Setting Aside Agreements Reached at Court-Annexed Mediation: Procedural Grounds and the Role of Unconscionability

★

TINA COCKBURN & MELINDA SHIRLEY†

There is an emerging body of case-law concerning the circumstances in which an agreement reached at mediation may be set aside both at law and in equity. In such cases procedural aspects of the mediation in question are often challenged and equitable intervention may be sought on the basis of an alleged unconscionable bargain. This article considers some of the circumstances in which a mediation agreement may be set aside at law or in equity.

MANY legal disputes are settled by mediation and there is an increasing recognition of the claim that it is in the public interest for disputes to be compromised whenever practical.[1] In court-annexed mediation, the model of the process adopted, the training of the mediator involved, and the legislation governing the process will all impact upon the experience for the disputants. In mediation theory, the process is generally accepted to be consensual and mediators are expected to be equipped with appropriate skills to ensure that a mediation session is not used inappropriately to the disadvantage of one of the parties. However, in practice, recent cases suggest that this may not be a universal experience. There is an emerging body of case-law concerning the circumstances in which an agreement reached at mediation may be set aside at law or in equity. In such cases procedural aspects of

† Lecturers in Law, Queensland University of Technology.

1. See *Studer v Boettcher* [2000] NSWCA 263, para 74.

the mediation are often challenged and equitable intervention is sought on the basis of an alleged unconscionable bargain, so that the mediation agreement can be set aside.[2]

The recent decision in *Pittorino v Meynert*[3] is such an example, highlighting both the grounds upon which an agreement reached at a mediation conference may be challenged and the difficulties in applying equitable doctrines to set aside the agreement. In *Pittorino*, the mediation was conducted by a Deputy-Registrar of the Supreme Court of Western Australia and concerned an inheritance application made by the plaintiff in relation to the estate of her deceased parents, Mr and Mrs Pittorino. The plaintiff, and the second and third defendants were the daughters of Mr and Mrs Pittorino. The fourth defendant was their brother and the only son of the deceased.

The mediation conference was held at the Supreme Court of Western Australia over two days in September 2000 and for most of the proceedings the plaintiff was represented by Queen's Counsel and a solicitor. An agreement was purportedly reached at the end of the second day of the mediation; it was reduced to writing and then signed by the parties and their solicitors. The plaintiff was the only party to challenge the agreement subsequently.

The grounds relied upon for setting aside the agreement were as follows:

1. The plaintiff was not effectively legally represented at the mediation conference on 25 September in that she had lost the confidence of her former solicitors prior to the conference and received no advice or proper advice;
2. The Deputy-Registrar who presided over the conference was aware of the alleged loss of confidence;
3. The Deputy-Registrar was wrong in law when she sought to influence the plaintiff by giving her advice on the compromise;
4. The mediation conference was conducted over an excessive length of time with acrimony, most of it directed at the plaintiff;
5. The plaintiff suffered a ruptured cyst during the conference and her request for an adjournment and to be excused from further attendance should have been granted;
6. The first defendant, as trustee of the estate, had failed to provide full and proper accounts to all of the parties prior to the conference; and
7. The purported agreement was unconscionable.

---

2. The non-determinative nature of the mediator's role generally leads to these types of proceedings being brought by originating process as distinct from a review or appeal. Where statutory confidentiality provisions apply, as under the Farm Debt Mediation Act 1994 (NSW), the court may be prevented from embarking upon an examination of what occurred in the mediation process.
3. [2002] WASC 76.

In searching for relevant authorities to guide his decision, Scott J commented that this was the first time in Western Australia that an agreement reached at a mediation conference had come under challenge and that counsel had been unable to find any case dealing with the circumstances under consideration. This paper will examine the seven grounds raised to challenge the agreement reached at the mediation conference. These grounds can be discussed under the four headings which are set out below.

INEFFECTIVE LEGAL REPRESENTATION

It is widely accepted that there is no general obligation on lawyers to be present during mediation although they will often play a role in both preparation for the session and the drafting of any agreement reached.[4] Where they do participate, the role of legal representatives is influenced by many variables including the identity of the lawyers, the preferences of the parties, the nature of the dispute and the extent to which the issues involved are factually or legally complex.[5] The various rules of court also contemplate different levels of participation from lawyers assisting parties engaged in mediation, with some jurisdictions giving the mediator unfettered control over the process, including the right to exclude the parties' legal representatives at their discretion.[6]

Against this background, in the absence of a statutory entitlement to legal representation in the process in question, an allegation that a party ought to be able to have an agreement set aside on the sole basis of the absence of legal representation in a mediation would be unsustainable. The allegation that the representation which was given was not effective is, however, a different matter.

