

## CASE NOTE

### AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v C G BERBATIS HOLDINGS PTY LTD\*

#### CURBING UNCONSCIONABILITY: *BERBATIS* IN THE HIGH COURT OF AUSTRALIA

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*[This case note critically analyses the High Court's recent decision in *Berbatis*. The majority in *Berbatis* took a restrictive approach in applying s 51AA of the Trade Practices Act to the facts of the particular case. In contrast, the single dissenting judge took a more expansive view of the merits of the appeal. This case note criticises the majority judges' rather perfunctory handling of the facts of the case — a matter made worse by their Honours' failure to link the elements of unconscionable dealing to a sophisticated conceptual account of interpersonal exploitation in market exchange contexts. The case note explains how the minority judge's reasoning might have been reinforced by reference to the developing jurisprudence on so-called 'lawful act' duress, especially as found in the United States.]*

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\* (2003) 197 ALR 153 ('*Berbatis*').

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## I INTRODUCTION

In *Berbatis*, the High Court was asked to decide a complaint founded on the general proscription contained in s 51AA(1) of the *Trade Practices Act 1974* (Cth) ('the Act'), namely:

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.

The Court was content to confine its decision to the construction of s 51AA as it applied to the facts of the particular case on appeal. It was ultimately unnecessary for the High Court to resolve any wider questions that might exist or later arise in relation to the meaning and scope of s 51AA, due to the basis upon which the litigation had been conducted in the lower courts and on appeal.<sup>1</sup>

In a capsule, the question to be decided was whether the owners of premises in a shopping centre had engaged in conduct that was 'unconscionable within the meaning of the unwritten law' under s 51AA of the Act. The owners had agreed to grant an extension of the lease on the condition that the lessors abandon legal proceedings legitimately pending against them. Furthermore, the owners knew that this extension was vital to the lessees' plan to sell their business to a third-party purchaser.

The majority of the Court (Gleeson CJ, Gummow, Hayne, and Callinan JJ)<sup>2</sup> answered this question resoundingly in the negative. Kirby J dissented and would have ruled that the lessors' conduct in the particular circumstances of the case contravened the proscription in s 51AA. Undoubtedly, the majority judgments signal a clear reluctance on the part of the High Court, at least as presently composed, to interpret and apply s 51AA more liberally than it otherwise would were it being asked to administer directly the characteristically conservative, conscience-based 'unwritten law' that the section incorporates by reference.

Although the majority's restrictive approach to the unconscionability precept in a business context<sup>3</sup> might assuage fears that were expressed by some after the enactment of the protections in Part IVA of the Act in 1992,<sup>4</sup> in this case note I criticise the majority judges' rather perfunctory handling of the facts of the case, which was made worse by their failure to link the elements of unconscionable dealing to a sophisticated conceptual account of interpersonal exploitation in market exchange contexts. Instead, and in contrast with Kirby J's approach, their Honours proceeded upon an overly caricatured conception of free competitive bargaining enterprise. I also draw upon the developing jurisprudence on so-called 'lawful act' duress — yet another example of the use to which the concept of 'unconscionable conduct' has been put in the 'unwritten law' — in order to

<sup>1</sup> See *Berbatis* (2003) 197 ALR 153, 162, 165 (Gummow and Hayne JJ), 174 (Kirby J), 194, 198 (Callinan J).

<sup>2</sup> Gleeson CJ and Callinan J delivered separate judgments, while Gummow and Hayne JJ delivered a joint judgment.

<sup>3</sup> For a recent illustration of the extreme consequences of applying s 51AA in a pure business context, see *Boral Formwork & Scaffolding Pty Ltd v Action Makers Ltd* [2003] ATPR ¶41-953.

<sup>4</sup> See, eg, Anne Finlay, 'Unconscionable Conduct and the Business Plaintiff: Has Australia Gone Too Far?' (1999) 28 *Anglo-American Law Review* 470.

demonstrate that some of the majority's observations in *Berbatis* belie complexities, normatively sensitive discriminations, and judgements that have been well demonstrated and (at least in the United States) publicly exercised outside the immediate area of the High Court's focus in the case.

## II THE FACTS, LITIGATION AND DECISION

### A *The Facts*

The first respondents, C G Berbatis Holdings Pty Ltd ('the owners'), owned, in common with associated others, a shopping centre in Western Australia. Mr and Mrs Roberts leased one of the premises in the centre, from which they operated a fish and chip shop. The Roberts had taken possession of the premises as assignees of a five-year retail shop lease and, in June 1992, exercised a five-year option under that lease that extended its term to 14 February 1997.<sup>5</sup>

In 1990, a number of tenants at the centre, including the Roberts, complained about certain charges that had been levied under their individual leases. The Roberts estimated that they had personally made overpayments totalling approximately \$50 000, which they desired to recover from the owners. From January 1996, various legal proceedings ensued against the owners, with one tenant (not the Roberts) eventually taking a 'test case' to the Supreme Court of Western Australia. In November 1998, however, the Supreme Court proceedings were settled. The terms of the settlement involved repayments to the participating tenants up to a maximum of \$3898 for any single tenant. Had the Roberts participated in this compromise, they would have been entitled to \$2429.50 by way of refund of management fees and to \$356.93 apropos various outgoings. This is compared to the \$50 000 that they believed was overpaid to the owners.<sup>6</sup>

By this time, however, the Roberts had already concluded negotiations with the owners for an extension of their lease, which had been due to expire in February 1997. The Roberts had also been anxious to sell their business and had found a suitable purchaser by October 1996. The purchaser had signed an offer to purchase the Roberts' business for \$65 500, subject to a lease of the premises being assigned to the purchaser's satisfaction.<sup>7</sup> The owners were aware (through their agent, the manager of the centre) of the Roberts' plan to sell and of their consequent need to negotiate a new lease term that could be assigned to the incoming purchaser. The owners also knew through their agent that the Roberts' daughter was seriously ill with encephalitis, which was difficult and expensive to treat and only added to the Roberts' personal need to realise their business as a going concern.<sup>8</sup> The owners agreed to renew the Roberts' lease, but only on the condition that the proposed deed of renewal and assignment contain a clause (cl 14) whereby the Roberts, and their assignee, would discharge the owners from all claims arising from any act or omission by the owners before the

<sup>5</sup> *Berbatis* (2003) 197 ALR 153, 159.

<sup>6</sup> *Ibid* 159–60.

<sup>7</sup> *Ibid* 160.

<sup>8</sup> *Ibid* 167.

proposed assignment date, and whereby the Roberts would dismiss their current legal proceedings against the owners.<sup>9</sup>

The release condition contained in cl 14 took the Roberts by surprise. It had earlier been dropped from the parties' negotiations, leaving the Roberts under the impression that any renewal or extension of their lease would be unconditional. Clause 14 was then reinserted by the owners into the draft documents relating to the proposed transaction, at the last minute and without warning or mention. Mrs Roberts became aware of the inclusion only after one of her customers, a lawyer, perused the documents for her. Although Mrs Roberts' solicitor advised against signing any document containing the release condition, the Roberts nevertheless felt that they had 'no choice' but to abandon their legal rights in order to settle the transfer of their business on the due date and not have it fall through as on a prior occasion. The sale subsequently took place on 2 December 1996 but, notwithstanding cl 14, the Roberts did not discontinue their pending litigation against the owners.<sup>10</sup> At no subsequent stage, however, did the Roberts seek to have the deed they entered into with the owners, or cl 14 in particular, set aside on the grounds of unconscionability or otherwise. Rather, it was the Australian Competition and Consumer Commission ('ACCC'), exercising its powers under the Act, that initiated proceedings in the Federal Court seeking injunctive relief and a declaration that the owners had contravened (inter alia) s 51AA of the Act.<sup>11</sup>

### B *The Litigation*

The ACCC alleged that the owners' imposition of cl 14 contravened Part IVA of the Act.<sup>12</sup> The primary judge, French J, although declining to order the injunctive relief sought by the ACCC, granted a declaration that the various respondents, either directly or as parties knowingly concerned, had contravened s 51AA of the Act.

In essence, French J found that the respondents had contravened s 51AA because they had taken unfair advantage of a special 'situational' disadvantage affecting the Roberts, in order to compel them to abandon their bona fide litigation in respect of their rights under the existing lease.<sup>13</sup> It was held that the Roberts were operating under a 'special disadvantage' relative to the owners because the value of their business to any prospective purchaser was 'critically dependent upon' the length and tenure of the premises that could be conveyed to

<sup>9</sup> Ibid 160.

<sup>10</sup> *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* [2000] ATPR ¶41-778, 41 183-4.

<sup>11</sup> *Berbatis* (2003) 197 ALR 153, 160-1.

<sup>12</sup> An allegation was also made under s 52 of the Act in respect of certain representations that the owners had made to the Roberts during negotiations. However, since this claim failed at first instance and was not pursued on appeal, I shall not discuss it at all.

A case was also presented with respect to other tenants, as well as the Roberts, but these were unsuccessful at trial and not pursued on appeal. I shall accordingly focus on the s 51AA claim as regards the Roberts only, as did the Full Court and High Court.

<sup>13</sup> *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* [2000] ATPR ¶41-778, 41 196-7.

a purchaser at settlement. The sale of their business thus depended on the owners' preparedness to grant a new lease, which they were under no legal obligation to do. As small business operators, the Roberts were significantly outmatched in terms of relative bargaining power vis-a-vis the owners and this, in French J's view, constituted a 'situational disadvantage' arising 'out of the intersection of the legal and commercial circumstances in which they found themselves.'<sup>14</sup> This 'disadvantage, not being constitutional in character, was not able to be mitigated by the fact of legal representation which they had available to them at all material times.'<sup>15</sup>

It must be emphasised here that the primary judge went further and held that the Roberts' situational disadvantage vis-a-vis the owners was indeed 'special' or beyond the 'normal run of bargaining inequality between large landlords and small tenants.'<sup>16</sup> The Roberts suffered the additional relative disadvantage of facing loss of the value of their business upon expiry of the lease if the owners refused to renew. Although this did not oblige the owners to renew, according to French J, it did raise the question of whether the lessor could nevertheless 'unfairly exploit' the lessees' disadvantage in a manner contrary to the dictates of equity's conception of conscience.<sup>17</sup> 'Unfair exploitation of disadvantage amounting to unconscionable conduct', his Honour opined, 'may occur when an owner uses its bargaining power to extract a concession from the tenant that is commercially irrelevant to the terms and conditions of any proposed new lease.'<sup>18</sup> That is precisely what occurred when, in these special circumstances, the owners insisted upon the Roberts abandoning their entitlement to proceed with bona fide litigation in relation to their rights under the existing lease. Although the owners could have refused point-blank to renew the Roberts' lease because of their claims against the owners (or indeed for any other reason), the owners could not, with knowledge of the Roberts' special circumstances (including their personal circumstances in relation to their ill daughter — circumstances that were at least in part motivating their decision to sell), pursue a course of granting consent to renew conditional solely upon execution of a release clause. This was despite the fact that what the Roberts were being asked to abandon was, as matters turned out, relatively small in financial terms. 'The way in which the owners acted', said French J, 'was a grossly unfair exploitation of the particular vulnerability of the Roberts in relation to the sale of their business.'<sup>19</sup>

The owners appealed to the Full Court of the Federal Court.<sup>20</sup> No dispute arose as to the principles involved — counsel on both sides accepted that the ACCC had to establish that the Roberts were under a 'special' disadvantage vis-a-vis the owners in connection with the proposal for renewing or extending their lease.

