

‘Unfair’ results and unfair doctrines: Structuring the application of the equitable doctrines of undue influence and unconscionable dealing.*

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Introduction

The equitable doctrines of undue influence and unconscionable dealing are both designed to achieve transactional fairness between parties involved in improvident transactions by providing remedies to overcome the effect of unfair transactions. In their orthodox formulations, undue influence is primarily focused upon the quality of the weaker parties consent to the transaction rather than the existence of unconscionable conduct by the stronger party,¹ while unconscionable dealing is primarily focused upon the conduct of the stronger party rather than consent.² However various issues surrounding the transaction and the parties remain relevant to both doctrines and Mason J. has contended that in one sense both doctrines constitute a “species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which cannot be enforced because to do so would be inconsistent with equity and good conscience”.³

The concepts of unconscionability and good conscience seem to have confused many Judges in their application of these doctrines of transactional fairness. In order to establish these doctrines on the one hand the court needs to analyse matters of transactional fairness; these are matters relating to the transaction itself, such as the parties’ conduct and characteristics of the parties themselves relevant to the parties’ conduct. On the other hand the court needs to analyse matters of substantive fairness, such as the resulting improvidence of the

* The purpose of this article is to investigate the equitable doctrines of undue influence and unconscionable dealing as they have been applied in Australian courts. A prudent practitioner dealing with circumstances giving rise to such doctrines may also need to investigate statutory relief, such as through the Trade Practices Act 1974 (Cth), but that is beyond the scope of this article.

** Special thanks to Henry Dickson and Samantha Hepburn.

¹ Samantha Hepburn *“Principles of Equity and Trusts”* (2nd ed, 2001) at 129.

² *The Commercial Bank of Australia v. Amadio* (1983) 151 CLR 447, as per Mason J. at 461

³ *Ibid*

transaction. However when the latter matters are used to imply the former matters we may be left with an unusual situation that the doctrine is no longer truly based upon transactional fairness at all.

This essay will aim to determine what the relevance of the substantive matter of an unfair result has upon the application and development of these transactional fairness doctrines in Australia. Primarily focus shall be placed upon the need to keep considerations of transactional fairness and substantive fairness separate, as what is described as first limb and second limb considerations. Also presumptions based upon matters relevant to the transaction shall be separated from presumptions based upon matters relevant to the mere result of the transaction. This shall be highlighted by reference to various cases involving undue influence and unconscionable conduct, as well as the 'special wives equity' which seems to have developed as a hybrid of undue influence but displays its own unique and, in the writer's opinion, dysfunctional existence in Equity.

Undue Influence

There are three main types of undue influence; actual undue influence, presumptive undue influence and proven undue influence. All these categories are concerned with the quality of the consent of the weaker party that is alleged to be subject to the undue influence.⁴ Actual undue influence is not relevant to our present discussion. It involves the proof of actual pressure being exerted during the transaction,⁵ and therefore without doubt focused upon the conduct of the transacting parties, not just the fairness of the overall result of the transaction. Therefore, the following discussion focuses upon presumptive and proven undue influence.

Presumptive undue influence occurs where a presumed relationship of influence exists, in which a special degree of trust and confidence is placed upon the dominant party.⁶ Such relationships are, solicitor and client,⁷ religious adviser and disciple,⁸ physicians and patients,⁹ and parent and child¹⁰. However the categories are not closed,¹¹ but a relationship of trust and confidence must be proven for the presumption to apply.¹²

⁴ Hepburn, above n 1, 129

⁵ Ibid

⁶ R. P. Meagher, J.D. Heydon, and M.J. Leeming *"Meagher, Gummow and Lehane's Equity Doctrines and Remedies"* (4th ed, 2002) at 507

