MUCH ADO ABOUT VERY LITTLE: SOME REFLECTIONS ON *ACCC v BERBATIS*

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Introduction

In *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*[1] the High Court turned its attention to the prohibition on unconscionable conduct contained in s 51AA of the *Trade Practices Act 1974* (Cth) (the Act). That section prohibits conduct in trade or commerce that is unconscionable within the meaning of the unwritten law of the States and Territories. It has always been clear that this section embodies the equitable concept of unconscionable conduct as recognized by the High Court in *Blomley v Ryan*[2] and *Commercial Bank of Australia Ltd v Amadio*.[3][4] It has never been clear if the section reaches other conduct that might be considered unconscionable. In both *Blomley* and *Amadio*, the court's power to set aside a transaction on the grounds of unconscionable conduct was seen to be limited to circumstances in which one party was under a special disability or special disadvantage and the other party knowingly took advantage of that special disability or special disadvantage to procure an unfair advantage for themselves[5]. The special disabilities that justified setting aside the transactions in both *Blomley* and *Amadio* were distinctly human frailties.[6] In each case the weaker party was unable to judge whether the proposed transaction was in their own best interests. In each case the weaker party later sought to withdraw from the transaction and in each case the High Court permitted them to do so. This was despite the fact that the stronger party had not created the special disadvantage. It was enough that they were aware of the vulnerability of the weaker party and accepted their consent to a transaction without first ensuring that they understood its significance. It follows that the High Court would have refused to set aside any transactions where the weaker party had received independent legal advice. Such

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1 (2003) ATPR ¶41-916.
2 (1956) 99 CLR 362.
3 (1983) 151 CLR 447.
4 See for eg the explanatory memorandum that was promulgated in connection with the Bill for the *Trade Practices Legislation Amendment Act 1992* (Cth) which inserted Part IVA containing s 51AA. See also the second reading speech when the legislation was introduced: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992 at 2408.
5 (1956) 99 CLR 362 at 405, 415; (1983) 151 CLR 441 at 461-463.
6 Alcoholism in *Blomley* and a combination of age, lack of command of written English and limited commercial experience in *Amadio*.

advice would invariably ensure protection of the weaker party's best interests meaning they were no longer at a special disadvantage. Furthermore, it was emphasized in *Amadio*[7] that inequality of bargaining power was not on its own sufficient to constitute a special disadvantage because this does not necessarily affect a party's ability to make a judgment as to their own best interests.

The Australian Competition and Consumer Commission (ACCC) is entitled under the Act to bring proceedings in its own name to enforce the rights of others.[8] The idea is that ACCC involvement, including the possibility of representative actions, facilitates promotion of the objects of the Act (the promotion of competition, fair trading and provision of consumer protection)[9] and translates the principles of the legislation into corporate behaviour, thereby incorporating, inter alia, equitable notions into everyday trade and commerce.[10]

A prime reason for inserting s 51AA into the Act in 1992 was that it would allow the ACCC, then the Trade Practices Commission, to take action against unconscionable conduct by large businesses in their dealings with smaller ones.[11] It was perceived that large businesses often exploited their superior bargaining power in their dealing with smaller businesses.[12] Yet the ACCC was powerless to intervene in such cases because the only prohibition on unconscionable conduct in the Act prior to the introduction of s 51AA in 1992 was limited to conduct which affected people in their capacity as consumers.[13]

The idea that s 51AA would empower the ACCC to go into battle on behalf of small businesses proved to be misguided. Because of the general understanding that s 51AA merely gave statutory force to the *Amadio* category of unconscionable

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7 (1983) 151 CLR 447 at 462.

8 The Act, ss 80, 87.

9 The Act, s 2.

10 See (2003) ATPR ¶41-916 at [108]; Explanatory Memorandum to the Bill for the *Trade Practices Legislation Amendment Act 1992* (Cth) which inserted s 51AA.

11 Another justification was that a wider range of remedies would be available to both the ACCC and also to private litigants. The implication appeared to be that nothing short of setting aside the entire transaction was available under the rules of equity: see (2003) ATPR ¶41-916 at [73], [108]-[109].

12 'A particular purpose of the inclusion of s 51AA in the Act was to afford more effective remedies to small operators in the marketplace, ... They already had access to remedies of an equitable character. However, in practice, where the stakes were comparatively low ... a corporation dealing with 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' (2003) ATPR ¶41-916 at [74] per Kirby J.

