reflect the characterisation as unconscionable of the conduct of the party seeking to hold the plaintiff to a contract entered into under the influence of innocent misrepresentation[36] or unilateral mistake[37]. Again, the various doctrines and remedies in the field of estoppel, at a general level, may be said to overcome the unconscionable conduct involved in resiling from the representation or expectation induced by the party estopped.

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33 (2001) 208 CLR 199 at 227 [45].

34 *Stern v McArthur* (1988) 165 CLR 489 at 526-527; *Ashburner's Principles of Equity*, 2nd ed (1933) at 262; *Pomeroy's Equity Jurisprudence*, 5th ed (1941), §433.

35 *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 722.

36 *Redgrave v Hurd* (1881) 20 Ch D 1 at 12-13; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 535-536 [117].

37 *Taylor v Johnson* (1983) 151 CLR 422 at 430-433.

43 It will be unconscientious for a party to refuse to accept the position which is required by the doctrines of equity. But those doctrines may represent, as the above examples indicate, the outcome of an interplay between various themes and values of concern to equity. The present editor of *Snell* has noted the use of the terms "unconscionable" and "unconscientious" "in areas as diverse as the nature of trusteeship and the doctrine of laches"; he rightly observed that "this may have masked rather than illuminated the underlying principles at stake"[38].

44 In *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd*[39], Gyles J expressed the view that unconscionable or unconscientious conduct is only one element of the doctrine of equitable estoppel. His Honour rejected the submission that s 51AA of the Act was concerned with a general doctrine of unconscionability which is recognised by equity and encompasses all circumstances where behaviour which can be described as unconscionable plays a part in the entitlement to relief. On the other hand, in his judgment dealing with the challenge to the validity of s 51AA, French J concluded[40]:

> "[T]he concept of unconscionable conduct 'within the meaning of the unwritten law' is presently confined in its operation by reference to specific doctrines. Nevertheless the cases indicate that its use is a matter of taxonomy which may be subject to substantial change. As Hardingham has suggested[41]:
>
> > '... the boundaries between traditional heads of intervention against unconscionable behaviour – specifically between common law duress and actual undue influence or pressure, between presumed undue influence and unconscionable dealing as such – are shifting. Lines of demarcation are not now as clearly defined as they may have been in the past. As a consequence, the traditional heads themselves may be ready for some redefinition or [rationalisation].'
>
> In considering the contention that 'unconscionable conduct within the meaning of the unwritten law' in s 51AA refers to some kind of legal dictionary, it is important to observe that it has no settled technical meaning. It is, as Mahoney JA[42] said, 'better described than defined'. It

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38 McGhee (ed), *Snell's Equity*, 30th ed (2000), Preface.

39 (2001) 117 FCR 23 at 77.

40 (2000) 96 FCR 491 at 501-502.

41 "Unconscionable Dealing", in Finn (ed), *Essays in Equity*, (1985) 1 at 2.

42 *Antonovic v Volker* (1986) 7 NSWLR 151 at 165.

> offers a standard determined by judicial decision-making rather than a rule, albeit it may for the present be subject to limitation in its factual field of operation by the existence of specific doctrines."

45 This appeal may be decided without choosing between the differing emphases in the views expressed by Gyles J and French J respecting the present state of equitable doctrine and thus the reach of s 51AA. Nor need this Court now determine whether the section is limited to matters of equitable doctrine so as, for example, to exclude developments in the common law respecting principles of duress. For example, in *Crescendo Management Pty Ltd v Westpac Banking Corporation*[43], McHugh JA considered, with reference to English authority, what has come to be called "economic duress". His Honour said[44] that pressure will be illegitimate "if it consists of unlawful threats or amounts to unconscionable conduct". Again, it will be recalled that, in *Muschinski v Dodds*[45], Deane J referred to the "general equitable notions" respecting unconscionable conduct which have found "expression in the common law count for money had and received".

46 It is unnecessary to resolve these questions concerning the reach of s 51AA because, as remarked earlier in these reasons, and consistently with what had been said in the Explanatory Memorandum, the litigation was conducted on the footing that the facts fell within that well-established area of equitable principle concerned with the setting aside of transactions where unconscientious advantage has been taken by one party of the disabling condition or circumstances of the other. In such situations, and as will be further discussed below, equity intervenes not necessarily because the complainant has been deprived of an independent judgment and voluntary will, but because that party has been unable to make a worthwhile judgment as to what was in the best interests of that party.

The reasoning of the primary judge

47 The reasoning of the primary judge which led his Honour to find in favour of the ACCC in respect of the complaints respecting the Roberts was introduced in the following passage[46]:

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43 (1988) 19 NSWLR 40.

44 (1988) 19 NSWLR 40 at 46.

45 (1985) 160 CLR 583 at 619-620. See also *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 525-526 [16], 554-555 [100].

46 (2000) ATPR ¶41-778 at 41,196-41,197.

> "The Roberts as lessees of Shop 14 operated a small business, the Leeming Fish Supply, the value of which to any prospective purchaser was critically dependent upon the length and security of the tenure of the premises which the Roberts could convey to that purchaser at settlement. At the time that they first negotiated with Mr Holland between March and May 1996, they had less than twelve months of their lease to run. A mere assignment of the balance of the term, to which they were entitled by virtue of the provisions of the *Commercial Tenancy Act*, could not secure for Mr Holland a tenancy of the length necessary to make his investment worthwhile. So the sale of the business was dependent upon the owners' willingness to grant a new lease. They were under no obligation to do so. Neither the Roberts nor Mr Holland were actually or potentially large tenants. They were actual and prospective small business operators. The Roberts, in particular, had little bargaining power when it came to dealing with the owners. There was a marked inequality of bargaining power between them. The Roberts suffered what might be called a 'situational' as distinct from a 'constitutional' disadvantage. That is to say it did not stem from any inherent infirmity or weakness or deficiency. It arose out of the intersection of the legal and commercial circumstances in which they found themselves. That disadvantage, not being constitutional in character, was not able to be mitigated by the fact of legal representation which they had available to them at all material times."

48 The distinction drawn by French J between "situational" and "constitutional" disadvantages was important for his reasoning. In particular, it was because the disadvantage identified by his Honour was of the former rather than the latter character that no particular significance attached to the availability to Mrs Roberts of independent legal advice, which she received but chose not to follow.

49 French J continued by saying that[47]:

> "the circumstances in which a business operator on a lease may effectively lose the value of that business upon expiry of the lease does place the tenant at a special disadvantage in dealing with the owner".

50 Whilst this did not import any obligation of renewal, a question arose whether the owner unfairly exploited the disadvantage of the tenant in a fashion regarded by equity as unconscionable. His Honour continued[48]:

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47 (2000) ATPR ¶41-778 at 41,197.

48 (2000) ATPR ¶41-778 at 41,197.

> "Unfair exploitation of disadvantage amounting to unconscionable conduct may occur when an owner uses its bargaining power to extract a concession from the tenant that is commercially irrelevant to the terms and conditions of any proposed new lease."

51 The respondents criticise the use in this context of the phrase "commercially irrelevant". The evidence was that it was important to the owners and their advisers that cl 14 be included, so much so that without it they were not prepared to renew the lease. In that setting, for a court to suggest that concern was a commercial irrelevance falsely suggests the availability to the court of some objective criterion of relevance which may override the attitude taken by the owners.

52 The critical passage in which French J formulated his conclusions was as follows[49]:

> "In my opinion for the owners to insist, as they did through Mr Sullivan in this case, upon the Roberts abandoning their rights to proceed with bona fide litigation in relation to their rights under their existing lease was to engage in unconscionable conduct. The claims that they, in common with other tenants, were raising against the owners were bona fide and serious. They were taken seriously by both the tenants and by the owners."

His Honour added that it was of no consequence that the detriment suffered by the Roberts may have been small in monetary terms; there had been an exploitation of the vulnerability of the Roberts in relation to the sale of their business which was "grossly unfair".

53 French J also referred to the personal circumstances of the Roberts, saying[50]:

> "Whether or not [the owners] had personal knowledge of the circumstances of the Roberts, they were fixed with such knowledge through that of Brian Sullivan and his company. The corporate respondents were therefore in contravention of s 51AA and the natural respondents knowingly involved in that contravention."

54 The reference to the personal circumstances of the Roberts was primarily to a discussion in or about March 1995 between Mrs Roberts and Ms Glenda

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49 (2000) ATPR ¶41-778 at 41,197.

50 (2000) ATPR ¶41-778 at 41,197.

Clapp, the Centre Manager at Farrington Fayre, who was employed by the managing agent. Mrs Roberts had told Ms Clapp that she and her husband were thinking of selling the business, that their daughter was ill and required considerable attention and that both she and her husband thought it was time to get out, having been in the business long enough.

Conclusions

55 In *Commercial Bank of Australia Ltd v Amadio*[51], Mason J referred to passages in the judgments of Fullagar J and Kitto J in *Blomley v Ryan*[52]. Mason J said[53]:

> "It is made plain enough, especially by Fullagar J, that the situations mentioned are no more than particular exemplifications of an underlying general principle which may be invoked whenever one party by reason of some condition [or] circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created. I qualify the word 'disadvantage' by the adjective 'special' in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party."

His Honour went on to emphasise[54] the need for the plaintiff seeking relief to establish the taking of unconscientious advantage of the plaintiff's disabling condition or circumstance. It will be apparent that the special disadvantage of which Mason J spoke in this passage was one seriously affecting the ability of the innocent party to make a judgment as to that party's own best interests.

56 In the present case, the respondents emphasise that point and stress that a person in a greatly inferior bargaining position nevertheless may not lack capacity to make a judgment about that person's own best interests. The respondents submit that the facts in the present case show that Mr and

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51 (1983) 151 CLR 447 at 461-463.

52 (1956) 99 CLR 362 at 405, 415.

53 (1983) 151 CLR 447 at 462.

54 (1983) 151 CLR 447 at 462-463.

Mrs Roberts were under no disabling condition which affected their ability to make a judgment as to their own best interests in agreeing to the stipulation imposed by the owners for the renewal of the lease, so as to facilitate the sale by Mr and Mrs Roberts of their business. Those submissions should be accepted.

57 In dealing with the owners for a new lease, the Roberts were in a difficult bargaining position because they had no legal right to a renewal, there having been no option bargained for and included in the subsisting lease. Nor was their situation like that of the hotel lessee considered by Waddell CJ in Eq in *Bond Brewing (NSW) Pty Ltd v Reffell Party Ice Supplies Pty Ltd*[55]. In the circumstances of that case, the lessor was estopped from terminating the defendant's lease without making a payment for the goodwill built up by the tenant and an order for possession was made in favour of the lessor only upon the lessor giving security for an amount of compensation for goodwill to be determined thereafter by the Court. However, the situation in which the Roberts were placed did not necessarily support the conclusion that they lacked the capacity to make a judgment about their best interests by agreeing to cl 14 as the price of obtaining the renewal which then would support the sale of the business to Mr Holland.

58 The second requirement to which Mason J pointed in *Amadio* is the taking advantage of the alleged disadvantage. The present case was conducted on the footing that it was the imposition by the owners of cl 14 which constituted the unconscionable conduct. Much of the argument for the ACCC falls away after an understanding of what is required to constitute the necessary special disadvantage and of the conduct impugned as that requiring the inclusion of cl 14.

59 A little more should be said respecting the situations in which the owners and the Roberts were placed when the negotiations for the renewal of the lease reached their final stage. The lease held by the Roberts was not the only lease of premises at the Centre whose term was set to expire in February 1997. There was a significant number of leases which would expire at that time. Moreover, there were seven or eight vacant shops. Mr Sullivan had regarded these matters as weakening the bargaining position of the owners. The Roberts valued their rights of recovery of overpayments at $50,000. That was a significantly over-optimistic estimate. The best indication that this was so is provided by the estimated entitlement to a sum of less than $3,000 had the Roberts participated in the later settlement. On the other hand, the renewal of the lease was essential for the consummation of the sale of the business to Mr Holland for some $65,500.

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55 Unreported, Supreme Court of New South Wales, 17 August 1987.

60 There were three apparent resolutions to the impasse between the parties. First, the lease might be renewed without the inclusion of cl 14. This was unacceptable to the owners; they were not obliged to grant any renewal at all and so were at liberty to prevent that outcome and thereby deprive the Roberts of their sale proceeds. The second and third possibilities were both acceptable to the owners but, given the evidence of Mr Sullivan referred to above, the second probably was preferable. The second was renewal of the lease and inclusion of cl 14; the third was no renewal and no release of the owners by cl 14. To the Roberts, the renewal of the lease (albeit giving up the other claim later shown to be worth apparently only some $3,000) was vital to the sale of the business, making the second outcome preferable to the third. Against that background, it may not be surprising that the bargain struck reflected the second outcome.

