UNCONSCIONABLE CONTRACTS IN ANGLO-AUSTRALIAN LAW

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An Overview

In recent years, courts and legislatures have become increasingly sensitive to imposition on members of the public by persons who, by abusing their 'superior' bargaining power, exact unfair contracts from them. In Anglo-Australian contract law, notions of unconscionability have emerged which enable courts to review unfair contracts not otherwise open to review on the ground that they are procured by the abuse of unequal bargaining power.

In England, developments apparently inspired and encouraged by contemporary legislation, have been said to "herald the eventual acceptance of a new contractual doctrine of economic duress"[1] or to be the promising beginning of a doctrine of unconscionability comparable to s.2:302 of the American Uniform Commercial Code[2] .

In actuality the responses of the courts in England do not quite support any impression of heightened receptiveness to a doctrine of unconscionability. The English notion of unconscionability is still skeletal and has small if distinguished following. In applying it, judges have constantly safeguarded their decisions by basing them in the alternative on traditional principles. In Australia, until 1983, courts have tended to do justice only according to law, however, regretably bad the law may be.

The skeletal notions of unconscionability, and even if tentatively propounded, are yet another example of a discernible readiness on the part of judges to be more direct and open in their approaches to contractual problems. And as unconscionability takes into account a spectrum of social and economic factors not susceptible to being comprehensively listed, it

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1 Woolridge, 'Inequality of Bargaining Power in Contract' [1977] *J Bus L* 312

2 E.g. Terry, 'Freedom from Freedom of Contract' [1975] *N Z L J* 197 at 202, Waddams *The Law of Contract* (1977) at 323. On a more moderate note, some commentators conclude that the development is only suggestive of attitudes and prefer to explain the cases on more familiar grounds. E.g. Trebilcock, 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords' (1976) 26 *U of Toronto L J* 359. Clarke speaks of a 'new willingness to consider' abuses of unequal bargaining power. 'Unequal Bargaining Power in the Law of Contract' (1975) 49 *A L J* 229.

has become the subject of criticism as a means of administering 'justice' at the expense of 'certainty'.

Irrespective of whether 'justice' and 'certainty' are in the first instance opposed or harmonious objectives,[3] unconscionability is now very much a part of Anglo-Australian law. For legislation in England and Australia have in the meantime superseded the notions to varying degrees. In England, the Unfair Contract Terms Act 1977 empowers courts to, inter alia, police the reasonableness of contractual terms. In Australia, the Contracts Review Act 1980 of the state of New South Wales invests courts with a wide discretion to review unfair contracts.

The most important development in Australia is the proposed federal proscription of unconscionability to be introduced in the Trade Practices Act 1974. The exposure draft amendments to this Act has a section prohibiting "unconscionable conduct relating to contracts and proposed contracts". Apart from the implications of the proposed amendment for Australian law, this move will foreseeably influence the fruition of state and territorial initiatives commenced almost a decade ago. For example, in late 1975, the Working Party on Consumer Protection Laws for the Australian Capital Territory (A.C.T.) prepared a Bill for the Law Reform (Harsh and Unconscionable Contracts) Ordinance 1976 which went further than isolated applications of unconscionability such as s.88F of the Industrial Arbitration Act 1940 of New South Wales,[4] s.32 of the now repealed Hire-Purchase Act 1960, also of New South Wales[5] and s.4 of the now repealed Money-lenders' Act 1912-24 of W.A. Although the Bill did not progress beyond the Legislative Assembly,[6] the Consumers' Affairs Council of the A.C.T. decided in May 1980 to further consider the matter and to determine what action if any, should be taken. In South Australia, the Law Reform Committee in its 43rd Report "Relating to Proposed Contracts Legislation" recommended that the law should be altered to enable the courts to review contracts which are unjust and to modify the application of unjust contractual terms in certain circumstances to avoid injustice that may otherwise ensue[7].

3 Tiplady, 'The Judicial Control of Contractual unfairness' (1983) 46 *Modern L R* 601

4 S 88F empowers the New South Wales Industrial Commission to declare a contract void in whole or in part on the ground that it is unfair, harsh or unconscionable, or is against the public interest but only where the contract has an 'industrial colour or flavour' and is one by means of or by the agency of which a person performs work in any industry

5 Trebilcock, 'Reopening Hire Purchase Transactions' (1968) 41 *A L J* 424 The new comprehensive credit legislation of N S W is now made up of the Credit Act, 1984 and six cognate Acts all of which were assented to on 28 June 1984 In Victoria there are the Credit Act 1984 and the Credit (Administration) Act 1984, both assented to on 22 May 1984

6 Further work on the subject will be resumed after the Working Party has perused the report of the first twelve months operation of the N S W Contracts Review Act 1980 Ninth Annual Report of the A C T Consumer Affairs Council and Bureau

7 The committee received its reference following a resolution of the state's Legislative Council that the Contracts Review Bill before it be withdrawn for reference to the Law Reform Committee 'for its report and recommendations regarding the implementation of the Bill and that the Bill be re-drafted to allow for its inter-relationship with other Acts and to take into account its effect on international and currency contracts'

The pages that follow review the state of Anglo-Australian law on unconscionable contracts in greater detail. The first part of the paper looks at equitable developments which may yet have significant residual application. The second part of the paper studies the English and New South Wales legislation as two convenient 'models' for the proposed introduction of a federal notion of unconscionability. The differences in the designs of the Unfair Contract Terms Act 1977 and the Contracts Review Act 1980 justify their treatment as two dissimilar legislative approaches. The Unfair Contract Terms Act 1977 is more specific, detailed and particular. As Lord Diplock observed, "It is a complicated statute. One could almost describe it as a fussy one."[8] The Contracts Review Act 1980 is brief and more general.

Unconscionability in English Law: Origin and Theoretical Basis

The notion of unconscionability in the United Kingdom is developed in the concept of abuse of bargaining power in the three main cases of *Lloyds Bank* v *Bundy*, *Schroeder Music Publishing* v *Macaulay*, and *Clifford Davies* v *WEA Records*. According to its chief proponent, Lord Denning, it has older origins and is a progression of the common theme of relief from unfairness underlying several traditional defences. These include undue influence,[9] duress of goods,[10] unconscionable transaction[11] undue pressure[12] and unfair salvage agreements where, broadly speaking, the abuse of unequal bargaining power was the basis for reopening bargains where exchanges had been made for totally inadequate considerations.[13] The time has come, says Lord Denning, to unite the several established rules into a general principle: "as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall".[14]

It would seem that the traditional defences enumerated by Lord Denning have in the course of becoming accepted doctrines concealed

8 Diplock, 'The Law of Contract in the Eighties' (1981) 15 *U B C L R* 371

9 E g Allcard v Skinner (1887) 36 Ch D 145 (C A) Tate v Williamson (1866) L R 2 Ch App 55, at 61 , Tufton v Sperni [1952] 2 T L R 516

10 As where a party has a strong bargaining position because he has possession of goods obtained by a legal right as a pawn or pledge, e g Astley v Reynolds (1731) 2 Stra 915, 93 E R 939, Green v Duckett (1883) 11 Q B D 275, Pigot's case (1614) 11 Co Rep 26b, 77 E R 1177, Parker v Bristol & Exeter Railway (1851) 6 Exch 702, Steele v Williams (1853) 8 Exch 625, Maskell v Horner [1915] 3 K B 106

11 E g Evans v Lewellin (1787) 1 Cox Eq C 333, 29 E R 1191, 'equitable surprise', Fry v Lane (1888) 40 Ch D 312, 'unfair advantage', Wood v Abrey (1818) 3 Madd 417, 56 E R 558, O'Rorke v Bolingbroke (1877) 2 App Cas 814, at 823 per Lord Hatherley In these cases the contract is invalid

12 E g Ormes v Beadel (1860) 2 Giff 166, at 174, 66 E R 70, D & C Builders v Rees [1965] 3 All E R 837, at 841

13 Lloyds Bank v Bundy [1974] 3 All E R 757, at 765, applied in McKenzie v Bank of Montreal et al (1975) 7 O R (2d) 521, aff'd (1976) 12 O R (2d) 719 (Ont C A) where a bank was held to have taken advantage of a woman's emotional relationship with a man and a wrongful seizure of a car Noted in Carr, 'Inequality of Bargaining Power' (1975) 38 L R 463, Sealy, (1975) 34 *Camb L J* 21, Wooldrige, supra n 1 Clark, 'The Unconscionability Doctrine Viewed from an Irish Perspective' (1980) 31 *No Ire L Q* 114-146

14 [1974] 3 All E R 757, at 763

the notion of unconscionability that threaded them.[15] For example, the notion of unconscionability which underlies undue influence has remained obscured in the chapter of undue influence. And as the specific doctrine of undue influence defined in some detail the types of clauses and contracts that can be set aside, it resisted the development of a general principle of unconscionability. The view was taken that specific doctrines ought not be extended liberally.[16] In equity too was hidden a doctrine of mistake and surprise which prevented a party from 'snapping up an offer' because of unconscionable conduct vis-a-vis the other.[17] Indeed, a general relief from unconscionable transactions was being developed by the Court of Chancery but it scarcely made its mark because it was overshadowed by the specific equitable reliefs granted to certain more common types of unconscionability: in particular, the equitable relief exercised in favour of heirs and expectant heirs.[18] Until *Chesterfield* v *Janssen*,[19] the courts were more willing to consider transactions involving heirs and expectant heirs as being harsh and oppressive.[20]

