THE UNCONSCIONABLE BARGAINS DOCTRINE IN ENGLAND AND AUSTRALIA: COUSINS OR SIBLINGS?

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In discussions concerning the modern equitable unconscionable bargains doctrine, judges and commentators often draw seamlessly from English and Australian law as though they are siblings from the same family. In reality, their doctrinal elements are substantively and substantially different, and these differences reflect three core points. First, English and Australian law, respectively, impose negative and positive duties on contracting parties. Secondly, the legal policy underlying equitable intervention in completed contracts is much narrower and targeted in England than it is in Australia. Thirdly, 'unconscionability' means different things in the two jurisdictions. Ultimately, the Australian and English iterations of the doctrine are cousins rather than siblings, which counsels caution as to how the doctrine should be approached from a comparative perspective.

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I Introduction

In discussions concerning the modern equitable doctrine of unconscionable bargains,[1] it is common for judges[2] and commentators[3] to draw seamlessly

[1] The doctrine has also variously been labelled 'unconscionable dealing', 'unconscionable conduct', 'unconscionable transactions', 'catching bargains' or simply 'unconscionability': see, eg, *Bridgewater v Leahy* (1998) 194 CLR 457, 478 [75] (Gaudron, Gummow and Kirby JJ) ('*Bridgewater*'), citing Sir Anthony Mason, 'The Impact of Equitable Doctrine on the Law of Contract' (1998) 27(1) *Anglo-American Law Review* 1, 6–8; *Re Premier Bay Pty Ltd* [2018] VSC 168, [801], [805], [920] (Robson J) ('*Re Premier Bay*'). Note that while the label 'unconscionable bargains' is utilised in this paper, this should not be taken to mean that a *bargain*, properly so-called, is necessary; for example, the doctrine can be used to set aside unilateral gifts: see, eg, *Wilton v Farnworth* (1948) 76 CLR 646 ('*Wilton*').

[2] See, eg, *Boustany v Pigott* (1995) 69 P & CR 298, 303 (Lord Templeman) ('*Boustany*'); *Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* [1996] CLC 11, 42 (Longmore J) ('*Credit Lyonnais*'); *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221, 232 (Ward LJ) ('*Dusangh*'); *Barclay's Bank plc v Goff* [2001] EWCA Civ 635, [32]–[34] (Mantell LJ); *Bank of Scotland v Henry Butcher & Co* [2001] 2 All ER (Comm) 691, 714–15 [80] (Michel Kallipetis QC), all of which are English decisions which cite the Australian case *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 ('*Amadio*'). See also *Evans v Lloyd* [2013] EWHC 1725 (Ch), [52] (Keyser J) ('*Evans*'), which cites the Australian case *Louth v Diprose* (1992) 175 CLR 621 ('*Louth*').

[3] See, eg, Andrew Boon Leong Phang, 'Undue Influence Methodology, Sources and Linkages' [1995] *Journal of Business Law* 552, 566–7; Nicholas Bamforth, 'Unconscionability as a Vitiating Factor' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 538, 539; Anne Finlay, 'Can We See the Chancellor's Footprint? Bridgewater v Leahy' (1999) 14(2) *Journal of Contract Law* 265, 274; James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) 61–2; Rick Bigwood, 'Contracts by Unfair Advantage: From Exploitation to Transactional Neglect' (2005) 25(1) *Oxford Journal of Legal Studies* 65, 91–2 ('Contracts by Unfair Advantage'); James Devenney and Adrian Chandler, 'Unconscionability and the Taxonomy of Undue Influence' [2007] *Journal of Business Law* 541, 544; John Phillips, '*Smith v Hughes* (1871)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing, 2008) 205, 218–19; Prince Saprai, 'Unconscionable Enrichment?' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 417, 419–21; John Phillips, 'Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine' (2010) 45(1–4) *Wake Forest Law Review* 837, 845 ('Unconscionable Bargains as a Unifying Doctrine'); David Capper, 'The Unconscionable Bargain in the Common Law World' (2010) 126 (July) *Law Quarterly Review* 403, 416; JD Heydon, Justice MJ Leeming and

from English and Australian law as though they are siblings. Thus, it is common for cases from both jurisdictions to be cited freely in discussions concerning only one jurisdiction (usually English law). It is also common for the law of one jurisdiction (usually England) to be criticised on the basis of the developments of another (usually Australia).[4] But little effort has been made to consider *precisely* how the law of the two jurisdictions differs and — more fundamentally — *why* those differences exist. Without the benefit of a detailed examination of those points, it is not at all obvious, their shared historical root notwithstanding, that treating English and Australian law as siblings is justified in the modern law.

In this paper we attempt to examine those unaddressed issues. We begin in Part II with an overview of the requirements of the doctrine in England and Australia. In Part III, we undertake a point-by-point comparison of those requirements to ascertain how, precisely, the doctrine differs in the two jurisdictions. On the basis of that analysis, Part IV observes three core differences which distinguish the two jurisdictions. These differences concern: the nature of the duty imposed on contracting parties; the policy considerations underlying equity's intervention in transactions; and the meaning of unconscionability. The conclusion we draw, in Part V, is that these differences demonstrate that the Australian and English iterations of the doctrine are cousins rather than siblings, and this conclusion counsels caution as to how we ought to approach the doctrine from a comparative perspective.

II Overview

The modern unconscionable bargains doctrine can be traced back to England between the 17th and 19th centuries, with the Court of Chancery's jurisdiction to set aside agreements to protect the financial interests of expectant heirs and reversioners on account of their age and vulnerability.[5] Where there was an inadequacy of transaction, relief was provided 'on that ground alone'.[6] This was later extended to poor and ignorant persons with contracts at an undervalue

PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 501–2 [16-005]–[16-010]; Nelson Enonchong, 'The Modern English Doctrine of Unconscionability' (2018) 34(3) *Journal of Contract Law* 211, 231; Sinéad Agnew, 'The Meaning and Significance of Conscience in Private Law' (2018) 77(3) *Cambridge Law Journal* 479, 495.

[4] See, eg, *Evans* (n 2) [52] (Keyser J); *Credit Lyonnais* (n 2) 42 (Longmore J); Phang (n 3) 566–7; Enonchong (n 3) 230–1.

[5] *Earl of Ardglasse v Muschamp* (1684) 1 Vern 237; 23 ER 438, 438–9 (Lord Guilford); *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484, 489–90 (Lord Selborne LC) ('*Earl of Aylesford*').

[6] *Fry v Lane* (1888) 40 Ch D 312, 320 (Kay J) ('*Fry*').

and having no independent legal advice, most notably in *Fry v Lane* ('*Fry*').[7] Since then, the categories of case and the requirements for equity's intervention have been extensively developed in England and Australia, although in different directions.

A *English Law*

In England, after *Fry*, the doctrine effectively went into hibernation[8] until it was applied to members of a lower-income group and the less educated in *Cresswell v Potter* ('*Cresswell*').[9] The surrender by a wife of her interest in the former matrimonial home in favour of her ex-husband in return for a release from an existing mortgage was set aside because of her ignorance in relation to property transactions.[10] In *Multiservice Bookbinding Ltd v Marden* ('*Marden*'), Browne-Wilkinson J held explicitly, probably for the first time, and without reference to any authority, that 'a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience'.[11] This was taken up by Peter Millett QC (sitting as a deputy High Court judge) in his restatement of the requirements of the doctrine in *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* ('*Alec Lobb*'):

> [I]f the cases are examined, it will be seen that three elements have almost invariably been present before the court has interfered. First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken … secondly, this weakness of the one party has been exploited by the other in some morally culpable manner … and thirdly, the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive.[12]

[7] Ibid 321–2 (Kay J). See also *How v Weldon* (1754) 2 Ves Sen 516; 28 ER 330, 331 (Clarke MR); *Wood v Abrey* (1818) 3 Madd 417; 56 ER 558, 560–1 (Leach V-C); *Longmate v Ledger* (1860) 2 Giff 157; 66 ER 67, 69 (Stuart V-C); *Clark v Malpas* (1862) 4 De G F & J 401; 45 ER 1238, 1239–40 (Bruce LJ).

[8] Capper (n 3) 403.

[9] [1978] 1 WLR 255, 257 (Megarry J) ('*Cresswell*').

[10] Ibid 257–8.

[11] [1979] 1 Ch 84, 110 ('*Marden*').

[12] [1983] 1 WLR 87, 94–5 ('*Alec Lobb*').

Later cases have taken this passage as authority that represents the modern requirements of the unconscionable bargains doctrine.[13] Certainly, the three requirements are not mutually exclusive, since the presence of one may have a strong effect on the court's finding of another. For example, Peter Millett QC went on to observe that 'impropriety … in the terms of the transaction itself' may often provide reason to infer 'impropriety … in the conduct of the stronger party'.[14] Nor do courts always strictly distinguish between these requirements in practice.[15] Nevertheless, each requirement points to a particular aspect of the doctrine, which together would '[shock] the conscience of the court'.[16] The first requirement speaks to the position of the weaker party ('C') vis-a-vis the stronger party ('D'); the second speaks to D's conduct; and the third speaks to the terms of the transaction itself.

For the sake of completeness, it can be noted that in the earlier case of *Lloyds Bank Ltd v Bundy* ('*Bundy*'), Lord Denning MR had attempted to propound a general principle of 'inequality of bargaining power', which would subsume the unconscionable bargains doctrine.[17] Explaining this principle, his Lordship said:

> 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.[18]

When compared against the *Alec Lobb* requirements, Lord Denning MR's principle retains the first and third requirements while dispensing of the second: overt exploitation on D's part is not necessary. But that wider principle was decisively laid to rest in *National Westminster Bank plc v Morgan* ('*Morgan*'), with Lord Scarman stating:

[13] See, eg, *Boustany* (n 2) 303 (Lord Templeman); *Deakin v Faulding* [2001] EWHC 7 (Ch), [86] (Hart J); *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB), [35] (Blair J) ('*Strydom*'); *Nosworthy v Instinctif Partners Ltd* [2019] UKEAT 0100/18/RN, [49] (Slade J); *Singla v Bashir* [2002] EWHC 883 (Ch), [28] (Park J) ('*Singla*'); *Humphreys v Humphreys* [2004] EWHC 2201 (Ch), [106] (Rimer J) ('*Humphreys*'); *Fineland Investments Ltd v Pritchard* [2011] EWHC 113 (Ch), [77] (Alison Foster QC) ('*Fineland*'); *Evans* (n 2) [50], [76] (Keyser J). See also Enonchong (n 3) 214.