61 It was never the case of the ACCC that the owners were obliged to deal with the Roberts by producing the first outcome, so that the owners, consistently with s 51AA, might deal with the Roberts only to the disadvantage of the owners. To conclude that the owners "extract[ed]" the agreement by the Roberts to include cl 14, as did the primary judge, mistakes the significance of the available outcomes. The owners would not agree to renew the lease without cl 14 and were at liberty to achieve that result, as his Honour accepted. To stigmatise the second (and actual) outcome appears to favour as the preferable result the third outcome whereby the owners would have had no further dealing with the Roberts, the lease would have expired and the sale lost, but the Roberts would have later received some $3,000 at the settlement.

62 Reference has been made to the evidence concerning the family circumstances of the Roberts. It was submitted to this Court that there was no clear basis for a finding that the knowledge of Ms Clapp, an employee of the managing agent of the Centre, respecting the illness of the daughter of the Roberts, was to be attributed to the owners. Section 84(1) of the Act would apply[56]. It would direct attention to the scope of the actual or apparent authority of Ms Clapp.

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56 Section 84(1) stated:

> "Where, in a proceeding under this Part in respect of conduct engaged in by a body corporate, being conduct in relation to which section 46 or 46A or Part IVA or V applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, being a director, servant or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind."

63 It is unnecessary to embark upon that inquiry. First, the primary judge made no clear finding, saying[57]:

> "The personal circumstances of the Roberts are also relevant in so far as they were known to the owners or their agents",

and that the case disclosed unconscionable conduct "[q]uite apart from that circumstance". Secondly, on the facts of this case, so far as they were found, the particular family situation, which with other matters led the Roberts to wish to sell the business rather than to seek a renewal purely for their benefit, fell short of a disabling condition or circumstance seriously affecting their ability to make a judgment as to their own best interests.

Orders

64 The appeal should be dismissed with costs.

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57 (2000) ATPR ¶41-778 at 41,197.

65 KIRBY J. Yet again the Court has before it an appeal concerning the application of the *Trade Practices Act* 1974 (Cth) ("the Act"). On this occasion the issue involves s 51AA of the Act which incorporates a statutory prohibition of unconscionable conduct, as such conduct is understood in the unwritten law of Australia. Yet again this Court has a choice between affording a broad and beneficial application of the relevant provision of the Act, as opposed to a narrow and restrictive one.

66 In the proceedings at trial in the Federal Court of Australia, French J (the primary judge) found that the respondents had engaged in unconscionable conduct. As other members of this Court have found, the Full Court of the Federal Court, in allowing the appeal from his Honour's judgment, applied an excessively narrow legal criterion. Given that the relevant factual findings are undisturbed and that the primary judge did not make any error of legal principle, this Court should affirm his Honour's judgment.

The facts, legislation and common ground

67 *Facts and legislation*: The facts are stated in the reasons of Gummow and Hayne JJ ("the joint reasons") and of Callinan J. Also set out in other reasons are the terms of the applicable provisions of the Act and passages from the reasons of the primary judge and of the Full Court of the Federal Court, explaining the contrasting conclusions to which they respectively came. I will avoid unnecessary repetition.

68 *Common ground*: There was a great deal of common ground in the appeal. I will state the main points in summary form, in order to make it clear that I have put all such matters to one side. Thus, the parties agreed that:

(1) Section 51AA of the Act, whose meaning was chiefly in question in the proceedings, is a valid law of the Commonwealth. This was so despite the arguments advanced at trial that the section involved an impermissible delegation of law-making power by the Parliament to the judiciary, or an invalid attempt by a law of the Parliament to intrude into the functions of the courts responsible for making the "unwritten law"; and was unacceptably uncertain or otherwise void[58]. The validity issue was the subject of a separate decision on the part of the primary judge[59]. It was not a matter upon which special leave was granted by this Court. I will

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58 cf *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 484-488, concerning the *Native Title Act* 1993 (Cth), s 12.

59 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491 at 504-510 [29]-[44].

assume that the decision upholding the validity of s 51AA was correct and that the section bound the respondents in the terms enacted by the Parliament.

(2) The reference in s 51AA to "the unwritten law" includes a reference to the principles of equity as developed by Australian courts exercising equitable jurisdiction concerned with "unconscionable" conduct and in particular (but not limited to) the principles stated in such decisions as *Blomley v Ryan*[60] and *Commercial Bank of Australia Ltd v Amadio*[61]. In accordance with such decisions, whatever else the section covers, it includes the case of a party to a contract who was in such a debilitated condition that there was not "a reasonable degree of equality between the contracting parties"[62]; where "the [party's] condition was sufficiently evident to those who were acting for the [other party] at the time to make it prima facie unfair for them to take his assent to the [impugned transaction]"[63]. As was said in *Evans v Llewellin*[64], "though there was no actual fraud, it is something like fraud, for an undue advantage was taken of [the] situation". Further, "the principle applied is not one which extends sympathetic benevolence to a victim of undeserved misfortune; it is one which denies to those who act unconscientiously the fruits of their wrongdoing"[65].

(3) The factors relevant to determining whether the conduct of a party was unconscionable in the circumstances of a given case cannot be comprehensively catalogued. They may include the wealth or poverty of the party seeking relief, that party's means and access to independent assistance and advice, as well as the party's age, state of health, infirmity of body and mind[66], and also financial and other circumstantial

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60 (1956) 99 CLR 362 ("*Blomley*").

61 (1983) 151 CLR 447 ("*Amadio*"). See the reasons of the primary judge, *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491 at 502 [23].

62 *Longmate v Ledger* (1860) 2 Giff 157 at 163 [66 ER 67 at 69].

63 *Blomley* (1956) 99 CLR 362 at 428 per Kitto J.

64 (1787) 1 Cox 333 at 340 [29 ER 1191 at 1194].

65 *Blomley* (1956) 99 CLR 362 at 429.

66 *Blomley* (1956) 99 CLR 362 at 405, 415. See also *Amadio* (1983) 151 CLR 447 at 474.

pressures[67]. It is not enough that the weaker party has suffered a hard bargain. There needs to be some *special* disadvantage that renders the consequences of enforcing the parties' legal rights unfair to the point of offending conscience when all the circumstances are considered.

(4) The advantages introduced by s 51AA of the Act include the provision, in a case in which the complaining party could have sought relief in a court exercising equitable jurisdiction, of the wide-ranging remedies available under the Act; the support of, and sometimes representation by, the Australian Competition and Consumer Commission ("the ACCC") to pursue that party's cause as a matter of principle and example; and the facility of federal jurisdiction such as the ACCC invoked in the Federal Court in these proceedings on behalf of the tenants.

(5) None of the tenants in the shopping centre represented by the ACCC in the proceedings before French J, other than Mr and Mrs Roberts ("the Roberts"), was entitled to relief under the Act.

The meaning and scope of unconscionable conduct in s 51AA

69 *The history of the section*: A starting point for deriving the meaning and scope of the section is contextual. It is important to remember the history of the introduction of s 51AA in order to understand the legislative purpose for adding that section and a number of other provisions in a new Pt IVA of the Act dealing with "Unconscionable Conduct"[68].

70 The history of the insertion of s 51AA into the Act was recounted by the primary judge. His Honour took account of this indication of the statutory purpose[69]. This Court, in deciding the application of s 51AA to the facts and circumstances of this case, should likewise start from a clear appreciation of the novelty of the objects sought to be accomplished by the inclusion of the section in the Act. In interpreting the scope of a provision such as s 51AA, this Court

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67 *Blomley* (1956) 99 CLR 362 at 415.

68 By the *Trade Practices Legislation Amendment Act* 1992 (Cth), s 9. Part IVA has been subsequently amended, however those amendments have no bearing on the provision invoked in the present proceedings.

69 See *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491 at 494-496 [5]-[8].

should assist so far as it properly can in furthering the attainment of those purposes[70].

71 The enactment of s 51AA of the Act followed a review of the Act by the Swanson Committee[71]. That Committee rejected suggestions that a general prohibition of "unfair" conduct on the part of corporations engaging in trade and commerce should be enacted. However, it accepted that a prohibition upon unconscionable conduct in such activities should be included in the Act "as a civil matter only". According to its conclusions, such facilities should be added to ensure that it was possible to deal with the problem of the general disparity of bargaining power between buyers and sellers[72]. The Committee recognised that unconscionable conduct involved a standard "quite apart from, and usually not encompassed by, the standards of misleading or deceptive conduct"[73]. The equitable doctrine of unconscionable dealing itself seeks to uphold a broader principle of ethical behaviour, whereby conduct on the part of contracting parties which falls short of fraud could still enliven equity's intervention[74].

72 It took some time for the Government and the Parliament to accept the Swanson Committee's recommendation. Initially, in 1986, s 52A was introduced into the Act prohibiting unconscionable conduct in consumer dealings. As the primary judge pointed out, before the enactment of s 51AA, a number of additional reports examined the issue of whether a similar statutory prohibition of unconscionable conduct should extend to purely commercial dealings[75]. Eventually, the Parliament acted.

73 *The objects of the Act and of the section*: The object of the Act, as stipulated in s 2, is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection". The

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70 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

71 *Report of the Trade Practices Review Committee to the Minister for Business and Consumer Affairs*, (1976) ("Swanson Committee Report").

72 Swanson Committee Report, par 9.59.

73 Swanson Committee Report, par 9.60.

74 *Blomley* (1956) 99 CLR 362 at 429.

75 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491 at 494-495 [7]. See also O'Brien, "The ACCC v Berbatis Litigation and Section 51AA of the Trade Practices Act 1974 (Cth)", (2002) 10 *Trade Practices Law Journal* 201 at 202.

introduction of statutory notions of unconscionable conduct into the Act was a recognition of the advantages of the "unwritten law" doctrines in promoting fair trading. Such equitable categories developed in order to protect the integrity of the contracting process where a party is induced to act or enter a transaction due to weakness or illegitimate pressure, and does so without full information or appreciation of the extent or nature of the transaction or the way it affects that party's interests and choices. By enacting s 51AA, the Parliament adopted from the unwritten law the characterisation of conduct as unconscionable, and prohibited such conduct by corporations engaged in trade or commerce. The design of s 51AA was intended not to expand the notions of unconscionable conduct in the unwritten law but to allow the application in such circumstances of the flexible remedies available under the Act[76]. Yet the very fact that such a provision would facilitate more cases coming before the courts than might otherwise be the case inevitably results in a closer elaboration of the concept of unconscionable conduct in new and different factual circumstances. The present is such a case.

74 A particular purpose of the inclusion of s 51AA in the Act was to afford more effective remedies to small operators in the marketplace, such as the Roberts. They already had access to remedies of an equitable character. However, in practice, where the stakes were comparatively low (as here) a corporation dealing with such a small player would normally be entitled to assume that it could take advantage of the comparative weakness of that player without any real fear that it would be rendered accountable in a court of law or equity.

75 *The proper approach to the section*: In outlining his approach to the construction and application of s 51AA, the primary judge said, correctly in my view[77]:

> "Section 51AA prohibits corporations from engaging in conduct which is unconscionable within the meaning of the common law of Australia. The meaning of the term is found in the dictionary. Its meaning is not altered by the unwritten law. What the unwritten law does presently is to confine its operation to certain classes of case. The reference in s 51AA to the 'meaning of the unwritten law' is a reference to the classes of case in which the unwritten law will award remedies for

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76 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491 at 495 [8]; cf at 503 [25] in relation to ss 51AB and 51AC of the Act.

77 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491 at 503-504 [26].

> unconscionable conduct ... There is no distinct rule which defines such conduct. The description embodied in the word 'unconscionable' ultimately refers to the normative characterisation of conduct by a judge having jurisdiction in the relevant class of case. … [T]he rules governing the relevant application of the term 'unconscionable conduct' and therefore the application of s 51AA are judge-made rules that can change from time to time. The development of doctrine which may alter that application may occur in the judgments of the courts of the States and Territories and of the High Court and of the Federal Court in the exercise of its accrued jurisdiction. This may also occur through the exercise of jurisdiction under s 51AA which itself if valid, will become a significant source of the unwritten law."

