16 Capacity

16.1 Introduction

Adults of sound mind have full contractual capacity. On the other hand, minors, the mentally incapacitated and companies have limited contractual capacity. In the case of minors and the mentally incapacitated, contract law seeks to protect such persons from the consequences of their own inexperience or inability. The limitations placed upon the contractual capacity of companies raise rather different issues, to which we shall return at 16.4.

Although contract law seeks to play a role in protecting minors and the mentally incapacitated, a competing policy is that the law does not wish to expose to hardship those who deal fairly and in all good faith with such persons. We shall see that the rules of law reflect an uneasy compromise between these competing policies. We shall begin our analysis by a consideration of the contractual capacity of minors (16.2), then we shall discuss the contractual capacity of the mentally incapacitated (16.3) and, finally, we shall analyse the contractual capacity of companies (16.4).

16.2 Minors

A minor is a person under the age of 18. The law adopts a particularly protective attitude towards minors, often at the expense of those who deal with them in all good faith. The general rule is that a minor is not bound by a contract which he enters into during his minority. But this general rule is subject to three principal exceptions.

The first is that a contract to supply a minor with 'necessaries' is binding upon the minor where the contract as a whole is for the benefit of the minor; where its terms are harsh or onerous it is not binding upon the minor. The definition of 'necessaries' is a wide one. In the case of a contract for the sale of goods, necessaries have been defined in s.3(3) of the Sale of Goods Act 1979 as 'goods suitable to the condition in life of the minor . . . and to his actual requirements at the time of the sale and delivery'. At common law a wide definition of necessaries has also been adopted. Regard must be had to the station in life of the minor; the higher the status, the greater the range of necessaries. So in *Peters* v. *Fleming*

(1840) 6 M & W 42, rings, pins and a watch chain were held to be necessaries for an undergraduate who had a rich father. But there is a trap for the trader here because, in deciding whether a particular article is a necessary, a court will have regard to the status of the minor and his actual needs at the time of entry into the contract. Thus, in *Nash* v. *Inman* [1908] 2 KB 1, a tailor sold 11 fancy waistcoats to a minor, who was a Cambridge undergraduate. The minor refused to pay for them. The tailor's action for payment failed because he could not establish that the defendant was not already amply supplied with clothing; the waistcoats were not therefore necessaries. Although a minor is bound by an executed contract for necessaries, it remains unclear whether a minor is bound by an executory contract for necessaries (contrast *Nash* v. *Inman* (above) and *Roberts* v. *Gray* [1913] 1 KB 520).

Secondly, a minor is bound by a contract of employment if that contract is generally for his benefit (contrast *Clements* v. *L & NW Rly* [1894] 2 QB 482 and *De Francesco* v. *Barnum* (1889) 43 Ch D 430). This principle, however, is confined to contracts of employment and analogous con tracts (such as a contract to give publishers the exclusive rights to publish the minor's memoirs, see *Chaplin* v. *Leslie Frewin (Publishers) Ltd* [1966] Ch 71). But there is no general principle of law that a contract with a minor is binding simply because it is for his benefit.

Thirdly, certain contracts with minors are not void but are only voidable; that is to say, the contract is valid and binding upon the minor unless he repudiates liability before majority or within a reasonable time thereafter. Only the minor can repudiate; the adult is bound by the contract. For example, a contract under which a minor acquires an interest in land or shares in a company is voidable, as is a partnership agreement to which a minor is a party. The effect of the repudiation is to release the minor from his obligations to perform in the future. But the minor can only recover back money paid under such a contract where there has been a total failure of consideration (*Steinberg* v. *Scala (Leeds) Ltd* [1923] 2 Ch 452). A total failure of consideration arises where the basis upon which the minor paid the money has wholly failed, that is to say, he has received no part of the performance for which he has bargained.

Outside these three categories, the general rule is that, as we have noted, minors are not bound by the contracts into which they enter. However, a minor may incur liability to an adult in a number of other ways. In the first place, the minor will be liable on the contract if he ratifies it after he has reached majority. Secondly, where a contract is unenforceable against the minor or he has repudiated it, the court may 'if it is just and equitable to do so', require the minor to transfer to the other party any 'property acquired' by the minor under the contract, or any 'property representing it' (s.3(1) of the Minors' Contracts Act 1987: it should be noted in this context that the Act contains no definition of 'property'; in particular, it is unclear whether 'property' includes money). The aim of this section is to prevent the unjust enrichment of the minor in cases such as *Nash* v. *Inman* (above), by enabling the court to order the minor to restore to the vendor the fancy waistcoats. But the court cannot order the minor to return the property where he has disposed of it and obtained nothing in return for it. This limitation has been criticised on the ground that it should be irrelevant that the benefits conferred are no longer identifiable in the minor's hands. Nevertheless, this provision is to be welcomed in so far as it reduces the possibility of the unjust enrichment of the minor. But it should be noted that the Act did not abolish the existing common law rules (see *Stocks* v. *Wilson* [1913] 2 KB 235 and *Bristow* v. *Eastman* (1794) 1 Esp 172), so that the adult may still have resort to these rules where, for some reason, a remedy is not available to him under the 1987 Act. However, it is unlikely that an adult will wish, in future, to have resort to the pre-1987 common law because s.3(1) of the Act generally improves the position of the adult *vis-à-vis* the minor.

Thirdly, a minor who has actually performed his side of the contract may be unable to recover the benefits which he has conferred upon the other party. At first sight this seems rather anomalous. The foolish minor enters into improvident bargains; the very foolish minor actually carries through his side of the bargain. The courts have, however, approached this issue from a different perspective. Their approach has been to allow minority to act as a *defence* to a claim brought against the minor by an adult (as in *Nash* v. *Inman* (above)), but they have refused to allow that same minority to be used as the foundation for an *active* claim by the minor: that is to say, they have refused to recognise that minority can act as a factor rendering the conferral of a benefit unjust so as to trigger an unjust enrichment claim. On the contrary, a minor who seeks to recover the value of a benefit which he has conferred upon an adult must satisfy the same requirements as an adult making a restitutionary claim (except that, where the claim is based on a total failure of consideration, the minor can make out a restitutionary claim even though the adult was ready and willing to perform his side of the bargain). It is for this reason that we find in the cases that minors have relied upon traditional grounds of restitution, such as total failure of consideration (see, for example, *Steinberg* v. *Scala (Leeds) Ltd* (above)). The failure to recognise minority as a ground of restitution presents an odd contrast with the case of mental incapacity (see 16.3) where it is clear that it is the incapacity (together with the knowledge of the other party) which constitutes the factor which renders the enrichment unjust. There is much to be said for the view that minority should also constitute a ground of restitution subject to the requirement that the minor make counter-restitution to the adult (that is to say, the minor must restore to the adult any benefit which he has obtained at the expense of the adult). Indeed, this may have been the view that English law originally adopted in *Valentini* v. *Canali* (1889) 24 QBD 166, before the case was (wrongly) interpreted as an authority for the proposition that the minor must establish the existence of a total failure of consideration.

Fourthly, a contract with a minor is effective to pass property to the minor (s.3(1) of the Minors' Contracts Act 1987); similarly it is effective to pass property from the minor to the adult. Finally, a minor may incur liability in tort or in restitution, but, where the effect of the tort action or the restitutionary action would be to undermine the protection afforded by the law of contract, then the tort action will also be barred. In *R Leslie Ltd* v. *Sheill* [1914] 3 KB 607, a minor obtained a loan of £400 by fraudulently misrepresenting his age. It was held that the minor could not be sued in the tort of deceit because the effect of granting damages in the tort action would be indirectly to enforce the contract and thus undermine the protection afforded by the law of contract. But it must be doubted whether *Leslie* would be followed today. It has been sharply criticised (for example, by Burrows 1993c, p.452) on the ground that a restitutionary action to recover the value of a benefit conferred is not the same thing as an action to enforce the contract of loan, a point recognised in another context by the House of Lords in *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] AC 669, 718. The measure of recovery in a restitutionary claim is the value of the benefit conferred (here the loan) subject to the defence of change of position, whereas in the contractual claim it is the principal sum together with the contractually agreed rate of interest.

