

## UNCONSCIONABILITY AS A UNIFYING CONCEPT IN EQUITY

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### ABSTRACT

This article seeks to examine the extent to which a unified concept of unconscionability can be used to rationalise related doctrines of equity, in particular, in the areas of (1) unconscionable bargains, undue influence and duress (2) proprietary estoppel (3) knowing receipt liability and (4) relief against forfeitures. The conclusion is that such a process of amalgamation may provide a principled doctrinal basis for equity's intervention which has already found favour in the English courts.

### INTRODUCTION

A recent discernible trend in equity has been the willingness of the English courts to adopt a broader-based doctrine of unconscionability as underlying proprietary estoppel claims and the personal liability of a stranger to a trust who has knowingly received trust property in breach of trust. The decisions in *Gillett v Holt*,<sup>1</sup> *Jennings v Rice*<sup>2</sup> and *Campbell v Griffin*<sup>3</sup> in the context of proprietary estoppel and *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*<sup>4</sup> on the subject of receipt liability, demonstrate the judiciary's growing recognition that the concept of unconscionability provides a useful mechanism for affording equitable relief against the strict insistence on legal rights or unfair and oppressive conduct. This, in turn, prompts the question whether there are other areas which would benefit from a rationalisation of principles under the one umbrella of unconscionability.

The process of amalgamation, it is submitted, would be particularly useful in areas where there are currently several related (but distinct) doctrines operating together so as to give rise to confusion and overlap in the same field of law. Most notably, it has already been suggested by some legal

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<sup>1</sup> [2001] Ch 210, (CA).

<sup>2</sup> [2002] EWCA Civ 159, (CA).

<sup>3</sup> [2001] WLTR 981, (CA). See also, most recently, *Ottey v Grundy* [2003] EWCA Civ 1176.

<sup>4</sup> [2000] 4 All ER 221, (CA).

commentators that a radical overhaul of the doctrines of unconscionable bargains, undue influence and duress is much needed, with a view to providing a single, coherent principle justifying equity's intervention to prevent the exploitation of the vulnerable. This can best be achieved it is submitted, by bringing together these various doctrines under one unified concept of unconscionable use of power. Another area, hitherto unexplored both academically and judicially, is equity's jurisdiction to relieve against forfeitures. Here again, it may be possible to unify the various criteria for relief under one overarching notion of unconscionability.

## UNCONSCIONABLE BARGAINS

Although the jurisdiction to set aside unconscionable bargains was originally confined to reversioners and expectant heirs, it has since been extended to poor and ignorant persons and where the transaction in question was made at a considerable undervalue without the benefit of independent legal advice.<sup>5</sup> More recently, it has been held that the modern equivalent of "poor and ignorant" is "a member of the lower income group . . . less highly educated."<sup>6</sup> This broadening of the class of claimant eligible for relief has increased considerably the potential availability of the doctrine to a wider range of transactions where the terms are unconscionable and the victim does not receive independent legal advice. The essential elements of the doctrine were set out by Mr Peter Millett QC (sitting as a deputy judge of the High Court) in *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd*:<sup>7</sup>

"First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken . . . Second, this weakness of the one party has been exploited by the other in some morally culpable manner . . . And third, the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive."

A modern illustration of the jurisdiction is to be found in *Boustany v Pigott*,<sup>8</sup> involving a lease of land, where the respondent was successful in establishing all three ingredients enabling the grant of a lease to be set aside.

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<sup>5</sup> *Fry v Lane* (1888) 40 Ch D 312.

<sup>6</sup> *Cresswell v Potter* [1978] 1 WLR 255n, at 257, per Megarry J.

<sup>7</sup> [1983] 1 WLR 87, at 94-95.

<sup>8</sup> (1995) 69 P & C R 298, (PC).

Similarly, in the earlier case of *Creswell v Potter*,<sup>9</sup> a conveyance of the matrimonial home executed by a wife in favour of her husband was set aside as an unconscionable bargain. Although the wife was employed as a telephonist requiring considerable alertness and skill, she could properly be described as “ignorant” in the context of property transactions. There was also, clearly, an undervalue since she only received a release from her liability under an existing mortgage in return for giving up all her interest in the matrimonial home which had increased in value. There was also no suggestion that she had had any independent legal advice. Again, in *Backhouse v Backhouse*,<sup>10</sup> the wife, in the course of divorce proceedings, executed a deed transferring her interest in the matrimonial home to her husband without seeking independent legal advice. She received no consideration for the transfer except release from her liability under the mortgage. Balcombe J concluded (albeit *obiter*) that all three elements necessary to set aside the transaction on the ground that it was an unconscionable bargain had been made out.

