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UNCONSCIONABILITY AND INEQUALITY OF BARGAINING POWER

Pages **663** and **664** refer to extracts from judgments in some of the leading cases in which the courts have considered whether a contract can be set aside on the ground that the contract was, in some ways, unfair. These cases are set out below.

Earl of Aylesford v. Morris
(1873) 8 Ch App 484, Court of Appeal

The plaintiff, when he was a young man of twenty-two, had run up a large number of debts. His father was in poor health and the plaintiff stood to inherit a large amount of property on the death of his father. His creditors were pressing for payment, and the defendant money lender agreed to lend him money to pay off his debts. The plaintiff received no independent advice and the rate of interest which the defendant demanded was over 60 per cent. The plaintiff applied to have the defendant's actions for payment restrained and his action succeeded. An order for delivery up of the bills and policy which he had advanced by way of security for the loan was made on payment by the plaintiff of the sums actually advanced and interest at 5 per cent.

Lord Selborne, LC

There is hardly any older head of equity than that described by Lord Hardwicke in *Earl of Chesterfield* v. *Janssen* 2 Ves Sen 125, 157 as relieving against the fraud 'which infects catching bargains with heirs, reversioners, or expectants, in the life of the father', &c. 'These (he said) have been generally mixed cases', and he proceeded to note two characters always found in them. 'There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting––weakness on one side, usury on the other, or extortion, or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain.' . . .

Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *primâ facie* to raise this presumption, the transaction cannot stand

unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable.

This is the rule applied to the analogous cases of voluntary donations obtained for themselves by the donees, and to all other cases where influence, however acquired, has resulted in gain to the person possessing at the expense of the person subject to it. Lord Cranworth, in a recent case in the House of Lords (*Smith* v. *Kay* 7 HLC 750, 751), said that no influence can be more direct, more intelligible, or more to be guarded against than that of a person who gets hold of a young man of fortune, 'and takes upon himself to supply him with means, pandering to his gross extravagance during his minority, and extorting from him, or at least obtaining from him, for every advance that he has made, a promise that the moment he comes of age it shall all be ratified, so as to make the securities good'. The circumstances of the particular case in which these words were spoken differed widely from those of the case now before us; the element of personal influence is here wanting. But it is sufficient for the application of the principle, if the parties meet under such circumstances as, in the particular transaction, to give the stronger party dominion over the weaker; and such power and influence are generally possessed, in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience, and moral imbecility.

In the cases of catching bargains with expectant heirs, one peculiar feature has been almost universally present; indeed, its presence was considered by Lord Brougham to be an indispensable condition of equitable relief, though Lord St. Leonards, with good reason, dissents from that opinion (Sug V & P 11th edn, 316). The victim comes to the snare (for this system of dealing does set snares, not, perhaps, for one prodigal more than another, but for prodigals generally as a class), excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him, if he did not feel compelled to secrecy. He comes in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him. Great Judges have said that there is a principle of public policy in restraining this; that this system of undermining and blasting, as it were, in the bud the fortunes of families, is a public as well as a private mischief; that it is a sort of indirect fraud upon the heads of families from whom these transactions are concealed, and who may be thereby induced to dispose of their means for the profit and advantage of strangers and usurers, when they suppose themselves to be fulfilling the moral obligation of providing for their own descendants.

Whatever weight there may be in any such collateral considerations, they could hardly prevail, if they did not connect themselves with an equity more strictly and directly personal to the Plaintiff in each particular case. But the real truth is, that the ordinary effect of all the circumstances by which these considerations are introduced, is to deliver over the prodigal helpless into the hands of those interested in taking advantage of his weakness; and we so arrive in every such case at the substance of the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it . . .

Sir G Mellish LJ concurred.

Commentary

This case demonstrates that a concern for the fairness of the bargain is not a recent phenomenon. It has a respectable history. There is no suggestion that the plaintiff was lacking in capacity to comprehend the nature of the transaction into which he was entering. But he was young, inexperienced, and lacked access to independent advice. Furthermore, the

terms of the contract were substantively unfair. The defendant certainly took advantage of the plaintiff's vulnerable position, but did he act 'wrongfully' in doing so? Further, it should be noted that the onus was put upon the defendant to prove that the transaction was fair, just, and reasonable.

