

UDC 347.44

Comparative analysis of impact of equity doctrines on contract law in common law jurisdictions

Philipp Naumov

Bachelor of Laws,
University of Kent, Canterbury, UK,
Consultant at the JSC “KPMG”,
111524, 10 Presnenskaya emb., Moscow, Russian Federation;
email: naymov13@mail.ru

Abstract

This article is devoted to the three equitable doctrines which have been developing and changing since equity emerged. The concepts discussed in this work are closely related to the unconscionability in bargains, the area of contract law which has not lost its relevance. The author focuses on the doctrines of unconscionable bargain, undue influence and promissory estoppel. The purpose of this piece is to compare the approaches of judiciary towards the doctrines in various common law jurisdictions and analyse the ways in which they shaped the rigid rules of contract law. At the present time the essence of the doctrines analysed, as well as mentioned common law duress, clearly overlap. The concepts are driven by the same willingness to achieve balance in the various transactions. The remedies available for the weaker parties claiming to equity to intervene are similar. Certain instances of the doctrines' application are argued as easing the uncompromising contract law; certain enhance its strict position. Although particular principles “pierced” the contract law to a different degree, the author concludes there is a common denominator under the three doctrines. As the result of the study conducted, it seems reasonable to agree to the idea proposed and conclude that it is practical both for the judiciary and for the claimants to substitute the equitable doctrines of unconscionable bargain, promissory estoppel and undue influence, as well as contract law doctrine of duress with the uniformed approach to the unconscionable bargains.

For citation

Naumov Ph. (2018) Sravnitel'nyi analiz vliyaniya doktrin spravedlivosti na dogovornoe pravo v yurisdiktsiyakh obshchego prava [Comparative analysis of impact of equity doctrines on contract law in common law jurisdictions]. *Voprosy rossiiskogo i mezhdunarodnogo prava* [Matters of Russian and International Law], 8 (3A), pp. 136-143.

Keywords

Common law, equity, equitable doctrines, unconscionable bargain, promissory estoppel, undue influence.

Introduction

Since ancient times, the courts in England have applied common law or “judge-made” law. The evolution of the society and its rules revealed that application of common law may not be as flawless as it appeared before: the case law can be too inflexible in unexpected circumstances or may disregard certain important facts, leading to injustice. As ‘the need for individualised, context-specific, fast-sensitive justice’ [Worthington, 2006] was apparent, the judicial system responded with the introduction of the specific body of law – equity. Since the 14th century equitable doctrines have been shaping the ways of dealings in the court cases in different areas of law. Its influence on contract law is emphasised particularly.

Within the framework of contractual relations, the parties always tended to acquire the most advantageous deals possible, in certain scenarios, regardless of the means used. Knowing of the one’s weakness or having a better relational position may trigger the other’s temptation to use it as leverage to achieve the desired bargain. As the topic does not lose its relevance to these days, the judiciary’s approach towards resolving cases on unconscionable conduct is still developing and changing. In this regard, it seems interesting to compare the approaches of the court in various common law jurisdictions towards the three equitable doctrines related to the protection of vulnerable in unfair dealings: undue influence, unconscionable bargain and estoppel. This article will also explore the contributions made to the contract law, whether positive or not.

Unconscionable bargain

The concept of unconscionable bargain could be described as the one seeking to ‘achieve transactional fairness between parties involved in improvident transactions by providing remedies to overcome the effect of unfair transactions’ [Sykes, 2006]. According to the doctrine, the general criteria required to be present to establish unconscionable bargain are (1) the parties in relational inequality, (2) an unconscionable conduct in procuring the contract between those parties and (3) a transactional imbalance, namely a special disadvantage [Capper, 2010].¹

Emerging in England in the 19th century as a way of protecting aristocratic wealth, the doctrine became widespread after the *Fry v Lane* case. Pursuant to the precedent established in 1888, if ‘a poor and ignorant man’ makes a purchase of a ‘considerable undervalue’, the guilty unconscionable conduct will be established and the court will have an equitable jurisdiction to set the contract aside. The stronger party would bear the burden of proof².