13 Section 52A inserted in 1986 (which was renumbered as s 51AB when s 51AA was introduced in 1992) prohibited unconscionable conduct in connection with the supply of goods or services of a kind that are normally acquired for personal, domestic or household use: subsections (5) and (6).

conduct, it seemed that proof of a special disadvantage was the essential first step in building a case for breach of s 51AA. A mere difference in bargaining power would never be enough to prove a special disadvantage. Because many small businesses operated under the corporate form it was conceptually very difficult to attribute to them the distinct human frailties that had previously been held to amount to a special disability. Such things as alcoholism, age, a limited command of English and a lack of experience in commercial matters were not things that could sensibly be treated as placing a corporation at a special disadvantage.

The difficulties associated with trying to apply the equitable concept to corporate vulnerabilities, led to calls for the introduction of a third prohibition on unconscionable conduct; one that would be more user-friendly to small businesses and did not involve attributing human frailties to corporate entities. In July 1998 s 51AC was inserted into the Act. That section prohibits unconscionable conduct in trade or commerce in connection with the supply or acquisition of goods or services priced up to $3 million by a person or corporation, other than a listed public company. This section does not rely simply upon the "unwritten law" as the determinant of unconscionable conduct. Instead s 51AC(3) lists in para (a)–(k) eleven circumstances to which regard may be had in determining whether there has been a breach of the section. However, the Court's determination is not limited to these matters. Conduct caught by the section was henceforth excluded from the application of s 51AA.[14] A primary justification for its introduction was exactly the same as that for s 51AA - that the Act needed to empower the ACCC to go into battle on behalf of small businesses whose weak bargaining position was sometimes exploited by larger businesses.

The ACCC instituted the *Berbatis* proceedings in the Federal Court on 3 April 1998. It seems that this was because, in part at least, at that time the enforcement of the unconscionable commercial conduct provisions had become a major ACCC priority, consistent with the Federal Government's desire to protect small businesses from unconscionable conduct.[15] Test cases to demonstrate the efficacy of the unconscionable commercial conduct provisions were consistent with this priority. To demonstrate the efficacy of s 51AA the ACCC selected two disputes each involving the circumstances surrounding the renewal of a commercial lease. One of these was the *Berbatis* dispute[16] which the ACCC has pursued all the way to the High Court. Despite this, the meaning, scope and operation of s 51AA are little clearer now than they were at the commencement of this litigation.

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14 Section 51AA (2).

15 See, for example, the 1997-1998 Annual Report of the ACCC and the report of the House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance — Towards Fair Trading in Australia.*

16 The other was *ACCC v Samton Holdings Pty Ltd* (2002) 117 FCR 301.

The facts[17]

Margaret and James Roberts owned and operated a fish and chip business in a shopping centre in Western Australia. The business occupied leased premises. The lease had an expiry date of February 1997. The Robertses had no right of renewal of the lease.

In 1996 the Robertses, along with other tenants in the shopping centre, were party to litigation against the owners claiming a refund of alleged overpayments made to the owners during the terms of their leases. The Robertses estimated their claim at approximately $50,000.00 but had they participated in a subsequent (1998) settlement of the proceedings, they would have recovered $2,786.43.

In 1996 the Robertses were desirous of selling their business. This was for various reasons. They thought they had been in the business long enough and that it was time to exit. They also had an ill daughter to whom they wished to devote more time, attention and money. In October 1996 the Robertses received an offer to buy their business subject to a lease of the premises being assigned to the satisfaction of the purchaser. The owners would only agree to a renewal and assignment of the lease to the prospective purchaser if the Robertses and the purchaser would discharge the owners from all claims for any act or omission of the owners prior to the proposed assignment date and if the Robertses would discharge current legal proceedings against the owners. The Robertses acceded to these requests of the owners and the sale of their business was completed in December 1996 with the purchaser obtaining an assignment of the lease for a term to his satisfaction.

On 3 April 1998 the ACCC instituted Federal Court proceedings on behalf of the Robertses and two other tenants, alleging breaches of Parts IVA (unconscionable conduct) and V (misleading or deceptive conduct) of the Act. The claim on behalf of the other tenants failed at first instance and on cross-appeal to the Full Court. As regards the Robertses, it was alleged that the owners' requirement of a discharge and discontinuance of proceedings as a condition of the grant of a new lease contravened Part IVA of the Act, specifically s 51AA. It was further alleged that representations by the owners made in the course of negotiations with the Robertses contravened s 52 of the Act. At trial, French J held that there was no breach of s 52 but that there was a breach of s 51AA. This note is concerned only with the position of the Robertses and only with the claim of a contravention of s 51AA.