[14] *Alec Lobb* (n 12) 95.

[15] See, eg, *Lloyds Bank Ltd v Bundy* [1975] 1 QB 326, 339 (Lord Denning MR) ('*Bundy*').

[16] *Alec Lobb* (n 12) 95.

[17] *Bundy* (n 15) 339.

[18] Ibid.

> 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 the mischief … I doubt whether the courts should assume the burden of formulating further restrictions.[19]

B *Australian Law*

Perhaps the first case resembling the modern unconscionable bargains doctrine in Australia was *Wilton v Farnworth* ('*Wilton*'), where the High Court set aside a gift from a 'dull-witted and stupid' man to his stepson of all his interest in his late wife's estate, amounting to about £1,800.[20] Over the following decades, the High Court extended the reach of the doctrine through a series of cases. In particular, since the expansion of the doctrine in *Commercial Bank of Australia Ltd v Amadio* ('*Amadio*'),[21] 'the decisions [applying the doctrine] have been legion'.[22] Indeed, even Lord Walker observed in *Lawrence v Poorah* that '[t]he doctrine of unconscionable bargain appears to be particularly vigorous in Australian jurisprudence'.[23]

In *Amadio*, an elderly Italian couple with little formal education and a limited grasp of English were approached by their son and his bank manager to execute a guarantee for the son's benefit. When the son defaulted, the bank sought to enforce the guarantee. The parents successfully set aside the guarantee in the High Court.[24] It was held that the bank manager (and hence the bank) knew or ought to have known that the parents suffered from a special disability, and therefore the bank ought to have taken steps to ensure that the parents they understood the nature of the transaction.[25] Because no such steps were taken, the guarantee was rendered unenforceable. The precise requirements for the doctrine are found in Deane J's judgment:

[19] [1985] 1 AC 686, 708 ('*Morgan*').

[20] *Wilton* (n 1) 649–50 (Latham CJ), 655 (Rich J, Dixon J agreeing at 656, McTiernan J agreeing at 656).

[21] (n 2).

[22] Heydon, Leeming and Turner (n 3) 501 [16-005] n 2.

[23] [2008] UKPC 21, [20], citing Justice RP Meagher, Justice JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) 525–33.

[24] *Amadio* (n 2) 460 (Gibbs CJ), 481 (Deane J, Mason J agreeing at 468, Wilson J agreeing at 468).

[25] Ibid.

> The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable …[26]

These requirements have not always been treated as mutually exclusive. For example, in *National Australia Bank Ltd v Nobile*, Neaves J held that in the absence of any knowledge by the bank of the principal debtor's actions in inducing his parents to act as surety, the parents were not at a special disadvantage vis-a-vis the bank.[27] Nevertheless, as with English law, the requirements point to three distinct aspects of the doctrine: the first requirement speaks to C's position; the second speaks to D's conduct; and the third speaks to the terms of the transaction itself.

For the sake of completeness, it can be noted that, although our discussion concerns the equitable unconscionable bargains doctrine, it shares a close relationship with certain statutory regimes. For example, the *Australian Consumer Law*,[28] pt 2-2 of which concerns '[u]nconscionable conduct', contains s 20 which provides that '[a] person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time'. This has been interpreted to mean 'the principles of law and equity expounded from time to time in decisions respecting the common law of Australia'.[29] A similar approach is also taken in relation to the prohibition against 'conduct that is, in all the circumstances, unconscionable' in relation to the supply or acquisition of goods or services, as provided for by s 21(1). For the purposes of determining whether a contravention has occurred, s 22 contains a long but non-exhaustive list of 'matters to which the court may have regard'; but even so, the equitable doctrine of unconscionable bargains has been held to be relevant to the interpretation and application of these sections.[30] Similar

[26] Ibid 474. His Honour repeated these requirements in *Louth* (n 2) 637.

[27] (1988) 100 ALR 227, 251 (Federal Court).

[28] *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*'), which creates a national regime for consumer protection.

[29] *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 71 [38] (Gummow and Hayne JJ) ('*Berbatis*').

[30] *Berbatis* (n 29); Heydon, Leeming and Turner (n 3) 507 [16-060].

provisions are also found in ss 12CA–12CC of the *Australian Securities and Investments Commission Act 2001* (Cth), which specifically deals with financial services. It has likewise recently been suggested that those provisions cover 'conduct that is unconscionable in equity'.[31] There are also other statutes which extend and modify the application of the equitable doctrine in relation to specific types of contracts.[32] These statutory provisions are not examined in this paper, as they usually involve issues of statutory interpretation,[33] leading in many cases to an application of a concept of unconscionability which is 'wider than the general law'.[34]

III The Requirements

A *The First Requirement*

In England, the first requirement is for C to suffer from a 'serious disadvantage'.[35] In Australia, the same phrase was previously used in *Blomley v Ryan* ('*Blomley*'), where Fullagar J noted that the doctrine comes into play where one party is placed 'at a *serious disadvantage* vis-à-vis the other'.[36] However, although this passage was quoted by both Mason J[37] and Deane J[38] in *Amadio*, the term 'special' was intentionally substituted for 'serious',[39] with the result that the first requirement in Australia is for C to be under a 'special disability' or 'disadvantage'.[40] Justice Mason cited two reasons for this. First, it is 'to disavow any

[31] *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 36 [82] (Gageler J) ('*Kobelt*'). See also at 37–9 [83]–[90] (Gageler J), 49 [120] (Keane J).

[32] See, eg, *Retail Leases Act 1994* (NSW) s 62B (for retail shop leases); *Contracts Review Act 1980* (NSW) ss 7–9 (for contracts within New South Wales).

[33] Heydon, Leeming and Turner (n 3) 508 [16-060]. See also *Kobelt* (n 31) 48–9 [119]–[120] (Keane J).

[34] *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) 15 BPR 29699, 29765 [291] (Allsop P). See also *Kobelt* (n 31) 85 [257] (Nettle and Gordon JJ), 102 [295], 106 [311] (Edelman J). For a detailed discussion, see Jeannie Marie Paterson, 'Unconscionable Bargains in Equity and under Statute' (2015) 9(2) *Journal of Equity* 188.

[35] See, eg, *Alec Lobb* (n 12) 94 (Peter Millett QC).

[36] (1956) 99 CLR 362, (emphasis added) 405 ('*Blomley*'). This observation was made on the basis of two 19th century English cases: *Cooke v Clayworth* (1811) 18 Ves Jr 12; 34 ER 222, 224 (Grant MR) ('*Cooke*') and *Wiltshire v Marshall* (1866) 14 LT NS 398, cited in *Cooke* (n 36) 222.

[37] *Amadio* (n 2) 462.

[38] Ibid 475.

[39] Ibid 462 (Mason J), 474 (Deane J).

[40] Justice Mason said that the doctrine applies where 'a party … suffers from some special disability or is placed in some special situation of disadvantage': ibid 462. 'Disability' and 'disadvantage' can therefore be used interchangeably.

suggestion that the [doctrine] applies whenever there is some difference in the bargaining power of the parties';[41] secondly, the term 'emphasize[s] that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests'.[42]

It is unclear whether these reasons sufficiently call for the change in terminology. As to the first reason, Lord Scarman held in *Morgan* that '[t]he fact of an unequal bargain … can never become an appropriate basis of principle of an equitable doctrine'.[43] This remains the case in England today where the phrase 'serious disadvantage' is used.[44] As to the second reason, Lord Hardwicke LC held in the early case of *Earl of Chesterfield v Janssen* ('*Earl of Chesterfield*') that the unconscionable bargains doctrine protects persons who are 'unable to judge for [themselves]'.[45] For these reasons, we suggest that, despite the difference in terminology employed, the essence of the first requirement is substantially similar in England and Australia.

1 *A Liberal Approach*

The similarity in the first requirement can most obviously be detected in the liberal approach both jurisdictions take in relation to the first requirement.

In England, judges have been careful not to limit the serious disadvantage requirement.[46] While in *Alec Lobb*, Peter Millett QC noted poverty, ignorance and lack of independent advice as examples of serious disadvantage,[47] later cases have interpreted these widely. 'Poor' has been read to include 'a member of the lower income group' and 'ignorant' as including one who is 'less highly educated'.[48] In *Portman Building Society v Dusangh* ('*Dusangh*'), 'poor and ignorant' was 'modern[ised]' to include one who is 'elderly, illiterate and on a very low income'.[49] It has also been observed that '[a]dvanced age is a recognised disability or bargaining weakness',[50] and in *Watkin v Watson-Smith*, poverty and ignorance were even substituted with a desire for a quick sale in addition to old

[41] Ibid 462. See also *Berbatis* (n 29) 64 [11] (Gleeson CJ).

[42] *Amadio* (n 2) 462. Both points were also cited in *Thorne v Kennedy* (2017) 263 CLR 85, 112 [64] (Nettle J) ('*Thorne*').

[43] *Morgan* (n 19) 708.

[44] See above n 36.

[45] (1751) 2 Ves Sen 125; 28 ER 82, 100 ('*Earl of Chesterfield*').

[46] See Enonchong (n 3) 229.

[47] *Alec Lobb* (n 12) 94–5.

[48] *Cresswell* (n 9) 257 (Megarry J).

[49] *Dusangh* (n 2) 229 (Simon Brown LJ).

