The first project of the Ministry of Justice also refers to this concept in Article 63:

> There is also duress where one party abuses the weak situation of the other party, who, under the influence of a state of necessity or of dependence, enters into a contract which he would not have entered in the absence of that constraint.

(4) In the field of competition law, in 2001 and 2005, some statutes have introduced the concept of *dependence économique* (L442-6, 2° Code de Commerce). In 2008, the legislator went even further. Initially, under Article L442–6, 2° a party was liable who

> abuses the dependent relationship in which he holds his partner . . by imposing upon the other party unreasonable commercial conditions or obligations. In the Law adopted on 4 August 2008, the reference to *dependence économique* disappeared. A person is now liable simply if he submits or tries to submit 'a commercial partner to obligations which create a significant imbalance in the rights and obligations of the parties.[127]

Interestingly, the Belgian courts and legal authors have developed a doctrine of qualified *lésion* based on the doctrine of *cause licite* and/or the doctrine of *culpa in contrahendo*. On this Belgian doctrine of qualified *lésion*, Jacques Herbots writes:[128]

> The doctrine requires two elements: first a serious disproportion between the terms of the contract. But this is not sufficient. Moreover there must be an exploitation of one of the parties, a taking advantage of the needs, weaknesses, emotions or ignorance of one of the parties, or an abuse of a dominant position.[129]

In Dutch law, in a case of qualified *laesio enormis*, the contract may be avoided under Article 3:44 IV BW as there has been an abuse of circumstances and the excessive disadvantage should have prevented the one party from prompting the other party to enter into the contract.[130]

11.4.B SPECIFIC DOCTRINES: UNDUE INFLUENCE IN ENGLISH LAW

It is in English law that it is least clear whether there is any equivalent to what is here called qualified *laesio enormis*. Certainly there are certain doctrines which lean in that direction, notably undue influence and the rules on unconscionable bargains. However, the former is distinctly limited in its application while the latter, though of ancient origin, is of uncertain scope in modern law. As we will see later, an attempt by Lord Denning MR to formulate a broad doctrine of inequality of bargaining power was firmly rejected by the House of Lords.[131]

[127] Terré et al (above n 6) para 248.

[128] J Herbots, *Contract Law in Belgium* (Deventer/Boston/Brussels, Kluwer Law and Taxation/Bruylant, 1995) 129.

[129] With references to Cass, 25 November 1977, Arr Cass, 1978.343 and Comm Brussels, 16 April 1974, BRH, 1974.229.

[130] See below pp 596ff.

[131] Below pp 591ff.

House of Lords **11.20 (E)**

Royal Bank of Scotland v Etridge (No 2)[132]

Undue influence may be proven by evidence that one party abused a relationship of trust and confidence. If the parties were in a relationship of trust and confidence and the claimant entered a transaction that requires explanation, it will be presumed that this resulted from undue influence unless the other party shows that this was not the case.

Facts: see the judgment.

Judgment:

LORD NICHOLLS OF BIRKENHEAD . . .

[5] My Lords, before your Lordships' House are appeals in eight cases. Each case arises out of a transaction in which a wife charged her interest in her home in favour of a bank as security for her husband's indebtedness or the indebtedness of a company through which he carried on business. The wife later asserted she signed the charge under the undue influence of her husband. . . . Seven of the present appeals are of this character. In each case the bank sought to enforce the charge signed by the wife. The bank claimed an order for possession of the matrimonial home. The wife raised a defence that the bank was on notice that her concurrence in the transaction had been procured by her husband's undue influence. The eighth appeal concerns a claim by a wife for damages from a solicitor who advised her before she entered into a guarantee obligation of this character.

UNDUE INFLUENCE

[6] The issues raised by these appeals make it necessary to go back to first principles. Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress. Originally this was narrow in its scope, restricted to the more blatant forms of physical coercion, such as personal violence.

[7] Here, as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced', in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (*Huguenin v Basely* (1807) 14 Ves Jun 273 at 300). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.

[8] Equity identified broadly two forms of unacceptable conduct. The first comprises

[132] [2001] UKHL 44, [2001] 4 All ER 449.

overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage . . .

[9] In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired . . .

