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Lloyds Bank Ltd v Bundy: The Influence of the Omnibus Principle of Unequal Bargaining Power

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I. INTRODUCTION

Lloyds Bank Ltd v Bundy[1] is a landmark case in consumer protection law. However, in contrast to many of the cases in this collection, its influence does not come directly from initiating a change in legal doctrine or principle: the impact comes from the organising theme or omnibus principle that emerged from it. *Lloyds Bank Ltd v Bundy* gave relief to an ill-informed third-party guarantor of a family member's business debt, on the basis of the undue influence of the lender bank. This approach, based on the exceptional circumstances of the case, was some years later subsumed by a more protective version of doctrine applying to non-commercial third-party guarantees in *Royal Bank of Scotland v Etridge (No 2)*.[2] In this aspect, the case falls within a family of principles concerned to protect non-commercial sureties, commonly family members who agree to mortgage their home to support a loved one's business borrowings. Lord Denning MR's broader, proposed omnibus principle of unequal bargaining power, unifying the vitiating factors of undue influence, undue pressure, duress and unconscionable dealing, has failed to find ongoing recognition in English law.[3] Yet it is that very principle that has proven

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[1] *Lloyds Bank Ltd v Bundy* [1975] QB 326 (CA).

[2] *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 41, [2002] 2 AC 773. See also *Barclays Bank plc v O'Brien* [1994] 1 AC 180. See also R Bigwood, 'From *Morgan* to *Etridge*: Tracing the (Dis)Integration of Undue Influence in the United Kingdom' in JW Neyers, R Bronaugh and SGA Pitel (eds), *Exploring Contract Law* (Oxford, Hart Publishing, 2009).

[3] The principle has been rejected or constrained in a number of cases. See, eg, *Pao On v Lau Yiu Long* [1980] AC 614; *National Westminster Bank plc v Morgan* [1985] 1 AC 686, 708; *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1985] 1 WLR 173.

most influential across a broad compass of consumer transactions. The understanding that business to consumer contracts are characterised by a profound inequality of bargaining power that reduces the ability of the weaker party to protect their own interests, undermines glib assertion of the place of 'freedom of contract', supports a generous conceptualisation and application of the doctrine of unconscionable dealing, and informs many of the interventions provided by consumer protection legislation. The omnibus principle has travelled well beyond its English village birthplace and the domestic surety context.

The principle of inequality of bargaining power may be seen as a key factor in the evolution of the doctrine of unconscionable dealing in Canada[4] and, to some extent, Australia,[5] supporting broadly framed and, at times, controversial responses to conduct that exploits a superior bargaining position. It has been less significant in respect to the English doctrine of unconscionable dealing,[6] which is arguably overshadowed by, and confused with, that of undue influence.[7] In Singapore, the principle has been met with judicial concerns about the potentially disruptive impact of granting relief in any case where the parties are not on equal terms, leading to courts adopting a 'middle ground' approach.[8] Yet, even in England, concern with unequal bargaining power, along with the influence of the EU, has informed statutory responses to unconscionable conduct,[9] unfair conduct,[10] and unfair contract terms.[11] Admittedly, the influence of traditional attitudes within the common law of contract law decrying the destabilising effect of such considerations has led to some unfortunately narrow readings of statute,[12] which is something of a theme of this collection.[13] Nonetheless, the statutory initiatives have allowed regulators to respond in a systemic manner to overreaching conduct by firms that exploit their bargaining advantage and the information asymmetries that face consumers in dealing with them. As we will see, these legislative schemes are now widespread, arguably manifesting a shared and broadly-framed statutory policy concerned to address the sorts of concerns articulated by Lord Denning MR. Looking forward, it seems likely, and desirable, that attention and resources should be focused on enabling more effective regulatory enforcement rather than continuing to debate the merits of the intervention.

In this chapter, we begin by discussing the decision in *Lloyds Bank Ltd v Bundy*. We consider the evolution of English law dealing with the discrete situation raised

[4] *Uber Technologies Inc v Heller* (2020) SCC 16, 447 DLR 4th 179.

[5] *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14, (1983) 151 CLR 447.

[6] YK Liew and D Yu, 'The Unconscionable Bargains Doctrine in England and Australia: Cousins or Siblings?' (2021) 45(1) *Melbourne University Law Review* 206.

[7] *Royal Bank of Scotland* (n 2) 798 [5] (Lord Nicholls); *cf Thorne v Kennedy* [2017] HCA 49, (2017) 263 CLR 85, 103–4 [39]–[40] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) discussing the Australian authorities that consistently distinguish the doctrines. See also D Capper, 'The Unconscionable Bargain in the Common Law World' (2010) 126 *Law Quarterly Review* 403.

[8] *BOM v BOK* [2018] SGCA 83.

[9] Competition and Consumer Act 2010 (Cth), sch 2, s 21 (Australian Consumer Law).

[10] Consumer Protection from Unfair Trading Regulations 2008, pt 2.

[11] Consumer Rights Act 2015, pt 2; Australian Consumer Law, pts 2–3.

[12] JM Paterson and E Bant, 'Contract and the Challenge of Consumer Protection Legislation' in TT Arvind and J Steele (eds), *Contract Law and the Legislature: Autonomy, Expectations, and the Making of Legal Doctrine* (Oxford, Hart Publishing, 2020).

[13] See ch 1.

by the case, namely non-commercial guarantors of another's business debt. We then consider the indirect impact of the principle of unequal bargaining power in informing the equitable doctrine of unconscionable dealing in England and also in Canada, Australia and Singapore. We next turn to its manifestations in the relief given under consumer protection legislation from unfair or unconscionable conduct, as well as from unfair terms. Finally, we consider the role of statutory penalties in making this body of law effective as a deterrent to overreaching conduct and abuses of bargaining power.