<sup>14</sup> Ibid 41 197.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> *C G Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555 (Hill, Tamberlin, and Emmett JJ).

This was in accordance with the reasoning of the High Court in *Commercial Bank of Australia Ltd v Amadio*.<sup>21</sup> What was at issue was whether the Roberts were truly labouring under such a disadvantage in the circumstances of the particular case, so as to compel the application of s 51AA of the Act, which incorporates, at minimum, the unwritten law as judicially elaborated in *Amadio*.

The Full Court unanimously allowed the owners' appeal, taking a qualitatively different view of their conduct from French J at first instance:

By offering terms upon which a renewal or extension of the lease could be granted, the Roberts were, in effect, thrown a lifeline. Whether they were better off by foregoing their claims and accepting that lifeline than if the lifeline had not been offered to them may be a matter of judgment for them to make. Clearly, their judgment was that they were better off by accepting the lifeline. It would be curious, therefore, to characterise the conduct that led to that result as unconscionable.

A distinction can be drawn between parties who adopt an opportunistic approach to strike a hard bargain and parties who act unconscionably. It cannot be said that the Roberts' wills were so overborne that they did not act independently and voluntarily. Unfortunately for the Roberts, the owners were under no obligation to renew or extend their lease. The Roberts had the choice of either maintaining their legal claims against the owners and losing the opportunity to sell their business or abandoning their claims and gaining the opportunity to sell their business. They made that choice of abandoning their claims. That may have been a hard bargain, but it was not an unconscionable one.

It is inappropriate to characterise the detriment that a tenant has by reason of the imminent expiration of a lease as a special disadvantage.<sup>22</sup>

The ACCC was granted special leave to appeal to the High Court, mounting its case on the same basis presented at both levels in the Federal Court below. In particular, the ACCC submitted that the Full Court erred in construing s 51AA as requiring that the Roberts' wills had to be 'so overborne that they did not act independently and voluntarily.'<sup>23</sup> This, the argument went, was to confuse unconscionable conduct with notions associated with common law duress and non est factum. In the High Court, the case was pleaded and argued exclusively on the footing that the facts fell within the narrow equitable category of 'unconscionable dealing', as expounded by the High Court in *Amadio*.

### C The High Court's Decision

The High Court, by a majority of four to one, dismissed the ACCC's appeal. In essence, each of the majority judges held that the Roberts neither occupied a position of 'special disadvantage' during negotiations for renewal or extension of their lease, nor (*ex hypothesi*) experienced 'unconscientious advantage-taking' at the hands of the owners.

<sup>21</sup> (1983) 151 CLR 447 ('*Amadio*').

<sup>22</sup> *C G Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555, 571 (Hill, Tamberlin and Emmett JJ) (citations omitted).

<sup>23</sup> *Berbatis* (2003) 197 ALR 153, 162.

Gleeson CJ made it quite plain that '[a] person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power'<sup>24</sup> and that '[u]nconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position.'<sup>25</sup> His Honour opined that the critical disadvantage affecting the Roberts in this case was simply their absence of a legal entitlement to renew or extend their lease — a simple 'lack of ability to get their own way' — and that there was nothing 'special' about this sort of disadvantage.<sup>26</sup> Such a disability routinely affects virtually all persons according to their circumstances in commerce and in life. All that the Roberts really lacked was the commercial ability to pursue two financial interests concurrently: their apparently relatively small interest (as it turned out after the November 1998 settlement) in pursuing their legitimate claims against the owners and their (doubtless significantly greater) interest in selling their business to a third party. Quite rationally, and with the benefit of legal advice, they pursued the second course over the first. His Honour did not understand the Full Court as intending to imply that a judgment of unconscionability required duress by its statement that it could not 'be said that the Roberts' wills were so overborne that they did not act independently and voluntarily': rather, '[i]t was simply an observation of fact as to part of the context in which the issue of unconscionability arose.'<sup>27</sup>

In a joint judgment, Gummow and Hayne JJ (Kirby J agreeing on this point)<sup>28</sup> accepted the ACCC's submission against the Full Court's construction of s 51AA, which apparently required that the will of the individual in question be so overborne as to rob his or her jural act of its independent and voluntary nature.<sup>29</sup> Their Honours found it unnecessary, for the purposes of the appeal, to determine the precise reach of the concept in s 51AA of 'unconscionable conduct within the meaning of the unwritten law' — specifically, whether it extended beyond the narrow form of 'unconscionable conduct' encapsulated by the High Court's decision in *Amadio* to, for example, all specific equitable and perhaps common law doctrinal categories in which a broad concept of 'unconscionability' plays a part in justifying judicial interference in the particular case.<sup>30</sup> This was because

the litigation was conducted on the footing that the facts fell within that well-established area of equitable principle concerned with the setting aside of transactions where unconscientious advantage has been taken by one party of the disabling condition or circumstances of the other.<sup>31</sup>

<sup>24</sup> Ibid 157.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid 157–8.

<sup>27</sup> Ibid 158.

<sup>28</sup> Ibid 174–5.

<sup>29</sup> Ibid 162.

<sup>30</sup> Ibid 165.

<sup>31</sup> Ibid (Gummow and Hayne JJ).

On that basis, their Honours accepted that although the Roberts, having no right of renewal of the lease, were in a greatly inferior bargaining position as against their lessors, they

were under no disabling condition which affected their ability to make a judgment as to their own best interests in agreeing to the stipulation imposed by the owners for the renewal of the lease, so as to facilitate the sale by Mr and Mrs Roberts of their business.<sup>32</sup>

For this reason, the argument that the owners unfairly or unconscientiously took advantage of the Roberts' disadvantage under the *Amadio* doctrine simply fell away.<sup>33</sup>

The final member of the majority, Callinan J, also rejected the ACCC's principal submission that the owners had engaged in unconscionable conduct by knowingly exploiting the serious disadvantage of the Roberts in order to secure the assumption of contractual obligations. In his Honour's view, the primary judge's decision was not, contrary to the appellant's submission, an exercise wholly or substantially based on 'discretion': rather, it was guided by the tests discussed in cases such as *Amadio*. Although such tests naturally involve an *evaluation* of the facts (as distinct from their initial 'finding' at first instance), this was not, his Honour said, synonymous with discretion and hence could be revisited on appeal.<sup>34</sup> In the event, Callinan J preferred the Full Court's evaluation of the facts to that of French J at first instance. Although the Roberts faced a hard choice, there was no escaping the fact that the owners were under no obligation to extend or renew the lease. His Honour therefore agreed with the Full Court, holding that the Roberts were not labouring under a 'special disadvantage' vis-a-vis the owners at the time of signing the deed of assignment containing cl 14. The responsibility lies upon all tenants, if they want to avoid being caught in a situation similar to that faced by the Roberts, to bargain for adequate protection from the outset (for instance, an option or further option to renew), the presence or absence of which may well be reflected in the amount of rent payable by the tenant during the term.<sup>35</sup> His Honour did not read the decision of the Full Court as implying that a judgment of 'unconscionable conduct' under s 51AA required a finding that the weaker party's will had been 'so overborne that they did not act independently and voluntarily.' Although an overbearing of the other party's will would be relevant to an unconscionability inquiry, it was not an essential element of that inquiry.<sup>36</sup> In the end, Callinan J held that the Roberts had made a considered judgement with respect to a

<sup>32</sup> Ibid 168. Their Honours further stated that the personal circumstances of the Roberts (particularly their family situation) that in part led them to want to sell their business in the first place, 'fell short of a disabling condition or circumstance seriously affecting their ability to make a judgment as to their own best interests': at 169. Their Honours also noted that French J made no clear finding on this point at first instance: at 169. In dissent, Kirby J did not agree on this point: at 178–9.

<sup>33</sup> Ibid 168 (Gummow and Hayne JJ).

<sup>34</sup> Ibid 195.

<sup>35</sup> Ibid 195–6 (Callinan J).

<sup>36</sup> Ibid 196.



‘commercial choice’ that ultimately was theirs alone to make.<sup>37</sup> The gain that the owners acquired thereby was not an ‘undeserved’ one:

it is perfectly open ... to describe the withdrawal from litigation as part of the price of the grant of a new lease which an owner was in no way obliged to grant, as a not unreasonable quid quo pro. Whenever parties are in a business relationship with each other and they fall out over an aspect of that relationship, it will generally not be unreasonable or indeed unconscionable for them to seek to insist upon their legal rights, or to require that one party give up some right in exchange for the conferral of a new right upon that party. ...

[T]here is nothing special about a situation in which a tenant without an option is anxious to obtain a fresh lease, and the landlord, conscious of that anxiety, utilizes it to obtain a business advantage, whether by way of a higher rent or otherwise.<sup>38</sup>

Finally, like Gummow and Hayne JJ, Callinan J held that the ACCC’s attempt to bring the Roberts into the *Amadio* test for special disadvantage failed.<sup>39</sup> On the contrary, the Roberts could judge only too well where their best interests lay:

They recognised and understood what was in their best interests, and acted accordingly by undertaking to withdraw from the proceedings in the tribunal and by taking up the opportunity of obtaining a fresh lease. It is difficult to see how any prudent choice could be otherwise.<sup>40</sup>

Kirby J dissented and would have restored the decision of French J at first instance. The dissent is prefaced by his Honour’s perception that this was yet another occasion for choice presented to the Court in respect of the application of the Act, in this instance ‘between affording a broad and beneficial application of [s 51AA], as opposed to a narrow and restrictive one.’<sup>41</sup> After analysing the legislative history of s 51AA and the objects of the Act — in particular, its educative and deterrent purposes<sup>42</sup> — Kirby J was inclined to a construction that extended the section’s reach. However, his Honour ultimately dissented on the narrower ground that, because the relevant factual findings were undisturbed and there had been no error of legal principle (such as the application of an incorrect legal criterion) at first instance, the High Court should affirm French J’s decision.<sup>43</sup> Notably, Kirby J refused to regard the fact that the owners were not obliged to assist the Roberts by extending their lease as an impediment to adjudging their conduct to be in contravention of s 51AA. On the contrary, such a fact in his Honour’s view masked ‘the realities of the economic and litigious

<sup>37</sup> Ibid.