76 The primary judge also observed that s 51AA "uses the unwritten law to the extent that it provides for the characterisation of conduct as unconscionable and then prohibits such conduct"[78]. In terms of the type of conduct that would fit the description "unconscionable within the meaning of the unwritten law", the primary judge made three pertinent observations: first, that as a general proposition the object of equity's intervention is to prevent behaviour contrary to conscience, however, this does not mean that the prohibition in s 51AA encompasses all conduct that would attract the intervention of equity[79]; secondly, that within the meaning of the "unwritten law" the notion of unconscionable conduct has no "technical meaning" and provides "a standard determined by judicial decision-making rather than a rule"[80]; and thirdly that while the Explanatory Memorandum prepared in support of the clause in the Bill that became s 51AA of the Act specifically referred to the concept of unconscionable conduct explained in *Blomley* and *Amadio*, that "may turn out to have been an unduly narrow selection of case law"[81].

77 While the present appeal was substantially argued by reference to the principles of unconscionable dealing as elaborated in cases such as *Blomley* and

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78 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491 at 504 [28].

79 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491 at 498 [14]. See also *Australian Consolidated Investments Ltd v England* (1995) 183 LSJS 408 at 439 per Doyle CJ.

80 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491 at 502 [21].

81 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491 at 495 [8].

Amadio, the reach of the section, in my view, goes further. Its full scope remains to be elaborated in this and future cases.

The Full Court erred

78 In allowing the respondents' appeal against the judgment of the primary judge, and in distinguishing the characteristics of an unconscionable bargain, the Full Court held that, in the circumstances, it could not be said that "the Roberts' wills were so overborne that they did not act independently and voluntarily"[82]. I agree with the joint reasons, in their criticism of this crucial part of the reasoning of the Full Court[83]. To the extent that the judges in the Full Court decided the appeal by reference to the foregoing criterion, they erred in law.

79 As the joint reasons point out, the question of whether the will of the party was overborne, so that it cannot be said that that party acted voluntarily, is a consideration relevant to the doctrine of common law duress[84]. Nascent in the case law is the development of principles of economic duress[85], upon which the parties did not seek to rely in this case. The quality of the consent (or assent) of the weaker party and the extent to which it acted independently and voluntarily is also relevant to the equitable principles of undue influence[86]. While circumstances involving those "unwritten law" doctrines may fall within the scope of s 51AA, the criterion of the section is not so narrowly confined. Before this Court, the respondents did not submit otherwise.

80 In cases where unconscionable dealing is relied upon, equity will provide relief where, even if the act of the weaker party is independent and voluntary, it "is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position"[87]. The

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82 *C G Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555 at 571 [81].

83 The joint reasons at [35]-[36].

84 The joint reasons at [36].

85 *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 46 per McHugh JA; cf *Equiticorp Finance Ltd (In Liq) v Bank of New Zealand* (1993) 32 NSWLR 50 at 107. See also *Parras Holdings Pty Ltd v Commonwealth Bank of Australia* unreported, Federal Court of Australia, 24 October 1997 at 99, 127-129 per Davies J; Clough, "Trends in the Law of Unconscionability", (1999) 18 *Australian Bar Review* 34 at 46-49.

86 *Amadio* (1983) 151 CLR 447 at 461 per Mason J, 474 per Deane J.

87 *Amadio* (1983) 151 CLR 447 at 461 per Mason J; see also at 474 per Deane J.

demonstrated error of the Full Court therefore requires that the appeal of the ACCC to this Court must be upheld unless this Court concludes, on its own review of the facts and of the applicable law, that the same result follows as favoured by the Full Court. In my opinion, the conclusion of the primary judge should be restored.

Reasons for restoring the decision at trial

81 *Advantages of the primary judge and appellate restraint*: Many serious mistakes and injustices arise in factual determinations at trial. Depending upon the applicable legislation, an appellate court normally has power to correct such errors[88]. The Full Court had such power[89]. However, such correction is subject to well-established constraints. These include the restrictions that arise from credibility findings[90]. They also include those that derive from the advantages that the trial judge has in considering all the facts disclosed by the evidence[91]. Appellate courts normally only perceive the evidence through the "telescoped" procedures that are available to, or feasible for, them.

82 The decision of the primary judge in the present case was not strictly a discretionary one, so far at least as it concerned whether the conduct of the respondents was "unconscionable"[92]. Yet it undoubtedly involved elements of evaluation and assessment, as the primary judge himself recognised[93]. It involved the application to a mass of evidence of a legal standard expressed in broad statutory language and of decisional law calling forth a judicial response that is partly analytical and partly intuitive. In the nature of things, it is difficult for appellate courts to replicate exactly the advantages of the primary judge in making such decisions. These are not reasons for neglecting the appellate function. However, they are reasons for exercising a degree of restraint when asked, on the basis of the written record, to review a conclusion about unconscionable dealing reached at trial.

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88 I agree in this respect with the observations of Callinan J at [167].

89 *Federal Court of Australia Act* 1976 (Cth), s 27.

90 *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479, 483.

91 *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 330 [89]-[90]; 160 ALR 588 at 619. See also *Housen v Nikolaisen* (2002) 211 DLR (4th) 577 at 586 [14].

92 Issues of discretion arose in the provision of relief under the Act.

93 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2000) ATPR ¶41-778 ("*Berbatis*") at 41,197 [124].

83 The primary judge's reasons represent the best expression in words of the overall conclusion that the judge has reached, based on a consideration of all the evidence and the consequent findings and inferences of fact[94]. Considerable caution should be observed in disturbing such an opinion given the significant advantages enjoyed by the primary judge in the evaluation and characterisation of the facts. One reason for disturbing such conclusions would be if it were shown that the primary judge had applied an incorrect legal criterion[95], as the Full Court did in the present appeal. However, no such error of legal principle has been demonstrated on the part of the primary judge to authorise the reversal of his ultimate conclusions on that ground.

84 *Special considerations of the Roberts*: Essential to equitable relief under the principles of unconscionable dealing (as explained by this Court's decisions in cases such as *Blomley* and *Amadio*) is a demonstration that the weaker party was subject to a disadvantage which was in some way "special". In this Court, as in the Full Court, the finding of the primary judge that the Roberts were suffering from such a special disadvantage has been criticised. In my view, his Honour's conclusion was open on the basis of the evidence that he accepted.

85 The primary judge specifically addressed his attention to the rejection of the notion that the presence of an inequality in bargaining power between the parties, or the striking of a hard bargain from the perspective of the weaker party, would, in itself, justify the conclusion of unconscionable conduct on the part of the stronger party[96]. That rejection was correct. The reasons for it are clear. Many transactions involve a disparity in bargaining power. Further, courts are not always well placed to determine whether, in all the circumstances, a bargain that was struck was fair or hard as between the transacting parties. To do this would involve the re-examination of many transactions and a risk that courts would usurp the economic freedom of individuals normally to decide for themselves the transactions that they would, and would not, agree to.

86 Conscious of such considerations, the primary judge recognised that "circumstances of inequality do not of themselves necessarily call for the intervention of equity"[97]. His Honour also pointed out that "the requisite

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94 cf *Aktiebolaget Hässle v Alphapharm Pty Ltd* (2002) 77 ALJR 398 at 417 [97]; 194 ALR 485 at 510 referring to *Biogen Inc v Medeva plc* [1997] RPC 1 at 45 per Lord Hoffmann.

95 *Housen v Nikolaisen* (2002) 211 DLR (4th) 577 at 594 [33].

96 *Amadio* (1983) 151 CLR 447 at 462 per Mason J.

97 *Berbatis* (2000) ATPR ¶41-778 at 41,195 [117].

disadvantage will not necessarily be found in the normal run of bargaining inequality between large landlords and small tenants"[98]. In addition, his Honour had earlier observed, correctly in my view[99]:

> "The elements of inequality, disadvantage or disability on the one hand and the unfair conduct of the stronger party taking advantage of them on the other are not … to be weighed up as though independent. It is conduct in context which has to be judged. A party may take advantage of the disadvantage of another without necessarily acting unfairly or so unfairly, having regard to the nature of the disadvantage, that equity would intervene. Where the disadvantage or inequality is great it may take less to discern unconscientious exploitation of it than in a situation involving less disadvantage or inequality."

87 The primary judge held that the special disadvantage of the Roberts was of a "situational" rather than "constitutional" nature. It arose out of the "legal and commercial circumstances in which they found themselves", rather than from some inherent weakness or infirmity on their part[100]. That disadvantage, and the resulting effect on their ability properly to assess and evaluate their options and interests, "was not able to be mitigated by the fact of legal representation which they had available to them at all material times"[101]. It was in light of the Roberts' need to maintain the value of their business (in order to proceed with an imminent sale of that business) that the conduct of the owners and their insistence on the inclusion of a release clause was judged to be unconscionable.

88 It is true that the respondent owners of the shopping centre were not obliged to extend the Roberts' lease in such a way as to protect their goodwill and thus afford the Roberts a sellable business. However, this fact masks the realities of the economic and litigious positions in which the Roberts and the owners respectively found themselves. I agree with the primary judge that, for the purposes of the section, generalisations about the relationship of landlord and tenant are not helpful[102]. It is the particular circumstances of the relationship and conduct in question that need to be examined. In the present case the owners were already faced with a shopping centre that had a number of empty shops. They knew that the Roberts were good tenants and that their proposed assignee

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98 *Berbatis* (2000) ATPR ¶41-778 at 41,197 [123].

99 *Berbatis* (2000) ATPR ¶41-778 at 41,196 [118].

100 *Berbatis* (2000) ATPR ¶41-778 at 41,197 [122].

101 *Berbatis* (2000) ATPR ¶41-778 at 41,197 [122].

102 *Berbatis* (2000) ATPR ¶41-778 at 41,196 [119].

was an objectively acceptable, indeed desirable, tenant. Thus, it was in the interests of the owners and agents to extend the lease and facilitate the sale of the Roberts' business.

89 The original litigation between the tenants and the owners was brought on behalf of a number of the tenants in the shopping centre due to their concern about alleged overcharging by the owners and their agents. That litigation would not disappear because of any dealings the owners had with the Roberts. The owners and their agents were also concerned about possible commercial damage to their business because of media attention to the subject matter of the dispute between the shopping centre and the tenants, including the Roberts.

90 In such circumstances, apart from the Roberts' need to terminate their position as tenants and to sell their business immediately as a going concern, it would seem very unlikely that any difficulty would have been placed in the way of the extension of the lease and its assignment to the proposed new tenants. It is in this context that the imposition of the requirement to agree to a release of their legal rights must be evaluated by the standards of the Act. It was open to the primary judge to view the insistence on that requirement as an opportunistic attempt to take advantage of the special position in which the Roberts found themselves. Others have accepted that it involved striking a hard bargain[103]. The point of difference is therefore whether, by enforcing such a bargain in the circumstances, the conduct of the owners was unconscionable as the primary judge concluded. The starting point of the analysis must be the appreciation of the fact that, without the Roberts' need to renew the lease quickly, in order for them to proceed with the agreed sale, any proposal they made to that end would have been viewed as advantageous to the owners and likely to be accepted by them.

91 Two further points in the conclusions of the primary judge need to be noticed. First, the initial proceedings of the ACCC were brought not only on behalf of the Roberts but also for two other small business owners in the shopping centre (the Ternents and the Raitts). In the end, the primary judge restricted relief pursuant to s 51AA to the Roberts. He rejected the claims made in relation to the other tenants who were also subject to some disadvantage. The Ternents had a hardware business that was struggling. They were in arrears in their rent and were contemplating abandonment of the business altogether. They had no prospective purchaser. The owners, through their agents, attempted to persuade them to stay on at a reduced rent and indicated a preparedness to drop the release clause[104]. The primary judge was not satisfied that the owners would

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103 *C G Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555 at 571 [81].

104 *Berbatis* (2000) ATPR ¶41-778 at 41,188 [83].

have insisted on the inclusion of such a clause in any new lease to the Ternents[105].

92 The other tenants were the Raitts. Like the Roberts, they had a viable business. They too needed a renewal of the lease in order to maintain its goodwill and value[106]. However, they were not in the peculiar position of the Roberts, and had no plan, or immediate need, to sell their business. The primary judge found that the Raitts lost their lease because they were outbid by another bidder, and not because they were unprepared to execute a release clause[107]. While the Raitts may have been in an inferior bargaining position and suffered loss and inconvenience as a result of the need to relocate because their lease was not renewed, they were not "labouring under a serious disadvantage". Therefore, their loss was held not to result from any unconscionable conduct on the part of the owners[108].

