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UNCONSCIONABLE
BARGAINS:
WHAT ARE THE COURTS DOING?

Mindy Chen-Wishart

A thesis submitted in partial fulfilment
of the requirements for the degree of
MASTER OF LAWS (LLM)
at the University of Otago, Dunedin, New Zealand
November 1987
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Mindy Chen-Wishart
Dunedin, November 1987
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Tweedie v Geib (1982) 138 DLR (3d) 311
Waters v Donnelly (1885) 9 OR 391
Wilton v Farnsworth (1948) 76 CLR 646
Wood v Abrey (1818) 3 Madd 417; 56 ER 558
Wright v Carter [1903] 1 Ch 27
I. UNCONSCIONABILITY : UNITY IN DIVERSITY?

At its most basic level, the jurisdiction setting aside unconscionable bargains seeks to prevent undue contractual advantage-taking of the "weak" by the "strong". Thus, the elderly, the sick, the simpleton, the emotionally distressed, the mentally unstable, the financially needy and such like, walk on and off stage in a parade of cases which exhibit richness both in legal principles and human interest. If frequently argued and applied in the courts, the apparent width of this jurisdiction would strongly challenge the traditional understanding of the nature of contractual obligations and have far-reaching consequences for many existing areas of contract law. The lack of certainty as to the precise target and scope of such a potentially important jurisdiction has, however, been noted frequently with concern and frustration. In the opinion of one commentator:

"The fascinating and exasperating feature of these cases is their refusal to be harmoniously integrated into a general theory of the enforceability of promises given for good consideration ...".

A scan of the cases reveals no apparent agreement on the precise elements required to find unconscionability, let alone what the contents of such elements would be. The search for a consistent rationale for the body of unconscionability cases may, therefore, appear futile. Indeed Professor Sheridan comments that:

---

1 Based on principles of freedom of contract and subjectivity of values.
2 Such as undue influence, non est factum, mistake and duties of disclosure, see infra Chapter V Conclusion.
4 Crawford, B E "Restitution - Unconscionable Transaction - Undue Advantage Taken of Inequality Between Parties" (1966) 44 Can Bar Rev 142.
5 Although, for New Zealand, the law as to unconscionability is much clearer since the Privy Council determination in Hart v O'Connor [1985] 1 NZLR 159 and the New Zealand Court of Appeal's interpretation of it in Nichols v Jessup, supra n2. For a comment on these two cases see Chen-Wishart, M "Unconscionable Bargains" [1987] NZLJ 107.
6 Sheridan, supra n3, 73.
"Probably the only safe generalisation is that the court considers each case on its individual merits to see whether one party has taken advantage of the weakness or necessity of the other to an extent which strikes the judge as being a greater advantage than the current morality of the ordinary run of business men allows."

In the same vein, Lambert JA sees unconscionability as involving the single issue of: 7

"... whether the transaction seen as a whole, is sufficiently divergent from community standards of commercial morality."

A measure of truth must be granted to such assessments. However, to accept them without qualification would necessitate a shift in the focus of any examination of unconscionability from a search for consistent principles, to a study of the current judicial perception of the "community standards of commercial morality". This is a sociological inquiry of dubious utility and legitimacy in determining the enforceability of contractual obligations.

Moreover, such an approach could make no claim to the certainty or predictability which must be a desirable object of any legal basis for judicial intervention in private contracts. Terms such as "unfair" or "unconscionable" carry the implication that we instinctively understand what they mean. The same words are given varying contents by different judges. The verbal tangles result in a tangle of ideas and confused judgments. Rae J cautions that: 8

"... if business is to be carried on with any degree of certainty in one man's dealings with another, transactions between them cannot be lightly set aside. Nor can one use the jurisdiction in equity subjectively according to the conscience of the individual judge ... the jurisdiction to interfere is to be exercised with great care, discrimination and objectivity."

On the other hand, Lord Scarman notes that: 9

"This is a world of doctrine, not of neat and tidy rules.... Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case."

---

To allow flexibility and discretion in decision-making, however, should not necessitate
the sanctioning of a system of "ad hoc palmtree justice". Subjective factors referred to by the
courts in unconscionability cases (such as impairment, unfair bargains and advantage-taking)
are difficult to calibrate. This will inevitably render the jurisdiction quantitatively uncertain.
However, it is argued that the courts must place some real boundaries on the jurisdiction by
framing its qualitative basis as precisely as possible. The real impetus behind judicial action
can then be clearly understood. We ought not simply accept, without more, that the result of
each case depends on the judicial assessment of its facts. An appeal to the individual conscience
of a judge, although a necessary component of this equitable jurisdiction, is a poor substitute for
a clear articulation of rational, sound and functional standards.

Furthermore, acceptance of such a subjective approach to judicial intervention would leave
the unconscionability jurisdiction a theoretical oddity running counter to the well-established
concept of freedom of contract and the rules of contract formation and enforceability, for, by
virtue of it,

"... courts of equitable jurisdiction have relieved promissors from their
bargains [made for good consideration] where there has been no
misrepresentation, no mistake or duress, no fiduciary obligation or any
other special characteristic such as one party being an expectant heir or
the like."^{11}

The aim of this thesis is first, to explain judicial action in the body of unconscionability
cases along consistent and rational lines; and second, to provide a survey of the ways in which
unconscionability is argued and applied in the cases.

A. JUDICIAL EXPLANATIONS OF UNCONSCIONABILITY

The obvious starting point in any attempt to understand the unconscionability jurisdiction
is with the cases themselves. What is it that the courts say they are doing? What are the
principles upon which judicial intervention is justified? What is the correct burden of proof? To

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10 Pedan, J R, supra n3.
11 Crawford, B E, supra n4.
set the scene for discussion, it is suggested that, at least for now, we leave the confusing detail of the forest floor and ascend for a bird's eye view of the unconscionability terrain. At this level, the major features of the judicial articulations on unconscionability fall into sharper relief.

Three points of general agreement in judicial opinion can be identified. First, unconscionability is often contrasted with the related jurisdictions of duress, mistake and especially undue influence. These areas are said to be concerned with the "reality" and "sufficiency" of the "weaker party's" consent whereas a plea that a bargain is unconscionable is said to invoke "relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker". The will of the weaker party "even if independent and voluntary, is the result of this" advantage-taking. Second, it is common ground that the unconscionability jurisdiction is not aimed at unfair exchange (or substantive unfairness). Eyre LCB declared himself resolutely opposed to the proposition that: "... inadequacy of consideration is in itself a principle upon which a party may be relieved from a contract which he has wittingly and willingly entered into, if so it would throw everything into confusion and set afloat all the contracts of mankind."

During the course of this thesis, the judicial certainty that unconscionability is not targeted at defective consent is seriously questioned, while the judicial assertion that unfair exchange does not form the basis of judicial intervention is totally rejected.

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12 Such detail will receive extensive treatment in Chapter III.
14 Alec Lobb (Garages) Ltd & Others v Total Oil GB Ltd [1983] 1 All ER 944, 961.
15 Morrison v Coast Finance Ltd (1956) 55 DLR (2d) 710, 713.
16 Ibid.
18 See this point made in Keeton and Sheridan, Equity (1976 2nd ed) 227; Cope, supra n3, para 261; Sheridan, L A, Fraud in Equity (1956) 127.
19 Griffith v Spratley (1787) 1 Cox 383, 388-9. See also for example Alec Lobb (Garages) Ltd and Others v Total Oil GB Ltd [1985] 1 All ER 303, 313; Hart v O'Connor, supra n5, 166; Harris v Richardson [1930] NZLR 890, 903; O'Connor v Hart, supra n3, 289.
20 See Chapter II B.
21 See Chapter IV.
What, then, is the judicially articulated target of unconscionability? The jurisdiction is said to be concerned with the manner by which a contract is concluded. In *Hart v O'Connor* 22 Lord Brightman explained that:

"If a contract is stigmatised as 'unfair', it may be unfair in one of two ways. It may be unfair by reason of the unfair manner in which it was brought into existence; a contract induced by undue influence is unfair in this sense. It will be convenient to call this 'procedural unfairness'. It may also, in some contexts, be described (accurately or inaccurately) as 'unfair' by reason of the fact that the terms of the contract are more favourable to one party than to the other ... it will be convenient to call it 'contractual imbalance'. The two concepts may overlap. Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence or some other form of *victimisation*. Equity will relieve a party from a contract which he has been induced to make as a result of *victimisation*. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing."

The distinction between procedural unconscionability (naughtiness in the bargaining process) and substantive unconscionability (evils in the resulting contract) was first popularized by Arthur Allen Leff in his seminal article "Unconscionability and the Code - The Emperor's New Clause". 23 The writer questions the validity and usefulness of this distinction in explaining the jurisdiction, 24 but for now, the focus will remain on the *judicial* version of unconscionability.

Despite a general judicial concurrence that unconscionability is concerned with procedure rather than substance, the case law reveals no uniformity over the precise content of the procedural ill which is to be curbed. Judicial discussions of unconscionability have centred around four elements: (i) the special disability or disadvantage of the party seeking to escape contractual liability (the complainant 25); (ii) that party's lack of independent advice; (iii) the harshness of the bargain struck for that party; 26 and (iv) the overreaching conduct of the

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22 Supra n5, 166.
24 For further discussion see infra Chapter IVB.
25 To avoid emotionally charged terms such as 'stronger' or 'weaker' party which, it is submitted, predetermines the issue, the terms 'complainant' and 'enforcer' are preferred as being more neutral, and will be used throughout this thesis.
26 This is frequently noted although it is obviously substantive, as opposed to procedural, in nature. Its role, both articulated and unarticulated, is examined in Chapters III and IV.
party seeking to enforce the contract (the enforcer). These four "colours" and their shadings are applied with varying emphasis by different judges to paint different pictures of unconscionability, albeit within one general theme. The most significant disagreement is over the need for the complainant to establish unconscionable conduct by the enforcer. Different answers have been given based on different rationales and yielding different burdens of proof. These will now be set out.

(1) Protection of the Weak

According to one line of cases, proof of enforcer misconduct is unnecessary since inequality of bargaining power is at the heart of unconscionability, a protective jurisdiction which will "come to the rescue whenever the parties to a contract have not met upon equal terms". Sir Lloyd Kenyon explained that:

"... if the party is in a situation, in which he is not a free agent and is not equal to protecting himself, ... this Court is bound to afford him such protection." (emphasis added)

Boyd C agreed that the Court must deliver such a person "from the disadvantages of a transaction which he would not have entered into had he been properly advised." It is on this basis that Lord Denning put forward a general principle of relief against inequality of bargaining power.

Accordingly, the primary inquiry becomes the ability or competency of the party seeking relief to protect his/her own interests in the transaction. If contracting ability is found to be lacking to the requisite degree, any serious inadequacy of consideration will render the bargain

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27 This divergence is noted by Hall, PM in Unconscionable Contracts and Economic Duress (1985) para 110; see this also for the historical development of this divergence.
28 Although this justification has been largely discredited in New Zealand since 1985 (see text accompanying fn43-46), it nevertheless represents a significant part of the overall picture of unconscionability and must be acknowledged and discussed in any attempt to understand and explain unconscionability cases along consistent lines.
29 Riki v Codd (1980) 1 NZCPR 242, 249.
30 O'Rorke v Bolingbroke (1877) 2 App Cas 814 per L Hatherley 823; 26 ER 239.
31 Evans v Llewellin (1787) 1 Cox 333; 29 ER 1191, 1194; see also Grealish v Murphy [1946] IR 35, 47.
32 Waters v Donnelly (1885) 9 OR 391, 406.
33 For further reference, and the response of the House of Lords to this, see infra Chapter IIA, text accompanying fn9-11.
voidable. For, in the clear words of Hardie Boys J:\(^{34}\)

"The purpose of courts of equity has always been to protect certain kinds of persons from disposing of property for inadequate consideration."

Some courts therefore, see unconscionability as made out on proof of inequality of bargaining power resulting from the complainant's special disability or disadvantage and an improvident bargain.\(^{35}\) Others see proof of disability by one party throwing upon the other party the onus of proving that the contract was "fair, just and reasonable". That is, that "the price given was the value" of the property purchased.\(^{36}\) The two burdens of proof amount to the same thing with the bargaining conduct of the enforcing party a legally irrelevant consideration.

Under such an analysis, unconscionability effectively imposes an equitable incapacity upon those with sufficiently impaired self-protective abilities who, nevertheless, cannot show that they possess an incapacitated status recognised at law. As such, unconscionability has more in common with jurisdictions protecting the infant and the mentally disabled than with notions of fraud and, therefore, the term "unconscionable" would seem a misnomer. Indeed Hardie Boys J expressed his preference for the term "unfair bargains" since "unconscionable bargains" gave the appearance of setting the standard too high. He said:\(^{37}\)

"The expression of the principle in some of the early cases suggests an element of unscrupulousness on the part of the stronger party that is not in fact a necessary element at all.... It is not a matter of showing that he has acted honestly or honourably. Although that may be relevant, it is not the crux of the matter. It is the result of the transaction that is relevant rather than the motives of the parties."

\(^{34}\) Riley and Fifield v Jones, High Court Christchurch A224/81, 17 November 1983, 17; see also Towers v Affleck [1974] 1 WWR 714, 717.

\(^{35}\) See for example, Baker v Monk 4 De GJ & S 388; Fry v Lane (1888) 40 Ch Div 312, 322; Grealish v Murphy, supra n31, 51.

\(^{36}\) See for example Waters v Donnelly, supra n32, 401; Marshall v Canada Permanent Trust Co (1968) 69 DLR (2d) 260; Fry v Lane, supra n35.

\(^{37}\) Riki v Codd, supra n29, 248-249.
Jessel MR in *Benyon v Cook* agrees that:38

"The doctrine has nothing to do with fraud.... It has been laid down in case after case that the court, wherever there is dealing of this kind, looks at the reasonableness of the bargain, and if it is what is called a hard bargain, sets it aside."

The effect of this articulated burden of proof is that it is unfair dealing (and so unconscionable) simply to obtain a very favourable bargain from a person subsequently judged to be under disability and without adequate independent advice at the time of contract formation.

This approach does not consistently explain the outcome of unconscionability cases, for although all bargains found to be unconscionable involve disability, lack of adequate independent advice and contractual imbalance, not all bargains involving these factors have resulted in a finding of unconscionability when, according to this articulated rationale, they should. For example, in *Errington v Martell-Wilson (deceased) and Cook*,39 the defendant was found to be incapable of managing her affairs due to her contractual capacity. Her doctor testified of her,

"... sometimes grossly confused mental state; of her suffering from delusions; of her saying she has seen and spoken to her dead sister; of her memory being bad; of her never seeming to be able to find things she wants; and after a short time forgetting what she was searching for."

This elderly woman, acting through her solicitors, sold for five hundred pounds land which was subsequently valued at between three thousand and four thousand pounds. Her solicitors merely implemented her instructions, being unaware of her incapacity and did not advise her as such. However, despite her severe mental disability, lack of adequate advice and the serious

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38 (1875) LR 10 Ch 389, 391.
39 Queens Bench Division, 16 May 1980, Lexis (transcripts from Lexis contain no pagination, therefore no page references are possible). See also *Hart v O'Connor*, supra n5 where an elderly vendor found to be of unsound mind sold farm land for $180,000, some $20,000 below valuation. Moreover, at a time of rapidly rising land prices, it was agreed that the purchaser would pay no deposit, the full price being payable some two years later when the valuation of the land had risen to $272,000. There again, no unconscionability was found, significantly because the purchaser "was guilty of no unconscionable conduct", 174.
contractual imbalance involved, the bargain was found not to be unconscionable.\textsuperscript{40}

In contrast, unconscionability was found in \textit{Nichols v Jessup}\textsuperscript{41} where the party seeking relief suffered a relatively mild degree of impairment. Prichard J found that despite her occupation as a registered nurse and owning a block of flats, she was unintelligent, muddleheaded, inexperienced in the subject of the contract and likely to be swayed by wholly irrelevant considerations.

It is submitted that the protection of those under disability or disadvantage will take us some way towards understanding judicial action in unconscionability cases.\textsuperscript{42} However, it cannot offer a full and consistent explanation for the way cases are decided. The degree of impairment, although important, is \textit{not} the primary determinant of whether relief will be granted, and the judicially advanced burden of proof by which unconscionability is said to be made out on proof of disability, lack of advice and contractual imbalance, does not find consistent application in the cases.

Moreover, in the light of developments in recent cases, such an approach is no longer tenable "at least in its antipodean statement".\textsuperscript{43} Somers J of the New Zealand Court of Appeal\textsuperscript{44} rejected the view that unconscionability is a paternal jurisdiction protecting people from bad bargains,\textsuperscript{45} and concurred with the Privy Council's view that:\textsuperscript{46}

"Equity will relieve a party from a contract which he has been induced to make as a result of \textit{victimisation}. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to \textit{unconscionable dealing}" (emphasis added)

\begin{itemize}
  \item \textsuperscript{40} The issue of unconscionability was raised as a defence to an action for damages for breach of contract. The defendant vendor had no title to the land having already sold it some years before. Her forgetfulness of this merely confirms her incapacity. The writer suggests that the court's decision was based on the purchaser's ignorance of the vendor's impairment. Neither he nor his solicitor dealt directly with her and therefore had no reason to suspect that she was not "fully compos mentis". Nor were they aware of the undervalue involved.
  \item \textsuperscript{41} High Court of Auckland, A1381/83, Prichard J, 21 March 1985.
  \item \textsuperscript{42} For further discussion see Chapter IIA.
  \item \textsuperscript{43} \textit{Nichols v Jessup}, supra n3, Somers J, 3.
  \item \textsuperscript{44} Relying on the decisions in \textit{CBA v Amadio}, supra n17; \textit{Moffat v Moffat}, [1984] 1 NZLR 600; and \textit{Hart v O'Connor}, supra n5.
  \item \textsuperscript{45} Supra n3, 2-3.
  \item \textsuperscript{46} \textit{Hart v O'Connor}, supra n5, 166; see also \textit{Alec Lobb (Garages) v Total Oil GB Ltd}, supra n14, 961; supra n19, 312-313.
\end{itemize}
It is to this approach that we now turn.

(2) Concern with Unconscionable Conduct

The weight of judicial opinion supports the view that unconscionability is a jurisdiction dealing with equitable fraud. As such it operates to "deny to those who act unconscionably the fruits of their wrongdoing". It is said that:

"The essence of the fraud charged is that advantage was taken of weakness, ignorance and other disabilities on the side of the weaker, and the contract was derived from such behaviour and it is an unfair bargain." (emphasis added)

The focus is thus on the conduct of the party seeking to enforce the contract and not merely on the disability of the party seeking to escape it. The court must ask "... whether having regard to all the circumstances, it was consistent with equity and good conscience that he should be allowed to enforce it".

Different burdens of proof can be isolated from the cases taking this view of unconscionability. According to one, the complainant need not point to anything reprehensible in the enforcer's conduct, for, where disability, lack of advice and an improvident bargain can be established, it is said that: "The Court has a right to infer that the bargain was brought about either by intimidation or fraud." A presumption of advantage-taking or fraud arises:

"... which the stronger must repel by proving that the bargain was fair, just and reasonable ... or perhaps by showing that no advantage was taken." (emphasis added)

However, it is unclear just how the enforcer can show that no advantage was taken.

47 Blomley v Ryan, supra n17, 429 per Kitto J; see also Moffat v Moffat, supra n44, 606 per Somers J; 608, per Hardie Boys J.
48 Ibid, 382 per McTierman J.
49 Alec Lobb (Garages) Ltd and Others v Total Gil GB Ltd, supra n14, 961; CBA v Amadio, supra n17, 423 per Deane J.
50 Blomley v Ryan, supra n17, 401-402 per Fullagar J; CBA v Amadio, supra n17, 423 per Mason J.
51 Gissing v Eaton (1911) 25 OLR 50, 56.
52 Morrison v Coast Finance Ltd, supra n15, per Davey JA; see also Harry v Kreutziger, supra n7 per McIntyre J; Knupp v Bell (1968) 67 DLR (2d) 256 per Woods JA; Harrison v Guest (1860) 6 De G M & G 424; 11 ER 517; Multiservice Bookbinding Ltd and Others v Marden [1978] 2 All ER 489; Hart v O'Connor, supra n5; Waters v Donnelly, supra n32; Sareckzy v Fodermayer and Housing Corporation of New Zealand, High Court, Auckland, A 1610/35, 13 March 1986, Henry J.
In some cases, the courts appear to require that the bargain be shown by the enforcer to be "fair, just and reasonable", rather than the enforcer's bargaining conduct about which the presumption of fraud is made. This is an illogical and unsatisfactory position. Before the court requires the enforcer to discharge the onus of showing that the contract is a fair one, the court has already found, as a matter of fact, that the bargain is abhorrent to its sense of justice, that the complainant was impaired in his/her ability to obtain a fair bargain, and lacked the necessary independent advice. Thus, the presumption is effectively rendered irrebuttable and there is no room to accommodate any evidence as to the actual quality of the enforcer's conduct.

"It does not necessarily follow that what could have been done has been done; whether an unfair advantage has been taken depends on the facts of each case." 

Some cases take the opposing view in suggesting that enforcer misconduct must be proved to make out a case for unconscionability. In Blomley v Ryan Kitto J referred to the need to "establish that the stronger party unconscientiously took advantage of the opportunity placed in his hands". McTiernan J remarked on the need to show "weakness on one side, usury on the other, or extortion or other advantage taken of that weakness".

Meagher, Gummow and Lehane in Equity, Doctrines and Remedies clearly stated the essentiality of establishing the advantage-taking of the stronger party. When this is combined with inequality of positions and a bargain beneficial to the stronger, the onus passes to the stronger to show that their conduct was fair, just and reasonable. Prichard J rightly found this formula rather illogical in that "once it appears that the stronger party has intentionally taken

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53 McMullin J justifies this position by his reasoning in O'Connor v Hart, supra n3, 289-290 (reiterated in Moffat v Moffat, supra n44, 605) that: "Overreaching and unfairness are often associated in decisions on equitable fraud and it would be hard to imagine a case of overreaching which was other than unfair." He thus sets up a fictional equivalence between an unfair bargain and overreaching conduct in the context of impaired bargaining ability which cannot be justified. For although unfair dealing or overreaching usually results in contractual imbalance, not every case of contractual imbalance is the result of unfair dealing.

54 Multiservice Bookbinding Ltd and Others v Marden, supra n52, 502.

55 Supra n17.

56 Ibid, 415.

57 Ibid, 385.

58 (2nd ed) 1984, 385.
advantage of the weaker, it will be unlikely that he can show his conduct was fair, just and reasonable".\textsuperscript{59}

Recently a number of cases\textsuperscript{60} have given unconscionable conduct a specialised meaning. Accordingly it is unconscionable to profit from an unequal bargain made with someone you know to be under disability or disadvantage at the time of the contract. Thus,\textsuperscript{61}

"If A, having actual knowledge that B occupies a situation of special disadvantage in relation to an intended transaction, so that B cannot make a judgment as to what is in his own interests, takes unfair advantage of his (A's) superior bargaining power or position by entering into that transaction, his conduct in so doing is unconscionable...."

By way of anticipation, it is contended that this approach offers the most promising lead in detecting a consistent fact pattern in unconscionability cases.

How valid is the view that unconscionability is aimed at depriving wrongdoers of the fruits of their wrongdoing? To answer this, we must identify the contents of this all important "wrongdoing" to determine whether they are in fact present in cases of unconscionability and absent where unconscionability is rejected. Ironically, however, the courts offer very little in the way of definition bar the use of abstract descriptive terms - such as extortion, imposition, overreaching, unconscionable conduct, fraud,\textsuperscript{62} making unconscientious use of a superior position,\textsuperscript{63} taking advantage,\textsuperscript{64} preying upon,\textsuperscript{65} pushing to the wall,\textsuperscript{66} exploiting, imposing objectionable terms in a morally reprehensible manner affecting his conscience\textsuperscript{67} - which themselves need defining.

\textsuperscript{59} \textit{Nichols v Jessup}, supra n41, 12-13.
\textsuperscript{60} \textit{Black v Wilcox} (1976) 70 DLR (3d) 192; \textit{CBA v Amadio}, supra n17; \textit{Moffat v Moffat}, supra n44; \textit{Nichols v Jessup}, supra n3.
\textsuperscript{61} \textit{CBA v Amadio}, supra n17, 411 per Mason J; see also Deane J at 422; \textit{Moffat v Moffat}, supra n44, 606, Somers J; 608, Hardie Boys J; approved in \textit{Nichols v Jessup}, supra n3.
\textsuperscript{62} \textit{Hart v O'Connor}, supra n5, 169-174.
\textsuperscript{63} \textit{CBA v Amadio}, supra n17, 412 per Mason J.
\textsuperscript{64} \textit{Morrison v Coast Finance Ltd}, supra n15, 713; \textit{Knupp v Bell} (1966) 57 DLR (2d) 466, 475.
\textsuperscript{65} Crawford, B E, supra n4, 143.
\textsuperscript{66} \textit{Lloyds Bank Ltd v Bundy} [1975] 1 QB 326, 336-337.
\textsuperscript{67} \textit{Multiservice Bookbinding Ltd and Others v Marden}, supra n52, 502; \textit{Alec Lobb (Garages) Ltd and Others v Total Oil GB Ltd}, supra n14, 961.
Nevertheless, some types of enforcer conduct have been noted with disapproval by the courts. We will assume that such conduct gleaned from the cases are the "wrongdoings" referred to. First, is conduct which produces or exacerbates the other party’s disability or disadvantage with the transaction in mind. Accordingly, where one party causes or contributes to the other party's intoxication, emotional distress, or financial need in order to obtain a contractual advantage, the courts have set aside the resultant bargains for unconscionability. Cases involving such obvious wrongful conduct are, however, few and far between.

Much more plentiful are cases involving conduct which is per se ambiguous as to wrongfulness, but which has been noted by the courts as reprehensible in the circumstances of the cases. In these the party now seeking to enforce the contract was found to have done one or more of the following: initiated the negotiations and/or taken the dominant role in formulating the terms of the final agreement; acted with haste in concluding the contract; dissuaded the other party from obtaining independent advice; used influential intermediaries to procure the agreement of the other party; used pressure, harassment or threats not otherwise unlawful to induce the other party to enter the contract; deliberately or recklessly misled the complainant with a view to the contract; failed to recommend (or insist) that the other party obtain independent advice; and/or failed to draw the other party’s attention to

68 See for example Say v Barwick (1812) 1 V & B 195; Blomley v Ryan, supra n17; Cooke v Clayworth (1811) 18 Ves 12; Sheridan, L A, supra n3, 70-80.
71 For further examination of these see Chapter IIIIE(1).
72 See for example Blomley v Ryan, supra n17; Harris v Richardson, supra n19; Pridmore v Calvert (1975) 54 DLR (3d) 133; Towers v Affleck, supra n34; Waiers v Donnelly, supra n32.
73 See for example Evans v Llewellin, supra n31; Clark v Malpas (1862) 4 De G F & J 401; 54 ER 1067; Blomley v Ryan, supra n17; Pridmore v Calvert, supra n72.
74 See for example Mundinger v Mundinger, supra n69; Loe v Tylee, High Court Auckland, A 58/84, Vautier J, 13 July 1984.
75 See for example Portal Forest Industries Ltd v Saunders, supra n8.
76 See for example Junkin v Junkin (1978) 86 DLR (3d) 751; Harry v Kreutziger, supra n7; Hnatuk v Chretian (1960) 31 WWR 130.
77 See for example Paris v Machnick (1972) 32 DLR (3d) 723; Buchanan v Canadian Imperial BC (1979) 100 DLR (3d) 624; Hnatuk v Chretian, supra n76; Harry v Kreutziger, supra n7.
78 See for example Evans v Llewellin, supra n31; Knupp v Bell, supra n52 and 64.
information which significantly affects that party's liability under the contract, and/or to explain to that party the true nature of the contract.  

The writer contends that, despite the judicial emphasis on "unconscionable conduct", acts or omissions identified as reprehensible cannot in themselves explain the general picture of judicial intervention. In several cases, allegations of unconscionability were rejected despite the presence of one or more of these "unconscionable" acts, in particular, a failure to recommend advice or explain the nature of the bargain to the complainant.

By way of anticipation, it is suggested that the conduct identified should properly be viewed as evidence of a certain frame of mind possessed by the enforcing party. It is evidence of knowledge of the complainant's disability and consequent impairment in bargaining ability. It is also evidence of a conscious attempt, in the light of that knowledge, to take advantage of the disabled party to obtain a very profitable bargain at that party's expense.

The two judicial explanations for unconscionability identified above - protection of the weak and concern over contractual misconduct - are qualitatively distinct because of their difference in emphasis. The two are, however, related in that those under a disability will be more easily taken advantage of by others. Moreover, both are important aspects of the unconscionability jurisdiction. In the words of Somers J:

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79 CBA v Amadio, supra n17; Cresswell v Potter [1978] 1 WLR 255; Buchanan v CIBC, supra n77.
80 It is far from clear that they are unconscionable or wrongful. Initiating the bargaining process and proposing the terms finally agreed upon cannot be per se objectionable. Employing influential intermediaries and forceful arguments or other pressures to bring about agreement are frequently used and accepted techniques in pre-contractual negotiations, and there may be sound economic and business reasons for expedition in concluding a contract or dissuading the other party from what may be costly independent advice. Moreover, whether pre-contractual statements (not otherwise actionable misrepresentations) mislead or not depends a great deal on the gullibility of the listener; and lastly, contracting parties dealing at arm's length generally owe each other no fiduciary duty of care, it is therefore not a requirement of a valid contract that parties disclose important information bearing on the contract or insist that the other party obtain independent advice.
81 For example Riley and Fifield v Jones, supra n34, in which the enforcing party initiated the transaction making an offer on three occasions. There was also a suggestion of undue haste. See other examples Aqua Leisure Ltd v Bammant & Styles, CA (Civil Div) 1977 A 62, 15 May 1980. Cooke v Clayworth, supra n68; Gissing v Eaton, supra n51; Calumsky v Karaloff [1946] 2 DLR 513.
82 Supra n3, Somers J, 2-3.
"The equitable jurisdiction to set aside unconscionable bargains is not a paternal jurisdiction protecting or assisting those who repent of foolish undertakings. It is a jurisdiction protecting those under a disadvantage from those who take advantage of that fact; equity looks to the conduct of the stronger party." (emphasis added)

It is the balance which is important. Of themselves, neither is capable of fully explaining the judicial action in unconscionability cases.

B. THE FACT PATTERN OF UNCONSCIONABILITY

The apparent divergence in judicial approach to the question of unconscionability which exists at the level of judicial articulation is clear. This has given rise to an understandable confusion and uncertainty as to the scope of the jurisdiction. However, unconscionability need not yet be seen as an area incapable of consistent resolution. If the courts cannot be relied upon to provide a workable explanation for their decisions, we must return to square one, and probe beyond what the courts say they are doing to examine what, in fact, the courts are doing. How has each case been dealt with? What fact findings are made? What are the evidentiary bases for such fact findings? What features of the case are noted or commented upon as having significance? How is the case finally resolved? In other words, assuming, as we must, that like cases are being decided in a like manner, we need to identify the legally significant "like" features (or the fact pattern) of cases found by the courts to contain unconscionability.

In this search, observed judicial action has yielded a picture of remarkable uniformity in contrast to the overall picture presented by judicial rhetorics. Where unconscionability has been found, it is contended that five elements have been consistently present, whether they are expressly required and discussed by the courts or not. The precise content and nature of each of these elements receive extensive treatment in Chapter III. The task at hand is to identify these elements and to adduce evidence in support of the writer's contention that each should be viewed as operative in the overwhelming majority of unconscionability cases.

83 If this cannot be assumed, the quest for rationality in judicial action is futile.
(1) **Complainant disability or disadvantage:** All the burdens of proof put forward by the courts require complainant disability or disadvantage as an essential element of unconscionability. Such disability or disadvantage has also received uniform treatment in practice as an indispensible factor in any ultimate finding of unconscionability.

(2) **Lack of adequate independent advice:** Most courts refer to this factor as necessary to a finding of unconscionability. Some, however, ignore it, although it is suggested that the omission is inadvertent rather than deliberate. Generally, in practice, where unconscionability has been found, the complainant has either had no advice or the advice, although present, was deemed to be inadequate. Where the advice element has been a factor in unconscionability being rejected, it is either present and adequate or absent because of the complainant's refusal to obtain advice despite the enforcer's recommendation to do so.

