

Equitable Doctrine of Unconscionable Bargain Fleshed Out

Preliminary matters that must shape analysis:

Equitable Doctrine

As an equitable doctrine, in assessing whether there is an unconscionable bargain, we must “look to the conduct of the stronger party” - *Nichols v Jessup* (Somers J) (CA), affirmed in *Bowkett v Action Finance Ltd* (HC), *Gustav v Macfield* (SC).

A court of equity will not restrain a suit at law unless the conscience of the plaintiff was in some way affected - *O'Connor v Hart* (PC); *Gustav v Macfield* (SC).

Holistic Assessment

Though there are a set of compulsory requirements as held in *Bowkett v Action Finance*, the assessment of each element of unconscionable bargain is not done in isolation or distinctly. Instead, “it is the cumulative weight of all of the relevant points which is important” – *Bowkett v Action Finance Ltd* (HC).

All of the material considerations must be weighed, and the question is simply “whether the bargain can be properly characterised as unconscionable so that equity should intervene” - *Bowkett v Action Finance Ltd* (HC). That is, to alleviate the conscience of the plaintiff.

Some degree of caution

As we undertake this assessment, we must do so with a degree of caution and “tread carefully”. “This hesitancy stems from *Bowkett v Action Finance* (HC), where it was held that “the circumstances must be such as to call loudly for equitable relief” - *Bowkett v Action Finance Ltd* (HC). “There is no room for intervention on a tender, moralistic basis—*Bowkett v Action Finance*—and it was later confirmed that unconscionable bargain “is not intended to relieve parties from 'hard' bargains or 'save the foolish from the foolishness'” - *Gustav v Macfield* (SC).

The focus is on the point at which the contract was entered into.

“The correct approach is to examine whether the transaction was unconscionable at the date it was entered into” - *Gustav v Macfield* (SC); building on *Nichols v Jessup* (CA).

If, at a later date, the contract is varied to the detriment of the party claiming that the contract is unconscionable, the Court must assess whether the variation makes the contract unconscionable at the date the variation is agreed - *Gustav v Macfield* (SC)

The 6-Limb Test:

- a. **The weaker party must be under a significant/special disability** - *Bowkett v Action Finance Ltd* (HC); *Gustav v Macfield* (SC); *Nichols v Jessup* (CA); *O'Connor v Hart* (PC).

Start:

- This limb is compulsory. Without it, there is no unconscionable bargain – *Bowkett v Action Finance Ltd* (HC)

Crux of the Law:

- The disability must be such that it “prevents the weaker party from exercising rational and independent judgment” (*Nichols v Jessup*, Somers J (CA)), “seriously affects the ability of the innocent party to make a judgment as to their own best interest” (*Blomley v Ryan* (HCA)), or “diminishes a party’s ability to assess his or her best interest” (*Gustav v Macfield* (SC)).
- While this is an open-ended concept (*Gustav v Macfield* (SC)), it has specifically included criteria such as “poverty or need, sickness, age, gender, infirmity of body or mind, drunkenness, illiteracy or lack of education, and lack of assistance or explanation where

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assistance is necessary" (*Blomley v Ryan*) or Ignorance, lack of education, illness, age, mental or physical infirmity, stress or anxiety (*Gustav v Macfield* (SC)).

While [these disabilities] were not specifically recognised in other cases such as Blomely v Ryan (HCA) or Gustav v Macfield (SC), weakness is an "open-ended concept" (Gustav v Macfield (SC)) and it better judged by the effects of [weakness].

