Contract Law: Text Cases and Materials (11th edn)
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20. Unconscionability and Inequality of Bargaining Power

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https://doi.org/10.1093/he/9780198898047.003.0020
Published in print: 17 May 2024
Published online: August 2024

Abstract

This chapter considers a group of cases, such as those concerned with unconscionable bargains, in which the courts have been asked to grant relief on the basis that the contract concluded between the parties was, in some way, unfair, outlining examples drawn both from the common law (including equity) and from statutes. The rise and fall of a doctrine of inequality of bargaining power is also noted. It then considers the arguments in favour of drawing these disparate cases together into one general doctrine and concludes by drawing on some academic reflections on the case-law and the role of fairness in the law of contract more generally.

Keywords: English contract law, case-law, unfairness, unconscionable bargain, inequality of bargaining power

Central Issues

1. The role of fairness in the law of contract is a matter of some controversy. It is clear that the law is concerned with matters of procedural fairness, although the extent of that concern and the meaning of procedural fairness is a matter of debate. More difficult is the role of substantive fairness. Can a court set aside a contract on the ground that it is substantively unfair or is the function of substantive unfairness confined to the provision of evidence from which some other ground of invalidity can be deduced?

2. In this chapter consideration will be given to a range of cases in which the courts were asked to set aside a contract on the ground that the contract was, in some way, unfair. An examination of the cases will reveal that the courts have invoked a range of factors in deciding whether or not to set aside a contract. These factors include matters such as the existence of a special or serious disadvantage or disability on the part of the party seeking to set aside the contract, actual or constructive fraud on the part of the party seeking to enforce the contract, the role of independent advice, and the presence of disadvantageous terms.
3. It is also necessary to examine the role of Parliament in regulating unfair terms and the reasons why the courts have so far refused to recognize a general doctrine of unconscionability or inequality of bargaining power. The chapter will conclude by drawing on various analyses of unconscionability and the role of substantive fairness in the law of contract.

20.1 Introduction

There is no doubt that the law recognizes that duress and undue influence can suffice to set aside a contract (see Chapters 18 and 19). More difficult is the question whether or not a court can set aside a contract on the ground that it is in some way unfair. Does English law recognize a doctrine of unconscionability or inequality
p. 686 of bargaining power? The House of ↵ Lords in *National Westminster Bank* v. *Morgan* [1985] AC 686 (20.4) saw no need for a general doctrine of inequality of bargaining power (a view confirmed by the Supreme Court in *Pakistan International Airline Corporation* v. *Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101, [26]). Nevertheless, specific instances can be found of cases in which courts have intervened to set aside a contract that was, in the view of the court, unfair. The exact scope of these decisions is the subject of some debate. A further issue is whether or not the law ought to bring these disparate cases together and form one coherent doctrine. Lord Denning attempted to do this in *Lloyds Bank Ltd* v. *Bundy* [1975] QB 326 (20.4) but his attempt was rejected by the House of Lords in *National Westminster Bank* v. *Morgan* [1985] AC 686.

In so far as these decisions are based on the unfairness of the procedure by which the contract was concluded they are not particularly controversial. The laws of misrepresentation and duress demonstrate that the law of contract is concerned with the fairness of the procedure by which a contract has been concluded. Much more difficulty is created by the proposition that the law of contract is concerned with the substantive fairness of the terms of the contract, particularly the adequacy or the fairness of the price. The fairness of the terms is a matter for the parties to decide, not the courts. The latter proposition is a fundamental tenet of freedom of contract. Can a commitment to the fairness of the terms be reconciled with a commitment to freedom of contract? Professor Collins, *The Law of Contract* (4th edn, Butterworths, 2003), pp. 270–271 has stated:

> A system of contract law committed to freedom of contract must reject controls over the fairness of contracts. No matter that the purchaser has paid an excessive price or the seller received a gross undervalue, the principle of freedom to select the terms must prohibit intervention designed to redress the balance of obligations. At most the law can scrutinize minutely the procedures leading up to the contract to ensure that the freedom of the parties was not restricted by pressure, fraud, abuse of positions of trust, and other factors which interfered with the voluntariness of consent. Tests of procedural propriety are both compatible with and required by the principle of freedom of contract, but any examination of the fairness of the substance of the contract must be forbidden. Accordingly, texts describing the classical law of contract offered no place for a discussion of a requirement of fairness in contracts.
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> A reluctance to acknowledge the significance of substantive unfairness in contracts as a ground for intervention still characterises judicial decisions in the common law. A court will stress any elements of procedural impropriety that it can discover rather than address directly the unfairness of the bargain. The substantive unfairness may provide the motive for intervention, but the formal legal reason given for upsetting the contract will be couched in terms of a procedural defect, such as deception, manipulation or unfair surprise. This approach receives further support from economic analysis of law, since these procedural defects can be regarded as evidence of market failure which prevented the operation of a competitive and efficient market. To discover the real significance of substantive unfairness in the common law of contract therefore requires an investigation which digs behind the formal reasons given for decisions.

In this chapter it will be necessary to 'dig behind the formal reasons given for decisions' in order to ascertain the reason for the intervention of the court. The most difficult issue relates to the role of the substantive unfairness of the term or terms of the contract. What role, if any, does a concern for substantive fairness play
p. 687 in the cases? And what is the role ↵ of procedural fairness? Is there any one factor that predominates or do the courts rely upon a mixture of factors? Academic analyses of the cases often draw upon a mixture of factors. Thus Nicholas Bamforth (20.5) identifies four factors that are consistently taken into account by the courts (namely, (i) special or serious disadvantage or disability, (ii) actual or constructive fraud, (iii) lack of independent advice, and (iv) disadvantageous terms) while David Capper (20.5) identifies three factors (namely, (i) relational inequality, (ii) transactional imbalance, and (iii) unconscionable conduct). It may be that it is impossible to locate one factor which alone can explain all the cases and that the multi-factor approach is the best one to adopt. But such an approach has its dangers in that different courts can give different weight to the various factors with the consequence that the cases develop in an inconsistent and haphazard fashion.

This chapter will proceed in four stages. First, brief consideration will be given to a group of cases in which the courts have been asked to grant relief on the basis that the contract concluded between the parties was, in some way, unfair. Secondly, we shall outline one or two examples of the statutory regulation of unfair terms. Then, thirdly, consideration will be given to the arguments in favour of drawing these disparate cases together into one general doctrine before concluding the chapter by drawing on some academic reflections on the case-law and the role of fairness in the law of contract more generally.

