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UNCONSCIONABLE DEMANDS UNDER ON-DEMAND GUARANTEES: A CASE OF WRONGFUL EXPLOITATION

ABSTRACT

Unconscionable conduct is well recognised in Singaporean and Australian jurisdictions as a ground for restraining the beneficiary calling under an on-demand guarantee. An on-demand guarantee is provided by an issuer to guarantee that the applicant will meet obligations owed to the beneficiary. When the applicant fails to perform the amount becomes payable by the issuer on demand of the beneficiary. The objective of this article is to examine the meaning of unconscionable conduct in the context of on-demand guarantees. This article examines the equitable doctrines potentially encapsulated in the relevant unconscionability provisions under the Competition and Consumer Act 2010 (Cth) sch 2 and underlying judge-made law, and their relevance to on-demand guarantees. This article argues that only certain categories of unconscionability in equity jurisprudence are appropriate to describe unconscionable demands under on-demand guarantees. Drawing on the theory of exploitation it also argues that unconscionable demands under on-demand guarantees are a case of wrongful exploitation that calls for judicial intervention.

I INTRODUCTION

The concept of unconscionable conduct ‘first seeped, and then flooded, into Australian legal usage from the early 1980s’.¹ The statutory recognition given to this concept under the Competition and Consumer Act 2010 (Cth) sch 2 (‘Australian Consumer Law’), and the recognition of this concept in

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¹ Paul Finn, ‘Unconscionable Conduct’ (1994) 8 Journal of Contract Law 37, 37.
the context of on-demand guarantees, constitutes a significant development in Australian law. The literature indicates a similar trend in the Singaporean jurisprudence which recognises unconscionable conduct as a ground for restraining the enforcement of on-demand guarantees. These significant developments in Australian and Singaporean law, and the academic debates surrounding the different meanings that can be attributed to unconscionable conduct in equity jurisprudence, provide the need for deeper reflections on the concept of unconscionable conduct in the context of on-demand guarantees. This article aims to explore a conceptual framework for defining unconscionable demands under on-demand guarantees. As the first step to this conceptual framework it will examine unconscionability in Singapore as a ground for restraining demands under on-demand guarantees and will also refer to the equivalent Australian jurisprudence. This survey of the literature, through case examples and statutory provisions, will illustrate the genesis and development of unconscionability as a ground for restraining beneficiaries calling under on-demand guarantees in these jurisdictions.

In defining the equitable concept of unconscionability, in the context of on-demand guarantees, it is important to examine unconscionability’s defining indicators in equity and their relevance to on-demand guarantees. Although relief against unconscionable conduct evolved in the equity jurisdiction as a protection mechanism against the exploitation of the vulnerability of people with a special disability (‘constitutional disadvantage’) over time courts have recognised the possibility of its broader application to include people who are disadvantaged due to the superior bargaining position of the other party (‘situational disadvantage’). Drawing upon the idea of a situational disadvantage this article will argue that:

(a) Although the competition in the market to secure the underlying contract of export or construction, makes the applicant of a demand guarantee

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2 An on-demand guarantee is a written declaration from an issuer, which guarantees to satisfy the beneficiary’s claim for a certain financial amount if the applicant does not meet certain obligations (default in delivery or performance of the goods or work executed). On-demand guarantees do not require the beneficiary to produce any proof of default. The beneficiary will generally receive payment of the full amount upon the presentation of a written statement to the issuer stating that the applicant has failed to perform. For a brief description of on-demand guarantees, see generally, Howard N Bennett, ‘The Formal Validity of Demands under Performance Bonds’ (1991) 6(5) Journal of International Banking Law 207; note that reference to on-demand guarantees in this article is also a reference to other terms used for on-demand guarantees in practice and in the literature, for example ‘performance bonds’, ‘bank guarantees’, ‘demand guarantees’, and ‘standby credits’ which are payable on-demand of the beneficiary.

3 See generally Chan Sek Keong, ‘Developments in Singapore Law 2006–2010: Trends and Perspectives’ (Speech delivered at the Singapore Academy of Law Conference 2011, Singapore, 24 February 2011): in 1995, the Court of Appeal (Singapore) in Bocotra Construction v Attorney-General, introduced the doctrine of unconscionability from the Australian law as the basis for restraining unfair calls on performance bonds — a departure from the trite English position which requires fraud to be clearly established before a call on a performance bond can be restrained.
vulnerable to agree to the terms of the beneficiary, or places the applicant at a situational disadvantage vis-à-vis the beneficiary in the guarantee market, by entering into a demand guarantee contract the beneficiary does not engage in unconscionable conduct. Mere inequality of bargaining power between two competent parties is not on its own accepted as a ground for intervention in commercial contracts such as demand guarantees.

(b) After the contract is made the applicant once again becomes vulnerable — vulnerable to honour the beneficiary’s demand for payment under the guarantee upon a simple demand without proof of default under the underlying contract. Whilst the beneficiary is entitled to make such demands it is the expectation of the applicant, and perhaps the implicit agreement on the part of the beneficiary, that the beneficiary would resort to such demands only in the event of non performance, late performance or defective performance of the contract. If the beneficiary makes a demand in circumstances where there is no real risk to him, and particularly in circumstances where his conduct amounts to opportunistic and unfair advantage taking of the applicant’s situation, then such a demand for payment is unconscionable. The idea of a vulnerability or situational disadvantage thus plays an important role in this second argument.

In order to develop a conceptual analysis of unconscionable conduct this article will also make reference to the case law on unconscionable dealing. Notably, the concept of unconscionable dealing has typically been used to determine whether there was some form of procedural unfairness in the bargaining process. It will be shown that the Australian courts have drawn upon the concept of unconscionable dealing in its interpretation of unconscionable conduct in the context of demand guarantees. Additionally, the equitable principle of insistence upon strict legal rights in circumstances which make that insistence harsh or oppressive has also been drawn upon as a link to interpretation of unconscionable conduct in the context of demand guarantees.

Hence, exploitation of vulnerability or situational disadvantage and insistence upon rights in circumstances which make that insistence harsh or oppressive provide useful links to the conceptual analysis of unconscionable demands under on-demand guarantees. Based on the underlying criteria of these strands of unconscionability, it will be argued that the law’s intervention with unconscionable demands will protect not only applicants’ reasonable expectation that the beneficiaries will not take an unfair advantage of the on-demand character of the guarantee but will also protect the applicants against exploitation of vulnerability arising from the relatively superior position of beneficiaries in the on-demand guarantee market.

Finally, drawing on the theory of exploitation, this article will argue that unconscionability, on the part of the beneficiary demanding payment, is a wrongful exploitation of the vulnerable position of applicants in the on-demand guarantee market. Notably, its objective is not to argue that on-demand guarantees are in themselves contracts of exploitation and that the law should
intervene to prohibit such instruments being used in the guarantee market. Rather, unconscionable demands under on-demand guarantees conceptually involve a form of exploitation, although the source of the applicants’ vulnerability — ‘the exploitable circumstances’ — is quite unique in the case of on-demand guarantees. The problem with on-demand guarantees lies in the opportunistic and unfair advantage taken of applicants’ vulnerability in the on-demand guarantee market. This exploitation justifies prohibition of unconscionable demands under on-demand guarantees.

II Judicial Recognition of Unconscionability in the Enforcement of On-Demand Guarantees

A The Position under Singaporean Law

Unconscionability in the context of on-demand guarantees has been the subject of considerable litigation over the past two decades in Singapore. A review of the line of cases, and various criticisms of the case law that brought about this concept under Singaporean law, will be instructive for understanding the defining elements of unconscionability or unconscionable conduct as a ground for restraining the enforcement of on-demand guarantees.

The genesis of the application of unconscionability in the context of on-demand guarantees in Singaporean jurisprudence can be traced back to the Singapore Court of Appeal decision in Bocotra Construction Pte Ltd v Attorney-General.4 This decision has been subject to extensive academic review in the recent past.5 The case involved a construction contract under which Bocotra Construction were the contractors commissioned by the Public Works Department to undertake certain engineering works involving the central expressway. A performance guarantee was issued to the Public Works Department by a bank on the instructions of Bocotra Construction. Bocotra Construction failed to complete the works according to schedule and a dispute ensued between the parties. Bocotra Construction claimed that the delay was due to two factors: first, errors contained in the Public Works Department’s drawings and specifications and secondly, maladministration on the part of the Public Works Department. The Public Works Department counterclaimed for the cost of remedial works necessary to rectify defects in the construction of the tunnel. Both matters were referred to arbitration in accordance with the arbitration clause in the construction contract. Before determination of the dispute by the arbitrator, the Public Works Department notified Bocotra

4 Bocotra Construction Pte Ltd v Attorney General [1995] 2 SLR 733 (‘Bocotra Construction’).

Construction and the bank of its intention to call for payment on the guarantee. Bocotra Construction then sought and obtained from the arbitrator a restraining order requiring the Public Works Department to desist from making a call on the performance bond. The Public Works Department appealed against the order.

The Court of Appeal of Singapore considered the grounds upon which a call on an on-demand guarantee can be restrained. Karthigesu JA made reference to *Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd* and went on to state:

> Whether there is fraud or unconscionability is the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted … We need only note that dispensing with consideration of the balance of convenience does not make an injunction any easier to obtain. Indeed, a higher degree of strictness applies, as the applicant will be required to establish a clear case of fraud or unconscionability in interlocutory proceedings. It is clear that mere allegations are insufficient.

It is important to note that *Bocotra Construction* is the first time in the Singaporean jurisprudence that the term unconscionability was specifically mentioned as a ground for restraining a demand under an on-demand guarantee. What the Court of Appeal in this case appears to have done is to dispense with the application of fraud as the sole ground for restraining payment on performance bonds and to require the applicant to prove one of following: (a) that the beneficiary was acting fraudulently or (b) that there is a clear and convincing case of unconscionable conduct on the part of the beneficiary calling under the guarantee. Dismissing the appeal, the Court of Appeal concluded that Bocotra Construction failed to satisfy the Court as to its entitlement to an injunction restraining the Public Works Department from calling on the guarantee. In particular it had not shown, and indeed had conceded that it could not show, that fraud or unconscionability was present on the facts. Whilst this judicial pronouncement marks the Singaporean courts’ recognition of equitable intervention in the enforcement of demands under performance guarantees it fails to explain the meaning and relevance of the equitable concept of unconscionability in the context of on-demand guarantees.

