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An Attempt at Codifying the Equitable Doctrine of Unconscionable Dealings

DAN SVANTESSON⁺

Abstract

*This article is written in honour and in memory of my dear colleague the late Professor Denis Ong — a talented, hard-working, and deservedly leading, authority on equity. Here, I seek to articulate a potential ‘codification’ of the equitable doctrine of unconscionable dealings. While I have been advocating a reform-oriented codification of Australia’s contract law, including the equitable doctrine of unconscionable dealings, for almost 15 years, the ambition of this article is limited to a restatement of *lex lata*.*

On my path to that goal, I start by providing a brief overview of the origins of the equitable doctrine of unconscionable dealings. I then proceed to discuss Professor Ong’s view of the equitable doctrine of unconscionable dealings before I engage with the modern key cases on the topic. Having outlined my proposed codification of the equitable doctrine of unconscionability, I then say a few words about the relationship between the equitable doctrine of unconscionability and unconscionability under the Australian Consumer Law (ACL), before concluding the article with some final observations.

I Introduction

Equity as a principle of fairness and equality is a necessity in any legal system worthy of the name. But equity as a separate source of law — as a branch of law that developed alongside common law — is, in my view, an unnecessary complication that now ought to be merged with the common law. Of course, I was never brave enough to express that view directly to the esteemed equity expert, the late Professor Ong, in whose honour and memory I write this article.

Professor Ong’s writings show an astute appreciation of the risks associated with unnecessarily dividing matters into sub-categories.¹ So

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This article draws, and expands, on research presented in Dan Svantesson, *Svantesson on the Law of Obligations* (Centre for Professional Legal Education, Bond University, 4th ed, 2021). I am grateful for the research assistance provided by Montgomery Frankish.

¹ Denis SK Ong, *Ong on Equity* (Federation Press, 2011) 503.

perhaps we would have agreed that the law ought to avoid unnecessarily being divided into sub-categories. However, we would perhaps have disagreed as to whether the distinction and separation between common law and equity amounts to such an unnecessary subdivision.

At any rate, the aim of this article is to present a possible ‘codification’ of the law as it applies in the form of the equitable doctrine of unconscionable dealings. On my path to that goal, I start by providing a brief overview of the origins of the equitable doctrine of unconscionable dealings. I then proceed to discuss Professor Ong’s view of the equitable doctrine of unconscionable dealings before I engage with the modern key cases on the topic. Having outlined my proposed codification of the equitable doctrine of unconscionability, I then say a few words about the relationship between the equitable doctrine of unconscionability and unconscionability under the Australian Consumer Law (ACL), before concluding the article with some final observations.

Since 2008, I have been advocating a reform-oriented codification of Australia’s contract law, including the equitable doctrine of unconscionable dealings.² In my early writings on the topic, I noted that ‘[c]odifying Australia’s contract law is doubtlessly a daunting undertaking. However, if done successfully, it can also be a remarkable, significant and long-lasting achievement’.³ The urgency of such reform has, in my view, increased as the unnecessary complexity of this field of law continues to worsen.

The codification I explore here merely involves a restatement of *lex lata*. Thus, the comparatively modest aim is limited to making the current law more accessible and ‘user-friendly’. However, in an ideal world, this codification ought to be combined with modernisation and reform. Furthermore, I remain convinced that there is a need to codify Australia’s contract law as a whole. Thus, while the discussion here is limited to the equitable doctrine of unconscionable dealings, I am not proposing a ‘standalone’ codification of that topic. Rather, what I show here may be seen as an illustration of the broader codification I envisage.

II Briefly about the Origins of the Equitable Doctrine of Unconscionable Dealings

This article does not aim to fully account for the origin, history, and development of the equitable doctrine of unconscionable dealings. Others have examined this.⁴ The goal is to appreciate the consistency

² Dan Svantesson, ‘Codifying Australia’s Contract Law: Time for a Stocktake in the Common Law Factory’ (2008) 20(2) *Bond Law Review* 92. Professor Ong was the editor of the *Bond Law Review* at the time of the publication of that article.

³ *Ibid*, 116.

⁴ See, eg, *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 94 (Edelman J) (‘*Kobelt*’).

of the application of this doctrine over a period spanning approximately 270 years. It should be noted that the doctrine was expressed — in a form similar to how it is expressed today — already in 1751 in the case of *Earl of Chesterfield v Janssen*.⁵ However, a particularly valuable articulation of the doctrine may be found in *Earl of Aylesford v Morris*:

Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as prima facie to raise this presumption [of fraud] the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just and reasonable.⁶

With this said, the remainder of the article is aimed at *de lege lata* and, to a much lesser degree, *de lege ferenda*.

III Professor Ong's View of the Equitable Doctrine of Unconscionable Dealings

It seems appropriate to start the article by providing an overview of how Professor Ong viewed the equitable doctrine of unconscionable dealings before proceeding to an analysis of the modern key cases in the field. In *Ong on Equity*, the learned equity expert guides us through the structure of analysing whether a transaction entered into for value was the result of an unconscientious exploitation by one party of the other party's diminished ability to conserve his or her own interests.

Professor Ong teaches us to divide such an analysis into two consecutive questions:

[F]irst, whether one party to the transaction had taken advantage of a bargaining position that was superior to that of the other party, to which, in 'most' cases, the answer would be in the affirmative; and, second, but only if the answer to the first question is in the affirmative, whether the fact that such an advantage had been taken was, in the circumstances attending the transaction, an unconscientious exploitation of the other party's diminished ability to conserve his or her own interests. However, this second question itself needs to be divided into two consecutive sub-questions: first, was the weaker bargaining position of the other party to the transaction *the result of* a diminished ability to conserve his or her own interests? If the answer to this sub-question is in the negative, then there would *not* have been any *culpable* (ie unconscientious) exploitation of the weaker party to the transaction by the stronger party thereto.