20.2 Unfairness in the Cases

There are a number of cases in which the courts have set aside a contract on the ground that it was, in some way, unfair. These cases can be grouped into a number of categories but it cannot be said that these categories are watertight.Extracts from the judgments in the principal cases referred to in this section can be found in the online resources which support this book. Here we shall confine ourselves to a brief account of the cases and of the grounds on which they were decided and to one example of the way in which the courts exercise this jurisdiction.

The first group of cases concerns the protection which equity has long afforded to 'expectant heirs' (that is to say young men who would inherit a substantial fortune on the death of their father but who had very limited immediate access to cash and were thus vulnerable to exploitation by moneylenders). A leading example is *Earl of Aylesford* v. *Morris* (1873) 8 Ch App 484. The plaintiff, when he was a young man of 22, had run up a large number of debts. His father was in poor health and he stood to inherit a large amount of property on the death of his father. His creditors were pressing for payment and the defendant moneylender agreed to lend him money to pay off these debts. The plaintiff received no independent advice and the rate of interest which the defendant demanded was over 60 per cent. The plaintiff applied to have the defendant's actions for payment restrained and succeeded in doing so. It was held that, in the circumstances of the case, the transaction could not stand unless the defendant could repel the presumption that it had been procured unconscientiously by proving that the transaction with the plaintiff was fair, just, and reasonable. This the defendant was unable to do.

The second group of cases concerns the protection which English law has traditionally afforded to what have been termed 'poor and ignorant persons'. The leading case is *Fry* v. *Lane* (1888) 40 Ch D 312. The plaintiffs were two brothers. One was a laundryman and the other worked for a plumber. They sold their reversionary interests in the estate of John Fry to the defendant for £170 and £270, respectively. When they entered into the
p. 688 transaction, they were ↵ advised by an inexperienced solicitor who was acting for both parties to the transaction. The property which was the subject of their interest was later sold for £3,848, of which the plaintiffs' share would have been £730 each. The proceeds of the sale were paid into court. An actuary stated that JB Fry's contingent interest in the £730 would have been valued at £475 at the date of the transaction. The plaintiffs' claim to set aside the transaction with the defendant was successful. There were three elements to the decision of Kay J: (i) the plaintiffs were 'poor and ignorant', (ii) the sale was at an undervalue, and (iii) the plaintiffs were not independently advised. Proof of these three matters suffices to shift the onus of proof on to the defendant to prove that the transaction was fair, just, and reasonable and, once again, the defendant was unable to do this. A more modern example of the exercise of the same jurisdiction is provided by *Creswell* v. *Potter* [1978] 1 WLR 255. On the break-up of her marriage to the defendant, the plaintiff, a telephonist, released and conveyed to the defendant her interest in the matrimonial home in return for an indemnity against liability under the mortgage. The defendant later sold the former matrimonial home and made a profit of £1,400 on the sale. The plaintiff sought to set aside the release on the ground that it was exercised in circumstances which amounted to unfair dealing. Her claim was successful. She established that she was 'poor' (in the sense that she was a member of 'the lower income group') and 'ignorant' (which for this purpose

meant 'less highly educated'), that the sale was at a considerable undervalue, and that she had not received any independent advice. The defendant was unable to prove that the transaction was fair, just, and reasonable (for a further example, see *Credit Lyonnais Bank Nederland NV* v. *Burch* [1997] 1 All ER 144).

Thirdly, cases can be found in which the courts have intervened to protect claimants who have found themselves in extremely difficult circumstances and the defendant has attempted to exploit that situation. An example in this category is *The Medina* (1876) 1 P 272. Here the plaintiffs sought to take advantage of the imminent danger in which the master of a vessel and some pilgrims found themselves. Their vessel had been wrecked and they were huddled on a rock, awaiting rescue. The plaintiffs declined to rescue the pilgrims unless they were paid £4,000. The defendants, not having any other alternative open to them (other than death), promised to pay this sum. When the plaintiffs sued to recover the promised amount, the court declined to order the defendants to pay and, instead, relegated the plaintiffs to a claim for £1,800 (for another example of a court intervening to set aside an extortionate salvage agreement, see *The Port Caledonia and The Anna* [1903] P 184).

But the courts have generally been slow to grant relief in cases of alleged unfairness. As Dillon LJ observed in *Alec Lobb (Garages) Ltd* v. *Total Oil (Great Britain) Ltd* [1985] 1 WLR 173, 183: '[t]he courts would only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall.' To similar effect is the judgment of Rose J in *The Libyan Investment Authority* v. *Goldman Sachs International* [2016] EWHC 2530 (Ch), [132], where she observed that 'generally speaking the law will not intervene to save people from making improvident bargains'. Before 'the court will consider setting a contract aside as an unconscionable bargain, one party has to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive' (*Strydom* v. *Vendside Ltd* [2009] EWHC 2130 (QB), [39]). All of these elements must be present before a contract will be set aside as an unconscionable bargain. No one factor will suffice. In particular, it is insufficient for the claimant to establish that the bargain was a hard one or in some other way improvident; it is necessary to go further and establish that the defendant took advantage of the claimant's position (*Fineland Investments Ltd* v. *Pritchard* [2011] EWHC 113 (Ch), [2011] All ER (D) 18 (Feb)).

p. 689 ↵ The most recent authoritative summary of the various jurisdictions to set aside a contract which are discussed in this section was provided by the Supreme Court in *Pakistan International Airline Corporation* v. *Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101. Thus Lord Hodge stated (at [23]–[24]):

> Unconscionability is not an overarching criterion to be applied across the board without regard to context. Were it so, judges would become arbiters of what is morally and socially acceptable. Equity takes account of the factual and legal context of a case and has identified specific contexts which call for judicial intervention to protect the weaker party. For example … the equitable doctrine of unconscionable bargains has been applied where B is at a serious disadvantage relative to A through 'poverty, or ignorance, or lack of advice or otherwise' so that circumstances existed of which unfair advantage could be taken; A exploited B's weakness in a morally culpable manner; and the resulting transaction was not merely hard or improvident but overreaching and oppressive: *Alec Lobb (Garages) Ltd* v. *Total Oil (Great Britain) Ltd* [1983] 1 WLR 87, 94–95, per Peter Millett QC, sitting as a deputy High Court judge. … Examples of unconscionable transactions include circumstances in which A knowingly negotiates an agreement with B while B is elderly, unwell and intoxicated (*Blomley* v. *Ryan* (1954) 99 CLR 362) and where a poor, illiterate and unwell person is induced to enter into a disadvantageous transaction without advice and in great haste (*Clark* v. *Malpas* (1862) 4 De GF & J 401; 45 ER 1238). In *Fry* v. *Lane* (1888) 40 Ch D 312, Kay J summarised the then existing case-law in these terms (p 322): 'where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.' He held that the circumstances of poverty, ignorance and lack of independent advice impose on the purchaser the burden of showing that the purchase was fair, just and reasonable. Unequal bargaining power does not suffice; it is necessary for the claimant to show that unconscientious advantage has been taken of his or her disabling condition or circumstances: *Boustany* v. *Pigott* (1993) 69 P & CR 298 (JCPC) at p. 303 per Lord Templeman. Extortionate bargains can be struck down or varied in other circumstances; see, for example, *The Port Caledonia and the Anna* [1903] P 184 in which the court drastically reduced a claim for salvage where a ship's captain in an emergency had been forced to accept an extortionate offer from a tug captain for the provision of salvage services. But the rules relating to salvage may depend on specialties of maritime law. …