[50] *Radley v Bruno* [2006] EWHC 2888 (Ch), [32] (Collins J) ('*Radley*').

age, with accompanying diminution of capacity and judgment.[51] As for independent advice, this is taken to be 'not so much an essential freestanding requirement, but rather a powerful factor confirming the suspicion of nefarious dealing which the presence of advice would serve to dispel'.[52]

English courts have also been willing to go further than the three examples cited in *Alec Lobb*. For example, intoxication, a disadvantageous factor affecting C in the Australian case of *Blomley*,[53] was cited as a serious disadvantage in *Alec Lobb*.[54] Another example is found in *Boustany v Pigott* ('*Boustany*'), where a serious disadvantage was inferred from the fact (inter alia) that C, an elderly woman with early Parkinson's disease, had passed the responsibility for managing her properties to her cousin, but had nevertheless requested a barrister to renew the lease of a property she owned in favour of D when C's cousin was temporarily away, and even after the barrister had pointed out the manifestly disadvantageous terms of the new lease.[55]

In Australia, a similarly wide approach is taken: the situations which may lead to a special disadvantage 'may take a wide variety of forms and are not susceptible to being comprehensively catalogued'.[56] For example, in *Blomley*, Fullagar J cited 'poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary';[57] and Kitto J's list included 'illness, ignorance, inexperience, impaired faculties, financial need or other circumstances [which] affect his ability to conserve his own interests'.[58] In *Wilton*, C was found to be at a special disadvantage due to being 'dull-witted and stupid'.[59] In that same case, Rich J held that a special disadvantage would be established due to a lack of understanding of the nature of a transaction and the lack of information of material facts, in particular where D, 'possessing

[51] 'Setting Aside Sale as Unconscionable Deal', *The Times* (London, 3 July 1986) 36 ('*Watkin v Watson-Smith*'). Note, however, that in *Irvani v Irvani* [2000] 1 Lloyd's Rep 412 ('*Irvani*'), addiction to heroin was not considered to be a serious disadvantage, short of C being incapable of knowing the consequences of their behaviour: at 424 (Buxton LJ).

[52] *Dusangh* (n 2) 235 (Ward LJ). Much turns on the common practice of the type of transaction in question: '[t]he more usual it is to have a solicitor, the more striking will be [their] absence, and the more closely will the courts scrutinise what was done': *Cresswell* (n 9) 258 (Megarry J).

[53] *Blomley* (n 36) 405 (Fullagar J).

[54] *Alec Lobb* (n 12) 95 (Peter Millett QC).

[55] *Boustany* (n 2) 302–4 (Lord Templeman).

[56] *Amadio* (n 2) 474 (Deane J). See also at 462 (Mason J); *Louth* (n 2) 637 (Deane J); *Kobelt* (n 31) 57 [147] (Nettle and Gordon JJ).

[57] *Blomley* (n 36) 405, cited with approval by Mason J in *Amadio* (n 2) 462.

[58] *Blomley* (n 36) 415.

[59] *Wilton* (n 1) 649 (Latham CJ).

greater information … nevertheless withheld the facts'.[60] Unfamiliarity with the English language has also, among other factors, been held to be a special disadvantage.[61] And in *Thorne v Kennedy* ('*Thorne*'), C was found to be suffering from a special disadvantage where her fiancé, D, 'created the urgency with which [a] prenuptial agreement was required to be signed and the haste surrounding the postnuptial agreement and the advice upon it'.[62]

2 *Disadvantage vis-a-vis the Stronger Party?*

It might be asked whether Australian law differ from English law because it requires disadvantage to be determined vis-a-vis D's status or actions. As observed earlier, Deane J suggested in *Amadio* that there must be an 'absence of any reasonable degree of equality' between the parties.[63] Later on, his Honour also said that the matter was 'best approached by a comparison of the relative positions' of the parties.[64] For Mason J, the 'gross inequality of bargaining power' between the bank and the parents (the sureties) led to the conclusion that the latter were 'in a position of special disadvantage vis-a-vis the bank'.[65]

However, in *Kakavas v Crown Melbourne Ltd* ('*Kakavas*'), the High Court observed that the unconscionable bargains doctrine may be engaged even where there is absent 'a demonstrated inequality of bargaining power'.[66] This appears to be the way in which Deane J ultimately approached the facts in *Amadio*: the factors leading his Honour to find that the parents were at a special disadvantage had little to do with surveying the bank's position and much to do with assessing the parents' situation.[67]

Therefore, we suggest that the better view is that it is ultimately 'unnecessary to show that [D] contributed to [C's] weakness',[68] D's status and actions at best being evidence of C's special disadvantage. Therefore, Australian law does not differ from English law in this regard.

[60] Ibid 655.

[61] *Amadio* (n 2) 464 (Mason J), 477 (Deane J).

[62] *Thorne* (n 42) 112 [65] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

[63] See above n 26 and accompanying text.

[64] *Amadio* (n 2) 475–6.

[65] Ibid 464. The phrase 'serious disadvantage vis-à-vis the other' seems to originate from *Blomley* (n 36) 405 (Fullagar J). This was repeated in *Amadio* (n 2) not only by Mason J: at 462; but also by Deane J: at 475. It has also been echoed in later cases: see, eg, *Louth* (n 2) 638 (Deane J), 650 (Toohey J); *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 398 [6] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ) ('*Kakavas*'). See also *Kobelt* (n 31) 57 [146] (Nettle and Gordon JJ).

[66] *Kakavas* (n 65) 425 [118] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[67] *Amadio* (n 2) 476. See also at 464 (Mason J).

[68] *Louth* (n 2) 629 (Brennan J).

3 *Emotional Dependence or Strain*

It might appear that Australian and English law differs as to whether emotional dependence or strain itself is sufficient to fulfil the first requirement. However, a close examination reveals that the difference is more apparent than real.

The position in English law seems clear. In *Backhouse v Backhouse*, Balcombe J observed in obiter that C had entered the relevant contract without independent advice because of 'great emotional strain',[69] and this factor might find a place within Lord Denning MR's wider principle of 'inequality of bargaining power'.[70] However, as we have observed earlier,[71] Lord Denning MR's principle has been rejected, and presumably, along with it, *mere* emotional strain as a factor leading to serious disadvantage.

The position is less straightforward in Australia. In *Louth v Diprose* ('*Louth*'), C, a solicitor, was infatuated with D, lavishing her with gifts, and even proposing to her at one point, which she refused.[72] D untruthfully told C that she was facing eviction from her home and would commit suicide unless C provided her with money for the purchase of a house.[73] The High Court considered that C's emotional dependence put him at a special disadvantage,[74] whereby he had 'disregard[ed] entirely his own interests'.[75]

Yet, the judgment indicates that mere emotional dependence is insufficient. As Brennan J emphasised, it must be so severe that it differs from that arising in 'the ordinary relationship of a man courting a woman'.[76] On the facts, C was under a special disadvantage not only due to his infatuation, but also because of

> the extraordinary vulnerability of [C] in the false 'atmosphere of crisis' in which he believed that [D] with whom he was 'completely in love' and upon whom he was emotionally dependent was facing eviction from her home and suicide unless he provided the money for the purchase of the house.[77]

[69] [1978] 1 WLR 243, 251.

[70] Ibid 252.

[71] See above n 19 and accompanying text.

[72] *Louth* (n 2) 644–5 (Toohey J).

[73] Ibid 625 (Mason CJ).

[74] Ibid 626 (Mason CJ), 630 (Brennan J), 638 (Deane J), 642 (Dawson, Gaudron and McHugh JJ).

[75] Ibid 626.

[76] Ibid 629–30.

[77] Ibid 638 (Deane J).

However, the High Court in *Bridgewater v Leahy* ('*Bridgewater*') controversially stretched the law even further. C, an uncle, sold land to his nephew, D, at a gross undervalue.[78] Although C was advanced in age and of ill health, he was examined by a doctor who confirmed that he was of sound mind and capable of making decisions.[79] Justices Gaudron, Gummow and Kirby held that C's 'goal to preserve his rural interests intact and his perception that [D] was the candidate to provide reliable and experienced management thereof were significant elements in his emotional attachment to and dependency upon [D]'.[80] In addition, the initiative for the sale came from D.[81] These factors led to their conclusion that the parties met on unequal terms,[82] such that C was at a special disadvantage. Their Honours explained that emotional dependence could give rise to a special disadvantage without requiring C to be physically frail or feeble, with diminished knowledge of his property and affairs;[83] it could also arise *even though* C had 'the capacity … to know what he was doing and to make informed decisions about the disposition of his property'.[84]

If we remind ourselves that the core concern of the special disadvantage requirement is to identify those who are unable to judge what is in their best interests, then it is seriously doubtful whether it is ever open to a court to find that a person 'of sound mind and capable of making decisions about his personal affairs'[85] is nevertheless unable to judge what is in their best interests.[86]

Be that as it may, later cases appear to have fallen back on first principles, which suggests that *Bridgewater*, although a High Court decision, can be confined to its facts. For example, in *Mackintosh v Johnson* ('*Mackintosh*'), C, a 73-year-old man, entered into a five-month relationship with D, a 45-year-old woman, during which he paid her $175,000 to support her business and $480,000 to buy a house in her sole name.[87] C claimed that the transactions were unconscionable on the basis of his age, the fact that he was lonely,

[78] *Bridgewater* (n 1) 463 [6] (Gleeson CJ and Callinan J).

[79] Ibid 465 [15] (Gleeson CJ and Callinan J).

[80] Ibid 493 [122].

[81] Ibid.

[82] Ibid 493 [123].

[83] Ibid 490 [116].

[84] Ibid 491 [118].

[85] Ibid 465 [15] (Gleeson CJ and Callinan J).

[86] This seems to be the argument in Finlay (n 3) 270–1. See also CEF Rickett, '*Bridgewater v Leahy — A Bridge Too Far?*' (2012) 31(2) *University of Queensland Law Journal* 233, 241: 'the outer limits of the requirement for special disability appear to have been seriously muddied'.

[87] (2013) 37 VR 301, 302 [1]–[2] (Buchanan, Whelan JJA and Hargrave AJA) ('*Mackintosh*').

vulnerable, retired and desirous of a companion, and the fact that he was infatuated with D.[88] The Victorian Court of Appeal rejected his claim, holding that

> [s]omething more than mere infatuation and consequent foolish action based on clouded judgment was required to establish [C's] ability to make decisions in his own best interests was so seriously affected as to amount to a special disability or disadvantage.[89]

Unlike the false 'atmosphere of crisis' D created in *Louth*,[90] D was at most 'tearful' when she explained that she needed money for her business;[91] and unlike the solicitor in *Louth*, C was a wealthy, successful businessman.[92] Although the Court noted the *Bridgewater* judgment,[93] it made little of it, and instead relied more heavily on *Louth*.[94]

We therefore suggest that emotional dependence or strain, where relevant, ought to be understood in light of *Louth*, and not in the expanded manner in *Bridgewater*. If this is right, then both English and Australian law take the same approach: emotional dependence or strain does not itself suffice as a relevant disadvantage.