(3) **Contractual imbalance:** In the great majority of cases, contractual imbalance is incorporated in the judicially articulated burdens of proof either to raise the presumption of unconscionability by its presence, or to rebut that presumption by its absence. In examining judicial practice, it can confidently be said that all bargains found to be unconscionable involve some obvious contractual imbalance. Conversely, bargains found not to be unconscionable generally involve no serious contractual imbalance; or any apparent contractual imbalance could be accounted for by acceptable reasons other than unfair dealing.

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84 For example *Tweedie v Geib* (1982) 138 DLR (3d) 311; 19 Sask R 48; but cf *Moffat v Moffat*, supra n44.

85 See for example *Evans v Llewellin*, supra n31; *Morrison v Coast Finance Ltd*, supra n15; *Mundinger v Mundinger*, supra n69.

86 See for example *Grealish v Murphy*, supra n31; *Hart v O'Connor*, supra n3 and 5; *Blomley v Ryan*, supra n17.

87 See for example *Multiservice Bookbinding Ltd and Others v Marden*, supra n52; *Burmah Oil Co Ltd and Another v Governor of Company of Bank of England*, Chancery Division, 3 July 1981, Lexis.

88 See for example *Harrison v Guest*, supra n52; but cf *Moffat v Moffat*, supra n44; and refer Chapter IIIC, text accompanying footnotes 256-259.

89 For further discussion see Chapter IVA.

90 For a discussion of what constitutes contractual imbalance, see infra Chapter IIIB.

91 For further discussion see Chapter IVC.
(4) **Enforcer knowledge of complainant impairment**: This component of the proposed fact pattern differs from those so far mentioned in that, until very recently, it has been largely absent from judicial explanations of unconscionability and the burdens of proof put forward as applicable. The writer's contention that it is, nevertheless, an important operative factor in determining the outcome of unconscionability cases, therefore, warrants fuller justification.

In their treatment of this component, the cases can be divided into three groups. First, are the handful of recent, mostly Australasian cases which expressly recognise the relevant knowledge as, in practice, and more significantly, in principle part of the definition of unconscionability. Thus in *Black v Wilcox*, Evans JA stated that in unconscionability:

"The question is whether the transaction reveals a situation existing between the parties which was heavily balanced in favour of the defendant and of which he knowingly took advantage."

The knowledge requirement was also made explicit in *Commercial Bank of Australia Ltd v Amadio*.

In New Zealand, the requirement was first adopted by the Court of Appeal in the 1984 decision of *Moffat v Moffat*, where Somers J held that the receipt or retention of a contractual benefit under contract was unconscionable if the complainant was:

"... under a disability or disadvantage sufficiently serious to make it unfair to allow it to stand in favour of one who knew or ought to have known of that condition."

This was affirmed in the recent decision of *Nichols v Jessup*. In all these cases, express fact findings of enforcer knowledge were made by the courts in setting the bargains aside for

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92 The possible justifications for requiring knowledge in unconscionability are explored in Chapter II.
93 Refer supra n60.
94 Supra n60.
95 Ibid, 195.
96 Supra n17; see text accompanying supra n61.
97 Supra n44.
98 Hardie Boys J agreeing at 608.
99 Ibid, 606.
100 *Nichols v Jessup*, supra n3; see judgments of Cooke P and Somers J.
unconscionability. This group of cases may point to the existence of a distinct Australasian approach to unconscionability, what Somers J labelled unconscionability "in its antipodean statement". However, it is argued that the knowledge component plays an operative role in determining the outcome of unconscionability cases whether its significance is acknowledged or not and whether its presence is expressly found or simply presumed.

Thus, in the second group of cases, where no formal references are made to the knowledge component in explaining unconscionability, the courts have, nevertheless, expressly noted its presence in finding unconscionability; alternatively, they have noted its absence in rejecting unconscionability. That is, although the requirement is unacknowledged in principle, it is applied in practice.

Chief among these cases is the recent Privy Council decision of *Hart v O'Connor* in which Lord Brightman defined an unconscionable bargain as:

"... a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction."

The knowledge factor is not mentioned. However, the role played by its absence in the court's ultimate rejection of unconscionability is clear, particularly in view of the complainant's incapacity and the improvidence of the bargain. There was no unconscionability:

"... because the defendant was guilty of no unconscionable conduct ... he acted with complete innocence throughout. He was unaware of the vendor's unsoundness of mind. The vendor was ostensibly advised by his own solicitor. The defendant had no means of knowing or cause to suspect that the vendor was not in receipt of and acting in accordance with the most full and careful advice."

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102 Examples of other cases in this group are: *Ayres v Hazelgrove*, Queen's Bench Div 1982/NJ 1003, 9 Feb 1984 Lexis; *Archer v Cutler* [1980] 1 NZLR 386; *Grealish v Murphy*, supra n31; *Harris v Richardson*, supra n19; *Harry v Kreutziger*, supra n7; *Hnauw v Chretian*, supra n76; *Knupp v Bell*, supra n52 and 64; *Morrison v Coast Finance Ltd*, supra n15; *Portal Forest Industries Ltd v Saunders*, supra n8; *Pridmore v Calvei*, supra n72; *Towers v Affleck* supra n34; *Tweedie v Geib*, supra n84. These cases are discussed in Chapter IIID which deals with the judicial application of the knowledge requirement.
103 Supra n5.
104 Ibid, 171.
In the view of Cooke P, the outcome of the case could be explained because:

"... it was not a case where as a purchaser he [the enforcer] either knew or ought to have known that he was taking advantage of any deficiency in the vendor's understanding of the transaction or mental capacity."

This interpretation of *Hart v O'Connor* makes sense of Lord Brightman's statement in that case that victimisation, if, by "unconscionable circumstance", his Lordship can be taken to mean "having knowledge of the other party's impairment in judgment".

*Blomley v Ryan* provides a further example. Again, no formal reference is made to the necessity of finding knowledge. However, in setting aside the sale of land, the judges relied heavily on the fact that the enforcer must have known during the negotiation and signing of the agreement that the complainant "was in no fit state to transact business" due to intoxication. The court was also satisfied that the complainant's intemperate habits and peculiar lifestyle were a matter of common knowledge in the area and must have been known to the enforcer, who was previously acquainted with him.

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106 *Nichols v Jessup*, supra n3, Cooke P, 3.
107 The only reservation the writer holds is that neither the Court of Appeal nor the Privy Council in *Hart v O'Connor* addressed the question of what the enforcer did know of the complainant's disability short of mental incapacity, particularly in the light of the trial judge's comment that: "... the respondent [enforcer] must have wondered about Jack [the complainant]'s competence to undertake business of any complexity." (although on the evidence he was not able to find knowledge of mental incapacity) supra n3, 284. Cf *Archer v Cutler*, supra n102, where McMullin J found the enforcer had no knowledge of unsoundness of mind but was aware of the complainant's old age and eccentric behaviour in finding unconscionability.
108 Supra n5, 171.
109 Supra n17.
110 Ibid, 401; see also 367, 369-70, 374-5, 393, 399.
The third group of cases make no express references to the knowledge factor at all in finding unconscionability. However, the presence of the relevant knowledge is easily inferred on the facts of these cases and, it is argued, can be presumed to have influenced the courts in their finding of unconscionability. Thus, in *Baker v Monk*, Turner LJ held that the degree of inequality in bargaining power between the parties:\textsuperscript{111}

"... rendered it incumbent on the appellant [enforcer] to throw further protection around this lady before he made the bargain with her."

Such a comment assumes that the enforcing party knew why the "lady" needed further protection; namely, that she suffered some disability which had impaired her self-protective ability. Relationships of marriage\textsuperscript{112} or dependency\textsuperscript{113} between the contracting parties can also sustain an inference that one party knew of any impairment in the other's self-protective ability. Knowledge can also be inferred where the complainant's impairment would have been obvious to a reasonable person in the enforcer's position. It is submitted that these cases\textsuperscript{114} are best interpreted as supporting the requirement of knowledge in finding unconscionability. At the very least they are not inconsistent with such a requirement.

Only two judgments have expressly rejected the need for this knowledge component in

\textsuperscript{111} Supra n35.
\textsuperscript{112} See for example *Cresswell v Potter*, supra n78; *K v K*, supra n68.
\textsuperscript{113} See for example *Growden v Bean*, Queen's Bench Division, July 1982, Lexis; *Loe v Tylee*, supra n73; *Riki v Codd*, supra n29; *Sareczky v Fodermayer and Housing Corporation of NZ*, supra n52.
\textsuperscript{114} *Baker v Monk*, supra n35; *Clark v Malpas*, supra n73; *Evans v Lleweliin*, supra n31; *Fry v Lane*, supra n35; *Wood v Abrey* (1818) 3 Madd 417; 56 ER 558.
finding unconscionability. Neither are persuasive or authoritative, and should be regarded as anomalies in an area where direct and indirect judicial support for the knowledge requirement is strong.

(5) Unconscionable conduct and/or inadequate insulation: As noted, the courts have disagreed in principle on whether unconscionable conduct by the enforcer should be a necessary component of unconscionability. In practice, however, where unconscionability has been found, either the complainants were able to point to evidence of the enforcer's unconscionable or advantage-taking conduct, or the enforcers were unable to discharge their burden of

115 In Marshall v Canada Permanent Trust Co, supra n36, Kirby J held that unconscionability was made out on proof of complainant disability and contractual improvidence. Whether the enforcer knew of the complainant's disability was immaterial. To support this position Kirby J cited Knupp v Bell, supra n52 and 64; Morrison v Coast Finance Ltd, supra n15; and Waters v Donnelly, supra n33, all of which contain very express fact findings of enforcer knowledge in finding unconscionability. The presence of such knowledge in Baker v Monk, supra n35, and Evans v Llewelin, supra n31, should be treated as presumed as argued above. The finding of unconscionability in this case can stand with the requirement of knowledge in the footing that the enforcer knew he was paying a gross undervalue for the farmland and knew that the complainant resided at a rest home. This decision has never been cited in the twenty years since it was reported.

In Nichols v Jessup, supra n3 (p4) McMullin J rejected the need to establish "some improper mental element by the party seeking to take advantage". In doing so, he purported to be interpreting Hart v O'Connor, supra n5. The conflicting, and it is argued preferable, interpretation of Cooke P and Somers J has already been discussed. Again, the cases referred to by McMullin J do not support his position. Harris v Richardson, supra n19; Blomley v Ryan, supra n17; Moffat v Moffat, supra n44; Commercial Bank of Australia v Amadio, supra n17; all give a prominent place to the enforcing party's knowledge of the disability of the other party in finding unconscionability. In Archer v Cutler, supra n102, McMullin J himself referred to the stronger party's awareness of the other party's advance age and eccentricity. In Riki v Codd, supra n29, knowledge can be presumed from the parties' eighteen years' previous dealing, and in Cresswell v Potter, supra n79, from the parties' marriage of four years. McMullin J also cites Fry v Lane, supra n35, which is convincingly interpreted by Cooke P (p7) as consistent with the requirement of knowledge.

Other points of inconsistency and confusion detract from McMullin's judgment. On the one hand, he said he did not read Hart v O'Connor as "insisting upon overreaching as necessary to establish an unconscionable bargain" (p7); on the other, he admits that in finding no unconscionability, lack of "overreaching and advantage-taking ... were the factors on which Hart v O'Connor finally turned" (p8). McMullin J explained this apparent paradox by reasoning that although overreaching was generally unnecessary, "their lordships regarded the finding of the trial judge in Hart v O'Connor as to price and terms of sale as being insufficient in the absence of overreaching to support a finding that the bargain was unconscionable" (p8). That is, where inadequacy of consideration is insufficiently gross for a finding of unconscionability it may be supplemented by some finding of overreaching (which includes having the relevant mens rea). On McMullin J's reasoning Prichard J's decision in the High Court should have been affirmed, since the $48,000.00 disparity in value there must be considered gross by any standard and so not necessitate an inquiry into overreaching. Nevertheless, McMullin J agreed with the other two judges that the case should be remitted to the trial judge for further hearing on the issue of overreaching.

116 See for example Blomley v Ryan, supra n17; Portal Forest Industries Ltd v Saunders, supra n8; Gaertner v Fiesta Dance Studios Ltd (1972) 32 DLR (3d) 639; for further discussion see Chapter IIIE(1).
showing that everything had been "right and fair and reasonable" on their part. The latter involves showing not only the absence of unconscionable conduct but also that sufficient steps were taken to "distance" or place the complainant's at "arm's length" (namely to recommend that they obtain independent advice or to provide them with the relevant information in respect of the contract themselves).

C. THE BURDEN OF PROOF?

Having identified the five elements in the fact pattern of an unconscionable bargain, the question arises as to how each element fits into a workable burden of proof capable of explaining the results of unconscionability cases. There is no simple answer. Judicial practice is inconsistent and there is often an absence of judicial reference to the concept of burden of proof. In practice, the courts rarely insist on strict proof of set elements by the respective parties along adversarial lines. Rather, some feature/s of the case (usually complainant disability and/or unfair contract terms) are noted as a precursor to a general judicial inquiry into all the circumstances surrounding the contract. Nevertheless, the writer argues that, a burden of proof can be posited on the basis of the identified fact pattern which can consistently account for the outcome of unconscionability cases in relation to their facts.

Accordingly, it is submitted that to set up a presumption of unconscionability, the complainants need to show:

(i) their special disability or disadvantage;
(ii) their lack of adequate advice;
(iii) the improvidence of the bargain for them; and

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117 See Morrison v Coast Finance Ltd, supra n15, 713; Portal Forest Industries Ltd v Saunders, supra n8, 670; Waters v Donnelly, supra n33, 401; Slator v Nolan (1876) 11 IR Eq 367, 386; Knupp v Bell, supra n52, 475; supra n64, 259; Mundinger v Mundinger, supra n69, 610; see also infra Chapter III E(2).

118 For example, as noted, while the burden of showing substantive unfairness is treated by some judges as that of the complainant's (in setting up a presumption of unconscionability), it is regarded by others as that of the enforcer's (to rebut the presumption of unconscionability); see text accompanying supra n35-38.
(iv) the enforcers' knowledge of their special disability or disadvantage.

The enforcers have an evidentiary burden in respect of these elements. Thus, for example, if they can show that despite the appearance of substantive unfairness to the complainants the bargain cannot in fact be considered unfair in all the circumstances then existing,\textsuperscript{119} then no presumption of unconscionability will arise. However, once the complainants have established these four elements to the courts' satisfaction, it is argued that a finding of unconscionability will follow unless the enforcers can rebut this presumption by showing:

(i) an absence of unfair or unconscionable conduct; \textit{and}

(ii) the presence of sufficient steps taken to distance the complainants.

**D. WHERE TO NOW?**

The divergence in the articulated judicial approaches to unconscionability may have suggested that like cases were being treated differently by courts adopting different approaches. However, it has been argued that this overall picture of inconsistency is more apparent than real. When judicial action is examined, it can be seen that like cases are indeed being treated in a like manner. The legally significant "like" features, fact pattern or constituent "building blocks" of unconscionability have been identified and a burden of proof capable of explaining the outcome in the cases suggested.

The quest for the understanding of judicial action in unconscionability will continue as follows:

\textit{Chapter II} explores some procedural rationales for the proposed burden of proof. This is in line with the traditional emphasis on the primacy of the freedom, certainty and sanctity of contractual obligations. More significantly, these procedural explanations rest on an acceptance of the elements of disability, advice, knowledge and misconduct at face value as procedural in nature.

\textsuperscript{119} For further discussion see Chapter IIIB(3).
Chapter III is an exercise in deconstruction. Each of the five elements ("bulding blocks") of unconscionability is broken down to reveal its precise composition. The focus is on the standards required, the categories employed, the evidentiary basis accepted and the limits applied by the courts with respect to each. Thus a blueprint for the construction of an unconscionability case is revealed, and the crucial role played by substantive contractual unfairness in that case brought to light.

Chapter IV then examines the validity of the procedure-substance distinction drawn by many courts in explaining unconscionability, and brings together the evidence challenging the judicial assertion that unconscionability is targeted at procedural irregularities and not substantive ones. A view of unconscionability based on substantive concerns is then suggested.

This study not only seeks to present the "why" and the "how-to" of unconscionability, but also endeavours to give a glimpse of the dichotomy which exists between judicial rhetorics and judicial action in the decision-making process.
II. PROCEDURAL RATIONALES FOR THE PROPOSED BURDEN OF PROOF

The burden of proof proposed in the preceding chapter supports the general view that: a contracting party A, will not be allowed to enforce a bargain against B, a party suffering impairment in self-protective ability, if B was without adequate independent advice, the bargain is improvident to B and A had notice of B’s impairment at the time of contracting; unless A can show that B was placed at "arm's length" and that A has him/herself otherwise acted with complete propriety during the negotiations.

How should judicial intervention on such a basis be explained? Why should contract law extend special protection to those whose impairment falls short of contractual incapacity? Why should such people be prima facie entitled to adequate advice in respect of their contracts? Why should contract parties who obtain a very profitable bargain at the expense of someone they know to be so impaired in self-protective ability, be unable to enforce that bargain? Why must such a party act with complete propriety and place the other party "at arm's length" to ensure the enforceability of his/her bargain? Both procedural and substantive considerations are involved. However, in deference to the stated judicial position that unconscionability is targeted at procedural ills in the contracting process, this chapter will concentrate on examining three possible procedural rationales for the proposed burden of proof and assessing their validity and workability in explaining judicial action in unconscionability cases. These are:

A. Protection of the weaker contracting party
B. Defective consent
C. Unconscientious/unreasonable reliance

The role played by substantive concerns will be discussed in Chapter IV.

By way of an aside, it is noteworthy that any rationale or justification for the proposed
burden of proof is intimately related to the way in which each element in that burden is actually applied by the courts. Thus, it is much easier to justify the protection of people with serious impairments in self-protective ability than the protection of those with trivial or trifling impairments. The same reasoning applies to substantive unfairness. This chapter must therefore be seen in the context of the next chapter which examines in detail the way in which each element has been applied in unconscionability cases.

A. PROTECTION OF THE WEAKER CONTRACTING PARTY

"... [If] there is one thing which more than another public policy required it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily should be held sacred."\(^1\)

Such a view places supreme emphasis on the autonomy and freedom of individuals to make contracts for themselves. Freedom of contract means the freedom to make bad bargains, a matter of private ordering which should suffer a minimum of legal interference. This approach rests on a view of the paradigm contract as a carefully negotiated agreement between parties of relatively equal bargaining power, each with a freedom of choice.

Fairness is said to require equality before the law, but the measure of equality is perfunctory rendering the particularities of the individual legally irrelevant considerations.

"What bound the wise man would also bind the fool. What was good for the individual person was good for the railway company or the international banking corporation."\(^2\)

While theoretically sound and simple, such an approach is ethically harsh and remote from the

\(^1\) Printing and Numerical Registering Co v Sampson (1875) LR 19 Eq 462, 465 per Jessel MR.
real world in which contract law must operate. To the extent that people begin with differing intellect, experience, judgment, mental capacity, emotional stability, financial resources, and opportunities, and to the extent that these determine the strength of an individual's bargaining power, which in turn determines the contractual advantages that that individual can obtain or extract, the notion of equality is a legal fiction. The indiscriminate enforcement of bargains may therefore amount, at times, to legally sanctioned oppression of the weak by those with greater bargaining power. Protection should, therefore, be extended to those least able to protect themselves. For, if equality is one of the ends of law, then "there is no greater inequality than the equal treatment of unequals".

The harshness resulting from such "equal treatment of unequals" has indeed proven distasteful to the judiciary which has not consistently approached contract as purely a private law matter between the parties. Public policy has been permitted to intrude. Holmes noted in his classic book, The Common Law, that:

"The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy...."

The concern that public policy is an "unruly horse" which no judge should ever try to mount lest it races out of control is met by Lord Denning's confident assertion that:

"With a good man in the saddle, the unruly horse can be kept in control. It can jump obstacles. It can leap the fences put up by fictions and come down on the side of justice...."

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5 Holmes, The Common Law (1881), 35.

Contracting parties engaged in the push and shove of the bargaining process are, in a sense, antagonists. If one party is seriously handicapped vis-a-vis the other in this process and is therefore unable to obtain a fair exchange, then "the instinctive preferences and inarticulate convictions" which give content to public policy, are to protect that party from the harshness of strict enforcement. The austerity of doctrine should and would be "tempered for the shorn lambs who might shiver in its blast",

"... when the parties have not met on equal terms - when the one is so strong in bargaining power and the other so weak - that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall."

On this basis Lord Denning has formulated a general principle of relief against inequality of bargaining power where a weaker party

"... without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefit of others."

In this way relief for duress, unconscionable bargains, undue influence, undue pressure, cases of "colore officii" and particular "salvage agreements" would be unified under one principle. Concern that the general operation of such a principle would bring too much uncertainty into contract law has recently led the House of Lords to "question whether there is any need in the modern law" for it and to reject it in favour of a more particularized formulation of undue influence.

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7 Supra n5.
8 Gilmore, G, supra n2, 21.
9 Lloyds Bank Ltd v Bundy [1975] 1 QB 326, 339 per Lord Denning.
Nevertheless, it is argued that protective concerns based on the notion of inequality of bargaining power has found judicial expression, inter alia, in the equitable doctrine preventing a mortgagee from bargaining away his equity of redemption, the rules against the enforcement of forfeitures, penalties and restraint of trade, the imposition of fiduciary duties of good faith, the law relating to exemption clauses, duress, undue influence, undue pressure, salvage agreements, "expectant heir" contracts and unconscionable bargains. Refusal to enforce such contracts represents judicial "protection of those whose bargaining power is weak against being forced by those whose bargaining power is strong to enter into bargains that are unconscionable". The exaction of too great an advantage in such circumstances will not be judicially sanctioned.

The term inequality of bargaining power, however, covers a multitude of sins. The unconscionability jurisdiction is primarily and specifically concerned with a disparity in bargaining positions resulting from an impairment in one party's self-protective ability and the consequent inability of that party to deal competently with the transaction at hand. Such impairment may stem from limitations in intelligence, judgment, experience, emotional stability, understanding or comprehension which may in themselves arise from a myriad of causes, mental, physical or circumstantial.

Contracts made by those so impaired may result in serious loss or hardship, either because that party is less able to resist the subtle pressures exerted by the other unimpaired party or simply because that party is unable to make a rational judgment as to what is a fair and reasonable bargain, and what they need or can afford. Usually it is a combination of the two which causes loss. Such people may need protection from themselves as much as from those

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14 Supra n12.
15 As opposed to, for example, disparity in financial resources per se.
16 For detailed examination of the categories of special disability see infra Chapter IIIA.
who would prey upon them. The judicial concern for the protection of those with impaired self-protective abilities is consistent with one line of judicial explanation for unconscionability. It also accounts for the requirements of disability, lack of adequate independent advice and an improvident bargain. But it does not explain the judicial concern with the enforcing party's knowledge and that party's conduct in the light of that knowledge. As noted in Chapter I, rationalisation of unconscionability solely on the basis of protection does not consistently explain the results reached in all unconscionability decisions. The protective impulses of the judiciary, although an obviously important factor in unconscionability, must be balanced by the needs of certainty and predictability in contract, and considerations of fairness to the other party.

B. DEFECTIVE CONSENT

Judicial agreement that unconscionability was not explainable in terms of defective consent, has been noted. The writer questions such an unqualified rejection and suggests that the notion of defective consent may well explain why relief should be and is given to one party in unconscionability decisions. At the very least, it is not inconsistent with the principle of freedom of contract which recognises the mutual consent of the parties as the source of contractual obligations and correspondingly, some defect in that consent, as justifying the non-enforcement of the contract. However, the formalistic objective test of consent should be replaced by a search for the indicia of "real" agreement when the circumstances of disability and improvidence are raised.

In the Commercial Bank of Australia Ltd v Amadio Mason J distinguished undue influence, in which the will of one party is not independent and voluntary, from unconscionability where the will of the party, even if independent and voluntary, is the result of that party's disability and of the other party's overreaching. Such a distinction is unrealistic. In

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17 Refer supra Chapter IA(1).
18 See Chapter I, text accompanying fns13-17.
neither situation is there any question of consent being given against the will of the party. Both act voluntarily, although in both cases, the consent is not all that it should be. In undue influence, consent is not independent because one party has placed too much reliance on or trust in the other party and is, therefore, vulnerable to that party's unfair persuasion. In unconscionability, consent can be said to be deficient because it is not accompanied by the necessary degree of understanding, intelligence or rationality. Along the same lines, the law of mistake can be seen as dealing with the lack of informed consent, while duress deals with the lack of free or voluntary consent.

Where one party's consent is not accompanied by meaningful and informed understanding and rational judgment, the resulting contract can justifiably be challenged as reflecting his/her agreement on the ground of unconscionability. The consent which is given is not an operative or worthwhile consent.

This defective consent perspective finds direct support in some cases. In Multiservice Bookbinding Ltd and Others v Marden, Browne-Wilkinson J rejected the complainant's allegation of unconscionability because: [1978] 2 All ER 489.

"The parties made a bargain which the plaintiffs, who are businessmen, went into with their eyes open, with the benefit of independent advice, without any compelling necessity to ... and without any sharp practice by the defendant." (emphasis added)

In Hnatuk v Chretian, Wilson J approved Kerr on Fraud (7th ed, p226) to the effect that proof of disability, lack of advice and inadequacy of consideration shifts the onus of proof onto

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20 Sheridan, L A, Fraud in Equity (1956) 192.
the enforcer to show that the complainant:25

"entered into the transaction voluntarily, and deliberately, knowing its nature and effect, and that his consent ... was not obtained by reason of any undue advantage taken of his position or of any undue influence exerted over him." (emphasis added)

Only then would the contract be enforceable. In *Gissing v Eaton*,26 Garrow JA rejected the claim of unconscionability, commenting that:27

"People must not be allowed to play fast and loose with settlements made as this was, deliberately, intentionally, and with full knowledge of all the facts." (emphasis added)

Logically, therefore, where consent to an agreement has *not* been deliberate, intentional and given with full knowledge of all the facts; where the contract was entered into with "eyes closed"; its terms may not be enforceable. Other cases provide indirect support for such a view.28

Defective consent, however, has its limitations in explaining unconscionability for consent becomes problematical the more mentally impaired the complainant is. Some people, although impaired, are capable of giving meaningful consent if provided with the relevant information and/or adequate help from an independent advisor. Others, however, cannot give meaningful consent regardless of the amount of help given because of the severity of their impairment, yet

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25 Ibid, 133.
26 (1911) 25 OLR 50.
27 Ibid, 59.
28 In *Harrison v Guest* (1860) 6 De GM & G 424, 11 ER 517, there was evidence that the complainant quite deliberately entered the agreement. He had "over and over again stated to various people what the bargain was". In *Haverty v Brooks* [1970] 1 R 214, there was no indication of the complainant's disability; moreover he had initiated the transaction and actively negotiated its terms which the court found to be entirely satisfactory in the complainant's circumstances. He was found not to be unequal to protecting his own interests. A similar situation was presented by Kitto J in his dissenting judgment in *Blomley v Ryan* (1954-56) 99 CLR 362. See also *Calumsky and Karaloff v Karaloff* [1946] 2 DLR 513.
their contracts are not necessarily voidable\textsuperscript{29} as the consent approach would suggest. Moreover, such an approach sits awkwardly with the elements of unconscionability identified, having a direct link only with complainant disability and lack of advice.

The writer suggests that impairment in mental capacity to understand and form a worthwhile judgment in respect of a transaction (along the same scale used to determine mental incapacity to contract), is a more helpful concept than operative consent in understanding unconscionability, although consent can provide a satisfactory explanation for some unconscionability decisions.

C. UNCONSCIENTIOUS/UNREASONABLE RELIANCE

According to the proposed burden of proof, if A knows of the B's disability and resulting impairment in self-protective ability and B lacks adequate advice, then it is prima facie unconscionable to enter into a one-sided bargain with B. A presumption of unfair dealing arises. The courts then inquire into A's bargaining conduct in the light of his/her knowledge either to confirm, or displace that presumption of unfair dealing. The rationale behind such treatment of enforcer knowledge and conduct will now be discussed.

(1) Enforcer Knowledge of Complainant Disability

Why should such knowledge count against the possessor of that knowledge and render a very profitable bargain unenforceable? Unconscionability is aimed at the protection of certain disabled people from loss. But that should not be its sole object. Considerations of certainty and predictability require that there should be a reason for depriving contracting parties of their bargains over and above considerations pertinent to the other party. Otherwise, no one could ever be certain of the enforceability of his/her contracts since there is always the risk that some

\textsuperscript{29} See Hart v O'Connor [1985] 1 NZLR 159 for such contracts to be voidable the mental incapacity of one party must have been known to the other party. See Green, M "Proof of Mental Incompetency and the Unexpressed Major Premise" [1944] 53, Yale LJ 271, who argues further that some improvidence is almost always involved.
unknown weakness existed in the other party at the time of contracting. As Meredith JA commented on the facts of one case:30

"... we have, I hope, hardly got so far as to hold that every bargain made by a woman in ill-health is voidable on the ground of fraud if it turns out to be a bad bargain for her, but valid if bad for the other fellow."

People should be able to predict the legal consequences of their actions. Otherwise the law becomes a source of uncertainty rather than security.

The requirement of knowledge of mental incapacity before a contract made with a mental incompetent is considered voidable31 is based on the same rationale. As Latey J explained:32

"There is nothing illogical or unjust about that. In the case of testamentary disposition or of a gift inter vivos there is an exercise of bounty and no legal rights in the recipient. In the case of a contract there is a business relationship with the creation of legal rights and obligations of both parties to be considered and to be accommodated within the law as fairly as they can be."

Given that at common law, knowledge is required of mental incapacity to render any contract made with such a person unenforceable; and given that mental incapacity must be considered one of the severest forms of the "special disability" required to activate the unconscionability jurisdiction; it would seem logical to (and illogical not to) require knowledge of lesser degrees of impairment in self-protective ability before unenforceability is concluded.

The requirement of certainty explains why the burden of proof should include an element pertinent to the enforcing party. That that element should consist of knowledge of the other party's disability can be justified both in terms of traditional contract theory and of equitable principles.

A chief aim of the law of contract is to protect the reasonable expectations of one

30 Supra n26, 61.
31 Supra n29.
32 Errington v Martell-Wilson (deceased) and Cook, Queens Bench Division, 16 May 1980, Lexis; see also Scott v Wise, Court of Appeal 105/83, Somers J, 20 May 1980, 19-20, but cf Greatish v Murphy [1946] IR 35, 49.
contracting party, A, engendered by a reasonable reliance on the other party B's expressions of assent. Where, however, A knows that B cannot properly comprehend and/or assess the merits of the transaction without help, A knows that B cannot properly comprehend and/or assess the merits of the transaction without help, A is put on notice that B's assent does not represent the exercise of informed, rational and intelligent judgment. Therefore, A's purported reliance on B's assent cannot be said to be reasonable, fair or in good faith.

Some help may be derived from the case of *Tilden Rent-A-Car Co v Clendenning*.

There the plaintiff sought to enforce an unusual and onerous exclusion clause against the defendant whom the plaintiff knew had not read the car rental document. Dubin JA quoted with approval Professor Waddams' comment that:

"One who signs a written document cannot complain if the other party reasonably relies on the signature as a manifestation of assent to the contents, or ascribes to words he uses their reasonable meaning. But the other side of the same coin is that: only a reasonable expectation will be protected. If the party seeking to enforce the document knew or had reason to know of the other's mistake the document should not be enforced." (emphasis added)

Since the plaintiff had emphasised the speed and convenience of the transaction and knew that its customers did not read, and therefore did not consciously assent to, all the provisions of the document they signed, Dubin JA held that the plaintiff could not rely on unusual and onerous printed terms not drawn to the customer's attention. It is argued that the same rationale supports the granting of relief from substantively unfair contracts resulting from unilateral mistakes known to the other party (Contractual Mistakes Act 1977 (NZ) s6(1)(a)(i)).