It is only partly true that unconscionability is derived from the traditional doctrines. For unconscionability has undoubtedly been encouraged by the widespread use of exhorbitant exception clauses and standard form contracts whereas the traditional doctrines have arisen quite independently of them. At most it may be said that exception clauses are merely "penal-

15 They involved a common element of exploiting or trading on the weakness of one of the parties See also Waddams, 'Unconscionability in Contracts' (1976) 39 M L R *369*

16 For example, Sir Eric Sachs (and Cairns L J agreeing) in Lloyds Bank v Bundy was sympathetic with Lord Denning's view of a general doctrine of abuse of bargaining power but preferred to base his decision on the ground of undue influence in a relationship of trust and confidence which was conceded by the bank

17 Hartog v Colin & Shields [1939] 3 All E R 566 is the first reported decision of such a case in relation to sale of goods See generally, W Ashburner, *Principles of Equity* 2nd ed (1933) chap 20, 294-303

18 See Fletcher, 'Review of Unconscionable Transactions' [1973] 1 *Uni Qld L J* 44, Waddams, supra n 15, Lawson, 'The Law Relating to Improvident Bargains' (1973) 24 *No I L Q* 171, Slayton, 'The Unequal Bargain Doctrine Lord Denning in Lloyds Bank v Bundy' (1976) 22 *McGill L J* 94, Winder, 'Undue Influence and Coercion' (1939-40) 3 *M L R* 97, Crawford, 'Restitution — Unconscionable Transaction — Undue Advantage Taken of Inequality between Parties' (1966) 44 *Can Bar Rev* 142, and generally, Wilson, 'Freedom of Contract and Adhesion Contracts' (1965) 14 *Int Comp L Q* 172, Ross-Martyn, 'Unconscionable Bargains' (1971) 121 *New L J* 1159 It is sometimes thought that James v Morgan (1663) 1 Lev 111, 83 E R 323 is the earliest case providing for review of unconscionable bargains in the common law In that case there was a sale of a horse for a barley corn a nail in the horse's shoes, doubling the amount for each successive nail There were 32 nails and the price came to 500 quarters of barley worth £100 The jury at Hyde C J 's urging awarded £8, the value of the horse as damages for breach of contract There is, however, no indication in the brief reports of the facts of the case and the judge's direction that there was any unfair or opprobrious practice in the procurement of the contract Thornborow v Whitacre (1705) 2 Ld Raym 1164, 92 E R 270 (an agreement to deliver an amount of rye which exceeded that in the whole world) — a poorly reported case which was settled out of court has also been regarded as support for James v Morgan, cf in Hume v U S (1889) 132 U S 406 and Chesterfield v Janssen (1751) 2 Ves Sen 125, 28 E R 82, where damages were awarded according to what the courts regarded were the parties' fair entitlement where the contracts were unreasonable and unconscionable

19 (1751) 2 Ves Sen 125, 28 E R 82

20 The other party was required to discharge the onus that there was no unconscionable practice in the procurement of the contract In Wiseman v Beake (1690) 2 Vern 122, 23 E R 688, for example, a transaction entered into by an expectant heir who was an ecclesiastical law practitioner to raise money on promissory notes due on his uncle's death was avoided Although there was no undue pressure or questionable conduct by the other party in the procurement of the agreement, the court held that his urgent need of money was used to get from him the harshest terms possible in return

ty clauses in reverse"[21] and that whereas some of the traditional doctrines deal with "unduly high liquidations", unconscionability deals with "unduly low liquidations".[22] None of the traditional doctrines is concerned with standard form contracts in the same way as unconscionability can have special relevance to them.

It would seem that if unconscionability does in fact deal with the same problem as do the traditional doctrines, these latter doctrines would be quite sufficient. This is demonstrably not the case. In the cases of undue influence typified by *Allcard* v *Skinner*[23] the element of unconscionability lay in disreputable, unconscientious conduct and the assertion of pressure of a very personal kind. Some "unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained" by the guilty party was involved.[24] Thus, to capitalise on a father's fear of the criminal prosecution of his son,[25] to take advantage of one suffering from religious delusions[26] or of the old age and lack of business experience of a party[27] are well known examples. Similarly, in the cases of the vulnerable expectant heirs the advantage taken of their financial embarrassment involved comparable pressure.

In a corporate economy characterised by mass production, transactions are seldom quite so personalised that one party may be said to have gained dominance over the needy or the desperate.[28] Situations of fiduciary or confidential relationships are perhaps even less common in the many situations involving the use of standard form contracts. Here the "trading on the weakness of another" takes the form of a diminished or unreal option in the market, uninformed choice, and the use of the notorious "small-print" clauses to surprise the other party. The subservient or exploited party may be the consumer; the oppressor, usually a business corporation. The element of oppression often arises precisely from the impersonalised and non-individualised means of contracting of which the standard form contract is a classic example.

21 Robophone Facilities v Blank [1966] 3 All E R 128 (C A), at 142, per Lord Diplock "The court has no general jurisdiction to re-form terms of a contract because it thinks them unduly onerous on one of the parties — otherwise we should not be so hard put to find tortuous constructions for exemption clauses which are penalty clauses in reverse", cf his view in Schroeder Music Publishing v Macaulay [1974] 3 All E R 616

22 The expressions are borrowed from Waddams

23 (1887) 36 Ch D 145 (C A)

24 Supra at 181, per Lindley L J , in Union Bank of Australia v Whitelaw [1906] V L R 711, at 720, the court spoke of "the improper use of the 'ascendancy' acquired by one person over another for the benefit of himself or someone else, so that the acts of the person influenced are not, in the fullest sense of the word, his free, voluntary acts"

25 Williams v Bayley [1861-73] All E R 227 (H L)

26 Norton v Relly (1764) 2 Eden 286, 28 E R 908

27 Blomley v Ryan (1957-58) 99 C L R 362, Black v Wilcox (1977) 70 D L R (3d) 192 A sale of land at a serious undervalue was set aside for unconscionability where the vendor knew that the purchaser was suffering from the effects of alcohol and had no independent advice

28 See the personalised nature of the conditions giving rise to undue influence in Williston, *Contracts* Vol 13, 3rd ed para 1625A,

If unconscionability has no strong claim to older origins, it is at least theoretically consonant with the fundamentals of English contract law — it is not opposed to the sanctity of terms and freedom of contract. For these are given a fresh interpretation to accomodate judicial review of an unconscionable contract.

Without denying the basic idea of consensus it is now insisted that the element of agreement must be 'real'. When bargains were more individualised and parties co-determined the terms of their contract it was acceptable to regard the contract as the objective manifestation of the parties' subjective actual agreement to their terms. But in contracts where one party does not negotiate and co-determine the terms with an approximate economic equal, the resultant contract cannot realistically be said to reflect his agreement. The truth of the matter is that if both parties are to have meaningful freedom of contract, the need to refrain from interference must be reconciled with the need to ensure real freedom of contract. For this purpose a distinction is made between freedom to enter into an agreement "freely and voluntarily" and the freedom from intervention once the contract is made.[29] Judicial intervention is said to be necessary precisely for the preservation of freedom of contract that underpins contract law. To put no restriction on the freedom, it is said, will "logically lead . . . to contracts of slavery".[30] In effect then, freedom of contract and sanctity of terms remain as fundamental concepts of contract law.

Unconscionability accordingly focuses on the circumstances and process of contract procurement which affect the free and informed choice of one party. It justifies judicial revision of the substantive unfairness of a contract.

Uncertain Framework and Skeletal Principles

It appears from the three main English cases[31] that there are various kinds of unconscionability and, accordingly, different ways in which unequal bargaining power may be abused. Unequal bargaining power may exist because men are "necessitous" there being an abuse of such power when advantage is taken of their need. *Lloyds Bank* v *Bundy* involved

29 This distinction is valid since the concept of freedom of contract was originally to ensure freedom of action and not to enshrine contracts See also Isaacs 'The Standardising of Contracts (1917) 27 *Yale L J* 34 (freedom of contract is not synonymous with liberty) Meyer 'Contracts of Adhesion and the Doctrine of Fundamental Breach (1964) 50 *Va L Rev* 1178 (freedom of contract protects against interference with the freedom to enter into contracts but not the freedom of enforcement) Wilson supra n 18 Woodridge supra n 1

30 Cohen 'The Basis of Contract (1933) 46 *Harv L Rev* 553 at 586 ' There is the vigilance of the common law which while allowing freedom of contract watches to see that it is not abused' per Lord Denning in John Lee v Railway Executive [1949] 2 All E R 581 at 584 Lord Reid in Smsse Atlantique said 'Freedom of contract must surely imply some choice or room for bargaining' [1967] A C 361 at 406

