

Unconscionable conduct relates to a situation where one party takes advantage of a weaker party who is under a special disadvantage. This article will discuss the elements required to establish an unconscionable dealing as well as the defences and remedies available.



A. INTRODUCTION AND DEFINITION

An 'unconscionable dealing' in equity refers to a situation where one party to a transaction is under a 'special disability', which is evident to the other party and therefore makes it unconscionable for that other party to take a benefit from the transaction. Essentially, an unconscionable transaction is an equitable doctrine that is concerned with a stronger party attempting to obtain the benefit of a transaction from a vulnerable party, which would not be in good conscience.

In Australia, the doctrine of unconscionable dealing is shaped through the Australian High Court case of *Commercial Bank of Australia Ltd v Amadio* (1983). In this case, the plaintiffs were elderly Italian migrants who had provided a bank guarantee for their son (who they thought was a successful business owner). The bank manager had visited the parents' home to obtain their signature but did not properly explain the document that they were signing. The parents were under the impression that the guarantee was limited to \$50,000.00 for a duration of six months. However, the guarantee was actually for securing all debts and was unlimited in time. The Court held that the bank had engaged in unconscionable conduct because they knew about the parents' special disadvantage (ie being elderly, having limited English and not being aware of their son's situation). As a result, the bank could not rely on the guarantee.

In the *Commercial Bank of Australia Ltd v Amadio* case, it was held that the following elements need to be proven to establish an unconscionable dealing:

1. The plaintiff (weaker party) was under a 'special disability';
2. The defendant (stronger party) had actual or constructive knowledge of the special disability; and
3. The defendant unconscientiously exploited the plaintiff's special disability.¹

B. PLAINTIFF UNDER A 'SPECIAL DISABILITY'

The first element requires the plaintiff to have been under a 'special disability' (or 'special disadvantage') at the time of the dealing, resulting in inequality between the two parties.² The special disability is regarded as being a 'disabling condition' as the plaintiff's ability to make decisions to his or her own best interests is seriously affected.³

¹ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 474 - 475 (Deane J) ('*Amadio*').

² *Ibid.*

³ *Ibid.*



There are a variety of disabling factors that can give rise to a 'special disability'. Examples of factors amounting to a special disadvantage include age, sickness, impairment, poverty, drunkenness, lack of education, illiteracy and emotional dependence on another.⁴

C. ACTUAL OR CONSTRUCTIVE KNOWLEDGE

The second element to prove unconscionable dealing requires the defendant to have knowledge of the plaintiff's special disability. For this element, it is generally necessary for the defendant to have known or ought to have known of the plaintiff's special disability along with the effect that would take place if the transaction was to occur.⁵

Where there is no evidence of the defendant having direct knowledge of the special disability, the courts will look to the mind of a reasonable person and whether they would question the plaintiff's judgment and capability in making sound decisions.⁶

D. UNCONSCIENTIOUS EXPLOITATION OF THE SPECIAL DISABILITY

The last element to prove unconscionable dealing requires the defendant to exploit and take advantage of the situation by preying on the plaintiff's special disability.⁷ The court will consider the defendant's actions to be unconscionable if he or she had acted upon exploiting the plaintiff's disability for his or her own benefit.⁸

E. DEFENCES

E.1. TRANSACTION NOT IMPROVIDENT OR UNFAIR

Under this defence, the defendant must be able to show that he or she did not unconscientiously exploit the plaintiff's disability. This requires the defendant to prove that the transaction was not improvident or unfair because steps had been taken to remedy the disadvantage. For instance,

this could include the plaintiff obtaining independent advice before entering into the transaction.

E.2. ACQUIESCENCE

Acquiescence is a defence that requires the defendant to prove that the plaintiff's actions or lack of actions suggest that the plaintiff had accepted or agreed to the defendant's conduct.⁹

In this sense, the plaintiff knowingly abandons their rights and therefore their ability to make a legal claim.

E.3. LACHES

Laches is a defence that can be applicable when there is an unreasonable delay in commencing legal proceedings. The unreasonable delay must cause significant detriment to the defendant, thus making it unjust for the plaintiff's claim to proceed.¹⁰

F. REMEDIES

There are several remedies available for dealings that are found to be unconscionable. The type of remedy ordered will depend on the circumstances of each case. Remedies typically awarded include:

- Specific performance - ordering the breaching party (defendant) to perform the contract in a specific way;
- Rescission - cancelling the contract (deal) and returning the parties to the position they were in before entering into the deal; and
- Equitable compensation - compensating the plaintiff for his or her loss in circumstances where rescission is not available.

G. CONCLUSION

Unconscionable dealings are recognised and enforced within equitable jurisdictions.

⁴ *Blomley v Ryan* (1956); *Louth v Diprose* (1992).

⁵ *Thorne v Kennedy* [2017].

⁶ *Amadio* (n 1).

⁷ *Ibid.*

⁸ *Bodapati & Anor v Westpac Banking Corporation & Anor* [2015].

⁹ *Orr v Ford* (1989).

¹⁰ *Barker v Duke Group Ltd (in Liq)* (2005).



For a dealing to be unconscionable, all three elements discussed above must be evident.

For more information on equitable remedies, you may wish to read the following articles:

1. **[Equitable Remedies](#)**: This article discusses equitable remedies and when and how they are granted.
2. **[Injunctions](#)**: Discusses the nature of injunctions and how one can be applied for.

Comasters Law Firm can act for clients in starting or responding to a claim regarding unconscionable dealings.

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