⁵ (1751) 2 Ves Sen 125. Indeed, as noted by Havelock: 'The notion of "conscience" was a primary basis of decision-making in the original Chancery jurisdiction and in this sense the genesis of developed equitable rules and principles': Rohan Havelock, 'Conscience and Unconscionability in Modern Equity' (2015) 9(1) *Journal of Equity* 1, 27.

⁶ (1873) LR 8 Ch App 484, 490–1 discussed in Ong (n 1) 487.

However, if the answer to this sub-question is in the affirmative, namely, if the weaker bargaining position of the other party to the transaction *was* the result of a diminished ability to conserve his or her own interests, then the second sub-question will require to be asked and answered: did the stronger party to the transaction *know* or *ought he or she to have known* that the party in the weaker bargaining position was weaker *because* he or she suffered from a diminished ability to conserve his or her own interests? If the answer to this sub-question is in the negative, then, again, there would *not* have been any *culpable* exploitation of the weaker party to the transaction by the stronger party thereto. On the other hand, if the answer to this sub-question is in the affirmative, namely, if the stronger party to the transaction *knew* or *ought to have known* that the party in the weaker bargaining position was weaker *because* he or she suffered from a diminished ability to conserve his or her own interests, and the stronger party nevertheless proceeded to conclude the transaction with the thus weakened party, then the stronger party would have *culpably* (ie unconscientiously) exploited the diminished ability of the weaker party to the transaction, so that the thus weakened party will be entitled to have the transaction set aside.⁷

To this, Professor Ong adds the ‘critical question’ of ‘what does a person’s diminished ability to *conserve* his own interests mean?’, and in answering, he notes that: ‘[t]he courts have made it clear that, in the context of the relevant equitable principle, a person’s diminished ability to conserve his own interests means his diminished ability “to make a judgment as to his own best interests”’.⁸

Based on this, Professor Ong concludes that:

[U]nder this head of equitable relief, a party who was merely not able to *protect* his interests when he entered into a transaction, but who was nevertheless competent to make a *judgment* as to his interests when he entered into the transaction, would not be entitled to avoid that transaction notwithstanding that the other party thereto knew of the former’s inability to protect his interests. A deficiency of *power* in the bargaining process, even if such a deficiency was known to the other party to the transaction, does not attract this head of equitable relief. However, a party’s *diminished* ability to make a *judgment* as to his interests in the bargaining process, if such an impaired judgment was known to the other party to the transaction, will attract this head of equitable relief.⁹

This useful analysis makes clear that, for the application of the equitable doctrine of unconscionable dealings, it is the exploitation of a party’s diminished ability to make a judgment as to its interests that is in focus. This allows us to distinguish unconscionability for related concepts such as undue influence, in which a party’s will is overborne.¹⁰

⁷ Ong (n 1) 488–9 (citations omitted).

⁸ Ibid 489. See also *Kobelt* (n 4) 36 (Gageler J), 57 (Nettle and Gordon JJ).

⁹ Ong (n 1) 490.

¹⁰ See also Ong (n 1) 490–1.

In the above, Professor Ong — in his characteristically insightful and sharp manner — provides the contours and structure for a possible codification of the equitable doctrine of unconscionable dealing. However, curiously, Professor Ong does not engage in a discussion of the potential relevance of the resulting transaction being ‘fair, just, and reasonable’ as has been an express consideration from, at least, the 1873 case of *Earl of Aylesford v Morris*.

Finally, in this context, it is interesting to contrast Professor Ong’s clear structure to the majority view in the recent High Court decision in *Stubbings v Jams 2 Pty Ltd*.¹¹ There, Kiefel CJ, Keane and Gleeson JJ expressed the view that the factors¹² articulated in *Commercial Bank of Australia Ltd v Amadio*¹³ (discussed below) ‘should not be understood as if they were to be addressed separately as if they were separate elements of a cause of action in tort’.¹⁴ Personally, I much prefer the structured approach presented by Professor Ong, and perhaps it is telling that Kiefel CJ, Keane and Gleeson JJ, having made their observation noted above, still proceeded to discuss the case exactly according to the set of factors they stated should not be understood as if they were to be addressed separately as if they were separate elements of a cause of action.¹⁵

IV The Modern Key Cases

The application of the equitable doctrine of unconscionable dealing is well illustrated in the classic authority of *Commercial Bank of Australia Ltd v Amadio*.¹⁶ There, the matter before the Court involved Mr and Mrs Amadio, an elderly couple with Italian origins, who had agreed to act as guarantors for a construction business owned by their son.

The couple had little business experience, little formal training, and limited grasp of written English. Further, they had no reason to believe that their son’s company was in financial trouble. However, the bank was well aware of the company’s financial difficulties. Indeed, it was in response to the bank’s demands for security that the son approached Mr and Mrs Amadio to give a guarantee of approximately \$50,000 for six months (the son had not discussed any such limitations to the

¹¹ (2022) 399 ALR 409 (*‘Stubbings’*).

¹² Namely: (1) a relationship that places one party at a ‘special disadvantage’ vis-à-vis the other; (2) knowledge of that special disadvantage by the stronger party; and (3) unconscientious exploitation by the stronger party of the weaker party’s disadvantage.

¹³ (1983) 151 CLR 447 (*‘Amadio’*).

¹⁴ *Stubbings* (n 11) 418 [39].

