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THE STATE OF THE DOCTRINE OF UNCONSCIONABILITY IN SINGAPORE

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In *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* (2010), the Singapore High Court declared that unconscionability as a vitiating factor in contract did not form part of the law of Singapore. That statement was the culmination of growing judicial doubts as to the status of the doctrine of unconscionability in Singapore. However, the signal decision of the Singapore Court of Appeal in *BOM v BOK* (2018) arrested that development and charted a new course for the doctrine. This article examines the current state of the doctrine of unconscionability in Singapore. It traces the rise and fall of judicial scepticism towards unconscionability in Singapore and welcomes the clarity introduced by the restatement of the doctrine in *BOM v BOK*. It calls on the Singaporean courts to resist the temptation, manifested in *BOM v BOK*, to accept the view that the doctrine of unconscionability is redundant because its function is now performed by undue influence. The article argues that, contrary to the characterisation in *BOM v BOK*, the doctrine of unconscionability represented by the earlier English cases is a broad doctrine, not a narrow one. It also contends that it is misleading to suggest that the formulation of the doctrine in the current English cases is, in substance, the same as that of the 'broad' doctrine of unconscionability exemplified by the decision of the High Court of Australia in *Commercial Bank of Australia Ltd v Amadio* (1983). The paper scrutinises the reshaped doctrine of unconscionability formulated in *BOM v BOK*, highlights some potential difficulties in the three-step process of that doctrine and concludes with a call for a reconsideration of some aspects of the doctrine.

I. INTRODUCTION

It has long been established that while there is no general rule that "equity must suffer no man to have an ill bargain",[1] equity can intervene to relieve against unconscionable bargains.[2] The doctrine of unconscionable bargains—or unconscionability—is now recognised in many common law jurisdictions. Indeed, as one Canadian commentator remarked, unconscionability is "one of the cornerstones of the law of contract".[3] However, in Singapore, until recently, the status of unconscionability as a general doctrine of the law of contract has been, as stated in a leading text, "not wholly clear".[4] Judicial comments in a string of cases displayed an ambivalent attitude towards the

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1 *Maynard v Moseley* (1676) 3 Swans 651 at 653.

2 *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125.

3 Gerald Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 330.

4 Andrew Phang & Yihan Goh, "Duress, Undue Influence and Unconscionability" in Andrew Phang, ed, *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012) at para 12.219 [*Phang & Goh*].

doctrine of unconscionability, culminating in a statement in *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* that "unconscionability has not been accepted in Singapore as a separate ground for vitiating a contract".[5]

Much of the uncertainty about the status of unconscionability in Singapore has now been dispelled by the landmark decision of the Singapore Court of Appeal ("SGCA") in *BOM v BOK*.[6] In an extensive and grand discussion of the doctrine of unconscionability, the apex court in Singapore declared that what it classified as a 'broad' doctrine of unconscionability, represented by the decision of the High Court of Australia in *Commercial Bank of Australia Ltd v Amadio*[7] and the current English cases, is not recognised in Singapore,[8] but what it described as a 'narrow' doctrine of unconscionability, epitomised by the earlier English cases, including *Fry v Lane*[9] and *Cresswell v Potter*,[10] was part of the law of Singapore. The SGCA went on to reshape that 'narrow' doctrine into a modified doctrine of unconscionability designed to occupy a middle ground between the 'narrow' doctrine, on the one hand, and the 'broad' doctrine, on the other hand. Nevertheless, the SGCA could see "much force" in the argument that unconscionability is a redundant doctrine and therefore should be rejected. This is based on the court's hypothesis that the narrow doctrine of unconscionability is identical to, and coterminous with, Class 1 undue influence. However, the court did not reach a definitive conclusion on this point, which was left as a hypothesis "for the time being", until such a time as the court would receive detailed arguments on the point. The court confirmed that "[i]n the meantime", the 'narrow' doctrine of unconscionability, as modified, applies in Singapore.[11] Where, it may be asked, has all this left the doctrine of unconscionability in Singapore?

This paper seeks to provide a critical assessment of the state of the doctrine of unconscionability in Singapore in the light of recent developments in the case law. It first traces, in Part II, the provenance and the rise of judicial doubts and uncertainty about the status of unconscionability in Singapore, leading to the radical pronouncement in *E C Investment Holding* that unconscionability was not part of the law of Singapore. Then, in Part III, the paper examines the SGCA's characterisation of a 'narrow' and a 'broad' doctrine of unconscionability that led the court to search for, and to find, a new middle way doctrine. It argues that, contrary to the assertions of the court in *BOK*, the doctrine of unconscionability applied in the earlier English cases was a broad one and that the formulation of the doctrine of unconscionability by the current English cases is a narrow one, not a broad doctrine of "unbridled discretion".[12] The paper further contends that the proposition that the current English formulation of the doctrine of unconscionability is the same in substance as the 'broad' doctrine of *Amadio* is misleading. It endeavours to show that, in principle and in practical terms, the current English doctrine of unconscionability is different from and narrower than the *Amadio* doctrine.

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5 [2011] 2 SLR 232 (HC) at para 49 [*E C Investment Holding*].
6 [2019] 1 SLR 349 (CA) [*BOK*].
7 (1983) 151 CLR 447 (HCA) [*Amadio*].
8 *BOK*, *supra* note 6 at paras 133, 148.
9 (1888) 40 Ch D 312 [*Fry*].
10 [1978] 1 WLR 255 [*Cresswell*].
11 *BOK*, *supra* note 6 at para 152.
12 *Ibid* at para 148.

The modified doctrine of unconscionability expounded in *BOK* is scrutinised in Part IV. The authoritative restatement of the elements of unconscionability in Singapore is welcomed. However, drawing on the experience in other jurisdictions, the paper highlights some potential difficulties in the application of the modified doctrine, especially in relation to the shifting of the burden of proof to the defendant to show that the transaction was fair, just and reasonable. It goes on to advocate for a reconsideration of this aspect of the modified doctrine. In Part V, the paper interrogates the theory, advanced in some quarters and adopted in *BOK*, that the doctrine of unconscionability is redundant because its function is now being performed by undue influence. The paper advances the view that, while there is some overlap between the two doctrines, they are not coextensive with each other. It shows that, contrary to the SGCA's hypothesis, there are situations where applying the two doctrines to the same facts have actually produced, and will produce, different results. The two doctrines therefore complement rather than duplicate each other. The conclusions are stated in Part VI.

II. From Uncertainty to Clarity

The Singapore courts have not always entertained doubts about the existence of the doctrine of unconscionability in Singapore. In a succession of cases in the twentieth century, the courts repeatedly applied the doctrine of unconscionability without question.[13] Indeed, it is not too much to say that by the end of the last century it was regarded as settled that the doctrine of unconscionability, received from English law,[14] was part of the law of Singapore.[15] Judicial doubts and uncertainty started to appear around 2006 and increased rapidly within a short period. The seeds of these doubts were first planted in *Wellmix Organics (International) Pte Ltd v Lau Yu Man,*[16] where Phang J said that "[t]he status of unconscionability as a substantive doctrine is still unsettled in the context of the Commonwealth". Similar comments followed in the SGCA's decisions of *Gay Choon Ing v Loh Sze Ti Terence Peter*, where it was held that "unconscionability is still a fledgling doctrine in the Commonwealth law of contract"[17], *Chua Chian Ya v Music & Movements (S) Pte Ltd (formerly trading as M & M Music Publishing)*, where it was held that the doctrine of unconscionability has "yet to take root in the Commonwealth in general and in Singapore in particular"[18], and in other cases.[19]

The era of doubt and uncertainty climaxed in the astonishing pronouncement in *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* that unconscionability

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13 See *Lim Geok Hian v Lim Guan Chin* [1993] 3 SLR (R) 183 (HC) [*Lim Geok Hian*]; *Pek Nam Kee v Peh Lam Kong* [1994] 2 SLR (R) 750 (HC) [*Pek Nam Kee*]; *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1997] 2 SLR (R) 296 (HC) [*Rajabali Jumabhoy*], aff'd [1998] 2 SLR (R) 434 (CA). See also *United Malayan Banking Corp Bhd v Masagoes* [1994] 1 SLR (R) 367 (CA) [*Masagoes*].

14 See s 3 of the *Application of English Law Act* (Cap 7A, 1994 Rev Ed Sing) [*AELA*]. Section 6 of the *AELA* repeals s 5 of the Civil Law Act (Cap 43, 1999 Rev Ed Sing).

15 *Fong Whye Koon v Chan Ah Thong* [1996] 1 SLR (R) 801 (HC) [*Fong Whye Koon*]. See also *Masagoes*, *supra* note 13.

16 [2006] 2 SLR (R) 117 (HC) at para 72.

17 [2009] 2 SLR (R) 332 (CA) at paras 112, 114 [*Gay Choon Ing*].

18 [2010] 1 SLR 607 (CA) at paras 17, 24.

19 *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR (R) 891 (CA) at para 39.

was not part of the law of Singapore.[20] The case concerned a claim for specific performance of an option to buy a property. The option was granted to the claimant, a property developer, by AA, the owner of a company experiencing serious financial difficulties due to the global financial crisis of 2008. AA argued, *inter alia*, that the option was voidable for unconscionability. The court rejected the unconscionability claim because AA, who was an experienced businessman, did not satisfy two of the three requirements for relief set out in *Cresswell*. However, in delivering his judgment, Quentin Loh J stated that:

> I do not think unconscionability as a vitiating factor in contract forms any part of Singapore law, in spite of the rather tentative comments, undoubtedly *dicta*, of the Court of Appeal in *Gay Choon Ing*. . . at least not until the time comes for an abandonment of the doctrine of consideration in favour of doctrines like economic duress, undue influence and unconscionability. We already have the doctrine of undue influence, constructive fraud in equity and even *non est factum* in contract for the protection of the weak, the elderly, the very young and the ignorant. To do more and put forward a fledgling doctrine of unconscionability, without some considered, comprehensive and rational basis, which the Court of Appeal itself [in *Gay Choon Ing*] recognises is not without its own specific difficulties. . . would be in my respectful view to inject unacceptable uncertainty in commercial contracts and in the expectations of men of commerce.[21]

This pronouncement fuelled the idea, expressed by commentators and judges, that in Singapore "the doctrine of unconscionability has not been unambiguously established"[22] or that unconscionability "is a doctrine of uncertain. . . existence in Singapore law".[23]

However, the pronouncement in *E C Investment Holding* was not followed by other judges and has in effect been repudiated by the SGCA in *BOK*. In that case, three days after the death of his mother, when he was still suffering from acute grief, the claimant was asked by his wife to sign a declaration of trust ("DOT"). The wife, who was previously a practising lawyer, had prepared the DOT. The DOT purported to constitute the husband and his wife as joint trustees of all his assets for the sole benefit of their infant son. He signed the document without taking time to consider it and without receiving independent advice. He later claimed that the DOT should be set aside on the grounds of misrepresentation, mistake, undue influence and unconscionability. The High Court held that all four vitiating factors were made out and proceeded to set aside the DOT. The SGCA unanimously affirmed the decision on the same grounds, but for different reasons.