Despite the enactment of the Minors' Contracts Act 1987, the law relating to the contractual capacity of minors remains in a confused state. The rules relating to necessaries can act as a trap for persons who deal in all good faith with minors. On the other hand, given that in the vast majority of cases a minor can avoid liability without the need to repudiate, it is difficult to understand why certain contracts are treated as voidable so that the minor can only avoid liability by a timely repudiation. The rules of law remain in need of further rationalisation in an effort to provide a better balance between, on the one hand, the protection of minors and, on the other hand, the interests of those who deal in all good faith with them.

16.3 Mental Incapacity and Drunkenness

A contract entered into by a person whose property is subject to the control of the court under Part VII of the Mental Health Act 1983 is voidable at the instance of such a party, although the contract does bind the other party (*Re Walker* [1905] 1 Ch 60). The justification for this rule would appear to be that, where the patient's property is subject to the control of the court, an attempted disposition of the property does not bind him, since it would interfere with the court's control over the property.

Where the property is not subject to the control of the court under the 1983 Act, then mental incapacity is not a ground for the setting aside of a contract or for the return of benefits conferred under a contract, unless the incapacity is known to the other party to the contract (*Imperial Loan Co* v. *Stone* [1892] 1 QB 599). Where the incapacity is not known to the other party, the contract cannot be set aside, unless the contract is of such a nature as to attract the equitable jurisdiction to relieve against unconscionable bargains between two persons of sound mind (*Hart* v. *O'Connor* [1985] AC 1000, see further 17.4). This requirement that the other party be aware of the incapacity should be contrasted with the case of minors, where there is no requirement that the other party be aware of the minority and, indeed, the minor may be relieved even when he has misrepresented his age. In Scotland the rule is that knowledge of the insanity is not a relevant consideration (*John Loudon & Co* v. *Elder's* CB 1923 SLT 226). It is therefore no surprise to learn that the requirement that the other party be aware of the incapacity has been subjected to severe criticism (see Hudson, 1986), although its harshness may be mitigated in practice by the existence of the equitable jurisdiction to set aside an improvident bargain made with a poor and ignorant person (*Creswell* v. *Potter* [1978] 1 WLR 255, see further 17.4).

Drunkenness is treated in the same way as mental incapacity, so that the contract may only be set aside by the drunken party where the drunkenness prevented him from understanding the transaction and the other party to the contract knew of his incapacity (*Gore* v. *Gibson* (1843) 13 M & W 623). Finally, it should be noted that in the case of a contract for the sale of goods, 'where necessaries are sold and delivered to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price for them' (s.3(2) of the Sale of Goods Act 1979).

16.4 Companies

A company is a legal person which is separate and distinct from its shareholders. But the capacity of the company is limited by the objects for which the company is set up and which are contained in the company's memorandum of association. If the company acts beyond its objects then it has acted *ultra vires*, that is to say, it has acted beyond its capacity. In *Ashbury Railway Carriage and Iron Co* v. *Riche* (1875) LR 7 HL 653, it was held that a contract which was *ultra vires* the company was void. One of the principal justifications for the *ultra vires* rule is that it gives protection for shareholders who can learn from the objects clause 'the purposes to which their money can be applied' (*Cotman* v. *Brougham* [1918] AC 514, 520 per Lord Parker of Waddington). In theory, it also provides protection for those who lend money to the company because they can infer from the objects clause the extent of the company's powers. But, in practice, a strict application of the rule caused hardship to innocent third parties who entered into a contract with a company, unaware of the *ultra vires* nature of the contract.

So it is not surprising to learn that the courts have created a number of exceptions to the rule in an effort to provide some protection for innocent third parties who deal in all good faith with the company (see Farrar, 1998, pp.107–14). The most significant protection is now provided by statute in s.35(1) of the Companies Act 1985 (as amended by the Companies Act 1989) which states that:

> 'The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of the fact that it is beyond the objects of the company stated in the memorandum of association.'

The intention behind this section is to abolish the *ultra vires* rule as regards innocent third parties who deal in all good faith with the company (see further s.35A and s.35B), while retaining it for internal purposes concerning the relationship between the shareholders and the company (s.35(2) and (3)). Therefore, in effect, this section has abolished the *ultra vires* rule in relation to third parties who deal in all good faith with the company, so that the contract remains valid and enforceable.

Summary

1 The general rule is that a minor is not bound by a contract which he enters into during his minority.
2 But a minor is bound by a contract to supply him with 'necessaries' where the contract as a whole is for the benefit of the minor and he is also bound by a beneficial contract of employment. Certain contracts involving minors are voidable and the minor can escape liability only by a timely repudiation.
3 However a minor may incur liability in a number of other ways. He may incur liability on the contract if he ratifies it after attaining majority, he may incur liability in tort, he may be ordered to restore any property he has acquired under the contract or any property representing it (s.3(1) of the Minors' Contracts Act 1987) and it is more difficult for a minor to obtain a remedy where the contract has been performed.
4 A person whose property is subject to the control of the court under Part VII of the Mental Health Act 1983 appears to be incapable of entering into a contract. In all other cases mental incapacity is not a ground for the setting aside of a contract, unless the incapacity is known to the other party to the contract.
5 The rule established in *Ashbury Railway Carriage and Iron Co* v. *Riche* was that a contract which is *ultra vires* a company is void. The effect of s.35 of the Companies Act 1985 (as amended) is virtually to abolish the doctrine of *ultra vires* in relation to third parties who deal in all good faith with the company.

Exercises

1 John, who is aged seventeen, agrees to buy a motor bike from Trike Ltd for £2500. He takes delivery of the bike but refuses to pay for it. Advise Trike Ltd.
2 In what circumstances may a minor incur liability to an adult as a result of entering into a contract?
3 John, who suffers from senile dementia, agrees to sell a portrait to Brian for £5000. Brian does not know that John is suffering from senile dementia. It is later discovered that the portrait is, in fact, an original nineteenth century painting, which is worth £125,000. Advise John whether he has any rights against Brian.
4 What does *ultra vires* mean? What effect does it have on a contract with a party who is unaware of the *ultra vires* nature of the transaction?

17 Duress, Undue Influence, and Inequality of Bargaining Power

17.1 Introduction

The law of contract has always placed limits upon the exercise of economic power by contracting parties (see Reiter, 1981). This role has traditionally been played by the doctrines of duress and undue influence, although recent years have also witnessed a (largely abortive) attempt to introduce into the common law a doctrine of inequality of bargaining power. While the English courts appear to have abandoned the attempt to create a doctrine of inequality of bargaining power, the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999, No. 2083), which give effect to an EC Directive on Unfair Terms in Consumer Contracts, have now conferred upon the courts significant powers to regulate unfair terms in consumer contracts (see 1.6 and 17.6). In this chapter we shall give separate consideration to each of these issues and conclude by discussing the extent to which the law of contract is concerned with the fairness of the bargain reached by the parties.

17.2 Common Law Duress

The doctrine of duress has been a relatively late developer in English contract law. Although the courts have had little difficulty in setting aside a contract on the ground of duress to the person, they have had more difficulty in recognising the existence of more subtle forms of duress, such as duress to goods and economic duress (see below). Historically, some of the work was done by the doctrine of consideration (see 5.3, 5.6 and 5.11). For example, if X puts a gun to Y's head and extracts from Y a promise to pay him £10,000, then Y's promise is unenforceable because of the absence of any consideration provided by X. But the doctrine of consideration was never well equipped to deal with duress and this is largely because of the rule that consideration must be sufficient but need not be adequate (see 5.6). So if X agrees to give Y his pen worth £1 in return for the promise to pay £10,000, the consideration hurdle is overcome.