<sup>38</sup> Ibid 197–8 (Callinan J).

<sup>39</sup> Ibid 199.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid 170.

<sup>42</sup> See *ibid* 172–4. See also at 182–3.

<sup>43</sup> Ibid 184–5. His Honour stated (at 184):

This was not ... an instance where the judge mistook a hard bargain for one resulting from an unconscionable misuse of economic superiority. It was not one in which he approached s 51AA in a way that exceeded its proper place in a legal system that normally holds people to their concluded bargains...

positions in which the Roberts and the owners respectively found themselves.<sup>44</sup> Indeed, his Honour noted that the owners themselves had an interest in extending the lease so as to facilitate the sale and consequent assignment to an objectively acceptable tenant — they owned a shopping centre that already lacked sufficient tenants to fill available space.<sup>45</sup> The Roberts' proposal to introduce a promising tenant to continue their viable business was in the owners' best interests as well.<sup>46</sup> Nor would the owners' worries about the litigation necessarily disappear if they gave the Roberts what they wanted: a sufficient number of other tenants would remain to pursue claims against the owners, all attracting adverse publicity for the owners and their business. Thus, in reality, from the standpoint of the Roberts with respect to the owners, there was no impediment to the extension of the lease other than the Roberts' particular need to sell their business — a need that was known to the owners and consequently became their principal bargaining chip. It was in this more complex light, Kirby J said, that the Court had to evaluate the opportunistic imposition of the requirement to agree to a release of rights in return for an extension of the lease. Specifically, he continued, the Court had to determine whether 'procuring the Roberts' assent to the impugned term involved an abuse, in the circumstances, of their disproportionately weak and vulnerable position, commercial, financial and personal.'<sup>47</sup>

In answering this question, Kirby J opined, the primary judge was entitled to have regard not only to the release clause demanded by the owners, but also to the entire course of negotiations between the parties. In contrast to the majority,<sup>48</sup> his Honour emphasised the fact that the owners, through their agents, knew that the illness of the Roberts' daughter was putting them under great emotional stress and contributing to their 'need' to sell the business.<sup>49</sup> Also highly relevant to Kirby J's evaluation of the facts was the owners' strategic use of surprise: the release clause had earlier been dropped from the lease negotiations, leaving the Roberts under the impression that any extension actually granted would not restrict their independent rights. Only then was the clause reinserted into the draft deed for execution, at the last minute and without warning. At this stage, the Roberts, given their lack of opportunity for reflection on the matter, had 'little option' but to sign on the day if they did not want the sale of their business to fall through again. In Kirby J's view, this change of stance by the owners and the belated revival of their insistence upon the release clause

had all the hallmarks of a well-tuned demand, imposed by those with proportionately greater economic power to take advantage of the vulnerable position

<sup>44</sup> Ibid 177.

<sup>45</sup> Ibid.

<sup>46</sup> I initially thought that this factor would undercut Kirby J's conclusion that the Roberts were under a 'special disadvantage' vis-a-vis the owners, since it signifies that the Roberts also had 'threat advantage' over the owners and at the end of the day might have called the owners' bluff. However, there is no doubt that the owners' threat advantage was significantly greater than that of the Roberts. By 'threat advantage' I simply mean a party's relative willingness not to contract if the other party does not accept his or her proposal. That party is then in a position to apply pressure on the other party to make any concessions that the first party might demand.

<sup>47</sup> *Berbatis* (2003) 197 ALR 153, 180.

<sup>48</sup> See *ibid* 167, 169 (Gummow and Hayne JJ), 199 (Callinan J).

<sup>49</sup> *Ibid* 178–9.

that the Roberts found themselves in, given the course of dealings and their commercial, financial and personal circumstances at the time. ... They were taken by surprise and without sufficient opportunity or 'time to act with caution'. ... This is why it can be said that there was no real bargaining over the term and, in the circumstances, the Roberts were unable to assess properly their options and interests.<sup>50</sup>

In the final analysis, Kirby J would have allowed the history and 'educative and deterrent purposes' of s 51AA to validate the outcome reached by French J on the basis of the facts as found at first instance. In Kirby J's view, the case should have been approached on the footing that 'its importance extends beyond the humble case of the Roberts. By upholding the rights of the Roberts — on the face of things small and objectively of limited significance — a message is delivered that the Act is not to be trifled with.'<sup>51</sup>

### III ANALYSIS

#### A *Reflections on the Divergence between the Majority and Minority Approaches in *Berbatis**

It is with some trepidation that I offer my reflections on the High Court's decision and reasoning in *Berbatis*. Attempting to provide a coherent conceptual account of the variform subject matter of 'unconscionable conduct' — let alone of 'unconscionable dealing' as a species within that genus — is much like, to both mix and adapt my metaphors, opening a can of worms and then trying to contain them in a string bag. As the divergence between the majority and minority in *Berbatis* indicates, there are often basic and typically unarticulated normative premises underlying individual perceptions of unconscionability that render impossible the reconciliation of judgments dispensed in actual cases at that most basic (philosophical or justificatory) level. This might explain why courts, such as the High Court in this instance, are occasionally divided in cases that involve conscience-based reasoning.

It does not, however, explain the courts' lack of clarification or elaboration of foundational concepts, policies and issues that besiege the increasingly ubiquitous unconscionability concept.<sup>52</sup> *Berbatis* is yet another case in point. Disappointingly, the Court was quite happy to confine its decision to the narrow arguments presented by counsel both on appeal and in the courts below. Moreover, it recoiled from firmly signalling, for the benefit and guidance of individuals and their advisers in the future, its view of the intentions, effect, and present reach of s 51AA beyond those narrow arguments. Although we must acknowledge the exigency of docket clearing in busy appellate courts such as the High

<sup>50</sup> Ibid 181–2 (citations omitted).

<sup>51</sup> Ibid 183.

<sup>52</sup> This is much to the chagrin of some: see, eg, J W Carter and Andrew Stewart, 'Commerce and Conscience: The High Court's Developing View of Contract' (1993) 23 *University of Western Australia Law Review* 49, 70, 72–3.

Court, there is inevitably a sense of lost opportunity whenever ‘test cases’ are not fully tested on their day.<sup>53</sup>

Yet, that said, I shall also refrain from embarking upon a wider analysis of s 51AA and hence of the ‘unwritten law’ of unconscionable conduct that it takes in. I shall mostly confine my discussion within the intellectual borders that counsel and the High Court set for themselves in *Berbatis*. These comments thus focus on the Court’s approach to the narrow equitable category of ‘unconscionable dealing’, as judicially elaborated in earlier cases such as *Amadio*, *Blomley v Ryan*<sup>54</sup> and *Bridgewater v Leahy*.<sup>55</sup> These cases establish that, in order to prove unconscionable dealing, the victim of such alleged conduct must show: (1) that he or she was ‘by reason of some condition of [sic] circumstance ... placed at a special disadvantage vis-a-vis [the other party to the transaction]’; and (2) that ‘unfair or unconscientious advantage [was] then taken [by that other party] of the opportunity thereby created.’<sup>56</sup> Obviously, while agreeing on these constituent elements of the action, the conceptions, assessments and emphases of the individual judges varied when the Court was called upon to give them ‘a content specific to the case at hand’.<sup>57</sup> But such variation should hardly surprise us since no secret is made of the fact that the criteria of unconscionable dealing are ineradicably normative: they ‘undoubtedly [involve] elements of evaluation and assessment’ and call ‘forth a judicial response that is partly analytical and partly intuitive.’<sup>58</sup> Although this may be granted, what affects a judge’s evaluation and assessment in any particular case is likely to be determined significantly by his or her understanding of the underlying basis and purpose of the equitable jurisdiction to relieve against an unconscionable dealing. On this matter, however, the majority judgments in *Berbatis* are virtually silent altogether. We do not generally see in the important unconscionable dealing cases — *Amadio* and *Berbatis* included — clear agreement on the theoretical underpinnings, or even the basic juristic purpose, of the modern equitable jurisdiction to relieve against an ‘unconscionable dealing’. Most courts today emphasise the detection and correction of exploitation as the fundamental aim of unconscionable dealing regulation,<sup>59</sup> but judges are seldom (if ever) explicit about their particular

<sup>53</sup> It must be noted that, by limiting its decision to the particular facts and arguments presented, the High Court’s decision in *Berbatis* does not cast doubt on the correctness of the Full Federal Court’s decision in *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301 (‘*Samton Holdings*’). In that case, the Full Court rejected submissions, based on the Explanatory Memorandum to the amending Bill that incorporated s 51AA into the Act, that the section’s operation was confined to the narrow equitable category of ‘unconscionable dealing’ only, as applied in *Blomley v Ryan* (1956) 99 CLR 362 (‘*Blomley*’) and *Amadio* (1983) 151 CLR 447: at 317 (Gray, French and Stone JJ).

<sup>54</sup> (1956) 99 CLR 362.

<sup>55</sup> (1998) 194 CLR 457.

<sup>56</sup> *Amadio* (1983) 151 CLR 447, 462 (Mason J).

<sup>57</sup> Sir Gerard Brennan, ‘The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective’ in Philip Alston (ed), *Promoting Human Rights through a Bill of Rights: Comparative Perspectives* (1999) 454, 458.

<sup>58</sup> *Berbatis* (2003) 197 ALR 153, 175 (Kirby J).

<sup>59</sup> See, eg, *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1, 127–8 (Debelles and Wicks JJ). Their Honours said that ‘[u]nconscionable conduct connotes exploitation by one party of another’s position of disadvantage’: at 127. The term ‘exploitation’ is also used in *Amadio* (1983) 151 CLR 447, 489 (Dawson J); in *Louth v Diprose* (1992) 175 CLR 621, 630–2 (Bren-

conception of ‘exploitation’ for legal operational purposes. Courts are rather adept at formulating doctrinal criteria — for example, attenuated knowledge requirements — that are inconsistent with the anti-exploitation objectives said to be served by those criteria at the higher justificatory level.<sup>60</sup>

Ignoring this problem, however, and assuming for present purposes that the law’s precept against unconscionable dealing is motivated at least by an abhorrence of interpersonal exploitation in voluntary or consensual transactions, the majority judges in *Berbatis* do not proceed from a very sophisticated conception of market exchange exploitation. This is due, in part, to the fact that they do not proceed from a particularly refined intellection of the free competitive bargaining enterprise that would be the context for developing such a conception. Both the majority and minority judges correctly presuppose that the function of conscience-inspired regulation in the unwritten law (and hence under s 51AA that purports to absorb it) is not to contradict or displace the normal or tolerable risks inherent in commercial life, one of which is suffering defeat at the hands of a better resourced, shrewder, luckier or more skilled bargaining adversary.<sup>61</sup> The reason why the law tolerates many less than virtuous practices in commercial bargaining encounters as ‘not unfair’ — including threats, puffs, bluffs, shading the truth, disguising intentions, nondisclosure and pressing for advantage — and so leaves them mostly unregulated, is that such practices do not violate any of the basic assumptions about the free competitive bargaining process and the individually responsible agents that partake in it.<sup>62</sup> The law of unconscionable dealing, however, is concerned precisely with the problem of delineating the point at which our *normal* assumptions about free competitive bargaining either no longer hold true or are incapable of being fairly applied. The threshold criterion of ‘special disadvantage’, for instance, is concerned with the question of determining when it becomes ‘unfair’, ‘wrong’, or ‘inappropriate’ for the other bargaining party to play for advantage by the *ordinary* rules of free competitive bargaining. In this situation, the rules need to be qualified, adjusted or suspended in favour of the specially disadvantaged bargaining party.