93 Secondly, the condition of the Roberts' daughter is clearly a relevant factor in explaining the primary judge's conclusions in respect of their claim under the Act. The owners, through their agents[109], knew that the Roberts' daughter had been ill and had contracted encephalitis. They knew that her condition was difficult and expensive to treat. They knew that her illness added great personal stress and emotional strain to the Roberts' lives[110].

94 The primary judge specifically referred to the condition of the Roberts' daughter and said that their "personal circumstances" were "also" relevant. I do not agree that he made "no clear finding" about their situation[111]. The full passage is set out in the reasons of Callinan J[112]. Read fairly and in the context of

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105 *Berbatis* (2000) ATPR ¶41-778 at 41,198 [125]-[126].

106 *Berbatis* (2000) ATPR ¶41-778 at 41,193-41,194 [107]-[108].

107 *Berbatis* (2000) ATPR ¶41-778 at 41,198 [128]. In fact, the primary judge found that during the course of the negotiations with the owners, Mr Raitt was not fully aware of the meaning of the "mutual release" clause: see at 41,198 [127].

108 *Berbatis* (2000) ATPR ¶41-778 at 41,198 [128].

109 See the Act, s 84(1). Ms Clapp's primary duties included liaising between the owners and their tenants: *Berbatis* (2000) ATPR ¶41-778 at 41,169 [12].

110 *Berbatis* (2000) ATPR ¶41-778 at 41,176 [37], 41,180 [51], 41,197 [124].

111 The joint reasons at [63].

112 Reasons of Callinan J at [150].

the wider factual setting, it indicates that the primary judge treated the Roberts' family predicament as a factor contributing to the special features of their case.

95 In particular, the need for the Roberts to proceed at that point with the sale of their business was explained by their desire to have more time and also the money to devote to their daughter, given her medical condition[113]. Although the illness concerned was not that of the tenants themselves, it was an illness that was bound to play a part in the Roberts' decisions. It was part of the circumstances that placed them in a serious "situational" disadvantage and inequality vis-a-vis the owners. The differentiation of the case of the Roberts from the other tenants, is thus explained, in large measure, by reference to the Roberts' vulnerability caused by their need to sell their business because of their personal circumstances[114]. It may be that, in the view of the primary judge, the Roberts would have been entitled to relief even in the absence of their personal situation including the condition of their daughter. However, it was unnecessary to go that far for the purpose of the present case.

96 *The course of the negotiations*: The reliance on unconscionable conduct in seeking relief, either in equity or under the Act, is not just an incantation[115]. To seek to answer the question whether the bargain was unconscionable first, and only then to reflect upon the conduct of the stronger party in procuring the assent of the weaker one, is to invert the proper approach to analysis in such cases[116]. The quality of the bargain (or the adequacy of the consideration) has never been either a necessary or a sufficient element for establishing unconscionable dealing. Similarly, focusing only on the outcomes available in the negotiations over the lease between the Roberts and the owners does pose a question that can be more easily answered. But it strips the problem of all of its complexity. It may well be that adopting a particular negotiating stance, including a requirement of a release clause by the owners as part of the discussions for extending or renewing the lease, would not, on its own, constitute a contravention of s 51AA of the Act.

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113 *C G Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555 at 560 [23]; *Berbatis* (2000) ATPR ¶41-778 at 41,176 [37], 41,180 [51].

114 *Berbatis* (2000) ATPR ¶41-778 at 41,197 [124].

115 cf Ellinghaus, "In Defense of Unconscionability", (1969) 78 *Yale Law Journal* 757 at 814.

116 cf *C G Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555 at 571 [83].

Yet a closer investigation of the detail of the contracting process may give that insistence quite a different complexion[117].

97 The reference to the extension of the lease on the owners' terms as a "lifeline"[118] to the Roberts also tends to obfuscate, rather than clarify, the process of reasoning. Many cases in which equity would traditionally intervene under this head of relief involve situations where "unusual pressures" are exerted upon a party not only as a result of some inherent weakness or infirmity, but as a result of "the contingencies of the moment"[119]. These would include the so-called "catching bargains" of expectant heirs or others vulnerable due to need or distress and similar instances of usurious conduct, where it can often be said that the party seeking relief was thrown a "lifeline"[120].

98 Looking upon the development of the doctrine of unconscionable dealing from a contemporary perspective, it can fairly be said that the touchstone of the intervention of equity under this head of relief (and, in my view, the reason that the "unconscionable conduct" standard was picked up in the Act[121]), is the protection of the assumptions and conditions necessary to make effective the freedom to contract of the parties. As Professor Finn noted[122]:

> "[U]nconscionable conduct can be said to be synonymous with the use of a manipulative power to induce or produce a course of conduct, in a way which offends the fundamental assumptions on which the making of a binding contract are premised, be this by contriving the information on which a judgment is made or by contriving choice itself."

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117 Ellinghaus, "In Defense of Unconscionability", (1969) 78 *Yale Law Journal* 757 at 767.

118 *C G Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555 at 571 [80].

119 Ellinghaus, "In Defense of Unconscionability", (1969) 78 *Yale Law Journal* 757 at 768.

120 *Earl of Aylesford v Morris* (1873) LR 8 Ch 484 at 492-493; *Rees v De Bernardy* [1896] 2 Ch 437 at 444-446. See also *James v Kerr* (1889) 40 Ch D 449 at 460 where Kay J observed that the fact the lenders may have been doing the plaintiff a service would not prevent equity's intervention.

121 cf Ellinghaus, "In Defense of Unconscionability", (1969) 78 *Yale Law Journal* 757 at 759-761.

122 Finn, "Unconscionable Conduct", (1994) 8 *Journal of Contract Law* 37 at 49.

99 The elements of a party's disadvantage and its ability to assess its interests and options before entering into a transaction are not purely abstract notions. The foregoing characterisation provides a proper reference point by which the question of the weaker party's ability to make an appropriate judgment about its choices and the conservation of its own interests can be determined. It also explains three aspects of the equitable doctrine. First, the fact that the categories of "special disadvantage" could never be stated exhaustively. Secondly, that the mere presence of disadvantage is not sufficient to obtain relief. And thirdly, following from these, that in characterising the conduct of the stronger party, the circumstances in which the contract was made are relevant to determine whether the assent to any aspect of the bargain was obtained somehow "in the dark"[123]. As Deane J observed in *Amadio*[124]:

> "Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so."

100 It follows that the ultimate issue for decision in this case on the question of unconscionability was whether procuring the Roberts' assent to the impugned term involved an abuse, in the circumstances, of their disproportionately weak and vulnerable position, commercial, financial and personal. In answering that question, it was proper for the primary judge to have regard not only to the release clause, but also to the entire course that the negotiations had taken.

101 The issue of the release clause was originally raised by the owners' agents (Mr Sullivan and Ms Clapp), in relation to the negotiations for a new lease with Mr Holland as the prospective purchaser of the Roberts' business[125]. The initial sale of the Roberts' business failed because Mr Holland was not prepared to buy the business without an extension of the lease. Further, he was not interested in obtaining a lease if the Roberts were forced to abandon their legal rights[126].

102 The owners then apparently dropped the clause from the negotiations. No reference was made to the release provision in two subsequent offers which the

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123 *Filmer v Gott* (1774) 4 Brown 230 at 241 [2 ER 156 at 164].

124 (1983) 151 CLR 447 at 474.

125 *Berbatis* (2000) ATPR ¶41-778 at 41,178 [44]. In these negotiations, Mr Sullivan insisted that Mr Holland (as a prospective tenant) have no legal representation: see at 41,178-41,179 [45]-[46].

126 *Berbatis* (2000) ATPR ¶41-778 at 41,179 [47].

owners' agents made to the Roberts[127]. The second of those offers was signed by the Roberts, and an acceptance was also signed by or on behalf of the owners[128]. Unsurprisingly, in such circumstances, the Roberts were left under the impression that a new seven year lease had been concluded based on that offer without reference to the release of their legal rights.

103 Mr Holland made a second offer to purchase the business from the Roberts. They accepted. The contract for sale was made subject to a condition of the lease being assigned to Mr Holland[129]. It follows that, in their negotiations with Mr Holland, the Roberts were proceeding on the assumption that a new lease had been concluded[130]. It was at that point that Mrs Roberts became aware that, for some unexplained reason, no lease documents had been completed pursuant to the previous offer[131]. In her discussions with the agents, Mrs Roberts received some assurance that a release of their legal rights would not be required[132].

104 It was only at the very end of Mrs Roberts' dealing with the owners' agents, that a release clause was inserted in the documents for the extension of the lease. Initially, Mrs Roberts was not made aware of this. However, her attention was drawn to the clause when a regular customer of the Roberts' shop, who was a lawyer, looked over the lease documents at her request[133]. Mrs Roberts then sought further advice from her solicitor. He counselled her against signing the documents.

105 However, in the circumstances, the Roberts, as explained by Mrs Roberts, felt that they had "little option" but to sign the proposed deed. This was because they "could not afford to have the sale of the business fail again"[134]. She expressed her concern "because she had to decide that day without the

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127 *Berbatis* (2000) ATPR ¶41-778 at 41,181 [54]-[55].

128 *Berbatis* (2000) ATPR ¶41-778 at 41,181 [55].

129 *Berbatis* (2000) ATPR ¶41-778 at 41,181 [56].

130 cf *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 446.

131 *Berbatis* (2000) ATPR ¶41-778 at 41,181 [56]-[57].

132 *Berbatis* (2000) ATPR ¶41-778 at 41,181-41,182 [57]-[59].

133 *Berbatis* (2000) ATPR ¶41-778 at 41,183-41,184 [63].

134 *Berbatis* (2000) ATPR ¶41-778 at 41,184 [65]-[66].

opportunity to give the matter proper consideration"[135]. By that time, the Roberts had not only concluded the agreement for the sale of their business to Mr Holland. Mr Holland had already started to move into the premises[136]. The change of stance of the owners and the belated revival of their insistence upon the clause had all the hallmarks of a well-tuned demand, imposed by those with proportionately greater economic power to take advantage of the vulnerable position that the Roberts found themselves in, given the course of dealings and their commercial, financial and personal circumstances at the time. Had it been otherwise, in their negotiations towards extending the lease or for the sale of the business, the Roberts might have sought an adjustment of the rent, and/or the price at which they would sell the business. Further, as Mrs Roberts herself acknowledged, they might not have proceeded with the sale of the business in such circumstances at all[137]. They were taken by surprise and without sufficient opportunity or "time to act with caution"[138]. This was the way in which the information upon which the Roberts were proceeding was contrived, as was their ultimate assent to the transaction. This is why it can be said that there was no real bargaining over the term and, in the circumstances, the Roberts were unable to assess properly their options and interests[139].

106 *The purpose and nature of the provision and remedies*: It is true that the amount that the Roberts hoped, and expected, to recover from their litigation with the owners was more than they would, in fact, have recovered under the settlement, had they been parties to it. It was also considerably less than the sum they recovered as a consequence of the sale of their business to Mr Holland. In the big picture of national and world economies, these issues and sums are indeed trivial. However, with the primary judge, I regard the size of the damage or loss sustained as less important than the issue of principle that was at stake. The original litigation brought by the tenants jointly was about alleged overpayments of charges to the owners and their agents. It involved what were found to have been genuine claims; not frivolous or vexatious ones[140]. In the end, a degree of acknowledgment by the owners of such overcharging may appear from the settlement by which all shopkeepers who remained in the proceedings recovered a recoupment from the owners. The Roberts would have

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135 *Berbatis* (2000) ATPR ¶41-778 at 41,184 [64].

136 *Berbatis* (2000) ATPR ¶41-778 at 41,184 [67].

137 *Berbatis* (2000) ATPR ¶41-778 at 41,181 [57].

138 *Evans v Llewellin* (1787) 1 Cox 333 at 340 [29 ER 1191 at 1194].

139 cf *Harrison v Guest* (1860) 8 HLC 481 at 491-492 [11 ER 517 at 521].

140 *Berbatis* (2000) ATPR ¶41-778 at 41,197 [124].

done so if they had not been obliged, in their circumstances, to execute the release term that was effectively imposed upon them.

107 The Act does not contain an exemption for cases where the loss suffered by the weaker party, as a result of the unconscionable conduct, is small. Although small in the present case, the enforcement of a remedy on behalf of the Roberts, for the action of the owners in depriving the Roberts of what otherwise would have been their legal entitlement, stands as a warning against like conduct by similar parties in the future. Specifically, it constitutes a warning to others against the use of their economic power to obtain from a comparatively weak and vulnerable market player a concession not extractable from other participants in the market and only extracted from the Roberts because of their imperative need to secure an extension of their lease that, in other circumstances, would have been granted without relevant countervailing conditions.