Consequent to this ruling the concept of unconscionability was invoked by Lai J in *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd*. A brief examination of the facts of this case will prove useful to identify the context in which the unconscionable

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9 *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd* [1999] 2 SLR 368 (‘Min Thai’); see also the High Court of Singapore decision in *Raymond Construction v Low Yang Tong* [1996] SGHC 136 (11 July 1996). This case was referred to in *Min Thai* [1999] 2 SLR 368, 374 [19] (Lai J).
conduct was applied to the call under the on-demand guarantee. Min Thai agreed to supply 50,000 metric tons of white rice of Chinese origin to Sunlabel. Under this contract Min Thai procured an on-demand performance guarantee in favour of Sunlabel. There was also a force majeure clause in that contract which provided grounds for relief from liability. Subsequent to the issue of the guarantee China was subjected to severe floods caused by a typhoon and Min Thai promptly informed Sunlabel of the impediment to the delivery caused by the flooding. Min Thai even offered an alternative performance — supply of rice with a maximum of 30 per cent broken rice. A meeting was scheduled to explore the practical solutions to the flood problems. However, before this scheduled meeting, and unknown to Min Thai, Sunlabel made a demand under the guarantee.

Justice Lai concluded that it was unconscionable for Sunlabel to demand payment under the guarantee. This was because the areas from which white rice were to be supplied were affected by severe flooding, which China had not experienced in the last 100 years, and as flooding was one of the exceptions specified in the force majeure clause. Further there was evidence that Min Thai attempted to provide substitute white rice and that the demand on the performance guarantee was made despite the force majeure clause in the contract. Thus, this decision represents an instance where the Singaporean High Court decided that unconscionability was present in the on-demand guarantee context. Arguably a demand under an on-demand guarantee, stemming from non-delivery of goods due to natural disasters, despite a force majeure clause in the underlying contract, amounts to unconscionable conduct as defined in this case.

The Court of Appeal of Singapore in *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* once again affirmed that unconscionability is a ground under Singaporean law for restraining the enforcement of an on-demand guarantee without delving into the meaning of unconscionability in equity or the context in which it applies to on-demand guarantees. The dispute in the case was between parties to a construction contract under which GHL awarded Unitrack Building Construction a building contract for the construction of a boarding house. The facts indicated that a year after the construction works began the parties agreed to a written variation of the contract whereby the subcontractors would receive payment directly from GHL. The main contract sum was correspondingly revised downwards to S$1,961,400 but the performance bond remained at 10 per cent of the initial sum, S$5,781,400. GHL then attempted to call on the performance guarantee for the full amount. The Court of Appeal found that in the light of the revision of the contract sum, GHL’s call on the performance bond for the full amount was unconscionable.

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10 Another subsequent case in which unconscionability was approved as a separate ground for injunctive relief against a beneficiary of a demand guarantee is the High Court decision of *Sin Kian Contractor Pte Ltd v Lian Kok Hong* [1999] 3 SLR 732; see Wong, above n 5, 166.

11 See Wong, above n 5, 173.

12 *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 4 SLR 604 (‘GHL’); see also Loh and Wu, above n 8.
In coming to this conclusion the Singapore Court of Appeal took the opportunity to review the law and restate the law with regard to on-demand guarantees. The Court of Appeal stated unequivocally that unconscionability is a ground for restraining the call of an on-demand guarantee. Referring to the Bocotra Construction ruling the Court stated that ‘we should add that the concept of “unconscionability”’ was adopted after deliberation, and was not inadvertently inserted as a result of a slip; nor was it intended to be used synonymously or interchangeably with “fraud”.  

This statement of the Court of Appeal reaffirms that equitable intervention in the enforcement of on-demand guarantees is well recognised under Singaporean law.

Beyond GHL there are a number of cases, both in the Court of Appeal and the High Court of Singapore, where the courts encountered the issue of whether a particular circumstance fell within the concept of unconscionability. None of these cases have gone into an examination of the indicators of unconscionable conduct or its defining criteria in equity. However, the Court of Appeal decisions in Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan, Eltraco International Pte Ltd v CGH Development Pte Ltd, Samwoh Asphalt Premix Pte Ltd v Sum Cheong Piling Pte Ltd, JBE Properties Pte Ltd v Gammon Pte Ltd, and BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd, which reiterate unconscionability as a ground for restraining the beneficiary calling under a demand guarantee provide some insight into the meaning of this concept in the demand guarantee context.

In Dauphin Offshore Dauphin were shipbuilders who entered into a contract with HRH to build a luxury motor yacht for HRH. Dauphin was required to furnish an irrevocable confirmed bank guarantee upon the receipt of the first instalment. This was a guarantee for the repayment of the first instalment in case they failed to fulfil their contractual obligations. On HRH’s part, they were required to furnish an irrevocable letter of credit to secure payment of the full amount of the contract price. The parties honoured their contractual obligations with regard to the first instalment in that Dauphin procured a bank guarantee issued by the Bank of America and HRH opened a letter of credit. However, a dispute arose as to the payment of the second instalment. Instead of making the payment of the second instalment.

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15 [2000] 1 SLR 657 (‘Dauphin Offshore’).
16 [2000] 4 SLR 290 (‘Eltreco International’).
18 JBE Properties Pte Ltd v Gammon Pte Ltd [2011] 2 SLR 47 (‘JBE Properties’).
19 [2012] SGCA 28 (7 February 2012) (‘Mount Sophia’).
instalment, HRH gave notice of termination of the underlying contract citing several instances of breaches and made a demand on the performance guarantee.

One of the issues before the Court of Appeal was whether HRH’s conduct was unconscionable in making the demand under the guarantee. The Court of Appeal examined the recognition of unconscionability exception under Singaporean law. After a somewhat detailed analysis of the Singaporean case law on the matter, the Court of Appeal affirmed the views expressed in GHL that in Singapore unconscionability has been accepted as, and is a separate ground in itself, for granting injunctive relief in so far as a performance guarantee is concerned. The Court of Appeal then considered what would constitute unconscionability in the context of on-demand guarantees and stated as follows:

"We do not think it is possible to define “unconscionability” other than to give some very broad indications such as lack of bona fides. What kind of situations would constitute unconscionability would have to depend on the facts of each case. This is a question which the court has to consider on each occasion where its jurisdiction is invoked. There is no predetermined categorisation."

The Court then referred to a statement of Lai J in Raymond Construction v Low Yang Tong which attempts to identify the ambit of unconscionability:

"The concept of ‘unconscionability’ to me involves unfairness, as distinct from dishonesty or fraud or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party. Mere breaches of contract by the party in question would not by themselves be unconscionable."

On this view the concept of unconscionability in the demand guarantee context is not susceptible to definition, other than to say that it involves ‘unfair’ conduct. The question whether the beneficiary has acted unconscionably in calling under the guarantee would depend upon the factual circumstances of each case. However, in an attempt to identify the constituent elements of unconscionability in the context of on-demand guarantees the Court made the important observation that a conduct of a kind so reprehensible or lacking in good faith’ would come under the broad heading of ‘unconscionable conduct’ in equity.

Coming back to the facts of the case, the Court of Appeal held that the evidence indicated that HRH was clearly unhappy with various aspects of the construction

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21 Ibid 668.
22 Ibid.
of the yacht and sought to terminate the contract due to a fundamental breach by Dauphin. Therefore, the call under the guarantee could not be considered unconscionable.

The Singapore Court of Appeal decision in *Eltraco International* reiterates the extent to which unconscionability on the part of a beneficiary can be used to restrain payment under on-demand guarantees. Eltraco were engaged by CGH as the main contractors for the construction of a super-structure for a proposed serviced apartment and shopping development. They procured an on-demand guarantee favouring CGH as security for their performance under the contract. After the completion of the project Eltraco submitted a progress claim for an amount representing the work done up to completion. The claim was not certified by the architect as required by the underlying contract because Eltraco had not fully rectified certain defective works in the construction. CGH then demanded the full amount under the guarantee even though they held retention money. Eltraco sought to restrain CGH from claiming under the guarantee on two grounds: first, that CGH had to show Eltraco was in breach of the underlying contract before it was entitled to demand under the guarantee and secondly that CGH’s demand for payment was unconscionable in the circumstances.

As regards the first ground, the Court of Appeal held that the guarantee in question was an on-demand guarantee that did not require the beneficiary (CGH) to establish breach of contract before it demanded payment under the guarantee. The Court of Appeal further confirmed that the two grounds upon which a court would grant an injunction are where there is fraud or unconscionability on the part of the beneficiary. Considering the definition of unconscionability so far adopted Chao JA observed that:

The appellants would appear to suggest that based on this opinion, unfairness, per se, could constitute ‘unconscionability’. We do not think it necessarily follows. Lai Kew Chai J said the concept of ‘unconscionability’ involves unfairness. We agree. That would be so. In every instance of unconscionability there would be an element of unfairness. But the reverse is not necessarily true. It does not mean that in every instance where there is unfairness it would amount to ‘unconscionability’.25

On this statement, unconscionability is one type of unfairness and every instance of unconscionable conduct amounts to unfair conduct, although the reverse is not necessarily true.

On the second ground, the Court of Appeal was of the view that unconscionable conduct on the part of CGH in demanding full amount of the guarantee would not necessarily have the effect of striking down the entire demand:

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It must be borne in mind that the court in restraining a beneficiary from calling on a bond on the ground of unconscionability is exercising an equitable jurisdiction. We are unable to see why in the exercise of this jurisdiction the court may not limit the restraint to only that part which was clearly excessive and allow the other part which would not be unconscionable to remain, bearing in mind that under the terms of the bond, the beneficiary is entitled to make calls from time to time and for such sums as may be appropriate. To restrain the entire call when part of it is clearly not unconscionable would be inconsistent with the object of the jurisdiction which is to ensure that there is no injustice or abuse. To say that the restraint must be on the entire call would surely cause injustice to the beneficiary. The object of this jurisdiction is not to punish the beneficiary for making an excessive call but to achieve equity and justice.26

Thus, in the above statements, the Court of Appeal made a distinction between unconscionability and unfairness; unconscionability is just one element of unfairness. Hence, unconscionable conduct on the part of the beneficiary calling under the guarantee indicates unfair conduct on their part. The objective of equity’s intervention, to protect against unconscionable conduct on the part of the beneficiary calling under the guarantee, is to ensure that ‘there is no injustice or abuse’27 caused to either party. In order to achieve equity and justice, the Court would intervene to restrain only the part of the demand under the guarantee which is unconscionable. Applying this rationale, the Court decided that it should take into account the uncertified claims which would have given CGH ample security. CGH was therefore to be restrained from receiving monies in excess of that claim, which amounted to S$600,000. Thus the Court, in the exercise of its equitable jurisdiction, restrained only that part of the demand that was unconscionable and allowed the remainder of CGH’s demand that was not unconscionable.