In relation to the doctrine of unconscionability, with which this paper is concerned, the SGCA started its discussion by observing that this was "the most contentious of the [four] vitiating factors" in the appeal.[24] The court confirmed that a 'narrow'

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20 *E C Investment Holding, supra* note 5.
21 *Ibid* at para 66; see also para 49.
22 *Phang & Goh*, *supra* note 4 at para 12.247.
23 *BOK v BOL* [2017] SGHC 316 at para 100 [*BOL*].
24 *BOK, supra* note 6 at para 114.

doctrine of unconscionability, based on the early English cases, applies in Singapore in a modified form.[25] It rejected a 'broad' doctrine of unconscionability as embodied in *Amadio* and the current English cases, declaring that such a doctrine "does not represent the law in the Singapore context".[26] Further, although the question of whether the doctrines of duress, undue influence and unconscionability should be amalgamated into one umbrella doctrine of unconscionability did not arise, the SGCA made it clear in a coda to its judgment that it would have rejected such a doctrine on the basis that it would lead to excessive uncertainty and unpredictability.[27]

The unambiguous and authoritative pronouncement by the apex court in Singapore that a 'narrow' doctrine of unconscionability formed part of the law of Singapore has provided much awaited clarity on the status of unconscionability in Singapore. Almost two decades ago, in neighbouring Malaysia, doubts about the existence of the doctrine of unconscionability were also dispelled by a similarly unambiguous decision by the Malaysian Court of Appeal in *Saad Marwi v Chan Hwan Hua*,[28] where it was held that the doctrine of unconscionability formed part of the law of Malaysia.[29] However, unlike the Malaysian Court of Appeal in *Saad Marwi*, the SGCA in *BOK* went further and provided an authoritative restatement of the elements of the doctrine of unconscionability in Singapore. In formulating its restatement, the SGCA was seeking to position the new doctrine of unconscionability for Singapore in the middle way between what it characterised as the 'narrow' doctrine of unconscionability on the one hand, and the 'broad' doctrine of unconscionability on the other hand. Before examining the new middle ground doctrine of unconscionability adumbrated in *BOK*, it is helpful first to interrogate the court's characterisation of the 'narrow' and the 'broad' doctrines.

III. The Narrow and Broad Doctrines of Unconscionability

A. *Two Unsatisfactory Versions of Unconscionability?*

In *BOK*, the SGCA traced the historical roots of the doctrine of unconscionability to a strand of English cases in the seventeenth to nineteenth century concerned with improvident transactions by expectant heirs. It said that this line of cases was picked up in the late nineteenth and twentieth centuries to constitute "the narrow doctrine of unconscionability".[30] This narrow doctrine of unconscionability, "in its most contemporary form", is found in *Fry* and later in *Cresswell*.[31] The narrow doctrine was later reformulated in a way that turned it into a "broad doctrine of

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25 *Ibid* at para 142.

26 *Ibid* at para 148; see also paras 133-134.

27 *Ibid* at paras 175-176.

28 [2001] 3 CLJ 98 (CA) [*Saad Marwi*].

29 The Malaysian courts have since been applying the doctrine without hesitation. See *Standard Chartered Bank Malaysia Bhd v Forewood Industries Sdn Bhd* [2004] 6 CLJ 320 (HC); *AEH Capital Sdn Bhd v AM-EL Holdings Sdn Bhd* [2008] 4 MLJ 487 (CA) at paras 129-135; *Low Sook Yee v Galaxy Music Sdn Bhd* [2013] 7 CLJ 514 (HC); *Syarikat Sesco Bhd v Yu Thian Motor Services Sdn Bhd* [2013] 2 MLJ 116 (HC).

30 *BOK, supra* note 6 at para 127.

31 *Ibid* at para 129.

unconscionability".[32] The narrow doctrine contrasts sharply with the broad doctrine, which the court observed, "is perhaps best exemplified" by the decision in *Amadio*.[33] The parameters of this broad doctrine were identified in the judgment of Deane J, where the learned justice said:

> 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.[34]

This doctrine of unconscionability was castigated by the SGCA as too broad because "it affords the court too much scope to decide on a subjective basis".[35] Indeed, the court considered that "the *Amadio* formulation comes dangerously close to the ill-founded principle of "inequality of bargaining power" that was introduced in *Lloyd's Bank v Bundy*[36]".[37]

The SGCA commented that "as the English courts have also purported to shift away from the narrower rubric in relation to improvident transactions, the manner in which they have done so does, with respect, give rise to concern inasmuch as the resultant formulations tend to adopt the same broad language that was utilised in *Amadio*."[38] As an example of such a formulation, it referred to *Multiservice Bookbinding Ltd v Marden*, where Browne-Wilkinson J said that for a transaction to be set aside as an unconscionable bargain one of the parties must have imposed the objectionable terms "in a morally reprehensible manner".[39] The SGCA complained that the use of the phrase "a morally reprehensible manner" introduced "*even more* subjectivity into the entire process".[40] It noted that the formulation in *Multiservice Bookbinding* has been cited with approval in subsequent English cases such as *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd,*[41] *Credit Lyonnais Bank Nederland NV v Burch*[42] and *Portman Building Society v Dusangh*.[43] It concluded that "the current English formulation of what is supposed to be the narrow doctrine of

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32 *Ibid* at para 132.
33 *Ibid*.
34 *Amadio, supra* note 7 at 474.
35 *BOK, supra* note 6 at para 133.
36 [1975] QB 326 (CA) [*Bundy*].
37 *BOK, supra* note 6 at para 133.
38 *Ibid* at para 135 [emphasis omitted].
39 [1979] Ch 84 at 110 [*Multiservice Bookbinding*].
40 *BOK, supra* note 6 at para 136 [emphasis in original].
41 [1983] 1 WLR 87 (HC) at 94-95 [*Alec Lobb*].
42 [1997] 1 All ER 144 (CA) at 152-153.
43 [2000] 2 All ER (Comm) 221 (CA) [*Portman Building Society*].

unconscionability is... no different (in substance at least) from the broad doctrine of unconscionability".[44]

The learned judges in *BOK* rejected the 'broad' doctrine (of *Amadio* and the current English cases) which they criticised as "a broad discretionary legal device which permits the court to arrive at any decision which it thinks is subjectively fair in the circumstances".[45] However, they also expressed misgivings about the 'narrow' doctrine as being too restrictive. They found a middle way, a "*via media* between the narrow doctrine of unconscionability on the one hand and the broad doctrine of unconscionability on the other" in their own modified doctrine of unconscionability.[46] This new doctrine is examined below. At this point, I respectfully question the view in *BOK* that the doctrine of unconscionability in the early English cases was a narrow one and that the current formulation of the doctrine by the English courts is a broad one. I also interrogate the court's assessment that the current English formulation of the doctrine is the same as the broad doctrine of *Amadio*.[47]

B. *Is the Current English Doctrine of Unconscionability a Broad Doctrine?*

In this section I endeavour to show that the current English doctrine of unconscionability is not a broad doctrine. Rather, it is a narrow doctrine—narrower than that applied in the earlier cases, including *Fry* and *Cresswell*. The contention is that while there has been a shift in the formulation of the doctrine of unconscionability by the English courts, the shift has been from a broad doctrine, in the earlier cases, to a narrow doctrine, in the current authorities, and not the other way round. In discussing the 'narrow' doctrine of unconscionability, the court in *BOK* did not fully explain the contours of the doctrine and did not explain in detail in what way the doctrine is said to be narrow. Whilst the court stated that the original doctrine was limited to the categories of expectant heirs and improvident transactions,[48] it was not made clear whether the doctrine was said to be narrow because it covered only certain types of transaction (such as improvident transactions with expectant heirs) or because, if it covered a wider range of transactions, the requirements for relief were very stringent, thus restricting the doctrine's scope, or both. However, it is respectfully submitted that the doctrine of unconscionability applied in the earlier English cases was a broad one both in terms of the types of transaction to which it applied and the threshold of the requirements for relief.

Concerning the types of transaction that fell within the scope of the early doctrine, this was not limited to improvident transactions with expectant heirs. The doctrine applied generally to other transactions such as sales of property,[49] assignment or sale

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44 *BOK, supra* note 6 at para 138.

45 *Ibid* at para 148.

46 *Ibid* at para 138.

47 For a criticism of the SGCA's view that the broad doctrine is represented by the decision in *Amadio*, see Rick Bigwood, "Knocking Down the Straw Man: Reflections on BOM v BOK and the Court of Appeal's "Middle-ground" Narrow Doctrine of Unconscionability for Singapore" [2019] Sing JLS 29.

48 *BOK, supra* note 6 at paras 127, 129.