108 A prime purpose for bringing the notions of unconscionability into the Act, and expressing them as relevant to business standards for Australian corporations engaged in trade and commerce, was to render those standards more effective by creating real sanctions and by affording novel remedies that might on occasion be invoked by the ACCC on behalf of small players. The ACCC is entitled under the Act to bring proceedings (as it did here) in its own name to enforce the rights of others[141]. In this way, it was envisaged by the Parliament that test cases, such as that brought by the ACCC for the Roberts, would help to promote the object of fair trading and translate the principles of the legislation into corporate behaviour, thereby incorporating equitable notions into practical day-to-day application. This point is reinforced by an examination of the kinds of remedies available for a contravention of s 51AA. In particular, recovery of damages under s 82 or pecuniary penalties under s 76 of the Act was not available[142].

109 In a passage cited earlier in these reasons[143], the primary judge commented on the relationship between the emerging case law interpreting and applying s 51AA of the Act, and the existing doctrines of the unwritten law. This is an issue that will warrant further examination. It may be that the different policies and concerns that motivate the provision of relief in equity and under the Act, would also translate into subtle differences in the characterisation of conduct as unconscionable. The concern of equity is limited to justice in the individual case given the potential for inadequate results by reason of some of the rules of the

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141 The Act, ss 80, 87.

142 See the joint reasons at [33].

143 At [75].

common law[144]. Therefore, even if conduct otherwise exhibits the elements of unconscionable dealing as understood in equity, it may still not receive that characterisation if the traditional equitable remedies (such as setting aside the transaction for instance) are not appropriate in the circumstances of the case. The Act on the other hand provides a wider set of procedures and remedies (as this appeal illustrates) designed to enhance the "educative and deterrent effect of [the] legislative prohibition"[145]. Given that such purposes would ordinarily be outside equity's contemplation, a contravention of the Act might yet be found although equitable relief would not lie.

110 It follows that this Court should approach a case such as the present, brought under the Act, recognising that its importance extends beyond the humble case of the Roberts. By upholding the rights of the Roberts – on the face of things small and objectively of limited significance – a message is delivered that the Act is not to be trifled with. Unconscionable conduct, in the sense referred to in s 51AA of the Act, is to be avoided by corporations lest they find themselves on the receiving end of proceedings such as the ACCC brought on behalf of the Roberts. Uninstructed by the history and purpose of the Act, and remembering only the cases in equity from which the "unwritten law" on unconscionable conduct is derived, a court might well view the present proceedings differently. But when the place of s 51AA in the Act, its history and its educative and deterrent purposes are remembered, the outcome reached by the primary judge can be better understood.

111 *Unconscionable conduct in a commercial setting*: In *Austotel Pty Ltd v Franklins Selfserve Pty Ltd*[146], I said, by reference to the circumstances of that case:

> "[C]ourts should be careful to conserve relief so that they do not, in commercial matters, substitute lawyerly conscience for the hard-headed decisions of business people".

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144 Loughlan, "The Historical Role of the Equitable Jurisdiction", in Parkinson (ed), *The Principles of Equity*, 2nd ed (2003) 3 at 6-7. See also Duggan, "Is Equity Efficient?", (1997) 113 *Law Quarterly Review* 601 at 602.

145 Trade Practices Legislation Amendment Bill 1992 (Cth), Explanatory Memorandum at [44].

146 (1989) 16 NSWLR 582 at 585. More recently, see Hayne, "Address to Commercial Law Conference", (2002) 23 *Australian Bar Review* 24; cf Mason, "The Impact of Equitable Doctrine on the Law of Contract", (1998) 27 *Anglo-American Law Review* 1 at 11-13.

112 The circumstances there referred to were "the relationships of substantial, well-advised corporations in commercial transactions"[147]. I still hold that view[148]. In enacting a prohibition against unconscionable conduct in s 51AA, the Parliament invoked the principle of unconscionability and applied it in the context of "trade and commerce" without apparent differentiation. However, what is "unconscionable" conduct of a corporation in its dealings with another corporation of roughly equal size – and especially a large trading corporation well able to be advised and look after its own interests – will be quite a different matter when compared to a context in which the complaining party is an individual trader of modest means and known circumstances of vulnerability, with restricted economic power and limited facilities to receive effective legal advice, dealing with an economically superior well-advised market player.

113 It is the serious or "gross inequality of bargaining power"[149] in the relationship between parties that refines and sharpens issues of conscience and the need to provide remedies, whether in equity or under provisions such as s 51AA of the Act. The special position of the Roberts enlivens the need to consider the complaint of unconscionability in the conduct of the respondents. Their position as small traders involved precisely the kinds of circumstances that the legislature had in mind when enacting s 51AA, given that consumers already had access to a broader prohibition of unconscionable conduct on the part of corporations[150].

114 The owners and their agents were concerned about the enforceability of the release clause. They sought the advice of two different solicitors[151]. Correctly and prudently, the respondents' legal advisers drew to their notice the risk they ran that the release clause with respect to the litigation may not be enforceable because it comprised "key-money"[152], or because the tenants could argue that the release was made under duress[153]. Such advice does not, of itself, establish that the respondents' conduct was unconscionable. However, the fact

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147 *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 586.

148 cf *Pilmer v Duke Group Ltd (In Liq)* (2001) 207 CLR 165 at 221 [138].

149 *Amadio* (1983) 151 CLR 447 at 464 per Mason J.

150 The Act, s 51AB (formerly s 52A).

151 *Berbatis* (2000) ATPR ¶41-778 at 41,174-41,175 [31]-[33].

152 See ss 9(1) and 3 of the *Commercial Tenacy (Retail Shops) Agreements Act* 1985 (WA).

153 *Berbatis* (2000) ATPR ¶41-778 at 41,175 [32].

that advice was sought, and given in such terms, suggests the existence of a sense of disquiet on the part of the owners and their agents about depriving the tenants of access to their legal rights. Understandably, that disquiet could arise from the recognition that, ordinarily, in a society such as ours, people are entitled to pursue their legal rights and have them decided by an independent court or tribunal and not surrendered in circumstances when they are specially vulnerable to overbearing conduct or adventitious pressure. Perhaps the state of the respondents' conscience in relation to these events is reflected in the comment by Mr Atzemis, as one of the proprietors, to Mr Raitt (long after the Roberts were out of the picture) that Mr Sullivan "was getting people to sign documents that he shouldn't have"[154].

115 *Conclusion: restore primary judge's evaluation*: The primary judge concluded that of the tenants the Roberts, and they alone, fell within the category of persons who answered the description of suffering a "special" disadvantage about which the cases on unconscionable conduct speak[155]. This was not, therefore, an instance where the judge mistook a hard bargain for one resulting from an unconscionable misuse of economic superiority. It was not one in which he approached s 51AA in a way that exceeded its proper place in a legal system that normally holds people to their concluded bargains. The primary judge refined the several suggestions of unconscionable conduct – all in the context of relationships of unequal bargaining power. He reduced them, in the end, to the case of the Roberts. He regarded their case as relevantly "special".

116 Cases of this kind depend (as the primary judge and others who have dealt with like problems have pointed out) upon their own facts and circumstances judged against a criterion that is easier to describe than to define[156]. The statutory standard is flexible. It must be so because of the wide variety of circumstances to which s 51AA of the Act applies. Having regard to the history and purposes of that provision, and the language of its expression, I could not accept the proposition that s 51AA has a limited operation. It is as large as the statutory text and the incorporated unwritten law permit. It has a capacity to expand and apply to new circumstances as the unwritten law evolves "from time to time".

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154 *Berbatis* (2000) ATPR ¶41-778 at 41,194 [109].

155 *Berbatis* (2000) ATPR ¶41-778 at 41,197 [124]. See *Amadio* (1983) 151 CLR 447 at 461-463.

156 eg *Antonovic v Volker* (1986) 7 NSWLR 151 at 165 per Mahoney JA noted by the primary judge: *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491 at 501-502 [20]-[21].

117 It was therefore open to the primary judge to conclude as he did on the basis of the facts as he accepted them. No error of legal principle has been shown in his Honour's approach in reaching his conclusions. This Court has no warrant to substitute a different conclusion. We should therefore affirm the primary judge's judgment.

Orders

118 Because there is no ground of cross-appeal or notice of contention before this Court challenging the validity and appropriateness of the remedial declarations and orders fashioned by the primary judge[157] and because this Court has heard no argument addressed to such points, I will resist the temptation to enter into a consideration of the terms of the orders made at trial[158]. The very form of those orders – involving no punishment and no pecuniary impositions but simply remedies designed to ensure compliance with the Act – confirms my view that the proceedings were treated as a test case concerned with upholding the Act and achieving its objects rather than extracting money from the owners or enriching the Roberts as such.

119 The appeal should therefore be allowed. The judgment of the Full Court of the Federal Court should be set aside. In place of the Full Court's judgment, it should be ordered that the appeal to that Court be dismissed. In accordance with the condition imposed by this Court on the grant of special leave as enlarged by the acknowledgment of the ACCC in its notice of appeal, the appellant should pay the respondents' costs of the appeal to the Full Court and the respondents' costs of the appeal to this Court.

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157 *Berbatis* (2000) ATPR ¶41-778 at 41,199-41,200; *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2000] FCA 1893.

158 cf reasons of Callinan J at [187]-[190].

120 CALLINAN J. The question which this appeal raises is whether the insistence by a landlord upon the discontinuation of litigation by a tenant as the condition of a grant of a fresh lease constituted unconscionable conduct within the meaning of s 51AA of the *Trade Practices Act* 1974 (Cth) ("the Act").

Facts

121 The first to fourth respondents were the owners and operators of the Farrington Fayre Shopping Centre at Leeming in Western Australia ("the Centre") which comprised 26 small retail shops, including a supermarket. The fifth and sixth respondents were directors of the corporate owners. The eighth respondent was a director of the seventh respondent which effectively acted as a manager of the Centre on behalf of the respondent owners.

122 The respondent owners had also engaged Raine and Horne International (WA) Pty Ltd ("Raine and Horne") as the managing agents of the Centre. Raine and Horne performed that role until August or September 1996 when Davpac Holdings Pty Ltd, trading as First Pacific Davies ("FPD"), were engaged. Mr Craig Wilson and Ms Glenda Clapp were employees of Raine and Horne and, subsequently, FPD. Mr Wilson was responsible for the management, leasing and marketing of shopping centres managed by Raine and Horne and FPD. Ms Clapp was responsible, amongst other things, for collecting rents and dealing with tenants at the Centre.

123 From 1990, a number of the tenants at the Centre, including Margaret and James Roberts who traded as Leeming Fish Supply ("the business"), complained to the respondent owners about various charges purportedly imposed on them under their leases. Mr and Mrs Roberts had conducted the business from late 1989. Mrs Roberts was also experienced in various other business activities. Their lease was not due to expire until 14 February 1997 as a result of the exercise of the one option contained in it.

124 A daughter of Mr and Mrs Roberts suffered a serious and distressing illness which was expensive to treat, and in respect of which her parents spent much of the income they derived from conducting the business. Ms Clapp was aware of these matters.

125 In or about March 1995 the respondent owners were advised that Mr and Mrs Roberts were contemplating the sale of the business because their daughter required "considerable attention" and they thought that it was "time to get out", as they had been in the business "long enough". Mrs Roberts said that the grant of a new lease was desirable to enable them to make a satisfactory sale.

126 On 16 March 1995, Ms Clapp pointed out to the respondent owners that Mr and Mrs Roberts were "good operators".

127 On 10 April 1995, a letter of offer was sent by Ms Clapp to Mr and Mrs Roberts proposing a lease with terms of either seven years two months, eight years two months or ten years two months effective from 15 February 1997. No period for acceptance was stipulated by the letter. Mrs Roberts treated it as an open offer and did not take it up at that time.

128 In January 1996, some tenants of the Centre instituted proceedings against the respondent owners in the Commercial Tribunal of Western Australia ("the Tribunal"). On 24 April 1996, Mr and Mrs Roberts also instituted proceedings. In May 1996, the respondent owners and the tenants agreed to treat one tenant's case as a test case. The respondent owners were anxious about the pending litigation and its effect upon their reputation and standing in the community. They took steps to engage a "talkback" radio presenter to "turn the media discussions around".