A similar claim was made in the recent case of *Studer v Boettcher*.[7] In that case the appellant had compromised litigation in a mediation on the advice of his solicitor (the respondent) and subsequently sued the solicitor for damages in negligence. The appellant claimed that he had been unduly pressured into accepting a compromise and/or that the respondent had been negligent in preparing for the mediation because he had failed to make a proper assessment of the respective cases and caused the appellant to compromise on improvident terms. The appellant's case required him to establish both that the respondent had given him bad advice and that he had been negligent in doing so.

---

4. L Boulle *Mediation: Principles, Process, Practice* (Sydney: Butterworths, 1996) 142.
5. Ibid, 141.
6. See, eg, Uniform Civil Procedure Rules (Qld) r 326, which provides that the mediator may gather information about the nature and facts of the dispute in any way he or she sees fit; decide whether a party may be represented at the mediation (and, if so, by whom); and, during the mediation, see the parties, with or without their representatives.
7. Above n 1.

The New South Wales Court of Appeal held that the respondent had acted with proper skill and care in the preparation for and the conduct of the mediation and that his advice to compromise on the available terms was sound and in the best interests of the appellant. In addition, it was not established that the respondent had overlooked any relevant fact, document or legal argument in his client's favour.

In considering the appropriate test of negligence, the Court of Appeal stated that advice to compromise litigation will not be considered negligent merely because a court may subsequently consider that a more favourable outcome might have been obtained at a later stage in the proceedings or at judgment. The court also acknowledged that a wide range of factors may need to be considered in giving such advice, including the fact that disagreements on the law occur even in the judgments of the High Court, that it is often impossible to predict the outcome of litigation with a high degree of confidence, the difficulty in predicting the performance of witnesses at trial and the various costs of litigation in terms of time and money.[8]

Reference was also made to the fact that it is in the public interest for disputes to be compromised whenever practical. In this regard the court commented:

> [Practitioners] should not be unduly inhibited in making a decision to settle a case by the apprehension that some Judge, viewing the matter subsequently, with all the acuity of vision given by hindsight, and from the calm security of the Bench, may tell him he should have done otherwise.[9]

A similarly robust view was taken in *Pittorino,* although with less consideration of the test of negligence. Scott J found on the evidence that the plaintiff had failed to establish either a loss of confidence in her solicitor or that she was not properly represented at the mediation conference. He observed:

> If, as the plaintiff says, she had lost confidence in her solicitor before the mediation agreement was finalised, it is remarkable that she did not tell anybody of that loss of confidence or seek an adjournment on that basis. In addition, in my view, it is also remarkable that she continued to use the services of the same solicitor for some months after the mediated agreement was finalised.[10]

MEDIATOR INTERVENTION

In *Pittorino,* the plaintiff alleged that the Deputy-Registrar sought to influence her by saying:

---

8. *Studer v Boettcher* above n 1, para 63.
9. *Karpenko v Parvian* (1981) 117 DLR (3d) Anderson J 383, as cited in *Studer v Boettcher* above n 1, para 62.
10. *Pittorino* above n 3, para 107.

> If I was a 36-year-old single female and had been offered the sum of $1 000 000 and some real estate on top of it.... This is something that the average 36-year-old female does not have and I should look very carefully at the position and accept the offer.[11]

She also alleged that the Deputy-Registrar had hugged her and tried to comfort her, urging her to accept the offer that had been made in the mediation.[12]

Preferring the evidence of other witnesses, Scott J came to the conclusion that the alleged remarks were not in fact made and that the plaintiff was prone to distort and exaggerate matters because she had become so intensely emotionally involved with them. The case does, however, raise the question as to what sort of mediator interventions would render the mediation process unsound and any subsequent agreement reached open to challenge.

In considering the appropriate role of a mediator, Scott J referred to Boulle's textbook[13] and accepted that it would not be proper for a mediator to bring improper pressure to bear on a party to a mediation, although he also acknowledged the difficult and delicate role the mediator must often fulfil when conveying offers from one party to another.[14]

Similarly, in *Studer,* Sheller J commented that whilst current practice suggests different views about whether a mediator should do no more than facilitate negotiation, it is generally agreed not to be part of a mediator's function to attempt to impose a compromise upon a party.