¹⁵ See especially *ibid* [42]: ‘It could not be, and was not, disputed by the respondents that the primary judge’s findings as to the appellant’s circumstances established that he was at a special disadvantage vis-à-vis the respondents. The outcome of the appeal to this Court turns on the extent of Mr Jeruzalski’s knowledge of the appellant’s circumstances and whether Mr Jeruzalski exploited that disadvantage so that the respondents’ attempt to enforce their rights under the loans and mortgages was unconscionable.’

¹⁶ *Amadio* (n 13).

guarantee with the bank). When the bank manager, Mr Virgo, visited Mr and Mrs Amadio to obtain their signatures, the couple did not read the agreement, and apart from discussing that the guarantee was in fact not limited in time, Mr Virgo did not explain the content of the agreement.

The agreement that was signed was not at all in line with what the son had told Mr and Mrs Amadio. Instead, under the agreement, Mr and Mrs Amadio undertook to pay to the bank, on demand, all money owing, or that thereafter became owing, by the company, together with interest. Less than a year after the agreement was signed, the company went into liquidation and the bank sought to exercise the rights under the contract. It was held that the whole transaction was to be set aside, and Deane J expressed the following rule:

The jurisdiction [of courts of equity to relieve against unconscionable dealing] is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or ‘unconscientious’ that he procure, or accept, the weaker party’s assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable.¹⁷

In relation to Deane J’s reasoning, Professor Ong has observed that:

Deane J’s attempt in *Amadio* to identify the special disadvantage (or ‘special disability’) experienced by the plaintiffs implied that *inequality* of bargaining *power* between the parties to a transaction would place the weaker party at a special disadvantage in relation to the stronger party, and implied further that this inequality of bargaining power could be removed by reversing, through the provision of ‘assistance and advice’ to the weaker party, the latter’s ‘lack of knowledge and understanding’ of the proposed transaction. However, it is not immediately apparent how ‘equality’ can be vouchsafed to the weaker party by merely apprising him of the ramifications of the proposed transaction, given that the weaker party’s *understanding* of the proposed transaction will only serve to *confirm* to him that he *is* the weaker party. The weaker party’s *understanding* of the weakness of his position cannot *remove* that weakness.¹⁸

There is no doubt legitimacy in what Professor Ong writes. At the same time, however, perhaps it may be argued that, while the weaker party’s understanding of the weakness of its position cannot remove that weakness, it may demonstrate that a decision by the weaker party is made with the weakness in mind which, in turn, could be said to signify

¹⁷ Ibid 474.

¹⁸ Ong (n 1) 496.

that party's ability to make a judgment as to its interests. The exact delineation here deserves further judicial attention, or — better still — could be addressed in a reform-oriented codification of the equitable doctrine of unconscionable dealings.

At any rate, in the *Amadio* case Mason J stated that:

[I]f A having actual knowledge that B occupies a situation of special disadvantage in relation to an intended transaction, so that B cannot make a judgment as to what is in his own interests, takes unfair advantage of his (A's) superior bargaining power or position by entering into that transaction, his conduct in so doing is unconscionable. And if, instead of having actual knowledge of that situation, A is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person, the result will be the same.¹⁹

This passage suggests that there is no need for actual knowledge of the innocent party's special disadvantage; rather, it is sufficient that the other party ought to have known of the existence and effect of the special disadvantage.²⁰ Thus, where the party that is said to have acted unconscionably neither knew or ought to have known of the existence and effect of the special disadvantage, as was the case in *Lisciandro v Official Trustee in Bankruptcy*,²¹ the doctrine of unconscionability ought not intervene.

In the *Lisciandro* case, the appellant (Mr Lisciandro) had entered into guarantees in respect of the obligations of a company (TAG Industries). When the company to which the guarantees were granted (Alminco) sought to exercise its rights under these guarantees, Lisciandro argued that the guarantees were unenforceable against him due to misrepresentations made by the person procuring the guarantees (Mr Radford) on behalf of TAG Industries. Lisciandro argued that Radford was an agent of Alminco and procured the guarantee from Lisciandro on behalf of TAG and Radford's misrepresentations could be imputed to Alminco. One of the matters in focus was whether Alminco had knowledge of Mr Lisciandro's special disadvantage in relation to Mr Radford. The Court adopted the reasoning of the trial judge, Kiefel J:

In the present case Alminco could not be said to have known of any financial difficulties experienced by Mr Radford or that he was unlikely to be able to meet payments on the account. It knew little of his background. It knew nothing of Mr Lisciandro's personal circumstances, save that he

¹⁹ *Amadio* (n 13) 467.

²⁰ *Thorne v Kennedy* (2017) 263 CLR 85, [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) ('*Thorne*'): 'Before there can be a finding of unconscientious taking of advantage, it is also generally necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage'. See also Rick Bigwood 'Still Curbing Unconscionability: *Kakavas* in the High Court of Australia' (2013) 37(2) *Melbourne University Law Review* 463 discussing the situation in detail after *Kakavas* but before *Thorne*.