31 Lloyds Bank v Bundy [1974] 3 All E R 757 Schroeder Music Publishing v Macaulay [1974] 3 All E R 616 and Clifford Davis v W E A Records [1975] 1 All E R 237 see also Carr supra n 13 Slayton supra n 18

an abuse of bargaining power of this kind. Bundy had guaranteed his son's company's overdrafts and executed sizeable charges on his only asset to the bank to borrow money for the son whose company was in dire straits. Bundy had no independent advice and the forms were not left for his consideration. In allowing the appeal on the ground that the contract was unfair and had resulted from the abuse of unequal bargaining power, Lord Denning took into account (i) the fact that the consideration which the bank had supplied was grossly inadequate: the bank did not promise to continue or increase the overdraft. It had merely extended the overdraft for a short period of five months but effectively reduced it by insisting on 10% of incomings going to a second account; (ii) the relationship of trust and confidence which existed between them and that the bank knew Bundy relied on it to advise him on the transaction; and (iii) the bank's awareness that the farm was his only asset and that despite this and the conflict of interests between them, the bank had traded on his weakness by allowing him to charge to his ruin without independent advice.[32]

A more 'economic' instance of abuse of bargaining power is where a party exploits his superior market power by the use of standard form contracts. Here, standard form contracts are seen to be the result of the concentration of particular kinds of businesses in relatively few hands. Unless, it is said, they are the result of extensive prior negotiations by representatives of the commercial interests involved and are adopted because experience has shown that they facilitate the conduct of trade and where the parties' bargaining powers are fairly matched, they are unconscionable. For they are dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: "If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it". When a party is in a position to adopt such an attitude, it is a "classic instance of superior bargaining power".[33]

The English ticket cases in the nineteenth century, it is said, were probably the first examples. The restraint of trade agreements in *Schroeder Music Publishing* v *Macaulay*[34] and *Clifford Davies* v *W.E.A. Records*[35] are more recent instances. In both cases, exceedingly lop-sided agreements were entered into between individual songwriters and publishers. The

32 An alternative ground of decision was the breach of a fiduciary relation owed by the Bank to Bundy This comes within the second class of undue influence described by Cotton L J in Allcard v Skinner where the court intervenes "not on the ground that any wrongful act has in fact been committed by the donee but on the ground of public policy and to prevent the relations which existed between the parties and the influence arising therefrom being abused" The other judges based their decisions on this ground too See the conservative approach by Cairns L J in Mountford v Scott [1975] 1 All E R 198, at 202, *cf* McVeigh J in Buckley v Irwin [1968] N I 98

33 Schroeder Music Publishing v Macaulay [1974] 3 All E R 616, at p 624

34 [1974] 3 All E R 616

35 [1975] 1 All E R 237

songwriters were bound to assign to the publishers for a period of five years (which could be extended by the publishers to ten years) the world copyright in all compositions during and before the term of the contract. Royalties were payable for songs published or recorded but the publishers were not bound to exploit the works. The songwriters were not to engage in publishing work. The contracts were set aside on the ground that the bargains were unfair[36] with Lord Diplock observing in the first case that

> what your lordships have in fact been doing has been to assess the relative bargaining power of the publisher and the songwriter at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the songwriter promises that were unfairly onerous.[37]

The contracts were unconscionable because they were not the subject of negotiation between the parties. The policy, Lord Diplock explained, is to protect weaker parties from being forced into unfair bargains by those who are in stronger bargaining positions.

A difficulty with this type of abuse of bargaining power relates to how superior market power is determined. It seems to be presumed in Lord Diplock's discussion of standard form contracts that the use of consumer standard form contracts is *per se* the result of the concentration of market power. The sweep of such a suggestion is grossly misleading for it takes a linear view of standard form contracts. Thus it has been severely criticised as being "entirely without factual foundation".[38] Perhaps Lord Diplock did not intend to assert categorically that their use is invariably the result of the concentration of market power. His emphasis on bargaining power in standard form contracts had been in reply to the

36 It was assumed by the House of Lords that the agreement was in restraint of trade Under the accepted law a restraint is void unless it is compatible with public interest and is reasonable between the parties The leading case in the nineteenth century on these tests was Nordenfelt v Maxim Nordenfelt Guns & Ammunition [1894] A C 535, see also Herbert Morris v Saxelby [1916] 1 A C 688, at 707, a different approach was adopted in Jacobs v Bills [1967] N Z L R 249, at 252-253, Peeters v Schimanski [1975] 2 N Z L R 328, at 335

37 [1974] 3 All ER 616, at 623 It is quite clear that the test of restraint of trade is now the fairness of the contract "the test of fairness is, no doubt whether the restrictions are both reasonable, necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract" Lord Diplock's approach is wider than even Lord Pearce's comment in Esso Petroleum v Harper's Garage (Stourport) [1969] A C 269 (H L), at 324, that the two traditional questions are not separate but there is "one broad question — is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable and enforceable"

38 Trebilcock, supra n 2 According to him the real measure of choice is whether a consumer has available to him a workably competitive range of alternative sources of supply and not the commonality of terms which may be expected even in a perfectly competitive market where the product is homogenous and every supplier 'takes' his price and other terms from the market At the same time the presence of dickering between the parties is not necessarily assurance of competition because dickering may be a reflection of a monopolistic attempt to price discriminate among customers

contention that because the contract was a standard form one used by the performer in every case, it was fair and reasonable.[39]

It seems possible that even in the absence of any concentration of market power, there may be unequal bargaining power as where through the operation of competition, producers take their terms from the market so that effectively there is one price in a choice- or competition-diminished market. This may seem like a result flowing from the use of standard form contracts by a significant number of producers and was the thrust of Lord Reid's decision in *Schroeder Music Publishing* v *Macaulay*. Instead of discussing market power and the alternatives available from other suppliers, he merely looked to the presence or absence of negotiation between the parties to the contract. The agreement, he observed, was not "made freely by parties bargaining on equal terms" or "moulded under the pressures of negotiation, competition and public opinion"; and such evidence as there was, was inadequate to justify the bargain.[40]

Other suggestions of abuse of bargaining power include the situation where an offeror has had the advantage of time and advice to draw up a contract which the other has little or no opportunity to examine or would not have understood it in any case. In *Clifford Davies* v *W.E.A. Records*, for instance, Lord Denning M.R. inferred from the cyclostyled contract which was very long and full of legal terms and phrases, that it was drawn up by lawyers and the manager had taken a stock form, got the blanks filled in and asked the composer to sign it without reading it through or explaining it. There may also be abuse of unequal bargaining power where a party by virtue of his official position or public profession can exact more than what is justly due.

The cases so far require that the abuse of unequal bargaining power be quite substantial before it justifies intervention. A party's bargaining power must be "grievously impaired".[41] Advantage must also have been taken of one's bargaining power to procure a contract which is

39 It may also have been that the English ticket cases of the nineteenth century which Lord Diplock thought were the first examples of such a phenomenon were very much in his mind when he generalised on the characteristics of objectionable standard form contracts His observations reflect the condition of the English railway industry at that time when the superior bargaining power of the railway companies was undoubtedly typified by a 'take it or leave it' attitude In England the economic strength of the four main line railway companies in 1937 was reflected in the report by the Ministry of Transport of their refusal to accept liability for accidents to passengers travelling by train with the cheap daily tickets which constituted a high proportion in the number of their contracts The bias of the common law in those cases in favour of the railway companies had undoubtedly also contributed much to their strength 14 April, 1938 Hansard Vol 334, Col 1129, Sales, 'Standard Form Contracts' (1953) 16 *M L R* 318 In G N Railway v L E P Transport and Depository (1922) 127 L T 664, 670, Scrutton L J noted the strength of these companies For example in McManus v Lancashire & Yorkshire Railway (1859) 4 H & N 327, at 346, 157 E R 865, Erle J said that the railway companies were as much in need of every aid law can afford as customers of railways were in need of protection on account of their incapacity to resist oppression Thus a person who entered into a standard form contract, the terms of which were all specifically brought to his notice, was bound even if he objected to them Walker v York & North Midland Railway (1853) 2El & Bl 750, 118 E R 948, Eric Gnapp v Petroleum Board [1949] 1 All E R 980, Thompson v L M S Railway (1930) 1 K B 41

40 [1974] 3 All E R 616, at 623

41 Lloyds Bank v Bundy [1974] 3 All E R 757, at 765

"unreasonable and not in accordance with the ordinary rules of fair dealing".[42]

The abuse of unequal bargaining power is clearly only the justification for judges to revise bargains. The subject of revision is an unfair or lopsided bargain or harsh terms. Harsh terms alone will not justify review: "No bargain will be upset which is the result of the ordinary interplay of forces".[43] What will be considered the "ordinary interplay of forces" is unclear. In extreme cases neither independent advice nor an understanding of the transaction would prevent a contract from being impugned. Those who willingly but foolishly undertake onerous contractual obligations[44] may also be protected. How severely imbalanced a contract or how harsh a term must be before a court will review it and its relation to the abuse of unequal bargaining power needed to justify the review, are matters for speculation.

