

PROTECTING THOSE IN A DISADVANTAGEOUS
NEGOTIATING POSITION: UNCONSCIONABLE
BARGAINS AS A UNIFYING DOCTRINE

*John Phillips**

INTRODUCTION

Theories of the function and purpose of contract law abound. English law has been most influenced by the “classical” theory.¹ Its recurring theme is that a contract is a reciprocal bargain entirely dependent upon the “will” of the parties and, importantly in the context of this Article, that the general law should intervene as little as possible with the freedom of the parties to contract. The model is one of liberal individualism, with the parties entirely free to pursue their own interests. As Professor Patrick Atiyah once put it:

[T]he Court is the umpire to be appealed to when a foul is alleged, but the court has no substantive function beyond this. It is not the Court’s business to ensure that the bargain is fair, or to see that one party does not take undue advantage of another, or impose unreasonable terms by virtue of superior bargaining position. Any superiority in bargaining power is itself a matter for the market to rectify.²

Some see contract law quite differently. One view is that its function is to promote economic efficiency.³ Others argue that altruism should be the underlying rationale⁴ and, indeed, that

* Professor of English Law, School of Law at King’s College London.

1. *See generally* P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979) (looking at the historical evolution of contract theory and classical contract theory’s place in English law). The classical theory was resurrected and refined by attorney and scholar Charles Fried. *See generally* CHARLES FRIED, *CONTRACT AS PROMISE* (1981) (proposing and developing a renewed understanding of the classical theory of contracts).

2. ATIYAH, *supra* note 1, at 404

3. For an overview, see Richard Craswell, *In That Case, What Is the Question? Economics and the Demands of Contract Theory*, 112 *YALE L.J.* 903 (2003) (identifying the goals of economic contract analysis); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 *YALE L.J.* 829 (2003) (evaluating economic contract analysis).

4. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976) (using the law of contracts to examine “individualism” and “altruism,” “two opposed rhetorical modes for

contract law should be the vehicle for the distribution of wealth.⁵ Yet another school seeks to redefine⁶ (some might say abolish)⁷ contract law as part of the general law of obligations founded upon the “idea of recompense for benefit, of protection of reasonable reliance, and of the voluntary creation and extinction of rights and liabilities.”⁸ There are also those who assert that contract law serves no useful purpose at all since businesspeople pay little attention to legal doctrinal rules⁹ either when negotiating contracts or when enforcing them. Sceptics even suggest that contract law encourages a culture of overextended credit.¹⁰

This is only a snapshot of the multitude of contractual approaches. Yet, they provide a backdrop to this Article, since a cursory reading of these theories reveals immediately that, in formulating a particular theoretical framework of contract law, different legal scholars contextualise the law in fundamentally different ways. The judiciary, at least in England, replicates the same divergences.¹¹ English law, in its approach to the construction of contracts, does not now confine its enquiry to what may be termed corrective contextualism,¹² but determines issues of interpretation by reference, not only to the relevant commercial (or other) context,

dealing with substantive issues” in “private law disputes”).

5. See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 472 (1980). But see generally Martin Hevia, *Kronman on Contract Law and Distributive Justice*, 23 J. CONT. L. 105 (2007) (criticizing Kronman’s distributive theory for its failure to account for the private nature of contracts and arguing that contracts concern parties’ rights, not their welfare).

6. See P.S. ATIYAH, *ESSAYS ON CONTRACT* 10–13 (1986).

7. See generally GRANT GILMORE, *THE DEATH OF CONTRACT* (Ronald K.L. Collins ed., 2d ed. 1995) (arguing that the law of contract is gradually being reabsorbed into the law of tort, causing the effective “death” of contract law).

8. ATIYAH, *supra* note 1, at 779.

9. See ROGER BROWNSWORD, *CONTRACT LAW: THEMES FOR THE TWENTY-FIRST CENTURY* 2–6 (2d ed. 2006); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58 (1963).

10. See BROWNSWORD, *supra* note 9, at 5.

11. See, e.g., *Investors Comp. Scheme Ltd. v. W. Bromwich Bldg. Soc’y*, [1998] 1 All E.R. 98 (H.L. 1997) (appeal taken from Eng.) (Lord Hoffman and Lord Lloyd looking to entirely different commercial contexts in construing a deed of assignment and reaching contrary conclusions as to its meaning).

12. Even in the nineteenth century, the courts used the “commercial context” to negate obvious drafting errors and mistakes. As an illustration, the expressed consideration for a guarantee of a credit arrangement for the supply of goods might be expressed in the past tense (goods at the request of the guarantor having been supplied to the buyer), but this was interpreted with regard to the context (and quite contrary to the literal wording) as meaning the future supply of goods. See *Morrell v. Cowan*, (1877) 7 Ch.D. 151. As a modern example, see *Mannai Investment Co. v. Eagle Star Life Assurance Co.*, [1997] 3 All E.R. 352, 352 (H.L.) (appeal taken from Eng.), in which a tenant gave notice to terminate a lease but did so one day earlier than was required by the terms of the lease. The court held that, in this particular context, the tenant was intending to give notice in accordance with the lease. *Id.*

but also to the reasonable expectations of the parties.¹³ The problem is that different judges view the reasonable expectations of the parties in quite different ways, leading to diametrically opposing views as to the meaning of the same document.¹⁴ The majority and dissentients alike congratulate themselves on having identified “the proper context.” This has led to the (not unmeritorious) criticism that contextualism is just “another name for construing the contract until one arrives at the result one wants.”¹⁵

In order to counter this criticism, it is important that legal scholars (if not judges) clearly delineate their individual approaches to contract law and the *particular context* that is important for them. My position is that promises should be fulfilled since—leaving aside any inherent morality in keeping a promise—they engender reasonable expectations in the party to whom they are addressed. A legal regime that upholds promises and the ancillary enforcement mechanisms, albeit imperfect ones due to insolvency and costs of process, provide some degree of security if that trust breaks down. In short, contract law enables contracting parties to proceed and plan with a degree of confidence. There is a flavour here of the classical model of contract law, with authority being conferred on parties to enter into contracts of their own choice and on their own terms. Yet, in this author’s view, this individual liberalism needs to be qualified and tempered with coherent mechanisms for relieving persons in disadvantaged positions from transactions that are unfair or unjust.

This Article therefore argues that the doctrine of unconscionable bargains, as developed in some common law jurisdictions, is the most appropriate doctrinal tool for achieving this objective because it responds sensitively to a whole range of

13. *Investors Comp. Scheme Ltd.*, [1998] 1 All E.R. at 114–15 (Lord Hoffman); *Total Gas Mktg. Ltd. v. Arco British Ltd.*, [1998] 2 Lloyd’s Rep. 209, 221 (H.L.) (appeal taken from Eng.) (stating that issues of construction must be considered “in the light of the contractual language, the contractual scheme, the commercial context, and the reasonable expectations of the parties”) (Lord Steyn); *Mannai Inv. Co.*, [1997] 3 All E.R. at 369. See generally Adam Kramer, *Common Sense Principles of Contract Interpretation (And How We’ve Been Using Them All Along)*, 23 OXFORD J. LEGAL STUD. 173 (2003) (examining contracts under “common sense principles by which any serious utterance would be interpreted in ordinary life”); Ewan McKendrick, *The Interpretation of Contracts: Lord Hoffman’s Re-Statement*, in COMMERCIAL LAW AND COMMERCIAL PRACTICE 139 (Sarah Worthington ed. 2003) (Eng.) (analyzing Lord Hoffman’s principles of contract interpretation, including balancing semantic analysis with common sense); Donald Nicholls, *My Kingdom for a Horse: The Meaning of Words*, 121 L.Q.R. 577 (2005) (Eng.) (promoting judicial consideration of contracting parties’ intentions).

14. See, e.g., *Investors Comp. Scheme Ltd.*, [1998] 1 All E.R. 98.

15. BROWNSWORD, *supra* note 9, at 162; see also Roger Brownsword, *After Investors: Interpretation, Expectation and the Implicit Dimension of the ‘New Contextualism,’* in IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE RELATIONAL AND NETWORK CONTRACTS 103 (David Campbell et al. eds., 2003).

contexts. Furthermore, and more controversially, the author argues that, since unconscionability underpins related doctrines such as undue influence, duress, and some aspects of mistake, these doctrines should be replaced by the overarching doctrine of unconscionable bargains. At present there are too many doctrines, differing in scope and application, but there is no sensible conceptual theme.