There is not unanimous support for the proposition that mediators should not influence the content and outcome of the process. Astor and Chinkin comment that:

> There is no empirical evidence of the extent to which Australian mediators influence the course and outcome of mediations and how they might define the limits of appropriate and ethical conduct. Even where mediators do not espouse or adopt an especially interventionist role, they may influence the course of the session by subtle interventions which are not necessarily apparent to the parties.[15]

Given that it is also the mediator's role to attempt to balance power between disputents, it is submitted that the level of intervention that will be acceptable in any mediation must also vary with the circumstances. If a mediator perceives that one party is less articulate than the other, or less competent in terms of negotiation skills, it is their duty to find a way to attempt to assist that party without influencing

---

11. Ibid, para 99.
12. Ibid, para 103.
13. Above n 4.
14. *Pittorino* above n 3, para 127.
15. H Astor & C Chinkin *Dispute Resolution in Australia* 2nd edn (Sydney: Butterworths, 2002) 150-151.

the substance of the dispute with their own attitudes and opinions. For this reason Astor and Chinkin argue that the extent of a mediator's influence rests on 'nuanced judgements about the parties, the dispute and the interactions taking place in the mediation'.[16]

In *Pittorino,* Scott J also acknowledged the fact that even the mediator's body language may raise concerns in terms of mediator intervention, although in the case at hand he was unable to conclude that the mediator conducted herself other than with the complete correctness.

THE LENGTH AND ACRIMONY OF THE PROCESS

Scott J accepted that the mediation was conducted over a long period of time but rejected the allegation that it was conducted with acrimony, or that such acrimony was directed at the plaintiff. On the issue of time, he accepted the evidence of the solicitor for the third defendant that the mediation had gone on for a considerable period, but that there was nothing particularly remarkable about this mediation compared to other mediations that the solicitor had attended.

On the issue of acrimony, that solicitor also gave evidence, which was again accepted, that most mediations are conducted under some pressure and the fact that there were 'two camps' in this mediation was hardly surprising.

In mediation theory the flexibility of the mediation process and the fact that it is not governed by rules of procedure offers disputants the potential advantage of controlling both the timing and format of the dispute resolution session. On the other hand, whilst there are 'loose protocols'[17] governing the likely interaction of the parties, there are no technical rules and procedures to ensure procedural justice for the participants, which may leave the process open to question on natural justice grounds.

Whilst mediation is also promoted as a forum within which conflict can be safely expressed and constructively managed, cases like *Pittorino* suggest that the emotional experience which accompanies such expression can infect the experience for some disputants, calling the process itself into question. Indeed, *Pittorino* appears to be just such a case, where the judge made it clear that the plaintiff's evidence was rejected not on the grounds of deliberate deceit, but because in his opinion the plaintiff had distorted and exaggerated matters as a result of becoming too emotionally involved in the dispute.

As mediation is being increasingly used in testamentary disputes, it is submitted that cases such as *Pittorino* are to be expected with increasing frequency. In 1992,

16. Ibid, 154.
17. Boulle above n 4, 35.

the New South Wales Law Society statistics showed that approximately eight per cent of matters mediated were probate, testamentary or estate matters, with that figure increasing to 20 per cent in subsequent years.[18]

The dynamics of such disputes are also unique because the disputants are often suffering what may be described as 'double disconnection'. This arises where a disputant has had a relationship with the deceased, and is dealing with the grief associated with that death when they also find themselves estranged from siblings or other immediate family as a result of the terms of the will.[19]

In the writers' view it is not surprising that the dynamics of this sort of dispute may lead to dissatisfaction with an agreement made as a result of mediation with other family members. The difficult question is how to apply legal authority and in particular the equitable doctrine of unconscionability, which has been developed in the context of contractual negotiations, to the unique dynamics of court-annexed mediation.

