The Unequal Bargain Doctrine: Lord Denning in Lloyds Bank v. Bundy

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I

Views on Lord Denning differ. Some consider that the Master of the Rolls does not have an appropriate sense of his proper position. A former Lord Chancellor sitting on appeal from a Denning-led decision remarked that "it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords".[1] Not long before, a judge sitting with the Master of the Rolls said of Lord Denning's judgment in the case they were considering that "in some respects he has sought to wield a broom labelled 'For the use of the House of Lords only' ".[2] Others (and among them perhaps even those same critics), consider him to be, in the words of Professor Clive Schmitthoff, "one of the great judges of the century". Professor Schmitthoff writes:

> Future centuries will remember him as one of the makers of the common law. Legal historians will say of him what Holdsworth says about Lord Mansfield: 'he succeeded in infusing a new spirit into the common law ...'.[3]

Whatever your view of the Master of the Rolls, you cannot ignore his contribution to English law and to all those systems of law mothered by England. Fresh evidence of his dominant role in the

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[1] *Cassell & Co.* v. *Broome* [1972] 1 All E.R. 801, 809 *per* Lord Hailsham of St Marylebone L.C. The appellant was appealing from a decision of the Court of Appeal which held the House of Lords decision on punitive damages in *Rookes* v. *Barnard* [1964] A.C. 1129, on which the appellant in part relied, to have been decided *per incuriam.* In his judgment, Lord Denning said: "I think the difficulties presented by *Rookes* v. *Barnard* are so great that the judges should direct the juries in accordance with the law as it was understood before *Rookes* v. *Barnard.*"; [1971] 2 Q.B. 354, 384.

[2] *Gallie* v. *Lee* [1969] 1 All E.R. 1062, 1076 *per* Russell L.J. The Court of Appeal's decision was affirmed by the House of Lords *sub nom. Saunders* v. *Anglia Building Society* [1970] 3 All E.R. 961.

[3] C. Schmitthoff, *Lord Denning and the Contemporary Scene* (1974) 6 Manitoba L.J. 11, 11-12. The Holdsworth quotation is from W. Holdsworth, *Some Makers of English Law* (1966), 162.

development of the common law is constantly being produced by the English Court of Appeal. The most recent exhibit is the extraordinary case of *Lloyds Bank Ltd* v. *Bundy*.[4] This article is about *Lloyds Bank,* but in the process of considering that case I want to draw attention to certain aspects of Lord Denning's judicial technique, particularly as demonstrated in the law of contract. The main thrust of Lord Denning's activity in this area of the law has been to organize the cases around certain great principles which he himself articulates, sometimes in a novel form, and sometimes for the first time. The Master of the Rolls reforms, using a kind of codification as one of his instruments of reform. Cases are treated not as *sui generis,* standing by themselves and supported by the doctrine of precedent, but as *examples* of the application of a great principle. Here, in some measure, are civilian tendencies at work, not in the sense of the unthinking use by a judge of a rule laid down by the legislature, but in the sense of an impetus to synthesize or codify. Dare one suggest that Lord Denning is a civilian at heart?

The Denning-as-civilian notion is not vitiated because Denning is a judge rather than a legislator. The theory may be that in civilian systems judges do not make law, but that theory is not much nearer the truth than the corresponding fiction politely preserved by common law lawyers. The question is not who remodels the law, but how it is done. The Master of the Rolls seeks to codify. The irony is that the English Law Reform Commission intended to codify contract, but has apparently given up the task as a bad job. Here is fertile ground for exploration of the delicate balance between legislature and judiciary in any system, and for consideration of which arms of the state can best reform and update law.[5]

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[4] [1974] 3 All E.R. 757.

