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KNOCKING DOWN THE STRAW MAN: REFLECTIONS ON *BOM v BOK* AND THE COURT OF APPEAL'S "MIDDLE-GROUND" NARROW DOCTRINE OF UNCONSCIONABILITY FOR SINGAPORE

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In *BOM v BOK*, the Singapore Court of Appeal settled a three-pronged test for unconscionable transactions: (1) plaintiff "infirmity", (2) defendant "exploitation" of plaintiff infirmity, and (3) evidential burden on defendant to show the challenged transaction to be "fair, just and reasonable". This formulation is intended to represent a "middle-ground" doctrine of unconscionability, in the sense that it is broader than the *original* "narrow doctrine" of unconscionability from such cases as *Fry v Lane* and *Cresswell v Potter* in England, but "much narrower" than the "broad doctrine" of unconscionability in such cases as *Commercial Bank of Australia Ltd v Amadio* in Australia. The Court rejected for Singapore the so-called "broad doctrine" on the ground that it is too unruly to function as a legal doctrine. To the extent that the Court saw the *Amadio* formulation as representing the spurned "broad doctrine", this article is an attempt to defend that formulation against a charge of hopeless uncertainty. In significant respects, it is argued, the Court's "middle-ground" doctrine is itself *potentially broader* than the *Amadio*-style approach to unconscionability.

I. INTRODUCTION

There is much to admire in the Singapore Court of Appeal's recent examination of the law relating to unconscionability (and other vitiating factors) in *BOM v BOK*.[1] It is lamentably rare for courts to pause nowadays to reflect deeply, and on this occasion at considerable length, about the conceptual and practical underpinnings of the modern doctrine of unconscionability as it affects both bargain transactions and voluntary dispositions.[2] Instead, many modern decisions, including those of very senior courts, resonate of what might be termed "ritual incantation"[3] or "reflex

* Professor, TC Beirne School of Law, The University of Queensland. I am grateful to an anonymous referee for his or her helpful comments on the original version of this article. I have tried my best to take those comments into account, although it possible that I have not adequately addressed all of them. Remaining failures, errors or omissions are mine alone.

1 [2018] SGCA 83 [*BOK (CA)*].

2 The Court does not consider the possibility that the unconscionability doctrine might apply differentially as between bargain and non-bargain transactions. It is occasionally suggested that the jurisdiction may be more liberally applied in relation to gift transactions than genuine contracts: see *eg, Wilton v Farnsworth* (1948) 76 CLR 646 (HCA) at 649 *per* Latham CJ, 655 *per* Rich J; *Scott v Wise* [1986] 2 NZLR 484 (CA) at 492-493 *per* Somers J, quoted in *Dark v Boock* [1991] 1 NZLR 496 (HC) at 502 *per* Heron J; *Williams v Maalouf* [2005] VSC 346 at para 192 *per* Hargrave J.

3 To borrow a phrase from *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 at 42 (CA) *per* Cooke P.

repetition"[4]—a praxis of serialised rote dependence on select passages from prior cases with nothing new being offered in the way of explanation or critical analysis.[5] And while this habit may well be understandable given the workload confronting modern appellate courts, it is not ideal for orderly development of the law. It may even perpetuate "historical missteps" in the progression of the law.

Now, no one who reads *BOK (CA)* could accuse the Court of not expending the intellectual calories necessary for the achievement of coherence and practical order in a notoriously difficult subdivision of the law. Indeed, their Honours go well beyond what was necessary to decide the substantive appeal in an attempt to clarify the law for the benefit of future courts, litigants and legal advisers, including appending a "coda" to their main judgment in which the Court addresses the novel (and somewhat radical) question of whether the independent doctrines of duress and undue influence might plausibly be subsumed within a "single umbrella doctrine of unconscionability". Such a doctrine would, *ex hypothesi*, be a *broad* doctrine of unconscionability, which the Court "eschews and rejects" as part of the law of Singapore.[6] A broad doctrine of unconscionability, the Court concludes, is unfortunately "riddled with a lack of legal clarity" and hence too uncertain to function as a legal doctrine.[7] Instead, the Court settles on a (modified) "middle-ground" *narrow* doctrine of unconscionability, which, their Honours also hypothesise, but do not definitively decide, may be no different than "Class 1" undue influence.

In this article, I attempt to capture, in summary form, the Court's reasoning that led to a rejection of the so-called "broad doctrine" of unconscionability in and for Singapore. To the extent that their Honours understood such a doctrine to be represented—indeed "perhaps best exemplified"[8]—by the leading Australian case of *Commercial Bank of Australia Ltd v Amadio*,[9] I also attempt to defend the *Amadio* formulation of unconscionability against a charge of hopeless uncertainly. I argue that in both form and application, the *Amadio* unconscionability doctrine is in fact no broader, and in some respects may even be *narrower*, than the "middle-ground" narrow doctrine that the Court ultimately endorses in *BOK (CA)*. Indeed, the *Amadio* doctrine appears to function as something of a "straw man" in the Court's reasoning, which their Honours were able to knock down in an attempt to fortify their "much narrower"[10] doctrine. In the closing part of the article, I also address the question of the wisdom of assimilating the doctrines of duress, undue influence and unconscionable dealing to form a "single umbrella doctrine of unconscionability". Although the Court ultimately recoiled from implementing such a reform initiative for essentially the same reasons it rejected the "broad doctrine" of unconscionability, their Honours nevertheless considered the case for assimilation to be a strong one based on

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4 Dennis R. Klinck, "The unexamined "conscience" of contemporary Canadian equity" (2001) 46 McGill LJ 571 at 611.

5 A welcome recent exception in the area of unconscionability is the Canadian case of *Downer v Pitcher*, 2017 NLCA 13 [*Downer*], which is not cited in *BOK (CA)*. I examine *Downer* in Rick Bigwood, "Rescuing the Canadian Unconscionability Doctrine? Reflections on the Court's 'Applicable Principles' in *Downer v. Pitcher*" (2017) 60 Can Bus LJ 124.

6 See *BOK (CA), supra* note 1 at para 148.

7 *Ibid* at para 121.

8 *Ibid* at para 132.

9 (1983) 151 CLR 447 (HCA) [*Amadio*].

10 *BOK (CA), supra* note 1 at para 158.

perceived "linkages or relationships" across the various doctrines marked for subsumption under the umbrella doctrine. And while I accept and welcome the Court's decision not to embrace the enveloping doctrine envisaged, I respectfully argue that the linkages or relationships across the subject doctrines may not be as strong as the Court apprehended. Quite apart from the question of whether "workable" criteria could conceivably be formulated so as to discipline an ambitious "umbrella doctrine" of unconscionability, doctrinal amalgamation would nevertheless risk destruction of critical points of distinction that arguably exist among the subject doctrines and which, in my view, necessitate their continued separation as independent grounds for relief from improper transactions or benefits. And while this may no longer matter now for Singapore in the light of the Court's resounding rejection of the umbrella doctrine on uncertainty grounds, it may continue to serve as a caution to others who continue to agitate for doctrinal amalgamation on the basis of perceived "linkages or relationships" among the subject doctrines alone. Moreover, the question of the precise conceptual connections and practical overlaps among the various doctrines examined by the Court in *BOK (CA)* remains alive for future cases where it must be decided whether, and to what extent, an individual exculpatory doctrine can be applied in the resolution of a particular claim, that is, to the complete exclusion of some alternative ground for relief.

II. The Main Judgment

I shall begin by discussing the main grounds of the substantive appeal before discussing separately the Court's "coda" below.

A. *The Facts and Trial Decision*

A week after his mother's death, a wealthy 29-year-old husband signed a trust deed prepared by his formerly practising-lawyer wife after a heated argument between them. The deed purported to establish an unconditional and irrevocable trust over all of the husband's assets in favour of the couple's infant son as sole beneficiary, the husband and wife being named as joint trustees. After the wife subsequently filed for divorce, the husband commenced proceedings to set aside the trust on the grounds that the wife had misled him as to his ability to use his assets freely during his lifetime (that is, that the trust would only take effect upon the husband's death), that (relatedly) he was causatively mistaken as to the legal effect of the deed that he was asked to sign, that the wife had exercised "undue influence" over him in procuring the execution of the trust deed, and that the trust deed was an "unconscionable transaction".

The husband claimed that the wife's request for him to sign the trust deed took him by surprise, and, moreover, that she had threatened to eject him from a property (the family home of the wife's parents), where he was then-currently residing, if he did not sign the trust deed immediately. Although the husband initially refused to sign, which led to an argument between the couple, he eventually capitulated later the same evening. The husband claimed that the wife had, with the assistance of her father, "pressured" him into signing the trust deed, and also that the wife had not

provided him with any explanation as to the legal purport of the deed that he felt pressed to sign.

The Judge at first instance set aside the trust for misrepresentation, mistake, undue influence and unconscionability. She accepted that the husband had not requested that the wife prepare the trust deed but rather was taken by surprise when she asked him to sign it.[11] Her Honour also found that, at the time of signing, the husband was experiencing acute grief and a sense of isolation as a result of his mother's recent death, which rendered him susceptible to the wife's influence, underscored in part by the fact that the husband's decision to sign the deed was "out of character" for him.[12]

The Judge also found that the wife had knowingly misrepresented to the husband that the deed would only take effect upon his death, and that he was thus free to use his assets during his lifetime, which misrepresentation influenced the husband's decision to sign.[13] The wife's misrepresentation was further given credibility by the wife's father (a senior lawyer who was involved in the circumstances leading to the signing of the impugned deed) not contradicting it.[14] The Judge also found that the wife was aware of the husband's vulnerable mental state and intended to use that to her advantage, as corroborated in part by the wife's "inexplicable sense of urgency" in relation to finalising the arrangement.[15] The Judge also found that the husband had a limited comprehension of how trusts operated, despite holding a Masters of Law from a reputable English university.[16]

As for undue influence, the Judge held that the deed creating the trust was voidable for both "Class 1" and "Class 2A" undue influence. There was "Class 1" undue influence because the wife took advantage of her ability to influence the husband, which ability was a result of husband's susceptibility to influence due to his relationship with the wife and the grief he was experiencing in the wake of his mother's death.[17] There was also "Class 2A" undue influence because, although a husband–wife relationship does not "give rise to an irrebuttable presumption of a relationship of trust and confidence", there was nevertheless an "implied retainer between the couple which created such a presumption".[18]

Finally, the Judge also held that the deed could be set aside on the basis of "the doctrine of unconscionability", as there was (1) "weakness" on the husband's side (resulting from his acute grief and creating, for the wife, "a window of opportunity for oppression"), (2) the wife had "exploited" that weakness-hence-opportunity (as evidenced by a transaction at undervalue), and (3) the wife could not demonstrate that the transaction was a "fair, just and reasonable way of providing for [the husband's] family".[19]

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11 *BOK v BOL* [2017] SGHC 316 [*BOK (HC)*] at para 41.
12 *Ibid* at para 51.
13 *Ibid* at para 52.
14 *Ibid* at para 65.
15 *Ibid* at para 57.
16 *Ibid* at para 73.
17 *Ibid* at para 92.
18 *Ibid* at para 94; See *BOK (CA), supra* note 1 at para 27(c).
19 *BOK (HC), supra* note 11 at paras 123-124; *BOK (CA), supra* note 1 at para 27(d).

B. *In the Court of Appeal: Misrepresentation, Mistake and Undue Influence*

The wife and son appealed the first-instance Judge's decision. Ignoring for present purposes two preliminary issues that the Court of Appeal had to resolve before dealing with the substantive appeal, the principal substantive issue for decision was whether the Judge was correct in setting aside the trust deed for misrepresentation, mistake, undue influence and/or unconscionability. No real challenge was made by the appellants to the Judge's analysis and application of the relevant principles of law; rather, objection was taken to her Honour's findings of fact as to the husband's desire to sign the trust deed, his understanding of how trusts operated, and the precise events on the evening the trust deed was signed. Indeed, a considerable portion of the discussion on appeal involved challenges to the Judge's assessment of the evidence (including as to the credibility of witnesses), but ultimately the Court found no errors in that regard. Certainly, in the Court's view, that the husband had no intention to execute a trust that divested him immediately of all his assets reinforced a conclusion that he was indeed "taken by surprise" when the wife presented to him for signature a document that would have precisely that effect.[20]

The Court of Appeal upheld the Judge's decision on all grounds (apart from "Class 2A" undue influence), there being no basis to disturb her Honour's decision to set aside the deed of trust. Again, the appellants could not show that the Judge had erred in her assessment of the evidence. The husband was indeed seriously mistaken as to the legal effect of the trust deed—that it would only take effect upon his death—but that misapprehension was the result of a fraudulent misrepresentation on the part of the wife that induced the husband to sign the impugned deed when he had no desire to divest himself immediately of all his assets. The deed was thus voidable for deceit, as well as for serious causative mistake in equity in accordance with the principles in *Pitt v Holt*,[21] which principles apply to voluntary dispositions.[22]

Although the Court's determination as to misrepresentation and operative mistake sufficed to dispose of the appeal against rescission of the trust deed, their Honours nevertheless proceeded to consider the other grounds that the Judge applied in setting aside the impugned trust: undue influence and unconscionability. As for undue influence (I shall consider unconscionability separately below), the Judge had set aside the deed for both "Class 1" and "Class 2A" undue influence. The Court of Appeal agreed with her insofar as Class 1 undue influence could be established on the facts, but disagreed that there was Class 2A undue influence. The Judge found Class 1 undue influence, which does not depend upon proof or presumption of a "relationship of trust and confidence", because the wife, who had the capacity to influence her acutely grieving husband, "had exercised the influence unduly by taking advantage of his vulnerability by persistently asking him to sign the [trust deed], making the misrepresentation, and roping in the Father, whom the Husband respected as a senior lawyer, to convince the Husband to sign the [trust deed]".[23] The Judge found Class 2A undue influence because there was an "implied retainer" between the husband and the wife, which gave rise to "an irrebuttable presumption of a relationship of

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20 *BOK (CA), supra* note 1 at para 63.
21 [2013] 2 AC 108 (SC).
22 *BOK (CA), supra* note 1 at para 92.
23 *Ibid* at para 94.

trust and confidence" between the couple.[24] The deed of trust was "manifestly disadvantageous" to the husband and the wife was unable to discharge the consequent burden of showing that undue influence had not been exercised.