49 *Filmer v Gott* (1774) 4 Bro PC 230, 2 ER 156; *Evans v Llewellin* (1787) 1 Cox Eq Cas 333, 29 ER 1191; *Coles v Trecothick* (1804) 9 Ves Jun 234, 32 ER 592.

of sailors' shares of prize money,[50] family settlements[51] and voluntary dispositions. Indeed, in *Earl of Aylesford v Morris*,[52] which concerned transactions involving an expectant heir, after explaining the operation of the doctrine of unconscionability in that context, Lord Selborne LC went on to state that "[t]his is the rule applied to the analogous cases of voluntary donations obtained for themselves by the donees, and to all other cases where influence, however acquired, has resulted in gain to the person possessing at the expense of the person subject to it."[53] Since the earlier doctrine of unconscionability applied to *all* types of transactions, it is too much to characterise it as a narrow doctrine on the basis that it applied only to improvident transactions with expectant heirs.

Nor was unconscionability in its early incarnation a narrow doctrine in the sense that the conditions for the exercise of the jurisdiction were more numerous or more difficult to satisfy than under the current English formulation. The requirements for relief under the earlier doctrine were stated by Kay J in *Fry* and summarised by Megarry J in *Cresswell*. After referring to Kay J's judgment in *Fry*, Megarry J said that:

> The judge thus laid down three requirements. 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.[54]

The requirements applied in the current English cases were stated in *Alec Lobb,* where three criteria for relief were identified. First, one party must be:

> at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that the circumstances existed of which unfair advantage could be taken... Second, this weakness of the one party has been exploited by the other in some morally culpable manner... Third, the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive.[55]

It is recognised that the *Alec Lobb* formulation, which has been adopted in the vast majority of current English cases,[56] represents a shift away from the earlier formulations. However, it is submitted that the shift has been from a broad doctrine, in the earlier cases, to a narrow doctrine, in the current cases.

It is true that the first requirement of the *Fry* and *Cresswell* test ("poor and ignorant" person) is narrower than its *Alec Lobb* counterpart (person "at a serious disadvantage"). Thus looking at this first gateway in isolation, it may be said that the current formulation is broader than the earlier formulation. It is also recognised that the *Fry*

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50 *How v Eldon and Edwards* (1754) 2 Ves Sen 516, 28 ER 330.
51 *Cory v Cory* (1747) 1 Ves Sen 19, 27 ER 864.
52 (1873) LR 8 Ch App 484 (CA) [*Earl of Aylesford*].
53 *Ibid* at 491.
54 *Cresswell, supra* note 10 at 257.
55 *Alec Lobb*, *supra* note 41 at 94-95.
56 See Nelson Enonchong, "The Modern English Doctrine of Unconscionability" (2018) 34 JCL 211 at 214-216 [Enonchong, "English Doctrine of Unconscionability"].

and *Cresswell* formulation can be seen as narrower in that it includes a requirement that there be a lack of independent advice, which is not part of the criteria in the current cases. However, it is submitted that, when each formulation is examined as a whole it will be seen that the current formulation, based on *Alec Lobb,* is narrower than the *Fry* and *Cresswell* test. First, although a lack of independent advice is a requirement under the earlier criteria, this does not make a significant difference in practice. This is because under the current approach, the question whether the weaker party received independent advice before entering into the impugned transaction is highly relevant as an evidential factor in relation to the question whether the first two requirements of *Alec Lobb* are satisfied, *ie*, whether the claimant was at a serious disadvantage and whether the defendant exploited the claimant's serious disadvantage.[57] The consequence is that, under the current approach, where the claimant received independent advice before entering into the transaction, the unconscionability claim is more likely to fail,[58] just as under the earlier doctrine,[59] and where the claimant entered into the transaction without independent advice the claim is more likely to succeed.[60]

Secondly, unlike the *Fry* and *Cresswell* criteria, the current *Alec Lobb* criteria include the important requirement that the stronger party must have exploited the serious disadvantage of the weaker party in a morally culpable manner. The absence of this requirement in the earlier test makes it considerably easier for a claimant to succeed under the earlier than the current English test. The practical significance of this difference can be illuminated by the contrasting outcomes in *Cresswell* and *Alec Lobb*. In *Cresswell* the unconscionability claim succeeded and the transaction was set aside because the three *Cresswell* requirements were satisfied even though there was no specific finding that the stronger party had acted in a morally culpable manner. By contrast, in *Alec Lobb* the claim failed precisely because the stronger party had not acted in a morally culpable manner. On appeal, it was submitted that the trial judge applied the wrong test by including morally culpable conduct on the part of the stronger party as a requirement for relief. The contention was that where there was unequal bargaining power between the parties, the test was whether the terms of the transaction were fair, just and reasonable, but it was "unnecessary to consider whether the conduct of the stronger party was oppressive or unconscionable."[61] The English Court of Appeal firmly rejected that contention, holding that relief on the ground of unconscionability is not available where, as in that case, the stronger party has not used his power in a morally culpable manner. In both cases, the stronger party had not acted in a morally culpable manner, but the unconscionability claim succeeded under the earlier doctrine and failed under the current *Alec Lobb* formulation.

Not only is the current formulation narrower in that it includes the requirement of morally culpable conduct on the part of the stronger party, which is not part of the *Fry* and *Cresswell* requirements, in practice, the threshold required by the

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57 See Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 3d ed (London: Sweet & Maxwell, 2018) at paras 19-004-19-006. [Enonchong, *Duress, Undue Influence and Unconscionable Dealing*].

58 *Jones v Morgan* [2001] Lloyd's Rep Bank 323 (CA) at para 38.

59 *Pritchard v Ovey* (1820) 1 Jac & W 396.

60 *Mortgage Express Ltd v Lambert* [2017] Ch 93 (CA) [*Mortgage Express*].

61 *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 (CA) at 183.

modern English cases to satisfy this requirement is also extremely high. There must have been some active conduct that is morally reprehensible, such as dissuading the weaker party from obtaining independent advice.[62] Passive acceptance of a benefit, or "passive exploitation",[63] is not sufficient in the modern English cases. In *BOK*, the SGCA disagreed with the view that *Alec Lobb* is in fact narrower and stricter than *Fry*.[64] It reasoned that the *Alec Lobb* requirement of "morally reprehensible" conduct "was intended merely to emphasise that the defendant's conduct had to be more than mere taking advantage of the plaintiff in a situation of inequality of bargaining power."[65] The difficulty with this interpretation is that it does not accord with the restrictive way in which the English courts have actually applied that requirement. It is perhaps telling that the SGCA in *BOK* did not refer to any cases in which the English courts interpreted the requirement of a morally reprehensible conduct in the manner suggested. The reality is that the high threshold for this requirement of exploitation in a morally culpable manner has made it extremely difficult for claimants to satisfy the requirement in the vast majority of the modern English cases, with the result that unconscionability claims have failed in almost all the modern cases.[66] That record is hardly the hallmark of a broad jurisdiction to grant relief.

Thirdly, while both the earlier and the current formulations of the unconscionability doctrine include a requirement that there must be substantive unfairness in the impugned transaction, the threshold for establishing this requirement is lower under the earlier than the current formulation. Under the former, it was sufficient that the imbalance in the terms of the transaction was "considerable",[67] or that the transaction was improvident, but under the latter, the transaction must be "not merely hard or improvident, but overreaching and oppressive".[68] The very high threshold in the current formulation makes it more difficult for claimants to satisfy the requirement in modern cases, thereby narrowing the protective reach of the current English doctrine. For example, in *Portman Building Society* the unconscionability claim failed, in part, because the transaction "although improvident, was not 'overreaching and oppressive' ".[69] Due to the higher threshold, this requirement has not been satisfied in the vast majority of recent English cases, including those where the court found that the transaction was "a very one-sided one"[70] or "exceptionally improvident".[71] Thus, by raising the threshold for the requirement to such a high level, the modern English cases have turned what was a broad doctrine of unconscionability into a very narrow doctrine.

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62 *Ruddick v Ormston* [2005] EWHC 2547 (Ch) at para 33 [*Ruddick*].

63 Hugh Beale, "Undue Influence and Unconscionability" in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith, eds, *Defences in Contract* (Oxford; Portland, OR: Hart Publishing, 2017) at 104.

64 This view was advanced in Enonchong, "English Doctrine of Unconscionability", *supra* note 56 at 217.

65 *BOK, supra* note 6 at para 139.

66 See eg, *Humphreys v Humphreys* [2004] EWHC 2201 (Ch) at para 106 [*Humphreys*]; *Ruddick*, *supra* note 62 at para 33; *Evans v Lloyd* [2013] EWHC 1725 (Ch) [*Evans*]; *Yedina v Yedin* [2017] EWHC 3319 (Ch) at paras 283-284.

67 *Fry*, *supra* note 9 at 322; *Cresswell*, *supra* note 10 at 257.

68 *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* [2020] Ch 98 (CA) at para 40.

69 *Portman Building Society*, *supra* note 43 at 229.

70 *Humphreys*, *supra* note 66 at para 106.

71 *Kalsep Ltd v X-Flow BV* [2001] All ER (D) 113 (Mar).

What emerges from the above discussion is that the current English doctrine of unconscionability is a narrow one, narrower than that in the earlier cases.[72] The shift in the approach of the English courts has been from a broad doctrine in the earlier cases to a narrower doctrine in the current cases. The three requirements of the current formulation are successive gateways to relief, with the next gateway narrower than the previous one, thereby creating an overall bottleneck effect. The first gateway—serious disadvantage—is broad and therefore allows many claimants through to the second gateway. But the second gateway—exploitation in a morally culpable manner—is significantly narrower, so that only a few claimants can get through to the third gateway. The third and final gateway—that the transaction must be "not merely hard or improvident", but "overreaching and oppressive"—is even more restrictive than the second and is a formidable barrier to all but a tiny trickle of claimants who can pass through to enjoy the protection of unconscionability. It is respectfully submitted that a doctrine of unconscionability based on such stringent requirements cannot justly be chastised as "flawed because it does not contain or embody—in and of itself—the elements of principle accompanied by a datum level of certainty and predictability".[73]

C. *Is the Current English Doctrine the Same as the Broad Doctrine of Amadio?*

It is further submitted that the view that the current English cases have adopted "the same broad language that was utilised in *Amadio*"[74] or that the current English doctrine is "no different (in substance at least) from the broad doctrine" of *Amadio*[75] is misleading. In this section, I seek to show that the current English doctrine of unconscionability is significantly different from, and narrower than, the *Amadio* doctrine. It is accepted that in substance the requirement of "special disability" in *Amadio* is not very different from the requirement "serious disadvantage" of *Alec Lobb*. However, there are significant differences between the *Amadio* and the *Alec Lobb* doctrines. First, whereas under *Alec Lobb* unfairness in the terms of the transaction is a prerequisite for relief, this is not a requirement under the *Amadio* doctrine, although it is a relevant evidential factor.[76] This makes the ambit of the *Amadio* doctrine wider, since in a situation where there is no unfairness in the terms of the transaction, a claim based on *Amadio* can succeed, but a claim based on *Alec Lobb* would fail.