By the early 20th century, the doctrine of unconscionable bargain faded away³. It has only re-emerged in the case of *Cresswell v Potter* in 1968⁴. Although the principle of application remained intact, the doctrine of unconscionable transaction itself undergone changes and became ‘significantly different from the one that applied in the late 19th century’⁵. The court in *Cresswell* modernised the

1 Note that ‘transactional imbalance’ is not always required.

2 *Fry v Lane* [1888] LR 40 Ch D 312, 322.

3 Several reasons for disappearance of unconscionable transaction cases are as follow: s. 174 of LPA 1925 ensured that transactions could not be set aside without unfair dealings, such transactions disappeared with the fall of aristocracy and others

4 *Cresswell v Potter* [1978] 1 WLR 255.

5 (n3), 404.

definition of ‘poor and ignorant’ to ‘member of the lower income group’ and ‘less highly educated’. The judge also emphasised the absence of any independent advice of the weaker party as an important requirement when deciding on the matter.

The decisions outside England and Wales also influenced the legal processes related to unconscionable bargains. The New Zealand court in *Hart v O'Connor* held that in case the parties to agreement both acted in good faith and one merely has more favourable conditions, the others incapacity will not allow equity to intervene and set the contract aside, unless the stronger party had been guilty in knowing about the weaker’s disability⁶. As in *Hart* the conditions of the contract were proposed by the plaintiff’s solicitor, the court stated that the defendant was not guilty in entering into unfair bargain.

Subsequently, the courts in England followed the precedent provided in *Hart*, stating that even in case of transactional imbalance, ‘equity will not provide relief unless the beneficiary is guilty of unconscionable conduct’⁷.

The modern English law ‘clearly reject the English doctrine of the late 19th century’⁸ as the bar for unconscionable transactions in common law is set very high, thus, reducing the chances of the “poor and ignorant” to claim the equitable remedy for unconscionable bargains they entered in to. In this regard, academics claim that ‘[the] relief on [the] ground [of unconscionable bargain] has been refused in virtually all the recent cases where it has been pleaded’ [Enonchong, 2006]. It is, therefore, argued that the doctrine discussed had not worked towards breaking down the rigid rules of common law. Instead, it has made the rules even more rigid.

The Australian profile of application of the doctrine of unconscionable bargain is different. The leading case on the matter is *Commercial Bank of Australia v Amadio* which notably broadened the principle, comparing to the English common law. In *Amadio*, the court laid down the circumstances under which the contract would be rescinded: a weaker party is under special disability and that this disability is ‘sufficiently evident to the stronger party to make it *prima facie* unfair or "unconscientious" that he procure, or accept, the weaker party's to the impugned transaction in the circumstances in which he procured or accepted it’⁹. It is often argued that the more flexible principle¹⁰ from *Amadio* should be followed in England due to the fact that ‘relief is not limited to active exploitation of the other party’s weakness but may be granted in circumstances when there is “passive acceptance of a benefit in unconscionable circumstances”’ [Phillips, 2010, 837, 842]. As already mentioned, the principles established in England requires ‘morally reprehensible’ manner of actions¹¹.

The Australian contract law has undergone important change since the decision in *Amadio*. The doctrine of unconscionable bargain was codified in the Australian Consumer Law and other statutes (Competition and Consumer Act 2010 (Cth) sch 2 Australian Consumer Law, the successor of the Trade Practices Act 1974). It is argued that the development of the equitable doctrine of unconscionable transactions resulted in its dominant position over the doctrine of undue influence, which is to be

⁶ *Hart v O'Connor* [1985] AC 1000 PC.

⁷ *Boustany v Pigott* [1993] 42 WIR 175, 180. Also see the later case following the approach: *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221.

⁸ (n3), 408

⁹ *Commercial Bank of Australia v Amadio* [1983] HCA 14, [12].

¹⁰ However, it is argued that the concept creates ‘an unacceptable level of uncertainty’. See further [McKendrick, 2015, 307].

¹¹ See, for example *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, 110

discussed later in this article. In comparison with its counterpart in England, the doctrine has been more successful in breaking down the strict rules of modern contract law by looking far beyond ‘the fiction of equality of bargaining power that the common law takes for granted’¹².