To similar effect is the following passage from the judgment of Lord Burrows (at [77]):

> [T]he law on 'unconscionable bargains' … deals not with illegitimate threats or pressure but with the exploitation by A of a weakness of B by entering into a contract that is clearly disadvantageous to B who has not obtained independent advice. In almost all past English cases on unconscionable bargains, B has been an individual with a mental weakness such as inexperience, confusion because of old age or emotional strain: see, eg, *Earl of Aylesford* v. *Morris* (1873) 8 Ch App 484; *Fry* v. *Lane* (1888) 40 Ch D 312; *Cresswell* v. *Potter (Note)* [1978] 1 WLR 255; *Backhouse* v. *Backhouse* [1978] 1 WLR 243; *Boustany* v. *Pigott* (1993) 69 P & CR 298; *Chitty on Contracts*, 33rd ed (2018), paras 8-132 to 8-142. But it is not inconceivable that the relevant weakness could be the very weak bargaining position of a company; and this possibility was recognised 35 years ago by the Court of Appeal in *Alec Lobb Garages Ltd* v. *Total Oil (Great Britain) Ltd* [1985] 1 WLR 173.

p. 690 ↵ The cumulative nature of the tests applied by the courts, combined with their stringent requirements, has the consequence that very few modern examples can be found of contracts which have been set aside on the ground of unconscionability. One such exceptional case is:

Boustany v. Pigott
(1995) 69 P & CR 298, Privy Council

In 1977 Miss Pigott leased property to Mrs Boustany for a period of five years at a monthly rent of $833.33. Miss Pigott was 'quite slow', and her affairs were managed by her cousin, George Pigott. In 1980 Mrs Boustany discussed the possibility of a new lease with George Pigott but no agreement was reached. Later that year, while George Pigott was away, Mrs Boustany went to the chambers of a certain Mr Kendall and presented him with a copy of a new lease which was for ten years at a monthly rent of $1,000, renewable at the same rent at the option of Mrs Boustany. Mr Kendall demanded to see Miss Pigott together with Mr and Mrs Boustany and, during the course of the interview, he pointed out to Miss Pigott various aspects of the agreement which were not in her best interests but she insisted that he draw up the agreement. He did so. When George Pigott discovered what had happened he protested to Mrs Boustany, who was unmoved and so he asked for a declaration that the lease was an unconscionable bargain which should be declared null and void. The Privy Council, upholding the decision of the Court of Appeal of the Eastern Caribbean States, set aside the lease as an unconscionable bargain.

Lord Templeman

[giving the judgment of the Privy Council]

In a careful and thoughtful submission, Mr Robertson, who appeared before the Board on behalf of Mrs Boustany, made the following submissions with which their Lordships are in general agreement:

(1) It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that 'one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience': *Multiservice Bookbinding* v. *Marden* [1979] Ch 84, 110.

(2) 'Unconscionable' relates not merely to the terms of the bargain but to the behaviour of the stronger party, which must be characterised by some moral culpability or impropriety: *Lobb (Alec) (Garages) Limited* v. *Total Oil (Great Britain) Limited* [1983] 1 WLR 87, 94.

(3) Unequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness, 'it was not right that the strong should be allowed to push the weak to the wall': *Lobb (Alec) (Garages) Limited* v. *Total Oil (Great Britain) Limited* [1985] 1 WLR 173, 183.

(4) A contract cannot be set aside in equity as 'an unconscionable bargain' against a party innocent of actual or constructive fraud. Even if the terms of the contract are 'unfair' in the sense that they are more favourable to one party than the other ('contractual imbalance'), equity will not provide relief unless the beneficiary is guilty of unconscionable conduct: *Hart* v. *O'Connor* [1985] AC 1000 applied in *Nichols* v. *Jessup* [1986] NZLR 226.

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(5) 'In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances': per Mason J in *Commercial Bank of Australia Ltd* v. *Amadio* (1983) 46 ALR 402, 413.

Mr Robertson submitted that Miss Pigott had received independent advice from Mr Kendall, that she had been made aware by Mr Kendall that the terms of the 1980 lease were disadvantageous to her, that Miss Pigott could not be described as poor or ignorant and that the judge did not find and could not, consistently with the evidence, have found unconscionable behaviour on the part of Mrs Boustany.

The crucial question in this case is—what brought Miss Pigott to the chambers of Mr Kendall in September 1980? That question was not answered by direct evidence because Miss Pigott was not able to give evidence and Mrs Boustany and her husband chose not to do so. The trial judge inferred unconscionable conduct by Mrs Boustany after careful consideration of a number of features which he held were only consistent with unconscientious conduct on the part of Mrs Boustany. The management of the property had been given up by Miss Pigott because of her incapacity. The properties were managed by Mr George Pigott and there was no reason why Miss Pigott should interfere in the management of this one property leased to Mrs Boustany. There was no evidence of any personal attachment between Miss Pigott and her tenant. Mrs Boustany had negotiated with Mr George Pigott and knew that he was the representative of Miss Pigott. No advice was sought by Miss Pigott; she turned up not at her family's solicitors but to Mr Kendall who knew nothing about her save that he had prepared the 1976 lease. Miss Pigott gave to Mr Kendall, according to his evidence, absurd reasons for the grant of a new lease and no reason for the grant of a lease for 20 years on disadvantageous terms.

