THE NARROW, BROAD AND MIDDLE GROUNDS: THE MUDDLED DOCTRINE OF UNCONSCIONABILITY

TOH DING JUN*

I. INTRODUCTION: *BOM V BOK*

In 2018, the Singapore Court of Appeal ("SGCA") in *BOM v BOK*[1] confirmed that the doctrine of unconscionability formed part of the law in Singapore.[2] To this end, the SGCA stated that for the doctrine of unconscionability to be invoked, the plaintiff must show:

1. That he was suffering from an infirmity; and
2. That the infirmity was exploited by the other party exploited in procuring the transaction.[3]

Once the plaintiff has satisfied the requirements, the burden then shifts to the defendant to show that the transaction was fair, just and reasonable.[4] To this end, the court will invariably consider, *inter alia*, whether:

1. Whether the transaction was at an undervalue; and
2. Whether the plaintiff had received independent legal advice.[5]

The SGCA stated that this approach was a modification of the 'narrow' doctrine of unconscionability that was first espoused by the House of Lords in *Fry v Lane*[6] and *Cresswell v Potter*[7].[8] In doing so, the SGCA stressed that the approach to be adopted in Singapore was not the 'broad' doctrine of unconscionability adopted by the Australian courts.[9] In other words, it would seem that the SGCA was adopting a 'middle' ground to the doctrine of unconscionability. However, this leads to the question—what exactly is this 'middle' ground?

In this article, it is submitted that the difference between the 'broad' and 'middle' grounds is more apparent than real. Further, it will be argued that the court ought to take a broader approach

* Third Year Student, Faculty of Law, National University of Singapore.

[1] [2019] 1 SLR 349 (CA) [*BOM*].

[2] *Ibid* at para 114.

[3] *Ibid* at para 142.

[4] *Ibid.*

[5] *Ibid.*

[6] (1888) 40 Ch D 312.

[7] [1978] 1 WLR 255.

[8] *BOM*, supra note 2 at para 141.

[9] *Ibid* at para 144.

to invoking the doctrine of unconscionability, which could include situational infirmities such as emotional dependence and infatuation.

II. THE ORIGINAL NARROW DOCTRINE OF UNCONSCIONABILITY

At this stage, it is apposite to briefly state the 'narrow' doctrine of unconscionability that was originally conceptualised by the English courts to prevent expectant heirs from being exploited and deprived of their inheritances.[10] The 'narrow' doctrine involves the consideration of three requirements:

1. Whether the plaintiff is poor and ignorant;
2. Whether the sale was at a considerable undervalue; and
3. Whether the vendor had independent advice.[11]

By accepting that the plaintiff may have other forms of infirmities besides being poor and ignorant, the SGCA has certainly broadened the doctrine of unconscionability from its 'narrow' beginnings.[12] However, the question remains—what is the scope of the doctrine of unconscionability as espoused by the SGCA? This is a question we now turn to.

III. THE 'BROAD' DOCTRINE ADOPTED IN AUSTRALIA

The position as adopted in Australia will be discussed first, followed by Singapore's latest position in *BOM*.

The SGCA in *BOM* used the High Court of Australia ("HCA") decision of *Commercial Bank of Australia Limited v Amadio*[13] to exemplify the 'broad' doctrine of unconscionability. Briefly, this 'broad' doctrine of unconscionability requires the plaintiff to prove that ["*Amadio* formulation"]:

1. He 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…"[14]; and

[10] *Ibid* at para 127.
[11] *Ibid* at para 130.
[12] *Ibid* at para 141.
[13] (1983) 46 ALR 402 (HCA) [*Amadio*].
[14] *Ibid* at 422.

2. "…[T]hat the disability was sufficiently evident to the stronger party to make it *prima facie* unfair or 'unconscientious' that he procure[d], or accept[ed], the weaker party's assent to the impugned transaction…".[15]

Once these elements were established by the plaintiff, the onus is then on the defendant to show that the transaction was fair, just and reasonable.[16]

Further, the HCA emphasised that a mere difference in bargaining power of the parties was *ipso facto* insufficient to invoke the doctrine of unconscionability. As Mason J put it:

> I qualify the word "disadvantage" by the adjective "special" in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to [emphasise] that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.[17]

Two points can be distilled from this quote:

1. There is a standard of "special" disadvantage, presumably taken from the objective person's point of view, *ie* it must be "special" in the circumstances, presumably taken from a reasonable man's standpoint.
2. The content of this standard is that the condition or circumstance must have "seriously" affected the ability of the innocent party to protect his own best interests.

