Setting aside settlements: the importance of independent legal advice

Moss v Insurance Australia Ltd [2004] FCA 1636

By Tina Cockburn

A settlement agreement that has been entered into as a consequence of unconscionability on the part of the insurer may be set aside. Unconscionability may arise under equitable doctrine in cases where one party is shown to be at a special disadvantage or disability vis-a-vis another and the stronger party, knowing of the disadvantage, exploits it.[1] In addition, Part IVA of the *Trade Practices Act* 1974 prohibits unconscionable conduct by corporations. It both broadens the equitable concept of unconscionability and offers the procedural advantages of the broad range of remedies contained in Part IV, including injunctions,[2] damages[3] and other orders.[4] The statutory jurisdiction also opens the door for representative action by the Australian Competition and Consumer Commission (ACCC).[5]

Where the defendant insurer can show that the plaintiff had the benefit of independent legal advice, claims to have settlements set aside on the grounds of unconscionability have poor prospects of success. The recent decision of *Moss v Insurance Australia Ltd*[6] provides a useful illustration of the application of the unconscionability doctrine to attempts to have settlements set aside, and highlights the critical importance of plaintiffs having the benefit of independent legal representation.[7]

THE FACTS

The applicant (Moss) was involved in a motor vehicle accident in February 1999. The respondent (IAL, formerly NRMA) was the compulsory third-party insurer of the at-fault vehicle. After the accident, Moss complained of injuries to the neck, shoulder, elbow and hip, and of sexual problems. His then solicitor served a claim on NRMA, and liability was admitted in September 1999.

In January 2000, Moss advised NRMA that he was no longer legally represented and offered to settle for $150,000.

In March 2000 Moss negotiated with Centrelink to accept $10,000 in satisfaction of a $32,000 debt he owed (which had arisen out of social security fraud). A garnishee order pursuant to s1233 of the *Social Security Act* was issued to NRMA in June stating that $10,000 was to be paid to Centrelink. The amount claimed pursuant to the garnishee order was subsequently reduced to $8,000 after further negotiations with Moss.

Moss eventually settled his personal injury claim in June 2000 for $10,943 (less $1,000 owing to the Health Insurance Commission and $943 for NRMA's out-of-pocket expenses) and subject to a deduction of any amount payable to Centrelink. Prior to the settlement Moss had been represented by, or had consulted, a total of four firms of solicitors, all of whom told him that he had unrealistic expectations as to the value of his claim and at least two of whom told him that his social security debt could be used against him on credit by NRMA if the claim went to a hearing. On the day of settlement, Moss consulted the solicitor who had first represented him and was advised to accept the offer of $10,000 after the solicitor unsuccessfully attempted to have the offer increased (although later that day Moss managed to get NRMA to increase its offer by $943).

Moss subsequently telephoned NRMA on numerous occasions to complain about his settlement, eventually >>

complaining to the Office of the Ombudsman and to the Motor Accident Authority. When these complaints were not resolved to Moss's satisfaction, he commenced proceedings against NRMA.

THE PROCEEDINGS

Moss, appearing in person, claimed that the settlement was procured by unconscionable conduct in breach of s51AA of the *Trade Practices Act* 1974 (Cth).[8]

He alleged that his will was overborne by threats made by a NRMA claims manager that NRMA would disclose in any court proceedings Moss's $32,000 debt to Centrelink, and that it was proposing to garnishee any settlement funds obtained by him in partial satisfaction of the debt. The claims manager denied the threats, and no admissible evidence was led of any such threats.

Moss also pleaded that he suffered from a special disadvantage by reason of, inter alia, his impecuniosity and lack of education, and that NRMA took advantage of his position by illegally obtaining information about his social security debt from Centrelink, and using the information to overbear his will by illegitimate threats of disclosure of the information.

FINDINGS OF FACT

Justice Jacobsen found that no threats were made to Mr Moss by the NRMA.[9] He considered that the settlement had been freely negotiated without duress, as Moss had been made well aware by his solicitors of the weaknesses of his case, the prospect of NRMA cross-examining him on credit about the Centrelink debt, and he had been advised on the day of settlement to accept $10,000.[10] He also found that Moss, with the benefit of advice he received from four solicitors at different stages of the negotiations, was able to, and did, understand the terms of settlement, and did not suffer from lack of ability to assess or protect his own interests; but rather had 'consciously sought to maximise his ability to resolve his Centrelink debt by using the amount of his proposed NRMA settlement as a bargaining tool to extract a favourable outcome with Centrelink'.[11]

THE DECISION

As he found that no threats had been made, Justice Jacobsen held that Moss's claim failed.[12] He therefore dismissed the application and ordered that Moss pay the costs of the proceedings.[13]

There was no unconscionability under s51AA, as Moss was not under any 'special disadvantage' which seriously affected his ability to make a judgement about his own best interests.[14] Although the evidence showed that Moss suffered 'from a lack of formal education and, as some medical evidence suggested, paranoia', he was 'able to understand and protect his own commercial interests'; he was 'streetwise'.[15]

In any event, as Moss had the benefit of independent legal advice as to the value of his claim and had received legal advice on the day of settlement that he should accept the amount offered, the unconscionability claim faced an 'insuperable problem'.[16] His Honour concluded:

> 'As Heerey J observed in *Henderson*, while lack of assistance is a well-recognised basis for a finding of special disadvantage, the existence of legal representation will usually be an answer to such a claim. Here Mr Moss was not represented in the final negotiation that culminated in settlement but four solicitors advised him in the period from July 1999 to the date of settlement. He received legal advice on the day of settlement and he improved on the figure which he was advised to accept.
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> This is not a case in which one party was unable to judge what was in his best interests or where there was any disability evident to the other party to make it prima facie unfair or unconscionable for the other party to retain the benefit of the disadvantaged party's assent to the transaction; cf *Louth v Diprose* (1992) 175 CLR 621.' ■

Notes: **1** The leading case is *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. **2** s80. **3** s82. **4** s87. **5** See generally Dal Pont and Chalmers, *Equity and Trusts in Australia*, 3rd ed, Lawbook Co, 2004, chapter 9; Dal Pont and Cockburn, *Equity and Trusts in Principle*, Lawbook Co, 2005, chapter 9. **6** [2004] FCA 1636; Jacobson J, Federal Court, 14 December 2004. **7** Unconscionability may also found a claim to have an agreement reached in court-annexed mediation set aside: for a detailed discussion see T Cockburn & M Shirley, 'Setting Aside Agreements Reached at Court-Annexed Mediation: Procedural Grounds and the Role of Unconscionability' (2003) *The University of Western Australia Law Review* 31(1) 70. **8** The statement of claim was drafted by a barrister pursuant to an Order 80 of the Federal Court Rules for representation, limited to the preparation and filing of the statement of claim. **9** At [89]. **10** At [91] - [92]. **11** At [100]. **12** At [104]. **13** At [110]. **14** At [105]-[106] citing *Australian Competition and Consumer Commission v Berbatis* (2003) 214 CLR 51at [12] – [15] per Gleeson CJ; at [55] per Gummow and Hayne JJ; at [98] – [99] per Kirby J; at [154] per Callinan J and *Australian Competition and Consumer Commission v Samson Holdings Pty Limited* (2002) 117 FCR 301 (Gray, French and Stone JJ). **15** At [103]. **16** Citing *Henderson v Amadio Pty Limited* (1995) 140 ALR 391 per Heerey J at 550.

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