17 The facts are stated in the reasons of Gummow and Hayne JJ at [21]-[28] and of Callinan J at [121]-[147].

The law

At the relevant time, Part IVA comprised ss 51AA-51AB. It has since been amended, in particular by the insertion of s 51AC (unconscionable conduct in business transactions). At the relevant time s 51 AA 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.

Because the conduct complained of was not conduct prohibited by s 51AB the case turned entirely upon s 51AA(1). The constitutional validity of s 51AA was called into question but upheld.[18] This note is not concerned with the validity of s 51AA but with its construction and application to the facts concerning the Robertses.

The Trial[19]

At the trial, all parties proceeded on the basis that s 51AA would have been breached if the transaction could have been set aside under the principles outlined in *Amadio*. Accordingly the evidence at the trial was directed to showing first, that the Robertses were suffering from a special disadvantage and secondly, that the owners had knowingly exploited this special disadvantage. This evidence covered not only the events surrounding the granting of the renewal but included the whole course of dealing between the parties over a period of many months. The evidence disclosed that the Robertses had received competent legal advice throughout the negotiations and that Mrs Roberts had actually signed the relevant documents over the objections of her solicitor.

The fact that the Robertses had signed the renewal over the objections of their solicitor was not, according to French J, fatal to the ACCC's case. His Honour drew a distinction between "situational" and "constitutional" disadvantage[20]. In His Honour's view a situational disadvantage arose from legal and commercial circumstances whereas constitutional disadvantage arose from inherent factors such as infirmity, ignorance or other weakness. Unlike constitutional disadvantage, situational disadvantage and the resulting effect on the ability to assess and evaluate one's best interests could not be alleviated by independent legal advice. French J regarded the Robertses as suffering from "situational" disadvantage that was not overcome by their receipt of competent legal advice.

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18 *ACCC v CG Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491; 169 ALR 324; ATPR ¶41-755; *ACCC v Samton Holdings Pty Ltd* (2000) ATPR ¶41-791. See also *CG Berbatis Holdings Pty Ltd v ACCC* (2001) ATPR ¶41-826 at 43,181.

19 *ACCC v CG Berbatis Holdings Pty Ltd v ACCC* (2000) ATPR ¶41-778.

20 (2000) ATPR ¶41-778 at 41,196-41,197.

As to the second issue, French J decided that the owners had engaged in unconscionable conduct by requiring the Robertses to release them from claims arising under the existing lease as a condition of the grant of a new lease. He took the view that there had been an exploitation of the vulnerability of the Robertses in relation to the sale of their business that was "grossly unfair". It was inconsequential to him that the value of the claims released by the Robertses may have been small in monetary terms and that the advantage obtained by the Robertses being able to sell their business may have been comparatively large in monetary terms. For French J it was unconscionable for the owners to take advantage of the situation in which the Robertses found themselves, namely that the sale of the business was dependant on the owners' willingness to grant a new lease, which the owners were not obliged to do.

French J granted declaratory relief that the various respondents, either directly or as parties knowingly concerned, had contravened s 51AA.[21] Subsequent to the trial, on the application of the ACCC, French J made orders for the "re-education" of the natural person as distinct from the corporate respondents. Four natural persons were ordered to attend a trade practices compliance seminar, to be conducted by a specialist in trade practices law, where the unconscionable conduct provisions of the Act, and in particular s 51AA, were to be addressed.[22]

Appeal to the Full Court of the Federal Court

The owners appealed successfully to the Full Court of the Federal Court (Hill, Tamberlin and Emmett JJ).[23] The Full Court, in a single joint judgment, took the view that although the owners may have taken the opportunity to strike a hard bargain they had not engaged in unconscionable conduct within the meaning of s 51AA. On one analysis of the judgment, the Full Court construed s 51AA as requiring that the will of the Robertses be so overborne as to deny to their action the nature of an independent and voluntary act. In the view of the Full Court, the Robertses chose to abandon their claims to gain the opportunity to sell their business rather than choosing to maintain their claims against the owners and losing the opportunity to sell the business.