The Court of Appeal decision in *Samwoh Asphalt* once again reaffirms the Singaporean courts’ recognition of unconscionability in the context of on-demand performance guarantees. A dispute arose in relation to some subcontracted works of a construction project under which the subcontractor, Samwoh, furnished a performance guarantee to SC Piling for the due performance of the subcontract.

After a detailed examination of the facts, the Court of Appeal concluded that the call for payment by SC Piling under the on-demand guarantee was not based on any bona fide claim that it had against Samwoh. The clear inference was that it had invoked the guarantee as a bargaining chip to compel Samwoh to agree to its terms. In all the circumstances, SC Piling had acted unconscionably in calling for payment under the performance guarantee. Addressing the main issue before the Court of Appeal, whether Samwoh had acted unconscionably in calling on the performance guarantee, Thean JA observed as follows:

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26 Ibid 300 (Chao JA).
27 Ibid.
In Singapore, unconscionability on the part of the beneficiary in calling for payment on a performance guarantee is a separate and distinct ground from fraud for seeking injunctive relief … In determining this issue it is necessary to examine all the relevant facts and circumstances of the case including the facts leading up to the demand for payment under the performance guarantee.28

On this statement, the presence of unconscionable conduct in the demand guarantee context would depend on the facts of each case. In disagreeing with the High Court judge,29 Thean JA held that the demand made by SC Piling was utterly lacking in bona fides and that it had acted unconscionably in calling on the guarantee. Hence this case suggests that lack of bona fides on the part of the beneficiary calling the guarantee may amount to unconscionable conduct on their part.

The Court of Appeal decision in JBE Properties is another case that represents the Singaporean courts’ affirmation of unconscionability as a ground for restraining beneficiaries calling under on-demand guarantees. The case involved a building contract under which Gammon was the builder of a residential building for JBE. Gammon’s obligations under the contract were secured by a performance bond issued by BNP Paribas Singapore. The cladding of the building turned out to be defective but the completion certificate identified those defects as ‘minor’ defects. Before Gammon could rectify the cladding defects JBE solicited bids from other contractors to do the same job. Four bids were received, quoting prices between S$2.2 million and S$2.7 million. The bids were made on the basis of replacing the existing cladding of the building and installing new cladding. JBE accepted the lowest bid and then made a call on the bond. Gammon applied to restrain JEB’s call on the bond. The High Court directed Gammon to obtain bids for rectifying the defects and the highest quotation obtained indicated that the defects could have been rectified for S$0.56 million. The High Court decided that the bond was an on-demand bond and granted an interim injunction restraining the call on the grounds of unconscionability bordering on fraud. JBE appealed the judgment.

Referring to Bocotra Construction and the GHL cases, Chan CJ explained the basis for the judicial approach to restraining calls on performance bonds:

The juridical basis for adopting unconscionability as a relevant ground (separate from and independent of fraud) lies in the equitable nature of the injunction. Considerations of conscionability are applicable in relation to the use of the injunction in other areas of the law, and there is no reason why these considerations should not be applied for the purposes of determining whether a call on a performance bond should be restrained so as to achieve a fair balance between the interests of the beneficiary and those of the obligor.30

29 Ibid.
On this view, if the law recognises the operation of ‘conscience’ or ‘conscionability’ as a relevant consideration for injunctive relief in other areas of the law, in principle there cannot be any reasons for refusing its application in the context of on-demand guarantees. This is so as the equitable intervention to restrain the unconscionable conduct on the part of the beneficiary calling under the guarantee aims to achieve a fair balance of interests between the applicant and the beneficiary. Whilst this decision emphasises the functional and commercial reasons which justify judicial intervention to prevent unconscionable conduct in the guarantee market, it does not explain what constitutes unconscionability in the context of on-demand guarantees other than by making a passing reference to ‘where a call is made in bad faith’.

The Court of Appeal dismissed the appeal against the High Court decision to grant the interim injunction and held that the JBE’s call on the performance bond was unconscionable given the grossly inflated costs provided by it. The Court noted that:

given the cladding defects were described as minor and not proven to be otherwise, it was incongruous for JBE to rely on quotations for replacing the cladding of the whole building. Even if this was necessary, the costs were prima facie grossly inflated in the light of the quotations obtained by Gammon.

The Court of Appeal decision in *Mount Sophia* is the latest of the string of cases that represents Singaporean courts’ recognition of unconscionability as a ground for restraining the enforcement of on-demand guarantees. The brief facts of this case are as follows. Mount Sophia (a property developer) employed Join-Aim (a builder) to construct a residential condominium in Singapore. As security for the performance obligations under the contract, Join-Aim provided a performance bond payable on-demand. A dispute arose between the parties relating to the time for completion of the construction works. Mount Sophia made a call on the bond alleging that it was entitled to liquidated damages from Join-Aim for delay in the completion of the works allegedly caused by Join-Aim. Join-Aim argued that Mount Sophia was not entitled to any liquidated damages because the Delay Certificate was not issued in accordance with the contract and that any delays were caused by Mount Sophia or its consultants. It also argued that the demand under

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31 Ibid 52: Chan CJ made a distinction between performance guarantees (payable on-demand) and letters of credit, stating that the Singapore courts rationale in applying unconscionability as a separate and independent ground for restraining a call on a performance bond ... is that a performance bond serves a different function from a letter of credit and that 'a performance bond is not the lifeblood of commerce, whether generally or in the context of the construction industry specifically.'

32 Ibid 53.

33 Ibid 61.

34 Ibid.

the guarantee was made in bad faith and for a collateral purpose because it was made in retaliation to the request for arbitration. It further argued that it was unfair for Mount Sophia to call under the guarantee when a progress claim remained due and outstanding. The High Court judge granted an ex parte interim injunction restraining Mount Sophia from calling under the guarantee. The interim injunction was granted on the ground of unconscionable conduct on the part of Mount Sophia calling under the guarantee.

Dismissing the appeal, the Court of Appeal was of the view that there was a strong prima facie case of unconscionability justifying the continuance of the injunction restraining the call under the guarantee. Leong JA delivering the grounds of decision stated that ‘it is settled law that unconscionability … is a ground upon which the court can grant an injunction restraining a beneficiary of a performance bond from calling on the bond’. In relation to the elements that constitute unconscionability in the context of on-demand guarantees Leong JA observed as follows:

Unconscionability … includes conduct such as unfairness and abuse that are broader than the conduct that would constitute fraud. In other words, the availability of unconscionability acknowledges that conduct exhibited by the beneficiary other than fraud might be sufficiently reprehensible to justify relief on the part of the obligor. For example, unfairness is an element of unconscionability, but it would not make logical sense to say that a beneficiary had thereby acted in such an egregiously unfair manner as to amount to fraud. This is because the concept of unfairness admits of other dimensions beyond the fraudulent dimension, and is assessed on different parameters from those with which we assess fraud. The most we can say is that such conduct does not necessarily constitute fraud.

On this statement, conduct such as ‘abuse’ on the part of the beneficiary calling under the guarantee amounts to unconscionable conduct on their part. In other words, unconscionability is a type of unfair conduct that does not amount to fraud. However, the Court of Appeal went on to emphasise that:

broadly speaking, unconscionability is a label applied to describe unsatisfactory conduct tainted by bad faith. A precise definition of the concept would not be useful because the value of unconscionability is that it can capture a wide range of conduct demonstrating a lack of bona fides.

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36 Ibid [18].
37 Ibid [23].
38 Ibid [36]; see also at [41] wherein the Court of Appeal stated that: unconscionability in the context of performance bonds is a conclusion applied to describe certain types of conduct in certain contexts in the execution of a contract. It is not a formulaic doctrine with definite elements and must be distinguished from the general contract law doctrine of unconscionability, which is concerned with conduct at the time of the formation of the contract, and which can vitiate consent to a contract on the grounds that the terms of the contract are unfair and the contract was entered into in an unfair manner.
It appears that under Singaporean law it is now well settled that non-compliance with principles of good faith is the defining indicator of unconscionability in the context of on-demand performance guarantees.

Overall, the case law analysis leads to the conclusion that it is clear beyond doubt that in Singapore unconscionability is a ground for restraining the enforcement of on-demand guarantees. The courts in applying this concept to on-demand guarantees have not made reference to its meaning in equity jurisprudence but have stated that they are exercising an equitable jurisdiction. However, the case law provides ample illustrations of the factual circumstances upon which courts have applied unconscionability in the context of on-demand guarantees. For example, a demand under a guarantee stemming from non delivery of goods due to natural disasters, despite a force majeure clause in the underlying contract, amounts to unconscionable conduct (Min Thai case); in light of the revision of the value of the contract demand under the performance guarantee for the full amount amounts to unconscionable conduct (GHL case); and prima facie gross exaggeration of the costs of rectification in support of the beneficiary’s call under the guarantee amounts to unconscionable conduct (JBE Properties). The judicial pronouncements in Dauphin Offshore, Eltraco International and Mount Sophia provide some guidance in understanding the defining elements of unconscionable conduct in the on-demand guarantee context. These cases indicate that in the on-demand guarantee context unconscionability is just one type of unfairness. The courts have uniformly suggested that a beneficiary’s conduct, in calling under the guarantee, that is so reprehensible or lacking in good faith constitutes unconscionable conduct on their part and that the existence of unconscionability depends largely on the facts of each case. This is essentially what Leong JA in Mount Sophia referred to as “the entire chronology of the case, viewed in relation to all the relevant factors (set in their context)”, that established a strong prima facie case of unconscionability on the part of the beneficiary calling under the on-demand guarantee.

Thus, Singaporean courts have recognised and developed this equitable intervention in the enforcement of on-demand guarantees. This background, along with the courts’ consistent references to their equitable jurisdiction, stimulates deeper reflections on the meaning of unconscionable conduct in equity jurisprudence and the manner in which the concept has been applied in the context of on-demand guarantees under Australian law.

And at [45] wherein the Court of Appeal stated that:

a finding of unconscionability is a conclusion applied to conduct which the court finds to be so lacking in bona fides such that an injunction restraining the beneficiary’s substantive rights is warranted. Sufficient reasons must be given to the court to enable it to come to such a conclusion, and it is necessary that these reasons are drawn from a thorough consideration of the relevant facts as viewed in the entire context of the case, taking into account the parties’ conduct leading up to the call on the bond.

39 Ibid [54] (Leong JA)
40 See Chan, above n 3.
B The Position Under Australian Law

The judicial approach in Singapore and Australia to the enforcement of demands under on-demand guarantees, while not yet being uniform, is fundamentally similar. Both jurisdictions have recognised the possibility of equitable intervention to prevent unconscionable conduct under on-demand guarantees. In relation to on-demand guarantees, its origin and development under Australian law can be traced back to the unconscionability provisions in the *Australian Trade Practices Act 1974* (Cth) (‘TPA’) which were recently superseded by the *Australian Consumer Law*.

