

“Are there any circumstances (and if so, what are they) in which the Court may refuse to give effect to contractual provisions on the ground of repugnancy?”

“Should the Court have such a power?”

Introduction and Summary

There are very few circumstances in which the Courts will refuse to give effect to a contractual provision, having first expressly labelled it as ‘repugnant’. Thankfully, given that this essay would otherwise be rather brief, there are however a range of circumstances in which the Courts refuse to give effect to contractual provisions on what are, essentially, grounds of repugnancy.

This essay begins by defining what is meant by the term ‘repugnant’. It then answers the first of the two questions posed above, by outlining the circumstances in which the Courts may refuse to give effect to contractual provisions on what are, essentially, grounds of repugnancy.

Next, it turns to the second question, in doing so highlighting that that question demands consideration of the nature of the Court’s proper role in dealing with contractual disputes. Having briefly outlined the historical development of legal theory on that issue, it offers its own conclusions against the relevant historical backdrop.

Ultimately, this essay concludes that the Courts are, rightly, empowered to strike down contractual provisions on the grounds of repugnancy where the repugnancy in question arises out of:

- Illegality;
- Internal inconsistency within the body of a contract; or

- One party taking unfair advantage of another, as a result of an inequality of bargaining power

Two definitions of ‘repugnancy’

The Oxford English Dictionary offers up two definitions of the word ‘repugnant’ that are of relevance for present purposes:

- The first definition treats something as repugnant if it is contrary or contradictory to (or, put another way, inconsistent or incompatible with) something else.
- The second definition treats something as repugnant if it is distasteful, objectionable, offensive or repulsive to something (or someone) else.

When the court may refuse to give effect to a contractual provision on the grounds of repugnancy

There are a variety of circumstances in which the Court may refuse to give effect to a contractual provision on what are, essentially, grounds of repugnancy as defined above. The most important of those circumstances are set out below.

Illegality

It has long been a principle of the common law that no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act (*ex turpi causa non oritur actio*): see *Holman v Johnson* (1775) 1 Cowp 341, 343.

In the recent Supreme Court case of *Patel v Mirza* [2016] UKSC 42, the Court confirmed that the illegality doctrine is premised upon two public policy concerns, namely: (i) the notion that a person should not be allowed to profit from his own wrongdoing; and (ii) the notion that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand.

As *Patel* makes clear, when the Court invokes the illegality doctrine to strike down a particular contract or a particular contractual provision, it effectively does so on the ground that the contract or contractual provision in question is repugnant to public policy, in the second sense set out above.

Repugnant to the remainder of the contract

Where two contractual provisions within the same agreement are inconsistent with one another, the Courts ask which of the two contractual provisions is calculated to carry into effect the purpose of the contract as gathered from the instrument and its background, and reject the clause that would defeat that purpose¹.

The circumstances in which the Courts may refuse to give effect to a contractual provision on the grounds of inconsistency are, themselves, relatively limited. In order for a Court to conclude that two provisions are inconsistent, there must be such conflict between them that effect cannot fairly be given to both clauses². Such a conclusion is quite rare, given that the Courts are generally required to make an effort to give effect to every clause in a contract insofar as possible³.

As is instantly clear, where the Courts refuse to give effect to an inconsistent contractual provision, they do so on the grounds of repugnancy in the first sense set out above.

The penalty rule

The Courts may also refuse to give effect to a contractual provision where it is considered to be a penalty clause. In another recent Supreme Court case, *Cavendish v Talal El Makdessi* [2015] UKSC 67, the Court held that the key question in seeking to distinguish a penalty clause from a liquidated damages clause is:

“...whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.”

¹ *Walker v Giles* (1848) 6 C.B. 662, 702.

² *Pagnan v Tradax* [1987] 2 Lloyd's Rep. 342, 350.

³ *Barton v Fitzgerald* (1812) 15 East 529, 541.

As part of the majority judgment, the Supreme Court made clear that the relative bargaining power of the parties may be relevant in determining whether the provision in question is penal⁴.

From the foregoing it is clear that where the Court invokes the penalty rule, it does so on the basis that the clause in question is repugnant to the law or to public policy in the second sense set out above.

Unfair terms

By separate legislation, the Courts are also empowered to refuse to give effect to a contractual term on the grounds of unfairness. By way of example, unfair contract terms legislation regulates parties' attempts to exempt themselves from liability for negligence or – when dealing on their own written standard terms of business – contractual liability. In both cases, the clauses in question are subject to a requirement of reasonableness. Reasonableness is judged by reference to factors including, but not limited to:

- The strength of the parties' respective bargaining positions
- Whether the innocent party could have met his requirements by other means or by entering into a similar contract with a third party
- Whether there was an inducement to agree to the relevant term

Under unfair contract terms legislation, the Courts are effectively empowered to refuse to enforce contractual provisions on the grounds of repugnancy, in the second sense set out above. A similar protection regime has also been put in place in respect of consumer contracts by virtue of the Consumer Rights Act 2015.