I. UNCONSCIONABLE BARGAINS—EMBRACING CONTEXTUALISM

Equitable relief against unconscionable bargains derives historically from the English Court of Chancery's power to set aside transactions in which expectant heirs had dealt with their expectations without being adequately protected against the pressure placed upon them by their poverty.¹⁶ But the doctrine has seen its most expansive, even radical, development in common law jurisdictions outside England, most notably Australia.¹⁷ The relevant principles were set out by the High Court of Australia in *Commercial Bank of Australia v. Amadio*:

The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it *prima facie* unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where

16. See, e.g., *Earl of Aylesford v. Morris*, [1873] 8 Ch. App. 484, 484–88 (Eng.). The principle was subsequently restated by *Fry v. Lane*, [1888] 40 Ch.D. 312, 321–22 (Eng.). For a doctrinal analysis of the English Law, see 1 CHITTY ON CONTRACTS paras. 7-126 to -139 (H. G. Beale ed., 30th ed. 2008); EDWIN PEEL, TREITEL: THE LAW OF CONTRACT para. 10-040 (12th ed. 2007).

17. The doctrine of unconscionability may have had its origins in Roman law and, in particular, the principles of curatorship (*cura*) applicable to boys aged 14–25 and girls aged 12–25. These boys and girls were both, technically, capable of entering fully enforceable contracts. Unsurprisingly, it seems that some of them were taken advantage of, and, around 200 BC, the Romans passed the *lex Plaetoria*, which created the (penal) offence of defrauding a minor. The praetor (magistrate in charge of the civil litigation system) developed the idea behind the statute by allowing a defence based on the statute against anyone seeking to enforce a disadvantageous transaction against one of these boys or girls. When the transaction had already taken place, the praetor would order rescission of the contract if there had been exploitation. In order to avoid uncertainty about whether contracts would be enforceable, those contracting with minors would now insist on the presence of a third party of full age whom the minor trusted; this could then be relied on as showing that there had been no exploitation. By the second century AD these "curators" would be appointed permanently. See ANDREW BORKOWSKI & PAUL DU PLESSIS, TEXTBOOK ON ROMAN LAW § 5.4.3.2, at 149–50 (3d ed. 2005). I am indebted to Dr. Paul Mitchell, University College London, for his guidance on this aspect of Roman law.

such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable¹⁸

Thus, two elements are required to activate the doctrine: first, one party (the weaker party) must be under a special disability; and second, the stronger party must have knowledge of the disability. The burden of proof is then placed on the stronger party to show that the transaction is “fair, just, and reasonable.”

As to the first requirement, probably the term “special disadvantage” rather than “special disability” is more appropriate¹⁹ since the matters that the court is permitted to take into account are far ranging. These may include not only constitutional disadvantages²⁰ (which may extend beyond physical infirmities²¹ to lack of business acumen,²² or the special difficulties encountered by ethnic minority groups²³) to situational disadvantages. The latter embrace a broad spectrum of factors such as the relative bargaining position of the parties,²⁴ the length and complexity of the negotiations,²⁵ as well as any pressure applied during negotiations.²⁶ Even a lack of income,²⁷ which may indicate that there may not be a capacity to repay the loan, has been regarded, at least in some contexts, as a relevant “serious disadvantage.”

18. *Commercial Bank of Austl. v. Amadio* (1983) 151 C.L.R. 447, 474 (Austl.) (Deane, J.).

19. Mason J. used a similar term in *Amadio*: “special disadvantage.” See *id.* at 462.

20. See this term used by French J. in *Australian Competition and Consumer Commission v. Berbatis Holdings Party Ltd.*, [2000] A.T.P.R. ¶ 41-778.

21. See *Blomley v. Ryan*, (1956) 99 C.L.R. 362, 405 (Austl.).

22. *Nat'l Austl. Bank Ltd. v. Nobile*, [1988] A.T.P.R. ¶ 40-856, 89,240 (Davies, J.); *Household Fin. Servs. Ltd. v. Price*, [1995] ANZ Conv. R. 165; *Nolan v. Westpac Banking Corp.*, (1989) 51 S.A. St. R. 496, 501 (Austl.).

23. Cf. *Nat'l Westminster Bank PLC v. Amin*, [2002] UKHL 9 (discussing undue influence).

24. *Amadio*, 151 C.L.R. at 476 (emphasising that “[t]he bank, for its part, was a major national financial institution”) (Deane, J.); see also *Nat'l Austl. Bank Ltd. v. Nobile*, [1988] A.T.P.R. ¶ 40-856.

25. *Amadio*, 151 C.L.R. at 476 (Deane, J.); see also *Austl. & N. Z. Banking Group Ltd. v. Official Tr. in Bankr. (Re Ferdinando and Another)*, (1993) 42 F.C.R. 243 (Austl.).

26. See *Amadio*, 151 C.L.R. at 476; *Bawn v. Trade Credits Ltd.*, [1986] ANZ Conv. R. 709; *Nolan*, (1989) 51 S.A. St. R. at 503.

27. In *Elkofairi v. Permanent Trustee Ltd.*, [2002] N.S.W.R. 413 (Austl.), a husband and wife borrowed a substantial sum giving a mortgage on their jointly-owned house as security. The circumstances of the case are, however, somewhat unusual in that the amount borrowed was very substantial, and the creditor took the guarantee without ascertaining the income of the borrowers, so there was an absence of any financial information regarding their capacity to make repayments. For restrictive interpretations, see *Commonwealth Bank Ltd. v. Crowe*, [2004] N.S.W.S. Ct. R. 330, ¶ 297 (Austl.); *Accom. Fin. Pty. Ltd. v. Mars Pty. Ltd.*, [2007] N.S.W.S. Ct. R. 726, ¶ 52 (Austl.).

Amadio itself provides an illustration of the operation and interaction of some of these factors. Mr. and Mrs. Amadio, as potential guarantors of a loan to a company controlled by their son, were held to be under a special disadvantage because of a variety of circumstances: their age and limited grasp of English; they were approached to sign a lengthy and complicated guarantee in their kitchen after lunch when Mr. Amadio was reading the newspaper and his wife was washing dishes; they placed trust in their son, who had misled them as to the extent and duration of the guarantee; and it was not insignificant that the relationship between the bank and the company was more than a normal business arrangement, arising out of the bank's desire to protect its own position and that of its wholly owned subsidiary, which financed many of the company's projects.²⁸

In respect to the second requirement of knowledge, the special disadvantage must be "sufficiently evident" to the stronger party to make it unconscionable for that party to accept the weaker party's consent to the transaction.²⁹ This requirement is satisfied not only if the stronger party has actual knowledge of the facts, but also if the stronger party is "aware of facts that would raise [such] possibility in the mind of any reasonable person."³⁰ One uncertainty (left rather ambiguous by the statement of principle in *Amadio*³¹) is whether or not, in addition to knowledge of the special disadvantage, the stronger party must engage in further conduct of an improper nature before the behaviour will be regarded as unfair or unconscionable. Despite some judicial statements to the effect that the stronger party must have acted (objectively speaking) in a "morally reprehensible"³² manner, the dominant view is that relief is not limited to active exploitation of the other party's weakness but may be granted in circumstances when there is "passive acceptance of a benefit in unconscionable circumstances."³³

Whilst the law cannot be described as settled, it has been said that the principles of unconscionable bargains are applicable to business undertakings, including companies.³⁴ This might be because the company "is in desperate financial position, and,

28. *Amadio*, 151 C.L.R. at 467.

29. *Id.* at 474.

30. *Id.* at 467.

31. *See id.* at 474.

32. *See, e.g.*, *Alec Lobb (Garages) Ltd. v. Total Oil Gr. Brit. Ltd.*, [1983] 1 W.L.R. 87, 94-95 (Ch.) (Eng.).

33. *Hart v. O'Connor*, [1985] 1 A.C. 1000, 1024 (P.C.) (appeal taken from N.Z.).