²¹ (1996) 69 FCR 180.

was a director of the company TAG Industries, as in fact he was, and that he had in that sense an interest in the company. It knew nothing of the trust he placed in Mr Radford nor indeed of any relationship between Mr Radford and Mr Lisciandro save for the business relationship appearing from the information provided. It made no inquiry, but there was in my view nothing apparent from the circumstances to raise a question as to Mr Lisciandro's circumstances or understanding of the transaction. Whilst it would obviously be desirable if creditors made inquiries as a matter of course I do not understand the law to have proceeded to the point where it is required in all cases before a security document obtained can be enforced.²²

The matter of knowledge was also one of the central considerations in *Kakavas v Crown Melbourne Ltd*.²³ The *Kakavas* case involved an examination of whether a man (Mr Kakavas) was at a special disadvantage by way of his 'inability, by reason of his pathological urge to gamble, to make worthwhile decisions in his own interests while actually engaged in gambling'.²⁴ Mr Kakavas' proposition on appeal to the High Court was that Crown Melbourne had taken advantage of his special disadvantage unconsciously and that equity should intervene under the principles outlined in *Amadio*.²⁵

The High Court delivered a joint judgment, indicating strong consensus regarding the approach and resultant decision of the Court. Their starting point was the application of the *Amadio* principle in *Louth v Diprose* where Deane J explained: '[T]he intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent victimisation'.²⁶

The judgment restated that equity will not intervene purely due to a loss, or to correct the consequences of 'improvident transactions conducted in the ordinary and undistinguished course of a lawful business'.²⁷ Not as a rule, but perhaps as an observation, the Court noted that proving unconscionability in ongoing transactional relationships (that are freely entered into) does display 'practical difficulty'.²⁸ Significance was attached to the relationship between Mr Kakavas and Crown, being that the applicant was a 'high-roller' and that it was a commercial relationship with the 'unmistakable purpose of each party was to inflict loss upon the other party to the transaction'.²⁹

The Court endorsed the approach to questions of equity that was undertaken in *Jenyns v Public Curator (Qld)*, and subsequently

²² Ibid 185–6.

²³ (2013) 250 CLR 392 ('*Kakavas*').

²⁴ Ibid [5].

²⁵ Ibid [6].

²⁶ (1992) 175 CLR 621, 638 ('*Louth*').

²⁷ *Kakavas* (n 23) [19]–[20].

²⁸ Ibid. There is also a comparison drawn with negligence — perhaps more poignant for the gambling — though negligence is also a *general law* principle: at [22].

²⁹ Ibid [25].

confirmed by the HCA in *Tanwar*.³⁰ Their Honours expressed the view that:

In *Jenyns v Public Curator (Qld)*, Dixon CJ, McTiernan and Kitto JJ explained that the invocation of equitable doctrines, such as those concerned with the conscience of a party to a transaction, in order to impugn that transaction:

calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the [other party]. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. Indeed no better illustration could be found of Lord Stowell's generalisation concerning the administration of equity: 'A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case': *The Juliana*.³¹

From this, the Court concluded that:

The issue as to special disadvantage must be considered as part of the broader question, which is whether the impugned transactions were procured by Crown's taking advantage of an inability on the appellant's part to make worthwhile decisions in his own interests, which inability was sufficiently evident to Crown's employees to render their conduct exploitative.³²

Ultimately, the Court found that there was no exploitation of any special disadvantage, and that Mr Kakavas' conduct, being that he was able to moderate his behaviour, had not demonstrated that any such circumstance existed. Further, the Court noted that:

Equitable intervention to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party requires proof of a predatory state of mind. Heedlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose.³³

Here, it is worth noting that, Mr Kakavas' appeal raised the question of required knowledge. In this respect, it may be said that the Court seemingly rejected, or at least modified, Mason J's judgment in *Amadio*: 'It is apparent from what Mason J said in relation to the transaction under consideration in *Amadio* that his Honour was speaking of wilful ignorance, which, for the purposes of relieving against equitable fraud,

³⁰ *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, [23].

³¹ *Kakavas* (n 23) [122] citing *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 quoting *The Juliana* (1822) 2 Dods 504, 521.

³² *Kakavas* (n 23) [124].

³³ *Kakavas* (n 23) [161].

is not different from actual knowledge.³⁴ In this context, their Honours relied on precedent from the Queen's Bench in 1885³⁵ as well as Gaudron, McHugh, Gummow and Hayne JJ in *Garcia v National Australia Bank Ltd*.³⁶

Perhaps then, it may be said that the constructive knowledge that is required in the absence of actual knowledge is — as the law stands — somehow grounded in wilful ignorance. However, in the recent High Court decision in *Stubbings v Jams 2 Pty Ltd*, the majority opted for a different formulation; namely, a 'sufficient appreciation of the appellant's vulnerability'.³⁷ It may not be farfetched to imagine that future cases will provide further details (and hopefully clarifications) in this respect.

At this juncture, it may be appropriate to examine the circumstances under which a party is acting under special disadvantage of the purpose of an action for unconscionability. However, the impossibility of exhaustively listing the circumstances under which a party is acting under special disadvantage is widely recognised. Indeed, as recently noted by the High Court: 'No particular factor is decisive, and it is usually a combination of circumstances that establishes an entitlement to equitable relief'.³⁸ Nevertheless, in *Blomley v Ryan*,³⁹ we find a starting point for such a list.

In that case, the plaintiff had entered into a contract with the defendant by which the latter sold a grazing property to the former for £25,000. Having noted that the defendant was heavily intoxicated at the time of negotiations and at the time of signing the contract, and bearing in mind that the property was worth £8,000–9,000 more than the agreed price, the Court found that the contract should be rescinded.

In *Amadio*, the High Court referred to Fullagar J's statement in *Blomley v Ryan*.⁴⁰

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

³⁴ *Ibid* [156].

³⁵ *Manchester Trust v Furness* [1885] 2 QB 539, 545.

³⁶ (1998) 194 CLR 395, 410-11, [39]. See also Mason, 'The Impact of Equitable Doctrine on the Law of Contract' 27 (1998) *Anglo-American Law Review* 1, 15.

³⁷ *Stubbings* (n 11) [46].

³⁸ *Ibid* [40].

³⁹ (1956) 99 CLR 405.