In the Full Court it was accepted by all parties that, for s 51AA to operate, it was necessary to show that the Robertses were under a special disadvantage in their dealings with the owners in accordance with the reasoning in *Amadio*. The dispute on appeal was about the application of this principle to the facts – were the Robertses at a special disadvantage? The ACCC said they were. The owners said they were not and the Full Court agreed. It is inappropriate, the Full Court said, to characterise the detriment that a tenant has by reason of the imminent

21 (2000) ATPR ¶41-778 at 41,199-41,200.
22 (2001) ATPR ¶41-802.
23 *CG Berbatis Holdings Pty Ltd v ACCC* (2001) 185 ALR 555.

expiration of a lease as a special disadvantage. The circumstances of the parties were not such that the conclusion should be drawn that the Robertses were at a special disadvantage so as to make the conduct of the owners unconscionable.

Appeal to the High Court

The ACCC appealed to the High Court.[24] A 4:1 majority dismissed the appeal. The majority judgments will be considered separately from the dissenting judgment.

The majority judgments

There are two common threads to the majority judgments: application of the Amadio *principles to the facts and rejection of the notion the s 51AA requires a party's will to be so overborne that they did not act independently and voluntarily. Each of these threads will be considered separately.*

Application of the Amadio principles

Each of the three majority judgments tested the facts against the *Amadio* category of unconscionable conduct and concluded that the requirements of that category were not satisfied with the result that there was no breach of s 51AA. The majority judgments did this because the ACCC presented the case on the basis that the *Amadio* principles applied and that the case could be dealt with by applying those principles to the facts. This approach was accepted by all parties and had also been taken by the trial judge and the Full Court on appeal.[25]

In the view of the majority the *Amadio* principles require two things:

- A special disadvantage on the part of one party, ie circumstances or conditions which seriously affect the ability of this party to make a judgment as to their own best interests.
- The other party taking unconscientious advantage of that special disadvantage. This requires that the other party knows or ought to know of the special disadvantage and its effect on the party with the special disadvantage. Put another way, there must be knowing exploitation by one party of the special disadvantage of the other.

Gummow and Hayne JJ, in a joint judgment, concluded that neither of these requirements was satisfied. The first requirement was not satisfied because, although in a difficult bargaining position, it could not be concluded that the Robertses lacked the capacity to make a judgment about their best interests. The

24 (2003) ATPR ¶41-916.
25 (2003) ATPR ¶41-916 at [5]-[7], [37], [40], [46], [68], [77], [154], [161], [166], [182].

second requirement can only be met if the first is met, ie the owners could only take advantage of the Robertses' alleged special disadvantage if such a disadvantage existed.

Callinan J took the view that the circumstances or conditions giving rise to a special disadvantage did not exist because the Robertses recognised and understood what was in their best interests and acted accordingly.[26] Callinan J observed that "the Full Court held, and correctly so, ... 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, ...".

In evaluating the facts Callinan J stated that whenever parties in a business relationship fall out over an aspect of that relationship, it will generally not be unreasonable or unconscionable for them to seek to insist that one party give up some right in exchange for the conferral of a new right upon that party.[27] In his view the owners used an entirely unexceptional and unexceptionable right to grant or withhold a new lease upon a condition that enabled it to rid itself of troublesome litigation.[28]

In the view of Gleeson CJ there was no special disadvantage on the part of the Robertses, nor unconscientious conduct on the part of the owners. He accepted that they were at a disadvantage because they had no right of renewal but there was nothing "special" about this. The Robertses were able to judge or protect their financial interests and did so by favouring the sale of the business over the claims against the owners. There was no lack of ability on the part of the Robertses to make a judgment about anything. Rather, there was a lack of ability to get their way.

Overborne will

There was unanimous rejection of the notion that s 51AA requires that the will of the weaker party be so overcome as to deny their action the nature of an independent and voluntary act. The ACCC submitted that the Full Court construed s 51AA as requiring this.[29] Gummow and Hayne JJ, said such a construction "reflects notions associated with common law duress and the deforce of *non est factum* rather than unconscionable conduct and was wrong".[30] In the

26 (2003) ATPR ¶41-916 at [185].
27 (2003) ATPR ¶41-916 at [176].
28 (2003) ATPR ¶41-916 at [173].
29 (2003) ATPR ¶41-916 at [36], [171].
30 (2003) ATPR ¶41-916 at [36], citing *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].

view of Callinan J the Full Court did not conclude that the will of a party had to be so overborne as to prevent that party from acting independently and voluntarily. Rather, the Full Court was indicating that this was a relevant, but not essential element, in many cases of unconscionability.[8] He noted that the Full Court held that the evidence showed that the Robertses where not overborne notwithstanding that they may have been at a commercial disadvantage. This finding on the evidence was implicitly accepted as correct by Callinan J.