'Unconscionable' Contracts in Australian Law

There is no paralell development of a notion of unconscionability in Australian contract law. On the contrary, Australian courts have, in the past, been disinclined to review contracts and will not liberally find an abuse of bargaining power to justify relieving a party from a harsh transaction. In *The South Australian Railways Commissioner* v *Egan*,[45] for example, the court noted the exceedingly unbalanced nature of the standard form contract but declined to infer from the form and circumstances of the contract any abuse of bargaining power. Menzies J. deplored the "outrageous" "most wordy, obscure and oppressive contract" he has come across in which "not one oppressive provision which could be found was omitted". For instance, clause 32 entitled "Settlement of Disputes" had about 700 words to the effect that any dispute was to be referred to and decided, finally and conclusively by the chief engineer for Railways. But he would not grant relief:

> The contract is so outrageous that it is surprising that any contractor would undertake work for the Railways Commissioner upon its terms. It is, of course, a contract to which the doctrine of contra

42 Samuel v Newbold [1906] A C 461, per Lord Macnaughten at 470, the court gave relief under the Money-Lenders Act 1900 to cases beyond those to which the Court of Chancery would have granted relief before it *The Port Caledonia and The Anna* [1903] P 134, the towage contract was "inequitable, extortionate and unreasonable"

43 Lloyds Bank v Bundy [1974] 3 All E R 757, at 763

44 *Contra* no relief from "voluntary foolish bargains" was granted under the earlier doctrines Pawlett v Pleydell (1679) 79 Selden Soc 739, where although the terms were onerous there was no evidence that the lenders had acted unconscionably Besides, the court noted, the plaintiff had agreed voluntarily Batty v Lloyd (1682) 1 Vern 141, 23 E R 374 a loan of £350 to be repaid double after the death of two relatives (which happened within two years of the loan) was a normal business risk

45 (1973) 47 A L J R 140

> proferentem applies. The employment of such a contract tempts judges to go outside their function and attempt to relieve against the harshness of, rather than give effect to, what has been agreed by the parties. Courts search for justice but it is justice according to law; it is still true that hard cases tend to make bad law.[46]

'Justice' was done only where established principles of law or equity were available. In *Blomley* v *Ryan*,[47] specific performance of an unconscionable and unfair agreement to purchase grazing land was disallowed on "principles which do not differ in substance from those applied in *Clark* v *Malpas*, and *Fry* v *Lane* . . .".

This has not, however, always been the case. Some forty-five years earlier a promising Tasmanian case was decided in a manner very similar to *Lloyds Bank* v *Bundy*. That was *Harrison* v *National Bank of Australasia*[48] which seemed to have been largely overlooked. A 67-year old woman without legal advice gave a bank security over land to help her son-in-law in a business venture. Although she was inexperienced in business matters, she knew she would lose her property if the business failed. Crisp J. held that she was not bound to the agreement which had been entered into without due deliberation, independent advice and knowledge of its true effect.[49] Although the decision could, as was done in *Lloyds Bank* v *Bundy*, be explained on the well settled principle of a breach of fiduciary relationship between the bank and the woman, it is apparent that the judge had construed the facts with the aim of granting relief from the transaction.

In two subsequent cases, the courts seemed prepared to consider harsh and unconscionable practices. Windeyer J. in *TNT* v *May & Baker*[50] touched on the justice of enforcing a contract according to its terms where there is inequality between the parties. In the High Court of Australia decision in *H. & E. Van Der Sterren* v *Cibernetics*,[51] Walsh J. (with whom Barwick C.J. and Kitto J. agreed), found for the proferens of an exception clause stressing that the contract was freely entered into by two informed parties.

46 At 141 See also Gibbs J , "Provisions such as those contained in the contract under consideration find little favour in modern eyes, but we are required to give them their legal effect and are not to be deflected from that course because they appear unfair and one-sided", at 148

47 (1958) 99 C L R 362, at 404-405 See also Forrestry Commission of N S W v Stefanetto (1976) 8 A L R 297 where if the challenge had to be met, the court seemed only prepared to consider the ambit of the doctrines of equity in relief against forfeitures and penalties

48 (1928) 23 Tas L R 1

49 (1928) 23 Tas L R 1 at 8

50 (1966) 115 C L R 353, at 373

51 (1970) 44 A L J R 157

The most recent development is the High Court's endorsement of the equitable doctrine of unconscionability as stated in *Blomley* v *Ryan*. In *The Commercial Bank of Australia* v *Amadio*[52] all the members of the High Court applied or expressed views on the doctrine which illustrate the potential controversy over its scope.

There is general agreement that unconscionability is distinct from but not mutually exclusive with undue influence. "Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so".[53] In contrast, undue influence looks to the quality of a party's consent: the will of the innocent party being overborne is not independent and voluntary.[54]

There is also agreement among the judges that unconscionability may be invoked whenever one party "by reason of some condition or circumstance is placed at a special disadvantage vis-a-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created."[55] The *special* disability or special disadvantage must be one which seriously affects the innocent party's ability to make a judgement as to his own best interest and the other party knows or ought to have known of the existence of that condition or circumstance and of its effect on the innocent party.

The circumstances that may amount to a special disability are "not susceptible to being comprehensively catalogued". But the principle does not apply "whenever there is some difference in the bargaining power of the parties". However, as "times have changed new situations have arisen in which it may be appropriate to invoke [it]"[56]; such as the "entry into a standard form of contract dictated by a party whose bargaining power is greatly superior". There is less agreement, however, on what constitutes that crucial condition, circumstance or state of affairs.

In the case before the High Court, an old Italian couple with little education and a "limited grasp of written English" signed a "memorandum of mortgage" presented for immediate signature without independent advice and under a serious misapprehension of the effect of the document. The memorandum contained a mortgage of a property they owned to secure the existing and future indebtedness of their son's company, Amadio Builders, and a personal guarantee, unlimited as to amount or time, to pay the whole of any such indebtedness on demand. The couple

52 (1983) 46 A L R 402
53 per Deane J at 423, Dawson J , at 434-5 describes it in similar terms
54 per Deane J
55 per Deane J at 428 Cf Lloyds Bank v Bundy [1975] 1 Q B 326 at 337
56 per Mason J at 413

had been misled by their son's express misrepresentation just a few hours before the execution of the document into believing that their liability was for 6 months for up to $50,000. Neither the complicated and lengthy document, save on the point of the unlimited duration of their liability, nor the grave financial difficulties of the son was explained to them. They were not even provided with a copy of the mortgage/guarantee. Contrary to the couple's belief in the son's ostensible wealth, the son's company, Amadio Builders, was on the brink of insolvency. The bank which was concerned that its most important customer should survive its "liquidity crisis" had been actively involved in its selective dishonour of cheques for the purpose of maintaining a facade of prosperity. A wholly-owned subsidiary of the bank was in a joint venture with Amadio Builders and another company controlled by the son. Under the arrangement between the bank and Amadio Builders for which the mortgage/guarantee was needed, the latter was given "merely a temporary respite" whereas the bank improved its existing and inadequate security. At the presentation of the documents for signature, the bank's manager had reason to believe that the couple did not understand the extent of their commitment but did not explain the "complicated and lengthy document".

Gibbs C.J. held that the mortgage and guarantee were not binding because of the bank's misrepresentation (albeit unintended) in failing to disclose material facts not naturally to be expected to take place between the bank and the company. Although on the authority of *Hamilton* v *Watson*, the bank was not obliged to disclose matters pertaining to the credit of the company, it should have disclosed that the company was given only a temporary respite whereas the bank improved its existing and inadequate security and that it was a party to the selective dishonour of cheques to maintain an appearance of prosperity. These unusual circumstances of the transaction between it and the son had the effect that "the position of the customer is different from that which the surety would naturally expect, particularly if it affects the nature or degree of the surety's responsibility."

On the question of an unconscionable dealing Gibbs C.J. considered this was plainly not a case of unconscionable bargain which will be set aside in equity. The guarantors were not poor even in the expanded sense of a member of a lower income group. Nor were they under any disability. And in the absence of the bank's failure to disclose, it had made no unfair use of its position.

But it was equally plain to Deane, Wilson and Mason JJ. that the guarantors were under overwhelming disabilities which prevented them from making a judgement in their own interests. There was "gross inequality" of bargaining power between the parties. The guarantors were

disadvantaged because of their reliance on and confidence in their son, their infirmities, age, limited command of the language and the lack of business experience in the field or at the level in which their son and the company were engaged. And the bank, having actual knowledge of their special disadvantage, took unfair advantage of its own superior bargaining power. It should have disclosed the facts which would enable them to form a judgement for themselves and ensured that they obtained independent advice. This "major national financial institution" was afterall not a disinterested party in securing the mortgage and was in an "unusual relationship" with the son's company. It was privy to the business affairs and financial instability of the company and had in the first place suggested the mortgage in question. There was, however, no "dishonesty or moral obliguity" on the part of the bank's affairs.[57]

Throughout their judgments the majority of the High Court stressed the unconscientious conduct of the bank in not ensuring that the guarantors could make an informed decision in their own interest. Little was said about the lop-sided bargain which the English and American courts ultimately seek to adjust on the ground that it was procured by unconscientious conduct. Deane J. thought that inadequacy of consideration from the stronger party was not essential; a transaction may be unfair, unreasonable, or unjust from the viewpoint of the party under the disability. This view departs from, for example, *Lloyds Bank* v *Bundy* if it suggests that a substantively unfair transaction is unnecessary. Even then the departure may not be quite so significant because according to Deane J., upon the establishment of a prima facie case of unconscionability, the onus is on the stronger party to show that the transaction was fair, just and reasonable. If such onus is discharged by showing that the transaction is substantively fair and reasonable, 'substantive' unconscionability is as much a component of the equitable doctrine as 'procedural' unconscionability. It may be that an inadequate consideration moving *from* the stronger party *to* the other party, rather than inadequate consideration per se, is not a pre-requisite. In which case, a party under the disability who is a guarantor or surety may have relief on the ground of unconscionability so long as the transaction to be impugned is substantively harsh having due regard to the inadequate consideration moving from the bank to the principal debtor.