129 The eighth respondent, a director of the seventh respondent, advised the respondent owners in relation to negotiations with the tenants of the Centre. In late June 1996, the respondent owners agreed that the eighth respondent be provided with "greater autonomy" as property consultant, and, on 1 July 1996, he proposed that the issue of "extension and renewal of various leases and a leasing strategy" become "part of the asset management brief" effective from that day.

130 In March 1996, Ms Clapp advised the eighth respondent that a number of leases at the Centre would be expiring in early 1997 and that although it was to be hoped that most lessees would seek new leases, some would not. The eighth respondent provided this information to the respondent owners in a letter dated 23 April 1996.

131 In April or May 1996, the respondent owners accepted, and subsequently acted upon advice from the eighth respondent that no current tenant should be given a new lease at the Centre unless that tenant agreed to discontinue any litigation it had commenced against the respondent owners ("the mutual release").

132 At about the same time, the eighth respondent advised the respondent owners that he expected limited rental growth at the Centre, but that the negotiation of new leases would present an opportunity to resolve disputes with existing tenants; that it was essential that negotiations be on a "one to one basis" to achieve the "best possible deal" for the respondent owners; and, that as part of this policy, he had instructed Raine and Horne to prepare a "tenant by tenant plan of attack".

133 On or about 26 March 1996, Mr and Mrs Roberts entered into a conditional agreement with Mr Holland for the sale of the business for $68,000. The condition was that a new five year lease with an option of five years, "as per letter of 10 April 1995", be available.

134 Ms Clapp informed the eighth respondent that the "purchaser" would be a "suitable tenant" and "potentially a successful operator of the business".

135 In or about May 1996, Mr Holland withdrew from the agreement to purchase the business because he was not prepared to enter into a lease for ten years: and further, that he was not interested in obtaining a lease if it meant that Mr and Mrs Roberts were obliged to withdraw their claim in the Tribunal. Mr Holland told Mrs Roberts that he remained interested in buying the business, and suggested that when things "cooled down" they might negotiate again. Mrs Roberts agreed to inform him of any other offers she and her husband might receive to purchase the business.

136 Mrs Roberts said that she and her husband were under "considerable stress". She advised Ms Clapp of it and her husband's illness as a result of that stress. Mrs Roberts was forced to cancel various plans, including for trips overseas and interstate to visit members of her family, and to investigate possible employment elsewhere. The staffing of the business had to be "reorganised" as numerous staff had left when the sale had been announced, and new staff had to be trained. There was "considerable disruption" to Mrs Roberts and her family as a result of the loss of the sale to Mr Holland.

137 On 6 June 1996, Mr and Mrs Roberts finally purported to accept the respondent owners' offer of a lease made on 10 April 1995. Ms Clapp advised them that the offer had lapsed, and submitted to them a draft lease with new terms. Neither the letter nor the enclosed documents (including the draft lease) referred to the mutual release. Mr and Mrs Roberts were not comfortable with some other conditions, and some mistakes in the documents. Mrs Roberts raised those concerns with Ms Clapp whose response was that it would consider any inaccuracies in the disclosure statement, but that "the lease was what the owners were willing to offer" and that they "could take it or leave it". Mr and Mrs Roberts decided to "leave it" at that time.

138 On 14 August 1996 Mr and Mrs Roberts were made a further offer, this time of a lease for seven years to commence on 1 October 1996. No reference was made at that time to the mutual release. Mr and Mrs Roberts signed the offer and an acceptance of it was signed by or on behalf of the respondent owners. Nevertheless Mr and Mrs Roberts held the mistaken belief that a lease had been concluded.

139 In October 1996, Mr and Mrs Roberts received an offer from another potential purchaser of the business. Mrs Roberts told Mr Holland of it. On 28 October 1996, Mr and Mrs Roberts entered into an agreement with Mr Holland for the sale of the business. Settlement was to be effected on 25 November 1996. The sale was subject to an assignment to Mr Holland of a lease for seven years (commencement date 1 October 1996).

140 On 29 October 1996, Mrs Roberts met Mr Wilson to ask whether the respondent owners would insist on the mutual release as a condition of the assignment of the lease, as she did not wish to undertake the selling of the business again if the requirement to withdraw the claim in the Tribunal remained. Mrs Roberts left the meeting believing that the respondent owners would not insist upon the inclusion of the mutual release. Between 29 October and mid-November 1996, numerous communications passed between Mr and Mrs Roberts, Ms Clapp and Mr Holland with respect to the preparation of a new lease and its assignment, on the basis that time was of the essence.

141 On 13 November 1996, Ms Clapp sought instructions from the eighth respondent as to the preparation of documents to extend or vary the lease and to assign it to Mr Holland. At about this time, the eighth respondent said that he had met the respondent owners and that they had affirmed that Mr and Mrs Roberts should only be offered a new lease if they agreed to the mutual release. Following that meeting, he said that he instructed FPD to prepare the relevant documents which were to make provision for the mutual release.

142 The operative clause for mutual release was as follows:

> "14.1 The Assignor and the Assignee do hereby jointly and severally release and discharge the Lessor from all actions, claims, demands, suits, proceedings and other liabilities arising directly or indirectly from any act or omission by the Lessor or its servants, agents or contractors which occurred prior to the assignment date which the Assignor or the Assignee may be otherwise able to make or bring pursuant to any rule of law or in equity or any statute, absolutely.
>
> 14.2 Without limiting the generality of Clause 14.1 the Assignor shall immediately file consent orders to dismiss any action, claim, demand, suit or proceeding made against the Lessor or its servants, agents or contractors with no order for costs.
>
> 14.3 The Assignor and the Assignee acknowledge and agree the releases and discharges express or implied in this Clause 14 shall be construed as widely as possible and that the Lessor may plead the releases and discharges as a complete and effectual defence.
>
> 14.4 The parties covenant and agree with each other to execute all documents that may be required to give full effect to the provisions of this Clause 14."

Mrs Roberts became aware of the inclusion of the mutual release in the documents relating to an assignment of the lease when it was brought to her attention by a lawyer who was incidentally one of her customers and who had looked over the documents for her. "Mrs Roberts could not believe" that the

mutual release clause had been included because "[she] had [been] assured ... it would not be something they insisted on".

143 Mrs Roberts' solicitor contacted the respondent owners' solicitor regarding the inclusion of the mutual release on 2 December 1996, but was advised that the respondent owners believed they had given Mrs Roberts "due consideration" by allowing the sale of the business to proceed. Mrs Roberts was "very upset by this" and "very concerned" because she had to make a decision that day without the opportunity to give the matter proper consideration.

144 Mrs Roberts felt that she had "little option" but to sign the deed because her lease was shortly due to expire, there was "no prospect of renewal", and "without [a new lease] she would have no business to sell". She therefore believed that she had no choice but to sign the deed as it was, and was "extremely upset and angry" that the agents and respondent owners had, in her view, "put her in a situation where she had no choice but to give up her legal rights". She raised her concerns with Mr Wilson and Ms Clapp who offered to bring the matter to the respondent owners' attention again, but this would have meant that settlement would not be able to be effected on the due date. Mrs Roberts said that she wanted the settlement to proceed because "she could not afford to have the sale of the business fail again". She signed a deed (which contained the mutual release) on Monday 2 December 1996 and the settlement of the sale took place on the same day.

145 Less than a fortnight later the Tribunal decided in part in one tenant's favour, against the respondent owners. Both parties appealed to the District Court.

146 On 22 January 1997, senior counsel's advice was obtained by the tenants' solicitor. It was that the respondent owners' appeal on the test case was likely to succeed to a considerable extent, but that there was a prospect that at least part of the tenants' original claims would succeed. On the basis of that advice, the tenants agreed that the respondent owners' appeal be allowed. The tenants commenced fresh proceedings however in the Supreme Court. In breach of their obligations under the mutual release Mr and Mrs Roberts took no steps to discontinue their claims.

147 The Supreme Court proceedings were resolved in November 1998 by a compromise, which, had Mr and Mrs Roberts participated in it, would have yielded them a refund of about $2,800.

The application to the Federal Court

148 On 3 April 1998 the appellant in exercise of the powers conferred on it, by for example ss 80 and 87 of the Act, instituted proceedings in the Federal Court for (*inter alia*) contravention of ss 51AA and 52 of the Act in respect of the

respondents' dealings with several of the tenants including Mr and Mrs Roberts. The contraventions of s 51AA were said to be the conduct of the respondent owners in relation to the renewal or assignment of the leases of premises at the Centre in imposing the mutual release upon the tenants.

149 The matter came on for hearing before French J. His Honour found for the appellant and made these declarations on 26 September 2000[159]:

> "1. It is hereby declared that in May 1996 and October 1996 the First, Second and Third Respondents, engaged in conduct that was unconscionable within the meaning of the unwritten law from time to time of the States and Territories, in contravention of s 51AA of the *Trade Practices Act 1974*, in that the said Respondents required, as a condition of the grant of a new lease to Margaret Joan Roberts and James Arthur Roberts, as Trustees of the Roberts Family Trust, trading as Leeming Fish Supply at Shop 14, Farrington Fayre Shopping Centre, that the Roberts do release the First to Fourth Respondents from various claims arising under their existing lease.
>
> 2. It is hereby declared that in May 1996 and October 1996 the Fourth, Fifth and Sixth Respondents were directly or indirectly knowingly concerned in or party to conduct in trade or commerce that was unconscionable within the meaning of the unwritten law from time to time of the States and Territories, in contravention of s 51AA of the *Trade Practices Act 1974*, in that the said Respondents required, as a condition of the grant of a new lease to Margaret Joan Roberts and James Arthur Roberts, as Trustees of the Roberts Family Trust, trading as Leeming Fish Supply at Shop 14, Farrington Fayre Shopping Centre, that the Roberts do release the First to Fourth Respondents from various claims arising under their existing lease.
>
> 3. It is hereby declared that the Seventh Respondent, in October 1996 and the Eighth Respondent in May 1996 and October 1996, acting as agent for or on behalf of the owners of Farrington Fayre, were directly or indirectly knowingly concerned in or party to conduct in trade or commerce that was unconscionable with[in] the meaning of the unwritten law, from time to time of the States and Territories, in contravention of s 51AA of the *Trade Practices Act 1974*, in requiring, as a condition of the grant of a new lease to Margaret Joan Roberts and James Arthur Roberts, as Trustees of the Roberts Family Trust, trading as Leeming Fish Supply at Shop 14, Farrington Fayre Shopping Centre, that the Roberts do release the First to

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159 (2000) ATPR ¶41-778 at 41,199-41,200.

Fourth Respondents from various claims arising under their existing lease."

150 His Honour made these findings in favour of Mr and Mrs Roberts[160]:

"In order to address the question whether the owners contravened s 51AA in their dealings with the Roberts it is convenient first to consider whether there was a relationship of disadvantage, disability or inequality between the two parties.

The Roberts as lessees of Shop 14 operated a small business, the Leeming Fish Supply, the value of which to any prospective purchaser was critically dependent upon the length and security of the tenure of the premises which the Roberts could convey to that purchaser at settlement. At the time that they first negotiated with Mr Holland between March and May 1996, they had less than twelve months of their lease to run. A mere assignment of the balance of the term, to which they were entitled by virtue of the provisions of the *Commercial Tenancy Act*, could not secure for Mr Holland a tenancy of the length necessary to make his investment worthwhile. So the sale of the business was dependent upon the owners' willingness to grant a new lease. They were under no obligation to do so. Neither the Roberts nor Mr Holland were actually or potentially large tenants. They were actual and prospective small business operators. The Roberts, in particular, had little bargaining power when it came to dealing with the owners. There was a marked inequality of bargaining power between them. The Roberts suffered what might be called a 'situational' as distinct from a 'constitutional' disadvantage. That is to say it did not stem from any inherent infirmity or weakness or deficiency. It arose out of the intersection of the legal and commercial circumstances in which they found themselves. That disadvantage, not being constitutional in character, was not able to be mitigated by the fact of legal representation which they had available to them at all material times.

The use of the word 'special' to describe the class of disadvantage or disability which will attract the application of the doctrines of equity is not to be treated as one would treat the word in a statute. It indicates that the requisite disadvantage will not necessarily be found in the normal run of bargaining inequality between large landlords and small tenants. In my opinion, however, the circumstances in which a business operator on a lease may effectively lose the value of that business upon expiry of the lease does place the tenant at a special disadvantage in dealing with the owner. This does not import any obligation on an owner to renew a lease which has expired. The question is whether the owner has unfairly

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160 (2000) ATPR ¶41-778 at 41,196-41,197 [121]-[124].

exploited the tenant's disadvantage in a way that equity would regard as unconscionable. Unfair exploitation of disadvantage amounting to unconscionable conduct may occur when an owner uses its bargaining power to extract a concession from the tenant that is commercially irrelevant to the terms and conditions of any proposed new lease.