Fry v. Lane
(1888) 40 Ch D 312, Chancery Division

The plaintiffs were two brothers. One (JB Fry) was a laundryman and the other (George Fry) worked for a plumber. They sold their reversionary interests in the estate of John Fry to the defendant for £170 and £270 respectively. When they entered into the transaction, the plaintiffs were advised by an inexperienced solicitor who was also acting for the defendant. The property which was the subject of their interest was later sold for £3,848, of which the plaintiffs' share would have been £730 each. The proceeds of the sale were paid into court. An actuary stated that JB Fry's contingent interest in the £730 would have been valued at £475 at the date of the transaction. The plaintiffs' claim to set aside the transaction with the defendant was successful.

Kay J

I reserved judgment that I might more carefully consider the facts of the case, and the law which is applicable to them since the passing of the statute 31 Vict c 4.[1]

Long before the passing of that Act it was settled that the Court of Chancery would relieve against a sale of or other dealing with a remainder or reversion at an undervalue on that ground alone, and this even where the remainderman was of mature age and accustomed to business.

[he listed a number of cases and continued]

In such cases it was held that the onus lay upon the purchaser to shew that he had given the 'fair' value as it was called in *Earl of Aldborough* v. *Trye* 7 Cl & F 436, 456, or 'the market value': *Talbor* v. *Staniforth* 1 J & H 484, 503.

By the 31 Vict c 4, reciting that it was expedient to amend the law as administered in Courts of Equity with respect to sales of reversions, it was enacted (by sect. 1) that 'no purchase, made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue', and by sect 2 the word 'purchase' in the Act is to include 'every kind of contract, conveyance, or assignment, under or by which any beneficial interest in any kind of property may be acquired'. This Act came into operation on the 1st day of January, 1868.

It is obvious that the words 'merely on the ground of undervalue' do not include the case of an undervalue so gross as to amount of itself to evidence of fraud, and in *Earl of Aylesford* v. *Morris* (1873) LR 8 Ch App 484, 490 Lord Selborne said that this Act 'leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree whatever altered the *onus probandi* in those cases,

[1] The Sales of Reversions Act 1867, which has since been re-enacted in section 174 of the Law of Property Act 1925. As Kay J points out, while the Act provided that a sale of a reversionary interest could not be set aside merely on the ground that the sale had taken place at an undervalue, it expressly preserved the jurisdiction of the court to set aside unconscionable bargains.

which, according to the language of Lord Hardwicke, raise "from the circumstances or conditions of the parties contracting––weakness on one side, usury on the other, or extortion, or advantage taken of that weakness"––a presumption of fraud. Fraud', says Lord Selborne, 'does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as primâ facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable'.

The most common case for the interference of a Court of Equity is that of an expectant heir, reversioner, or remainderman who is just of age, his youth being treated as an important circumstance. Another analogous case is where the vendor is a poor man with imperfect education, as in *Evans* v. *Llewellin* 1 Cox 333. . .

In the case of a poor man, in distress for money, a sale, even of property in possession, at an undervalue has been set aside in many cases.

[he discussed the cases and continued]

The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.

This will be done even in the case of property in possession, and *à fortiori* if the interest be reversionary.

The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was 'fair, just, and reasonable'.

Upon the evidence before me I cannot hesitate to conclude that the price of £170 in JB Fry's case and £270 in George Fry's case were both considerably below the real value. The property has been subjected to the costs of appointing new trustees, and also to part of the costs of an administration suit, and yet the net produce of one-fifth share is £730. Managed in a more careful manner it might have produced more.

Both JB Fry and his brother George were poor, ignorant men, to whom the temptation of the immediate possession of £100 would be very great. Neither of them in the transaction of the sale of his share, was, in the words of Sir J Leach, 'on equal terms' with the purchaser. Neither had independent advice. The solicitor who acted for both parties in each transaction seems, from the *Law List*, to have been admitted in March, 1877. In October, 1878, at the time of completing the sale of JB Fry's share, he had not been much more than a year and a-half on the roll. His inexperience probably in some degree accounts for his allowing himself to be put in the position of solicitor for both parties in such a case. I think in each transaction he must have been considering the purchaser's interest too much properly to guard that of the vendors . . . I regret that I must come to the conclusion that, though there was a semblance of bargaining by the solicitor in each case, he did not properly protect the vendors, but gave a great advantage to the purchasers, who had been former clients, and for whom he was then acting. The circumstances illustrate the wisdom and necessity of the rule that a poor, ignorant man, selling an interest of this kind, should have independent advice, and that a purchase from him at an undervalue should be set aside, if he has not. The most experienced solicitor, acting for both sides, if he allows a sale at an undervalue, can hardly have duly performed his duty to the vendor. To act for both sides in such a case, and permit a sale at an undervalue, is a position in which no careful practitioner would allow himself to be placed. . .