Miss Pigott must have been under a total misapprehension of the facts when she represented that she might be worried about the property and about the repair of the property while she was away. Mr Kendall forcibly pointed out not only to Miss Pigott but also to Mrs Boustany and her husband the disadvantages to Miss Pigott of the new lease but Mrs Boustany and her husband gave no explanation and offered no concessions. They were content to allow Miss Pigott ostensibly to insist on the unjustifiable terms which they must have already persuaded her to accept. When a writ was issued Mrs Boustany did not write to the solicitor but sought out Miss Pigott and obtained a disclaimer which the court in due course rejected. The inference which the trial judge drew, and which he was entitled to draw, was that Mrs Boustany and her husband had prevailed upon Miss Pigott to agree to grant a lease on terms which they knew they could not extract from Mr George Pigott or anyone else. When they were summoned by Mr Kendall and the unfairness of the lease was pointed out to them, they did not release Miss Pigott from the bargain which they had unfairly pressed on her. In short Mrs Boustany must have taken advantage of Miss Pigott before, during and after the interview with Mr Kendall and with full knowledge before the 1980 lease was settled that her conduct was unconscionable.

Commentary

This is a curious judgment. The five 'submissions' listed by Lord Templeman are followed by a list of six factors from which unconscionable conduct was inferred. It is difficult to disagree with Nicholas Bamforth ('Unconscionability as a Vitiating Factor' [1995] *LMCLQ* 538, 543–544) when he concludes:

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> *Boustany* v. *Pigott* is a prime example of the imprecise approach which must be avoided if unconscionability is to merit support as a vitiating factor. … There are some basic problems with the Privy Council's treatment of the facts. We are not told *why* Mrs Boustany could be said to have had full knowledge that her conduct was unconscionable, or how any of the 'submissions' were brought into play. Miss Pigott had been incapable of giving evidence at the original trial and Mrs Boustany declined to do so, explaining the need to make inferences. This cannot, however, justify the failure to explain the inferences in the light of the five 'submissions'. The Privy Council simply presented a list of 'submissions' and a list of factual findings, without connecting the two. As in other unconscionability cases, terms such as 'affects his conscience', 'moral culpability', 'unconscientious' and 'unconscionable' were used without explanation of their precise meaning. …
>
> The danger of using pejorative terms should be clear: precision and clarity are crucial when a court is drawing up and deploying criteria for assessing whether a transaction is unconscionable, for the court must strike a delicate balance between conflicting policy considerations. On the one hand, it is important to safeguard the certainty of commercial transactions, especially those involving real property. It is also, however, important to protect weaker parties against improper exploitation in the bargaining process. The situation is further complicated by the need, in protecting weaker parties, to avoid compromising their autonomy through excessive judicial intervention in their transactions. The chances of striking a coherent balance between those considerations are greatly reduced when courts use imprecise or ambiguous language, or fail properly to explain why transactions are upheld or struck down.

A further difficulty with *Boustany* is that Miss Pigott did have independent advice. Indeed, Lord Templeman points out that the disadvantages of the new lease were 'forcibly pointed out to her'. Why did this independent advice not suffice to negate her claim? It is not entirely clear. It may be that not enough was done to bring home to Miss Pigott the nature of the transaction she was concluding.

20.3 The Role of Statutes

Parliament also has a role to play in regulating unfair terms in contracts. The most significant examples are Part 2 of the Consumer Rights Act 2015 (see Chapter 14) and the Unfair Contract Terms Act 1977 (13.3). A further example of legislative regulation of unfair relationships is provided by sections 140A–140C of the Consumer Credit Act 1974 which provides protection for consumer debtors. Section 140A gives to the court the power to make an order under section 140B,

> if it determines that the relationship between the creditor and the debtor arising out of the agreement … is unfair to the debtor because of one or more of the following: (a) any of the terms of the agreement or of any related agreement; (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement; or (c) any other thing done (or not done) by, or on behalf of the creditor.

This provision does not confer upon the courts a general jurisdiction to review transactions concluded between commercial lenders and private borrowers in the name of unfairness. Rather, the requirements of the
p. 693 section must be satisfied before the jurisdiction of the court ↵ is triggered, albeit that the section is framed in broad terms. In particular, the relationship between the debtor and the creditor must be unfair, the focus of the court's inquiry is upon hardship to the debtor (although matters relating to the creditor may also be relevant to the court's inquiry), and the alleged unfairness to the debtor must have arisen from one of the factors listed in sub-paragraphs (a)–(c) (*Plevin* v. *Paragon Personal Finance Ltd* [2014] UKSC 61, [2014] 1 WLR 4222). Once over the hurdles established by section 140A, section 140B confers broad powers on the courts in order to remedy the unfairness in the relationship between these parties. Thus they can (for example) order repayment of sums paid, reduce or discharge any sum payable by the debtor, or alter the terms of the agreement.

While statutes provide individual examples of the regulation of unfair terms, it is difficult to use statutes as building blocks in the construction of a general principle of unconscionability or inequality of bargaining power. The reason for this is that statutes and statutory instruments apply only to transactions that fall within their scope. They cannot be applied by way of analogy to cases that fall outside their scope and the courts have generally not been willing to rely on Acts of Parliament when developing the common law (see *National Westminster Bank plc* v. *Morgan* [1985] AC 686, 20.4, although contrast *Timeload Ltd* v. *British Telecommunications plc* [1995] EMLR 459, 13.3.3).

20.4 A General Principle?

Thus far we have seen that English law has a collection of cases and statutes that seem to reflect a concern for the fairness of the bargain that has been concluded by the parties. But are they anything more than a collection of individual cases? Can they be rationalized into a principle or set of principles of general application? Lord Denning famously sought to create such a general principle in his judgment in *Lloyds Bank Ltd* v. *Bundy* [1975] QB 326. He stated (at pp. 336–339):

Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. There are many hard cases which are caught by this rule. Take the case of a poor man who is homeless. He agrees to pay a high rent to a landlord just to get a roof over his head. The common law will not interfere. It is left to Parliament. Next take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and it is guaranteed by a friend. The guarantor gives his bond and gets nothing in return. The common law will not interfere. Parliament has intervened to prevent moneylenders charging excessive interest. But it has never interfered with banks.

Yet there are exceptions to this general rule. There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms—when the one is so strong in bargaining power and the other so weak—that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the court.

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The categories

The first category is that of 'duress of goods' [on which see 18.3].

The second category is that of the 'unconscionable transaction'. A man is so placed as to be in need of special care and protection and yet his weakness is exploited by another far stronger than himself so as to get his property at a gross undervalue. The typical case is that of the 'expectant heir' [see 20.2]. This second category is said to extend to all cases where an unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker.

The third category is that of 'undue influence' usually so called. These are divided into two classes as stated by Cotton LJ in *Allcard* v. *Skinner* (1887) 36 Ch D 145, 171 [see 19.3].

The fourth category is that of 'undue pressure'. The most apposite of that is *Williams* v. *Bayley* (1866) LR 1 HL 200 [see 19.1].