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33 (1978) 83 DLR (3d) 400.
35 The customers' consent to usual and not overly onerous terms can be implied from their signatures.
rationale is also consistent with relief being limited when contracts are made with protected mental patients36 "in good faith" (Mental Health Act 1969 (NZ) s85(5)); and relief being denied when contracts are made with a protected person37 "in good faith and without notice that a protection order had been made" (The Aged and Infirm Persons Protection Act 1912 s24(2)).

The writer argues that the unreasonable reliance rationale can also explain the prima facie unenforceability of very one-sided contracts made with people known to be seriously impaired in self-protective ability in the proposed analysis of unconscionability. The party seeking to enforce the bargain bears the burden of showing positively that, despite such knowledge, his/her reliance on the impaired party's assent was nevertheless fair, just and reasonable. Thus the enforcers' conduct in the light of their knowledge comes under scrutiny.

36 As defined by s82 Mental Health Act 1969 (NZ):
S.82(1) "Protected patient" (a) A committed patient subject to a reception order, or to an order or direction under Part VII of the Criminal Justice Act 1985; or (b) An informal patient in respect of whom a certificate has been given under section 8 of the Mental Health Amendment Act 1961 and in respect of whose estate the powers, duties, and functions of the Public Trustee under Part VIII of the Mental Health Act 1911 have not ceased; or (c) A person who has been a patient under the Mental Health Act 1911 and in respect of whose estate the powers, duties, and functions of the Public Trustee under Part VIII of that Act have not ceased; or (d) A person in respect of whose estate an order appointing a committee has been made under section 89 of the Mental Health Act 1911 and has not been rescinded; or (c) A special patient, other than a person who is subject to an order made under subsection (2)(b)(ii) or subsection (11) of section 121 of the Criminal Justice Act 1985 or under the proviso to subsection (3) of section 171 of the Summary Proceedings Act 1957, or to arrangements made under section 43 of this Act.

37 As defined by s4 and 5 The Aged and Infirm Persons Protection Act 1912:
4. Court may in certain circumstances make protection order - Where it is made to appear to the satisfaction of the Court that any person is, by reason of age, disease, [physical or mental illness or infirmity or mental subnormality], -
(a) Unable, wholly or partially, to manage his affairs; or
(b) Subject to, or liable to be subjected to, undue influence in respect of his estate, or the disposition thereof, or of any part thereof; or
(c) Otherwise in a position which in the opinion of the Court renders it necessary in the interest of such person or of those dependent upon him that his property should be protected as provided by this Act, -
the Court may make a protection order in the form or to the effect in the First Schedule to this Act in respect of the estate or part of the estate of such person.
5. Protection order in respect of estate of person addicted to excessive use of alcoholic liquors, etc. - Where it is made to appear to the satisfaction of the Court that any person is, by reason of his taking or using in excess alcoholic liquors, or any intoxicating, stimulating, narcotic, or sedative drug, unable, wholly or partially, to manage his affairs, whether such inability is continuous or occasional, the Court may make a protection order in or to the effect of the form in the Second Schedule hereto, anything in [the Alcoholism and Drug Addiction Act 1966] or in any other Act to the contrary notwithstanding.
Equitable fraud provides a further rationalisation for the knowledge requirement. Fraud was one of the two justifications put forward by the courts for the unconscionability jurisdiction. Accordingly wrongdoers were not to be entitled to the fruits of their wrongdoing. However, the cases show that this equitable fraud did not require actual wrongdoing, morally culpable conduct or intentional overreaching susceptible of independent proof.

"'Fraud' in its equitable context does not mean, or is not confined to, deceit; it means an unconscientious use of the power arising out of these circumstances and conditions of the contracting parties."39

Thus the complainant need not show "a conscious attempt by the enforcer to overreach them",40 "intentional fraud",41 "active moral delinquency",42 "intentional unfairness or dishonesty"43 on the part of the enforcer. Viscount Haldane LC explains the nature of equitable fraud:44

"... when fraud is referred to in the wider sense ... used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent.... What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience."

See Chapter IA(2).

Nichols v Jessup, CA 56/85, 26 September 1986, Cooke P, 2; see also Earl of Aylesford v Morris (1873) LR 8 Ch App 484, 491; Waters v Donnelly (1885) 9 OR 391, 402; Knupp v Bell (1968) 67 DLR (2d) 256, 258; Harris v Richardson (1930) NZLR 890, 902.


Moffat v Moffat, supra n40, 608, per Hardie Boys J.

Hnatuk v Chretian, supra n24, 133 per Wilson J quoting with approval Fry on Specific Performance (6th ed) 190.

Nocton v Lord Ashburton [1914] AC 932, 954; see also Harris v Richardson, supra n39, 902 per Adams J.
The writer submits that the word "conscience" is a helpful concept in unconscionability. Hobhouse J explains that:

"The intervention of equity arises because there is something in the transaction which should affect the conscience of the beneficiary and therefore call for an equitable remedy."

"... the protection of unsophisticated and defenceless persons against the exactions of conscienceless persons who seek to take advantage of them" is the concern of unconscionability. The writer argues that it is unconscientious to profit immodestly from contracts made with, and at the expense of, those known to require help in protecting their interests and who were without that help. Again this is consistent with the law on mental incapacity. To obtain a very profitable bargain at the expense of one known to be mentally incompetent involves "demonstrable fraud."

"... that person is acting dishonestly, not only in concluding the contract for his own benefit but thereafter attempting to enforce it."

The proposed burden of proof and the unconscientious reliance rationale can stand with the judicial explanation of unconscionability based on enforcer misconduct if such misconduct is interpreted to mean equitable fraud in the above manner. In Hart v O'Connor, Lord Brightman used terms such as "victimisation", "overreaching" and "imposition" to describe unconscionable conduct. In concrete terms, however, he said that this conduct:

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45 Growden v Bean, Queens Bench Division, 26 July 1982 (Lexis).
46 Gaertner v Fiesta Dance Studios Ltd (1972) 32 DLR (3d) 639, 642 per McKay J.
47 Scott v Wise, supra n32, 19.
48 Ayres v Hazelgrove, Queens Bench Division, 1982/NJ/1003, 9 February 1984, Russell J.
49 Supra n29.
50 Ibid, 230.
"... can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances."\textsuperscript{41} (emphasis added)

It is submitted that the circumstances which make the passive acceptance of a benefit against conscience are disability of the party conferring the benefit, that party's lack of adequate advice and knowledge of that disability by the party accepting the benefit. Although Lord Brightman makes no specific reference to the theoretical significance of enforcer knowledge, it has already been argued that this should be read in as the correct interpretation of the Privy Council's position on unconscionability.\textsuperscript{51}

The writer submits that references to enforcer misconduct in other cases should be similarly interpreted. To interpret these cases otherwise, as requiring active misconduct is inconsistent with the fact pattern which emerges from the case law.

The writer further contends that not only can this approach make sense of the enforcer "misconduct" line of cases, it can also rationalise the alternative judicial approach based on paternalistic protection (which rejects the need to establish misconduct), with the actual way in which unconscionability claims are dealt.

According to the latter approach, complainant impairment, lack of advice and an improvident bargain is all that needs to be established to make out unconscionability. Alternatively these elements raise an inference of unfair dealing which is effectively irrebuttable.\textsuperscript{52} The result is a theoretically illogical position which also does not reflect the practice of the courts. It is argued that the presumed unfair dealing which justifies depriving the enforcer of the benefit of the bargain should, at the very least, involve the conscience of the enforcer. There should be a conscious aspect to this advantage-taking which involves the enforcer's state of mind. If not, a person could be guilty of "advantage-taking" and "victimisation" unintentionally or unconsciously. Contracting parties would not be able to

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\textsuperscript{51} See supra Chapter IB(4), text accompanying fns102-107.  \\
\textsuperscript{52} See supra Chapter IA(2), text accompanying fns52-53.
\end{flushleft}
consciously act, or refrain from acting, in such a manner as to insulate their bargains from the attack of unconscionability. Such a position derogates from the needs of certainty and predictability in contract law to an unjustifiable degree. This is so where the justification for judicial interference is the protection of the impaired, but more so where it is the inferred unfair dealing of the enforcer. In either case, enforcers ought to have a prescriptive notice of the circumstances which could place their bargains in jeopardy, and be able to take steps to insulate it from voidability for unconscionability.

Knowledge of the other party's impairment provides such notice, and it should be an implied requirement of unconscionability (in addition to the articulated requirements of disability, lack of advice and an unfair bargain). This would, at least, not be inconsistent with the non-requirement of intentional or active misconduct mentioned by these cases. It would further make sense of the frequent references to the enforcer's culpable failure to recommend or insist on independent advice for the complainants. Cooke P interpreted the seminal case of Fry v Lane,53 which makes no reference to enforcer knowledge, as consistent with the requirement of such knowledge,54

"... on the footing that the purchasers probably knew that the vendors had no independent advice."

This knowledge can only be significant in the light of prior knowledge of the other party's impairment and therefore need for independent advice. Thus in Evans v Llewelin,55 Sir Lloyd Kenyon held that the enforcers "should not have permitted the man to have made the bargain without going to consult his friends". In Cresswell v Potter,56 Megarry J found that the enforcer had to do something "to bring to the notice of that other party the true nature of the transaction and the need for advice", before he could enforce such an advantageous transaction.

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53 (1888) 40 Ch Div 312.
54 Nichols v Jessup, supra n39, Cooke P, 7.
55 (1787) 1 Cox 333; 2 Bro CC 151; 29 ER 1191.
56 (1978) 1 WLR 255, 259.
In *Baker v Monk*, Turner LJ found that it was,

"...incumbent on the appellant to throw further protection around this lady before he made the bargain with her."

Since this judicially imposed requirement to throw protection around the complainant by recommending or giving advice is not applied to all contracting situations, it must be seen as *premised on the enforcer's knowledge of the other party's impairment*.

The protection of the weak approach can also be made consistent with the requirement of knowledge on the footing that if mental incapacity, an extreme disability deserving the highest degree of judicial protection, must be known by the other party before it can void a bargain, then how much more should knowledge be required of lesser impairments before they become operative in voiding a bargain for unconscionability?

Even if a court makes no special point of the enforcer's behaviour or state of mind in any given case, to obtain a very profitable bargain from the elderly, the sick, the drunk, the simple, the emotionally unstable, and such people, is itself hardly a character reference. Knowledge is often strongly inferrable.

Ordinarily there is a presumption of fair dealing. However, where disability exists on one part, knowledge of that disability on the other, and the resultant bargain is unduly advantageous to the one who knows and improvident to the one disabled, it is reasonable that the ordinary presumption should be displaced by a suspicion that the advantage was obtained by some unfair dealing. The burden is then on the party seeking to retain the benefit to show that their conduct in obtaining the advantage was fair, just and reasonable.

57 (1864) 4 De GI & S 388; 46 ER 968.
58 This point is made by Leff A A in "Unconscionability and the Code - The Emperor's New Clause" (1966-67) 115 U Pa L Rev 458, 533.
59 See Chapter IIID.
(2) **Enforcer Conduct in the Light of Knowledge**

A contracting party is not absolutely barred from dealing with those known to be under disability and it is not unconscionable simply to enter a contract with such a person. Knowledge is therefore not the end of the inquiry. Examination of the enforcer's conduct may serve to either confirm the presumption of intentional advantage-taking and unfair dealing, or rebut that presumption and so shield the bargain from interference. The cases show that in order to insulate the bargain the enforcer may point to evidence either that

(i) the bargain was not improvident to the complainant. (These cases view the absence of contractual improvidence as rebutting the presumption of unconscionability, rather than seeing its presence as necessary to raise the presumption in the first place.) This point, involving contractual imbalance, will be discussed in the next two chapters; or

(ii) that "everything has been right, fair and reasonable on his part". This involves showing firstly, an absence of unfair dealing, and secondly that the complainant has received adequate help from an independent advisor, or the enforcer has explained the true nature of the contract and/or recommended that the complainant obtain independent advice.

The need to establish an absence of unfair dealing in the form of undue haste, unfair harassment pressures or threats used against the complainant is clear enough. The onus on the enforcer depends very much on what evidence the complainant can point to in respect of the enforcer's bargaining conduct. The question, however, is why positive conduct on behalf of the complainants should be required of the enforcers to enable them to enforce their bargains?

In terms of the unfair reliance rationale, A's reliance on B's consent to a very one-sided bargain in favour of A is rendered unfair and unreasonable by A's knowledge of B's

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60 Crawford points out that one danger of such an approach is the serious reduction of the ability of such people to enter into contracts they genuinely want and need to. See Crawford, B E "Restitution - Unconscionable Transaction - Undue Advantage Taken of Inequality Between the Parties" (1966) 44 Can Bar Rev 142, 150-151.

61 See Chapter IIIE(2) and Chapter IV.


63 For further discussion, see Chapter IIIE(2).
impairment in self-protective ability. If, however, A refrains from unfair dealing and takes steps to ensure that B is adequately informed and advised in respect of the contract, then A has reason to believe that B knows what he/she is doing in entering the contract. A has restored the "arm's length" lost by A's knowledge of B's impairment. A's subsequent reliance on B's consent cannot be said to be unfair or unreasonable.

The equitable fraud explanation runs along similar lines. A's conscience is affected when he/she makes a very profitable bargain with B knowing that B's self-protective ability is seriously impaired. A presumption is also raised that A obtained the contractual advantage by unfair dealing. If A can rebut this presumption and show that he/she has taken sufficient steps to ensure that B received the help necessary, such conduct can only be described as "right, fair and reasonable" and not against conscience.

The courts, however, offer a different rationale for the insulation conduct required of the enforcer. Such requirements are presented as obligations imposed by a court of conscience, and as "the standard of conduct demanded by equity". Failure to comply is itself the unconscionability.

Since this standard of conduct or duty is not generally required when contracting it must be seen as predicated on the enforcer's knowledge of the complainant's impairment. Thus, conduct which is not wrongful or reprehensible per se, is rendered so by the possession of a certain state of mind. Alternatively, the relevant knowledge becomes the source of duty. In *Morrison v Coast Finance Ltd*, for example, Davey JA explained that the facts known by the enforcing party,

"... made it their duty to see that the appellant received independent advice, but the knowledge possessed by the solicitor was not sufficient to impose that duty upon him." (emphasis added)
In *Harris v Richardson*, Adams J commented that the enforcer need not have entered the contract, but if he does so with knowledge of the complainant's impairment, he was obliged to be fair, just and reasonable as defined by the court.

This judicially imposed "duty" thus involves a component of protective concern for the party known to be under disability. As Professor Crawford observed:

"A peculiarly exacting duty of fairness and disinterestedness has occasionally been demanded of persons who transact business with others dealing with them on less than equal footing."

For example, in *Knupp v Bell*, Woods JA held that in the circumstances it was,

"... the duty of the appellant to take care of the interests of Mrs Bell ... the appellant failed to carry out his obligation by not insisting that Mrs Bell discuss the transaction with her family and obtain independent advice as to value."

In *Baker v Monk*, Turner J thought it "incumbent on the appellant to throw further protection around the complainant before he made a bargain with her". Similarly in *CBA v Amadio*, Deane J conceded that, while disclosure of the relevant information by the bank was not normally required, where it was evident to the Bank that the Amadios stood in need of advice, it was incumbent on them to draw such information to their attention. Effectively, the enforcers are under a duty to show that they have been "scrupulously considerate of the other's interests".

In practice, the rationales proposed by the writer and that put forward by the courts to

\[\text{68 Supra n39.} \]
\[\text{69 Ibid, 920.} \]
\[\text{70 Supra n60, 142.} \]
\[\text{71 Supra n39.} \]
\[\text{72 Ibid, 261.} \]
\[\text{73 Supra n57, 970.} \]
\[\text{74 Supra n19, 328.} \]
\[\text{75 Supra n60, 143; see also Waters v Donnelly, supra n39, 401.} \]
explain their concern with enforcer conduct will yield the same result on the facts of any particular case. However, the theoretical difference may be significant. Several comments can be made about the courts' view that the unconscionability lies in the enforcer's failure to comply with an imprecise judicially imposed duty.

First, contract law, while prescribing wrongful conduct, should not as a rule impose involuntary obligations or duties on contracting parties to take positive actions (such as insisting on independent advice and explaining the true nature of the contract to the other party). There are no reasons, such as a position of trust or agency to make one contracting party the fiduciary concern of another. The enforcing party must not be made an involuntary trustee or guardian of the complainant under disability. Ironically, if the duty to explain the true nature of the contract were complied with, but the complainant nevertheless makes an improvident bargain, the enforcer may open themselves up to the further charge of undue influence.

Second, the words "duty" and "obligation" have a mandatory quality about them which imply a culpable dereliction of duty which is not enforced in practice. No damages have yet been ordered; in general specific performance is denied or the contract rescinded.

The unfair or unconscientious reliance analysis put forward by the writer rejects the notion of duty. The one-sided bargain is prima facie unconscionable because the proferens, A, has had notice of the other party, B's impairment, and therefore could not, without doing more, accept, procure or rely on B's consent with good conscience and good faith. The appearance of advantage-taking or unfair dealing is strong. A is under no "obligation" or "duty" to take any positive action. But if A wants to insure the enforceability of the contract, A can insulate it by negativing the inference of unfair dealing and taking actions which would render an otherwise unfair and unconscientious reliance, fair and reasonable. It is submitted that this view is preferable.

76 The duty to be fair, just and reasonable, as presented by the courts, bears some similarity to the tortious duty of care. However, breach of one's duty of care can result in damages being ordered while breach of this equitable "duty" has not yet brought such a result.
Unconscionability deals typically with cases in which the equities of the parties are finely balanced. Complainants with serious disabilities deserve the protection of the court because they cannot adequately protect their own interests and may suffer serious loss. A very improvident bargain should therefore not be enforced against them. On the other hand, the enforcing party's reasonable reliance and expectations should be protected. The values of certainty and sanctity of contract therefore require enforcement unless some factor were to count against the enforcer. This policy conflict is reflected in the conflict over the necessity of establishing enforcer misconduct inherent in the two articulated judicial explanations for unconscionability - protection of the weak and concern with enforcer misconduct.

Both are important and justifiable considerations of the law of contract and both need to be accommodated. For no matter how important or absolute a legal consideration is perceived to be, it cannot avoid running up against another equally important or absolute consideration. It is the courts' task to preserve an acceptable balance. One cannot be allowed to prevail at the expense of the other. To do so would risk producing more unfairness. For instance, an over emphasis on protection would inevitably result in innocent contracting parties who enter into contracts in good faith and without notice being deprived of their bargains. This undermines the certainty of contract to an unjustifiable extent. On the other hand, to require actual misconduct on the part of the enforcer before voiding a very one-sided bargain in favour of the enforcer may tip the balance unduly against the impaired complainant. For, where impairment is serious, it will not be necessary to resort to active dishonesty or wrongful conduct to obtain a bargain which nevertheless smacks of imposition. Subtle pushes and pulls may be all that is required.\textsuperscript{77}

The equities embodied in real life situations require careful balancing and it is submitted that the proposed burden of proof deduced from an observation of judicial practice, and the rationalisation of it posited in this chapter does take account of these conflicting equities.

\textsuperscript{77} For illustrations see Chapter IIIE(1).
Impairment and improvidence will only operate to threaten the validity of a bargain if the other party has had notice of the impairment and has not taken sufficient action to insulate the bargain.

It was argued in Chapter III that the procedural justifications put forward by the courts to explain judicial action in unconscionability cases simply do not work. Neither protection of the weak nor concern with unconscionable conduct can adequately explain the observed operative elements of unconscionability. In this chapter, the writer has posited an explanation in procedural terms which, it is argued, does consistently and persuasively explain the outcome of unconscionability cases and the proposed burden of proof. Moreover, this unreasonable/unconscientious reliance rationale is in keeping with the formal prevailing ascendency of the freedom of contract doctrine and consequent reluctance of the courts to review contracts for substantive fairness (at least openly); and consistent with the wider judicial justification for intervention on the basis of procedural unfairness.

Although such a rationalisation is theoretically sound and acceptable, the writer nevertheless argues that to see unconscionability in purely procedural terms does not give a complete picture of the jurisdiction. Procedural considerations will not always yield an accurate prediction of what a court will decide on the facts of any case. The presence or absence and magnitude of contractual imbalance also plays a significant part in determining the issue of unconscionability. The proposed burden includes this element. However, its true significance in the unconscionability picture is more often covert than overt. For instance, it often functions as evidence supporting the presence of procedural elements such as disability, lack of adequate advice and even enforcer knowledge. This point is made in the next chapter (III) which examines the judicial application of these procedural elements. The following chapter (IV) will bring together evidence refuting the judicial assertion that its action in unconscionability is not targeted at substantive irregularities but rather at procedural ones.
III. JUDICIAL APPLICATION OF THE ELEMENTS OF UNCONSCIONABILITY

It has been argued that the burden of proof consistently applied in unconscionability cases is as follows. The complainant has the onus of establishing special disability, a substantively unfair bargain, lack of adequate independent advice, and enforcer knowledge of his/her disability. In order to avert a finding of unconscionability at this point, the enforcer needs to show that his/her conduct in entering the bargain was fair, just and reasonable.

How are these requirements applied by the courts? What are their contents? How strongly do they operate as limiting factors in finding unconscionability? Each element will now be examined in turn.

A. COMPLAINANT DISABILITY

(1) General Judicial Guidance

(a) Circumstances producing and effects of disability

Case authority supports a very open-ended definition of special disability. The most commonly cited passage on this point is from Fullagar J in Blomley v Ryan:\(^1\)

"The circumstances adversely affecting a party are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a disadvantage vis-a-vis the other."

Kitto J held that operative disability may arise from:\(^2\)

\(^{1}\) (1954-56) 99 CLR 362, 405.
\(^{2}\) Ibid, 415.
"... illness, ignorance, inexperience, impaired faculties, financial need or other circumstances which affect his [the complainant's] ability to conserve his own interests."

It is unhelpful to examine the disability component by simply listing the circumstances which have qualified for relief\(^3\) since the particular circumstance will not always qualify. Rather, the cases suggest that attention should be focused on the effect which the circumstance of disability or disadvantage has on the complainant.

First, the disability should operate to impair the complainant's ability to protect his/her own interests in the transaction.\(^4\) In Blomley v Ryan where a land sale was set aside, Taylor J found that the complainant's intoxication was:\(^5\)

"... such that he was incapable of considering the question of the sale of his property with any real degree of intelligent appreciation of the matters involved ... at no time was his participation in the transaction accompanied by any reasonably intelligent consent to it ... his condition was not such as to enable him to make an adequate analysis of the position in which he then stood or to make any attempt to safeguard his own interests."

Special disability thus operates by casting doubt on the quality of the complainant's decision to enter into the challenged contract.\(^6\) This may suggest a judicial requirement of contractual capacity which is, in practice, of a higher standard than the law of contractual incapacity would indicate. But in view of the fact that judicial inquiry into capacity is only triggered by a substantively unfair contract, it may simply be that the more improvident the bargain the greater the contractual capacity needed to make it.\(^7\)

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\(^5\) Supra n1, 370, 374, 375.

\(^6\) See supra Chapter IIIB for a defective consent analysis of unconscionability.

\(^7\) For further discussion see Chapter IIIA(3)(d).
Second, the disability should render the complainant less able to resist the subtle pressures which may be exerted by the other party at the contract formation stage. Davey JA referred to disability "which left him [the complainant] in the power of the stronger". Millet QC described the complainant's disability as "circumstances of which unfair advantage could be taken", and McTiernan J referred to the complainant as "by reason of his circumstances and condition, exposed to imposition and overreaching". Such people are easier targets for advantage taking because they are more easily deceived and imposed upon, and more likely to succumb to the many subtle pushes and pulls which may be exerted on them to obtain their agreement to a one-sided bargain. Such disability, therefore, casts doubt on the fair-dealing or good faith of the other party.

The relevant disability must, in addition, result in the complainant being placed "at a disadvantage vis-a-vis the other" party. The concept of inequality of bargaining power is thus brought into play. The importance of this is seen in the often-made judicial comparisons of the parties' relative bargaining power. For example, in Waters v Donnelly, the complainant was found to be "weak minded and very easily led", while the enforcer was "described even by friendly witnesses as a shrewd, keen, businessman". In Easton v Sinclair, Teefel J found the complainant to be: "a man of a lower degree of intelligence than most men: he is unacquainted with and unskilled in business matters, and could easily be persuaded and deceived, and would be very much like wax in the hands of the [enforcer's agents], who are exceedingly bright and intelligent men."

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8 Morrison v Coast Finance Ltd (1956) 55 DLR (2d) 710, 713.
9 Alec Lobb (Garages) Ltd and Others v Total Oil GB Ltd [1983] 1 All ER 944, 961.
10 Supra n1, 392.
11 Supra n1, 405; see also O'Rorke v Bolingbroke (1877) 2 App Cas 814, 823; CBA v Amadio, supra n4, 414, 422.
12 (1885) 9 OR 391, 403 but cf Moffat v Moffat, supra n4.
13 (1912) 3 DLR 652.
14 Ibid.
In *Taylor v Armstrong*,\(^1\) the relative abilities of the contracting parties left the judge in no
doubt that the enforcer "could easily ... wrap the plaintiff around her little finger".\(^2\) *Gladu v Edmonton Land Co*,\(^3\) Scott J concluded that the complainant was "practically at the mercy" of the enforcer, and in *Morrison v Coast Finance Ltd*,\(^4\) Davey JA spoke of inequality which leaves the complainant "in the power" of the enforcer.\(^5\)

In view of the huge number of circumstances which can potentially yield an operative
disability, this requirement of disparity of bargaining power would seem to impose little limit on
the definition of special disability. What other limits exist and how effective are they in
circumscribing the scope of this factor?

(b) **Special disability contrasted with folly**

Some courts have recognised that the danger of a potentially all-embracing definition of
operative disability is to give the appearance that they are prepared to "upset contractual
commitments at whim". Thus, it is said:\(^6\)

"... the court must preserve the distinction between unfair bargains and
foolish bargains. It is no part of the court's duty to protect one of two
equal parties from his own folly."

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\(^1\) (1979) 99 DLR (3d) 547.
\(^2\) Ibid, 550.
\(^3\) (1914) 19 DLR 688, 692.
\(^4\) Supra n8, 713.
\(^5\) See also the following cases where the complainant's disabilities were contrasted with the enforcers' intelligence, knowledge and experience in the subject matter of the transaction: *Blomley v Ryan*, supra n1; *Nichols v Jessup*, CA 56/85, 26 September 1986; *Portal Forest Industries Ltd v Saunders* [1978] 4 WWR 658; *Black v Wilcox* (1976) 70 DLR (3d) 192; *Knupp v Bell* (1968) 67 DLR (2d) 256; *Riley and Fifield v Jones*, High Court Christchurch, A 224/81, Hardie Boys J, 17 November 1983. But contrast *Moffat v Moffat*, supra n4 in which the complainant's disability was viewed in an absolute rather than a relative way. The wife's disability in negotiating the separation agreement was said to lie in the mental and physical strain occasioned by her affair and desire, therefore, to quickly end the marriage and in her ignorance of the extent of her equity in the matrimonial home. In finding unconscionability, the Court overlooked any mental and physical distress which the *husband* very likely experienced from the events preceding the agreement. In addition, the Court acknowledged that he too was ignorant of the extent of their equity in the home but held that it made "no difference because it was the position of the wife which was in issue".

\(^6\) *Riki v Codd* (1980) 1 NZCPR 242, 249.
Tritschler JA found no.\textsuperscript{21}

"...precedents wherein the courts have gone so far as to protect people against their own folly."

Thus, in one case, the question for the court to answer was whether the complainant:\textsuperscript{22}

"... was just a foolish old man or a weak old man, without either the will or the power to judge for himself."

It is argued that such rhetorics of reassurance contain little substance. For the designation of a complainant or his/her bargain as "foolish" merely signifies the already reached judicial conclusion that \textit{no} special disability existed. In any case, it would not be inaccurate to describe the conduct of a person suffering from special disability (and the improvident bargain made by such a person) as "foolish". Foolish has been defined as "unwise, silly, resulting from folly or stupidity, weak minded, simple",\textsuperscript{23} and in \textit{Slavor v Nolan},\textsuperscript{24} operative disability was said to include "distress, or recklessness, or wildness, or want of care...". It is, therefore, difficult to see how the former is distinguishable from the latter. Certainly, any difference was overlooked by McMullin J in \textit{Moffat v Moffat}\textsuperscript{25} where the complainant was found to have acted "hastily and possibly foolishly" in entering the bargain she did. The judge, however, saw "no reason why her foolishness should preclude her from asserting that the bargain was unconscionable". In another case,\textsuperscript{26} where unconscionability was found, the judge upheld the distinction between a foolish and an unconscionable bargain but frankly conceded that his decision came "perilously close to the granting of an indulgence".

\textsuperscript{21} Griesshammer v Ungerer (1958) 14 DLR (2d) 599, 603.
\textsuperscript{22} Blomley v Ryan, supra n1, 397; see also Nichols v Jessup, High Court of Auckland, A 1381/83, Prichard J, 21 March 1985, 13.
\textsuperscript{23} Collins Dictionary of the English Language.
\textsuperscript{24} (1876) 11 IR Eq 367 approved by Boyd C in Waers v Donnelly, supra n12, 401.
\textsuperscript{25} Supra n4, 605.
\textsuperscript{26} Nichols v Jessup, supra n22, 16.
The distinction is particularly unhelpful in view of the fact that courts often infer the complainant's special disability from the improvidence of the bargain he/she made. How is a court to distinguish improvidence which results from special disability and improvidence resulting from folly? The distinction is unworkable. Where improvidence is serious, a court will generally be prepared to infer operative disability.

(c) Special disability contrasted with inequality of bargaining power

The House of Lords in National Westminster Bank Plc v Morgan has recently rejected any need for a general principle of relief against inequality of bargaining power. In the context of unconscionability, (and despite some suggestions to the contrary) the disability requirement is not satisfied simply by showing a disparity in the bargaining power of the contracting parties. As Proudfoot J acknowledged:

"The law does not require parties to a contract to be of equal mental capacity, if it did no contract could stand."

Dillon J agreed that:

"Inequality of bargaining power must anyhow be a relative concept. It is seldom in any negotiation that the bargaining power 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

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27 See infra Chapter IIIA(1)(d).
29 Ibid, 708.
30 See Moffat v Moffat, supra n4, per McMullin J, 604 where approval was given to Lord Hatherley's statement made in O'Rorke v Bolingbroke, supra n11, 823, that "a court of equity extended its aid to all cases in which parties to a contract had not met upon equal terms"; see also Harris v Richardson [1930] NZLR 890, 901, where Herdman J approved Knight Bruce LJ in Baker v Monk (1864) 4 De GJ & S 388; 46 ER 968, that "... the question is whether ... the parties to the transaction were on equal terms".
31 Waters v Donnelly, supra n12, 407; see also Moffat v Moffat, supra n4, Hardie Boys J at 608,
32 Alec Lobb (Garages) Ltd and Others v Total Oil GB Ltd [1985] 1 All ER 303, 313.
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.33

Indeed Lord Denning MR, who put forward the doctrine of inequality of bargaining power in Lloyds Bank v Bundy,34 concedes that "no bargain will be upset which is the result of the ordinary interplay of forces".

To satisfy the requirement of complainant disability, the situation must go beyond mere inequality to one of special disability or disadvantage.35 Mason J explains:36

"I qualify the word 'disadvantage' by the adjective 'special' in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasise that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests...".

For the purposes of unconscionability, therefore, special disability is a narrower concept than inequality of bargaining power. All circumstances of special disability involve an inequality of bargaining power. But an inequality of bargaining power does not always involve special disability.37 The Chancery decision of Burmah Oil Co Ltd & Another v Governor & Co of the Bank of England38 illustrates this. In that case the Burmah Oil Company sold a very large

33 The same point is made by Wetmore Co Ct J in Graham v Voth Brothers Const (1974) Ltd and Powell River Shopping Plaza Ltd [1982] 6 WWR 365, 370: "In its idyllic state, the law of contract envisions two persons with identical capacities arriving at a mutual arrangement from the basis of mutual desires and pressures. That, of course, is not reality. The automobile dealer is under pressure from his supplier or his banker for greater volume. The shrewd buyer negotiates a price in the aura of that pressure. The annual clearance sale is often motivated by the pressure of anticipated style changes. The buyer at that sale accepts the price reduction knowing of that pressure on the retailer. Nobody in good sense would challenge those transactions".