The role of consideration in regulating duress-type situations is likely to diminish still further as a result of the decision of the Court of Appeal in *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (discussed in more detail at 5.11–5.14). The approach of the Court of Appeal strongly suggests that the modern courts will be more willing to find the presence of consideration in the renegotiation of a contract and leave it to duress to regulate the fairness of the renegotiation. Indeed, one of the factors which was relied upon in adopting a more liberal approach to consideration was the fact that the court could always set aside the re-negotiated contract on the ground of duress where the ingredients of duress were established. Thus, a case such as *Stilk* v. *Myrick* (1809) 2 Camp 317 and 6 Esp 129 (see 5.11 and 5.13) was reclassified as a duress case rather than a consideration case. So, post-*Williams* v. *Roffey Bros*, it is clear that the doctrine of duress assumes greater significance. The difficulty is that duress has been bedevilled by conceptual confusion with the result that it is not easy to identify its limits and it is not obvious that it is ready to play the role which has been allocated to it. Having set duress in its context, we must now turn to consider the scope of the doctrine of duress at common law.

A contract which has been entered into under duress is voidable. There are three types of duress at common law. The first, and least controversial, is duress to the person. This may consist of actual violence to the claimant or to members of his family or threats of such violence. In *Barton* v. *Armstrong* [1976] AC 104, the Privy Council held that the threats need not be the sole reason for entry into the contract; it was sufficient that the threats were a factor influencing the victim to enter into the contract.

The second type of duress is duress to goods, that is a threat of damage to the victim's goods rather than to his person. Here the development of the law has been hindered by the old case of *Skeate* v. *Beale* (1840) 11 Ad & E 983, in which it was held that the unlawful detention of another's goods does not constitute duress. On the other hand, there was authority for the proposition that money paid to release goods which had been unlawfully detained could be recovered back in an action for money had and received (*Astley* v. *Reynolds* (1731) 2 Str 915). The decision in *Skeate* v. *Beale* has come under heavy academic criticism (see Beatson, 1974) and in *The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293, Kerr J refused to follow it. Given the development of the doctrine of economic duress (see below), it can be predicted with some confidence that *Skeate* will not be followed today and in *The Evia Luck* [1992] 2 AC 152, Lord Goff stated that the limitation in *Skeate* that only duress to the person would entitle a party to avoid a contract had been 'discarded'. So it is now clear that duress to goods can, in an appropriate case, form the basis of a claim for relief.

The third type of duress, and the most difficult to stabilise, is economic duress. This type of duress arises where one party uses his superior economic power in an 'illegitimate' way so as to coerce the other contracting party to agree to a particular set of terms. The existence of this doctrine was first recognised in England by Kerr J in *The Siboen and The Sibotre* (above) and it has since been recognised in a number of cases, most importantly by the House of Lords in *Universe Tankships of Monrovia v. International Transport Workers Federation* ('The Universe Sentinel') [1983] 1 AC 366. In the latter case the defendant trade union 'blacked' the claimants' ship in port and refused to release it until certain monies were paid, including a payment to the union's welfare fund. The House of Lords held that the latter payment was recoverable because the will of the shipowners had been coerced into making the payment and the pressure applied by the defendant union had been 'illegitimate'.

One question which must be asked here is: on what basis do the courts intervene to set aside a contract on the ground of duress? The traditional answer is that the courts will intervene where the victim's will has been 'coerced', such as 'to vitiate his consent'. This emphasis upon the need to establish a 'coercion of the will' can be seen in *The Siboen and The Sibotre* and, albeit to a lesser extent, in *The Universe Sentinel*. However the difficulties inherent in the 'coercion of the will' theory have been convincingly exposed by Professor Atiyah (1982). The principal difficulty is that duress does not deprive a person of all choice, but merely presents him with a choice between evils. For example, if a man forces me at gun point to enter into a contract, I do in fact consent to entering into the contract. Indeed, the more real the pressure, the more real is my willingness to enter into the contract, even if it is only to extricate myself from my predicament. What is wrong with the contract is not the absence of consent, but the wrongful nature of the threats which have been used to bring about the consent.

Given these criticisms of the 'coercion of the will' test it is not surprising to find that the courts have begun to distance themselves from it. In *The Evia Luck* (above) Lord Goff, giving the principal judgment of the House of Lords, noted (at p.165) the criticisms which have been levelled against the theory and doubted whether 'it is helpful to speak of the [claimant's] will having been coerced'. Hopefully, the courts will soon abandon the test completely and have regard to the consent of the claimant only for the purpose of ensuring that there is a sufficient causal link between the pressure applied by the defendant and the entry into the contract. That said, there is some uncertainty as to the test which is to be applied by the courts when seeking to determine whether or not there is a sufficient causal link between the two. In the context of duress to the person, the threat need only be a cause of the claimant acting as he did and there is even a suggestion in *Barton* v. *Armstrong* (above) that the onus of proof switches to the defendant to show that the illegitimate pressure would not have influenced the claimant in any event. It is clear that this generous approach to the claimant does not apply to cases of economic duress because it would lead to relief being given too readily (in particular, it could make it too easy for a claimant to set aside a re-negotiation of a contract which he has since decided is definitely disadvantageous for him). So a claimant must overcome a more serious hurdle in the case of economic duress than in the case of duress to the person but it is not clear how significant that hurdle is. The onus of proof is probably on the claimant to prove the existence of a sufficient causal link (see *Huyton SA* v. *Peter Cremer GmbH & Co Inc* [1999] 1 Lloyd's Rep 620, 638–9 (Mance J)) and it may be that the claimant must also show that the pressure applied was a 'significant cause' inducing him to enter into the contract (see *The Evia Luck* [1992] 2 AC 152, 165 (Lord Goff) and *Huyton SA* v. *Peter Cremer GmbH & Co Inc* (above) pp.636–7 (Mance J)). The courts are also likely to consider whether or not there was an alternative open to the claimant. In the *Huyton* case, Mance J stated (at p.638) that, while it was 'not necessary to go so far as to say that it is an inflexible third essential ingredient of economic duress that there should be no or no practical alternative course open to the innocent party', it seemed to him 'self-evident that relief may not be appropriate, if an innocent party decides, as a matter of choice, not to pursue an alternative remedy which any and possibly some other reasonable persons in his circumstances would have pursued'. Consent also has a role to play in distinguishing between duress and a settlement of an honest claim (*Pau On* v. *Lau Yiu Long* [1980] AC 614) and in barring a claim, which would otherwise have succeeded, where a party has subsequently affirmed the contract (*North Ocean Shipping Co Ltd* v. *Hyundai Construction Co Ltd* [1979] QB 705).

