

Unconscionable Bargain Problem Question Cheat Sheet

Notes: Paul always asks: any further information that may be relevant to answering the question?

- Does chemotherapy affect a person's mental state? Does morphine do the same?
- Drugs affect his brain?
- Did Phil know about drugs?
- Perhaps how old valuation is
- Did Dan know about supermarket buying up?
- How long ago did wife die?
- How old is Phil? – cf. Archer being older than Cutler
- Did Phil improve property anyway?
- Did anyone let Dan know the supermarket was expanding?

Don't say things like "X is clearly/obviously under a disability". It won't be clear or obvious.

Don't split the infinitive. To boldly go.

Issue statement

I have been asked to advise X whether he/she would have a successful claim in unconscionable bargain.

Or: ... breach of contract, based on whether Y would have a successful claim in unconscionable bargain.

Doctrine of Unconscionable Bargain:

Equity involves a set of principles and doctrines that alleviate the harshness of the common law. Equity and common law are separate concepts. An important maxim of equity is that equity favours the diligent, not the tardy. Another is that one who comes to equity must do so with clean hands. The aim of the equitable doctrine of unconscionable bargain is not to relieve the foolish from their foolishness but to relieve the weak from bargains entered into due to their weakness (*Bowkett v Action Finance*). It is not easy to establish that a bargain is unconscionable; the circumstances must cry out for equitable relief and shock the conscience of the Court (*Bowkett*). Unconscionability depends on the facts of each case (*Cooke P, Nichols v Jessup*). Equity should not intervene in commercial relationships on a tender moralistic basis (*Bowkett*) Equity looks to the stronger party's conduct (*Somers J, Nichols*). Only circumstances leading up to and present on the date on which the contract was entered into are relevant (*Tipping J, Gustav & Co Ltd v Macfield Ltd*)

Unconscionable Bargain Test

The test for unconscionable bargains as expressed in *Bowkett* includes five limbs. While this test comes from a High Court application for an interim injunction, it has been adopted by the Court of Appeal and Supreme Court in *Gustav*.

Three limbs must be satisfied for a bargain to be unconscionable: one party (the weaker party) must be under a weakness, the other party (the stronger party) must have knowledge of this disability and the stronger party must take advantage of/victimise the weaker party.

Two limbs refer to factors that are not mandatory but often present in unconscionable bargain cases. These are an inadequacy of consideration and procedural impropriety.

It is the cumulative weight of these relevant points that is important to whether a bargain can be characterised as unconscionable (*Bowkett*).

Gustav included a sixth limb: the stronger party can rebut the premise that the bargain is unconscionable by showing the transaction as a whole was fair, just and reasonable.

Limb 1: Weakness/Disability

For a bargain to be unconscionable, one party must be under a significant disability (*Bowkett*). This is not a closed class; it includes age, poverty, illness, unsoundness of mind or body, drunkenness, illiteracy, lack of education and lack of advice (*Fullager J, Blomley v Ryan*). A group of factors can cumulatively make up a weakness (*Arnold J, Gustav*). The weakness should put one party at a serious disadvantage vis-à-vis the other (*Fullager J, Blomley*). However, an inequality of bargaining power does not automatically mean there will be a disability (*Arnold J, Gustav*). The weakness must prevent the weaker party from exercising rational and independent judgment (*Somers J, Nichols*). The weakness must diminish the party's ability to assess his/her best interests (*Arnold J, Gustav*).

Remember to consider lack of advice here.

If age is relevant, look to see if they're still sharp.

Why disadvantage? Because rational and independent judgment/ability to look after interests hindered.

Note transactional/temporary disability as was found in *Gustav*: only related to that transaction.