Gleeson CJ did not believe that the members of the Full Court thought that unconscionability required duress because their judgment remarked that it could not be said that the will of the Robertses was overborne, or that they did not act independently and voluntarily. The Full Court's reference to such matters was simply an observation of fact as to part of the context in which the issue of unconscionability arose.[31]

Notwithstanding the differing interpretations the majority judges took of the Full Court's reference to an overborne will negating independent and voluntary action, it is clear that all of the judges in the majority considered that this is not a requirement for a breach of s 51AA.

The dissenting judgment

The two common threads to the majority judgments, application of the *Amadio* principles and whether s 51AA requires an overborne will, also permeate the dissenting judgment of Kirby J. His dissent is confined to the first of these threads. He assented to the majority view on the second thread.

Application of the Amadio principles

Although Kirby J favoured a "broad and beneficial' application of s 51AA as opposed to a "narrow and restrictive" one, much of his judgment is concerned with the *Amadio* principles because the trial and both appeals had been argued by reference to those principles. He believed that the Court should affirm the judgment of French J given that the factual findings were undisturbed and that French J had not made any error of legal principle.[32]

With respect to a special disadvantage on the part of the Robertses it was Kirby J's view that the finding that they were suffering from a special disadvantage was open to French J on the basis of the evidence that he accepted.[33] Three points in particular influenced Kirby J. First, the fact that without the Robertses' need to renew the lease quickly in order to effect the sale, any renewal proposal they made

31 (2003) ATPR ¶41-916 at [18].
32 (2003) ATPR ¶41-916 at [66].
33 (2003) ATPR ¶41-916 at [84].

would have been viewed as advantageous to the owners and likely to be accepted by them.[34] This supported the view that insistence on the release was an opportunistic taking advantage of the special position in which the Robertses found themselves.[35]

Secondly, the different position of the Robertses from the other two tenants on whose behalf the ACCC brought the action.[36] That difference was the fact that the other two tenants did not need to sell their business. Both were at some disadvantage but not a special disadvantage like the Robertses caused by their need to sell.[37] Thirdly, the special position of the Robertses, brought about by the illness of their daughter, which increased their need to sell the business. The owners knew of this illness and its effect on the Robertses, thereby increasing the Robertses' vulnerability.[38]

The course of the negotiations was significant for Kirby J.[39] He thought 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. An examination of that course revealed that the Robertses were unable to assess properly their options and interests and that their assent to the release clause was contrived. The requiring of the release clause may not, on its own, have breached s 51AA but the entire course of the negotiations, of which the insistence on the release clause was a part, pointed to a breach of the section.

Kirby J also supported the findings of French J by reference to the purpose and nature of s 51AA and the remedies designed to enhance the educative and deterrent effect of s 51AA.[40] A contravention of the Act might thus be found although equitable relief would not lie.[41] The decision of French J was consistent with the history and purpose of s 51AA.[42]

Kirby J noted the significant advantages enjoyed by a primary judge in the evaluation and characterisation of the facts.[43] This was a reason for appellate restraint when asked, on the basis of the written record, to review a conclusion

34 (2003) ATPR ¶41-916 at [90].
35 (2003) ATPR ¶41-916 at [90].
36 (2003) ATPR ¶41-916 at [91].
37 (2003) ATPR ¶41-916 at [91]-[92].
38 (2003) ATPR ¶41-916 at [93]-[95].
39 (2003) ATPR ¶41-916 at [96]-[105].
40 (2003) ATPR ¶41-916 at [106]-[110].
41 (2003) ATPR ¶41-916 at [109].
42 (2003) ATPR ¶41-916 at [110].
43 (2003) ATPR ¶41-916 at [81]-[83].

about unconscionable dealing reached at trial.[44] Because French J had not applied an incorrect legal criterion, there was no authority to reverse his conclusions.[45]

Overborne will

Kirby J agreed with Gummow and Hayne JJ that the Full Court had erred in law by suggesting that s 51AA required a party's will to be so overborne that they did not act independently and voluntarily.[46] He considered this to be a crucial point of the reasoning of the Full Court. The appeal thus had to be upheld unless the High Court concluded, on its own review of the facts and law, that the same result should be reached. In the view of Kirby J, the conclusion of French J should be restored.[47]

Comments on the case

This case exhibits a number of disappointing features for a test case taken to the High Court.