The appellants argued that there could be no Class 1 undue influence if the party alleged to have exercised such was not the one benefiting from the resultant transaction. This argument was quickly dismissed by the Court; for the problem with undue influence is not a matter of who is ultimately benefiting from the improper diversion of value, but rather one of *how* the improper diversion of value was produced: "It therefore matters not that the person benefiting from the voluntary disposition or transaction had not exercised any influence over the plaintiff. What matters is that the voluntary disposition or transaction resulted from a wrongful exercise of influence."[25] With respect, it is hard to argue against that logic (subject, of course, to the usual defences available to a factually innocent third-party recipient of a benefit resulting from another's wrongdoing to which he or she (the third party) was in fact a stranger).

As to the existence of Class 1 undue influence itself, the Court agreed that suffering from acute grief can put a person into a vulnerable state, leaving him or her with poor judgment and susceptible to the influence of another.[26] Also, undue influence is not dependent on the alleged victim lacking "mental capacity", as she or he may possess full capacity and yet suffer an impairment of "free will" as a result, for example, of the "bullying or importunity" of another. That, the Court concluded, was the case here: the wife knew that the husband was in no appropriate state of mind to execute important legal documents; and she knew that he was a lonely individual who, following his mother's death, had only the son and herself whom he now could call family. Yet this did not prevent her from "pressuring" him into signing the impugned deed under threat of being chased out of the property where he was currently residing. The Court saw this as a clear case of the wife taking advantage of the husband by "badgering him" into signing the trust deed. It was not the point that if the husband had been chased out of his current residential situation he would have had multiple other properties to which to turn: "the threat of being chased away by the wife ha[d] less to do with homelessness and more to do with exploiting the Husband's acute sense of loneliness in a time of grief".[27]

Although in the light of the Court's conclusion on Class 1 undue influence it was not necessary to consider the possible existence of Class 2A undue influence as well, their Honours nevertheless thought it important to express a view on the question of whether an "implied retainer" existed between the husband and the wife so as to generate "an irrebuttable presumption of a relationship of trust and confidence" between them. This was essentially a matter of whether, on a holistic objective inquiry, the wife could reasonably be understood to have been acting as a putative solicitor to the husband as putative client at the relevant time, and that that ought to have been reasonably apparent to the wife.[28] But the Court disagreed with the Judge that an implied retainer emerged from all the circumstances, despite the wife

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[24] *Ibid*.
[25] *Ibid* at para 103.
[26] *Ibid* at para 105.
[27] *Ibid* at para 106.
[28] *Ibid* at para 109.

having drafted the impugned deed of trust and the husband customarily relying on the wife for legal advice. The Court thought that the Judge had assigned insufficient weight to the non-commercial nature of the marital status of the parties, drawing as well on Atkin LJ's famous remarks in *Balfour v Balfour*[29] as to the reasons in policy why courts are slow to find an intention to create legal relations in the context of a domestic arrangement.[30] Although the Court would not foreclose the possibility of an implied retainer arising between spouses, that, their Honours said, would be a rare eventuality and there was nothing on the present facts "to tip the scale in favour of a finding that [such an arrangement existed between the wife and the husband]".[31]

C. *In the Court of Appeal: Unconscionability*

Having dispensed with the previous grounds for relief, the Court then turned to what their Honours saw as the "most contentious of the vitiating factors" raised in the appeal: "unconscionability".[32] The Judge at first instance had held that the doctrine of unconscionability was part of the law of Singapore and that the trust deed was voidable for having been procured by "unconscionable conduct". Although the Court agreed with the Judge's finding in that regard, their Honours differed in their reasons. This was then followed by a lengthy discussion of the exact parameters of the unconscionability doctrine in Singapore: was it a *narrow* doctrine or a *broad* doctrine, or perhaps something in between?

The Court began by drawing a distinction between "unconscionability" as a "*rationale*"—that is, as "a mere general underlying justification for a … doctrine"[33]—and "unconscionability" as a "*legal doctrine*" itself—that is, as the specific doctrinal vehicle that a court invokes to justify setting aside a particular transaction impugned in the name of the particular doctrine: the substantive doctrine of "unconscionable bargain" or "unconscionable dealing", in contrast to say "undue influence" or "duress". The doctrine of unconscionability, of course, will reflect and implement unconscionability as a rationale, but it cannot, by hypothesis, be the doctrine itself.[34] As a rationale, said the Court, the concept of unconscionability "refers to the spirit of justice and fairness that is embodied in the maxim that 'one is not permitted to take unfair advantage of another who is in a position of weakness"',[35] but this, of course, is too general, or too vague and loose, to itself be utilised as a *legal doctrine*. Indeed, if the doctrine were to be framed so as to be virtually indistinguishable

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29 [1919] 2 KB 571 (CA) at 579.

30 *BOK (CA), supra* note 1 at paras 111-112.

31 *Ibid* at paras 110, 112.

32 *Ibid* at para 114.

33 *Ibid* at para 122 [emphasis omitted].

34 *Ibid* at para 118.

35 *Ibid* at para 119. Of course, as a rationale, "unconscionability", like its predecessor, "equitable fraud", underlies or informs a number of specific doctrines or heads of equitable jurisdiction that regulate conduct or circumstances that do not necessarily involve "taking unfair advantage of special vulnerability or weakness". Profiting from a position of trust or confidence, insisting upon one's rights where such insistence is "harsh", "unjust" or "oppressive" (*eg*, estoppel), unjustly denying obligations, or unjustly retaining property are all examples of "conscience"-affecting conduct or circumstances that may or may not be accompanied by unfair advantage-taking.

from its rationale, it would, self-evidently, not supply the certainty and predictability expected of a substantive legal doctrine.[36] "The challenge", the Court said, "is [thus] to distil the general rationale of unconscionability into a legally workable doctrine."[37]

To that end, the Court considered two possible formulations of the doctrine of unconscionability: the "narrow" doctrine and the "broad" doctrine. The *narrow* doctrine of unconscionability is founded historically on cases involving improvident transactions or bargains with expectant heirs,[38] but it was subsequently extended by English courts to other types of transactions and dealings, albeit still in relation to a tightly circumscribed class of eligible persons. The Court[39] thus cited *Cresswell v Potter*[40] as indicative of the contemporary form of the *narrow* doctrine of unconscionability. In that case, Megarry J, relying on the much earlier views of Kay J in *Fry v Lane*,[41] presented "three requirements" for relief:[42]

> What has to be considered is, first, whether the plaintiff is poor and ignorant; second, whether the sale was at a considerable undervalue; and third, whether the vendor had independent advice.

As for the *broad* doctrine of unconscionability, the Court saw this as "perhaps best exemplified"[43] by the leading Australian decision of the High Court of Australia in *Amadio*.[44] Their Honours selected the following passage from Deane J's judgment in that case as indicative of the parameters of the "broad doctrine":[45]

> The jurisdiction [of courts of equity to relieve against unconscionable dealing] is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable …

The Court, however, *rejected* this formulation of the unconscionability doctrine on the ground that it is "phrased in too broad a manner inasmuch as it affords the court too much scope to decide on a subjective basis".[46] Despite Mason J's statement in *Amadio* that mere inequality of bargaining power is insufficient to succeed under the doctrine, their Honours' observed that "the *Amadio* formulation comes dangerously close to

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36 *Ibid* at para 125.
37 *Ibid* at para 126.
38 For *example, Earl of Chesterfield v Janssen* (1750) 2 Ves Sen 125, 28 ER 82.
39 See *BOK (CA), supra* note 1 at para 130.
40 [1978] 1 WLR 255 (HC) [*Cresswell*].
41 (1888) 40 Ch D 312 [*Fry*].
42 *Cresswell, supra* note 40 at 257.
43 *BOK (CA), supra* note 1 at para 132.
44 *Supra* note 9.
45 *Ibid* at 474, citing *O'Rorke v Bolingbroke* (1877) 2 App Cas 814 at 823 *per* Lord Hatherley; *Fry, supra* note 41 at 322 *per* Kay J; *Blomley v Ryan* (1956) 99 CLR 362 (HCA) at 428-429 *per* Kitto J [*Blomley*].
46 See *BOK (CA), supra* note 1 at para 133; *Lloyds Bank Ltd v Bundy* [1975] QB 326 at 336-337 (CA) [*Bundy*].

the ill-founded principle of 'inequality of bargaining power' that was introduced in *Lloyd's Bank v Bundy* [*sic*]".[47] The Court then noted a number of subsequent English authorities[48] that have purported to shift away from the original narrow doctrine, formulating the jurisdiction in the same broad language as was employed in *Amadio*, so as to become, "in substance at least",[49] *no different than* the broad doctrine of unconscionability.

The Court then turned to consider whether there might be a *middle ground* between the original narrow doctrine of conscionability and the (rejected) broad doctrine of unconscionability. Does rejection of the broad doctrine necessitate endorsement of the narrow one *as originally formulated*?[50] Or is it possible to *modify* the elements of the narrow doctrine "without necessarily descending down the slippery slope into what is, in substance, the broad doctrine of unconscionability"?[51]

In short, the Court held that it was indeed possible. What was necessary is that the first element laid down in *Fry* and *Cresswell*—that the claimant is "poor and ignorant"—be extended to include *other* forms of infirmity, whether physical, mental and/or emotional in nature.[52] Of course, such an inquiry would be "an intensely fact-sensitive one", and not every "infirmity" would quality for the purpose: the infirmity "must have been of sufficient gravity as to have *acutely* affected the plaintiff's ability to 'conserve his own interests'".[53] It must also have been, or ought to have been, evident to the other party.[54] However, the second and third requirements of *Fry* and *Cresswell*—whether the sale was at a considerable undervalue, and whether the claimant had received independent advice—were not mandated as doctrinal elements, although the Court conceded that they were important "factors" that a court would take into account. Certainly, their Honours said, the presence of undervalue and absence of independent advice would make it virtually impossible for the defendant to be able to show that the impugned transaction "was nevertheless fair, just and reasonable".[55]

So, the "middle-ground" (but still "narrow") doctrine of unconscionability applicable in Singapore can be summarised as follows:[56] The plaintiff must show (1) that she or he "was suffering from an [acute] infirmity", and (2) that "the other party exploited [that acute infirmity] in procuring the transaction". Upon proof of (1) and (2), the burden is then placed on the defendant to show (3) that the impugned transaction "was nevertheless fair, just and reasonable". As to (3), the court will consider whether the transaction was at an undervalue or whether the plaintiff had received independent advice in assessing whether the transaction was "improvident". The

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47 See *BOK (CA), supra* note 1 at para 133.

48 See *BOK (CA), supra* note 1 at paras 135-137. The Court mentions or discusses *Multiservice Bookbinding Ltd v Marden* [1979] 1 Ch 84 (HC), especially at 110 *per* Browne-Wilkinson J (as he then was); *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87 at 94-95 (HC) *per* Peter Millett QC (as he then was) (aff'd: [1985] 1 WLR 173 at 182-183 (CA) *per* Dillon LJ, 188-189 *per* Dunn LJ) [*Alec Lobb*]; *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 (CA) *per* Millett LJ (as he then was) [*Burch*]; and *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221 (CA).

49 See *BOK (CA), supra* note 1 at para 138.

50 *Ibid*.

51 *Ibid* at para 140.

52 *Ibid* at para 141.

53 *Ibid*, citing *Blomley, supra* note 45 at 381.

54 *Ibid*.

55 *Ibid*.

56 *Ibid* at para 142.

Court was also anxious to emphasise that the application of the criteria relating to (1)—"infirmity"—must not be overly broad, lest the narrow doctrine be stretched into the broad doctrine so as to cover situations that are not intended to fall within the narrow doctrine. Their Honours saw the broad doctrine as going *further* than their (modified, middle-ground) narrow doctrine, "because it may potentially encompass fact situations where the [*Amadio*-style] 'special disability' concerned … is something *broader* than the type of *infirmity*… referred to in [(1) above]".[57] And also, lest their Honours' (modified, middle-ground) narrow doctrine be mistaken for the broad doctrine, the Court emphasised that its approach (as summarised above) must "be applied through the *lens* of cases exemplifying the narrow doctrine (*eg, Fry* and *Cresswell*) rather than those embodying the broad doctrine (*eg, Amadio* and *Alec Lobb*)".[58] This, as a starting point, said the Court, "distinguishes the narrow doctrine *subtly but significantly* from the broad doctrine, and represents a middle ground based on *practical application* rather than *theoretical conceptualisation*".[59]

Finally, before applying their modified narrow doctrine of unconscionability to the case at hand, their Honours also attempted (albeit tentatively) to dismiss the broad doctrine on the basis that it may in fact represent a "historical misstep" in the law (rendering it, possibly, a redundant exculpatory category). As to the suggestion that the broad doctrine is "historically flawed" in its genesis, the Court, while accepting that the exact origins of the unconscionability doctrine remain somewhat obscure, nevertheless suggested that what is now the law relating to the *narrow* doctrine of unconscionability may actually properly belong to "Class 1 undue influence", which developed more or less contemporaneously with "Class 2 undue influence", but which did not, in contrast to Class 2 undue influence, involve a "relationship of trust and confidence". In the Court's own words:

> [H]aving regard to the fact that the narrow doctrine [of unconscionability] was formulated at or around the same time as Class 2 undue influence, we are of the view … that this doctrine was *not* a separate doctrine of *unconscionability* as such but, rather, was *another species* of *undue influence*—what we have come to term today as Class 1 undue influence.[60]

It follows from this that not only may "the expansion of the narrow doctrine of unconscionability [be] *historically flawed* inasmuch as it proceeded from a *non-existent*

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57 *Ibid*. The Court does not elaborate on when this might be, and so it is difficult to assess this concern.

58 *Ibid* at para 144.

59 *Ibid*. I confess that the distinction may be a little too subtle, at least for me. I am not quite sure what the burden of the Court's point is here. Ideally a doctrine should be properly "theorised" in settling the criteria that are intended to serve the doctrine in accordance with its underlying rationale or purpose, at which point courts are then free simply to apply the criteria without "re-theorising" the jurisdiction each time. However, in *BOK (CA)*, the Court actually mostly just discusses the criteria of unconscionability against the backdrop of a rhetorical fear—avoiding uncertainty—rather than cashing out what their Honours considered the *rationale* of the doctrine to be: that "one … not [be] permitted to take unfair advantage of another who is in a position of weakness". But what does "taking unfair advantage of another" mean? And why does (or should) the law care about it? To my mind, the answers to those questions are just as important to the settling of appropriate application criteria for the unconscionability doctrine as are the consequences of an overly broad doctrine. In other words, the "theoretical conceptualisation" should drive the "practical application" (via the theoretically conceptualised criteria), and yet virtually no time at all is dedicated to that relationship in *BOK (CA)*.