Commentary

There appear to be three elements to the decision of Kay J: (i) the plaintiffs were 'poor and ignorant'; (ii) the sale was at an undervalue; and (iii) the plaintiffs were not independently advised. The justification for intervention therefore appears to be the vulnerability of the plaintiffs and the substantive unfairness of the terms of the contract. There was no express finding that the defendant had exploited the inexperience of the plaintiffs. On the other hand, the fact that the solicitor was acting for the defendant, and the fact that the sale was at a considerable undervalue might be seen as evidence of the fact that the defendant had indeed exploited the plaintiffs.

The Medina
(1876) 1 P 272, Probate Division

Sir Robert Phillimore

The circumstances of this case are very singular; but it is one in which the Court really feels no doubt as to the judgment which it ought to give. It is not necessary that I should go into an examination of the authorities which I recently referred to in the case of *The Cargo Ex Woosung* (1876) 1 P 260 and which I also referred to in the case of *The Waverley* Law Rep 3 A & E 369. But I may state the result of them to be this, that it is the practice of this Court, partly for the protection of absent owners and partly on the grounds of general policy, to control agreements made by masters when an examination of those agreements shews that they are clearly inequitable. In the present case there were upwards of five hundred pilgrims on a rock which is just six feet above water. Their ship had gone to pieces, and the plaintiffs' vessel, the *Timor*, came up close without any difficulty or danger at all; because the evidence is that the water was quite deep up to the rock; she came up and her captain, in effect, says, I will not relieve you from this situation, which a few hours of bad weather might convert into one of most imminent danger, indeed into your total destruction. I will not take you away unless you give me 4000*l.* Now, what is 4000*l.* with regard to the matter saved, which is human life? On the other hand, however, 4000*l.* is the whole sum that was to be paid for conveying the pilgrims to Jedda, and in my opinion if the master of the *Timor* had not taken these pilgrims off the rock in the circumstances stated, and bad weather had come on, and they had lost their lives in consequence, he would hardly have been in a better position than a pirate. Nevertheless, it was certainly a valuable salvage service according to the principles upon which such services have always been considered in this Court, but I am of opinion that 4000*l.* is a great deal too much, and I shall award 1800*l.*

Commentary

This is a very different case from *Earl of Aylesford* v. *Morris* and *Fry* v. *Lane*. Here the plaintiffs sought to take advantage of the imminent danger in which the master of the vessel and the pilgrims found themselves. Thus the defendants were extremely vulnerable, being in great danger, they did not appear to have any alternative open to them (other than death), and the plaintiffs sought to exploit the situation by charging an extremely high price for their services. This the court would not allow them to do and, while it held that they were entitled to recover something in respect of the services which they had rendered, they were not entitled to the sum which they had extracted from the master of the vessel. Admiralty

cases do not often feature in contract textbooks probably because the rules that have evolved in Admiralty often differ in significant respects from the common law rules. But the rule laid down in *The Medina* can be reconciled with cases such as *Fry* v. *Lane*. The cause of the disadvantage may be different but the courts seem to be looking for the same elements, namely inability to look after one's own interests, lack of independent advice or alternatives, and substantively unfair terms.

The Port Caledonia and The Anna
[1903] P 184, Probate Division

The *Port Caledonia* and the *Anna* were sheltering in Holyhead Harbour from a storm when the *Port Caledonia* began to be dragged towards the *Anna*. The master of the *Port Caledonia* signalled for a tug, but the master of the tug demanded '£1,000 or no rope'. The master of the *Port Caledonia* initially objected but agreed to pay the money. The tug then towed the vessel back to its original berth. The master of the tug brought a claim to recover the £1,000. The court set aside the agreement to pay £1,000 on the ground that it was extortionate, and the plaintiffs were awarded instead the sum of £200 for the services which they had rendered.

Bucknill J

With the 1000*l.* agreement on one side, and that which I think was the value of the services on the other, I have to ask myself whether the bargain that was made was so inequitable, so unjust, and so unreasonable that the Court cannot allow it to stand?

