

## Common law: Contractual incapacity

- Hard to know if someone lacks contractual capacity, often people have periods of lucidity, need psychiatric evidence.
- High threshold: have to be severely ill: incapable of understanding nature of K
- And must know of the condition
- Hence why equity will intervene to relieve a party from the rigours of the common law. When people are impaired but not so much as common law requires.

## Intro

### Issue statement

The issue in this case is whether \_\_\_\_ will be able to (rescind the contract/ obtain specific performance of the contract/ obtain an injunction) against \_\_\_\_\_ under the **equitable doctrine of unconscionable bargain** where \_\_\_\_\_.

### Bowkett test

The test for the equitable doctrine of unconscionable bargain (EDUB) was set out by Tipping J in Bowkett v Action Finance (High Court). The test has since been affirmed by the Court of Appeal (at [29]) and in the Supreme Court in Gustav & co v Macfield Ltd. It has five steps. The first three must be satisfied in order that a bargain be unconscionable and the others will likely be present (*Bowkett* 460:50)

*AG for England and Wales v R* followed test set out in *Bowkett* at CoA

### Also

Not easy to establish. The circumstances must call loudly for equitable relief (shock the conscience of the core): *Hart, Bowkett*

Equity must be read carefully when intervening in commercial relationships - not judge on a tender moralistic basis: *Bowkett*

- not a paternal jurisdiction protecting or assisting those who repent of foolish undertakings: *Somers J Nichols*

The rationale for the intervention is not to relieve the foolish from their foolishness, but the weak from entering into contracts as a result of their weaknesses: *Bowkett*

Equity looks to the conduct of the stronger party at time of contracting: *Gustav, Nichols per Somers J*

- there will be little bits of the answer that happens post-contract. State that it is irrelevant in your answer.
- Cf variation of K

Categories are not silos, they overlap.

## 1. Weaker party is under a significant disability

### What is a disability

- a. Something that prevents the weaker party from exercising rational and independent judgment: *Nichols Somers J*
- b. It is a condition or characteristic which significantly diminishes a party's ability to assess his or her best interests: *Gustav CA Arnold J*
- c. Can't conserve his own interests: *Blomley* per Kitto J
- d. Serious disadvantage vis a vis the other :*Blomley* per Fulagar J

- e. Allow a party to get out of certain circumstances when they are sure that a party is impaired but not to the extent that contractual capacity requires - Weakness or impairment is **lower than 'do not understand the nature of the contract'** that is necessary for contractual incapacity. (Nichols v Jessup (HC no 2)).
- f. Allow a party to get out of certain circumstances when they are sure that a party is impaired but not to the extent that contractual capacity requires.
- g. **Evidence: Are they acting out of character? (Gustav)**

### List in *Blomley v Ryan*

- includes - illness, ignorance, inexperience, impaired faculties, financial need, illiteracy, unsoundness of mind, age, business inexperience, lack of advantage.
- Poverty, or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where necessary (Fullager J).
- Gustav adds: Stress or anxiety. **Look at facts of other cases, ILA** (mention overlap)
  - If they had ILA, it alleviates their weakness
- Gustav: **Can also look at the job/experience in the industry** (experienced property developer).
- **Not a closed class, open-ended concept** (*Nichols, Bowkett, Gustav*). Not desirable nor possible to exhaust the categories of what might constitute a significant disadvantage.

### Consider

- Also consider **advantages** that may outweigh disability e.g. **business person, property developer, educated...**

### Mention

- **Cumulative effect:** None of these factors in isolation would be sufficient, however together they cumulatively give rise to a weakness: *O'Connor, Bowkett*
- Does not arise merely from an inequality of bargaining power – *Gustav* p 43 at [30]; *Blomley v Ryan* as cited in *Bokwett*
- Must be at time of contracting: *Gustav*

### Contractual imbalance relevance

- The five criteria impact on each other. The weakness can be **so grave that little contractual imbalance** may be needed before an UB may be found (*Nichols Somers J, Bowkett* 4601).
- **Large imbalance shows inference of disability:** *Nichols* ought to know?
- **If you find no disability or only finely find a disability:** “However, it may be established later on in the UB test that X’s **disability may not need to be so significant** if the **contractual imbalance is startling.**”

### Case examples

- *O'Connor v Hart*: How old should you be before you’re incapable of protecting yourself? (Asked by Sir Dennis Buckley) Sir Andrew Tipping- at 65 the court should begin to be aware of the age of the party. Age alone is not sufficient
- *Nichols v Jessup* – Weakness unintelligence and muddle-headedness is enough (with no legal advice). C/F (she owned flats...)
- *O'Connor v Hart* - Old and ill health is enough (even with advice maybe)
- *Bowkett v A.F* (*arguable weakness*)\_No independent advice, Not versed in in business matters, They were clearly under pressure from their son who was about to go bankrupt.

## 2. Stronger party knew or ought to have known about the disability

### Actual knowledge

### Constructive knowledge

- "Constructive knowledge is when a reasonable man would have adverted to the possibility of its existence": *Nichols* per Somers J

### Imputed knowledge

- Knowledge can be imputed through a principal-agent relationship: *Bowket*
  - o Cf Mr Thiele learnt of terminal nature of the cancer in a private capacity and had no obligation to pass on to Macfield: *Gustav*

### Ask: what did the stronger party know?

- Consider: imbalance of consideration infer suspicion (*Gustav*), lack of independent advice, people acting out of character (*Gustav*), weakness is public knowledge?