[5] After these words were written, the case of *Liverpool City Council* v. *Irwin* [1975] 3 All E.R. 658 was reported. In that case, Lord Denning found an implied term in a tenancy agreement to the effect that the landlord should take care to keep the lifts and staircases reasonably fit for the use of tenants and their visitors. Said Lord Denning:

> "I am confirmed in this view by the fact that the Law Commission, in their codification of the law of landlord and tenant, recommend that some such term should be implied by statute. But I do not think we need wait for a statute. We are well able to imply it now in the same way as judges have implied terms for centuries. Some people seem to think that, now there is a Law Commission, the judges should leave it to them to put right any defect and to make any new development. The judges must no longer play a constructive role. They must be automatons applying the existing rules. Just think what this means. The law must stand still until the Law Commission has reported and Parliament passed an Act on it; and, meanwhile, every litigant must have his case decided by the dead

II

The plaintiff ("the bank") in *Lloyds Bank* v. *Bundy* alleged that the defendant had on four occasions, most recently December 17, 1969, charged his farm by way of legal mortgage as security for monies which he covenanted to repay the bank; and that on three occasions, most recently December 17, 1969 (on this last occasion jointly and severally with his son) he had guaranteed up to £ 11,000 the debts owed to the bank by his son's company (MJB Plant Hire). On December 10, 1970, so the plaintiff's claim recited, the bank required of the defendant payment of £ 11,000 owing to the bank by the company (which had gone into receivership in May of that year), but the defendant refused or neglected to pay. The bank accordingly sought to exercise its rights as mortgagee under the *Law of Property Act, 1925*[6] (rights which were also expressly granted them in the legal charges), contracted in December 1971 to sell the property, and required the defendant by notice to vacate the farm by January 31, 1972. The defendant did not do so, and the bank now sought to have him evicted.

In his defense the defendant claimed in part that the December 17, 1969 legal charge cancelled or superseded the earlier charges, and that he had been induced to execute the last charge while under the influence of the bank's agent, Mr Head, manager of the plaintiff's local branch. The defendant counterclaimed for an order setting aside the legal charge and guarantee dated December 17, 1969 or declaring them to be void, for delivery up and cancellation of the documents, and for an injunction restraining the bank from selling the property.

The critical events were those of December 17, 1969, when the assistant manager of the plaintiff's Salisbury branch met with the defendant. Mr Head had with him completed forms of guarantee and charge, requiring only the defendant's signature. The new guarantee and charge would bring the father's liability to £ 11,000. Lord Denning described the events of that day:

> Mr Head produced the forms that had already been filled in. The father signed them and Mr Head witnessed them there and then. On this occasion, Mr Head, unlike Mr Bennett [Head's predecessor as assistant

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hand of the past. I decline to reduce the judges to such a sterile role. They should develop the law, case by case, as they have done in the past; so that the litigants before them can have their differences decided by the law as it should be and is, and not by the law of the past. So I hold here that there is clearly to be implied, for the common parts, some such term as the Law Commission recommend." (at 666)

[6] 15-16 Geo.V, c.20 (U.K.).

> manager], did not leave the forms with the father; nor did the father have any independent advice.[7]

Sir Eric Sachs, after drawing attention to the paucity and quality of the defendant's evidence (Mr Bundy was aged and unwell), placed emphasis on a statement made by Mr Head under cross-examination: "I would think the defendant relied on me implicitly to advise him about the transaction as Bank Manager."[8] Sir Eric graphically described the defendant's plight on December 17, 1969:

> He was faced by three persons anxious for him to sign. There was his son Michael, the overdraft of whose company had been ... escalating rapidly; whose influence over his father was observed by the judge — and can hardly not have been realised by the bank; and whose ability to overcome the difficulties of his company was plainly doubtful, indeed its troubles were known to Mr Head to be 'deep-seated'. There was Mr Head on behalf of the bank, coming with the documents designed to protect the bank's interest already substantially made out and in his pocket. There was Michael's wife asking Mr Head to help her husband.
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> The documents which 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... .[9]

Sir Eric Sachs gave the majority judgment. He first observed that a duty of fiduciary care may arise

> ... where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person on whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded.[10]