The fifth category is that of salvage agreements. When a vessel is in danger of sinking and seeks help, the rescuer is in a strong bargaining position. The vessel in distress is in urgent need. The parties cannot be truly said to be on equal terms [see 20.2].

The general principles

Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously

> impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases.

Commentary

The choice of 'inequality of bargaining power' as the label was perhaps an unfortunate one. It appeared to suggest that a mere imbalance in bargaining power would suffice to give the court jurisdiction to intervene. But the sentence in Lord Denning's judgment immediately following the reference to 'inequality of bargaining power' makes clear that what is required is both procedural and substantive unfairness. There must be a 'grossly inadequate' consideration, a 'grievous impairment' of bargaining power, and 'undue influences or pressures'. This is hardly an easy test to satisfy. The creation of a general principle found some supporters (see, for example, S Waddams, 'Unconscionability in Contracts' (1976) 39 *MLR* 369) who saw it as a means of unifying a range of disparate cases and doctrines (for example, the penalty clause jurisdiction (23.11), the rules relating to the incorporation and interpretation of exclusion clauses (13.2), the rules relating to the incorporation of terms (Chapter 9), and the protection of weak and vulnerable parties) and as a platform for the development of the law).

p. 695 ↵ However, these hopes were dashed by the House of Lords in *National Westminster Bank plc* v. *Morgan* [1985] AC 686, 707–708 when Lord Scarman stated:

> Lord Denning MR [in *Bundy*] believed that the doctrine of undue influence could be subsumed under a general principle that English courts will grant relief where there has been 'inequality of bargaining power' (p. 339). He deliberately avoided reference to the will of one party being dominated or overcome by another. The majority of the court did not follow him; they based their decision on the orthodox view of the doctrine as expounded in *Allcard* v. *Skinner*, 36 Ch D 145. The opinion of the Master of the Rolls, therefore, was not the ground of the court's decision, which was to be found in the view of the majority, for whom Sir Eric Sachs delivered the leading judgment.
>
> Nor has counsel for the respondent sought to rely on Lord Denning MR's general principle; and, in my view, he was right not to do so. The doctrine of undue influence has been sufficiently developed not to need the support of a principle which by its formulation in the language of the law of contract is not appropriate to cover transactions of gift where there is no bargain. The fact of an unequal bargain will, of course, be a relevant feature in some cases of undue influence. But it can never become an appropriate basis of principle of an equitable doctrine which is concerned with transactions 'not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act' (Lindley LJ in *Allcard* v. *Skinner*, at 185). And even in the field of contract I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task—and it is essentially a legislative task—of enacting such restrictions upon freedom of contract as are in its judgment necessary to relieve against the mischief: for example, the hire-purchase and consumer protection legislation, of which the Supply of Goods (Implied Terms) Act 1973, Consumer Credit Act 1974, Consumer Safety Act 1978, Supply of Goods and Services Act 1982 and Insurance Companies Act 1982 are examples. I doubt whether the courts should assume the burden of formulating further restrictions.

Two points can be made in relation to the judgment of Lord Scarman. First, it depends upon a particular perception of the relationship between the common law and statute law. According to this view, once Parliament assumes the role of protecting the weak and the vulnerable, the common law should return to its laissez-faire principles. But there is another view. The alternative view is that the common law should build upon the principles contained in these statutes: that is to say, the courts should see in these statutes a commitment to fairness which should be reflected in the law outside the immediate context of the statutes. The second point is that Lord Scarman gives priority to Lord Denning's choice of label over the substantive content of the principle he set out in *Bundy*. Greater concentration on the scope of the principle might have enabled it to survive the scrutiny of the House of Lords. Notwithstanding these arguments, the Supreme Court has recently affirmed the analysis of Lord Scarman in *Pakistan International Airline Corporation* v. *Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101, [26] in the following terms:

> It is not in dispute that there is in English common law no doctrine of inequality of bargaining power in contract, although such inequality may be a relevant feature in some cases of undue influence: *National Westminster Bank Plc* v. *Morgan* [1985] AC 686, 708 per Lord Scarman. As Lord Scarman observed in *The Universe Sentinel* (p 401), when he referred to the judgment of Lord Wilberforce and
> p. 696 Lord Simon in *Barton* v. *Armstrong*, in commercial life ↵ many acts are done under pressure and sometimes overwhelming pressure. In negotiating a commercial contract each party to the negotiations seeks to obtain contractual entitlements which he or she does not possess unless and until the parties agree the terms of the contract. Inequality of bargaining power means that one party in the negotiation of a commercial contract may be able to impose terms on a weaker party which a party of equal bargaining power would refuse to countenance. Equally, a party in a strong bargaining position, such as a monopoly supplier, may refuse outright to enter into a contract which the weaker party desires or may impose terms which the weaker party considers to be harsh. The courts have taken the position that it is for Parliament and not the judiciary to regulate inequality of bargaining power where a person is trading in a manner which is not otherwise contrary to law.

20.5 The Search for Coherence

If it is the case that a general principle of inequality of bargaining power or unconscionability is not acceptable to the courts, is it possible to identify the range of factors taken into account by the courts in the cases with a view to providing a structured framework within which the courts can decide whether or not to set aside a particular contract? Attempts have been made to identify these factors and, in so doing, to bring about a greater degree of coherence and predictability in the law. Two examples are set out. The first, provided by Nicholas Bamforth, identifies ‘unconscientious receipt’ as the basis for intervention and further identifies four factors that are generally taken into account by the courts. Secondly, David Capper identifies three such factors, although it is important to note that his list is part of a wider project, namely to merge the doctrines of undue influence and unconscionability into one doctrine by subsuming undue influence under his wider notion of unconscionability. At the end of the extract Capper raises the question of the role of substantive unfairness in the law of contract. He suggests that it performs an evidentiary function; that is to say it provides evidence from which other grounds of invalidity can be deduced. The last extract takes up the difficult question of the role of substantive unfairness in the law of contract. Professor Stephen A Smith argues for a more extensive role for substantive unfairness than that recognized by Capper. While he dismisses a number of reasons that are commonly put forward in support of the proposition that substantively unfair contracts are ‘bad’, he does identify one argument which, in his view, supports the proposition that such contracts are bad. That argument is that substantively unfair contracts make it more difficult for us to lead autonomous lives, in the sense that they make it more difficult for us to plan and direct our lives.