B *The Second Requirement*

In England, the second requirement is for C's position of disadvantage to have been 'exploited by [D] in some morally culpable manner'.[95] In Australia, the requirement is for C's disadvantage to have been

> sufficiently evident to … [D] to make it prima facie unfair or 'unconscientious' that he procure, or accept, [C]'s assent to the impugned transaction in the circumstances in which he procured or accepted it.[96]

A comparison of these requirements can be broken down into two questions: what level of knowledge is required, and is exploitation necessary?

[88] Ibid 306 [24] (Buchanan, Whelan JJA and Hargrave AJA).

[89] Ibid 316 [77] (Buchanan, Whelan JJA and Hargrave AJA).

[90] *Louth* (n 2) 624 (Mason CJ), 637 (Deane J), 639 (Dawson, Gaudron and McHugh JJ), 649 (Toohey J).

[91] *Mackintosh* (n 87) 316 [79] (Buchanan, Whelan JJA and Hargrave AJA).

[92] Ibid 317 [82] (Buchanan, Whelan JJA and Hargrave AJA).

[93] Ibid 305–6 [18]–[20] (Buchanan, Whelan JJA and Hargrave AJA).

[94] See, eg, ibid 316–18 [77]–[90] (Buchanan, Whelan JJA and Hargrave AJA).

[95] *Alec Lobb* (n 12) 95 (Peter Millett QC).

[96] *Amadio* (n 2) 474 (Deane J).

1 *Categories of Knowledge*

In order to facilitate a discussion of the first question, it is first necessary to identify a precise tool for evaluating the element of knowledge. In this regard, it is helpful to look to the well-known scale developed (albeit in a different context) in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* ('*Baden*').[97] There, Peter Gibson J provided a descending scale of mental states, consisting of the following five categories:[98]

1 Actual knowledge;

2 Wilfully shutting one's eyes to the obvious;

3 Wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make;

4 Knowledge of circumstances which would indicate the facts to an honest and reasonable person;

5 Knowledge of circumstances which would put an honest and reasonable person on inquiry.

An analysis of unconscionable bargains cases in terms of the *Baden* scale is capable of producing a more rigorous and accurate analysis. The reason for this is that, as discussed below, judges tend to speak in terms of 'actual knowledge', 'constructive knowledge' and 'constructive notice' — but these are slippery terms. For example, there is a common practice of dividing up the fivefold classification into two general categories of 'actual knowledge' (categories (i)–(iii)) and 'constructive knowledge' (categories (iv) and (v)).[99] As a result, when judges use the phrase 'actual knowledge', they may mean one of two things: they may be referring specifically to category (i) knowledge, that is, a reference to subjective knowledge; or they may be referring more loosely to categories (i)–(iii). To take another example, the phrases 'constructive knowledge' and 'constructive notice' are sometimes treated as coterminous terms,[100] although the basis for and extent of this is not immediately obvious. When measured against the *Baden* scale, however, it becomes apparent that, while 'constructive knowledge' covers categories (iv) and (v), 'constructive notice' specifically refers

[97] [1993] 1 WLR 509 ('*Baden*'). See also *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 362 [264]–[265] (Finn, Stone and Perram JJ) ('*Grimaldi*').

[98] *Baden* (n 97) 575–6 [250].

[99] See, eg, *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 454 (Nourse LJ).

[100] See *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250, 267–8 (Buckley LJ).

to category (v) knowledge.[101] Therefore, the *Baden* scale allows us to analyse the element of knowledge in a more precise way.

2 *Level of Knowledge Required*

To return to the unconscionable bargains doctrine, both English and Australian law require D to have knowledge of C's position of disadvantage. Thus, the English requirement of exploitation has been said to 'impl[y] a high level of *knowledge* … by D of [C's] probable weakness or vulnerability relative to him';[102] while in Australia the *Amadio* test requires C's disadvantage to be 'sufficiently evident' to D.[103] Therefore, the level of knowledge required differs in the two jurisdictions.

Consider English law first. A measure of inconsistency on this issue was detected in *Jones v Morgan* ('*Jones*'), where Chadwick LJ held that

> a bargain cannot be unconscionable unless one of the parties has imposed the objectionable terms in a morally reprehensible manner; that is to say, in a manner which affects his conscience[104]

and yet in the same judgment went on to hold that '[t]he enquiry is not whether the conscience of the party who has obtained the benefit of the transaction is affected in fact; the enquiry is whether, in the view of the court, it *ought* to be.'[105] The former statement suggests category (i) knowledge is necessary, while the latter suggests that even constructive knowledge — categories (iv) and (v) — might suffice. That decision notwithstanding, a strong line of cases suggests that only category (i) knowledge will suffice. For example, in *Fineland Investments Ltd v Pritchard*, it was said that 'the law of unconscionable bargain requires the knowing taking advantage by one party of another'.[106] Another example is *Minder Music Ltd v Sharples* ('*Sharples*'), where the doctrine was held not to apply, one reason being that D was not 'aware of the full extent of' C's position

[101] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 163 [177] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Grimaldi* (n 97) 362 [265]–[266] (Finn, Stone and Perram JJ).

[102] Bigwood, 'Contracts by Unfair Advantage' (n 3) 70–1 (emphasis in original). See also *Chagos Islanders v A-G* [2003] EWHC 2222 (QB), [562] (Ouseley J).

[103] *Amadio* (n 2) 474 (Deane J). See also *Louth* (n 2) 626 (Brennan J) (emphasis added): there must be 'a relationship between the parties which, *to the knowledge of the donee*, places the donor at a special disadvantage'.

[104] [2001] EWCA Civ 995, [35] (emphasis added) ('*Jones*').

[105] Ibid (emphasis added). See also Bigwood, 'Contracts by Unfair Advantage' (n 3) 70–1 (emphasis omitted), suggesting that 'actual or subjective knowledge' is sufficient.

[106] *Fineland* (n 13) [77] (Alison Foster QC). See also John McGhee (ed), *Snell's Equity* (Sweet & Maxwell, 33rd ed, 2015) 230 [8-042], 231–2 [8-045].

of disadvantage.[107] And in *Mitchell v James* ('*Mitchell*'), the Court held that C had to establish that D 'knowingly [took] advantage' of C.[108] The need to establish category (i) knowledge is also consistent with the further requirement that D exploit C in a morally culpable manner, a point discussed below.[109] In principle, exploitation surely requires actual, subjective knowledge of the victim's position, which facilitates the exploitative act.[110]

In Australia, Mason J's judgment in *Amadio* stated that it must be the case D '[knows] or ought to know of the existence of [C's] condition or circumstance and of its effect on [C]'.[111] This point was subject to further comment in *Kakavas*. In that case the High Court referred[112] to a passage of Mason J's judgment in *Amadio* where his Honour said:

> [i]f, instead of having actual knowledge of that situation, [D] is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person, the result will be the same.[113]

The High Court then commented that Mason J 'cannot be taken to have supported the importation of the concept of *constructive notice* into the operation of the principle he enunciated in *Amadio*'.[114] Their Honours then explained that Mason J 'was speaking of *wilful ignorance*, which, for the purposes of relieving against equitable fraud, is not different from *actual knowledge*'.[115] In

[107] [2015] EWHC 1454 (IPEC) [35] (Recorder Michaels) ('*Sharples*').

[108] (High Court of England and Wales, Park J, 10 July 2001) [82] ('*Mitchell*').

[109] See below Part III(B)(3).

[110] Hugh Beale, 'Undue Influence and Unconscionability' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Contract* (Hart Publishing, 2017) 87, 107–8. See also Enonchong (n 3) 231. Cf Rick Bigwood '*Kakavas v Crown Melbourne Ltd* — Still Curbing Unconscionability: *Kakavas* in the High Court of Australia' (2013) 37(2) *Melbourne University Law Review* 463, 491, who suggests that exploitation does not imply conscious impropriety: D 'need only intend to perform those acts or omissions that objectively would constitute the wrong of exploitation'. However, labelling both 'conscious impropriety' and 'intending to perform' cases as 'exploitation' would cause more confusion than it resolves, since the wrongfulness of D's act is clearly qualitatively different in the two scenarios. And in any event, for the purposes of the present discussion, it is clear that Australian law, unlike English law, does not insist on exploitation in the former sense. To avoid confusion, it is therefore better to use the term 'exploitation' in its most natural sense, confining it to describe the English approach.

[111] *Amadio* (n 2) 462. See also *Thorne* (n 42) 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ); *Kobelt* (n 31) 58 [148] (Nettle and Gordon JJ).

[112] *Kakavas* (n 65) 436–7 [151] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[113] *Amadio* (n 2) 467.

[114] *Kakavas* (n 65) 438 [155] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ) (emphasis added).

[115] Ibid 438 [156] (emphasis added).

support of this point, their Honours suggested[116] that Mason J was simply paraphrasing Lord Cranworth LC's statement in *Owen v Homan* ('*Homan*') that

> it may safely be stated that if the dealings are such as fairly to lead a *reasonable man* to believe that fraud must have been used in order to obtain [the advantage], he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases *wilful ignorance* is not to be distinguished in its equitable consequences from knowledge.[117]

It is at once noticeable that the *Kakavas* judgment supports two different kinds of analyses. The first is that 'actual knowledge' is required *in the loose sense* which encompasses categories (i)–(iii) knowledge. The fact that category (iii) knowledge was thought to suffice can be seen from Lord Cranworth LC's language in *Homan*, where his Lordship assessed 'wilful ignorance' by the standard of 'a reasonable man'; similarly, the *Kakavas* judgment comments that Mason J in *Amadio* 'was speaking of wilful ignorance',[118] and Mason J in *Amadio* referred to the standard of the 'reasonable person'.[119] The second possible analysis is that, in addition to the foregoing, category (iv) knowledge is also sufficient to trigger the doctrine. Support for this point can be found in the statements in *Kakavas* that 'constructive notice' — ie category (v) knowledge — is insufficient.[120] This implies that the other levels of knowledge will suffice. The point is reinforced by the fact that nowhere in *Kakavas* does the High Court once use the phrase 'constructive knowledge'; the phrase 'constructive notice' is used consistently throughout.[121]

It is not an easy task to ascertain which view represents Australian law, as later cases have taken diverging views. While some cases have said that actual knowledge as opposed to *constructive knowledge* is necessary,[122] others have

116 Ibid 438 [155].

117 (1853) 4 HL Cas 997; 10 ER 752, 767 (emphasis added) ('*Homan*').