The first question to consider is, What was the position of the two persons who made the agreement? The position was this. One man was in a position to insist upon his terms, and the other man had to put up with it. He could not help himself. He says in his letter to his owners: 'He demanded 1000*l.* to take me away. I offered him 100*l.*, or to leave it to the owners; but he would not agree, so I agreed to give 1000*l.* rather than foul the *Anna*'. He appreciated the possibility of fouling the *Anna* if the weather had remained bad, and if the wind had remained in the S.W., neither of which things happened. So he found himself obliged to give way to a person who would not move him, and who would have allowed him and the *Anna* to drift towards the rocks, and who would, I think, have seen them go there without putting a hawser on board unless he got a promise of 1000*l.*

I have expressed my opinion about the matter. This opinion is shared by the Elder Brethren, and I hold that this agreement cannot be allowed to stand, and I set it aside.

I hope that those who perform such grand services in tugs from time to time, in worse weather than this, and, in peril of their own lives, save property around the coast, will note that this Court will keep a firm hand over them if they attempt to do what has been done in this case.

This was an inequitable, extortionate, and unreasonable agreement, and I think that the services rendered will be well rewarded by the sum of 200*l.*, and with county court costs.

Commentary

This case is very similar to *The Medina*. There may be a difference between the two in that the ship in *The Medina* had 'gone to pieces' and the danger was to the lives of the passengers. Here the immediate danger was to the vessel itself. But the principle seems to be the same.

Cresswell v. Potter
[1978] 1 WLR 255, Chancery Division

On the break-up of her marriage to the defendant, the plaintiff, a telephonist, released and conveyed to the defendant her interest in the matrimonial home in return for an indemnity against liability under the mortgage. The defendant later sold the former matrimonial home and made a profit of £1,400 on the sale. The plaintiff sought to set aside the release on the ground that it was exercised in circumstances which amounted to unfair dealing. Her claim was successful.

Megarry J

[He considered the judgment of Kay J in *Fry* v. *Lane* and continued]

The judge thus laid down three requirements. What has to be considered is, first, whether the plaintiff is poor and ignorant; second, whether the sale was at a considerable undervalue; and third, whether the vendor had independent advice. I am not, of course, suggesting that these are the only circumstances which will suffice; thus there may be circumstances of oppression or abuse of confidence which will invoke the aid of equity. But in the present case only these three requirements are in point. Abuse of confidence, though pleaded, is no longer relied on; and no circumstances of oppression or other matters are alleged. I must therefore consider whether the three requirements laid down in *Fry* v. *Lane* are satisfied.

I think that the plaintiff may fairly be described as falling within whatever is the modern equivalent of 'poor and ignorant'. Eighty years ago, when *Fry* v. *Lane* was decided, social conditions were very different from those which exist today. I do not, however, think that the principle has changed, even though the euphemisms of the 20th century may require the word 'poor' to be replaced by 'a member of the lower income group' or the like, and the word 'ignorant' by 'less highly educated'. The plaintiff has been a van driver for a tobacconist, and is a Post Office telephonist. The evidence of her means is slender. The defendant told me that the plaintiff probably had a little saved, but not much; and there was evidence that her earnings were about the same as the defendant's, and that these were those of a carpenter. The plaintiff also has a legal aid certificate.

In those circumstances I think the plaintiff may properly be described as 'poor' in the sense used in *Fry* v. *Lane*, where it was applied to a laundryman who, in 1888, was earning £1 a week. In this context, as in others, I do not think that 'poverty' is confined to destitution. Further, although no doubt it requires considerable alertness and skill to be a good telephonist, I think that a telephonist can properly be described as 'ignorant' in the context of property transactions in general and the execution of conveyancing documents in particular. I have seen and heard the plaintiff giving evidence, and I have reached the conclusion that she satisfies the requirements of the first head.

The second question is whether the sale was at a 'considerable undervalue'. Slate Hall cost £1,500, £1,200 of the price being provided by the mortgage. The release recited that £1,196 13s. 5d remained outstanding on the mortgage, so that very little had been paid off the capital sum due. Nevertheless, all that the plaintiff was getting for giving up her half interest in Slate Hall was the release from her liability under the mortgage. If Slate Hall was worth no more than it cost, she was giving up her half share in any equity worth £300; and, after all, the mortgage was a recent mortgage to a well-known building society. If she had sought advice it is unlikely in the extreme that she would have been told that there was any real probability that the value of the property would be less than the sum due under the mortgage. There can be little doubt that she was getting virtually nothing for £150.