⁷ *Dowsett v. Reid* (1912) 15 CLR 695, as per Barton J. at 707-708

⁸ *Morley v. Loughnan* [1893] 1 Ch 736

⁹ *Breen v. Williams* (1996) 186 CLR 71, as per Dawson and Toohey JJ. at 92

¹⁰ *Phillips v. Hutchinson* [1946] VLR 270 at 273

¹¹ Hepburn, above n 1, 130

¹² K.N. Scott, 'Evolving Equity and the Presumption of Undue Influence' (2002) 18 *Journal of Contract* < <http://www.lexisnexis.com.au/> > [6]

Once the relationship is established, the second limb question becomes ‘is the transaction between the two related parties a gift of importance favoring the dominant party?’ If so, the burden is cast on the dominant party to prove that the transaction was free from ‘undue influence’ and “was the free outcome of the donor’s uninfluenced will”¹³.

If the relationship is not one that can be categorised as being of ‘presumed undue influence’ then a reversal of the burden of proof may still occur through ‘proven undue influence’. ‘Proven undue influence’ has the same effect as ‘presumed undue influence’. The only distinction is that proven undue influence is when an individual relationship of trust and confidence is proven on the facts,¹⁴ rather than simply one of the presumptive categories being established. Therefore the party claiming undue influence has a burden of proof that is not upon them in establishing presumptive undue influence.

In the High Court case of *Johnson v. Buttress*¹⁵ the principle of ‘proven undue influence’ was applied to set aside a transaction when a donor, who was found to be illiterate and below average intelligence with no experience in business,¹⁶ was in a relationship of trust and confidence with a donee. This relationship was found to have affected his free will to carry out gratuitous transactions.¹⁷ Thus the judgment technically focuses upon the relationship of trust and confidence and consent of the donor through relevant considerations and is thus correct in its conclusion that the burden of presumption of influence exists (even though actual undue influence is not proven).¹⁸

However the *result* of the transaction was not irrelevant. Latham C.J. pointed out the land transacted was the donor’s “sole source of income” and the transaction was “highly improvident”¹⁹. Of course this was an assessment of the transactions result, it is an assessment of the gift itself. In *Royal Bank of Scotland v. Etridge (No. 2)*²⁰ it was found that such a ‘gift’ is a ‘gift of importance’ relevant to the discussion above if it is “so large” that it would be seen to be accounted for by usual motives such as charity or friendship.²¹ It would seem that the donor’s gift in Johnson fitted this definition.

Judges may mistakenly find that this assessment of the gift means that if the gift is inexplicably large it must be presumed to have been obtained through undue

¹³ *Watkins v. Combes* (1922) 30 CLR 180 at 193

¹⁴ Hepburn, above n 1, 131

¹⁵ *Johnson v. Buttress* (1936) 56 CLR 113

¹⁶ *Ibid*, as per Latham C.J. at 120-121

¹⁷ *Ibid*, as per Latham C.J. at 122-123; as per Starke J. at 124

¹⁸ *Ibid*, as per Latham C.J. at 123

¹⁹ *Ibid*, as per Latham C.J. at 121

²⁰ *Royal Bank of Scotland v. Etridge (No. 2)* [2001] 4 All ER 449

²¹ *Ibid*, as per Lord Nicholls at 461-462; approving Lindley L.J.’s judgment in *Allcard v. Skinner* (1887) 36 Ch D 145

influence. However that is not what *Royal Bank* states. The size of the gift has no necessary relationship to the conduct of the transaction; it is a consideration additional to findings upon the relationship and the conduct of the transaction. For presumptive and proven undue influence a relationship of influence must be found, and a 'gift' or improvident transaction must be found, but the latter does not imply the former.

However such a distinction has not been found in many cases. In *Union Fidelity Trustee Co. of Australia Ltd v. Gibson*²² Gillard J. found that a relationship of proven undue influence existed between a deceased donor and her personal friend, the Defendant. Given that this presumption was not rebutted, a gift to the Defendant, in the form of the discharging of a mortgage, was set aside.