Moreover, the threshold for the *Alec Lobb* requirement of unfairness in the terms of the transaction is extremely high. It is not only higher than that in the earlier English cases, as discussed above, but is also higher than the threshold in some other

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[72] See eg *Al Nehayan v Kent* [2018] 1 CLC 216 at para 187, where it was held that "the standard of unconscionability is a high one". See also *Wallis Trading Inc v Air Tanzania Co Ltd* [2020] EWHC 339 (Comm) at para 118, where it was held that the circumstances in which a court will intervene on the ground of unconscionability "are limited".

[73] *BOK, supra* note 6 at para 148.

[74] *Ibid* at para 135.

[75] *Ibid* at para 138.

[76] *Amadio, supra* note 7 at 462, 475. See also *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 (HCA) at para 118 [*Kakavas*] and *Thorne v Kennedy* (2017) 263 CLR 85 (HCA) at para 121 [*Thorne*].

jurisdictions, where the requirement is satisfied by showing that the transaction was improvident[77] or substantially unfair.[78] The very high threshold of the *Alec Lobb* requirement widens further the chasm between the current English doctrine and its *Amadio* cousin.

Secondly, whilst under both *Amadio* and *Alec Lobb* some misconduct on the part of the stronger party is a requirement for relief, the threshold for the *Alec Lobb* requirement is higher. For example, whereas under *Amadio* passive acceptance of a benefit can constitute unconscionable conduct,[79] the current English cases insist on some active conduct that is morally reprehensible, as discussed above. The result is that whereas under *Amadio* an unconscionability claim can succeed even in the absence of active conduct that is morally reprehensible,[80] the claim will fail in the absence of such active conduct under the current English approach.[81]

Thirdly, the *Amadio* doctrine is broader than the current English doctrine in that *Amadio* extends to suretyship transactions in a non-commercial context, where the surety entered into the transaction as a result of the wrongdoing of a third party (who is usually the borrower). Indeed, *Amadio* itself is such a case. An elderly couple entered into a guarantee with a bank to support an overdraft facility to their son's company. The guarantors, who had moved to Australia from Italy and had limited command of English, were induced to enter into the transaction by misrepresentations from their son. At the time they signed the guarantee, the bank was aware that they were Italians, that they were of advanced age, that their command of English was not good and that their son had procured their agreement to sign the guarantee. The bank failed to explain the transaction to them when it obtained their signatures. It was held that the bank was guilty of unconscionable conduct in procuring the execution of the guarantee in these circumstances and that the transaction should be set aside.

By contrast, the English doctrine of unconscionability does not extend to such cases. The English courts deal with the problem of third party wrongdoing in this context by using the doctrine of constructive notice,[82] as enunciated in *Barclays Bank Plc v O'Brien*[83] and clarified in *Royal Bank of Scotland Plc v Etridge (No 2)*.[84] In *O'Brien*, a wife was induced by her husband's misrepresentation to execute a mortgage of their matrimonial home as security for overdraft facilities given by a bank to her husband's company. It was held that the wife was entitled to have the mortgage set aside because in the circumstances the bank was fixed with constructive

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77 For examples from Canada, see *Uber Technologies Inc v Heller,* 2020 SCC 16 at para 65 [*Uber Technologies*]; *Norberg v Wynrib* [1992] 2 SCR 226 at 256 [*Norberg*]. For examples from Ireland, see *Carroll v Carroll* [1998] 2 ILRM 218 (HC), aff'd [2000] 1 ILRM 243; *Prendergast v Joyce* [2009] IEHC 199.

78 For examples from Nova Scotia, see *Stephenson v Hiltin (Canda) Ltd* (1989) 93 NSR (2d) 366 at para 12; *Woods v Hubley* (1995) 146 NSR (2d) 97 at paras 25-26. For examples from Saskatchewan, see *Dolter v Media House Productions Inc* (2002) 227 Sask R 153 at 154; *Burkhardt v Gawdun*, (2004) 254 Sask R 271.

79 The threshold is higher in the context of statutory unconscionability; see *Paciocco v ANZ Banking Group Ltd* [2016] 258 CLR 525 (HCA) at para 188.

80 As the case of *Amadio* itself demonstrates; see also *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 41 at paras 57-59; *Perpetual Trustee Company Ltd v Khoshaba* [2006] NSWCA 41.

81 *Portman Building Society*, *supra* note 43; *Ruddick*, *supra* note 62 at para 33; *Evans*, *supra* note 66.

82 In most cases, the creditor will not have actual notice of the third party's wrongdoing.

83 [1994] 1 AC 180 (HL) [*O'Brien*].

84 [2002] 2 AC 773 (HL) [*Etridge*].

notice of the misrepresentation made by the husband to the wife and the bank failed to take reasonable steps to ensure that she understood the nature and effect of the transaction before agreeing to it.

Thus, whilst the outcome in *Amadio* and *O'Brien* are similar, the jurisprudential bases are different: unconscionability for the former; constructive notice for the latter. This divergence in approach demonstrates that, in this context, the *Amadio* doctrine extends into a domain that has remained beyond the reach of the current English doctrine of unconscionability. In *Garcia v National Australia Bank Ltd*,[85] the High Court of Australia expressly declined to follow the English approach based on constructive notice, preferring the doctrine of unconscionability. It said that the constructive notice approach of *O'Brien* "may well distract attention from the underlying principle: that the enforcement of the legal rights of the creditor would, in all the circumstances, be unconscionable."[86] But in the subsequent decision in *Etridge*, the House of Lords confirmed the *O'Brien* approach for English law.[87] This has cemented the divergence in approach and concretised the gap between the broad doctrine of *Amadio* and the current narrow doctrine of English law.

A further difference between the Australian and English doctrines is that although the primary remedy is rescission (including rescission on terms),[88] in English law rescission of a contract "is an all or nothing process".[89] Partial rescission of a contract is not available, subject to the normal principles of severance.[90] By contrast, under the doctrine in *Amadio* the courts can grant partial rescission for unconscionability.[91] Similarly, whereas the English courts do not normally use the doctrine of unconscionability to strike down a particular term and leave the rest of the contract enforceable, in other jurisdictions a more expansive doctrine of unconscionability has allowed the courts to do just that. For example, the courts in Canada have relied on unconscionability to refuse to enforce particular terms such as an exemption clause,[92] a penalty clause,[93] an entire agreement clause,[94] and an arbitration clause.[95] Whilst equivalent relief may be available in English law on different grounds (such as under

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85 (1998) 194 CLR 395 (HCA).

86 *Ibid* at para 39.

87 *First National Bank v Achampong* [2003] EWCA Civ 487; *National Westminster Bank v Alfano* [2012] EWHC 1020 (QB); *HSBC Bank Plc v Brown* [2015] EWHC 359 (Ch); *Syndicate Bank v Dansingani* [2019] EWHC 3439 (Ch). For a detailed discussion of the constructive notice doctrine of English law, see Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, *supra* note 57 at Ch 23-25.

88 Alternatively, refusal to order specific performance in cases where the stronger party is seeking specific performance.

89 *TSB Bank Plc v Camfield* [1995] 1 WLR 430 (CA) at 438.

90 *de Molestina v Ponton* [2002] 1 Lloyd's Rep 70 (HC) at 286-289; *Kennedy v Kennedy* [2014] EWHC 4129 (Ch) at para 46. The position is different in relation to the setting aside of non-contractual voluntary dispositions: *Kennedy v Kennedy* [2014] EWHC 4129 (Ch); *Rogge v Rogge* [2019] EWHC 1949 (Ch).

91 *Amadio, supra* note 7 at 481; *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 (HCA).

92 *Tercon Contractors Ltd v British Columbia (Transportation and Highways)* [2010] 1 SCR 69 at paras 122-123; *ABB Inc. v Domtar Inc.* [2007] 3 SCR 461 at para 82. See also *Plas-Tex Canada Ltd v Dow Chemical of Canada Ltd* (2004) 245 DLR (4th) 650 (ABCA); *Maloney v Dockside Marine Centre Ltd*, 2013 BCSC 395.

93 *7084421 Canada Ltd v Vinczer*, 2020 ONSC 217 at para 72.

94 *2190322 Ontario Ltd v Ajilon Consulting*, 2014 ONSC 21.

95 *Uber Technologies*, *supra* note 77. See also, in relation to a jurisdiction clause, *Douez v Facebook Inc* [2017] 1 SCR 751 at paras 112-116 [*Douez*].

statute),[96] the point here is that, unlike the *Amadio* doctrine, the current English doctrine of unconscionability is not broad enough to provide such relief.

IV. The Modified Doctrine of Unconscionability

Prior to the decision in *BOK*, there was considerable inconsistency in the approach of the Singapore courts to the elements of unconscionability. In most cases the *Cresswell* requirements were applied.[97] However, in some other cases, the courts applied the *Cresswell* requirements plus the *Alec Lobb* requirement of morally reprehensible conduct on the part of the stronger party.[98] A yet further approach was that if the claimant established the three *Cresswell* requirements, the burden shifted onto the defendant to show that the transaction was fair, just and reasonable.[99] There has also been some confusion in the literature. For example, Phang and Goh state in their leading work that since the Singapore cases follow the approach of English law, "it would be appropriate to discuss the requirements of this approach."[100] Then, after referring to the *Cresswell* criteria and the *Alec Lobb* criteria, the learned authors go on to discuss the three *Alec Lobb* requirements, but not the *Cresswell* requirements even though, as indicated above, it is the *Cresswell* (rather than the *Alec Lobb*) requirements that have been followed in most of the Singaporean cases.