In fact, as is now known, within a little over two years the property fetched £3,350, so that at the time in question the plaintiff's share of the equity may have been worth appreciably more than £150. It is true, as Mr Balcombe pointed out on behalf of the defendant, that there was no valuation evidence before me, and that any valuation of the property must rest upon inferences from the prices for which the property was sold. I do not think it right to assume, without evidence, that there was a dip in the value of the property between its purchase in November 1958, and the sales in December 1960, and September 1961; and without such a dip it seems to me that the probabilities point to the property having a value in August 1959, which at all events substantially exceeded the sum due under the mortgage for £1,200. The more valuable the equity, of course, the less valuable would be the indemnity against the mortgage. It seems to me that by the release the plaintiff parted with her interest in Slate Hall at an undervalue which cannot be dismissed as being trifling or inconsiderable. In my judgment the undervalue was 'considerable'.

As for independent advice, from first to last there is no suggestion that the plaintiff had any. The defendant, his solicitor and the inquiry agent stood on one side; on the other the plaintiff stood alone. This was, of course, a conveyancing transaction, and English land law is notoriously complex. I am certainly not saying that other transactions, such as hire-purchase agreements, are free from all difficulty. But the authorities put before me on setting aside dealings at an undervalue all seem to relate to conveyancing transactions, and one may wonder whether the principle is confined to such transactions, and, if so, why. I doubt whether the principle is restricted in this way; and it may be that the explanation is that it is in conveyancing matters that, by long usage, it is regarded as usual, and, indeed, virtually essential, for the parties to have the services of a solicitor. The absence of the aid of a solicitor is thus, as it seems to me, of especial significance if a conveyancing matter is involved. The more usual it is to have a solicitor, the more striking will be his absence, and the more closely will the courts scrutinise what was done.

Mr Balcombe points out that the plaintiff was not bereft of possible legal assistance; for on or before July 28, 1959, when she was having difficulty in getting some furniture and effects from Slate Hall, she consulted a Colchester firm of solicitors, who wrote a letter dated July 28, 1959, that produced the required result. If she wanted legal advice, he said, this shows that she knew how to get it. However, what matters, I think, is not whether she could have obtained proper advice but whether in fact she had it; and she did not. Nobody, of course, can be compelled to obtain independent advice: but I do not think that someone who seeks to uphold what is, to him, an advantageous conveyancing transaction can do so merely by saying that the other party could have obtained independent advice, unless something has been done to bring to the notice of that other party the true nature of the transaction and the need for advice. . .

At the end of the day, my conclusion is that this transaction cannot stand. In my judgment the plaintiff has made out her case, and so it is for the defendant to prove that the transaction was 'fair, just, and reasonable'. This he has not done. The whole burden of his case has been that the requirements of *Fry* v. *Lane*, 40 Ch D 312, were not satisfied, whereas I have held that they were. . .

Commentary

At first sight *Cresswell* appears to be a modern-day *Fry* v. *Lane* and it seeks to bring the principle up-to-date with new terminology to replace 'poor and ignorant'. Why did the court grant the plaintiff relief? Was it because she was a telephonist who did not understand conveyancing or was it because her marriage had broken up and she was dealing with the sale of

the matrimonial home? In many ways it seems unnecessary to elaborate upon the meaning of 'poor and ignorant' in this way. Should it not suffice that the plaintiff was in a weak or vulnerable position, whatever the cause of her weakness or disability? *Cresswell* was followed by Balcombe J in *Backhouse* v. *Backhouse* [1978] 1 WLR 243.