His Honor correctly focused upon the quality of the donor's consent and the relationship between the Defendant and the donor.²³ However it is not what tests Gillard J. failed to apply but the means by which he applied them that was erroneous. When determining the first limb question of the relationship Gillard J. saw the substantial size of the gift as relevant. Gillard J. found it "difficult to accept that someone had not influenced" the donor and "very difficult" to accept such a possibility in light of, inter alia, "the size of the amount".²⁴ Basically it was found that the size of the gift, which is a second limb question, was very relevant to the question of whether a relationship existed, which is a first limb question.

Unfortunately Gillard J. could neither establish nor disprove a relationship of influence by looking at the size of the gift. Judging solely upon such grounds the relationship between the donor and the Defendant could well have been an innocent friendship free from undue influence. Although Gillard J. did not solely base his judgment on such grounds and considered relevant evidence in addition to the size of the gift when approaching the question of whether a relationship of undue influence existed, it is his mere consideration of the size of the gift as an irrelevant factor that taints his judgment in *Union Fidelity*.

Similar criticisms may be used to analyse the hybrid development of the 'special wives equity' which is discussed below.

'Special Wives Equity'

The 'special wives equity' applies to the situation where a third party creditor gains the surety of a wife for her husband's loan. If the transaction is tainted by the actual undue influence of the husband then the transaction will be set aside if it is proven that the creditor knew there was a marriage, unless the creditor can

²² *Union Fidelity Trustee Co of Australia Ltd v. Gibson* [1969] VIC LEXIS 223
<<http://www.lexisnexis.com.au/>>

²³ *Ibid*, at [3]-[4] and [30]

²⁴ *Ibid*, at [26]

prove the wife received independent legal advice.²⁵ However even if actual undue influence is absent, the second element of the special wives equity is that if the wife did not appreciate the surety transactions effect then the transaction will be set aside unless the creditor took steps to inform the wife and reasonably believed she understood the transaction.²⁶ In both the first and second elements of the ‘special wives equity’ actual or constructive notice of any undue influence or relationship of influence is irrelevant,²⁷ only knowledge of the existence of a marriage is necessary.

These principles were established in the case of *Yerkey v. Jones*²⁸, and subsequently approved in *Garcia v. National Australia Bank*²⁹. Although they are essentially principles that deal with the application of undue influence to third parties their doctrinal separation from traditional undue influence is obvious. Firstly, the principles apply to a third party that need not have had any involvement in the undue influence or the relationship of undue influence whatsoever. Secondly, the second element doesn’t even require actual or presumed undue influence; but it simply imputes the consequences of undue influence into every marriage.³⁰ In *Yerkey* Dixon J. expressly found that marriage was *not* a category of presumptive undue influence, as the “relation of husband to wife is not one of influence”³¹. This finding remains undisturbed by *Garcia*.³²

It is in this doctrinal separation from undue influence that the faults of the ‘special wives equity’ begin to emerge. The ‘special wives equity’ is poorly disguised as a principle that corrects inequitable transactions, when in reality it is simply a principle that imposes a result with no real regard to the conduct of the parties. Although marriage was not found to be a category of presumptive undue influence, the effect of the doctrine seems to be that all married women are subject to the ‘special wives equity’ because they trust their husbands with economic management.

However this basis for the doctrine has no real footing either in today’s society or in the actual majority judgment in *Garcia*. In *Garcia* the majority controversially found that in marriage relationships wives “often” “may” leave business judgments to their husband, and that “often” there is a relationship of trust and confidence.³³ However the court does not ‘often’ enforce the ‘special wives

²⁵ Hepburn, above n 1, 138

²⁶ Ibid

²⁷ Andrew Phang and Hans Tjio, ‘From Mythical Equities to Sustantive Doctrines – Yerkey in the Shadow of Notice and Unconscionability’ (1999) 14 *Journal of Contract Law* 72, 75

²⁸ *Yerkey v. Jones* (1939) 63 CLR 649

²⁹ *Garcia v. National Australia Bank Ltd* (1998) 194 CLR 395

³⁰ George Williams, ‘Equitable Principles for the Protection of Vulnerable Guarantors: Is the Principle in *Yerkey v. Jones* Still Needed?’ (1994) 8 *Journal of Contract Law* 67, 79-80