[10] The law has long recognised the need to prevent abuse of influence in these 'relationship' cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type (see Treitel, *The Law of Contract* (10th edn, 1999) pp 380–381). For example, the relation of banker and customer will not normally meet this criterion, but exceptionally it may (see *National Westminster Bank plc v Morgan* [1985] AC 686, at 707–709).

[11] Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.

[12] In *CIBC Mortgages plc v Pitt* [1994] 1 AC 200 your Lordships' House decided that in cases of undue influence disadvantage is not a necessary ingredient of the cause of action. It is not essential that the transaction should be disadvantageous to the pressurised or influenced person, either in financial terms or in any other way. However, in the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous. The issue is likely to arise only when, in some respect, the transaction was disadvantageous either from the outset or as matters turned out.

BURDEN OF PROOF AND PRESUMPTIONS

[13] Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.

[14] Proof that the complainant placed trust and confidence in the other party

in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.

. . .

[17] The availability of this forensic tool in cases founded on abuse of influence arising from the parties' relationship has led to this type of case sometimes being labelled 'presumed undue influence'. This is by way of contrast with cases involving actual pressure or the like, which are labelled 'actual undue influence' (see *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 953. . . . This usage can be a little confusing. In many cases where a plaintiff has claimed that the defendant abused the influence he acquired in a relationship of trust and confidence the plaintiff has succeeded by recourse to the rebuttable evidential presumption. But this need not be so. Such a plaintiff may succeed even where this presumption is not available to him; for instance, where the impugned transaction was not one which called for an explanation.

[18] The evidential presumption discussed above is to be distinguished sharply from a different form of presumption which arises in some cases. The law has adopted a sternly protective attitude towards certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where, moreover, substantial gifts by the influenced or vulnerable person are not normally to be expected. Examples of relationships within this special class are parent and child, guardian and ward, trustee and beneficiary, solicitor and client, and medical advisor and patient. In these cases the law presumes, irrebuttably, that one party had influence over the other. The complainant need not prove he actually reposed trust and confidence in the other party. It is sufficient for him to prove the existence of the type of relationship.

[19] It is now well established that husband and wife is not one of the relationships to which this latter principle applies . . .

INDEPENDENT ADVICE

[20] Proof that the complainant received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all the circumstances. In the normal course, advice from a solicitor or other outside advisor can be expected to bring home to a complainant a proper understanding of what he or she is about to do. But a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case.

MANIFEST DISADVANTAGE

[21] As already noted, there are two prerequisites to the evidential shift in the burden of proof from the complainant to the other party. First, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant. Second, that the transaction is not readily explicable by the relationship of the parties.

[22] Lindley LJ summarised this second prerequisite in the leading authority of *Allcard v Skinner*, where the donor parted with almost all her property. Lindley LJ pointed out that where a gift of a small amount is made to a person standing in a confidential relationship to the donor, some proof of the exercise of the influence of the donee must be given. The mere existence of the influence is not enough. He continued:

'But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift.' (See (1887) 36 ChD 145 at 185.)

. . .

[30] I return to husband and wife cases. I do not think that, in the ordinary course, a guarantee of the character I have mentioned is to be regarded as a transaction which, failing proof to the contrary, is explicable only on the basis that it has been procured by the exercise of undue influence by the husband. Wives frequently enter into such transactions. There are good and sufficient reasons why they are willing to do so, despite the risks involved for them and their families. They may be enthusiastic. They may not. They may be less optimistic than their husbands about the prospects of the husbands' businesses. They may be anxious, perhaps exceedingly so. But this is a far cry from saying that such transactions as a class are to be regarded as prima facie evidence of the exercise of undue influence by husbands.

[31] I have emphasised the phrase 'in the ordinary course'. There will be cases where a wife's signature of a guarantee or a charge of her share in the matrimonial home does call for explanation. Nothing I have said above is directed at such a case.

A CAUTIONARY NOTE

[32] I add a cautionary note, prompted by some of the first instance judgments in the cases currently being considered by the House. It concerns the general approach to be adopted by a court when considering whether a wife's guarantee of her husband's bank overdraft was procured by her husband's undue influence. Undue influence has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused. Statements or conduct by a husband which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances should not, without more, be castigated as undue influence. Similarly, when a husband is forecasting the future of his business, and expressing his hopes or fears, a degree of hyperbole may be only natural. Courts should not too readily treat such exaggerations as misstatements.