Yet this exercise in delineation cannot be assisted by judicial encapsulations that portray the ‘ordinary’ conception of free competitive bargaining as a mere *caricature*, wherein ‘[e]ach party to the [contractual] negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresenta-

nan J); and in *ASB Bank Ltd v Harlick* [1996] 1 NZLR 655, 662 (Gault, Henry, and McGechan JJ).

<sup>60</sup> Attenuated knowledge requirements — ‘ought to have known’, ‘being put on inquiry’ and the like — gesture merely at a form of transactional ‘neglect’ rather than exploitation, which requires advertence in the manner of deliberate or reckless advantage-taking, both of which presuppose actual or subjective knowledge.

<sup>61</sup> See, eg, *Berbatis* (2003) 197 ALR 153, 157 (Gleeson CJ), 176 (Kirby J). This is consistent with views I have expressed elsewhere. However, with regard to the liberal conception of contract in particular, see Rick Bigwood, ‘Conscience and the Liberal Conception of Contract: Observing Basic Distinctions’ (Pt 1) (2000) 16 *Journal of Contract Law* 1; Rick Bigwood, ‘Conscience and the Liberal Conception of Contract: Observing Basic Distinctions’ (Pt 2) (2000) 16 *Journal of Contract Law* 191.

<sup>62</sup> See generally Eleanor Norton, ‘Bargaining and the Ethic of Process’ (1989) 64 *New York University Law Review* 493.

tions<sup>63</sup> and according to which ‘good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests.’<sup>64</sup> Although the individualistic, adversarial conception of pre-contractual negotiations might be true as a generalisation, precisely because it is a generalisation it belies the complex *relational* nature of *individual* real-life bargaining encounters. As a result, the subtleties that one would expect to confront adjudicators in this area of the law are ignored. To begin with, outside of fiduciary contexts and at least in connection with the modern law of unconscionable dealing, good conscience has never required an advantaged party to *forfeit* his or her advantages, or *neglect* his or her own interests. Indeed, the ‘neighbourly’ responsibilities befalling parties who knowingly occupy a position of special advantage over a bargaining opponent function merely as ‘disabilities’ or ‘side-constraints’ upon the advantaged party’s otherwise unencumbered contractual liberty or power<sup>65</sup> and so do not strictly require that party to ‘forfeit’ or ‘neglect’ anything.<sup>66</sup> The majority judgments in *Berbatis* should not be allowed to convey the impression that the phenomenology of ‘unconscionable contracts’ is anything less than highly complex, not to mention perspectival. It cannot do, for example, to say, as Gleeson CJ does at one point in his judgment, that ‘[w]hat is relevant to a commercial negotiation is whatever one party to the negotiation chooses to make relevant.’<sup>67</sup> If this were true, it would be impossible to understand the law’s response to transaction-inducing ‘blackmail’-type pressure.<sup>68</sup> The objection to this practice seems to be connected to a conception of exploitation inhering in a seriously disjunctive relationship between the particular ‘ends’ sought and the particular ‘means’ chosen on the bargaining occasion in question.<sup>69</sup>

Compounding the deficiencies in the majority judgments is their Honours’ rather perfunctory treatment of the facts of *Berbatis* when seeking to apply those

<sup>63</sup> *Walford v Miles* [1992] 2 AC 128, 138 (Lord Ackner). If this were true, then the law of unconscionable dealing could not be accommodated at all (let alone other conscience-based decisions in the field of pre-contractual negotiations, such as *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387).

<sup>64</sup> *Berbatis* (2003) 197 ALR 153, 157 (Gleeson CJ).

<sup>65</sup> Inside the subject matter of defeasible jural transactions, this is the only sensible way for us to understand certain negative ‘responsibilities’ that feature in our law — for example, the ‘duty’ to not exercise ‘undue influence’ or ‘duress’, or not to ‘innocently misrepresent facts’ during contract formation. Strictly speaking, there is no true ‘obligation’ or ‘duty’ not to unduly influence, wrongfully coerce or innocently mislead another during contract negotiations: see, eg, Lord Millett’s succinct discussion in *Agnew v Länsförsäkringsbolagens AB* [2001] 1 AC 223, 265–6. All these so-called ‘obligations’ or ‘duties’ are merely transactional disabilities or side-constraints engrafted upon the wholly self-interested pursuit of private goals that the law of contract (for example) exists to facilitate.

<sup>66</sup> That is to say, unconscionable dealing does not prevent the defendant from pursuing self-interest against the plaintiff, but rather prevents the pursuit of self-interest against the plaintiff in a particular way. Thus, such a fetter on the defendant’s contractual liberty functions not as an independent goal of action vis-a-vis the plaintiff (or as a full-blown duty on the defendant with a correlative claim/right in the plaintiff), but rather merely as a legal ‘hurdle’ that the defendant must surmount if he or she wants, again wholly self-interestedly, to enlist the plaintiff’s assistance in pursuit of the defendant’s own economic projects.

<sup>67</sup> *Berbatis* (2003) 197 ALR 153, 158.

<sup>68</sup> See, eg, *Robertson v Robertson* [1930] QWN 41; *Williams v Bayley* (1866) LR 1 HL 200.

<sup>69</sup> I return to the pressure cases below.

facts to the doctrinal criteria of unconscionable dealing. I shall not indulge in my own evaluation of the facts for the purpose of defending either the majority or minority conclusions in the case. Instead, I am content merely to note the remarkably different approaches taken by the majority and minority judges to the evaluative exercise demanded by the issues at hand.

Unlike the majority judges, Kirby J *does* attempt to understand the doctrinal criteria of unconscionable dealing by reference to the purposes of equity in this area. His Honour cites several overlapping or complementary justifications for equity's exclusive jurisdiction to relieve against an unconscionable dealing: protection of the integrity of the contracting process (although the jurisdiction applies to inter vivos gifts as well);<sup>70</sup> 'protection of the assumptions and conditions necessary to make effective the freedom to contract of the parties';<sup>71</sup> maintenance of 'a broader principle of ethical behaviour';<sup>72</sup> achievement of 'justice in the individual case';<sup>73</sup> and prevention of 'behaviour contrary to conscience'.<sup>74</sup> These justifications are themselves rather vague and are not sharpened by reference, for example, to a distinct mode of abuse targeted by the jurisdiction, such as interpersonal exploitation. Nonetheless, in seeking to elaborate on what motivates the law's precept against unconscionable dealing, his Honour might simply have referred to that which generally motivates equity's moderation of the common law: the desire to 'do more perfect and complete justice' than would be the result of leaving the parties to their remedies at common law.<sup>75</sup> Indeed, by focusing rigorously on the entire course of negotiations between the parties in the case, Kirby J was rightly at pains not to strip 'the problem of all its complexity'.<sup>76</sup> In effect, his Honour epitomised the very administration of equity, at least as it was famously encapsulated by Lord Stowell's words in *The Juliana*:

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.<sup>77</sup>

<sup>70</sup> *Berbatis* (2003) 197 ALR 153, 173.

<sup>71</sup> *Ibid* 180, quoting Paul Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37, 49. Kirby J implies that characterising the approach to special disadvantage in this way renders the concept concrete since it provides 'a proper reference point by which the question of the weaker party's ability to make an appropriate judgment about its choices and the conservation of its own interests can be determined': *Berbatis* (2003) 197 ALR 153, 180. But this can only follow if we in fact have a stable account of what are, to use Finn's words, 'the fundamental assumptions on which the making of a binding contract are premised'. This would require a complete political, moral and legal theory.

<sup>72</sup> *Berbatis* (2003) 197 ALR 153, 172.

<sup>73</sup> *Ibid* 183.

<sup>74</sup> *Ibid* 174.

<sup>75</sup> *Wilson v Northampton & Banbury Junction Railway Co* (1874) LR 9 Ch App 279, 284 (Lord Selbourne LC).

<sup>76</sup> *Berbatis* (2003) 197 ALR 153, 179.

<sup>77</sup> (1822) 2 Dods 504, 522; 165 ER 1560, 1567 (Lord Stowell), quoted in *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 119 (Dixon CJ, McTiernan and Kitto JJ).

Kirby J therefore highlights facts that were quickly and rather unsatisfactorily dismissed or de-emphasised by the majority judges<sup>78</sup> and the Full Court. In particular, his Honour refers to the owners' strategic use of 'surprise' (the last-minute reinsertion, without warning, of the release clause)<sup>79</sup> and the role that the illness of the Roberts' daughter played in contributing to their particular vulnerability vis-a-vis the owners.<sup>80</sup>

I shall return to the significance of these facts shortly, but not before making two further points preliminary to a discussion of the doctrinal dimensions of unconscionable dealing. One point relates to the basic difference of approach between the majority and minority judges in *Berbatis*, while the other concerns Kirby J's dissenting approach in particular. The first point not only helps to explain the different reading of the facts by the majority and minority judges, but also has significant doctrinal implications because ultimately the point must affect the operational ambit of the unconscionable dealing doctrine. Certain members of the majority were emphatic that 'unconscionable' is a precise and specially constructed legal term, rather than a colloquial expression.<sup>81</sup> Kirby J (quoting French J at first instance), on the other hand, was equally insistent that '[t]he meaning of ["unconscionable"] is found in the dictionary.'<sup>82</sup> My dictionary, for example, defines 'unconscionable' as an adjective to mean, inter alia: 'Showing no regard for conscience; not in accordance with what is right or reasonable.'<sup>83</sup> This tells us very little, of course, because as Kirby J (again quoting French J) acknowledges: 'The description embodied in the word "unconscionable" ultimately refers to the normative characterisation of conduct by a judge having jurisdiction in the relevant class of case.'<sup>84</sup> This remains true regardless of whether 'unconscionable' has a dedicated juridical meaning or is defined by an ordinary dictionary. Enlisting my dictionary's meaning, then, 'unconscionable conduct' must ultimately refer to that which a *court of competent jurisdiction* considers to be 'not in accordance with what is right or reasonable' on a particular set of proven facts, as opposed to what an ordinary, intelligent person without legal training or knowledge of the mass of prior decisions in which the concept of good conscience has been given 'a content specific to the case at hand', might consider to be 'not in accordance with what is right or reasonable'. If this is all the majority judges intended to signify by saying that 'unconscionable' is a legal term, the point is unexceptional and unexceptionable. But it is readily apparent from a survey of the case law in this area that, in order to warrant a dyslogistic judgment of 'unconscionable dealing', courts have

<sup>78</sup> See, eg, *Berbatis* (2003) 197 ALR 154, 167, 169 (Gummow and Hayne JJ), 192, 199 (Callinan J).