In many cases, the facts may give rise to a potential defence based on either the doctrine of undue influence (discussed below) or equity’s jurisdiction to relieve against unconscionable bargains. This has been recognised judicially, most notably in *Credit Lyonnais Bank Nederland NV v Burch*,<sup>11</sup> where Nourse L J accepted that the legal charge in favour of the bank could have been set aside as an unconscionable bargain (as opposed to the claimant relying on undue influence) stating that such jurisdiction was still “in good heart and capable of adaptation to different transactions entered into in changing circumstances.”<sup>12</sup> Undoubtedly, there are strong similarities between the two doctrines and this has motivated a number of academic commentators to urge for a merger of the two sets of principles into one overarching notion of unconscionability. Indeed, the recognition in *Burch* that the *O’Brien*<sup>13</sup> principle is an application of unconscionability has prompted some writers<sup>14</sup> to suggest that the true basis of the decision in the former case was not the absence of the claimant’s real consent (ie, undue influence) but the unconscionable conduct on the part of the bank in accepting a transaction which was so heavily unbalanced.

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<sup>9</sup> [1978] 1 WLR 255n.

<sup>10</sup> [1978] 1 All ER 1158.

<sup>11</sup> [1997] 1 All ER 144, (CA).

<sup>12</sup> *Ibid* at 151.

<sup>13</sup> *Barclays Bank plc v O’Brien* [1993] 4 All ER 417, (HL).

<sup>14</sup> See, eg, M Chen-Wishart “The *O’Brien* Principle and Substantive Fairness”, [1997] 56 *CLJ* 60, at 63.

## UNDUE INFLUENCE

A rare opportunity to consider the interaction between unconscionable bargains and undue influence claims arose in the case of *Portman Building Society v Dusangh*.<sup>15</sup> Here, the building society granted a mortgage to the defendant, who was elderly (aged 72 years of age), illiterate and on a very low income. The mortgage was guaranteed by the defendant's son, who received the bulk of the sum advanced and used it to purchase a supermarket. The same solicitor acted for all parties. The supermarket business was not a success and the son fell behind with the mortgage repayments. When the building society sought possession of the property, the defendant argued that he was entitled to set aside the charge directly against the society as an unconscionable bargain. On the facts, the defendant's argument failed since all the requisite ingredients of an unconscionable bargain were found to be lacking. The defendant was not at a serious disadvantage to the building society (having no existing indebtedness towards it), his situation was not exploited by the society, and the society had not acted in a morally reprehensible manner. Accordingly, the transaction, although improvident, was not oppressive and the conscience of the court was not shocked.

In the course of his judgment, Ward L J adopted the approach taken by Mason J in *Commercial Bank of Australia Ltd v Amadio*,<sup>16</sup> who sought to distinguish the two concepts in the following way:<sup>17</sup>

“In [undue influence] the will of the innocent party is not independent and voluntary because it is overborne. In [unconscionable conduct cases] the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.”

In essence, therefore, the suggestion here is that undue influence is concerned with the weakness of the complainant's consent resulting from over-dependence on the defendant's judgment, skill or expertise. By contrast, the doctrine of unconscionable bargains, it is suggested, places greater emphasis on the defendant's exploitation of the complainant's weakness (ie, the wrongful conduct of the defendant). This is the approach taken by Birks

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<sup>15</sup> [2000] 2 All ER (Comm) 221, (CA).

<sup>16</sup> (1985) 15 CLR 447, (High Court of Australia).

<sup>17</sup> *Ibid* at 461.

and Chin<sup>18</sup>, who view undue influence cases as “plaintiff-sided” because the essence of the doctrine is the complainant’s dependency on the defendant as opposed to the defendant’s wrongdoing. Thus, they point out that, in the presumed undue influence category, the defendant’s conduct does not usually involve any actual coercion or abuse; the doctrine operates simply to remove from the defendant benefits which he has passively obtained under the transaction. Moreover, the defendant can rebut the presumption by establishing that the claimant entered into the transaction freely and with informed consent; the rebuttal focuses on consent and is not concerned with unconscionable conduct on the defendant’s part. Even in some cases involving actual undue influence, say Birks and Chin, the evidence is merely that the defendant made the decision for the complainant and with the intention of benefiting him (or her).<sup>19</sup>

Other commentators,<sup>20</sup> however, have argued that there is a close relationship between the principles relating to undue influence and unconscionable bargains and that the two doctrines should be fused within an all-embracing doctrine of unconscionability. According to Capper,<sup>21</sup> for example, the two doctrines share three common features, namely, (1) inequality of bargaining position (ie, relational inequality); (2) transactional imbalance; and (3) unconscionable conduct on the part of the defendant. So far as the requirement of relational inequality is concerned, this is present in presumed undue influence cases because the complainant must prove the existence of a relationship under which he (or she) generally reposed trust and confidence in the wrongdoer. Such relationships are “infinitely various”<sup>22</sup> and do not warrant precise definition. They are not necessarily fiduciary but a vital element is confidentiality. Relational inequality is always present (by definition) in actual undue influence cases. The requirement is also to be found in unconscionability cases in that the complainant must be

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<sup>18</sup> Birks and Chin “On the Nature of Undue Influence” in *Good Faith and Fault in Contract Law*, (Beatson and Friedmann, ed, 1985, at 57-97).

<sup>19</sup> See, *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876.

<sup>20</sup> See, eg, R Bigwood “Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation’?” (1996) 16 *O J L S* 503, who argues that both undue influence and unconscionable dealings concern a form of “exploitation”, although the source of the claimant’s vulnerability is different in each case. In his view, however, despite definitional differences between the two concepts, “there is no logical reason” why the jurisdiction of unconscionable dealings could not include undue influence and duress: *Ibid* at 514.