34. *Commonwealth Bank Ltd. v. Ridout Nominees Pty. Ltd.*, [2000] W.A.R. 37, ¶ 55-59 (Austl.). On appeal, the issue was not taken further. *See generally* Celia Hammond, *Can a Company Be the "Victim" of Undue Influence and Unconscionability?*, 19 COMPANY & SEC. L.J. 74 (2001) (examining *Ridout*, which held a contract unenforceable because the company was a "victim" of unconscionability or undue influence).

attempting to escape from that position, acts without legal advice.”³⁵ Additionally, a court may be prepared to look behind the corporate structure at the special disadvantages of its directors and impute those disadvantages to the company.³⁶ There is merit in this approach. Sometimes individuals are advised to adopt corporate structures without understanding the consequences, and, indeed, incorporation may simply conceal the commercial reality that the business is being conducted by individuals, or a group of individuals. The exclusion of the principles of unconscionability from any application to companies would also mean that contracts entered into by the directors (for example, a director’s guarantee of the company’s debts) would be subject to the legal regime of unconscionability, but not the guaranteed contract entered into by the company and controlled by the directors. This is despite the fact that in the usual case all these transactions are related and interlinked.

Whilst there may be no justification for permitting unconscionability to intrude into the whole commercial sector when major enterprises can legitimately protect their own best interests, small business, even if incorporated, should not be precluded from seeking relief. There are mechanisms (albeit somewhat arbitrary and imperfect) for identifying small businesses.³⁷ This may be done either in terms of numbers of employees, turnover, or, preferably, by excluding transactions in excess of a certain value.³⁸

Unquestionably the doctrine of unconscionable bargains embraces contextualism. It enables a wide range of factors to be taken into account in order to determine whether or not there is a “special disadvantage”—which at the same time is nondiscriminatory in terms of sex or race. Persons from socially disadvantaged groups may take advantage of the doctrine having regard to the particular contextual background *qua* individuals and not because they fit within some general category perceived to be disadvantaged. Protective rules applying to broad groups tend to be divisive. Thus in Australia, despite the quite radical development of the doctrine of unconscionability, there remains a special rule

35. *Ridout*, [2000] W.A.R., ¶ 55.

36. *See id.* ¶ 59.

37. For a discussion of possible options, see Late Payment of Commercial Debts (Interest) Act, 1998, c. 20, §§ 2–5 (U.K.); Law Comm’n & Scottish Law Comm’n, *Unfair Terms in Contracts: A Joint Consultation Paper* paras. 5.35–40 (Law Comm’n Consultation Paper No. 166, Scottish Law Comm’n Discussion Paper No. 119, 2002), available at <http://www.lawcom.gov.uk/docs/cp166.pdf>.

38. A 2005 Law Commission Report defines a small business as one in which there are no more than nine employees, but, additionally, only transactions which have a value in excess of £500,000 will be subject to the regime. *See* LAW COMM’N & SCOTTISH LAW COMM’N, UNFAIR TERMS IN CONTRACTS paras. 5.24, .35 (Law Comm’n Consultation Paper No. 292; Scottish Law Comm’n Discussion Paper No. 199, 2005), available at <http://www.lawcom.gov.uk/docs/lc292.pdf>.

applicable to contracts of guarantee.³⁹ This rule grants to a married woman a prima facie right to have her guarantee of her husband's debts set aside if the guarantee has been procured by her husband,⁴⁰ and it is shown that she does not understand the guarantee in its essential respects.⁴¹ In fact this puts a married woman in a more favourable position as a claimant because her status as a married woman is in itself sufficient to lead to the presumption that the guarantee should be set aside, without the need to show that there are particular circumstances placing her at a special disadvantage.⁴² Yet, clearly the rule is "offensive" and "discriminatory"⁴³ and has rightly been condemned on this basis.⁴⁴ It stigmatises a married

39. See *Garcia v. Nat'l Austl. Bank Ltd.*, (1998) 194 C.L.R. 395, 403–12 (Austl.) (endorsing the holding of *Yerkey v. Jones*, (1939) 63 C.L.R. 649, 683 (Austl.)). See generally JAMES O'DONOVAN & JOHN PHILLIPS, *THE MODERN CONTRACT OF GUARANTEE* ¶¶ 4.2500–.2570 (2004).

40. Note, however, that the High Court in *Garcia* did not refer to the fact of procurement in listing the elements which make it unconscionable to enforce the guarantee pursuant to the rule. *Garcia*, 194 C.L.R. at 408–09; cf. *Yerkey*, 63 C.L.R. at 683. It is, therefore, arguable that proof that the husband has procured the guarantee is not a mandatory requirement for the application of the rule or, at least, that the element of "procurement" should be interpreted in the broadest possible sense.

41. As to the level of understanding required, see O'DONOVAN & PHILLIPS, *supra* note 39, ¶ 4.2500.

42. See *Garcia*, 194 C.L.R. at 403.

43. *Garcia*, 194 C.L.R. at 412–36 (Kirby, J., dissenting). He proposed a gender-neutral model, which is well synthesised by Su-King Hii, as follows:

Where a person has entered into an obligation to stand as surety for the debts of another and the credit provider knows, or ought to know, that there is a relationship involving emotional dependence:

- (i) the surety obligation will be valid and enforceable unless the surety was procured by the undue influence, misrepresentation or other legal wrong of the debtor;
- (ii) if there has been legal wrong by the principal debtor, unless the creditor has taken reasonable steps to satisfy itself that the surety entered into the obligation freely and in knowledge of the true facts, the guarantee will be unenforceable because it will be fixed with notice of the surety's right to set aside the transaction;
- (iii) to avoid being fixed with constructive notice, the creditor must warn the surety at a private meeting, of the amount of potential liability, of the risks involved to the surety's own interest and advise the surety to obtain independent advice.

Su-King Hii, *From Yerkey to Garcia, 60 Years On and Still as Confused as Ever!*, 7 AUSTL. PROP. L.J. 47, 67 (1999) (footnote call numbers omitted).

44. See, e.g., Kristie Dunn, 'Yakking Giants': *Equality Discourse in the High Court*, 24 MELB. U. L. REV. 427, 433–34 (2000) (Austl.); Hii, *supra* note 43, at 48; Miranda Kaye, *Equity's Treatment of Sexually Transmitted Debt*, 1 FEMINIST LEGAL STUD. 35 (1997); Dianne Otto, *A Barren Future? Equity's Conscience and Women's Inequality*, 18 MELB. U. L. REV. 808, 823–24 (1992) (Austl.). As a result of this criticism the rule has been extended to de facto long-term relationships of the same or opposite sex, and in one scholar's view, it now extends to all relationships of trust and dependency. See generally O'DONOVAN & PHILLIPS, *supra* note 39, ¶ 4.2510.

woman as less able to understand the nature and import of a guarantee.

The concept of unconscionability as developed in the common law of Australia is, of course, a direct challenge to the classical model of contract theory since its essential basis is that the defendant has improperly taken advantage of the claimant.⁴⁵ Although the claimant is required to establish that he or she is in a disadvantaged position, the underlying rationale is not that the claimant's consent to the transaction has been vitiated (or, as it was originally put in the context of undue influence, that the claimant's "will has been overborne").

No doubt as a result of this threat to notions of freedom of contract inherent in the classical model, the reception of the doctrine of unconscionability in England has been lukewarm, to say the least. Lord Denning's modern reiteration of what he termed "the inequality of bargaining power"⁴⁶ was met by not unexpected judicial antagonism. Lord Scarman bluntly stated that contracts are not supposed to be vitiated simply because they have been procured unfairly by a dominant position.⁴⁷ Some considered that the statutory protection of consumers should mark the limits of intervention on the basis of procedural unconscionability in the law of contract.⁴⁸ Nevertheless, and inconsistently, there is a line of authority in England which mirrors developments in Australia. Thus in *Boustany v. Piggot*,⁴⁹ an elderly lady (Miss Piggot), suffering from early dementia, who owned property that she leased to the defendant and her husband, was befriended by the defendant.⁵⁰ The

45. See *Garcia*, 194 C.L.R. at 409; *Commercial Bank Ltd. v. Amadio*, (1983) 151 C.L.R. 447, 461 (Austl.).

46. *Lloyd's Bank Ltd. v. Bundy*, [1975] Q.B. 326, 337 (U.K.). The formulation in terms of inequality of bargaining power is unfortunate since it focuses on merely one element that may lead to a finding that the contract is an unconscionable bargain. It does not properly describe the broader contextual enquiry in *Amadio*.