³¹ *Yerkey v. Jones* (1939) 63 CLR 649, as per Dixon J. at 678; Phang and Tjio, above n 27, 80

³² Phang and Tjio, above n. 27, 89

³³ *Garcia v. National Australia Bank Ltd* (1998) 194 CLR 395, as per Gaudron, McHugh, Gummow and Hayne JJ. at 404

equity' depending on the characteristics of the relationship; it *always* enforces the doctrine for every marriage relationship. But in many cases women do not blindly follow their husband's decision on economic matters, so the doctrine has no real footing based upon the actual relationship.

Furthermore Dal Pont points out that the doctrine has no legitimate basis upon any broad concept of unconscionable conduct by the stronger party. If the 'special wives equity' aims to claim its basis upon some form of unconscionable conduct by the guarantor then logically it would need to claim some wrong-doing by that party. However Dal Pont argues that no such wrong-doing really existed on the Defendant's part in *Garcia*. He finds that such cases are "not so much a conflict between right and wrong as between right and right".³⁴ *Garcia* does not really find a traditional form of 'unconscionable conduct' on the bank's part, it finds:

"a failure to ensure that a volunteer in a specified relationship with another understands the purport and effect of a transaction, meaning that it stems from *omission* rather than commission, and as such is of different genus to unconscionable conduct which forms the basis of certain other equitable doctrines."³⁵

In addition to this, the second element of the 'special wives equity' finds that no relief is available when the wife understands the transaction. Thus in spite of any conduct by the guarantor, one factor that can determine the application of the doctrine is an objective factor totally out of their control. This does not reflect a usual doctrine based on the blameworthiness of the guarantor.³⁶

The sum of these considerations seems to lead to the inevitable conclusion that the 'special wives equity' is also not based upon the conduct of the guarantor or the consent of surety. Indeed, this is supported by the majority judgment's declaration that "the statement that enforcement of the transaction would be 'unconscionable' is to characterise the result rather than to identify the reasoning that leads to the application of that description"³⁷. Therefore the doctrine does not really appear to be correctly and legitimately focused upon any substantial aspect of the transaction. It just imposes a result.³⁸

Why would the court impose such a duty upon the free will of contracting parties? One theory put forward by Dal Pont is that *Garcia* was simply a wealth distribution case, simply placing the loss upon the party most able to bear it.³⁹ Of

³⁴ G. Dal Pont, 'The Varying Shades of "Unconscionable" Conduct – Same Term, Different Meaning' (2000) 19 *Australian Bar Review* 135, 147

³⁵ *Ibid*, at 156

³⁶ *Ibid*, at 157

³⁷ *Garcia v. National Australia Bank Ltd* (1998) 194 CLR 395, as per Gaudron, McHugh, Gummow and Hayne JJ. at 409; *Ibid* at 157

³⁸ Dal Pont, above n 34, 157

³⁹ *Ibid*, at 148

course, such reasoning is not found in the judgment and remains unsubstantiated by express statement⁴⁰, however what also remains unsubstantiated is any substantial logical legal reasoning that links the decision to transactional fairness. The fact that a woman is a wife does not seem to have any comprehensive correlation with the finding of actual unfairness in a transaction in which she is treated as an exploited, unduly influenced, or even blindly trusting party. Thus from being a socially unrealistic assumption of wives, the judgment is also legally flawed.

The point here is not that the 'special wives equity' is faulty because it assumes women are weak. Indeed the majority judgment in *Garcia* found the modern 'special wives equity' was based on the idea that a relationship of trust and confidence "often" affected wives⁴¹, also the majority considered possible future extension of the principle to other groups in relationships of trust and confidence.⁴² The point is that the blanket assumptions about these relationships of trust and confidence, that are found *not* to be relationships of influence,⁴³ have no real correlation with either the parties or the transaction itself.

