

# LAWS211 Problem Question Template

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## Introduction/Issue

I have been asked to advise [weaker party/stronger party] on whether the [transaction at issue] falls under the equitable doctrine of unconscionable bargain.

If relevant:

[Stronger party] will be seeking the equitable remedy of specific performance because the [land/item at issue] is not fungible and therefore damages would be inadequate *Loan Investment Corporation of Australasia v Bonner*.

If relevant:

[Weaker party] will be seeking the equitable remedy of rescission which puts the parties back to the status quo ante.

In finding whether [the transaction] is an unconscionable bargain I will apply Tipping J's 5 prong test from *Bowkett*, upheld in the Supreme Court in *Gustav* and applied in *Attorney-General of England and Wales v R*.

## Limb One: Weakness - this is compulsory

The weaker party, [weaker party], must have a serious disadvantage vis-à-vis the stronger party, [stronger party] *Archer*. [Weaker party] must be at a special disadvantage due to things such as illness, ignorance, inexperience, impaired faculties, financial need, poverty, age, infirmity of body or mind, drunkenness, illiteracy, lack of education *Blomley*. This list is non-exhaustive *Diprose*.

A weakness is a disabling condition or circumstance which seriously affects the weaker party's ability to act in his/her best interests, *Blomley*, and prevents him/her from exercising his/her rational independent judgment, *Nichols*. Multiple factors may form a weakness *Gustav*.

For weakness:

Evidenced by... [facts that point to disability], it seems that [weakness] prevented [weaker party] from exercising [his/her] rational and independent judgment.

Furthermore... {E.g. medical evidence from expert, business evidence} suggests that [weaker party] was at a disadvantage.

If relevant: Just as in {E.g. *Archer/Nichols/O'Connor/Bowkett/Bridgewater*} [weaker party] was...

Against weakness:

Although [weaker party] [was/had] [potential weakness], this did not put [him/her] under such a disadvantage that [he/she] was unable to serve [his/her] own best interests.

This is because... {E.g. weaker party was still doing something efficiently, etc}

If relevant: Mere inequality of bargaining power is not a qualifying disability *Blomley*.

If relevant: Analogising with *Gustav*, where Mr Parkinson's actions indicated that there was no weakness, [weaker party]'s actions also indicate...

Conclusion:

The cumulative effect of [combined potential weaknesses] [do amount/do not amount] to a sufficiently serious disability, such that [weaker party] was unable to serve [his/her] best interests.

If there is a weakness: Therefore we must look at the conduct of the stronger party *Nichols*.

If relevant:

[Weaker party]'s [weakness] is so severe that there will be a presumption of unconscionability, meaning the onus switches to [stronger party] to show the transaction was not an unconscionable bargain *Fry v Lane*.

## **Limb Two: Knowledge – this is compulsory**

[Stronger party] must have actual or constructive knowledge of [weaker party]'s weakness *Bowkett*.

This must be at the time of contracting *Gustav*.

There will be constructive knowledge if a reasonable person in the shoes of [stronger party] ought to have known of [weaker party]'s weakness, [weakness(es)].

Knowledge of an agent may be imputed to the principal *Bowkett*.

### Actual Knowledge

For actual knowledge:

Evidenced by... [facts that point to actual knowledge], it seems that [stronger party] was aware of [weaker party]'s [weakness].

If relevant: Just as in {E.g. *Archer/Nichols/Bowkett/Bridgewater*} [weaker party] was...

If relevant: [Agent]'s knowledge of [weakness] is imputed to [stronger party/principal].

Against actual knowledge:

If relevant: Although [stronger party] was somewhat aware of {E.g. weak factor}, [he/she] did not know that [weaker party] was suffering from... to that extent.

This is because... {E.g. reason why stronger party couldn't have known of the weakness}

If relevant: Similar to *O'Connor*, there is no evidence to indicate that [stronger party] knew of ...