60 *Ibid* at para 145 [some emphasis removed, some retained].

doctrine of *unconscionability*",[61] it might also be considered, in both form and substance, a *redundant* doctrine, such that it would make sense, and create less confusion, simply to refer to it as "Class 1 undue influence",[62] as "unconscionability" (under the doctrine of that name) is merely "but another way of describing" that particular form of undue influence.[63] And although the Court saw considerable force in the argument that the narrow doctrine of unconscionability should be declared otiose, their Honours ultimately saw no reason to take special steps to formally excise it from the unwritten law of Singapore, not least because it has not led to any obvious legal anomalies and the doctrine is generally accepted across the Anglo-Commonwealth.[64] Also, the Court would not rule out the possibility that the application of the respective doctrines of Class 1 undue influence and unconscionability to the same fact situation might (albeit extremely rarely) produce different results.[65] Their Honours accepted that equitable doctrines may develop so as to both supplement and temper the strictures of the common law,[66] but even if it were true that the two doctrines merely "overlapped" (as opposed to being conterminous with each other), the Court nevertheless opined that that overlap "would be so extensive as to result in both doctrines being virtually coincident with or identical to each other".[67] As the case before the Court illustrated, whenever Class 1 undue influence could be shown, "unconscionable conduct" will necessarily exist as well. And although their Honours considered it possible that unconscionability could present in the form of a *passive* manifestation of advantage-taking rather than an overt act of "influence", they considered this "would be *extremely rare* indeed", particularly considering how fine the line can be in terms of activity and passivity—"acts" and "omissions"—when it comes to one party benefiting from a significant power–vulnerability relationship with another.[68] Indeed, the Court considered it "difficult to imagine a situation *in real life* where an unconscionable act by the defendant which takes advantage of the plaintiff is somehow *not* accompanied by some overt act that facilitates the defendant in his or her taking advantage of the plaintiff".[69]

Still, at the end of the day, there was no decisive ruling on the "redundancy" argument, and their Honours left it hanging merely as a "hypothesis", at least until such time as the Court were better placed to definitively decide on the basis of arguments

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61 *Ibid* at para 147 [some emphasis removed, some retained].

62 *Ibid* at para 146.

63 *Ibid* at para 149. The Court, quite rightly in my respectful view, rejected (*ibid* at para 151; and see also *ibid* at paras 170-171) the idea that Class 1 undue influence and the narrow doctrine of unconscionability can be plausibly distinguished on the ground that the former is "plaintiff-sided" (or "consent"-focused) and the latter "defendant-sided" (or "conduct"-focused), as would appear to be the law now in Australia since *Thorne v Kennedy* (2017) 91 ALJR 1260 (HCA) [*Thorne*].

64 *BOK (CA), supra* note 1 at para 149.

65 *Ibid*.

66 *Ibid* at para 150. Reference might have been made to Lord Denning MR's famous remark in *Eves v Eves* [1975] 1 WLR 1338 (CA) at 1341, that "[e]quity is not past the age of child bearing"! Note, too, that the Court in *BOK (CA)* at para 150 cited "Class 1, Class 2A and Class 2B undue influence" as examples of categories that "were developed only later on in the more *modern* case law". Query, however, whether these are simply labels that a modern court attached to categories that had developed considerably earlier in time.

67 *Ibid* at para 151.

68 *Ibid* at para 152.

69 *Ibid* [some emphasis removed, some retained].

received on the particular issue.[70] Applying its modified, middle-ground narrow doctrine of unconscionability to the facts of the appeal, the Court held[71] that the Judge was correct to set aside the impugned deed of trust for unconscionability—a not-unsurprising conclusion given the identified overlap between unconscionability and Class 1 undue influence, which was also found to have occurred on the facts. Indeed, not only did the husband's acute grief render him susceptible to the wife's "influence" for the purposes of a Class 1 undue influence claim, it also constituted a mental state of sufficient gravity to constitute an "infirmity" for the purposes of an unconscionability claim. Moreover, the wife was *aware* of the husband's infirmity and "took advantage" of it "by leveraging on his sense of isolation".[72] The Court further noted that the husband had received no independent advice and that the deed of trust was clearly "a transaction at an undervalue" in the sense that it was not a reasonable way of providing for the couple's son (especially given the circumstances in which the deed was signed). These additional factors, said the Court, "underscore[d] and highlight[ed] the exploitation of an infirmity that render[ed] … [the] transaction improvident",[73] and which in turn meant that it was also not possible for the wife to show that the transaction was "fair, just and reasonable".

III. Reflections on The Main Judgment

The Court's judgment on the substantive issues in the appeal is, with respect, impressive in its range and ambition. I also found their Honours' responses to the appellant's challenges to the Judge's evidential issues to be thoroughly expert and convincing. If I were to have any quibbles at all with the main judgment, they would be directed at the Court's statement of, and approach to, certain basic doctrinal propositions upon which key aspects of their Honours' reasoning was based. This is with a view, hopefully, to informing the ongoing development of the relevant law in Singapore—and indeed beyond if other jurisdictions are prepared to learn from the harvestable insights garnered from the labours of other, cognate legal systems—in case the opportunity should arise in the future for the Court to "fine tune" (or perhaps simply to clarify) at least some of what was said in *BOK (CA)*. And although I shall focus principally on the Court's discussion of the unconscionability doctrine (below), it is impossible to avoid saying something about what was said about undue influence, given the conceptual dovetailing of those two doctrines at various junctures of their Honours' reasons for judgment.

A. *Undue Influence*

The Court's statement of the law relating to undue influence is principally to be found at paragraph 101 of their Honours' judgment. There, the "Class 1" and "Classes 2A and 2B" classifications from *Bank of Credit and Commerce International SA v*

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70 *Ibid*.
71 *Ibid* at paras 154-156.
72 *Ibid* at para 154.
73 *Ibid* at para 155 [emphasis removed].

Aboody[74] are clearly adopted. More than a hint of *Royal Bank of Scotland plc v Etridge (No 2)*[75] in also evident in the Court's formulation,[76] despite that case not being expressly named as an informing source of the modern law in this area.[77] For example, their Honours refer to an "irrebuttable" presumption of a relationship of trust and confidence in the Class 2A undue influence cases, and a "transaction that calls for an explanation".[78] These are phrases that are found in *Etridge*[79] but not in *Aboody*. And yet, if the Court in *BOK (CA)* really intended to endorse the burden of what was said about the "first principles" of undue influence in *Etridge* (and it may well be possible that those principles have *not* been adopted wholesale in Singapore[80]), it would potentially conflict with critical assertions made or conclusions drawn about that particular exculpatory category in their Honours' judgment. For example, in describing "Class 2" undue influence, the Court said that it "suffices for the plaintiff to demonstrate (i) that there was a relationship of trust and confidence between [the plaintiff] and the defendant; (ii) that the relationship was such that it could be presumed that the defendant abused the plaintiff's trust and confidence in influencing the plaintiff to enter into the impugned transaction; and (iii) that the transaction was one that calls for explanation".[81] But this would seem to be at variance with what is said in *Etridge*,[82] because their Lordships were there

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74 [1990] 1 QB 923 at 953 (CA) *per* Slade LJ [*Aboody*] (approved by the House of Lords in *Barclays Bank plc v O'Brien* [1994] 1 AC 180 (HL) at 189 [*O'Brien*]).

75 [2002] 2 AC 773 (HL) [*Etridge*]. This would explain why the Court's formulation of the jurisdiction in *BOK (CA)* is not identical to the *Aboody* and *O'Brien* formulations, despite the basic classifications from *Aboody* being adopted.

76 *BOK (CA), supra* note 1 at para 101.

77 *Ibid*. The Court of Appeal seemed to approve of the statement of law in the High Court case of *The Bank of East Asia Ltd v Mody Sonal M* [2004] 4 SLR(R) 113 (HC), which at para 6 seems to approve of the essence of the *Etridge* formulation of undue influence.

78 *BOK (CA), supra* note 1 at para 101(b)(i).

79 *Supra* note 75 at paras 14, 18, 24 and 85 *per* Lord Nicholls of Birkenhead (with whom all the other Law Lords agreed).

80 On my reading of the leading local textbook on contract law in Singapore, there is substantial approval of what was said in *Etridge*: see Andrew Phang gen ed, *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012) [*Phang*] at paras 12.115-12.120. However, the authors of that section of the work (Andrew Phang and Goh Yihan) clearly see undue influence as being capable of proof in three ways (*ibid* at para 12.104) — by direct proof, by indirect proof (*ie*, by inference), and by way of presumption — and on my reading of *Etridge*, their Lordships viewed the "presumption" of undue influence simply in terms of a process of inferential reasoning, that is, as merely "descriptive of a shift in the evidential onus on a question of fact": *Etridge, supra* note 75 at para 16 (and see also paras 107 and 161). In other words, proof of the basic facts triggering the "presumption" would alone suffice to justify a finding of undue influence *in the absence of* counter-evidence adduced by the defendant (*ie*, given that one of those basic facts is proof of a transaction that is "explicable *only* on the basis that undue influence has been exercised to procure it" (*Etridge, supra* note 75 at paras 25, 29 and 30 [emphasis added]), but as soon as the defendant adduces *some* evidence in reply, it is then a matter of drawing "the appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff": *Etridge, supra* note 75 at para 16. If this is correct (and I do not necessarily believe that it should be), then the language of "presumption" is rather misleading, for it has no compelling or mandatory effect (such as it did in the pre-1985 cases in England).

81 *BOK (CA), supra* note 1 at para 101(b).

82 It also seems to be at variance with the view expressed in *Phang, supra* note 80 at para 12.117, where the learned authors state that the presumption of undue influence in both the Class 2A and 2B cases results not from the existence of a relationship of "trust and confidence" alone (whether established by law or proven *ad-hoc*), but rather from the existence of such a relationship "*when coupled with a relationship*

adamant that the presumption of undue influence (or abuse of trust) arose *not* from the relationship itself (element (ii) in their Honours' formulation), but rather from a "*transaction* [that] is not readily explicable by the relationship of the parties"[83] (element (iii) in their Honours' formulation). In other words, elements (ii) and (iii) of the Court's formulation in *BOK (CA)* are not separate criteria but rather merely representative of a *single* evidential operation by which undue influence is proven as a matter of inferential reasoning in the case at hand (undue influence often being difficult to establish by direct proof in the "special relationship" category of case). Perhaps this is something that the Court might have occasion to clarify in the future if the opportunity were to arise.

Also, elsewhere in the Court's judgment—indeed in their Honours' "coda" (of which more below)—it is stated that a "very close relationship" exists between the doctrines of unconscionability and undue influence, and that this is "certainly" true of "Class 1" undue influence and "possibly" true of "Class 2B" undue influence,[84] suggesting (correctly in my view) that Class 1 and Class 2 undue influence involve substantively different concerns or complaints so as to be incapable of simple conflation. But this is not consonant with the House of Lords' description in *Etridge* of the equitable jurisdiction to relieve against an *inter vivos* transaction for undue influence. There, "Class 1" ("actual") undue influence and "Class 2" ("presumed") undue influence are presented as representing not different principles, but rather simply as different ways of proving what is perceived to be the *same* legal phenomenon ("undue influence");[85] the difference is simply that "actual" undue influence involves "overt" acts of exercising influence, whereas "presumed" undue influence involves "non-overt" uses of influence that typically cannot be proved without the assistance of inferential reasoning.[86] For this reason, three of their Lordships[87] in *Etridge* gestured that "Class 2B" was a redundant category (although there was no decisive ruling to abandon that sub-category of undue influence in the case). Indeed, their Lordships' House did not confine the "relationship" ("Class 2") cases to "abuse of trust and confidence"; they also include, it was said, "cases where a vulnerable person has been exploited".[88] If that is correct (and I do not want to be taken as suggesting that it is), then not only is "Class 1" undue influence conterminous with the unconscionability doctrine (as the Court in *BOK (CA)* suggests), but so too is "Class 2" undue influence. And it is potentially a *broad* doctrine of unconscionability rather than a narrow one.

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that calls for explanation" [emphasis in original]. See also *Phang, supra* note 80 at paras 12.132–12.136, 12.139: "[t]here cannot be a 'presumption of *undue* influence' arising from any relationship *per se*". I believe that this is correct, but if that is the case, then it reveals a possible infelicity in the Court's three-pronged formulation of the Class 2 jurisdiction. Surely only two prongs are necessary?

83 *Etridge, supra* note 75 at para 21 *per* Lord Nicholls (with whom all the other Law Lords agreed) [emphasis added].

84 *BOK (CA), supra* note 1 at para 179.

85 On my reading of leading textbook on contract law in Singapore, this is perceived to be the position in that jurisdiction as well, namely, that the distinctions between the different "classes" of undue influence have to do with *manner of proof* rather than with the nature or substance of what has to be proved; see *Phang, supra* note 80 at para 12.115.

86 *Etridge, supra* note 75 at paras 8–10 *per* Lord Nicholls. Compare also *Daniel v Drew* [2005] EWCA Civ 507 at para 31 *per* Ward LJ (Buxton LJ and Wilson J agreeing).

87 *Etridge, supra* note 75 at para 92 *per* Lord Clyde, para 107 *per* Lord Hobhouse, para 161 *per* Lord Scott.

88 *Ibid* at para 11 *per* Lord Nicholls.