<sup>79</sup> Ibid 180–2.

<sup>80</sup> Ibid 178–9.

<sup>81</sup> See ibid 156 (Gleeson CJ), 163 (Gummow and Hayne JJ). See also at 164–6 (Gummow and Hayne JJ).

<sup>82</sup> Ibid 173, quoting *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd [No 2]* (2000) 96 FCR 491, 503–4.

<sup>83</sup> William Trumble and Angus Stevenson (eds), *Shorter Oxford English Dictionary: On Historical Principles* (5<sup>th</sup> ed, 2002) vol 2, 3421.

<sup>84</sup> *Berbatis* (2003) 197 ALR 153, 173, quoting *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd [No 2]* (2000) 96 FCR 491, 504.



sometimes emphasised the need for the defendant's process of advantage-taking, when taken as a whole, and after 'real ... consideration and judgment',<sup>85</sup> to be 'shock[ing]',<sup>86</sup> 'reprehensible',<sup>87</sup> or 'towards the extreme end of the scale' of unreasonable behaviour<sup>88</sup> and not merely 'morally unfair' or 'unreasonable'.<sup>89</sup> There must, as it is sometimes said, be 'real unfairness'.<sup>90</sup>

Care must be taken, however, with the use of superlatives in connection with discussions of unconscionable dealing, as they can be misleading as to the conduct actually needed to support a judgment of unconscionable dealing. Acts of exploitation can vary greatly between the extremes of activeness and passivity,<sup>91</sup> so that they will naturally appear less 'shocking' or 'reprehensible' in some cases than in others. As Gummow and Hayne JJ point out in their joint judgment, the term 'unconscionable' or any of its cognates has attracted multiple shades of meaning and emphasis depending on the context in which it is used.<sup>92</sup> Like its predecessor, 'equitable fraud', the concept cannot be 'placed under the genus of a single standard' and is quite apt to embrace a wide variety of conduct ranging from 'the depths of depravity to the misplaced kindly intention'.<sup>93</sup> In relation to unconscionable dealing in particular, the notion of unfair advantage being taken by a defendant of the plaintiff's known position of special disadvantage vis-a-vis the defendant is probably more realistically represented by the standard once propounded by a Canadian court in *Harry v Kreutziger*,<sup>94</sup> namely, whether the defendant's advantage-taking relative to the plaintiff was 'sufficiently divergent from community standards of commercial morality'.<sup>95</sup> Indeed, in *Amadio* itself, Mason J conceived of 'unconscionable conduct' rather prosaically, as that which is 'inconsistent with equity and good conscience'.<sup>96</sup> This is not very different from my dictionary's definition of 'unconscionable'.

<sup>85</sup> Cf *Harry v Kreutziger* (1978) 95 DLR (3d) 231, 240 (Lambert JA), cited in *Commonwealth v Verwayen* (1990) 170 CLR 394, 441 (Deane J).

<sup>86</sup> See, eg, *Bowkett v Action Finance Ltd* [1992] 1 NZLR 449, 462 (Tipping J); *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1, 127 (DeBelle and Wicks JJ).

<sup>87</sup> See, eg, *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, 110 (Browne-Wilkinson J); *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1983] 1 All ER 944, 961 (Millett J); *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221, 229 (Simon Brown LJ), 232 (Ward LJ).

<sup>88</sup> See the discussion in *Samton Holdings* (2002) 117 FCR 301, 310–11 (Gray, French and Stone JJ).

<sup>89</sup> See, eg, *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445, 463, where Hill J stated that '[a]t the least the conduct must be unfair.'

<sup>90</sup> *Blomley* (1956) 99 CLR 362, 405 (Fullagar J).

<sup>91</sup> Compare, for instance, the exploitation found in *Louth v Diprose* (1992) 175 CLR 621, with that found in *Amadio* (1983) 151 CLR 447.

<sup>92</sup> *Berbatis* (2003) 197 ALR 153, 164. See generally Gino dal Pont, 'The Varying Shades of "Unconscionable" Conduct — Same Term, Different Meaning' (2000) 19 *Australian Bar Review* 135.

<sup>93</sup> L A Sheridan, *Fraud in Equity: A Study in English and Irish Law* (1957) 214.

<sup>94</sup> (1978) 95 DLR (3d) 231.

<sup>95</sup> *Ibid* 241 (Lambert JA). But see the cautionary words in relation to this test in *Smyth v Szep* [1992] 2 WWR 673, 693–4 (Gibbs JA). Cf *Commonwealth v Verwayen* (1990) 170 CLR 394, 441, where Deane J held that unconscionable conduct is that which 'commonly involve[s] the use of or insistence upon legal entitlement to take advantage of another's special vulnerability or misadventure ... in a way that is unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing.'

<sup>96</sup> *Amadio* (1983) 151 CLR 447, 461.

The second point I want to mention before turning to the doctrinal dimensions of *Berbatis* concerns Kirby J's dissent, although as mentioned above, the point is not critical to the narrow ground upon which his Honour was ultimately prepared to reject the appeal. While Kirby J notes that s 51AA was 'intended not to expand the notions of unconscionable conduct in the unwritten law',<sup>97</sup> he immediately follows this by saying:

Yet the very fact that such a provision would facilitate more cases coming before the courts than might otherwise be the case inevitably results in a closer elaboration of the concept of unconscionable conduct in new and different factual circumstances. The present is such a case.<sup>98</sup>

That this passage begins with the conjunction 'yet' signifies that Kirby J might be suggesting that increased judicial scrutiny of alleged unconscionable conduct under s 51AA could lead to an expansion of our general notions of what constitutes 'unconscionable conduct', at least in connection with commercial activity. This seems to beg the question, however. Section 51AA might — indeed should — have a neutral effect; or it might have an increasingly restrictive effect on our conception of unconscionable conduct in distinctly commercial settings. The result simply cannot be predicted.

The important point is that, regardless of the volume and variability of the cases that might fall for adjudication by virtue of s 51AA — and the majority's judgments are far from opening the valve on the floodgates here — there is no escaping the fact that Parliament has deferred to the unwritten law and its values, standards and qualifying thresholds in this particular field. Given this fact, it is difficult to see how a judge could legitimately incorporate, as Kirby J would have seen fit,<sup>99</sup> the history and 'educative and deterrent purposes' of s 51AA directly into his or her assessment and evaluation processes under the section. By limiting courts to the notion of 'unconscionable conduct *within the meaning of the unwritten law*', Parliament must be taken to be limiting the courts to whatever properly informs and constrains the unwritten law of 'unconscionable conduct' that has developed, and will continue to develop, quite apart from the educative and deterrent purposes of the Act. While there is nothing wrong with courts using 'education and public deterrence' merely to confirm or support judgments that equity would independently make, the danger in Kirby J's approach in *Berbatis* is that it may set a precedent for the relaxation or enlargement of the assessments that the court could legitimately entertain had the adjudication taken place outside the scheme of the Act.<sup>100</sup>

I do not ignore here the fact that Kirby J thought it appropriate to approach the appeal in the light of desiderata extending beyond 'the humble case of the

<sup>97</sup> *Berbatis* (2003) 197 ALR 153, 173.

<sup>98</sup> *Ibid.*

<sup>99</sup> See *ibid* 172–4, 182–3.

<sup>100</sup> If, as I suspect, Kirby J was intending to signify by his words merely that increased judicial scrutiny of alleged unconscionable conduct under s 51AA might enable us to develop a more nuanced and sophisticated conception of unconscionability in commercial contexts than might otherwise develop under the unwritten law, then the prediction contained in his above-quoted passage ought doubtless to come to pass.

Roberts.<sup>101</sup> This approach would have had the effect, consistent with Parliament's intention, of delivering a public deterrent message that the Act 'is not to be trifled with.'<sup>102</sup> In turn, this approach allowed his Honour to reason that the size of the damage or loss suffered by the Roberts as a result of the owners' conduct was less important than the larger principle at stake — namely, education and public deterrence.<sup>103</sup> But his Honour did not have to resort to the educative and deterrent ends of the Act in order to make this point, since equity itself might well be motivated to send out educative and deterrent messages for its own intents and purposes (although I do not believe this to be the primary function of equity). In my view, equity should be concerned to discipline unconscionable dealing even when the losses or gains caused by such dealing are small. This is not necessarily because 'unconscionable dealing' is something that we should all be educated against and deterred from engaging in, or because acts of unconscionable dealing 'undermine ... rules and distinctions of significance beyond the specific case',<sup>104</sup> but rather because the doctrine, at least in its antipodean formulation, disciplines *procedural* impropriety rather than substantive impropriety per se. If the objection to unconscionable dealing is that the complainant's autonomy as a decision-maker has actively or passively been compromised by the other party's exploitative conduct, then the size of the complainant's loss and the latter party's gain consequent upon that exploitation is only contingently (rather than definitionally) related to that autonomy-focused concern. Moreover, courts consistently disclaim substantive unfairness as a *criterion* of relief in this area (while not denying it an often vital evidentiary function),<sup>105</sup> which supports the view that the inquiry here is directed to the question of relative autonomy inter se. In other words, fundamental respect for the integrity of voluntary or consensual transactions and hence for the personal autonomy of those who partake in such encounters, rather than 'education and deterrence' per se, is the larger principle at stake rendering the size of the damage or loss sustained criteriologically immaterial in unconscionable dealing law.<sup>106</sup>

<sup>101</sup> *Berbatis* (2003) 197 ALR 153, 183.

<sup>102</sup> *Ibid.*

<sup>103</sup> See *ibid* 182–3.

<sup>104</sup> To borrow Calabresi and Melamed's phrase: Guido Calabresi and A Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089, 1126. Joel Feinberg has argued that if some forms of exploitation were to become general, they may cause harm to social practices and institutions in which all persons have a stake, even though such forms of exploitation are not directly causative of harm to a particular person: Joel Feinberg, 'Noncoercive Exploitation' in Rolf Sartorius (ed), *Paternalism* (1999) 201, 225.

<sup>105</sup> See, eg, *Blomley* (1956) 99 CLR 362, 405 (Fullagar J); *Amadio* (1983) 151 CLR 447, 475 (Deane J); *Hart v O'Connor* [1985] 1 AC 1000, 1018 (Lord Brightman); *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157, 174 (Richardson J); *Boustany v Pigott* (1993) 69 P & CR 298, 303 (Lord Templeman).