118 *Kakavas* (n 65) 438 [156].

119 *Amadio* (n 2) 467.

120 *Kakavas* (n 65) 437–8 [151]–[156], 439–40 [161]–[162] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

121 See, eg, ibid 437–8 [151]–[156].

122 See, eg, *Clarke v Great Southern Finance Pty Ltd* [2014] VSC 516, [1933] (Croft J); *Perpetual Trustees Victoria Ltd v Burns* [2015] WASC 234, [224] (Heenan J); *Dewar v Ollier* [2020] WASCA 25, [178] (Beech, Vaughan JJA and Archer J); *Brown v Barber* [2020] WASC 84, [330] (Smith J).

said that only *constructive notice* is insufficient.[123] To compound the confusion, yet other cases suggest that even category (v) knowledge suffices: 'it is enough that [D] has sufficient awareness to be placed on *inquiry* so that ignorance of the special disability may be characterised as wilful'.[124]

We suggest that those cases which include category (v) knowledge are wrong and ought not to be followed. Most obviously, this analysis unjustifiably disregards the authoritative decision in *Kakavas*. Moreover, category (v) imposes a duty on D, at their own expense, to make inquiries — and it is doubtful that D needs to go to such lengths to discover if C suffers from a special disadvantage.[125] After all, as we explain later,[126] the unconscionable bargains doctrine requires fault in the sense of a breach of a primary duty, and this does not square with the 'property protection rationale' which underlies category (v) knowledge.[127] As between the remaining two views, while there is ample case law to support either, we suggest that categories (i)–(iv) knowledge are all sufficient to engage the doctrine. A point we make below[128] is that, in Australia, where D is *aware* of any information concerning C's special disadvantage, they must supply that information to C's legal advisor. This suggests that category (iv) knowledge of D's special disadvantage suffices — in particular, D's obligation to supply such information is not confined to situations where D acts recklessly or in wilful ignorance.

If the above analyses are correct, then it is clear that English and Australian law require different levels of knowledge. While English law insists on 'actual knowledge' in the technical sense of category (i) knowledge only, Australian law accepts categories (i)–(iv) knowledge.

123 See, eg, *Re Premier Bay* (n 1) [803] (Robson J); *ABL Nominees Pty Ltd v MacKenzie* [2014] VSC 460, [22] (Derham AsJ) ('*ABL Nominees*'). See also *Re Mahoney* [2015] VSC 600, [184] (McMillan J), quoting *Amadio* (n 2) 467–8 (Mason J): what is required is 'knowledge of the facts which would raise the possibility [that the donor was under a special disability] in the mind of a reasonable person'.

124 *ABL Nominees* (n 123) [18] (Derham AsJ) (emphasis added); *Owerhall v Bolton & Swan Pty Ltd* [2016] VSC 91, [49] (Derham AsJ) (emphasis added).

125 To borrow McPherson JA's words in *Port of Brisbane Corporation v ANZ Securities Ltd [No 2]* [2003] 2 Qd R 661, 673 [17], in rejecting the relevance of category (v) knowledge in a different context, the law does not take D to be running 'a detective agency'.

126 See below Part IV(A).

127 For the dichotomy between 'fault' and 'property protection' and its relationship with the *Baden* scale: *Grimaldi* (n 97) 362–3 [263]–[267] (Finn, Stone and Perram JJ).

128 See below Part III(C)(3).

3 *Exploitation*

In addition to the requirement of knowledge, *Alec Lobb* indicates that D must exploit C in a morally culpable manner.[129] This requirement is absent in *Amadio*, and yet many later Australian decisions have described the unconscionable bargains doctrine as addressing D's 'unconscientious exploitation' of C's special disadvantage.[130] This might suggest that both jurisdictions agree on the need for exploitation. But we suggest that this is not in fact the case.

Consider Australian law first. There are two reasons why exploitation is not in reality a positive requirement. The first is that it is analytically inconsistent with the third requirement of the doctrine, which casts the onus on D to demonstrate that the transaction was fair, just and reasonable. Exploitation is inherently unfair, unjust and unreasonable. If exploitation were a requirement at the second stage of the enquiry, then this would render the third stage nugatory.[131] The second reason is that it is irreconcilable with the fact that category (iii) knowledge is undoubtedly sufficient to fulfil the second requirement of the doctrine. As Peter Gibson J noted in *Baden*, category (iii) 'imports in part an objective test'.[132] Where D at most has category (iii) knowledge, it can seriously be doubted that their knowledge is sufficiently subjective such that they can properly be said to be in a position *to exploit* C.

In the light of these reasons, we suggest that the judicial language of 'exploitation' is best understood not as a positive *requirement* but a loose *description* of the effects of the doctrine. A positive requirement that D must have 'exploited' C would suggest that only category (i) knowledge would suffice, as is the case in English law.[133] But if D has category (i)–(iv) knowledge, then setting aside an unfair or unjust transaction can be described as having the *effect* of

[129] *Alec Lobb* (n 12) 95 (Peter Millett QC).

[130] See, eg, *Louth* (n 2) 626–7 (Brennan J); *Berbatis* (n 29) 64 [14] (Gleeson CJ). See also *Director of Consumer Affairs Victoria v Scully* (2013) 303 ALR 168, 180 [40] (Santamaria JA); *Kakavas* (n 65) 439 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ); *Kobelt* (n 31) 17–18 [15] (Kiefel CJ and Bell J). See also *Thorne* (n 42) 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), where the High Court notes that other phrasings are used, such as 'victimisation' and 'unconscientious conduct'. Cf *Kobelt* (n 31) 58 [149], 59 [152] (Nettle and Gordon JJ).

[131] Support for this point can be found in Keane J's judgment in *Kobelt* (n 31) 48 [118], where the (statutory) notion of unconscionability was said to contain 'an element of exploitation', which his Honour distinguished from 'terms such as "unjust", "unfair" or "unreasonable"'.

[132] *Baden* (n 97) 577 [255].

[133] See above Part III(B)(2).

avoiding or preventing C from being exploited.[134] This best explains what, in reality, the term 'exploitation' is taken to mean in Australian jurisprudence.

This point is well demonstrated by contrasting the majority and minority decisions in *Amadio*. In Dawson J's dissent, his Honour held that the doctrine requires 'exploitation by one party of another's position of disadvantage in such a manner that the former could not in good conscience retain the benefit of the bargain'.[135] This reflects an understanding of 'exploitation' as a positive requirement, in line with the English approach discussed below. Unsurprisingly, this led his Honour to hold that the bank had not acted unconscionably: it did not actively *exploit* the parents' position for its own benefit; moreover, even if the parents relied on their son, this '[did] not convert the occasion into one of exploitation on the part of the bank'.[136] This conclusion is unsurprising because the bank clearly did not possess category (i) knowledge. However, it did at least possess category (iii) knowledge,[137] since the bank manager who dealt with the parents had 'simply closed his eyes to the [parents'] vulnerability',[138] and this led the majority of the High Court to set aside the guarantee. While the bank had not *exploited* the parents — indeed, the majority judgments do not even once employ the term 'exploitation' — nevertheless equity's intervention can be described as having avoided or prevented the parents from being exploited.

The situation is different in English law, where active exploitation is a distinct prerequisite. It is distinct from the requirement to show that C was at a serious disadvantage: '[u]nequal bargaining power … provide[s] no basis for equitable interference in the absence of unconscientious or extortionate abuse of power'; it is also distinct from the requirement to show that the transaction is overreaching and oppressive:

> Even if the terms of the contract are 'unfair' in the sense that they are more favourable to one party than the other ('contractual imbalance'), equity will not provide relief unless the beneficiary is guilty of unconscionable conduct.[139]

Exploitation must also be established in addition to the element of knowledge. Thus, D must have '*imposed* the objectionable terms in a morally reprehensible

[134] This was precisely the way in which Nettle and Gordon JJ understood the idea of exploitation in the context of the equitable doctrine of unconscionable bargains in *Kobelt* (n 31) 85 [258].

[135] *Amadio* (n 2) 489.

[136] Ibid 490.

[137] In *Amadio*, the bank was wilfully ignorant: see, eg, *Amadio* (n 2) 478–9 (Deane J). See also *Kakavas* (n 65) 439 [157] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[138] *Kakavas* (n 65) 439 [157], quoting *Amadio* (n 2) 478 (Deane J).

[139] *Boustany* (n 2) 303 (Lord Templeman), citing *Hart v O'Connor* [1985] 1 AC 1000 ('*Hart*').

manner';[140] some 'impropriety' is necessary;[141] C must positively prove that D had 'knowingly taken advantage' of C's vulnerability;[142] and 'it requires a very strong case before the courts will intervene'.[143] Nor does the fact that the doctrine can be engaged by way of a 'passive acceptance of a benefit in unconscionable circumstances' suggest otherwise.[144] In such cases the exploitation 'consists in [D's] retention of benefits in circumstances where [D has] become aware that [D's] receipt of them was unfair'.[145] Here, '[f]rom the moral point of view, the failure to return … hardly differs from deliberate fraud'.[146]

In short, English law requires a positive, overt act of exploitation, while Australian law does not, despite the courts' use of that term.

C *The Third Requirement*

In relation to the third requirement, English law requires the overall transaction or the term in question to be 'overreaching and oppressive';[147] in Australian law it must be not 'fair, just and reasonable'.[148] Three matters arise for consideration: the content of the requirement; its effect on the burden of proof; and the role of independent legal advice.

1 *Content*

On the face of it, it might be thought that 'overreaching' or 'oppressive' overlaps with 'unfair', 'unjust' or 'unreasonable'. However, it seems clear from the cases that English courts, again, require a higher threshold than their Australian counterparts. Thus, while an overreaching and oppressive term is indicative of 'a bargain … which [is not] a fair and reasonable transaction',[149] it is insufficient

[140] *Boustany* (n 2) 303 (emphasis added), quoting *Marden* (n 11) 110 (Browne-Wilkinson J). See also *Sharples* (n 107) [37] (Recorder Michaels); *Humphreys* (n 13) [106] (Rimer J).