Alec Lobb (Garages) Ltd v. Total Oil (Great Britain) Ltd

[1985] 1 WLR 173, Court of Appeal

The defendant oil company advanced money to the plaintiff company ('the appellants') for the purpose of its garage and petrol filling station business and took mortgages on its property as security. In 1969 the company was in financial difficulty and so it entered into fresh negotiations with the defendants. Contrary to the advice of its solicitors, the plaintiff entered into an agreement with the defendants under which the plaintiff company agreed to grant a lease of the property to the defendants for fifty-one years for a £35,000 premium and a peppercorn rent and the defendants agreed to grant the second and third plaintiffs (who were the directors of the plaintiff company) a lease-back at a rent of £2,250 *per annum* and a tie to the defendants to supply all the petrol for the whole term of the lease-back. In 1979 the plaintiffs sought to set aside the 1969 agreement on the grounds that it was in restraint of trade and that it was an unconscionable bargain. It was held (both at first instance and in the Court of Appeal) that the lease and lease-back were not in restraint of trade, that the transaction was not unconscionable, and that, in any case, the plaintiffs' claim was barred by laches.

Dillon LJ [concluded that the lease and lease-back were not in restraint of trade and continued]

I turn therefore to the appellants' case on equitable grounds. The basis of the contention that the transaction of the lease and lease-back ought to be set aside in equity is that it is submitted, and in the court below was accepted on behalf of Total, that during the negotiations for the lease and lease-back the parties did not have equal bargaining power, and it is therefore further submitted that a contract between parties who had unequal bargaining power can only stand and be enforced by the stronger if he can prove that the contract was in point of fact fair, just and reasonable. The concept of unequal bargaining power is taken particularly from the judgment of Lord Denning MR in *Lloyds Bank Ltd* v. *Bundy* [1975] QB 326. The reference to a contract only standing if it is proved to have been in point of fact fair, just and reasonable is taken from the judgment of Lord Selborne LC in *Earl of Aylesford* v. *Morris* (1873) LR 8 Ch App 484, 490–1. Lord Selborne was not there seeking to generalise; he was dealing only with what he regarded as one of the oldest heads of equity, relieving against fraud practised on heirs or expectants, particularly fraud practised on young noblemen of great expectations, considerable extravagance and no ready money. It is none the less submitted that the logic of the development of the law leads to the conclusion that Lord Selborne LC's test should now be applied generally to any contract entered into between parties who did not have equal bargaining power.

In fact Lord Denning MR's judgment in *Lloyds Bank Ltd* v. *Bundy* merely laid down the proposition that where there was unequal bargaining power the contract could not stand if the weaker did not have legal advice. In the present case Mr Lobb and the company did have separate advice from their own solicitor. On the facts of this case, however, that does not weaken the appellants' case if the general proposition of law which they put forward is valid.

Total refused to accept any of the modifications of the transaction . . . which the company's and Mr Lobb's solicitor suggested, and in the end the solicitor advised them not to proceed. Mr Lobb declined to accept that advice because his and the company's financial difficulties were so great, and, it may be said, their bargaining power was so small, that he felt he had no alternative but to accept Total's terms. Because of the existing valid tie to Total which had, as I have said, three to four years to run, he had no prospect at all of raising finance on the scale he required from any source other than Total. There is no suggestion that there was any other dealer readily available who could have bought the property from him subject to the tie. The only practical solutions open to him were to accept the terms of the lease and lease-back as put forward by Total on which Total was not prepared to negotiate, or to sell the freehold of the property to Total and cease trading. In these circumstances, it would be unreal, in my judgment, to hold that if the transaction is otherwise tainted it is cured merely because Mr Lobb and the company had independent advice.

But on the deputy judge's findings can it be said that the transaction is tainted? Lord Selborne LC dealt with the case before him as a case of fraud.

[he quoted a passage from the judgement of Lord Selborne which is set out above in the extract from his judgment in *Earl of Aylesford* v. *Morris*]

The whole emphasis is on extortion, or undue advantage taken of weakness, an unconscientious use of the power arising out of the inequality of the parties' circumstances, and on unconscientious use of power which the court might in certain circumstances be entitled to infer from a particular—and in these days notorious—relationship unless the contract is proved to have been in fact fair, just and reasonable. Nothing leads me to suppose that the course of the development of the law over the last 100 years has been such that the emphasis on unconscionable conduct or unconscientious use of power has gone and relief will now be granted in equity in a case such as the present if there has been unequal bargaining power, even if the stronger has not used his strength unconscionably. I agree with the judgment of Browne-Wilkinson J, in *Multiservice Bookbinding Ltd* v. *Marden* [1979] Ch 84, which sets out that to establish that a term is unfair and unconscionable it is not enough to show that it is, objectively, unreasonable.