Their Lordships' judgments in *Etridge*, if correct, also put paid to the Court's statement in *BOK (CA)* —again, in their Honours' coda—that the doctrine of undue influence, whether of the "Class 1" or ("especially", as the Court said) the "Class 2" variety, "seeks to address situations where *illegitimate forms of pressure* are applied by the defendant to influence the plaintiff into entering into certain transactions".[89] But the House in *Etridge* saw the paradigm of "undue influence" not as "illegitimate pressure" (although such pressure might, of course, suffice, whether from threats or the creation of an unnecessary sense of urgency, or for some other reason), but rather "unacceptable persuasion".[90] As Lord Clyde said: "There is a considerable variety in the particular methods by which undue influence may be brought to bear on [the plaintiff]. They include cases of coercion, domination, victimisation and all the insidious techniques of persuasion."[91]

The Court's treatment of undue influence in *BOK (CA)* also places stress on their Honours' (admittedly tentative) suggestion that the expansion of the narrow doctrine of unconscionability to a broad doctrine may be "historically flawed", and indeed on their suggestion that even the *narrow* doctrine may itself represent but an instantiation of "Class 1" undue influence.[92] In drawing this conclusion, their Honours rely in part on a respected legal historian, Professor Ibbetson,[93] who, in a passage quoted by the Court, said that Chancery "was more generous in extending duress from its narrow common-law base into situations where one party had exercised an *undue influence* over the other".[94] It is said that this extension was "relatively straightforward where there was *a relationship of power, trust, or confidence between the parties*, such as between trustee and beneficiary, parent and child, or attorney and client", for "it smacked of fraud for the dominant party to take advantage of the weaker".[95] Chancery was "less willing", however, "to intervene where there was *no prior relationship* between the parties: relief was regularly granted where moneylenders and the like had *taken advantage of indigent but prodigal expectant heirs*".[96] Although I am not myself a legal historian, it strikes me that Professor Ibbetson was not intending to authoritatively resolve a taxonomical question in such an epigrammatic passage, and it would be drawing a fairly long bow to infer from this a "historical misstep" in the law or the "non-existence" of a separate jurisdiction of unconscionable transactions apart from Class 1 undue influence.[97] For a start, there is no reason to think that the concept of abusing trust or confidence in the "relationship" cases was ever intended to correct for an overly narrow doctrine of

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89 *BOK (CA), supra* note 1 at para 171.

90 *Etridge, supra* note 68 at paras 6–7 *per* Lord Nicholls. Compare also American Law Institute, *Restatement (Second) of Contracts* §177(1) (1981); American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* §15(1) (2011).

91 *Etridge, supra* note 68 at para 93.

92 *Etridge, supra* note 68 at para 145.

93 David J Ibbetson, *A Historical Introduction to the Law of Obligations* (New York: Oxford University Press, 1999).

94 *Ibid* at 209, as quoted by the Court of Appeal in *BOK (CA), supra* note 1 at para 146 [some emphasis removed, some retained].

95 *Ibid*.

96 *Ibid*.

97 I note as well, though, that Michael Lobban, in "Contractual Fraud in Law and Equity, c1750–c1850" (1997) 17 OJLS 441 at 450-453, also discusses the expectant-heir cases of the eighteenth century under the heading of "undue influence".

duress at common law or involved an actual taking of advantage by the dominant party over the weaker party. As Cotton LJ famously captured the essence of Class 2 undue influence, at least as it was understood in 1887: "the court interferes [with a transaction impugned for undue influence], not on the ground that any wrongful act has in fact been committed by the [influential party], but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused".[98]

It is probably true, of course, that "Class 1" undue influence, *outside of* relations of trust and confidence, developed as a corrective to an overly circumscribed duress doctrine at common law (although the term "undue influence" was not always used in those cases involving an equitable conception of "coercion" or "undue pressure").[99] And there were certainly historic cases of actual "coercion" or "domination" occurring *inside* a special relationship of trust and confidence (typically, though not exclusively, involving the relation of spiritual adviser and devotee) which were set aside for undue influence.[100] But these were really, *in substance*, cases of *Class 2* undue influence where the claimant was effectively able to show an *actual* misuse of *fiduciary* influence within a "special relationship of influence" without the need to rely on the traditional "presumption" associated with the Class 2 category of cases. Indeed, it has even been suggested[101] that *Class 1* undue influence may be a mistaken category, and that "undue influence" should never have been expanded beyond the "protected relationship" cases (within which an abuse of trust could be shown either by direct evidence or only with the assistance of a policy-inspired compelling presumption of law).[102] Also, if there has been a "historical misstep" at all in relation to undue influence, then it is likely to be found not in a false partition between "Class 1 undue influence" and "unconscionability", but rather between "Class 2 undue influence" and "fiduciary law",[103] which, if correct, would afford a significant reason for pause against any proposal for doctrinal amalgamation in

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98 *Allcard v Skinner* (1887) 36 Ch D 145 (CA) at 171 *per* Cotton LJ.

99 Some of the cases employed the term "undue pressure" (in equity) rather than "undue influence", because they occurred outside "close and confidential" relationships (*eg, Williams v Bayley* (1866) LR 1 HL 200; *Ormes v Beadel* (1860) 2 Giff 166; 66 ER 70; *Ford v Olden* (1866-67) LR 3 Eq 461 ("undue influence" used in the keywords but not the short decision itself). However, many cases invoked the term "undue influence" to cover what we would nowadays call "lawful-act duress" (*eg, Mutual Finance Ltd v John Wetton and Sons Ltd* [1937] 2 KB 389; *Robertson v Robertson* [1930] QWN 41 (husband threatened to tell of his wife's alleged infidelities unless she transferred certain realty to him); *Langton v Langton* [1995] 2 FLR 890 (threats by son and daughter-in-law to stop caring for the father whose health was failing and who was terrified of institutionalisation unless his property was signed over to them); *Bank of Scotland v Bennett* [1997] 1 FLR 801 ("moral blackmail" by husband who indicated to his wife that their marriage depended on her entering into a contract in accordance with his wishes).

100 See *eg, Norton v Relly* (1764) 2 Eden 286; 28 ER 908 (exploitation of religious delusions); *Whyte v Meade* (1840) 2 Ir Eq Rep 420; *Nottidge v Prince* (1860) 2 Giff 246; 66 ER 103 (intellectually weak person manipulated by claims of supernatural powers; "gross imposture"); *Lyon v Home* (1868) LR 6 Eq 655; *Morley v Loughnan* [1893] 1 Ch 736 ("actual exercise of undue influence under the guise of religion").

101 W H D Winder, "Undue Influence and Coercion" (1939) 3 MLR 97.

102 Personally, I am partial to this view. In my opinion, a concept of "undue influence" makes very little sense outside relationships of trust and confidence involving personal influence that the law expects to be exercised exclusively in the interests of the subordinate party who is governed by the judgement of the influential party, and gives that party his or her dependence and entrusts him with his or her welfare.

103 See, most recently, Robert Flannigan, "Presumed Undue Influence: The False Partition from Fiduciary Accountability" (2015) 34 UQLJ 171 [*Flannigan*].

this area—of which more below. I accept, though, that virtually all "Class 1" undue influence cases involve what could be seen today as constituting "lawful-act duress"; and since that species of duress involves pressure that is only "illegitimate" by dint of an "unconscionable" or "exploitative" use (or proposed use) of the defendant's lawful rights, powers or liberties,[104] then it is possible that such cases could fall to be administered under either the common-law doctrine of duress or some equitable exculpatory category such as unconscionable dealing that responds to actual exploitation, regardless of the "history" that explains the current position. Which doctrine is best suited to administering lawful-act duress claims is a difficult question that has not yet been definitively resolved in Australia,[105] and I have elsewhere discussed the merits (and possible demerits) of any proposed doctrinal reform initiative in this area.[106]

Although it would not have affected the outcome of the appeal in *BOK (CA)*, it is nevertheless possible that the Court of Appeal may one day have to revisit and reconsider the criteria of the law relating to undue influence in Singapore, and to decide whether it will fully endorse the *Etridge* "first principles" or perhaps take a more traditional line that does not involve undue influence collapsing into what is essentially an "unconscionable dealing" inquiry. At the least, the Court should consider abandoning the notion that the presumption of a relationship of trust and confidence in the Class 2A category of case is "irrebuttable". Quite apart from the inherent unintelligibility of a concept of an "irrebuttable presumption"—for surely such can only represent a "deeming operation" or a "legal fiction",[107] or a substantive principle expressed in the language of a "presumption", rather than a genuine presumption itself[108]—there is in fact no basis in precedent or principle for it.[109]

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[104] As it was put in a relatively recent Australian case, pressure that is lawful may nonetheless be "illegitimate" if no reasonable or justifiable connection exists between the pressure applied and the demand that the pressure supports: *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASCA 36 at para 25 *per* McLure P (Newnes JA agreeing) (appeal allowed on a different issue (2014) 251 CLR 640 (HCA)) [*Verve*].

[105] See, in particular, *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149 (NSWCA). The High Court avoided resolution of the issue in *Thorne, supra* note 63.

[106] Rick Bigwood, "Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales" (2008) 27 UQLJ 41.

[107] As Murphy J stated in *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 214 (HCA): "Unlike a presumption, the purpose and effect of a deeming provision is to prevent any attempt, by either party, to prove the truth." The phenomenon of a conclusive (*ie*, irrebuttable) presumption, however, does seem to be recognised in the law of evidence in Singapore; see *Phang, supra* note 80 at para 12.113.

[108] Unless the relevant presumption is concerned with "proof" or "evidence", it cannot be considered a "true" presumption at all. Compare William Swadling, "Explaining Resulting Trusts" (2008) 124 LQR 72 at 74-79.

[109] I deal with this point in Rick Bigwood, "From *Morgan* to *Etridge*: Tracing the (Dis)Integration of Undue Influence in the United Kingdom" in Jason W Neyers, Richard Bronaugh & Stephen GA Pitel, eds. *Exploring Contract Law* (USA: Hart Publishing, 2009) at 424-425, footnotes 189 and 190. The pedigree for the proposition is unclear. Lord Nicholls in *Etridge* seemed simply to adopt blindly a point made *per incuriam* by Stuart-Smith LJ in the Court below: [1998] 4 All ER 705 (CA) at para 6. Stuart-Smith LJ was possibly echoing Millet LJ's reference to an "irrebuttable presumption" in *Burch, supra* note 48 at 154, where his Lordship, in adopting the *Aboody* classification, attempted to differentiate between Class 2A and Class 2B undue influence, but no authority was cited therein for the proposition. Certainly, in neither *Aboody* (*supra* note 74) nor *O'Brien* (*supra* note 74) was any considered reference

B. *Unconscionability*

Far and away the most important aspect of the Court's judgment in *BOK (CA)* is its eschewal and unequivocal rejection of what their Honours dubbed the "broad doctrine" of unconscionability. Such a doctrine, in their view, lacks the criteria necessary to provide sufficient practical guidance in the resolution of actual claims, that is, as we would expect of a legal doctrine that was not simply a vehicle for "excessive [judicial] subjectivity", or an instrument of "broad and unbridled discretion",[110] which can only lead to "excessive uncertainty and unpredictability".[111]

Now, as the Court rightly acknowledged, the quest for certainty (predictability, sanctity of concluded transactions) in the law must constantly be tempered by the countervailing quest for individualised justice in particular circumstances as well. To the extent that those are inconsistent desiderata in law and society, no magic pointer can be found to tell us precisely where the correct balance point is or should be, whether in general or in particular situations. To my knowledge, no common yardstick exists by which it is possible to measure and weight incommensurables like conflicting legal values or policies. How does one measure, for example, whether there is "too much uncertainty" or "too little interpersonal justice"? Also, there seems to be no fixed order of priority among competing legal values, or at least the importance of any particular legal value is likely to vary from one situation to another. Of course, the Court's concern with an overly broad doctrine of unconscionability is directed at the *risk* or *anticipation* of uncertainty rather than its actualisation, for the Court's fear, ultimately, is a *rhetorical* one rather than evidence-based. Even in those legal systems to which their Honours attribute a "broad doctrine" of unconscionability—such as Australia and the United Kingdom—there is no evidence (at least of which I am aware) that the unconscionability doctrine has led to intolerable transactional uncertainty. And even if a legal system were to adopt a broad doctrine of unconscionability, one assumes the existence of both institutional and practical constraints upon judicial decision-making that keep naturally in check an awful lot of what is speculatively feared.[112]

Still, the Court is, with respect, right to want to fashion a doctrine of unconscionability that is sufficiently disciplined by transparent and workable application criteria that channels the judicial inquiry in a meaningful way and which enables lawyers to properly advise their clients as to the likelihood (or otherwise) of success when contemplating whether to petition a court for transactional relief in the name of the doctrine. Needless to say, there are no certainty gains to be had in adopting tests such as that once formulated by a Canadian judge: "[The] single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded".[113] As mentioned,

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made to the question of the presumption of influence in the standard Class 2A relationships being incapable of rebuttal.

110 See *BOK (CA)*, s*upra* note 1 at para 148.

111 *Ibid* at para 178.

112 See, *eg* the discussion in E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (UK: Cambridge University Press, 2005), especially Chapters 5 ("The idolatry of certainty") and 10 ("The constraints on the judiciary").

113 *Harry v Kreutziger* (1978) 95 DLR (3d) 231 at 241 (British Columbia CA) *per* Lambert JA. It has had a mixed reception with other Canadian courts; see Rick Bigwood, "Antipodean Reflections on the

their Honours in *BOK (CA)* rejected what they apprehended to be a "broad doctrine of unconscionability". They stated, recall, that such a doctrine is "perhaps best exemplified" by *Amadio* in Australia, and also by contemporary English authorities such as *Alec Lobb* that "tend to adopt the same broad language that was utilised in *Amadio*". I shall restrict my comments to the *Amadio* line of authorities, rather than the English cases to which the Court in *BOK (CA)* refers.[114] This is not only because I am well placed to comment on how the unconscionability doctrine actually works in my own legal system of Australia, but also because the Court in *BOK (CA)* specifically marked *Amadio* as an exemplar of the doctrine that they "eschew[ed] and reject[ed]".[115] Mention should also be made that, in one important respect, at least, the Australian unconscionability doctrine differs from that of England, which, at least criteriologically, renders the latter *narrower* than the former: the English doctrine appears to be predicated on proof of both procedural *and* substantive unconscionability,[116] whereas the Australian doctrine is purely procedural in its focus, substantive unconscionability serving merely an important *forensic* role, namely, "as supporting the inference that a position of disadvantage existed", and also "as tending to show that an unfair use was made of the occasion".[117] This is perhaps consistent with the Court's (modified) narrow statement of the doctrine for Singapore, as the *Fry* and *Cresswell* requirement of "a sale at significant undervalue" was rejected as a mandatory element and endorsed merely as an "important factor" to be considered in the unconscionability inquiry.