<sup>21</sup> D Capper “Undue Influence and Unconscionability: A Rationalisation”, (1998) 114 *LQR* 479.

<sup>22</sup> *National Westminster Bank plc v Morgan* [1985] 1 All ER 821, at 831, *per* Lord Scarman.

shown to be suffering from some special disadvantage to warrant equity's intervention. The complainant's disabling circumstances, as we have seen, have been given a broad interpretation by the English courts. In *Multiservice Bookbinding Ltd v Marden*,<sup>23</sup> for example, Browne-Wilkinson J stated<sup>24</sup> that the categories of unconscionable bargains were not limited and that "the court can and should intervene where a bargain has been procured by unfair means." There is no reason to suppose, therefore, that the English courts would be reluctant to grant relief in a wide range of circumstances.<sup>25</sup>

Turning to transactional imbalance, Capper concedes that this requirement does not feature in the actual undue influence category, which requires mere proof of actual coercion over the weaker party. His argument, however, is that transactional imbalance (ie, the bargain itself must be oppressive) is not an essential requirement of any undue influence or unconscionability case (albeit invariably present), but simply "powerful evidence in support of relational inequality and unconscionable conduct, which are the true invalidating grounds."<sup>26</sup> On this point, he (like other commentators) doubt whether manifest disadvantage should be an essential feature of the presumed undue influence category. The better view, largely endorsed now by the House of Lords in *Royal Bank of Scotland v Etridge (No. 2)*<sup>27</sup> is that the primary function of manifest disadvantage is evidentiary in deciding whether there is any issue of abuse which can properly be raised by the complainant. As such, it is only one of the factors determining whether a successful plea of undue influence has been made out. According to Capper, transactional imbalance is also not an essential precondition to finding an unconscionable bargain. Although many of the unconscionability cases do involve sales at an undervalue and other forms of contractual imbalance, this is not always the case. He concludes that "if manifest disadvantage assumes the evidential role recommended for it in respect of presumed undue influence, then assimilation with actual undue influence and unconscionability becomes relatively easy."<sup>28</sup>

Finally, so far as unconscionable conduct is concerned, this is, according to Capper, a requirement of both doctrines. It is clearly evident in actual undue influence cases and is an essential feature of the unconscionability

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<sup>23</sup> [1979] Ch 84.

<sup>24</sup> *Ibid* 110.

<sup>25</sup> It is apparent, for example, that inability to speak English, if taken advantage of, may come within the doctrine: *Barclays Bank plc v Schwartz*, *The Times*, August 2, 1995, unreported.

<sup>26</sup> *Ibid* at 486.

<sup>27</sup> [2001] 4 All ER 449, (HL). See, M Thompson, "Wives, Sureties and Banks", [2002] *Conv* 174.

<sup>28</sup> *Ibid* at 500.

cases. In his view, “actual undue influence (without pressure) is only different from presumed undue influence in so far as what is presumed in the latter is affirmatively proved in the former.”<sup>29</sup> Although in the presumed undue influence category, coercion and abuse by the defendant is less easy to discern, nevertheless, many of the cases on unconscionable dealing also concern little more than passive acceptance of benefits received under unconscionable circumstances.<sup>30</sup>

Capper’s persuasive argument for a new combined doctrine is mirrored by another academic writer, Chen-Wishart,<sup>31</sup> who argues that “unconscionability should be recognised as the informing principle at the root of the *O’Brien* formulation which is, in turn, merely one application of the unconscionability jurisdiction.”<sup>32</sup> She also suggests that both doctrines reflect same concerns and are subject to the same burden of proof. First, the requirement of “special disability” in unconscionable dealing cases is reflected, under the *O’Brien* doctrine, “in the need to show that the surety’s consent was tainted by the debtor’s undue influence or misrepresentation.” Secondly, the requirement of an “improvident transaction” corresponds with the *O’Brien* requirement that the transaction be manifestly disadvantageous (at least in the presumed undue influence category). Finally, the element of “unconscientious advantage-taking” is mirrored in the need to show, under *O’Brien*, “that the lender has constructive notice of the undue influence but obtains the benefit of the transaction without taking adequate steps to meet that suspected influence.”<sup>33</sup>

The unifying doctrine of unconscionability can, therefore, also be extended to embrace the liability of a third party lender in circumstances where it has actual or constructive notice that the loan transaction is tainted with undue influence, misrepresentation or some other equitable wrongdoing. Significantly, in *Portman Building Society v Dusangh*<sup>34</sup>, Ward L J recognised that the doctrine of notice (as explained in *O’Brien*) could apply in the context of an unconscionable dealing so as to bind the lender in the same way as in a case involving undue influence. His Lordship relied on a passage in

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<sup>29</sup> *Ibid* at 493.

<sup>30</sup> See, eg, *Hart v O’Conor* [1985] A C 1000, at 1024, (PC), where Lord Brightman explained the meaning of unconscionable conduct in this context as: “. . . victimisation, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.”

<sup>31</sup> M Chen-Wishart, “The *O’Brien* Principle and Substantive Unfairness”, [1997] *CLJ* 60.