Section 20(1) of the *Australian Consumer Law* states that ‘[a] person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law, from time to time’.\(^{41}\) It is important to note that for s 20(1) neither the previous legislation, the *TPA*, nor the current legislation, the *Australian Consumer Law*, provides a statutory definition or any illustrations of unconscionable conduct in commercial transactions.\(^{42}\) However, s 20(1) makes reference to ‘unconscionable conduct within the meaning of unwritten law’\(^{43}\), which in essence is a reference to unconscionable conduct within the meaning of equity jurisprudence.

The case law analysis in the previous section indicated that the Singaporean courts have not set out defining indicators of unconscionable conduct but recognised that unconscionable conduct in the context of on-demand guarantees is determined by reference to principles of good faith and the facts of each case. However, such defining indicators can be found in s 22(2) of the *Australian Consumer Law*, which has set out a list of principles that are relevant to an identification of unconscionable conduct in commercial transactions.\(^{44}\) Whilst this list of indicators is not exhaustive it is intended to provide guidance in determining whether conduct in relation to a commercial transaction is unconscionable.

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\(^{41}\) *Australian Consumer Law* s 20(1); see also *TPA* s 51AA, which is equivalent to s 20(1) of the *Australian Consumer Law*.

\(^{42}\) Note that in Australia there had been several attempts in the past to define ‘statutory unconscionability’ in trade transactions. Several of these attempts came by way of proposed amendment to the *TPA*, but have not been brought into effect under the *Australian Consumer Law* due to a number of factors: see Senate Standing Committee on Economics, Parliament of Australia, *The Need, Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IV A of the Trade Practices Act 1974* (2008); see also Bryan Horrigan, David Lieberman and Ray Steinwall, *Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct* (Expert Panel Report, The Treasury and Department of Innovation, Industry, Science and Research, February 2010) <http://archive.treasury.gov.au/documents/1744/PDF/unconscionable_conduct_report.pdf>.

\(^{43}\) *Australian Consumer Law* s 20(1); note that Australian Courts have broader powers to intervene under ss 21 and 22 of the *Australian Consumer Law* (previously ss 51 AB and 51AC of the *TPA*) than they do under s 20(1). In other words, ss 21 and 22 are not limited by the unwritten law relating to unconscionable conduct.

\(^{44}\) See *Australian Consumer Law* ss 22(1), 22(2); see also *TPA* s 51AC; see generally, S G Corones, *The Australian Consumer Law* (Lawbook, 2011) 157.
The literature indicates that in relation to on-demand guarantees there are some judicial pronouncements that invite the introduction of unconscionable conduct in section 20(1) of the *Australian Consumer Law* as a ground for restraining the beneficiary calling under the guarantee. However, the purpose of this article is not to traverse the case law — this already been done adequately. Its objective is primarily to consider the judicial pronouncements that invoke the application of statutory unconscionability as a ground for restraining the enforcement of on-demand guarantees and the manner in which they contribute to the understanding of unconscionable conduct in the context of on-demand guarantees.

The Supreme Court of Victoria in *Olex Focas Pty Ltd v Skodaexport Co Ltd* considered the application of statutory unconscionable conduct provisions as a ground for restraining the enforcement of mobilisation guarantees payable on demand. In coming to a finding of unconscionable conduct on the part of the beneficiary calling up the full amount of the mobilisation guarantees under s 51AA of the *TPA* (the equivalent to s 20(1) of the *Australian Consumer Law*) Batt J explored the meaning of unconscionable conduct:

There is discussion in two cases which is helpful in throwing light on the notion of ‘unconscionable’ found in s 51AA. The first case is *Logue v Shoalhaven Shire Council* … at 553–5, where equitable fraud is discussed and where, in substance, it is said that what is involved is a situation or conduct unconscionable so as to invoke the intervention of the court that from the beginning regarded itself as a court of conscience. Fraudulent conduct is linked with unconscientious conduct in many of the cases of equitable fraud and in some of the discussion in Logue’s case. More recently, in the majority judgments in *Stern v McArthur* (1988) 165 CLR 489, there are to be found statements which, whilst not exhaustive or definitional, exemplify the denotation of the concept of unconscionability. At 526 Deane and Dawson JJ said that … ‘The general underlying notion is that which has long been identified as underlying much of equity’s traditional jurisdiction to grant relief against unconscientious conduct, namely, *a person should not be permitted to use or insist upon his legal rights to take advantage of another’s special vulnerability or misadventure for the unjust enrichment of himself*’.48

Batt J relied on two case examples to exemplify the notion of unconscionable conduct within the meaning of unwritten law. First, was the judgment in *Logue v Shoalhaven Shire Council* which recognised equity’s role in providing relief against unconscientious insistence of a title at law or under statute. Secondly, was the judgment in *Stern v McArthur*, which recognised equity’s role in providing relief

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46 [1998] 3 VR 380 (‘Olex Focas’).
48 Ibid 403–4 (emphasis added).
49 [1979] 1 NSWLR 537, 554.
against the unconscientious actions of the vendors in insisting on maintaining their rescission and forfeiture of the purchaser’s interest in the land.\(^{50}\) Thus, Batt J seems to suggest that the concept of unconscionable conduct in the context of guarantees can also be linked to the equitable notion that a person should not be permitted to use or insist upon his legal rights to take advantage of another’s special vulnerability or misadventure as had been applied in the cases that his Honour cited.

Similarly, the case of *Boral Formwork and Scaffolding Pty Ltd v Action Makers Ltd (in Administrative Receivership)*\(^{51}\) examined the applicability of unconscionable conduct provisions in the context of standby credits, which in essence operate similarly to on-demand guarantees.\(^{52}\) The Supreme Court of New South Wales decided that it would be appropriate to make an order under s 51AA of the *TPA* as there was evidence of unconscionable conduct within the meaning of s 51AC of the *TPA* (the equivalent to s 22 of the *Australian Consumer Law*).\(^{53}\)

In exploring the concept of unconscionable conduct within the meaning of the unwritten law, Austin J observed that the Full Federal Court in *Australian Competition and Consumer Commission v Samton Holdings*\(^{54}\) rejected the view that the operation of unconscionable conduct provisions in the statute is limited to one type of unconscionable conduct — the taking advantage of a special disadvantage of another as applied in *Blomley v Ryan*\(^{55}\) and *Commercial Bank of Australia Limited v Amadio*.\(^{56}\) His Honour also noted that the present case was clearly not one where this special disadvantage criterion, in the determination of unconscionable conduct, would apply. The aspect of unconscionable conduct in equity jurisprudence that was most relevant to the present case was the ‘unconscientious reliance on strict legal rights’:\(^{57}\)

\[\text{‘Like most of the traditional doctrines of equity, it operates upon legal entitlement to prevent a person from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct’: Muschinski v Dodds (1985) 160 CLR 583, at 619 per Deane J;}\]

\[\text{‘Underlying the approach taken in the Dagenham (Thames) Dock case and Kilmer’s case is an expansive view of the equitable doctrines of jurisdiction}\

\[^{50}\text{Batt J, (1988) 81 ALR 463.}\]
\[^{52}\text{For an explanation of the basic concepts covered in this article, see above n 2.}\]
\[^{53}\text{*Boral Formwork* [2003] ¶ATPR 41–953, 47 493 [87] (Austin J).}\]
\[^{54}\text{(2002) 189 ALR 76, 92 (‘Samton Holdings’).}\]
\[^{55}\text{(1956) 99 CLR 362 (‘Blomley’).}\]
\[^{56}\text{(1983) 46 ALR 402 (‘Amadio’).}\]
\[^{57}\text{*Boral Formwork* [2003] ATPR ¶41–953, 47–491 [77] (Austin J).}\]
to relieve against forfeiture. This in turn conforms to the fundamental principle according to which equity acts, namely that a person having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscientious conduct’: Legione v Hateley (1983) 152 CLR 406, at 444 per Mason & Deane JJ.58

Whilst identifying a particular theme of unconscionable conduct in equity (that is the assertion or insistence of a legal right in circumstances that it would constitute unconscientious conduct) as appropriate to describe unconscionable conduct in the context of on-demand guarantees, and similar instruments like standby credits, Austin J went on to examine s 51AC of the Trade Practices Act 1974 (Cth) (the equivalent to s 22 of the Australian Consumer Law): ‘[j]ust as the specified conduct of the administrative receivers is unconscionable within the unwritten law of New South Wales, so it is unconscionable within the words of s 51AC’.59

In relation to the criteria in s 51AC of the TPA, s 51AC provided a list of indicators of unconscionable conduct in business relationships, Austin J stated that:

But in my opinion they do not add materially to the analysis, except to make it clear that the word ‘unconscionable’ in s 51AC is not limited to conduct that would be unconscionable according to equitable principles. Here, in my view, both the equitable principles and s 51AC are applicable. Having regard to s 51AA(2), relief in such circumstances is to be granted under s 51AC to the exclusion of s 51AA.60

After Boral Formwork, in the decision in Clough Engineering Ltd (ACN 009 093 869) v Oil and Natural Gas Corporation Ltd,61 the Full Court of the Federal Court examined whether the beneficiary’s demand on the bank guarantee was unconscionable under s 51AA of the TPA (the equivalent to s 20 of the Australian Consumer Law) and concluded that the facts did not suggest unconscionable conduct by the beneficiary in calling under the guarantee:

the party in whose favour the performance bank guarantee has been given may be enjoined from acting unconscionably in contravention of s 51AA of the TPA: Olex Focas Pty Ltd v Skodaexport Co Ltd [1998] 3 VR 380 (Olex Focas). On this point, different views have been expressed about the reach of s 51AA. The High Court has not determined which of these views is correct: Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd (2003) 214 CLR 51; 197 ALR 153; [2003] HCA 18 at [44]–[45] (CG Berbatis Holdings). In any event, none of the categories of unconscionable conduct recognised in Australian Competition and Consumer Commission v

58 Ibid (emphasis added).
59 Ibid 47–493 [87].
60 Ibid [90].
The scope of s 51AA was discussed by the Full Court in *Samton Holdings*. As was pointed out in that case, a party alleging a contravention of s 51AA must be able to identify conduct which is unconscionable in a sense known to the ‘unwritten law, from time to time, of the States and Territories’. Under the unwritten law, which is the common law of Australia, unconscionable conduct will be such conduct as would support the grant of relief on principles set out in specific equitable doctrines.