1. The case does nothing to clarify the reach of s 51AA

Given that the proceedings were in the nature of a test case,[48] one might have assumed that one of the objectives of taking such a case was to clarify the scope of the prohibition in s 51AA(1). In the end, the case failed to do this. From the start, the ACCC position was that the owners had contravened s 51AA(1) because their conduct matched the criteria laid down in *Amadio*. That is, the conduct involved knowingly taking advantage of the position of special disadvantage occupied by the Robertses. In the High Court, the majority decided that the owners' conduct did not satisfy the criteria laid down in the *Amadio* case. Since the ACCC had offered no argument to the effect that conduct other than that which exploits a special disadvantage might also contravene s 51AA(1), the majority of the High Court was left with no choice but to dismiss the appeal. The High Court was not called upon to consider whether s 51AA prohibited conduct outside the *Amadio* criteria.

The narrow approach pleaded throughout by the ACCC is difficult to understand because French J, in the context of examining the constitutional validity of the section,[49] had already cast doubt on the assertion in the explanatory memorandum that the section was limited to the concept of unconscionability as found in cases

44 (2003) ATPR ¶41-916 at [82].
45 (2003) ATPR ¶41-916 at [117].
46 (2003) ATPR ¶41-916 at [78]-[79].
47 (2003) ATPR ¶41-916 at [80].
48 (2003) ATPR ¶41-916 at [108].
49 (2000) ATPR ¶41-755 at [23].

such as *Blomley* and *Amadio*. In his view, the type of conduct proscribed by the section could well extend to include situations in which equitable relief might be granted under other specific equitable doctrines such as equitable estoppel or where relief might be granted against harsh or oppressive clauses.

Despite this invitation to argue for a broad interpretation of the scope of the prohibition in s 51AA, the ACCC chose to argue the case at all levels on the basis that the owners had breached the section because their conduct was unconscionable according to the principles enunciated in *Amadio*. French J held that this was true with respect to the Robertses because they were under a special disability but essentially the same conduct was not unconscionable with respect to the other tenants because those tenants were not suffering from a special disability. In particular they were not seeking to renew their leases for the purpose of selling their businesses.

In the Full Federal Court, the question of the breadth of the prohibition in s 51AA was not at issue. The single joint judgment noted that each side had argued the case, both at first instance and on appeal, on the basis that it was the *Amadio* type of unconscionable conduct that was applicable.

In the course of its appeal to the High Court however, the ACCC did include a submission that, for the purposes of s 51AA, unconscionable conduct might fall into one of four possible categories. These categories were described as follows:[50]

(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.

The only High Court judge to make any reference to this submission was Callinan J. He stated that it was unnecessary to give any serious consideration to the appropriateness of this attempted categorisation given that the case had been argued, both in the Full Federal Court and in the High Court, on the basis that it was the *Amadio* type test as summarised in (a)[51] that was applicable to the facts in this case. It is unfortunate that the ACCC by its own concession confined the proceedings to the first of the four categories of conduct that it identified as arguably falling within

50 (2003) ATPR ¶41-916 at [159].
51 (2003) ATPR ¶41-916 at [160].

s 51AA. High Court consideration of whether the other categories were reached by s 51AA would have been helpful.

2. What is the status of the concept of a situational disadvantage after Berbatis?

At trial French J used the term 'situational disadvantage' to describe a class of disadvantage arising from particular circumstances rather than any inherent weakness or infirmity.[52] Disadvantage arising from any inherent weakness or infirmity he described as "constitutional disadvantage". Why did French J introduce this taxonomy? Seemingly it was to draw a distinction between disadvantages that can and cannot be overcome by independent legal advice bearing in mind that the Robertses had such advice which they did not follow. Gummow and Hayne JJ say the distinction was important as it was because the disadvantage was situational rather than constitutional that no particular significance attached to legal advice. That is, all the advice in the world could not change a situational disadvantage. It does seem that French J's purpose in crafting the distinction was to enable the *Amadio* requirement of a special disadvantage causing a party to be unable to assess their best interests to be satisfied notwithstanding that the party had the benefit of independent legal advice, which would normally be regarded as enabling the party to make informed decisions about their best interests.