When Concluding:

- It is also important to note that the factors are taken together, and the assessment of the weakness is a cumulative assessment—*Moffat v Moffat*.
- If there is a significant inadequacy of consideration, then the weakness required will be lesser (*Bowkett v Action Finance Ltd* (HC), Tipping J)
- If there is a severe weakness, then it will colour the rest of the test and perhaps require lesser victimisation. (*Bowkett v Action Finance Ltd* (HC), Tipping J)

Established	Failed
<ul style="list-style-type: none"> - <i>Longmate v Leger</i> - known eccentric, sold at 50% undervalue; no independent advice. Established as a matter of the sheer degree of inequality. - <i>Nichols v Jessup</i> - ignorant about property rights, unintelligent, muddleheaded, and her judgment in matters of business swayed by irrelevant considerations, acting without professional advice (Pritchard J swayed on what of that was known, but described it all as relevant). - <i>Bowkett v Action Finance Ltd</i> - "elderly, unversed in business matters; clearly under pressure from son who was about to become bankrupt, had no independent advice" 	<ul style="list-style-type: none"> - <i>Archer v Cutler</i> - in fact, had severe senile dementia; however, relevantly, she was a somewhat frail, somewhat eccentric, did not have advice. Note, against a backdrop of operating in goodwill and not being too far undervalue. - <i>O'Connor v Hart</i> - in fact, much worse; however, the known and relevantly, he was old and had a lack of independent advice (shared a solicitor), though also didn't know he was not acting on full effective advice.

b. The stronger party must have known or ought to have known about that weakness.

Start:

This is a compulsory limb to find unconscionable bargain - (*Bowkett v Action Finance Ltd* (HC), Tipping J)

Legal Crux

- This will be satisfied if the party has actual knowledge (*O'Connor v Hart* (PC); *Bowkett v Action Finance Ltd* (HC); *Nichols v Jessup* (CA)), affirmed in *Gustav v Macfield* (SC).
- In the absence of actual knowledge, constructive knowledge will be enough (*Nichols v Jessup* (CA); *Bowkett v Action Finance Ltd* (HC); affirmed in *Gustav v Macfield* (SC). That is to say, it is sufficient that "a reasonable man in the position of the stronger party would have adverted to the possibility of its existence" (*Nichols v Jessup* (CA)), notwithstanding that they did not subjectively appreciate the weakness.
- The knowledge of someone acting on behalf of the stronger party can be imputed to them - *Bowkett v Action Finance Ltd*; affirmed in *Gustav v Macfield* (SC).

Established	Failed

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<p>- <i>Bowkett v Action Finance</i> - via Mrs Webley who advised them, working with their solicitors, guided them throughout - and in doing so, had both knowledge and significant doubts - attributed that knowledge to <i>Action Finance Ltd</i>.</p>	<p>- <i>O'Connor v Hart</i> - thought that he had been advised effectively by his solicitor, but didn't know not really acting on his advice. - <i>Gustav v Macfield</i> - (CA) knew of the medical illness and physical decline; knew that it was bought at a premium; knew that he had a solicitor but thought it was just for conveyancing. (SC) knew of physical deterioration but did not attribute or extend that knowledge to mental diminishment.</p>
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c. The stronger party must either have taken advantage of the weaker party, or passively accepted a benefit in unconscionable circumstances.

Start:

This limb is compulsory. Without it, there is no unconscionable bargain – *Bowkett v Action Finance Ltd* (HC)

Legal Crux

- The stronger party must have taken advantage of the weaker's disability, either by active extortion of the bargain or passive acceptance of it in circumstances where it is contrary to conscience that the bargain should be accepted (*Bowkett v Action Finance Ltd* (HC)).
 - o There will be active extortion where the stronger party actively went out to procure the bargain in unconscionable circumstances (*Bowkett v Action Finance Ltd* (HC)). This may be by equitable fraud, victimisation, taking advantage, over-reaching, or other unconscionable doing" - *O'Connor v Hart* (PC)
 - o In the absence of active extortion, passive acceptance of a benefit in unconscionable circumstances will suffice - (*Bowkett v Action Finance Ltd* (HC)). This means that the party "unconscientiously received or retained the benefit of a bargain" – *Moffat v Moffat*, in *Nichols v Jessup*; or "unconscientiously used their power that arose in the circumstances" - *O'Connor v Hart* (PC)

It is acceptance of a benefit in circumstances in which the stronger party has an obligation to refuse the transaction unless the other party receives (and can demonstrate that they have received) full independent advice – *Bowkett v Action Finance Ltd* (HC), affirmed in *Gustav v Macfield* (SC).