From this judicial statement it can be argued that a party alleging unconscionable conduct under the *Australian Consumer Law* is required to establish that such conduct support the grant of relief under specific equitable criteria. In the course of this judgment the Full Court of the Federal Court made reference to the case of *Olex Focas* and the equitable understanding of unconscionable conduct that ‘a person should not be permitted to use or insist upon his legal rights to take advantage of another’s special vulnerability or misadventure for the unjust enrichment of himself’ that has been applied in the context of on-demand guarantees. Thus, this judicial pronouncement strengthens the position under Australian law that unconscionable conduct in contravention of the *Australian Consumer Law* can be a ground for restraining calls under on-demand guarantees.

The Supreme Court of Victoria in the decision in *Board Solutions Australia Pty Ltd v Westpac Banking Corporation* revisited the application of unconscionable conduct in the demand guarantee context and reiterated that unconscionable conduct on the part of the beneficiary constitutes a ground upon which a call on a demand guarantee can be restrained in Australia. In concluding that a case had been made out on the basis of a potential breach of s 51AA of the *TPA* (the predecessor to s 20 of the *Australian Consumer Law*) Forrest J made an important observation in relation to the equitable theme of unconscionable conduct that can be applied in the context of on-demand guarantees:

Bendigo relied upon the principles set out by Deane J in *Commercial Bank of Australia Ltd v Amadio* as to unconscionable conduct. However, I do not understand his Honour’s statements to be an exhaustive commentary of what may or may not constitute unconscionable conduct. As was said by the Full Court of the Federal Court in *Hurley v McDonald’s Australia*: Before sections 51AA, 51AB or 51AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract ‘unfair’ or ‘unreasonable’ or ‘immoral’ or ‘wrong’. And by French J in *ACCC v Samton Holdings Pty Ltd*: The special disadvantage may be constitutional, deriving from age, illness,

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62 Ibid 478 [77] (French, Jacobson and Graham JJ)
63 Ibid 492 [130] (French, Jacobson and Graham JJ).
64 Ibid 494.
poverty, inexperience or lack of education — Commercial Bank of Australia Ltd v Amadio. Or it may be situational, deriving from particular features of a relationship between actors in the transaction. This case, I think, falls within that situational description.\(^{66}\)

Thus, whilst recognising the existence of different categories of special disadvantage (namely, constitutional disadvantage and situational disadvantage) in equity that relate to unconscionable conduct, the Supreme Court of Victoria decided that the applicant of the demand guarantee in the present case was under a situational disadvantage and that the beneficiary’s conduct in calling the guarantee amounted to a taking advantage of the applicant’s position — taking advantage of a situational disadvantage — as recognised in Samton Holdings.\(^{67}\)

Overall, it can be seen that the Australian courts, in applying unconscionable conduct under the TPA and the Australian Consumer Law as a ground for restraining the enforcement of on-demand guarantees, have drawn upon the equitable principles of unconscientious reliance or insistence on strict legal rights to take advantage of a special vulnerability, and unfair advantage taking of a situational disadvantage as appropriate in the on-demand guarantee context. Therefore, further reflections on the equity jurisprudence that describes these criteria in the context of business relationships and their reference to on-demand guarantees would prove useful to the conceptual understanding of unconscionable demands under on-demand guarantees.

### III Defining Unconscionable Demands in the Light of Equity Jurisprudence

As discussed in the previous section, both Singaporean and Australian courts have adopted the equitable concept of unconscionable conduct as a ground for restraining calls under on-demand guarantees. In the application of this concept to on-demand guarantees, the courts have made reference to: the equitable jurisdiction or the unwritten law; concepts such as good faith; the underlying defining criteria of unconscientious reliance or the insistence on strict legal rights to take advantage of a special vulnerability; and unfair advantage taking of vulnerability arising from a situational disadvantage. Hence, it would be useful to examine the underlying criteria of unconscionability in equity jurisprudence and its relevance to on-demand guarantees as a ground for judicial intervention.

The vast literature on unconscionability in equity jurisprudence indicates that it embraces a variety of themes and/or categories of conduct which offend equity and good conscience.\(^{68}\) Among that academic literature one commentator, Finn,

\(^{66}\) Ibid [51], [52] (Forrest J) (emphasis added).

\(^{67}\) See Samton Holdings (2002) 117 FCR 301, 318.

\(^{68}\) See generally Philip H Clarke et al, ‘Notion of Unconscionability’ in Paul Vout (ed), Unconscionable Conduct, The Laws of Australia (Thomson Reuters, 2\(^{nd}\) ed, 2009) 121 [35.5.10]: this scholarly writing identifies five distinct categories in which unconscionable conduct can be found in equity: (1) Exploitation of vulnerability or
has identified two criteria that the law uses in determining whether a party to a relationship or dealing has acted unconscionably: unconscionable conduct as contractual wrongdoing and unconscionable conduct as tortious wrongdoing. By reference to unconscionable conduct as a wrongdoing in a contractual relationship Finn observes that:

The limits the law has set on what constitutes a contract, on when a contract is created, and on the implications of the contractual terms, leave without contractual force or redress a significant range of actions and interactions by and between parties dealing consensually with each other. Obvious examples are the relied upon voluntary promise (Legione v Hateley (1983) 152 CLR 406); action taken in anticipation of a contract which does not eventuate (for example Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387); a course of conduct over time which is referable to the expectations a party reasonably could entertain of a relationship but which expectations have no foundation in an actual agreement between them (for example Gillies v Keogh [1989] 2 NZLR 327); and the insistence upon contractual rights and freedoms but in a way which is inconsistent with the spirit and intendment of the contractual relationship itself (for example Stern v McArthur (1988) 165 CLR 489).

Thus, the types of situations that Finn has identified as unconscionable conduct are those which ordinarily the law of contract has left without redress or resolution. It is in those situations that equity should intervene to soften the rigidities of the law of contract. Among those situations ‘the insistence upon contractual rights and freedoms but in a way which is inconsistent with the spirit and intendment of the contractual relationship itself’ can be linked to the conceptual analysis of unconscionable conduct in the context of on-demand guarantees. Arguably, the beneficiary who insists upon his strict legal right to payment on the guarantee in circumstances inconsistent with the ‘spirit’ of the demand guarantee (that the guarantee is payable only in the event of non-performance, defective performance, or late performance of the underlying contract but without having to prove the default) falls within this type of unconscionable conduct. In relation to unconscionable conduct as a tortious wrongdoing, Finn states that:

In those cases where equitable doctrine is invoked to avert or reverse harm occasioned by another, the parties invariably will be in a clear relationship of proximity, be this as persons negotiating a contract, as disputants in litigation, or as parties in a family, social or business relationship. Equally

weakness; (2) Abuse of positions of trust or confidence; (3) Insistence upon rights in circumstances which make that insistence harsh or oppressive; (4) Inequitable denial of legal obligations; and (5) Unjust retention of property; see also Patrick Parkinson, ‘The Conscience of Equity’ in Patrick Parkinson (ed), The Principles of Equity (Lawbook, 2nd ed, 2003) 35; Finn, above n 1.

69 Finn, above n 1, 39.
70 Ibid 40 (emphasis added).
71 Ibid.
the relative positions of the parties will be such as to place one in a position of vulnerability to the other because of a significant inequality between them such that the one has the power to occasion harm (invariably economic) to the other. And the common issue is whether, having that power and being able to occasion that consequence, the power possessor should be subject to a ‘duty of care’, if I can so describe it, to the other to avert or to refrain from inflicting that harm … what we are witnessing in substance could fairly be said to be the emergence of a new species of economic tort.72

According to Finn, the second criterion of unconscionable conduct may arise in relationships of proximity and in situations where one party to the relationship is placed at a position of vulnerability due to the superior power possessed by the other to inflict an economic loss — this Finn describes as a ‘‘new species of economic tort’’.73 It is possible to argue that in the context of on-demand guarantees there can be situations where the competition in the market compels the applicant of the guarantee to agree to procure an on-demand guarantee in favour of the beneficiary. Thus, the beneficiary becomes the power possessor who could avert or refrain from inflicting an economic harm to the applicant.

Thus, Finn’s analysis of unconscionable conduct falls into two themes, namely the contract theme and the tort theme, which he describes as follows:

The first, the contract theme, is that:

a party should not, for its own advantage or to the other’s detriment, act so as to deny the reasonable expectations the other had, or was entitled to have, in or in consequence of their relationship, whether or not that relationship culminated in a contract …

The second, the tort theme, is that:

a party should not, for its own advantage or to the other’s detriment, use its superior relative power or position to exploit the vulnerability of the other, be this by positive acts of manipulation or through inaction.74

This article argues that these themes can be utilised in exploring a conceptual analysis of unconscionable demands under on-demand guarantees. The contract theme will essentially support the prevention of unconscionable conduct on the part of the beneficiary who attempts to take advantage of the on-demand character of the security instrument to the detriment of the applicant and thereby deny the applicant’s reasonable expectations that the beneficiary will not misuse the unique character of the guarantee. The tort theme will also provide support for restraining the unconscionable conduct of the beneficiary who attempts to exploit the on-demand guarantee through the use of its relatively superior power or position in the guarantee market. Hence, in the analysis that follows, these underlying criteria

72 Ibid 42 (emphasis added).
73 Ibid.
74 Ibid 45.
will be drawn upon and related back to the conceptual analysis of unconscionable demands under on-demand guarantees.

A The Exercise of Superior Power to Take Unfair Advantage of Vulnerability

The nature of unconscionable conduct on the part of a beneficiary calling the demand guarantee can be explained by reference to the aforementioned underlying notion in equity that exploitation of a person's special vulnerability amounts to unconscionable conduct. Arguably, there are two key components that underpin this notion — ‘power’ and ‘vulnerability’. In the context of on-demand guarantees whilst the ‘power’ may arise from the relatively superior positions of the beneficiaries in the guarantee market, the ‘vulnerability’ of applicants may emanate from their transactionally disadvantaged position. Hence, the presence of these elements in the guarantee market results in a form of exploitation. To quote Finn:

Historically it [unconscionable conduct] has tended to focus upon protecting a person because of his own weakness. Today the pressure would seem to be to protect a person because of another’s strength, to curb self-interested power rather than to aid an inept and incompetent interest. This reorientation is a feature of contract review legislation [eg section 52A Trade Practices Act 1974 (Cth); Uniform Commercial Code, § 2–302 (US)] … And it provides some explanation both for the growing invocation … and for the espousal of its suitability to dealings in which a person otherwise capable of conserving his own interests nonetheless ‘transactionally disadvantaged’ given the nature of the particular dealing in question.75

It would not be wrong to identify the applicants of on-demand guarantees as transactionally disadvantaged when they procure a demand guarantee in favour of the beneficiaries who will therefore be entitled to payment upon a simple demand without having to prove the default on the part of the applicants. In extending the application of unconscionable conduct to on-demand guarantees the courts have demonstrated their willingness to intervene to protect the applicants against beneficiaries pursuing their ‘self-interested power’ in insisting that the demand guarantee should be honoured in circumstances it would be unconscionable for them to do so.