### Then: based on that, should they have known the weaker party was weak?

#### Case examples:

- O'Connor v Hart – no knowledge. Had legal advice (thought competent) all the terms proposed by Jack's solicitors.
- Nichols v Jessup – Reluctance may be important. (note: however, time of signing was wrong question here).
- Bowkett v AF - They had actual knowledge that Michael was under financial pressure (owed them 10.3k). Knew no legal advice. Knew were not well versed. (did they have to decline given signed waiver of ILA). **This is an arguable case – remember.**
- Gustav
  - o Good and bad days?
  - o Experience with the disease/infirmity (but not to the extent that it actually affects \_ drugs)
  - o Are they still continuing with other business activities?
  - o Have other parties who ought to have known the extent been in the room and expressed no concern. Is it in the public domain? **Was there a rational reason for doing something (joint venture).**

## 3. Stronger party has victimised the weaker

### Either through Active extortion

- Manipulating/applying pressure/setting out to get them: *Bowkett*
- Aka using the arts: *Longmate*
- Look to reaction of weaker party as a guide, careful

### Or, through Passive acceptance

- in the circumstances where it is contrary to conscience that the bargain should be accepted, either at all, or without ILA: *Bowkett*
- Should not have accepted assent in securing contractual rights: *Gustav SC T*
  - o aware of contractual imbalance (*Blomley*), disability, lack of ILA
  - o see also definition [7] *Gustav SC Tipping + Tipping in Bowkett*

There can be a presumption of victimisation if the contractual imbalance is extreme (*Nichols*) (it is then up to the stronger party to rebut this presumption).

**Note: First three limbs are compulsory.**

## **4. Contractual imbalance**

There is a marked inadequacy of consideration and the stronger party either knows or ought to have known: *Bowkett*

**If contractual imbalance so much (huge), then burden shifts: *Nichols, PC O'Connor***

### **Necessity?**

- Not mandatory but will almost always be present (Deane J in *Amadio*; cited in *Bokwett*)
  - o On a practical level will always be present, no point in suing if not a bad deal

### **What counts?**

- Was an independent valuer involved?
- Who set the terms/proposed things/ nominated the valuer (Hart)
- Did the stronger party **know** of inadequacy / property value? Did their profession mean they **should have known**?
- Favourable terms to which party?
  - o Gustav was to purchaser – conditional on due diligence process
  - o Cf *O'Connor v Hart* – 2 years to pay during inflation.
  - o But also opportunity to get more doesn't count
- Consent to the imbalance? *Bridgewater*.
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The greater the weakness, the less the inadequacy of consideration needs to be: *Bowkett*

Stronger party must know.

Massive imbalance = presumption it is an UB: *O'Connor*

## **5. Procedural impropriety**

Procedural unfairness either demonstrated or presumed from the circumstances: *Bowkett*

- Not mandatory but will almost always be present (Tipping J in *Bokwett* p 37 460:54)
- Absence of procedural impropriety does not bar equity (*Bowkett*)
- **Pretty much just to do with ILA**

If ILA, then hard to find UB. But do they have knowledge that the advice is inadequate.

If they had ILA, it alleviates their weakness

## **6. Fair, just and reasonable (FJR)**

If above conditions are met, onus shifts on stronger party to show that contract was FJR and therefore be upheld: *Gustav CA Good deal?*

Somewhat weird.... Difficult to find if UB established.

**Prichard J in *Nicholls (No 1)* found illogical... (p 21 207) but reneged in No 2(p 29 239:22)**

Endorsed in higher courts

Other

- Maybe undue influence / pressure *O'Connor*,
- maybe conflict of interest *Gustav*. **Mention need with Conflict of interest to prove why it led to X decision.** Also need to allege.
- Can consent to conflicts of interest (*Gustav*)

## Remedy

X would want the equitable remedy of \_\_\_\_\_ because \_\_\_\_\_

- Specific performance [sale & purchase of land K] – stronger party will want if weaker party didn't perform – at equity
- Damages – at common law
- Recession – returns to situation prior to K - weaker party will want. *Status quo ante* – at equity

Note: can get equitable remedies even when a course of action is open under common law

Note: ONLY when common law relief is insufficient: when damages insufficient.

### Equitable defences to remedies

1. Any disqualifying behavior from plaintiff?

1. Maxim: He who seeks equity must do so with clean hands

2. Too great a delay?

1. Equitable defence of **laches** (look at decisions in COA and HC r.e. this – factors they take into account).

2. Maxim: Equity favors the diligent over the tardy. [becomes inequitable to grant remedy]

3. Time case is filed, not when heard e.g. *Archer*

4. *O'Connor* – reasonable explanation for 2 year delay – bad lawyer, trustees

- Has there been such a delay that makes it unconscionable?
- Has there been prejudice to the def caused by the plaintiff delaying his/her suit?
- Have to balance the equities between the parties.

Only available against the equitable remedies.

## Conclusion