II. THE DECISION

Lloyds Bank Ltd v Bundy[14] arose from an attempt by Lloyds Bank to take possession of Yew Tree Farm, which was owned by Mr Bundy. The facts of the case were 'special',[15] if not singular. The Bank had a longstanding and close relationship with the Bundy family.[16] It was intimately familiar with their financial circumstances.[17] Relevantly, the value of the farm, Mr Bundy's main asset, was £10,000. His son's business, which held an overdraft account with the Bank, was experiencing increasing difficulties. Mr Bundy had earlier used the farm as security for the overdraft facility with the Bank, initially to an amount of £1,500. Subsequently, the value of the security was increased to £7,500. On this occasion, Mr Bennett had afforded Mr Bundy proper opportunity to seek, and follow, the independent advice of his local solicitor, a reputable advisor well-known to the Bank.[18] This advice was that, given the value of the farm, this was the utmost Mr Bundy could sink into his son's affairs.[19]

However, Mr Bundy subsequently increased the secured amount to £11,000. In this final transaction, a new assistant bank manager, Mr Head, came to the farmhouse armed with the prepared guarantee and charge documents, ready for signature. The son and his wife were present and clearly anxious for Mr Bundy to sign.[20] The Bank well knew both the true, and perilous, financial condition of the son's business and the son's influence with his father.[21] Yet Mr Head did not notify Mr Bundy of the reality of the situation. The forms were signed on the spot, with no opportunity for, or recommendation to obtain, independent legal advice. Some short months later, the son's company went into receivership and the Bank made demand for repayment, followed by an attempt to exercise its rights under the mortgage and sell the farm. Mr Bundy sought an order setting aside the guarantee and charge, and an injunction restraining the Bank from selling the farm. He failed at first instance but was successful before the Court of Appeal, which ordered the charge and guarantee to be set aside and these documents to be delivered up for cancellation.

[14] *Lloyds Bank Ltd* (n 1).
[15] ibid 347 (Sachs LJ).
[16] ibid 339 (Lord Denning MR), 344 (Sachs LJ).
[17] ibid 344–46 (Sachs LJ).
[18] ibid 345 (Sachs LJ).
[19] ibid 335 (Lord Denning MR).
[20] ibid 345 (Sachs LJ).
[21] Ibid 339 (Lord Denning MR), 345 (Sachs LJ).

Given the relationship between the parties and the circumstances of the transaction, the result was unsurprising. The risks in the transaction for Mr Bundy were obvious. As described by Sachs LJ:

> The documents Mr Bundy [the defendant] was being asked to sign could result, if the company's troubles continued, in [the defendant's] sole asset being sold, the proceeds all going to the bank, and his being left penniless in his old age. That he could thus be rendered penniless was known to the bank – and in particular to Mr Head. That the company might come to a bad end quite soon with these results was not exactly difficult to deduce ….[22]

Mr Bundy was subject to the influence of his son, of which the Bank was well aware.[23] The assistant bank manager, Mr Head, acknowledged that Mr Bundy relied on him to provide advice about the transaction.[24] These circumstances meant that it would be quite straightforward to grant relief on grounds of undue influence.[25] Such an approach was taken by Sachs LJ, who held that the Bank owed to Mr Bundy a 'fiduciary' duty of care arising from the relationship of influence and, in the absence of an opportunity for independent advice, this duty had not been fulfilled.[26] Cairns LJ agreed with Sachs LJ. Lord Denning MR considered these factors also supported granting relief on grounds of undue influence. This was because the relationship between the Bank and Mr Bundy was one of trust and confidence, meaning the bank should not have allowed Mr Bundy to give the guarantee and mortgage without obtaining legal advice.[27]

Lord Denning MR further held that relief should be granted on the basis of a unifying principle of 'inequality of bargaining power'.[28] In developing this principle, Lord Denning MR recognised that a harsh outcome was not on its own a reason for setting aside a third-party guarantee or any contract. Yet, there were exceptions to this 'general rule' arising from 'common fairness'.[29] His Lordship noted numerous established categories of relief against a bargain in cases where there was an inequality of bargaining power between the parties that offended ideas of fairness: duress of goods, unconscionable transactions, undue influence, undue pressure, and salvage situations. Lord Denning MR considered that a single thread ran through these instances of relief, that of 'inequality of bargaining power'.[30] Relief on this ground was not open-ended. Lord Denning MR envisaged four requirements for providing relief on grounds of this principle, namely

> the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs

[22] ibid 345 (Sachs LJ).
[23] ibid 339 (Lord Denning MR), 345 (Sachs LJ).
[24] ibid 335–36, 339 (Lord Denning MR), 343–44 (Sachs LJ).
[25] *Allcard v Skinner* (1887) 36 Ch D 145.
[26] *Lloyd's Bank Ltd* (n 1) 344–45; see also 339, 340 (Lord Denning MR).
[27] ibid.
[28] ibid 339.
[29] ibid 336.
[30] ibid 336.

> 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.[31]

In this case, Lord Denning MR held that the guarantee was voidable owing to the unequal bargaining position in which Mr Bundy had found himself in when dealing with the bank. The relevant factors supporting this position were that the consideration moving from the bank was grossly inadequate; the longstanding relationship between the bank and the father was one of trust and confidence; the relationship between the father and the son was one where the father's natural affection had much influence on him; and there was a conflict of interest between the bank and the father.[32]

III. THE DEVELOPING LAW ON NON-COMMERCIAL THIRD-PARTY GUARANTEES

The phrase 'third-party guarantee' refers to the situation where the person who guarantees a loan is not the borrower or a person directly benefiting from the business or purpose for which the loan is obtained. Third party-guarantors are not even in a position akin to an ordinary consumer. They are assuming the risk of default on the loan transaction without receiving any tangible benefit in return. The concern over third-party guarantees in a family context, illustrated by *Lloyds Bank Ltd v Bundy*, arises from the risk that such a party has had their judgement clouded by love, loyalty, or affection. In such circumstances, the guarantor may lose out in the process by not being aware of the full extent of the legal and financial risk they are assuming.[33] As courts have recognised, this risk is present wherever the third-party guarantor stands in a close domestic relationship with the primary debtor.[34] Relief is dependent on the bank being, or being treated as being, aware of that relationship and the risk that it poses to the guarantor's free and full consent.

The relief granted in *Lloyds Bank Ltd v Bundy* was independently supported by the close, fiduciary-like quality of the relationship between the bank manager and Mr Bundy. The relevant principles applying to undue influence and third-party guarantees were restated in *National Westminster Bank plc v Morgan*,[35] with Lord Scarman rejecting any need for support from a principle of inequality of bargaining power.[36] In *National Westminster Bank plc v Morgan*, Lord Scarman said:

> The fact of an unequal bargain will, of course, be a relevant feature in some cases of undue influence. But it can never become an appropriate basis of principle of an equitable doctrine which is concerned with transactions 'not to be reasonably accounted for on the

[31] ibid 339.
[32] ibid 339–40.
[33] ibid.
[34] *Royal Bank of Scotland* (n 2) 813–14 (Lord Nicholls). See also *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 404 [21]–[22] (Gaudron, McHugh, Gummow and Hayne JJ); *Kranz v National Australia Bank Ltd* (2003) 8 VR 310, 319–22 [23]–[31] (Charles JA, Winneke P and Eames JA concurring).
[35] *National Westminster Bank plc* (n 3).
[36] ibid 707–8.

> ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act'.[37]

Subsequently, English courts developed a different approach to third-party guarantees that does not rely on finding these kinds of 'exceptional circumstances' to give relief on grounds of undue influence.[38] In *Royal Bank of Scotland v Etridge (No 2)*, Lord Nicholls held that a lender will be put on inquiry as to the risk of undue influence in cases where the relationship between the borrower and the guarantor is one where the law presumes a relationship of trust and confidence for the purposes of the doctrine of undue influence, and in every case where the relationship between the parties is not 'commercial'.[39]

A lender put on inquiry will be required to take steps to reduce the risk of the guarantor entering into the transaction under a misrepresentation or as a result of undue influence. If these steps are not taken, the bank will be deemed to have notice that the transaction was procured by undue influence or misrepresentation on the part of the borrower and the guarantee may be set aside.[40] Typically, the bank will protect its position by ensuring the guarantor receives independent legal advice. The form and content of guarantees in consumer transactions is also now regulated by the Consumer Credit Act 1974, a consideration relied on by Scarman LJ in refusing to follow Lord Denning MR's principles in *National Westminster Bank plc v Morgan*.[41]

Royal Bank of Scotland v Etridge (No 2) aimed to find a balance between allowing parties to use domestic property as security for business ventures, and protecting the interests of third-party guarantors.[42] The motivation for intervention is clear. Granting a mortgage and guarantee over property is a useful way of securing business loans. Yet third-party guarantors are left in a highly exposed position, and may often lack understanding of this simple reality because their decision-making has been influenced by reasons of interpersonal or emotional loyalty or affection. The response in *Royal Bank of Scotland v Etridge (No 2)* was to lay down a 'clear, simple, and practically operable'[43] set of rules for lending banks taking a mortgage over land in domestic contexts where the guarantor is not benefiting from the transaction. The inevitable corollary of this position is that it does not require any substantive inquiry into whether the bank's steps to address undue influence had any real effect in liberating the guarantor from the influence of the borrower.

In Australia, the High Court has taken a different approach to the challenge of mediating the competing interesting in non-commercial third-party guarantee scenarios. The principles from the decisions in *Yerkey v Jones*[44] and *Garcia v National Australia Bank Ltd*[45] direct the courts to inquire into the range of risks of which a

[37] ibid 708.
[38] *Barclays Bank plc* (n 2); *Royal Bank of Scotland* (n 2).
[39] *Royal Bank of Scotland* (n 2) 813–14 [86]–[87] (Lord Nicholls).
[40] ibid 814 [87] (Lord Nicholls). For the different approach taken in Australia, see *Garcia* (n 34).
[41] *National Westminster Bank* plc (n 3) 708.
[42] *Royal Bank of Scotland* (n 2) 801 [34]–[37] (Lord Nicholls), endorsing the analysis of Lord Browne-Wilkinson in *Barclays Bank plc* (n 2) 188–89.
[43] *Royal Bank of Scotland* (n 2) 793 [2] (Lord Bingham).
[44] [1939] HCA 3, (1940) 63 CLR 649.
[45] *Garcia* (n 34).

bank should have been aware through its knowledge of the nature of the relationship between the primary debtor and the guarantor. Thus, close domestic relationships raise the risk that a guarantor may be mistaken as to the terms of the guarantee and their potential liability.[46] This is because the nature of the relationship may foster informal and inaccurate communication of information, even with the best of intentions. Likewise, a risk of undue influence may be present in cases involving a domestic surety, depending on the nature of the relationship.[47] As will be apparent, the risk of illegitimate pressure is far less likely to be apparent to a bank, absent any unusual features of the relationship or other facts known to the bank.[48] Where the bank is aware of facts that indicate a risk of vitiated consent, and the guarantor is not receiving a direct benefit from the loan transaction, then the bank must take steps to reduce this risk to a level where it is proper to proceed. Independent legal advice may be an element of that process, the appropriateness of which will be the subject of the court's active consideration.[49]

Consistently with Lord Denning MR's approach in *Lloyds Bank Ltd v Bundy*, the current approaches to third-party guarantees in both England and Australia may be understood as reflecting the institutional advantages of banks and comparative vulnerabilities (including information asymmetries and exposure to influence) of third-party guarantors. It is noteworthy that there is no requirement for the bank to ever deal directly with the domestic surety, far less for it to be aware of the reality of the guarantor's vulnerability or be seeking actively to take advantage of a grossly unfair transaction in its favour. In these respects, the guarantee doctrines stand in contrast to the more conditional approach proposed by Lord Denning MR.[50]

IV. THE WIDER PRINCIPLE OF INEQUALITY OF BARGAINING POWER

We have seen that the unifying principle of inequality of bargaining power identified by Lord Denning MR brought together doctrines of undue influence, unconscionable dealing, and duress. As outlined above, the principle of inequality of bargaining power would give relief to a party, usually a consumer dealing with a business,

i. who entered into a contract on terms which were 'very unfair' or transferred property for a consideration which was 'grossly inadequate';
ii. in circumstances were that party's bargaining power was 'grievously impaired' by reason of their 'own needs or desires', or 'ignorance or infirmity';

[46] ibid 404 [21] (Gaudron, McHugh, Gummow and Hayne JJ).

[47] *Liu v Adamson* (2003) 12 BPR 22,205 [22]–[23] (Macready M); *Kranz* (n 34) 319–22 [23]–[31] (Charles JA, Winneke P and Eames JA concurring).

[48] *National Australia Bank Ltd v Satchithanantham* [2009] NSWSC 21, affd [2009] NSWCA 268.

[49] *Garcia* (n 34) 408–9 [28]–[33], 408–9 [31], 411 [41] (Gaudron, McHugh, Gummow and Hayne).