In reference to equity’s intervention in this type of ‘power and vulnerability’ situation in business relationships Finn observes that:

Equity now plays a major part in sanctioning the more egregious uses of such power. In saying this I should state immediately that we are not having unqualified altruism forced upon us. Save where we are in a fiduciary position, or have by contract bound ourselves to act in a specified way, we are permitted (if not necessarily encouraged) to use self-interestedly the

advantages we possess in our relationships and dealings with others. *Where the halt is called is where that advantage is used unacceptably to exploit the vulnerability of another.*

Thus, Finn’s approach identifies two exceptions to the general acceptance that in business relationships one party is permitted to use his power over the other; namely where there exists a fiduciary relationship or where a party is contractually bound to act in a specified manner. However, in circumstances where the conduct of the party using that power amounts to an ‘egregious use of power’ equity intervenes to restrain that power possessor from exploiting the vulnerability of the other.

Notably, this theme has traditionally been used to explain the exploitation of a person with a special disability (‘constitutional disadvantage’). For example in the case of *Blomley*, Fullagar J stated that:

> The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other.

On this statement, only a special class of people would be entitled to equity’s protection against unconscionable conduct. The common characteristic of this special class of people being that they suffer from ‘a serious disadvantage’ vis-a-vis the other party, such as ‘poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary’. Likewise Kitto J spoke of this category of unconscionable conduct as follows:

> This is a well-known head of equity. It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.

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76 Finn, above n 1, 48 (emphasis added).
77 Ibid.
78 Blomley (1956) 99 CLR 362.
79 Ibid 405 (emphasis altered).
80 Ibid.
81 Ibid 415.
Revisiting these statements the High Court of Australia in *Amadio*\(^{82}\) appeared to confine the application of unconscionable conduct to the ‘special disability’ criterion in equity:

But 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. Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.\(^{83}\)

Admittedly, the High Court was referring to unconscionable conduct in the narrow sense, namely where a party takes advantage of a constitutional disadvantage of the other party. Subsequently, the Full Federal Court in *Samton Holdings*\(^{84}\) considered the application of this category of unconscionable conduct as a contravention of s 51AA of the *TPA* (the equivalent to s 20 of the *Australian Consumer Law*). Notably, the Court recognised the possibility of extending the traditional application of this category of unconscionable conduct to exploitation of a situation of special disadvantage, and that ‘there must … be something more than commercial vulnerability (however extreme) to elevate disadvantage into special disadvantage’ for this purpose.\(^{85}\)

Under the rubric of unconscionable conduct, equity will set aside a contract or disposition resulting from the knowing exploitation by one party of the special disadvantage of another. The special disadvantage may be constitutional, deriving from age, illness, poverty, inexperience or lack of education: *Commercial Bank of Australia Ltd v Amadio*. Or it may be situational, deriving from particular features of a relationship between actors

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\(^{82}\) *Amadio* (1983) 151 CLR 447.

\(^{83}\) Ibid 413.

\(^{84}\) *Samton Holdings* (2002) 117 FCR 301.


Strong judicial support exists for extending unconscionability in section 51AA beyond its conventional equitable boundaries, with clear potential application to a broad band of commercial conduct beyond *Amadio*-like situations and to dealings between commercial parties in the public and private sectors.
in the transaction such as the emotional dependence of one on the other:

*Louth v Diprose; Bridgewater v Leahy* (1998) 194 CLR 457; 158 ALR 66.86

Equity’s intervention to protect people with a special disadvantage was primarily based on the fact that such people are unable to make judgments as to their own best interests. However, in the above statement in *Samton Holdings* the Court seems to suggest a broader application of the special disadvantage criterion, dispensing with the requirement to establish that the special disadvantage resulted in the innocent party being unable to make a judgment as to his own best interests. With respect to these categories of special disadvantage the High Court in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*87 observed that:

In the present case, French J said that the lessees suffered from a ‘situational’ as distinct from a ‘constitutional’ disadvantage, in that it did not stem from any inherent infirmity or weakness or deficiency. That idea was developed somewhat in a joint judgment, to which French J was a party, in *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* … One thing is clear, and is illustrated by the decision in *Samton Holdings* itself. *A person is not in a position of relevant disadvantage, constitutional, situational, or otherwise, simply because of inequality of bargaining power. Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests.*88

Thus the High Court was of the view that in determining unconscionable conduct equity’s recognition of a special disadvantage criterion (such as the constitutional disadvantage, formulated by the judges in the decisions in *Blomely* and *Amadio*; or situational disadvantage formulated by the judges in the decision in *Samton Holdings*) cannot be said to exist in a commercial transaction where there was simply an inequality of bargaining power between the parties. High Court’s emphasis was that mere taking advantage of an inequality of bargaining position in the context of business transactions would not of itself attract legal consequences under s 51AA of the *TPA*.89 Referring to the categories of special disadvantage — constitutional and situational — Gleeson CJ stated that this distinction is ‘understandable and acceptable’,90 and went on to state as follows:


87 (2003) 241 CLR 51 (‘Berbatis’).


89 Note that the indicators listed under s 22 of the *Australian Consumer Law*, and in particular s 22(2)(a) speaks of the ‘relative strengths of the bargaining positions’ of the parties, which is arguably based on the criteria for determining unconscionable conduct in the equity jurisprudence; note that neither the *TPA* s 51AC nor the *Australian Consumer Law* s 22 were in force at the time *Berbatis* (2003) 241 CLR 51 was decided.

There is a risk that categories, adopted as a convenient method of exposition of an underlying principle, might be misunderstood, and come to supplant the principle. The stream of judicial exposition of principle cannot rise above the source; and there is nothing to suggest that French J intended that it should. A problem is that the words ‘situation’ and ‘disadvantage’ have ordinary meanings which, in combination, extend far beyond the bounds of the law referred to in s 51AA; and, it may be added, far beyond the bounds of what was explained to Parliament as the purpose of the section.91

Although Gleeson CJ’s above statement highlights the risks of misinterpretation of the term ‘situational disadvantage’, it does not amount to a judicial rejection of the utility of the special disadvantage category in determining whether the conduct alleged was unconscionable. It is important to note that in the same majority judgment Gummow and Hayne JJ noted the importance of the distinction between constitutional and situational disadvantages drawn by French J for his reasoning.92 In a dissenting judgment Kirby J also noted the distinction and stated that:

While the present appeal was substantially argued by reference to the principles of unconscionable dealing as elaborated in cases such as Blomley and Amadio, the reach of the section, in my view, goes further. Its full scope remains to be elaborated in this and future cases ... Having regard to the history and purposes of that provision, and the language of its expression, I could not accept the proposition that s 51AA has a limited operation. It is as large as the statutory text and the incorporated unwritten law permit. It has a capacity to expand and apply to new circumstances as the unwritten law evolves ‘from time to time’.93

91 Ibid.

92 Ibid 75 [48] (Gummow and Hayne JJ); note that the literature also suggests that the approach taken by French J in Samton Holdings as well as in Berbatis (at first instance) has survived the High Court decision in Berbatis. See, eg, Lindsay Trotman and Robert Langton, ‘Much Ado About Very Little: Some Reflections on ACCC v Berbatis’ (2003) 15(2) Bond Law Review 377; see also Nicole Dean, ‘Cases and Comments — ACCC v Berbatis Holdings (2003) 197 ALR 154’ [2004] Sydney Law Review 256, 256 wherein the author states:

The High Court’s judgment neither directly counters the idea that s 51AA unconscionable conduct can arise between commercial parties as a result of situational disadvantage, nor does it definitively reject the proposition that s 51AA may embrace not only the narrow doctrine, but also the broad principle, of unconscionability.

93 Ibid 74–5 [77] (Kirby J); commenting on the different approaches taken by the majority and minority judges in the High Court in Berbatis, one commentator has stated that:

It is regrettable that a case like Berbatis was argued exclusively on the footing that its facts fell within the narrow equitable category of unconscionable dealing. Not only did this allow the High Court to avoid wider analysis and interpretation of s 51AA of the Act, but it also allowed the majority judges especially to approach the case with blinkered vision, causing them to ignore or overlook normatively sensitive features of the ACCC’s claim. By so straight jacketing themselves, counsel and the Court were constrained to conceptualise and dispose of the case entirely in terms of the specific doctrinal criteria of an unconscionable dealing claim — ‘special disadvantage’ and ‘unfair advantage...
Arguably, this *situational disadvantage* provides a link to the present analysis of unconscionable conduct on the part of beneficiaries calling under on-demand guarantees. Overall, questions arise as to whether the on-demand character of the guarantee gives the beneficiary a superior position vis-a-vis the applicant in the guarantee market and hence in a given case the applicants are placed in a situational disadvantage or vulnerability arising from the on-demand character of the guarantee, which makes them vulnerable to honour the beneficiary upon a simple demand. In this inquiry it would be relevant to consider whether the beneficiary who procured the guarantee payable on-demand, attempted to use their superior power to take unfair advantage of situational disadvantages of the applicant. For example, such situational disadvantage can be identified in circumstances where non-performance or delay in performance of the underlying contract was due to factors beyond the control of the applicant, such as natural disasters, unavailability of a particular material causing delay in construction or supply of export items and delay in performance due to a failure on the part of the beneficiary to comply with a particular requirement. However, the very nature of the on-demand guarantee makes these applicants vulnerable to honour a demand under the guarantee even in circumstances where they are placed at a situational disadvantage in the guarantee market. If beneficiaries make demands simply to take unfair advantage of the special disadvantage of applicants such demands for payment are unconscionable.

### B Harsh or Oppressive Insistence on Strict Legal Rights to take Unfair Advantage of Vulnerability

As one commentator has said:

> Relationships, whatever their type, inevitably give to one or both parties the de facto capacity to affect adversely the interests of the other. Expectations can be thwarted, obligations ignored, vulnerability exploited, legitimate interests disregarded, powers exercise harshly, and so on.94

Hence, equity’s underlying criterion, which has long been identified in equity jurisprudence to grant relief against unconscionable conduct, is that ‘a person should not be permitted to use or insist upon his legal rights to take advantage of another’s special vulnerability or misadventure for the unjust enrichment of himself’.95

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94 Finn, above n 75, 95.