- *Archer* – dementia, incapable of understanding the nature of the contract. May have understood it related to land but not its terms or price. Old, eccentric, drank. Doctor: She was normal at some times, could have been good the day of contracting. Could conserve her own interests – lived by herself.
- *O'Connor* – Old 83 and in ill health, ineffective advice
- *Nichols* – muddle-headed, rambling, vague, confused, unknowledgeable on property rights. But she was a nurse; rented property had an insurance broker and son.
- *Bowkett* – no legal advice, inexperience with documents, never had mortgage
- *Gustav* – terminal cancer, pain and affects of drugs

Is a lesser level of disability needed because of CI/PI? (Say: I will expand on the CI/PI further on).

Conclude

Limb 2: Knowledge

The conduct of the stronger party must occur with knowledge of the disadvantage (*O'Connor v Hart, Bowkett*). This knowledge may be actual knowledge (where the stronger party actually knew of the weakness) or constructive knowledge (where the stronger party ought to have known of the disadvantage) (*Somers J, Nichols*). The test for constructive knowledge is whether a reasonable person in the stronger party's position would have reasonably been led to believe that the weaker party was under a disadvantage affecting his/her ability to protect his/her interests (*Somers J, Nichols*). If an agent for a principal has knowledge of the disadvantage, knowledge may be imputed to the principal (*Bowkett*).

- *Archer* – She was old and frail, living in a garage, long walks. Not enough to say that a reasonable person would know. Doctor possible that he was unaware
- *O'Connor* – does not comment on constructive knowledge. No way for Hart to know of weakness and he didn't know he had ineffective legal advice

- *Nichols* – She was a nurse and was a landlord, he ought to have known (muddle-headed, old, no knowledge) and he should have told her to get a solicitor
- *Bowkett* – Imputed knowledge, what Ms Webley knew, AF knew. Tipping infers that \$10,300 paid to AF as reduction of existing loan - Knowledge that he was point of bankruptcy if not bankrupt
- *Gustav* – difficult to determine, good days and bad days. Wife and assistance would not have known – Ms East was not called as a witness, inferred she would not have aided their case.

Conclude

Limb 3: Victimisation/Taking Advantage

The stronger party must have victimised/taken advantage of the weaker party (*Bowkett, O'Connor*). This can be in the form of active extortion (exerting influence over the weaker party to induce them to enter the contract) or passive acceptance of a benefit in unconscionable circumstances (*O'Connor*). Passive acceptance refers to situations where there are circumstances which ought to be, or are, known by the stronger party that mean the party is obliged not to accept the benefit of the transaction either at all or unless the weaker party procures independent advice (*Bowkett*). Equity looks to the stronger party's conduct (Somers J, *Nichols*).

Passive acceptance: compare with *O'Connor* (as per *Nichols No 2*) and *Bowkett*.

**Is there a presumption of procedural impropriety from a large inadequacy (must be very large)?
Can the stronger party rebut this?**

- *Archer* – did not (he offered to pay more, she initiated sale, he was older so he would have thought he was not of unsound mind, no reason to think younger person was not). Friends – Archer's conscience does not need alleviating.
- *O'Connor* - Hart did not victimise O'Connor, because he did not know of his weakness.
- *Nichols* – HC No 1: No AE nothing intentional or unconscientiously. No 2: should have insisted on legal advice as he knew she was at a weakness
- *Bowkett* – PA, Ms Webley knew they were not receiving advice, should have insisted on legal advice, she only suggested it
- *Gustav* – SC - no victimisation (no weakness and no knowledge) or pressure by Macfield, contract favourable. CA – PA, no use of the arts, Thiele brings information /without intending him to sign

Conclude

Short UB three limb conclusion – then: Now I will consider limbs 4 and 5, which are not mandatory but can cumulatively weigh up to affect the overall decision of whether there is an unconscionable bargain

Limb 4: Inadequacy of Consideration

While not mandatory, a large inadequacy of consideration is a factor present in most unconscionable bargain cases (*Bowkett*). A large inadequacy may give rise to a presumption of procedural impropriety, which the stronger party must rebut. (*O'Connor, Bowkett*). Inadequacy of consideration can result from transactions where one party's consideration benefits a third party (Deane J, *Amadio, Bowkett*). The stronger party needs actual or constructive knowledge (meaning that they ought to know) of the inadequacy (*Bowkett*). As it is the cumulative weighting of factors that is relevant, the more startling the inadequacy of consideration the less substantial the disability may need to be and vice versa (*Bowkett*).