However, with the authoritative restatement by the SGCA in *BOK,* uncertainty as to the elements of the doctrine of unconscionability in Singapore has come to an end. According to that restatement, there is a three-step process.[101] The claimant has to show that two elements are satisfied: first, that the claimant was suffering from an infirmity; and second, that the other party exploited the claimant's infirmity in procuring the transaction. The third step is that when these two requirements are established, the burden shifts to the defendant to show that the transaction was fair, just and reasonable.

The SGCA referred to this new doctrine of unconscionability as its "approach to the narrow doctrine".[102] However, it is respectfully submitted that the new doctrine is such a radical departure from the doctrine of *Fry* and *Cresswell* in both form and substance that it is not merely an "approach" to the 'narrow' doctrine; it is a very different doctrine of unconscionability altogether. First, the *Cresswell* requirement of "poor" and "ignorant" person has been vastly expanded to a different requirement of "infirmity", as discussed below. Secondly, the remaining two *Cresswell* requirements—that the transaction was at a considerable undervalue and that the claimant lacked independent advice—have simply been jettisoned, although they

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96 See, for example, the Unfair Contract Terms Act (Cap 50, 1977) (UK) or the Consumer Rights Act (Cap 15, 2015) (UK).

97 See *Pek Nam Kee*, *supra* note 13 at para 131, where the court made no reference to *Alec Lobb*. See also *Rajabali Jumabhoy*, *supra* note 13 at para 196; *E C Investment Holding*, *supra* note 5.

98 *Lim Geok Hian*, *supra* note 13.

99 *Fong Whye Koon*, *supra* note 15 where the court made no reference to *Alec Lobb*.

100 *Phang and Goh*, *supra* note 4 at 885-891.

101 *BOK, supra note* 6 at para 142.

102 *Ibid* at para 144.

remain "very important factors" that the court will take into account.[103] Thirdly, the modified doctrine includes the *Alec Lobb*-type requirement that the stronger party must have exploited the special weakness of the claimant, which is not one of the *Cresswell* requirements. These significant differences between the two doctrines show that the *BOK* doctrine bears very little, if any, resemblance to the *Cresswell* doctrine. Having said that, we may now examine each of the three steps of the *BOK* doctrine with more analytical granularity.

A. *Was the Claimant suffering from an Infirmity?*

The element of special weakness, which delineates the category of persons who are the object of equity's protection on the ground of unconscionability, has been variously stated. Some formulations are more expansive than others. In *BOK*, the SGCA criticised both the *Amadio* formulation (which requires a "special disability" creating an absence of "any reasonable degree of equality between the parties") and the *Alec Lobb* formulation (which requires a "serious disadvantage" creating "circumstances... of which unfair advantage could be taken") for being too broad. But the court also rejected the *Cresswell* formulation (which requires the claimant to be a "poor" and "ignorant" person) as too narrow. Indeed, in the earlier case of *Rajabali Jumabhoy v Ameerali Jumabhoy*, Prakash J explained that the *Cresswell* formulation was ill-suited to the circumstances of Singapore because it "would allow the doctrine of unconscionability to be invoked by only a small minority of people in modern Singapore".[104] That problem is vividly illustrated by the facts of *BOK*. In that case, the claimant could not satisfy the *Cresswell* test because he was well-educated, worked as the managing director of an energy company, and was "a man of substantial means".[105] Yet, he entered into the impugned transaction in circumstances of special weakness, namely, shortly after the funeral of his mother, when he was suffering from acute grief and without access to independent advice.

To expand this element beyond the limits of the *Cresswell* gateway of "poor and ignorant", the SGCA adopted the requirement of "infirmity", which extends to persons suffering from "other forms of infirmities—whether physical, mental and/or emotional in nature."[106] This expansion made it possible for the claimant in *BOK* to satisfy the requirement of infirmity on the basis that he suffered from acute grief that impaired his ability to make decisions.

However, there are limits to the expanded gateway of infirmity. As the SGCA stated, "not every infirmity would *ipso facto* be sufficient" to satisfy this requirement.[107] For an infirmity to reach the required threshold, it must be of sufficient gravity as to have acutely affected the claimant's ability to "conserve his own interests".[108] The inquiry into this will be "an intensely fact sensitive one."[109] It is

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[103] *Ibid* at para 141.
[104] *Rajabali Jumabhoy*, *supra* note 13 at para 198.
[105] *BOK, supra* note 6 at para 141.
[106] *Ibid*.
[107] *Ibid*.
[108] *Ibid*.
[109] *Ibid* at para 141.

suggested that the pre-*BOK* case of *Lim Geok Hian v Lim Guan Chin*[110] is an illustration of a situation where the requirement would not be satisfied even though the claimant suffered from an infirmity. In that case, the court accepted that the complainant was a poor and ignorant person, and therefore was suffering from an infirmity. Yet it was held that the requirement was not satisfied because, as the court explained, the complainant "understood the agreement and intended the legal effect of the agreement. Her "poverty" or "ignorance" did not place her at any disadvantage."[111] In other words, the claimant's infirmity (poverty or ignorance) was not of sufficient gravity to have acutely affected her ability to conserve her own interests.

Given that under the modified doctrine "infirmity" extends to various forms, "whether physical, mental and/or emotional in nature", it is unclear whether there is much (if any) difference between the *BOK* requirement of infirmity and the *Amadio* requirement of "special disability" or the *Alec Lobb* requirement of "serious disadvantage", both of which were criticised and rejected in *BOK*. The SGCA insisted that its modified doctrine is different from the 'broad' doctrine. It stated that the modified doctrine should "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*. . .)."[112] However, beyond this general statement, the court did not provide any specific guidance on the difference between the requirement of infirmity and the counterpart requirements in *Amadio* and *Alec Lobb*.

B. *Did the Defendant Exploit the Claimant's Infirmity?*

The second requirement for the claimant to establish under the *BOK* doctrine is that the defendant exploited the claimant's infirmity in procuring the transaction. It is widely recognised that in order to satisfy this element it must be shown that the defendant had knowledge of the claimant's infirmity.[113] The defendant must have had "a blameworthy state of mind".[114] For this purpose, actual knowledge—which includes Nelsonian knowledge or wilful ignorance—is sufficient.[115] However, there is disagreement whether a lesser state of knowledge should be sufficient. In Australia, it is unclear whether the law on this point is entirely settled. The wording used by Deane J in the earlier cases of *Amadio* and *Louth v Diprose*[116] is that the claimant's disability had to be "sufficiently evident" to the defendant. It was thought that that included constructive notice. But the High Court of Australia later clarified in *Kakavas v Crowne Melbourne Ltd*[117] that it did not include constructive notice, which was not sufficient in this context. However, in the subsequent decision in *Thorne v Kennedy* the majority of the High Court of Australia stated that what is

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110 *Lim Geok Hian, supra* note 13.

111 *Ibid* at para 48.

112 *BOK, supra* note 6 at para 144.

113 For authority from New Zealand, see *Hart v O'Connor* [1985] AC 1000 (PC) [*Hart*]; *Gustav & Co Ltd v Macfield Ltd* [2008] 2 NZLR 735 (NZSC) at para 6 [*Gustav & Co Ltd*]. For authority from Australia, see *Louth v Diprose* (1992) 175 CLR 621 (HCA) at 637; *Kakavas, supra* note 76.

114 A Burrows, *Restatement of English Law of Contract* (Oxford: Oxford University Press, 2016) at 210-211.

115 *Owen and Gutch v Homan* (1853) 4 HLC 997 at 1035; 10 ER 752 at 767.

116 *Amadio, supra* note 7.

117 *Thorne, supra* note 76.

required is that the defendant "knew or ought to have known"[118] of the claimant's special disadvantage.[119] This is similar to the test adopted by the Supreme Court of New Zealand, which looks to whether the defendant "knows or ought to be aware" of the claimant's special disability.[120] In Canada, it has been held at the level of the Court of Appeal that knowledge was required and that constructive knowledge was sufficient.[121] However, in the more recent decision in *Uber Technologies Inc v Heller*[122] the Supreme Court of Canada decided by a majority that proof that the stronger party knowingly took advantage of the weaker party is not required.

In Singapore, under the *BOK* doctrine, the claimant's infirmity must have "been, or ought to have been, evident to the" defendant.[123] Whether one agrees with this formulation or not, it does provide some welcome clarity.

However, while *BOK* provides authoritative guidance on the state of knowledge required of the defendant, it does not provide further guidance on the kind of conduct that will count as exploitation, where the defendant has the requisite knowledge. This leaves room for some uncertainty. For example, would both the active seeking and the passive acceptance of the claimant's consent to the transaction amount to exploitation, as is the case in some jurisdictions?[124] In the pre-*BOK* case of *Fong Whye Koon*, the Singapore High Court aligned itself with the view that both active seeking and passive acceptance can amount to exploitation.[125] However, it is not obvious that the position is the same under the *BOK* doctrine, since the court did not explicitly state whether passive acceptance would be sufficient. *BOK* itself is a case of active exploitation where the defendant procured, rather than accepted, the transaction. She drafted the document, she asked the claimant to sign it and she took advantage of the claimant's "grief by badgering him into signing the DOT".[126] So, the factual finding that the defendant exploited the claimant's infirmity does not tell us much about the position of the court on passive acceptance.

Indications from statements of the court are somewhat equivocal on the point. It should be recalled that in articulating the *Amadio* doctrine, which was roundly condemned in *BOK* as too broad, Deane J specifically mentioned the defendant's unconscionable conduct to "procure or accept" the claimant's assent to the transaction. In *BOK*, the court only referred to the defendant exploiting the claimant's infirmity "in procuring" the transaction.[127] There is no mention of accepting the transaction. This may be seen as an indication that the court intended to exclude passive acceptance. That view may appear to be consistent with the court's desire

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118 *Thorne*, *supra* note 76 at para 38.