⁴⁰ *Ibid*.

characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other.⁴¹

The last sentence of Fullagar J's statement is not to be understood to imply that inequality of bargaining power always indicates unconscionability. In fact, the respective strength of contractual parties is rarely, if ever, exactly equal. As noted by Professor Ong with one of his characteristically long, but convincing and clearly argued, sentences:

Fullagar J's opinion in *Blomley v Ryan* that the common characteristic of this head of equitable relief is that one party to the transaction was placed at a serious disadvantage vis-a-vis the other party thereto, is too wide to be accurate because the use of the criterion of one party to a transaction being at a serious disadvantage in relation to the other party thereto fails to exclude from the reach of this head of equitable relief the situation where there was, at the time the transaction was entered into, a mere inequality of bargaining power between the parties so transacting.⁴²

In the field of equitable doctrine of unconscionable dealings, there are also several cases in which a donor later seeks to reverse a voluntary disposition. Most famously, in *Louth v Diprose*,⁴³ the respondent (Diprose) was a solicitor who was 'completely in love' with the appellant (Louth). While his feelings were not reciprocated by Louth, their friendship lasted for approximately seven years. Having known each other for about three years, Diprose bought a house for Louth in 1984. Louth was already living in the house in question and had told Diprose that she would commit suicide if she was forced to move out. Louth continued living in the house, but in mid-1988 the relationship between the two parties deteriorated, and Diprose sought ownership of the house. The High Court held in Diprose's favour, and Deane J noted that:

On the findings of the learned trial judge in the present case, the relationship between the respondent and the appellant at the time of the impugned gift was plainly such that the respondent was under a special disability in dealing with the appellant. That special disability arose not merely from the respondent's infatuation. It extended to the extraordinary vulnerability of the respondent in the false 'atmosphere of crisis' in which he believed that the woman with whom he was 'completely in love' and upon whom he was emotionally dependent was facing eviction from her home and suicide unless he provided the money for the purchase of the house. The appellant was aware of that special disability. Indeed, to a significant extent, she had deliberately created it. She manipulated it to her

⁴¹ Ibid 475. The majority of the factors listed below in art 3 of my attempted codification, are mentioned in Fullagar J's statement in this case. Others, such as 'emotional dependence', have been recognised as relevant in other cases. See, eg, *Louth* (n 26) 638.

⁴² Ong (n 1) 487 (citations omitted).

⁴³ *Louth* (n 26).

advantage to influence the respondent to make the gift of the money to purchase the house.⁴⁴

In discussing *Louth v Diprose*, Professor Ong also notes that:

The basis of the High Court's decision in *Louth* was that the plaintiff's unrequited (albeit not unexploited) emotional attachment to the defendant placed him in a position of special disadvantage in relation to the defendant because it *impaired* his *judgment* as to whether or not to make the gift of money to the defendant. The basis of the High Court's decision in *Louth* was not that the positions respectively there occupied by the plaintiff and the defendant were not *equal* to each other.⁴⁵

Furthermore, in his writings, Professor Ong has used the *Louth v Diprose* case as an illustration that it may be possible for the stronger party to a transaction to find himself in a position of special disadvantage in relation to the weaker party:

[I]n *Louth v Diprose* the solicitor was the stronger party in relation to the impecunious but importunate defendant, but the solicitor nevertheless occupied a position of special disadvantage in relation to the defendant because he was infatuated with her when he succumbed to her importunity to purchase a house for her.⁴⁶

While I agree with this sentiment, I question the utility of categorising the parties as stronger, and respectively weaker, in a general sense. It seems to me that what is important in the context of the equitable doctrine of unconscionable dealings is the parties' respective strengths and weaknesses in relation to each other in the circumstances of the relevant transaction. That said, I do recognise that there may be a pedagogical value in emphasising, as Professor Ong does, that a party that is in a general sense stronger may occupy a position of special disadvantage in relation to the other party.

At any rate, before moving away from *Louth v Diprose*, it may be noted that, in discussing this case, some commentators have made important observations as to the potential impact that societal presumptions regarding gender and class may have on a court's reasoning.⁴⁷ This is extremely important. At the minimum, it is a reminder that (1) societal values and perceptions evolve, (2) the law ought to reflect those changes, and (3) older precedents must be evaluated by reference to modern societal standards rather than being blindly accepted.

⁴⁴ Ibid 638.

⁴⁵ Ong (n 1) 497.

⁴⁶ Ibid 503–4.

⁴⁷ See also Andrew Robertson and Jeannie Paterson, *Principles of Contract Law* (Lawbook, 6th ed, 2020) 802–3 referring to Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19 *Melbourne University Law Review* 701.

A more recent case is perhaps hinting at the mentioned change. In *Mackintosh v Johnson*,⁴⁸ a man in his mid-70s — Mr Johnson — was infatuated with a considerably younger woman, Ms Mackintosh. Their relationship began with a sexual encounter in August 2008, and by February 2009, Mr Johnson had: (1) paid Ms Mackintosh about \$175,000 to support her business, and (2) provided \$480,000 to buy a house in her name as sole proprietor. While the relationship did not end until April 2010, all sexual relations ceased after 17 January 2009, the day on which Mr Johnson gave Ms Mackintosh the deposit on the house.

Once the relationship ended, Mr Johnson pleaded, amongst other things unconscionability, pointing to special disadvantage constituted by his age, the fact that he was lonely and vulnerable, the fact that he was retired and desirous of a companion, as well as that he was ‘infatuated’ with Ms Mackintosh, and that in February 2009 he was recovering in hospital from heart surgery.

Examining the facts of the case, the Court pointed out that Mr Johnson was a successful and wealthy businessman who was well able to afford his dispositions in favour of Ms Mackintosh. This was placed in contrast to *Louth v Diprose* where the man in question gave away nearly all of his assets to the woman, in circumstances where he simply could not afford it and he had three dependent children. The Court also emphasised the absence of an atmosphere of crisis in this case, which may be most important distinguishing factor to *Louth v Diprose*.