This gradual move away from the coercion of the will test suggests that greater emphasis should be placed in future cases upon the nature of the pressure applied by the more powerful party. So the principal task which remains for the courts is to ascertain what constitutes 'illegitimate' pressure. It is clear that it encompasses unlawful threats, such as a threat to commit a crime, a tort or a breach of contract (see *Pao On* v. *Lau Yiu Long* (above)). Lord Scarman stated in *The Universe Sentinel* that it should extend to threats which, though lawful in themselves, are used to attain a goal which is unlawful, such as blackmail. On the other hand, a refusal to waive existing contractual obligations should not amount to duress because of the absence of a wrongful threat (*Alec Lobb (Garages) Ltd* v. *Total Oil (Great Britain) Ltd* [1983] 1 WLR 87, 94) and a demand for payment made by an owner of goods who has validly terminated a hire-purchase contract as the price for not exercising his right to repossess the goods has also been held not to constitute duress (*Alf Vaughan & Co Ltd* v. *Royscot Trust plc* [1999] 1 All ER (Comm) 856). Equally, a threat to refuse to contract should not constitute duress because, in the absence of an obligation to enter into a contract, no wrongful threat is made in refusing to contract. However it would appear that the latter proposition cannot be stated in unqualified terms. The Court of Appeal in *CTN Cash and Carry Ltd* v. *Gallaher Ltd* [1994] 4 All ER 714 held that a threat to refuse to contract (on the facts of the case, a threat to refuse to provide urgently needed credit in future transactions) did not constitute duress. But in considering the scope of the decision it should be noted that the court placed some emphasis on the fact that the party applying the pressure did not act in bad faith: that is to say, they genuinely but erroneously believed that they were entitled to make the demand which they had made and which they had backed up by their refusal to provide credit. So the position may be otherwise where there is bad faith. In such a case it *may* be possible to say that there has been illegitimate pressure brought to bear. Thus Steyn LJ expressly refrained from stating that there could 'never' be a case of 'lawful act duress' in a commercial context. Although a refusal to contract or to waive existing contractual obligations may have serious consequences for the victim and may 'coerce his will', such threats should not (except perhaps in the most exceptional case) constitute duress because no wrongful threat has been made by the more powerful party. This suggests that, in future cases, the primary focus of the court's inquiry should be upon the nature of the pressure applied by the more powerful party rather than the state of mind of the victim.

While the focus of attention upon the nature of the pressure applied will, ultimately, bring greater coherence to the law, it will not eliminate all the difficult questions. The courts are likely to experience considerable difficulties where the duress is alleged to take the form of a threatened breach of contract. The emphasis on the need for an illegitimate threat has led us to the conclusion that a threat to break a contract can constitute duress, whereas a refusal to waive an existing contractual obligation cannot. While this sounds very neat in theory, it can be difficult to apply in practice because, in many cases, one of the most difficult and contentious issues is whether or not the party who has exerted the pressure was threatening to break the contract, or whether he was entitled to make the demand which he was making. This has led some commentators to suggest that not all threatened breaches of contract should count as the application of illegitimate pressure: some additional element should be required. Thus Burrows (1993c) has argued that bad faith should play a critical role in deciding whether or not a threatened breath of contract is illegitimate (the point was noted by Mance J in *Huyton SA* v. *Peter Cremer GmbH & Co Inc* [1999] 1 Lloyd's Rep 620, 637 and was stated to be 'by no means uncontentious' but it was not necessary for him to decide the point). One problem with this test lies in identifying what constitutes bad faith. Burrows defines it in the following terms: 'a threatened breach of contract should be regarded as illegitimate if concerned to exploit the claimant's weakness rather than solving financial or other problems of the defendant'. Another problem with the emphasis on bad faith is that English law does not generally invoke notions of bad faith in the context of breach of contract: either one is in breach of contract, or one is not. A threatened breach of contract is a threat which, under the terms of the contract, one is not entitled to make, irrespective of one's good faith (the emphasis placed on bad faith in *CTN Cash and Carry Ltd* v. *Gallaher Ltd* (above) can be distinguished on the ground that a refusal to contract is not in itself wrongful so that bad faith might there be used to tip the scales in favour of a finding of 'illegitimacy', but a threatened breach of contract is already wrongful and so there is no need to place any reliance upon bad faith in that context).

A case which may illustrate the difficulties here is *Williams* v. *Roffey Bros* (the facts of which are set out at 5.11). It is a little difficult to apply the duress analysis with any confidence to this case because duress was, for some reason, not pleaded. But it is not very easy to ascertain why duress was not in issue in the case: there was a potential breach of contract by the sub-contractors and the probability of that breach was a cause of the main contractors offering to pay more for the performance of the agreed work. Yet most people seem to feel content with the conclusion that there was no duress on the facts of the case. One reason for this is that it was the main contractors who called the meeting and who made the offer to pay more. But the fact that they made the suggestion cannot, of itself, be decisive because the reason for them making the offer of extra payment may well have been the pressure which they were under as a result of the lack of progress being made and the possible inability of the claimant to complete the work. The second point which tends to suggest that there was no duress is the fact that the claimant was obviously incompetent: not only was he unable to supervise his workforce but he could not cost the job properly. But how would we feel about the sub-contractor who deliberately priced the job very low so that he was awarded the contract and who then, without making any explicit threats, made it clear to the main contractor that he was unlikely to complete on time unless offered more money? The latter example seems more akin to duress. Yet how can the courts distinguish between the incompetent sub-contractor (as in *Williams* v. *Roffey*) and the contractor who deliberately underprices the job? Do these examples suggest that there might be a role for an additional factor, such as bad faith, to distinguish those breaches of contract which are illegitimate, from those which are legitimate? Or should we conclude that all breaches of contract are illegitimate and that a vital error was made in *Williams* in failing to bring the duress issue before the court? The fact that these fundamental questions remain to be answered suggests that the law relating to duress remains rather undeveloped in English law and that it is not yet ready to play the role given to it by the Court of Appeal in *Williams* v. *Roffey Bros*.

17.3 Undue Influence

Undue influence, being a creation of equity, has emerged separately from common law duress. Although undue influence is a well-worn phrase, its meaning has not been subjected to precise analysis by the courts. What does 'undue' mean? Does it mean 'illegitimate' (and, if so, does it have the same meaning as in common law duress?) or does it mean 'too much'? And what about 'influence'? Does it mean 'pressure' or is it a more subtle, continuing form of domination? The courts have not provided any clear answer to these questions (the most significant academic analysis is provided by Birks and Chin Nyuk Yin, 1995).

The traditional approach is to divide undue influence into two distinct categories: presumed and actual undue influence. But an important preliminary point was considered by the House of Lords in *National Westminster Bank plc* v. *Morgan* [1985] AC 686. There it was held that, before a transaction could be set aside on the ground of presumed undue influence, it had to be shown that the transaction was wrongful, in the sense that it constituted a *manifest and unfair disadvantage* to the person seeking to have the contract set aside. In *Bank of Credit and Commerce International SA* v. *Aboody* [1990] 1 QB 923, the Court of Appeal held

> 'that a disadvantage would be a manifest disadvantage if it would have been obvious as such to any independent and reasonable persons who considered the transaction at the time with knowledge of all the relevant facts.'

A disadvantage will not be manifest if it emerges only 'after a fine and close evaluation of [the transaction's] various beneficial and detrimental features'. The key requirement would appear to be that the disadvantage be 'clear and obvious' (see *Cheese* v. *Thomas* [1994] 1 WLR 129). It need not be large or even medium-sized as long as it is clear and obvious and more than *de minimis* (*Barclays Bank* v. *Coleman* [2000] 1 All ER 385, 400). Given the present rather uncertain status of 'manifest disadvantage' within the law (on which see below), the courts are unlikely to enlarge its significance by making it a particularly difficult hurdle for a claimant to overcome (see, in particular, *Barclays Bank* v. *Coleman* (above)).