119 *Ibid* at para 144, where Gordon J stated that the test is whether the special disadvantage of the weaker party was "sufficiently evident" to the stronger party "to make it unconscientious to procure or accept the assent of the weaker party".

120 *Gustav & Co Ltd*, *supra* note 113 at para 6. See also *Trustees Executors Ltd v Turnbull and Turnbull* [2009] NZCA 574.

121 *Downer v Pitcher* [2017] 409 DLR (4th) 542 and *Input Capital Corp v Gustafson* [2019] 438 DLR (4th) 387.

122 *Uber Technologies, supra* note 77.

123 *BOK, supra* note 6 at para 141.

124 For authorities from New Zealand, see *Hart, supra* note 113 at 1024; *Moffat v Moffat* [1984] 1 NZLR 600 (CA). For authorities from Australia, see *Bridgewater v Leahy* (1998) 194 CLR 457 (HCA) at 493.

125 *Supra* note 15 at para 20.

126 *BOK, supra* note 6 at para 106.

127 *Ibid* at para 142.

to ensure that the modified doctrine, though wider than the 'narrow' doctrine of *Cresswell*, should remain narrower than the broad doctrine of *Amadio*.[128]

However, it may be that the court did not refer to "accepting" the transaction because it considered that exploitation by procurement of the transaction (which is active) also includes exploitation by accepting the transaction (which is passive). Thus, while the learned judges in *BOK* recognised that "there could be situations of unconscionability where advantage has been taken of the plaintiff without the overt exercise of influence", they took the view that "the line between a (passive) act of taking advantage of the plaintiff and an (overt) act of influence can be a very fine one indeed." They went on to state that "it is difficult to imagine a situation in real life where an unconscionable act of 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."[129] This suggests that the SGCA's view of exploiting the claimant's infirmity to procure the transaction may be a broad one which includes both active seeking and passive acceptance of the transaction. Nevertheless, as the court was not explicit on this point, it requires clarification.

It is submitted that the clarification should be that the concept of exploitation in this context includes passive acceptance. If passive acceptance is excluded, it would restrict the protective reach of unconscionability to such an extent that it may be unable to provide relief in certain cases where equity should intervene to protect the weaker party. Suppose a poor and ignorant person offers to sell his or her flat to another person at a gross undervalue, in ignorance of the market value of the property and without receiving independent advice. The other party, who is aware of the vendor's ignorance, accepts to buy the property at the price stated by the vendor, without first advising the vendor to seek independent advice. In such a case, the idea that the ignorant vendor should be denied relief because the buyer did not take any active step that is morally reprehensible, such as to dissuade the vendor from seeking independent advice, is unattractive. The court's intervention on the ground of unconscionability in the pre-*BOK* case of *Fong Whye Koon* is explicable on the basis that passive acceptance of the vendor's offer amounted to exploitation of the vendor's infirmity. Yet, if passive acceptance is excluded from the concept of exploitation following the decision of *BOK*, then on facts identical to those of *Fong Whye Koon*, a Singapore court would reach a different decision today. Such a change in the law would be a change in the wrong direction.

C. *The Burden Shifts to the Defendant, but is this Third Step Necessary or Desirable?*

If, in the first and second stages discussed above, the claimant establishes that he or she was suffering from an infirmity and that the defendant exploited the infirmity in procuring the transaction, then the burden shifts to the defendant to show that the transaction was fair, just and reasonable. This process of shifting the burden to the

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[128] *Ibid* at para 144.
[129] *Ibid* at para 152.

defendant was adopted by the trial judge in *BOK v BOL*.[130] The learned judge stated, citing *Chitty on Contracts*,[131] that once the two requirements[132] are established, it will be for the defendant to show, in the words of Lord Selborne LC,[133] that the transaction was "fair, just and reasonable". If the defendant "is unable to do so, then the transaction is liable to be set aside on the ground of unconscionability."[134] It follows that if the defendant succeeds in discharging that burden, then, under the modified doctrine, relief on the ground of unconscionability will not be available even though the claimant has established that (i) he or she suffered from an infirmity of sufficient gravity and (ii) the defendant exploited that infirmity to procure the transaction.

It is respectfully submitted that this approach is not well-founded. Where, as in *BOK*, the claimant has established infirmity and exploitation by direct evidence, rather than through an evidential presumption,[135] there is no point in going to a further stage where the burden shifts to the defendant to show that the transaction was fair, just and reasonable. This is because the defendant will normally not be able to discharge this burden on the available evidence, since on the same evidence the claimant has already satisfied the court that there was infirmity on one side and exploitation of that infirmity on the other. To put it another way, the evidence that enables the claimant to establish the two elements (in stages one and two) will also weigh against a finding that the transaction is fair, just and reasonable (in stage three). This is illustrated by *BOK* itself. There, the fact that (a) the claimant did not have independent advice and (b) the transaction was at an undervalue both weighed "heavily in favour of a finding of unconscionability."[136] The court noted that these facts played a role in establishing "exploitation of an infirmity", that is to say, the two requirements to be established by the claimant. The court then went on to say that "it is also for these reasons that we agree with the Judge that the DOT was by no means fair, just and reasonable".[137] Thus, the same evidence that led the court to find that there was exploitation of an infirmity also led it to the conclusion that the defendant failed to discharge the burden of proof that had been shifted to her to show that the transaction was fair, just and reasonable. It is hard to see how a court can, on the basis of all the available evidence (including evidence that there was significant inadequacy of consideration and that the claimant did not receive independent advice), find that the defendant exploited the claimant's infirmity in procuring the transaction and also find that nevertheless the transaction was fair, just and reasonable.

The shifting of the burden of proof to the defendant, after the claimant has established the necessary requirements by direct evidence is not only unnecessary but also undesirable because it can give rise to difficulties. The potential difficulties may be illuminated by the experience of the courts in the Canadian province of British

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130 *BOL, supra* note 23.
131 Hugh Beale, ed, *Chitty on Contracts*, 32d ed (London: Sweet & Maxwell, 2015) at para 8-139.
132 The two requirements identified by the judge are different from those formulated by the SGCA.
133 *Earl of Aylesford*, *supra* note 52 at 490-491.
134 *BOL*, *supra* note 23 at para 122.
135 Which is the situation that Lord Selbourne LC was addressing in *Earl of Aylesford, supra* note 52.
136 *BOK, supra* note 6 at para 155.
137 *Ibid* at para 155.

Columbia, where the burden of proof has similarly been shifted to the defendant. The fountain source of the process in British Columbia is the leading case of *Morrison v Coast Finance Ltd*.[138] In that case, Davey JA (Bull JA concurring) said that the material ingredients for unconscionability are:

> [1] proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker, which left him in the power of the stronger, and [2] proof of substantial unfairness of the bargain obtained by the stronger party. [3] On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable.[139]

This test of unconscionability (the "*Morrison* test") has been repeatedly applied by the British Columbia Court of Appeal.[140] To be sure, in terms of the elements to be established by the claimant, the *Morrison* test is different from the doctrine adumbrated in *BOK*. First, substantial unfairness (or inadequacy of consideration) is a requirement under the former, but not under the latter. Secondly, the stronger party's exploitation of the infirmity of the weaker is a requirement under *BOK*, but it is not an explicit requirement of the *Morrison* test, although this may be regarded as implied in the wording of the test, *eg* circumstances of the weaker party "which left him in the power of the stronger" and substantial unfairness of the bargain "obtained by the stronger" party.[141]

However, the two tests are very similar in terms of process. In the first place, both are based on a three-step process. Secondly, the third step is the same in both. In each, upon proof of two requirements by the claimant (in the first two stages), the burden of proof shifts to the defendant to show that the transaction was fair, just and reasonable. In the discussion below, I show how this third step has caused difficulty in British Columbia and warn that it has the potential to give rise to similar problems if so retained in Singapore.

The difficulty in the context of British Columbia was highlighted by Taylor JA in *Smyth v Szep*.[142] After quoting from the judgment of Davey JA in *Morrison* and summarising the *Morrison* test, Taylor JA said:

> The question of who bears the onus of proof is not entirely clear. If the weaker party must prove "substantial unfairness of the bargain" and the onus then falls on the other party to show "that the bargain was fair, just and reasonable", that would

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138 (1965) 55 DLR (2d) 710 [*Morrison*].

139 *Ibid* at 713 [numbers in square parentheses supplied].

140 See *Harry v Kreutziger* (1978) 95 DLR (3d) 231 (BCCA); *Principal Investments Ltd v Thiele Estate* (1987) 12 BCLR (2d) 258 (BCCA) at 263; *Klassen v Klassen* 2001 BCCA 445; *Roy v 1216393 Ontario Inc* 2011 BCCA 500 at para 29; *Hughes v Brown Estate* 2012 BCCA 172 at paras 27-31; *Loychuk v Cougar Mountain Adventures Ltd* (2012) 347 DLR (4th) 591 (BCCA); *Sherry v CIBC Mortgages Inc*. 2016 BCCA 240 at para 82.

141 This wording suggests that it is necessary to show abuse of power by the stronger party in procuring the impugned bargain. Indeed, in some cases, in applying the *Morrison* test, the courts consider whether there has been abuse of power. See *Wang v Laura W Zhao Personal Estate Corp.* [2019] BCJ No. 1809 at para 170.

142 (BCCA) [1992] BCJ No 37.

> seem to mean no more than that the party raising the issue of unconscionability has the burden of proving it. The other party, has, of course, the opportunity to meet the case advanced by showing that there was no unfairness or unreasonableness. There may be something more to it than that, but I find it unnecessary to decide the matter for the present purpose.[143]

This uncertainty has led some judges in the British Columbia Court of Appeal to modify the three-step process of *Morrison*. Such modification would normally be a positive development. However, it has been a problem in this context because various judges of the same court have modified the *Morrison* process in different ways, resulting in inconsistency in the approach of the court.