47. See *Nat'l Westminster Bank PLC v. Morgan*, [1985] A.C. 686, 708 (H.L.) (appeal taken from Eng.). There was also strident criticism by the Court of Appeals in *Barclays Bank PLC v. Schwartz*, in which Lord Justice Millett considered that the doctrine of unconscionable bargains "needed careful confinement if it was not itself to become an instrument of oppression," and Lord Justice Simon Browne thought that it was capable of doing "grave disservice" to those seeking financing. See *Illiteracy No Defence in Contract*, *TIMES* (U.K.), Aug. 2, 1995, at 16.

48. See, e.g., *Morgan*, [1985] A.C. 686 at 708.

49. (1993) 69 P. & C.R. 298 (P.C.) (appeal taken from Ant. & Barb.); see also generally *Hart v. O'Connor*, (1985) 1 A.C. 1000 (P.C.) (appeal taken from N.Z.) (mental incapacity and unfairness in bargaining); *Alec Lobb (Garages) Ltd. v. Total Oil Gr. Brit. Ltd.*, (1983) 1 W.L.R. 87 (Ch.) (Eng.) (doctrine of unconscionability in English law); *Cresswell v. Potter*, (1978) 1 W.L.R. 255 (Ch.) (Eng.) ("poor and ignorant" wife unduly influenced to sign contract).

50. See *Boustany*, 69 P. & C.R. at 299.

latter gained Miss Piggot's confidence.⁵¹ As a result Miss Piggot executed a new lease, replacing the existing one with the defendant and her husband.⁵² Miss Piggot signed the lease even after a solicitor pointed out to her that its terms were disadvantageous to her.⁵³ The lease was set aside because the defendant "must have taken advantage of Miss Piggot before, during, and after the interview with [the solicitor] and with full knowledge . . . that her conduct was unreasonable."⁵⁴ This does not quite equate with the doctrine of unconscionability as articulated in Australia because, by emphasising the defendant's awareness of the unreasonable nature of her conduct, it appears to require a conscious intention to exploit the weaker party's situation. Yet the thrust of the reasoning is similar, so it is possible to discern nascent indications of the adoption of the principles of unconscionable bargains in English law.

Judicial reluctance to embrace the doctrine is accompanied by forceful objections by academics and other commentators. It is said that unconscionable bargains create "an unacceptable level of uncertainty,"⁵⁵ in particular, because the factors which determine whether or not the claimant is in a disadvantageous position are open ended. Yet, such uncertainty is apparent (and barely criticised) in other related doctrines that vitiate a contract. The determination of whether or not there is sufficient illegitimate pressure to invalidate a contract on the basis of economic duress is also a far-ranging enquiry. Indeed, any proper contextual analysis necessitates some degree of uncertainty, or putting it more positively, flexibility. In any event, the uncertain nature of the doctrine can be overstated since in time the courts delineate those circumstances and patterns of behaviour that invoke the doctrine and those that do not.⁵⁶ The general principle therefore becomes refined by judicial decision making, which enables the prediction of outcomes (and the giving of proper legal advice) to become much easier.

Some have gone further and (as prophets of doom) have predicted that the application of the principles of unconscionability will fundamentally undermine the sanctity of contract, permitting the unscrupulous to escape from an improvident bargain.⁵⁷ But this ignores mechanisms inherent in the doctrine which are designed to avoid, or at the least have the effect of avoiding, this result. Even though it may be found that the stronger party, knowing of the disability of the weaker party, has acted unconscientiously in

51. *See id.* at 304.

52. *Id.* at 300.

53. *See id.* at 300–01.

54. *Id.* at 304.

55. For a helpful summary of the main objections, see EWAN MCKENDRICK, *CONTRACT LAW* 301 (8th ed. 2009).

56. *See* O'DONOVAN & PHILLIPS, *supra* note 39, ¶ 4.1910.

57. MCKENDRICK, *supra* note 55.

accepting the weaker party's consent to the contract, it is still open to the stronger party to show that the contract is "fair, just and reasonable."⁵⁸ If this is the case, its validity will be upheld. Even apparently one-sided transactions may be "fair, just and reasonable." For example, a guarantee will fall into this category if the guarantor has substantial potential benefits in undertaking the transaction (such as a wife guaranteeing the business debts of a husband) and the consequences of enforcement are tolerable (because the wife has substantial assets).⁵⁹ Furthermore, the doctrine permits the strong party to protect its position by ensuring that the weaker party obtains independent legal and, in appropriate cases, financial advice.⁶⁰ If such advice is obtained, the contract will rarely be set aside. The result is that lenders, or others in a clearly superior negotiating position, as a matter of course will refer the other negotiating party to an independent adviser whenever there is a possibility that the latter may be in a disadvantageous situation. At the general level, therefore, the doctrine of unconscionable bargains has the effect of creating procedures in the marketplace which protect the disadvantaged.

Another objection is that the courts are not equipped for determining whether or not the contract is "fair, just and reasonable" because "the adversarial nature of litigation does not make it easy for them to set the transaction which is before them in the context of the market in which the parties are operating."⁶¹ Yet the English courts are well used to making a determination of whether particular terms of a contract are unreasonable. The *Unfair Contract Terms Act of 1977* subjects certain contractual clauses, most notably exclusion clauses, to the requirement of "reasonableness" so that if the clause does not satisfy this requirement it will be invalid.⁶²

This enquiry is not only relevant when the contract is entered into by a consumer but also in the context of business transactions "where one [party] deals . . . on the other's written standard terms of business."⁶³ A nonexclusive list of factors which are relevant to

58. See *supra* note 18 and accompanying text.

59. See O'DONOVAN & PHILLIPS, *supra* note 39, ¶ 4.1930. On one view, however, a guarantee can never be fair, because having regard simply to the terms of the transaction, the guarantor receives no value from the arrangement. See *Nat'l Austl. Bank Ltd. v. Nobile*, [1988] A.T.P.R. ¶ 40-856 (Austl.). But this approach is too inflexible and would have a negative influence on commercial lending.

60. O'DONOVAN & PHILLIPS, *supra* note 39, ¶ 4.1940. Note, however, that a more onerous obligation is imposed on the creditor to disclose facts once he or she knows of the serious disadvantage. *ANZ Banking Grp. Ltd. v. Guthrie*, [1989] ANZ Conv. R. 221 (Austl.).

61. O'DONOVAN & PHILLIPS, *supra* note 39.

62. See *Unfair Contract Terms Act, 1977*, c. 50, § 11 (U.K.).

63. *Id.* at § 3; see also generally 1 CHITTY ON CONTRACTS, *supra* note 16, at paras. 14-059 to -113 (discussing the *Unfair Contract Terms Act of 1977*).

determining this issue are set out in the statute and include:

(a) the strength of the bargaining positions of the parties relative to each other . . . ; (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term; [and] (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term⁶⁴

Other factors, such as the availability of insurance and the financial capacity of the contracting parties, have been separately identified by the courts as relevant to the determination of reasonableness.⁶⁵

Thus, the courts are involved in a complex enquiry, balancing often conflicting considerations.⁶⁶ If this relatively sophisticated contextual analysis can be undertaken in determining issues of substantive unconscionability, there seems to be no reason why an equivalent task cannot be undertaken when procedural unconscionability is in issue.

Another objection to the development of the doctrine of unconscionability is that it is not the function of contract law to engage in the distribution of wealth.⁶⁷ Whatever one's views as to whether this is an appropriate purpose of contract law, this objection fundamentally misunderstands the doctrine. It neither seeks to redistribute wealth nor is it capable of doing so. Its aim is the more modest one of providing protection for those who, because of a range of circumstances, are in an especially disadvantageous position.