<sup>32</sup> *Ibid* at 62.

<sup>33</sup> *Ibid* at 62. See also, J R F Lehane, “Undue Influence, Misrepresentation and Third Parties”, (1994) 110 *LQR* 167, at 173.

<sup>34</sup> [2000] 2 All ER (Comm) 221, (CA).

Lord Browne-Wilkinson's speech in *O'Brien* where he stated<sup>35</sup> that a wife who has been induced to stand as a surety for her husband's debts "by his undue influence, misrepresentation or some other legal wrong" had an equity as against him to set aside the transaction. In his view, unconscionable conduct was "some other legal wrong" and, therefore, the principles in *O'Brien* relating to notice and third parties were equally applicable in cases involving unconscionable bargains.<sup>36</sup> Although, clearly, the current law focuses on a test of notice, there is no reason why the principle could not be reformulated so that, if a lender has the requisite degree of knowledge of an unconscionable transaction (eg, between a husband and wife), it will itself be treated as acting unconscionably in relying on the transaction.<sup>37</sup>

## DURESS

There is no reason why, it is submitted, the related doctrine of common law duress should not also feature in this assimilation process since it also embodies notions of relational inequality and unconscionable conduct associated with the doctrines of undue influence and unconscionable dealings.

Although originally confined to threats or acts of violence to the person or to goods, the concept of duress has now been extended to include a wide range of threats including those to a party's economic and business interests. The current trigger for duress, however, is different from that used in undue influence cases. Essentially, the complainant has to prove two elements, namely, (1) that the threat of pressure was illegitimate; and (2) the lack of a reasonable or realistic alternative to making the contract.<sup>38</sup> Where, however, what is threatened is not a civil wrong (ie, a breach of contract or tort) but a crime, only the first element need be proved. A good example of the operation of the doctrine is to be found in *B & S Contracts & Design Ltd v Victor Green Publications Ltd*,<sup>39</sup> where a builder agreed to erect stands for an exhibition at Olympia, London. Less than a week before the opening of the exhibition, the builder told the owner that he would not do it without extra

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<sup>35</sup> [1994] 4 All ER 417, at 428, (HL).

<sup>36</sup> [2000] 2 All ER (Comm) 221, at 233-234. See also, *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, at 153, (CA), *per* Millet L J

<sup>37</sup> See, eg *Shoppers Trust Co v Dynamic Homes Ltd* (1993) 96 DLR (4d) 267, (Ontario Court), where it was held to be unconscionable to permit the lender to take advantage of the mortgage in the absence of proper independent legal advice.

<sup>38</sup> *Universe Tankships Inc of Monrovia v International Transport Workers' Federation and Laughton* [1983] A C 366, (HL).

<sup>39</sup> [1984] ICR 419, (CA).

payment to satisfy the demands of his workforce. Failure to erect the stands in time for the exhibition would have been disastrous for the owner, so he gave way to the demand and paid the extra amount. It was held that this was clearly illegitimate pressure and the owner had no real option but to accede to the demand. Accordingly, the extra amount was recoverable as money paid under duress.

As we have seen, the doctrine of undue influence is based on the notion of actual (or presumed) pressure being exerted over the complainant so that he (or she) is unable to form a free and informed decision to enter into the transaction. In the presumed undue influence category, unlike duress, the doctrine relies on establishing a relationship of trust and confidence between the parties which leads one party to place reliance on the other's impartial judgment and advice. In the actual undue influence category, however, the difference with duress is less easy to discern. Here, the question is largely the same, namely, whether consent was induced by pressure which the law does not regard as legitimate. Several academic commentators have, therefore, argued strongly for the assimilation of actual undue influence cases involving pressure within the ambit of the doctrine of duress.<sup>40</sup> Most recently, in *Royal Bank of Scotland v Etridge (No 2)*,<sup>41</sup> Lord Nicholls opined that "today there is much overlap with the principle of duress as this principle has subsequently developed."<sup>42</sup>

## PROPRIETARY ESTOPPEL

Undoubtedly, the modern trend of English case law is to apply a broad notion of unconscionability in proprietary estoppel claims. This trend was begun by Oliver J in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd*,<sup>43</sup> who, referring to Fry J's five probanda in *Willmott v Barber*,<sup>44</sup> was able to identify from the authorities<sup>45</sup> "a much wider equitable jurisdiction to interfere in cases where the assertion of strict legal rights is found by the

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<sup>40</sup> Birks and Chin "On the Nature of Undue Influence" in *Good Faith and Fault in Contract Law*, (Beatson and Friedman, ed, 1995). See also, A Phang "Undue Influence Methodolgy, Sources and Linkages", [1995] *JBL* 552, at 566.

<sup>41</sup> [2001] 4 All ER 449, (HL). See also, *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389, at 394-395, *per* Porter J.

<sup>42</sup> *Ibid* at 457.

<sup>43</sup> [1982] QB 133.

<sup>44</sup> (1880) 15 Ch D 96.