[50] The doctrine in *Garcia* may also go beyond Australia's statutory prohibition on unconscionable conduct. These generally require the vitiating factor affecting the guarantor's consent to be either attributable to the bank, or the principal debtor acting for the bank: see, eg, Australian Securities and Investments Commission Act 2001 (Cth) s 12CC that prohibits unconscionable conduct including circumstances of mistake, pressure and influence on conduct of service supplier or person acting on behalf of the supplier. The National Credit Code, s 76, found in sch 1 of the National Consumer Credit Protection Act 2009 (Cth), which would otherwise avoid this limitation, does not apply to commercial borrowings: s 5.

iii. coupled with 'undue influences or pressures' brought to bear for the benefit of the other; and
iv. there was an absence of legal advice.[51]

Lord Denning MR subsequently applied the principle of inequality of bargaining power in *Clifford Davis Management Ltd v WEA Records Ltd*, an interlocutory injunction case on restraint of trade.[52] His Lordship suggested that the decision of the House of Lords in *A Schroeder Music Publishing Co Ltd v Macaulay*[53] afforded support for the principles for relief against unequal bargaining power identified in *Lloyds Bank Ltd v Bundy*.[54] Nonetheless, the principle has made little direct impact on English case law and has been expressly rejected in a number of cases. Thus, in *Pao On v Lau Yiu Long*, Lord Scarman said that any argument to the effect that agreements were voidable because they were procured by the abuse of a dominant bargaining position was 'misconceived'.[55] In *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd*, Dillon LJ referred to the principle of unequal bargaining power expounded in Lord Denning MR's judgment in *Lloyds Bank Ltd v Bundy* and read it down to apply to situations where there had been no independent legal advice.[56] In *National Westminster Bank plc*, Lord Scarman further referred to statutory protection for consumers as a reason against the common law recognising a principle of relief against inequality of bargaining power, stating:

> 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: for example, the hire-purchase and consumer protection legislation … I doubt whether the courts should assume the burden of formulating further restrictions.[57]

The principle of inequality of bargaining power propounded by Lord Denning MR in *Lloyds Bank Ltd v Bundy* and its related interpretations have also been the subject of considerable criticism by scholars,[58] many of which resurfaced with the recent decision of the Supreme Court of Canada in *Uber Technologies Inc v Heller*.[59] Criticisms include that the approach would let an illusory standard destabilise the certainty of contract law,[60] and also that the value based justifications

[51] *Lloyds Bank Ltd* (n 1) 339–40.
[52] *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 WLR 61.
[53] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616.
[54] *Clifford Davis Management Ltd* (n 52) 64–5.
[55] *Pao On* (n 3) 632.
[56] *Alec Lobb (Garages) Ltd* (n 3) 181–82.
[57] *National Westminster Bank plc* (n 3) 708.
[58] See, eg, LS Sealy, 'Undue Influence and Inequality of Bargaining Power' (1975) 34 *Cambridge Law Journal* 21; MJ Trebilcock, 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords' (1976) 26 *University of Toronto Law Journal* 359. *cf*, in greater support of the doctrine, BJ Reiter, 'Courts, Consideration, and Common Sense' (1977) 27 *University of Toronto Law Journal* 439; P Slayton, 'The Unequal Bargain Doctrine: Lord Denning in Lloyds Bank v Bundy' (1976) 22 *McGill Law Journal* 94; SM Waddams, 'Unconscionability in Contracts' (1976) 39 *Modern Law Review* 369.
[59] *Uber Technologies Inc* (n 4).
[60] 'Uber Technologies Inc v Heller: Supreme Court of Canada Targets Standard Form Contracts' (2021) 134 *Harvard Law Review* 2598.

for the approach are not articulated.[61] It should be noted at this juncture that Lord Denning MR recognised such a risk and placed limitations around the scope of the principle.[62]

Lord Denning MR's suggested omnibus principle unifying the doctrines of duress, undue influence and unconscionable dealing has not expressly been adopted in any jurisdiction, and the relationship between these doctrines remains contested.[63] Yet the case has had an ongoing impact on this area of law. In particular, the influence of Lord Denning MR's identification of the distorting influence of unequal bargaining power on the fairness of transactions can be seen to varying extents in formulations of the doctrine of unconscionable dealing recognised in England, Australia, Singapore and Canada. Indeed, in Canada[64] and in Australia,[65] the doctrine of unconscionable dealing sets out a more contextual and less stringent set of criteria for relief than recognised by Lord Denning MR. It is to these influences of the principle of inequality of bargaining power from *Lloyds Bank Ltd v Bundy* on the equitable doctrine of unconscionable dealing that we now turn.

Concerns about a principle of relief against inequality of bargaining power represent an ongoing tension in the law of contract. On the one hand, it is clear that 'mere' inequality of bargaining power is insufficient to set a contract aside; contracting parties are rarely evenly matched.[66] Yet exploitation in the contracting process can undermine the foundations of contract with its emphasis on free consent,[67] as well as expressing profound disrespect for the autonomy of parties to contracts generally.[68]

In response to this kind of concern, courts of Equity have traditionally given relief in respect of bargains characterised by exorbitant terms entered into by 'poor and ignorant' persons who lacked the advantage of independent advice.[69] Lord Denning MR drew on this case law in framing his principle of inequality of bargaining power. However, the modern equitable doctrine of unconscionable bargain in England remains more limited in its scope than envisaged by Lord Denning MR. In *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd*, Peter Millett QC identified three elements for relief for an unconscionable bargain to be granted:

> 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.[70]

[61] See R Bigwood, 'Strict Liability Unconscionability in the Supreme Court of Canada: Observations on *Uber Technologies Inc v Heller*' (2021) 65 *Canadian Business Law Journal* 153.

[62] *Lloyds Bank Ltd* (n 1).

[63] See in particular *Thorne* (n 7); *BOM* (n 8); *Times Travel (UK) Ltd v Pakistan International Airline Corp* [2021] UKSC 40, [2021] 3 WLR 727.

[64] *Uber Technologies Inc* (n 4).

[65] *Amadio* (n 5).

[66] *Alec Lobb (Garages) Ltd* (n 3); *Times Travel (UK) Ltd* (n 63) [3], [25], [77].

[67] *Uber Technologies Inc* (n 4) [59]. On the rationales for relief from unconscionable bargains, see M Chen-Wishart, *Unconscionable Bargains* (London, Butterworths, 1989).

[68] On transactional exploitation, see generally R Bigwood, *Exploitative Contracts* (Oxford, OUP, 2003).

[69] *Fry v Lane* (1888) 40 Ch D 312, 322. See also *Cresswell v Potter* [1978] 1 WLR 255.

[70] *Alec Lobb (Garages) Ltd* (n 3) 94–5.