In *Aboody*, the Court of Appeal held that the manifest disadvantage requirement was also applicable to cases of actual undue influence but this argument was rejected by the House of Lords in *C.I.B.C. Mortgages plc* v. *Pitt* [1994] 1 AC 200. Lord Browne-Wilkinson stated that actual undue influence was a 'species of fraud' and that, once a claimant had proved actual wrongdoing, there was no need for him to assume the additional obligation of proving manifest disadvantage. This must be right. If I subject you to illegitimate pressure or to undue influence so that you enter into a contract into which you would not otherwise have entered, the fairness of the bargain is irrelevant: the fact that my wrongdoing caused you to enter into the transaction is enough to give you a ground for relief. So why do the courts insist on manifest disadvantage in the context of presumed undue influence? The answer which Lord Browne-Wilkinson gave is that its function is 'to raise a presumption of undue influence'. An example will illustrate the point. Suppose that a solicitor purchases an antique from his client at a fair market value. There is nothing suspicious about this transaction and so the solicitor is not called upon to prove that he did not subject the client to undue influence. But let us suppose that the antique was sold for half the market value. Here the manifestly disadvantageous nature of the transaction causes us to suspect that something has gone wrong in the bargaining process (see *Royal Bank of Scotland plc* v. *Etridge (No. 2)* [1998] 4 All ER 705, 713–14), in other words, the presumption of undue influence has been raised. This seems to make sense. But two caveats must be entered. The first is that Lord Browne-Wilkinson pointed out that the manifest disadvantage requirement does not apply to an obscure line of cases sometimes referred to as the 'abuse of confidence cases'. In an abuse of confidence case it is for the fiduciary (the one in whom the confidence is reposed) to show that the transaction was a fair one (in contrast to the presumed undue influence cases where the burden is upon the weaker party to show manifest disadvantage). It is possible to argue that these abuse of confidence cases are all examples of actual undue influence (by focusing upon the word 'abuse') and if this is right no problem arises because we know that manifest disadvantage does not apply to actual undue influence. But if these cases cannot be so confined, then claimants will obviously plead abuse of confidence rather than presumed undue influence in order to escape the manifest disadvantage requirement. The second caveat is that the fact that manifest disadvantage applies to presumed but not to actual undue influence assumes that a clear line can be drawn between the two categories. But this is not so and claimants will now be tempted to plead actual undue influence rather than presumed in order to avoid the manifest disadvantage requirement. On the other hand, the courts may well be reluctant to make a finding of actual undue influence in the absence of clear evidence because, once they reach such a conclusion, there are very few control devices which they can then employ to deny a claim to relief.

As has already been stated, undue influence cases are traditionally divided into two categories. The first group of cases are cases of 'presumed undue influence'. In this group of cases the relationship between the parties plus manifest disadvantage gives rise to a presumption of undue influence and the onus of proof switches to the recipient to show that he did not exercise undue influence. In *Bank of Credit and Commerce International SA* v. *Aboody* (above), the Court of Appeal held that cases of presumed undue influence can themselves be divided into two categories. The first group of cases concern the 'well established categories of relationship', such as solicitor and client, doctor and patient and religious adviser and disciple, where 'the relationship as such will give rise to the presumption'. The second category consists of relationships which do not fall within the first class but which 'may be shown to have become such as to justify the court in applying the same presumption'. The relationship between the parties is often a relationship of trust and confidence, but it need not be; a relationship of ascendancy and dependence will suffice (see *Royal Bank of Scotland plc* v. *Etridge (No. 2)* [1998] 4 All ER 705, 712). In the second category is *Re Craig* [1971] Ch 95, in which an elderly widower employed a young woman as his secretary and companion. He employed her only two months after the death of his wife and over the next six years gave her gifts worth £28,000. It was held that there was a relationship of confidence between the two, such as to give rise to a presumption of undue influence, and that the young woman had failed to rebut the presumption that she had obtained the gifts by the use of undue influence.

Once the presumption of undue influence has arisen it may be rebutted by showing that the donor acted independently of any influence of the recipient and with full appreciation of what he was doing. The most usual, although not the only way of rebutting the presumption, is to show that the donor had competent and independent advice before acting. But the presumption may also be rebutted by showing that the act of the donor in making the gift had been a 'spontaneous and independent act' (*Re Brocklehurst* [1978] Ch 14).

The second group of undue influence cases are cases of 'actual undue influence'. They arise, not from the relationship between the parties, but because there has been some unfair and improper conduct on the part of the party alleged to have exercised the undue influence. The unfair and improper conduct often takes the form of 'importunity and pressure' but it has been stated that 'pressure is neither always necessary nor always sufficient' (*Royal Bank of Scotland plc* v. *Etridge (No. 2)* [1998] 4 All ER 705, 712). In these cases the undue influence must be proved by the party seeking to establish its existence; there is no presumption of undue influence. Cases within this category tend to be a rather rare species because they are either argued as cases of common law duress or it is sought to establish that there is a relationship between the parties such as to give rise to a presumption of undue influence. A case such as *Re Craig* (above) can be decided either as a case of presumed undue influence (in the second category) or as a case of actual undue influence. As the Court of Appeal acknowledged in *Aboody*, the border between the second category of presumed undue influence and actual undue influence may be a 'slender' one. But now that we know that manifest disadvantage does not apply to actual undue influence, a claimant in a case such as *Re Craig* is more likely to opt for actual undue influence rather than presumed. A rare case of actual undue influence is *Williams* v. *Bayley* (1866) LR 1 HL 200. A father sought to rescind a mortgage which he had executed in favour of a banker. He proved that he had executed the mortgage because he was frightened by the banker's warning that he had it in his power to prosecute his son for forgery. It was held that he was entitled to rescind the mortgage on the ground of undue influence.

17.4 Inequality of Bargaining Power

The issue whether a doctrine of inequality of bargaining power exists in English law has been one of some controversy in recent years. The primary source of this controversy lies in the seminal judgment of Lord Denning in *Lloyds Bank* v. *Bundy* [1975] QB 326. The facts of the case were, in many ways, unremarkable. Mr Bundy, an elderly man not well versed in business affairs, gave his bank a guarantee regarding his son's business debts and mortgaged his house to the bank as security for the guarantee. In entering into this transaction Mr Bundy relied implicitly on his bank manager as his adviser, but the bank manager was also acting on behalf of the son, thereby creating a conflict of interest. When the bank sought to enforce the guarantee against old Mr Bundy and obtain possession of the house, Mr Bundy defended the action on the ground that the mortgage had been improperly obtained. The majority of the court decided the case on orthodox grounds, holding that the bank had failed to rebut the presumption of undue influence because they could not show that Mr Bundy had been independently advised. All this, however, was not for Lord Denning. He set out the following general principle:

> '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 and 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 the other.'

Lord Denning envisaged that this new general principle would unify hitherto discrete areas of law and provide a basis for a solution to a wide range of problems. But it has since received a rather frosty reception in the appellate courts. In *Pao On* v. *Lau Yiu Long* (above), Lord Scarman, giving the judgment of the Privy Council, said that agreements were not voidable simply because they had been 'procured by an unfair use of a dominant bargaining position'. A much more severe rebuff was handed out by Lord Scarman, giving the judgment of the House of Lords in *National Westminster Bank plc* v. *Morgan* (above). He specifically disapproved of Lord Denning's principle of inequality of bargaining power and questioned whether there was any need for such a doctrine, given that Parliament, in statutes such as the Consumer Credit Act 1974, has undertaken the task of placing 'such restrictions upon freedom of contract as are necessary' to protect the most likely victims of inequality of bargaining power.

However, although Lord Denning's principle of inequality of bargaining power has been rejected, it should not be assumed that courts will stand by and allow the strong 'to push the weak to the wall' (*Alec Lobb (Garages) Ltd* v. *Total Oil (Great Britain) Ltd* [1985] 1 WLR 173, 183). Even in *National Westminster Bank* v. *Morgan*, Lord Scarman recognised the existence of an equitable jurisdiction to grant relief against an unconscionable (or unfair) bargain. He refused to confine the jurisdiction of equity within rigid limits, saying that the 'court in the exercise of this equitable jurisdiction is a court of conscience'. Thus we find that equity intervenes to relieve against unconscionable bargains (*Earl of Chesterfield* v. *Janssen* (1751) 2 Ves Sen 125), to set aside an agreement made with an expectant heir (*Earl of Aylesford* v. *Morris* (1873) LR 8 Ch App 484), to set aside an improvident bargain made with a poor and ignorant person (*Creswell* v. *Potter* [1978] 1 WLR 255) and to grant relief where there has been an abuse of a relationship of confidence (*Demarara Bauxite Co Ltd* v. *Hubbard* [1923] AC 673). The jurisdiction to set aside an improvident bargain made with a poor and ignorant person has recently been stated to be 'in good heart and capable of adaptation to different transactions entered into in changing circumstances' (*Credit Lyonnais Bank Nederland NV* v. *Burch* [1997] 1 All ER 144, 151 (Nourse LJ)) and examples can still be found of contracts set aside by the courts on the ground that they constitute unconscionable bargains (see, for example, *Boustany* v. *Piggott* (1995) 69 P & CR 298). There are two principal objections to this development.