UNCONSCIONABILITY AS A BASIS FOR SETTING ASIDE MEDIATION AGREEMENTS

Relief in equity on the basis of unconscionability is available where one party unconscientiously takes advantage of a party having a special disability.[20] The jurisdiction is invoked –

> whenever one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affecting his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.[21]

In order to establish unconscionable dealing it is necessary to show that one party is at a special disadvantage and that the other party has unconscientiously taken advantage of it.[22]

Special disadvantage or disability

The plaintiff must establish that at the time of entering into the transaction he or she suffered from a disability or disadvantage which seriously affected his or her

---

18. R Charlton *Dispute Resolution Guidebook* (Sydney: Law Book Co, 2000) 101.
19. Ibid, 102.
20. *Blomley v Ryan* (1956) 99 CLR 362, Kitto J 415; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, Mason J 461; *Bridgewater v Leahy* (1998) 194 CLR 457, Gleeson CJ & Callinan J 470.
21. *Blomley v Ryan* ibid, Kitto J 415.
22. *Commercial Bank v Amadio* above n 20, Mason J 474. See also *Louth v Diprose* (1992) 175 CLR 621, Brennan J 631-632, Deane J 637.

ability to make a judgement in his or her best interests vis à vis the other party to the transaction.[23] Although the categories are not closed,[24] the kinds of disability which have been recognised in the cases can be classified as follows:

- **physical incapacity** – illness, old age or other disability to the extent that it affects a person's capacity to act in his or her best interests;[25]
- **intellectual and emotional incapacity** – mental illness, lack of intelligence, stress and drug or alcohol induced impairments, emotional dependency;[26] and
- **lack of endowments** – poverty, illiteracy, lack of education, ignorance, language difficulties, inexperience in business and financial affairs.[27]

The disability or disadvantage will not necessarily involve 'physical frailty and enfeeblement with diminished knowledge by the party in question of that party's property and affairs generally'.[28] As noted by the trial judge in *Louth v Diprose:*

> It is an oversimplification to say that because the respondent acted as he did with his eyes open, and with a full understanding of what he was doing, he was not in a position of disadvantage, and therefore not the victim of unconscionable conduct.[29]

Furthermore, victimisation 'can consist either of the active extortion of a benefit or *the passive acceptance of a benefit in unconscionable circumstances*'.[30] Thus, relief may be awarded in cases where the stronger party has simply accepted the

---

23. *Bridgewater v Leahy* above n 20, Gleeson CJ & Callinan J 470, citing *Commercial Bank v Amadio* above n 20, Mason J 462, Deane J 476-477.
24. *Blomley v Ryan* above n 20, Fullager J 405; cited with approval in *Bridgewater v Leahy* above n 20, Gleeson CJ & Callinan J 470; see also *Louth v Diprose* above n 22.
25. *Blomley v Ryan* above n 20 (age, lack of education, alcoholism).
26. *Louth v Diprose* above n 22; *Bridgewater v Leahy* above n 20 (emotional dependence). This type of special disability has been referred to as 'situational' disadvantage: *ACCC v Samton Holdings Pty Ltd* (2002) 189 ALR 76, para 48. See also *Berbatis Holdings Pty Ltd v ACCC* (2002) 185 ALR 555, where the alleged special disadvantages were (a) the plaintiff's financial security depended upon their ability to sell their business, which was difficult or impossible without a new or extended lease in the shopping centre; and (b) as a result of their daughter's illness, the plaintiff was unable to give full attention to the protection of their own economic interests. The plaintiff's claim failed. The alleged situational disadvantage was based upon financial and commercial dependence and a comparison of relative positions of the parties involved. An appeal to the High Court was heard on 21 October 2002. Judgment has been reserved.
27. *Commercial Bank v Amadio* above n 20 (elderly Italian parents who had little formal education and a poor command of English).
28. *Bridgewater v Leahy* above n 20, 490.
29. *Diprose v Louth [No 2]* (1990) 54 SASR 450, Jacobs ACJ 453. On appeal a majority of the High Court held that the plaintiff was under a special disability despite the fact that he was a solicitor and had sufficient time to consider the merits of the transaction entered into: *Louth v Diprose* above n 22; but compare Toohey J 653-655 (dissenting). See also *Bridgewater v Leahy* above n 20, 491.
30. *Bridgewater v Leahy* above n 20, 479.

benefit of a transaction entered into by a person at a special disadvantage as well as in cases where he or she has initiated the transaction.[31]

In *Pittorino,* the plaintiff relied upon alleged unconscionable conduct as a ground for setting aside the mediation agreement.[32] The special disabilities alleged were the plaintiff's ill health at the mediation conference and loss of confidence in her solicitors.[33] The plaintiff did not succeed in her application as she was unable to establish that she was suffering from a special disability at the time of entering into the mediation agreement. Scott J made the following findings of fact:

> I do not accept that the plaintiff's physical disabilities were such that she could not properly be party to the agreement and I do not accept that the legal advice given to her throughout the day on 25 September 2000 was in any way inadequate. Nor do I accept that the plaintiff communicated to anybody at the conference either the fact that she was ill, if that was the case, or a loss of confidence in her solicitor.[34]

In *National Australia Bank Ltd v Freeman,*[35] it was also alleged that a mediation agreement should be set aside on the basis of unconscionability. The special disability alleged was that the defendant suffered from stress and anxiety at the time of the mediation and that he was therefore mentally unable to cope with the pressures he was under and was unable to think clearly or to understand the documentation shown to him. Again, the party alleging unconscionability was unable to establish on the evidence that he was suffering a relevant special disability at the time he entered into the mediation agreement. Ambrose J was unpersuaded upon the whole of the evidence that –

> the defendant did have any incapacity or had a reduced capacity to protect his own interests or to understand the effect of the agreement he made reflected in the Deed of Mediation which resulted from mental abnormality whether or not due to anxiety or undue pressure brought to bear upon him by the plaintiff in an unconscionable way or indeed that any such pressure was brought to bear upon him at any material time.[36]

In some models of mediation a party at a special disadvantage may be protected from victimisation by appropriate mediator interventions. This issue is discussed in mediation theory in terms of empowerment and is relevant to this discussion in two

---

31. Ibid, citing *Commercial Bank v Amadio* above n 20, Deane J 474; *Hart v O'Connor* [1985] AC 1000, 1024.
32. *Pittorino* above n 3, paras 120–126.
33. Ibid, para 117.
34. Ibid, para 125.
35. [2000] QSC 295. This decision was not considered by Scott J in *Pittorino.*
36. Ibid, para 78.

respects. First, the question arises as to whether the power differential between the parties is so significant that any agreement reached is likely to reflect that imbalance and not truly represent a consensual outcome.[37] In such cases it is commonly argued that mediation ought not to be attempted and that the dispute should be resolved by some other means such as the highly structured process of litigation. Alternatively, if the imbalance does not become evident until after the process has commenced, the mediator should exercise his or her prerogative to terminate the process.[38]

In practice, where matters are being referred to mediation by a court, this question is one of discretion and a party's willingness to participate in the process will not necessarily be taken into account. Indeed, recent amendments to the Rules of the Federal Court specifically enable that court to refer a matter to mediation 'with or without the consent of the parties to the proceedings'.[39]

This power was recently considered in *Idoport Pty Ltd v National Australia Bank Ltd.* Einstein J said:

> The amendments raise[d] some debate surrounding the appropriateness of mandatory mediation. Some view this notion as a contradiction in terms, opposing the culture of ADR which generally encompasses a voluntary, consensual process. It is important to note, however, that whilst parties may be compelled to attend mediation sessions, they are not forced to settle and may continue with litigation without penalty. Furthermore, Part 7B requires that referrals follow a screening process by the court, and that mediation sessions are conducted by qualified and experienced mediators.[40]

What sort of power imbalance would be considered too great for the court to order mandatory mediation is another difficult question, made even more topical by the recent decision in *ACCC v Lux Pty Ltd.*[41] In that case, Nicholson J in the Federal Court used the mandatory power to compel an intellectually disabled party to participate in the mediation process, stating:

> In my opinion there is no evidence here that this factor would disfavour the continuance of the order for mediation. In appropriate circumstances mediation may avoid a complainant with an intellectual disability being called as a witness and consequently have the potential to reduce the pressure of court proceedings on that complainant.[42]

---

37. For example, disputes involving a single citizen against the state or abused spouses and their former partners.
38. Boulle above n 4, 138.
39. Federal Court of Australia Act 1976 (Cth) s 53A.
40. [2001] NSWSC 427, 24.
41. [2001] FCA 600.
42. Ibid, para 13.

The second question arises where a matter involving a power imbalance is referred to mediation. In those circumstances should the mediator be permitted to intervene to redress the imbalance and, if so, how?

It is submitted that the answer to this question will again vary according to the model of mediation being implemented and the forum where the dispute resolution process takes place. Boulle acknowledges this as a 'grey zone' in mediation theory:

> Mediators have some role in redressing power imbalances, without acting as the advocates or saviours of the weak. If they treat unequal parties evenly they will preside over unequal bargaining; if they intervene too strongly they will undermine their impartiality.[43]

It is generally acknowledged that mediators are in a unique position to impose pressure on disputants to reach a settlement. Whether or not this is a legitimate function of the mediator is, however, controversial.