There must also be confidentiality, a phenomenon "impossible to define and which is a matter for the judgment of the court on the facts of any particular case"[11] although "[i]t is one of the features of this element that once it exists, influence naturally grows out of it".[12] Sir Eric concluded after his examination of the facts that the bank owed Mr Bundy a duty of fiduciary care. He considered that if such a duty is not fulfilled, then no benefit can be retained from the transaction by the person owing the duty. What constitutes fulfilment depends on the facts of the individual case, although in

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[7] *Supra,* note 4, 762.
[8] *Ibid.,* 769.
[9] *Ibid.,* 770.
[10] *Ibid.,* 767.
[11] *Ibid.*
[12] *Ibid.*

general the duty is one "to ensure that the person liable to be influenced has formed 'an independent *and informed* judgment' ".[13]

As to fulfilment of the duty in the instant case, Sir Eric said:

> The situation was ... one which to any reasonably sensible person, who gave it but a moment's thought, cried aloud the defendant's need for careful independent advice. Over and above the need any man has for counsel when asked to risk his last penny on even an apparently reasonable project, was the need here for informed advice as to whether there was any real chance of the company's affairs becoming viable if the documents were signed. If not, there arose questions such as, what is the use of taking the risk of becoming penniless without benefiting anyone but the bank; is it not better both for you and your son that you, at any rate, should still have some money when the crash comes; and should not the bank at least bind itself to hold its hand for some given period? The answers to such questions could only be given in the light of a worthwhile appraisement of the company's affairs — without which the defendant could not come to an *informed judgment* as to the wisdom of what he was doing.
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> No such advice to get an independent opinion was given ... .[14]

Sir Eric concluded that "the breach of the duty to take fiduciary care is manifest".[15] Lord Justice Cairns, in a very short judgment, agreed with Sir Eric Sachs that a duty had arisen requiring the plaintiff to advise the defendant about the desirability of obtaining independent advice, and that since this duty had not been fulfilled the guarantee could be avoided on the grounds of undue influence. Accordingly, the appeal from the Salisbury County Court was allowed, and judgment given for the defendant on the counterclaim; the December 17, 1969 guarantee and charge were set aside, and the documents ordered to be delivered up for cancellation.

The Master of the Rolls agreed with this result, but took a substantially different approach. He first proclaimed the "general rule" that "[n]o bargain will be upset which is the result of the ordinary interplay of forces".[16] But, of course, there are exceptions to this rule:

> There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall.[17]

Then Lord Denning gives a very important statement of the approach he proposes to take in the case, and, indeed, of his general judicial

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[13] *Ibid.*, 768.
[14] *Ibid.*, 770.
[15] *Ibid.*
[16] *Ibid.*, 763.
[17] *Ibid.*

technique. Of cases where there has been "inequality of bargaining power, such as to merit the intervention of the court", Lord Denning says:

> Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them.[18]

To find this yet unknown principle he looks to the separate categories, approaching the cases in each as examples and applications of the principle. Lord Denning names five categories — duress of goods (to which he adds cases of *colore officii*), unconscionable transaction, undue influence, undue pressure (an example being "where one party stipulates for an unfair advantage to which the other has no option but to submit",[19] as in *D. & C. Builders Ltd* v. *Rees*),[20] and salvage agreements. Then the Master of the Rolls pronounces:

> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal.[21]

Applying this newly-discovered principle to *Lloyds Bank* v. *Bundy*, Lord Denning noted (1) that the consideration moving from the bank was grossly inadequate ("all that the company gained was a short respite from impending doom");[22] (2) the relationship between the bank and the father was one of trust and confidence; (3) the relationship between the father and the son was one where the father's natural affection had much influence on him; and (4) the father would naturally desire to accede to his son's request. He observed also that there was a conflict of interest between the bank

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[18] *Ibid.*
[19] *Ibid.*, 764.
[20] [1965] 3 All E.R. 837.
[21] *Supra*, note 4, 765.
[22] *Ibid.*

and the father (unnoticed by the bank), and the bank did not suggest that the father get independent advice.

Lord Denning concluded that "[t]hese considerations seem to me to bring this case within the principles I have stated".[23] In the event that he should be wrong, he joined Sir Eric Sachs in considering the case to be one of undue influence.