[141] *Kalsep Ltd v X-Flow BV* (2001) 24(7) IPD 24044, 29–30 (Pumfrey J). See also *Dusangh* (n 2) 231–2 (Ward LJ).

[142] *Mitchell* (n 108) [82] (Park J). See also Beale, 'Undue Influence and Unconscionability' (n 110) 104, 108.

[143] *Singla* (n 13) [28] (Park J).

[144] *Hart* (n 139) 1024 (Lord Brightman). An example of a case involving passive acceptance is *Watkin v Watson-Smith* (n 51).

[145] Saprai (n 3) 426.

[146] Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (Oxford University Press, 1990) vol 4, 210. See also Bigwood, 'Contracts by Unfair Advantage' (n 3) 78.

[147] See, eg, *Alec Lobb* (n 12) 95 (Peter Millett QC).

[148] See, eg, *Amadio* (n 2) 474 (Deane J).

[149] *Hart* (n 139) 1024 (Lord Brightman).

for the bargain merely to be 'unreasonable':[150] the transaction must in addition 'be oppressive to the complainant in its overall terms'.[151] This indicates that 'overreaching and oppressive' requires *more than* unfairness, unjustness, or unreasonableness. That something more, we suggest, is linked to the exploitation requirement: the unfair, unjust, or unreasonable transaction must *stem from* a deliberate act of exploitation on D's part, such that D can be said to have 'imposed' the transaction or term on C.[152] As the Privy Council held in *Boustany*, beyond the objective unfairness in the terms of the transaction itself, 'the behaviour of the stronger party … must be characterised by some moral culpability or impropriety'.[153]

Two cases neatly demonstrate this point. In *Humphreys v Humphreys*, C, a poor, deaf woman of modest education, entered into a trust deed with D by which C signed away the entire beneficial interest in a house she owned for an undervalue.[154] Despite finding that D had unduly influenced C into entering the transaction, Rimer J rejected C's alternative claim that the trust deed represented an unconscionable bargain, since there was an absence of 'the requisite degree of moral culpability', and D had not acted 'in a morally reprehensible manner'.[155] In *Dusangh*, C, a 72-year-old man, applied and obtained a mortgage from D with the aim of helping his son to purchase a supermarket business.[156] When his son defaulted, D sought possession.[157] C attempted to resist the order based on the unconscionable bargains doctrine, on the basis that he was poor, illiterate, and received low income.[158] Lord Justice Ward held that, although

> it was a financially unwise venture … there was nothing, absolutely nothing, which comes close to morally reprehensible conduct or impropriety. No unconscientious advantage has been taken of the father's illiteracy, his lack of business acumen or his paternal generosity. True it may be that the son gained all the advantage and the father took all the risk, but this cannot be stigmatised as impropriety. There was no exploitation of father by son such as

[150] *Marden* (n 11) 110 (Browne-Wilkinson J); *Strydom* (n 13) [39] (Blair J).

[151] *Strydom* (n 13) [39] (Blair J). See also *Fineland* (n 13) [72] (Alison Foster QC).

[152] *Humphreys* (n 13) [106] (Rimer J).

[153] *Boustany* (n 2) 303 (Lord Templeman), citing *Alec Lobb* (n 12) 95 (Peter Millett QC).

[154] *Humphreys* (n 13) [5], [105]–[106] (Rimer J).

[155] Ibid [106]–[107].

[156] *Dusangh* (n 2) 223 (Simon Brown LJ).

[157] Ibid.

[158] Ibid 229 (Simon Brown LJ).

> would prick the conscience and tell the son that in all honour it was morally wrong and reprehensible.[159]

In contrast, the ease by which the third requirement can be fulfilled in Australia can be detected from two perspectives. The first is the wide lens through which the requirement is evaluated. In *Blomley*, Fullagar J said that it is not essential that C 'should suffer loss or detriment by the bargain', citing an old English case to make the point that there need not be 'anything actually unfair in the terms of the transaction itself'.[160] So long as 'an unfair use was made of the occasion',[161] the transaction will be held to be unfair, unjust, or unreasonable.[162] The second is the willingness to assess the matter not only at the time at which the transaction was entered into, but also potentially *afterwards*. This point was made by Allsop P in *Aboody v Ryan* ('*Aboody*'), where D provided a solicitor to advise C in relation to a transfer of land for no consideration.[163] Having found that the transaction was unconscionable, Allsop P went on to suggest, obiter, that it would nevertheless have been unconscionable for D to have *retained* the benefit of the transaction if they had found out after the transaction was complete that the solicitor did not adequately advise C, even if at the time of the transfer D was unaware of this.[164]

2 *Onus*

On the issue of onus, the position in Australia is clear: once C has established the first and second requirements, then D bears the burden of establishing that the transaction was fair, just, and reasonable.[165]

It might be thought that a different rule applies where the transaction is not a bargain, but a gift. In *Louth*, where a gift was successfully set aside, Brennan J suggested that 'it is for the party impeaching the gift to show that it is the

[159] Ibid 232. Of course, where the terms of the transaction are grossly disadvantageous, courts are able to infer exploitation on D's part, but English courts by no means do so routinely: see, eg, *Radley* (n 50) [34] (Collins J).

[160] *Blomley* (n 36) 405, citing *Cooke* (n 36).

[161] *Blomley* (n 36) 405.

[162] Cf the English position, where not even a 'contractual imbalance' is enough to engage the doctrine: *Fineland* (n 13) [77] (Alison Foster QC).

[163] [2012] NSWCA 395, [80] ('*Aboody*').

[164] Ibid. Cf the English position, where '[t]he question must … be determined on the facts as they are at the time the contract is entered into': *Strydom* (n 13) [39] (Blair J).

[165] This position has been arrived at due to a strict reading of certain old English cases: see, eg, *Blomley* (n 36) 385–6 (McTiernan J), citing *Earl of Chesterfield* (n 45) and *Earl of Aylesford* (n 5). See also *Amadio* (n 2) 474 (Deane J).

product of the donee's exploitative conduct',[166] and later stated that '[t]he *plaintiff* discharged that onus in the present case'.[167] This approach has not been followed, however, and ought not to be followed. It is obvious from Brennan J's judgment that his Honour was purporting to apply the principle as set out in *Amadio* without modification. In particular, there was no explicit departure from the *Amadio* position in relation to the onus issue. It can therefore be surmised that Brennan J's point was an oversight. This is fortified by three reasons. First, the reversal of burden of proof was not in issue on the facts of that case, where D's clear and overt exploitation of C's position was obviously unconscionable. Hence Brennan J's statements on the onus point were strictly obiter. Secondly, in *Louth*, Deane J explicitly repeated his Honour's own words in *Amadio*, stating that 'an onus is cast upon the stronger party' where it is sufficiently evident to them that the weaker party is under a special disability.[168] Thirdly, consistency dictates that the principles upon which transactions are set aside ought to apply equally to bargains (strictly so-called) and gifts.

In England, however, the cases do not speak with one voice. In some cases, judges have held that where the three considerations cited in *Cresswell* for setting aside a transaction — poor and ignorant, sale at a considerable undervalue, and lack of independent advice[169] — are fulfilled, then D bears the onus of showing that the transaction was 'fair, just and reasonable'.[170] Meanwhile, other judges have taken the view that the burden of proof is reversed only when the three *Alec Lobb* requirements — serious disadvantage, exploitation in a morally culpable manner, and overreaching and oppressive transaction[171] — have been established.[172] A third view, found in Park J's judgment in *Mitchell*,[173] as well as the Privy Council's judgment in *Boustany*, is that no reversal of burden occurs at all: 'it is necessary for [C] who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances'.[174]

166 *Louth* (n 2) 632.

167 Ibid (emphasis added).

168 Ibid.

169 *Cresswell* (n 9) 257 (Megarry J), relying on and modernising the judgment of Kay J in *Fry* (n 6) 322.

170 *Fry* (n 6) 322 (Kay J), quoted in *Dusangh* (n 2) 226 (Simon Brown LJ) and *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 151 (Nourse LJ). This adopts a similar position taken by Lord Selborne LC in *Earl of Aylesford* (n 5) 491.

171 *Alec Lobb* (n 12) 94–5 (Peter Millett QC).

172 See, eg, *Radley* (n 50) [32] (Collins J); *Strydom* (n 13) [36] (Blair J). See also HG Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 31st ed, 2012) vol 1, 749 [7-139].

173 *Mitchell* (n 108) [82].

174 *Boustany* (n 2) 303 (Lord Templeman), quoting *Amadio* (n 2) 462–3 (Mason J).

It seems clear that the second view is wrong because it is self-contradictory. It is difficult to see how D can establish that the transaction is 'fair, just, and reasonable' if it has already been shown that D exploited C's serious disadvantage by way of an oppressive transaction. That is to say, the second and third *Alec Lobb* requirements are *precisely* those which establish that the transaction was not 'fair, just, and reasonable'.[175]

The first view suggests that a reversal of burden occurs once the first and third *Alec Lobb* requirements are established, casting upon D the onus of showing that she had *not* exploited C. This is the effect of reading *Cresswell* in the light of *Alec Lobb*: the first and third *Cresswell* considerations map onto the 'serious disadvantage' requirement (the first *Alec Lobb* requirement), while the second *Cresswell* consideration relates to whether the terms of a transaction were 'overreaching and oppressive' (the third *Alec Lobb* requirement).[176]

We suggest that the first view should also be rejected, and that the third view — that no reversal of burden of proof occurs — best represents the current state of English law.[177] The reason for rejecting the first view is that in cases where judges have explicitly applied the second *Alec Lobb* requirement, they do not examine whether D has *discharged* the burden of demonstrating non-exploitation, but instead approach the matter directly by asking whether C was exploited in the relevant way. To take but one example, in *Sharples*, C's unconscionable bargain claim was rejected, the judge holding that, 'in the light of [C's] evidence taken as a whole I am not persuaded that [D] sought to [take advantage of C] in an unconscientious manner'.[178] If a reversal of burden were at play, it would have been more natural for the judge to speak of D having 'successfully discharged the burden of establishing non-exploitation'.

If our analysis is correct, then the reversal of burden of proof which applies in Australia but not in England reflects yet another difference between the two jurisdictions.