<sup>45</sup> In particular, *Inwards v Baker* [1965] 2 QB 29, (CA); *E R Ives Investment Ltd v High* [1967] 2 QB 379, (CA) and *Crabb v Arun District Council* [1976] Ch 179, (CA).

court to be unconscionable.”<sup>46</sup> The broad approach taken by Oliver J was adopted by Robert Goff J in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*,<sup>47</sup> who also emphasised the flexible nature of the estoppel doctrine and rejected rigid over-categorisation. In the same case, Lord Denning M R (in the Court of Appeal) perceived all forms of estoppel (ie, proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel) as merging into one general principle shorn of limitations, namely:<sup>48</sup>

“When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.”

Subsequently, the Privy Council in *Attorney-General of Hong Kong v Humphreys Estate (Queen’s Gardens) Ltd*<sup>49</sup> referred with approval to a general test, indicated by Scarman L J in *Crabb v Arun District Council*,<sup>50</sup> that equity will interfere if “it would be unconscionable and unjust to allow the defendants to set up their undoubted rights against the claim being made by the plaintiff.” Their Lordships also approved the judgment of Oliver J in *Taylor Fashions*, reiterated in the Court of Appeal in *Habib Bank Ltd v Habib Bank AG Zurich*,<sup>51</sup> and also the above-cited passage from the judgment of Lord Denning M R in the *Amalgamated Investment* case.

More recently, the Court of Appeal in *Gillett v Holt*<sup>52</sup> has, once again, openly recognised that the proprietary estoppel doctrine is founded on a generalised theory of unconscionability. In the words of Robert Walker L J.<sup>53</sup>

“ . . . the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine.”

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<sup>46</sup> *Ibid* at 147.

<sup>47</sup> [1982] QB 84, at 103-104.

<sup>48</sup> *Ibid* at 122.

<sup>49</sup> [1987] 2 WLR 343, (PC).

<sup>50</sup> [1976] Ch 179, at 195, (CA).

<sup>51</sup> [1981] 1 WLR 1265, at 1285, (CA).

<sup>52</sup> [2001] Ch 210, (CA).

<sup>53</sup> *Ibid* at 225.

Although a proprietary estoppel claim will fail unless the claimant is able to prove the three essential elements of assurance, reliance and detriment, it is evident from the *Gillett* ruling that these prerequisites are not “watertight compartments” and that “the quality of the relevant assurances may influence the issue of reliance, [and] that reliance and detriment are often intertwined.”<sup>54</sup> In this connection, Robert Walker L J also recognised that “in the end the court must look at the matter in the round” and that, ultimately, the process involves “a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.”<sup>55</sup>

It is submitted that these observations mark the beginning of the expansion of proprietary estoppel doctrine into a wider notion of “unconscientious dealing” in relation to property. This has been highlighted in several recent decisions, namely, *Jennings v Rice*,<sup>56</sup> *Campbell v Griffin*,<sup>57</sup> *Ottey v Grundy*,<sup>58</sup> *Uglove v Uglove*<sup>59</sup> and *Murphy v Burrows*,<sup>60</sup> all of which stress the court’s considerable flexibility in determining the appropriate award in satisfying the claimant’s estoppel equity. In particular, they emphasise that the primary function of proprietary estoppel is not to protect expectations but to prevent unconscionable conduct and to do justice between the parties. Although such a principle will inevitably give rise to a more protracted assessment of the circumstances in a given case, it is, in the writer’s view, to be welcomed as giving further support to the simple proposition, already expressed elsewhere,<sup>61</sup> that where a person has induced another into an expectation, the court should provide a remedy if it would be unconscionable to deny it.

## KNOWING RECEIPT LIABILITY

There has been much debate, in recent years, over the correct test for determining when a stranger to a trust will be held personally liable as a constructive trustee for receipt of trusts assets in breach of trust. The orthodox view has been that the concept of knowledge underpins the personal liability of a stranger in this context. This approach, however, was firmly

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<sup>54</sup> *Ibid* at 225, *per* Robert Walker L J.

<sup>55</sup> *Ibid* at 232.

<sup>56</sup> [2002] EWCA Civ 159, (CA).

<sup>57</sup> [2001] W & T L R 981, (CA).

<sup>58</sup> [2003] EWCA Civ 1176, (CA).

<sup>59</sup> [2004] EWCA Civ 987, (CA).

<sup>60</sup> [2004] EWHC 1900.

<sup>61</sup> M Halliwell, “Estoppel: Unconscionability as a Cause of Action”, (1994) 14 *LS* 15.

rejected by the Court of Appeal in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*,<sup>62</sup> which has adopted a more general concept of unconscionability in preference to a strict test of knowledge.

Interestingly, Nourse L J (who gave the leading judgment) considered the different “*Baden*” categories of knowledge<sup>63</sup> as helpful, but only in determining dishonesty for the purposes of accessory liability. In the knowing receipt cases, his Lordship preferred to base liability on the concept of unconscionability which, in his view, accorded with the approach taken by Buckley L J in *Belmont Finance Corporation v Williams Furniture Ltd (No 2)*,<sup>64</sup> namely, whether the recipient can “conscientiously retain [the] funds against the company”<sup>65</sup> or, in the words of Megarry V-C in *Re Montagu’s Settlement Trusts*<sup>66</sup>, “the recipient’s conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee.”<sup>67</sup> Looked at in this way, there was no need to resort to the *Baden* categorisation (whether or not reduced to the division between actual and constructive knowledge) since, in all cases, the test was simply whether the recipient’s knowledge was such as to make it unconscionable for him to retain the benefit of the receipt.