III

Lloyds Bank v. *Bundy* has attracted considerable attention. There have been several comments in the journals.[24] The case has proved influential in subsequent litigation.

In *Clifford Davis Management Ltd* v. *WEA Records Ltd*,[25] the defendants appealed against the refusal of the judge to discharge an interim injunction granted the plaintiff in chambers. The injunction restrained WEA Records from infringing the plaintiff's copyright in the compositions of two "pop" musicians (members of a group known as the "Fleetwood Mac") by dealing in any way with a record called "Heroes are Hard to Find". The plaintiff's claim to copyright was based on a publishing agreement signed by the two musicians when the plaintiff was manager of their group. Lord Denning examined the terms of the agreement and said of the contract that it contained "amazing provisions": "It gives the publisher, alias the manager, a stranglehold over each of the composers. It does it by means of the copyright."[26] By an important provision the composer bound himself to the publisher for five years, with the publisher able to extend the term at his option for another five years. Lord Denning characterized the agreement as "restrictive of trade" in the sense "that it requires a man to give his services and wares to one person only for a long term of years to the exclusion of all others".[27] Although careful to say that he need not come to a final opinion since the proceedings were interlocutory, and that in his decision he was assessing the balance of convenience only, Lord Denning did observe that "it may well be said that there was such inequality of bargaining power that the agreement should not be enforced".[28] In advancing this opinion, the Master of the Rolls noted that (1) the

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[23] *Ibid.*, 766.

[24] *E.g.*, C. Carr, *Inequality of Bargaining Power* (1975) 38 M.L.R. 463 and L.S. Sealy, *Undue Influence and Inequality of Bargaining Power* (1975) 34 C.L.J. 21.

[25] [1975] 1 All E.R. 237.

[26] *Ibid.*, 239.

[27] *Ibid.*, 240.

[28] *Ibid.*, 241.

terms of the contract were manifestly unfair; (2) the property was transferred for a consideration that was grossly inadequate; (3) the bargaining power of each of the composers was gravely impaired because (a) each composer was in a group managed by the other contracting party and was therefore in part dependent on him for success, and (b) the plaintiff was skilled in business and finance, and the composers were not; and (4) "undue influences or pressures were brought to bear on the composers by or for the benefit of the manager".[29] On this last point, Lord Denning noted:

> The composer had no lawyer and no legal advisers. It seems to me that, if the publisher wished to exact such onerous terms or to drive so unconscionable a bargain, he ought to have seen that the composer had independent advice.[30]

In his judgment, Lord Denning referred to the House of Lords decision in *A. Schroeder Music Publishing Co.* v. *Macaulay*,[31] a case similar in its facts to *Clifford Davis*[32] and decided before *Lloyds Bank* v. *Bundy*.[33] In *Schroeder*, the House of Lords held the agreement in question unenforceable as in restraint of trade; Lord Reid said that "if contractual restrictions appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner, then they must be justified before they can be enforced".[34] Lord Diplock took the same approach. Lord Denning observed that the speeches in *Schroeder* afford support for the principles he stated in *Lloyds Bank* concerning inequality of bargaining power. Browne L.J. agreed with the Master of the Rolls in the *Clifford Davis* case, and the injunction was discharged.

In Canada, *Lloyds Bank* was applied within months, in *McKenzie* v. *Bank of Montreal*.[35] The seed fell on fertile ground. Bradley Crawford, for one, has drawn attention to Canadian cases where "the courts intervene to rescind the contract whenever it appears that one of the parties was incapable of adequately protecting his interests and the other has made some immoderate gain at his expense".[36] A recent example is *Towers* v. *Affleck*,[37] where Anderson J. of the British Columbia Supreme Court held the plaintiff not bound by a release she signed in consideration of $125 following an auto-

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[29] *Ibid.*
[30] *Ibid.*
[31] [1974] 3 All E.R. 616.
[32] *Supra*, note 25.
[33] *Supra*, note 4.
[34] *Supra*, note 31, 622.
[35] (1975) 55 D.L.R. (3d) 641 (Ont.H.C.).
[36] (1966) 44 Can.Bar Rev. 142, 143.
[37] [1974] 1 W.W.R. 714 (B.C. S.C.).