It is possible to explain the majority decision in the *Amadio case* on the basis of a tougher stand taken by judges on the procurement of further security for heavy present indebtedness. But it would be difficult to confine the application of unconscionability to such instances. The circumstances

57 Deane, Mason, Wilson JJ , Dawson J dissenting at 7 A bank not guilty of a breach of its limited duty to disclose may nonetheless be considered to have engaged in unconscionable conduct, per Mason J at 15

of special disability, we are warned, not being susceptible of comprehensive catalogue, clearly anticipate a larger role for the doctrine. It would be equally difficult and unpersuasive to restrict its application to the banker-guarantor-principal debtor tri-partite scenario or to regard it merely as another expression of an expanded duty of disclosure on the part of banks. As Mason J. puts it, a bank not guilty of a breach of its limited duty of disclosure may nonetheless have engaged in unconscionable conduct. Gibbs C.J. quite clearly entertained a notion of unconscionability separate from the duty to disclose.

Unconscionability does pose serious problems for banks. It has the effect, in practice, of imposing a considerably higher duty of disclosure — a duty which may well bring them into conflict with their duty of confidentiality to their customers. The potentially devastating consequences of unconscionability require that parties such as banks should be able to confidently rely on any necessary disclosure of the principal debtor's financial position and the insistence on independent legal advice to guarantors as sufficient to disprove unconscientious conduct. Independent legal advice ought to be the 'bottom line' criterion of conscientious conduct. Regretably the High Court did not particularly address itself to the issue of independent legal advice. Indeed if its endorsement of *Lloyds Bank* v *Bundy* is without exception, Lord Denning's caution that in some cases, whatever they may be, even independent legal advice will not suffice, is ominous.

Legislation in the United Kingdom: the Unfair Contract Terms Act 1977

The Unfair Contract Terms Act 1977 requires courts to deliberate on the reasonableness of certain contract terms. Although the Act is not concerned with a general principle of fairness, it may be said that there is in English law a general statutory concept of fairness, however, proscribed.[58] It is primarily aimed at controlling excessive exception

58 There is ample discussion of the U C T A see generally Beale, 'Unfair Contract terms Act 1977' [1978] 5 *Br J L & Soc* 114, Coote, 'Unfair Contract Terms Act 1977' (1978) 41 *M L R* 312, Goldsworth, 'Unfair Contract Terms Act 1977' (1977) 127 *New L J* 1207, Haycroft, 'The Unfair Contract Terms Act 1977 Some Practical Aspects' (1978) 128 *New L J* 176, Melville, 'Fundamental Breach after the Unfair Contract Terms Act' (1978) 128 *New L J* 127, Samuels, 'Unfair Contract Terms Act 1977' (1977) 121 *Sol J* 734, Sealy, 'Unfair Contract Terms Act 1977' (1978) 37 *Camb L J* 15, Tillotson, 'Exclusion Clauses, Consumer Protection and Business Reasonableness the Unfair Contract Terms Act 1977' (1978) 12 *J of the Association of Law Teachers* 11, Lowe, 'New Weapons for the Consumer' (1978) *Legal Action Group Bulletin* 16, Clarke, 'Contract — Notice of Terms' (1978) 37 *Camb L J* 15, Males, 'Fundamental Breach — Burden of Proof — Reasonableness' (1978) 37 *Camb L J* 24, Borrie, 'Legislative and Administrative Controls over Standard Forms of Contract in England' [1978] *J Bus L* 319, Luecke, 'Exclusion Clauses and Freedom of Contract Judicial and Legislative Reactions' (1977) 51 *A L J* 532, Kerr, 'Unfair Contract Terms Act and the Consumer' (1978) 29 *No Ire L Q* 190, Adams, 'Optimistic Look at the Contract Provisions of Unfair Contract Terms Act 1977' (1978) 41 M L R 703, P K Thompson *Unfair Contract Terms Act 1977* (1978), D Yates, *Exclusion Clauses in Contracts*, (1978) chaps 3 and 4, R Lawson *Exclusion Clauses after the Unfair Contract Terms Act* (1978) chap 6, G H Treitel *The Law of Contract* 5th ed (19) chap 7, A G Guest (ed) *Anson's Law of Contract* 25th (centenary) ed , (19) J Mickleburgh *Consumer Protection* (1979) chap 13, Palmer, 'Exclusion of Liability under Non-Contractual Bailments and Unfair Contract Terms Act' (1978) 128 *New L J* 887, 915, Walmsley, 'Unfair Contract Terms Act 1977 — Do You Realise the Implications?' 8 *Prof Admin* 20, Clarke, 'Unfair Contract Terms Act 1977 — a Revolution in the Law of Contract' [1978] *S L T* 26, Reynolds, 'The Unfair Contract Terms Act 1977' [1978] *Ll 's M C L Q* 201, Murdoch, 'Exclusion Clauses The New Law' (1978) 248 *Estates Gazette* 393, 'Mistatement and the Unfair Contract Terms Act 1977' (1979) 129 *New L J* 4, Note 'Exemption Clauses in Contracts' (1971) 121 *New L J* 873

clauses — to "impose further limits" on the extent to which civil liability for breach of contract or for negligence or other breach of duty can be avoided by means of contract terms and otherwise.[59] It is not confined to contracts and it is not concerned with the fairness of contract terms in general. Its targets are the exclusions and restrictions of contractual and tortious liability by means of "any contract term" and a "contract term or notice" respectively.

The U.C.T.A. seeks to achieve its aim in three main ways. First, it repeals the statement in the *Harbutt's Plasticine Case*. Strictly speaking, s.9 of the U.T.C.A. expressly repeals the reasoning in that case (to the effect that a discharge by breach terminates a contract) only in cases where the clause in question is subject to the criterion of reasonableness.[60] This anomaly was, however, indirectly corrected when the House of Lords in *Photo Production* v *Securicor Transport* rejected the same rule.

Second, it protects the private rights of particular contracting parties and entrenches them as 'inalienable' rights by nullifying any attempt to contract out of them. It distinguishes between consumer and non-consumer contracts and bolsters the bargaining strength of consumers on the assumption that the other party is a better distributor of loss. But these controls in cases of sale of goods, hire-purchase and misrepresentation in the U.C.T.A. are mainly restatements with occasional extensions of the existing law as found in the former Sale of Goods Act 1893,[61] the Supply of Goods (Implied Terms) Act 1973 and the Misrepresentation Act 1967.[62]

Finally it permits the exclusion or restriction of other clauses only if they are reasonable. It invests in the courts a discretion to police them under a broad statutory standard wherein lies the notion of unconscionability.

59 Preamble of the U C T A

60 E g ss 4, 6(3) and 7(3) Tettenborn, 'Fundamental Breach a Rule Abolished' (1978) 122 Sol J 720

61 Now the Sale of Goods Act 1979

62 S 6 of the U C T A is illustrative of the modern growth of consumer protection It bans the exclusion and limitation of responsibility for title, correspondence with description, merchantable quality and fitness for purpose in consumer sales Under the common law there was no general inexcludable implied term as to the quality of goods Caveat emptor prevailed Barr v Gibson (1838) 150 E R 1196 The Law was codified in ss 13 and 14 of the Sales of Goods Act 1893 In all contracts for the sale of goods, a term may be implied in respect of the seller's undertaking that the goods correspond with their description or sample, that the goods are fit for their stated purposes and that they are of a merchantable quality only in the absence of contrary evidence The rationale was that the parties were free to determine their own rights and liabilities Chalmers, 'Codification of Mercantile Law' (1903) 19 *L Q Rev* 10 In 1973 the Supply of Goods (Implied Terms) Act redrafted ss 13, 14 and 15 of the 1893 Act and created 'inalienable' rights in consumer sales which are restated in s 6(2)(a) of the U C T A A buyer from a private seller is, however, only protected to the same extent as a buyer in a commercial sale since he does not "deal as a consumer" In any event the control is dependent on there being a statutorily implied condition before the issue of an acceptable exclusion or restriction clause arises For instance, the implied condition as to merchantable quality and fitness for a particular purpose only arises when the supplier acts in the course of a business and a private seller would not be subject to the implied condition And where the private seller chooses to undertake express conditions the U C T A does not prevent him from restricting liability for breach of an express, as opposed to an implied undertaking

Reasonableness

Non-consumer contracts generally[63] are subject to a requirement of reasonableness which is basically a modified derivation from corresponding provisions in the previous legislation. In s.6(3) of the U.C.T.A. the previous law in s.55(4) of the 1893 Act (inserted in 1973) is restated with two differences.

First, unlike the 1893 Act, a clause is no longer assumed under the U.C.T.A. to be reasonable until proven otherwise. The onus is on the party relying on the clause to show that it is fair and reasonable.[64] There is, however, no change in the guidelines for the test of reasonableness under the U.C.T.A. from those set out in s.55(5) of the 1893 Act. To decide if a particular clause is reasonable, a court is to consider the guidelines in Schedule 2 of the U.C.T.A. They include the relative bargaining positions of the parties, the availability of alternatives, the parties' knowledge, the reasonableness of the time for complaints, whether it was the acquirer who stipulated the specification of the goods to be manufactured, all the circumstances especially the exact knowledge, actual or implied, that the buyer had of the extent of the term, and whether the buyer had a choice of adopting the contract with or without the exception clause. Schedule 2, however, specifically applies to only certain provisions of the U.C.T.A.[65]

Where the court has to decide on the reasonableness of a contract term or notice which seeks to restrict liability to a 'specified sum' of money, it must consider the resources which the proponent of the clause could expect to be available to meet the liability and the availability of insurance.[66] Underlying this provision is a search for the visibly acceptable risk absorber.