This approach requires more in all respects than Lord Denning MR's principle of inequality of bargaining power: a serious disadvantage rather than impaired bargaining power; morally culpable exploitation rather than undue influence or pressure; and a resulting transaction that is oppressive, as opposed to containing terms that are unfair or providing inadequate consideration. Unconscionability in English law classically applies where 'a poor, illiterate and unwell person is induced to enter into a disadvantageous transaction without advice and in great haste'.[71] Lord Burrows has observed, following the authority of *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd*, that it is possible the relevant weakness might be a 'very weak bargaining position', but these cases are very rare and more likely to be pleaded as economic duress.[72] This is in contrast to the position in Australia and Canada where courts recognise the possibility of not merely 'personal' disadvantage but also 'situational' vulnerability,[73] whereby the relevant inequality arises from the 'contracting circumstances' in which consumers find themselves.

In Australia, Lord Denning MR's principle of relief against inequality of bargaining power has not been expressly adopted but clear echoes of the concerns giving rise to the suggested principle can be seen in the equitable doctrine of relief on grounds of unconscionable dealing, particularly as formulated in *Commercial Bank of Australia Ltd v Amadio*, a case with not dissimilar facts to *Lloyds Bank Ltd v Bundy*.[74] Indeed, in *BOM v BOK*, the Singapore Court of Appeal thought that 'the *Amadio* formulation comes dangerously close to the ill-founded principle of "inequality of bargaining power" that was introduced in *Lloyd's Bank v Bundy*'.[75] Although not premised on inequality of bargaining power, the Australian approach to unconscionable dealing incorporates elements reminiscent of Lord Denning MR's formulation, albeit focused on the conscience of the stronger party rather than the pressure applied to the more vulnerable party. Thus, in the influential case of *Commercial Bank of Australia Ltd v Amadio*,[76] Mason J described the circumstances in which relief would be granted, focusing on the existence of a 'special disadvantage' that affected the weaker party's 'ability to act in their own best interests at the time of transacting' in circumstances where the 'other party secured the transaction with knowledge of the special disadvantage and without doing anything to redress its effect'.[77] The formulation has remained influential, although in *Stubbings v Jams 2 Pty Ltd*, Kiefel CJ, Keane and Gleeson JJ warned that the considerations should not 'be understood as if they were to be addressed separately as if they were separate elements of a cause of action in tort'.[78]

[71] *Times Travel (UK) Ltd* (n 63) [24], citing *Clark v Malpas* (1862) 4 De GF & J 401, 45 ER 1238.

[72] *Times Travel (UK) Ltd* (n 63) [77].

[73] *Uber Technologies Inc* (n 4) [71]. In Australia, see *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* [2002] FCA 62, (2002) 117 FCR 301, 318 [46] (French J), and more qualified discussion in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18, (2003) 214 CLR 51, [10] (Gleeson CJ).

[74] *Amadio* (n 5). Interestingly, this is a case that might alternatively have been pleaded on grounds of undue influence, between parent and their son, with notice and indeed involvement by the bank.

[75] *BOM* (n 8) [133].

[76] See P Ridge, 'Sir Anthony Mason's Contribution to the Doctrine of Unconscionable Dealing: *Amadio's Case*' in B McDonald, B Chen and J Gordon (eds), *Dynamic and Principled: The Influence of Sir Anthony Mason* (Alexandria, Federation Press, 2022).

[77] *Amadio* (n 5) 462, 468 (Mason J). See also *Thorne* (n 7) 103 [38]. *cf Amadio* (n 5) 474 (Deane J).

[78] *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6, (2022) 399 ALR 409, 418 [39].

Mason J saw relief for unconscionable dealing as responding firmly to concerns over the unconscientious use of superior bargaining power[79] in circumstances where a special disadvantage prevented the weaker party from acting in their own best interests.[80] However, a difference in bargaining power is not on its own sufficient to give rise to relief.[81] There must be unconscionable dealing in the circumstances of the case on the part of the stronger party, which is usually associated with some form of transactional exploitation.[82] The underlying principle concerns the ability of the innocent party to make a judgment as to their own best interests.[83] Additionally, the position of disadvantage must be evident or known to the other party.[84] Under this approach, in contrast to that taken in England, there is no requirement for an improvident bargain, although such an outcome may support an inference of advantage being taken.[85]

As noted, the Singapore Court of Appeal in *BOM v BOK*[86] rejected a 'broad', Australian-style approach to unconscionable dealing, preferring instead a narrower or middle-ground approach.[87] To invoke this 'narrow' formulation of the doctrine, the plaintiff must show they were

> suffering from an infirmity that the other party exploited in procuring the transaction. Upon the satisfaction of this requirement, the burden is on the defendant to demonstrate that the transaction was fair, just and reasonable. In this regard, while the successful invocation of the doctrine does not require a transaction at an undervalue or the lack of independent advice to the plaintiff, these are factors that the court will invariably consider in assessing whether the transaction was improvident.[88]

The extent to which this differs from the Australian position remains to be seen. However, what is clear is that the Singapore Court of Appeal further rejected a unifying or umbrella doctrine of unconscionability,[89] which might be considered akin to the umbrella concept of abuse of bargaining power contemplated by Lord Denning MR in *Lloyds Bank Ltd v Bundy*.

In Canada, the doctrine of inequality of bargaining power has gained a stronger foothold. From the outset, *Lloyds Bank Ltd v Bundy* was applied in a number of decisions.[90] Canadian courts, however, quickly developed their own doctrine of

[79] *Amadio* (n 5) 461.
[80] ibid 462.
[81] ibid 462.
[82] *Thorne* (n 7) 103 [38].
[83] *Amadio* (n 5) 462.
[84] ibid; *Thorne* (n 7) [65] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).
[85] *Times Travel (UK) Ltd* (n 63) [26]; *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, 717 (Steyn LJ).
[86] *BOM* (n 8).
[87] ibid [133]. See also R Bigwood, 'Knocking Down the Straw Man: Reflections on *BOM v BOK* and the Court of Appeal's 'Middle-Ground' Narrow Doctrine of Unconscionability for Singapore' [2019] *Singapore Journal of Legal Studies* 29; *cf* B Ong, 'Unconscionability, Undue Influence and Umbrellas: The 'Unfairness' Doctrines in Singapore Contract Law after '*BOM v BOK*'' [2020] *Singapore Journal of Legal Studies* 295.
[88] *BOM* (n 8) [142].
[89] ibid [175] ff.
[90] See, eg, *McKenzie v Bank of Montreal* (1975) 55 DLR (3d) 641; *Towers v Affleck* [1974] 1 WWR 714. See generally Slayton (n 58) 100–3.