Has the distinction drawn at trial survived the subsequent hearings? The Full Court said nothing about the idea of situational advantage introduced by French J. It reversed French J by taking a different view of the facts. The High Court majority preferred the Full Court's evaluation of the facts to that of French J. Callinan J was silent on the distinction. Gleeson CJ said it was 'useful and acceptable' provided that such descriptions do not supplant the principle and there was nothing to suggest that French J intended that it should. Gleeson CJ noted *ACCC v Samton Holdings Pty Ltd*[53], decided between the *Berbatis* trial and High Court decision, in which the idea of the distinction was 'developed somewhat' in a joint judgment to which French J was a party. Gummow and Hayne JJ noted the importance of the distinction to French J's reasoning but neither approved or disapproved of the distinction.

It is submitted that the distinction was not significant to the majority. They concentrated on *Amadio*. That is, the need for a special disadvantage, known to the other party and unconscionably exploited by that party. They all opined that no special disadvantage existed because that requires a party not to be able to act in their best interests. The Robertses were able to make a decision in their best

52 *ACCC v CG Berbatis Holdings Pty Ltd* (2000) ATPR ¶41-916 at [122]. See also *ACCC v CG Berbatis Holdings Pty Ltd* (2000) FCA 1893 at [9] (judgment on ancillary relief and costs subsequent to the primary judgment).

53 (2002) 117 FCR 301 at 318.

interests and did so. That is, although at a disadvantage that did not preclude them looking after their best interests and thus there was not a special disadvantage. Their ability to make a judgment in their best interests was not dependent on legal advice.

Kirby J noted the distinction drawn by French J between situational and constitutional disadvantage and that the effect of the disadvantage on the ability of the Robertses to properly assess and evaluate their options and interests was not able to be mitigated by legal representation.[54] Although Kirby J does not expressly support the distinction, his acknowledgement of it might be taken as implied support for the distinction.

In conclusion, it appears that the distinction has survived the High Court decision in *Berbatis*. None of the High Court judges took the opportunity to reject the distinction. The development of the distinction in *ACCC v Samton Holdings Pty Ltd* was noted but also not rejected. But does the distinction change the law? Gleeson CJ's comment on the distinction suggests not. He views the terms "constitutional" and "situational" as descriptive of a special disadvantage. Such descriptions must not "take on a life of their own, in substitution for the language of the statute, and the content of the law to which it refers."[55] Furthermore, he said that there was nothing to suggest that French J intended his convenient method of exposition of an underlying principle to supplant the principle. This suggests that the underlying principle, and thus the law, remains the same. The distinction is merely a way of describing forms of special disadvantage. At the end of the day it is not the description that matters.

3. Overborne will not required

One positive aspect of the High Court judgments is that they all agree that unconscionable conduct does not require the will of a party to be overborne so that they did not act independently and voluntarily. All of the High Court judges emphatically rejected suggestions to the contrary by the Full Federal Court.

4. Section 51AA has been largely superseded by section 51AC

The decision of the ACCC to take up the Robertses' plight and to use it as a test case involved an unfortunate element of timing. The events giving rise to the ACCC's allegation of unconscionable conduct occurred prior to the coming into force of s 51AC on 1 July 1998. Were a similar case to arise after 1 July 1998, s 51AA(1) would no longer be available to either the ACCC or a private litigant. This is because s 51AA(2) was amended with effect from 1 July 1998 to state that

54 (2003) ATPR ¶41-916 at [87].
55 (2003) ATPR ¶41-916 at [10].

s 51AA (1) does not apply to conduct that is prohibited by s 51AB or s 51AC.[56] The latter section prohibits conduct that is unconscionable in four separate situations.[57] All involve conduct in connection with the supply (or acquisition) of goods or services to (or from) persons whose acquisition (or supply) is for the purposes of trade or commerce. This severely restricts the scope of s 51AA. Most cases of unconscionable conduct in trade or commerce will arise in connection with the supply of goods or services. This is due to the extraordinarily wide definition of 'services' provided by the Act.[58]

It seems clear that the conduct that was alleged to be unconscionable in the *Berbatis* litigation would now fall within the scope of s 51AC. This is because the impugned conduct was in connection with the renewal of a commercial lease, which appears to come within the s 4(1) definition of a 'service' and this service was clearly acquired for the purposes trade or commerce.[59] It follows that, by the time the case came before French J, the important *practical* question was whether the conduct was unconscionable according to the meaning of that term in s 51AC, not whether the conduct was unconscionable according to the meaning of that term in s 51AA. As such it is far from clear why the ACCC felt it was worthwhile as a matter of principle to pursue this litigation.