3 *The Role of Independent Legal Advice*

Finally, the role of independent legal advice falls for consideration. There is some common ground in the English and Australian approaches on this point: the absence of independent legal advice is not invariably necessary for the

[175] See Enonchong (n 3) 215–16.

[176] Ibid 213–14.

[177] Except in specific relation to bargains with expectants, which the law presumes to be unconscionable: see Charles Mitchell, 'Undue Influence and Unconscionable Bargains' in Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th ed, 2016) 413, 436 [11-60].

[178] *Sharples* (n 107) [36] (Recorder Michaels).

application of the unconscionable bargains doctrine,[179] nor does the provision of such advice invariably lead to its disapplication.[180]

However, a major difference is found in relation to the lengths which D must go to *ensure* that C receives quality legal advice. Representative of the English approach is Chadwick LJ's statement in *Jones* that

> it is for a solicitor to advise the naïve, the trusting or the unbusinesslike in their dealings with the more astute. In such a case the client relies on the solicitor to protect his interests; and, if the solicitor is competent and fulfils his role, the imbalance which would otherwise exist by reason of the client's naïveté, trust and lack of business experience is redressed.[181]

This suggests that, except in extreme cases, the transaction will not be overreaching or oppressive where C receives legal advice.

On the other hand, Australian courts have been much less willing to find that the transaction is fair, just, and reasonable even where C receives independent legal advice. For example, in *Aboody*, it was held to be insufficient for D to have provided a solicitor to C, where D was aware of C's irrational political fear but did not inform the solicitor of that fact.[182] Another striking example is *Thorne*, where it was held to be insufficient for D to have provided a solicitor to C to advise her of the terms of their pre-nuptial agreement — whose legal advice was not only independent but impeccable[183] — because D created the 'urgency' and 'haste' of the situation, which counted against him.[184] In the context of sureties, the Queensland Court of Appeal has also held that '[i]nsistence on a certificate of independent legal advice cannot be a panacea for prima facie unfairness or unconscientious conduct';[185] in addition to explaining the effect of the surety or insisting upon independent advice being obtained by the

[179] See, eg, for England: *Alec Lobb* (n 12) 98 (Peter Millett QC); *Dusangh* (n 2) 235 (Ward LJ); Beale, *Chitty on Contracts* (n 172) 748 [7-138]; David Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 (July) *Law Quarterly Review* 479, 496–7 ('Undue Influence and Unconscionability'); for Australia: Heydon, Leeming and Turner (n 3) 506 [16-035]. However, *denying* C access to independent legal advice counts against D: *Bridgewater* (n 1) 485–6 [100] (Gaudron, Gummow and Kirby JJ).

[180] See, eg, for England: *Alec Lobb* (n 12) 95–6, 98 (Peter Millett QC); for Australia: *Aboody* (n 163) [68] (Allsop P); *Thorne* (n 42) 112 [65] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

[181] *Jones* (n 104) [40].

[182] *Aboody* (n 163) [68] (Allsop P).

[183] A majority of the High Court observed that C 'was given emphatic independent legal advice that the agreement was "entirely inappropriate" and that [C] should not sign it': *Thorne* (n 42) 90 [1] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

[184] Ibid 112 [65] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

[185] *ANZ Banking Group Ltd v Alirezai* [2004] QCA 6, [111] (Wilson J).

proposed surety, the lender must disclose sufficient financial information for an informed decision to be made.[186]

All this indicates an important point of difference between English and Australian law: while the mere availability of legal advice weighs heavily in favour of neutralising C's serious disadvantage in England, Australian courts require D (who has relevant knowledge of C's special disadvantage) to go further, by positively *supplying* any relevant information to the legal advisor, and by creating optimal conditions such that C's digestion of the legal advice will be meaningful, where this is within D's control.

IV Three Core Differences

The above discussion has identified the crucial points of divergence between English and Australian law concerning the unconscionable bargains doctrine. While both jurisdictions find much in common over the first requirement, significant differences are found in relation to the second and third requirements. In relation to the second requirement, English law not only requires D to have category (i) knowledge, but D must also have exploited C in a morally culpable manner; whereas in Australia categories (i)–(iv) will be enough to engage the doctrine, even without any overt exploitation. In relation to the third requirement, English law will not intervene unless C establishes that the transaction is 'overreaching and oppressive', while in Australia the law intervenes unless D discharges the onus of demonstrating that the transaction was 'fair, just, and reasonable'. Australian courts also require D to *ensure* that the legal advice C receives and the conditions under which it is received are of satisfactory quality, where these are within D's control, whereas in England the mere fact that C receives independent legal advice seems enough generally to abate equity's intervention. These points of divergence demonstrate the precise doctrinal reasons why Australian law is significantly more generous to claimants than English law.

As we explained at the beginning of this article, the wider approach in Australia is often taken as the basis for criticising the more restrictive English approach.[187] However, the underlying assumption that Australian and English law are siblings, and therefore *ought* to have a high degree of familial resemblance, is mistaken. In this Part, we draw on the points of divergence identified in Part II above, to demonstrate that there are three core differences that distinguish the law in the two jurisdictions. These relate to: the type of duty to which

[186] Ibid [91] (Jerrard JA).

[187] See above n 4 and accompanying text.

D is subject; the situations in which equity will intervene to set aside a contract; and the meaning of unconscionability. Ultimately, these differences indicate that Australian and English law are not siblings, but are (at best) cousins.

A *Content of the Duty*

It is clear that the unconscionable bargains doctrine in both jurisdictions is wrong-based, in the sense that it arises to correct the effects of D's breach of a primary duty.[188] In England, the wrong is understood to consist of D exploiting C in a morally culpable manner — in Australia, the wrong is understood to lie in D's procuring or accepting C's assent to the transaction in circumstances where they ought not to.[189] A fundamental difference, however, exists at the primary-duty level, in relation to the content of the duty to which contracting parties are subject. In English law, the duty is a negative duty — D has a duty *not to exploit* those in a position of serious disadvantage; in Australian law, the duty is a positive duty — D has a duty *to help* those in a position of special disadvantage, if they are aware of it. Putting this in another way, in England the doctrine responds to a breach by commission, while in Australia it responds to a breach by omission.

This distinction can be detected at each point of doctrinal divergence between the two jurisdictions. Consider first the role of independent legal advice. In England, such advice 'serve[s] to dispel' 'the suspicion of nefarious dealing',[190] which suggests that courts examine the presence or absence of legal advice *in order to* determine whether D exploited any serious disadvantage of C. In Australia, the contrasting position requires D to do much more to ensure the quality of legal advice received by C, including an obligation to make the advisor aware of factors within D's knowledge which may affect C, and (where possible) to ensure that the conditions under which C receives legal advice are

[188] See Edelman (n 3) 61. As Edelman notes, at 62, although

> compensatory damages have historically been unavailable for unconscionable transactions … it is difficult to see how this cause of action … can be based primarily, perhaps exclusively, upon the fault of [D] without relying upon any characterisation of the facts as a breach of duty. … The effect of this analysis means that an award of compensatory damages might, in the future, be possible in an action for such unconscionable transactions.

Suggestions that equitable compensation is available under the unconscionable bargains doctrine are found in: *Boustany* (n 2) 304 (Lord Templeman); *Harrison v Schipp* [2001] NSWCA 13, [131] (Giles JA); *Karam v ANZ Banking Group Ltd* [2001] NSWSC 709, [506]–[511] (Santow J).

[189] See above Part III(B).

[190] *Dusangh* (n 2) 235 (Ward LJ).

optimal.[191] All these are consistent with the imposition of a positive duty on D to help C.

In relation to the requisite level of knowledge, the negative duty imposed in English law is consistent with the higher threshold of knowledge it requires: one can only 'exploit' where one has category (i) knowledge.[192] On the other hand, in Australia, the doctrine can also be triggered by categories (ii)–(iv) knowledge, which signifies a shift away from (pure) subjective knowledge and incorporates a degree of objectivity.[193] This indicates that, to some extent, the law holds D to an objective standard which requires D to do more than their English counterpart to make themselves (subjectively) aware of C's true position and act accordingly. This is consistent with the imposition of a positive duty on D to help C.

Finally, in Australia, the reversal of burden of proof sends the message that, if D is aware of C's special disadvantage, equity will intervene *unless* D discharges their positive duty to ensure that the overall transaction is fair, just, and reasonable. This explains why C need not suffer any loss or detriment as a result of the transaction:[194] equity will intervene on the basis that D does not *do enough* to ensure the transaction is fair, just, and reasonable. In contrast, in England, C must establish that the transaction is overreaching and oppressive,[195] which amounts to demonstrating that D has breached their duty *not to* exploit C in the relevant way.

B *Policy of Equitable Intervention*

It is observable that, in modern times, English law has been unenthusiastic about developing or applying the unconscionable bargains doctrine,[196] with undue influence being the primary basis upon which transactions are set aside.[197] But in Australia, the position is precisely in the reverse: 'there is hardly a modern case decided on the basis of undue influence since … it has been de

[191] See above n 182.

[192] See above nn 106–107.

[193] See above 20–1.

[194] See above n 160 and accompanying text.

[195] See above n 147.

[196] The last case in which an unconscionable bargains claim was successful was in the 1995 Privy Council decision of *Boustany* (n 2). Although in the more recent case of *Radley* (n 50), where D succeeded in setting aside a summary judgment, Collins J nevertheless observed that, on the facts, C could well succeed on the basis of the doctrine: at [34].

[197] Capper, 'Undue Influence and Unconscionability' (n 179) 479. See also *Special Trustees for Great Ormond Street Hospital for Children v Rushin* (England and Wales High Court, Rimer J, 19 April 2000) [196] ('*Rushin*').

facto superseded by the more encompassing doctrine of unconscionability'.[198] The difference can no doubt be accounted for on the basis of the different doctrinal directions in which both jurisdictions have developed the unconscionable bargains doctrine. There is a more fundamental point, however: the distinction reveals that the two jurisdictions have distinctive legal policies concerning the circumstances in which equity will intervene to set aside transactions.