The first is that the failure of the courts to define the basis of their jurisdiction leads to uncertainty and inconsistency. Is the basis of these doctrines the inequality between the parties, the unfair nature of the terms, the knowing taking advantage of the weakness of another or some combination of these factors? The answer is unclear (a good example is provided by *Boustany* v. *Piggott* (above), where the precise reason for the lease being set aside does not emerge from the advice of the Privy Council with any clarity). The second objection is that, although there is no general principle of inequality of bargaining power, it remains to be seen how far these residual equitable doctrines will be resurrected to play the role which Lord Denning envisaged would be played by his doctrine of inequality of bargaining power. In this way the courts may achieve covertly what they refuse to do overtly and such subterfuge should not be encouraged in the law.

17.5 The Role of Parliament

Parliament has also had a role to play in regulating contracts in an effort to protect the most likely victims of inequality of bargaining power. For example, section 137(1) of the Consumer Credit Act 1974 states that

> 'If the court finds a credit bargain extortionate it may reopen the credit agreement so as to do justice between the parties.'

An extortionate credit bargain is one which requires the debtor or a relative of his to make payments which are 'grossly exorbitant' or which 'otherwise grossly contravenes ordinary principles of fair dealing' (s.138(1)). In deciding whether these requirements have been satisfied, the court must engage in a wide-ranging inquiry but must, in particular, have regard to the interest rates prevailing at the time that the agreement was made, the relevant characteristics of the borrower (such as age, experience, health and the presence or absence of financial pressure upon him), the risks accepted by the creditor and the creditor's relationship to the debtor. The court is also given considerable discretion to remake the agreement according to its conception of what justice requires on the facts of the case.

Other examples of statutes enacted in an attempt to protect the most likely victims of inequality of bargaining power include the Unfair Contract Terms Act 1977 and the Supply of Goods and Services Act 1982. Parliament has also intervened to regulate the employment relationship and the relationship between landlords and tenants in an effort to provide greater protection for employees and tenants (see 1.2). But, as we have already noted, Lord Scarman in *Morgan* used the existence of such legislation as a justification for refusing to create a doctrine of inequality of bargaining power (contrast the approach of the Court of Appeal in *Timeload Ltd* v. *British Telecommunications plc* [1995] EMLR 459, where section 3 of the Unfair Contract Terms Act was used as a 'platform' from which the court could reach out to regulate clauses which fell outside the ambit of the Act). But the better approach would surely have been to create such a doctrine and follow the policy being pursued by Parliament. Instead, the common law has been left pursuing an individualistic policy which is diametrically opposed to the policies being pursued by Parliament in statutes such as the Consumer Credit Act 1974 and the Unfair Contract Terms Act 1977.

17.6 The Unfair Terms in Consumer Contracts Regulations 1999

The Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999, No. 2083) have recently been enacted into domestic law in implementation of an EC Directive on Unfair Terms in Consumer Contracts (93/13 EEC). The Regulations were first enacted in the form of the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994, No. 3159) which came into force on 1 July 1995 (although the EC Directive itself came into force on 1 January 1995). The 1994 Regulations were revoked by the 1999 Regulations which in turn came into force on 1 October 1999. The regulations will have a considerable impact on contracts concluded between businesses (including providers of public services) and consumers. The Directive was implemented into UK law by means of Regulations made under s.2(2) of the European Communities Act 1972 and no attempt was made to integrate the Regulations with existing legislation (in particular, the Unfair Contract Terms Act 1977 (UCTA) (on which see 11.9–11.16)). No amendments were made to UCTA and so this new right of action is an addition to the consumer's existing rights of action under the 1977 Act. This will inevitably give rise to some confusion because the scope of the two rights differ in significant respects. The most important one for present purposes is that the 1977 Act is confined in its application to particular types of clauses (essentially exclusion, limitation and indemnity clauses, see 11.16), while the Regulations are not confined to any particular type of term. Thus the jurisdictional problems which we noted under the 1977 Act (see, for example, 11.10) should not arise under the Regulations. But the co-existence of UCTA and the Regulations may give rise to some difficulties. For example, paragraph 1 (a) of Schedule 2 to the Regulations gives an example of a term which is indicatively unfair as a term which has the object or effect of 'excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier'. Yet section 2(1) of UCTA states that any attempt to exclude or restrict business liability for death or personal injury caused by negligence is of no effect (see 11.10). So the term is void by virtue of the Act but is only indicatively unfair as far as the Regulations (a subsequent statutory instrument) are concerned. It is highly unlikely that a court would take the view that the Regulations had impliedly repealed s.2(1) of UCTA (see Reynolds, 1994), but the procedure adopted by Parliament has little to commend it.

Before examining the text of the Regulations, it is important to note that the Regulations have been enacted in implementation of an EC Directive. This is important for two reasons. The first is that the drafting of the Directive itself is not a model of clarity (see Hartley, 1996). It is the Directive itself which is the source of a number of the difficulties which are likely to be encountered when seeking to interpret the Regulations. For example, it is not entirely clear whether the Directive extends to contracts for the sale of land; the definition of 'unfair' lacks clarity; and a number of the definitions of the terms which are stated to be indicatively unfair will give rise to considerable uncertainty. The passage of the Regulations through Parliament could have provided the opportunity to iron out some of these difficulties, but no attempt was made to do so. The approach which was adopted, particularly in the case of the 1999 Regulations, was largely to 'copy-out' the text of the Directive without seeking to resolve these ambiguities (for criticism of this approach, see Bright and Bright, 1995). The second point of significance which flows from the fact that the Regulations have been enacted in implementation of an EC Directive relates to the approach which should be adopted when seeking to interpret the Regulations. Domestic legislation tends to be interpreted with close regard being paid to the precise words which Parliament has chosen to use, and rather less emphasis is placed on the purpose or spirit behind the legislation. In contrast, the European Court of Justice adopts a much more purposive or teleological approach to interpretation which, at times, seems to do some violence to the words which have actually been used in the texts that are being interpreted. An English lawyer must therefore learn to approach the interpretation of the Regulations with a less finely tuned linguistic fork and pay greater attention to the purposes which lie behind the Directive and to the other language versions of the Directive. One illustration of this point will suffice for present purposes. Do the Regulations apply to contracts for the sale of land? In relation to the 1994 Regulations, the answer seemed at first sight to be 'no' because the Regulations referred only to sellers and suppliers of 'goods' or 'services' and land, as far as English lawyers are generally concerned, is neither a good nor a service. The 1999 Regulations have deleted the reference to 'goods' and 'services' in the definition of seller or supplier but the deletion of these words does not necessarily mean that land now falls within the scope of the Regulations. They are simply silent on the point. But the French text of the Directive uses the words 'vendeur de biens', words which can encompass a seller of both movable and immovable property. The French text therefore includes land and it would undermine the goal of uniformity if the Directive were to apply to contracts for the sale of land in France but not to contracts for the sale of land in the United Kingdom. It is unlikely that the European Court of Justice will tolerate such a divergence and, although the point cannot be said to be settled, the balance of opinion supports the view that the Regulations will apply to sales of land provided that the other requirements of the Regulations are satisfied (see Bright and Bright, 1995 and Attew, 1995).