It will be recalled that their Honours rejected the *Amadio* formulation of unconscionability for being "phrased in too broad a manner inasmuch as it affords the court too much scope to decide on a subjective basis", and also because it "comes dangerously close to the ill-founded principle of 'inequality of bargaining power' that was introduced in … *Bundy*".[118] Is this a fair and accurate assessment of the *Amadio* doctrine of unconscionable dealing? With respect, I would argue not. Indeed, I would go even further and suggest that the *Amadio* formulation, both in its form and in its actual applications in subsequent cases, is *narrower* than the Court's (modified) "narrow" formulation of unconscionability in *BOK (CA)*. What is described as being a "broad doctrine" of unconscionability is actually, at least on closer inspection, a rather "narrow doctrine" of unconscionability, and what has been formulated as "middle-ground narrow doctrine" of unconscionability is actually a rather *broad* doctrine of unconscionability. In my opinion, the distance between the *Amadio* and *BOK (CA)* formulations of unconscionability is much smaller than their Honours' judgment implies. In fact, in many ways, *Amadio* (as represented by Deane J's and Mason J's judgments therein) becomes something of a "straw man" that the Court

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Canadian Unconscionability Doctrine" (2005) 84 Can B Rev 171 at 196-197. The Lambert test was recently rejected by the Newfoundland and Labrador Court of Appeal in *Downer, supra* note 5 at para 15.

114 For a recent discussion of the modern law relating to the unconscionability doctrine in England, see Nelson Enonchong, "The Modern English Doctrine of Unconscionability" (2018) 34 JCL 211.

115 *BOK (CA), supra* note 1 at para 148.

116 *Alec Lobb, supra* note 48 at 95 per Peter Millett QC (aff'd [1985] 1 WLR 173); *Godden v Godden* [2015] EWHC 2633 (Ch) at para 94 *per* Andrew Simmonds QC.

117 *Blomley, supra* note 45 at 405 *per* Fullagar J. See also *Downer, supra* note 5 at para 54(6).

118 *BOK (CA), supra* note 1 at para 133.

was able easily to attack in favour of its "much narrower"[119] unconscionability doctrine. This then leads to what is sometimes referred to as "the straw man fallacy": the Court fails to address the proposition in question—that only a "narrow" doctrine of unconscionability is capable of delivering the legal criteria, guidance and consequent certainty and predictability that is needed in relation to a judicially administered power to upset transactions for "unconscionability"—by (unintentionally) misrepresenting the *opposing* position (as represented by the so-called "broad" formulation of the doctrine in *Amadio*). It does this, essentially, by either oversimplifying or exaggerating the *Amadio* version of the doctrine, and then attacking the oversimplified or exaggerated version to demonstrate the wisdom of its own statement of the law. Again, I respectfully submit, the *real* version of the *Amadio* doctrine parallels, and in crucial respects is *noticeably narrower than*, the Court's modified, "middle-ground" doctrine of unconscionability endorsed in *BOK (CA)*. I shall attempt to explain.

It will be recalled that the Court in *BOK (CA)* settled on a three-pronged test for unconscionability: (1) plaintiff "infirmity", (2) defendant "exploitation" (of plaintiff's infirmity), and (3) a burden on the defendant to show that the challenged transaction was "fair, just and reasonable", at which point the factors of "substantial undervalue" and whether the plaintiff had received "independent advice" become relevant.[120] It will also be recalled that their Honours quoted a passage from Deane J's judgment in *Amadio* as indicative of the "broad doctrine" of unconscionability in Australia. Deane J also presented a three-staged test for unconscionability, namely: (1) plaintiff "special disability", (2) defendant awareness of plaintiff's special disability (such as "to make it prima facie unfair or 'unconscientious' that he procure, or accept, the … [plaintiff's] assent to the impugned transaction in the circumstances in which he [the defendant] procured or accepted it"), and (3) an onus on the defendant to show that the transaction was "fair, just and reasonable".

In form, at least, the *BOK (CA)* and the *Amadio* formulations look very similar to each other (and indeed, in relation to the third criterion, they present as identical in both form and substance). I shall explore below the extent to which the first two criteria are comparable in substance, for at first blush "plaintiff infirmity" (*BOK (CA)*) and "plaintiff special disability" (*Amadio*) might turn out to be coincident, and "defendant exploitation" (*BOK (CA)*) and "defendant awareness of special disability" (*Amadio*) might at least significantly overlap given that "knowledge" is a critical element within the mental componentry of the act of "exploitation". For now, though, I want to say something briefly about the *forensic structure* of the respective formulations, as they both adopt, at step (3), what might be termed a "shifting onus" approach. But they do not do it in quite the same way. With respect, Deane J's formulation works as a forensic approach in terms of how "presumptions and burdens" usually operate in the course of a trial, whereas the *BOK (CA)* formulation, at least on my reading, is less intuitive in that regard.

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[119] *Ibid* at para 158.

[120] The Court does not, however, explain why the advice must always be "independent", because these are not cases where, like in Class 2 undue influence situations, a "relationship of influence" must first be dissolved before entry into the impugned transaction, that is, in order to emancipate the plaintiff from the defendant's significant interpersonal influence, thereby establishing *independence* between the parties. I discuss this point in Rick Bigwood, *Exploitative Contracts* (USA: Oxford University Press, 2003) at 263-267 [*Bigwood*].

Now, I take it as axiomatic that the *legal burden* of proving an "unconscionable transaction" rests throughout on the plaintiff who asserts that proposition, and that the legal burden (or "burden of persuasion") cannot "shift" on that single issue.[121] The "single issue" for the Court in *BOK (CA)* seems to be whether the transaction can ultimately be shown, on the balance of probabilities, to be an "improvident" one, but because their Honours say that it is "the exploitation of an infirmity that renders a transaction improvident",[122] the *real* matter to be established is "exploitation of infirmity", and "improvidence" is not itself the object of the forensic inquiry or the true fact in issue. (To be sure, it seems odd to say that the basis of the jurisdiction is the setting aside of transactions because they are "unwise", as opposed to the plaintiff having been subjected to unconscionable conduct—interpersonal exploitation, no less—on the part of the defendant.) In that respect, the essential matter to be proved both in Singapore and in Australia is an exploitative use of a special opportunity resulting from the defendant's awareness of the plaintiff's "infirmity" or "special disability", either for the personal gain of the defendant or for that of a third party at the defendant's direction. If that is correct, we can see that the first two elements of Deane J's formulation in *Amadio*—"special disability" on the one side, and "superior-party knowledge" on the other—generate what is sometimes referred to as a "permissible inference" (of the ultimate proposition to be established): they merely operate to make out a "prima-facie case" (of exploitation), "in the sense that from them the fact in issue *may* be inferred, but not in the sense that it *must* be inferred unless the contrary is proved".[123] Step (3) of Deane J's formulation thus represents the product of a "presumption" (and consequent *evidential* burden in reply) that is "*provisional* only"—that is to say, the first two elements "are only guides to the Court in deciding whether to infer the fact in issue or not",[124] but they do not themselves "supply the want of necessary evidence".[125] In other words, Deane J's third step describes merely a tactical burden on the part of the defendant to bring evidence forward to affect the weight of, or to throw doubt on, the initial inference (or "prima-facie case") established by the plaintiff, which is a burden of production only rather than a "legal" or "persuasive" burden in its own right. The defendant who adduces no evidence in reply simply risks summarily losing; but as soon as the defendant adduces *some* countervailing evidence, it is then a matter of deciding whether the plaintiff has succeeded in meeting his or her burden of proof "on the balance of probabilities", that is, after the court has "drawn the appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff".[126] Basically, what step (3) in Deane J's formulation envisages is that the defendant must adduce sufficient evidence to satisfy the court (not as a separate legal burden but merely in the sense just described) that, notwithstanding his or her "sufficient knowledge" of the plaintiff's "special

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[121] Once a legal burden (on a single issue) is created, it cannot shift during the course of a trial. Instructive on this is A T Denning, "Presumptions and Burdens" (1945) 61 LQR 379 [*Denning*]. See also *Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] 4 SLR(R) 855 (CA) at [58]-[60].

[122] See *BOK (CA), supra* note 1 at para 155.

[123] *Denning, supra* note 121 at 379.

[124] *Ibid* at 380.

[125] *Ibid* at 383.

[126] *Etridge, supra* note 75 at para 16 *per* Lord Nicholls. See also para 93 *per* Lord Clyde, paras 106-107 *per* Lord Hobhouse, and paras 160-161 *per* Lord Scott.

disability", he or she did *not* take "unfair or unconscientious advantage of"—that is, *exploit*—the opportunities thereby arising. Practically, this can be done by the defendant showing that he or she responded to the plaintiff's transactional needs and interests by taking whatever steps were necessary and sufficient in the circumstances to neutralise the effect of the serious power–vulnerability relationship that existed between the parties, for example by ensuring that the plaintiff was fully and competently advised, that she or he had time to consider the wisdom of the proposed transaction, that particularly unfair terms were specifically notified, and the like. If the defendant can show that she or he were successful in that regard, a judgment of "exploitation" would be impossible (or at least unjust in the circumstances).

Contrast the Court's three-pronged formulation in *BOK (CA)*. The plaintiff carries the burden of showing (1) plaintiff "infirmity" and (2) defendant "exploitation" (of plaintiff's infirmity), at which point (3) a burden falls upon on the defendant to show that the challenged transaction was "fair, just and reasonable". But the first two steps cannot sensically be described as a provisional burden establishing a mere "prima-facie case" of unconscionability, because if the plaintiff has established step (2) to the satisfaction of the court on the balance of probabilities, then she or he has actually discharged the *entire* legal burden that is on him or her to prove the proposition or fact in issue: that there was "exploitation of an infirmity" (which, according to the Court, "renders a transaction improvident"). The third criterion makes little additional sense because it is impossible to imagine what burden of production could plausibly remain on the plaintiff after she or he has already shown there to be "exploitation of infirmity", the "exploitation" concept itself definitionally enclosing a judgment of "unjustness" sufficient to denominate the transaction "improvident" (if "improvidence" is in fact the relevant question).[127] Other courts that have formulated the unconscionability doctrine along parallel lines have been similarly criticised,[128] and so my point is not a novel one. But the same objection cannot be levelled against Deane J's formulation in *Amadio*, for the reasons just stated. Indeed, what the Court of Appeal describes in *BOK (CA)* as "factors" relevant to the defendant's burden of proof at step (3) strikes me as not being genuine *standalone* "factors" at all. Whether the plaintiff was properly (independently?) advised before entry into the impugned transaction (or not) must surely speak to the question of whether, all things considered, she or he could be said to have been acting under a relevant "infirmity" (or not), and the fact of the impugned transaction being at a "substantial undervalue" must likewise support an inference that the plaintiff was acting under an "infirmity", as well as tending to show that the defendant had made unconscientious use of that occasion by "exploiting" the plaintiff's inability, by virtue of his or her "infirmity", to meaningfully participate in the proposed transaction at the time. In other words, both "factors" speak to the first two criteria and are not part of some "third" criterion

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[127] By definition, "exploitation" *means* "[t]aking *unjust* or *unfair* advantage of another for one's own advantage or benefit": *Black's Law Dictionary*, 6th ed, *sub verbo* "exploitation" [emphasis added]. See also *Bigwood, supra* note 120, Chapters 4 and 5. Accordingly, it is strictly speaking pleonastic for courts to speak of "unfair exploitation" (*eg Kakavas v Crown Melbourne Ltd* (2013) 298 ALR 35 (HCA) at para 161 [*Kakavas*]), or a party being "exploited by the other in some morally culpable manner" (*Alec Lobb, supra* note 48 at 110), for at least in relation to "persons" (as opposed to mere "things"), there is no other kind of exploitation.

[128] I have discussed this point elsewhere (in the Canadian context); see *supra* note 113 at 180-182. See also *Bigwood, supra* note 120 at 238-239.

that purports to create an evidential presumption which, given the burden required to be discharged at the second step, must surely be incapable itself of being discharged. Again, this might be something that could be clarified if the Court were to revisit the unconscionability doctrine in the future.

A further question that struck me as I read the Court's judgment in *BOK (CA)* is this: Why do their Honours select Deane J's formulation to exemplify the so-called "broad doctrine" of unconscionability from *Amadio* when in fact subsequent decisions of the High Court have tended to prefer Mason J's two-pronged formulation from the same case (while emphasising, as well, that there is "no real difference" between the two formulations).[129] Mason J's formulation is simply this: the jurisdiction to relieve against an "unconscionable dealing" can be invoked wherever (1) "one party by reason of some condition of circumstance is placed at a special disadvantage vis-à-vis another", and (2) "unfair or unconscientious advantage is then taken of the opportunity thereby created"[130] (which, in subsequent cases, has simply been captured by the labels "exploitation" or "victimisation").[131] Again, this looks very similar to the *BOK (CA)* formulation of "plaintiff infirmity" and "defendant exploitation of infirmity", except that Mason J clearly saw it as unnecessary to incorporate into the formal substantive criteria any additional (but quite redundant) evidentiary operation in the manner of a sequent burden of production. But, as earlier mentioned, their Honours in *BOK (CA)* rejected Mason J's formulation in *Amadio*. They said that it comes "dangerously close" to Lord Denning's ill-founded principle of "inequality of bargaining power" in *Bundy*. They also said that the concept of "special disadvantage" (or "special disability") may extend to types of "infirmity" that are beyond those referred to in their Honours' own modified "narrow doctrine" of unconscionability so as to "cover a fact situation that is *not* intended to fall within it".[132]

With respect, both propositions are difficult to substantiate. First, when Mason J said in *Amadio* that mere inequality of bargaining power was insufficient to invoke the doctrine, this was a specific remark directed not at the entire jurisdiction represented by the doctrine as such, but rather merely at one internal aspect of it: the criterion of "special disadvantage". His Honour's actual words are these:

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

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[129] See, *eg Kakavas, supra* note 127 at para 118 *per* French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ: "Essential to the principle stated by both Mason J and Deane J in *Amadio* is that there should be an unconscientious taking advantage by one party of some disabling condition or circumstance that seriously affects the ability of the other party to make a rational judgment as to his or her own best interests"; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 (HCA) at 77-78 *per* Gummow and Hayne JJ, 85 *per* Kirby J [*Berbatis*]. Most recently, Mason J's formulation is emphasised in *Thorne, supra* note 63 at para 38 *per* Kiefel CJ, Bell, Gageler, Keane and Edelman JJ, para 112 *per* Gordon J.

[130] *Amadio, supra* note 9 at 462.

[131] See, *eg Berbatis, supra* note 129; *Kakavas, supra* note 127.

[132] *BOK (CA), supra* note 1 at para 143.