Seen in this light, it is puzzling as to why the SGCA rejected this 'broad' doctrine on the basis that "it affords the court too much scope to decide on a subjective basis"[18], because it comes dangerously close to empowering the court to subjectively decide whether there was an inequality of bargaining power as between the parties.[19] This seems to go against the express wording of the judgment, as made by Mason J, where he stated that the inequality of bargaining power must have arose from the "disabling condition" of the weaker party, and must have "seriously [affected]" the weaker party's ability to make a judgment as to his best interests.[20] It is submitted that Mason J's words *suggest* that the courts have an *objective* standard to guide its inquiry into whether there was

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[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid* at 413.

[18] *BOM, supra* note 1 at para 133.

[19] *Ibid* at paras 133, 134.

[20] *Amadio, supra* note 13 at 413.

an inequality of bargaining power for the purposes of invoking the doctrine of unconscionability – that of a "disabling condition" which "seriously affects" the innocent party's ability to make a judgment as to his own best interests. Indeed, it is submitted that where the disadvantage merely amounts to inequality in bargaining positions seen in the normal course of business, the innocent party's ability will not be said to be "seriously affected" such that the doctrine of unconscionability can be invoked.

Moreover, it is unclear as to why the SGCA was concerned with the "subjectivity" of the 'broad' doctrine of unconscionability. When the HCA applied the law to the facts of *Amadio*, Deane J stated:

> [T]he result of the combination of their age, their limited grasp of written English, the circumstances in which the bank presented the document to them for their signature and, most importantly, their lack of knowledge and understanding of the contents of the document … [the plaintiffs] lacked assistance and advice where assistance and advice were plainly necessary if there were to be any reasonable degree of equality between themselves and the bank.[21]

As stated in the *Amadio* formulation, the court is to determine the inequality of bargaining power through the lens of what is reasonable in the circumstances that the transaction was completed (*ie* "reasonable degree").[22] This has since been suggested to be a comparison of the relative disparity between the positions of the stronger and weaker party rather than focusing upon the inherent weakness of the latter.[23] If this is true, it seems to suggest an objective test being used, where the "relative disparity" is seen from a third party's point of view, with the third party necessarily objective and neutral. Again, this is certainly not a subjective test which the SGCA was concerned would lead to uncertainty in contract law.[24]

Further, it is submitted that the use of the term "plainly necessary"[25] fortifies the opinion that a reasonable man standard was used by the HCA in establishing the first element to the *Amadio* formulation. In other words, it is submitted that the HCA was suggesting that any reasonable person not party to the transaction would have known that, without assistance and advice, there would not be any reasonable degree of equality between the parties. To conclude, and with due

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[21] *Ibid* at 425.

[22] *Ibid.*

[23] Burton Ong, "Unconscionability, Undue Influence and Umbrellas: The "Unfairness" Doctrines in Singapore Contract Law After BOM v BOK" [2020] SJLS 295 at 307 [Ong, *Unconscionability*].

[24] *BOM, supra* note 2 at para 121.

[25] *Amadio, supra* note 11 at 425.

respect, it is submitted that had the SGCA considered the position in *Amadio* in this light, the *Amadio* formulation may have well been adopted in Singapore.

IV. THE POSITION IN SINGAPORE: DIFFERENCE MORE APPARENT THAN REAL?

It is also submitted that the doctrine of unconscionability may be similar, if not the same, in both Singapore and Australia. Briefly, there are three reasons why this may be so:

1. In both jurisdictions, the doctrine of unconscionability is primarily concerned with procedural fairness and not substantive fairness.
2. *Prima facie*, both jurisdictions seem to accept the same range of infirmities or special disabilities.
3. In both jurisdictions, the evidential burden of proof is shifted to the defendant once the plaintiff has made out a *prima facie* case of unconscionability.

First, it is submitted that the focus of the inquiries in Australia and Singapore is on procedural fairness as opposed to substantive fairness. In *BOM,* the SGCA held:

> We stress that the absence of independent advice and the characterisation of a transaction as being at an undervalue are not mandatory elements to be satisfied … However, as this case demonstrates, the presence of these factors will often underscore and highlight the exploitation of an infirmity that renders a transaction improvident.[26]

In an article, Professor Rick Bigwood wrote:

> [T]he Australian doctrine is purely procedural in its focus, [with] substantive unconscionability serving merely an important forensic role, namely, 'as supporting the inference that a position of disadvantage existed', and also 'as tending to show that an unfair use was made of the occasion'.[27]

As such, it can be seen that both the 'broad' and 'middle' grounds of unconscionability are primarily concerned with procedural unfairness, with the SGCA making it clear that an undervalue only goes to "underscore and highlight the exploitation of an infirmity"[28], rather than *ipso facto* allowing the doctrine of unconscionability to be invoked.