In the present case there are findings of fact by the deputy judge that the conduct of Total was not unconscionable, coercive or oppressive. There is ample evidence to support those findings and they are not challenged by the appellants. Their case is that the judge applied the wrong test; where there is unequal bargaining power, the test is, they say, whether its terms are fair, just and reasonable and it is unnecessary to consider whether the conduct of the stronger party was oppressive or unconscionable. I do not accept the appellants' proposition of law. In my judgment the findings of the judge conclude this ground of appeal against the appellants.

Inequality of bargaining power must anyhow be a relative concept. It is seldom in any negotiation that the bargaining powers of the parties are absolutely equal. Any individual wanting to borrow money from a bank, building society or other financial institution in order to pay his liabilities or buy some property he urgently wants to acquire will have virtually no bargaining power; he will have to take or leave the terms offered to him. So, with house property in a seller's market, the purchaser will not have equal bargaining power with the vendor. But Lord Denning MR did not envisage that any contract entered into in such circumstances would, without more, be reviewed by the courts by the objective criterion of what was reasonable: see *Lloyds Bank Ltd* v. *Bundy* [1975] QB 326, 336. The courts would only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall. The concepts of unconscionable conduct and of the

exercise by the stronger of coercive power are thus brought in, and in the present case they are negatived by the deputy judge's findings.

Even if, contrary to my view just expressed, the company and Mr and Mrs Lobb had initially in 1969 a valid claim in equity to have the lease and lease-back set aside as a result of the inequality of bargaining power, that claim was, in my judgment, barred by laches well before the issue of the writ in this action.

Dunn LJ

Equitable relief

Mr Cullen [counsel for the plaintiffs] conceded that he could not bring himself within any of the established categories of equitable relief, but relied on the dictum of Lord Denning MR in *Lloyds Bank Ltd* v. *Bundy* [1975] QB 326, 339 and submitted that the circumstances of this case disclosed a classic case of inequality of bargaining power of which the defendants had taken advantage by entering into the transaction, although he did not suggest any pressure or other misconduct on their part. He submitted that if it was necessary to categorise the grant of relief sought, it was an unconscionable bargain. He reminded us that the categories of unconscionable bargains are not closed (per Browne-Wilkinson J in *Multiservice Bookbinding Ltd* v. *Marden* [1979] Ch 94, 110) and sought to distinguish the instant case from that case by submitting that here the plaintiffs were under a compelling necessity to accept the loan, so that misconduct by the defendants was unnecessary. The fact of their impecuniosity, that they were already tied to the defendants by mortgages, that there was no other source of finance, and that they could not sell the equities of redemption under the mortgages without giving up trading, coupled with the knowledge of the defendants of those facts, rendered the transaction unconscionable, and placed the onus upon the defendants to show that its terms were fair and reasonable.

I find myself unable to accept those arguments. Mere impecuniosity has never been held a ground for equitable relief. In this case no pressure was placed upon the plaintiffs. On the contrary the defendants were reluctant to enter into the transaction. The plaintiffs took independent advice from their solicitors and accountants. They went into the transaction with their eyes open, and it was of benefit to them because they were enabled to continue trade from the site for a number of years. In my view the judge was right to refuse equitable relief.

Waller LJ delivered a concurring judgment.

Commentary

Here we have a case in which the claim to set aside the transaction failed. Just as *Cresswell* v. *Potter* breathed new life into *Fry* v. *Lane*, so the plaintiffs in *Alec Lobb* tried to breathe new life into *Earl of Aylesford* v. *Morris*. This time the attempt failed. The plaintiffs were undoubtedly in a vulnerable economic position and, in that sense, were in a similar position to the plaintiff in *Earl of Aylesford*. But there the similarity ended. The plaintiffs in the present case had access to independent advice (which the plaintiff in *Earl of Aylesford* did not) and there was held to be no evidence of unconscionable, coercive, or oppressive conduct by the defendants on the facts of the case. In other words, there was weakness but no advantage-taking. The judgment of Lord Denning in *Lloyds Bank Ltd* v. *Bundy*, which is mentioned in the judgment of Dillon LJ is discussed at p. **669** of the textbook)

Credit Lyonnais Bank Nederland NV v. Burch
[1997] 1 All ER 144, Court of Appeal

The defendant, an eighteen-year-old, was asked by her employer, Mr Pelosi, to mortgage her flat as security for an increase in the company's overdraft (which was in the region of £250,000). She agreed to this request and she entered into a transaction with the plaintiff bank under which she gave them a second charge over the flat and gave the bank an all moneys unlimited guarantee. No attempt was made by the bank to explain to her the nature of the transaction into which she was entering. She was advised to obtain independent advice but did not do so. The company went into liquidation and the bank brought proceedings against the defendant in which they sought possession of the flat. The defendant successfully defended the proceedings. The Court of Appeal set aside the transaction on the ground of undue influence but they also gave brief consideration to the existence of a wider equitable jurisdiction to set aside the transaction.