Further, the Court disagreed with the trial judge who had found in favour of Mr Johnson by pointing to the impact of the infatuation and the other argued factors pointing to a special disadvantage:

Taken together, his reasons amount to no more than findings that Mr Johnson became infatuated with Ms Mackintosh and that he set out to win her continued affections by lavishing large sums of money upon her in the hope of establishing a lasting relationship. That state of affairs was not sufficient to establish a special disability within the meaning of the authorities. Something more than mere infatuation and consequent foolish action based on clouded judgment was required to establish that Mr Johnson’s ability to make decisions in his own best interests was so seriously affected as to amount to a special disability or disadvantage.⁴⁹

Against this background, the Court concluded that:

Mr Johnson was not affected by a special disability at the time he made the payments to Ms Mackintosh. It is accordingly unnecessary to decide whether Ms Mackintosh exploited him and thus acted unconscionably. The judge found that Ms Mackintosh acted deceitfully, by concealing the true nature of her feelings for Mr Johnson from him. In our opinion, conduct of that kind would not, on its own, be sufficient to amount to exploitation of

⁴⁸ *Mackintosh v Johnson* (2013) 37 VR 301.

⁴⁹ *Ibid* [77].

the kind required to establish a case based on unconscionable conduct. It is the stuff of ordinary human relationships.⁵⁰

Another illustrative case is found in *Thorne v Kennedy*.⁵¹ The context was a marriage and the enforcement of a prenuptial agreement that arose from an online romance between a 67-year-old Greek Australian property developer (Mr Kennedy) and a 36-year-old Eastern European woman (Ms Thorne) who lived in the Middle East.

Ms Thorne relocated to Australia under the promise of marriage, children and being treated as a 'Queen'.⁵² After relocating to Australia for several months, the prenuptial agreement was thrust upon Ms Thorne, mere weeks before the wedding, as a condition to the marriage. Ms Thorne received legal advice nine days prior to the wedding that included an 'urge to reconsider your position as this Agreement is drawn to protect [Mr Kennedy's] interests solely and in no way considers your interests'.⁵³

Ms Thorne signed the agreement, as well as a post-nuptial agreement that reflected largely the same terms, and in the same circumstances. Approximately four years later, the couple separated, with Ms Thorne commencing proceedings the following year. She sought orders to set aside the two agreements and to have the settlement adjusted. Mr Kennedy died during the proceedings and was substituted by the executors and trustees of the estate.

The High Court found that Ms Thorne was at a special disadvantage being:

[T]hat special disadvantage arose from the circumstances in which Mr Kennedy brought Ms Thorne to Australia, the proximity of the wedding and the circumstances in which the agreement was first provided, coupled with the finding that Ms Thorne knew that the wedding would not take place (and the relationship would be at an end) if she did not sign the agreement.⁵⁴

It was uncontroversial that the agreement was to Mr Kennedy's advantage, a position that was achieved through Ms Thorne's acquiescence due to her position of special disadvantage just prior to the wedding, a circumstance that was created by Mr Kennedy. In this case, all of the members of the HCA, albeit through separate judgments,⁵⁵ concluded that Ms Thorne was subject to dealing that was unconscientious on the behalf of Mr Kennedy.

⁵⁰ Ibid [84].

⁵¹ *Thorne* (n 20).

⁵² Ibid [122].

⁵³ Ibid [9].

⁵⁴ Ibid [116] (Gordon J).

⁵⁵ Gordon and Nettle JJ each wrote individual judgments whilst the plurality consisted of Kiefel CJ, Bell, Gageler, Keane and Edelman JJ.

Unconscionability has also been considered in relationships lacking the amorous nature of *Louth v Diprose*, *Mackintosh v Johnson*, and *Thorne v Kennedy*.

In *Bridgewater v Leahy*,⁵⁶ the respondent (Neil) had had a close business and personal relationship with a man named Bill York. Put simply, Mr York had agreed to sell land to the respondent at a very favourable price. When Mr York died, his four daughters (jointly the appellants) sought to set aside the sale, arguing that the transaction was unconscionable. Even though a medical practitioner had found Mr York fit to make his own decisions, and despite the fact that Mr York was perfectly happy with the disputed transaction, the majority of the High Court found the contract unconscionable.

This decision may be thought of as surprising considering that Mr York had non-financial reasons for selling the land to the respondent. Mr York wanted to retain the land as ‘an integrated farming enterprise under reliable and experienced management’.⁵⁷ Instead of taking this into account in determining whether the contract was fair, just and reasonable, the majority of the High Court viewed this goal as an indication of emotional dependence: ‘Bill’s goal to preserve his rural interest intact and his perception that [the respondent] was the candidate to provide reliable and experienced management thereof were significant elements in his emotional attachment and dependency upon Neil’.⁵⁸ Interestingly, this shows that the same factors (here the non-financial interest of keeping the estate intact rather than divided) that may signify that a party suffers from emotional dependence (which supports a claim of unconscionability), may at the same time be indicators that the transaction was fair, just and reasonable, and an expression of the weaker party’s ability to make a judgment as to its interests. Courts must consequently approach such factors with great care, and perhaps we would have seen a different outcome in this case had the Court taken account of whether there was a ‘predatory state of mind’ involved as they later did in *Kakavas*.⁵⁹

Furthermore, it is interesting to note that, in the majority’s view, the fact that Mr York had had access to legal advice was negated by the fact that Mr York’s solicitor also did work for the respondent. Evidence suggesting that the transaction would have been carried through even if another solicitor had been involved was held to be irrelevant: ‘[The] denial of the opportunity to have ‘the assistance of a disinterested legal adviser’ ... rather than speculations as to what might have followed had

⁵⁶ (1998) 194 CLR 457.