95 *Stern v McArthur* (1988) 165 CLR 489, 527 (Deane and Dawson JJ); see Clarke et al, above n 68, 130 [35.5.420]:

This criterion — that is, the insistence upon rights in circumstances which make that insistence harsh or oppressive — describes another link to defining unconscionability in the context of on-demand guarantees. In the demand guarantee context, the unconscionability lies in the insistence of the beneficiary’s right under the on-demand guarantee to demand payment in circumstances where it amounts to an abuse of that right. For instance, Batt J in the Supreme Court of Victoria in *Olex Focas*[^96] stated that:

> Even if one is acting within one’s rights one may still engage in unconscionable conduct: *Stern v McArthur* (1988) 165 CLR 489 at 527. It must therefore follow that even if one believes, wrongly, that one is acting within one’s rights, one can thereby engage in unconscionable conduct.

To my mind the first defendant’s conduct based on its legal rights, or on its perception of its legal rights, so far as that conduct relates to the mobilisation or procurement advance guarantees is, according to ordinary human standards, quite against conscience. I am bound to say that I regard it as unconscionable.[^97]

Thus, in determining an appropriate definition of unconscionable conduct in the context of on-demand guarantees Batt J cited with approval the definition that had been provided in academic writing: ‘the insistence upon rights in circumstances which makes that harsh or oppressive ... [which causes] hardships to others by violating their reasonable expectations’ is a form of unconscionable conduct in equity.[^98] Based on Batt J’s reasoning it can be argued that if the beneficiary’s conduct in calling on the guarantee amounts to a harsh or oppressive insistence on his right to payment on-demand, such conduct can be treated as unconscionable and therefore the demand for payment is unconscionable. It is argued that this form of unconscionable conduct, which imposes a restriction upon a party’s entitlement to insist upon his strict legal rights, is founded upon concepts such as good faith and fair dealing in contracts,[^99] and has also been referred to in the Singaporean

[^97]: Ibid 405.
[^99]: One of the notions underlying the principles of good faith is that it comprises standards of fair dealing in the performance and enforcement of contracts. According
cases discussed above. This criterion for determining unconscionable conduct in a commercial context is reflected in s 22(2)(l) of the Australian Consumer Law which provides that the court may have regard to the extent to which the parties have acted in good faith. In the on-demand guarantee context it then becomes relevant to consider whether the beneficiary has acted in good faith in the insistence of his strict right to payment under the guarantee.

Overall the criteria for defining unconscionable conduct, that have been adopted in the context of on-demand guarantees, are based upon the protection of vulnerable applicants against the beneficiaries’ unfair advantage taking in the enforcement of guarantees. The theory of exploitation also lends weight to an argument that demands under on-demand guarantees should be restrained in the event of unconscionability as described above.

IV The Theory of Exploitation

The literature on the general theory of exploitation provides different perspectives or accounts of this theory depending on the discipline (economics, philosophy or law) in which it is rooted. However, as will be shown in the analysis that follows, the core notion across all these accounts of exploitation remains constant:


100 See, eg, Alan Wertheimer, Exploitation (Princeton University Press, 1996) 77–96, 96–123: Wertheimer’s account of exploitation refers to situations where both the exploiter and the exploited gains from the transaction and that the exploited is harmed by the transaction or he gains less than he should (‘mutually advantageous exploitation’); see also, Wertheimer’s analysis of exploitation of student athletes and commercial surrogacy which illustrates the elements of his account of exploitation; Alan Wertheimer, ‘Exploitation and Commercial Surrogacy’ (1996–97) 74 Denver University Law Review 1215.

101 See, eg, Robert Goodin, ‘Exploiting a Situation and Exploiting a Person’, in Andrew Reeve (ed), Modern Theories of Exploitation (Sage Publications, 1987) 166, in which Goodin argues that to exploit people is to wrong them, however, much or little they may lose or you may gain from the act.

102 See, eg, Rick Bigwood, Exploitative Contracts (Oxford University Press, 2003), in which he explicates a concept of ‘legal contractual exploitation’, which concerns a form of wrongdoing that defines exploitation in the procurement or acceptance of a contract bargain transaction. Note that this account of exploitation draws significantly upon philosophical analyses of exploitation, see, eg, ibid.
exploitation involves unfair advantage taking of another for one’s own advantage and that ‘unfairness’ (therefore wrongfulness) in the advantage taking is an inherent feature of the theory of exploitation. Drawing upon this intrinsic feature of the theory of exploitation this article argues that unconscionability on the part of the beneficiary calling under the on-demand guarantee is wrongful exploitation which calls for judicial intervention. Wertheimer’s work, which defends exploitation from a moral perspective (that is, to commit an act of exploitation is to commit a wrong), is a useful guide to understanding the constituent elements of the theory of exploitation:

At least one criterion for a valid exploitation claim will turn out to be a moral criterion: a transaction is exploitative only if it is unfair … A exploits B when A takes unfair advantage of B. Taking unfair advantage could be understood in two ways. First, it may refer to some dimension of the outcome of the exploitative act or relation, and this it seems has two elements: (1) the benefit to A, and (2) the effect on B. We may say that the benefit to A is unfair because it is wrong for A to benefit at all from his or her act or because A’s benefit is excessive relative to the benefit to B. Second, to say that A takes unfair advantage of B may imply that A has been able to turn some characteristic of B or some feature of B’s situation to his or her advantage.103

Wertheimer sees exploitation as ‘taking unfair advantage’ which involves two scenarios: first, taking unfair advantage can be seen in a defective distribution of the total outcome or benefits (that is, an unequal distribution of benefits) that flows from a mutually advantageous transaction;104 secondly, taking unfair advantage can be seen in circumstances where one person to the transaction takes advantage of a characteristic of the other party to the transaction or some characteristic of his situation in relation to the transaction. It should be noted that Wertheimer calls this exploitation ‘mutually beneficial exploitation’ and ‘consensual exploitation’.105

The idea of taking advantage is central to Goodin’s analysis of the general notion of exploitation:

The general notion of exploitation always consists in a certain sort of behaviour in a certain sort of situation. The nub of the matter is invariably taking advantage in one way or another. Exploiting a situation amounts essentially to taking advantage of some peculiar features of that situation. Exploiting a person similarly involves taking advantage of some peculiar

103 Wertheimer, above n 100, 16; See also Joel Feingberg, Harmless Wrongdoing (Oxford University Press, 1990) 179.

104 Cf Goodin, above n 101, 181 in which he argues that ‘the essence of exploitation must be sought in some characteristic of the process, rather than in some characteristic of the end results. There the “unfairness” lies in the process rather than in the end result’.

105 The idea behind mutually beneficial exploitation is that the exploited gains from the transaction but disproportionately or exorbitantly less than exploiter gains: see Wertheimer, above n 100, 16.
features of that person or less elliptically, it amounts to taking advantage of some peculiar features of the situation in which exploiters and the exploited find themselves, where the situation is defined so as to include a description of both personal characteristics and impersonal circumstances.\textsuperscript{106}

Whilst Wertheimer's account of exploitation involves unfair advantage taking from a mutually beneficial transaction, Goodin's account of exploitation seems to place emphasis on the characteristic of advantage taking in particular features of situations and persons. Whilst exploiting a situation (such as crop failures or natural disasters) is to take advantage of the peculiar features of that situation, exploiting a person is to take advantage of the peculiar features of that person and/or the peculiar features of the circumstances or situation in which he finds himself. With reference to this latter form of exploitation, Goodin states that 'built into the concept of exploiting a person is a notion of “unfairness” (of taking unfair advantage) which is out of place in talking of our treatment of mere situations'.\textsuperscript{107} Goodin's account of exploiting a person closely resembles the equitable theme that unconscionable conduct in the demand guarantee context may arise from an exploitation of vulnerability arising from a situational disadvantage: the beneficiary who makes an unconscionable demand is taking unfair advantage of the on-demand character of the guarantee which is essentially what Goodin in his analysis of exploitation has described as 'turn to advantage' or 'mak[ing] use of a favouring circumstance'.\textsuperscript{108}

Goodin's account of the theory of exploitation identifies four situations in which it is inappropriate to play for advantage: (i) it is wrong to play for advantage against other players who have renounced playing for advantage themselves; (ii) it is wrong to play for advantage against other players who are unfit or otherwise unable to play in games of advantage at all; (iii) it is wrong to play for advantage against other players who are hopelessly outmatched in terms of bargaining power; and (iv) it is wrong to play for advantage against other players when the relative advantage derives from others' grave misfortunes.\textsuperscript{109} These situations can also be identified as situations of vulnerability and can arguably be extended to on-demand guarantees. As in situation (i) the applicants who procure guarantees payable on-demand of the beneficiaries can be seen as parties who have at least partly renounced playing for advantage themselves. As in situation (ii) the applicants of on-demand guarantees can be seen as parties unable to play in games of advantage not for reasons of constitutional disadvantage, but for reasons of their situational disadvantage in the guarantee market. This element can be linked with situation (iii). If the beneficiary of the guarantee possesses a relatively superior bargaining position in the guarantee market it is wrong for him to play for his advantage by calling on the guarantee in circumstances where it is unconscionable to do so; or as in situation (iv), it is wrong for the beneficiary to play for his advantage specially when that advantage flows from the situational disadvantage on the part of the applicants owing to changes

\textsuperscript{106} Goodin, above n 101, 167.

\textsuperscript{107} Ibid.

\textsuperscript{108} Ibid 168.

\textsuperscript{109} Ibid 185–6.
in circumstances — for example non-performance or delay in performance due to severe weather conditions, or shortage of material necessary for the manufacture or supply of items to sell to an overseas buyer.

Bigwood speaks to this element of vulnerability when he states that ‘all acts of exploitation begin with a plaintiff’s peculiar vulnerability’. He states that:

What is objectionable about exploitation is that a defendant (exploiter) chooses, freely and knowingly, to benefit from the relative position of power resulting from such vulnerability, and that the defendant’s (exploiter’s) gain, results from that power ... To be sure exploiter is guilty of disregarding the weaker party’s interests primarily as a means to pursuing his or her own.

Here Bigwood appears to suggest that the relative position of power resulting from vulnerability is what makes an interaction exploitative and that the benefits accrue to the exploiter is a result which flows from the relatively superior position of that power. Bigwood refers to situations of vulnerability or disadvantage, as exploitable circumstances that attract equitable relief against unconscionable dealings:

Thus in its modern context the gist of the jurisdiction lies in the abuse of a superior bargaining position and not simply with the notion of inequality of bargaining power ... In other words, relief is dependent precisely upon ‘exploitation by one party of another’s position of disadvantage in such a manner that the former [cannot] in good conscience [insist on] the benefit of the bargain’.

Thus a party with superior bargaining position insisting on the benefits of the bargain in circumstances where it amounts to unconscionable advantage taking of a position of disadvantage of the other is a form of unconscionable dealing.