In effect, the *Akindele* ruling has introduced a single test of unconscionability for knowing receipt cases. In Nourse L J’s view, a single test based on unconscionability ought to avoid the difficulties of “definition and allocation to which the previous categorisations [of knowledge] have led.”<sup>68</sup> His Lordship also considered that such a test would make it easier for the courts to give common-sense decisions in the commercial context, in which most knowing receipt claims are made. One practical consequence, however, of adopting a broader-based doctrine of unconscionability in this context (as in proprietary estoppel cases) is that it will tend to give rise to a more sophisticated (and protracted) assessment of the facts in a given case. This is true also of the accessory liability category where, once again, knowledge has been avoided as a defining ingredient in favour of a single test of dishonesty.<sup>69</sup> Is it true to say, therefore, that for both categories of constructive trust, the terms dishonesty and unconscionability are now largely synonymous?

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<sup>62</sup> [2000] 4 All ER 221, (CA).

<sup>63</sup> See, *Baden, Delvaux and Lecuit v Société Générale pour Favoriser le Développement du Commerce et de L’Industrie en France SA*, [1992] 4 All ER 161.

<sup>64</sup> [1980] 1 All ER 393, (CA).

<sup>65</sup> *Ibid* at 405.

<sup>66</sup> [1992] 4 All ER 308.

<sup>67</sup> *Ibid* at 323-324.

<sup>68</sup> [2000] 4 All ER 221, at 236.

<sup>69</sup> *Royal Brunei Airlines v Tan* [1995] 3 All ER 97, (CA).

This is an interesting question to which there is no easy answer. It is submitted, however, that the tests are different despite the obvious similarities in language. Dishonesty, in the context of accessory liability means conscious impropriety. Moreover, it must be established that the recipient's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that, by those standards, his conduct was dishonest.<sup>70</sup> So, for example, participating in a transaction knowing it involves a misapplication of trust funds will constitute dishonesty. Equally, deliberately closing one's eyes to the obvious or deliberately not asking questions will give rise to liability. However, mere carelessness or negligence will not be enough. In the recipient liability category, however, constructive knowledge of a breach of trust (ie, *Baden* categories (4) and (5)) may give rise to liability, albeit only exceptionally, where "there is no justification on the known facts for allowing a commercial man who has received funds paid to him in breach of trust to plead the shelter of the exigencies of commercial life."<sup>71</sup> In such cases, it may well be unconscionable for the recipient to retain the benefit of the funds despite the absence of proof of any actual knowledge (or recklessness) on his part (ie, *Baden* categories (1)-(3)).

## RELIEF AGAINST FORFEITURE

It is possible also to rationalise equity's jurisdiction to relieve against forfeitures under one unified concept of unconscionability. More specifically, it is submitted that equity will have jurisdiction to grant relief against forfeiture where the unconscionability falls to be characterised by reference to (1) the nature of the transaction; (2) the contractual stipulation; or (3) the party's misconduct or unjust enrichment. Each of these is discussed briefly below.

### *The nature of the transaction*

The inquiry here focuses on identifying the nature of the bargain struck between the parties. The court intervenes to prevent the innocent party from insisting on his strict legal rights by reference to the nature of the contract itself and the circumstances at the time it was made. If the forfeiture clause is inserted as a security for the payment of money, equity will invariably grant

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<sup>70</sup> *Twinsectra Ltd v Yardley* [2002] 2 All ER 377, (HL).

<sup>71</sup> *Westpac Banking Corporation v Savin* [1985] NZLR 41, per Richardson J, cited with approval by Nourse L J in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2000] 4 All ER 221, (CA), at 234 and 236.

relief upon payment by the party in default of the amount owing together with interest and costs. This accords with the nature of the bargain made between the parties because the innocent party obtains the benefit of his bargain if he receives his money (albeit late) with compensation. In this situation, the object of the contractual stipulation is achieved and it would be unconscionable for the innocent party to expect more and take advantage of the forfeiture. Thus, by the very nature of the transaction, acting upon conscience, equity grants relief. The equitable jurisdiction to grant relief against forfeiture for non-payment of rent may be explained on this basis.

If the forfeiture clause is inserted as a security to achieve a stated result other than the payment of money, equity has jurisdiction to grant relief where the stated result can effectively be attained when the matter comes before the court.<sup>72</sup> Here again, once performance of the primary purpose is achieved, it would be unconscientious for the innocent party to insist on his strict legal rights and demand a forfeiture.