Whilst practice standards have been produced by the Law Council of Australia,[44] the National Alternative Dispute Resolution Advisory Council[45] and other service providers of mediation, to date most of those standards have been directed at the practitioner rather than the court or tribunal as a service provider. The Access to Justice Advisory Committee (AJAC) has recommended that minimum standards be developed for court and tribunal programs:

> Governments have a special responsibility for the quality, integrity and accountability of the ADR processes provided by their courts and tribunals. [This responsibility] extends to all ADR programs funded by the government.[46]

Even where appropriate standards do apply the issue arises as to how such standards are to be enforced. Where standards are stated to be binding upon mediators a deviation may render the mediator liable to a charge of unprofessional conduct. Other provisions, however, are intended only to be guidelines for professional conduct.

There are also varying levels of protection conferred upon mediators under the different statutory schemes, the level of immunity varying according to the role being performed. In many cases there is also contractual protection which arises under the agreement to mediate entered into between the mediator and the disputants prior to the mediation session.

---

43. Boulle above n 4, 134.
44. 'Ethical Standards for Mediators' (1996) 32 Australian Lawyer 29.
45. National Alternative Dispute Resolution Advisory Council *A Framework for ADR Standards* (Canberra: A-G's Dept, 2001).
46. Access to Justice Advisory Committee *Access to Justice – An Action Plan* (Canberra: AGPS, 1994) 294.

It is submitted that the question of whether mediators can be found liable for misconduct during the mediation process for failure to deal adequately with issues such as power imbalance will be a significant consideration in future actions of this nature. In any case, where a mediation agreement is ultimately entered into in circumstances where a person suffering a special disability is unconscientiously taken advantage of it will be necessary for the person alleging unconscionability to bring proceedings and provide clear evidence of the existence of the special disability alleged.

Unconscientious taking of advantage

To qualify for equitable relief there must have been an unconscientious advantage taken of the party with the special disability. This requires the other party to have knowledge of the special disability. The test of knowledge is objective: the special disability must be sufficiently evident to the other party[47] and either actual or constructive knowledge will suffice.[48] Thus, in order to establish knowledge for the purposes of the doctrine, the circumstances must be such 'as to raise in the mind of a reasonable person a very real question as to the respondent's ability to make a judgement as to what was in their own best interests'.[49] In *Commercial Bank of Australia Ltd v Amadio,* Mason J said:

> Relief on the ground of 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage – eg, a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink.[50]

His Honour continued:

> In deciding whether the bank took unconscientious advantage of the position of disadvantage in which the respondents were placed, we must ask, first, what knowledge did the bank have of the respondents' situation?[51]

A particular difficulty for the plaintiff in *Pittorino* was that she did not tell anyone of her pain or her loss of confidence in her solicitor prior to the mediation. The plaintiff failed to establish unconscionability as she was unable to establish

47. *Commercial Bank v Amadio* above n 20, Mason J 462, 467-468, Deane J 474.
48. 'Aware of the possibility that that situation may exist or [was] aware of facts that would raise that possibility in the mind of any reasonable person': ibid, Mason J 467.
49. Ibid, Mason J 466-467.
50. Ibid, 461, cited in *Pittorino* above n 3, Scott J para 122.
51. Ibid, 466, cited in *Pittorino* above n 3, Scott J para 123. His Honour also referred to the judgment of Deane J in *Commercial Bank v Amadia* above n 20, 474, 477.

either that she was labouring under a special disability at the relevant time or that the defendant had knowledge of any alleged special disability. Scott J concluded:

> For the reasons that I have already expressed in dealing with the facts, even if the plaintiff did suffer from some disability on the day in question, such as the ill-health from which she said she suffered and her lack of confidence in her solicitors, there was no acceptable evidence that any of the defendants were fixed with knowledge of that disadvantageous position of the plaintiff. [52]

Upholding transactions

If the plaintiff establishes that there has been an unconscientious taking of advantage, the party seeking to uphold the transaction must establish that the bargain is fair, just and reasonable.[53] Two factors are particularly relevant in this determination:

1. adequacy of consideration; and
2. independent advice.