The aim of the Directive and of the Regulations is to regulate unfair terms in contracts concluded between a seller or supplier and a consumer. A consumer is defined in Regulation 3(1) as 'any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession'. It should be noted that this definition is narrower than the corresponding provision in s.12 of UCTA which does not necessarily exclude a company from the definition of a consumer (see 11.11). A seller or supplier is defined in Regulation 3(1) as 'any natural or legal person who, in contracts covered by the

Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned'. The Regulations will therefore apply to the provision of public services by contract (the question whether or not there is a 'contract' in the case of the provision of public services is likely to give rise to some difficulty, on which see Whittaker, 2000).

The core of the Regulations is to be found in the definition of 'unfair term' which is contained in Regulation 5(1) which provides that

> 'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer.'

There are a number of requirements here. The first is that the term in the contract must not have been 'individually negotiated'. A term has not been individually negotiated 'where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term' (Regulation 5(2)). The fact that one term of the contract has been individually negotiated does not prevent the Regulations from applying to those parts of the contract which have not been individually negotiated provided that an overall assessment of the rest of the contract indicates that it is a pre-formulated standard contract (Regulation 5(3)). The burden of proof is upon the seller or supplier to show that the term has been individually negotiated (Regulation 5(4)). The second point relates to the definition of 'unfair term'. The Regulations do give some guidance as to their possible scope by including in Schedule 2 'an indicative and illustrative list of the terms which may be regarded as unfair' (Regulation 5(5)). It should be noted that inclusion on the list does not mean that the term is unfair. It only means that it may be unfair: in this sense it is a grey list rather than a black list. The grey list goes beyond attempts to exclude or limit liability for negligence or breach of contract and encompasses, for example, terms which purport to make 'disproportionately high' sums payable by the consumer in the event of breach, clauses which enable the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract, and even clauses which have the effect of irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract. The Regulations therefore have a broad reach.

The 1994 Regulations contained some further guidance as to the meaning of 'good faith'. Schedule 2 to these Regulations stated that in making an assessment of good faith, particular regard should be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term, whether the goods or services were sold or supplied to the special order of the consumer, and the extent to which the seller or supplier had dealt fairly and equitably with the consumer. These factors bore a strong resemblance to the factors taken into account by the courts when assessing the reasonableness of an exclusion clause under UCTA and so had a familiar resonance for English lawyers. However Schedule 2 to the 1994 Regulations was deleted from the 1999 Regulations. This does not mean that these factors are no longer relevant. They are all mentioned in the preamble to the Directive and so a court may still make reference to them notwithstanding the fact that they no longer appear on the face of the Regulations. Regulation 6(1) further states that the unfairness of a contract term shall be assessed 'taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent'.

One rather unusual feature of the definition of an 'unfair term' is that no assessment must be made of the fairness of any term which defines the main subject matter of the contract or which concerns the adequacy of the price or remuneration, as against the goods or services supplied in exchange, in so far as these terms are in 'plain, intelligible language' (Regulation 6(2)). While it may seem odd to exclude these terms from the fairness requirement, it has been suggested that the aim of the Regulations is to attack what may be called 'unfair surprise' (see *Director General of Fair Trading* v. *First National Bank plc*, [2000] 2 All ER 759); that is to say, consumers tend to be aware of the price of the goods or services and the definition of the main subject-matter of the contract but they tend to be unfamiliar with, and hence surprised by, the myriad of terms found in the 'small-print' of consumer contracts. It is these clauses, generally to be found in the small-print, which are the subject of regulation.

Where a term is held to be unfair, the consequence is that it 'shall not be binding on the consumer' (Regulation 8(1)) but 'the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term' (Regulation 8(2)). Regulation 7 further states that a seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language and, if there is a doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail. This is probably no more than what English contract lawyers would call the *contra proferentem* rule (see 9.6 and 11.5). The enforcement provisions are also of considerable importance and the 1999 Regulations enlarge these enforcement powers. Consumers tend to be reluctant to resort to litigation to enforce their rights and so some additional enforcement mechanism had to be used in order to give the Regulations some bite. The 1994 Regulations gave the Director General of Fair Trading power to intervene to prevent the continued use of unfair terms in consumer contracts and considerable use was made by the Director of these powers (by the end of March 1999 he had received 3753 complaints, most of which were resolved by informal methods with the relevant sellers or suppliers). But no other body was given enforcement powers. Consumer bodies argued that this restriction constituted a failure to implement the Directive properly and the Government eventually gave way and agreed to increase the number of bodies with enforcement powers. The organisations to which enforcement powers have been given consist of a number of statutory bodies (such as trading standards departments, the Director Generals of Electricity Supplies, Gas, Telecommunications, Water Services and the Rail Regulator) together with the Consumers' Association. The Director General of Fair Trading has a duty to consider any complaint made to him that any contract term drawn up for general use is unfair, unless the complaint appears to be frivolous or vexatious (Regulation 10(1)). He can seek an injunction against any person appearing to him to be using or recommending use of an unfair term in contracts concluded with consumers (Regulation 12), as can the various statutory bodies and the Consumers' Association (notification provisions have been enacted in an effort to ensure as far as possible that there is no duplication of resources). The Director General of Fair Trading also has considerable powers to obtain documents and information for the purpose of facilitating his consideration of a complaint that a contract term drawn up for general use is unfair. The Director General also has power to disseminate information concerning the operation of the Regulations (Regulation 15)). The enforcement mechanisms introduced in the 1999 Regulations give the legislation more teeth and, if the various bodies given enforcement powers make use of them, they could go a long way towards reducing the use of unfair terms in the small-print in consumer contracts.

Finally in this context, two phrases in the definition of an unfair term are worthy of further comment. The first is 'good faith' and the second is 'significant imbalance'. As we have already noted (see 12.10), good faith is not a standard which is generally employed in English contract law, although it is more familiar to our civilian counterparts. In *Director General of Fair Trading* v. *First National Bank plc* both Evans-Lombe J at first instance ([2000] 1 WLR 98, 109) and Peter Gibson LJ in the Court of Appeal ([2000] 2 All ER 759) emphasised the civilian origins of 'good faith' and the need to interpret it in the light of these origins. It is likely that good faith will be used by the judiciary to promote fair and open dealing, and to prevent unfair surprise and the absence of real choice. If this is so, what does good faith add to the definition in Regulation 5(1)? Does it simply mean that, where there is a significant imbalance, there is a lack of good faith, or can there be a lack of good faith even where there is no significant imbalance? Earlier drafts of the Directive distinguished clearly between significant imbalance and incompatibility with the requirement of good faith: they were alternative rather than cumulative grounds of unfairness. Thus a draft of the Directive stated that a contract term was unfair if:

> 'it causes to the detriment of the consumer a significant imbalance in the parties' rights and obligations arising under the contract, or
> it causes the performance of the contract to be unduly detrimental to the consumer, or
> it causes the performance of the contract to be significantly different from what the consumer could legitimately expect, or
> it is incompatible with the requirements of good faith.'

But in the final version of the Directive and the text of the Regulations, the test appears to be cumulative so that the primary focus is upon whether there is a significant imbalance and not on good faith. In *Director General of Fair Trading* v. *First National Bank plc* (above) the Court of Appeal stated that there were three elements to the test of unfairness, namely, absence of good faith, significant imbalance in the parties' rights and obligation and detriment to the consumer. On this view a consumer must satisfy all three requirements before a court will conclude that a term is 'unfair', albeit that, as the Court of Appeal acknowledged, there may well turn out to be a substantial overlap in practice between the significant imbalance requirement and the absence of good faith requirement.

