UNCONSCIONABLE BARGAIN

- **Equitable doctrine**
- First three steps are **mandatory** – others are usually present (*Bowkett v Action Finance Ltd* [1991]).
- Circs in their entirety must "call loudly" for relief (*Bowkett*).
- Overall discretion for the judge because it is an equitable doctrine.
- Equity looks to the conduct of the stronger party, ultimately hoping to answer the question of whether their conscience is thus affected that it needs alleviating (*Gustav v Macfield* [2008]).

TEST: Tipping J in *Bowkett* as cited in *Gustav.*

1. Weaker party must be at a significant disadvantage vis-à-vis the other – *Blomley v Ryan* (1956).

- Significant disability:
  - "something which prevented the person exercising rational and independent judgement" – Somers J (*Nicholls v Jessup* (1986))
  - "a condition or characteristic which significantly diminishes a party's ability to assess his or her best interests." – Arnold J in *Gustav*
- *Blomley* categories: illness, ignorance, impaired faculties, financial need, illiteracy, unsoundness of mind, business experience, lack of independent advice.
- May give rise to a presumption of unconscionability → the more severe the weakness, the more likely it is that UB will found.
- *Commonwealth Bank of Australia v Amadio* (1983)*:* not just about difference in bargaining power.
- Overlap w step 5: procedural impropriety/lack of independent advice can also be a weakness.

2. Stronger party knows or ought to have known of that disability – *Nicholls v Jessup.*

- At the time the bargain is entered into (conditionally or unconditionally) – Somers J.
- Actual knowledge OR constructive knowledge will suffice. Suspicion will also suffice (*O'Connor v Hart*)
  - Constructive knowledge = ought to have known of the circumstance; when a reasonable man would have adverted to the possibility of its existence – Somers J.
  - May be the knowledge of principal or agent – *Bowkett*

3. Taking advantage/victimisation – *O'Connor v Hart* [1985].

- Stronger party must take advantage of the weakness.
- Procedural unfairness vs contractual imbalance (which usually requires something more).
- Active extortion of a benefit (using the arts – *Longmate*); OR
- Passive acceptance of the benefit in unconscionable circumstances.
  - Where it is contrary to good conscience that the bargain should be accepted.
- *Blomley:* unconscientiously takes advantage of the opportunity thus placed in his hands.
- According to *Archer* unfairness incl: price below true value, no independent advice, disparity in bargaining positions because of mental capacities.

4. Inadequacy of Consideration

- Often present.
- Other party must know or ought to have known of the inadequacy (*Bowkett*).
- Large inadequacy may raise a presumption of procedural impropriety (*O'Connor*).
  - Burden shifts to the stronger party to show not unconscionable.
- Degree of inadequacy will depend on the weakness → really severe weakness may only require a slight inadequacy of consideration and vice versa (*Bowkett*).

5. Procedural impropriety – either demonstrated or presumed from the circumstances – *Bowkett*

- Lack of independent advice.
  - Only need *adequate* advice – because viewed from position of stronger party this is anything.
  - Receiving independent advice usually means disability is deemed overcome. (*Bowkett*)
- Contractual imbalance may be so great as to raise presumption of procedural unfairness (*O'Connor*).
- Overlapping of step – also count in step 1.

CONCLUDE

6. Fair, just and reasonable

- If these conditions are met the burden falls on the stronger party to show that the transaction was a fair, just and reasonable one (*Gustav, Archer*).

7. Policy

- Equity should read carefully when intervening in commercial relationships (*Gustav*)

Lack of Contractual Capacity – CL Defence

- *Archer v Cutler* [1980]*:* the common law test of contractual incapacity is whether the party, at the time of entering the disputed contract, was suffering from such a degree of mental disability that he was incapable of understanding the nature of the contract.
- *Imperial Loan Co v Stone* (1892)*:* not void "unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about."
- *Chesire and Fifoot :* actual or constructive knowledge will suffice:
  - Constructive = ought to have known from circs.
  - Suspicion enough – *O'Connor.*
- *O'Connor v Hart:* "unfairness" is not a ground to void a contract under the common law principle of contractual incapacity unless such unfairness is enough to amount to equitable fraud [at which stage equity will relieve].
  - This overturns law in *Archer.*
- Consideration greatly below value might not be enough to invalidate a transaction but might be with other factors – *Longmate v Ledger* (1888).