### Constructive knowledge

For constructive knowledge:

Due to {E.g. indications of a weakness} [stronger party] ought to have known of [weaker party]'s [weakness]. A reasonable person would have realised...

Against constructive knowledge:

It would be unreasonable to presume that someone in [stronger party]'s position ought to have known about [weaker party]'s [weakness], because...

### Conclusion:

On balance, it would seem that [stronger party] [did/did not] have [actual/constructive] knowledge of [weaker party]'s weakness at the time of contracting.

If no knowledge: As this is a mandatory limb, and it is not satisfied, there would likely be no unconscionable bargain. However, I will continue to examine the next three limbs.

### **Limb Three: Victimization – this is compulsory**

[Stronger party] must take advantage of [weaker party]'s disability *Bowkett*.

Victimization may be either active extortion or passive acceptance of a benefit *O'Connor*.

Passive acceptance will occur in circumstances known or ought to be known to the stronger party where he has an obligation under equity to say: no I cannot in all good conscience accept the benefit of this transaction at all, or unless you have full independent advice *Bowkett*. Active extortion may be pressuring, overreaching, or conduct which falls below the standards demanded by equity *O'Connor*.

#### Active extortion:

For active extortion:

[Stronger party] seems to have taken advantage of... This is shown by...

#### Against active extortion:

If relevant: Here [weaker party] initiated the transaction, this suggests there was no active extortion.

If relevant: Like Mr Hart in *O'Connor*, [stronger party] seems to be innocent of any overreaching behaviour. This is suggested by... {E.g. good faith between parties}

#### Passive acceptance:

For passive acceptance:

If relevant: Although there was no active extortion, it can be argued that [stronger party] passively accepted [the transaction at issue] in unconscionable circumstances.

If relevant: [Stronger party] set the terms of the contract which suggests that [he/she] could have Analogising with {E.g. *Nichols/Bowkett/Bridgewater*}, [stronger party] knew [he/she] was getting a lopsided deal out of [the transaction at issue] and therefore may have accepted the bargain in unconscionable circumstances.

#### Against passive acceptance:

[Stronger party]'s actions veto the suggestion of any unconscionable circumstances. For instance...

If relevant: As in *O'Connor*, [stronger party] was not aware that [he/she] was getting a good bargain at the time of contracting, so it is difficult to class as passive acceptance.

If relevant: As in *Gustav* it was [weaker party] who set the terms of the contract, namely... This makes it difficult to class as passive acceptance.

If relevant: As in *Archer*, [stronger party] altered the purchase price in [weaker party]'s favour this makes the situation difficult to class as passive acceptance.

#### Conclusion:

Overall it seems that [stronger party] [did/did not] victimise [weaker party].

As relevant: [He/she] [did not actively extort/actively extorted] the benefit from [weaker party].

If relevant: [He/she] [did/did not] passively accept the bargain in unconscionable circumstances.

If no victimisation: As this is a mandatory limb, and it is not satisfied, there would likely be no unconscionable bargain. However, I will continue to examine the next two limbs.

## **Limb Four: Inadequacy of consideration – this is not compulsory**

Knowledge or constructive knowledge of the inadequacy of consideration is not mandatory, but may point to an unconscionable bargain *Bowkett*.

A large inadequacy of consideration may give rise to a presumption of unconscionability, putting the onus on the stronger party to prove it not an unconscionable bargain *O'Connor*.

The more startling the inadequacy of consideration the less substantial the disability may need to be and vice versa *Bowkett*.

### 1. Contractual imbalance:

For contractual imbalance:

The [transaction at issue] is lopsided because... {E.g. price was greatly in excess of the value}

If relevant: In *Archer* the land was sold for \$7000 under its true value, here the inadequacy of consideration was... {E.g. even greater than \$7000}

Against contractual imbalance:

[Weaker party] is receiving adequate consideration in the form of...