35 Moffat v Moffat, supra n4, 608.
36 CBA V Amadio, supra n4, 413.
37 See for example Multiservice Bookbinding Ltd and Others v Marden [1978] 2 All ER 489; Gissing v Eaton (1911) 25 OLR 50; Shaw v Hossack (1917) 39 DLR 797.
parcel of its shares in BP Oil to the Bank of England at a huge discount. Burmah Oil sought, but failed, to have the transaction set aside for unconscionability on the ground of unequal bargaining power. The court held that it would be "moving into extremely dangerous quicksands" to extend the unconscionability jurisdiction to a case where "there is considerable bargaining strength on both sides but one side does not, in fact, bargain as well as it might have done".39 In the opinion of Walton J:40

"The idea of equating the Board of Burmah, however supine it may have been, with an expectant heir, borrowing money to feed youthful riot, or a poor man, with an imperfect education, or even with old Mr Bundy himself 'a poor old gentleman' who had a heart attack in the witness box, appears to me to be quite laughable.... Nor was Burmah in a position where it could not command sufficient money to obtain proper advice; [in fact] it obtained the best advice as required; both legally and financially."

The court concluded that the ordinary rule of pacta sunt servanda applied in this situation.

The focus of judicial inquiry is, therefore, not simply on the existence of disparity in the bargaining powers of the contracting parties. Rather is it on the presence of some circumstance/s which significantly impair the complainant's ability to "exercise rational, and independent judgment".41 Impairment in the complainant's comprehension, intelligence and judgment provides the key42 to the concept of special disability. This excludes impairment in bargaining power due purely to ordinary economic pressures.

Thus, it is submitted that relief for unconscionability tends, although not exclusively, to be limited to individualised one-to-one transactions rather than being extended to commercial contracts involving professional business people or corporations with significant resources. It would be rare indeed to find a business person whom a judge would be prepared to designate as

39 Ibid.
40 Ibid.
41 Moffat v Moffat, supra n4, 606, 608.
42 Hnatuk v Chretian (1960) 31 WWR 130, 132; for other discussion see supra Chapter IIA and B.
ignorant, weak, inexperienced or feeble minded to the requisite degree, although it is theoretically possible and has been so found.

(2) **Major Categories of Operative Disability**

We now turn our attention to the concept of disability as specifically applied by the courts. What major categories of disabilities have been accepted as satisfying this requirement? What are the types of evidence relied on? When will courts tend to find that special disability has not been made out?

The categories of disability can be divided into three broad categories - cognitive weakness, social inferiority and financial need.

(a) **Cognitive weakness**

Impairment in the complainant's ability to understand the terms of the contract and assess its wisdom and desirability in the context of the complainant's personal circumstances has traditionally been the concern of the unconscionability jurisdiction. Such impairment may result from:

(i) Mental weakness
(ii) Ignorance or misunderstanding of the contract terms
(iii) Inexperience or lack of information

(i) Mental Weakness: The complainants' "mental equipment" is defective in some respect so that their capacity to both understand and assess the transaction is impaired. Such impairment may be long-termed or temporary. The former category includes people who are unintelligent, simple or feebleminded of any age group; and those who have become so with old age, accidents, or diseases such as strokes or senile dementia.

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43 See for example the complainants in *Alec Lobb (Garages) Ltd and Others v Total Oil GB Ltd*, supra n9 and *Multiservice Bookbinding Ltd and Others v Marden*, supra n37.
45 See for example *Archer v Cutler* [1980] 1 NZLR 386.
46 See for example *Pridmore v Calvert* (1975) 54 DLR (3d) 133.
In *Marshall v Canada Permanent Trust Co*, the complainant suffered brain damage due to a hardening of the arteries. His doctor gave evidence that following a minor stroke:

"... [the] ability to think, to rationalise, to speak, gets progressively worse ... [he] was definitely not capable of transacting business ... he could not relate to the past or future."

In *Grealish v Murphy*, Gavan Duffy J said of the sixty year old complainant:

"... he can hardly read and he signs as a marksman; he is afflicted with a worse than Boeotian headpiece and a very poor memory; a long life has not taught him sense ... [he] cannot tell the time."

In *Knupp v Bell*, the sale of land at an undervalue was found to be unconscionable, the vendor being a woman of eighty-five, ignorant of land values,

"...easily led by ... persons in whom she had confidence..., frequently disorientated as to time, was of poor memory and somewhat senile, without any business experience."

In *Tweedie v Geib*, there was evidence of the complainant's mental retardation. He "lacked the ability to conduct his affairs in a good and acceptable manner" and he treated serious warnings "like water off a duck's back - like who cares".

In *Paris v Machnick*, the complainant sold a farm property for less than a third of its value. Hart J found her to have:

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48 (1968) 69 DLR (2d) 260.
49 Ibid, 264.
50 [1946] IR 35.
51 Ibid, 37, 39.
52 Supra n19.
53 Ibid, 257-258.
56 (1972) 32 DLR (3d) 723.
57 Ibid, 727-728.
"... absolutely no comprehension of the value of her property or the amount of money which was paid to her by the defendant. She had attended only the first grade in school and could neither read nor write. She could count to 20 and make change in a store but was completely lost beyond this point, ... even if she had [agreed to the $2,500 purchase price] she would not have appreciated whether that price had any relationship to the actual value of her land. She simply had no capacity to understand figures in this range ... she would not know the difference between $500 and $5,000."

In *Errington v Martell-Wilson (deceased) and Cook*\(^{58}\) Latey J accepted the evidence of the complainant’s doctor who wrote of her

"...sometimes grossly confused mental state; of her suffering from delusions; of her saying she has seen and spoken to her dead sister; of her memory being bad; or her never seeming to be able to find things she wants; and after a short time forgetting what she was searching for."

Of course mental weakness is a question of degree and bargains have been set aside in cases of complete incapacity (which few of us suffer from) to cases in which the complainants were described merely as "unintelligent and muddleheaded",\(^ {59}\)
"imperfectly educated ... and intellectually not gifted";\(^ {60}\)
"possessing an intelligence which is not of a high order";\(^ {61}\)
having "less than average resources within herself and as a consequence more vulnerable than average to stress";\(^ {62}\)
"inarticulate, retiring and easily intimidated";\(^ {63}\)
"very naive, frank and quite artless";\(^ {64}\)
and showing "incredible gullibility";\(^ {65}\) (which must afflict a good proportion of the contracting population at one time or another). By way of anticipation, it is suggested that such a relaxed attitude to operative disability is only adopted where the facts yield a very serious contractual improvidence for the complainant. Thus, it seems that the degree of disability

\(^{58}\) Queens Bench Division, 16 May 1980, Latey J, Lexis.

\(^{59}\) See *Nichols v Jessup*, supra n19, supra n22.

\(^{60}\) See *Clark v Malpas* (1862) 4 De GF & J 401; 54 ER 1067.

\(^{61}\) See *Harris v Richardson*, supra n30; *Waters v Donnelly*, supra n12; *Pridmore v Calvert*, supra n46.

\(^{62}\) See *Straiton v Straiton* (1972) 30 DLR (3d) 102.


\(^{64}\) See *Portal Forest Industries v Saunders*, supra n19, 662.

\(^{65}\) *Gaertner v Fiesta Dance Studios Ltd* (1972) 32 DLR (3d) 639, 640; see also *Buchanan v Canadian Imperial BC* (1979) 100 DLR (3d) 624, 625 where the complainant was described as "of average intelligence" but lacked business experience and was "rather obviously, a trusting soul."
accepted as operative, in any case, will depend on the severity of the contractual imbalance present in that case.

Temporary impairment may result from drunkenness, either self-induced or enforcer induced,\textsuperscript{66} mind-changing drug or other medication,\textsuperscript{67} and physical illness resulting in great pain and/or depression.\textsuperscript{68} Events causing extreme emotional distress or shock may also temporarily impair the complainant's ability to comprehend and assess a transaction negotiated at that time. Such events include marriage breakups,\textsuperscript{69} the death of one's spouse or close family member and involvement in an accident or surgery. In one case\textsuperscript{70} the complainant was deeply depressed and stunned by her husband's death. Her friend gave evidence that she "went to pieces and became unsettled". In another case,\textsuperscript{71} the complainant's family circumstances - her father's death, her husband's alcoholism and her children's delinquency and truancy - led to a nervous breakdown some months prior to the challenged transaction. In a third case,\textsuperscript{72} the complainant entered into a contract when\textsuperscript{73}

"... she was only just recovering from a hysterectomy; she had been involved in a number of accidents for which she was not to blame; her husband was an alcoholic. All these things had combined to put the plaintiff into a depressed and confused mental state."

\textsuperscript{66} See for example Blomley v Ryan, supra n1; Cooke v Clayworth (1811) 18 Ves Sen 12, 34 ER 222; Peeters v Schimanski [1975] 2 NZLR 328.

\textsuperscript{67} See for example Bank of Montreal v Hancock et al (1982) 137 DLR (3d) 648, where the complainant had taken large doses of valium and could not recollect signing the contract; see also Fleury v Homocrest Dairy Co-operative (1958) 15 DLR (2d) 161 where the complainant did not realise what she was doing since she was under the effects of sedatives together with doses of rum and brandy to relieve pain.

\textsuperscript{68} Ibid.

\textsuperscript{69} Moffat v Moffat, supra n4, the wife's distress was said to be evidenced by her weight loss, nervous indigestion, requirement of medical care and an "outburst of violence" some ten days prior to the contract. Blackhouse v Blackhouse [1978] 1 WLR 243, 251. Balcombe J explained that "when a marriage has broken down, both parties are liable to be in an emotional state. The party remaining in the matrimonial home, as the husband did in this case, has an advantage. The wife is no doubt in circumstances of great emotional strain". Operative disability was found although the wife was a business person of some ability. See also K v K [1976] 2 NZLR 31; Mundinger v Mundinger (1969) 1 OR 606.

\textsuperscript{70} See for example Growden v Bean, Queens Bench Division, 26 July 1982, Hobhouse J, Lexis.

\textsuperscript{71} See for example Bank of Montreal v Hancock, supra n67; see also Royal Bank of Canada v Hinds (1978) 88 DLR (3d) 428.

\textsuperscript{72} Towers v Affleck [1974] 1 WWR 714.

\textsuperscript{73} Ibid, 716.
In a fourth case, the complainant's wife and children left their home causing the complainant great emotional stress. He took to drinking, became depressed and suicidal and tried to bum down the home. Operative disability was found in all these cases.

The temporary nature of these disabilities, if known to the other contracting party, throws an adverse light on the conscience or good faith of that party if he/she deliberately chooses that time to deal with the disabled party or fail to stay his/her hands until the effect of the disabilities had passed.

(ii) Ignorance or Misunderstanding of the Contract: Although the complainants' mental equipment are not lacking, some factor/s may operate to block their knowledge or comprehension so that they are ignorant or mistaken as to the true nature of the contract terms. Ignorance is generally caused by some problem in communication. The complainant may be illiterate and so unable to read the agreement; or deaf so unable to hear the agreement as read out to them, or unable to comprehend fully the language in which the negotiations are conducted. The latter usually involves immigrants not conversant with the language in which the negotiations are conducted and the agreement recorded. But, it should also include the complainant who is not conversant with the jargon accompanying some complex transactions, for the effect on comprehension is comparable. Ability to comprehend may, therefore, vary with the complexity of the transaction and the complainant's training or experience. Intoxication and the influence of drugs may also obstruct understanding of the contents of a bargain.

Failure to appreciate the true nature of the contract may also result from genuine

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74 Riley and Fifield v Jones, supra n19.
75 See for examples Grealish v Murphy, supra n55; Taylor v Armstrong, supra n15; Paris v Machnick, supra n56.
76 See for example Wilton v Farnsworth (1948) 76 CLR 646.
77 See CBA v Amadio, supra n4; Sarecksky v Fodernayer and Housing Corporation of New Zealand, High Court of Auckland, A 1610/85, Henry J, 13 March 1986; Gladu v Edmonton Land Co, supra n17; Cymbaluk v Lewicki [1973] 3 WWR 169; Hnatuk v Chretian, supra n42.
78 Thus, there is some overlap with the following category of inexperience and lack of information.
79 This overlaps to some extent with mental weakness.
misunderstanding or mistake. For example, in \textit{CBA v Amadio}\textsuperscript{80} the debtor induced the complainants to believe that their liability under the guarantee agreement was limited to $A.50,000 and of six months' duration when it was in fact unlimited as to amount and time. In \textit{Cresswell v Potter},\textsuperscript{81} the complainant signed without reading the deed of release conveying to her husband her interest in the parties' home. He had led her to believe that the document merely enabled the property to be sold without affecting her rights in it. In \textit{Royal Bank of Canada v Hinds},\textsuperscript{82} the complainant thought she was signing a receipt for her deceased husband's shares and did not appreciate that she was in effect taking over his debts to the bank. In \textit{Taylor v Armstrong},\textsuperscript{83} the complainant was induced by a woman to convey to her a part interest in his house in the belief that he was signing a will. The deed was set aside for unconscionability and non est factum.

The mistake of the complainant usually operates in conjunction with other circumstances of disability. The potential overlap in the law relating to mistake, misrepresentation, non est factum and unconscionability is obvious and would make an interesting topic of discussion.

(iii) Lack of Relevant Information and Experience: Even where the complainant suffers no mental weakness and is aware of the contents of his/her agreement, he/she may lack the necessary background information or experience to assess the prudence of the agreement. The nature and complexity of the subject matter of the agreement are therefore relevant. An individual may be of average intelligence and yet lack the aptitude or experience to make a deliberative and informed judgment concerning the desirability and the legal implications of a particular transaction.

\textsuperscript{80} Supra n4.
\textsuperscript{81} [1978] 1 WLR 255.
\textsuperscript{82} Supra n71.
\textsuperscript{83} Supra n15, the contract was set aside on the grounds of undue influence, unconscionability and non est factum.
Members belonging to this class are often described as uneducated, ignorant, humble, and inexperienced in the subject matter of the contract. For instance, in *Hnatuk v Chretian*, the complainant was referred to as "intensely ignorant" and "innocent as babes of all legal procedure". In *Pridmore v Calvert*, where the complainant signed a release from claims for personal injury for $331.40 but found to be worth $20,000, Toy J found the complainant "lacking in business acumen" and knowledge of "releases".

Ignorance of important background information pertinent to the agreement may also constitute an operative disability. In *CBA v Amadio* and *Buchanan v Canadian Imperial Bank of Commerce*, the complainants entered into guarantee agreements in respect of the debts of the business ventures of their son and son-in-law respectively. The complainants had full confidence in the debtors. Unlike the banks, they were ignorant of the full extent of the financial difficulties suffered by the debtors' businesses which made the guarantee agreements entered into grossly improvident for the complainants. Such inexperience and lack of relevant information may also make the complainant unduly gullible, naive or trusting when dealing with other parties.

These three causes of cognitive weakness overlap a great deal in the cases. Usually an assortment of impairments individually or cumulatively satisfy the disability component of unconscionability. However, while mental weakness may be so severe that the complainant cannot even appreciate the need for independent advice nor be significantly helped by it, advice is the very thing needed to remedy ignorance or misunderstanding of the contract terms,

84 See *Baker v Monk*, supra n30; *Cresswell v Potter*, supra n81; *Riki v Codd*, supra n20; *Gladu v Edmonton Land Co*, supra n17; *Portal Forest Industries Ltd v Saunders*, supra n19; *Morrison v Coast Finance Ltd*, supra n8; *Clark v Malpas*, supra n60.
85 Supra n42.
86 Ibid, 131, the court found unconscionable the sale at undervalue obtained by the enforcing party's threat of foreclosure.
87 Supra n46, 140.
88 Supra n4.
89 Supra n65; also 125 DLR (3d) 394.
90 See for example *Fleury and Fleury v Homocrest Dairy Co-operative*, supra n67; *Moffat v Moffat*, supra n4; *Paris v Machnick*, supra n56; *Straion v Straion*, supra n62; for further discussion see infra Chapter IIIC.
and inexperience or lack of background information in assessing the prudence of the agreement. In the latter cases, the complainants can protect their own interests given the right help. In the former, mental weakness may be so severe that no amount of help given can remedy the disability.

(b) Social inferiority

In this category, the complainants' weaknesses lies in their real or perceived inferiority in social, racial or sexual terms. In consequence, the complainants' dealings may be characterized by excessive reliance on or undue deference being paid to those they perceive to be superior (including the enforcer). They may also be inhibited from entering into the "push and shove" of negotiation. This is recognised as a type of special disability which significantly impairs the complainants' ability to protect their own interests in the negotiations and may operate on its own or in combination with some cognitive defect. The nature of this disability is best illustrated.

In Riki v Codd,\(^9\) the four Maori plaintiffs leased land to a pakeha for a 10 year period at an "absurdly low" rent and with no provision for rent review. After noting the unusual method of payment,\(^9\) Hardie Boys J said of the parties' respective bargaining powers:\(^9\)

"The real inequalities lay in experience of leasing land; in knowledge of values and of trends in values; in individual financial circumstances; and I think also in racial terms. By the last I mean this. Mrs Toatoa, Mrs Riki and Mr Hohepa are all obviously of a generation which whilst yielding nothing in terms of dignity or pride in their people, tends to defer to the pakeha. This may be a result of modesty or reticence, it may be a recognition of their lack of education and business experience; most likely it is a combination of these and of other factors too. It really leads to misunderstanding on the part of the pakeha if he is not sufficiently perceptive to understand its source. He tends to adopt a

\(^{9}\) Supra n20.

\(^{9}\) When any of the plaintiffs needed money they would ask the defendant for a lump sum as advancements on the rent. The payments were generally well ahead of the rent due. The defendant would then ask the plaintiffs to enter into new leases in similar terms to ensure that he would have a further term out of which to recoup these and prospective further advances.

\(^{9}\) Supra n20, 249-250.
paternalistic or patronal role. Thus I think did Mr Codd deal with these people and their rent which was due from him. *His attitude in turn induced them to look to him as a provider who would meet their financial needs.* (emphasis added)

In *Grealish v Murphy*, the complainant suffered severe mental impairment but was also described by the court as "neglected by his relatives and almost bereft of friends." This, combined with the frequent conflicts he encountered with his neighbours, who were in the habit of taking conacre from him, contributed to the complainant's feeling that he needed a reliable factotum as a manager and protector. Pursuant to this, the complainant entered into an agreement by which he would surrender irrevocably his own title to the farm by a will in consideration of the enforcer's personal covenant to work on the complainant's farm, but this was backed up by no sanctions.

Such dependency and reliance can also be seen in *Loe v Tylee* where the complainant was unable to perform many day to day tasks because of the onset of Parkinson's Disease. He "had no relations on whom he could readily depend for any help he needed", although he was strongly desirous of continuing to live by himself on his farm. Vautier J found that these factors had led him into a very improvident agreement with a couple who had befriended him and provided much of the domestic help he needed. In *Pridmore v Calvert*, a woman, whose husband had died the previous year, signed a very improvident release of claim for personal injuries just 48 hours after her accident. Toy J set aside the release since the complainant was still suffering from the effects of her accident, had no independent advice nor

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94 Supra n50.
95 Ibid, 37.
96 The letting for a season of small portions of land ready prepared for a crop.
97 High Court of Auckland, A 58/84, Vautier J, 13 July 1984.
98 Ibid, 2-3.
99 The lease and option to purchase agreement was for a grossly inadequate consideration both as to rental and as to purchase price. The purchase price was short of the independent valuation by $130,000.
100 The agreement was also set aside for undue influence.
101 Supra n46.
other "close personal friends to whom she could turn for advice or counselling of a confidential nature". In Junkin v Junkin, the seventy-one year old complainant, "obviously a mild-mannered man ..., obviously lacking in aggressiveness, obviously untutored in the law, credulous and unrepresented by a solicitor", sold his portion of a farm for a quarter of its value, after being "brow-beaten" by the enforcer's solicitor, "a physically large man with a loud and strident voice who admitted that he raises his voice when he became excited". The complainant afterwards "broke down and wept". Henry J found the complainant to have been outmatched physically, intellectually and in terms of professional status. The bargain was found to be unconscionable.

Social inferiority raises issues of influence, domination and overbearing, and therefore lies on the borders of unconscionability which overlap with the jurisdiction to set aside bargains resulting from undue influence. In terms of disability, unconscionability deals, par excellence, with cognitive rather than social defects and it can be seen that the latter usually acts in combination with the former.

(c) Financial need

While financial need is often mentioned as a type of special disability, judicial treatment of it reveals a narrow definition of operative financial need. The complainant's need for finance must be accompanied by the threat of insolvency, business collapse or a forfeiture of mortgage. Thus, operative disability was found in Alec Lobb (Garages) Ltd v Total Oil GB Ltd where the complainants stood to lose their livelihood and face personal bankruptcy if they failed to raise the necessary finance. On the other hand, operative financial need was not found in Multiservice Bookbinding Ltd and Others v Marden since the complainants sought

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102 Ibid, 140.
103 Supra n63; see also Harry v Kreutziger, supra n63.
104 Ibid, 754-755.
105 Supra n9.
106 The court, however, refused to find that the bargain made was unconscionable since neither its terms nor the enforcer's conduct were improper.
107 Supra n37.
additional finance merely to expand their business. Browne-Wilkinson J commented that if the complainants "... did not like the terms offered [they] could have refused them without being made insolvent or losing [their] home". 108 Similarly, operative financial need was rejected in *Burmah Oil Co Ltd and Another v Governor of the Company of the Bank of England*, 109 for although financial 110

"... ruin may have been staring Burmah in the face, it was not so staring many of the members of the Board personally so that they were not able to act dispassionately."

Thus, it is not the financial need per se which is important, but rather the resultant impairment to rational judgment which makes financial need an operative disability. In the absence of other disabilities, serious impairmen: of judgment is generally only occasioned by a real threat of financial ruin. This strict definition is necessary to prevent the floodgates from opening. For otherwise, a complainant's very act of borrowing money would evidence financial need and place all loan agreements at the mercy of the unconscionability sword.

In practice, where financial need operates with other cognitive or social weakness to support a case for relief, it need not be accompanied by the threat of ruin. The complainant may be pressed by creditors, 111 "frantic to secure enough money to" obtain expert medical help for a long term illness, 112 poor and require money generally, 113 or simply be: 114

"... poor, ignorant men, to whom the temptation of the immediate possession of one hundred pounds would be very great."

But unless extremely grave, financial need alone will not constitute special disability for

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110 Ibid.
111 See *Harris v Richardson*, supra n30.
112 See *Fleury and Fleury v Homocrest Dairy Co-operative*, supra n67.
113 See *Riki v Codd*, supra n20.
114 See *Fry v Lane* (1888) 40 Ch Div 312, 323.
the purposes of unconscionability. The focus of judicial concern is primarily on those suffering
cognitive weakness. Financial need alone is distinguishable since the complainant usually
knows exactly what is going on and enters the contract with "eyes open" to its consequences
while those cognitively impaired cannot fully appreciate its improvidence to them. The former
may go "down kicking and screaming over the alleged injustices which are being done to"
them\textsuperscript{115} while the latter may not become aware until later when advised by other people.

Independent advice takes on questionable significance where the sole disability is
operative financial need. If a complainant is so pressed for finance as to have effectively no
choice but to accept the terms offered, the absence of independent advice cannot strengthen the
case for unconscionability and the presence of advice cannot disqualify the complainant from
alleging unconscionability.\textsuperscript{116}

Financial need alone usually occurs in a commercial setting and rarely qualifies as
operative disability. This supports the view that unconscionability is generally targeted at
transactions on an individualised one-to-one level.

(3) Evidence of Special Disability

(a) Objective indicia

A range of evidence may support a finding of special disability. Some evidence is
relatively objective, for example, the complainant's age, physical and medical condition, level of
education, present and past occupation, literacy, comprehension of written and spoken English,
financial circumstances and previous experience in transactions of the kind challenged, may be
adequate evidence of the complainant's financial need, or cognitive defect. Evidence of the
occurrence of events likely to cause extreme emotional distress\textsuperscript{117} and so impair the

\textsuperscript{115} See this point made by Crawford, B E "Restitution - Unconscionable Transactions - Undue Advantage
Taken of Inequality Between Parties" (1966) 44 Can Bar Rev 142, 149; see also Chapter III B.

\textsuperscript{116} The decision in Alec Lobb, supra n31, recognises this at 312. Dillon LJ: "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".

\textsuperscript{117} For example, the infidelity of a spouse, death of spouse or close relative, or accident causing physical
injury.
complainant's rational judgment is also relatively objective.

(b) Judicial assessments

A large proportion of evidence as to cognitive and social weakness comes in the form of opinion evidence. The presiding judges often give their own assessment of the complainant. In *Towers v Affleck*\(^\text{118}\) Anderson J found:

"... from seeing Mrs Towers in the witness box and listening to her testimony in chief and in cross examination that she is a person of limited intelligence."

In *Portal Forest Industries Ltd v Saunders*\(^\text{119}\) Rae J concluded that the complainant was:

"... very naive, even now.... He was a very frank, honest and quite artless witness. He answered questions on occasions in such a way as clearly not to advance his cause, without seemingly understanding the true import or significance of what he was saying. Some of his answers simply were not understandable as logic of the average person.... He demonstrated as a witness that he was a person not capable of looking after his interests in even a relatively simple business transaction. He has neither the schooling nor the native wit for it."

In *Easton v Sinclair*,\(^\text{120}\) Teetzel J had:

"... no difficulty in finding, upon the evidence and from the appearance and manner of the plaintiff in the witness-box, that the plaintiff is a man of a lower degree of intelligence than most men; he is unacquainted with and unskilled in business matters and could easily be persuaded and deceived."

In *Grealish v Murphy*,\(^\text{121}\) Gavan Duffy J's impression of the complainant's performance as a witness led him to say:\(^\text{122}\)

\(^{118}\) *Supra* n72, 716.
\(^{119}\) *Supra* n19, 662.
\(^{120}\) *Supra* n13.
\(^{121}\) *Supra* n50.
\(^{122}\) *Ibid*, 39.
"I must go along with the medical evidence to the extent of classifying him among the mentally deficient ... I cannot measure his deficiency in scientific terms ... [however] as I appraise him, the brain, while it must have developed with time has never since childhood attained the normal powers of an adult ... for instance, he can read the clock, but cannot tell the time; ... [he] was unable to count two thousand pounds in fifty, ten and five pound notes...."

Where the complainant's mental impairment is obvious, the judge's own assessment provides valid supporting evidence of disability. However, the pitfall of relying solely on this, where the impairment is not so obvious, is recognised in Nichols v Jessup. Prichard J found the complainant to be:  

"... ignorant about property rights, ... unintelligent and muddleheaded, and that her judgment in matters of business is likely to be swayed by wholly irrelevant considerations."

However, he continued:  

"I must confess that my conclusions about the defendant's intellectual capacity and competence in matters of business are essentially subjective and represent no more than the impression I formed when she was giving her evidence.... If I am wrong in that assessment - and I have thought of this possibility with a good deal of care - then it is because she has far better ability as an actress than I am prepared to credit her with.... Although the defendant has succeeded, she has done so only by virtue of a decision which, I fear, comes perilously close to the granting of an indulgence."

In finding operative disability, it is suggested that the trial judge was strongly influenced by the gross disparity in the values exchanged in that case. Judicial assessments of the complainant's mental capacity can only be given at the hearing which may often be some years after the formation of the challenged contract. Great care is therefore required in making a finding as to the complainant's condition at the time of the

123 Supra n22.
125 Ibid, 13, 16.
contract, on the basis of such a post facto assessment.

(c) Other opinion evidence

In this respect, the opinion evidence of the complainant's medical adviser, solicitor, friends, neighbours and relatives, may be more reliable as to the complainant's mental capabilities at the time of the contract. They may also be able to testify as to the complainant's day to day behaviour and circumstances. Any unusual or eccentric episodes may point to the existence of operative disability. For example, in Archer v Cutler, the 72 year old complainant was found to be:

"Something of an eccentric ... she elected to live in a garage in very cramped and uncomfortable conditions. She was known to go on her own for long walks, she kept to herself, she was rather independent and she tended to acquiesce in any suggestion which was made to her. She had taken to buying flagons of sherry for her own consumption and on one occasion she had drunk to excess, a factor which I would regard as being somewhat uncharacteristic of her lifestyle."

In Riley and Fifield v Jones, the complainant had taken to drink, become depressed and tried to burn down his own home.

Ayres v Hazelgrove demonstrates the finding of disability from a variety of such evidence. There, an 84 year old widow sold paintings worth some six to seven thousand pounds for the paltry sum of forty pounds. Russell J accepted that:

"In the 1970s Lady Ayres began to suffer from what was diagnosed by her doctor as senile dementia. By January 1980, according to her son, according to her daughter, according to her doctor, Dr Rowland, from all of whom I have heard, Lady Ayres had reached the stage when her mental faculties were grossly impaired. She was, according to these witnesses, confused, disorientated as to time, forgetful, lacking in 

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126 Such evidence was relied upon in Straiton v Straiton, supra n62; Blomley v Ryan, supra n1; Laderoute v Laderoute (1978) 81 DLR (3d) 433; Bank of Montreal v Hancock, supra n67; O'Neil v Arnew (1976) 78 DLR (3d) 671.

127 Supra n45.

128 Ibid, 389.

129 Supra n74.

130 Supra n47.
insight into her condition, incapable of making rational judgments. Her relatives gave me many instances of how this mental disability manifested itself. She did not leave the house. She did not handle her own finances. She did not prepare any meals. She was unable to have a rational conversation. Dr Rowland expressed the view that Lady Ayres was quite incapable by reason of her mental condition of handling her own affairs, making a will or contract with any appreciation at all of what it was about. The evidence, from that doctor, came as a result of visits which he paid ... (including) a visit on 30th January 1980, a fortnight or so after the events with which this case is concerned. When Dr Rowland saw his patient ... he was admitted into her company by Lady Ayres' daughter and within a very short time the old lady was inquiring of the doctor who the other lady in the room was, her own daughter."

(d) **Substantive unfairness of the bargain**

Where clear evidence of serious disability exists, unfairness in the bargain made is supporting or corroborative evidence of the complainant's impairment. However, where the types of evidence mentioned above are slight or absent, the courts have sometimes treated serious substantive unfairness as indirect evidence of special disability. Vautier J saw it as: 131

"... an important ingredient in considering whether a person did exercise any degree of judgment in making a contract."

On the facts of the case, the court may view the degree of improvidence to the complainant as substantiating "... the conclusion that the party did not understand what he was doing...".132

The following examples illustrate the process of inferring operative disability from substantive unfairness employed by the courts. In *Waters v Donnelly*,133 Osler JA treated the large disparity in the value of the properties exchanged as "an indication that [the complainant] was a man who was not on equal terms with Donnelly mentally."134 In *Riki v Codd*,135 financial need was accepted by Hardie Boys J as one of the complainant's disabilities. He said

131 *Loe v Tylee*, supra n97, 29.
132 See *Calumsky and Karoloff v Karoloff* (1946) 2 DLR 515.
133 Supra n12, 393.
134 Ibid, 398.
135 Supra n20.
"While there is no specific evidence of those needs, or of their financial circumstances in general, it is in my view entirely proper to draw the inference from what occurred..."

Namely, the one-sided bargain made and the unusual arrangement for payment to the enforcer. Similarly, serious undervalue was sufficient evidence of the financial distress of the vendor in *Heathcote v Paignon*.137 In *Nichols v Jessup*138 Somers J noted that:

"In assessing her [the complainant's] state at that time the nature and quality of the bargain she entered into, the advantages conferred by it on the plaintiff [$45,000] and the disadvantages occasioned to her or her property [$3,000], will of course be factors."

In *Portal Forest Industries Ltd v Saunders*,139 the judge accepted the great improvidence of the lease agreement to the complainant as an "indication of Saunders' lack of business sense". In *CBA v Amadio*,140 Mason J found a number of operative disabilities having satisfied himself that141 "any rational person ... would not have executed the instrument which they signed".

Thus where the bargain is sufficiently one-sided operative disability will be found even though there may be little or no independent evidence of the complainant's special disability. Such use of contractual imbalance as evidence of disability is rationalised along the lines that no one not suffering some serious impairment in self-protective ability would or could enter into such improvident bargains. That they did so is evidence that they were labouring under some special disability at the time.