[33] Inaccurate explanations of a proposed transaction are a different matter. So are cases where a husband, in whom a wife has reposed trust and confidence for the management of their financial affairs, prefers his interests to hers and makes a choice for both of them on that footing. Such a husband abuses the influence he has. He fails to discharge the obligation of candour and fairness he owes a wife who is looking to him to make the major financial decisions.

[Further extracts from this case, dealing with the position of the banks, will be found below.[133]]

[The other Law Lords each gave a speech. There are some minor differences between them but Lord Bingham said (at [3]) that Lord Nicholls's opinion 'commands the unqualified support of all members of the House'.]

Notes

(1) The *Etridge* case is now the leading exposition of the doctrine of undue influence. A contract may be avoided by a party (for the purposes of this note, we will assume the claimant is a woman, the other party a man) who shows that she was the victim of undue influence. She may prove undue influence directly: for example, by showing that she was the victim of improper pressure or coercion, or that she is a vulnerable person who has been exploited (see Lord Nicholls's speech at [11]), or that she left her affairs in the hands of the other party, who abused her trust by preferring his interests to hers (see at [8]–[9]). Lord Nicholls points out that undue influence in the form of coercion such as unlawful threats may now be treated as duress, as we noted earlier.[134]

(2) More frequently, the claimant will not prove directly that they were the victim of undue influence. Instead she will rely on the evidential presumption created by the fact that she placed trust and confidence in the other party and that the transaction between the parties is one 'that calls for explanation' (see at [14]).

(3) In some situations it will be irrebuttably presumed that there was a relationship of trust and confidence between the parties, for example, where he is her solicitor and she is his client (see above at [18]). In other cases the claimant will have to show that she placed trust and confidence in the other party. But in neither case will an evidential presumption that there has been undue influence unless there is a transaction 'which calls for explanation.'

(4) Lord Nicholls preferred that phrase to one which had been used in previous cases, 'manifest disadvantage'. In a passage not reproduced above, Lord Nicholls points out that the

> manifest disadvantage test is hard to apply to cases in which a wife guarantees her husband's business debts—in a narrow sense, having to give the guarantee is a disadvantage to her but overall it may be a perfectly sensible thing for her to do, and one that will help them both, so it does not always require explanation.

(5) In some of the cases before *Etridge*, the judges (following the example of Slade LJ in *Bank of Credit and Commerce International SA v Aboody*[135]) divided the cases up into classes. Class A were cases where actual undue influence was shown; in class 2A cases there was a presumption that there was a relationship of trust and confidence (see note (3) above); and class 2B cases were ones in which

[133] p 604.
[134] Above p 547.
[135] [1990] 1 QB 923, 953.

a relationship of trust and confidence was actually shown. But Lord Nicholls does not use this classification and some of the other lords doubted its usefulness.[136]

(6) The presumption of undue influence, once it has arisen, may be rebutted by showing that the plaintiff acted independently of any influence. The most usual way of rebutting the presumption is to show that the plaintiff had independent and competent advice before entering into the contract.[137]

(7) An example of undue influence where the claimant proved a relationship of trust and confidence is provided by *Lloyd's Bank Ltd v Bundy*.[138] In that case the defendant was an elderly farmer who was not well versed in business matters. His son formed a plant hire company. Father, son and the company were customers of the same plaintiff bank. The son's company was in financial difficulties. The defendant had already given a guarantee and a charge for £7,500 over his farmhouse (his only asset) to secure the company's overdraft. On that occasion the defendant had been advised by his solicitor that this was the most he could afford to commit to his son's business. The company's affairs got worse and a assistant bank manager and the son went to see the defendant. The assistant manager told the defendant that the bank could allow the company's overdraft to increase only if the defendant increased the guarantee and charge to £11,000. The defendant signed the form of guarantee and charge. There was evidence that the assistant manager knew that the defendant was relying on him for advice and that the house was the defendant's only asset; he did not explain the company's position in full to the defendant. The plaintiff bank proceeded to enforce the charge and sought possession of the farmhouse. The majority of the Court of Appeal decided that the defendant could set aside the charge on the basis of presumed undue influence by the bank. It should have been obvious to the bank that the defendant was trusting the manager to advise him and so a confidential relationship had been shown on the facts.[139]

(8) Undue influence renders a contract voidable,[140] although the courts and legal doctrine tend to speak of 'granting relief' or 'setting aside the contract'. The contract is avoided by the influenced party giving notice to the other within a reasonable time after the influence comes to an end.