relief from unconscionable dealing.[91] This version of a broad and plaintiff-focused principle was crystallised in *Uber Technologies Inc v Heller*.[92] In this case, the Supreme Court of Canada set aside an arbitration clause in contracts between Uber and its drivers which required all external dispute resolution processes to go through mediation and arbitration in the Netherlands. This process required an upfront fee of US$14,500. Abella and Rowe JJ affirmed a two-step test for unconscionability, requiring 'an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and … an improvident transaction'.[93] The justices considered that the relevant inequality of bargaining power might extend to 'cognitive asymmetry',[94] which occurs because of 'personal vulnerability or because of disadvantages specific to the contracting process, such as the presence of dense or difficult to understand terms in the parties' agreement'.[95] Additionally, the inequality relevant for relief is broadly defined to encompass transactional weakness that may be personal or circumstantial.[96] This is illustrated by the decision in *Uber Technologies Inc v Heller* itself, in which the inequality arises from the position of the drivers required to sign a 'take it or leave it' standard form contract in order to work.

The position taken by Abella and Rowe JJ does not include any requirement that the stronger party knowingly took advantage of the vulnerable position of the weaker party.[97] Such a requirement was not consistent with the focus of the doctrine on protecting the weaker party and would 'erode the modern relevance of the unconscionability doctrine, effectively shielding from its reach improvident contracts of adhesion where the parties did not interact or negotiate'.[98] As Gardner notes, the decision moves the focus of the unconscionability doctrine in Canada from targeting exploitation arising from a superior bargaining position to 'protecting weak individuals from unfair contracts'.[99] The outcome was described by Brown J as one of 'strict liability' that would erode commercial certainty.[100] As such, it may be seen as going beyond even Lord Denning MR's idea of inequality of bargaining power.

[91] See R Bigwood, 'Antipodean Reflections on the Canadian Unconscionability Doctrine' (2005) 84 *Canadian Bar Review* 171; R Bigwood, 'Rescuing the Canadian Unconscionability Doctrine? Reflections on the Court's 'Applicable Principles' in *Downer v Pitcher*' (2018) 60 *Canadian Business Law Journal* 124. See also P Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge, MA, Belknap Press, 2019) 167; A Swan, J Adamski and Y Na, *Canadian Contract Law*, 4th edn (Toronto, LexisNexis Canada. 2018) 986; SM Waddams, *The Law of Contracts*, 7th edn Toronto, Carswell, 2017) 379.

[92] *Uber Technologies Inc* (n 4).

[93] ibid [62]. Brown J held that the arbitration clause was invalid as contrary to public policy. Côté J would uphold the clause provided Uber advanced the funds needed to initiate the arbitration proceedings.

[94] ibid [71], quoting SA Smith, *Contract Theory* (Oxford, OUP, 2004) 343–44.

[95] ibid [71].

[96] ibid [67].

[97] ibid [84].

[98] ibid [85].

[99] J Gardner, 'Being Conscious of Unconscionability in Modern Times: *Heller v Uber Technologies*' (2021) 84 *Modern Law Review* 874, 881.

[100] *Uber Technologies Inc* (n 4) [165].

V. THE STATUTORY RESPONSE TO INEQUALITY OF BARGAINING POWER

English and Australian courts have, on more than one occasion, stated that it is for Parliament, not courts, to provide relief against inequality of bargaining power.[101] It is in legislation that Lord Denning MR's principle in *Lloyds Bank Plc v Bundy* has found its most effective expression in protecting consumers. Consumer protection regimes in England, and other jurisdictions such as Australia, provide relief against advantage-taking, typically requiring disadvantage or vulnerability on the part of the weaker party and some element of fault or culpability on the part of the stronger party. Additionally, and in this regard going further than Lord Denning's principle of inequality of bargaining power, unfair contract terms regimes focus on the problem of substantive unfairness in the bargain without proof of advantage-taking.

A. Statutory Prohibitions on Unfair and Unconscionable Conduct

In the UK, the Consumer Protection from Unfair Trading Regulations 2008 provide an avenue for relief in response to a commercial practice that is unfair.[102] A commercial practice is unfair where:

> (a) it contravenes the requirements of professional diligence; and
> (b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.[103]

In making this assessment, the prohibition directs courts that:

> 'professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either —
>
> (a) honest market practice in the trader's field of activity, or
> (b) the general principle of good faith in the trader's field of activity.[104]
>
> 'materially distort the economic behaviour' means in relation to an average consumer, appreciably to impair the average consumer's ability to make an informed decision thereby causing him to take a transactional decision that he would not have taken otherwise.[105]

The extent to which the prohibition on unfair trading can respond to an abuse of bargaining power depends on whether such conduct can be said to be contrary to the requirements of professional diligence. The general prohibition is also premised on the effect of the purportedly unfair conduct on an average consumer.[106] Thus, relief is dependent on whether the standard envisaged for the average consumer – that of being 'reasonably well informed, reasonably observant and circumspect' – can

[101] *National Westminster Bank* (n 3) 708; *Times Travel (UK) Ltd* (n 63) [3], [26], [77]. Also *Toll (FGCT) Pty v Alphapharm Pty Ltd* [2004] HCA 52, (2004) 219 CLR 165, 182–3.
[102] Consumer Protection from Unfair Trading Regulations 2008, reg 4. See also the Consumer Protection (Fair Trading) Act 2003 (Singapore), which gives a right of relief against an unfair practice: s 4.
[103] Consumer Protection from Unfair Trading Regulations 2008, reg 3.
[104] ibid reg 2(1).
[105] ibid reg 2(2).
[106] ibid reg 4.

accommodate the kind of disadvantage envisioned by the doctrine that arises from the need to transact.[107]

A more forgiving standard applies where the impugned practice is targeted at

> a clearly identifiable group of consumers … particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee.[108]

It is unclear if this extends to situational, as opposed to certain kinds of inherent, disadvantage, such as the position of a consumer overcome with bereavement or confusion in an unusual and complex transaction.[109] The scope of knowledge requirement is also uncertain. The Regulations refer to behaviour that will 'appreciably' impair the average consumer's ability to make an informed decision. This would suggest that constructive knowledge will be sufficient – the effect needs to be appreciated but not known. It should certainly catch business systems or patterns of behaviour that, by design or operation, exploit consumers' decision-making vulnerabilities to produce outcomes that are not welfare-enhancing,[110] for example by selling products that are overly expensive, produce little utility for the consumer, or are even positively harmful.[111]