While it is not essential to establish inadequate consideration in all cases, adequate consideration will provide strong evidence that there was no exploitation.[54] Furthermore, mere inadequacy of consideration is not of itself sufficient to impeach an agreement unless that inadequacy is so great as to amount to clear evidence of an unconscientious dealing.[55]

Evidence of independent advice is usually directed to showing that the contract was entered into with full knowledge of the value of the subject matter and nature and effect of the transaction.[56] If the party at a disadvantage has received independent advice, most authorities take the view that the stronger party cannot be said to have taken advantage of the weaker party. Although the courts have been reluctant to uphold transactions in the absence of independent advice, there is authority to support the proposition that the requirement of independent advice is not absolute.[57]

---

52. *Pittorino* above n 3, para 125.
53. *Commercial Bank v Amadio* above n 20, Deane J 474; cf *Louth v Diprose* above n 22, Brennan J 632. See generally, M Cope *Duress, Undue Influence and Unconscientious Bargains* (Sydney: Law Book Co, 1985) paras 260–266.
54. *Commercial Bank v Amadio* above n 20, Deane J.
55. *Blomley v Ryan* above n 20, Fullager J 405. See generally, Cope above n 53, para 261, citing *Clark v Malpas* (1862) 4 De G F & J 399; 45 ER 1238; *Blomley v Ryan* above n 20, Fullager J 405. See also *Bridgewater v Leahy* above n 20, 493.
56. See the discussion in Cope above n 53, para 263.
57. See Cope above n 53, para 264; citing *O'Rorke v Bolingbroke* (1877) 2 AC 814 (no independent advice but full value paid); *Harrison v Guest* (1860) 6 De G M & G 424; 11 ER 517 (no independent advice taken but there was a recommendation to do so and an opportunity was given which was declined). *Bridgewater v Leahy* above n 20, Gleeson CJ & Callinan J 469.

However, it has been suggested that a party with knowledge of a special disability should require that the party labouring under the disability obtain independent advice.[58] In *Commercial Bank of Australia Ltd v Amadio,* Mason J said:

> The bank was guilty of unconscionable conduct by entering into the transaction without disclosing such facts as may have enabled the respondents to form a judgement for themselves and without ensuring that they obtained independent advice.[59]

Furthermore, in *Bridgewater v Leahy,* a case of emotional dependence, it was considered that in cases of unconscionable dealing, independent advice is crucial as 'the court does not allow any person to take advantage of any known weakness of the vendor' and therefore it is necessary to ask whether that party had 'the opportunity' of professional advice as to 'the effect of what he [was] doing'.[60] The majority said:

> This denial of the opportunity to have 'the assistance of a disinterested legal adviser', rather than speculation as to what might have followed had it been pursued, is an element in the unconscientious conduct in respect of which equity intervenes to deny the entitlement of the disponee to retain the property in question, unless the disponee shows the disposition to have been 'fair, just and reasonable'.[61]

As previously discussed, the various rules of court contemplate different levels of participation from lawyers assisting parties engaged in mediation, with some jurisdictions giving the mediator unfettered control over the process including the right to exclude the parties' legal representatives at their discretion. Against that background, and in light of the public policy arguments highlighted in *Studer v Boettcher,* it is submitted that in court-annexed mediations where parties are legally represented it will be extremely difficult to have an agreement set aside for lack of independent advice unless that representation is shown to be ineffective. On the other hand, where parties are not legally represented at mediation, the lack of legal advice may make it more difficult to defend an allegation of unconscionability.

Remedies

The usual remedy in cases of established unconscionability is to have any agreement entered into with the party who has acted unconscionably while the

---

58. *Commercial Bank v Amadio* above n 20, Mason J 468. See also Deane J 477-478.
59. Ibid, 468.
60. *Bridgewater v Leahy* above n 20, 485-486; citing *Re Levey; Ex parte Official Assignee* (1894) 15 NSWR (B&P) 30, Manning J 36.
61. Ibid, 486 (footnotes omitted).

plaintiff was labouring under the special disability rescinded.[62] In many cases the appropriate equitable relief for unconscionable dealing will be for the court to set aside the entire transaction; however, in some cases lesser relief may be appropriate and the order may be subject to conditions.[63] In *Commercial Bank of Australia v Amadio,* Deane J noted that 'where appropriate, an order will be made which only partly nullifies a transaction liable to be set aside in equity pursuant to the principles of unconscionable dealing' and that 'where an order is made setting aside the whole of a transaction on the ground of unconscionable dealing, the order will, in an appropriate case, be made conditional upon the party obtaining relief doing equity'.[64]

This approach was adopted in *Bridgewater v Leahy* by the majority who considered that 'the equity may be satisfied by orders having the effect of setting aside no more than so much of a disposition as prevents the moving party "obtaining an unwarranted benefit at the expense of the other"'.[65] The majority said:

> In some cases, the equity that arises by reason of an unconscientious or unconscionable dealing of the nature with which this appeal is concerned may be satisfied only by setting aside this dealing in its entirety. The dealing may be embodied in the one instrument which contains several provisions or in several instruments. In other circumstances, of which this case is an example, the equity may be satisfied by orders setting aside some but not all of these instruments or some but not all of the provisions thereof.[66]

This approach is in accordance with the general principle that equitable relief is determined according to the circumstances of the case and the appropriate relief is the minimum to do justice between the parties. In cases of unconscionable conduct the court should therefore go no further than is necessary to prevent that conduct. As a person seeking equitable relief must be prepared to do equity, a court may impose conditions on relief. In *Waltons Stores v Maher,* Brennan J said:

> The element which both attracts the jurisdiction of a court of equity and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity, and the remedy required to satisfy the equity varies according to the circumstances of the case.... In moulding its decree, the court, as a court of conscience, goes no further that is necessary to prevent unconscionable conduct.[67]

---

62. *Maguire v Makaronis* (1997) 144 ALR 729.
63. See Cope above n 53, para 251, especially n 93.
64. *Commercial Bank v Amadio* above n 20, 480-481.
65. *Bridgewater v Leahy* above n 20, 494, citing *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 114.
66. *Bridgewater v Leahy* above n 20, 493.
67. (1988) 164 CLR 387, 419.

It is now clear that partial rescission of an agreement can be awarded.[68] Equitable remedies are flexible and discretionary, the guiding principles being (i) that the minimum equity necessary to do justice between the parties should be employed, and (ii) that a person seeking equity must do equity.[69] Any prejudice to third parties will be taken into account.[70]

The flexibility of equitable remedies and in particular the availability of partial rescission of agreements in cases where unconscionability is established but the minimum equity and practical justice do not support setting aside an entire agreement, provides a means of overcoming concerns which have been expressed in the context of mediation agreements. For example, in *Pittorino,* Scott J stated:

> It should be kept in mind that the plaintiff's case is that the mediation agreement should fail in its totality. Should that happen, the settlement reached by the third defendant will fall away. That is important in the context of this case where the third defendant has, in her evidence, indicated that she is quite content with the agreement that was reached on her behalf.[71]

The difficulty with partial rescission in testamentary disputes like *Pittorino,* where there are multiple parties, is that there is a limited fund available for distribution and any change to the agreed settlement by one beneficiary will have flow-on consequences for the other beneficiaries.

The other question this discussion raises is whether that remedy would still be appropriate if the mediator had knowledge of the special disability but the other party to the dispute did not. It is submitted that in those circumstances it would be inappropriate to order even partial rescission, as such an order may have the effect of prejudicing innocent third parties. The appropriate remedy in such cases may therefore lie directly against the mediator, although, as previously discussed, any issues of statutory immunity and confidentiality would need to be taken into account.

CONCLUSION

The courts are faced with the difficult task of balancing competing policy concerns when they are required to consider whether a mediation agreement should be set aside at law or in equity. They are, first, the public interest in the speedy and just resolution of disputes by compromise whenever practical and, secondly, the

---

68. *Vadasz v Pioneer Concrete (SA) Pty Ltd* above n 65.
69. According to both the majority and minority judges in *Bridgewater v Leahy* above n 20, relief was to be determined according to the principles that a person seeking equity must do equity and that the objective is to do what is practically just.
70. *Bridgewater v Leahy* above n 20; see also *Giumelli v Giumelli* (1999) 161 ALR 473.
71. Above n 3, para 109.

need for equity to provide relief in the situation where a party has unconscientiously taken advantage of another with a special disability.

However, the cases discussed in this paper suggest that the availability of grounds at law and in equity to avoid such agreements provide an opportunity for disgruntled parties to scrutinise the conduct of their mediator and/or the other party to the mediation in order to find grounds to avoid their contractual obligations.

It follows that the factual circumstances in which relief will be granted are narrow and that there is little prospect of relief for those seeking to have an agreement reached at a court-annexed mediation set aside. It is suggested, however, that in appropriate cases the doctrine of unconscionability will provide an appropriate remedy where the safeguards inherent in the mediation process fail and a person having a special disability enters into a mediation agreement in circumstances where it can be said that he or she has been treated unconscientiously.