⁵⁷ *Ibid* 492.

⁵⁸ *Ibid* 493.

⁵⁹ *Kakavas* (n 23) [161].

it been pursued, is an element in the unconscientious conduct in respect of which equity intervenes".⁶⁰

The 'weaker party' to a contract entered into as a result of unconscionable conduct is entitled to the same remedies as is the weaker party to a contract entered into under duress or undue influence. Thus, the contract is voidable at the weaker party's option. However, where the other party proves that the contract was, in fact, fair, just and reasonable, the weaker party loses her/his opportunity to have the contract (or other voluntary disposition) set aside in the exercise of the court's equitable jurisdiction. As far as the fairness, justness, and reasonableness of the contract are concerned, the statement made in *Blomley v Ryan* is illustrative:

It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain ... But inadequacy of consideration, while never of itself a ground for resisting enforcement, will often be a specially important element in cases of this type. It may be important in either or both of two ways – firstly as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion.⁶¹

Importantly, as was emphasised already in *Earl of Aylesford v Morris*,⁶² the contract being unfair, unjust and/or unreasonable is not a necessary requirement for establishing unconscionability. Instead, the defendant proving that the contract is fair, just, and reasonable may prevent the defendant's unconscionable conduct making the contract voidable.

While set in the context of unconscionability under the *Trade Practices Act*, another noteworthy case is *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd*.⁶³ There, as noted by Professor Ong,⁶⁴ the Federal Court observed:

The special disadvantage may be constitutional, deriving from age, illness, poverty, inexperience or lack of education ... 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 ...⁶⁵

⁶⁰ (1998) 194 CLR 457, 486.

⁶¹ (1956) 99 CLR 362, 405.

⁶² 'when the relative position of the parties is such as *prima facie* to raise this presumption [of fraud] the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just and reasonable.': *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484, 490–1 cited in Ong (n 1) 487. See also, eg, Andrew Robertson and Jeannie Paterson, *Principles of Contract Law* (Lawbook, 6th ed, 2020) 790.

⁶³ (2002) 117 FCR 301 ('*Samton Holdings*').

⁶⁴ Ong (n 1) 503.

⁶⁵ *Samton Holdings* (n 64) 318.

Endorsing the reasoning of Gleeson CJ in *Berbatis*,⁶⁶ Professor Ong asserts that: ‘It is suggested that the concept of a special disadvantage will not benefit from being subdivided into sub-categories, despite the attempt of the Full Court of the Federal Court to do so in *Samton*.’ I agree, but I also think that there is pedagogical value in emphasising that a special disadvantage may be constitutional or situational without necessarily seeking to draw sharp lines between them.

The mentioned *Berbatis* case is also an important authority, and one on which Professor Ong places great emphasis for his conclusions. Most importantly, Professor Ong notes:

In *Berbatis*, the High Court decided that mere inequality of bargaining power between two parties to a transaction did not entail that the weaker party would thereby be placed in a position of *special* disadvantage in relation to the stronger party, notwithstanding that such inequality could thereby place the weaker party in a position of *serious* (or even ‘critical’) disadvantage in relation to the stronger party (as was the situation in *Berbatis* itself).⁶⁷

Finally, just as in relation to duress and undue influence — and indeed the law of ‘rescission’ generally — a party having entered into a contract as a result of unconscionable conduct must bring its action as soon as possible after that the unconscionability has ceased. In *Baburin v Baburin*,⁶⁸ the plaintiff had sold shares to her sons. Nineteen years later she sought damages and to have the transaction set aside. The trial judge found that, while the case did not involve undue influence, the sons had engaged in unconscionable conduct. However, the trial judge also found that the plaintiff’s delay disentitled her to relief:

In my view there was unreasonable delay in commencing these proceedings and in view of what has occurred in the period, which has elapsed since the transfer of the shares, the consequences of that delay are such that it would be unjust to grant the relief sought by the plaintiff.⁶⁹

The trial judge’s approach was upheld on appeal.⁷⁰

V A ‘Codification’ of the Equitable Doctrine of Unconscionability

Admittedly, given that a court of equity must take a comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case, it may appear that the

⁶⁶ Where Gleeson CJ states: ‘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.’ *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 63–4 (‘*Berbatis*’).

⁶⁷ Ong (n 1) 503 (citations omitted).

⁶⁸ [1990] 2 Qd R 101.

⁶⁹ *Baburin v Baburin* [1990] 2 Qd R 101, 113 (Kelly SPJ).

⁷⁰ *Baburin v Baburin (No 2)* [1991] 2 Qd R 240.

very idea of codification in this field is both misguided and deemed to fail. I do not agree.

Elsewhere,⁷¹ I have argued that law fulfils at least three different roles; that is, law is: (1) a tool to decide legal disputes, (2) a tool to provide a framework to control, to guide, and to plan life out of court, (3) a tool to express and communicate the values of those who created the law.⁷² If the fluidity of equity indeed is such that it is impossible to articulate the parameters within which it operates in the form of a codification, then equity is necessarily failing in relation to both the second and the third of the three roles law is to perform.

Drawing upon the above, we may arguably formulate a codification of the equitable doctrine of unconscionability. This could, no doubt, be done in a variety of manners. I have, however, opted for an approach in which I break down the framework provided by the mentioned cases into three ‘Articles’ as per the below:

Article 1

Where a contract (or other voluntary disposition) is entered into as a result of unconscionable conduct, it is voidable at the innocent party’s application, unless it is proven that:

- (a) the contract was fair, just, and reasonable; or
- (b) an unreasonable amount of time has lapsed since the time the unconscionable conduct ceased.