mobile accident. He noted that at the time of signing the plaintiff was in a confused mental state and that "she is a person of limited intelligence and that this would be apparent to any reasonable person who came in contact with her".[38] Mr Justice Anderson concluded:

> While the Court will not lightly set aside settlement agreements, the Court will set aside contracts and bargains of an improvident character made by poor and ignorant persons acting without independent advice unless the other party discharges the onus on him to show that the transaction is fair and reasonable ... .[39]

Towers v. *Affleck* was applied in the 1975 case of *Pridmore* v. *Calvert*,[40] which had very similar facts. In that case Toy J. noted, among other things, that the plaintiff was of limited intelligence, had no business acumen, was in poor physical condition at the time the release was signed, and sought no advice concerning the document. The judge concluded that the plaintiff "was on such unequal footing with respect to the defendants and their representatives, that in all the circumstances, it would be inequitable to hold her to the bargain that was made".[41]

In *McKenzie* v. *Bank of Montreal*[42] the plaintiff asked *inter alia* for the setting aside of a mortgage on her farm lands and premises executed by her in favour of the defendant to secure the indebtedness of one Lawrence, another defendant and formerly an intimate friend of the plaintiff. The bank had earlier seized the plaintiff's automobile (registered in her name) pursuant to a chattel mortgage fraudulently granted the bank by Lawrence. The bank refused to release the car, even when they discovered the true owner, unless other security was given for Lawrence's debts, which had reached about $16,000. The plaintiff went with Lawrence to the bank and met with the credit manager. By this time, the bank knew about the disarray of Lawrence's affairs and about what the judge called Lawrence's "crooked dealings".[43] (In addition to the chattel mortgage incident, Lawrence had given the defendant false information about the extent and value of his assets.) In the course of ten or fifteen minutes, the plaintiff, who "asked no questions and was given no explanations",[44] appended her signature at least eight or nine times

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[38] *Ibid.*, 716.
[39] *Ibid.*, 719-720.
[40] (1975) 54 D.L.R. (3d) 133 (B.C. S.C.).
[41] *Ibid.*, 144.
[42] *Supra*, note 35.
[43] *Ibid.*, 652.
[44] *Ibid.*, 646.

to various papers, one of which was the mortgage in question (to which Lawrence, who was a joint tenant of the farm, was a party). Mr Justice Stark said:

> With the knowledge that the bank possessed, there was surely some duty resting upon the bank, either to require that she obtain independent advice or at the least to ensure that full disclosure be made to her of Lawrence's heavy debts with the bank, of his failure to keep up mortgage payments and taxes on the farm, and therefore of the unlikelihood that the farming venture could ever succeed. These explanations were never attempted....
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> It must be remembered that the only thought uppermost in the plaintiff's mind and the only purpose in her attendance at the bank, was the recovery of her motor-car. Her keys were handed over to her only after all the papers had been signed; and this withholding of her car placed the bank in a very strong and unfair bargaining position.[45]

Stark J. then proceeded to quote extensively Lord Denning's judgment in *Lloyds Bank* v. *Bundy*,[46] describing that case as "particularly in point" and saying that "the principles enunciated in that case are applicable here".[47] Said Mr Justice Stark:

> Special circumstances existed there, which imposed a duty of fiduciary care upon the bank; and in the case at bar, the special circumstances which I have outlined, placed a similar duty upon the bank.[48]

He concluded that the mortgage could not stand in so far as the plaintiff was concerned.