Apart from the foregoing provisions there is no other general test of reasonableness or guideline. Presumably, the guidelines in Schedule 2 are neither exhaustive in scope nor exclusive in application and will be freely resorted to for analogies. The Law Commission in its Second Report felt that all circumstances of the case should be interpreted widely, the object of the reasonableness test being that the court should have regard not merely to the terms of the exception clause or of the relevant contract but that it should take account of the "commercial and social realities of the situation". Commenting on the U.C.T.A., Lord Diplock said, ". . . in this field of law the test of reasonableness will be an extension of the test that the courts have hitherto applied in determining whether

63 Reasonableness may be applied to ss 2(2), 3, 4, 6(3), 7(3) and (4), and 8
64 S 11(5)
65 Ss 6(3), 7(3) and (4), 20 and 21
66 S 11(4)

a liquidated damage clause is enforceable or not (the obverse of the test of unconscionable bargain)."[67]

Second, s.55(4) of the 1893 Act provided that any clause attempting to exclude the stated matters (i.e. ss.13-15 of the 1893 Act) "shall not be enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term".[68] The U.C.T.A. now requires the reasonableness of the clause to be determined at the time when the contract is made.[69] Only the circumstances which were, or ought reasonably to have been known to or in the contemplation of the parties when the contract was made are to be considered. It is thought that to take into account later events would be to change the rules of the game.[70] It is also anticipated that the reasonableness test is inherently uncertain and by stipulating the time at which the test applies, uncertainty can be mitigated. The result is that any unreasonableness that flows from the operation of a term in the circumstances of a case does not make the term objectionable if it was *per se* reasonable at the time the contract was made. The court is specifically prohibited from considering the nature of the breach.[71] A court may therefore find a disputed term unreasonable if the parties were relatively unequal in bargaining power and the performer had virtually dictated the terms; but it may not disallow a term which is on its face reasonable but which becomes unreasonable in operation when, say, the performer wilfully breaches the contract because it is in his interest to do so. Nor would the buyer in *Rasbora* v *J.C.L. Marine*[72] be able to succeed in his claim on the ground that if the exception clause were to apply he "would be left without any remedy at all". That was the case where D contracted to build a boat for the buyer and limited his liability to replacement and repair of faulty materials and workmanship. Lawson J. held that D appreciated that defective design was likely to cause a fire and was by reason of such negligence guilty of a fundamental breach. It was therefore not fair or reasonable to allow reliance on the exception clause under s.55(4) of the Sale of Goods

67 Supra n 8 In Walker v Boyle [1982] 1 All ER 634, a term in a contract for the sale of land provided that errors, mistatements or omissions in answer to preliminary inquiry was not to annul the sale The reasonableness of the term was not established

68 Similar rules are applicable to hire-purchase transactions by virtue of the Supply of Goods (Implied Terms) Act 1973, s 12, as amended by the Consumer Credit Act 1974, s 182(3)(a) and Sch 4, para 35 George Mitchell v Finney Seeds Ltd [1982] 3 W L R 1036

69 S 6(3) together with s 11(1) U C T A , *contra* s 11(3) U C T A which deals with non-contractual notices S 8 of the U C T A which is substituted for s 3 of the Misrepresentation Act 1967 also requires the reasonableness of the clause to be determined at the time when the contract is made The previous law in s 3 of the Misrepresentation Act 1967 provided that any attempt to exclude or restrict liability for misrepresentation was of "no effect except to the extent (if any) that the court may allow reliance on it as being fair and reasonable in the circumstances of the case"

70 The views of the Scottish Law Commission prevailed over those of its English counterpart

71 S 1(4)

72 [1977] 1 Ll L R 645, Schofield, 'Consumer Sales and Credit Transactions' [1977] *J Bus L* 349

(Implied Terms) Act 1973 especially when the boat, by reason of D's defective workmanship, was destroyed just over a day after it was delivered.

Reasonableness under the U.C.T.A. seems to be different from the equitable notion of unconscionability as well as the comparable American doctrine in two respects. The U.C.T.A. speaks of the reasonableness of the clause in question, not the reasonableness of the transaction as in s.2:302 of the Uniform Commercial Code which requires the transaction to be substantially unfair too. Clauses and not transactions are regulated by the U.C.T.A. Several types of clauses are specifically regulated to different degrees. They include those which make a party's liability or its enforcement subject to "restrictive or onerous conditions",[73] exclude or restrict any right or remedy in respect of liability or subject a person to "any such prejudice in consequence of his pursuing any such right or remedy",[74] and clauses which subvert the rules of evidence or procedure.[75] Clauses which exclude or restrict liability by the exclusion and restriction of the duty of reasonable care and skill[76] and certain duties relating to the sale and supply of goods[77] are also monitored by the U.C.T.A. Other clauses include those which give a performer the choice to render a "substantially different" performance from that which the other party can reasonably expect,[78] clauses which purport to excuse non-performance of a part or whole of a contract, excepted perils clause, and indemnity clauses which pass to the other party the loss occassioned by a party's breach in respect of that other party or a third party.[79] A supportive provision which prevents evasion by means of a secondary contract is intended to ensure effective control.[80]

It is, however, open to question if courts will in practice, even if they can, decide on the reasonableness of a clause alone without regard for the rest of the contract. The other difference is that reasonableness under the U.C.T.A. does not seem to take into consideration or deal with the more subjective and personal inadequacies of the individual as do the

73 S 13(1)(a), e g an onerous prcedure for complaints as a condition of acceptance

74 S 13(1)(b), s 8, e g a requirement that the buyer indemnifies the seller for his own breach

75 S 13(1)(c), e g a clause that the buyer had satisfied himself that the performance of the goods delivered were in order would make evidence to the contrary inadmissable Under the common law such a clause has been held to have no legal effect as a contract term or a representation creating an estoppel Lowe v Lombank [1960] 1 All E R 611

76 S 2

77 Ss 5, 6 and 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty See also the concluding words of s 13(1)(c) A preliminary question which a court has to answer in every case is whether a clause excludes liability via the exclusion of duty or prevents the duty from arising in the first place It is likely that the court will go behind the facade of the words employed and determine if the clause was one or the other This would be in keeping with the spirit of the U C T A

78 S 3(2)(b)(i)

79 S 4 Written agreements to arbitrate are not regarded as exclusions or restrictions within s 13 Genuine agreed damages clauses are probably not affected by the U C T A but, foreseeably, their validity will be subject to scrutiny

80 S 10

notions of unconscionability in s.2:302 of the U.C.C. and in equity. It employs the objective standard of the 'average' and reasonable contractor.

But reasonableness may have no application at all even in the circumstances delineated by the U.C.T.A. This is simply because, in the words of the Law Commission,

> Clearly any attempt to rely on an exception clause can only succeed if the exemption in question was intended to apply in the situation that has in fact arisen. If it does not apply it cannot be relied upon, and no control over the exemption clause is needed in that case. Only if the exemption clause is wide enough to apply to the breach that has taken place is it necessary to bring into play a control by a reasonable test.[81]

The Law Commission's point is plain: the ambit of a clause must be wide enough to apply to the facts in question before the need to control it arises. Clarity would have been achieved by requiring courts to adopt the natural and ordinary meaning of words before subjecting the clause to a test of reasonableness. Instead, the rule of construction in *U.G.S. Finance* v *National Mortgage Bank of Greece*[82] was specifically retained. Fundamental breach in *Suisse Atlantique* and as reaffirmed recently by *Photo Production* v *Securicor Transport* continues to apply in principle by virtue of it being a rule of construction. As the law stands, according to how the courts will find that a clause is 'intended' to apply, the 'rule of construction' in *Suisse Atlantique* may be used effectively with far-reaching results beyond that intended by the Law Commission. Since in *Photo Production* v *Securicor Transport* Lords Diplock and Wilberforce recognised reasonableness as an aid to construction,[83] it can be embarrassingly easy to find that an exception clause was not intended to extend to a wilful or even reckless breach (for instance on the ground that it would be unreasonable to assume otherwise or because a clause which *prima facie* seeks to do that is unreasonable) and thus to do away completely with the need to apply the statutory standard of reasonableness. Contracts which have not been procured in objectionable circumstances may yet be reviewed by a court in the manner just described.

Some of the most complicated applications of reasonableness must be in relation to the three types of clauses in s. 3 of the U.C.T.A. These are (i) clauses by which a performer excludes or restricts any of his liability in respect of his own breach of contract (thus including even strict liability

81 *Second Report on Exemption Clauses*, Law Com No 89, Scot Law Com No 39, para 205
82 [1964] 1 Ll L R 446
83 [1980] 2 W L R 283 (H L), at 296, 296-297

for breach of contract), (ii) those by reference to which a party claims to be entitled to render a contractual performance substantially different from that which is reasonably expected of him, and (iii) those by which a party claims to be entitled to render no performance at all in respect of the whole or any part of his contractual obligation.