In Australia, equity's overwhelming policy concern is to compel a contracting party or donee, D, who knows of the special disadvantage of the other party, C, to take the initiative to ensure that the resulting transaction is fair, just, and reasonable. This is a wide policy; indeed, so wide that, in practice, it overlaps considerably with the subsidiary policy concern to protect those who enter into transactions and whose will is so overborne by being in a relationship of influence, that their assent is not independent or voluntary.[199] Thus, a whole range of reasons may cause C to suffer from a special disadvantage, of which being in a relationship of influence is but one.[200] Moreover, where the parties are in a relationship of influence, it is most unlikely for D not to have categories (i)–(iv) knowledge of C's special disadvantage by virtue of being in the relationship of influence. These explain why the unconscionable bargains doctrine appears to have subsumed the doctrine of undue influence. However, as mentioned, undue influence is underpinned by a distinct policy concern from the unconscionable bargains doctrine, and therefore they are not simply aspects of a singular doctrine.[201] And in practice, undue influence does play a residual, practical role: it will generally be relied upon either in rare cases where it is difficult to establish that D had the relevant level of knowledge of C's special disadvantage, or where the particular relationship which the parties are in gives rise to a presumption of undue influence, as it will 'provide a particular forensic advantage to plaintiffs'.[202]

Conversely, equitable intervention in English law is based on the primary policy of protecting only those entering into transactions in the context of

[198] Phillips, 'Unifying Doctrine' (n 3) 855; Sir Anthony Mason, 'The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective' in Donovan WM Waters (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1993) 3, 14.

[199] *Amadio* (n 2) 461 (Mason J); *Thorne* (n 42) 103 [40] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ). Cf Heydon, Leeming and Turner (n 3) 485 [15-035]:

> In cases of undue influence, the will of the innocent party may be independent and voluntary, the complaint being as to the quality of the consent or assent of that party and as to the disadvantageous position in which the innocent party acted.

This seems contrary to the express words of Mason J in *Amadio* (n 2) 461.

[200] Phillips, 'Unifying Doctrine' (n 3) 854.

[201] This is the unquestionable effect of the decision in *Thorne* (n 42).

[202] *Bridgewater* (n 1) 478 [74] (Gaudron, Gummow and Kirby JJ).

relationships of influence. This is an expression of the wider and more general policy that the law does not concern itself with transactional imbalances or unfairness, other than in exceptional circumstances. This attitude is best reflected in Lord Scarman's words in *Morgan*, observed earlier,[203] which take it to be essentially the legislature's and not the courts' task of providing relief against inequality of bargaining power. Entering into a transaction where one is unduly influenced is a recognised justifiable exception; but outside such cases, simply entering or agreeing to proceed with a transaction is not taken to be a cause for concern, even if C is in a position of serious disadvantage, unless C's position is overtly exploited by D in a morally culpable manner.[204] All this is reflected in the fact that the unconscionable bargains doctrine is 'a second string argument, the primary [doctrine] being … undue influence'.[205]

We think that one way in which the different policy approaches of the two jurisdictions can be understood is by analysing that difference as a facet or by-product of a wider point concerning the contractual environment that each jurisdiction aims to curate. It is well-known that England seeks to establish itself as an attractive venue for international dispute resolution. To that end:

> When deciding on matters involving contracts, the courts have always sought to uphold the terms of valid contracts, particularly in situations where the contracting parties were involved in the negotiation of terms. There has always been a focus on the need for certainty when looking at contracts, so that each party understands the entirety of its obligations.[206]

On the other hand, Australia has responded to the global nature of commerce by undertaking 'the task of contractual interpretation pragmatically',[207] adopting standards rather than hard-and-fast rules as the legal norm.[208] The former tends towards certainty while the latter towards flexibility, and this may well explain why English law takes a more restrictive — and Australian law takes a

[203] See above n 19 and accompanying text.

[204] See, eg, *Irvani* (n 51) 423–4 (Buxton LJ); McGhee (ed) (n 106) 230 [8-042] n 273.

[205] *Humphreys* (n 13) [105] (Rimer J). Indeed, judges often find it unnecessary to deal with counsel's arguments based on unconscionable bargains when an undue influence claim is found to have been made out: see, eg, *Rushin* (n 197) [196] (Rimer J).

[206] Oliver Browne, Ian Felstead and Mair Williams, 'England and Wales' in Steven M Bierman (ed), *The Complex Commercial Litigation Law Review* (Law Business Research, 2nd ed, 2019) 105, 105.

[207] Kenneth P Hickman et al, 'The Complex Commercial Litigation Law Review: Australia', *The Law Reviews* (Web Page, 14 January 2021) <https://thelawreviews.co.uk/title/the-complex-commercial-litigation-law-review/australia>.

[208] See Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17(1) *Melbourne University Law Review* 87, 98.

more generous — approach towards equitable intervention in completed contracts, even outside the commercial context.

This difference in legal policy sounds three crucial points of caution for those who tend to draw uncritically from the jurisprudence of both Australian and English law. First, a proper understanding of the law cannot be attained by an intent focus only on the unconscionable bargains case law; it must involve an appreciation of how it works alongside undue influence, and what both doctrines *together* reveal about equitable intervention in transactions more generally. Secondly, matters of policy are inherently intricate and complex, and cannot be reduced simply to a sum of the differences between the requirements of the unconscionable bargains doctrine. Therefore, the fact that the doctrine has been developed differently in the two jurisdictions does not in itself suggest how they ought to be reconciled, if at all. And thirdly, legal policy is jurisdiction-specific. It is clear from the analysis above that English and Australian law differ as to the extent to which they depart from the 'classical' theory of contract law.[209] Australian law is more ready to sacrifice contractual autonomy for the sake of transactional fairness, while English law's position is in the reverse. There is clearly no 'one right answer' — any universal truth — as to where the law ought to draw the line between autonomy and transactional fairness. Therefore, it would be wrong to assume or to expect that jurisdictions take a uniform approach in relation to matters of policy and, to the same extent, in relation to the development of the unconscionable bargains doctrine.

C *Unconscionability*

In *Amadio*, Mason J observed that the phrase 'unconscionable conduct' may refer either to an overarching principle which includes fraud, misrepresentation, breach of fiduciary duty, undue influence, and unconscionable conduct, or a specific class of case where 'a party … suffers from some special disability or is placed in some special situation of disadvantage'.[210] The use of the term in the latter sense is certainly more specific than the former and is helpful insofar as it identifies the doctrine with which this article is concerned. Nevertheless, what Mason J does not observe is that 'unconscionability' is also commonly taken to have the further function of providing the *rationale* of the unconscionable bargains doctrine.

[209] See generally PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979); Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford University Press, 2nd ed, 2015).

[210] *Amadio* (n 2) 461.

Three distinct ways in which the term has been used as a rationale for the doctrine can be detected. First, 'unconscionability' has been taken to refer to 'the underlying spirit of equity centring on fairness'.[211] For example, Dr Andrew Phang argues that the unconscionable bargains doctrine is 'merely the more concrete as well as substantive manifestation' of that underlying spirit.[212] Secondly, the term has been used to refer to an overt act of wrongdoing, as where Kitto J in *Blomley* described the doctrine as 'den[ying] to those who act unconscientiously the fruits of their wrongdoing'.[213] Thirdly, the term has been employed simply as a description of the effects of the doctrine. For example, the Full Federal Court in *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* said that '[e]quity is directed to the prevention of unconscionable behaviour', and that equitable relief is granted on the principle 'that a party having a legal right may not exercise it in such a way that the exercise amounts to unconscionable conduct'.[214] If the doctrine *prevents* unconscionability, then 'unconscionability' describes the effect of the doctrine. Notably, this usage ostensibly identifies a reason for which the doctrine arises, but in fact it does not, since an effect can hardly provide a reason for equity's intervention. Those reasons are found in the requirements of the doctrine which lead to its application.

We suggest that English law uses the term 'unconscionability' in the second sense. This is easy to understand: exploitation in a morally culpable manner is an overt act of wrongdoing.

In contrast, we suggest that in Australia 'unconscionability' is used in the third sense. As we have discussed earlier,[215] active exploitation is not a prerequisite in Australia, nor does D act in a distinctly wrongful manner when they enter into a transaction with knowledge that C is under a special disadvantage, since the law does not prevent one from entering into contracts under these circumstances per se. The wrong lies in failing to ensure that the transaction is fair, just, and reasonable; but that wrongdoing need not be overt in any way, since not doing enough is sufficient to trigger the doctrine. But, as discussed earlier,[216] it remains possible to describe the doctrine as *preventing* C from being exploited. This, we suggest, is what 'unconscionability' in fact refers to: the state of affairs prevented through an application of the doctrine.

211 Phang (n 3) 568 (emphasis omitted).

212 Ibid (n 3) 569.

213 *Blomley* (n 36) 429.

214 (2002) 189 ALR 76, 91 [46] (Gray, French and Stone JJ).

215 See above Part III(B)(3).

216 See above n 134 and accompanying text.

Apart from indicating a fundamental difference in the way the term 'unconscionability' is used, the above analysis also provides a warning against lumping English and Australian law under a broad notion of 'unconscionability', as suggested by the first sense of the term. Such a usage provides a false unity by setting too high a level of generality to take into account the nuances which differentiate the law in the two jurisdictions. As explained earlier, it is wholly legitimate — indeed, it is to be expected — that different jurisdictions may adopt different policies as to how they balance contractual freedom with transactional fairness. Condemning or preferring one approach over another on the basis of a general notion of 'fairness' is to turn a blind eye to the rich and complex web of reasons that underlie each jurisdiction's development of the law.

V Conclusion

In this article, we have compared the specific requirements of the unconscionable bargains doctrine in England and Australia in order to explain the precise points at which they differ. We have demonstrated that those differences are hardly trifling: they are substantive and substantial. That detailed comparison has allowed us to observe that the two jurisdictions reflect three core differences. First, English law imposes a negative duty while Australian law imposes a positive duty on contracting parties; secondly, the policy consideration underlying equitable intervention is much narrower and targeted in English law than it is in Australian law; and thirdly, 'unconscionability' means an overt act of wrongdoing in English law, while in Australia it is used in a conclusory manner to describe the effect of the unconscionable bargains doctrine's operation.

All these differences suggest that the English and Australian versions of the unconscionable bargains doctrine are at best cousins — they are not siblings. Their differences must be factored into any comparative discussion of the doctrine, and one must avoid drawing lessons from one jurisdiction to inform the other in an uncritical manner.