Nourse LJ

. . . the recorder identified . . . the truly astonishing feature of this case. Under the terms of the legal charge, Miss Burch was required not simply to pledge her home as security for the £20,000 extension; she was required to pledge it without limit. Worse than that, she was required to enter into a personal covenant guaranteeing not simply repayment of the additional £20,000, nor even repayment up to the new limit of £270,000; she was required to guarantee without limit repayment of all API's borrowings from the bank, present and future and of whatever kind, together with interest, commission, charges, legal and other costs, charges and expenses. All that was required as the price of extending the limit by no more than £20,000 and, be it remembered, of someone who was a mere employee of API, to whom the only detriment in API's collapse would have been the loss of her job. It could not have helped the bank to say that it used its standard form. A mortgagee who uses such a form without regard to its impact on the individual case acts at his peril.

Millett LJ

No court of equity could allow such a transaction to stand. The facts which I have recited are sufficient to entitle Miss Burch to have the transaction set aside as against Mr Pelosi and the company. . . .

An eighteenth century Lord Chancellor would have contented himself with saying as much. It is an extreme case. The transaction was not merely to the manifest disadvantage of Miss Burch; it was one which, in the traditional phrase, 'shocks the conscience of the court'. Miss Burch committed herself to a personal liability far beyond her slender means, risking the loss of her home and personal bankruptcy, and obtained nothing in return beyond a relatively small and possibly temporary increase in the overdraft facility available to her employer, a company in which she had no financial interest. The transaction gives rise to grave suspicion. It cries aloud for an explanation.

Miss Burch did not seek to have the transaction set aside as a harsh and unconscionable bargain. To do so she would have had to show not only that the terms of the transaction were harsh or oppressive, but that 'one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience.'

Swinton Thomas LJ delivered a concurring judgment.

Commentary

This is another difficult decision. Nourse LJ appears to suggest that the unfairness of the charge, combined with an inequality of bargaining power, would have been enough to set aside the transaction with the bank. The judgment of Millett LJ is more cautious in that he stated that, in order to set aside the transaction on this ground, it would have been necessary for Miss Burch to show some impropriety on the part of the bank. The Court of Appeal in *Portman Building Society* v. *Dusangh* [2000] 2 All ER (Comm) 221 distinguished *Burch* on the ground that the transaction in *Dusangh*, although improvident, was not 'overreaching and oppressive' and there was no evidence that the building society in that case had acted in 'a morally reprehensible manner'. This suggests that *Burch* will be confined within very narrow limits. In *Dusangh* the defendant, an elderly, illiterate man, living on a low income, agreed to mortgage his home in order to enable his son to acquire a supermarket. The supermarket business was not a success and the building society was held to be entitled to a declaration that it was entitled to a charge by way of a legal mortgage over the defendant's home. Ward LJ stated (at p. 232):

> The salient features here are that the son had committed himself to the purchase of the small supermarket business. There is no reason to think that he did not believe that it would be a profitable venture which would turn out to his advantage. He needed money to complete the purchase. He persuaded his father to lend it. On the findings of the judge there was no undue influence and no misrepresentation. So it was a case of father coming to the assistance of his son. True it is that it was a financially unwise venture because, absent good profit from the business, there was never likely to be the income to service the borrowing and the father's home was at risk. But there was nothing, absolutely nothing, which comes close to morally reprehensible conduct or impropriety. No unconscientious advantage has been taken of the father's illiteracy, his lack of business acumen or his paternal generosity. True it may be that the son gained all the advantage and the father took all the risk, but this cannot be stigmatised as impropriety. There was no exploitation of father by son such as would prick the conscience and tell the son that in all honour it was morally wrong and reprehensible.

Incorporated Council of Law Reporting: extracts from the *Probate Division* (P) and *Weekly Law Reports* (WLR).