IV

What do these cases amount to? At the very least, some further definition has been given to the notions of undue influence and restraint of trade. There will be a presumption of undue influence sufficient to render a contract unenforceable when a duty of fiduciary care arises. Such a duty comes into existence when there is a relationship of confidentiality, and

> ... where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person on whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded.[49]

The presumption can be rebutted by showing that the duty of fiduciary care has been fulfilled; that can be accomplished, in general (although not always), by ensuring that the person owed the duty

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[45] *Ibid.*, 649.
[46] *Supra*, note 4.
[47] *Supra*, note 35, 650.
[48] *Ibid.*, 650-651.
[49] *Lloyds Bank Ltd* v. *Bundy, supra*, note 4, 767 *per* Sir Eric Sachs.

has arrived at an independent and informed judgment; that, in turn, will normally require obtaining outside advice on the transaction. Among these new cases, we have, in support of this view of the law relating to undue influence, the *ratio decidendi* of the majority and Lord Denning's *obiter* in *Lloyds Bank*,[50] the *Clifford Davis* case,[51] *McKenzie* v. *Bank of Montreal*,[52] and perhaps *Towers* v. *Affleck*[53] and *Pridmore* v. *Calvert*.[54] If this is all these cases stand for, they are unexceptional. A principle of this sort has been clearly established at least since *Allcard* v. *Skinner* (1887).[55] Its latest formulation is not entirely satisfactory. Firstly, the concept of "confidentiality" remains vague. Indeed, Sir Eric Sachs did not even attempt its definition. No doubt confidentiality is the umbrella expression which justifies the judge's exercise of his discretion in equity; confidentiality exists or not depending on whether the judge decides, on the basis of the facts, that he will or will not enforce the contract. Secondly, the renewed emphasis on obtaining *independent* advice (which in any event may not be sufficient to rebut the presumption) may cause some concern in certain circles, perhaps, if one dare say it, in banking circles. It is now almost certain that even *good* advice from the party having the duty of fiduciary care will not rebut the presumption of undue influence.

The House of Lords decision in the *Schroeder* case[56] suggests, in its particular application of the restraint of trade doctrine, another avenue for achieving the result that was obtained in the *Clifford Davis* case. In *Schroeder* Lord Reid, on the question of the reasonableness of exclusive services provisions, quoted Lord Pearce in the leading case on exclusive dealing, *Esso Petroleum Co.* v. *Harper's Garage (Stourport), Ltd*:[57] "It is important that the court, in weighing the question of reasonableness, should give full weight to commercial practices and to the generality of contracts made freely by parties bargaining on equal terms."[58] Lord Reid emphasized the phrase "made freely by parties bargaining on equal terms". It appears clear that in the context of exclusive dealings, where the parties have manifestly not been on equal bargaining terms, the courts may strike

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[50] *Supra*, note 4.
[51] *Supra*, note 25.
[52] *Supra*, note 35.
[53] *Supra*, note 37.
[54] *Supra*, note 40.
[55] (1887) 36 Ch.D. 145.
[56] *Supra*, note 31.
[57] [1967] 1 All E.R. 699.
[58] *Ibid.*, 723; quoted in *A. Schroeder Music Publishing Co.* v. *Macaulay*, *supra*, note 31, 622.

down the contract using the restraint of trade doctrine. The importance of the parties meeting on a roughly equal basis seems well established in this area of the law by the *Esso* and *Schroeder* cases.

However, clearly more is at stake than a reformulation of undue influence principles and an interesting application of the restraint of trade rule. In these cases, and particularly in *Lloyds Bank* v. *Bundy*, we may well be witnessing the birth of a new equitable doctrine — the unequal bargain doctrine. The doctrine is, of course, explicit in and is the *ratio decidendi* of Lord Denning's judgment in *Lloyds Bank*:

> [T]he English law gives relief to one who, without independent advice, enters into a contract on 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.[59]

The doctrine is quite compatible with the majority judgment in *Lloyds Bank;* indeed Sir Eric Sachs expresses

> ... some sympathy with the views that the courts should be able to give relief to a party who has been subject to undue pressure as defined in the concluding passage of his [Lord Denning's] judgment on that point.[60]

It is quite compatible with the House of Lords decision in *Schroeder*, a case explicitly brought under the doctrine's wing by Lord Denning in *Clifford Davis*. That last case squarely applies the principle. In Canada, Denning's *Lloyds Bank* principle is adopted in *McKenzie* v.