> or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.[133]

As the emphasised words disclose, his Honour was not intending to incorporate "inequality of bargaining power" directly into his *test* for unconscionability, but rather attempting simply to *narrow* our comprehension of the reach of the jurisdiction by making the concept of "disadvantage" referable to a qualifying threshold of "seriousness" so as to guard against excessive liberality in application, presumably in the name of preserving transactional security. I see this as potentially no different than the Court's own attempt in *BOK (CA)* to delimit the criterion of "infirmity" by reference to the qualifying threshold that "[i]t must be of sufficient gravity as to have *acutely* affected the plaintiff's ability to 'conserve his own interests"'.[134] And although I am not sure whether the adjectives of "seriously" and "acutely" are intended by the respective courts to indicate differential thresholds in application, I can confirm that, in Australia, the "special disadvantage" criterion is a significant threshold not lightly applied in the modern cases.[135] In part this explains why the Australian doctrine of unconscionability is actually a *narrow* doctrine and not, as feared in *BOK (CA)*, a dangerously broad one, at least in its modern application (and the Court in *BOK (CA)* certainly emphasises the need to understand the unconscionability doctrine through the lens of "practical application" rather than "theoretical conceptualisation").[136] In my respectful view, the Court in *BOK (CA)* was right to expand the test for unconscionability to capture infirmities beyond the *Cresswell* categories of "poverty and ignorance", so as to "include situations where the plaintiff is suffering from other forms of infirmities—whether physical, mental and/or emotional in nature",[137] provided they pass the threshold of "acuteness". But unless that threshold is somehow higher than that of "seriousness" (from *Amadio*)—and there is nothing in their Honours' discussion to indicate whether that is indeed the case—it is difficult to see when the Court's fear that the *Amadio* "special disability" test "may potentially encompass fact situations … [that are] broader than the type of infirmity" envisaged by their Honours' middle-ground narrow doctrine would ever be realised.[138] To be sure, there is no reason in principle for artificially cutting off "infirmities" or "special disabilities" according to their type or source, provided the

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133 *Amadio, supra* note 9 at 462 [emphasis added].

134 *BOK (CA), supra* note 1 at para 141.

135 Nick Seddon & Rick Bigwood, *Cheshire & Fifoot Law of Contract, 11th Australian Edition*, 11th ed (Australia : LexisNexis, 2017) at para 15.8.

136 *BOK (CA), supra* note 1 at para 144.

137 *Ibid* at para 141.

138 The anonymous referee on the original version of this article suggested that the very open-endedness of the Australasian "special disadvantage" formulation is something that the Singaporean courts should obviously want to avoid, lest they invite such litigation as was seen in *Kakavas* (*supra* note 120), where the High Court of Australia had to "close down" an argument that a wealthy person's gambling addiction could be a "special disadvantage" for the purposes of the *Amadio* doctrine. In his or her view, this explains the search "for language that pre-empts opportunistic attempts to get out of contracts by invoking unconscionability". The referee's impression was that "the Australian judges have managed well in spite of, rather than because of, the 'special disadvantage' gateway". I have no response to this except to say that the interpretation of another legal system's doctrinal formulation is to a significant and unavoidable extent perspectival, and I have not personally found the "special disadvantage" criterion to be intolerably "open-ended" in its formulation (although granted this is probably shaped somewhat by my knowledge of how the criterion has actually been applied by the local courts). Certainly, one does not routinely encounter academic or curial concern over the formulation of the criterion in Australia. The referee's

requisite level of "acuteness" or "seriousness" (as the case may be) is met. Whether situational or constitutional,[139] "acute infirmities" or "special disadvantages" render people vulnerable to merely instrumental utilisation (exploitation, victimisation) at the hands of others who become aware of the ready opportunities for personal gain that result from the seriously disequalised position of the parties. Known serious vulnerability on the one side is merely a source of interpersonal power on the other, the exploitation of which (interpersonal power) the law seeks to suppress or control through individuated exculpatory doctrines such as unconscionability.

Mention should also be made that Mason J's formulation of the unconscionability doctrine in *Amadio* cannot plausibly be said to come "dangerously close" to Lord Denning's "ill-founded" principle in *Bundy*.[140] For not only was Mason J's reference to "inequality of bargaining power" not his *test* for "unconscionability" (or for the criterial threshold of "special disadvantage" within the unconscionability inquiry), Lord Denning's principle did not depend "on proof of any wrongdoing" either.[141] But Mason J's second criterion of unconscionable dealing in *Amadio* requires precisely proof of wrongdoing in the manner of "victimisation" or "exploitation", namely, that "unfair or unconscientious advantage [was] then taken [by the advantaged party] of the opportunity thereby created". And that, too, like the "special disadvantage" criterion, is a requirement that has significantly narrowed the doctrine's rescissory reach in Australia.

To be sure, this has been confirmed, and indeed strengthened, in later High Court decisions that have explained and applied the *Amadio* principle.[142] In fact, Mason J's

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suggestion that the wealthy gambler in *Kakavas* might somehow have been acting "opportunistically" in attempting to invoke the jurisdiction in aid of his plight, such that the High Court had to "close down" his argument, is again perspectival. For myself, though, the fact that Mr Kakavas ultimately lost his case is not "hindsight" evidence of an opportunistic attempt on his part to avail himself of a doctrine that is (or should be) reserved only for a narrower band of much worthier claimants. The fact that Mr Kakavas lost despite being diagnosed with a pathological gambling condition was a conclusion reached only after a very close and quite sophisticated ventilation of the unique circumstances of the case, and at no point in the litigation history was it suggested that Mr Kakavas was somehow acting frivolously or overreaching in seeking to invoke the jurisdiction in aid of the relief he sought. I have written at length on the *Kakavas* case; see R Bigwood, "Still Curbing Unconscionability: *Kakavas* in the High Court of Australia" (2013) 37 Melb UL Rev 465 [*Still Curbing Unconscionability*]. I agree with the referee that language performs an important signalling function in law, although I remain unsure, based simply on the linguistic formulations of the respective "infirmity" and "special disadvantage" criteria, what exactly is the conceptual and practical distance between them in the wake of *BOK (CA)*. Perhaps this is something that will have to be elaborated and clarified in subsequent cases.

139 The label "constitutional disadvantage" is used in Australia to cover those "disadvantages which are inherent characteristics of a person, for example, lack of intelligence, infirmity and illiteracy", while the term "situational disadvantage" is employed to denote those "disadvantages which arise because of the circumstances in which an otherwise normal and ordinary person finds herself" (such as emotional dependence or pressing need that the other party is uniquely positioned to alleviate): *Warren v Lawton (No 3)* [2016] WASC 285 at para 158 *per* Le Miere J.

140 *Bundy, supra* note 39 at 336-337.

141 *Ibid*.

142 I have discussed elsewhere a number of the post-*Amadio* cases. See, *eg* Rick Bigwood, "Curbing Unconscionability: *Berbatis* in the High Court of Australia" (2004) 28 MULR 203; *Still Curbing Unconscionability, supra* note 138 (re *Kakavas, supra* note 120); Rick Bigwood, "The Undue Influence of 'Non-Australian' Undue Influence Law on Australian Undue Influence Law: Farewell *Johnson v Buttress*? Part I" (2018) 35 JCL 56 (Part II forthcoming in the next issue of the JCL) (re *Thorne, supra* note 63). I consider it unnecessary to elaborate significantly on that case law for the purposes of the present article, as not only would that increase significantly the length of this article, only

reference to "unfair or unconscientious advantage[-taking]" has been construed to imply that nothing short of proof of naked exploitation suffices for relief in the name of the doctrine; the defendant's decision not to respond to the plaintiff's known special advantage before taking a benefit from him or her must have been *deliberate* (intentional, reckless, predatory) in the manner demanded by an exploitation claim;[143] the jurisdiction is "not engaged by mere inadvertence, or even indifference, to the circumstances of the other party to an arm's-length commercial transaction".[144] Consistently with this, the High Court has held that the requirement of "knowledge", on the part of the defendant of the plaintiff's "special disadvantage", means *actual* knowledge, which includes "wilful blindness" or "shut-eye" knowledge, but not mere "constructive" knowledge or notice (subsequent interpretations of Mason J apparently to the contrary being deemed mistaken as to his Honour's true intentions).[145] Needless to say, "actual knowledge" and "exploitation" represent very high standards of proof, which, in addition to the significant threshold for "special disadvantage", further constricts the application reach and potential of the *Amadio* doctrine, rendering it a *very narrow doctrine indeed*. Contrast the following aspect of the Court's middle-ground narrow formulation in *BOK (CA)*: "Such infirmity must also have been, *or ought to have been*, evident to the other party procuring the transaction."[146] With respect, attenuated knowledge standards in relation to an "unconscionability" complaint are inconsistent with a formal requirement to show "exploitation"—the second element of the *BOK (CA)* formulation—as a precondition of relief. A judgment of "exploitation" cannot conceptually extend (for example) to the defendant merely knowing facts from which an honest and reasonable person would have drawn the critical inferences as to the plaintiff's "infirmity", but which the defendant him- or herself failed to draw (albeit not in a "wilful" or "reckless" manner). It gestures, instead, at what I have in the past dubbed "transactional neglect".[147] Such neglect may or may not be an appropriate standard for a judgment of "unconscionability", of course, but if it were appropriate, it would represent a broad and not a narrow doctrine of unconscionability. Indeed, as formulated, the *BOK (CA)* middle-ground narrow doctrine of unconscionability is arguably a *considerably broader doctrine* than the broad doctrine that their Honours eschewed and rejected as an instrument of "broad and unbridled discretion" (at least to the extent that such a doctrine is said to be exemplified by *Amadio*).

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disproportionate gains would flow from such an exercise. The subsequent cases largely just endorse the *Amadio* formulation (with the occasional explanation thereof), and so my focus on *Amadio* suffices for the points that I want to make in this article.

143 Compare John Lawrence Hill, "Exploitation" (1994) 79 Cornell L Rev 631 at 680 and 684 *et seq*; *Kakavas, supra* note 127 at para 161.

144 *Kakavas, supra* note 127.

145 *Ibid* at paras 150-159 and 162). But compare *Thorne, supra* note 63 at para 38 *per* Kiefel CJ, Bell, Gageler, Keane and Edelman JJ: it is "also … necessary that the other party knew *or ought to have known* of the existence and effect of the special disadvantage" [emphasis added]. No mention is made as to the possible inconsistency here with what the High Court had held in *Kakavas*.

146 *BOK (CA), supra* note 1 at para 141 [emphasis added].

147 Rick Bigwood, "Contracts by Unfair Advantage: From Exploitation to Transactional Neglect" (2005) 25 OJLS 65.

IV. The Court's Coda

A. *Toward a Single "Umbrella Doctrine" of Unconscionability?*

Although there was no reason in the substantive appeal for the Court to consider the "more novel issue"[148] of possible linkages or relationships (if any) among the hitherto independent doctrines of duress, undue influence and unconscionability, and whether two or more of those doctrines ought to be legally assimilated so as to constitute a new "single umbrella doctrine of unconscionability",[149] their Honours nevertheless proceeded, in a "coda" to their judgment, to "settle this particular issue in a definitive manner".[150] This resolution of the issue, however, was strictly *obiter*, as their Honours made it clear that they were proceeding on the *assumption* that what they described as the "broad" doctrine of unconscionability was viable for Singapore, which, of course, is contrary to what was emphatically decided (and in fact the Court found it more plausible that the narrow doctrine of unconscionability could be absorbed into Class 1 undue influence). The Court also noted that the debate over the merger of the aforementioned doctrines has to-date occurred entirely inside the pages of academic literature, which affords further reason for caution. Unlike judges, academics are not constrained by the practical implications of their normative proposals, as their vocational mission is quite different to that of the judge. This obtains, as well, for judges who happen to express opinions in an extra-curial capacity, either as a current judge or (*a fortiori*) as a career academic before she or he was appointed to the bench (Andrew Phang Boon Leong JA being an example in point in *BOK (CA)*).[151] With that observation (among others) in mind, the Court then turned to address the arguments in favour of a standalone umbrella doctrine of unconscionability, within which the doctrines of duress and undue influence would be subsumed, evaluating those arguments against the desiderata of "logic", "principle", "fairness" and "practicality".[152]

The arguments in favour of doctrinal amalgamation, the Court said, "find their force principally from the linkages across the doctrines of economic duress, undue influence, and unconscionability".[153] Indeed, earlier in the Court's judgment the close association between Class 1 undue influence and the (narrow) doctrine of unconscionability was highlighted.[154] The Court also stated that, "as its name suggests, the doctrine of *undue* influence seeks to address situations where *illegitimate*

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148 *BOK (CA), supra* note 1 at para 153.

149 *Ibid*. As the Court explained, in addition to duress not being argued in the case, the question of doctrinal merger or assimilation would only arise if their Honours had endorsed the *broad* doctrine of unconscionability capable of absorbing duress and undue influence, which they of course did not.

150 *Ibid* at para 154.

151 *Ibid*, see the discussion at paras 165-167. As the Court notes, his Honour recommended a merger among the doctrines of duress, undue influence and unconscionability while he was an academic: Andrew Phang, "Undue Influence—Methodology, Sources and Linkages" [1995] JBL 552; Andrew Phang & Hans Tjio, "The Uncertain Boundaries of Undue Influence" [2002] LMCLQ 231 at 232-234, 241-243; Andrew Phang & Hans Tjio, "Drawing Lines in the Sand: Duress, Undue Influence and Unconscionability Revisited" (2003) 11 RLR 110 at 117 *et seq*.

152 *BOK (CA), supra* note 1 at para 168.

153 *Ibid* at para 169.

154 *Ibid* at paras 146-152.

forms of pressure are applied by the defendant to influence the plaintiff into entering into certain transactions".[155] Their Honours continued:

> This is especially evident where "Class 2" undue influence is concerned, for it presupposes a pre-existing relationship of trust and confidence, which in turn assumes that the plaintiff is in a *disadvantaged position* following from the trust and confidence reposed in the defendant.[156]

The Court then observed that "[*d*]*uress* and *undue influence* are also very similar in substance".[157] The former requires proof of a transaction that has been procured through the exertion of "illegitimate pressure" by one party making a credible threat against the other in support of "a demand for a promise which (if satisfied) nullifies the threat".[158] Whatever form it takes (whether duress to the person or to goods, or economic duress), it involves (1) pressure that is "illegitimate", and (2) "coercion of the will" of the victim of the (illegitimate) pressure.[159] The Court then cited a *probate* decision—*Hall v Hall*[160]—to illustrate the similitude between duress and undue influence, Sir J P Wilde in that case speaking of undue influence comprising "pressure, of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment", or "[irresistible] [i]mportunity and threats", or "moral command asserted and yielded for the sake of peace and quiet, or of escaping from distress of mind or social discomfort"—all of which, "if carried to a degree … [sufficient to overbear the will of the victim] will constitute undue influence, though no force is either used or threatened".[161]

The Court then stated that given the close linkage between undue influence (of the "Class 1" variety at least) and duress, "a very close relationship" also exists between duress and unconscionability: "Put broadly, both doctrines are in essence about the use of illegitimate pressure or the exploitation of an infirmity to form a transaction that the court will not uphold."[162] "Viewed from this perspective", the Court then concluded, "a persuasive argument can be made that the distinctions across these three doctrines are more apparent than real."[163] Their Honours even cite Deane J in *Amadio* to demonstrate the similitude between undue influence and unconscionable dealing, the former looking to "the quality of the consent or assent of the *weaker* party", and the latter looking to "the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a *person under special disability*",[164] the italicised words apparently revealing a unity between the two doctrines. The

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155 *Ibid* at para 171.