N Bamforth, 'Unconscionability as a Vitiating Factor'
[1995] *LMCLQ* 538, 555–557

> Courts are not, in reality, acting in a wholly discretionary fashion in cases where unconscionability is invoked as a vitiating factor. Behind the imprecise language, four elements have characteristically been treated as important in assessing whether a transaction should be set aside: first, whether the
> p. 697 weaker party was afflicted by a special or serious ↵ disadvantage or disability, mere inequality of bargaining power being insufficient; secondly, whether the stronger party's conduct amounted to actual or constructive fraud; thirdly, whether the weaker party lacked independent advice; fourthly, whether the terms of the transaction were clearly disadvantageous to the weaker party.
>
> However, the precise weight attached to each of the four elements seems to vary. There are many views about the importance of the terms of the transaction by comparison with the other three elements, and it has even been suggested that disadvantageous terms might not always be necessary. On balance, the unconscionability cases seem to conform with Professor Atiyah's suggestion that, in judicial assessments of the propriety of transactions, 'ideas of procedural and substantive fairness feed upon each other'. The fraud element is also problematic. 'Dishonesty'—the actual fraud requirement—tends towards imprecision, and reliance on constructive fraud would take the unconscionability vitiating factor dangerously close to being the sort of general power, decried by Toohey J, to set aside bargains just because they appear at first glance to be unfair or harsh. Given the vagueness of this element, it is unsurprising that there have been differences of judicial opinion about whether the stronger party's knowledge of the other's weakness should be subjectively held or objectively assessed.
>
> This brings us to two interconnected issues. The first—a policy issue—is whether unconscionability deserves support as a distinct vitiating factor. The second—an issue of legal principle—is to identify unconscionability's juristic basis, that is, to establish the general principle which underpins it and locates it at a particular point within the law. These two issues are interconnected because failure to identify an underpinning principle is likely to magnify any appearance of imprecision in unconscionability cases, disturbing those who believe that law should, as a matter of policy, embody a degree of certainty. A suitable underpinning principle would, by contrast, provide a way of understanding, rationalising and controlling the development of the vitiating factor's four elements, minimising the danger of palm tree justice. The identification of a suitable underpinning principle therefore affects the assessment of unconscionability's desirability, in policy terms, as a vitiating factor. The relative importance attached to the three policy factors … —certainty in commercial transactions, protection of weaker parties from improper exploitation, and avoiding judicial intervention on a scale which deprives vulnerable persons of any bargaining autonomy—is also likely to influence the categorisation of a particular underpinning principle as suitable.
>
> It is likely that for most lawyers the desirable policy balance will be something of a compromise—enough certainty to enable forward planning and security of receipt in transactions, but sufficient flexibility to leave room for a residual unconscionability jurisdiction according to which utterly exploitative transactions can be struck down. A variety of possible underpinning principles might fit within this balance. 'Inequality of bargaining power' has been dismissed as an underpinning

principle in the case law—rightly, as it cannot explain the need for special disadvantage and the relevance of the terms of the transaction. It is also, in and of itself, too vague a principle on which to base an entire vitiating factor. Another possibility has been canvassed by John Cartwright, who argues that '[t]he key is that one party has abused his or her [bargaining] position vis-à-vis the other'. Unfortunately, the term 'abuse' does not assist us greatly, being as pejorative as much of the language used by the judiciary. This impression is confirmed by Cartwright's suggestion that misrepresentation, duress and undue influence might also be described as examples of 'abuse of bargaining position', implying that 'abuse' is a malleable concept which can simply be adjusted to fit the vitiating factor in play. A similar argument can be made against the suggestion that the basis of unconscionability is the effecting of relief in equity from fraud. Fraud is as vague a concept when deployed as an underpinning principle as it is when treated as an element which needs to be
p. 698 established in ↵ an unconscionability claim; and, like 'abuse of bargaining position', it appears to be capable of manipulation to fit whatever vitiating factor or rule it is said to underpin.

The most appropriate possibility, within the policy balance envisaged, is the suggestion that unconscionability works to reverse or prevent unjust enrichment … unconscionability as a vitiating factor falls within the family of 'unjust factors' labelled 'unconscientious receipt', where 'the question for restitution is that the defendant behaved badly in receiving the value in question'.

If restitution for unconscientious receipt is the principle which underpins unconscionability as a vitiating factor, it is necessary to identify the type of behaviour which should be regarded as 'bad'. Otherwise, unconscionability will be indistinguishable from other forms of 'unconscientious receipt'. It is here that the four common elements in unconscionability cases come into play. For the purpose of 'unconscientious receipt' behaviour will be deemed to be 'bad', in the sense which justifies the intervention of unconscionability as a vitiating factor, where the stronger party exploits, in a dishonest fashion, the special disadvantage of the weaker party in concluding with them a bargain which is to their severe disadvantage, where the weaker party lacks adequate independent advice. This formulation, marrying the underpinning principle with the elements of unconscionability, is general enough to allow the vitiating factor to adapt itself to new fact-situations, but sufficiently specific that it will be kept under tight control. As 'receipt' rests on a defendant-sided approach, it follows that the unconscionability vitiating factor should be confined to cases where there has been deliberate wrongdoing by the stronger party—in other words, where they have subjectively exploited the other's weakness rather than fallen below an objectively-assessed standard of conduct.

D Capper, 'Undue Influence and Unconscionability: A Rationalisation'
(1998) 114 *LQR* 479, 499–500

> ## A New Doctrine of Unconscionability
>
> How would this new doctrine work? In essence, the court would have to weigh up the three elements of relational inequality, transactional imbalance, and unconscionable conduct, and come to an overall judgment as to whether a particular transaction can stand. This would not, however, be a purely impressionistic exercise. Transactional imbalance would serve an evidentiary function … The principal grounds for relief would thus be relational inequality and unconscionable conduct. The more there was of one of these features, the less would be required of the other; and where one was not strongly in evidence transactional imbalance would be needed to bolster it. Where the parties to a transaction are on very unequal terms and the transaction is weighted strongly in favour of one party, unconscionable conduct can be inferred. Where the parties are on fairly equal terms and the defendant has clearly behaved unconscionably, the court could infer that the defendant's conduct has induced an unfair transaction if the transaction appears unbalanced. …
>
> The new doctrine would be neither specifically plaintiff-sided nor specifically defendant-sided. The stronger the plaintiff-sided factor the weaker the defendant-sided factor needs to be and vice versa, although a degree of unconscionable conduct would be present in all cases since the passive receipt of benefits flowing under a seriously unbalanced transaction where the plaintiff was clearly in an
> p. 699 unequal relationship with the defendant would count ↵ as unconscionable conduct. In theory a transaction could be unconscionable where the defendant has behaved abominably and extracted benefits from a plaintiff on equal terms with himself, although it is probably unlikely that there would be many cases like this. The new doctrine would also be more concerned with procedural than with substantive unfairness. The importance of substantive unfairness as a vitiating factor in contract is acknowledged, but this tends to provide evidence from which grounds of invalidity can be deduced rather than serve as a vitiating factor of itself. Substantive unfairness is not likely to become an independent ground of invalidity so long as courts maintain the approach that they cannot make or remake a contract for the parties. If a contract is substantively unfair, the obvious solution would be to alter it to make it fair, but with some very limited exceptions, English law does not do this.