⁴ *Cavendish*, [35].

Standard terms

The Courts may also refuse to enforce repugnant contractual provisions when those provisions arise out of standard form contracts.

Many unobjectionable standard forms have arisen out of a desire to facilitate the conduct of trade in the context of transactions of common occurrence. However, as Lord Diplock noted in *Schroeder Music v Macaulay*, [1974] 3 All ER 616, other standard form contracts have arisen as a result of stronger parties seeking to leverage their unequal bargaining power to their advantage when dealing with weaker counterparts. In such instances, the Courts are often empowered to strike down repugnant clauses by statute. One example arising in the construction industry is the statutory prohibition on stronger parties making express provision to the effect that they will only pay those below them in the contractual food chain when they themselves have been paid⁵.

Such statutory control also comprises a rejection of contractual provisions on grounds of repugnancy, in the second sense set out above.

Whether the courts ought to have such powers

Illegality

In cases of illegality, the question is effectively whether – as a matter of public policy – the Court ought to enforce a claim if to do so would be harmful to the integrity of the legal system; see *Hall v Herbert* [1993] 3 RCS 159. This essay considers that the Court ought not to enforce such claims, given the inherent public interest in maintaining the integrity of the legal system.

Inconsistency

⁵ Section 113 of the Housing Grants, Construction and Regeneration Act 1996.

In cases of inconsistency between different contractual provisions, the only question is how best to give effect to the parties' objective intention. This essay contends that striking down a contractual provision in circumstances where it appears that it would otherwise defeat the very purpose of the parties' agreement is justifiable in seeking to give effect to the parties' intentions.

All other cases

The remaining categories of intervention set out above raise more difficult issues of legal philosophy. Specifically, they demand consideration of what the Courts ought to be doing when they are asked to determine contractual disputes. The history of legal thought on that issue is particularly informative, because it provides an analytical framework within which to consider what the position ought to be in the twenty-first century.

Historical context

If one had asked a common law jurist back in the twelfth century what role the Courts should have in dealing with contractual disputes, the answer would have been clear: quite simply, the Court had no such role. As Glanvill put it in around 1180AD: "it is not the custom of the court of the Lord King to protect private agreements"⁶. That remained broadly the position, at least insofar as informal agreements were concerned, until around the late fourteenth century when the common law Courts adopted jurisdiction over cases of *assumpsit*: see *Skyrne v Butolph* (1388) YB 11 Ric 2 (Ames Foundation) 223⁷.

The common perception of the Court's role in relation to contractual disputes could not have changed more radically by the time the classical era of English contract law arrived in the mid-nineteenth century. The ultimate drive towards pure freedom of contract most likely had its intellectual roots in the work of Sir Edward Coke, for whom a form of proto-economic liberalism sprung out of a desire for political freedom from the arbitrary power of the Crown⁸.

⁶ Glanvill X, 18; *Cheshire, Fifoot and Furmston's Law of Contract*, 2012 Ed. p. 2.

⁷ *Cheshire*, p. 5.

⁸ P. S. Atiyah, *The Rise and Fall of Freedom of Contract*, 1979, Clarendon Press Oxford, p. 113.

Taken together with the fact that both bar and bench were highly individualistic in nature (thus tending to foster belief in the virtues of freedom and enterprise)⁹, those responsible for the development of contract law were ideologically receptive to the notion that parties' bargains ought to be enforced wherever possible by the time the industrial revolution began in around 1760. Such receptiveness only grew once it became clear that significant social and economic development could be encouraged through the promotion of a highly individualistic market economy (in which prior restrictions on the mobility of capital and labour were swept away¹⁰) and through the protection of autonomy in individuals' increasingly important private contracts¹¹.

Even at the height of classical contract theory in around 1870, there never existed a truly *laissez-faire* system of government in England; that was - and remains - a myth originally propagated by Dicey¹². However, there is no doubt that the gradual rise of freedom of contract was, by that time, influenced by the works of Adam Smith and his belief that freedom of contract was not only beneficial to the individual but also to the promotion of the public interest.

Judgments from that period show that the courts had an atomistic view of the nature of the relatively new market economy, and that they repeatedly refused to strike down agreements despite the fact that they smacked of monopoly power and restraint of trade¹³. Nowhere was freedom of contract more celebrated than in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, where Sir George Jessel held that:

“... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.”