This leads us on to the second point, namely the meaning of 'significant imbalance'. The use of this phrase suggests that the Regulations are directed towards substantive unfairness (that is, unfairness in the terms or the substance of the contract) rather than procedural unfairness (that is, unfairness in the procedure by which the contract was concluded). But if the focus of the Directive and the Regulations is upon substantive unfairness, why does Regulation 6(2) (above) state that an assessment of the unfair nature of the terms shall not relate to the adequacy of the price, provided that the price is stated in plain, intelligible language? Surely the adequacy of the price is central to any notion of substantive unfairness? While those responsible for the drafting of the Directive and the Regulations may have wanted to avoid the conclusion that a term was unfair simply because the subject-matter of the contract was overpriced, is it not taking matters too far to say that the supplier is not subject to review under the Regulations provided that he ensures that the price is in 'plain intelligible language'? In *Director General of Fair Trading* v. *First National Bank plc* (above) both Evans-Lombe J and the Court of Appeal had regard to substantive and procedural matters when considering the fairness of the term. At the moment the position is rather uncertain. Over time it may be that many of the issues which relate to procedural fairness will be factored into the 'good faith' requirement, via the notion of 'unfair surprise', leaving 'significant imbalance' as a test which focusses largely on the substantive fairness of the term at issue.

Despite one or two drafting difficulties, the Regulations should be welcomed on the basis that they strengthen the rights of consumers in this country and will help bring about greater uniformity within Europe. The fact that the Regulations are confined in their scope to consumer contracts means that it is kept out of the commercial sphere where the need for certainty is greatest. So the uncertainty which the Regulations will initially create is not the grave cause for concern which it would be if it applied to international contracts for the sale of goods.

17.7 A General Doctrine of Unconscionability?

Despite the efforts of Parliament and the European Community, any discussion of the desirability of a general doctrine of unconscionability may seem rather academic, given the rejection of Lord Denning's doctrine of inequality of bargaining power. At first sight English contract law seems unconcerned with the fairness of the contract concluded by the parties. The courts have rejected a doctrine of inequality of bargaining power and, as we have already noted (5.6), the general rule is that consideration must be sufficient but need not be adequate. Freedom of contract reigns and the adequacy of the consideration is irrelevant.

But, despite initial appearances to the contrary, the rules which make up English contract law are concerned with the fairness of the bargain reached by the parties. We have seen the hostility which the courts have displayed towards exclusion clauses, both in terms of the interpretative devices adopted (11.5) and their reluctance to incorporate exclusion clauses and other onerous clauses into a contract (9.4). Innominate terms (10.5) were created to give the courts greater remedial flexibility, so that the injustice of cases such as *Arcos Ltd* v. *E A Ronaasen* [1993] AC 470 need no longer occur (see also s.15A of the Sale of Goods Act 1979). We have also noted the protective attitude which the courts have adopted towards minors (see 16.2). Later in this book we shall see that the courts are reluctant to order specific performance of a contract which is unfair (21.9), they have an equitable jurisdiction to grant relief against forfeiture (21.7) and they have developed a penalty clause jurisdiction, under which a court will not enforce a term of a contract which seeks to punish a contracting party who is in breach of contract (21.6). Surely, conceptions of fairness must underpin, to a greater or lesser extent, these rules and doctrines (see Waddams, 1976)? If these conceptions of fairness permeate the law of contract, would it not be better to acknowledge these considerations openly by the creation of a general doctrine of unconscionability?

Four principal objections can be raised against the creation of such a doctrine. The first is that the courts are unable to identify contracts which are unfair because of their inability to understand the operation of financial markets (see Trebilcock, 1976). The second is that such a general doctrine would create an unacceptable degree of uncertainty. The third is that English law has a general aversion to the creation of broad, general principles; the courts in particular prefer to reason incrementally and by analogy to existing categories rather by reference to a general, overarching principle. The fourth is that it is not the function of contract law to engage in the redistribution of wealth (Fried, 1981, contrast Kronman, 1980 who defends 'the view that the rules of contract law should be used to implement distributional goals whenever alternative ways of doing so are likely to be more costly or intrusive').

These are powerful objections to the creation of such a general doctrine. But they are not necessarily conclusive. We have already noted (1.3) the conflicting ideologies which run through the law of contract and it is here that market-individualism and consumer-welfarism are in direct conflict (although contrast Tiplady, 1983). Given that these conceptions of fairness run throughout the law of contract, they cannot be dismissed as an insignificant aspect of contract law. Although Parliament must continue to play the principal role in regulating the economy and placing necessary restrictions upon freedom of contract, a residual role can nevertheless be played by the courts and that role can best be recognised by the creation of a general doctrine of unconscionability. Uncertainty can be reduced by the recognition of the fact that unfairness can take different forms. Broadly speaking, two types of unfairness can be recognised. The first may be called procedural unfairness and the second substantive unfairness (although it should be noted that the distinction between the two has been doubted by Atiyah (1986d), who maintains that the two 'feed upon each other'). The first is concerned with the process by which the contract is negotiated. The second is concerned with the fairness of the terms or the substance of the contract. It is easier to identify the procedural tactics which are unacceptable as part of the process of contractual negotiation than it is to define substantive unfairness (see Thal, 1988). It is also easier to provide a sound justification for the law's concern with the fairness by which the contract was concluded than it is to identify the principle which explains why the law is concerned with the fairness of the terms of the contract (but see Smith, 1996). Unacceptable tactics might include threats to commit a crime, a tort or a breach of contract and the courts might recognise that there are certain bargaining weaknesses, such as infirmity and necessity, which should not be exploited. More difficulty is experienced in defining substantive unfairness; all that can be said is that it should only be a ground of relief in the very rare case where the consideration is manifestly and totally inadequate and that the courts must be left to work out the principles on a case-by-case basis. Such a narrowly drawn doctrine of unconscionability would not create an unacceptable level of uncertainty, but it would prevent injustice arising in the few cases in which it was needed.

Summary

1 A contract may be set aside on the ground of duress. The duress may be to the person, to his goods or economic duress.
2 Duress can be shown to exist where the consent of the victim has been obtained by illegitimate pressure.
3 Undue influence is an equitable doctrine. Before a contract can be set aside on the ground of presumed undue influence it must be demonstrated that the contract was manifestly disadvantageous to the person seeking to set it aside.
4 In cases of presumed undue influence, the relationship between the parties gives rise to a presumption of undue influence and the onus of proof switches to the recipient to show that he did not exercise undue influence. In cases of actual undue influence, there must be some unfair and improper conduct on the part of the party alleged to have exercised the undue influence. Actual undue influence must be proved by the party seeking to establish its existence.
5 English law does not recognise the existence of a general doctrine of inequality of bargaining power. But equity may intervene to set aside unconscionable bargains, agreements made with expectant heirs, improvident bargains made with poor and ignorant persons and contracts procured by an abuse of a relationship of confidence.

6 Parliament has also intervened, in statues such as the Consumer Credit Act 1974 and the Unfair Contract Terms Act 1977, in an effort to protect the most likely victims of inequality of bargaining power.

Exercises

1 A threatens B that he (A) will shoot the next person he sees unless B pays him £10. B pays the £10. Can he recover it? Would your answer be the same if A had threatened to burn one of B's old family heirlooms unless he paid the £10?
2 What is the relationship between the doctrine of consideration and duress? (See *Stilk* v. *Myrick* (5.11) and *D & C Builders* v. *Rees* [1966] 2 QB 617.)
3 What is economic duress? What are its limits?
4 What is undue influence? How does it differ from duress?
5 Does English law recognise the existence of a doctrine of inequality of bargaining power? Should it?
6 Do you think that the courts are concerned with the fairness of the bargain reached by the parties?
7 An old lady is 'induced by her solicitor under strong pressure to sell him a large and inconvenient family home at full market value'. Can the transaction be set aside by the old lady? If so, on what grounds?
8 Assess the likely significance of the Unfair Terms in Consumer Contracts Regulations.