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[26] *BOM, supra* note 1 at para 155.

[27] Rick Bigwood, "Knocking Down the Straw Man: Reflections on BOM v BOK and the Court of Appeal's "Middle-Ground" Narrow Doctrine of Unconscionability for Singapore" [2019] SJLS 29 at 47.

[28] *BOM*, *supra* note 1 at para 155.

Second, while different terms were used by the SGCA and HCA, *ie* "infirmities" and "special disability" respectively, it would seem that both courts had the same definition in mind. In *BOM,* the SGCA stated:

> [I]n addition to considering whether or not the plaintiff is poor and ignorant, we would also include situations where the plaintiff is suffering from other forms of infirmities – whether physical, mental and/or emotional in nature … [The infirmity] must have been of sufficient gravity as to have acutely affected the plaintiff's ability to "conserve his own interests" … Such infirmity must also have been, or ought to have been, evident to the other party procuring the transaction.[29]

Similarly, in *Amadio*, the HCA stated:

> The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogued … [They include] 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 of explanation is necessary …[30]

It bears mentioning that the definition of "special disability", as stated by the HCA, is intended to be non-exhaustive.[31] Likewise, it seems that the SGCA left the categories of "infirmities" broad. As such, it is submitted that the list of specific "special disabilities", as stated by the HCA, could very well be mapped onto the broad categories stated by the SGCA. For example, the concepts of "age" and "sex", as espoused by the HCA, could very be placed under the broad categories of "physical" or "emotional". Likewise, the idea of "drunkenness" may well be categorised under "emotional" or "mental". In other words, there exists an argument that the list of infirmities as stated by the SGCA may be as broad as the position taken by the HCA. To this end, we will now discuss the boundaries of what constitutes an "infirmity".

V. INFATUATION: WHAT SHOULD SINGAPORE'S POSITION BE?

With regards to the criterion of "infirmity", it would seem that both the courts and academics have drawn a distinction between "situational infirmities" and "constitutional infirmities".[32]

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[29] *BOM, supra* note 1 at para 141.

[30] *Amadio, supra* note 13 at 423.

[31] *Ibid.*

[32] Ong, *Unconscionability*, *supra* note 23 at 306.

As noted by Le Miere J in *Warren v Lawton (No 3)*[33]:

> I use the descriptions constitutional and situational disadvantage to distinguish between disadvantages which are inherent characteristics of a person, for example, lack of intelligence, infirmity and illiteracy – and disadvantages which arise because of the circumstances in which an otherwise normal and ordinary person finds herself.[34]

Further, as noted by Professor Burton Ong:

> The SGCA's choice of the noun "infirmity" to describe the disadvantageous position of the weaker party appears confined to a limited range of constitutional qualities personal to him or her. It would probably not be enough, for example, to plead vulnerability on the basis that a party faced difficult circumstances in his personal life (*ie*, a situational disadvantage) …[35]
>
> Furthermore, not every constitutional disadvantage is likely to be regarded as an "infirmity" for the purposes of the Singapore doctrine of unconscionability … it is far from certain whether "infirmity" would cover a foolish, naïve or immature individual … who has entered into a bad bargain.[36]

One such "situational infirmity" immediately comes to mind—emotional dependence arising out from an intimate relationship, or infatuation, as accepted by the HCA in *Louth v Diprose*[37].

Indeed, at the boundaries of the doctrine of unconscionability lies the "situational infirmity" of emotional dependence and infatuation. This area of the law is fraught with much difficulties because courts are generally ill-equipped to determine the emotional state of parties to the impugned transaction.[38] Indeed, it is likely that the weaker party will find it hard to furnish scientific evidence to the courts to establish his "emotional weakness" at the time when the transaction was completed.

Further, as noted by the dissenting judgment given by Toohey J in *Louth*:

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[33] [2016] WASC 285.

[34] *Ibid* at para 158.

[35] Ong, *Unconscionability*, *supra* note 23 at 306-307.

[36] *Ibid* at 307.

[37] (1992) 110 ALR 1 (HCA) [*Louth*].