The first type of clause presupposes that notwithstanding the clause a contractual obligation has been undertaken and it protects a party from aspects of that liability. The second type is more involved. An example of it is found in *Anglo-Continental Holidays* v *Typaldos Line*.[84] The defendants who were travel agents, agreed to book for the plaintiffs, who were also travel agents, cruises on a named ship following a fixed itinerary. The agreement was subject to the following clause:

> "Steamers, Sailing Dates, Rates and Itineraries are subject to change without prior notice."

Relying on this clause, the defendants offered the plaintiffs cruises on a different ship following a different itinerary. The substituted ship was inferior to the ship originally named and from the plaintiffs' point of view the new itinerary was inferior to the original. In the Court of Appeal, Lord Denning M.R. doubted if the clause relied upon by the defendants formed part of the contract; but, on the assumption that it did, he held that the defendants could not "rely on a clause of this kind so as to alter the substance of the transaction".[85] The cases cited in support of this view suggest that Lord Denning, with whose views Davies L.J. agreed, regarded the clause as an exception clause. Russell L.J., however, disagreed: "It is a clause under which the actual contractual liability may be defined, and not one which will excuse from the actual contractual liability . . . I prefer to state it as being a matter of construction of a general clause, and the propounder of that clause cannot be enabled thereby to alter the substance of the arrangement". It is now immaterial under s.3 whether or not such a clause is an exception clause.

Nonetheless, one must determine the 'substance' of an agreement before it can be said if a clause enables a party to render a performance which is substantially different. The 'substance' of the agreement is that which is reasonably expected of the other and not the actual obligations undertaken by him. For this purpose a judge could adopt one of two approaches: (i) to arrive at what may be reasonably expected of one party solely from the language of the agreement; or (ii) to determine the legitimate expectations of a party by virtue of the contract being a transaction of that

84 [1967] 2 Ll L R 61
85 Supra at 66

type, taking into consideration all circumstances especially the price. The second approach would bring the law more realistically in line with lay expectation[86] and would prevent a performer from using vague phraseology or a less specific content to better enable him to argue that a particular performance was not on the face of the contract reasonably expected. It must be noted that any such clause which purports to entitle a party to render a substantially different performance is subject to it being reasonable. In other words, s.3 sets a minimum standard of exchange and monitors the procurement of the contract.

In the third type of clause, the criterion is not the reasonable expectation of a party but what was in fact undertaken by the other. To ensure that parties have freely agreed to perhaps a contract of chance, s.3 requires the court to be satisfied that the clause is reasonable, that is, that it should be procured in unobjectionable circumstances.

In dealing with these clauses, a court may now have to consider questions of reasonableness on half a dozen occassions in respect of:[87]

(i) the reasonable notice (and this depends on the reasonableness of the exception clause) necessary to incorporate an exception clause into the contract.
(ii) the reasonable construction that ought to be given to an ambiguous exception clause
(iii) the reasonableness of an exception clause under s.3(2)(a) if it restricts the proferen's liability
(iv) the reasonable expectations of the parties to a contract for the purpose of determining their rights and liabilities where an exception clause purports to define them
(v) the reasonableness of such an exception clause which defines rights and liabilities under s.3(2)(b)(ii); and
(vi) whether it is reasonable to allow reliance on an exception clause as suggested in *Lloyds Bank* v *Bundy*.

It is quite clear that the U.C.T.A. is fussy. It is a complex piece of legislation. Although concerned with unfair use of bargaining power in the formation of contracts it is confined to certain contracts and only controls specific clauses. It distinguishes between types of liability, transactions, losses, contractual terms and the status of the parties. It invests in the courts a broad discretion (with vague and general guidelines) applicable only to narrowly specific situations. As Waddams puts it neatly: it appears to be saddled with the uncertainty inherent in a broad discretion based on fairness and lacks the flexibility that goes with it.[88]

86 An example is perhaps the Canadian case of Tilden Rent-a-Car v Clendenning [1973] 4 B L R 50 (Ont C A) which has been described as a development of contract doctrine in the best tradition of the common law Waddams, 'Legislation and Contract Law' (1979) *U W O L Rev* 185

87 Palmer and Yates, 'The Future of the Unfair Contract Terms Act 1977' (1981) 40 *Camb L J* 108 at 124-125

88 Supra n 86

It is therefore not surprising that the U.C.T.A. has been received with mixed feelings. It has been welcomed as a "gratifying piece of law reform", regarded as a "major advance" in consumer protection, regretted as a "grievious mistake" at the level of principle and in terms of its practicality, and doubted for its social significance.

Legislation in Australia: The Contracts Review Act 1980 (N.S.W.)

The Contracts Review Act, 1980 generally empowers a court to review "unjust" contracts or unjust contractual provisions.[89] Relief under it is, however, not extended to the Crown, public or local authorities or corporations and persons who contract in the course of or for the purpose of any trade, business or profession carried on or proposed to be carried on other than a farming undertaking.[90] The preclusion of relief under the Act to persons contracting in the course of or for the purpose stated severely limits the operation of the Act to essentially consumer transactions. This unjustified restriction distinguishes between consumer and non-consumer contracts and assumes that all contractors acting in the course of or for the purpose of trade are able to protect themselves from unjust provisions. Since the court has to consider factors as the equality of bargaining power and the ability of the party seeking relief to protect himself against injustice, there is no reason why the restriction should be made at all. The restriction departs from the recommendation of the Peden Report. While Professor Peden was prepared to preclude the Crown, state instrumentalities and corporations from relief on the ground that they have "sufficient commercial experience" to protect themselves, he was concerned to bring within the protection of his draft Bill the many "small family enterprises" unlikely to have any more commercial experience than non-professional partnerships or sole traders.

The principal relief under the Act is set out in a single provision. Where the contract or contractual provision is unjust in the circumstances relating to the contract at the time it was made, the court "may, if it considers it just to do so" mete out any of the prescribed remedies for the purpose of avoiding as far as practicable an unjust consequence or result.[91] It appears that the choice of the word 'unjust', like Professor Peden's preference for "harsh or oppressive or unconscionable or unjust",[92] is intended to confer on the courts a "new and wide discretion"[93] free from

89 The word 'unjust' includes unconscionable, harsh or oppressive s 4(1) Goldring, Pratt, and Ryan, 'The Contracts Review Act (NSW)' (1981) 4 *U N S W L J* 1

90 ss 6(1) and (2)

91 s 7(1) Sections 7-9 and Schedule 1

92 s 7(1) of his draft Bill

93 *Peden Report*, 25

any predisposition towards a narrow interpretation according to existing case law.

The crux of the provision seems to be this. The court has the discretion to grant any of the remedies and if it "considers it just to do so" it must exercise its discretion for the purpose of avoiding unjust consequences. This it seems is conditional on there being an unjust contract or contractual provision in the first place. It is not explicitly stated that a contract is unjust if it is on its face substantially unfair and has been procured by some oppressive practice or circumstances. But it would seem that the impeachability of the contract procurement circumstances justifies relief from a substantially harsh contract and cannot on its own be sufficient to qualify for relief.

The Act only provides that in determining whether a contract or part of it is unjust, the court is to consider the public interest and all the circumstances of the case including the consequences of compliance or breach of the whole or part of the contract. Other valid and supplementary considerations seem to focus more on the procurement of the contract and include (i) the presence or absence of material inequality in bargaining power between the parties, (ii) whether there was any prior negotiation and its practicability for the purpose of modifying the contract, (iii) the presence or absence of provisions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party, (iv) the inability of any party other than a corporation or his representative to protect himself because of his age or the state of his physical or mental capacity, (v) the parties' relative economic status, (vi) the forms of contract, (vii) the use of unfair tactics or pressure on the party seeking relief, (viii) and generally the commercial or other setting, purpose and effect of the contract.[94] In *Commercial Banking Co. of Sydney* v *Pollard*,[95] Rogers J. explained that the provisions of the Contracts Review Act are "very much akin" to ss. 30 and 30A of the now repealed Moneylenders Act 1941 and may be relied on by way of defence. To the extent that *Beaumont* v *Helvetic Investment Co. Pty. Ltd* suggests to the contrary, it should not be followed. The effect of the Act is finally secured by making it incompetent for a party to waive his rights under it, by making void any attempt to exclude, restrict, or modify its application[96] and by making such latter attempts in certain circumstances an offence liable to a penalty of not more than $2,000.[97]

Quite curiously, the same provision, s.7, vests in the court two types of discretion and on two levels. It has a broad discretion guided by some

94 s 9
95 [1983] 1 N S W L R 74
96 s 17(1) and (2)
97 s 18

supplementary guidelines, to decide if a contract is unjust. It also has a discretion whether or not to grant relief after a contract has been found to be unjust. S.9(5) confirms this:

> In determining whether it is just to grant relief in respect of a contract or a provision of a contract *that is found to be unjust*, the Court may have regard to the conduct of the parties to proceedings in relation to the performance of the contract since it was made.

A remedy need not follow from a finding that a contract is unjust. It is only available if the court "considers it just" to grant it. If it decides in the affirmative then any remedy chosen must be for the purpose of avoiding as far as possible an unjust consequence. This anticipates that an unfair contract obtained in oppressive conditions may not result in unfair consequences to the complainant. But the Act does not suggest in what circumstances a court may consider it just to give no remedy to an aggrieved party to an unjust contract.