Finally, it is said that "English law has an aversion to the creation of broad general principles; the courts in particular prefer to reason incrementally by analogy to existing categories rather than by reference to a general, overarching principle."⁶⁸ This may

64. Unfair Contract Terms Act, at sched. 2.

65. For an analysis of the relevant decisions, see 1 CHITTY ON CONTRACTS, *supra* note 16, at paras. 14-089 to -099.

66. This is very much a contextual inquiry. As Professor Chitty comments, the cases "are of limited value as precedents since the position of the parties and the circumstances surrounding the transaction, and the precise wording of the clause in question will necessarily differ in each particular situation." *Id.* at para. 14-089. This Article is not concerned with substantive unconscionability. Suffice to say that when neither party is under a special disadvantage, it is this author's view that the argument is less strong for then subjecting the terms of a contract to a broad test of reasonableness or unfairness without some guidance as to the genre of terms which are to be proscribed. A preferable approach is to delineate clearly the types of terms which *prima facie* should be prohibited. In England, *The Unfair Terms in Consumer Contracts Regulations*, 1999, sched. 2 does set out a list (this applies only to consumer contracts), but it is an indicative list and not—as the author prefers—an exhaustive one.

67. MCKENDRICK, *supra* note 55.

68. *Id.*

be true, but the assertion says more about English law than the doctrine of unconscionability. This incremental approach has led to the development of separate doctrines, with different technical rules, even though they have a common underlying thread. Pursuing this theme, the author will now argue that, so far as English law is concerned, unconscionability lies at the heart of other doctrines which render a contract voidable in circumstances when (speaking in general terms) one party has either actively or passively taken advantage of another. These are duress, undue influence, and some aspects of mistake. Furthermore, the law would achieve greater conceptual coherence if they were replaced by the doctrine of unconscionable bargains.

II. RATIONALISATION THROUGH UNCONSCIONABILITY

A. Duress

The doctrine of duress has now developed beyond duress to the person and duress to goods to embrace economic duress.⁶⁹ The essential element is “illegitimate pressure,” which causes the other contracting party to enter into the contract.⁷⁰ Most commonly such pressure arises when one party threatens to breach an existing contract unless the other party renegotiates its terms; for example, by paying more than the existing contract price. A classic example is *Atlas Express Ltd. v. Kafco (Importers and Distributors) Ltd.*, in which a carrying company (Atlas) contracted with a small import company (Kafco) that was under a contractual obligation to deliver goods to a large retail store by a certain date.⁷¹ A rate of carriage was agreed at £1.10 per carton, since Atlas had estimated that each truckload would contain between 400 and 600 cartons.⁷² In fact, it transpired that each truck could only carry about 200 cartons.⁷³ Atlas then refused to make any further deliveries unless Kafco paid a minimum rate of £440 per truckload.⁷⁴ Kafco agreed, albeit unwillingly, because at the time it would have been impossible to find another haulage contractor to deliver the goods, since its survival depended on making deliveries to the retail store by the due date.⁷⁵

Conversely, there are other cases in which the courts have

69. For a full analysis of duress, see 1 CHITTY ON CONTRACTS, *supra* note 16, at paras. 7-001 to -126; MCKENDRICK, *supra* note 55, at ch. 17; PEEL, *supra* note 16, at paras. 10-002 to -007; JANET O’SULLIVAN & JONATHAN HILLIARD, THE LAW OF CONTRACT paras. 11.7–23 (2d ed. 2006).

70. PEEL, *supra* note 16, at para. 10.002.

71. *Atlas Express Ltd. v. Kafco (Imps. and Distribs.) Ltd.* [1989] 1 Q.B. 833, 835.

72. *Id.* at 835–36.

73. *Id.* at 837.

74. *Id.* at 838.

75. *Id.*

treated a party's conduct as amounting to normal commercial pressure rather than "illegitimate pressure." For example, in *Pao On v. Lau Yiu Lau* the holders of issued share capital in a private company whose principal asset was a building under construction agreed to sell shares in the private company to a public company.⁷⁶ The price of the shares was to be satisfied by an issue of shares in the public company to the owners of the private company.⁷⁷ So as not to depress the market for the public company's shares, the owners of the private company agreed not to sell their newly acquired shares for over a year.⁷⁸ In order to protect themselves against a possible fall in the value of the shares during this period, the parties entered into a subsidiary agreement whereby the majority shareholders in the public company agreed to repurchase sixty percent of the allotted shares at the current price of £2.50 a share.⁷⁹ This was not, of course, a sensible arrangement from the point of view of the owners of the private company because the repurchase arrangement meant they could not profit from any market rise in the price of the shares.⁸⁰ What the private company really wanted was an indemnity to the effect that if the share price fell below £2.50 per share, the public company would indemnify them against such losses.⁸¹ The private company, now aware of the commercial unattractiveness of the subsidiary agreement, refused to complete any part of the transaction unless the subsidiary agreement was replaced by an indemnity.⁸² In the circumstances it was held that this did not amount to illegitimate pressure because the public company had the time and opportunity to consider the matter thoroughly and had other options open to it, including litigation.⁸³ But the company formed the view that any risk in giving the indemnity was small and that avoiding litigation was sensible and cost-effective under the circumstances.⁸⁴

The distinction between these cases and, generally, whether or not there is "illegitimate pressure," as opposed to normal commercial pressure, is said to be dependent on a variety of circumstances, helpfully summarised by Dyson J. in *DSDN Subsea Ltd. v. Petroleum Geo-Services ASA*:

In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include

76. *Pao On v. Lau Yiu Lau*, [1980] A.C. 614, 623 (P.C.) (appeal taken from H.K.).

77. *Id.*

78. *Id.* at 624.

79. *Id.*

80. *See id.*

81. *See id.*

82. *Id.* at 625.

83. *Id.* at 635.

84. *Id.*

whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining.⁸⁵

Yet, economic duress is in reality no more than the doctrine of unconscionability in disguise. The terminology of “illegitimate pressure” and “victim” is different, but the essential thrust of the principle is that the stronger party has acted unconscientiously in taking advantage of the disadvantageous position of the weaker party. The contextual enquiry (in terms of the factors set out by Dyson J. in *DSDN Subsea Ltd. v. Petroleum Geo-Services ASA*) is likely to be very similar. Thus, in determining whether a person is in a position of special disadvantage for the purpose of the doctrine of unconscionability, it is relevant to consider if that person had “any realistic practical alternative” open to him, as well as evidence of protest at the time of the agreement, or affirmation subsequent to it. Indeed, the application of unconscionability to factual situations presently governed by the law of duress has the advantage in that it overtly permits a broader contextual enquiry, enabling additional factors to be taken into account in determining whether or not one party is in a specially disadvantaged position.⁸⁶

As to the other requirements of unconscionable bargains, knowledge of any vulnerability must, in the usual case, be sufficiently evident to the person demanding a change in the contractual arrangements.⁸⁷ Furthermore, the fact that the demand is made in “bad faith” indicates that there is not just a passive but an active exploitation of the other party’s weakness.⁸⁸

Unconscionability also enables an assessment to be made of the fairness of the negotiated contract because it is open to the stronger party to show that the transaction is “fair, just and reasonable.” By contrast, duress renders the contract voidable upon proof of the illegitimate pressure causing the victim to enter into the contract

85. *DSDN Subsea Ltd. v. Petrol. Geo-Servs. ASA*, [2000] B.L.R. 530, 545 (Q.B.).

86. *See supra* notes 20–27 and accompanying text. One factor which may be especially relevant here is the financial position of the party against whom the threat is made. *See Elkofairi v. Permanent Tr.*, [2002] N.S.W.S. Ct. R. 413. Some argue that only a threatened breach of contract made in bad faith should be considered illegitimate, thus narrowing the scope of the contextual inquiry. *See, e.g.*, Peter Birks, *The Travails of Duress*, 1990 MAR. COM. L.Q. 342, 346–47 (Eng.). But emphasis on this factor alone is likely to enable those who have made a bad bargain to escape from the contract too easily.

87. Birks, *supra* note 86, at 346.

88. *Id.*

without this further enquiry. So if we reassess *Atlas Express* in terms of unconscionability, the court would be entitled to determine whether or not the renegotiated price of £440 was fair and reasonable. It is not clear on the facts if this was the case, but it was certainly a reasonable possibility given that the original contract price was reached as a result of a mistake as to the number of cartons that could be carried on each truckload. But the point is that unconscionability (unlike duress) enables a renegotiated contract arising from a threat to breach the original contract to be viewed in the broader context of the original negotiations. It also emphasises to those who claim that the application of the principles of unconscionability will inevitably lead to the unravelling of contractual obligations that sometimes the doctrine may operate so as to uphold those obligations.