When concluding:

- There may be moments where "the contractual imbalance is so extreme as to raise the presumption of procedural unfairness" - *O'Connor v Hart* (PC), at which point the defendant must then show that there was no unconscionable behaviour.

Established	Failed
<p><i>Nichols v Jessup</i> - repeated approached to get her to sign when she was at first reluctant; did not go through a solicitor despite that being routine (though the timing rendered this irrelevant, as far as the Court was concerned).</p>	<p>- <i>O'Connor v Hart</i> - the terms were proposed by the other solicitor; hadn't done anything else. - <i>Gustav v Macfield</i> - Gustav was the party who approached, unsolicited, more interested; gave very good terms and the ability to cancel.</p>

d. Inadequacy of Consideration

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Start

- Though this will commonly be present, it is not a compulsory limb - (*Bowkett v Action Finance Ltd* (HC); drawing on *Amadio* (HCA))

Crux of Law

- a. There is a lopsided bargain where there is a significant inequality of consideration being received by each party; this was discussed by the Privy Council as "contractual imbalance" – *O'Connor v Hart*.

Notably, in *Bowkett v Action Finance Ltd* (HC), this only required imbalances in the consideration or benefits being *received*, not necessarily an imbalance in what is passing *from* the stronger party.

- b. The stronger party must have known that there was a disparity, or the circumstances had to be such that a reasonable person in the shoes of the defendant ought to have known – *Nichols v Jessup* (CA); *Bowkett v Action Finance Ltd* (SC).

When concluding:

- There may be moments where "the contractual imbalance is so extreme as to raise the presumption of unconscientious behaviour" - *O'Connor v Hart* (PC); affirmed in *Bowkett v Action Finance Ltd* (HC)
- "The more startling the inadequacy of consideration, the less substantial the disability may need to be and vice versa" - *Bowkett v Action Finance Ltd* (HC).

Established	Failed
	<ul style="list-style-type: none"> - <i>Nichols v Jessup</i> - there was a significant inequality of \$47 000 gain, compared to \$3 000 loss. However, because he did not appreciate that inequality (until later) it was not a weighing factor. - <i>Bowkett v Action Finance</i> - the "dubious advantage of helping their son" was traded for mortgage rights, and the payment for significant debts.

e. Procedural Impropriety

Start

- Though this will commonly be present, it is not a compulsory limb - (*Bowkett v Action Finance Ltd* (HC)).

Crux of Law

- Procedural impropriety be established in the absence of effective, independent advice – *Bowkett v Action Finance Ltd* (HC)
- Notably, the stronger party does not need to look to the actual quality of the advice (except for, perhaps, the most extreme circumstances), and the stronger party is not concerned whether the advice is actually followed (*Mowat v Clark*).

When concluding:

- If the weaker party has received adequate independent advice, then the disability will normally be deemed to have been overcome. That is, "It would be hard to find a bargain unconscionable if the weaker party had received adequate independent advice" - *Bowkett v Action Finance Ltd* (HC)

Established	Failed

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	<p>- <i>O'Connor v Hart</i> - where solicitors worked at the same firm and advised both parties; this was raised in the context of incapacity and "lack of independent advice"; at lower courts this was considered enough, at the PC it was not decided.</p> <p>- <i>Nichols v Jessup</i> - "no independent <u>professional</u> advice" - where architect student son had been present, but it was raised as an ALMOST point.</p>
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f. Absence of defence: fair, reasonable, and proper

"If these conditions are met, the burden falls on the stronger party to show that the transaction was fair, just, and reasonable and should therefore be upheld" - *Gustav v Macfield* (SC); also similarly in *Bowkett v Action Finance* (HC).

- Feel free to be sceptical of this.