OBJECTIVE PRINCIPLE: *Smith v Hughes* (1871)

- Obj. Prin – *Freeman v Cooke* (1848)*:* 'if whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party **upon that belief enters into the contract** with him.'
  - *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007)*:* subjective element 'is an application of the objective theory of contract, not an exception to it.'
- Sale by sample – mere silence w regard to material fact where there is no legal obligation to divulge no basis for avoiding contract.
  - Caveat emptor: let the buyer beware – buyer alone responsible for checking the quality and suitability of goods b4 purchase.
- Mistake in *S v H* is re the nature and quality of the goods, different w Smith knowing because that would have been mistake as to terms of the contract. Smith would not fulfil OP.
- *Hartog v Colin Shields* [1939]: Contract void when one party is aware that the other expressed terms of an offer in a manner by mistake/contrary to their known intentions, and the party accepts this offer knowing of such mistake or should have reasonable known of it.

UNILATERAL CONTRACTS

- Unilateral contract: one party makes a promise if the other party will do or forebear from doing an act, even though the other party has made no counter-promise.
  - Doing/forbearing is acceptance, consideration and full performance of contract.
- *Carlill v Carbolic Smoke Ball Co* [1892]*:* unilateral = "offer made to all of the world… the contract is made with that limited portion of the population who come forward and perform the condition."

Markholm Construction Co Ltd v WCC [1984]:

- Contract A: binding UC to hold the ballot.
- Contract B: offer for sale and purchase when submitting application, accepted when winner announced – A automatically converts to bilateral B.
- The finding of unilateral contract on the words of ad.

- *Ron Engineering* wrong because there is **no executory/promissory obligations upon promisee in UC.**
- So breach of unilateral contract to amalgamate applications.

Blackpool v Flyde Aero Club Ltd v Blackpool Borough Council [1990]:
- Unilateral contract wholly implied here.
- There was clear intention to create contractual obligations – consider P's tender in conjunction v all conforming tenders or at least P's would be considered if the others were.
- Sometimes invitation to tender will give rise to contractual obligations.
- Reasonable person would have read it as their tender would be considered if submitted in time.
- *National Carriers Ltd v Panalpina (Northern) Ltd* [1981]– Wilberforce LJ: "imposition of just solution ascribed to reasonable men in the position of the parties."

THE PRE-EXISTING DUTY RULE

- *Pinnel's* case [1602]: part-payment of a debt cannot constitute good consideration for the whole.
  - Payment **before** due date might be sufficient.
- Other stream from *Stilk v Myrick* [1809]: practical benefit cannot constitute consideration where duty already owed (ship already supposed to be sailed).
  - Pretty much overturned by *Willams v Roffey Bros* [1991]: a practical benefit provides consideration in a case where the promisor undertakes to pay extra remuneration to the promisee for performance of the promisees existing contractual duty.

Foakes v Beer (1884) – debtor claiming interest:
- If not a deed need consideration or accord and satisfaction.
- Paying something you already owe cannot be seen as consideration – has to be supporting consideration; **independent benefit.**
- Where something is accepted by debtor in satisfaction and might be more beneficial to creditor than the debt court won't enquire into adequacy of consideration.
- Blackburn LJ: wants to dissent – thinks practical benefit should be enough but decides against allowing it to discharge the duty.

D & C Builders v Rees [1965] – forced to accept cheque:
- Cheque payment no longer exception to rule.
- Need an accord for satisfaction to be valid – Winn LJ
- PE: when a debtor is lead to suppose that "on payment of the lesser sum, the creditor will not enforce the payment of the balance and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then the creditor will not be allowed to enforce payment of the balance *when it would be inequitable to do so*." – Denning LJ.
  - Objective assessment.
  - True accord + action on that.
  - **In NZ need future debt + detrimental reliance – *Homeguard.***
- Can escape liability if A&S due to **economic duress – "illegitimate pressure."**
  - NZ authority – *Barns v Jacobsen* [1924]: s 92 (now S27A) doesn't apply to those under economic duress.
  - S27A only applying *Foakes* point not PE or duress points.