Such reasoning, of course, works the other way. Thus where the bargain is not:142

"... in its own nature such as necessarily discovers absence of judgment in the person making, or a degree of unfairness in those accepting it..."

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136 Ibid, 250.
137 (1787) 2 Bro CC 167, see Sheridan, supra n3, 129.
138 Supra n19.
139 Supra n19, 664.
140 Supra n4.
141 Ibid, 416.
142 See Cooke v Clayworth, supra n66.
this will tell against a finding of operative disability. This may be so even where there exist evidence upon which such a finding could have been justified. So that although counsel can point to evidence of the complainant's intoxication,\textsuperscript{143} old-age infirmity and illiteracy,\textsuperscript{144} psychiatric treatment for depression and suicidal tendencies,\textsuperscript{145} hearing and vision impairment and limited education,\textsuperscript{146} or illness, fainting spells and pain,\textsuperscript{147} the absence of serious improvidence resulting from the bargain is treated as persuasive evidence that these circumstances of disadvantage did not sufficiently impair the complainant's self-protective ability to warrant a finding of operative disability.

A scan of the cases shows that an extremely wide range of circumstances may result in differing degrees of impairment in the contracting parties' abilities to take care of their own interests during negotiations. However, the courts do not appear to require any constant minimum threshold of impairment before they will find operative disability. Rather the picture is one of a sliding scale.\textsuperscript{148} In practice, the degree of impairment or disability required can be said to be inversely proportional to the degree of substantive unfairness in any given case.

It seems that the greater and more certain the improvidence to the complainant, the less independent or direct evidence the courts require of the complainant's special disability, and the more willing they are to infer the necessary disability. Conversely, the less obvious the contractual imbalance, the more the courts will require in evidence of disability. Another way of looking at this is to say that the greater the evidence of disability, the more likely the courts are to give relief even for moderate contractual imbalance. Consistently, lesser evidence of impairment must be coupled with more serious disparity in exchange before relief will be

\textsuperscript{143} Ibid.
\textsuperscript{144} See Calumsky and Karaloff v Karaloff, supra n132; see also Aqua Leisure Ltd v Bammant and Styles CA (Civil Division) 1977 A 62, 15 May 1983, where the complainant was 85 years of age, and Laderoute v Laderoute, supra n126 where the complainant was 80 years of age.
\textsuperscript{146} See O'Neil v Arnew, supra n126.
\textsuperscript{147} Gissing v Eaton, supra n37.
granted. The role played by substantive unfairness in determining the presence or absence of operative procedural unfairness, of which special disability is one component, should not be underestimated.

(4) **The Limits to Special Disability**

The fluidity of the judicial definition of special disability as to type and degree may suggest that this is a potentially all-encompassing concept. However, this is not borne out by the judicial application of this requirement. There are limits. We have seen that mere inequality of bargaining power is not enough. What must be established is "special disability" whether physical, mental, economic or social, which impairs the complainant's ability to exercise rational and intelligent judgment. The category of those entitled to judicial protection in this jurisdiction:

"... must, par excellence, include someone who is disadvantaged in mental capacity."\(^{149}\)

Social inferiority and financial need per se are not the targets of unconscionability.\(^{150}\) In general they must act in combination with cognitive impairment or be so severe as to result in cognitive impairment.

Further help as to the limits of the special disability component can be derived by examining the cases in which the courts have found no special disability on the part of the complainants. There are twelve such cases.\(^{151}\) First, it is very significant that in

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\(^{149}\) *Errington v Martell-Wilson (deceased) and Cook*, supra n58.

\(^{150}\) Social weakness is primarily dealt with by the jurisdiction of undue influence, and financial need by the law relating to economic duress and credit contracts.

\(^{151}\) *Aqua Leisure Ltd v Bammant and Styles*, supra n144; *Armatrading v Stone and Other*, Queens Bench Division, 17 September 1984, Lexis; *Burmah Oil Co Ltd and Another v Governor of Company of Bank of England*, supra n109; *Calumsky and Karaloff v Karaloff*, supra n132; *Cooke v Clayworth*, supra n66; *Gissing v Eaton*, supra n37; *Harrison v Guest* (1860) 6 De GM & G 424; *Haverty v Brooks*, supra n145; *Laderoute v Laderoute*, supra n126; *Multiservice Bookbinding Ltd and Others v Marden*, supra n37; *O'Neil v Arnew*, supra n126; *Shaw v Hossack*, supra n37.
all these cases the courts found no serious substantive unfairness. This supports the writer's argument above that substantive unfairness is closely linked to fact findings on special disability.

The second feature of cases in which operative disability was found to be absent is the presence of evidence showing that the complainant understood the nature and consequences of the transaction and entered it with "eyes open". The complainant's profession and experience may show that he is:

"well able to protect his own ... interests in all things, as well as in procuring these loans upon the best terms that were obtainable."

The evidence of the complainant's family, friends, doctor or solicitor may also point to the complainant having the requisite comprehension and rationality in contracting, as may evidence of the complainant's conduct during and after the negotiations. For example, in the *Aqua Leisure* case, the lengthy negotiations in which the eighty-five year old complainant "bargained for and extracted certain advantages from" the other party made it "hopeless to contend that this was not an arm's length negotiation between parties of equal capacity". The evidence of the complainant's solicitor, son and daughter showed that he was "quite capable of driving a hard bargain", could readily appreciate an improvident bargain without expert advice, was:

152 *Armatrading v Stone & Another* is the one exception where great improvidence to the complainant was found. There, the court reasoned that although the complainant lacked the education, aptitude and interest in comprehending the contract of management without explanation, these disabilities were not operative because she was "earning quite substantial sums". Such an approach is not only anomalous but also wrong in principle. Wealth should not neutralise strong independent evidence of impaired self-protective ability. If anything, it makes the complainant more vulnerable to advantage-taking. One doubts whether the court would have taken such an approach if it had not been able to strike down the bargain in any case for undue influence.

153 See next section B in this Chapter (III) on the meaning of substantive unfairness.

154 See supra Chapter II.B.

155 *Shaw v Hossack*, supra n37, 800.

156 See this in *Haverty v Brooks*, supra n145; *O'Neil v Arnew*, supra n126.

157 Supra n144.
"... a man of individual mind, very determined ... and although willing to listen, he would not accede to suggestions contrary to what he himself wished."

Oliver LJ concluded that the complainant was a shrewd man of business who could look after himself in most business dealings and recognised when and where he needed advice or explanations. Thus a finding of special disability could not be sustained. In *Laderoute v Laderoute*,\(^\text{158}\) the evidence of the complainant's solicitor and brother and the judge's own assessment was that the 73 year old was:\(^\text{159}\)

"... alert, intelligent and in full possession of her mental faculties ... [having] a clear understanding of the issues which would have done credit to a person half her age."

She had agreed to transfer land to her son in exchange for his services of approximately equal value. Her understanding of this was evidenced by her explanation of the agreement to six people on different occasions. Similarly, Lord Campbell found the complainant in *Harrison v Guest*\(^\text{160}\) to be in full possession of his mental faculties. The offer initially came from the complainant who later "over and over again stated to various people what the bargain was".

In *Calumsky v Karaloff*,\(^\text{161}\) the evidence of the complainant's interpreters and advisers, the lack of improvidence and the passage of nine months before the second complainant executed the agreement indicated "that the agreement was not entered into without due consideration". Similarly in *Griesshammer v Ungerer*,\(^\text{162}\) the agreement to purchase 115 hours of dancing lessons was only entered into by the complainant after considering it on three occasions. Although the complainant could not afford them, she entered the bargain with:\(^\text{163}\)

\(\text{158}\) Supra n126.
\(\text{159}\) Ibid, 435.
\(\text{160}\) Supra n151.
\(\text{161}\) Supra n132, 517.
\(\text{162}\) Supra n21.
\(\text{163}\) Ibid, 603.
"... an expectation which was disappointed, that she would be able to cultivate the friendship of a particular dance instructor."

Thus, she knew what she was doing and merely later regretted it.164 In the same vein, Garrow JA found no special disability in *Gissing v Eaton*165 since the complainant's:166

"... real grievance is not that she did not understand the nature and effect of what she was going, but that she settled for too little."

The complainant's comprehension, rationality and deliberativeness in entering the bargain are central to the court's determination of special disability. As Garrow JA explained:167

"... people must not be allowed to play fast and loose with settlements made as this was deliberately, intentionally, and with full knowledge of all the facts."

There exist no objectively calibrated measures of special disability. The determination of the complainant's capacity to comprehend and make a rational, intentional decision, is by its very nature subjective, evaluative and to some degree impressionistic. Different witnesses and even judges may sometimes disagree as to the degree of impairment suffered by the complainant.168 Specific fact findings must, therefore, be based on a careful inquiry into and evaluation of the complainant's background and present condition, the circumstances of contracting, the information available to the complainant, the reasonableness of the complainant's actions in the light of his/her circumstances, and the credibility of the parties and witnesses giving conflicting testimonies.

164 The case was argued and decided on the basis of undue influence which was found not to have been made out. However it is argued that a case for unconscionability *can* be made out; she had entered into a "ridiculous bargain" as a result of her social weakness, namely her desire and hope for a romantic friendship. This was encouraged by the enforcer who, prior to the signing of the contract, paid her extravagant compliments and sent her a rose. See also *Gaertner v Fiesta Dance Studios Ltd*, supra n65.

165 Supra n37.

166 Ibid, 59.

167 Ibid.

168 See for example *Blomley v Ryan*, supra n1; *Cooke v Clayworth*, supra n66; *Calumsky and Karaloff v Karaloff*, supra n132; *Haverty v Brooks*, supra n145; *Gissing v Eaton*, supra n37.
B. CONTRACTUAL IMBALANCE

Contractual imbalance in a bargain means that terms of the bargain are more favourable to one party (the enforcer) than the other (the complainant). This component of unconscionability has been variously described in the cases as "substantive unfairness", "inequality of values exchanged", "undervalue", "gross undervalue", "inadequacy of consideration", "improvident bargain", "imbalance of benefits", "impropriety in the terms of the transaction", "an immodest gain", and a "one-sided bargain". What do these terms encompass?

(1) The Degree of Contractual Imbalance Required

Contractual imbalance, like inequality of bargaining power, is a relative concept. Rarely will the values exchanged between contract parties be absolutely equal. Woods JA noted that:169

"It is obviously difficult to delineate what degree of inequality between the parties or the extent of the inadequacy of consideration which must exist before the jurisdiction may be invoked."

However, it can be said that courts are not concerned with every deviation from the market price or every instance of improvidence. Judicial concern is reserved for the serious cases where:170

"... the resulting transaction has been not merely hard or improvident but overreaching and oppressive."

Reasonableness provides one standard against which substantive unfairness can be judged. If the contract terms, including price, are outside the range of what a rational person171 would accept, this points to it being unfair to the requisite degree. However, the threshold of

169 Knupp v Bell, supra n19.
170 Alec Lobb (Garages) Ltd and Others v Total Oil GB Ltd, supra n9, 961.
171 Refer CBA v Amadio, supra 4, per Mason J, 416.
operative substantive unfairness has been put at a lower level to designate contract terms which no "sensible, well-advised person", 172 no "reasonably prudent person", 173 no "responsible man of business" 174 would accept. In several cases, the threshold is further lowered to include terms which practising lawyers, advising the complainant, would have disapproved. 175

According to these dicta, it may appear that the substantive unfairness element can be easily satisfied on the facts of most cases so that it does not limit the scope of the unconscionability jurisdiction in any meaningful way. In practice, however, the courts tend to be slow to intervene in a transaction where the disparity in values exchanged is not perceived to be sufficiently great. 176

It has been suggested that the requisite degree of contractual imbalance may be dependent on the reaction which the contract evokes from the presiding judge:

"No principle appears to exist to determine what is unreasonable or unjust or unconscionable, which are emotive rather than precise terms, and so it is presumably a question of what shocks the conscience of whoever is trying the case." 177

Fortunately, the case law yields more definite guidelines as to the factors which a court will take into account in determining the issue of contractual imbalance. Both objective and subjective considerations may be relevant.

(2) **Objective Indicia of Contractual Imbalance**

A bargain can be said to be unfair if the price paid by the enforcer is far below the ascertainable fair market value. The evidence of professional valuers or evidence of other recent

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172 See *Multiservice Bookbinding Ltd and Others v Marden*, supra n37, 502.
173 See *Portal Forest Industries Ltd v Saunders*, supra n19, 661.
174 See *Tweedie v Geib*, supra n54, 321.
175 See *Towers v Affleck*, supra n72, 719; *Pridmore v Calvert*, supra n46, 143; *Tweedie v Geib*, supra n54, 321.
176 See following page of text.
177 *Sheridan, Fraud in Equity*, supra n3, 126.
transactions involving similar subject matters may provide the proper basis for determining the fair market value. Substantive unfairness, however, involves more than inadequacy of price. It also includes imprudence in other terms, including the mode of payment, and lack of enforcement mechanism against the other party.

The following examples of operative improvidence demonstrate the high degree of disparity in values exchanged generally required. In Black v Wilcox, a complex agreement amounted essentially to an exchange of land valued at $25-30,000 for $5,200. In Junkin v Junkin, the vendor sold his land for a quarter of its value. In Ayres v Hazelgrove, the complainant sold paintings worth some six to seven thousand pounds for forty pounds. In Cymbaluk v Lewicki, the complainant made a will giving the enforcer her house valued at $12,000 in repayment for the $1,743 she had borrowed from the enforcer. In Errington v Martell-Wilson, land worth three thousand four hundred pounds was purchased for five hundred pounds. In Harry v Kreutziger, a fishing boat worth $16,000 was sold for $4,500. In Harris v Richardson, a life interest in a sum of seven thousand two hundred and fifty pounds was sold for one thousand seven hundred and fifty pounds. In Pridmore v Calvert, the complainant released a claim which proved to be worth over $20,000 for $334.

179 For example, in Tweedie v Geib, supra n54, the complainant agreed to sell his land at a reasonable price but in addition, gave the enforcer a long-term option to purchase other land for no additional advantage to himself. The court upheld the sale but struck down the option.
180 For example, O'Connor v Hart, supra n178, 288 where the purchase price for a farm was not made due for 2 years at a time of rapidly accelerating farm prices.
181 For example, Grealish v Murphy, supra n50, the enforcer's consideration for the complainant's conveyance of property to him (being a personal covenant to reside in the complainant's house and work and manage the property on behalf of the complainant) was backed up by no adequate sanctions. See also Loe v Tylee, supra n97.
182 Supra n19.
183 Supra n63.
184 Supra n47.
185 Supra n77.
186 Supra n58.
187 Supra n63.
188 Supra n30.
189 Supra n46; see also Towers v Affleck, supra n72.
What is a substantively unfair bargain will also vary with the commercial setting of the contract. The courts must look carefully at the type and quantity of the commodity to be transferred, its market appeal, the mode of sale chosen, any time pressures operating on the parties, the state of the market and other such factors in each individual case.\textsuperscript{190}

The fairness of the bargain must, furthermore, be determined as at the date it was made and not in the light of subsequent events.\textsuperscript{191} If the enforcer shows that the transaction is one which parties of roughly equal bargaining power might well have entered into at that time, then the bargain will be enforceable. For example, in \textit{Gissing v Eaton},\textsuperscript{192} the complainant's release of her personal injuries claim for $50 (but found to be worth $750) was held not to be improvident. Meredith J said that the contract cannot be viewed in:\textsuperscript{193}

"... the after-light it is to be viewed from the standpoint of the parties at the time when the compromise was made."

So viewed, there was "nothing startling, nothing even suspicious" in the bargain since at that time everyone, including the complainant's doctor, believed that her injuries were trivial. Moreover, the complainant had initially only asked for $200 in settlement and her chances of success in a law suit seemed slim since she had lost the address of her only witness while the enforcer had a witness ready to testify. In these circumstances, Meredith J would not find that the $50 settlement was improvident for her.

In \textit{Multiservice Bookbinding Ltd v Marden},\textsuperscript{194} the enforcer sought to preserve the value of his money loaned to the complainant by linking the capital and interest repayments to the value of the Swiss Franc. Browne-Wilkinson J refused relief to the complainant since the

\textsuperscript{190} See \textit{Burmah Oil Co Ltd and Another v Governor of Company of the Bank of England}, supra n109 for a discussion on this point. See also \textit{Calumsky and Karaloff v Karaloff}, supra n132, 519-20 in which the court took into account the lack of land sales and poor prices at the time of the contract; but cf \textit{Harris v Richardson}, supra n30, 920 per Adams J that even if the enforcer were the only person who would buy from the complainant, that would not relieve them from the obligation to be fair, just and reasonable (including in price).

\textsuperscript{191} \textit{Riley and Fifield v Jones}, supra n74, 17.

\textsuperscript{192} Supra n37.

\textsuperscript{193} Ibid, 60.

\textsuperscript{194} Supra n37.
contract term was not unfair when made but only became harsh when the value of the pound fell dramatically. This was not foreseen at the time of the contract. In *Tweedie v Geib*," it was the unanticipated acceleration of land prices which rendered harsh a price considered fair by the parties at the time the sale was agreed to. And in *Aqua Leisure Ltd v Bammant*, the long term lease agreement providing for ten per cent increases at five year intervals only became improvident because of the higher than expected rate of inflation. This was not anticipated even by experts. In the words of Ackner LJ, "after the event, even a fool is wise".

(3) **Subjective Considerations**

Judicial application of the substantive unfairness requirement goes beyond an objective assessment of adequate consideration to include a subjective element. This is recognised in the terms "improvidence", "contractual imbalance" and "imbalance of benefits" which can only be determined by looking at the propriety of the contract for the respective parties in their particular circumstances. As Deane J explained:"  

"Notwithstanding that adequate consideration may have moved from the stronger party, a transaction may be unfair, unreasonable and unjust from the viewpoint of the party under the disability."

In New Zealand, legislative recognition of this can be argued in so far as relief for operative mistake is predicated either on a substantially unequal exchange of values" (an objective test) or, on the benefit derived by or obligation imposed on the complainant being in all the circumstances substantially disproportionate to the consideration given" (a subjective test).

Professor Waddams agrees that in some cases there may be grounds for relief even when the values exchanged are approximately equal. That no more than the market price was paid by the complainant for unwanted or inappropriate services does not remove the improvidence of

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195 Supra n54.
196 Supra n144.
197 *CBA v Amadio*, supra n4, 423.
the transaction for the complainant. For example, in *Gaertner v Fiesta Dance Studios Ltd et al.*201 a young woman entered into six agreements purchasing a total of 551 hours of dancing lessons for the going rate, an arrangement obviously improvident for her. McKay J found this to be evidence of the complainant's incredible gullibility, loneliness and foolishness. Similarly in *Griesshammer v Ungerer*,202 the complainant was persuaded to enter into a contract for 115 hours of dancing lessons which she could ill afford. Tritschler JA found this to be a "ridiculous bargain" for her.

That the circumstances of the complainant are relevant to the determination of substantive unfairness is also demonstrated in *Morrison v Coast Finance Ltd*.203 There, an elderly widow of 79 years and meagre means mortgaged her only substantial asset, her home, to borrow a small sum of money on usual terms for an *unusual* purpose which was known to the enforcer. Davey JA explained that:204

"... it would not be wrong for a bank to lend money to an old and ignorant person upon *usual banking terms* for his own purpose, but quite wrong to lend him money on *those terms* so that he might lend it to an impecunious debtor from whom the bank intended to recover it in payment of a bad debt." (emphasis added)

That she obtained no benefit and only an illusory security from the debtors made this a patently improvident bargain for her.

Similar considerations exist in a contract of guarantee where the benefit for the complainant's consideration does not move to the complainant but to some third party debtor.205 Where factors exist showing that the debt will almost certainly not be repaid and

201 ' Supra n65.
202 Supra n21.
203 Supra n8.
204 Ibid, 715.
205 CBA v Amadio, supra n4, 423.
"... it must have been obvious to [the enforcer] ..., as to anyone else having knowledge of the facts, that the transaction was improvident from the viewpoint of the complainants."
	hen then operative contractual imbalance will be found.

Where a bargain is unobjectionable on its face but improvident for the complainant in the circumstances of the case, it seems that such improvidence will only become operative where the relevant circumstances are, or should have been, known to the enforcer. On the other hand, there will be no operative contractual imbalance where an apparently one-sided arrangement turns out to bear an "innocent" explanation whether this is known to the enforcer or not. The subjective circumstances of the complainant which may excuse an apparently one-sided bargain are best illustrated.

In Knupp v Bell, MacPherson J took into account the contracting parties' relationship as neighbours and friends in deciding whether the undervalue could be adequately and acceptably explained in those terms. In Haverty v Brooks, the judge found that although the plaintiff could have got more money for his land he:

"... did not want to do that, he wanted the first defendant to buy it at his price and on his conditions because he knew and trusted him to repair his house, to pay the instalments of the purchase price without jeopardising his old age pension and to keep secret the transaction from his relatives so that they might continue to supply him with meals."

Similarly, in Calumsky and Karaloff v Karaloff, Martin CJS rejected the contention that the enforcer had derived an immodest benefit from his purchase for it was the complainant:

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206 Ibid, 416.
207 See for example CBA v Amadio, supra n4; Buchanan v Canadian Imperial Bank of Commerce, supra n65.
208 (1966) 57 DLR (2d) 466.
209 Supra n145.
210 Ibid, 220.
211 Supra n132.
212 Ibid, 520.
... who parted with his property for a consideration which he deemed satisfactory and which has been executed; moreover it ... provided for the preservation of the farm and the work thereon and was in the interest of the [complainants] ... in their declining years.

Lastly, in a dissenting judgment in *Blomley v Ryan*, Kitto J found no improvidence in the bargain for the complainant because he:

"... all along acted deliberately, even if not as hard-headedly as he might have.... His decision to accept a price so much below that which he had been demanding does not need any more probable explanation than that being, as he said, in a bad mood, tired of managing the property, feeling his age and the depressing effects of indifferent health, desiring the convenience of town life and the company it would afford, and realising that twenty-five thousand pounds was ample for his needs in such years as might remain to him, he came to the conclusion that the best thing to do was to take Blomley's offer and be done with it."

In these cases, the bargains made were found to be the products of deliberate and informed decisions on the part of the complainants. The complainants had their own reasons for agreeing to the apparently improvident terms, and these reasons provided "innocent", or at least judicially acceptable explanations for any apparent substantive unfairness in the bargains.

One explanation which has *not* been accepted as neutralising an apparent improvidence in the bargain is that of feelings of guilt in the context of a dissolution of marriage. In *Cresswell v Potter,* for example, Megarry J refused to countenance:

"... the execution of the release by the plaintiff as amounting in effect to *conscience money* conferring upon the defendant merely some compensation in respect of the plaintiff having left him for another man, or anything like it."

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213 Supra n1.
214 Ibid, 429-430.
215 See Moffat v Moffat, supra n4; Blackhouse v Blackhouse [1978] 1 WLR 243; K v K, supra n69.
216 Supra n81.
217 Ibid, 259.
Summary

A bargain may be substantively unfair because:

(i) it is objectively improvident in price, mode of payment, enforcement or other terms judged against market standards. That is, the terms fall outside the range of what a reasonable person would accept.

(ii) it is improvident for the complainant in the circumstances of the case. Accordingly, not only can the subjective circumstances of the parties render an apparently fair bargain improvident for the complainant but they can also render an apparently improvident bargain an acceptable one in the eyes of the court.

The question of improvidence must be determined as at the date of the contract and not in the light of subsequent events.

C. INDEPENDENT ADVICE

In finding unconscionability courts often note that the complainant was without the benefit of independent advice in that transaction. Since:

"It is not the doctrine of the court that a man cannot contract without his solicitor at his elbow."218

independent advice must be seen in the context of the judicial concern with the complainant's impairment in self-protective ability. To succeed in a claim of unconscionability, therefore, complainants must not only show that they were not up to protecting themselves, but also, inter alia, that they were not protected by someone else equal to the task.

The issue of advice is also used by the courts to throw light on the enforcer's conscience, in particular, whether knowing of the complainant's need for help the enforcer took such action in respect of ensuring independent advice for the complainant as to allow them to fairly, reasonably and with good conscience, rely on the complainant's consent to the contract. Thus

218 Hnatuk v Chretian, supra n42, per Wilson J, 132 quoting with approval Fry on Specific Performance (6th ed), para 400.
the relevant issue is not simply the presence or absence of independent advice; but also first, if present what the courts consider adequate advice such that it could forestall a finding of unconscionability; and second, if advice is absent, whether the enforcer had recommended it and why the complainant had not obtained it. The writer will examine the contents of adequate advice now, leaving the question of the enforcer's conscience in respect of advice to section E(2) in this chapter.

The impression may be given in some cases that the simple presence of independent advice would be sufficient to bar relief to the complainant. However, once advice is found to be present, its adequacy comes under judicial scrutiny. By way of preliminary comment, it is observed that the courts are reluctant to regard as "adequate", advice which has not saved the complainant from an improvident bargain. And, the writer suggests that such reluctance to enforce a perceived unfairness in result, has, in turn, been translated into a number of onerous requirements as to adequacy:

(1) Independence

The complainant's adviser must be independent and act solely in the interests and for the protection of the complainant. The requirement of independence may not be met where the adviser has acted for both parties in the transaction, has in some respect been the adviser of the enforcer, or has received the instructions for the drawing up of documents in relation to the transaction from the enforcer. Oliver LJ observes that:

219 For example see Fry v Lane, supra n114; Riki v Codd, supra n20. In these cases, the complainants were without any form of advice and the courts simply refer to this as satisfying an element of unconscionability without discussing the issue of the adequacy of advice.


221 For example Clark v Malpas, supra n60; Moffat v Moffat, supra n4; Longmate v Ledger (1860) 2 GIFF 157; (66 ER 67); Fry v Lane, supra n114.


223 Cavendish v Strutt (1903) 19 TLR 483; Ince Noriah v Shaik Allie Bin Omar, supra n220.

224 Aqua Leisure Ltd v Bamnant and Styles, supra n144.
"Just because parties use one solicitor who has let one side down is not enough to justify the court interfering with the bargain to set it aside, there being no evidence of collusion between the stronger and the solicitor."

However, this is a purely procedural approach and some judges are unable to overlook the unfairness in the substantive outcome when determining the independence of the adviser. For example, in *Clark v Malpas*, Knight Bruce LJ declared himself satisfied on the basis of the concluded bargain:

"...that if the solicitor was not the solicitor of the purchaser alone in the matter, he was more the solicitor of the purchaser than of the seller."

In *Fry v Lane*, Kay J observed that:

"...in each transaction he [the adviser] must have been considering the purchaser's interest too much properly to guard the vendor's ... he did not properly protect the vendors but gave a great advantage to the purchasers who were his former clients and for whom he was then acting."

The fairness of substantive outcome is therefore regarded as evidence of the adviser's true independence, a procedural matter.

(2) **Knowledge of the Material Aspects of the Contract and its Negotiation**

The adviser must also be fully acquainted with the material aspects of the transaction and the negotiation process. Advisers will not have the requisite knowledge and involvement if their advice is sought only in respect of part of the transaction. For example, in *Loe v Tylee*, the complainant had ostensibly been independently advised by a solicitor and an

225 Supra n60.
226 Ibid, 404 (1240).
227 Supra n114.
228 Ibid, 323.
229 *Wright v Carter* [1903] 1 Ch 27.
230 Supra n97; see also *Grealish v Murphy*, supra n50; *Inche Noriah v Shaik Allie Bin Omar*, supra n220.
accountant. However, the accountant advised only on the taxation aspect of one part of the total agreement, while the solicitor was employed only to draw up the lease having received the instructions from the accountant rather than the complainant himself. The solicitor was concerned about the improvidence of the lease for the complainant but did not intervene having assumed that the accountant was acting for him.\(^{231}\) The advice received by the complainant was held to be insufficient, as was the advice in *Blomley v Ryan*\(^{232}\) where the solicitor:\(^{233}\)

"...had no knowledge of the value of 'Worrah' [the property sold] and consequently was quite ignorant of the fact that the sale was being made at a very substantial undervalue. Moreover, he knew nothing of the circumstances in which the arrangement of the previous day had been made ..."

and therefore was ignorant of the unfair circumstances which had induced the complainant's agreement.

The same can sometimes be said of separation agreements where the terms have been pre-determined by the parties and a solicitor is involved only for the purpose of recording the agreement.\(^{234}\) Where unconscionability is subsequently alleged, the advice may be regarded as deficient both in respect of independence and knowledge of material aspects and negotiation of the transaction.

(3) **Knowledge of the Complainant's Disability**

The adviser is further required to be acquainted with the nature of the complainants' disability and so appreciate their special need for protection. Thus in one case, where the adviser believed the complainant to be meeting the other party on equal terms and fully capable of understanding the nature of the transaction, when in fact his mental and physical capacities

\(^{231}\) Supra n97, 4, 20-21.

\(^{232}\) Supra n1.

\(^{233}\) Ibid, 374.

\(^{234}\) See for example *Moffat v Moffat*, supra n4.
had been impaired by old age, illness and alcohol addiction; the advice given is inadequate. The adviser had failed to:

"...make an adequate analysis of the position in which he [the complainant] then stood or to make any attempt to safeguard his interests...."

(4) **Effective Communication of Advice to the Complainant**

This requirement is an extension on the requirement of knowledge of the complainant's disability. It necessitates that the advice conveyed to the complainants should have *in fact* been understood by them. For example, in *Blomley v Ryan*,236 the solicitor's act of reading out the contract to someone as "stupified" by rum as the complainant was described as "an empty ceremony".237 In *Ince Noriah v Shaik Allie Bin Omar*,238 Lord Hailsham found that the solicitor had failed to bring home to the complainant's mind "the consequences to herself of what she was doing."239 In *Portal Forest Industries Ltd v Saunders*240 the complainant's concern about the lease he was about to enter led him to consult the local bank manager, the Indian agent's office and a magistrate regarding the existence of any "hidden clauses". Nevertheless, Rae J found that the complainant:241

"...remained substantially unaware of what he was undertaking even after he had spoken to ... [these] persons before signing the lease proper...."

The onerous nature of this requirement in the circumstance of extreme mental disability are demonstrated in *Grealish v Murphy*.242 In that case, the advice given was deficient in a

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235 *Blomley v Ryan*, supra n1, 375; see also *Grealish v Murphy*, supra n50.
236 Supra n1.
237 Ibid, 397.
238 Supra n220. This case is argued and decided on the basis of undue influence but the principles relating to adequate independent advice are also applicable to unconscionability.
239 Ibid, 136.
240 Supra n19.
241 Ibid, 670.
242 Supra n50.
number of ways. The adviser did not know all the material facts relating to the transaction and was unaware of the full extent of the complainant's mental impairment. He, therefore, failed to explain the nature and effect of the deed in a way which was comprehensible to the complainant. His:

"... duty of illuminating Peter's benighted mind was more imperative and more formidable, if the task was possible than the solicitor supposed." (emphasis added)

Nevertheless, the court emphasised the fact that the complainant was not sufficiently enlightened or helped by the advice to understand what he was doing.

(5) **Competency**

The adviser must be competent in respect of the subject matter of the transaction. Its complexity is therefore important. In some transactions advice from a friend or a family member may be sufficient. But in more complex transactions, a solicitor or other specialist may be required. Latey J explained that:

"By 'proper' advice is meant ... advice from a suitably qualified source. If that advice is negligent, the recipient's remedy is against the giver of the advice."

Thus, the propriety of the adviser's qualifications is distinguished from the propriety of the actual advice given and judicial concern is seen as properly attaching only to the former. Such a

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243 Ibid, 46.
244 See for example *Evans v Llewelin* (1787) 1 Cox 333; 2 Bro CC 151 (29 ER 1191).
245 See for example *Knupp v Bell*, supra n19, and supra n208.
246 See for example *Demara Bauxite Co Ltd v Hubbard* [1923] AC 673; Sheridan, supra n3, 102. See also *Nichols v Jessup*, supra n42 where the advice of the complainant's son and insurance representative about an easement were not considered sufficient; and *Portal Forest Industries Ltd v Saunders*, supra n19 where Rae J found that the complainant "wanted and should have had competent legal advice" but since the nearest lawyer was several hundred miles away, he consulted a bank manager, an Indian agent's office and a magistrate about a lease. This was found to be insufficient.
247 *Errington v Martell-Wilson (deceased) and Cook*, supra n58.
procedural approach, however, overlooks the judicial concern with unfair substance or result evidenced in some cases where it is the impropriety of the advice given which is emphasised. In *Croker v Croker*, Lord O'Hagan LC set aside a deed because:

"The solicitor did not protect his client as he ought to have done. He did not inform him as he ought to have been informed, of his rights and his powers and of the nature of the acts he was asked to do."