<sup>106</sup> 'The quality of the bargain (or the adequacy of the consideration) has never been either a necessary or a sufficient element for establishing unconscionable dealing': *Berbatis* (2003) 197 ALR 153, 179 (Kirby J).

B *Adjudicating ‘Special Disadvantage’ and ‘Unconscionable Conduct’: Lessons from Duress?*

Far and away the most significant threshold criterion of the unconscionable dealing claim is ‘special disadvantage’. This is for two reasons. First, the criterion singularly defines the ambit of the jurisdiction because it circumscribes the category of person that might plausibly qualify for consideration under the doctrine. The comprisal of human vulnerabilities or disabilities within the criterion determines perforce the scope of our particular conception of unconscionable dealing. Second, the ‘special disadvantage’ criterion, preceding analytically the ‘unconscientious exploitation’ criterion, performs the lion’s share of the normative work in the unconscionable dealing inquiry. But of necessity, a judgment of ‘unconscionable dealing’ could never issue from ‘non-special’ disadvantages (even when they are fully known to the defendant) because the second condition of exploitation — taking *unfair* or *unconscientious* advantage of the opportunity — is itself linked inexorably to the conditions under which the defendant has pressed for advantage against the plaintiff. In other words, there is a direct interactive relationship between the first criterion and the second criterion of the unconscionable dealing claim: our objections to conduct that is targeted under the second criterion are likely to be connected to, if not entirely dependent upon, concerns that we have about people being seriously disqualified or ‘specially disadvantaged’ relative to others in particular social relationships or encounters.<sup>107</sup>

This explains why the majority in *Berbatis* considered that the ACCC’s claim ‘fell away’ as soon as it determined that the Roberts were not operating under a ‘special disadvantage’ vis-a-vis the owners at the time of entry into the deed of renewal and assignment containing cl 14. The appeal was effectively over from that point.

Still, some *conceptual account* of the special disadvantage criterion — of what exactly motivates and underlies it — is required because what seems crucial about the criterion is that it concerns the question of when the plaintiff ought to be *excused* from having to exercise that level of individual responsibility or self-reliance generally expected and required of contracting (or disposing) agents. The criterion is thus irreducibly normative because it relates to the ascription of responsibility for one’s jural acts, in particular the signifying of one’s contractual assent. The criterion therefore rests on the normative view that some motivations are consistent with informed and voluntary (and hence responsible) action, while others are not. In essence, in order for someone to be ‘responsible’ as a jural agent for their act of contractual assent, that act of assent must be relevantly related to *choices* that they made or were reasonably capable of making before assenting. The issue is whether *reasonable* choice lay within the plaintiff’s power to have acted differently on the occasion in question — that is, if the plaintiff wanted to choose to make the situation different from what it became as

<sup>107</sup> As the Full Federal Court said in *Samton Holdings* (2002) 117 FCR 301, 323 (Gray, French and Stone JJ): ‘Characterisation of disadvantage as “special” involves the recognition that it would be unconscionable knowingly to deal with the person so affected without regard to his or her disability’.

a result of manifesting his or her contractual assent to the defendant. Was it possible for the plaintiff to have understood the risks, general wisdom or full consequences of formally signifying his or her contractual consent to the defendant and, through reasonable choice, to have acted differently as a result?<sup>108</sup>

Given the substantial identity between ‘special disadvantage’ and (agency) responsibility, it may be useful when pondering the first criterion of an unconscionable dealing claim to refer to H L A Hart’s well-known conditions of excuse in relation to criminal responsibility.<sup>109</sup> These are enumerated in his ‘Responsibility Principle’, which provides that ‘what is crucial is that those whom we [hold legally responsible] should have had, when they acted, the normal capacities, physical and mental, ... and a fair opportunity to exercise these capacities’.<sup>110</sup>

Most ‘specially disadvantaged’ persons do not, on account of their age, feeble intellect, inexperience, poor health or other condition, have the normal capacities for acting in an ‘agency responsible’ manner — for example, when entering into a contract. Such persons lack the understanding, reasoning and control of conduct assumed to be necessary for participating in games of advantage, strategy and power. They lack the ability or capacity to understand relevant options, predict their consequences and relate them to their own values or preferences. They are, in short, *incapable* of free competitive bargaining.

Clearly, the Roberts never fell into this category of non-agency-responsible persons. Rather, they lacked — indeed, they were denied by the owners — what the ACCC would claim should have been a ‘fair opportunity’ to exercise their otherwise ‘normal’ capacities. The persistent application of the *Amadio* threshold test of ‘special disadvantage’ is therefore questionable in light of the fact that those afflicted by ‘pressing need of any kind’<sup>111</sup> may potentially avail themselves of the jurisdiction, despite the fact that the integrity of their *judgemental* capabilities is beyond reproach. Such persons fall into the ‘lack of fair opportunity’ limb of the Responsibility Principle, rather than the ‘incapacity’ limb.

It may be that I am reading too much into the word ‘judgment’ in Mason J’s famous threshold test. (The word ‘decision’ would have been more innocuous.) However, Gummow and Hayne JJ,<sup>112</sup> as well as Callinan J,<sup>113</sup> were clearly sidetracked by it in *Berbatis*. All three emphasised that the Roberts were not acting under a disabling condition that seriously affected their ability ‘to make a judgment as to their best interests’ in relation to the matter in question. Callinan J stated that ‘[t]hey recognised and understood what was in their best

<sup>108</sup> I am indebted here to my colleague Jim Evans, for his article ‘Choice and Responsibility’ (2002) 27 *Australian Journal of Legal Philosophy* 97, parts of which I have adapted for my own purposes herein.

<sup>109</sup> See generally the essays collected in H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968).

<sup>110</sup> *Ibid* 152. Cf at 181, 201, 218, 227.

<sup>111</sup> As is contemplated by Fullagar J’s non-exhaustive list of disabling circumstances or conditions in *Blomley* (1956) 99 CLR 362, 405.

<sup>112</sup> *Berbatis* (2003) 197 ALR 153, 168.

<sup>113</sup> *Ibid* 199.

interests'.<sup>114</sup> But surely the right question to be asked here was not whether the Roberts appreciated fully what they were doing, but rather whether what they were doing was done *legally voluntarily*. In other words, the issue in the case was whether the Roberts were under a special disadvantage with regard to the *volitional* or *freedom* dimension of their autonomy, rather than the purely cognitive, judgemental or deliberative dimension.

The marooned whalers in the famous American case of *Post v Jones* no doubt also 'recognised and understood' exactly what was in their best interests when they faced 'no choice' but to strike a highly disadvantageous agreement with their greedy Arctic rescuers, but this nonetheless did not deter the United States Supreme Court from invalidating the agreement that was struck under such conditions.<sup>115</sup> It might be objected that *Post v Jones* was a case of 'duress' rather than 'unconscionable dealing' and so does little to illumine the present discussion. However, although the Court in *Post v Jones* did say that the rescuer had used its 'absolute power' and that the captain and his crew had 'no choice' but to submit to the terms of the rescue and salvage, it is interesting to note that the familiar locutions of duress, such as 'compulsion' or 'force', are otherwise absent from the Court's judgment. On the contrary, the language actually employed is more familiar to exploitation, or naked 'advantage-taking', than coercion — more akin to our ordinary conceptions of unconscionable dealing than duress.<sup>116</sup>

Some members of the Court in *Berbatis* were distracted by the Full Court's apparent concern with the question of whether the Roberts' 'wills were so overborne that they did not act independently and voluntarily'.<sup>117</sup> However, the relationship between the legal categories of 'duress' and 'exploitation of necessity' (unconscionable dealing) is not sharply drawn in our law. Skipping the obvious point that a person's will need not be 'overborne' in order for it to be legally 'coerced' and hence potentially 'responsibility-relieving',<sup>118</sup> it is self-evidently undesirable for courts to define 'unconscionable dealing' either so as to *require* that there be coercion of the plaintiff's will, or else in a way that *excludes* conduct that might also qualify for correction under the independent doctrine of duress. This is more so nowadays since courts routinely conceive of 'illegitimate pressure' within the duress inquiry precisely in terms of 'unconscionable conduct', broadly speaking, especially in cases of so-called 'lawful act' duress.<sup>119</sup> This is not to argue for the conflation of the two exculpatory

<sup>114</sup> Ibid.

<sup>115</sup> 60 US 150, 160 (1857). See also *Akerblom v Price, Potter, Walker & Co* (1881) 7 QBD 129; *The Port Caledonia and The Anna* [1903] P 184; *The Medina* (1876) 1 PD 272.

<sup>116</sup> For example, the Court speaks of the salvor in that case as 'avail[ing] himself of the calamities of others to drive a hard bargain': *Post v Jones*, 60 US 150, 160 (1857).

<sup>117</sup> See *Berbatis* (2003) 197 ALR 153, 162 (Gummow and Hayne JJ), 174–5 (Kirby J).

<sup>118</sup> See *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, 45–6 (McHugh JA). McHugh JA's views on this matter were cited by Lord Goff in *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152, 165–6.

<sup>119</sup> See, eg, *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, 46 (McHugh JA) (emphasis added): 'Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct.' The language of 'unconscionability' seems also

categories, as some occasionally champion,<sup>120</sup> but rather merely to recognise potential overlap in doctrinal application of the conceptually distinct categories of ‘duress’ and ‘exploitation’ — say, by way of ‘unconscionable dealing’ — to a single set of facts. Whether cases of exploitation are also cases of coercion, and hence whether instances of unconscionable dealing are also doctrinally instances of duress, depends on whether the case under examination can be accommodated comfortably within both the common phenomenology of duress situations (threat and demand) and the normative framework that motivates the law’s theory of coercion.<sup>121</sup>

This point might have been significant for Kirby J, who, as noted above, classified the owners’ conduct as having

all the hallmarks of a well-tuned demand, imposed by those with proportionately greater economic power to take advantage of the vulnerable position that the Roberts found themselves in, given the course of dealings and their commercial, financial and personal circumstances at the time.<sup>122</sup>

It is notable that his Honour also broke free from the majority’s apparent preoccupation (apropos ‘special disadvantage’) with whether the Roberts were able to ‘make a *judgment* as to their own best interests’,<sup>123</sup> recognising that someone may be specially disadvantaged because of ‘the contingencies of the moment’.<sup>124</sup> This is a greatly superior way to approach the question of whether the Roberts were specially disadvantaged vis-a-vis the owners, as it better reflects the true nature of the concern that, were the Roberts themselves petitioning the Court for relief from the transaction, would lie at the basis of their claim: exploitation of impaired volition rather than exploitation of impaired judgement.