Capper returned to his theme in a later article ('The Unconscionable Bargain in the Common Law World' (2010) 126 *LQR* 403) where he noted a difference between the scope of the unconscionable bargain doctrine as it has evolved in England and the doctrine as it has developed in other parts of the Commonwealth. He set out the difference in the following terms (at p. 416):

> The unconscionable bargain doctrine in England and Wales is starkly different from doctrines of substantially similar juridical bases that are applied by the courts of Ireland, Australia, New Zealand and Canada. The difference is most apparent in the insistence by English courts that harsh terms must be imposed on the weaker party by the stronger party in a morally reprehensible manner. English law is not receptive to the view that a contract can be unconscionable because the terms are very much to the advantage of the stronger party and the latter passively received those advantages in the knowledge that the other party was vulnerable. Courts in other parts of the common law world are much more alive to this problem and not at all hesitant about granting relief.

Capper prefers the broader Commonwealth version of the doctrine, in part because the narrow English version requires an unhelpful extension to the doctrine of undue influence in order to catch cases which would otherwise fall outside the definition of an unconscionable bargain (an example which he cites in this respect is the decision of the Court of Appeal in *Credit Lyonnais Bank Nederland NV* v. *Burch* [1997] 1 All ER 144). Instead, Capper advocates a merger of, or at least an accommodation between, undue influence and unconscionable bargain. He concludes (at p. 419):

> A merged doctrine of undue influence/unconscionable bargain would not, it is submitted, generate further uncertainty than exists already in the common law. On the contrary, by allowing the courts to make a fresh start with conceptually clear principles, a much more functional doctrine could be created by judicial decisions which begin from the same sensible premises. The certainty so beloved of commercial lawyers would never be found but this is one area of contract law where justice has a larger role to play and where the parties cannot resolve all issues in advance by well drafted contractual terms. The uncertainty would be as to the outcome of cases when the relevant principles were applied, and that is much better than the same kind of uncertainty coupled with conceptual confusion as to what is truly objectionable about transactions under review. The current approach of
p. 700 English law, which ↵ formally recognises the existence of the unconscionable bargain but never seems to allow relief on this ground, risks incoherence by extending undue influence into cases … where it does not belong … if the courts cannot find any clear theoretical basis for distinguishing undue influence and the unconscionable bargain, the best way forward of all is surely to merge the smaller (undue influence) into the larger (unconscionable bargain).

SA Smith, 'In Defence of Substantive Unfairness'
(1996) 112 *LQR* 138, 145–154

> The advocate of substantive unfairness must … explain why substantively unfair contracts are bad. The enforcement of contracts is presumably a good thing generally, so some reason for non-enforcement must be provided. But the reason need not be along the lines that one of the parties coerced, defrauded, or manipulated the other party (though these are good reasons). All that needs to be shown, broadly speaking, is that a substantively unfair contract is not the sort of contract the law should promote. This is an easier standard to meet than the wrongfulness standard used in duress, fraud and so on. The difference is the same as the difference between deciding what sorts of activities the state should prohibit, or at least deter, and deciding what sorts of activities the state should subsidise. We may be uncertain, for example, whether prostitution should be prohibited, yet be reasonably confident that brothels should not be subsidised. Contract law—which is funded from tax revenue—subsidises certain sorts of activities.
>
> Why, then, might a contract's price affect our valuation of the contract? Five possibilities present themselves.
>
> ### Evidentiary value
>
> The first suggestion is that prices are of evidentiary importance. Unfair prices—understood here as abnormal prices—are not always accompanied by an invalidating procedural defect, but in some circumstances they are good evidence of such a defect. If there is a high risk of duress, undue influence, or fraud and the resulting contract is at an abnormal price, then even without direct proof of wrongdoing a court might reasonably conclude that wrongdoing has occurred. … Evidentiary arguments … are of limited interest. Evidentiary arguments do not provide a reason for caring about the price per se. At most, they merely show that in a few situations the price of a contract is evidence of something else that is valuable. …
>
> ### Distributive justice
>
> The most common, non-evidentiary, suggestion for why substantively unfair contracts should not be enforced is that they upset distributive justice. At first blush, this seems an unusual suggestion. Distributive justice is traditionally understood as requiring that common goods be distributed fairly amongst the members of a group or society. Contract law, which deals with two party interactions, appears unconcerned with the distribution of common goods.
>
> Contract law might, however, be instrumentally important in helping to preserve a just distribution of such goods. In particular, a requirement of substantive fairness might be important in maintaining a just distribution of purchasing power. If goods are traded at fair prices—understood again as normal prices—the trading parties end up with goods of roughly equivalent value to offer in the market. If they wish, the parties can, at least in theory, return ↵ to their original pre-contract

p. 701

position (minus transaction costs). Their purchasing power, as determined by the normal prices of all the goods that the parties own, is unchanged. Substantively unfair contracts upset the prior pattern of purchasing power and thus, it might be argued, conflict with distributive justice.

This suggestion is largely immune to the objection that contracting parties will bargain around redistribution rules, leaving unchanged or worsened the prior distributional pattern. Substantive fairness, on a distributive justice interpretation, does not require or support redistributions of purchasing power. It calls instead for preventing redistributions. This feature of the distributive justice argument, however, is also its main weakness (leaving aside the controversial issues of the value of distributive justice generally and the extent, if any, that purchasing power is a 'common good'). The distributive justice argument calls for upholding existing entitlements and therefore it applies straightforwardly only in societies—unlike any we know of—which are already distributively just. Preserving an unjust distribution of resources does not promote distributive justice. Indeed, if resources are unjustly distributed, what are needed from the perspective of distributive justice are substantively unfair terms … concerns of distributive justice provide at most a very weak justification for the party-based concerns of substantive fairness.