If relevant: Similar to *Gustav*, [weaker party] has realised that [he/she] should pay a premium for...

### 2. Knowledge of contractual imbalance:

#### (a) Actual knowledge

For actual knowledge:

[Stronger party] knew that... as shown by...

Against actual knowledge:

[Stronger party] [could not have known/did not know] of the inadequacy of consideration, because...

#### (b) Constructive knowledge

For constructive knowledge:

[Stronger party] ought to have known of the contractual imbalance because...

If relevant: Furthermore, being a {E.g. expert/qualified person in relevant field} [stronger party] should have been aware that [he/she] was getting a good bargain.

Against constructive knowledge:

[Stronger party] had no means of knowing that [he/she] was getting a good bargain because... {E.g. other information indicated otherwise/they are not an expert in the field/etc}

### Conclusion:

On balance, it is evident that there [was/was not] a marked inadequacy of consideration.

If relevant: [However/Likewise], [stronger party] was not aware nor ought to have been aware of the contractual imbalance and therefore this limb is not satisfied.

If relevant: As [stronger party] was aware of this contractual imbalance, this limb is satisfied.

If no contractual imbalance: As this is not a mandatory limb, it is still possible that the [transaction at issue] is an unconscionable bargain. However if there is no significant imbalance in consideration then it is unlikely that any issue of unconscionability will arise *Gustav*.

## Limb Five: Procedural impropriety – this is not compulsory

The absence of independent advice is tantamount to a procedural impropriety *Bowkett*.

Although this limb is not mandatory, if the weaker party received full independent advice it is unlikely that any issue of unconscionability will arise *Gustav*.

If the weaker party has had adequate independent advice "the disability will normally be deemed to have been overcome" *Bowkett*.

### For independent advice:

[Weaker party] did not receive any independent legal advice...

If relevant: In *Nichols*, the advice of Ms Jessup's architect son and insurance company representative was not enough, therefore [weaker party]'s advice from... is not enough to overcome the disability.

If relevant: Despite [stronger party] advising [weaker party] to get advice, the fact that [weaker party] did not receive advice is enough, as shown in *Bowkett*.

If relevant: Although [weaker party] received advice from [adviser], it was no adequate advice because...

### Against independent advice:

[Weaker party] received independent advice from...

If relevant: Although [weaker party] did not receive independent legal advice, it was [weaker party] who insisted on going ahead with the transaction...

If relevant: Although [weaker party] did not receive independent legal advice, neither did [stronger party]...

### Conclusion:

On balance, it is evident that there [was/was no] procedural impropriety as...

If no procedural impropriety: As this is not a mandatory limb, it is still possible that the [transaction at issue] is an unconscionable bargain. However "it would be hard to find a bargain unconscionable if the weaker party had received adequate independent advice" *Bowkett*.

## Summary

On consideration of all five of these limbs, giving extra weight to the first three compulsory limbs, it is more strongly argued that there [was/was no] unconscionable bargain. This is because... {E.g. brief outline of strongest arguments }

### Extra limb: Was the transaction fair, just and reasonable?

If unconscionable bargain: Notwithstanding the finding of an unconscionable bargain, the stronger party may prove that the transaction was in fact fair, just and reasonable and should be upheld *Gustav*. In reality it is difficult to find a situation where the bargain is unconscionable but also fair, just and reasonable *Nichols*.

If no unconscionable bargain: Despite my finding of no unconscionable bargain, we must also consider the extra 6<sup>th</sup> limb which asks whether the transaction overall was fair, just and reasonable.

For fair, just and reasonable:

{E.g. draw on most important facts from Bowkett test}

If relevant: [Weaker party] received adequate consideration...

Not fair, just and reasonable:

{E.g. draw on most important facts from Bowkett test}

If relevant: Overall, [weaker party] is left in a worse position, and enforcing the contract would be unjust.

Conclusion:

On balance, the transaction [is/is not] fair, just and reasonable.