Article 2

For the purpose of Article 1, conduct is unconscionable where:

- (a) the innocent party acts under a special disadvantage in the sense of a diminished ability to make a judgment as to its own best interests in the transaction in question;
- (b) the other party has actual awareness of the innocent party’s special disadvantage, wilfully ignored that matter, or otherwise has a sufficient appreciation of the other party’s vulnerability; and
- (c) the other party exploits the innocent party’s special disadvantage.

⁷¹ Dan Svantesson, ‘A Jurisprudential Justification for Extraterritoriality in (Private) International Law’ (2015) 13(2) *Santa Clara Journal of International Law* 517, 551–2. See also Dan Svantesson, *Solving the Internet Jurisdiction Puzzle* (Oxford University Press, 2017).

⁷² The first two of these roles may be derived from Hart: ‘The principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court’: HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 40. The third role, I articulated in Dan Svantesson, ‘A Jurisprudential Justification for Extraterritoriality in (Private) International Law’ (2015) 13(2) *Santa Clara Journal of International Law* 517, 551–2.

Article 3

In determining whether a party acts under special disadvantage in the sense of a diminished ability to make a judgment as to its own best interests in the transaction in question, attention shall be given to that party's constitutional and situational circumstances, as far as they are of relevance for the contract in question at the time the contract was formed, including, but not limited to:

- (a) age;
- (b) sex;
- (c) health;
- (d) intoxication;
- (e) infirmity of body or mind;
- (f) poverty;
- (g) needs of any kind;
- (h) emotional dependence;
- (i) illiteracy;
- (j) level of education;
- (k) level of experience;
- (l) ignorance; and
- (m) access to assistance, advice, and explanations.

VI The Relationship Between the Equitable Doctrine of Unconscionability and Unconscionability Under the ACL

Given that the ACL already contains a statutory version of a form of unconscionability, some observations ought to be made as to the relationship and difference between the two schemes.⁷³ Indeed, at a first glance, it may seem foolish to embark on a codification of the equitable doctrine of unconscionable dealings when the ACL already contains an attempt at expressing the doctrine. However, such a notion ought to evaporate upon a soberminded consideration of the real state of things.

Sections 21 and 22 of the ACL are neither an appropriate substitute, nor an obstacle to, a codification of the equitable doctrine of unconscionable dealings. After all, both Sections are limited to conduct that takes place 'in trade or commerce' and are not attempts to codify the doctrine as such. The codification explored in this article would — like the equitable doctrine of unconscionable dealings — not have any such limitation and would thus — in that regard — be broader in its

⁷³ For an in-depth discussion of this relationship, see Jeannie Marie Paterson, 'Unconscionable Bargains in Equity and under Statute' (2015) 9 *Journal of Equity* 188.

scope; be as it may that unconscionability under statute is otherwise broader.⁷⁴

Having explained the relationship between the equitable doctrine of unconscionability and unconscionability under the ACL, I hasten to add that, were we to allow ourselves a codification aimed for a reform and modernisation, as opposed to merely restating *lex lata*, it would be of great value to draw upon the experiences of the application of ACL sections 21 and 22, as well as their predecessors in the *Trade Practices Act 1974* (namely, sections 51AA, 51AB and 51AC).

VII Concluding Remarks

It is a well-known fact that the law changes slowly. Indeed, it may be suggested that slow and measured development is a key feature of the law. However, at least for me, it is concerning that we are in the position we are today when already approximately 200 years ago it was noted that ‘the law of England has swollen to an unmanageable bulk. There is but one cure and that is codification...’⁷⁵

As noted in the introduction, the situation is by no means better today, and it cannot be said that the situation in Australia is much better than that in England. The ever-increasing volume of case law, particularly when combined with lengthy and complex statutes, places the Australian law in an unhealthy state. To my mind, codification is the cure, and codification is overdue. Perhaps the calls for a reform-oriented codification of Australia’s contract law may gain momentum from the demands that new, and emerging, technologies place on the law.⁷⁶

The above has showcased that the equitable doctrine of unconscionable dealings has a long history and evolves at a modest pace, step-by-step. Perhaps the time has come for the next step.

In this article, I have sought to outline a proposal for how the equitable doctrine of unconscionable dealings could be codified. While I have strong doubt that a devoted equity expert such as Professor Ong would agree with my ambition, I am hopeful that he would indeed agree with the articulation of applicable law as I espouse in my ‘codification’.

Finally, the above has highlighted that the equitable doctrine of unconscionable dealings is a complex and difficult field. But then, for the one who is lazy, everything appears difficult. For someone committed and hardworking — like Professor Ong — the degree of

⁷⁴ See, eg, Elise Bant and Jeannie Paterson, ‘Systems of Misconduct: Corporate Culpability and Statutory Unconscionability’ (2021) 15(1) *Journal of Equity* 63, 63–4.

⁷⁵ HR Hahlo, ‘Here Lies the Common Law: Rest in Peace’ (1967) 30 *The Modern Law Review* 241, 244, citing Robert S Pollard, *Speed-up Law Reform* (Fabian Society, 1957) 6–7, who in turn referred to an article published in the *Law Times*.

⁷⁶ See, eg, Marco Rizzi and Natalie Skead, ‘Algorithmic Contracts and the Equitable Doctrine of Undue Influence: Adapting Old Rules to a New Legal Landscape’ (2020) 14(3) *Journal of Equity* 301.

difficulty and complexity was no doubt part of what attracted him to the field. In this, we can all find inspiration.