Facilitating contracting

A third possible reason for caring about contract prices is that contract pricing can affect individuals' ability to contract. If, as seems plausible, courts should facilitate contracting, this is a legitimate concern. There are at least four ways that contract pricing might inhibit contracting. First, in monopolistic (and monopsonistic) markets non-competitive pricing causes potential contractors to be priced out of the market. Monopolistic pricing typically results in fewer contracts, but at a higher price. For whatever reason contracts are valuable, this is undesirable. Second, the pricing strategy of situational monopolists can make contracting more difficult. … Third, and more generally, non-competitive pricing will, even in a competitive market, reduce contracting overall. … Finally, in situations where one of the contracting parties is unsure of the normal price for a good, a requirement that goods be sold at normal prices can facilitate contracting … [I]t seems clear that the reasons these suggestions provide for caring about contract prices are not reasons based on a concern for substantive fairness. The fairness of the impugned contracts is in each case beside the point. Indeed, there is nothing actually wrong with the contracts themselves in the above examples: what is 'wrong' is that other contracts did not or will not happen. … In short, whatever the merits of assessing contract prices in order to facilitate contracting, such regulation is not justified by a concern for substantive fairness.

Autonomy and basic needs

One reason for not enforcing a contract is that it does not support a valuable or worthwhile activity. The rules regarding so-called immoral or illegal contracts, such as contracts to sell babies and contracts of self-enslavement, are most naturally defended (insofar as they can be defended) on this basis. The problem with substantively unfair contracts is different. A substantively unfair contract may support a perfectly worthwhile endeavour. Yet there is a connection between substantive

fairness and 'non-valuable' contracts. The underlying justification for not enforcing non-valuable contracts is that the state should only lend a hand to endeavours that help individuals to achieve well-being and thus to realize fulfilling lives. Worthless activities, even if freely chosen, do not contribute to well-being. Contract prices can affect contracting parties' abilities to achieve fulfilling
p. 702 lives. One explanation of ↵ how this can happen draws on the importance, for well-being, of leading an autonomous, self-directed, life, and, more specifically, on the importance of having a threshold level of material wealth. It is not necessary to be rich to lead an autonomous life, but it is necessary to have one's basic physical needs met. Individuals whose every choice is dictated by the need to survive cannot lead autonomous lives. They are unable to direct their lives in any meaningful sense. A contract at abnormal prices can leave a contracting party in this position. If the magnitude of the deviation is severe enough, the wealth of the losing party may be reduced to less than the threshold level.

The problem with contracts that leave contracting parties in poverty is significant and helps to explain why some contracts at abnormal prices appear so repugnant. But, again, it is not a problem of substantive unfairness. Contracts which leave a party in poverty are like contracts of self-enslavement. They are bad, but they are not unfair (or at least only coincidentally unfair). Fairness is a relative concept: if someone has been treated unfairly, someone else has been treated differently. Yet in explaining why a contract that leaves someone in poverty is bad the situation of the other party to the contract is irrelevant. All we need to know is that one party has been left destitute. The same is true of contracts of self-enslavement: all we need to know to condemn such contracts is that someone has been made a slave. Thus, while some unfair contracts may be objectionable because they leave one of the parties in a state of poverty, the substantive unfairness of such contract is not the reason for the objection.

Autonomy and planning

The final reason for caring about contract prices is also founded on the importance, for achieving well-being, of living an autonomous life. More specifically, it is founded on the importance of being able to plan and control one's life. It is here, I suggest, that the key to understanding the value and meaning of substantive fairness is found. The problem with substantively unfair contracts is that they make it more difficult to direct our lives.

An autonomous life, in the sense I use this phrase, requires more than freedom from coercion. Autonomy is fundamentally a matter of being able to direct one's life: we lead autonomous lives, broadly speaking, when we direct our lives to a significant degree. Autonomous individuals need not live their lives according to rigid patterns, but they must have a reasonable ability to shape and plan their lives. Contract law helps us to lead autonomous lives by helping us to achieve valuable goals and, as importantly, by helping us do this autonomously. It increases our options and lets us decide what goals to pursue. The enforcement of contracts at abnormal prices, however, can make it more difficult to lead an autonomous life. Contracts at abnormal prices upset the material foundations upon which plans and aspirations are built. Rich or poor, we plan and shape our lives upon assumptions and expectations about our purchasing power. Contracts at abnormal prices upset plans and, more generally, individuals' abilities to control and direct their lives. … A contract at an

> abnormal price is similar to an unannounced change in tax policy. It shifts the purchasing power, leaving the losing party worse-off than before the contract, and thereby making it more difficult for that party to achieve an autonomous, that is, self-directed, life. This is true regardless of the justice of the prior distribution of resources. Of course it is not possible or desirable to protect individuals from all uncertainty. But avoidable, undesired, uncertainty should not be promoted by the law.
>
> The 'planning' justification supports a normal price standard for assessing contracts. Plans are built upon normal prices. To be sure, courts could ensure that plans were never upset by imposing fixed
> p. 703 prices for all goods. This solution is undesirable because contracting parties ↵ are normally better able than courts to set prices at mutually attractive levels. Setting fixed prices would make contracting far less appealing, thus limiting the good that contracting can achieve.
>
> The importance of planning and the relation between shifts in purchasing power and planning explain why courts should be concerned about contracts at abnormal prices. But these considerations do not apply equally to all contracts at abnormal prices. First, not all abnormal price contracts upset planning. In particular, contracts where either (1) the losing party was making a gift, (2) the losing party did not care about the price, or (3) the losing party was mistaken as to the nature and hence value of the good he or she was selling (for example, not realising that the painting offered was a Rembrandt) do not upset the losing party's ability to plan. In the first and third situation the losing party's expectations were not upset and in the second case the losing party had no expectations. Such contracts should therefore be enforced.
>
> A further, more general factor, in considering to what extent planning is upset by abnormal price contracts is that if the deviation from normal price is small, either in absolute terms or relative to the contract's price, then harm to planning, though not non-existent, is relatively trivial. … A second reason for limiting judicial scrutiny of abnormal price contracts is that invalidating contracts itself produces uncertainty and disrupts planning. … Taken together the results of our inquiries into (1) the harm caused by abnormal price contracts and (2) the ease of avoiding this harm suggest, therefore, the following general rule. Contracts in which the price deviates significantly, both in absolute and relative terms, from the normal price and in which the worse-off party cared about price, was not making a gift, was not mistaken about the value of the good he or she was selling and was not in a better position than the gaining party to obtain the normal price should not be enforced.

Further Reading

BAMFORTH, N, 'Unconscionability as a Vitiating Factor' [1995] *LMCLQ* 538.

CAPPER, D, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 *LQR* 479.

CAPPER, D, 'The Unconscionable Bargain in the Common Law World' (2010) 126 *LQR* 403.

MOORE, M, 'Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability' (2018) 134 *LQR* 257.

SMITH, SA, 'In Defence of Substantive Unfairness' (1996) 112 *LQR* 138.

THAL, SN, 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness' (1988) 8 *OJLS* 17.

WADDAMS, S, 'Unconscionability in Contracts' (1976) 39 *MLR* 369.

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