However Kirby J's separate approach to the 'special wives situation' and third party creditor's in general, which is more consistent with the English approach,⁴⁴ does not necessarily fall into this same fault. In *Garcia* Kirby found that a surety will only be effected by the undue influence or other legal wrong of the principle debtor if the creditor had actual or constructive notice of a relationship of emotional dependence between the parties.⁴⁵ If this is proven then certain steps must be taken by the creditor to ensure the surety's free will is not tainted by emotional dependence.⁴⁶ All these considerations directly relate to the transaction and the relationship between the surety, the principle debtor and the creditor. However in order to keep this approach focused upon the actual transaction and the conduct of the parties as opposed to the mere result of the transaction it is important for future cases to observe the following steps:

- (1). Proof of a "relationship of emotional dependence" means *actual* proof, not proof of a category. Actual proof may be established through evidence

⁴⁰ Ibid, at 147

⁴¹ *Garcia v. National Australia Bank Ltd* (1998) 194 CLR 395, as per Gaudron, McHugh, Gummow and Hayne JJ. at 404; Richard Haigh and Samantha Hepburn 'The Bank Manager Always Rings Twice: Stereotyping in Equity After Garcia' (2000) 26 *Monash University Law Review* 275, 283; note that Su-King Hii argues that this finding is still "clearly influenced by the equitable presumption of invalidating tendency" Su-King Hii 'From *Yerkey* to *Garcia*: 60 Years on and Still as Confused as Ever!' (1999) 7 Australian Property Law Journal, <<http://www.lexisnexis.com.au/>> [39]

⁴² *Garcia v. National Australia Bank Ltd* (1998) 194 CLR 395, as per Gaudron, McHugh, Gummow and Hayne JJ. at 404

⁴³ See for example Dixon J.'s comments on the husband and wife relationship in *Yerkey v. Jones* (1939) 63 CLR 649, as per Dixon J. at 678; Phang and Tjio, above n. 27, 80

⁴⁴ See *Barclays Bank Plc. v. O'Brien* [1993] QB 109

⁴⁵ *Garcia v. National Australia Bank Ltd* (1998) 194 CLR 395, as per Kirby J. at 430-431

⁴⁶ Ibid, 431

relating to the specific relationship. Emotional dependence is not something that can be quickly assumed to exist in categories. For example wives may not invest trust in estranged husbands with whom they conduct an on-going business relationship, and sexual partners do not always have a great emotional bond.

(2). In order to establish a *category* of great dependence, the stringent test of presumptive undue influence, referred to above, must be fulfilled, and the creditor must have notice that the relationship is one of such category. And clearly such a test of influence has not been accepted to be fulfilled in relation to husbands and wives.⁴⁷

Given the fact that Kirby J. aimed to develop a test “broader” than the test in *Yerkey*,⁴⁸ it would be fair to suggest that he did not aim for his test to be narrowly construed to the steps above. However following such steps will keep the test for third party creditors and sureties focused upon the transaction.

Unconscionable Dealing

Unlike the ‘special wives equity’ situations discussed above, the principles of unconscionable dealing are relatively settled and clear in Australia. Basically the doctrine finds that if a stronger party enters into an improvident transaction with a weaker party who suffers from a special disadvantage vis-à-vis the stronger party which affects the weaker party’s ability to protect their own interests; and

- that stronger party either knows of the special disadvantage or knows of facts that would lead to constructive knowledge of that special disadvantage; and
- the stronger party takes advantage of the special disadvantage, either actively or by passively allowing the transaction to proceed; then
- the transaction may be set aside for unconscionable dealing⁴⁹ or another equitable remedy may be applied.⁵⁰

The doctrine is not that dissimilar to undue influence in that it contains first and second limb considerations. With unconscionable dealing the first limb considerations are focused on whether or not the transaction was tainted by unconscionable dealing. Such considerations are primarily focused upon whether or not the conduct of the stronger party involved an unconscionable

⁴⁷ *Yerkey v. Jones* (1939) 63 CLR 649, as per Dixon J. at 678; Phang and Tjio, above n. 27, 80

⁴⁸ *Garcia v. National Australia Bank Ltd* (1998) 194 CLR 395, as per Kirby J. at 433-434

⁴⁹ *The Commercial Bank of Australia v. Amadio* (1983) 151 CLR 447, as per Gibbs C.J. at 459; *Turner v. Windever* [2003] NSWSC 1147 (4 December 2003), as per Austin J.