Outside the old expectant heir line of cases and excluding perhaps the current law relating to maritime salvage agreements,<sup>125</sup> there are few reported modern instances of ‘unconscionable dealing’ sourced in exploitation of ‘pressing need’ alone.<sup>126</sup> Cases of such exploitation mostly feature in the traditionally independ-

to be finding its way into modern English decisions on the duress doctrine: see, eg, *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd’s Rep 620, 637 (Mance J).

<sup>120</sup> See, eg, *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50, 107. In that case, Kirby P saw wisdom in the conflation of economic duress and unconscionable dealing and undue influence. Andrew Phang raises the possibility of subsuming economic duress and undue influence into unconscionable dealing in Andrew Phang, ‘Undue Influence Methodology, Sources and Linkages’ [1995] *Journal of Business Law* 552, 565. See also Daniel Clough, ‘Trends in the Law of Unconscionability’ (1999) 18 *Australian Bar Review* 34; Andrew Phang and Hans Tjio, ‘The Uncertain Boundaries of Undue Influence’ [2002] *Lloyd’s Maritime and Commercial Law Quarterly* 231, 241–3.

<sup>121</sup> Cf Alan Wertheimer, *Coercion* (1987) 229.

<sup>122</sup> *Berbatis* (2003) 197 ALR 153, 181.

<sup>123</sup> See, eg, *ibid* 169 (Gummow and Hayne JJ) (emphasis added).

<sup>124</sup> *Ibid* 179, quoting M P Ellinghaus, ‘In Defense of Unconscionability’ (1969) 78 *Yale Law Journal* 757, 768.

<sup>125</sup> For the law and theory on maritime salvage, see Mitchell McInnes, ‘Life Rescue in Maritime Law’ (1994) 25 *Journal of Maritime Law and Commerce* 451.

<sup>126</sup> For ‘financial need’ cases decided on the basis of unconscionable dealing, see, eg, *Sturge v Sturge* (1849) 12 Beav 229; 50 ER 1049; *Mulholland v Bartsch* [1939] 1 WWR 100; *Familiar Pty Ltd v Samarkos* (1994) 115 FLR 443; *Asia Pacific International Pty Ltd v Dalrymple* [2000] 2 Qd R 229.

ent field of economic duress, where unfair advantage has allegedly been taken of the victim's rapidly declining financial circumstances.<sup>127</sup> Unsurprisingly, then, and concerning the 'special disadvantage' criterion of the unconscionable dealing claim in particular, the concept of responsibility-relieving 'distress' or 'necessity' appears rather inchoate. Insights, however, could undoubtedly be garnered from analogical uses of the concept of 'constrained volition' elsewhere in the private law, such as via the necessity defence in tort,<sup>128</sup> the notion of 'danger' in maritime salvage law<sup>129</sup> or the criterion of 'no reasonable alternative' in the law of duress<sup>130</sup> (although these areas are themselves somewhat vague).

In order to be 'specially disadvantaged' for the purposes of the unconscionable dealing doctrine, the law will of course have to devise some way of distinguishing between a person's objective *needs* and his or her subjective *preferences*.<sup>131</sup> This is because it is not reasonably within a person's power to change or renounce his or her needs as it is within that person's power to change his or her preferences.<sup>132</sup> Thus, from the standpoint of determining a person's responsibility for choices made when entering into a contract, it is unlikely that a contracting party will be adjudged to be 'specially disadvantaged' relative to the other contracting party if the vulnerability–dependency relationship between them can fairly be stated in terms of the alleged victim's *desires* rather than his or her *needs* (even desiring something intensely does not perforce convert it into a need). Although the majority judges in *Berbatis* do not overtly employ the language of 'need', 'necessity', 'desire' or 'preference', by characterising the Roberts' 'disadvantage' as a simple 'lack of ability to get their own way'<sup>133</sup> or as a mere 'commercial choice',<sup>134</sup> it is clear that they would have been inclined to formulate the vulnerability–dependency relationship between the bargaining parties in terms of the Roberts' desires rather than their needs. Even the added fact of the illness of the Roberts' daughter might not have converted their desire into a need, since Gummow and Hayne JJ observe that the Roberts wanted to leave the business in any event, having been in it 'long enough'.<sup>135</sup> The only

<sup>127</sup> See, eg, *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1983] 1 All ER 944; *D & C Builders Ltd v Rees* [1966] 2 QB 617.

<sup>128</sup> See, eg, *Southwark London Borough Council v Williams* [1971] Ch 734, 746 (Edmund Davies LJ).

<sup>129</sup> In salvage law, there must be a danger or real threat to person or property such that 'no reasonably prudent and skilful person in charge of the venture would refuse a salvor's help if it were offered to him upon the condition of his paying a salvage reward': David Steel and Francis Rose, *Kennedy's Law of Salvage* (5<sup>th</sup> ed, 1985) 130. See also Geoffrey Brice, *Maritime Law of Salvage* (1983) 24–5.

<sup>130</sup> See Rick Bigwood, 'Coercion in Contract: The Theoretical Constructs of Duress' (1996) 46 *University of Toronto Law Journal* 201, 263–9.

<sup>131</sup> For a brief philosophical discussion of the distinction, see Robert Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (1985) 198–200.

<sup>132</sup> *Ibid* 199.

<sup>133</sup> *Berbatis* (2003) 197 ALR 153, 158 (Gleeson CJ).

<sup>134</sup> *Ibid* 196 (Callinan J).

<sup>135</sup> *Ibid* 167. Interestingly, Kirby J described the Roberts' 'need' to proceed with the sale of their business as being explicable 'by their *desire* to have more time and also the money to devote to their daughter, given her medical condition', and their 'vulnerability' as 'caused by their *need* to sell their business because of their personal circumstances': at 179 (emphasis added). I am of



thing that can follow from this characterisation of the parties' relationship is exactly what was enunciated in both the Full Court's and the High Court majority's judgments: the owners' failure to acquiesce to the Roberts' 'desires' or 'preferences' by refusing to extend the latter's lease unconditionally amounted merely to a failure to help the Roberts achieve their life plans. On this view, stigmatising the owners simply for failing to help the Roberts in this way would have ignored one of the most deeply-rooted and fundamental distinctions in the common law<sup>136</sup> — the distinction between harming a person and merely failing to bestow a benefit upon him or her.<sup>137</sup>

However, as Kirby J's dissent portends, it may be overly crude here to state the Roberts' vulnerability simply in terms of a mere 'preference' or 'desire' — at one point, his Honour describes the Roberts as having an 'imperative need to secure an extension of their lease'<sup>138</sup> — or to characterise the owners' conduct in terms of a *simple* 'failure to help'. After all, taking into account, as his Honour did, the entire course of the negotiations, it was not possible to construe the owners' conduct as a simple decision not to renew the lease. The mutual release condition was attached. Moreover, while such a 'premium' in exchange for a doubtlessly highly valuable extension of the Roberts' lease might not have been objectionable *tout court*, combined with the owners' knowledge of the Roberts' daughter's illness and their apparently deliberate strategy of 'surprise', it is surely open to interpret the owners' conduct as taking on a rather different, more cynical complexion than that of a mere nonfeasance.

Mention was made above of the law of duress, the ambit of which extends beyond threats of straightforwardly 'unlawful' action, such as crimes, torts and breaches of contract. Modern duress also captures pressure that, while not violating the other party's strict legal rights, is nevertheless 'wrongful' or 'illegitimate' in some broader 'moral or equitable' sense.<sup>139</sup> Indeed, all of the judges in *Berbatis* might have drawn on relevant principles and insights harvestable from the context of *lawful act* duress to support their respective conclusions on the merits of the appeal. As was also mentioned above, there are parallels between 'lawful act duress' and unconscionable dealing by way of 'exploitation of serious need', such need *ex hypothesi* entailing 'absence of reasonable choice'. The illegitimacy of the blackmail-type pressure usually present in successful lawful act duress claims seems to derive precisely from its *exploitative* flavour. The blackmailer 'coerces' his or her victim by exercising, or proposing to exercise, his or her lawful rights, privileges or powers in a manner calculated to 'exploit' the victim's peculiar vulnerability to being pressed.

course aware of the danger of reading too much normative significance into what may have been his Honour's casual use of language.

<sup>136</sup> Francis Bohlen once wrote that '[t]here is no distinction more deeply rooted in the common law and more fundamental': see Francis Bohlen, 'The Moral Duty to Aid Others as a Basis of Tort Liability' (Pt 1) (1908) 56 *University of Pennsylvania Law Review* 217, 219.

<sup>137</sup> Cf *Jaensch v Coffey* (1984) 155 CLR 549, 578 (Deane J).

<sup>138</sup> *Berbatis* (2003) 197 ALR 153, 182.

<sup>139</sup> See, eg, the famous American case of *Wolf v Marlton Corporation*, 154 A 2d 625, 630 (NJ, 1959) (Freund JAD). See also *CTN Cash & Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, 718 (Steyn LJ), approved in *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267, 289 (Kiefel J).

Additionally, the blackmailer has no legitimate interest in the interaction beyond simply getting the advantage demanded and certainly has no regard for the victim's end-status as a self-directing moral agent.<sup>140</sup> The hardest cases of alleged lawful act duress continue to involve threats not to do future business with the victim of the demand,<sup>141</sup> or otherwise to reduce the victim's commercial opportunities.<sup>142</sup> These cases clearly resonate with the *form* of the complaint made by the ACCC in *Berbatis*. Ordinarily, however, such threats do not constitute duress because they fail at both the 'coercion' prong<sup>143</sup> and the 'illegitimate pressure' prong of Lord Scarman's two-pronged test for duress in *Universe Tankships Inc of Monrovia v International Transport Workers Federation*.<sup>144</sup> This fortifies the majority's approach and conclusion in *Berbatis*. To my knowledge, there are no successful lawful act duress claims in Anglo-Commonwealth case law where the pressure applied was against the victim's *economic* interests only, the most famous local example being *Smith v William Charlick Ltd*, which was decided by the High Court in 1924.<sup>145</sup>

Lord Goff and Gareth Jones, however, citing the American *Restatement (Second) of Contracts* (1981), argue that, exceptionally, a threat not to contract (either at all, or unless the special terms demanded are met) may amount to duress.<sup>146</sup> Certainly in comparison to the *Restatement* provision on duress dealing exclusively with the legitimacy of pressure by 'lawful' means — § 176(2) — the current Anglo-Australian position on lawful act duress appears embryonic indeed. Section 176(2) of the *Restatement* reads:

A threat is improper if the resulting exchange is not on fair terms, and

- (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,

<sup>140</sup> The literature on blackmail is voluminous and mostly concerned with the reasons for criminalising blackmail. The two issues, however, are related if not analogous. See, eg, 'Blackmail Symposium' (1993) 141 *University of Pennsylvania Law Review* 1565.