156 *Ibid*.

157 *Ibid* at para 172.

158 *Ibid*.

159 *Ibid*.

160 (1868) LR 1 P & D 481.

161 *Ibid* at 482. As an aside, it is perhaps curious that the Court relies here on a probate case, as the *probate* doctrine of undue influence and the *equitable* doctrine of the same name (which applies to *inter vivos* transactions) clearly operate on different principles, whether rightly or wrongly so. Generally, see Pauline Ridge, "Equitable Undue Influence and Wills" (2004) 120 LQR 617. Compare also *Bridgewater v Leahy* (1998) 194 CLR 457 (HCA) at 478 *per* Gaudron, Gummow and Kirby JJ.

162 *BOK (CA), supra* note 1 at para 173.

163 *Ibid*.

164 *Amadio, supra* note 9 at 474.

main benefits that the Court considered doctrinal merger to offer are "conceptual neatness", as well as "bring[ing] clarity and perhaps even certainty to the law".[165] Merger into a single doctrine of unconscionability might well "simplify the law instead of obfuscating their similarities", which will in turn assist litigants and their advisers to better prepare and argue actual cases.[166]

Despite all of the aforementioned "virtues" of a novel (and somewhat radical) umbrella unconscionability doctrine, the Court ultimately *rejected* the possibility of such an innovation, even if, counterfactually, their Honours were prepared to endorse a "broad" doctrine of unconscionability for Singapore (which, again, might not even be viable if, as the Court feared, such a doctrine might be "historically flawed" in any event). Although such a doctrine might, in the Court's eyes, be "theoretically elegant", it was regarded as "practically problematic" because "there do not appear to be *practically workable legal criteria* that could be utilised by the courts to determine what amounts to unconscionable behaviour that vitiates a contract",[167] that is, so as to enable the umbrella doctrine "to function in a coherent as well as practical manner".[168] In other words, the Court rejected the "umbrella doctrine" essentially for the same reason it rejected the "broad doctrine" of unconscionability earlier in its judgment: no "workable", "principled" and "practical" legal criteria are available to discipline the application of such a broad legal device, the consequence of which would be an inevitable decline into "excessive subjectivity on the part of the court" (or "excessive use of discretion in a subjective sense"), which would in turn "unravel the contract concerned", lead to "excessive uncertainty and unpredictability", and "undermine the sanctity of contract to an unacceptable degree".[169] Although, of course, the Court accepted that *exceptions* to "sanctity of contract" are needed in the name of ensuring that injustice and unfairness are not delivered in particular situations, such exceptions "must be legally limited or constrained in a principled manner"; and, in their Honours' view, the broad doctrine of unconscionability (and hence the suggested umbrella doctrine, too) is not so limited or constrained.[170] Neither could the necessary (limiting or constraining) criteria be supplied via the existing legal criteria of the doctrines of duress and/or (especially) undue influence, because, the Court said, those existing criteria are narrowly targeted to the specific fact situations that attract those doctrines, so as to be, in fact, "heavily correlated to (if not coincident with) the legal criteria for the narrower doctrine of unconscionability".[171] Were they to be used to discipline the broad doctrine of unconscionability, the broad doctrine would simply "collapse back" into the narrow doctrine, and we would be left with no adequate criteria for the broad doctrine.[172]

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[165] *BOK (CA), supra* note 1 at para 174.
[166] *Ibid*.
[167] *Ibid* at para 176.
[168] *Ibid* at para 180 [emphasis removed].
[169] *Ibid* at para 176 [emphasis removed].
[170] *Ibid* at para 175.
[171] *Ibid* at para 179 [emphasis removed].
[172] *Ibid*.

B. *Reflections on the Single "Umbrella Doctrine" of Unconscionability*

As just mentioned, the Court ultimately rejected the umbrella doctrine of unconscionability on the ground that it is incapable of delivering the application criteria expected and required of a robust legal doctrine. I agree with that assessment, but not necessarily because it is impossible to tame a "broad doctrine" of unconscionability *per se*. The *Amadio* doctrine of unconscionability is branded by their Honours in *BOK (CA)* as a "broad doctrine", but it has well and truly been circumscribed by the highest court in Australia. Rather, in my view, it is impossible to settle on definitive criteria for an "umbrella doctrine" of unconscionability because the "linkages" between the doctrines that are intended to comprise it—duress, undue influence and unconscionable dealing—are not as "close" as they are often claimed to be. Granted, at the "macro" level, all three doctrine appear to regulate significant power–vulnerability relationships so as to ensure that "weaker" parties are not subjected to an improper motive or reason for entry into a legal contract or other lawful transfer of value in favour or at the direction of (much) "stronger" other parties. However, at the "micro" level, it is recognised that not all serious power–vulnerability relationships are the same, and that there are different *ways* of exercising interpersonal power–for example, coercively, exploitatively, disloyally, carelessly, and so on. The exculpatory doctrines that operate at the macro level are attracted by these differential ways of wrongfully inducing another to act in a manner or in a direction intended by the one with the capacity to exercise interpersonal power. Thus, the duress doctrine regulates *coercive* exercises of interpersonal power, the unconscionability doctrine regulates *exploitative* exercises of interpersonal power, and (Class 2) undue influence regulates the *conflictual* (disloyal) use—or the *mere possible use*—of interpersonal power resulting from a pre-existing "relationship of influence" (or of "trust and confidence"). "Linkages" are possible at the margins of individual doctrines because sometimes, for example, whether conduct is "coercive" or not might be parasitic on a conception of an "exploitative" use of rights, powers or liberties applied to bring irresistible pressure to bear upon another. Hence, we are able to debate whether "lawful-act duress", for example, properly belongs to "Class 1 undue influence", the common-law doctrine of "duress", or the equitable doctrine of "unconscionable dealing". And in "Class 2" undue influence situations, all that matters is that an actual or possible abuse of trust and confidence via a conflictual (undisclosed and unconsented-to) exercise of influence exists on the basic facts presented by the plaintiff and accepted by the court, regardless of the precise manner of the exercise of influence in the particular case (coercion, exploitation, even altruism).[173]

Such debates, I suspect, are inevitable, and perhaps insoluble. It may not even matter, in "overlap" cases, which doctrine is ultimately selected within a particular

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[173] At least as originally conceived, the doctrine of Class 2 undue influence could be seen to be founded (to borrow Joseph Story's famous words) "in an anxious desire of the law to apply the principle of preventive justice so as to shut out the inducement to perpetrate a wrong, rather than to rely on mere remedial injustice after a wrong has been committed. By disarming the parties of all legal sanction and protection for their acts, they suppress the temptations and encouragements which might otherwise be found too strong for their virtue": Joseph Story & Melville Madison Bigelow, *Commentaries on Equity Jurisprudence: as administered in England and America*, 13th ed, vol 1 (Boston: Little, Brown and Co, 1886) at §258. The traditional "presumption" of undue influence is thus a procedural prophylactic device and not merely a process of "standardised inference".

legal system as the judicial "weapon of choice". But there are other cases where each doctrine possesses a *distinct* sphere of operation, there being *no scope at all* for overlap. For example, neither duress nor Class 2 undue influence ultimately depends for its successful invocation on proof of "exploitation", while "unconscionable dealing", *ex hypothesi*, can never be "innocent". If this is correct, then it must militate against doctrinal collapse into a more generic exculpatory category, for something crucial will inevitably be lost in the process. It would self-evidently be wrong to recommend an "umbrella doctrine" of unconscionability (or indeed of anything else) by focusing only on surface-level similarities among whatever individual doctrines are intended to be brought under the larger umbrella, while ignoring or overlooking important substantive differences between them (which, arguably, is the real problem with Lord Denning's "inequality of bargaining power" principle in *Bundy*). I acknowledge, as well, that the perception of the purpose, operation and scope of each of "duress", "undue influence" and "unconscionability" lies somewhat in the eye of the "interpreter" of the relevant law. And one does not have to read very far into the case law and academic literature in the field nowadays to realise that significant disagreement is emerging as to the fundamental premises and purposes of the individual doctrines—the more so if one attempts a comparative exercise across the major jurisdictions of the former British Commonwealth.

As to the extent of the perceived "linkages or relationships" among the doctrines that might comprise a "single umbrella doctrine of unconscionability", consider, for example, the following statements from the Court's coda in *BOK (CA)*:

1. "[A]s its name suggests, the doctrine of *undue* influence seeks to address situations where *illegitimate forms of pressure* are applied by the defendant to influence the plaintiff into entering into certain transactions".[174] In *Etridge*, however, Lord Clyde said: "There is a considerable variety in the particular methods by which undue influence may be brought to bear on [the transferor]. They include cases of coercion, domination, victimisation and all the insidious techniques of persuasion."[175] Lord Nicholls, in the same case, with whom all the other Law Lords agreed, referred to undue influence as an "unacceptable form of persuasion".[176] As a technique, one exercises *persuasive power* over another by giving that other arguments or reasons that appeal to that other's (self-perceived) interests or principles, so that she or he *prefers* to do what the "persuader" desires over that other party's status quo (or over some alternative course of action available to him or her).[177] There may be no "threats" or conduct creating of a sense of "urgency" causing the plaintiff to feel pressured to respond, for example. In fact, historically, in the Class 2 cases, the law responded prophylactically to the *risk* that the influential party may have preferred his or her personal interests to those of the subordinate party: there was no need to inquire as to how, exactly, he or she might have done that. The *mere risk* was sufficient to reverse the impugned transaction or benefit unless and until the influential party could show true consent

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[174] *BOK (CA), supra* note 1 at para 171.
[175] *Etridge, supra* note 75 at para 93.
[176] *Ibid* at para 7. Compare also *Etridge (ibid)* at paras 9 and 10.
[177] Compare A de Crespigny, "Power and Its Forms" (1968) 16 *Political Studies* 192 at 204-205.

(which necessitated showing the absence of undue influence as well).[178] "Undue" was a reference to a particularly pernicious risk, which equity managed through a socially constructed prophylactic device—the "presumption of undue influence"—rather than a finding as to "illegitimate pressure" in fact.

2. "*Duress* and *undue influence* are also very similar in substance".[179] That, with respect, is only true of lawful-act duress and Class 1 undue influence, for historically there was a substantial correspondence between the "moral blackmail" type of pressure that epitomises virtually all of the reported instances of Class 1 undue influence (in equity) and the concept of "lawful-act duress" that was subsequently recognised at common law. But because "lawful-act duress" inevitably involves the *exploitative* application of "lawful" pressure, it might equally be accommodated by the modern doctrine of unconscionability (unless we are to exclude from that doctrine "infirmities" that are initially caused by the defendant *creating* a choice situation for the plaintiff, thereby creating a vulnerability in the plaintiff that would not otherwise exist). Although the Court cites *Hall v Hall* in support of its statement above, that is a probate case. The *equitable* doctrine of the same name is much subtler, especially in the Class 2 cases. In those cases, the defendant is much more likely to work *with* the plaintiff's will (*eg*, through persuasive techniques) than against it (*eg*, through fear created by a threat of an unwelcome consequence in support of a specific demand).

3. "[A] very close relationship [exists] between duress and unconscionability … Put broadly, both doctrines are in essence about the use of illegitimate pressure or the exploitation of an infirmity to form a transaction that the court will not uphold."[180] Again, this is true in "lawful-act" duress cases, but in "regular-duress" situations, where duress involves the defendant, in support of a specific demand, threatening the plaintiff with a consequence that is not the defendant's to dispense, because the threat, if implemented, would, *vis-à-vis* the plaintiff (or perhaps the state), be *unlawful*, the transaction is voidable regardless of the presence of "exploitation". (Likewise, "exploitation" can occur without the use of "illegitimate pressure".) In other words, ignoring lawful-act duress situations (which are rare in any event), duress, like misrepresentation, can be "innocent". Certainly, the law of *contractual* duress has drawn no distinction between a party's actual or proposed rights-violating conduct that is designed to coerce the other party, and a party's actual or proposed rights-violating conduct that unintentionally has a coercive effect on the victim. The famous case of *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*[181] is a case in point. Lawful-act duress aside,

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[178] In Australia, the leading case that epitomises this approach is *Johnson v Buttress* (1936) 56 CLR 113 (HCA) [*Johnson*], especially the separate judgments of Latham CJ, Dixon J (Evatt J concurring), and McTiernan J. The remaining member of the Court, Starke J, found undue influence as a matter of inference from the facts.

[179] *BOK (CA), supra* note 1 at para 172.

[180] *Ibid* at para 173.

[181] [1979] QB 705: duress can occur even without knowledge of the effect of one's conduct on the victim's choice conditions.

"liability" for duress is basically strict.[182] That is not true of unconscionable dealing, which requires proof of agency-responsible "fault" on the part of the defendant, and fault in the manner of *exploitation*, no less.