Third party given consideration: compare with *Bowkett*.

Potentially consider how long it's been since contract entered into, if change in value only recently became apparent.

Archer – land was sold \$17,000 valued \$24,000 - \$35,000, likely to be a disparity. But Archer did not know it was undervalued. Reasonable person would not have known, property across the road. His conscience does not need alleviating

- *O'Connor* – \$17,000 below value by one valuation but terms set out by O'Connor's solicitor and price was from an independent valuer commissioned by the O'Connors so Hart could not and should not have known. Hart favourable conditions in terms of contract, but PC did not hear argument decide on this limb.
- *Nichols* – Could not park on her driveway, decrease in value \$3000, cars near her window. He would get access and rise in value of property \$45,000. Inadequacy of consideration. *No 1*: finding of fact he did not know.
- *Bowkett* – Benefit was only to son. 25% interest 35% penalty, would not be able to repay. Loan went from \$46,000 to \$86,000. AF – had security
- *Gustav* – overpriced at \$12.35 million, Mr P accepted this because he thought he could gain greater benefits, good real estate: premium price.

Conclude

Limb 5: Procedural Impropriety

While not mandatory, procedural impropriety is often present in unconscionable bargain cases (*Bowkett*). Whether the weaker party received independent legal advice is important in considering whether procedural impropriety was present (*Bowkett*). The disadvantage will normally be deemed to have been overcome if adequate legal advice was received (*Bowkett*).

If advice not effective, no concern to stronger party (weaker party may be able to sue advisor, however).

Equity looks to the conduct of the stronger party – if they thought weaker party was receiving advice, this limb is not met.

Does not always have to be legal advice – an accountant's advice could suffice.

Substantive advice is what counts, rather than help drafting contract etc.

- *Archer* – no legal advice, and Archer knew. Archer did have advice.
- *O'Connor* - Jack received ineffective advice (though PC did not discuss whether advice needed to be effective). Hart thought Jack was receiving good advice.
- *Nichols* – No legal advice (only insurance broker and son). Prichard J said Nichols should have insisted on legal advice (but was referring to after the contract was entered into).
- *Bowkett* – No legal advice (Ms Webley acted for AF not them). Lacked legal advice but it was suggested to them but they declined because they trusted their son.
- *Gustav*- was the advice independent. One law firm acting for both sides. No material conflict found (not in evidence or put in cross-examination)

Limb 6: Fair, Just and Reasonable

The stronger party can rebut the premise that the bargain is unconscionable by showing the transaction as a whole was fair, just and reasonable (*Gustav*)

Could consider whether stronger party's conscience needs alleviating and whether they were unjustly enriched.

Overarching arguments. Can refer to what you've already said, but in a weighing it all up sort of thing.

Defences: x may apply here.

- Equitable defence of laches
 - Unreasonable, prejudicial delay on party's part to bring suit.
 - Equity favours the diligent, not the tardy.
 - Plaintiff should have inexcusably delayed too long, with the defendant suffering harm or prejudice as a result.
 - Whether other party relied on the inaction and altered their position based on the contract is relevant
- Equitable defence of acquiescence
 - Where the weaker party has made, or their conduct has given rise to, positive representations that they have accepted the contract as agreeable to them.

Conclusion:

-What happened regarding the first three limbs? Remember these three are compulsory.

-What is the effect of limbs 4-5? These mingle with the first three. Remember these are not mandatory.

-Can the contract be passed off as fair, just and reasonable?

Remedies:

- Equitable remedy of specific performance
 - Forces party to transfer property
- Equitable remedy of injunction
 - Stops bad behaviour from occurring
- Equitable remedy of rescission
 - Returns parties to their positions before the contract was formed
- Common law remedy of damages
 - Restores wronged party to economic position they would have been in had the contract been performed (typically, an award of actual value minus price paid)