



# Law of Contract II

## JDOC1002

Duress, Undue Influence,  
Unconscionability – Pt 3



# Unconscionability

- Equitable doctrine of unconscionability as basis for regarding contract voidable:
  - Accepted in Australia and Hong Kong
  - Some UK cases illustrating doctrine but scope of doctrine might be narrower than Australian/HK law



# Unconscionability

- *Boustany v Pigott* (1995) 69 P & CR 298
- Facts:
  - Miss Pigott (landlord) leased property to Mrs Boustany
  - Miss P “quite slow”; her affairs handled by Mr Pigott (cousin)
  - Mrs B procured renewal of lease on terms disadvantageous to Miss P
- PC:
  - New lease could be set aside
  - Mrs B acted unconscionably in taking advantage of Miss P’s vulnerability



# Unconscionability: limited doctrine in UK

- ▶ *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* – Lord Hodge accepted that there is an equitable doctrine of unconscionable bargains which:
  - ▶ “has been applied where B is at a serious disadvantage relative to A through poverty, or ignorance, or lack of advice or otherwise, so that circumstances existed of which unfair advantage could be taken; A exploited B’s weakness in a morally culpable manner; and the resulting transaction was not merely hard or improvident but overreaching and oppressive”



# Unconscionability doctrine in Australia and Hong Kong

- ▶ Contract is voidable on the basis of unconscionability where a party has a special disability or is in a position of special disadvantage in dealing with the other party so that there is inequality; and that disability was known to the other party who unconscientiously takes advantage of their superior position in obtaining the assent of the weaker party to the contract
  - ▶ *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447
  - ▶ Accepted in HK: *Ming Shiu Chung v Ming Shiu Sum* (2006) 9 HKCFAR 334 per Ribeiro PJ



# Unconscionability: elements

- PI under special disability or special disadvantage
- Def knew of that disability/disadvantage
- Def acted unconscionably in exploiting the disability/disadvantage



# Nature of doctrine

- ▶ Undue influence compared with unconscionability (*Commonwealth Bank v Amadio*):
  - ▶ Undue influence focuses on pl – quality of assent
  - ▶ Unconscionability focuses on def – whether def acted unconscientiously in taking advantage of vulnerability of weaker party
- ▶ But not mutually exclusive
- ▶ Unfairness in terms or inequality in bargaining power not in themselves sufficient to establish unconscionability (but relevant factors)



# Unconscionability

- *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447
- Facts:
  - Mr and Mrs Amadio granted mortgage to bank to secure son's business overdraft account
  - Amadios 71 and 76, Italian immigrants, limited knowledge of written English
  - Son's business in financial difficulties; security required by bank for continuation of overdraft; son procured parents to grant mortgage
  - Parents misled by son as to scope of liability and as to the financial position of his business
  - Bank manager did not explain mortgage terms to Amadios; no independent legal advice
- Issue:
  - Could mortgage be set aside on ground that bank acted unconscionably?





# Unconscionability

- High Court of Australia:
  - Contract voidable for unconscionability
- Special disability/disadvantage of Amadios:
  - Elderly
  - Poor English
  - No business experience
  - Relied on son about transaction



# Unconscionability



- ▶ Bank:
  - ▶ Knew of Amadios' circumstances
  - ▶ No reasonable basis for assuming they had received adequate advice
  - ▶ Knew of poor financial situation of son's business and risks/prejudice to Amadios
- ▶ Bank acted unconscionably:
  - ▶ Took advantage of Amadios in obtaining mortgage which disadvantaged Amadios
  - ▶ No explanation of terms to Amadios
  - ▶ Did not ensure there was independent legal advice



# Special disability / disadvantage

- Disability which seriously affects ability of weaker party to make judgment in their own best interests
- Egs:
  - Poverty
  - Sickness
  - Age
  - Infirmity of body or mind
  - Drunkenness
  - Illiteracy
  - Lack of education
  - Ignorance / inexperience



# Knowledge of disability/disadvantage

- ▶ Actual or constructive knowledge
- ▶ Sufficient if def aware of possibility that pl occupies a situation of disadvantage or is aware of facts that would raise that possibility in the mind of any reasonable person



# Whether took advantage

- All the circumstances of case must be looked at
- Relevant factors:
  - Whether def explained transaction to enable pl to form judgment for themselves
  - Whether def ensured that pl obtained independent legal advice
  - Whether any benefits of transaction to pl

# Hong Kong case

- *Lo Wo v Cheung Chan Ka Joseph* [2001] 3 HKC 70
- Facts:
  - HK developer (D2) purchasing flats for redevelopment
  - One flat: 50% ownership had earlier devolved to 3 pls (elderly sisters living in remote part of Guangdong province) – “simple country folk”
  - D1 (conveyancing clerk) and real estate agent travelled to village with cash
  - Procured sale and purchase agreement for \$870,000 (serious undervalue)
- Issue:
  - Could agreement be set aside for unconscionability?