4. "'Class 2' undue influence … supposes a pre-existing relationship of trust and confidence, which in turn assumes that the plaintiff is in a *disadvantaged position* flowing from the trust and confidence reposed in the defendant."[183] And as mentioned above, their Honours in *BOK (CA)* also cited Deane J in *Amadio* to emphasise the linkage between undue influence and unconscionable dealing, the former looking to "the quality of the consent or assent of the *weaker* party", and the latter looking to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a *person under special disability*",[184] the italicised words being intended to spotlight a common concern between the two doctrines. Of course, while both doctrines can loosely be said to be concerned (at least in part) with "weakness", "vulnerability" or "disadvantage", those vulnerable to Class 2 undue influence and unconscionable dealing are not vulnerable in quite the same way. Some people are vulnerable to merely instrumental utilisation because, constitutionally or situationally (or both), they are inept, weak or acutely unable to conserve their best interests when entering into voluntary or consensual transactions with much stronger others. They suffer from an "infirmity" or a "special disadvantage", but they have not necessarily conceded "trust or confidence" in another, or deferred to the disinterested guidance, advice or expertise of another in relation to the management of their affairs or everyday needs. The latter category of person effectively surrenders, partially or completely, control in his or her personal decision-making to another person so as to become susceptible to a much greater extent and to a higher order of wrongdoing altogether. She or he is not merely "weak", "infirm" or "specially disadvantaged" (although weakness, infirmity or disability might well have caused or contributed to the initial concession of trust and confidence), they are *exposed*, and their exposure is to disloyal opportunism or betrayal no less.[185] Traditionally, the corollary

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[182] Accordingly, it should not matter that the defendant honesty believed that she or he was entitled to make the threat that she or he did, provided that the resulting pressure did in fact "compel the will" of the plaintiff (as opposed, say, to providing the basis for the voluntary and genuine compromise of a bona fide dispute as to rights on both sides). It is difficult to see how the presence of good faith (or absence of bad faith) could ever de-illegitimise pressure that, if the threat were to be implemented, would be independently unlawful by reference to the substantive law, whether criminal or civil. Compare *Nav Canada v Greater Fredericton Airport Authority Inc* (2008) 290 DLR (4th) 405 (New Brunswick CA) at para 63 *per* Robertson JA; *Verve, supra* note 104 at para 30 *per* McLure P (Newnes JA agreeing), paras 184-200 *per* Murphy JA (point not discussed on appeal: (2014) 251 CLR 640 (HCA)). The defendant's motives for the pressure applied, however, may be relevant to the question of whether the illegitimate pressure was ultimately effective in coercing the will of the victim, as what begins as a genuine assertion of a bona fide belief as to a right might result in a genuine compromise between the parties rather than a coerced transaction.

[183] *BOK (CA), supra* note 1 at para 171.

[184] *Amadio, supra* note 9 at 474.

[185] In other words, "vulnerability" here denotes "exposure" (to fiduciary opportunism) rather than "weakness" or "incapacity" as such. Compare Robert Flannigan, "Commercial Fiduciary Obligation" (1998) 36(4) Alta L Rev 905 at 917.

> of such greater vulnerability and risk on the one side has been greater obligation on the other, which is the imposition of *fiduciary* accountability.[186] At one point the Court hints that it might well appreciate this distinction;[187] however, without a clearer signal as the *extent* to which the *Etridge* "first principles" represent the law in Singapore (their Lordships' House in *Etridge* not limiting Class 2 undue influence to "abuse of trust" situations), it not possible to speculate on their Honours' commitment to a "public policy" (rather than an "actual victimisation" or "exploitation") approach to Class 2 undue influence. Suffice it to say, there is a very real question—not explicitly confronted and answered in *Etridge*—as to whether subordinate parties within a Class 2 "relationship of influence" are adequately protected—their interests properly served—if their petitions for relief from impugned transactions are consigned to administration through what is effectively an "unconscionable dealing" inquiry only.

Ultimately, even though the Court in *BOK (CA)* observed that the linkages among the doctrines envisaged as suitable for comprisal within the contemplated broad "umbrella doctrine" of unconscionability were such as to "render it an extremely attractive solution at first blush",[188] the above observations, if they have any substance, indicate a reason for greater pause (even at "first blush"). Still, the Court refrained from taking such a novel and radical step for other reasons, which reasons have not prevented others from suggesting workable criteria in legislative form.[189] For myself, I am less sceptical about a court, law-reform body or parliament being able to settle workable criteria sufficient to discipline a standalone "umbrella doctrine" of unconscionability. I worry, however, that, in the process, vital doctrinal points of distinction will be overlooked or ignored in favour of surface-level "linkages" or "similarities". That, with respect, has been my experience of all such attempts or recommendations in the past.[190] And although this does not preclude such a law-reform initiative from ever successfully occurring in the future, whether in Singapore or elsewhere, it is necessary that every possible consequence of a departure from the presently compartmentalised doctrinal landscape of the law relating to "vitiating factors" be fully and carefully reasoned through.

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186 See, generally *Flannigan, supra* note 103. Compare also *Johnson, supra* note 178 at 135 *per* Dixon J (Evatt J concurring).

187 Their Honours in *BOK (CA), supra* note 1 at para 179, state there is a very close relationship between the doctrines of undue influence and unconscionability, and that this is "certainly" the case with Class 1 undue influence and "possibly" also true of Class 2 undue influence, but this point is not developed anywhere in the Court's judgment. However, judging by the discussion in the leading textbook on contract law in Singapore (see *Phang, supra* note 80 at Chapter 12), there may in fact be no reason for thinking that Class 2 undue influence is perceived to belong within the realm of fiduciary accountability and responsibility in that jurisdiction.

188 *BOK (CA), supra* note 1 at para 178.

189 See, *eg* British Columbia Law Institute, *Report on Proposals for Unfair Contracts Relief*, Report No. 60 (British Columbia Law Institute, 2011) [*BCLI proposal*]. The Report was prepared for the British Columbia Law Institute ("BCLI") by the Members of the Unfair Contracts Relief Project Committee. The proposed Contract Fairness Act is appended as Appendix B to the Report.

190 I critique the *BCLI proposal* (*ibid*) in Rick Bigwood, "Fairness Awry? Reflections on the BCLI's Report on Proposals for Unfair Contracts Relief' (2012) 52 Can Bus LJ 197.

V. Conclusion

The Court of Appeal in *BOK (CA)* rejected what their Honours referred to as a "*broad* doctrine of unconscionability". In a nutshell, this was because such a doctrine was perceived to look "very much like *a broad discretionary legal device which permits the court to arrive at any decision which it thinks is subjectively fair in the circumstances*—or, at least, does not provide the sound legal tools by which the court concerned can *explain* how it arrived at the decision it did based on principles that could be applied to *future* cases of a similar type".[191] Although I do not doubt that it is possible to frame an unconscionability doctrine so vaguely or so expansively as to warrant such a dyslogistic assessment, to the extent that the Court regarded the *Amadio* doctrine as having crossed that line, I have argued that this was effectively (but not intentionally) to erect a "straw man" that the Court could then easily attack. But, as I also hope to have shown, the *Amadio* formulation of unconscionability is, in both form and effect, potentially no broader than the "much narrower", middle-ground doctrine that the Court of Appeal held ought to apply in and for Singapore; and indeed, in respect of some of its application criteria, it is arguably even narrower than that middle-ground doctrine. What is more, to the extent that their Honours appeared willing to reject unconscionability as a "historically flawed", redundant category, in favour of "Class 1 undue influence", a reasonable mind might well question whether the Court-endorsed *Aboody* criteria[192] for that complaint is particularly well-suited to providing "the sound legal tools by which the court concerned can *explain* how it arrived at the decision it did based on principles that could be applied to *future* cases of a similar type", namely, that "the plaintiff … [must] demonstrate that: (i) the defendant had the capacity to influence him; (ii) the influence was exercised; (iii) its exercise was undue; and (iv) its exercise brought about the transaction."[193] To be sure, if the Court considered the *Amadio* formulation of unconscionability to be "phrased in too broad a manner inasmuch as it affords the court too much scope to decide on a subjective basis",[194] then it is, with respect, difficult to see how an *Aboody*-style formulation for Class 1 undue influence could fare much better.

Some might consider the Court's approach to the unconscionability doctrine in *BOK (CA)* to be overly conservative and risk-averse. For the feared consequences of an unconscionability doctrine that is broader than what their Honours were prepared to countenance for Singapore are purely rhetorical rather than experiential. Indeed, if intolerable legal uncertainty were truly a consequence of the doctrinal path not taken in *BOK (CA)*, then one would expect such uncertainty to be an endemic feature of those legal systems that have adopted a so-called "broad doctrine" of unconscionability. And yet, at least to my knowledge, no empirical studies exist to substantiate that to be the case in Australia, New Zealand and/or the United Kingdom (for example). Writing extra-curially, at a time when the "unconscionability" concept was rising significantly to prominence in Australia, Sir Anthony Mason declared "exaggerated"

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191 *BOK (CA), supra* note 1 at para 148.
192 *Supra* note 74 at 967 *per* Slade LJ.
193 *Ibid* at para 101(a).
194 *BOK (CA), supra* note 1 at para 133.

the force of criticisms that had been levelled against the use of "unconscionable conduct" in judicial reasoning on the grounds of imprecision and uncertainty.[195] And in *Berbatis*,[196] Callinan J observed that "[t]he manner in which the test of unconscionability in relevant aspects is generally stated or as discussed in *Amadio* does not presuppose the exercise of a discretion".[197] Indeed, it is highly unlikely, given the inherent constraints upon judicial decision-making, that even a judge with considerable leeways of choice afforded by a particular doctrine would ever treat his or her professional responsibility to exercise, transparently, such a choice in a particular dispute as if it were a state-sanctioned carte blanche. Still, it is a risk that we ought perhaps not to tolerate if it is unnecessary to do so.

Finally, although the Court in *BOK (CA)* was at pains to distinguish between unconscionability as a "rationale" and unconscionability as a "legal doctrine", their Honours also rightly accepted that there was an inevitable relationship between a doctrine's rationale and the stated application criteria that formally comprise the doctrine and ultimately give expression to the underlying rationale. One would expect the two to *match*. For "unconscionability", the Court said that, as a *rationale*, it referred to "the spirit of justice and fairness that is embodied in the maxim that 'one is not permitted to take unfair advantage of another who is in a position of weakness"'.[198] And yet, while the Court settled the criteria of its middle-ground *doctrine* of unconscionability against the backdrop of precedent and policy (particularly a significant concern for the maintenance of legal and transactional certainty), very little reference was actually made to the underlying rationale of unconscionability in that process. What does it *mean*, for example, to "take unfair advantage of another who is in a position of weakness"? The Court's criteria would suggest that *interpersonal exploitation* is the problem, but "exploitation" is an essentially contested concept. There seems to be very little consensus on what exploitation comprises and why a normative system, whether it be law or morality, should object to it as a practice. Also, given that the Court saw sufficient linkages across duress, undue influence and unconscionability as to at least explore the possibility of a "single umbrella doctrine of unconscionability", this would suggest that their Honours also saw those first two doctrines as being informed by the same rationale as for unconscionability. But does duress, for example, really involve "taking unfair advantage of weakness"? Like misrepresentation, duress might be considered to involve *causing* disadvantage (or weakness) before an advantage is then taken, rather than "taking" advantage *simpliciter*. Certainly, "regular" (as opposed to "lawful-act") duress is not preconditioned on proof of exploitation. Undue influence may well be concerned with the prevention of unfair advantage-taking (or opportunism), but it is not in relation to "weakness" *simpliciter*. Also, depending on whether the traditional "public-policy" approach to undue influence exists in Singapore,[199] then that form of undue influence may not be about proof of *actual* advantage-taking at all; the *mere risk* of compromised influence warrants

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[195] Sir Anthony F Mason, "Contracts, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66 at 89.

[196] *Supra* note 129.

[197] *Ibid* at 111 (para 167). Compare *Berbatis* (*ibid*) at 86 (para 82) *per* Kirby J.

[198] *BOK (CA), supra* note 1 at para 119.

[199] And as mentioned earlier, judging by local textbook discussion (see *Phang, supra* note 80 at Chapter 12), such an approach may well *not* exist in Singapore.

rescission of a conflictual transaction or benefit, unless the influential party can, as a condition of validity, show true consent or authorisation, whether *ex ante* or *ex post* the impugned transaction or benefit. Whether *BOK (CA)* represents the final word on these questions for Singapore is beyond my capacity to speculate. In my respectful view, however, further scope for reflection on these doctrines remains in the wake of *BOK (CA)*, despite the ambition, depth and reach of their Honours' impressive judgment in that case. In summary, and as identified in this article, the following might invite further inquiry, elaboration or clarification should the opportunity arise for the Court in the future:

1. Despite the Court's unambiguous and definitive rejection of a single "umbrella doctrine of unconscionability", what are the precise conceptual intersections and practical overlaps among those doctrines that would otherwise have comprised the umbrella doctrine? It is possible that further refinement of the intellectual boundaries among the several doctrines is necessary in order to clarify the scope of their respective independent operations, and indeed to determine whether one or more of the subject doctrines might not represent a mistaken or redundant doctrinal category (*eg*, unconscionability and Class 1 undue influence, or lawful-act duress and Class 1 undue influence).

2. What, exactly, are the boundaries of the "infirmity" criterion of the Court's middle-ground unconscionability doctrine in *BOK (CA)*? For example, as a qualifying threshold, does the Court's epithet of "acute" introduce or portend a more stringent standard or cut-off point for Singapore than the qualifier "special" does for the "special disadvantage/disability" criterion under the *Amadio* formulation in Australia?

3. To what extent do the "first principles" of undue influence, as espoused by the House of Lords in *Etridge*, represent the modern law of the same in Singapore? If there has been a substantial adoption of those principles in and for Singapore, to what extent is it necessary to refine the Court's statement of the criteria for undue influence contained at paragraph 101 of its judgment in *BOK (CA)*, especially apropos Class 2 undue influence?

4. Relatedly, should the Court consider abandoning the notion that the presumption of a relationship of trust and confidence in the Class 2A category of undue influence case is an "irrebuttable" presumption (or a conclusive rule of law)? What is the pedigree and principled basis for such a stance? What reason could possibly exist for deeming, conclusively, interpersonal influence to exist *inter partes* when such influence patently does not exist in the particular relationship *in fact*?[200]

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[200] To be sure, past courts have, in fact, admitted evidence to controvert the presumption of influence in the Class 2A category of case. See, *eg Westmelton (Vic) Pty Ltd v Archer and Shulman* [1982] VR 305 (Victoria SC) (presumption of influence rebutted in a solicitor–client case). Compare also *Goldsworthy v Brickell* [1987] Ch 378 (CA) at 401 *per* Nourse LJ (influence is presumed in the Class 2A relationships "unless the contrary is proved"); *Goodman Estate v Geffen* (1991) 81 DLR (4th) 211 (Canada SC) at 221 *per* Wilson J: "Equity has recognized that transactions between persons standing in certain relationships with one another will be presumed to be relationships of influence *until the contrary is shown*" [emphasis added].

5. Does the Court need to revisit the forensic structure of the unconscionability inquiry as formulated by their Honours in *BOK (CA)*? For example, how does the third criterion creating an apparent "shifting" evidential burden on the defendant work in the face of the first and second criteria, which, if met, would appear to entail that the plaintiff's legal burden has already been non-provisionally discharged?