Undue influence

As the primary objective of equity is to protect the vulnerable, the English contract law could not survive without a doctrine comprising such protection in bargains. Therefore, the English courts have been developing the concept of undue influence. The court in *Amadio* distinguished between these doctrines holding that ‘undue influence looks to the quality of the consent or assent of the weaker party...’ whereas ‘...unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability’¹³.

The common law defence of duress has for long been protecting persons who entered the contracts with no consent. However, the narrow scope of the duress only allowed agreements to be set aside on the grounds of physical or economic threats and pressure, without taking into account social pressures. The doctrine of undue influence was the response from equity¹⁴.

The doctrine of undue influence ‘is based upon the principle that a transaction to which consent has been obtained by unacceptable means should not be allowed to stand’¹⁵. The development of the case law on undue influence in England in the past decades has impacted the contract law widely. The decision in *Bank of Credit & Commerce International v Aboody* laid down the classes of undue influence which could potentially be pleaded in front of the court¹⁶. The first one was actual undue influence which required an actual influence to be exerted on the claimant. The additional requirement for actual undue influence was demonstration of ‘manifestly disadvantageous’ terms of the contract¹⁷. With the evolution of the category, the subsequent court ruling held that evidence of disadvantage was no longer required¹⁸. The author argues that such decision of the judge eased the rules of contract law in order to facilitate the vulnerable and achieve greater equity in contract proceedings.

The actual undue influence is highly difficult in terms of proving, and therefore, the attention should be shifted to the next class of undue influence established in English contract law. Under presumed undue influence there is no need to show that undue influence was exerted. The concept implies the existence of irreputable presumption of trust and confidence of the stronger party, for example in parent-child relationships. In circumstances where the weaker party was “forced” into bargain by such trust and confidence, the equity would intervene and render the bargain void.

Although the early precedents on the doctrine required the manifest disadvantage of the weaker party to be present, in 2001 the House of Lords in *Royal Bank of Scotland v Etridge* held that the requirement of manifest disadvantage should not be longer used because it had created misunderstandings and misapplications¹⁹. Their Lordships ruled that ‘transaction [which] is not readily

12 Australian Competition and Consumer Commission v Radio Rentals Ltd [2005] 146 FCR 292, 297.

13 (n13), [13].

14 (n1), 211.

15 R v Attorney General of England and Wales [2003] UKPC 22.

16 Bank of Credit & Commerce International v Aboody [1990] 1 QB 923.

17 Ibidem, 928.

18 CIBC Mortgages v Pitt [1994] 1 AC 200.

19 Royal Bank of Scotland v Etridge [2001] UKHL 44, [26]-[30].

explicable by the relationship of the parties' should be the one used to determine the existence of presumed undue influence²⁰.

In case the relationships between the parties do not clearly demonstrate presumption of trust and confidence, but nevertheless could arise due to specific circumstances, the third category of undue influence, called presumed or 'proven' undue influence, could be a ground for setting the deal aside. The weaker party then would have to prove that the trust and confidence were present. For example, the important case of *Lloyds Bank v Bundy* laid down the precedent, according to which the relationship of trust and confidence could be established between the bank manager and the client²¹. On the other hand, further development of the area of presumed undue influence led to the case of *National Westminster Bank v Morgan*²². The judge ruling on the case, provided that bank managers are not usually in a position of trust and confidence and the circumstances evidencing the opposite are limited. The already mentioned House of Lords' decision in *Etridge* followed the approach from *Morgan* in terms of not extending a group of status-based relationship and, moreover laid down the steps that banks could take in order to protect themselves from potential allegations of 'proven' undue influence.

Finally, the recent case of *Birmingham City Council v Beech* further shortened the list of status-based relationship²³. It was ruled that the relationship between landlord's agent and tenant would not be presumed to have trust and confidence.

The recent development of the doctrine of undue influence changed the way in which English contract law and parties operate. The contractual doctrine of duress could not provide remedies where economic or physical influence was absent, therefore equity intervened. Although restricting some aspects of undue influence, the courts held that there is no need for a disadvantage to be shown, thus made the doctrine more flexible. Moreover, the concept remains open, thus allowing the courts to work towards easing the rules of rigid contract law.