This is an area of evaluation and assessment where there are few hard and fast guides. In my opinion for the owners to insist, as they did through Mr Sullivan in this case, upon the Roberts abandoning their rights to proceed with bona fide litigation in relation to their rights under their existing lease was to engage in unconscionable conduct. The claims that they, in common with other tenants, were raising against the owners were bona fide and serious. They were taken seriously by both the tenants and by the owners. This conclusion would not prevent an owner from insisting as a condition of the renewal of a lease that a tenant not engage in frivolous or vexatious litigation against the owner. Nor would it prevent an owner from simply refusing to renew a lease in favour of a tenant with whom that owner was engaged in litigation. Each case must be considered according to its own circumstances. The personal circumstances of the Roberts are also relevant in so far as they were known to the owners or their agents. In particular, Mrs Roberts had spoken to Ms Clapp on numerous occasions over the years about her daughter's condition and the consequent emotional strain placed on herself and her husband. Quite apart from that circumstance, in my opinion, the present case insofar as it involves the Roberts, discloses unconscionable conduct on the part of the owners on the two occasions in May 1996 and November 1996 in which they insisted upon the execution of a release clause by the Roberts as a condition of the grant of a new lease and assignment thereof to Mr Holland. It is of no consequence, in my opinion, that the detriment suffered by the Roberts may have been small in money terms. The way in which the owners acted, through their agent Mr Sullivan and his company, was a grossly unfair exploitation of the particular vulnerability of the Roberts in relation to the sale of their business. Whether or not they all had personal knowledge of the circumstances of the Roberts, they were fixed with such knowledge through that of Brian Sullivan and his company. The corporate respondents were therefore in contravention of s 51AA and the natural respondents knowingly involved in that contravention."

151 Subsequently, on 20 December 2000 his Honour made orders on the application of the appellant for the "re-education" of the respondent natural persons (the fourth, fifth, sixth and eighth respondents) as follows, that they:

"(a) within four months from the date of this order, at their own cost, arrange and/or attend a Trade Practices Compliance Seminar ('the Seminar');

(i) conducted by a trade practices law specialist in the terms of the Seminar outline annexed; and

(ii) which addresses the unconscionable conduct provisions of the Act and, in particular, section 51AA; and

(b) within one week of attending the Seminar, notify the [appellant] of that attendance."

The outline to which his Honour referred in the orders is as follows:

"1. Introduction

Overview of principles of unconscionable conduct.

2. The Trade Practices Act

Unconscionable conduct and the Trade Practices Act

(i) Overview of Part IVA

(ii) Section 51AA

- special disability or situation of disadvantage

- unfair advantage of superior bargaining position

3. Business principles

(a) High risk situations:

(i) where weaker party did not fully understand transaction;

(ii) where there is no real opportunity for the weaker party to bargain;

(iii) where a contract is one-sided;

(iv) excessive terms and prices;

(v) using a position of power to impose unreasonable conditions

(b) Dispute avoidance and resolution".

152 The primary judge dismissed the appellant's claim that the respondents had engaged in deceptive conduct contrary to s 52 of the Act and also the appellant's claims in respect of tenants other than Mr and Mrs Roberts.

The appeal to the Full Court of the Federal Court

153 The respondents appealed to the Full Court of the Federal Court[161] (Hill, Tamberlin and Emmett JJ). A cross-appeal (with which this Court is not concerned) was also filed and argued by the appellant.

154 There was no dispute between the parties in the Full Court as to the relevant principles. All accepted that it was necessary to demonstrate that Mr and Mrs Roberts were under a "special" disadvantage in their dealings with the respondents in connexion with proposals for the renewal or extension of their lease in accordance with the reasoning of this Court in *Commercial Bank of Australia Ltd v Amadio*[162]. The dispute on appeal was whether the circumstances of the parties and Mr and Mrs Roberts were such that the conclusion should be drawn that the latter truly were at a relevant special disadvantage so as to attract the protection of s 51AA of the Act.

155 In a unanimous judgment the Full Court pointed out that this was not a case in which there was any expectation engendered in Mr and Mrs Roberts that they would be granted an unconditional fresh lease: even though Mrs Roberts had given evidence that she had been given an assurance to that effect, the primary judge had made an express finding that he could not be satisfied that such an unequivocal and groundless statement had been made. Their Honours in allowing the respondents' appeal said[163]:

> "By offering terms upon which a renewal or extension of the lease could be granted, the Roberts were, in effect, thrown a lifeline. Whether they were better off by foregoing their claims and accepting that lifeline than if the lifeline had not been offered to them may be a matter of judgment for them to make. Clearly, their judgment was that they were better off by accepting the lifeline. It would be curious, therefore, to characterise the conduct that led to that result as unconscionable.
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> A distinction can be drawn between parties who adopt an opportunistic approach to strike a hard bargain and parties who act unconscionably[164]. It cannot be said that the Roberts' wills were so

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161 (2001) 185 ALR 555.

162 (1983) 151 CLR 447.

163 (2001) 185 ALR 555 at 571 [80]-[83].

164 See *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2000) ATPR ¶41-791 at 41,403 [99].

overborne that they did not act independently and voluntarily. Unfortunately for the Roberts, the owners were under no obligation to renew or extend their lease. The Roberts had the choice of either maintaining their legal claims against the owners and losing the opportunity to sell their business or abandoning their claims and gaining the opportunity to sell their business. They made that choice of abandoning their claims. That may have been a hard bargain, but it was not an unconscionable one.

It is inappropriate to characterise the detriment that a tenant has by reason of the imminent expiration of a lease as a special disadvantage. His Honour appears to have accepted that proposition. His Honour erred, however, in concluding that the Roberts were under a special disadvantage such that the arrangements that they entered into in December 1996, with proper legal advice, were unconscionable. It follows that there was no contravention of s 51AA in relation to the conduct of the owners from October to December 1996.

Since the bargain that was struck between the Roberts and the owners in December 1996 was not unconscionable, it follows, a fortiori, that nothing that was done in May by the owners could be characterised as unconscionable. Equity is concerned with a remedy where a transaction has been entered into against good conscience or which is unconscientious. No transaction was entered into in May. There could be no conduct that could be characterised as unconscionable under the unwritten law."

The appeal to this Court

156 It is convenient first to set out s 51AA(1) of the Act:

"**51AA Unconscionable conduct within the meaning of the unwritten law of the States and Territories**

(1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories."

157 Section 51AA, together with ss 51AB and 51AC, is contained in Pt IVA of the Act. Part IVA was inserted in 1992 and s 51AC was added in 1998.

158 The explanatory memorandum that was promulgated with the Bill for the Act to insert Pt IVA said this of s 51AA:

"The provision embodies the equitable concept of unconscionable conduct as recognised by the High Court in *Blomley v Ryan*[165] and *Commercial Bank of Australia v Amadio*[166]. ...

The advantages of providing a statutory prohibition for conduct which is already dealt with by equity lie in the availability of remedies under the Principal Act, the potential involvement of the Commission including the possibility of representative actions, and the educative and deterrent effect of a legislative prohibition in the Principal Act.

... Because of the position of the High Court of Australia as the ultimate appellate court for all States and Territories, the 'unwritten law' of the States and Territories is the same. If a court in a State or Territory were thought to deviate from the principles recognised by the High Court, another court exercising its jurisdiction in relation to section 51AA would not be bound to follow that deviation, unless it was satisfied that to do so was consistent (or at least not inconsistent) with the law as recognised by the High Court from time to time."

159 The appellant submitted that unconscionable conduct for the purposes of s 51AA of the Act might arguably fall into any one of four categories:

"(a) the discrete doctrine of unconscionable dealing resulting from the knowing exploitation by one party of the special disadvantage of another;

(b) all specific equitable doctrines, including estoppel, unilateral mistake, relief against forfeiture and undue influence, which are united by the underlying notion of 'unconscionability';

(c) the doctrine of unjust enrichment in addition to all the specific equitable doctrines referred to in (b) above; and

(d) any conduct which is contrary to 'conscience' in its ordinary meaning."

160 As will appear, no wide-ranging consideration of what conduct may constitute unconscionable conduct within the "unwritten law", or of the correctness or otherwise of the appellant's attempted categorisation of it in those four last paragraphs is necessary in this case.

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165 (1956) 99 CLR 362.

166 (1983) 151 CLR 447.

The appellant's principal submissions

161 This case, the appellant submitted, was concerned with unconscionable conduct involving the unconscionable exploitation by one person of the serious disadvantage of another to secure the disposition of property, or the assumption of contractual or other obligations by the weaker party.

162 At the outset however the appellant sought to characterize the primary judge's decision as an exercise of a discretion, and accordingly not open to interference except upon narrow grounds[167] of a kind which were not available here. The primary judge, the appellant claimed, made detailed findings in respect of all facets of the case, including the litigation undertaken by the tenants against the respondent owners, the general strategy adopted by the respondent owners of tying new leases to the abandonment by the tenants of existing litigation, and the circumstances of Mr and Mrs Roberts' sale of the business. Only after considering those matters did the primary judge exercise such discretion as he identified as being available to him on the basis of a disciplined application of existing equitable principles.

163 The careful exercise of discretion, the appellant submitted, is apparent in the primary judge's conclusion that the respondent owners had engaged in unconscionable conduct in respect of Mr and Mrs Roberts, but had not engaged in unconscionable conduct in respect of the other two tenants whose cases were before him. In so exercising his discretion, the primary judge enjoyed the advantages that are inevitably associated with his position as the first instance judge including the benefit of exposure to the nuances of the evidence and the atmosphere at trial. The Full Court should therefore not have substituted its own discretionary analysis for that of the primary judge. The consequences of its doing so were particularly significant in view of the nature of the law under consideration of equitable principles of conscience.

164 The submission continued, that by enacting s 51AA, which expressly locates the notion of conscience in the arena of trade and commerce, the legislature on behalf of the Australian community has clearly signalled its view as to the appropriateness of applying equitable concepts in the commercial world: the courts have a clear obligation to apply s 51AA so as to give proper effect to the section in trade and commerce.

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167 *House v The King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ; *Lovell v Lovell* (1950) 81 CLR 513 at 533 per Kitto J; *Singer v Berghouse* (1994) 181 CLR 201 at 212 per Mason CJ, Deane and McHugh JJ; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 549 per Toohey and Gummow JJ, 569 per Kirby J.

165 Equitable jurisdiction, the appellant accepted, however, is to be exercised according to recognised principles. Courts are not armed with a general power to set aside bargains simply because in the eye of a particular judge, they might appear to be unfair, harsh or unconscionable. The primary judge's careful evaluation of the facts and application of relevant principles to those facts show that he was aware of, and appreciated this proposition.

166 Nonetheless the appellant did not seek the intervention of this Court on any different basis from the one upon which it relied in the Federal Court at both levels, that Mr and Mrs Roberts were at a special disadvantage, as the trial judge found, and of a kind to which *Amadio*[168] applied.

The appellant's submissions should be rejected

167 The appellant's submission that the primary judge's decision was wholly or substantially a discretionary one should be rejected. The language of s 51AA does not support it. Nor does the concept of unconscionability under the unwritten law support such a proposition. The manner in which the test of unconscionability in relevant aspects is generally stated[169] or as discussed in *Amadio* does not presuppose the exercise of a discretion. Practically, indeed perhaps every judgment of a trial judge requires an evaluation of facts, but the evaluation is a different and subsequent process from the finding of the facts. An evaluation of facts found is precisely one of the exercises which an appellate court is obliged, when an unrestricted right of appeal is available, to undertake.

168 In this case, the evaluation of the facts by the Full Court is to be preferred to that of the primary judge. The respondent owners were under no obligation to grant Mr and Mrs Roberts a new lease although they were under a statutory obligation (which they acknowledged at all material times) to consent to an assignment to a responsible new tenant[170]. Furthermore, Mr and Mrs Roberts had their opportunities, either to take up a new lease or to seek to enforce what they contended to be a concluded agreement to grant a new lease[171].

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168 (1983) 151 CLR 447.