<sup>141</sup> See, eg, *Smith v William Charlick Ltd* (1924) 34 CLR 38; *Eric Gnapp Ltd v Petroleum Board* [1949] 1 All ER 980; *Morton Construction Co Ltd v City of Hamilton* (1961) 31 DLR (2d) 323.

<sup>142</sup> See, eg, *CTN Cash & Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714; *Deemcope Pty Ltd v Cantown Pty Ltd* [1995] 2 VR 44.

<sup>143</sup> Assuming a competitive market, reasonable sources of alternative supply will readily be available to the plaintiff as the victim of a coercive proposal. The plaintiff should therefore be required, all else being equal, to take these alternatives rather than submit to the demand. Of course, it may be quite a different matter where the plaintiff faces a truly monopolistic supplier, as was the case in *Smith v William Charlick Ltd* (1924) 34 CLR 38.

<sup>144</sup> [1983] 1 AC 366, 400.

<sup>145</sup> (1924) 34 CLR 38. In that case the plaintiff miller lost its claim of compulsion (duress) against the Wheat Harvest Board, to whom it had made an unjustifiable payment under fear of the Board's clear intimation that it would not otherwise supply the plaintiff with its wheat in the future. The plaintiff lost despite the fact that the Board was a statutory monopoly that knew full well that the plaintiff's business would be devastated if it refused to do the Board's bidding. The majority of the Court held that the payment had not been made under compulsion because the Board was not obliged under the relevant legislation to supply wheat to anyone. It therefore had a right, liberty or power to refuse to do future business with the plaintiff. Interestingly, Higgins J dissented, applying equitable principles to hold that, quite apart from the strict legality of the Board's demand, the Board had no 'right' to take advantage of the plaintiff's necessity in order to achieve its unjustifiable end: at 66–7.

<sup>146</sup> Lord Goff and Gareth Jones, *The Law of Restitution* (6<sup>th</sup> ed, 2002) 337. Cf H G Beale et al (eds), *Chitty on Contracts* (28<sup>th</sup> ed, 1999) vol 1, 426–7.

- (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by the prior unfair dealing by the party making the threat, or
- (c) what is threatened is otherwise a use of power for illegitimate ends.

Ignoring for present purposes the curious prerequisite of unfair exchange,<sup>147</sup> we can see immediately that § 176(2)(a) and (c) resonate with the essential aspects of the ACCC's argument in *Berbatis*. Sub-section (2)(c) in particular echoes the gravamen of the ACCC's claim throughout — being largely the basis upon which the ACCC succeeded at first instance — that is, that the owners had used their bargaining power for disjunctive and hence exploitative ends 'to extract a concession from the tenant that [was] commercially irrelevant to the terms and conditions of any proposed new lease.'<sup>148</sup> The majority, however, disagreed that there was necessarily a disjunctive relationship between what the Roberts were seeking from the owners and what the owners were demanding in return.<sup>149</sup> Yet, even conceding the majority's view on this point would, at least in the light of the expansive criteria in § 176(2), only count as one strike against the Roberts' possible case for 'unconscionable conduct' (qua lawful act duress). Even ignoring for present purposes § 176(2)(a), sub-section (2)(b) may apply. I merely note that the following illustrations in the commentary to § 176(2), as well as a number of cases decided under § 176(2)(b) in particular,<sup>150</sup> might have strengthened Kirby J's reasoning in *Berbatis*:

13. A, who has sold goods to B on several previous occasions, intentionally misleads B into thinking that he will supply the goods at the usual price and thereby causes B to delay in attempting to buy them elsewhere until it is too late to do so. A then threatens not to sell the goods to B unless he agrees to pay a price greatly in excess of that charged previously. B, being in urgent need of the goods, makes the contract. If the court concludes that the effectiveness of A's threat in inducing B to make the contract was significantly increased by A's prior unfair dealing, A's threat is improper and the contract is voidable by B.

14. The facts being otherwise as stated in Illustration 13, A merely discovers that B is in great need of the goods and that they are in short supply but does not mislead B into thinking that he will supply them. A's threat is not improper, and the contract is not voidable by B.<sup>151</sup>

If we give credence to Kirby J's thorough analysis of the facts in *Berbatis*, rather than that of the majority, then, at least by way of analogy with the above

<sup>147</sup> As I have argued elsewhere, such a requirement seems to make little sense in the context of a doctrine that, like unconscionable dealing and undue influence, is concerned exclusively with questions of relative autonomy inter se and ensuring propriety in dealing: see Rick Bigwood, 'Coercion in Contract: The Theoretical Constructs of Duress' (1996) 46 *University of Toronto Law Journal* 201, 223–4.

<sup>148</sup> *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* [2000] ATPR ¶41-778, 41 197 (French J).

<sup>149</sup> See, eg, *Berbatis* (2003) 197 ALR 153, 158 (Gleeson CJ), 166–7 (Gummow and Hayne JJ), 196–7 (Callinan J).

<sup>150</sup> See, eg, *Eulrich v Snap-On Tools Corp.*, 853 P 2d 1350 (Or, 1993); *Andreini v Hultgren*, 860 P 2d 916 (Utah, 1993); *Shufford v Integon Indemnity Corp.*, 73 F Supp 2d 1293 (MD Ala, 1999).

<sup>151</sup> *Restatement (Second) of Contracts* § 176 cmt (1981).

illustrations, an evaluation could quite plausibly have been made that the owners had in fact engaged in ‘unfair dealing’ via their deliberate strategy of ‘surprise’. This strategy significantly increased the effectiveness of their threat not to renew. The Roberts had no practical or reasonable alternative but to accede to the mutual release demanded, not least because their purchaser had already begun to move into the premises under a concluded sale and purchase agreement.<sup>152</sup>

Note that ‘unfair dealing’ for present purposes is an expansive, ‘all-things-considered’ concept that cannot helpfully be elaborated upon apart from the facts of the particular case under examination. It does not strip problems of their complexity.<sup>153</sup> Moreover, the concept of ‘unfair dealing’ is not circumscribed by such narrow factual or doctrinal considerations as whether Mrs Roberts had been ‘assured’ — rather than being merely ‘left under the impression’<sup>154</sup> — that any new lease either had been or would be concluded without reference to the release of the lessees’ legal rights. Although certain members of the majority made it quite clear that the owners could not have been estopped from renegeing on Mrs Roberts’ impression in this regard,<sup>155</sup> there is no reason to believe, at least on the American experience, that a judgment of ‘unfair dealing’ assumes conduct that satisfies some independent doctrine such as estoppel or even perhaps a claim under s 52 of the Act for misleading or deceptive conduct. We are not asking here whether there was ‘unfair dealing’ for those purposes, but rather for meeting the criteria of a lawful act duress claim or a claim in unconscionable dealing.

#### IV CONCLUDING REMARKS

It is regrettable that a case like *Berbatis* was argued exclusively on the footing that its facts fell within the narrow equitable category of unconscionable dealing. Not only did this allow the High Court to avoid wider analysis and interpretation of s 51AA of the Act, but it also allowed the majority judges especially to approach the case with blinkered vision, causing them to ignore or overlook normatively sensitive features of the ACCC’s claim. By so straightjacketing themselves, counsel and the Court were constrained to conceptualise and dispose of the case entirely in terms of the specific doctrinal criteria of an unconscionable dealing claim — ‘special disadvantage’ and ‘unfair advantage taken of the opportunity thereby arising’ — criteria that remain fairly underdeveloped in Anglo-Australian law.

Certainly if the majority judges’ treatment of the ‘special disadvantage’ criterion in the subject case is anything to go by, then the criteria of unconscionable dealing are likely to remain underdeveloped for some time yet. As I have argued in this case note, some of the members of the Court appeared beguiled by the strangely persistent view that ‘special disadvantage’ requires ‘impaired judg-

<sup>152</sup> See *Berbatis* (2003) 197 ALR 153, 181 (Kirby J).

<sup>153</sup> This is confirmed by the cases decided under § 176(2)(b); see above n 150.

<sup>154</sup> *Berbatis* (2003) 197 ALR 153, 181.

<sup>155</sup> See *Berbatis* (2003) 197 ALR 153, 168 (Gummow and Hayne JJ), 195 (Callinan J), contrasting the Roberts’ situation with that of the tenant in *Bond Brewing (NSW) Pty Ltd v Reffell Party Ice Supplies Pty Ltd* (Unreported, Supreme Court of New South Wales Equity Division, Waddell CJ in Eq, 17 August 1987).

ment', when what is really at stake in cases like *Berbatis* is 'impaired volition' coupled with unconscientious advantage-taking. In support of that view I have contended that the ACCC's unconscionable dealing claim could have been enhanced by reference to the exculpatory category of 'lawful act' duress, given especially how that category has developed in the United States. Cases decided on the basis of such duress at least attest to the complexities and calibrations involved on occasions where a party seeks to support some specific and unwanted demand by making a credible proposal to press his or her lawful rights, powers or privileges against the victim of the demand, or against someone in affinity with him or her. Although the official default position is that it is ordinarily not 'illegitimate' for the purposes of a duress claim to press one's lawful rights, powers or privileges against another in support of a self-serving demand, it is also recognised that

it is not enough to justify a threat to do X by pointing to one's *right* to do X. Statements of rights are normally shorthand approximations of more complex specifications, and rights themselves are normally defeasible by other considerations. ... Until we have examined the details of a particular case ... it cannot be concluded from the judgment that someone has the right to do X or that it is permissible for them to threaten to do X unless someone complies with their demand, even where the demand is not in itself impermissible (ie it does not involve the other in doing something wrong). We need to know what X is, and what it is that is being demanded before we can know whether the pressure is legitimate.<sup>156</sup>

The majority's approach in *Berbatis* belies or simply overlooks the insights captured in this passage, whereas Kirby J's dissenting approach embraces them in full.

At one point in his dissent, Kirby J observes that '[c]ases of this kind depend ... upon their own facts and circumstances judged against a criterion that is easier to describe than to define.'<sup>157</sup> Although it is true that determinations in this area will forever remain highly fact-dependent and, at least in part, impressionistic, his Honour may have been premature to imply that the discriminating criterion itself is easy to describe. The members of the Court in fact described that criterion in subtly different ways in this particular case and each at a troubling level of vacuity. Still, it should have been open to the majority to follow Kirby J's lead and decide that what the owners did in order to direct the Roberts' contractual decision-making was, in the full circumstances of the case, 'unconscionable conduct' for the purposes of the unwritten law and hence for the purpose of s 51AA as well.

<sup>156</sup> Grant Lamond, 'The Coerciveness of Law' (2000) 20 *Oxford Journal of Legal Studies* 39, 50–1.

<sup>157</sup> *Berbatis* (2003) 197 ALR 153, 185, adapting *Antonovic v Volker* (1986) 7 NSWLR 151, 165 (Mahoney JA).