

Singapore Court of Appeal Clarifies Law on Unconscionability in Landmark Decision

The Singapore Court of Appeal has, in a landmark decision, clarified the law of unconscionability in Singapore: *BOM v BOK and another appeal* [2018] SGCA 83.

Our Comments

Where the defendant has exploited the plaintiff's position or situation in procuring a transaction and unless the defendant is able to demonstrate that the transaction was fair, just and reasonable, the transaction can be set aside by the defendant on the basis of unconscionability.

There are two doctrines of unconscionability i.e., the broad and narrow doctrines. Under the broad doctrine, a transaction is *prima facie* unconscionable so long as the plaintiff was under a special disability that was sufficiently evident to the defendant and there was no reasonable degree of equality between the parties. Under the narrow doctrine, a transaction is unconscionable if the plaintiff (who was poor and ignorant) additionally entered into the transaction at a considerable undervalue and against a defendant who had the benefit of independent advice.

Prior to this case, the Singapore High Court rejected the broad doctrine. This is borne out by various decisions of the High Court: *Lim Geok Hian v Lim Guan Chin* [1993] 3 SLR(R) 183; *Pek Nam Kee and another v Peh Lam Kong and another* [1994] 2 SLR(R) 750; *Rajabali Jumabhoy and others v Ameerli R Jumabhoy and others* [1997] 2 SLR(R) 296; and *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232 (affirmed on appeal). Only one case, *Fong Whye Koon v Chan Ah Thong* [1996] 1 SLR(R) 801, appears to have applied the broad doctrine, but even so, it was not an unequivocal endorsement of the broad doctrine.

In this case, the Court of Appeal resoundingly rejected the broad doctrine of unconscionability and extended the narrow doctrine of unconscionability to include other forms of infirmity (not limited to the poverty or ignorance of the plaintiff) such as physical, mental and/or emotional infirmities. The Court of Appeal also endorsed the position that the law will vitiate gifts that were procured by undue influence even if the person exerting the influence did not receive the said gift.

This case thus has relevance where one is dealing with an individual. To avoid arguments as to the unconscionability of the transaction or gift, it would be prudent to ascertain whether the contracting party is under any infirmity and to ensure the availability of independent legal advice to that party.

This update takes a look at the Court of Appeal's decision.

Background

The key facts relevant to the issues discussed in this update are as follows.

The respondent husband (the "**Husband**") and the wife (the "**Wife**") were married in August 2012. The Husband's mother disapproved of the marriage and the couple mostly lived apart. The Husband lived with his mother in one of her properties (the "**Holland Road Property**"), while the Wife stayed with her parents in their family home (the "**Stevens Road Property**").

In March 2014, the Husband's mother passed on. The Husband then moved into the Stevens Road Property to live with the Wife and her family.

Soon after the funeral, the Husband and his sister learnt that their mother had created a testamentary trust over her assets which

included, among other things, two landed properties. After reading their mother's will, the Husband and his sister had lunch with the Wife and her mother at the Stevens Road Property. The siblings agreed not to reveal the will's contents to the Wife. Upon being asked by the Wife about the mother's will, the Husband lied that his mother had willed all her property to charity.

After lunch, when the Husband and his sister left the Stevens Road Property, the Wife (who had been a practising lawyer up to 2012) drafted a deed of trust (the "**Deed of Trust**") by hand.

The Deed of Trust essentially provided that the Husband unconditionally and irrevocably declared that all assets owned by him were to be held in trust by him and the Wife as joint trustees for their son (the "**Son**").

When the Husband returned in the evening, the Wife asked him into her bedroom to sign the Deed of Trust. It is undisputed that the Husband initially refused, but eventually agreed, to sign it. However, the parties strongly disputed the other events which transpired that evening:

- The Husband claimed that the Wife's request for him to sign the Deed of Trust took him by surprise, and that she had represented to him that the trust would only take effect upon his death, until which time he would be free to deal with his assets (the "**Misrepresentation**"). He further asserted that she threatened to kick him out of the Stevens Road Property if he did not sign the Deed of Trust.
- The Wife, on the other hand, claimed that she had drawn up the Deed of Trust at the Husband's request, and that he had voluntarily signed it.

In June 2014, the Wife sent two e-mails to the solicitor assisting with the administration of the Husband's mother's estate (the "**Solicitor**"). She enclosed a copy of the Deed of Trust and asked the Solicitor to take note of it in administering the Husband's mother's estate. In December 2014, the Wife sent another e-mail to the Solicitor in relation to the transfer of property from the Husband's mother's estate to the Son. The Husband was not copied on those e-mails.

The parties' relationship fell apart by December 2014. On 18 December 2014, the Solicitor replied to the Wife and copied the Husband, informing them that the matter was best handled by his colleague. After receiving the Solicitor's e-mail, the Husband sought legal advice on the Deed of Trust.

In February 2015, the Husband decided to leave the Stevens Road Property. He also wrote a letter to the Wife, claiming that he would not have signed the Deed of Trust if she and her father had not pressured him into signing it. The next day, the Husband went back to the Stevens Road Property to deliver the letter to the Wife. This resulted in a heated confrontation between the Husband, the Wife and the Wife's mother. Their argument was secretly recorded by the Husband, which revealed that the Husband and the Wife disagreed as to whether the Husband had been pressured into signing the Deed of Trust, and whether the Wife had asked the Husband to consult a lawyer before signing the Deed of Trust.

On 30 November 2015, the Husband commenced court proceedings to have the Deed of Trust set aside on the grounds of misrepresentation, mistake, undue influence and unconscionability.

The High Court's Decision

The High Court Judge found in the Husband's favour and set aside the Deed of Trust on the basis of misrepresentation, mistake, undue influence and unconscionability.