To ensure that the courts do not consider "hardships befalling a party . . . which are unrelated to the contractual provisions or their implementation" a contract must be found to be unjust at the time when it is made.[98] But the effect of the strict time stipulation goes further and prevents the court from taking into consideration the conduct of the performer, however culpable, in any purported performance of the contract. In other words, the court cannot police the unfair or unjust *use* of contractual provisions where there is no unjust conduct or circumstance accompanying the conclusion of the contract. The conduct of the parties in relation to the performance of the contract is only relevant to the court's decision on whether relief will be granted after a contract has been found to be unjust.[99]

By contrast, the Bill for the Law Reform (Harsh and Unconscionable Contracts) Ordinance 1976 prepared for the Australian Capital Territory imposes no similar constraint and is to be preferred. The Bill leaves it open to the court to consider harsh consequences caused in part at least by extraneous changes in circumstances which are unprovided for by the contractual provisions, as well as the conduct of the performer in performing the contract.

A Federal Notion: The Impetus of Legislative Response

The Australian Commonwealth government proposes a statutory notion of unconscionability to "deal with the general disparity of bargain-

98 *Peden Report*, 26
99 s 9(5)

ing power between sellers and buyers". In its exposure draft of amendments to the Trade Practices Act 1974, it is proposed that a new section 52A should prohibit "unconscionable conduct relating to contracts and proposed contracts".

Accordingly, s.52A(1) provides that a corporation shall not, in trade or commerce, make a contract or vary a contract if the proposed contract or variation would in all the circumstances be unconscionable at the proposed time of contracting or at the time of the variation, and it shall not otherwise engage in unconscionable conduct in relation to a contract or proposed contract whether or not it is or to be a party of the contract or proposed contract.

In determining whether 52A(1) has been contravened, the court is to consider all the circumstances of the case, the need for certainty in commercial matters, and such of a list of matters set out in 52A(2) as the Court considers relevant. The fairly specific matters enumerated in 52A(2) are not exhaustive or intended to limit the court in its task.

Section 52A, like the Contracts Review Act 1980, introduces a general principle of unconscionability without the fastidious particularity of the U.C.T.A. It is, however, not confined to 'consumer transactions': a party to a contract applying for the remedies under the proposed s.82A need not be a consumer, much less one within s.4B of the Trade Practices Act.

It is not clear from s.52A what unconscionable conduct or an unconscionable contract may be. The spectrum of matters in s.52A(2) ranges from form to content, to market conditions and to subjective personal hardships. To use popular terminology, both procedural and substantive unconscionability are included. But s.52A does not expressly require that the unconscionable conduct must have led to an unjust contract before it is contravened or before the Court may make any of the orders under s.82A. It is possible in theory that a contract otherwise quite acceptable is unconscionable for reasons of procedural unconscionability alone. Accordingly any adjustment of a contract consequential on an order under s.82A serves to penalise the offending conduct. But to refuse to enforce a contract or to have a contract declared void or to have it varied in order to penalise unconscionable conduct is most unusual and unsatisfactory especially if the contract is otherwise substantively acceptable if not fair.

Perhaps s.52A ought to be understood in the same light as the Contracts Review Act 1980, that is, it is not targeted at the allocation of risks in a bargain, but rather polices the quality of conduct. More precisely it polices oppression so that no bargain, however, harsh or lop-sided will be affected if it or any variation of it has not been procured by unconscionable conduct.

At first glance s.52A(1)(c) may, however, require this explanation to

be modified. It prohibits a corporation from "otherwise engaging in unconscionable conduct in relation to a contract" whether or not it is a party or proposed party. Prima facie, apart from making or varying a contract, or proposing to do either in the circumstances set out, a corporation may infringe s.52A(1)(c) by maliciously breaching a contract. Quite conceivably, a financially strong corporation may at some expense to itself and as a matter of commercial strategy take advantage of the other's financial instability to wilfully cause it irreparable harm by breaching its contract with the latter.

According to this interpretation of s.52A(1)(c) the quality of a party's contractual performance and breach would come under the surveillance of the Court. Under s.52A(2)(c) the Court may consider the reasonably foreseeable consequences at the relevant time of compliance or non-compliance with, or contravention of, any of the contractual provisions. Admittedly most of the guidelines in s.52A(2) relate to circumstances of contract procurement but these being mere guidelines which the Court may have regard for, the potential application of s52A(1)(c) to breaches of contracts is not unequivocably precluded. Indeed s.52A(3) states that the guidelines "are not intended to imply a limitation of the matters" which the Court may consider. Nor does s.52A(5), strictly speaking, disprove our interpretation of s.52A(1)(c). For it prohibits the Court from considering any oppressiveness or injustice arising from circumstances that were not reasonably foreseeable at the time when the contract was made or varied in determining "whether a contract is unconscionable". It should be noted too that the proposed s.75B(3) in not excluding s.80 enables a party to apply for the grant of an injunction. So that while s.82A remedies, which essentially deprive the offending party of part or all of its benefits under the contract, make nonsense of this interpretation of s.52A(1)(c), the application of s.80 supports it.

S.52A(2) essentially adopts the guidelines in the Contracts Review Act 1980 with a few additions. They describe the familiar circumstances which judges have been able to recognise as constituting unconscionable conduct without having to define it. The guidelines are:

(i) the relative strengths of the bargaining positions of the parties to the contract or the proposed parties in the case of a proposed contract,

(ii) if any contractual provisions or proposed contractual provisions are or would be unreasonably difficult to comply with or are not or would not be reasonably necessary for the protection of the legitimate interests of any contracting party or proposed party,

(iii) the absence or presence of negotiation and whether any party could have successfully negotiated for different terms,

(iv) the reasonably foreseeable consequences at the relevant time of compliance or non-compliance with, or contravention of, any of the contractual provisions
(v) any failure to disclose material information at the relevant time
(vi) any exclusion or limitation of liability clause
(vii) inability of any party or proposed party, other than a corporation, or the representative of any party to reasonably protect his interests because of his age or the state of his physical or mental capacity,
(viii) the relative economic circumstances, educational background and literacy of each party or proposed party other than a body corporate, and any person who represented a party or proposed party
(ix) the form and intelligibility of the contract or proposed contract
(x) the accurate explanation of the legal and practical effects of the contract or proposed contract and a party's actual understanding of them
(xi) the exertion of any undue influence or unfair pressure or the use of unfair tactics against any party or proposed party by
  — any other party or proposed party
  — any person acting or appearing or purporting to act for or on behalf of any such person
  — any person to the knowledge of any other party or proposed party or any person acting or appearing or purporting to act for or on behalf of such person
(xii) any price difference in the acquisition of identical or equivalent goods or services which could have been made with another supplier at the relevant time of the contract
(xiii) the extent to which the contract or proposed contract favours any party or proposed party even if no simple provision is unreasonable
(xiv) the commercial or other setting, and the purpose and effect of the contract, and
(xv) the conduct of the parties in relation to any similar or related contract to which any one of them is or was a party or proposed party.

Any "oppressiveness or injustice" arising from circumstances that were not "reasonably foreseeable" at the time of the contract or variation may not be considered by the Court. Presumably this limitation reflects the need to mitigate the uncertainty inherent in unconscionability. The institution of legal proceedings in relation to the contract or a reference to arbitration of a dispute or claim under or in relation to the contract is not on its own engaging in unconscionable conduct.

A new s.82A sets out the orders that the Court "may, if it thinks fit" make. In doing so the Court may take into consideration the conduct

of the parties subsequent to the contravention and it may make any of the orders notwithstanding that the contract has been fully performed. A grant of injunction may be made pursuant to s.80. As any person other than the Minister and the Commissioner may apply for the grant of an injunction, the idea of protecting the public as consumers and the notion of public interest which support the standing to bring suit under s.80 assumes a more remote meaning in the context of s.52A. For a person who seeks an injunction under s.80 in respect of unconscionable conduct in a proposed but specific and private contract between parties champions the public interest in a discernibly different sense from one who seeks to restrain misleading or deceptive conduct in trade or commerce within s.52.

Finally attention may be briefly drawn to a matter of terminology and drafting. The proposed s.75B(3) states that a "reference in a provision of this Part, other than sections 80 and 83, to a contravention of, or of a provision of, Part V does not include a reference to a contravention of section 52A". In the light of the convenient distinction between a breach of Division 2 obligations and a contravention of Division 1 provisions in *Zalai* v *Col. Crawford* confusion may arise as follows: if an infringement of s.52A is not a contravention, it is a 'breach' which on the authority of *Zalai* v *Col Crawford* is not a matter within the jurisdiction of the Federal Court, contrary to the references to "the Court", that is, the Federal Court. This reasoning is of course specious. The breach of a Division 2 implied term entitles the aggrieved party to recover damages as a matter of contractual right and not by virtue of s.82. Moreover the breach of a Division 2 provision is not a contravention to which s.82 applies. Hence the Federal Court which has exclusive jurisdiction in actions, prosecutions and other proceedings under [Part VI] cannot hear a Division 2 matter except as an associate matter. Clearly, an infringement of s.52A not being a contravention only means that it does not entitle one to recover damages under s.82. It does not become a 'breach' which because of some intrinsic quality takes it outside the jurisdiction of the Federal Court and leaves it in a jurisdictional limbo. An aggrieved party who pursues a remedy under s.82A or s.80 is undoubtedly involved in a proceeding under Part VI for which the Federal Court has exclusive jurisdiction.