11.4.C SPECIFIC DOCTRINES: UNCONSCIONABILITY AND OTHER RULES IN ENGLISH LAW

Court of Appeal **11.21 (E)**

Crédit Lyonnais Bank Nederland NV v Burch[141]

For a bank to take as security for a business's debts a charge over a flat belonging to a junior employee of the company with no stake in the business, knowing that the employee had refused to take independent advice, may be unconscionable conduct entitling the employee to set aside the charge.

[136] See [2001] UKHL 44 at [105]–[1-7] and [158]–[162].

[137] For further details see *Treitel* (above n 7) paras 10-023–10-024; Cartwright (above n 49) 185–87. See also McGregor (above n 28) s 563, para 3, and at 223.

[138] [1975] 1 QB 326; see also below p 591.

[139] Extracts from Lord Denning MR's judgment in this case will be found below p 591.

[140] See Cartwright (above n 49) 192; See also *Restatement of the Law*, 2nd edn, *Contracts* 2d, §177 (2).

[141] [1997] 1 All ER 144.

Facts: The defendant, Miss Burch, had given a guarantee and charged her flat to secure the borrowings of her employer's company. She was a junior employee of the company with no stake in its future. She had been advised by the bank to seek independent advice, but had said she had no need of it.

Held: The charge could be set aside on the ground of undue influence by the employer of which the bank had constructive notice (on this point see below, 3.3.6). The charge might also have been set aside on the basis of unconscionable conduct by the bank, except that this argument had not been put to the trial court.

Judgment: NOURSE LJ: On that state of facts it must, I think, have been very well arguable that Miss Burch could, directly against the bank, have had the legal charge set aside as an unconscionable bargain. Equity's jurisdiction to relieve against such transactions, although more rarely exercised in modern times, is at least as venerable as its jurisdiction to relieve against those procured by undue influence. In *Fry v Lane*, *re Fry, Whittet v Bush* (1889) 40 ChD 312 at 322, [1886–90] All ER Rep 1084 at 1089, where sales of reversionary interests at considerable undervalues by poor and ignorant persons were set aside, Kay J, having reviewed the earlier authorities, said:

> The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction. This will be done even in the case of property in possession, and a fortiori if the interest be reversionary. The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was 'fair, just, and reasonable'.

Lord Selborne LC's words will be found in *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 at 491, [1861–73] All ER Rep 300 at 303. The decision of Megarry J in *Cresswell v Potter* [1978] 1 WLR 255 at 257 where he suggested that the modern equivalent of 'poor and ignorant' might be a 'member of the lower income group . . . less highly educated', demonstrates that the jurisdiction is in good heart and capable of adaptation to different transactions entered into in changing circumstances. See also the interesting judgment of Balcombe J in *Backhouse v Backhouse* [1978] 1 All ER 1158 at 1165–6, [1978] 1 WLR 243 at 250–252, where he suggested that these cases may come under the general heading which Lord Denning MR referred to in *Lloyds Bank Ltd v Bundy* [1974] 3 All ER 757 at 765, [1975] QB 326 at 339 as 'inequality of bargaining power'.

A case based on an unconscionable bargain not having been made below, a decision of this court cannot be rested on that ground . . .

Notes

(1) Outside the doctrine of undue influence, equity can give relief against what are often called 'unconscionable bargains' in cases in which the one party, being in a strong position, has exploited a weakness of the other party. One category of

these cases involves transactions at (considerable) undervalue by poor and ignorant persons[142] and expectant heirs.[143]

(2) So far, the courts have failed to define the basis of their jurisdiction in this area and it is therefore not exactly clear which requirements have to be met if relief is to be granted.[144] Cartwright, however, emphasizes:[145] 'that neither an unfair bargain, nor an inequality between the parties' bargaining positions, of themselves, vitiate a contract. What is required is an abuse of that inequality, which may be shown by the existence of an unfair bargain'. See Lord Brightman in *Hart v O'Connor*,[146] who held:

> 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.[147]