# Hong Kong case

- ➡ CA:
  - ➡ Yes
  - ➡ Special disability: age, inexperience
  - ➡ Defs aware of disability
  - ➡ Defs acted unconscionably: misleading statements, unfair tactics, seriously disadvantageous terms for pls, no independent advice



# Legislation

- Unconscionable Contracts Ordinance (Cap 458)
- Compare:
  - Trade Practices Act 1974 (Cth of Aust) s 51AB (repealed)
  - Competition and Consumer Act 2010 (Cth of Aust) Sch 2 (Australian Consumer Law) ss 20-22





# Unconscionable Contracts Ordinance

- UCO s 5 – elements:
  - Contract for sale of goods or supply of services
  - One party deals as consumer (and see s 3)
  - Contract (or part of contract) unconscionable in the circumstances relating to contract at time it was made



# Unconscionable Contracts Ordinance

- UCO s 5 – court's powers where s 5 applies:
  - Refuse to enforce contract
  - Enforce contract without unconscionable part
  - Limit application of, or revise or alter, any unconscionable part



# Unconscionable Contracts Ordinance

- ▶ UCO s 6 – matters to be considered in determining whether unconscionable include:
  - ▶ Parties' respective bargaining power
  - ▶ Whether terms not reasonably necessary for protection of legitimate interests of other party
  - ▶ Whether consumer could understand documents
  - ▶ Whether undue influence/pressure exerted or unfair tactics used
  - ▶ Amount which consumer could acquire equivalent goods/services from another



# Comparison with equitable doctrine

- UCO: focuses on whether contract unconscionable
- Common law: focuses on unconscionable conduct of stronger party
- But conduct also relevant to see whether contract unconscionable under UCO



# Cases on UCO

- *Chang Pui Yin v Bank of Singapore Ltd* [2017] 4 HKLRD 458
- Facts:
  - Changs: elderly couple, “simple couple who led uncomplicated lives”
  - Acquired fortune in late life from relatives and became private banking customers of bank
  - Intended to make low risk investments only
  - Bank changed their investment profile without informing them; sold them US\$14 million worth of high risk products
  - Losses suffered in 2008: global financial crisis
  - Service agreement terms: customers to assess own risk; bank assumes no responsibility or liability



# Cases on UCO

- Issue:
  - Was contract with bank unconscionable within UCO?
- CA:
  - Changs were dealing as consumers
  - Unconscionability: something not done in good conscience
  - Section 6 list of factors not to be applied mechanically (as score card)
  - Other factors can be taken into account
  - Clauses in service agreement exempting bank from liability were unconscionable



# Cases on UCO

- *Shum Kit Ching v Caesar Beauty Centre* [2003] 3 HKC 235
- Facts:
  - 29 March 2001: appellant (Shum) bought 2-month membership with beauty centre (\$549)
  - 2 days later, extended membership to end of year (additional \$1675)
  - Week later, appellant persuaded to buy “gold card VIP membership” for 267 facial treatments + other benefits (\$48,060)
  - Next day, appellant sought to cancel and obtain refund; beauty centre refused
  - Clause 19 of contract: no refunds possible
- Issue:
  - Was clause 19 unconscionable under UCO?



# Cases on UCO

- ➡ CFI:
  - ➡ Yes
  - ➡ Standard terms in small fine print
  - ➡ No explanation of terms to customer; no opportunity to read
  - ➡ Clause 19 went further than necessary to protect beauty centre's legitimate interests
  - ➡ Clause 19 not to be enforced
  - ➡ But contract otherwise valid and binding on appellant





# Other legislation

- Note also Trade Descriptions Ordinance (Cap 362)
- Section 13F: aggressive commercial practices by trader in relation to consumer (offence)
- Section 36: civil action for damages by consumer for loss or damage suffered because of conduct which constitutes an offence