This study has identified three different ways in which judges in the British Columbia Court of Appeal revised the *Morrison* test. First, in some cases the court simply reformulated the *Morrison* test as requiring only the first two steps. This approach is exemplified by the decision in *McNeill v Vandenberg*.[144] In delivering the unanimous judgment of the British Columbia Court of Appeal, Garson JA said that in order to set aside a bargain for unconscionability, the claimant must establish (a) inequality in the position of the parties and (b) substantial unfairness in the bargain. The learned judge did not add that on proof of these two requirements, the burden shifts to the defendant to show that the transaction was fair, just and reasonable. By so doing, this reformulation dispenses with the third step (the shifting of the burden of proof to the defendant) without explicitly saying so, thereby advancing a two-step approach.

A second approach is that the court not only refrained from mentioning the third step (shifting of the burden of proof to the defendant), but went further to state that the onus rested on the claimant. Thus, in *Do v Nichols*,[145] Geopel JA, in delivering the unanimous decision of the British Columbia Court of Appeal, quoted the unconscionability test as formulated in previous cases (including *Morrison*) before restating the law as follows:

> In order to set aside a bargain for unconscionability, a party must establish:
>
> (a) Inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him in the power of the stronger; and
> (b) Proof of substantial unfairness in the bargain
>
> The onus lies on the party seeking to establish that a bargain was unconscionable.[146]

By this restatement, not only was the *Morrison* third step discarded, but it was replaced by an explicit statement that the burden of proving that the transaction was unconscionable rested on the claimant.

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143 *Ibid* at 6.
144 2010 BCCA 583 at para 15.
145 (2016) 398 DLR (4th) 1 (BCCA). Leave to appeal was refused in [2016] SCCA No 206.
146 *Ibid* at para 26.

Under a third approach, the court by-passed the second step (whether the transaction was substantially unfair). Where it was determined at the conclusion of the first step that the requirement of inequality between the parties was satisfied, the court moved straight to the third step and considered the question of whether the transaction was fair, just and reasonable.[147] Thus, in *Cougle v Maricevic,*[148] after concluding that the first requirement was satisfied, the court moved straight to the third step and considered "whether in those circumstances the [defendant] has shown that the [transaction] was fair, just and reasonable."[149] It concluded that the defendant had discharged "the onus cast upon it by the decision in *Morrison v Coast Finance* to prove that the bargain was fair, just and reasonable."[150] The unconscionability claim therefore failed. There was no separate discussion of the second requirement (that the transaction was substantially unfair). The *Cougle* approach effectively reduced the *Morrison* three-step process to a two-step process.

The general picture in British Columbia, therefore, has been that the difficulty arising from the shifting of the burden of proof to the defendant has resulted in the same court applying different versions of the *Morrison* test. First, the courts have applied the original three-step process in some cases but a two-step process in others. Secondly, there are further divides between the cases that feature a two-step process. Some cases (such as *McNeil* and *Do v Nichols*) put the burden on the claimant to establish substantial unfairness of the transaction, while others (such as *Cougle*) placed the onus on the defendant to show that the transaction was fair, just and reasonable. Inconsistency of this kind undermines predictability in the law.

However, the recent decision of the Supreme Court of Canada in *Uber Technologies* should put an end to that inconsistency. In *Uber Technologies*, it was held that two elements are required for the doctrine of unconscionability to apply, namely "an inequality of bargaining power and a resulting improvident bargain."[151] There was no mention of a shifting of the burden of proof to the defendant to show that the transaction was fair, just and reasonable. The apex court of Canada endorsed earlier *dicta* by the same court in *Norberg v Wynrib*[152] and *Douez v Facebook Inc*[153] which espoused the same two-step approach without any reference to a shifting of the burden of proof. Under the *Uber Technologies* approach, the only question is whether the two elements are satisfied. If they are, the claim for unconscionability is made out. The burden of proof does not then shift to the defendant to show that the transaction was fair, just and reasonable. Applying this test of unconscionability to the facts of *Uber Technologies*, the Supreme Court of Canada held that there was inequality of bargaining power between the parties and that the improvidence of the impugned clause of the contract was clear. Consequently, the unconscionability claim succeeded[154] and the unconscionable arbitration clause was struck down. There was no discussion of a shifting of the burden of proof to the defendant. The

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147 See *McCullogh v Hilton* (1998) 63 BCLR (3d) 259 (BCCA).
148 [1992] 3 WWR 475 (BCCA) at paras 15-17 [*Cougle*].
149 *Ibid* at para 17.
150 *Ibid* at para 18.
151 *Uber Technologies*, *supra* note 77 at para 65.
152 *Ibid*, at para 40 (per La Forest J).
153 *Douez, supra* note 95 at para 115 (per Abella J).
154 *Uber Technologies*, *supra* note 77 at para 98.

decision in *Uber Technologies* should therefore consign to history the third step of the *Morrison* three-step process and the difficulties that it has presented to the courts of British Columbia.

It is worth noting that courts in other Commonwealth jurisdictions have declined to embrace a *Morrison*-type process of shifting the burden of proof to the defendant. In England, a similar process was stated in an earlier edition of *Snell's Equity*[155] and followed in *Strydom v Vendside*.[156] Under that approach, which was also adopted in *Chitty on Contracts*,[157] the burden shifts to the defendant to show that the transaction was fair, just and reasonable after the claimant successfully establishes the three *Alec Lobb* requirements. However, that approach has not been adopted by the current English authorities. It has been the subject of criticism[158] and was abandoned in the subsequent edition of *Snell's Equity.*[159]

Similarly, the approach adopted in Australia is one that does not include a shifting of the burden of proof to the defendant to show that the transaction was fair, just and reasonable. Thus, in *Kakavas*[160] and in *Thorne*[161] the High Court of Australia stated that for a claim based on unconscionability to succeed, two elements must be established: (1) that one party was suffering from a special disadvantage; and (2) that the other party unconscientiously took advantage of that special disadvantage. If these two requirements are established, the unconscionability claim succeeds without any need for the burden of proof to shift to the defendant to show that the transaction was fair, just and reasonable.

It is hoped that the apex court in Singapore would, when presented with the opportunity, dispense with the third stage of the current three-stage process of *BOK* in order to avoid the potential difficulties highlighted above. It should be noted that discarding the third stage of the *BOK* process will not alter the fundamental decision by the SGCA that relief on the ground of unconscionability is available only where two requirements are established: (1) infirmity of sufficient gravity on the side of one party; and (2) exploitation of that infirmity to procure the impugned transaction by the other party. These important requirements, which have been carefully selected and calibrated as a matter of legal policy, will remain intact. The change suggested here is only directed at removing a potential difficulty in the current process of applying the requirements.

V. Should the Doctrine of Unconscionability be Discarded as Redundant?

The question whether the doctrine of unconscionability is redundant because its function is now being performed by statutory regulation or some other legal doctrines has been raised in various forms. One view is that the extensive statutory regulation of contracts in recent times has taken over the role of the doctrine of unconscionability

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155 J McGhee, ed, *Snell's Equity*, 31st ed (London: Sweet & Maxwell, 2005) at para 8-47.
156 [2009] EWHC 2130 (QB) at para 36.
157 Hugh Beale, ed, *Chitty on Contracts*, 33d ed (London: Sweet & Maxwell, 2020) at para 8-141.
158 Enonchong,"English Doctrine of Unconscionability", *supra* note 56 at 215-216.
159 J McGhee, ed, *Snell's Equity*, 33d ed (London: Sweet & Maxwell, 2014) at para 8-042.
160 *Kakavas*, *supra* note 76.
161 *Thorne*, *supra* note 76 at paras 38, 110.

in protecting weaker contracting parties.[162] Another contention is that the doctrine is dispensable because its office is discharged by a combination of different doctrines such as undue influence, constructive fraud and *non est factum*.[163] A further variant of the redundancy question that was addressed by the SGCA in *BOK* is whether the doctrine of unconscionability should be rejected as redundant because it is identical to and coincident with Class 1 (or actual) undue influence. In *BOK*, the court could "see much force" in that argument.[164] Persuaded by arguments that undue influence is not different from unconscionability,[165] the court expounded a hypothesis that the 'narrow' doctrine of unconscionability is identical to and coincident with Class 1 undue influence.[166] On this basis, it makes no difference whether a claimant who is seeking to set aside a transaction relies on Class 1 undue influence or the 'narrow' doctrine of unconscionability.[167]

However, in the end, the court decided that the narrow doctrine of unconscionability should remain part of the law of Singapore. One reason for this is that the court recognised that its hypothesis "cannot be accepted unreservedly".[168] While in substance it might make no difference whether a claimant is relying on Class 1 undue influence or the narrow doctrine of unconscionability, nevertheless "given the myriad of possible situations that might come before the courts, it may not be prudent to completely rule out situations where the application of these doctrines to the same fact situation might lead to different results".[169] The court made it clear that its hypothesis "remains just a hypothesis, at least for the time being—until such time when we receive detailed arguments that would enable us to arrive at a definitive conclusion on this particular issue. In the meantime, the law relating to unconscionability in the Singapore context is the narrow doctrine of unconscionability, as modified".[170] This suggests that if in the future the SGCA were to arrive at a definitive conclusion that the doctrine of unconscionability in Singapore is coterminous with Class 1 undue influence then unconscionability may, at that point, be excised from the law of Singapore. Thus, while in *BOK* the SGCA has confirmed the place of unconscionability in the law of Singapore on one hand, it has left the sword of Damocles hanging over the doctrine on the other hand.

It is respectfully submitted that whilst there is some overlap between Class 1 undue influence and the narrow doctrine of unconscionability, the degree of overlap is not such as to justify a conclusion that the two doctrines are identical or coextensive. First, as courts in various Commonwealth jurisdictions have observed,[171]

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162 *Cf National Westminster Bank Plc v Morgan* [1985] AC 686 (HL) at 708.

163 *E C Investment Holding*, *supra* note 5 at para 66.

164 *BOK, supra* note 6 at para 149.

165 *Ibid* at para 151, citing Rick Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) 16 OJLS 503 and James Devenney and Adrian Chandler, "Unconscionability and the Taxonomy of Undue Influence" [2007] JBL 541.

166 *BOK, supra* note 6 at para 152.

167 *Ibid* at para 149.

168 *Ibid.*

169 *Ibid.*

170 *Ibid* at para 152 [emphasis omitted].