<[http://www.austlii.edu.au/cgi-](http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/supreme%5fct/2003/1147.html?query=title%28turner+%20near+%2e+windever%29)

[bin/disp.pl/au/cases/nsw/supreme%5fct/2003/1147.html?query=title%28turner+%20near+%2e+windever%29](http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/supreme%5fct/2003/1147.html?query=title%28turner+%20near+%2e+windever%29)> [105]

⁵⁰ *Louth v. Diprose* (1992) 175 CLR 621

taking of advantage of the weaker party's special disadvantage⁵¹. These matters involve the actual conduct of the stronger party, the actual existence of a special disadvantage in the weaker party and a necessary link between the two. Once this is established the second limb consideration is whether or not the result of the transaction was an improvident transaction.

The leading case of *The Commercial Bank of Australia Ltd v. Amadio*⁵² provides an example of the correct approach to unconscionable conduct. In that case a son asked his migrant parents, who had a poor command of English, to provide security for his loan from the Defendant. The son was in a poor financial situation and although the Defendant had knowledge of his finances, his parents did not.⁵³ A combination of factors led to the High Court's decision that the parents suffered a special disadvantage vis-à-vis the bank. Mason J. points to age, a limited command of English, and a lack of knowledge of their son's financial position which "the bank well knew"⁵⁴ Similar factors were pointed out by some other Justices,⁵⁵ while others such as Gibbs C.J. focused upon different matters in the case.⁵⁶ However the important fact to point out is the court addressed real factors that focused upon the conduct of the bank and involved the parties and the transaction. The fact that the result of the transaction was improvident was not a primary element in the Justices' decision that the dealings were unconscionable.

The later High Court decision in *Louth v. Diprose*⁵⁷ also seemed to technically apply the test correctly, although not without controversy. In that case it was found that a lawyer, Diprose, infatuated with a woman, Louth, was at a special disadvantage of unusual emotional dependence, which was exploited by the Louth when she "manufactured" an "atmosphere of crisis" and made suicide threats to influence Diprose to carry out an improvident transaction in her favour.⁵⁸ Ultimately the trial Judge found that a usually infatuated man had had his special disability of unusual emotional attachment exploited by Louth's conduct, and these matters were relevant to transactional fairness.

The trial Judge's findings were upheld by the majority. However Toohey J. dissented because he found that Diprose was not disabled by emotional attachment, despite the fact that the trial Judge had already ruled the opposite based upon his findings of fact.⁵⁹ Although Toohey's questioning of the facts has

⁵¹ *The Commercial Bank of Australia Ltd. v. Amadio* (1983) 151 CLR 447, as per Mason J. at 461

⁵² *The Commercial Bank of Australia Ltd. v. Amadio* (1983) 151 CLR 447

⁵³ Hepburn, above n 1, 147

⁵⁴ *The Commercial Bank of Australia Ltd. v. Amadio* (1983) 151 CLR 447, as per Mason J. at 464

⁵⁵ Peter Glover "Equity, Restitution & Fraud" (1st ed, 2004) at 285; *The Commercial Bank of Australia Ltd. v. Amadio* (1983) 151 CLR 447, as per Deane at 477

⁵⁶ Peter Wilson 'Unconscionability and fairness in Australian equitable jurisprudence' (2004) 11 Australian Property Law Journal, < <http://www.lexisnexis.com.au/>> [16]

⁵⁷ *Louth v. Diprose* (1992) 175 CLR 621

⁵⁸ Ibid, as per Brennan J. at 630

⁵⁹ *Diprose v. Louth (No. 1)* (1990) 54 SASR 438 at 448 per King C.J.

been repeated,⁶⁰ the only new question for the development of unconscionable dealing answered in *Louth* seemed to be that emotional dependence can be a 'special disadvantage'.