(3) In *Boustany v Piggott*[148] the Privy Council set aside a lease on the ground of unconscionability. Lord Templeman, delivering the judgment of the Privy Council, agreed in general terms with the submissions of counsel for the appellant:[149] (1) there must be unconscionability in the sense that objectionable terms have been imposed on the weaker party in a reprehensible manner; (2) 'unconscionability' refers not only to the unreasonable terms but to the behaviour of the stronger party, which must be morally culpable or reprehensible; (3) unequal bargaining power or objectively unreasonable terms are no basis for interference in equity in the absence of unconscionable or extortionate abuse where, exceptionally and as a matter of common fairness, 'it is unfair that the strong should be allowed to push the weak to the wall'; (4) a contract will not be set aside as unconscionable in the absence of actual or constructive fraud or other unconscionable conduct; and (5) the weaker party must show unconscionable conduct, in that the stronger party took unconscientious advantage of the weaker party's disabling condition or circumstances.

(4) In *Crédit Lyonnais Bank Nederland NV v Burch*[150] Millett LJ pointed out that it would be necessary to show that the bank had imposed the objectionable terms in a morally objectionable manner, but said that impropriety might be inferred from the terms of the transaction itself in the absence of an innocent explanation.

(5) English law also has a special rule allowing agreements for salvage to be adjusted if the salvor has charged an extortionate fee: *The Port Caledonia and The Anna*.[151] This rule is not one of Common Law but of Admiralty Law, which in turn came from the Roman *ius commune*.

[142] See, eg *Fry v Lane* (1888) 40 ChD 312; *Cresswell v Potter* [1978] 1 WLR 255.
[143] See, eg *Earl of Aylesford v Morris* (1873) 8 Ch App 484. For the other categories of cases, see Beale, Bishop and Furmston, at 803ff.
[144] See McKendrick (above n 7) 372.
[145] Cartwright (above n 49) 215.
[146] [1985] AC 1000, 1017–18.
[147] *Cf* also Alec *Lobb v Total Oil GB Ltd* [1985] 1 All ER 303. Equity thus seems to focus primarily on the unconscionable conduct of the stronger party ('procedural unfairness').
[148] (1995) 69 P& CR 298.
[149] At 303.
[150] [1997] 1 All ER 144, 153; see above p 585.
[151] [1903] P 184; see n 123 above, p 581.

(6) As noted previously, English legislation allows the re-opening of credit agreements in circumstances which amount to qualified *laesio enormis*: see the Consumer Credit Act 1974, sections 140A–140B.[152]

11.4.D AN ATTEMPT AT A GENERAL DOCTRINE IN ENGLISH LAW

Court of Appeal **11.22 (E)**

Lloyds Bank v Bundy[153]

[For the decision of the majority of the Court of Appeal, namely that the defendant could set aside the charge on the ground of presumed undue influence by the bank, see above.[154] Lord Denning reached the same conclusion but on broader grounds. What follows here is Lord Denning's heroic (but ultimately unsuccessful) attempt to infer from the case law a general principle that English law grants relief in cases of 'inequality of bargaining power'.]

Judgment: LORD DENNING MR: . . .

The general rule

Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. There are many hard cases which are caught by this rule. Take the case of a poor man who is homeless. He agrees to pay a high rent to a landlord just to get a roof over his head. The common law will not interfere. It is left to Parliament. Next take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and it is guaranteed by a friend. The guarantor gives his bond and gets nothing in return. The common law will not interfere. Parliament has intervened to prevent moneylenders charging excessive interest. But it has never interfered with banks.

Yet there are exceptions to this general rule. There are cases in our books in which the court will set aside a contract, or a transfer of property, 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. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the court.

The categories

The first category is that of 'duress of goods'. A typical case is when a man is in a strong bargaining position by being in possession of the goods of another by virtue of a legal right, such as by way of pawn or pledge or taken in distress. The owner is in a weak position because he is in urgent need of the goods. The stronger

[152] Above pp 560ff.
[153] [1975] 1 QB 326.
[154] Above n 138, p 588.

demands of the weaker more than is justly due: and he pays it in order to get the goods. Such a transaction is voidable. . . .[155]

The second category is that of the 'unconscionable transaction'. A man is so placed as to be in need of special care and protection and yet his weakness is exploited by another far stronger than himself so as to get his property at a gross undervalue. The typical case is that of the 'expectant heir'. But is applies to all cases where a man comes into property transferred to him: see *Evans v Llewellin* (1987) 1 Cox 333. . .[156]