In the *Inche Noriah* case, the Privy Council noted the adviser's failure to give the complainant "proper" advice. That is, that:

"...she could more prudently, and equally effectively have benefited the donee without undue risks to herself by retaining the property in her own possession during her life and bestowing it upon him by her will."

In *Fry v Lane*, Kay J noted the inexperience of the solicitor who acted for both parties, and several factors which he did not, but ought to have, informed the complainant of in respect of the transaction.

It is readily apparent from the foregoing list that for any independent advice to be adequate and thus operate against a finding of unconscionability, judicial requirements in respect of the protector and the substance of the protection given must be satisfied. The judicial concern with the results of advice, as much as the formal existence of adequate advice is clear

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248 (1870) 41 ILTR 181.
249 Ibid, 182.
250 Supra n220.
251 Ibid, 136.
252 Supra n114.
253 Ibid, 323.
254 This judicial concern with results is even consistent with the cases in which the advice factor has contributed to a finding of no unconscionability (advice is either found to be present and adequate or absent because of the complainant's refusal to obtain advice despite the enforcer's recommendation to do so). Significantly, these cases usually involve no or questionable contractual improvidence to the complainants. See for example *O'Rorke v Bolingbroke*, supra n10; *Harrison v Guest*, supra n150; *Multiservice Bookbinding Ltd and Others v Marden*, supra n36.
particularly in the light of the requirement that the complainant in fact understand the advice and be helped by it; and the force with which an improvident result for the complainant operates as evidence of some inadequacy in the advice given.

Given this judicial concern that advice should bring about a protective result, and given that "proper" advice will only protect the complainant if it is in fact followed, the question is raised whether, given compliance with all other requirements of adequacy, the advice will operate against a finding of unconscionability if it is not in fact followed. In theory, it seems justifiable that advice should not need to be followed to be operative. This would represent a recognition of the complainant's freedom of choice. However, two qualifications must be made in the light of the decided cases.

First, the presence of competent and adequate advice, which could have saved the complainant from an improvident bargain, may be passed over by the court if the complainant's refusal to follow it is interpreted by the court as an inability to follow that advice due to the extremity of his/her impairment. For example, in Fleury v Homocrest Dairy Co-op, the complainant had been warned by her doctor that she was seriously ill and should not make any settlement in respect of her injuries until her condition had improved. Her lawyer had also advised her that the settlement offered was too little and that she should wait until more was known about her condition. Aylen J regarded her refusal to follow this advice as supportive of his conclusion that she "was in an abnormal state at the time", and in finding unconscionability, he said in respect of advice.

"It is true that the plaintiff was represented by a solicitor but I am satisfied that even if he did his best for her she was incapable of following his advice."

255 This is the position in respect of advice in the area of undue influence, see Inche Noriah v Shaik Allie Bin Omar, supra n220, 135 and generally Sheridan, supra n3, 101.
256 Supra n67.
257 Ibid, 163.
258 Ibid, 165-166.
259 Ibid, 168.
Second, adequate independent advice is of little practical assistance where the complainant's disability is financial need, not involving any impairment of mental faculties. This is recognised in the *Alec Lobb*\(^{260}\) case where the complainants' financial problems necessitated them entering a lease and lease back arrangement with the enforcers. The complainants were separately advised by their own solicitors not to proceed with the improvident arrangement. However, they felt that their financial difficulties were so great that they had no realistic alternative. Dillon LJ conceded that:\(^{261}\)

"In these circumstances it would be unreal to hold that if the transaction is otherwise tainted it is cured merely because Mr Lobb and the company had independent advice."

To summarise then, the courts appear to have developed many tools to render any advice given to the complainant inoperative for inadequacy. These are generally called into use and applied with a vigour which is proportionate to the degree of perceived unfairness in the resulting bargain. Where advice is present, the stringent requirements of adequacy may nevertheless render it inoperative to cure an otherwise unconscionable contract. And, as evidenced by the *Fleury* and *Alec Lobb* decisions, the effect of independent advice may be discounted in some circumstances even though it is adequate in all other respects.

D. KNOWLEDGE OF DISABILITY

In addition to special disability, contractual imbalance and lack of adequate advice, the complainant also bears the burden of showing that the enforcer acted unconscionably in procuring or accepting the complainant's assent to the one-sided bargain, when the enforcer has had notice of his/her special disability. The focus here is on the enforcer's state of mind. Such

\(^{260}\) Supra n31.
\(^{261}\) Ibid, 312.
an inquiry is problematical in the light of its subjective nature and the notion of constructive knowledge has been adopted. Thus, knowledge may be actual or constructive, subjectively conceded or objectively determined. Somers J held that:262

"... a party may be regarded as unconscientious not only when he knew at the time the bargain was entered into that the other party suffered from a material disability or disadvantage and of its effect on that party, but also when he ought to have known of that circumstance; when a reasonable man would have adverted to the possibility of its existence.... If the circumstances are such as fairly to lead a reasonable man to believe that another is under some serious disadvantage affecting his ability to protect himself, he is bound to make inquiry and will be taken to know whatever such inquiry would have disclosed." (emphasis added)

In the same vein, Mason J held that the enforcer will have the requisite knowledge if:263

"... he is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person."

In these circumstances:

"... he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge."264

From the judicial dicta and observations of judicial practice, the writer submits that knowledge in the context of unconscionability can comprise any one of three mental states as follows:

1. Actual knowledge of disability.
2. Reason to suspect: that is, knowledge of circumstances which would indicate the other party's obvious disability to a reasonable person.

262 Supra n19, per Somers J, 3.
263 CBA v Amadio, supra n4, 417.
264 Ibid; see also Owen and Gutch v Homan, 4 HL Cas 997 at 1035 (10 ER 767).
(3) Reason to suspect: that is, knowledge of circumstances which would raise the possibility, or lead a reasonable person to suspect, that the complainant was operating under disability and so raise a duty to inquire.

These three types of operative knowledge are consistent with the definition of knowledge in the contexts of relief for unilateral mistake known to the other party,265 and liability as a constructive trustee where one knowingly assists in a fraudulent design on the part of the trustees.266

(1) **Actual Knowledge**

Actual knowledge of the complainant's disability may be conceded by the enforcer or evidenced by the enforcer's conduct. Enforcer admission that he/she possesses the relevant knowledge will be rare, indeed there are no cases of this. Knowledge as evidenced by an objective interpretation of enforcer conduct is best illustrated by *Blomley v Ryan*.267 There, the enforcer's undue haste to procure a written agreement from an intoxicated man was interpreted by the court as evidence of the enforcer's knowledge of the complainant's state and of his consequent desire to conclude the matter before the complainant emerged from his "pathetic state" to give the bargain sober consideration.268 In *Portal Forest Industries Ltd v Saunders*,269 the enforcer had procured the complainant's assent to a bargain which the complainant did not understand. In a written note charging a third party with obtaining the complainant's formal signature to the agreement, the enforcer referred to possible "trouble".

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265 See for example *Taylor v Johnson* (1983) 57 ALJR 197 at 201. A mistaken party "will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension...".

266 See for example *Baden, Delvaux and Lecuit and Others v Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France* SA [1983] BCLC 325, [1983] Com LR 88, Lexis for an extensive discussion of this point. Peter Gibson J concluded that operative knowledge may comprise: "(i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry. More accurately, apart from actual knowledge they are formulations of the circumstances which may lead the court to impute knowledge of the facts to the alleged constructive trustee."

267 Supra n1.


269 Supra n19.
Rae J inferred from this factor and others\textsuperscript{270} that the enforcer knew of the complainant's lack of understanding and knew that she had him "on a somewhat delicate hook".\textsuperscript{271}

(2) \textbf{Reason to Know}

Where knowledge of certain facts would indicate the other party's obvious disability to any reasonable person, the enforcer, knowing these facts, will be imputed with knowledge of such disability. The standard is an objective one since it would be unjust to allow such a person to plead ignorance.\textsuperscript{272}

"...because his own moral obtuseness prevented him from recognising an impropriety that would have been apparent to an ordinary man."

The complainant's impairment in self-protective ability may be obvious to the enforcer from the following factors:

(a) \textbf{The complainant's appearance, speech, behaviour or circumstance during negotiations}

\textit{Ayres v Hazelgrove}\textsuperscript{273} provides an excellent illustration of this. There, a twenty-nine year old bric-a-brac dealer purchased six paintings and some jewellery from an elderly woman of eighty-four for forty pounds. The pictures alone were valued at between six thousand to seven thousand pounds. The complainant's son, who lived with her, found no trace of the forty pounds. The complainant was suffering from senile dementia which left her incapable of contracting with any appreciation of what she was about. Nevertheless, the enforcer insisted that the complainant had "behaved perfectly normally" during his forty minute visit. He thought her about sixty years of age, "very much younger than his own grandmother, who was in her early seventies". The enforcer alleged that:

\begin{itemize}
  \item \textsuperscript{270} The extreme improvidence of the bargain for the complainant and his obvious lack of education and intelligence.
  \item \textsuperscript{271} Supra n19, 666.
  \item \textsuperscript{272} Supra n266, para 258.
  \item \textsuperscript{273} Supra n47.
\end{itemize}
"...he had acted from first to last honestly in the belief that this was a transaction freely entered into by somebody suffering from no disability."

In rejecting this, Russell expressed himself to be:

"... completely satisfied that the defendant did know it and knows it to this day. Lady Ayres was a strange old lady, eccentric in the extreme and one whom, within a very short time, let alone forty minutes, would have made it manifestly plain by her conduct that she was suffering from a mental incapacity ... having regard to her mental condition the manifestation of which must have been apparent to the defendant from first to last, I have no hesitation in saying that the plaintiff is entitled to have this so-called bargain set aside." (emphasis added)

Similarly in Grealish v Murphy274 Cavan Duffy J found that during the parties' negotiations:275

"Murphy must have discovered beyond doubt, if he did not know from the first day, that Peter needed decidedly more protection than the ordinary Western farmer and cattle dealer."

Murphy's conduct on one occasion also evidenced his knowledge of Peter's fear of victimisation by his neighbours if deprived of Murphy's protection. He knew that Peter was sure to succumb to his demand for money to prevent his desertion.276 In another case involving an unconscionable release,277 Anderson J noted the enforcer's knowledge of the complainant's medical condition and further found that the complainant's "limited intelligence ... would be apparent to any reasonable person who came in contact with her".278

In a further case involving a sale at undervalue,279 the purchaser knew that the vendor's

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274 Supra n50.
275 Ibid, 39.
276 Ibid, 41.
277 Towers v Affleck, supra n72.
278 Ibid, 715-716.
279 Hnatuk v Chretian, supra n42.
back was against the wall, that he was, with his wife and four children, poor, ignorant, jobless, and unable to pay off the charge against the property which he threatened to enforce. Wilson J found the purchaser to be a thoroughly capable businessman:

"... with an adequate estimation of the value of the cards he held and as I think, an equally sound estimation of the defendants' inability to value their cards." (emphasis added)

In other cases, the courts were able to impute to the enforcer knowledge of the complainants' emotional distress, intoxication, inexperience and lack of intelligence, since it was found that the relevant disability would be obvious to the enforcer from the facts known to them.

(b) Prior dealing

This is another source of information from which the court can impute knowledge of the complainant's impairment to the enforcer. For instance, in Harris v Richardson, the enforcer had purchased a life-interest from the complainant at a significant undervalue. In considering whether he had taken an improper advantage of the complainant, "an incompetent

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280 Ibid, 132.
281 Ibid, 131.
282 In Mundinger v Mundinger, supra n69, the judge found that the husband well knew that his affair was injurious to his wife's health. In Moffat v Moffat, supra n4, the husband's knowledge of his wife's mental and physical stress could be inferred from his knowledge of her loss of weight, requirement of medical care and outburst of violence.
283 In Black v Wilcox, supra n19, and Blomley v Ryan, supra n1, the courts found that the complainants' intoxicated state must have been readily apparent to the enforcers from observing their conduct and speech during the negotiations.
284 In Portal Forest Industries Ltd v Saunders, supra n19, it was found that the complainant's ignorance, naivety and simplicity must have been apparent to the enforcer who was an astute realty agent experienced in conducting interviews for market analysis; in Tweedie v Geib, supra n54, the enforcer was found to be aware of the complainant's unsophistication and lack of financial awareness; in Nichols v Jessup, supra n19, Cooke P found room on the evidence to infer that the enforcer "must have been well aware of the defendant's characteristics and must have known or suspected that she was no judge of her own interests"; in Easton v Sinclair, supra n13, Teetzel J found that the complainant was obviously of a lower degree of intelligence than most and would be very much like wax in the hands of the enforcers.
285 Supra n30.
bucolic with no business ability”, Herdman J noted that the parties were not unknown to each other:286

"From Richardson's previous experience of Harris and his family he must have been well aware that the family had been struggling against adversity... He admits that he knew Harris was financially embarrassed ... [he] must have known that their lives were lived in something akin to squalor, for he had refused to make an advance to Mrs Harris on her personal effects and he was aware of their impoverished circumstances." (emphasis added)

In *Knupp v Bell*,287 the contracting parties were old friends and neighbours, and MacPherson J said that:288

"... it would be amazing if he had not observed the forgetfulness and disorientation mentioned by so many other witnesses."

In both *Blomley v Ryan*289 and *Black v Wilcox*,290 the complainants' intemperate habits were well known to the people in and around the area, including the enforcers. This, and the complainants' intoxicated state during negotiations must have alerted the enforcers to the fact that they were in no fit state to negotiate intelligently.

Knowledge of the complainant's disability based on prior acquaintance or dealing can also be strongly inferred in cases involving relationships of intimacy such as marriage or cohabitation291 and relationships of dependency. For instance, in *Loe v Tylee*,292 the parties had been friends for several years. When the complainant was stricken with Parkinson's

286 Ibid, 897-899.
287 Supra n208.
288 Ibid, 475; see also *Cymbaluk v Lewicki*, supra n77.
289 Supra n1, 367-369, 387.
290 Supra n19, 194-195, 197.
291 See for example *Mundinger v Mundinger*, supra n69; *Moffat v Moffat*, supra n4.
292 Supra n97; see also *Growden v Bean*, supra n70, in which there existed a prior doctor-patient relationship.
disease, the enforcers assisted him in many ways including the provision of meals, performing
domestic and personal tasks, and providing the complainant with transport. It was in this
context that the enforcers proposed the deal eventually struck. Their knowledge of the
complainant's disability must be presumed.

Prior acquaintance, dealing, and a reasonable assessment of the complainant's
appearance, speech, behaviour and circumstance thus provide evidence from which the court
can infer the relevant knowledge on the part of the enforcer.

(3) **Reason to suspect**

If the enforcer is aware of facts which would raise the very real possibility, to a
reasonable person, that the complainant is not up to protecting his/her own interest at the time of
the contract, then the enforcer is bound to make inquiry concerning this. Knowledge of
disability will be imputed if the enforcer fails to make an inquiry or is put off by an answer that
would not have satisfied a reasonable person.\(^\text{293}\) If the enforcer is in doubt, independent advice
for the complainant should be strongly suggested.

The type of factors which, if known, should alert the enforcer to the possibility of the
complainant's impaired self-protective ability are varied. They certainly include words and
conduct of the complainant which would indicate a misunderstanding of the contract or need for
help. Gross inadequacy of consideration, or circumstances which would render the bargain
very improvident to the complainant, if known to the enforcer, should also put them on inquiry
as to the complainants' ability to look after their own interests. The following cases provide
illustrations.

In *CBA v Amadio*\(^\text{294}\) the High Court of Australia set aside a memorandum of mortgage
in favour of an elderly Italian couple with little formal education and lacking command of the

\(^{293}\) There are no examples of the latter situation in the case law, but it is submitted that this is the correct
position. See by analogy in the context of constructive trustee *Baden, Delvaux* etc, supra n266; the
standard is one of reasonableness and the court should not expect the enforcer to be hypercritical in
examining the explanation.

\(^{294}\) Supra n4; see also *Buchanan v Canadian Imperial Bank of Commerce*, supra n65, and *Owen and Gutch v Homan*, supra n264 involving similar fact situations.
English language. The Amadios mortgaged their land to guarantee the debts owed by their son's business to the bank. They, however, mistakenly believed that their son's business was prosperous and that the guarantee was limited as to time and amount. In fact, the business was in dire straits and the guarantee unlimited in any way. When the debtor company went into liquidation and the Amadios could not meet the $A240,000 demanded, the bank sought to exercise its powers of sale under the mortgage.

The bank alleged ignorance as to the Amadios' misunderstandings. It claimed that it had assumed that Vincenzo (their debtor son) had explained and advised them on the guarantee. The court found that although the bank may not have had actual knowledge, it, through its representative Mr Virgo, knew enough of the circumstances to be put on inquiry as to whether in fact the Amadios understood the true nature of the agreement. Mr Virgo knew that the Amadios were elderly Italians without a good command of English; that Vincenzo was the dominant member of the family whose judgment the Amadios relied upon; that Vincenzo was very anxious to procure his parents' consent to the guarantee and that Vincenzo himself had not read the agreement. Thus:

"... in a situation where it was apparent that advice and assistance were necessary, he knew that no one who might have rendered advice and assistance to the Amadios had even read the document to ascertain whether its terms imposed no greater potential liability than they were prepared to undertake."

Moreover, Mason J thought it:

"... inconceivable that the possibility did not occur to Mr Virgo that the respondents' entry into the transaction was due to their inability to make a judgment as to what was in their best interests, owing to their reliance on their son, whose interests would inevitably incline him to urge them to sign the instrument put forward by the bank."

Mr Virgo also knew that the Amadios themselves had not read the agreement before signing and

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295 Supra n4, 426.
296 Ibid 416
that when signing, Mr Amadio had commented that it was only for six months. In Deane J's opinion:

"It would, at least by that stage, have been plain to any reasonable person who was prepared to see and learn, that he was put on inquiry. The stage had been reached at which the bank through Mr Virgo, was bound to make a simple inquiry as to whether the transaction had been properly explained to Mr and Mrs Amadio." (emphasis added)

The bank was also aware of the debtor company's inability to pay its future debts as they fell due. It must have suspected that Vincenzo would misrepresent the financial health of this business so that the Amadios were unable to make an informed assessment of the true risks involved in the guarantee. Moreover, it must have been obvious to Mr Virgo that the transaction was disastrous for the Amadios while beneficial to the bank. He knew that:

"... any rational person knowing the circumstances of the company at the time would not have executed the instrument which they signed."

Thus, Mr Virgo had:

"... simply closed his eyes to the vulnerability of Mr and Mrs Amadio and the disability which adversely affected them."

The court held that the bank could not shelter behind its failure to make an inquiry and the guarantee was set aside. In a similar case, Lord Cranworth LC held that the "circumstances were such as to make inquiry natural and abstinence from inquiry unnatural".

In *Morrison v Coast Finance Ltd*, a 79 year old widow of meagre means was persuaded to mortgage her home, her only substantial asset, to borrow money from the finance company to lend to two comparative strangers. The subjective circumstances rendering the

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297 Ibid, 416, 424
298 Ibid, 416.
299 Ibid, 426.
300 Owen and Gutch v Homan, supra n264.
301 Supra n8.
The Court found that this improvidence should have been "self-evident" to the enforcers who had other reasons to suspect that the complainant was under disability. They had received the loan application from the two debtors and not the complainant and the enforcer's representative had obtained a valuation of the complainant's home and prepared the mortgage before ever meeting her. Moreover, he must have heard the complainant's comment to the two debtors when told to sign, "That is more than I agreed to lend you", and her asking the enforcer's solicitor whether she should sign, showing that she felt in need of advice. The Court held that advantage had been taken of the complainant's obvious ignorance and inexperience.

In *Portal Forest Industries Ltd v Saunders* the enforcer negotiated a lease of the complainant's land for a term of 99 years at a fixed annual rent of $2,000 with no provision for review. Quite apart from the complainant's obvious ignorance and naivety, Rae J held that the enforcer must have strongly suspected that the complainant did not understand the terms of the lease. She knew that the complainant desired only a short-term lease, yet he agreed to a lease which practically parted him from his land for a set rent. The lack of rent review in a lease of 99 years' duration was also entirely improvident to the complainant. From her previous dealings with other lands in the area, Rae J found that the enforcer:304

"... must be taken to have known what a reasonably prudent person in the defendant's position should be expected to do."

Thus, the complainant's agreement to a bargain known to the enforcer to be very imprudent for the complainant should have alerted the enforcer to the possibility of the complainant's special disability. In *Nichols v Jessup*, Cooke P made it clear that the glaring imbalance in the

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302 See supra section B in this Chapter.
303 Supra n19.
304 Ibid, 661, 665.
305 Supra n19.
contract made left it

"... open to the [trial] judge to conclude that the plaintiff must have been well aware of the defendant's characteristics and must have known or suspected that she was no judge of her own interests."

In Fleury and Fleury v Homocrest Dairy Co-op, the complainant signed an improvident release when she was suffering great pain from her injuries and under the influence of sedatives which prevented her from weighing and judging her rights and deciding whether or not the settlement was fair although she knew the nature of the document she was signing. Aylen J found no actual knowledge of this on the enforcer's part, however, he was of the opinion that knowing of the complainant's physical condition the enforcer could easily have inquired of her doctor concerning her mental condition. That is, the enforcer had reason to suspect the complainant's mental ability and was therefore put on inquiry.

Constructive knowledge of complainant disability on the part of the enforcer can be inferred from a number of sources. Prior dealing and therefore knowledge, the complainants' appearance, conduct, speech and circumstances during the negotiations, and the improvidence of the bargain to them, are all evidence from which the relevant constructive knowledge can be imputed to the enforcer.

E. THE QUALITY OF THE ENFORCER'S CONDUCT

Once the complainant has established disability, lack of adequate advice, substantive unfairness and knowledge, the onus is on the enforcer to show that his/her conduct in concluding the bargain with the complainant was fair, just and reasonable. The quality of the enforcer's dealings with the complainant thus comes under judicial scrutiny and the question is

306 Ibid, per Cooke P, 12.
307 Supra n67.
whether in the light of knowledge of the complainant's impaired self-protective ability, the enforcer's conduct in concluding the agreement can be described as in good faith, fair, just and reasonable; or against conscience, unfair, advantage-taking and overreaching?

In order to prevent a finding of unconscionability at this stage, the enforcers must show not only the absence of any advantage-taking conduct on their part, but also, that they had placed the complainants at "arm's length" and were scrupulously considerate of their interests. Of course, the case for unconscionability is considerably strengthened if the complainants can point to evidence that the enforcers took advantage of their known disability "to introduce a term which no sensible well-advised person or party would have accepted".308

(1) **Advantage-taking Conduct**

The types of reprehensible conduct noted by the courts in finding unconscionability can be divided into three categories. These will now be discussed.

(a) **Producing or exacerbating the complainant's disability**

The types of disability involved in the cases are drunkenness, emotional distress and financial need. Where the enforcer has deliberately and wrongfully produced or exacerbated such conditions, any unfair resultant bargain will be set aside. In *Fraud in Equity*,309 Sheridan refers to the case of *Say v Barwick*310 in which

"... an infant owned land, and the person who led him astray was out to become tenant. The latter managed to get the infant drunk daily during the period immediately preceding the attainment of his majority, ending up with a thorough carousel on the last night of his infancy. Early the next morning, his majority a couple of hours old, the landowner was woken to a hangover, and he signed a lease to the defendant at a little over half an economic rent for the premises, which lease had been the subject of discussion between them for some time. It was set aside."

*Blomley v Ryan*311 involved an elderly man with a widely known alcohol problem. Negotiations for the sale of his land proceeded over a bottle of rum provided by the purchasers.

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308 *Multiservice Bookbinding Ltd and Others v Marden*, supra n37,502.
309 Supra n3, 79.
310 (1812), 1 V & B 195.
311 Supra n1.
The sale at undervalue was set aside. These cases are consistent with the holding in *Cooke v Clayworth*\(^{312}\) that intoxication would furnish a ground for setting aside a contract if the intoxication was contrived by the other party.

Emotional distress operates in the same way. In *Mundinger v Mundinger*\(^{313}\) a woman relinquished her claim to alimony and a half interest in two valuable properties for a trifling consideration from her husband. The Court of Appeal noted that the husband's adultery, cruelty and maltreatment had caused the wife to have a nervous breakdown. She took an overdose of tranquilisers and required hospitalisation just prior to the agreement. When discussing the agreement, the husband had "addressed his wife in an abominable manner and adopted a very threatening attitude toward her", causing her acute mental and emotional distress. Moreover, at the time of contracting, the wife was "affected by brandy which was liberally provided by the husband for reasons best known to himself". The husband was thus able to "carry off the improvident and nefarious transaction". The bargain was set aside.

*Graham v Voth Bros Construction (1974) and Powell River Shopping Plaza Ltd*\(^{314}\) provides an example in respect of financial need. There, the court set aside an agreement to reduce charges previously set under a trucking contract. Wetmore J found that the enforcer, knowing of the complainant's financial difficulties had alleged that the loads were short and refused to pay anything unless the charges were reduced knowing that this would bring severe pressure on the complainant. The complainant, unable to pay his subcontractors and facing bankruptcy, complied. It was held that:\(^{315}\)

"... where the situation creating the eventual improvident bargain is created by the benefactor of that bargain, equity will closely scrutinise that transaction for fairness."

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\(^{312}\) Supra n66.

\(^{313}\) Supra n69; see also *Straiton v Straiton*, supra n62, in which the husband exacerbated his wife's emotional problems by telling her she was crazy, threatening to return her to a psychiatric hospital and continually holding up another woman, whom he later had an affair with, as an example to her.

\(^{314}\) Supra n33; see also *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837.

\(^{315}\) Supra n33, 371.
(b) Unfair dealing to obtain a contractual advantage

Conduct in this category is usually considered unobjectionable\(^{316}\) in "normal" circumstances. However, it takes on an unconscientious quality where the enforcer knows of the complainant's impairment and the resulting bargain unduly favours the enforcer at the expense of the complainant.

The types of conduct considered unfair vary in their degrees of blameworthiness and usually occur in combinations, but for clarity they are individually identified.

(i) Fraudulent hoax; reckless or deliberate misleading of the complainant

*Gaertner v Fiesta Dance Studios Ltd*\(^{317}\) is the only case of the enforcer actively and intentionally ensnaring the complainant through a "demeaning, cruel and fraudulent hoax" that preyed on the known weakness of the complainant. The complainant was persuaded to purchase 521 hours of dancing lessons. The enforcer had continually flattered her as to her ability and told her that she had been specially chosen to apply for membership of an exclusive club which would give her benefits such as outings with the male staff. To obtain approval she had to dance before a panel and be filmed on a movie camera.

"At the conclusion of this performance the staff members who had been present rushed up and congratulated her; champagne was opened; a cake was produced; still photographs were taken and then she was led off to the office of the manager at which time she was told that she had to sign up for more lessons - $2,573 worth of lessons. This, said the manager, was to bring her up to the standards required of a Gold Key Member. The plaintiff objected but finally signed. The "queen for a day" routine made it difficult for her to back out. Unknown to the plaintiff, the whole performance was carried out without film in the camera. The procedure was a standing joke among the staff members."\(^{318}\)

\(^{316}\) Apart from misleading statements which are held to be misrepresentations for which there is independent statutory redress in New Zealand under section 6 Contractual Remedies Act 1979.

\(^{317}\) Supra n65.

\(^{318}\) Ibid, 642-643.
The bargain was held to be unconscionable.

A reckless or deliberate statement designed to mislead the complainant and persuade him/her to assent to very unfavourable terms is another identifiable misconduct. In *Paris v Machnick*, the enforcer made an offer to purchase a farm worth $9,000 from an illiterate woman for $2,500, knowing that she was relying on him to establish a fair and reasonable price and that the farm was worth a good deal more than the price he named. In setting aside the sale, Hart J drew close analogies with the case of *Hagarth v Wearing* in which a sale was made for less than one-fifth its actual value. There, Sir John Wickens VC noted that the enforcer:

"... knew everything about the property and the circumstances. She [the complainant] knew nothing, and he knew that she knew nothing ... the representation that he made to her ... was, that the value of what she had to sell was about one hundred pounds. This ... was a deliberate statement made to her by a person having full knowledge, which statement was asked by her for her guidance in the transaction, and was acted on by her in reliance on its good faith and accuracy."

In setting aside the conveyance, the judge held that:

"... a person obtaining a conveyance of real estate on the faith of certain representations which are afterwards shown to be untrue, must submit to have the conveyance treated as fraudulent and void against the person deceived."

*Easton v Sinclair* and *Waters v Donnelly* also involved misleading statements about land values.

In *Buchanan v Canadian Imperial Bank of Commerce* the enforcer's representative

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319 Supra n56.
320 (1871) LR 12 Eq 320.
321 Supra n13, Teetzel J found the statements to be "untrue and were made recklessly and without honest belief in their truth".
322 Supra n12, the court noted the manner in which the enforcer valued his own land upwards to bring the sum up to the value of the complainant's land to justify the exchange. The enforcer knew that the complainant's land was more valuable than his own.
323 Supra n65.
held out the possibility of further financial help to the debtor, the complainants' son-in-law, if the complainants would provide security for his existing debts. In truth, the enforcer had no intention of providing further help. McKay J found that the enforcer's

"...employee did misrepresent, in a material way, the transaction being entered into by the Buchanans ... [further] the bank is liable because of the unconscionable manner in which it used the plaintiffs."

In Hnatuk v Chretian, the enforcer purchased an assignment of a mechanic's lien against the complainant's property and induced him to sell the property at a large undervalue. Knowing of the complainant's financial need, the enforcer represented to him the helplessness of his position in terms that were not justified by the facts. He threatened foreclosure and stressed that the complainant would lose everything unless he sold. The enforcer also said that he was acting as agent for a third party who wanted the land for pasture when in fact he purchased the land himself for a profitable subdivision.

In Harry v Kreutziger the seller, an inarticulate and retiring Indian with little education, agreed to sell his fishing boat for $4,500. In fact, the boat was worth $16,000, largely because of a fishing licence attached to it. The buyer, with full knowledge of the true value of the boat, had induced the sale by assuring the seller, either falsely or recklessly, that he could easily obtain another licence. The bargain was held to be unconscionable, as was the bargain in the Portal Forest case, where the enforcer told the complainant that she wanted the land for a dumping ground when in fact the intention was to build a pulp mill. The precise distinction between misleading statements or conduct constituting advantage-taking for the

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324 Ibid, 637.
325 Supra n42.
326 Supra n63.
327 Supra n19; see also Taylor v Armstrong, supra n265 where the enforcer induced her almost illiterate companion to sign a deed conveying half his property to her by telling him that he was merely executing a new will. The deed was set aside for unconscionability, non est factum and undue influence.
purposes of unconscionability and actionable misrepresentation can be suggested. But suffice it to say that the former is easier to establish than the latter and that even if an actionable misrepresentation cannot be shown, the enforcer conduct/statement complained of may still be a significant constituent of an unconscionable bargain.

(ii) Pressure harassment or threats

In *Harry v Kreutziger*, referred to above, the enforcer obtained the complainant's agreement not only by assurances about obtaining another licence, but also by a process of harassment knowing full well that the complainant was easily intimidated and ill-advised. In *Junkin v Junkin*, the complainant was obviously lacking in aggressiveness, untutored in the law, credulous and unrepresented by a solicitor. The enforcer's solicitor told the complainant that if he did not promptly agree to the sale (at great undervalue), the matter would be litigated at a great cost, so that he would end up with nothing. The solicitor was a large man with a loud strident voice who "brow-beat" the complainant into agreeing to the sale. The complainant broke down and wept after he left. Unfair pressure was intimated by Cooke P in *Nichols v Jessup*. The complainant entered an arrangement which was very much against her interests. When she had refused to sign the contract, the enforcer wrote to her emphasising the help that he had given her, which he detailed, and saying: "If you ever had a friend who cares about your welfare it is me".