Bridgewater v. Leahy:

The majority in *Bridgewater v. Leahy*⁶¹ followed the development of emotional dependence as a special disability but unlike *Louth*, they failed to consider the transaction and the parties correctly, it was almost entirely based upon the improvidence of the transaction and the deemed resulting unfairness. On the facts of the case Bill York engaged in an improvident transaction for the sale of land to his nephew Neil York. Bill had a working relationship with Neil and did not want the property broken up after his death. It seems from the facts that Bill saw Neil as the best person to keep and operate his property. At trial the Judge seemed to consider undue influence and found that there was no undue influence and Bill's will was not overborne.⁶²

On appeal a majority of the High Court set aside the transaction for unconscionable dealing. The majority focused heavily upon the fact that the transaction was improvident.⁶³ They did not seem to question that Bill was not of sound mind or that he did not understand the transaction, on the contrary they found that Bill aimed to preserve the land and saw Neil as an experienced and reliable candidate to fulfill this aim and that was a major element in Bill's emotional dependency upon Neil.⁶⁴ Their Honors appear to be finding that Bill has a special disadvantage similar to that found in *Louth*, but the reasoning is much less convincing. In essence they are saying that since Neil is found to be the best person to sell the land to, this is a major factor leading to Bill being dependant upon him. Does this mean that any family member who wants to sell a property to another particular family member is at a 'special disadvantage'?

Secondly their Honors found that Neil passively took advantage of Bill's 'special disadvantage' by allowing the sale to go ahead.⁶⁵ Admittedly passive means of exploitation are an acceptable part of the *Amadio* test, but there are conscious passive means of exploitation and there is innocent passivity. For example, Louth in *Louth v. Diprose* passively exploited Diprose by allowing the transaction to proceed, but this was only after she had unconscionably created an "atmosphere of crisis".⁶⁶ But Neil appears to have done absolutely nothing

⁶⁰ G. E. Du Pont, D. R. C. Chalmers, and J. K. Maxton "*Equity and Trusts: Commentary and Materials*" (3rd ed, 2004) at 295

⁶¹ *Bridgewater v. Leahy* (1998) 194 CLR 457

⁶² Anne Finlay 'Can We See the Chancellor's Footprint?: *Bridgewater v. Leahy*' (1999) 14 *Journal of Contract Law*, < <http://www.lexisnexis.com.au/> [4]-[7]

⁶³ *Bridgewater v. Leahy* (1998) 194 CLR 457, as per Gaudron, Gummow and Kirby JJ. at 493

⁶⁴ *Ibid*

⁶⁵ *Ibid*

⁶⁶ *Louth v. Diprose* (1992) 175 CLR 621, as per Brennan J. at 630

unconscionable on the facts of the case.⁶⁷ The majority judgment seemed much less concerned with these matters and much more concerned with the fact that they believed the effect of the transaction to be “neither fair nor just and reasonable”⁶⁸ and “grossly improvident”.⁶⁹

One of the few considerations that seem to provide considerable focus upon the parties conduct is the fact that Neil first suggested the improvident transaction. Although this appeared an important consideration,⁷⁰ it far from conclusively proves unconscionable dealing on Neil’s part and occupies a minor section of the majority’s judgment compared to the considerations listed above.⁷¹

Relevance of an unfair result for future unconscionable dealing and undue influence cases

Thus *Bridgewater* provided evidence that the improvidence of the transaction and the subjectively determined resulting unfairness of the transaction may be deemed relevant, if not decisive, to cases of unconscionable dealing. Indeed other jurisdictions, have followed such an approach in relation to similar doctrines.⁷² So the question remains how relevant should an unfair result be to the granting of relief for unconscionable dealing? Tina Cockburn finds that:

“Although inadequacy of consideration is not sufficient to set aside a contract unless it is so gross that it is clear evidence of unconscionable dealing, inadequacy of consideration may support an inference that a position of disadvantage existed and assist in showing that unfair use was made of it.”⁷³

With respect, I do not agree with this position. As with the doctrine of undue influence, a strict separation should occur between first limb considerations relevant to finding that an unconscionable dealing existed during the transaction, and the second limb consideration that the transaction was improvident. The blameworthiness of the Defendant and thus the broader concept of unconscionable conduct are central to the doctrine of unconscionable dealing.⁷⁴

⁶⁷ Tina Cockburn ‘The Boundaries of Unconscionability and Equitable Intervention: *Bridgewater v. Leahy*’ (1999) 8 Australian Property Law Journal 24, < <http://www.lexisnexis.com.au/> > [19]

⁶⁸ *Bridgewater v. Leahy* (1998) 194 CLR 457, as per Gaudron, Gummow and Kirby JJ. at 492

⁶⁹ *Bridgewater v. Leahy* (1998) 194 CLR 457, as per Gaudron, Gummow and Kirby JJ. at 493; Du Pont, above n. 34, 145

⁷⁰ Finlay, above n. 62, [12]

⁷¹ *Bridgewater v. Leahy* (1998) 194 CLR 457, as per Gaudron, Gummow and Kirby JJ. at 493

⁷² *Nichols v. Jessup (No. 2)* [1986] 1 NZLR 237, as per Prichard J. at 239; Du Pont, above n. 34, 143-144

⁷³ Cockburn, above n. 67, 21

⁷⁴ *Turner v. Windever* [2003] NSWSC 1147 (4 December 2003), as per Austin J.

<<http://www.austlii.edu.au/cgi->

However to look at the improvidence of the transaction is not to look at the Defendant's conduct. It is to deem unconscionable conduct where any number of reasons, such as concerns for the maintenance of a farm after death, may provide explanation for the grantor's will that is perceived as having an unfair result. Thus to deem unconscionable conduct is not the domain of the doctrine of unconscionable dealing.⁷⁵

Similar reasoning may be applied to find that the substantive unfairness of the result of the transaction should not be used to imply lack of consent into the transaction. If the weaker party's lack of consent remains the vital concern of undue influence then influence of the substantive unfairness of the result should have a restricted application. The result of the transaction remains relevant to determining whether or not the transaction is improvident but it should not be used to irrationally justify the means. This does not mean presumptions cannot occur. Presumptive undue influence has a settled place in equity because the presumptions are rationally based upon the relationship of the parties and the possibility of a lack of consent by the weaker party.

The doctrines of undue influence and unconscionable dealing therefore have one vital point in common. They are based upon transactional fairness not substantive fairness. Undue influence is based upon a lack of consent, while unconscionable dealing is based upon exploitation of a 'special disadvantage'. Thus this is what separates the doctrines from other equitable principles like penalties, which are based upon substantive unfairness.

However as seen in the cases above the correct application of these transactional fairness doctrines has been absent on many occasions. This does not mean the doctrines cannot expand or indeed branch off into the development of separate new doctrines, but when such expansion occurs the courts need to rationalise their decision. The reason that doctrines like the 'special wives equity' are so confusing is that the courts claim them to be based upon transactional fairness when they are supported by considerations not relevant to transactional fairness. Equity can evolve principles of substantive unfairness based on the result of the transaction but it should do so with rational explanation. To do otherwise is to infringe on the common law right of persons to freely contract, and this is to truly conflict with the common law rather than to complement it.⁷⁶

[⁷⁵ Du Pont, above n. 34, 157](http://bin/disp.pl/au/cases/nsw/supreme%5fct/2003/1147.html?query=title%28turner+%20near+%2e+winder%29> [105]</p></div><div data-bbox=)

⁷⁶ Maitland found that equity doesn't conflict with the common law it complements it; Frederic William Maitland "*Equity, Also the Forms of Action at Common Law*" (1910) at pp. 18-19