This second category is said to extend to all cases where an unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker: see the cases cited in Halsbury's *Laws of England*, 3rd ed, vol 17 (1956), p 682 and, in Canada, *Morrison v Coast Finance Ltd* (1965) 55 DLR (2d) 710 and *Knupp v Bell* (1968) 67 DLR (2d), 256. The third category is that of 'undue influence' usually so called. . . .[157]

The fourth category is that of 'undue pressure'. The most apposite of that is *Williams v Bayley* (1866) LR 1 HL 200. . .[158]

Other instances of undue pressure are where one party stipulates for an unfair advantage to which the other has no option but to submit. As where an employer—the stronger party—has employed a builder—the weaker party—to do work for him. When the builder asked for payment of sums properly due (so as to pay his workmen) the employer refused to pay unless he was given some added advantage. Stuart V-C said: 'Where an agreement, hard and inequitable in itself, has been exacted under circumstances of pressure on the part of the person who exacts it, this court will set it aside': see *Ormes v Beadel* (1860) 2 Giff. 166, 174 (reversed on another ground, 2 De GF & J. 333) and D & C Builders Ltd *v* Rees (1966) 2 QB 617, 625.

The fifth category is that of salvage agreements. . .[159]

The general principles

Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, 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 influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases.

[155] For duress of goods, *cf* above p 553.
[156] On undue influence, see above p 582.
[157] See above p 582.
[158] On salvage agreements see above p 590.
[159] [1985] 1 AC 687.

Notes

(1) Lord Denning's new doctrine did not find favour with other judges and was rejected by the House of Lords in *National Westminster Bank Plc v Morgan*.[160] Lord Scarman said:

> Lord Denning MR believed that the doctrine of undue influence could be subsumed under a general principle that English courts will grant relief where there has been 'inequality of bargaining power' (p. 339). He deliberately avoided reference to the will of one party being dominated or overcome by another. The majority of the court did not follow him; they based their decision on the orthodox view of the doctrine as expounded in *Allcard v Skinner*, 36 ChD 145. The opinion of the Master of the Rolls, therefore, was not the ground of the court's decision, which was to be found in the view of the majority, for whom Sir Eric Sachs delivered the leading judgment.
>
> Nor has counsel for the respondent sought to rely on Lord Denning MR's general principle: and, in my view, he was right not to do so. The doctrine of undue influence has been sufficiently developed not to need the support of a principle which by its formulation in the language of the law of contract is not appropriate to cover transactions of gift where there has been no bargain. The fact of an unequal bargain will, of course, be a relevant feature in some cases of undue influence. But it can never become an appropriate basis of principle of an equitable doctrine which is concerned with transactions 'not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which men act' (Lindley LJ in *Allcard v Skinner*,at p 185). And even in the field of contract I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task—and it is essentially a legislative task—of enacting such restrictions upon freedom of contract as are in its judgment necessary to relieve against mischief: for example, the hire-purchase and consumer protection legislation, of which the Supply of Goods (Implied Terms) Act 1973, Consumer Credit Act 1974, Consumer Safety Act 1978, Supply of Goods and Services Act 1982 and Insurance Companies Act 1982 are examples. I doubt whether the courts should assume the burden of formulating further restrictions.

See also Lord Scarman's speech in *Pao On v Lau Yiu Long*.[161] Some authors, on the other hand, have shown not to be dismissive and do seem to favour a general doctrine of inequality of bargaining power or unconscionability.[162] Whether any general doctrine in this field will be recognized in English law in the near future is uncertain. Until then, English law will pursue its piecemeal treatment of this type of case.

(2) A general doctrine of unconscionability has made its way into Australian and Canadian law.[163]

[160] [1980] AC 614, 634–35; *Treitel* (above n 7) paras 10-039–10-041.
[161] See, eg McKendrick (above n 7) 361–62; D Capper 'Undue Influence and Unconscionability: a Rationalisation' (1998) 114 *LQR* 479.
[162] See above p 591.
[163] See, eg Enman, 'Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law' (1987) 16 *AALR* 191; the Australian case of *Commercial Bank of Australia Ltd v Amadio* (1983) 151 *CLR* 447.