In *A & K Lick-A-Chick Franchises v Cordiv Ltd*, the court found that the enforcer

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328 The former involves complainants who are more easily misled than the average reasonable person; see text attached to footnotes 81-83 supra; the former may also not involve a direct statement of fact which is required to make out the latter (ie, it may be a statement of opinion or intention), eg, in *Paris v Machnick* the enforcer merely offered $2,500 implying, although not actually saying, "your land is worth $2,500".
329 Supra n63.
330 Supra n63.
331 Supra n19.
had used "high pressure tactics" which played on the complainants' known weakness in bargaining power. Inter alia, he threatened to open up a competing business across the road from the complainants' business if they would not agree, and he discouraged if not prevented the complainants from obtaining independent advice.

(iii) Initiative and undue haste

In general, if the momentum for the transaction is carried by the enforcer in initiating the negotiations, formulating the terms of the bargain and seeking to conclude the agreement with undue haste, this may be evidence that the enforcer "bulldozed" the complainant into passively accepting such terms or induced the complainant to agree to his/her own loss.\(^{(333)}\) For example, in Waters v Donnelly,\(^{(334)}\) the complainant exchanged his property for a much less valuable livery establishment belonging to the enforcer. In concluding unconscionability, Boyd C found that the enforcer had approached the complainant:\(^{(335)}\)

"... on several occasions and represented that the livery place was the one that he, Waters, ought to have. He played successfully upon Waters' weakness, and \textit{incited a strong desire on the part of the plaintiff to become proprietor of the livery establishment on any terms.} Some of the witnesses describe Waters as 'a man who could be led into a bargain if he took a notion of the thing.'" (emphasis added)

Undue haste is evidence that the enforcer took "surreptitious advantage" of persons unable to judge for themselves\(^{(336)}\) and "snatched"\(^{(337)}\) the bargain from them.\(^{(338)}\) For example, in

\(^{(333)}\) For example, in Harris v Richardson, supra n30, the complainant had offered his life interest as security for a loan. The enforcer declined this but induced the complainant to sell the interest at a substantial undervalue. In the Portal Forest case, supra n19, the complainant had made it clear that he was only prepared to lease his land for a "short-term". The enforcer obtained his agreement to a term of 99 years.

\(^{(334)}\) Supra n12.

\(^{(335)}\) Ibid, 402.

\(^{(336)}\) Chesterfield (Earl of) v Janssen (1751) 2 Ves Ser. 125 (1 Atk 301).

\(^{(337)}\) Blomley v Ryan, supra n1, 385.

\(^{(338)}\) See for example Clark v Malpas, supra n60 where the enforcer called on the complainant taken ill the day before and negotiated the deal. Execution was obtained the next day. The complainant died the day after. In Evans v Llewellin, supra n244, Sir Lloyd Kenyon found that the speed of the transaction meant that the complainant "was taken by surprise; he had not sufficient time to act with caution" or to consult his friends.
Knupp v Bell, the enforcer chose a time when the complainant's son, who had handled all his mother's affairs, was transferred out of town, to negotiate the purchase of the complainant's land at an undervalue. MacPherson said:

"The haste of the plaintiff, I think, was unseemly. He knew, or ought to have known, that Mrs Bell's affairs had for years been done by her son Duncan. The plaintiff, being an old friend and neighbour proposing a transaction with an elderly Mrs Bell who had an obvious tendency to senility, should, I feel, have insisted that she communicate with her son before selling, or that she take other and independent advice."

Thus, haste often goes hand in hand with a failure to recommend or give an opportunity for independent advice. It may also evidence a failure to allow the complainant time to recover from obvious and temporary impairments caused by intoxication or physical injury. In Blomley v Ryan, the court found "the initiative in the transaction was never taken by the" complainant who was besotted with rum during the negotiations, and that the final agreement was:

"... due not to any act of his own will but to his inability to resist Stemm's pressure and eagerness to get the transaction concluded." (emphasis added)

The haste with which the enforcer obtained execution of the agreement was also unseemly. The court found that "unrestrained by any scruples arising from the respondent's pathetic state" the enforcers sought "to bind him before he should have an opportunity of considering what deal he had made...". In a release of claim case, Anderson J accepted the complainant's
... (b) That there was no real bargaining, in the sense that the plaintiff merely accepted the figure suggested by the adjuster. (c) That the settlement was made in haste. "

(i) That she was told that she would have to pay 'the $100 deductible' if she did not sign the release."

Unconscionability was found. In another release of claim case, *Pridmore v Calvert*, the complainant was approached by an insurance adjuster within 48 hours of the relevant accident when she was still suffering from its effects. He assessed her claim "on the spot" without examining the accident site and without conferring with the complainant's doctor. Toy J found that the $200 claimed for her injuries was not advanced by the complainant but was: "

"... deliberately designed by the defendants' insurers to foreclose the possibility of a future claim...."

The release signed by the complainant was set aside.

Sheridan believes that it should not matter which party actually first states the terms of the eventual bargain since this; "

"... does not affect the question whether the stronger has taken advantage of the other's weakness ... advantage can be taken as much of an offer as by offering."

This is borne out in *Riki v Codd* where unconscionability was found despite the offer having come from the complainants. Hardie Boys J found that the enforcer had taken advantage of the complainants' anxiety for money to obtain an immodest contractual benefit. In the circumstances, "he need not have accepted the offer. He could easily have lent them money in the usual way...."

Nevertheless, whether the complainant actively participated in negotiating

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347 Ibid., 719.  
348 Supra n46.  
349 Ibid., 143.  
350 Supra n3, 74-75.  
351 Supra n20.  
352 Ibid., 250.
the eventual agreement is considered one indicator of advantage-taking by the courts. The cases indicate that where the complainants have initiated and/or actively negotiated the bargain, the courts are more likely to find an absence of impairment and improvidence and so reject unconscionability. 353

(iv) Dissuading the complainant from obtaining independent advice

Where the enforcer knows of the complainant's disability and obtains a very advantageous bargain at the expense of that party, evidence that the enforcer dissuaded the complainant from obtaining independent advice reflects adversely on the good faith or conscience of the enforcer, 354 particularly where it is accompanied by other advantage-taking conduct such as unfair pressure 355 or the exacerbation of the complainant's disability. For example, in *Mundinger v Mundinger*, 356 where the husband's maltreatment of his wife had caused her to have a nervous breakdown, the parties made a separation agreement very improvident to the wife. She had consulted a solicitor who expressed serious dissatisfaction with the agreement. When the husband discovered this he flew into a violent rage stating that his solicitor could take care of everything and that it was not necessary for her to be separately advised. She was thereupon induced to dispense with her solicitor.

(v) Use of influential intermediaries

To use an influential intermediary to procure impaired complainants' agreement to their own loss has also been considered unconscientious by the courts. In *Portal Forest Industries Ltd v Saunders*, 357 the court found that Nagy (the enforcer's representative) had simply led the complainant, an Indian who was clearly very naive and unintelligent, "into doing, in substance, what he did not really want to do and of which Nagy was aware". 358 Nagy had

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353 See for example *Harrison v Guest*, supra n151; *Aqua Leisure Ltd v Bannant and Styles*, supra n144; *Cooke v Clayworth*, supra n66; see also generally supra Chapter IIIA(4).

354 See for example *Loe v Tylee*, supra n97, 18.


356 Supra n69.

357 Supra n19.

358 Ibid, 667.
enlisted the aid of a leading citizen of the complainant's town who owned considerable property and had employed the complainant and his brother on occasions. He was "well known to the Indians and seemingly trusted by them". Nagy alleged that she had asked him to obtain the complainant's signature to the agreement because she thought he would assist the complainant. However, Rae J had no doubt that she had done so because of his influence among the Indians and his personal interest in encouraging the pulp mill proposed by Nagy which required a long term lease from the complainant.

The issue of influential intermediaries may also arise in a guarantee situation where there is evidence of some collusion between the enforcer bank and the third party debtor, so that the guarantee from the complainants gives the bank more than a simple security for loans to the debtor; and the bank is aware that the debtor, who actually obtains the complainants' agreement, is in a position to exercise influence over them. For example, in CBA v Amadio, the debtor's company was engaged in a joint business venture with a subsidiary of the bank so the bank had special reasons for keeping the company in business and maintaining an appearance of solvency when the company was clearly insolvent. In using the debtor to obtain the guarantee from the complainants, the bank thus obtained a "double benefit". A similar situation existed in Morrison v Coast Finance Ltd where, to the knowledge of the enforcer, the complainant was induced by two debtors to mortgage her home to secure a cash advance from the enforcer to them. They would in turn hand it back to the enforcer in exchange inter alia for a release of past indebtedness.

(vi) Inconsistency between the contract and prior expressions of intention by the complainant

359 Ibid, 660.
360 Ibid, 666.
361 However, the debtor's relationship with the bank or lending institution is not direct enough for the former to be considered an agent of the latter. For example, see Buchanan v Canadian Imperial Bank of Commerce, supra n65, 634.
362 Supra n4.
363 Supra n8.
One factor noted by the courts as supporting evidence of unfair persuasion is the inconsistency between the contract terms agreed to by the complainant and that party's prior expression of intention in respect of the subject matter of the contract. This may indicate that the enforcer induced or pressured the complainant to do what he/she had not wanted to do by some unfair means. For instance, in the case of *Knupp v Bell*, where the complainant sold her land at an undervalue, relatives gave evidence that it had always been understood and arranged in the family that the land would go to the complainant's son.

(vii) Enforcer knowledge of contractual imbalance

Knowledge on the part of the enforcers that the contract terms are heavily balanced in their favour and/or are very improvident for the complainants has often been noted by the courts in finding unconscionability. Such knowledge may constitute evidence that the enforcer had reason to doubt the complainant's self-protective ability and was thus put on inquiry. It is also evidence of conscious advantage-taking in that the enforcer knowingly obtained an immodest benefit at the expense of one not up to protecting him/herself. In *Harris v Richardson*, the enforcer knew of the complainant's disability. In concluding unconscionability, Herdman J said:

"It is difficult for me to believe that this shrewd experienced money-lender, when he agreed to purchase Harris' annuity ... was not perfectly well aware that he was not only walking on safe ground, but that he was handling an interest in property the true value of which was much in excess of the sum that he proposed to give for it ... although he invited me to believe in [this] transaction ... he was more or less a simpleton, [he] satisfied me that he knew that the property that he was offered had a high potential value."

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364 See for example *Blomley v Ryan* supra n1; *Mundinger v Mundinger*, supra n69; *Portal Forest Industries Ltd v Saunders*, supra n19, 667.
365 Supra n208.
366 Ibid, 468.
367 See this point made also in Chapter IIID(3).
368 See for example *Portal Forest Industries Ltd v Saunders*, supra n19, 661, 668; *Morrison v Coast Finance Ltd*, supra n8, 714; *Harry v Kreutziger*, supra n63, 237; *Waters v Donnelly*, supra n12, 403; *Tweedie v Geib*, supra n54, 323; *Buchanan v CIBC*, supra n65, 634, 638-9; *Bank of Montreal v Hancock*, supra n67, 652; *Growden v Bean*, supra n70, 18; *Gladu v Edmonton Land Co*, supra n17, 692.
369 Supra n30.
370 Ibid, 898-899; this was affirmed on appeal.
Similarly, in *Ayres v Hazelgrove*, where the enforcer "obtained for the paltry sum of forty pounds paintings which were valued at one hundred times more than that which he paid", Russell J concluded that not only was the complainant's disability obvious to the enforcer but he also "knew full well or thought at the time that the [paintings] were likely to achieve a high price". The absence of opportunity afforded to the complainant to obtain independent advice made this an unconscionable bargain. In *Nichols v Jessup*, Cooke P noted on the facts that:

"... the plaintiff, although not setting out intentionally to exploit her, must have realized at some stage that there was a real imbalance in the arrangement; or that at the very least, especially in the light of his work as a real estate agent, he ought to have realized that there was such an imbalance. In an appellate court it certainly seems glaring enough from the evidence."

Knowledge of contractual imbalance is not in itself unconscionous. As Wilson J cautioned:

"Not every man who knowingly buys a property for less than its worth is to be penalised. Trade and commerce survive by the application of this idea and to buy in anticipation of a profit on resale is perfectly respectable. What must be controlled is the victimisation of the ignorant by the knowing...."

Therefore, knowledge of contractual imbalance only becomes significant where the enforcer also knows of the complainant's impairment. However, such knowledge of impairment may be inferred from an obvious and gross contractual imbalance. Thus, the role played by

371 Supra n47.
372 Ibid.
373 Ibid.
374 Supra n19.
375 Ibid, per Cooke P, 11-12.
376 *Hnatuk v Chretian*, supra n42.
377 See supra Chapter III.D(3).
contractual imbalance in finding the various elements of unconscionability should not be underestimated.\textsuperscript{378}

(2) **Bargain Insulation**

To insulate a bargain from judicial interference once a presumption of unconscionability has been raised, the enforcer needs to show either that:\textsuperscript{379}

"... the bargain was fair, just and reasonable ... or ... that no advantage was taken."

(a) **Insulating enforcer conduct**

To show that no advantage was taken involves the enforcer "proving that everything has been right and fair and reasonable on his part"\textsuperscript{380} and that "his conduct throughout was scrupulously considerate of the other's interests".\textsuperscript{381}

(i) Absence of advantage-taking conduct

First, the enforcer must establish an absence of the indicia of advantage-taking identified above. They may point to evidence that in fact it was the *complainants* who took the initiative in the transaction;\textsuperscript{382} that they took an active part in the negotiations;\textsuperscript{383} that there was no undue haste nor unfair pressure put on them, and that they had ample time to consider the bargain and obtain independent advice.\textsuperscript{384} The enforcers may also be able to show that they

\textsuperscript{378} See infra Chapter IV.
\textsuperscript{379} *Morrison v Coast Finance Ltd*, supra n8, 713; see also *Portal Forest Industries Ltd v Saunders*, supra n19, 670.
\textsuperscript{380} *Waters v Donnelly*, supra n12, 401; *Slator v Nolan* supra n24, 386.
\textsuperscript{381} *Knupp v Bell*, supra n208, 473; *Mundinger v Mundinger*, supra n69, 610.
\textsuperscript{382} *Harrison v Guest*, supra n151; *Cooke v Clayworth*, supra n66; *Gissing v Eaton*, supra n37; *Alec Lobb*, supra n9; *Hart v O'Connor* [1985] 1 NZLR 159.
\textsuperscript{383} *Aqua Leisure Ltd v Bammant & Styles*, supra n144; *Riley and Fifield v Jones*, supra n74.
\textsuperscript{384} *Alec Lobb*, supra n9; *Gissing v Eaton*, supra r37; *Hart v O'Connor*, supra n382; *Harrison v Guest*, supra n151; *O'Neil v Arnew*, supra n126; *Cooke v Clayworth*, supra n66.
were not aware of obtaining a particularly good bargain.385 For example, in *Alec Lobb* (Garages) Ltd v Total Oil GB Ltd,386 Millett QC of the Chancery Division found:387

"... nothing whatever for criticisms in the defendants' [enforcer] conduct.... They did not press Mr Lobb for a quick decision; there was no undue haste. On the contrary, it was Mr Lobb and his solicitors who urged speed; the defendants were somewhat dilatory.... They were unenthusiastic; they did not regard the deal as particularly favourable to them ... they had the site professionally valued, and were advised that they were paying a realistic price. From first to last, there is not a trace, in any of their internal memoranda, of any appreciation of the fact that they were getting a bargain. They had no reason to believe, and I am satisfied that they did not believe, that they were acquiring the site at an undervalue."

The allegation of unconscionability was rejected. These findings and conclusion were upheld on appeal.388

In *Harrison v Guest*,389 Lord Campbell found nothing in the conduct of the purchasing enforcer "in the slightest degree to be blamed".390 The vendor had made the offer and there was ample evidence that he knew exactly what he was doing. The offer was not "snapped up" by the purchaser who told the vendor to take time to consider it and to consult someone else. Thus there was not "the smallest colour for setting it aside".391 Similarly in *O'Neil v Arnew*,392 Krever J found:393

"... no haste, or pressure in the signing of the agreement.... The plaintiffs, although undoubtedly anxious to obtain the property at a good price, did not take advantage of the defendant, or act in bad faith in any way."

385 *Gissing v Eaton*, supra n37; *Alec Lobb*, supra n9; *Errington v Martell-Wilson*, supra n58.
386 Supra n9.
387 Ibid, 962.
388 Supra n31, 313.
389 Supra n151.
390 Ibid, 491.
391 Ibid, 492.
392 Supra n126.
393 Ibid, 689-90.
In other cases, a combination of the factors mentioned led the courts to conclude that the enforcers had not been guilty of any "sharp practice",394 "intimidation or fraud or ... imposition of any kind".395

The absence of advantage-taking noted in these cases usually combines with a lack of operative disability,396 ignorance of any operative disability on the part of the enforcer,397 or absence of substantive unfairness398 to bring about a finding of no unconscionability. However, it would seem that where disability, enforcer knowledge of that disability and improvidence are present, the bargain can still be insulated from a finding of unconscionability if the enforcer not only refrains from advantage-taking conduct, but also takes additional action. The nature of these actions can be deduced from judicial statements regarding what the enforcer ought to have done in these circumstances. Effectively it amounts to taking action on behalf of the complainants for their protection.

(ii) Recommending independent advice

The role of independent advice for the complainant as it reflects on the enforcer's conscience is not clearly presented by the courts. Where the complainant has had advice but the court finds that advice to be inadequate,399 it is hard to see how the enforcer's conscience should be adversely affected by that inadequacy400 so that unconscionability is found. If the enforcers are aware of any inadequacy in that advice, then it is understandable that it would be

394 Multiservice Bookbinding Ltd and Others v Marden, supra n37, 503.
395 Gissing v Eaton, supra n37, 59.
396 Gissing v Eaton, supra n37; Multiservice Bookbinding Ltd and Others v Marden, supra n37; Harrison v Guest, supra n151.
397 Errington v Martell-Wilson, supra n58.
398 Cooke v Clayworth, supra n66; Gissing v Eaton, supra n37; O'Neil v Arnew, supra n126.
399 For discussion of what constitutes adequate independent advice see supra section C in this chapter.
400 See for example Grealish v Murphy, supra n50, where Gavan Duffy J asks this very question but avoids giving a direct reply by saying that unconscionability is primarily a protective jurisdiction.
unconscientious for them to contract with the complainants without further action. However, they will usually have no knowledge of any such deficiency in the relevant advice, unless knowledge of contractual imbalance should itself constitute a reason to know or suspect that the advice given to the complainant is inadequate. Accordingly the enforcers' conscience may be affected if they should have realised or suspected from the complainants' consent to a bargain so obviously improvident for them, that any advice received by them may have been deficient. Consistently:

"If advantage was being taken the mere existence of independent advice would not necessarily change the transaction. All the circumstances must be considered."

Again, the role of substantive unfairness, in giving rise to inferences of various procedural improprieties said to make up the unconscionability package, must be noted.

Where the complainant has not had independent advice, some courts hold that the enforcer should recommend and give the opportunity to the complainant to obtain independent advice. If this is not done, then the enforcer's reliance on the impaired complainant's consent cannot be said to be fair, just or reasonable. The bargain would be set aside. However, some cases suggest that a mere recommendation to obtain advice is insufficient. Rather the enforcer should insist on advice and even go so far as to refuse to contract with the complainant without it. In Evans v Llewellyn, undue haste in concluding the bargain deprived the complainant of the

401 For example in Blomley v Ryan, supra n1, the enforcers were present when the complainant was being advised by his solicitor and therefore, it is submitted, must have known that the advisor was ignorant of the complainant's impaired condition; the material facts of the transaction and negotiations, and that the complainant could not comprehend the albeit inadequate, advice he was receiving. See also Loe v Tylee, supra n97.

402 It is suggested that this is the case in Grealish v Murphy, supra n50 and Nichols v Jessup, supra n19, where unconscionability were found; cf Hart v O'Connor, supra n382, where the substantive unfairness was not serious enough to raise such an inference.

403 Growden v Bean, supra n70.

404 See for example Blackhouse v Blackhouse, supra n215, 251-2; Ayres v Hazelgrove, supra n47.

405 For example in Morrison v Coast Finance Ltd, supra n67.

406 Supra n244.
time necessary to act with caution. According to Sir Lloyd Kenyon MR, the enforcers:

"... should not have permitted the man to have made the bargain without going to consult his friends; there was not sufficient locus penitentioe; there was no person present to give him advice ... if the plaintiff had in fact gone back and consulted his friends, I should not have rescinded the transaction." (emphasis added)

If "due caution [had been] used in making him aware of the consequences", the bargain, though substantively unfair to the complainant, would theoretically stand. *Knupp v Bell* is another case where it was held that the enforcer should:

"... have insisted that she [the complainant] communicate with her son before selling, or that she take other and independent advice."

And in *Royal Bank of Canada v Hinds*, Stark J held it:

"... incumbent on the bank to satisfy itself that the customer was independently advised."

In *Harris v Richardson*, Adams J considered it:

"... very unfortunate that ... [the enforcer's solicitor] knowing as much as he did, thought it unnecessary to warn the respondent that he should consult an independent solicitor, and even to go to the length of refusing to complete the transaction until he had done so." (emphasis added)

If this had been done "the parties would have been placed 'at arm's length" and any bargain

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408 Ibid, 340.
409 Supra n208; see similar facts in *Ayres v Hazelgrove*, supra n47.
410 Ibid, 475.
411 Supra n71, approved and applied in *Bank of Montreal v Hancock*, supra n67, 648.
412 Ibid, 430.
413 Supra n30.
414 Ibid, 920.
415 Ibid, 920-921.
concluded enforceable.

Such a rigorous position may run into practical problems particularly as Megarry J
concedes, "Nobody, of course, can be compelled to obtain independent advice...".\textsuperscript{416}
Alternatively, advice may not be readily available.\textsuperscript{417} In general it seems that where advice is
recommended by the enforcer and obtained by the complainant, then the question becomes one
of the adequacy of that advice and the enforcer's awareness of any inadequacy. If, however,
advice is recommended but not obtained by the complainant, this will not necessarily bar relief
to the complainant nor absolve the enforcer of further action and unconscionability may
nevertheless be found.\textsuperscript{418} This is justifiable on the basis that although advice was
recommended, the enforcer nevertheless knows that the complainant's situation of impairment
has not changed, having not obtained the advice. When this occurs, it seems that the enforcers
should themselves "bring to the notice of that other party the true nature of the transaction",\textsuperscript{419}
to ensure its enforceability. Thus, although silence will not amount to misrepresentation,\textsuperscript{420}
and there is no general duty to disclose important information bearing on the bargain nor its true
nature, a contracting party may nevertheless have to make such disclosure in certain
circumstances to ensure that bargain is not set aside for unconscionability.

(iii) Giving advice

On the facts of \textit{Cresswell v Potter},\textsuperscript{421} Megarry J commented that:\textsuperscript{422}

"It would not have been very difficult to send to the plaintiff a short
covering letter which explained that by signing the release the plaintiff
would be giving up her half share in Slate Hall to the defendant in
return for nothing except an agreement by him that she would never
have to pay anything under the mortgage, adding that she ought to

\textsuperscript{416} \textit{Cresswell v Potter}, supra n81.
\textsuperscript{417} This was the case in \textit{Portal Forest Industries Ltd v Saunders}, supra n19.
\textsuperscript{418} This was the case in the following decisions: \textit{Moffat v Moffat}, supra n4; \textit{K v K}, supra n69; \textit{Stratton v
Stratton}, supra n62; \textit{Junkin v Junkin}, supra n63.
\textsuperscript{419} \textit{Cresswell v Potter}, supra n81, 259.
\textsuperscript{421} Supra n81.
\textsuperscript{422} Ibid, 259.
consider getting independent advice before signing the document. If *in the teeth of that information* the plaintiff had executed the release without obtaining such advice*" (emphasis added)

the contract could not be said to be unconscionable. The enforcer's failure "to explain the harshness of the release to the plaintiff"423 contributed to the finding of unconscionability in *Pridmore v Calvert*. And, in *CBA v Amadio*,424 where the bank had reason to suspect that the complainants misunderstood the true terms of the agreement:425

"... the bank was guilty of unconscionable conduct by entering into the transaction without disclosing such facts as may have enabled the respondents to form a judgment for themselves and without ensuring that they obtained independent advice." (emphasis added)

"... [the bank] was obliged either to ensure that the Amadios understood what they were doing or to advise them to seek independent advice...."426

The court felt that if the Amadios' liability had been limited in amount and duration as they believed and the bank had informed them of the true financial position of the debtor company, then427

"... it would be strongly arguable that the guarantee mortgage could not properly be said either to have resulted from their special disability or to be other than fair, just and reasonable."

The complainants would have entered the contract with their "eyes open", and the enforcers would have placed the complainants "at arm's length".

An even more onerous requirement for bargain insulation was put forward by Herdman J. He said that the enforcer's obligation to show that no undue or improper advantage was taken:428

423 *Pridmore v Calvert*, supra n46, 143.
424 Supra n4.
425 Ibid, 417.
426 Ibid, 418.
427 Ibid, 427.
428 *Harris v Richardson*, supra n30, 899.
"... can only be discharged by establishing not only that Richardson [the enforcer] made full disclosure of all relevant facts and of the rights to which they gave rise, but also that the plaintiff [the complainant] had independent and competent advice from a person having full knowledge of those facts and rights, and, in this case, it being a case of purchase, that he received adequate value." (emphasis added)

Such cumulative requirements may seem unduly onerous. However, it is suggested that it accurately describes the requirements in practice. For although cases have suggested that it is theoretically possible to insulate a one-sided bargain by recommending advice and/or making the necessary disclosures about the transaction as mentioned, in practice there have been no cases where the presumption of unconscionability has been rebutted at this stage by proving sufficient insulating conduct. It seems, therefore, that the enforcer is more likely to succeed if the bargain itself is shown to be not particularly improvident or unfair to the complainant.

(b) A fair, just and reasonable bargain

It has been noted that where the challenged bargain is found to involve no serious improvidence to the complainant, courts are generally reluctant to find, and certainly will not infer, that the procedural requirements of disability, inadequate advice and enforcer knowledge are satisfied. Therefore, such cases will usually not reach the stage of a presumption being raised and the enforcer being required to rebut it.

However, even where independent evidence of these procedural requirements exists, proof of a lack of improvidence will usually prevail against a finding of unconscionability. As Walton J explained:429

"... even in the case of a dealing with an expectant heir, in relation to which equity being determined as far as possible not 'to feed riot' always imposed its strictest obligations, a bargain at a fair price would always stand.... If the price paid, although low, is one which could legitimately be put forward [it] is not, if the word is to have any meaning at all, properly to be stigmatised as 'unconscionable', nor, indeed, even 'unfair'."

For instance, in Riley and Fifield v Jones,430 the complainant under disability was described as

430 Supra n74.
a "pathetic and inadequate man". He set fire to his own home and, without independent advice, agreed to sell the remains of the property to his neighbour who, it is argued, must have been aware of or at least suspected the complainant's impairment. Hardie Boys J held that:

"If the purchaser [enforcer] shows that the consideration was adequate and the transaction one which parties of equal bargaining power both properly advised might well have entered into, then he is entitled to have the contract enforced."

Since he found that the price agreed upon was not only nominated by the complainant but was also "entirely fair and adequate", the bargain was enforced.

In the same manner, unconscionability was rejected in Haverty v Brooks where the seventy-eight year old complainant had been in a mental hospital and relatives gave evidence of his confused, childish and biddable state. McLoughlin J distinguished the case from Grealish v Murphy involving similar circumstances where unconscionability was found. The factor which made the crucial difference was that this "was not an improvident transaction".

Lastly, in Laderoute v Laderoute, Goodman J found that "the consideration given by the defendant was not inadequate". He therefore concluded that no onus lay on the enforcer to show the absence of an unconscionable or unfair bargain. In any case he expressed himself to be "satisfied on the evidence that, in fact, it was not".

Thus while some cases discuss substantive unfairness in the context of raising the presumption of unconscionability, others apply it at the rebuttal stage. Either way, its

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431 In finding an absence of such knowledge it is suggested that Hardie Boys J was influenced by the lack of perceived improvidence in the bargain to the complainant.
432 Supra n74, 17.
433 Supra n145.
434 Supra n50.
435 Supra n145, 220.
436 Supra n126.
437 Ibid, 440.
438 Ibid, 441.
439 See for example Harris v Richardson, supra n30, 899, 903; Morrison v Coast Finance Ltd, supra n8, 713; Portal Forest Industries Ltd v Saunders, supra n19, 670.
absence will usually determine the issue of unconscionability in the negative.

In Chapter II, the observed and proposed burden of proof for unconscionability was rationalised in *procedural* terms in line with the judicial justification for its intervention in these cases. Chapter III has seen each element of that burden of proof "in action". Their metes and bounds have been discussed, and many examples given in an attempt to understand how the courts have, and probably will act in the circumstances of any particular case. What the reader will have observed, inter alia, is the all pervading influence of *substantive unfairness* which can, and often does, make its presence felt at every stage of the unconscionability inquiry. In the majority of cases where no clear evidence of procedural ills (complainant disability, inadequacy of advice and enforcer knowledge) exist, the courts fall back on substantive unfairness as the primary indicator of unconscionability. In the next chapter, the writer puts forward a view of unconscionability based largely on this judicial concern for unfair exchange.
The writer argues in this chapter that judicial concern with substantive unfairness plays a more active role in unconscionability than the courts have been prepared to recognise openly; so much so, that unconscionability can largely be seen in these terms. This thesis is supported by:

A. Judicial qualifications on the general rule disavowing concern with substantive unfairness: it is submitted that these qualifications effectively swallow up the rule.

B. Analysis of the procedure-substance distinction: it is submitted that the judicial concern with substance has been obfuscated, whether deliberately or unconsciously, by the judicial rhetorics of procedural concerns. In particular, it is argued:

   (1) that the procedural concerns, and hence requirements, can only be satisfactorily explained by a prior foundational concern with unfair substance, and

   (2) that the presence or absence of operative substantive unfairness will largely determine whether the procedural requirements, said to be the necessary constituents of unconscionability, are satisfied in any case.

C. The observed dominance of substance over procedure: it is submitted that where evidence as to procedure and substance conflict, substance will usually prevail.

A. JUDICIAL EXPLANATION OF THE ROLE OF SUBSTANTIVE UNFAIRNESS

Judicial insistence that unconscionability is aimed at procedural defects in the bargaining process is balanced by an equally vehement insistence that the fairness of a bargain's substance is not the proper concern of the courts. In the words of Patrick Atiyah:¹

"It has for many years, even centuries, been part of the traditional dogma of contract law that the adequacy of the consideration is immaterial to the validity of a contract. It is for the parties to make their own bargain, not for the courts. Each party to a contract must himself decide how much the other's performance is worth to him, and then decide whether to enter into the contract, yea or nay. If the contract is concluded then it must be assumed that each party is content with his bargain, or he would not have made it. There is simply no room for any inquiry into the fairness of the exchange." (emphasis added)

If parties having contractual capacity freely make a bargain then that bargain must be fair by definition, at least as far as the law is concerned. An apparently one-sided bargain is, thus, no ground for setting it aside. In unconscionability, the courts emphasise this by rejecting contractual imbalance as the motivation for judicial intervention. However, as noted, the majority of cases have included contractual imbalance in the formal burdens of proof. Only three cases appear to take a contrary position. Two of these decisions state that inadequacy of consideration is not strictly essential, but this is because:

"Notwithstanding that adequate consideration may have moved from the stronger party, a transaction may be unfair, unreasonable and unjust from the point of view of the party under disability."

Thus, far from rejecting the need for contractual imbalance, these cases suggest a concern which goes beyond objective inadequacy of consideration to the subjective benefit of the bargain for

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2 See dicta to this effect in Alec Lobb (Garages) Ltd and Others v Total Oil GB Ltd [1985] 1 All ER 303, 313; Blomley v Ryan (1954-56) 99 CLR 362, 374; Longmate v Ledger (1860) 2 GIFF 157, (66 ER 67); Multiservice Bookbinding Ltd v Marden [1978] 2 All ER 489; Fleury and Fleury v Homocrest Dairy Co-op (1958) 15 DLR (2d) 161; Hart v O'Connor [1985] 1 NZLR 159, 166; O'Connor v Hart [1983] NZLR 281, 289. See also Cope, Duress, Undue Influence and Unconscientious Bargains (1985), para 261; Keeton and Sheridan, Equity (1976) 2nd ed, 227; Sheridan, Fraud In Equity (1956), 125ff; Meagher, Gummow, Lehane, Equity Doctrines and Remedies (1984) 2nd ed, para 1604; Hall, P M, Unconscionable Contracts and Economic Duress (1985), para 120.