Estoppel

Finally, we have reached the equitable doctrine of promissory estoppel, which deserves attention in the context of influence on contract law as well. This doctrine prevents a person from withdrawing of a promise which the other party had relied upon. The principle was established in the case of *Central London Property Trust v High Trees House* and since has been developing²⁴. However, the approach taken by English courts seems limited comparing to Australian courts' view. The doctrine required the parties to have pre-existing contractual relationship or legal obligations²⁵ and 'it is not sufficient that the promisee has relied on the promise, even if the promisor intended him to rely on it, or could have foreseen that he would rely on it' [Cartwright, 2006, www]. Moreover, in the later case of *Combe v Combe* the court ruled that promissory estoppel can be used as a defence only, no cause of action based on the promissory estoppel is allowed²⁶. Therefore, although designed to expand principles of common

20 Ibidem, [21].

21 *Lloyds Bank v Bundy* [1975] QB 326.

22 *National Westminster Bank v Morgan* [1985] 1 AC 686.

23 *Birmingham City Council v Beech* [2014] EWCA Civ 830.

24 *Central London Property Trust v High Trees House* [1947] KB 130.

25 Note that, although it remains unclear whether the doctrine can be applied to pre-contractual relationship, there was the opinion expressed that estoppel could arise from a promise during negotiations, see further *Brikom Investments Ltd v Carr* [1979] QB 467.

26 *Combe v Combe* [1951] 2 KB 215.

law in relation to promises, it does not seem that it has done hard work in achieving equity in contracts. The principles limited the opportunities of the vulnerable. As once said by the English judge: ‘there is no real prospect of the claim succeeding unless and until the law is developed, or corrected, by the House of Lords’. It is hereby argued the correct interpretation of the ongoing yet not concluded metamorphoses of promissory estoppel²⁷.

The Australian application of doctrine of promissory estoppel is more flexible. According to the decision of *Walton Stores v Maher* promissory estoppel can act as a “sword”, in other words can be a cause of action²⁸. Furthermore, in Australia, equity can intervene to protect promises made beyond pre-existing contractual relations: ‘Even if a representation is insufficiently precise to give rise to a contract...that fact does not necessarily disqualify the representation from founding a promissory estoppel’²⁹. Therefore, it could be claimed that the doctrine is more successful in Australian courts in terms of reducing unconscionability in the courts’ decisions.

It is important to notice that throughout the modern case law in Australia on promissory estoppel, and in the decision of *Walton Stores v Maher* in particular, the idea of unconscionability can be found at a basement of the discussions. Moreover, the doctrine of unconscionability has been used as a link between different types of estoppel. However, this way of approaching the doctrine cannot be found in English cases where the principles of estoppel are not generalised in the doctrine of unconscionability. Perhaps, this is a more theoretical reason behind the stricter rules existing in England and Wales which do not allow the equity to pierce through the solidly established rules of common law.

Conclusion

Based on the comparative analysis conducted it is agreed that ‘both Equity and the Common Law adopt a clever strategy in dealing with [the cases of procedural unfairness]’. The introduction of the doctrines discussed above clearly leads to the greater upholding of equitable rights in the area of unconscionability within the scope of contract law in England and Australia. However in England, by arguably moving from paternalistic approach of protecting vulnerable to market-individualist approach, which only ensures that authentic consent is in place the equitable doctrines stepped back in breaking rigid walls of strict common law. In addition, the courts seem to be reluctant to lay down definitive principles of how doctrines should operate which can lead and perhaps have led to injustice.

At the present time the essence of the doctrines analysed, as well as mentioned common law duress, clearly overlap. The concepts are driven by the same willingness to achieve balance in the various transactions. The remedies available for the weaker parties claiming to equity to intervene are similar. It has been argued that since there are too many existing doctrines that currently lack ‘sensible conceptual scheme’, they ‘should be replaced by the overarching doctrine of unconscionable bargains’. As the result of the study conducted, it seems reasonable to agree to the idea proposed and conclude that it is practical both for the judiciary and for the claimants to substitute the equitable doctrines of unconscionable bargain, promissory estoppel and undue influence, as well as contract law doctrine of duress with the uniformed approach to the unconscionable bargains.

27 *Baird Textiles Holdings Ltd v Marks and Spencer plc* [2002] 1 All ER (Comm) 737, [55].