The Wife and the Son appealed to the Court of Appeal against the High Court Judge's decision.

The Court of Appeal's Decision

Dismissing the appeals, the Court of Appeal affirmed the High Court Judge's decision to set aside the Deed of Trust on all four bases.

Misrepresentation and mistake

The Court of Appeal accepted that the Wife had made the Misrepresentation, which she knew was false, and with the intention that the Husband would rely on it to sign the Deed of Trust. It therefore held that the Deed of Trust ought to be set aside for misrepresentation.

Among other things, the Court of Appeal accepted that the evidence showed that the Husband had not intended to execute a trust that immediately divested himself of all his assets, and that he was in fact ignorant as to its true legal effect.

In a similar vein, the Court of Appeal held that the Deed of Trust ought to be set aside for mistake. The Husband had been mistaken as to the effect of the Deed of Trust as a result of the Wife's Misrepresentation. The Deed of Trust had a completely different legal effect from what the Husband thought it had, and the seriousness of the mistake rendered it sufficiently grave to warrant the setting aside of the Deed of Trust.

Undue influence

The Court of Appeal also agreed with the High Court Judge's decision that "Class 1" undue influence was made out on the evidence and that the Deed of Trust ought to be set aside on that basis. It accepted that the Husband was suffering

from acute grief at the material time, that the Wife knew that the Husband was a lonely individual and that she and the Son were the only family he had left, and that she capitalised on this to pressure him into executing the Deed of Trust.

Significantly, the Court of Appeal affirmed that there is no requirement in law that undue influence can arise only from lack of mental capacity. The law recognises that "bullying or importunity" (as demonstrated on the facts of this case) can similarly impair a person's free will and thus constitute undue influence.

The Court of Appeal further clarified that there is no reason in principle why undue influence can operate only in situations where the party exerting the influence is also the party benefitting from the voluntary disposition or transaction. The "vice" of a transaction procured by undue influence lies in the abuse of a position of trust. All that matters is that the voluntary disposition or transaction resulted from a wrongful exercise of influence. It is beside the point that the person benefitting from the voluntary disposition or transaction (here, the Son) had not exercised any influence over the victim.

Unconscionability

The Court of Appeal held that the High Court Judge was correct to set aside the Deed of Trust on the basis of unconscionability.

In reaching this conclusion, the Court of Appeal made it clear that it was applying — with modifications — the narrow doctrine of unconscionability stemming from the English cases beginning with *Fry v Lane* (1888) 40 Ch D 312. It considered that the broad doctrine of unconscionability (best exemplified in *The Commercial Bank of Australia v Amadio* (1983) 151 CLR 447) is phrased in too broad a manner such that it affords the court too much scope to decide on a subjective manner, and therefore ought to be rejected.

To invoke the narrow doctrine of unconscionability as modified by the Court of Appeal:

- The plaintiff has to show that he was suffering from an infirmity that the other party exploited in procuring the transaction. The infirmity must:
 - Have been of sufficient gravity to have acutely affected the plaintiff's ability to conserve his own interests; and
 - Have been, or ought to have been, evident to the other party procuring the transaction.

The infirmity could include the plaintiff's poverty and ignorance or another form of infirmity, whether physical, mental or emotional in nature. The inquiry into this question would necessarily be intensely fact-sensitive.

- Upon satisfaction of this requirement, the burden is on the defendant to demonstrate that the transaction was fair, just and reasonable.
- While a transaction at an undervalue or the lack of independent advice to the plaintiff are not required to successfully invoke the doctrine, these are factors that the court will consider in assessing whether the transaction was improvident. In a typical improvident transaction in which the sale was at a considerable undervalue and the plaintiff vendor had not received any independent advice, it would be extremely difficult for the defendant to show that the transaction was fair, just and reasonable.

In this regard, the Court of Appeal reiterated that the criteria of infirmity must not be overly broad, and the approach is to be applied through the lens of cases exemplifying the narrow doctrine rather than embodying the broad doctrine of unconscionability.

In this case, the Court of Appeal found that the impairment of the Husband's mental state as a result of his acute grief was so grave that it constituted an infirmity that the Wife was aware, and took advantage, of when she leveraged on his sense of loneliness to pressure him into signing the Deed of Trust.

Finally, and importantly, the Court of Appeal also considered the question whether an umbrella doctrine of unconscionability merging the three doctrines of duress, undue influence and unconscionability would be desirable.

It concluded that it was not, for the following reasons:

- Firstly, the issue does not even arise as the Court of Appeal has endorsed only the narrow — and rejected the broad — doctrine of unconscionability. In its view, a prerequisite for even considering a merger of the doctrines is that the broad doctrine of unconscionability is legally viable to begin with.
- Secondly, subsuming the doctrines of duress and undue influence under the doctrine of unconscionability might be theoretically elegant, but practically problematic as there do not appear to be practically workable legal criteria that can be utilised by the court to decide what amounts to unconscionable behaviour that vitiates a contract. This would permit excessive subjectivity on the part of the court which in turn generates excessive uncertainty and unpredictability. In the Court of Appeal's view, the excessive use of discretion in a subjective sense (the consequence of which would be to unravel the contract concerned) would undermine the sanctity of contract to an unacceptable degree.
- Thirdly, the broad doctrine of unconscionability cannot be appropriately limited or constrained by incorporating the

existing legal criteria contained in duress and/or undue influence because those criteria relate to narrower and more specific fact situations which are also covered by the narrow (and not the broad) doctrine of unconscionability. If the existing legal criteria

for duress and undue influence are utilised to limit or constrain the broad doctrine of unconscionability, the court would simply be left with the narrow doctrine of unconscionability, and therefore be back to "square one".

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the partner at WongPartnership that you normally deal with or any of the following partners:



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