3 See this point made supra Chapter I, text accompanying fns18-19.

4 See supra Chapter IB(3).

5 Commercial Bank of Australia (CBA) v Amadio (1983) 46 ALR 402, 423; see Cope, supra n2, para 262; Riley and Fifield v Jones, High Court of Christchurch, A 224/81, 17 November 1983, Hardie Boys J, 17.

6 CBA v Amadio, supra n5, 423.
the complainant. The comment of Fullagar J in Blomley v Ryan, however, is more problematical. He said:

"It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain. In Cooke v Clayworth, in which specific performance was refused, it does not appear that there was anything actually unfair in the terms of the transaction itself." (emphasis added)

This is an inaccurate presentation of Cooke v Clayworth. Sir William Grant indeed found nothing in the bargain itself which, 

"...necessarily discovers absence of judgment in the person making, or a degree of unfairness in those accepting it."

This was not, however, a case in which specific performance was refused to the enforcer. Rather, the complainant (plaintiff) sought but failed to have the agreement declared fraudulent and void. The Judge said that in view of:

"... this state of evidence I cannot possibly hold that the plaintiff was by contrivance and management drawn to drink; or that any unfair advantage was taken of his intoxication to obtain an unreasonable bargain ... I can do nothing but dismiss the bill without costs...." (emphasis added)

It is difficult to see how Fullagar J's misunderstanding of the case arose. But, clearly, Sir William Grant saw the existence of an "unreasonable bargain" as a necessary pre-condition to judicial intervention for unconscionability. For, having found none, he refused to set the bargain aside.

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7 See supra Chapter IIIB on the meaning of contractual imbalance.
8 Supra n2.
9 Ibid, 405.
10 (1811) Vest Jun 12 (34 ER 222).
11 Ibid (223).
12 Ibid (224).
Despite a judicial disavowal of concern with a bargain's substance, the courts, nevertheless, recognise it as relevant to the issue of unconscionability in two ways. First, it:  

"...may be important in ... supporting the inference that a position of disadvantage existed, and as tending to show that an unfair use was made of the occasion."

That is, it is evidence of disability and advantage-taking, procedural elements which are presented as the proper concerns of unconscionability. Substantive unfairness is said to be "a note of fraud" but no more. It will not amount to proof of procedural improprieties.

To describe the role of substantive unfairness in unconscionability as being so limited is, however, contradicted by dicta to the effect that where substantive unfairness is so gross as to be "heard of with uplifted hands and exclamations of astonishment", the contract may be set aside for unconscionability. Since the courts reject any direct concern for unfair substance, the justification for such a position must be that substantive unfairness, if gross enough, may indeed constitute conclusive evidence of procedural improprieties rendering the bargain unconscionable.

Thus where the bargain:

"...whose very terms speak for themselves to the effect that somebody has been dealt with in such a way as to shock the conscience of the Court," (emphasis added)

where:

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13 Blomley v Ryan, supra n2, 405; Griffith v Spratley (1787) 1 Cox Eq Cas 383, 391.
14 Griffith v Spratley, supra n13.
15 Waters v Donnelly (1885) 9 OR 391, 397.
16 Clark v Malpas (1862) 4 De GF & J 401 (54 ER 1067).
17 See dicta to this effect in Alec Lobb (Garages) Ltd v Total Oil GB Ltd, supra n2, 961; Multiservice Bookbinding Ltd v Marden, supra n2, 502; Calumsky and Karaloff v Karaloff (1946) 2 DLR 513, 519; Black v Wilcox [1976] 70 DLR (3d) 192, 197; Hart v O'Connor, supra n2, 166.
19 Gissing v Eaton (1911) 25 OLR 50, 60, Garrow :A quoting Borrell v Dann (1843), 2 Hare 440, 450.
"...the inadequacy of consideration is so gross as of itself to prove fraud or imposition on the part of the purchaser..."

the court is entitled:20

"...to infer from this, that some scrt of fraud was used to draw the other party into the bargain, it may be such an ingredient of fraud as to make the court presume more than is in actual proof...".

However, Eyre LCB said he would:21

"...never quarrel with a Court of Equity which makes such an inference, where the inadequacy is so gross, as makes it impossible that the bargain could have been fairly made."

Fraud or imposition by the enforcer is said to be "the essence of the objection to the contract in such a case".22 Similarly, Cooke P concurred with Lord Macnaughton's view that:23

"...harsh and unconscionable means unreasonable and not in accordance with the ordinary rules of fair dealing. And that the rate of interest [price] may be so monstrous to show that by itself."

The general judicial position that procedural, and not substantive, unfairness is the basis of intervention for unconscionability must be seen as severely qualified by the reasoning that substantive unfairness is nevertheless a relevant consideration in determining unconscionability because it is evidence, sometimes *conclusive* evidence, of the existence of *procedural* unfairness. Thus, Hart LC frankly concedes that:24

"... the Court has got at it [inadequacy of price] by indirect means - it has been astute, as it is said to infer fraud from inadequacy, so as to raise it indirectly into a ground for relief."

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20 *Griffith v Spratley*, supra n13, 389; ref Sheridan, supra n2, 129.
21 Ibid.
22 *Gissing v Eaton*, supra n19, 60.
23 *Nichols v Jessup*, CA 56/85, 26 September 1986, per Cooke P, 5.
24 *Drought v Eustace* (1828) 1 Mol 328, 335.
B. THE PROCEDURE-SUBSTANCE DISTINCTION: A GORDIAN KNOT

To recap, the procedure-substance distinction was popularised by Arthur A Leff in his seminal article "Unconscionability and the Code - The Emperor's New Clause". Procedural unfairness means some impropriety in the contracting process which the common law courts have defined to include complainant disability, inadequacy of advice and enforcer misconduct. Substantive unfairness refers to an impropriety in the resulting contract.

This distinction, readily made in theory, is usually difficult to apply in practice. As noted, courts justify their concern for substantive unfairness on the basis that it is evidence of some other procedural evil which is the legitimate target of unconscionability. The writer argues that this explanation is unconvincing and can only work on the assumption that substantive unfairness is itself an evil to be prevented. For it is submitted that the courts would not care about or even be able to define the procedural circumstances rendering the bargain unconscientious if substantive unfairness was not regarded as wrong of itself.

The requirements of procedural fairness are often presented as "givens", which are known but purposely not stated lest cunning would-be wrongdoers circumvent them. Constructive fraud designates breaches of the standard of conduct required by courts of equity. The detailed outworkings of this "standard" are not announced prospectively. Its only visible outworking is when a breach is held to have occurred. The judicial justification runs something like this: "procedural unfairness is a flexible concept which we refuse to define, but we know it when we see it". Without taking account of substantive unfairness, this is an implausible and unacceptable position. It is argued that the framing of fair (and not unconscionable) procedure

26 See for example O'Connor v Hart, supra n2, 289.
27 See comments to this effect in Fort, J C "Understanding Unconscionability: Defining the Principle" (1978) 9 Loyola U of Chicago LJ, 765, 798; Atiyah, P S, supra n1, 5.
28 Sheridan, supra n2, Chapter I.
29 See supra Chapter IIC(2).
is materially influenced by the fairness of the bargain which is likely to result from it. Accordingly, special disability, inadequate advice and unconscientiousness in the enforcer's conduct are, in reality, judicially identified circumstances which most frequently result in contractual imbalance and for that reason, policed. These procedural requirements must be seen as substantively inspired and substantively orientated.

In addition, judicial fact-finding of these "procedural" requirements examined in Chapter III throws further light on the central role of substantive concerns in unconscionability. These procedural concerns are, par excellence, matters of degree. To determine whether they exist to the sufficient degree, for the purposes of unconscionability in any given case depends on the courts being able to fix the point (short of incapacity) at which impairment warrants the protection of the court; to distinguish (short of actual deceit or misconduct) acceptable enforcer behaviour from the unacceptable; and to determine (short of negligence) when advice given to the complainant has been inadequate.

The writer contends that these lines cannot be drawn prospectively as a matter of logic or policy. Neither can they be drawn retrospectively, for an examination of the cases shows that these procedural elements exist in dramatically varying degrees both in the cases which result in a finding of unconscionability and in those which do not. It is submitted that the way in which courts determine whether a procedural requirement is satisfied cannot be adequately understood or explained without resort to considerations of the fairness of the bargain.

The writer's thesis will now be examined as it applies to each of the procedural requirements of unconscionability.

(1) Special Disability

It is submitted that courts are only concerned with special disability because they are concerned with the fairness of the resulting bargain. Although the issue is presented as one of the presence, absence or degree of a contracting party's bargaining ability, the issue cannot be resolved without further reference to the question of "ability to do what?" and the potential
harm or injury involved if the person is deficient in that ability. What the courts are interested in is not capacity or ability per se. Such a "thing" does not exist. Rather, it is capacity or ability to make a fair and reasonable bargain. The potential injury or harm is loss or improvidence to that party in the bargain made.30

Again, help can be derived from the related law on minors and the mentally incompetent. The contracts of such people are subject to judicial review because they are seen as generally incapable of making sensible and/or voluntary decisions. Therefore, they need to be protected from the injury which they may have invited in their state of undeveloped or false consciousness.31 However, the contracts of such people are not prima facie void. Voidability is, in practice, preconditioned on loss or injury to the minor32 or mental incompetent33 and at their option. That is, judicial intervention rests, not merely with youth or mental incompetency, but usually requires that some injury is occasioned (that is, some contractual improvidence suffered).

The same applies to special disability in the context of unconscionability. For it is said that:34

"The classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible well-advised person or party would have accepted." (emphasis added)

The complainant's impairment can only be defined in terms of the harm which may result. In contract, the harm referred to is that which results from the complainant's preparedness to

31 Ibid, 633.
32 See for example s6(2) Minors Contract Act 1969 (NZ) which specifies that a court may enforce the contract, or enforce it on term if it finds the contract to be fair and reasonable, but may cancel the contract if it is not fair and reasonable. Also s5(2).
33 The primacy of substantive unfairness in contracts set aside for mental incompetency is discussed by Green in "Proof of Mental Incompetency and the Unexpressed Major Premise" [1944] 53 Yale LJ 271.
34 Browne-Wilkinson J in Multiservice Bookbinding v Marden, supra n2, 502.
accept such improvident terms. Thus, it is unsatisfactory to justify relief in terms of the
complainant's impairment to the exclusion of substantive unfairness, since the courts would not
care about the impairment or even be able to describe it unless they were first concerned about
substantive unfairness.

In determining whether the complainant's self-protective ability has indeed been impaired
to the required degree in any given case, the courts will always have the advantage of hindsight.
They already know whether the complainant has suffered contractual improvidence or not, and
the degree of improvidence involved. Where the substantive unfairness is serious, the courts
will readily find operative disability. Conversely, where no serious contractual imbalance
exists, the courts tend to be reluctant to find operative disability. Thus a sliding scale is
employed which is roughly in inverse proportion to the degree of unfairness perceived in the
bargain. For example, in a case involving a disparity of values to the tune of $48,000, the
judge seems to "scrape the bottom of the barrel" to find the operative disabilities of lack of
intelligence and muddleheadedness in a registered nurse who owned and ran a block of flats.
Similarly, where a one-sided bargain can be shown, old age is often seized on as an operative
disability. However, one complainant's eighty-five years of age was of no avail where the
court found no serious contractual imbalance at the time of contracting.

(2) Independent Advice

"It is not the doctrine of the Court that a man cannot contract without his
solicitor at his elbow...".

35 Although, of course, they will if there is sufficient independent proof of serious mental incapacity or lack
of comprehension. Where such independent evidence is absent, the courts will generally infer disability
from any serious substantive unfairness in the bargain concluded. Obviously where substantive unfairness
is lacking, the inference will not be made; see supra Chapter IIIA(3)(d).

36 Nichols v Jessup, High Court of Auckland, A 1381/83, 21 March 1985, Prichard J.

37 Aqua Leisure Ltd v Bammant and Styles, Civil Division CA, 1977, A62, 15 May 1980, Lexis; see also
Laderoute v Laderoute (1978) 81 DLR (3d) 433; O'Neil v Arnew (1976) 78 DLR (3d) 671; Harrison v
Guest (1860) 6 De GM & G 424 (11 ER 517); Calumsky and Karaloff v Karaloff, supra n17.

38 Hnatuk v Chretian (1960) 31 WWR 130, 132.
Why, then, should adequate independent advice be required to save contracts made in these circumstances from a finding of unconscionability? The requirement must be seen as premised on the complainants' impairment in self-protective ability and consequent need for protection from someone else, to prevent the threatened harm of loss in the transaction.

Not only is the requirement of advice largely a function of the judicial desire to relieve from contractual imbalance; so, it is contended, is the judicial prescription of what constitutes adequate advice. The courts express concern about the advisers' qualifications, competency, knowledge of the material aspects of the transaction, the negotiation process and the complainants' impairment. But significantly, they are also concerned about the propriety of the actual advice given and whether this "proper" advice has been effectively conveyed to and understood by the complainant so that the complainant is actually helped by it. Such judicial concerns reveal a preoccupation with the results of advice rather than merely with the form of advice, with substance rather than with procedure.

Judicial treatment of the advice factor demonstrates how concern with substantive unfairness can lead the courts to develop stringent requirements ostensibly geared towards regulating the bargaining process. However, the way in which that bargaining process is regulated is in turn geared towards achieving a fair bargain, and avoiding an unfair bargain for the complainant.

In applying this element, it has been noted that the courts have shown themselves to be very reluctant to regard as "adequate", in all the different ways required, advice which has nevertheless resulted in serious improvidence for the complainant.

39 In general advice will only be proper or competent if it counsels the complainant against accepting any improvident terms. However, if the complainant refuses to follow the advice, this may simply be treated as evidence of the extremity of the complainant's impairment.

40 See supra Chapter IIIC for a discussion of these requirements.

41 Ibid.
(3) **Enforcer Misconduct**

A similar thesis is contended in respect of the need for enforcer knowledge of the complainant's disability and unconscientious conduct in the light of that knowledge. The reason why this knowledge is significant is because the enforcer is more likely to attempt to obtain a larger advantage from the transaction than is usual at the expense of the complainant. Consistently, courts have often referred to the enforcers' knowledge that they were obtaining an unduly beneficial bargain (and/or that the bargain was very improvident for the complainant) as bearing adversely on the enforcers' conscience. The reason why this knowledge is significant is because the enforcer is more likely to attempt to obtain a larger advantage from the transaction than is usual at the expense of the complainant. Consistently, courts have often referred to the enforcers' knowledge that they were obtaining an unduly beneficial bargain (and/or that the bargain was very improvident for the complainant) as bearing adversely on the enforcers' conscience.42 Similarly, it can be said that courts are concerned with advantage-taking enforcer conduct, such as haste, unfair pressure or harassment, and use of influential intermediaries, because these tactics may further impair the complainant's decision-making process with the attendant risk of loss in the transaction. The judicial prescription for placing the complainant at "arm's length" - to insist on independent advice and/or to inform the complainant of the true nature of the bargain - must also be seen as targeted at avoiding substantive unfairness.

Thus, although courts declare themselves to be policing the standard of acceptable conduct in contracting, the standard required is result orientated. The enforcer is required to behave in such a way as to minimise the chances of an unfair outcome for the complainant. A "handicap" is effectively imposed on the stronger party in the "boxing match" of contract because the judicial umpire does not want to see the scrawnier, weaker party too bloodied up in the fight. The stronger must not move too fast or resort to any tricky moves; the weaker is entitled to a coach who can yell instructions and warnings from the sideline, or, if necessary, go into the fight on his/her behalf. Any deficiency in the coach could result in a mismatch. If the weaker party is without a coach, the stronger should insist that he/she gets one and even refuse to fight unless one is obtained. Alternatively, the stronger could instruct and warn the weaker, tie

42 See supra Chapter IIIE(1).
43 Ibid.
44 See Chapter IIIE(2)(a).
45 Ibid.
up one arm and one leg, and make sure that the final score is fairly even.\textsuperscript{46} It is argued that this scenario is not too far from the real workings of the unconscionability jurisdiction.

It is difficult to accept that such judicial prescription of "proper" conduct is motivated other than by its concern to avoid a one-sided result. Unconscionability speaks the language of restraint of power; the power to obtain a grossly immodest benefit at the expense of the complainant.

The courts explain their concern with unfair exchange as simply evidencing procedural ills via the reasoning that if the procedure is fair, the outcome must be fair. In practice the reverse seems to be the case. The reasoning frequently applied is that: "since the bargain is unfair, something must have gone wrong with the procedure. If nothing had been unfair in the procedure, why after all, would such unfairness have resulted?" Thus, when a court passes a judgment on the fairness of the bargaining process, more often than not, it is passing judgment on the fairness of the bargain itself. The influence of substantive concerns reaches back one step further in shaping the contents of the procedural requirements in the first place. Thus, when a court specifies what is required of the bargaining process, it is in fact specifying what is required of the substance of a valid bargain.

\section*{C. THE PRIMACY OF SUBSTANTIVE CONCERNS}

Whether judicial concern with substance is procedurally based as the courts allege, or whether the procedural concerns are substantively orientated as the writer contends, may seem a "chicken-or-egg" dilemma. However, the primacy of substantive concerns over procedural ones is strongly arguable on the following grounds.

First, the process of inferring procedural ills, for which relief is ostensibly given, from substantive unfairness has already been mentioned. In this respect, it is argued that substantive

\textsuperscript{46} See Chapter III(2)(b).
unfairness often acts as the invisible hand in the procedural glove of unconscionability. Where it is present, unconscionability will almost certainly be made out; where it is absent, the glove lacks the form and substance to make out a case for unconscionability. Instead the reverse inference is made. Since the bargain was not unfair, the complainant could not have been impaired to a serious enough degree, and therefore demonstrated no pressing need for advice; or any advice given must have been adequate. Alternatively, the enforcer could not have unconscientiously taken advantage to the degree necessary to warrant judicial interference.

Second, even where strong independent evidence of procedural ills exists, so that inference from the substance of the bargain is not theoretically called for, where the court nevertheless finds no serious contractual imbalance, no finding of unconscionability will result. Thus, proof of the absence of substantive unfairness, will rebut any presumption of unconscionability raised by a finding of procedural unfairness.\footnote{See supra Chapter IIIE(2)(b).} The procedural and substantive features of a bargain will usually point in the same direction; however, where a conflict arises, substantive concerns will usually prevail.

Third, general observations made of unconscionability cases support the primacy of substantive concerns. When a contract is challenged on the ground of unconscionability, one of the first things a court notes is whether the transaction is abnormal in the context of other similar transactions, or, whether there is an obvious improvidence or disparity in the values exchanged. If not, this is a significant indicator that the challenge is without merit. If so, judicial suspicion is immediately aroused. The substance of a bargain, therefore, provides the starting point and the impetus for judicial inquiry into the procedural aspects of any case.\footnote{See supra Chapter IC.}

Moreover, the fairness of the bargain challenged provides a more accurate source of information in predicting what courts will do in any given case, than the nature of the bargaining process. As noted, in practice, procedural factors vary greatly in kind and degree in cases falling on both sides of the unconscionability line. Thus, in themselves, they cannot provide a
consistent, comprehensive and convincing rationalisation of unconscionability decisions. In finding unconscionability, courts may ignore the presence of advice, the fact that the complainant suffered no obvious impairment, and that the enforcer did not act in any obviously reprehensible manner. However, substantive unfairness is seldom ignored. All cases designated unconscionable by the courts involve an obvious unfairness or improvidence in the bargain. This may appear unexceptional but for the further observation that in all fifteen cases where unconscionability was rejected bar one, the courts found that no serious substantive unfairness existed at the time the contract was concluded. This is convincing evidence of a primary judicial concern for a bargain's substance in unconscionability cases. This concern has usually been obfuscated by the judicial rhetorics of procedure, however, whether consciously or instinctively, judges have treated the substance of the bargain reviewed as largely determinative of the issue of unconscionability.

Other writers have also noted this concern for substance as explaining judicial action in many areas of contract law. Various justifications have been advanced for such a concern. Restitutionary principles involving the prevention of unjust enrichment in contract have been put forward. Concerns of public policy giving rise to a type of illegality based on the concept of

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49 Although its force may be weakened by the presence of advice, evidence that the complainant understood the bargain and lack of evidence of enforcer knowledge or overreaching.

50 As these are defined in Chapter III B.

51 *Aqua Leisure Ltd v Bammant & Styles*, supra n36; *Alec Lobb (Garages) Ltd v Total Oil GB Ltd*, supra n2; *Burmah Oil Co Ltd etc v Governor and Company of the Bank of England*, supra n18; *Calumsky and Karaloff v Karaloff*, supra n17; *Cooke v Clayworth*, supra n10; *Errington v Martell-Wilson (Deceased) and Cook*, Queens Bench Division, 15 May 1980, Lexis; *Gissing v Eaton*, supra n19; *Harrison v Guest*, supra n36; *Haverty v Brooks* [1970] IR 214; *Laderoute v Laderoute*, supra n36; *Hart v O'Connor*, supra n2; *O'Neil v Arnew* (1976) 78 DLR (3d) 671; *Riley and Fifield v Jones*, supra n5; *Shaw v Hossack* (1917) 39 DLR 797.

52 *Errington v Martell-Wilson (Deceased) and Cook*, supra n48; for discussion see Chapter IA(1) text accompanying fn53-37; see also *Armatrading v Stone and Another*, Queens Bench Division, 17 September 1984, Lexis, and see Chapter IIIA(4) for a criticism of this case.


54 See Crawford "Restitution - Unconscionable Transactions - Undue Advantage Taken of Inequality Between Parties" (1966) 44 Can Bar Rev 142, and Gordley, supra n51.
the laesio enormis or the just/fair price have also been mooted, as have justifications based on morality, the exercise of judicial conscience, distributive justice and paternalist motives. Such questions relating to the desirability and justification for a judicial concern with substantive fairness in contract fall outside the scope of this study.

D. AN ALTERNATIVE RATIONALE FOR UNCONSCIONABILITY

Several procedural rationales were discussed in Chapter II as justifying the proposed burden of proof in unconscionability cases. However, it is submitted that this burden of proof, as applied by the courts, can support an alternative rationale which gives open recognition to the critical role played by substantive unfairness in finding unconscionability.

Accordingly, relief is given primarily because the bargain is improvident to the complainant to a grave degree. However, that relief is subject to a two tier limit. First the complainant must suffer special disability and lack adequate independent advice remedying that disability; and second, the enforcers' conscience must be affected in the relevant way so that it is unfair for them to rely on the complainants' apparent consent to the bargain. According to this rationale, the primary concern with unfair exchange is recognised, but so is the need for limits to that concern. Wholesale review of contracts for unfairness could import wholesale uncertainty into the world of commerce and may cause more unfairness than it remedies. Thus relief should be limited to those who are least able to protect themselves and are not protected by anyone else up to the task. The danger of unfairness to, and uncertainty for, the enforcing parties if relief is extended to such complainants is met by the second limit that the enforcers' conscience must be affected (primarily by notice) so that they cannot fairly enlist the aid of the court to enforce their bargain.

55 See Leff, supra n25.
57 Kennedy, D, supra n29.
Although the judicial preference will be for a procedural rationale, the proposed substantive rationale will give the same result in each case. Unconscionability, on the whole, operates in a procedural framework and speaks the language of procedural ills. However, in understanding and predicting judicial action, the central role of substantive unfairness must be fully recognised.
V. CONCLUSION

First impressions of the mass of unconscionability judgments may lead the reader to the conclusion that:

"... the facts are in a welter from case to case, the proper decision is hard to give form to; doctrine is ... left loose and vague, giving largely uncontrolled discretion to the court; ... it tends into blunt broad form which guides decision little, hides the actual process of deciding, leaves little record of the intuitional influence of the varying fact-pressures."¹

However, unconscionability is a multi-dimensional creature and cannot be taken at face value. Its many layers must be carefully peeled back to expose all the facets of its workings. The writer has attempted to do this by examining not only what the courts have said about unconscionability,² but also what they do in unconscionability cases,³ and, by distinguishing the legal labelling and definitions of the constituent elements of unconscionability from the concrete facts which evidence their presence or absence.⁴

The conflicts existing at these various levels have been noted.⁵ Fundamentally, while the courts cast unconscionability in a procedural framework and speak the language of procedural ills, it has been argued that the real impetus behind judicial action lies with concern over perceived unfairness in the substance of the bargain under consideration. Thus, the gulf between articulated and unarticulated standards, between theory and practice, is vast.

¹ Llewellyn, K "The First Struggle to Unhorse Sales" (1939) 52 Harv L Rev 873, 877.
² See supra Chapter IA.
³ See supra Chapters IB and III.
⁴ See supra Chapter III.
⁵ See Chapters I, III and IV.
This manifestation of judicial schizophrenia has been viewed by several commentators as a conflict of convictions - between individualism and altruism; between free enterprise and social concern with fairness; between the desire to produce and protect market efficiency and the desire to achieve non-exploitive market results. Leff comments that:

"... we want to have the world so arranged that everyone will be motivated to get as good a deal for himself as possible ... but that no one will have to get a bad deal in the process. But the payoff for the former necessitates, indeed entails the latter ... we cannot have perfect freedom and perfect fairness at once."

The reconciliation of such competing values is an inevitable concomitant of judicial decision-making.

In the arena of unconscionability, judicial practice may be seen as an application of an unarticulated model of decency and good faith. Unconscionability is a mechanism for imposing on contracting parties the judicial conscience. It says, in effect, that certain values will sometimes outweigh our desire for a system of contract in which each party bears full responsibility for the protection of his/her own interests. In certain circumstances judicial limits will be put on self-interest so that advantage cannot be taken of relative bargaining positions to extract more than a decent person would.

The judicial concern with fairness in result is not confined to unconscionability.

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8 Reiter, B J, supra n6.

9 Leff, A A, supra n6.

10 Ibid, 428.

11 Reiter, B J, supra n6, 369.

12 See Chapter II, fn 50; and Chapter IIIB.
Notably, relief from contractual obligations for both mistake and undue influence are now expressly pre-conditioned on substantive unfairness to the party seeking relief. According to Atiyah, such a trend represents a return to an era when courts exercised a general paternalistic jurisdiction over contracts to ensure their fairness and probity. Such an ill-defined but potentially sweeping mandate raises the issue of just how unconscionability will affect established and related areas of law.

The ripple effect caused by casting the unconscionability stone into the contract lake has been hinted at in the thesis. Some areas coming under challenge can be briefly mentioned. Given that the law of unconscionability and mental incapacity both require enforcer knowledge of complainant disability and, to the extent that unconscionability can operate although the complainant's impairment falls far short of mental incapacity, unconscionability detracts from the present law of mental incapacity. The doctrine of non est factum is also seriously undermined to the extent that complainant ignorance or misunderstanding of contractual terms is sufficient for unconscionability without the requirements (imposed by the non est factum doctrine) that the contract be fundamentally different in substance or kind from that understood by the complainant, nor that there be an absence of negligence on the complainant's part in signing.

The recognition of ignorance or misunderstanding of contract terms as an operative disability may represent some encroachment into the area of mistake. The law on misrepresentation may also be challenged to the extent that unconscionability emphasises the

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13 See Contractual Mistakes Act 1977 (NZ), section 6(1)(b).
14 See National Westminster Bank plc v Morgan [1985] 1 AC 686, 704 per Lord Scarman: "Whatever the legal character of the transaction, the authorities show that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence ... evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence [is necessary]."
17 See for example Nichols v Jessup, High Court of Auckland A 1381/83, 21 March 1985, Prichard J, where non est factum could not be made out but unconscionability was found.
complainant having been misled (even by enforcer statements of opinion or intention) rather than the enforcer having made an inaccurate statement of fact.\textsuperscript{18} The principle that silence is no misrepresentation (since there is no general duty to inform the other party of information material to the contract) is also challenged in so far as unconscionability requires disclosure from the enforcer in certain circumstances\textsuperscript{19} to ensure the enforceability of the contract made.\textsuperscript{20} Lastly, to the extent that unconscionability recognises social inferiority or weakness as an operative disability, it overlaps with the jurisdiction to set aside contracts for undue influence;\textsuperscript{21} and the limited scope of relief for financial need in unconscionability\textsuperscript{22} may trespass on the area of duress.

The impact which an expanding doctrine of unconscionability will have on such traditional vitiating factors is uncertain. Tiplady warns that:\textsuperscript{23}

"... though they [the courts] know the word to start the sorcerer's broom, they will be unable to control it or to estimate just how clean a sweep it will eventually make."

The "benevolent giant" unconscionability must, therefore, be kept under tight control in recognition of the needs of certainty in contract law. Certainty, however, is not served by the merciless application of a rigid standard, for flexibility and discretion is demanded by the very nature of the problems dealt with. Even if the necessary elements of unconscionability were agreed upon, we have seen that each contains a substantial area of subjectivity and judgment. None is capable of mechanical application.

What is needed are clear statements of principle and burden of proof, careful and

\textsuperscript{18} See Chapter IIIE(1)(i), fns 80-83.
\textsuperscript{19} Where the enforcer knows of the complainant's impairment and lack of adequate advice and the bargain is improvident for the complainant, see Chapter IIIE(2)(a)(iii).
\textsuperscript{20} See \textit{Harris v Richardson} [1930] NZLR 890, 919; also Chapter IIIE(2)(a)(iii).
\textsuperscript{21} See supra Chapter IIIA(2)(b).
\textsuperscript{22} See Chapter IIIA(2)(c).
\textsuperscript{23} Tiplady, D "The Judicial Control of Contractual Unfairness" (1983) 46 MLR 601, 618.
meticulous examination of the facts, clear fact findings and reasoned application of the law as stated to such facts as found. This is in stark contrast to the bulk of existing unconscionability judgments. There is the discrepancy between judicial rhetorics and judicial action already mentioned; there is also the contrast between the diversity of approaches to unconscionability put forward by the courts,24 and the relative uniformity in the practice adopted.25 Explanations for the latter can only be guessed at. Some judges may be entirely unaware of the existence of the alternative approaches, for cases advocating one particular approach often make no reference to other approaches. Moreover, the perceived uniformity of judicial practice may be no more than a post-facto rationalisation which by chance works.

However, the writer prefers to see unconscionability as an example of instinctive justice applied to the distinct fact pattern of disability, improvidence, knowledge of disability and absence of adequate advice.26 Such fact pressures have produced a fair quantum of right results despite diverse and often poorly reasoned doctrine.27 This is demonstrated in Nichols v Jessup28 in which one High Court judge and three Court of Appeal judges arrived at the same result despite having adopted four different (and at times apparently conflicting) approaches.29

A primary component of this instinctive justice (or fact pressure) is judicial concern with the substantive fairness of the bargain considered. The clear judicial reluctance to admit this openly may mean that counsel need not only recognise the "stuff"30 of which a successful case of unconscionability is made, but also know how to present them in the more respectable

24 See Chapter IA.
25 See Chapter IB.
27 Llewellyn, K, supra n1, 876.
28 Supra n18; CA 56/85, 26 September 1986, Cooke P, Somers J, McMullin J.
29 For a comment on this case see Chen-Wishart, M "Unconscionable Bargains" [1987] NZLJ 107.
and acceptable jargon of procedural ills. Covert tools\textsuperscript{31} may not necessarily be undesirable if they can perform worthy functions reliably, and if the danger of making them overt is to provoke some reactionary backlash.

However, the writer believes that the vital role of substantive concerns ought not be obscured or denied if its operation can be shown. Whatever its merits or demerits, service is rendered by openly recognising its influence. We should heed the reminder of Fuller and Perdue\textsuperscript{32} that legal principles exist as a means to an end and can only be understood with reference to the purpose they serve and the end towards which they are directed:

"... the most common stupidity consists in forgetting what one is trying to do...."

\textsuperscript{31} Llewellyn, \textit{The Common Law Tradition} (1960) 365, "Covert tools are never reliable tools".
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