⁹ Ibid.

¹⁰ Atiyah, pp. 226 – 227.

¹¹ Atiyah, p. 417.

¹² Atiyah, p. 234.

¹³ Atiyah p. 410.

In the period immediately following on from the industrial revolution, it may have been justifiable for the courts to take such an approach, since there was intense competition between businesses and monopolies did not tend to flourish for very long¹⁴. However, by the 1890s, industrial power was becoming increasingly concentrated and, in the years that followed, economic theory struggled to keep pace with the fact that “oligopoly and monopoly and anti-competitive Trade Associations existed in almost every industry throughout the length and breadth of the country”¹⁵.

During the inter-war years, both economists and lawyers came to recognise that economic reality and, further, to acknowledge that consumers very often did not have the requisite level of knowledge to sustain the theory of perfect competition that lay at the heart of the classical model of contract. Those twin developments largely destroyed any lingering faith in a *laissez-faire* approach to contract law by the end of the First World War¹⁶.

The *coup de grâce* for freedom of contract came in 1936 when Keynes’ *General Theory* argued forcefully that individuals were often too weak or too ignorant to protect their own interests against big business, let alone to act in the public interest¹⁷. Since then, significant inroads have been made into the doctrinal purity of freedom of contract. Perhaps the most eloquent example of the rationale behind such inroads comes from Lord Denning MR, who held as follows in *George Mitchell v Finney Lock Seeds* [1983] 2 AC 803:

“None of you nowadays will remember the trouble we had - when I was called to the Bar - with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of “freedom of contract.” But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form

¹⁴ Atiyah, p. 410.

¹⁵ Atiyah, p. 618.

¹⁶ Atiyah, pp. 623 – 625.

¹⁷ Atiyah, p. 626.

or invoice. The big concern said, "Take it or leave it." The little man had no option but to take it."

The present day

As that historical context shows, the issue of whether the Courts ought to have the power to strike down a particular contractual provision on the grounds of repugnancy is often concerned as much with politics and economics as it is about abstract legal theory. By reference to that historical context, this essay argues that the Courts ought to have the power to refuse to give effect to a contractual provision on the grounds of repugnancy wherever a stronger party uses an inequality of bargaining power to take unfair advantage of a weaker party¹⁸.

Primarily, that is because – as a matter of economic theory – it is highly doubtful whether pure and unadulterated freedom of contract serves to benefit the public interest in the manner envisaged by Adam Smith. By contrast – if the early twentieth century experience is anything to go by – it merely serves to accelerate and exacerbate the concentration of power and wealth in the hands of a few, via monopolies and the restraint of trade. Rather than improving social and economic development, recent economic data suggests that such a growth in inequality may in fact be responsible for slower economic growth and a decrease in productivity. The British economy has moved on considerably since the ‘big bang’ of economic activity occasioned by the industrial revolution, which (for a time at least) may have justified a *laissez-faire* approach to the policing of parties’ contracts.

Leaving aside such economic arguments, the Courts ought to have such powers because insistence upon anything approximating doctrinal purity in respect of freedom of contract would inevitably result in the Courts tacitly approving sharp practice by large corporations and others in a particularly strong bargaining position. Whilst perhaps not as serious, such sharp practice sits on the same spectrum of immoral behaviour as illegality. For the Courts to sit idly by - and thus implicitly condone such conduct - would thus risk bringing the integrity of the Courts into question. That alone is a powerful argument for allowing the Courts to intervene in

¹⁸ *Cheshire*, p. 25.

contractual bargains whose terms have been influenced by a strong party taking unfair advantage of a weaker party.

Plainly, what constitutes taking ‘unfair advantage’ of a weaker party is not immutable, nor capable of precise abstract definition. For that reason alone it is likely that the precise nature of judicial and Parliamentary opinion on whether to intervene when faced with certain repugnant clauses will move slowly back and forth over time, in accordance with societal and political changes. If the Supreme Court’s most recent pronouncements in *Arnold v Britton* [2015] AC 1619 and *Cavendish v Makdessi* [2015] 3 W.L.R. 1373 are any guide, the law is currently in the process moving steadily away from the more vigorous judicial control of repugnant clauses that typified the key cases in the mid-to-late twentieth century.

From a legal theory perspective, the precise degree of the Courts’ intervention at any particular moment in time is not of paramount significance. Far more important is the fact that, in broad terms, the law has developed a series of nuanced and principled tests for determining the circumstances in which repugnant clauses ought to be struck down.

Matthew Finn
Keating Chambers

27 October 2016