### *The contractual stipulation*

If the forfeiture clause is construed as a penalty, equity will disregard the contractual provision and afford the innocent party relief.<sup>73</sup> This is because it would be unconscionable for the innocent party to rely upon a penalty. For example, the forfeiture clause may provide for the retention of instalments already paid which are wholly out of proportion to the possible damage suffered by the innocent party. In this situation, the courts have tended to assume (without discussion) that a forfeiture clause is penal given that the purchaser in default stands to lose all instalments already paid regardless of the extent to which the seller may have suffered damage as a result of the default.<sup>74</sup> Alternatively, the clause may provide for the re-transfer of property, the value of which bears no relationship to the likely loss occasioned by the breach.<sup>75</sup>

### *The party's misconduct or unjust enrichment*

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<sup>72</sup> *Shiloh Spinners Ltd v Harding* [1973] A C 691, (HL).

<sup>73</sup> Most recently, in *Warnborough Ltd v Garmite Ltd* [2006] EWHC 10 (Ch), Mr Richard Sheldon QC (sitting as a deputy judge of the High Court) opined, at para 117, that: “. . . there is a strong similarity between penalty clauses and forfeiture clauses and the boundaries of each jurisdiction are becoming increasingly blurred.”

<sup>74</sup> *Stockloser v Johnson* [1954] 1 QB 476, (CA), *per* Somervell and Denning L JJ.

<sup>75</sup> *Jobson v Johnson* [1989] 1 All ER 621, (CA).

Here, the forfeiture clause may be unimpeachable but the innocent party's conduct subsequent to entering into the contract may justify equity's intervention. In other words, there may be an unconscionable exercise of the innocent party's legal rights. The inquiry no longer centres around the nature of the transaction or the forfeiture provision but to the innocent party's conduct at the time when relief is sought. Thus, equity will intervene where the innocent party has taken an unfair advantage of the party in default.

Reference may be made here to the old Court of Chancery's jurisdiction to relieve in cases of fraud, accident, mistake and surprise, as illustrated by a number of early authorities.<sup>76</sup> In these cases, the principle of freedom of contract is maintained because equity is merely relieving the defaulting party, who would otherwise complete the contract, from the consequences of a breach induced by the unconscionable behaviour of the innocent party. An "unconscionable rescission" is also illustrated by the celebrated American case of *Cheney v Libby*,<sup>77</sup> where the purchaser had failed to pay an instalment of the purchase price in dollars on the due date largely because he had been misled by the vendor into thinking that another form of payment would be acceptable. On discovering the mistake, he promptly tendered the instalment in the correct money. The Supreme Court concluded that to permit the vendor to forfeit the contract would be to enable him to take advantage of his own wrong. Interestingly, the point was also addressed in *Shiloh Spinners Ltd v Harding*,<sup>78</sup> where Viscount Dilhorne intimated that the cases in which it would be right to give equitable relief against forfeiture involving a wilful breach of covenant would be likely to be few in number "and where the conduct of the person seeking to secure the forfeiture has been wholly unreasonable and of a rapacious and unconscionable character."<sup>79</sup>

The innocent party's unjust enrichment may also warrant equity's intervention, particularly where the disparity between his loss and the value of the property forfeited would render it unconscionable for him to enforce his legal rights. In *Legione v Hateley*,<sup>80</sup> the purchaser's breach was neither serious nor deliberate and the balance of the purchase money was tendered only a few days after the expiry of the notice to complete. Moreover, the purchasers had constructed a house on the land after going into possession at

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<sup>76</sup> *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439; *Barrow v Isaacs* [1891] 1 QB 417 and *Upjohn v Macfarlane* [1922] 2 Ch 256.

<sup>77</sup> (1890) 134 US 68. See also, *Legione v Hateley* (1983) 46 ALR 1, (High Court of Australia).

<sup>78</sup> [1973] A C 691, (HL).

<sup>79</sup> *Ibid* at 726.

<sup>80</sup> (1983) 46 ALR 1, (High Court of Australia).

a cost of \$35,000. Although not reaching a concluded view on the matter, the High Court of Australia intimated that those circumstances taken by themselves would render the vendor's rescission unconscionable.<sup>81</sup>

The English courts, although adopting a more traditionalist approach, have also recognised that the intervention of equity to grant relief to a defaulting purchaser may be justified in exceptional circumstances. Thus, where the vendor would be unjustly enriched by improvements made at the purchaser's expense (or where, as we have seen, the vendor has contributed to the breach), the courts appear more willing to grant equitable relief as a preliminary to the decree of specific performance. Although the grant of such relief constitutes a clear departure from the bargain made between the parties (in particular, the term making time of the essence), nevertheless, it will be permitted in circumstances where it would be unconscionable for the vendor to assert his strict contractual rights. Thus, by way of illustration, in *Re Dagenham (Thames) Dock Co*,<sup>82</sup> the Court of Appeal declared a term providing for forfeiture of half the purchase price to be a penalty and granted relief by way of a decree of specific performance of the contract, despite an express provision making time of the essence. An important feature of the case was that the purchaser had been in possession of the land pending completion for five years, during which time it had constructed a dock at its own expense. In this case, therefore, there were special features, based on the vendor's unjust enrichment, which made it unconscionable for the vendor to rescind the contract and recover the property. More significantly, in *Hedworth v Jenwise*,<sup>83</sup> the Court of Appeal was prepared to accept (although not deciding the point) that the principle in *Legione* was applicable in the English jurisdiction. In *Hedworth*, however, the facts did not warrant "this exceptional form of relief"<sup>84</sup> and the *Legione* case was distinguished on the basis that it was not simply land which was being forfeited but land with a house which the purchasers had built on after taking possession before completion.