Regulation 7 prohibits aggressive conduct, which might also provide a response to overreaching conduct by a more powerful bargaining partner. Aggressive conduct is defined as involving the 'use of harassment, coercion or undue influence'.[112] This is closer to duress or actual undue influence than the use of a superior bargaining position, or unconscionable conduct by a stronger party to exploit the position of disadvantage on the part of the other.[113]

Australia takes a different approach by including a statutory prohibition on unconscionable conduct that goes beyond the concept recognised in equity,[114] at least in principle.[115] The Australian Consumer Law, section 21 contains a prohibition on conduct which is, 'in all the circumstances', unconscionable.[116] Unconscionable conduct is not defined but section 21 contains a set of interpretative principles that aim to assist in the application of the section.[117] Section 22 contains a list of factors to

[107] JM Paterson and G Brody, '"Safety Net" Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models' (2015) 38 *Journal of Consumer Policy* 331.

[108] JM Paterson and E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44 *Journal of Consumer Policy* 1.

[109] For a recent application of this kind of approach see *Uber Technologies Inc* (n 4), discussed at n 92ff.

[110] E Bant and JM Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15 *Journal of Equity* 63.

[111] Paterson and Brody (n 107).

[112] Consumer Protection from Unfair Trading Regulations 2008 reg, 7(1)(a).

[113] *cf* P Cartwright and R Hyde, 'Virtual Coercion and the Vulnerable Consumer: 'Loot Boxes' as Aggressive Commercial Practices' [2022] *Legal Studies* 1.

[114] JM Paterson, 'Unconscionable Bargains in Equity and under Statute' (2015) 9 *Journal of Equity* 188.

[115] *cf* the use of the equitable formulation by the majority in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, (2019) 267 *CLR* 1 and *Stubbings* (n 78).

[116] See also Australian Securities and Investments Commission Act 2001 (Cth), s 12CC.

[117] The principles confirm that the statutory prohibition is not confined by the unwritten law: Australian Consumer Law, s 21(4)(a); and also that the prohibition is capable of applying to a 'system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour': s 21(4)(b).

which the court may have regard in deciding if conduct is unconscionable, including, pertinently, the 'relative strengths of the bargaining positions' of the parties;[118] whether the consumer was 'required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier';[119] and whether any 'undue influence or pressure was exerted on, or any unfair tactics were used against' the consumer,[120] as well as considerations relating to the terms and conditions of the contract.[121] Courts have reiterated that inequality of bargaining power is, on its own, insufficient to give rise to relief on grounds of unconscionable conduct under statute.[122]

The statutory doctrine is undoubtedly flexible in responding to systems of conduct or patterns of behaviour that, by design or operation, take advantage of consumers' need, inexperience or lack of understanding.[123] However, the correct relationship between the equitable doctrine and the statutory prohibition has been subject to ongoing uncertainty and debate. In our opinion, Australian courts have often been overly cautious to give effect to the full potential of the provision as represented by the statutory wording.[124] They have instead often been influenced by the requirements of the equitable doctrine and the need for a high standard of demonstrable moral culpability before giving relief.[125]

B. Unfair Contract Terms

Perhaps the statutory intervention that comes closest to Lord Denning MR's principle in *Lloyds Bank Ltd v Bundy* is the unfair terms regime in the Consumer Rights Act 2015,[126] and also in the Australian Consumer Law.[127] Remember that in *Lloyds Bank Ltd v Bundy*, Lord Denning MR identified as relevant circumstances where a party 'without independent advice, enters into a contract upon terms which are very unfair'.[128] Consistently, and giving content to the concept of 'unfairness', the unfair terms regimes confront the key consequence of unequal bargaining power, namely

[118] Australian Consumer Law, s 22(1)(a) and (2)(a).
[119] ibid, s 22(1)(b) and (2)(b).
[120] ibid, s 22(1)(d) and (2)(d).
[121] ibid, s 22(1)(j).
[122] See, eg, *Director of Consumer Affairs Victoria v Scully* [2013] VSCA 292, (2013) 303 ALR 168, 181 [43]; *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15, (2018) 356 ALR 440, 477–8 [196].
[123] Bant and Paterson, 'Systems of Misconduct' (n 110).
[124] JM Paterson, E Bant, N Felstead and E Twomey, 'Beyond the Unwritten Law' [2023] 17 *Journal of Equity* 1.
[125] See, eg, JM Paterson, E Bant and M Clare, 'Doctrine, Policy, Culture and Choice in Assessing Unconscionable Conduct under Statute: *ASIC v Kobelt*' (2019) 13 *Journal of Equity* 81.
[126] Consumer Rights Act 2015, pt 2.
[127] Australian Consumer Law, pts 2–3. See also the Consumer Protection (Fair Trading) Act 2003 (Singapore), sch 2, pt 1 (13). Taking advantage of a consumer by including in an agreement terms or conditions that are harsh, oppressive or excessively one-sided so as to be unconscionable. See further S Booysen, 'Regulating Unfair Terms and Consumer Protection' in M Chen-Wishart and S Vogenauer (eds), *Contents of Contracts and Unfair Terms* (Oxford, OUP, 2020). Also JM Paterson, 'Regulating Consumer Contracts in ASEAN: Variation and Change' in L Nottage and others (eds), *ASEAN Consumer Law Harmonisation and Cooperation: Achievements and Challenges* (Cambridge, CUP, 2019).
[128] *Lloyds Bank Ltd* (n 1) 339.

the inability of consumers to protect themselves from harsh, overreaching and one-sided terms. The UK regime sets aside as unfair terms those which, contrary to the requirements of 'good faith', cause 'a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'.[129] The regime therefore addresses the issue of the substantive unfairness of the term, rather the circumstances in which consent to the agreement was made and, in so doing, represents a considerable departure from traditional common law contract doctrine.[130]

The limitation of the regime is that it does not apply to the main subject matter or core price payable[131] (provided they are 'transparent and prominent')[132] as discussed elsewhere in this collection.[133] The regime may not have assisted Mr Bundy, whose basic complaint was a misunderstanding of the overall risks inherent in the guarantee transaction, rather than a term of that guarantee. In the UK, the unfair terms regime does not apply to small businesses as opposed to consumer contracts.[134] Thus, the unfair terms regime would not have assisted in the fact situation of *Uber Technologies Inc v Heller*.[135] Nonetheless, it has had a considerable impact on 'take it or leave it' contracts in other contexts, including, pertinently, compulsory arbitration or jurisdiction clauses that work against the interests of consumers.[136] Notably, the unfair terms regime in Australia has been extended to small business contracts,[137] providing broader avenues of relief against unfair contract terms arising from an inequality of bargaining power.