Reformulating duress in terms of unconscionability has other conceptual benefits. It makes it clear that the contract is voidable as a result of the unconscionable behaviour of the stronger party, not because there has been “a coercion of the will of the victim” such as to vitiate consent. There are vestiges of this classical model of contract law in some modern formulations of duress,⁸⁹ but, as critics have pointed out, this is a fictional nonsense.⁹⁰ There is no absence of consent. It is simply that the threat and pressure induces the consent. In fact, the victim is more eager and willing to consent if the pressure is extreme. Additionally, the avoidance of the terminology of “illegitimate pressure” will make it plain that relief is available even if the pressure is not itself unlawful.⁹¹ A (not uncommon) example is when the creditor demands that a wife execute a guarantee (secured over the matrimonial home) of the debts of a company controlled by her husband on the grounds of a technical breach of the loan agreement and when such a guarantee was never contemplated pursuant to the original financing arrangements. Here there is no unlawful threat to breach the contract, but the pressure can justifiably be regarded as illegitimate and unconscionable. It is unreasonable commercial behaviour which the law should not enforce.

B. *Undue Influence*

In the usual case, undue influence is established by means of a presumption.⁹² Leaving aside for the moment those cases in which

89. See, e.g., *Occidental Worldwide Inv. Corp. v. Skibs A/S Avanti*, [1976] 1 L.R.Q.B. 293, 334–36 (Com. Ct.).

90. P.S. Atiyah, *Economic Duress and the “Overborne” Will*, 98 L.Q.R. 197, 198 (1982) (Eng.).

91. The possibility of a finding of duress when the pressure is not itself unlawful was acknowledged by Lord Justice Steyn in *CTN Cash & Carry Ltd. v. Gallaher Ltd.*, (1984) 4 All E.R. 714, 718 (C.A. Civ.) (Eng.), but the law cannot be considered as settled.

92. For a detailed analysis of undue influence, see 1 CHITTY ON CONTRACTS,

the presumption arises simply as a result of the status of the parties, the presumption is based upon proof of two elements: "First, that the [claimant] reposed trust and confidence in the other party"; and, "[s]econd, that the transaction is not readily explicable by the relationship of the parties."⁹³

Undue influence is very much framed in the classical model of contract theory in that it emphasises an absence of consent. Historically, the underlying rationale of the requirement of proof of a relationship of trust and confidence is to show that "the will of the innocent party is not independent and voluntary because it is overborne."⁹⁴ The inherent limitation here, however, is that it becomes difficult to establish such a relationship in commercial or quasi-commercial relationships, even though the transaction involves parties in a potentially vulnerable position (for instance, a guarantee given by a wife in respect of her husband's debts). Examples are difficult to find and where they do exist the circumstances tend to be exceptional. Thus, in *Lloyds Bank Ltd. v. Bundy*, it was shown that a client of the bank (who executed a guarantee of the debts of his son) had placed trust and confidence in the bank, which advised him in relation to that transaction.⁹⁵ A significant finding was that the client had been advised by the bank manager over fourteen years in respect of his financial affairs, and it was clear that he had always trusted the judgment of the manager.⁹⁶ Needless to say, such situations are unlikely to arise in the context of modern banking practices, which involve extensive use of the Internet and more frequent changes of personnel.

The result is either that the doctrine fails to encompass those persons in a specially disadvantaged position or, alternatively, that the courts manipulate the factual context to find the existence of a relationship of trust and confidence when, in reality, none exists. In *Credit Lyonnais Nederland NV v. Burch*, the defendant mortgaged her flat, valued at £100,000 with equity of £70,000, as security for her employer's overdraft, which was in the region of £250,000 to £270,000.⁹⁷ It was held that the relationship of employer and

supra note 16, at paras. 7-001 to -126; MCKENDRICK, *supra* note 55, at ch. 17; O'SULLIVAN & HILLIARD, *supra* note 69, at 258-77; PEEL, *supra* note 16, at paras. 10.008 to .038.

93. *Royal Bank of Scot. PLC v. Etridge (No. 2)*, [2001] UKHL 44, [2002] 2 A.C. 773, at para. 21 (appeal taken from Eng.).

94. *Commercial Bank v. Amadio*, (1983) 151 C.L.R. 447, 461 (Austl.); *see also Allcard v. Skinner*, (1887) 36 Ch.D. 145, 171 (distinguishing two types of undue influence cases, the first of which deals with ensuring the "free exercise of the donor's will"). But some authorities now emphasise the need for some "wrongful" conduct on the part of defendants. *See supra* note 33 and accompanying text.

95. *Lloyds Bank Ltd. v. Bundy*, [1975] Q.B.326, 334 (U.K.).

96. *See id.* at 344.

97. *Credit Lyonnais Nederland NV v. Burch*, [1997] 1 All E.R. 144, 147 (C.A. Civ.) (Eng.).

employee had “ripened into” a relationship of trust and confidence because of “the excessively onerous nature of the transaction into which she was persuaded to enter, coupled with the fact that she did so at the request of, and after discussion with [her employer].”⁹⁸ In the absence of facts showing an antecedent relationship of trust and confidence, it is hard to discern that there is sufficient evidence here to establish the presumption. In particular, the reference to the “onerous nature of the transaction” is pertinent not to the first requirement of a relationship of trust and confidence, but to the second and separate element that the transaction is not readily explicable between the parties and calls for an explanation.

The stated purpose of this second requirement is to distinguish “innocuous” transactions between parties in a relationship of trust and confidence (which should not be invalidated) and those which are seriously disadvantageous to the weaker party. The transactional disadvantage “must be obvious” and not simply emerging after “a fine and close evaluation of its various beneficial and detrimental features.”⁹⁹ There will be some very clear cases, such as *Burch*, in which the junior employee had no financial interest in the business (other than keeping her job) and faced losing her home if the business failed.¹⁰⁰ Other arrangements will require more detailed analysis. Once again, taking up the example of a wife’s guarantee of her husband’s debts (or the debts of a company controlled by her husband) it has been held that such a transaction may well be for the wife’s benefit because “[i]f the husband’s business is the source of the family income, the wife has a lively interest in doing what she can to support the business.”¹⁰¹

Having regard to these principles, again it is this author’s view that the law would be better served by adopting the principles of unconscionable bargains (rather than undue influence) as a legal mechanism for protecting those in the disadvantaged position, who presently have to rely upon undue influence. It would avoid the distortion of the law which arises through the creation of fictional relationships of trust and confidence. Furthermore, the doctrine of unconscionable bargains will inevitably apply in cases in which there is clear evidence of such a relationship. The person who reposes trust and confidence in another is in a position of special disadvantage because he is not himself making a proper independent judgment as to the merits of the proposed contractual arrangement. The stronger party will either know, or at least ought to know, of this vulnerability.

Some might argue that undue influence encapsulates

98. *Id.* at 154.

99. *Id.*

100. *Id.* at 148–50.

101. *Royal Bank of Scot. PLC v. Etridge*, (No. 2) [2001] UKHL 44, [2002] 2 A.C. 773, at para. 28 (Lord Nicholls).

circumstances in which unconscionability does not apply because it cannot be said that the stronger party has taken advantage of the weaker one; it is simply that the weaker party is under such influence that he is not exercising rational thought. But this is unlikely in any practical sense because, as has been seen, the modern view of the doctrine of unconscionable bargains is that it embraces a “passive acceptance of benefits in unconscionable circumstances.”¹⁰² Indeed, in Australia it is not coincidental that there is hardly a modern case decided on the basis of undue influence since (although undue influence continues to exist as a separate legal doctrine) it has been de facto superseded by the more encompassing doctrine of unconscionability. Even in England there has been some recognition of a conceptual merger between the doctrines. There has been a recognition that a finding of undue influence, traditionally regarded as being concerned with the lack of consent, implies “a connotation of impropriety.”¹⁰³ In essence, “undue influence means that influence has been misused.”¹⁰⁴ This reference to some degree of blameworthy conduct, even in a passive sense, dovetails precisely with the theoretical underpinnings of the doctrine of unconscionable bargains.¹⁰⁵ Moreover, some of the detailed reasoning that has justified a finding of undue influence seems much more appropriate to determining whether or not there

102. See *supra* text accompanying note 33 (quoting *Hart v. O'Connor*, [1985] 1 A.C. 1000, 1024 (P.C.) (appeal taken from N.Z.)).