169 *Blomley v Ryan* (1956) 99 CLR 362 at 405 per Fullagar J, 415 per Kitto J; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461 per Mason J; *Louth v Diprose* (1992) 175 CLR 621 at 637 per Deane J.

170 *Commercial Tenancy (Retail Shops) Agreements Act* 1985 (WA), s 10.

171 cf *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623.

169 The facts of this case may be contrasted with those of *Bond Brewing (NSW) Pty Ltd v Reffell Party Ice Supplies Pty Ltd*[172] in which there was no appeal. That was one of a very large number of cases in which there had been a consistent course of dealings by a brewer landlord with respect to extensions and assignments of unwritten tenancy agreements of hotels, and payments by way of goodwill from time to time. It was also a case in which the Court was prepared to hold that the evidence went so far as to establish an estoppel against the owner[173].

170 The Full Court did not err in taking the view that the only matters which the evidence established as giving rise to any operative "special disadvantage" were those common to any tenant in similar circumstances. A person obligated under one contract, containing, as with most contracts, temporal limitations as to its operation, is under no obligation to extend or renew the operation of that contract. This is particularly so in the case of leases in respect of which the most naïve of tenants is likely to understand the need for, and accordingly the necessity to obtain at the outset, an option to renew, or, in this case a further option to renew. Such are the utility and flexibility, and therefore the value of options, they are something to be bargained for, and accordingly their presence or absence from the instrument of lease may well be reflected in the quantum of the rent payable during the term.

171 The appellant submitted that the Full Court erred at law in concluding that unconscionable conduct will generally only be found in equity and for the purposes of the section, where the weaker party's will is so overborne as to prevent that party from acting independently and voluntarily. I do not myself read the reasons of the Full Court as conveying that view. What the Court was saying was that whether a person's will had in fact been overborne was a relevant, but not necessarily an essential element in many cases of unconscionability, a proposition which the respondents do not contest. Here, the Full Court held that the evidence showed that Mr and Mrs Roberts were not overborne. They may have been at a commercial disadvantage. That disadvantage resulted from a number of factors, some, if not all of them of their own making, for example: their taking of a lease without a [further] option; their delay in seeking a fresh lease; their failure to seek to enforce what they contended to be a concluded agreement, or to accept in a timely way an unqualified offer of a fresh term; and, their desire to negotiate a different rent from the rent proposed by the respondent owners.

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172 Unreported, Supreme Court of New South Wales, 17 August 1987.

173 Unreported, Supreme Court of New South Wales, 17 August 1987 at 35, 43-45.

172 The appellant seeks to maintain the primary judge's holding that unfair exploitation of disadvantage amounting to unconscionable conduct may occur when an owner uses its bargaining power to "extract a concession" from the tenant that is commercially irrelevant to the terms and conditions of any proposed new lease. The appellant when challenged was unable to point to any authority for such an expansive principle. It is far too broad and imprecise to be accepted in this Court.

173 But in any event the facts of this case do not fall within a principle expressed even in those wide terms. To describe the promise to withdraw from the litigation in the Tribunal as a "concession" is to misdescribe it. Mr and Mrs Roberts had a choice. It was a commercial choice with respect to which they had to make, and did make a judgment. Which was worth more, either in money or certainty: the pursuit of litigation which might or might not involve an appeal, and the quantum of which could be (and did turn out to be) a few thousand dollars only; or a new lease which the respondent owners could not be obliged to grant, but which, if granted, would enable a prompt sale for tens of thousands of dollars to be effected? The word "extract" as used by the primary judge has overtones of coercion. For the respondent owners to seek the best commercial outcome for themselves when they were under no legal obligation to act otherwise, is hardly "to *extract* a concession". The evidence shows in fact that the respondent owners too had a choice to make between competing commercial considerations of, for example, keeping Mr and Mrs Roberts as tenants, or obtaining another responsible tenant such as Mr Holland, preserving their public image as non-oppressive landlords, fostering the goodwill of their tenants generally, and ridding themselves of irritating and no doubt expensive litigation when the opportunity to do so arose. The choice they too made was a commercial one. They used an entirely unexceptional and unexceptionable right that they had to grant or withhold a new lease upon a condition that enabled them to rid themselves of troublesome litigation.

174 Nor can it be said in my opinion that the "mutual release" was commercially irrelevant to the new lease. The primary judge spoke of commercial irrelevance as if it were a readily identifiable touchstone. With respect I very much doubt this. Perhaps anything arising between parties in negotiation that has a monetary significance, whether direct or indirect, is of commercial relevance, even assuming, which I am not at this stage prepared to do, that the seeming or actual commercial irrelevance of a condition or requirement by one arms length party of another, will render the former's conduct unconscionable.

175 The appellant submitted that either uncontradicted evidence concerning, or findings with respect to four matters had such significance that a finding of unconscionability was justified, and should not have been disturbed by the Full Court. The four significant matters were said to be the respondents' anxiety to renew the tenancies, the concern that the respondent owners held about their

relationship with the tenants generally, their concerns about the litigation against them in the Tribunal, and the use of their leverage of the potential to grant a fresh lease to obtain what was asserted to be an unrelated and undeserved gain.

176 This submission is in substance met by what I have so far said. But, in addition, the expression "unrelated and undeserved gain" is inaccurate. It immediately raises the question of what might be a deserved gain. Nowhere does the appellant in its submissions even attempt to define the nature of such a gain. It seems to me that it is perfectly open however to describe the withdrawal from litigation as part of the price of the grant of a new lease which an owner was in no way obliged to grant, as a not unreasonable *quid pro quo*. Whenever parties are in a business relationship with each other and they fall out over an aspect of that relationship, it will generally not be unreasonable or indeed unconscionable for them to seek to insist upon their legal rights, or to require that one party give up some right in exchange for the conferral of a new right upon that party.

177 I cannot help observing before leaving this submission that insufficient regard seems to have been given at first instance to the respective rights involved. I earlier described Mr and Mrs Roberts' claim at the Tribunal as uncertain as to both outcome and quantum. It certainly appears that the claim as formulated was overly ambitious and also raised the spectre of litigation which, including appeals, might in the end not necessarily have been to the nett financial benefit of Mr and Mrs Roberts. Whilst the claim of Mr and Mrs Roberts was on foot it provided them with a "bargaining chip" in their negotiations for a fresh lease, and little more than that. I do not think that it could even be fairly said that Mr and Mrs Roberts were exposed to the "rough edge"[174] of their contract with the respondent owners.

178 The appellant sought to describe the litigation in which Mr and Mrs Roberts were participating as "bona fide and serious litigation" as opposed to trivial or vexatious litigation. Experience tells that the outcome of much litigation is unpredictable. It was for these reasons no doubt that the respondent owners were advised by their lawyers of the possibility that their conduct might conceivably offend s 51AA of the Act, a matter incidentally relied upon by the appellant but which in my opinion has nothing relevant to say about the quality of their conduct in this case. Prudent business people will always seek legal advice, and the best lawyers will give it conservatively with a careful eye to the uncertainties, and desirability of the avoidance of litigation.

179 The appellant contended that the Full Court had misconstrued s 51AA of the Act. In doing so it inaccurately attributed to the Court a holding that in no circumstances of dealings between an owner and a lessee upon the expiry of the

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174 See *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at 626 per Lord Radcliffe.

lease, could there be unconscionable conduct on the part of the landlord. What the Full Court held, and correctly so, is that there is nothing special about a situation in which a tenant without an option is anxious to obtain a fresh lease, and the landlord, conscious of that anxiety, utilizes it to obtain a business advantage, whether by way of a higher rent or otherwise.

180 The Full Court did not rule out the application of s 51AA to the granting of leases in trade and commerce. Their Honours were applying themselves to the facts before them, and on those facts differed, as I think they were bound to do, from the conclusion of the trial judge.

181 It is possible to dispose of this case on its own facts. The appeal does not provide the occasion, as indeed the appellant ultimately conceded, for a complete exposition of the meaning and operation of s 51AA of the Act or the current law of unconscionability.

182 The case and the appeal in the Federal Court were conducted upon the complete basis that Mr and Mrs Roberts' situation, and the respondent owners' conduct were governed by the statements of Mason J in *Amadio*[175]. There his Honour first referred to statements by Fullagar J and Kitto J in *Blomley v Ryan*[176] respectively. In that case the former had said:

> "The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage *vis-à-vis* the other."

183 Kitto J also referred to illness, but added ignorance and financial need or other circumstances affecting a person's ability to conserve his own interests as relevant.

184 It is important to note that although their Honours expressed themselves very broadly in the passages to which I have referred, I do not understand that the presence of one or more of the factors which they mentioned necessarily dictated that in every such case unconscionability should be found. Take for example Kitto J's reference to "circumstances affect[ing a person's] ability to conserve his

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175 (1983) 151 CLR 447 at 462.

176 (1956) 99 CLR 362 at 405 per Fullagar J, 415 per Kitto J.

own interests". Use of the word "conserve" suggests the maintenance of a pre-existing or current right or interest. Two circumstances which almost always will have the capacity to affect a person's ability to protect or further his or her own interests, are the financial capacity of that person, and its relativity to the financial capacity of a person with a competing interest. Mason J was conscious of this in *Amadio*, and accordingly qualified the word "disadvantage" by the adjective "special" in order to disavow any suggestion that the principle applies whenever, and because there is some difference, even substantial, in the bargaining power of the parties. His Honour also obviously thought it necessary to emphasize that the relevant conditions or circumstances calling for the application of the doctrine be ones which seriously affect the ability of an innocent party to make the judgment as to his or her own best interests, when the other party knows, or ought to know of that condition or circumstance, and its effect on the innocent party.

185 The appellant's attempt to bring Mr and Mrs Roberts and the relevant circumstances within the principle stated by Mason J, fails. There was no circumstance seriously affecting the ability of Mr and Mrs Roberts to make a judgment as to where their best interests lay. They recognised and understood what was in their best interests, and acted accordingly by undertaking to withdraw from the proceedings in the Tribunal and by taking up the opportunity of obtaining a fresh lease. It is difficult to see how any prudent choice could be otherwise, even assuming that their daughter's illness, and their concern about it, were personal circumstances which were relevant and capable of giving rise to a special disadvantage, here, again a proposition which I seriously doubt.

186 What I have said is sufficient to dispose of the appeal. There are only two other matters to which I should however refer. The first is that the Act does make separate and explicit provision for the unlawful taking of advantage of a substantial degree of power in a market, by, for example s 46. There is no necessity to explore the ambit of that section in this case or its relationship with s 51AA. It is sufficient to point out that its presence may serve to indicate the, or some circumstances in which the use of a superior bargaining position may be relevant. Nor is it necessary in this case to seek to resolve the difficulties bound to arise in applying s 51AA of the Act, and therefore principles relating to unconscionability, to trade and commerce generally, in which the bargaining position, because of superior resources, skill, judgment, timing or indeed simply luck on one side, of the parties is rarely likely to be equal.

187 The second matter is the nature of the orders which were made by the primary judge after his Honour made the declarations that the respondents had infringed s 51AA of the Act. The orders which I have earlier set out were that the fourth, fifth, sixth and eighth respondents be, in effect, "re-educated".

188 There was no argument in this Court that the orders which were made were not an exercise of federal judicial power. Nor was any attention given to

the legality or practicality of their enforcement by proceedings for contempt. I will accordingly confine myself to a consideration of their appropriateness and availability on the assumption that they might properly constitutionally be made pursuant to s 87 or a combination of ss 80, 82 and 87 of the Act[177].

189 The conduct in question was conduct found to have occurred in relation to one tenancy only. The effect of the conduct even on his Honour's view of it was long spent. There was no suggestion of any repetition of it[178]. The seventh and eighth respondents no longer had any interest in the Centre, and the eighth respondent was not even currently employed in the relevant industry. The orders assumed, either that trade practices law specialists regularly conducted trade practices compliance seminars, or that it was appropriate for a trial judge to order and design a particular trade practices seminar, or to approve the appellant's proposal for one. The fact that the appellant may have issued in 1998 "A guide to unconscionable conduct in business transactions" and that in so doing it may have been acting within s 28 of the Act, could provide no basis for orders of the kind made by the primary judge here.

190 It is unnecessary, because of the other errors identified, to give consideration to the effect (if any) that the making of those unjustified orders might have on the declarations and reasoning to support them made and given earlier by the trial judge.

191 The appeal should be dismissed. I agree with the orders proposed by Gummow and Hayne JJ.

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177 See eg *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 264-266 per Gummow J.

178 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2000] FCA 1893 at [8].