VI. REDRESS AND CIVIL PENALTIES

The usual redress for consumers responding to inequality of bargaining power is to have the overly burdensome and unfair bargain set aside. This was, of course, the primary relief sought and granted in *Lloyds Bank Ltd v Bundy* itself. However, inequality of bargaining power also manifests in an absence of redress options for individual consumers. There are relatively few cases on the statutory progeny of the inequality of bargaining power principle in the UK. This cannot be purely referable to the overt reading down of the statutory provisions in cases such as *ParkingEye Ltd*

[129] Consumer Rights Act 2015, s 62.

[130] See M Chen-Wishart, 'Regulating Unfair Terms' in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Oxford, Hart Publishing, 2014) 105; JM Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Law Review* 934.

[131] Consumer Rights Act 2015, s 64(1).

[132] ibid, s 64(2).

[133] See ch 16.

[134] Consumer Rights Act 2015, s 61.

[135] *Uber Technologies Inc* (n 4).

[136] See, eg, R Garnett, 'Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward?' (2017) 39 *Sydney Law Review* 569.

[137] Under the Australian Consumer Law, s 23(4), the unfair contract terms law applies to standard form 'small business' contracts entered into or renewed on or after 12 November 2016.

v Beavis.[138] The relative paucity of case law is also very likely attributable to the cost of litigation for individual plaintiffs and the relatively rarity of class actions in the consumer law field. Thus, in practical terms, the statutory protection to consumers afforded by consumer protection statutes comes through the intervention of regulators.

Peter Cartwright in this collection discusses the landmark consumer cases on criminal offences.[139] Here, the objective is deterrence or the provision of incentives to comply with statutory standards. Increasingly, consumer protection statutes are making use of civil penalties as an alternative to criminal offences in allowing regulatory intervention to promote compliance with the protective provisions of the legislation. Such penalties have the attraction of carrying a civil, rather than criminal, burden of proof. They also typically are not dependent on showing the firm that contravened a statutory prohibition had the culpable state of mind required for a criminal prosecution, although this element may be taken into account in setting the quantum of the award.[140]

Civil pecuniary penalties are available under the Australian Consumer Law for contraventions of the prohibition on unconscionable conduct.[141] Currently, civil penalties or fines are not available as a response to contraventions of the UK's Consumer Protection from Unfair Trading Regulations 2008 or the Consumer Rights Act 2015. In 2019, the UK government announced a process of consultation on whether the Competition and Markets Authority should be given new powers to decide whether consumer law has been broken, without having to go through the courts, and to impose fines directly in response to such conduct.[142] There seems, however, to have been little further development on this initiative. Notably, civil penalties are available under the Data Protection Act 2018 for contraventions of its provisions and the EU's General Data Protection Right,[143] and may be imposed directly by the regulator itself.[144] The Financial Conduct Authority also has the power directly to impose penalties on financial institutions in response to unfairness or misconduct in dealing with consumers.[145] The availability of such awards gives a new 'bite' to statutory consumer protection regimes and thereby provides more effective deterrence against the offending conduct than provided by actions by individual, often relatively disempowered, consumers.[146]

[138] *ParkingEye Ltd v Beavis* [2015] UKSC 67; [2016] AC 1172. See also Paterson and Bant, 'Contract and the Challenge of Consumer Protection Legislation' (n 12).

[139] See ch 9.

[140] See Financial Conduct Authority, 'The Decision Procedure and Penalties Manual' (July 2022) [6.2.1].

[141] Australian Consumer Law, s 224. JM Paterson and E Bant, 'Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the Australian Consumer Law' in P Vines and MS Donald (eds), *Statutory Interpretation in Private Law* (Alexandria, Federation Press, 2019).

[142] Department for Business, Energy & Industrial Strategy and others, 'New Powers to Fine Firms that Exploit Consumer Loyalty' (Press Release, 18 June 2019) www.gov.uk/government/news/new-powers-to-fine-firms-that-exploit-consumer-loyalty.

[143] Data Protection Act 2018, s 15.

[144] Data Protection Act 2018, s 155(1).

[145] Financial Conduct Authority, 'FCA Handbook' (1 January 2022) EG 7.1.2 www.handbook.fca.org.uk/handbook/EG/7/?view=chapterLJ.

[146] On the deterrent effect of civil pecuniary penalties see Paterson and Bant, 'Intuitive Synthesis and Fidelity to Purpose?' (n 144).

Consumers now also have rights to resolve disputes with and protect their expectations of fair treatment from financial service providers under ombudsman schemes such as the Financial Ombudsman Service in the UK[147] and the Australian Financial Services Complaints Authority in Australia.[148] These schemes respond to the very equality of bargaining power identified in *Lloyds Bank Ltd v Bundy* and also carry responsibilities to recognise and report systemic wrongdoing by financial services providers.

VII. CONCLUSION

A rather sobering reflection on *Lloyds Bank Ltd v Bundy*, and indeed the personal costs of unfair contracting, is that Mr Bundy had a heart attack in the witness box.[149] Ultimately, however, the charge and guarantee were set aside, and a costs order was awarded in Mr Bundy's favour. Census and other records suggest that Mr Bundy remained at Yew Tree farm until his death in 1981, and that his wife remained in possession after that time.[150] *Lloyds Bank Ltd v Bundy*, and in particular Lord Denning MR's principle of relief against inequality of bargaining power, has remained a key concern in the law dealing with protecting consumers. This is apparent in debates around the appropriate scope of the doctrine of unconscionable dealing and also in the development of consumer protection legislation providing responses to both procedural and substantive unfairness in consumer transactions.

[147] See S Williams, 'The Rise of Austerity Complaints' in *Debt and Austerity* (Cheltenham, Elgar, 2020) 227–33.

[148] See H Bolitho, N Howell and JM Paterson, *Duggan and Lanyon's Consumer Credit Law* (London, Butterworths, 2020) ch 22.

[149] *Lloyds Bank Ltd* (n 1).

[150] Research from England & Wales, Civil Registration Death Index, 1916–2007 and Salisbury District Council in possession of the author.