There is no suggestion that the meaning of the term 'unconscionable' is the same in both sections. In contrast with s 51AA, s 51AC makes no mention of the unwritten law. Instead it prohibits conduct that is unconscionable *in all the circumstances*. Section 51AC provides a checklist of 11 items to which the court is invited to have regard in deciding if conduct is unconscionable for the purposes of

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56 ection 51AA(2) was amended to state that s 51AA does not apply to conduct that is prohibited by s 51AB or s 51AC.

57 Section 51AC Unconscionable conduct in business transactions:
(1) A corporation must not, in trade or commerce, in connection with:
(a) the supply or possible supply of goods or services to a person (other than a listed public company); or
(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);
engage in conduct that is, in all the circumstances, unconscionable.
(2) A person must not, in trade or commerce, in connection with:
(a) the supply or possible supply of goods or services to a corporation (other than a listed public company); or
(b) the acquisition or possible acquisition of goods or services from a corporation (other than a listed public company);
engage in conduct that is, in all the circumstances, unconscionable.

58 Section 4 (1) of the Act provides that "services" includes "any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce ...".

59 In addition the tenant was not a listed company and the price of the services did not exceed $3 million, either of which excludes the application of s 51AC: subsections (1), (2), (9) and (10).

that section.[60] Implicitly this checklist cannot be used in relation to s 51AA or s 51AB, although s 51AB has it own checklist that contains the same first five items as that in s 51AC. Neither checklist is exhaustive.

It follows from the above discussion that the reasoning of the judges of the High Court will be irrelevant to the vast majority of cases in which an owner of a shopping centre attempts to impose allegedly unconscionable conditions on the renewal of a lease. Those cases will be decided by reference to the 11 items on the checklist in s 51AC (3). However s 51AC is subject to two exceptions. These are the situation where the alleged victim of the unconscionable conduct is a publicly listed corporation[61] or where the transaction is priced at more than $3 million.[62] When these exceptions operate s 51AA(1) will still have a role to play.
Given the effect of s 51AA(2), an interesting question arises as to whether it makes sense to plead a contravention of s 51AA in the alternative in cases where

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60 Section 51AC(3). These are:
(a) the relative strengths of the bargaining positions of the supplier and the business consumer; and
(b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
(c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
(e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and
(f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; and
(g) the requirements of any applicable industry code; and
(h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and
(i) the extent to which the supplier unreasonably failed to disclose to the business consumer:
(i) any intended conduct of the supplier that might affect the interests of the business consumer; and
(ii) any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and
(j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and
(k) the extent to which the supplier and the business consumer acted in good faith.

61 Section 57AC(1),(2).

62 Section 57AC(9),(10).

the primary allegation relates to a contravention of s 51AC. In *Berbatis*, Senior Counsel for the ACCC made the point that ss 51AB and 51AC of the Act have a wider operation than s 51AA.[63] If this is correct, and it seems to be the generally accepted view,[64] there would be little hope of success under s 51AA if it were held that the conduct was not unconscionable under s 51AC.

Conclusions

One might be forgiven for expecting that a decision of the High Court on a test case taken to demonstrate the efficacy of s 51AA might advance knowledge and understanding of the true meaning and reach of that section. Regrettably *Berbatis* does not do so. In the words of Callinan J, the appeal did "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".[65] The decision is confined to its own facts but will not even be helpful in respect of similar facts arising in the future given that similar cases are now excluded from the application of s 51AA in favour of the application of s 51AC. As a test case instituted to demonstrate the efficacy of s 51AA, *Berbatis* must be regarded as a singular failure.

63 (2003) ATPR ¶41-916 at [5].

64 See, for example, Zumbo, 'Restraining Unconscionable Commercial Conduct: An ACCC Challenge' (1999) 7 *Trade Practices Law Journal* 145 at 149.

65 (2003) ATPR ¶41-916 at [181].