HBF Dalgety v Morton [1987] – real estate agent:
- A&S – *British Russian Gazette Ltd:* "the purchase of a release from an obligation by means of a valuable consideration *not being the performance of the actual obligation itself.* The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative."
  - Objective principle applies case by case – *Day v McLea* applied.
- Letter sent at time of banking cheque – made it clear not being banked in full/final satisfaction.
  - Did creditor lead debtor to believe the cheque was taken in full satisfaction.
- Reluctance to pay is not a genuine dispute to discharge rule.
- Failed on 3 grounds; no acceptance not implied by banking, statement on cheque not clear enough to be accord, *Foakes* applied because no consideration.

Magnum Photo Supplies v Viko NZ Ltd [1998] – banking cheque would constitute acceptance, accidental banking:
- D bears onus of showing A&S.
- Viko not entitled to infer accepted because they got a letter saying no at the same time they knew it was banked.
- In circumstances in which one party purports to prescribe conduct on the part of the other as constituting acceptance, the mere coincidental conduct of the kind prescribed cannot attach legal consequences. *The conduct must be linked to the offer.* (Subjective of objective principle).

Re SELECTMOVE Ltd [1995] – PAYE dude said will get back 2 u if not ok:
- Where offeree themselves indicates to take something as accepted if they don't say anything in ascertainable amount of time they are undertaking to speak if they don't want it to be concluded.
  - BUT Mr Polland had no ostensible authority to bind
- Practical benefit not enough – no @ *Roffey Bros.*
- Bc no authority to bind no promise to be estopped.
  - Company didn't uphold their obligations so not inequitable from the revenue anyway.

Collier v P & MJ Wright (Holdings) Ltd [2007] – joint loan:
- Practical benefit (receiving 1/3 instead of 0) here was not consideration because no additional benefit.
- Said PE does not require detrimental reliance:
  1. If a debtor offers to pay onl part of the amount he owes;
  2. The creditor voluntarily accepts that offer, and;
  3. In reliance on the creditor's acceptance that debtor pays that party of the amount he owes in full, the creditor will, by virtue of the doctrine of PE, be bound to accept that sum in full and final satisfaction of the whole debt.

MWB Business Exchange v Rock Advertising Ltd [2017] – oral variation to rent payments:

CA: NOM clause not binding – you can unbind yourself (Cardozo J in *Alfred Beatty*). Freedom of contract most important. DMac: necessarily agree to vary NOM clause too.
- Following *Selectmove* (not *Roffey ?*): good consideration because there was additional practical benefit – not empty + business there.
  - 2 Problems: always gonna have practical benefit, practical benefit not part of the bargain as nominal consideration is.
- No PE bc not inequitable – MWB promised to reschedule not forgo debt. Suggested need detrimental reliance (cf *Collier*).

SC: VARIATION not binding (NOM clause binding) – didn't agree w formalities of contract.
- Didn't decide on consideration – didn't like CA decision.
- Need detrimental reliance for estoppel – where NOM pretty much never estoppel.

LIMITATIONS/EXCEPTIONS TO RULE IN *FOAKES*

1. L - Only applies when claim is for a liquidated amount

2. L – The debt must be undisputed: debt must be genuinely disputed – not obliged to pay the amount claimed.
- Not dispute ab the debt/how much to discharge it.
- NZ just need genuine reason – no reasonable basis needed.

3. L – Introduction of a new element: Debtor does something not obliged to under contract. Additional benefit/detriment.
- Payment in alternative – courts don't measure adequacy.

4. E - Payment by a third party of a lesser sum: Winn J in *D&C Builders.* Also *Hirachand Paranumchand* – British soldier daddy paid x: debtor protected in privity legislation.

5. E – Payment by negotiable instrument: e.g by cheque but rejected now in *D & C Builders.*

OR

Composition/Compromise with Creditors: agreement w more than one creditor to get part now and part later, never get full.

6. E – Statutory exception: s27A Property Law Act 2007:
- Acknowledgement in writing
- By a creditor or person authorised in writing by the creditor
- Of the actual receipt
- Of part of his debt
- In satisfaction of the full debt.

[Can escape liability because of economic duress – see *D&C*]

7. E – Equitable/promissory estoppel: from *High Trees/D&C:*
- Objectively leading debtor to think u would not enforce payment where lesser payment agreed – can't enforce where it would be unequitable to do so.
- Need detrimental reliance + future payments – *Homeguard.*