28 *Walton Stores v Maher* 164 CLR 387.

29 *Galaxidis v Galaxidis* [2004] NSWCA 111.

References

1. Capper D. (2010) The unconscionable bargain in the common law world. *Law quarterly review*, 126, pp. 403-419.
2. Cartwright J. (2006) Protecting legitimate expectations and estoppel in English law. *Electronic journal of comparative law*, 10.3. Available at: <https://www.ejcl.org/103/art103-6.pdf> [Accessed 29/02/18].
3. *Competition and Consumer Act 2010 (Cth) sch 2 Australian Consumer Law*. Australia.
4. Enonchong N. (2006) *Duress, undue influence and unconscionable dealing*. London: Sweet and Maxwell.
5. *Law of Property Act 1925*. London: The Stationery Office.
6. McKendrick E. (2015) *Contract law*. 11th ed. Basingstoke: Palgrave Macmillan.
7. Phillips J. (2010) Protecting those in a disadvantageous negotiating position: unconscionable bargains as a unifying doctrine. *Wake Forest law review*, 45, pp. 837-861.
8. Sykes A. (2006) "Unfair" results and unfair doctrines: structuring the application of the equitable doctrines of undue influence and unconscionable dealing. *E law: Murdoch University electronic journal of law*, 13, pp. 46-57.
9. *Trade Practices Act 1974*. Australia.
10. Worthington S. (2006) *Equity*. Oxford: Oxford University Press.

Сравнительный анализ влияния доктрин справедливости на договорное право в юрисдикциях общего права

Наумов Филипп

Бакалавр права,
консультант АО "КПМГ",
111524, Российская Федерация, Москва, Пресненская набережная, 10;
email: naumov13@mail.ru

Аннотация

В данной статье описываются и анализируются три доктрины справедливости. Понятия, обсуждаемые в настоящей работе, тесно связаны с незаконностью сделок, областью договорного права, которая не утратила своей актуальности. Автор акцентирует внимание на доктринах незаконной сделки, неправомерного воздействия и обязательственного эстоппеля. Цель этой статьи состоит в том, чтобы сравнить подходы судебных органов к доктринам в различных юрисдикциях общего права и проанализировать, каким образом они формируют жесткие нормы договорного права. Утверждается, что некоторые случаи применения доктрин ослабляют бескомпромиссное договорное право; некоторые усиливают его строгую позицию. Хотя определенные принципы «пронизывают» договорное право в разной степени, автор приходит к выводу о том, что три доктрины обладают сходными характеристиками.

Для цитирования в научных исследованиях

Наумов Ф. Сравнительный анализ влияния доктрин справедливости на договорное право в юрисдикциях общего права // Вопросы российского и международного права. 2018. Том 8. № 3А. С. 136-143.

Ключевые слова

Общее право, справедливость, доктрины справедливости, незаконная сделка, обязательственный эстоппель, неправомерное воздействие.

Библиография

1. Capper D. The unconscionable bargain in the common law world // Law quarterly review. 2010. Vol. 126. P. 403-419.
2. Cartwright J. Protecting legitimate expectations and estoppel in English law // Electronic journal of comparative law. 2006. Vol. 10.3. URL: <https://www.ejcl.org/103/art103-6.pdf>
3. Competition and Consumer Act 2010 (Cth) sch 2 Australian Consumer Law. Australia.
4. Enonchong N. Duress, undue influence and unconscionable dealing. London: Sweet and Maxwell, 2006. 590 p.
5. Law of Property Act 1925. London: The Stationery Office.
6. McKendrick E. Contract law. 11th ed. Basingstoke: Palgrave Macmillan, 2015. 448 p.
7. Phillips J. Protecting those in a disadvantageous negotiating position: unconscionable bargains as a unifying doctrine // Wake Forest law review. 2010. Vol. 45. P. 837-861.
8. Sykes A. "Unfair" results and unfair doctrines: structuring the application of the equitable doctrines of undue influence and unconscionable dealing // E law: Murdoch University electronic journal of law. 2006. Vol. 13. P. 46-57.
9. Trade Practices Act 1974. Australia.
10. Worthington S. Equity. Oxford: Oxford University Press, 2006. 392 p.