171 For English authority, see *Alec Lobb*, *supra* note 41 at 95. For Canadian authority, see *Morrison*, *supra* note 138 at 713; *Norberg*, *supra* note 77 at 307-308. For Australian authority, see *Amadio, supra* note 7 at 461, 474; *Kakavas*, *supra* note 76 at para 117; *Thorne*, *supra* note 76 at para 40, 86, 94.

whereas undue influence is concerned with the quality of the consent of the weaker party (whether it is independent and voluntary),[172] unconscionability is concerned to provide relief "against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker."[173] Unlike Class 1 undue influence, unconscionability extends to cases where the claimant's consent was independent and voluntary.[174] Unconscionability allows the courts to "interfere with agreements the parties have freely concluded."[175] Therefore, in a situation where the complainant freely entered into the transaction, application of the two doctrines can lead to different results since a claim based on Class 1 undue influence will fail, but a claim based on unconscionability may succeed. *Cresswell* is an example of such a case.

Secondly, in arguing for its hypothesis, the court in *BOK* said that "in cases where Class 1 undue influence can be pleaded successfully, there would necessarily be unconscionable conduct as well."[176] However, the reverse is not true. There could be situations where, in the absence of any overt exercise of influence, conduct could be unconscionable so that a claim based on the narrow doctrine of unconscionability can succeed whereas Class 1 undue influence cannot. The court in *BOK* recognised this possibility but sought to play it down by saying that it "would be extremely rare".[177] However, it is respectfully submitted that such situations are not uncommon. In *Cresswell,* for example, in the absence of any pressure or oppression,[178] the claim based on the 'narrow' doctrine of unconscionability succeeded, but a claim based on Class 1 undue influence could not have succeeded (and was not even pleaded). Similarly, in *Morrison* a claim based on undue influence failed but, on the same facts, relief was granted on the ground of unconscionability. The Singaporean case of *Fong Whye Koon* also illustrates the point: in the absence of any pressure by the stronger party, a claim based on undue influence was not sustainable but a claim based on unconscionability succeeded. There are other cases where, on the same facts, a claim based on undue influence failed—or was not even pleaded—but a claim based on unconscionability succeeded.[179]

Thirdly, there are situations where a claim based on Class 1 undue influence can succeed where a claim based on unconscionability cannot. For example, whereas Class 1 undue influence can be successfully pleaded where the claimant was not suffering from any infirmity (or serious disadvantage), a claim based on unconscionability cannot succeed where the claimant was not suffering from an infirmity. Indeed, as was emphasised in *BOK*, "not every infirmity would *ipso facto* be sufficient to invoke the narrow doctrine of unconscionability."[180] Therefore, in situations

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[172] In the case of undue influence, the law is concerned with the manner in which the intention to enter into the transaction was produced: *Huguenin v Baseley* (1807) 14 Ves 273 at 300; *Etridge*, *supra* note 84 at para 7.

[173] *Morrison*, *supra* note 138 at 713.

[174] See *Bundy*, *supra* note 36 at 339; *Amadio, supra* note 7 at 461; *Thorne*, *supra* note 76 at para 40.

[175] *Hunter Engineering Co v Syncrude Canada Ltd* [1989] 1 SCR 426 at 462. See also *Allied Irish Bank Plc v DX* [2019] IEHC 549 at para 2(v)(a).

[176] *BOK, supra* note 6 at para 152.

[177] *Ibid*.

[178] *Cresswell, supra* note 10 at 257, where the court observed that "no circumstances of oppression or other matters [were] alleged" at trial.

[179] *Boustany v Pigott* (1995) 69 P & CR 298 (UKPC); *Mortgage Express*, *supra* note 60.

[180] *BOK, supra* note 6 at 141.

where a claimant was not suffering from an infirmity but was put under improper pressure to enter into the contract, a claim based on Class 1 undue influence can succeed[181] but a claim based on unconscionability must fail.

Fourthly, there is also a difference between undue influence and unconscionability with regards to the remedy. Whereas the principal remedy for both undue influence and unconscionability is rescission, in situations where rescission is not available,[182] equitable compensation may be awarded for undue influence,[183] but not for unconscionability.[184] Thus, in a case where the claimant requires the remedy of equitable compensation,[185] it would make a difference whether the claim is advanced on the ground of Class 1 undue influence or the doctrine of unconscionability.

The discussion above has shown that there are situations where the application of Class 1 undue influence and the doctrine of unconscionability to the same fact situation will lead to different results and that the two doctrines are therefore not coterminous with each other. The 'narrow' doctrine of unconscionability is therefore not redundant. It has its own distinct role to play. It is, as Prakash J once observed, "a useful jurisprudential tool".[186] It is, therefore, hoped the Singapore courts will hesitate long before concluding that the doctrine of unconscionability is redundant because it is identical to or coterminous with Class 1 undue influence.

VI. Conclusion

The doctrine of unconscionability in Singapore is currently in a momentous stage of its jurisprudential development. Only a few years ago it was described by judges and commentators as "a fledging doctrine",[187] "still in its formative stages of development."[188] However, following the recent decision in *BOK,* unconscionability in Singapore appears to have come of age. The comprehensive and authoritative restatement of the law in that case has brought welcome clarity in relation to both the status of the doctrine in Singapore and the elements required for relief. The decision in *BOK* has justly been hailed for crafting a carefully reasoned test for unconscionability.[189] That test is designed to occupy a middle ground between a perceived 'narrow' doctrine of unconscionability in the early English cases, represented by *Fry* and *Cresswell*, on the one hand, and a supposed 'broad' doctrine of unconscionability in *Amadio* and the current English cases, on the other hand.

However, this paper has respectfully challenged the assessment in *BOK* that the current English doctrine of unconscionability is a broad one. It has argued that the formulation of the doctrine of unconscionability in the current English cases is a

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181 *Cf Bank of Scotland v Bennett* [1997] 1 FLR 801 at 827 (HL); *Hewett v First Plus Financial Group Plc* [2010] 2 P & CR 22 (CA).

182 For example, where *resitutio in integrum* is impossible.

183 *Mahoney v Purnell* [1996] 3 All ER 61 (HC); *Jennings v Cairns* [2003] EWCA Civ 1935 at para 45.

184 *Norwich Union Life Insurance Society v Qureshi* [1999] Lloyd's Rep IR 263 (HC).

185 For example, where rescission is not available because *resitutio in integrum* is not possible and an account of profits is also not available.

186 *Rajabali Jumabhoy*, *supra* note 13 at para 198.

187 *E C Investment Holding, supra* note 5 at para 66.

188 *Phang & Goh*, *supra* note 4 at para 12.219.

189 V Ooi and W Yong, "A Reformulated Test for Unconscionability" (2019) LQR 400 at 405.

narrow one, narrower than the doctrine applied in the earlier English cases. The paper has demonstrated that while there has been a shift in the formulation of the doctrine by the English courts, that shift has been away from a broad doctrine in the earlier cases to a narrow doctrine in the current cases. If the formulations of the doctrine of unconscionability in the current English cases "give rise to concern", this paper has argued that this is not because the current formulations have expanded the scope of the doctrine. On the contrary, the concern is that the current approach of the English courts has hobbled the English doctrine of unconscionability. Thus, while it may have been right for the court in *BOK* to eschew the approach of the current English cases, it did so for the wrong reasons.

The paper has also argued that it is misleading to treat (as the Court of Appeal did in *BOK*) the current English formulation of the doctrine of unconscionability as being the same as the broad doctrine of *Amadio*. The paper has shown that although the current English test of "serious disadvantage" is similar to the *Amadio* test of "special disability" in respect of the first criterion for relief, there are important differences between the two doctrines that make the current English doctrine narrower than the *Amadio* doctrine.

The probe into the modified doctrine of unconscionability for Singapore disclosed that it is not, as described in *BOK,* merely "an approach" to the doctrine in *Fry* and *Cresswell.* It is a radically different doctrine, cast in a very different mould from that of *Cresswell*. Indeed, in some respects it is more closely aligned with the doctrines in *Amadio* and *Alec Lobb*. In terms of the first element to be established by the claimant, the expansion of the *Cresswell* test of "poor" and "ignorant" person to that of a person suffering from an "infirmity" takes the *BOK* doctrine away from *Cresswell* and closer to *Amadio* and *Alec Lobb*.

Concerning the requirement of exploitation, the restatement in *BOK* has injected welcome clarity on the state of knowledge that the defendant is required to have of the claimant's infirmity. However, it has been shown that the important question of whether passive acceptance of a transaction can constitute exploitation has not been satisfactorily resolved by the Singapore authorities. It has been suggested that the law on this point should be clarified and that the clarification should be in the sense that the concept of exploitation in this context includes both active seeking as well as passive acceptance of a transaction in unconscionable circumstances.

Drawing on the experience of the courts of British Columbia, the paper has shown that the third stage of the three-step process of *BOK* is not only unnecessary, but can also give rise to difficulties. The paper has advocated for the *BOK* process to be refined by discarding the third step, with the result that a claim based on unconscionability would succeed if the claimant establishes that, at the time of the impugned transaction, he or she was suffering from an infirmity and that the other party exploited that infirmity in procuring (or accepting) the transaction.

While the Singapore courts have been seduced by the argument that the doctrine of unconscionability is identical to and co-extensive with actual undue influence and is therefore dispensable, they have so far postponed a definitive judgment on the issue, leaving it instead as a hypothesis. This has left a question mark over the future trajectory of unconscionability in Singapore. This paper has argued that the hypothesis that the 'narrow' doctrine of unconscionability is identical to and coincident with actual undue influence is not well-founded. The paper has shown

that there are situations where the application of the two doctrines to the same facts can produce, and have produced, different outcomes. It is, therefore, suggested that if and when the Singapore courts have the opportunity to make a definitive decision on the issue, they should conclude that unconscionability in Singapore is not redundant, but remains a serviceable legal device. Consequently, the sword of Damocles, now hanging over the doctrine of unconscionability in Singapore, would be removed, leaving it to continue to operate alongside undue influence.