103. *Royal Bank of Scot.* (No. 2), [2001] UKHL 44, 2 A.C. at para. 32 (Lord Nicholls).

104. *Id.* at para. 93 (stating that undue influence includes “cases of coercion, domination, victimisation and all the insidious techniques of persuasion”) (Lord Clyde); see also *R. v. Attorney-General for England & Wales*, [2003] UKPC 22; *Nat'l Commercial Bank (Jamaica) Ltd. v. Hew*, [2003] UKPC 51. But the exact basis of undue influence cannot be regarded as settled. See *Pesticcio v. Huet*, [2004] EWCA (Civ) 372. There is much academic debate on the relationship between undue influence and unconscionability. See generally, e.g., Nicholas Bamforth, *Unconscionability as a Vitiating Factor*, 1995 LLOYDS MAR. & COM. L.Q. 538 (Eng.) (arguing for greater clarity in the elements of unconscionability); Peter Birks & Chin Nyuk Yin, *On the Nature of Undue Influence*, in *GOOD FAITH AND FAULT IN CONTRACT LAW* 57–58 (Jack Beatson & Daniel Friedmann eds., 1995) (arguing that “the doctrine of undue influence is about impaired consent, not about wicked exploitation”); David Capper, *Undue Influence and Unconscionability: A Rationalisation*, 114 L.Q.R. 479 (1998) (Eng.) (proposing undue influence and unconscionability be merged into one doctrine); Andrew Phang, *Undue Influence—Methodology, Sources and Linkages*, 1995 J. BUS. LAW 532 (Eng.) (assessing whether it is feasible to combine undue influence with unconscionability).

105. Another link between the doctrine of unconscionable bargains and undue influence is that, in the usual case, the validity of a transaction arising as a result of undue influence can be preserved if the weaker party receives independent legal advice. See *Royal Bank of Scot.* (No. 2), [2001] UKHL 44, [2002] 2 A.C. at para. 20. But in the case of undue influence, if the will of the weaker party is really “overborne,” it is difficult to see why independent legal advice by itself should have the effect of making the consent valid.

has been an unconscionable bargain. Thus, in *Abbey National Plc v. Stringer*,¹⁰⁶ it was held that a mother was under the influence of her son in executing a legal charge over her property because of various factors, including her inability to read English and her poor understanding of oral English, the transaction involved putting her home at risk by way of security for a loan not only to her son but also to two business associates whom she hardly knew, and the fact that she was asked to sign the document without notice and without explanation.¹⁰⁷ Lord Justice Lloyd concluded:

That seems to me to be a very clear case of advantage being taken by way of exploitation of a vulnerable person on the part of someone who knew that he could do so and that she would not have agreed to do what he wanted if she had understood properly what she was being asked to do. I agree with the judge that the transaction was utterly disadvantageous to her.¹⁰⁸

This case involved unconscionability barely disguised at all. It is true that undue influence also demands that the relevant transaction “is not readily explicable by the relationship of the parties” and “calls for an explanation,”¹⁰⁹ but this is in reality very similar to the contextual enquiry undertaken when determining whether the transaction is “fair, just and reasonable” in the context of unconscionable bargains.¹¹⁰ Indeed, as we have seen, the analysis of whether a wife’s guarantee of her husband’s debts is “fair, just and reasonable” (in relation to unconscionability)¹¹¹ is replicated in determining (for the purpose of undue influence)¹¹² whether the guarantee “is not readily explicable by the relationship of the parties” and “calls for an explanation.”¹¹³ Each analysis has regard to the particular (and broad) context. The language is different, but the approach is the same. Both doctrines are concerned with distinguishing between those transactions that are fair and those that are not.

Sometimes the presumption of undue influence does not arise because of the particular factual context, but as a result of the

106. *Abbey Nat'l Plc v. Stringer*, [2006] EWCA (Civ) 338.

107. *Id.*

108. *Id.*

109. *Royal Bank of Scot.*, [2001] UKHL 44, (2002) 2 A.C. at paras. 21, 24.

110. But one difference may be that in the case of undue influence, proof of the transactional disadvantage is more difficult. *See supra* note 99 and accompanying text; *Nat'l Westminster Bank PLC v. Morgan*, [1985] A.C. 686, 704 (H.L.) (Lord Scarman) (referring to the fact that the transaction must constitute an “advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it”).

111. *See supra* note 59 and accompanying text.

112. *See supra* note 112 and accompanying text.

113. *Royal Bank of Scot.* (No. 2), [2001] UKHL 44, 2 A.C. at paras. 21, 24.

status of the parties per se (for example, between solicitor and client or between parent and child)¹¹⁴ even if otherwise there is no evidence of a relationship of trust and confidence. This is really no more than a legal fiction, designed to call into question transactions in which it is thought more likely that one party will have influence. There may be good policy reasons for this, but the same prima facie position could be achieved within the context of the doctrine of unconscionability simply by deeming the relevant parties (solicitor and client and so on) to be the stronger and weaker parties respectively. A preferable approach, however, would simply be to directly reflect the true, rather than the fictional, position by stating explicitly that transactions between those parties are presumed to be invalid unless the vulnerable party has received independent legal advice.

Another species of undue influence in English law is actual undue influence,¹¹⁵ which normally consists of direct threats or abusive conduct toward the weaker party. This author has argued elsewhere that actual undue influence overlaps to such a degree with duress that they should not exist as separate doctrines.¹¹⁶ As in the case of duress, therefore, a more suitable basis for relief is unconscionability.

III. MISTAKE

The development of a general concept of mistake as an exculpatory factor in the law of contract is a relatively modern phenomenon. Even models of contract law in the mid-nineteenth century made only limited reference to mistake,¹¹⁷ and its modern adoption ignores the fact that many of the stated categories of mistake can be explained on other bases. For example, in *Raffles v. Wichelhaus*,¹¹⁸ in which the seller intended to sell cotton “ex Peerless” (the ship leaving Mumbai in December) and the buyer intended to buy cotton “ex Peerless” on another boat by the same name (leaving Mumbai in October), is described by many doctrinal

114. For the full range of such relationships, see 1 CHITTY ON CONTRACTS, *supra* note 16, at paras. 7-074 to -077.

115. A classic example is *Bank of Credit & Commerce International S.A. v. Aboody*, [1990] 1 Q.B. 923, 974. One advantage of relying on actual undue influence rather than presumed undue influence is that actual undue influence does not require proof that the transaction is disadvantageous.

116. See JAMES O'DONOVAN & JOHN PHILLIPS, THE MODERN CONTRACT OF GUARANTEE para. 4-123 (English ed. 2003).

117. For example, in CHITTY, LAW OF CONTRACTS (NOT UNDER SEAL) (5th ed. 1853), Russell J. refers to mistake only in the context of the following: rectification, *id.* at 112; the recovery of money paid, *id.* at 96; errors in the particulars of a contract for the sale of land, *id.* at 267; errors in items set out in an account stated, *id.* at 572; the principle that the parole evidence rule cannot be applied to explain a written contract in the absence of an ambiguity in its terms, *id.* at 96.

118. (1864) 159 Eng. Rep. 375 (Exch. Div.).

texts as an example of “mutual mistake.”¹¹⁹ Yet, the case is much better analysed in terms of uncertainty. Both seller and buyer had adopted reasonable interpretations of the contract, so its subject matter could not be properly identified.¹²⁰

Other mistake cases are really no more than voidable contracts induced by misrepresentation.¹²¹ Some categories of mistake, in particular, common mistake as to quality and *non est factum*, have been so restricted by judicial decision making¹²² that they now have little practical relevance, so to regard them as of importance in establishing a theoretical framework of the law of contract is more likely to mislead than inform.