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112 A similar account of exploitation can be found in John Hill, ‘Exploitation’ (1993–4) 79 Cornell Law Review 631, 679:

Exploitation is sometimes viewed as a function of social disparity, an endeavour on the offeror’s part, to take advantage of a socially superior position. Marxists, feminists and others argue explicitly or implicitly that a prerequisite of the exploitative relationship is that the offending party possess some social advantage over the victim ... Exploitation merely requires the taking advantage of some vulnerability of the other party.

Note that Hill’s argument is that ‘exploitation’ is a psychological rather than a social or an economic concept in the context of surrogate parenting arrangements, voluntary organ sales and consensual medical experimentation of prisoners.
113 Bigwood, above n 102.
114 Ibid 234.
Bigwood identifies this form of unconscionability as conforming to ‘victimization’ or ‘exploitation’ in consensual relations.115

Arguably, a form of vulnerability or situational disadvantage of the applicants, and relatively superior bargaining position of the beneficiaries, are common features of the on-demand guarantee market. The very nature of the on-demand guarantee makes applicants vulnerable to honour a demand under the guarantee that does not accompany the proof of default. Therefore the beneficiary’s unconscionable conduct in calling the guarantee falls within the realm of exploitation of the applicant’s vulnerability or their situational disadvantage in the guarantee market. One should also bear in mind that unconscionable conduct of a beneficiary calling on the demand guarantee is concerned with a unique kind of vulnerability of applicants. Arguably, what is characteristically vulnerable about the victims of unconscionable demands is that they are parties who have ‘at least partly renounced playing for advantage themselves’,116 by agreeing to issue a guarantee payable on-demand or ‘unable to play in games of advantage’, 117 because, for reasons of competitiveness in the market, they simply have no choice but to agree to procure a guarantee payable on-demand. A beneficiary who is making an unconscionable demand on the guarantee is thus ‘taking an unfair advantage’ of the very nature of on-demand guarantees, and hence the vulnerability of the applicants as well. This ‘unfairness’ in the advantage taking of power and/or opportunity is what turns this conduct into a wrongful exploitation that calls for judicial intervention.

Can exploitation occur when both parties to the contract benefit? On this point, it is appropriate to consider whether the very nature of on-demand guarantees makes such contracts exploitative and therefore should be prohibited in the guarantee market. In this inquiry one would ask, first, can it be seriously wrong for a beneficiary, for example, an overseas buyer, of an on-demand guarantee to engage in a mutually advantageous and consensual transaction with an applicant, for example an exporter of goods? Secondly, is the applicant wrong in allowing the beneficiary to take advantage of an unfair situation in the market? Arguably, on-demand guarantees are mutually advantageous contracts. They give the beneficiary the security for non-performance, late performance or defective performance of the applicant under the underlying contract and the applicant in return benefits from securing the underlying contract in a competitive market. Considering the high risk of engaging in a contract with an unknown applicant it is not unfair for the beneficiary to require that the guarantee should be payable on his demand without proof of default. If the applicant has consented to the guarantee being payable on-

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115 Ibid 237; see also Rick Bigwood, ‘Ill-Gotten Contracts in New Zealand: Parting Thoughts on Duress, Undue Influence and Unconscionable Dealing — Kiwi-Style?’ (2011) 42 Victoria University Wellington Law Review 83, 97:

I take it as axiomatic that exploitation is not an accidental or merely causal process of victimisation, but rather involves something deliberate on the part of the stronger party: that the superior party acted either purposively or with reckless disregard for the known special vulnerability of the claimant, intentionally turning, actively or passively, the claimant’s relative characteristics or circumstances to his, the superior party’s, own ends.

116 Goodin, above n 101, 185.

117 Ibid.
demand of the beneficiary, then, in the absence of ‘unfair advantage taking of unfairness’,\textsuperscript{118} it cannot be argued that the on-demand guarantee is an exploitative contract or that by entering into such contracts the beneficiary is engaging in an act of exploitation of the applicant of the guarantee.

Therefore, on-demand guarantees are not inherently exploitative, but unconscionable demands under them are. A beneficiary who requires the applicant to provide an on-demand guarantee is merely ‘taking advantage of an unfair background situation’ in the guarantee market. Particularly in a competitive market where applicants compete with each other to secure the underlying contract with overseas beneficiaries, the applicants no doubt would agree to the terms of the beneficiary. The weaker bargaining position of the applicants in negotiating on-demand guarantees is an unfair situation. But it is not wrong for the beneficiary of the guarantee to take advantage of this situation, by requiring that the guarantee be payable on his demand without proof of default. However, such advantage taking does not harm the applicant, rather both the applicant and beneficiary maximise their potential gains from the underlying contract. If the applicant consents to the issue of an on-demand guarantee to the beneficiary it is inappropriate to condemn the beneficiary for taking advantage of this opportunity. Therefore, it cannot be said that these on-demand guarantees are instruments of exploitation of applicants in the guarantee market. Therefore, the reason on-demand guarantees are permitted and enforced is because they are considered mutually advantageous and consensual transactions between commercial parties.

Coming back to the fundamental argument that unconscionable demands under on-demand guarantees are a form of wrongful exploitation, it is apposite to consider the moral objections to such exploitative conduct in the guarantee market. In this context it is worth noting Goodin’s comments that ‘an act of exploiting a person always constitutes a wrong’.\textsuperscript{119}

\begin{quote}
The wrongfulness of exploiting people is presumably connected, somehow, to its unfairness. After all, only one thing has changed in shifting from the exploitation of things to the exploitation of persons: the qualifier ‘unfair’ has been added to the general formula of ‘exploitation = taking advantage’. It is in this notion of unfairness that the source of our moral objections to the practice of exploitation is most naturally sought.\textsuperscript{120}
\end{quote}

Goodin claims that a moral objection to exploitative conduct is founded upon the wrongfulness or unfairness of the alleged advantage taking. It is wrong to use the vulnerability of people or their situations in certain ways. He attempts to explicate the notion of ‘unfairness’ by reference to game analogy. To quote Goodin: ‘[f]air play is play according to the formal rules and informal ethos of the game. Unfair play is play at variance with those standards. “Taking unfair advantage”, seen in

\begin{footnotes}
\textsuperscript{118} See also Wertheimer’s analysis of ‘Exploitation of Student Athletes’ in Wertheimer, above n 100, 77–95.
\textsuperscript{119} Goodin, above n 101, 173.
\textsuperscript{120} Ibid 174.
\end{footnotes}
this light, would consist in availing oneself of strategic opportunities which are
denied to one under the rules of ethos of the game at hand. Therefore, what
qualifies as wrongfulness or unfairness of the advantage taking can be determined
by the context in which the parties have conducted themselves.

Hence, in the demand guarantee context, it would be appropriate to impose on the
parties a moral responsibility to comply with the accepted standards of conduct in
business relationships. This would in turn impose a moral responsibility on the
part of the beneficiary to refrain from making unconscionable demands under
the guarantee. Hence, it is argued that it is morally wrong for the beneficiary of a
demand guarantee to behave in an overly self-interested manner through taking
unfair advantage of the applicant’s vulnerability even if the parties have agreed
that the guarantee is payable on-demand without proof of default; even if the
underlying contract was mutually advantageous. When the beneficiary of the
demand guarantee is in a strong position vis-à-vis the applicant those circumstances
impose upon the beneficiary (the stronger party) a moral responsibility to behave
in a particular manner. Hence, the unconscionable conduct on the part of the
beneficiary calling on the guarantee is a violation of his moral responsibility toward
the applicant, which gives a moral reason for the law’s intervention. The moral
reason is that such conduct violates the accepted standards of behaviour (such
as fair dealing) of a person who possesses a relatively superior position in the
guarantee market.

V Conclusion

The starting point for the conceptual analysis of unconscionable demands under
on-demand guarantees was a discussion of the cases and statutory provisions
that initially sparked the inclusion of unconscionable conduct as a ground for
restraining demands under on-demand guarantees in Singapore and Australia.
Placing the cases into a historical context proved useful in identifying the evolution
of this concept and how it has been developed over time as a ground for judicial
intervention in the enforcement of on-demand guarantees. Whilst Singaporean
courts have recognised unconscionability as a concept that entails conduct so
reprehensible or lacking in good faith and that it represents just one element
of unfairness, which depends on the facts of each case, the Australian courts, in
reliance on statutory unconscionability and underlying judge-made law, have
applied its meaning in equity. Hence it was necessary to explore the meaning of
unconscionability in equity. Drawing upon the relevant equity jurisprudence
it was argued that two criteria in equity, namely, exercise of superior power to

121 Ibid 183.

argues that the power possessor has an obligation to adhere to the standard canons of
decent treatment of others who are vulnerable to his power.

123 Wertheimer argues that ‘at least one of the truth conditions of an exploitation claim
is itself explicitly moral; a transaction is exploitative only when it is unfair’: see
Wertheimer, above n 100, 278.
take an unfair advantage of vulnerability or situational disadvantage and harsh or oppressive insistence on strict legal rights to take an unfair advantage of vulnerability or situational disadvantage are helpful in defining the concept of unconscionable demands under on-demand guarantees.

Focusing on the relevance of the underlying criteria of unconscionability to the broader concern with the theory of exploitation, it was argued that unconscionable demands under on-demand guarantees are a case of wrongful exploitation and that that provides a strong justification for judicial intervention in the enforcement of on-demand guarantees. However, this article did not argue that on-demand guarantees should be prohibited or rendered unenforceable because they represent an unfair situation in the guarantee market. Rather if these guarantees are mutually advantageous and accepted by applicants in a competitive market, they should be accepted and enforced.

In the course of these arguments, a distinction was made between ‘taking advantage of unfairness or misfortune’ and ‘taking unfair advantage’. The beneficiaries who secure on-demand guarantees are merely ‘taking advantage of an unfair situation’ (such as their relatively superior bargaining position, the on-demand character of the guarantee) in the guarantee market. Therefore, it is not wrong or unfair for the beneficiaries to enter into mutually advantageous transactions with the applicants. It does not follow that just because beneficiaries of on-demand guarantees are ‘taking advantage’ of a background injustice or unfairness in the guarantee market that these beneficiaries are ‘taking an unfair advantage’. However, the beneficiaries who make unconscionable demands under on-demand guarantees are ‘taking an unfair advantage’ of the vulnerability of applicants in the guarantee market. Therefore, unconscionable conduct by the beneficiary in calling on the guarantee amounts to a wrongful exploitation of the applicants.

Thus, the arguments under the theory of exploitation highlighted a more general point: unconscionable demands essentially involve wrongful, harsh or at least an unacceptable exercise of legal rights and unfair advantage taking by the beneficiaries over the applicants of on-demand guarantees. Therefore, the principle aim of the prevention of unconscionable demands under on-demand guarantees is to protect the allegedly exploited applicants of on-demand guarantees and thereby ensure fairness and fair dealing in the guarantee market.