[38] *Chong Yee Ka v Public Prosecutor* [2017] 4 SLR 309 (HC) at paras 55-56, where the court there noted that "psychiatry is an inexact science" and that it would generally be acceptable for different psychiatrists to have different expert opinions. Further, see *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 (CA) at para 97, where the court recognised that the "recognised psychiatric illness" requirement at the threshold stage of the *Spandeck* test was "more easily stated than ascertained".

> The [weaker party] was well aware of all the circumstances and of his actions and their consequences … That knowledge and his clear appreciation of the consequences of what he was doing run directly counter to a conclusion that he was suffering from some special disability or was placed in some special situation of disadvantage. It is clear that the respondent was emotionally involved with the appellant. But it does not follow that he was emotionally dependent upon her in any relevant legal sense.[39]

Admittedly, there is certainly much force in this statement. Why should the law intervene to vitiate a transaction where parties are fully aware of their what they are doing, notwithstanding that there may be certain situational disadvantages? After all, inequality in bargaining position may very well make the weaker party 'feel' as if he needs the transaction to be completed more than the stronger party *ie*, emotional pressure. Seen in this light, a strong argument exists against allowing "emotional weakness" to be seen as an "infirmity". In other words, a person may be "emotionally weak" in the *factual* sense but is taken as a normal person in the *legal* sense, when the court determines whether the doctrine of unconscionability should be invoked.

However, this cannot be right, and it is submitted that situational infirmities should be considered as an "infirmity" for the purposes of invoking the doctrine of unconscionability. The kernel of the doctrine of unconscionability lies in the element of exploitation, where the stronger party exploits the weaker party's infirmity, with the actual or constructive knowledge of that infirmity.[40] As such, it should follow that the law should not allow the stronger party to keep any gains he received from the transaction, notwithstanding that the "infirmity" exploited is a situational infirmity and not a constitutional one. In other words, where an offeror intentionally *manipulates* and *exploits* the offeree's emotions and the prevailing situation, *knowing* that the offeree has a certain emotional weakness *vis-à-vis* him or her, the transaction should be vitiated.

Further, perhaps the Singapore courts should not be overly concerned with limiting the list of legally acceptable "infirmities" for the purposes of the doctrine. As the SGCA rightfully noted:

> The inquiry [into the weaker party's infirmity] … would, of course, be an intensely fact-sensitive one … [The infirmity] must have been of sufficient gravity as to have acutely affected the plaintiff's ability to "conserve his own interests" …[41]

As such, it is submitted that the list of "infirmities" should not be limited or restricted. In the context of "emotional weakness", it is submitted that there is conceivably a myriad of situations

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[39] *Louth, supra* note 38 at 28.

[40] *BOM, supra* note 1 at para 141.

[41] *Ibid.*

where emotional manipulation or exploitation may take place in, and which would not attract the doctrines of duress or undue influence *eg*, emotional manipulation of one party by another over cyberspace.

It is further submitted that fears of contractual uncertainty, arising from a broad conception of "infirmity", are misplaced because:

1. Such an "infirmity" must still be proven by the plaintiff to have acutely affected his ability to conserve his own interests; and
2. The court is entitled to consider other factors such as, *inter alia*, the presence of independent legal advice and the entire factual matrix in which the transaction took place in.

Ultimately, this gives effect to both certainty, in the sense that parties know for certain that they want to partake in the transaction, and fairness, in the sense that nobody should be allowed to manipulate and exploit others beyond what is reasonably acceptable in commercial or domestic negotiations.

VI. CONCLUSION

In conclusion, it is submitted that, for the foregoing reasons established in this article, the *Armadio* formulation of the doctrine of unconscionability and the conception of the doctrine as espoused by the SGCA in *BOM* are more alike than initially thought. To recapitulate:

1. It is submitted that the SGCA was mistaken in its belief that adopting the *Armadio* formulation would introduce greater subjectivity into the doctrine of unconscionability. This possibly led to fears of greater contractual uncertainty.
2. Additionally, it is worth noting that the 'broad' conception of the doctrine was objectively applied by the HCA in *Armadio*.
3. Seen in this light, the 'middle' ground, as stated by the SGCA resembles the 'broad' ground espoused by the HCA. While different terms may have been used, it is submitted that the difference is more apparent than real.
4. To this end, it is submitted that the Singapore courts should interpret the term "infirmity" broadly because the doctrine of unconscionability is fundamentally concerned with exploitative conduct on the stronger party's part.