Stripped of these categories of mistake, little remains except unilateral mistake as to the terms of the contract; that is, one party cannot insist that the other party is bound by contract if he knows, or should reasonably have known, that the other party is mistaken as to the terms of the contract.¹²³ Conventionally the application of this rule has been regarded as resulting in a lack of consensus; that is, a simple failure of offer and acceptance. Thus, in *Hartog v. Colin and Shields*¹²⁴ the offeror intended to sell hare skins at a price per piece, but, by mistake, he made an offer at a price per pound.¹²⁵ This meant that the total price was excessively low since there were three pieces (or thereabouts) in each pound.¹²⁶ It was held that the buyer “could not reasonably have supposed that the offer expressed

119. See, e.g., 1 CHITTY ON CONTRACTS, *supra* note 16, at para. 5.071 (summarizing the facts and categorizing the case as one of “mutual misunderstanding”).

120. *Raffles*, 156 Eng. Rep. at 375. Decisions in other common law jurisdictions have approached the issue in this way. See *Mercantile Credits v. Harry*, (1969) 2 N.S.W.R. 248, (holding a contract void for uncertainty when the defendant guaranteed the performance by two named persons of their obligations under a lease with the plaintiff and there were in fact two leases between these persons and the plaintiff).

121. See, e.g., *Denny v. Hancock* (No. 1), (1870) L.R. 6 Ch. App. 1.

122. As to *non est factum*, see *Saunders v. Anglia Bldg. Soc.*, [1971] A.C. 1004, 1016 (H.L.) (appeal taken from Eng.) (noting, in particular, the relevance of the purposes of the transactions in determining the existence of a mistake) (Lord Reid). In respect of common mistakes as to quality of the subject matter, see *Great Peace Shipping Ltd. v. Tsavliris Salvage (International) Ltd.*, [2002] EWCA Civ. 1407, [2003] Q.B. 679, 679 (limiting, on one view, the invalidating effect of such mistakes to circumstances in which it is impossible for the parties to perform the contract). Note that the House of Lords in *Shogun Finance Ltd. v. Hudson* [2003] UKHL 62, [2004] 1 A.C. 919, 975 (H.L.) (appeal taken from Eng.), has endorsed the position that a unilateral mistake of identity may render a contract void. So here there is a separate recognised category of mistake, which does not fit within the theory propounded in the text.

123. *Smith v. Hughes*, (1871) 6 Q.B. 597, 603–04, is the most commonly cited authority discussing this issue.

124. (1939) 3 All E.R. 566 (K.B.).

125. *Id.* at 567.

126. *Id.*

the real intention of the persons making it”¹²⁷ and as a result there was no “binding contract”¹²⁸ between the parties. More recently, Lord Phillips in the House of Lords again stated the principle in terms of an absence of consensus: “If the offeree knows that the offeror does not intend the terms of the offer to be those that the natural meaning of the words would suggest, he cannot, by purporting to accept the offer, bind the offeror to a contract.”¹²⁹

It is considered, however, that this rationale arises from an erroneous interpretation of the nineteenth-century decision of *Smith v. Hughes*,¹³⁰ which first enunciated the rule.¹³¹ This decision is in reality underpinned by principles of unconscionability rather than concepts of mistake. Detailed analysis of this decision has been undertaken elsewhere.¹³² Suffice it to say here that only one of the three judges, Hannen J., articulated the relevant principle at all,¹³³ and his reasoning was based on a supposed theory of interpretation of contracts put forward by the now (largely forgotten) moral philosopher, Sir William Paley.¹³⁴ According to Hannen J., Paley considered that the existence of a contractual consensus should be dependent upon how the promisor *believed* that the promisee accepted the promise.¹³⁵ It followed that if the promisor believed that the promisee was mistaken as to a fundamental term of the contract, then any consensus was negated.¹³⁶

Yet Hannen J. in *Smith v. Hughes* adopted Paley’s approach to the interpretation of contracts without regard to the context in which it was made.¹³⁷ Paley explains that he has formulated the principle in order “to exclude *evasion* . . . where the promisor attempts to make his *escape* through some ambiguity in the expressions he used.”¹³⁸ He gave this example:

127. *Id.* at 566.

128. *Id.*

129. *Shogun Fin. Ltd. v. Hudson* [2003] UKHL 62, [2004] 1 A.C. 919, 964 (appeal taken from Eng.) (citation omitted).

130. (1871) 6 Q.B. 597.

131. *See id.* at 610.

132. *See generally, e.g.,* John Phillips, *Smith v. Hughes (1871)*, in *LANDMARK CASES IN THE LAW OF CONTRACT* 205 (Charles Mitchell & Paul Mitchell eds., 2008) (analyzing *Smith v. Hughes* and arguing that it has been wrongly interpreted).

133. *See id.* at 210–12.

134. *See generally* WILLIAM PALEY, *THE PRINCIPALS OF MORAL AND POLITICAL PHILOSOPHY* 106–09 (1785). (The earliest edition that this author could obtain was published in London by R. Foulder in 1785). As to the rather idiosyncratic views of William Paley, see MARTHA MCKACKIN GARLAND, *CAMBRIDGE BEFORE DARWIN: THE IDEAL OF A LIBERAL EDUCATION 1800–1860*, at 52–69 (1980); 3 P. SEARBY, *A HISTORY OF THE UNIVERSITY OF CAMBRIDGE 1750–1870*, at 295–313 (1997); Phillips, *supra* note 132, at 211–12.

135. *Smith*, [1871] 6 Q.B. at 610.

136. *See id.*

137. *See id.*

138. PALEY, *supra* note 134, at 107–08 (“[T]o exclude *evasion* . . . where the

Temures promised the garrison of *Sebastia*, that, if they would surrender, *no blood should be shed*. The garrison surrendered; and *Temures buried them all alive*. Now *Temures* fulfilled the promise, in one sense, and in the sense too in which he intended it at the time; but not in the sense in which the garrison of *Sebastia* actually received it, nor in the sense in which *Temures* himself knew that the garrison received it; which last sense, according to our rule, was the sense he was in conscience bound to have performed it in.¹³⁹

This example is illuminating because it shows that Paley, as a moral philosopher, was concerned not so much with defining a general approach to the interpretation of contracts, but with preventing behaviour which was calculated to deceive; in modern language, to prevent unconscionable behaviour.

The view that the law relating to unilateral mistake as to the terms of the contract is underpinned by the doctrine of unconscionability is more directly supported by cases in which a claimant seeks to *rectify* the terms of a contract on the same basis;¹⁴⁰ that is, the claimant has made a mistake as to the terms of the contract and the defendant knows this, or ought reasonably to know it. Such claims have been successful on the basis that the defendant's conduct is unconscionable.¹⁴¹ *Smith v. Hughes* is not relied upon, despite its obvious relevance to the contextual matrix and the fact that its application would result in a finding of an absence of consensus.¹⁴²

As a matter of principle, unconscionability is a more appropriate mechanism for determining whether a mistake by one of the parties should have an exculpatory effect. This reflects this author's philosophy that the entry into a contract involves an assumption of risk, with a corollary duty imposed on each party to protect its position. Any effect on the validity of the assumed obligation should not arise from a mistake per se, so that, for example, a common mistake as to quality which is not the result of unconscionable behaviour by one party should not operate as a vitiating factor. The focus of the enquiry should rather be directed to any conduct of the contracting party that may have exploited the disadvantaged position of the mistaken party.

promisor attempts to make his *escape* through some ambiguity in the expressions he used." (emphasis added)).

139. *Id.* at 108.

140. *See, e.g.*, *Comm'n for New Towns v. Cooper (Gr. Brit.) Ltd.*, [1995] Ch. 259, 282 (Lord Justice Stuart-Smith); *Well Barn Shoot Ltd. v. Shackleton*, (2003) EWCA (Civ) 02; *Templiss Props. Ltd. v. Hyams*, (1999) All E.R. (D) 404.

141. *See Comm'n for New Towns*, (1995) Ch. 259 at 280 (Lord Justice Stuart-Smith); *Hyams*, [1999] All E.R. (D) 404.

142. The reason for this was that the claimant wished to enforce the contract as rectified. Successful reliance on *Smith v. Hughes*, (1871) 6 Q.B. 597 (commonly interpreted as negating consent) would have meant that there was no contract to enforce.

2010]

UNCONSCIONABLE BARGAINS

861

Furthermore, and more generally, as argued in this Article, in accordance with this theoretical position, the doctrine of unconscionable bargains should also replace the existing doctrines of duress and undue influence. The doctrine of unconscionable bargains not only provides a more sophisticated contextual vehicle, but it also achieves some coherence of principle.