

## TRUSTS AND ESTATES LAW

# Unconscionable bargains

By Anthony Grant, *Trusts & Estates Litigator*

As people live longer and are increasingly exploited by their poorer relatives, the doctrine of unconscionable bargains is being pleaded with greater frequency.

It is one of equity's most useful remedies. I pleaded it successfully in 1979 in the case of *Archer v Cutler* [1980] 1 NZLR 386. I discovered the doctrine in Meagher Gummow & Lehane, having not heard of it before, and thought that I had brought the doctrine out of obscurity into the light, but I learned that it had actually been invoked in New Zealand on earlier occasions, even though few lawyers knew of it.

In *Archer v Cutler*, an elderly woman had agreed to sell her land to a neighbour for a sum less than its true value and at a time when she did not have sufficient mental capacity to understand what she was doing. The contract was set aside even though the neighbour had not been aware of the disadvantages from which Mrs Cutler suffered.

The Privy Council held a few years later in *O'Connor v Heart* [1985] 1 NZLR 159 that the doctrine will not succeed if – as happened in *Archer v Cutler* – the “innocent” party is not aware that he or she was dealing with, what the Privy Council said in that case was “an unsuspected lunatic”.

The term “unconscionable bargain” suggests the need for a bilateral arrangement, since it takes two people to make a bargain. But the doctrine does not require a bilateral relationship. Moore J has held that the doctrine will apply to a unilateral arrangement – see *Willis & Another v Thompson & Another* [2017] NZHC 1645 (18 July 2017). In that case, an elderly man transferred moneys into a joint account which he had with a woman who had been employed as his paid caregiver.

The man's son claimed successfully that his father's unilateral actions constituted an unconscionable bargain. In reaching this decision,



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Moore J relied on the recent English case of *Evan v Lloyd* [2013] EWHC 1725. Moore J said:

“To restrict the operation of this doctrine to contractual dealings has the potential to exclude those most deserving of its remedial application.” (para [58])

The extension of the doctrine of unconscionable bargain to unilateral transactions makes it inappropriate that the doctrine should retain the word “bargain” in its name, since a “bargain” necessarily involves at least two people. For this reason, Moore J says it is preferable for the doctrine to be known as “unconscionable dealings” instead.

The decision is obviously sensible. Lawyers who practise in the realm of contested estates will know that cognitively-impaired people are just as much at risk from unilateral arrangements as they are from bilateral arrangements and the *Willis* decision is a helpful expansion of the law.

*Round v Round* [2017] NZHC 428 (14 March 2017) is another recent case on unconscionable bargain and an allied allegation of undue influence. Here, a son – often drunk – took his father's house and left him near destitute. A claim by the father based on undue influence and unconscionable bargain succeeded and the transfer of the father's house to the son was set aside.

It was held that there was a rebuttable presumption of undue influence in circumstances where there was a relationship between “a son in the prime of life” on the one hand and “parents in the evening of life” on the other (see para [84]). The allegation of undue influence was successful. As for the allegation of an unconscionable bargain, the judge relied upon Tipping J's statement in *Bowkett v Action Finance Limited* [1992] 1 NZLR 449, that an unconscionable victimisation will occur where there are:

“... circumstances which are either known or which ought to be known to the stronger party in which he has an obligation in equity to say to the weaker party: no, I cannot in all good conscience accept the benefit of this transaction in these circumstances either at all or unless you have full independent advice.” (para [89])

And that would appear to be a good practical test by which allegations of unconscionable dealings should be assessed. ❖

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