## CONCLUSION

One serious objection to any process of amalgamation of related doctrines under the one umbrella of unconscionability is the notion that this

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<sup>81</sup> See also, *Ciavarella v Balmer* (1983) 57 AJLR 632, (High Court of Australia) and *Stern v McArthur* (1988) 62 ALJR 588, (High Court of Australia).

<sup>82</sup> (1873) LR 8 Ch 1022, (CA).

<sup>83</sup> [1994] EGCS 133, (CA).

<sup>84</sup> *Ibid per* Balcombe L J

would lead to considerable uncertainty in our law.<sup>85</sup> As one commentator has put it, “the problem with this doctrine [of unconscionable dealings] is that it may prove as long as the Chancellor’s foot and open up new vistas of litigation and uncertainty.”<sup>86</sup> The uncertainty argument should not, however, be overstated. As with most other doctrines, a broader notion of unconscionability would inevitably lead to the laying down of more specific guidelines for determining its application. At the same time, there would be a more systematic approach to the development of the requisite principles which would avoid the current overlap and confusion arising from several related but currently distinct doctrines. This is particularly so in relation to the current law on undue influence, unconscionable bargains and duress.

What is also significant is that the English courts have already adopted the concept of unconscionability as underlying specific areas of equity, most notably, proprietary estoppel doctrine<sup>87</sup> and cases involving liability for knowing receipt. Here, despite the concept being expressed in fairly broad terms, the courts have sought to exercise the jurisdiction according to well-defined principles. Thus, as we have seen, in proprietary estoppel cases, there is still a requirement that the claimant show the requisite ingredients of assurance and detrimental reliance. The doctrine, however, is only triggered if the legal owner can be shown to have taken unconscionable advantage of the claimant by denying him (or her) the right or interest they expected to receive. There is no question, therefore, of the courts administering a general discretionary power to uphold promises simply because it would be unfair or harsh to allow the defendant to go back on them. The same can be said of the current approach to recipient liability where the need for precise categorisation of the recipient’s state of knowledge has been rejected in favour of a single test based on unconscionability of receipt.

There are also other areas where a unified concept of unconscionability can be invoked as an attempt at rationalisation. Apart from equity’s jurisdiction to relieve against forfeiture, the Court of Appeal decision in *Pennington v Waine*,<sup>88</sup> in the context of equity’s jurisdiction to perfect

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<sup>85</sup> See, for example, the observations of Lord Hoffmann in *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, at 519, PC

<sup>86</sup> N S Price “Undue Influence: *Finis Litium?*” (1999) 115 *LQR* 8, at 10.

<sup>87</sup> Interestingly, the theoretical basis for imposing a constructive trust in the context of the family home is now seen as being no different to the rationale underlying the doctrine of proprietary estoppel namely, that equity is acting on the conscience of the legal owner so as to produce a fair result between the parties in the light of all the circumstances: *Oxley v Hiscock* [2004] EWCA Civ 546.

<sup>88</sup> [2002] 1 WLR 2075, (CA).

imperfect gifts, has attempted to rationalise earlier case law<sup>89</sup> under the single umbrella of unconscionability. In essence, equity will now intervene to perfect the gift if the circumstances in which the legal formalities are not completed make it unconscionable for equity to deny the gift. Although the case has been criticised for providing the courts with an unfettered discretion to perfect imperfect transactions<sup>90</sup>, it does provide a rational basis for imposing a constructive trust on the transferor as a means of justifying a transfer of the property in equity.<sup>91</sup> Again, most recently, the Court of Appeal in *Harris v Williams-Wynne*<sup>92</sup> has held that, where a covenant not to build on land has been breached but no action has been taken for some years, the test to be applied in determining whether the claim should proceed was whether it would be unconscionable in all the circumstances for the claimant to seek to enforce rights he undoubtedly had at the date of the breach of covenant. The Court acknowledged that, ultimately, the decision turned on the facts of each individual case.

Admittedly, English courts are still a long way from recognising a principled, universal doctrine of unconscionability, but there is no doubt that the “possible lines of development have been charted if the courts are bold enough to take them.”<sup>93</sup>

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<sup>89</sup> *Midland Bank Executor and Trustee Co v Rose* [1949] Ch 78; *Re Rose, (dec'd), Rose v IRC* [1952] Ch 499 and *Mascall v Mascall* (1985) 49 P & C R 119.

<sup>90</sup> See, M Halliwell, “Perfecting Imperfect Gifts and Trusts: Have We Reached the End of the Chancellor’s Foot?” [2003] *Conv* 192.

<sup>91</sup> See, J Garton, “The Role of the Trust Mechanism in the Rule in *Re Rose*, [2003] *Conv* 364.

<sup>92</sup> Unreported, 2 February 2006, (available on Lawtel).

<sup>93</sup> Cheshire, Fifoot and Furmston’s *Law of Contract*, (7<sup>th</sup> NZ ed, 1988), at 123, writing in the context of the English judiciary’s reluctance to entertain a wider notion of “unconscientious dealing.”