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[59] *Supra*, note 4, 765. That both the doctrine and its formulation reveal a civilian streak is suggested when one compares this *dictum* to the appropriate articles in various civil law codes. Article 138 of the German Civil Code is very similar and reads:

> "i Ein Rechtsgeschäft, das gegen die gnten Citten verstösst, ist nichtig.
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> ii Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Notlage, des Leichtsinns oder der Unerfahrenheit eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, welche den Wert der Leistung dergestalt übersteigen, dass den Umständen nach die Vermögensvorteile in auffälligen Missverhältnisse zu der Leistung stehen."

Article 38 of Quebec's Civil Code Revision Office *Report on Obligations* (1975), 75 states:

> "Lesion vitiates consent when there is a serious disproportion between the prestations of the contract, resulting from the exploitation of one of the parties.
>
> Serious disproportion creates a presumption of exploitation."

Note too article 21 of the Swiss Civil Code.

[60] *Ibid.*, 771.

Bank of Montreal, and enhances our understanding of earlier cases, such as *Towers* v. *Affleck, Pridmore* v. *Calvert,* and others. The embryonic doctrine may yet be aborted, but for the moment is very much with us.

How does the unequal bargain doctrine differ from that of undue influence? The traditional view is that the latter applies either when undue influence resulting in a contract that would not otherwise have been made can be proved as a fact, or when a confidential relationship exists leading to a duty of fiduciary care and giving rise to a presumption of undue influence which is not rebutted.[61] In my opinion, under the unequal bargain doctrine as set forth by Lord Denning (1) no confidential relationship or duty of fiduciary care is necessary, and (2) undue influence need not be proved as a fact, but will be presumed when bargaining power is impaired and the terms are very unfair or consideration grossly inadequate. If this is so, then clearly a new doctrine of momentous scope has been introduced into the law of contract.

As far as dispensing with the need for a duty of fiduciary care under the unequal bargain doctrine is concerned, it is true that the court held such a duty to exist in *Lloyds Bank,*[62] but Lord Denning hangs nothing on that in enunciating his "single thread". Nor do the categories of cases he sets forth as illustrating the unequal bargain doctrine support the necessity for such a duty. *McKenzie* v. *Bank of Montreal,*[63] which could have been treated as a simple case of duress of goods, held instead that the defendant owed a duty to the plaintiff; but that conclusion is not convincing. The facts were quite different from *Lloyds Bank,* and there is little if any indication (to adopt a critical part of Sir Eric Sachs' test) that the plaintiff relied on the defendant. She was not a customer of the bank. When she signed the mortgage, she "asked no questions and was given no explanations".[64] In any event, in *McKenzie* Stark J. embraced Denning's judgment in *Lloyds Bank* which, on my analysis, requires no duty of fiduciary care.

I have suggested that under the unequal bargain doctrine undue influence will be *presumed* when bargaining power is grievously impaired and the terms are very unfair or consideration grossly inadequate. But Lord Denning's formulation of the doctrine contains more than these simple considerations. What of independent advice?

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[61] See G.C. Cheshire and C.H.S. Fifoot, *The Law of Contract* 8th ed. (1972), 283-287.

[62] *Supra,* note 4.

[63] *Supra,* note 35.

[64] *Ibid.,* 646.

That has been and is best treated as a means of rebutting the presumption. What of the apparent requirement that bargaining power be impaired by reason of needs or desires, or ignorance or infirmity? This requirement is so general and vague that it is no requirement at all. What, finally, of the condition that there be present "undue influences or pressures brought to bear ... by or for the benefit of the other"?[65] Here it is evident, from the general purport of the doctrine and from its application in *Lloyds Bank* and in *McKenzie,* that undue influence need not exist as a fact, but *will be presumed if the other conditions are met.* Unequal bargaining power coupled with an unfair contract creates a presumption of undue influence; or, as an alternative expression of the same effect, it creates what my colleague Professor Waters has called an *"ad hoc* fiduciary relationship", a relationship created by the "offence".[66] In this respect, *Lloyds Bank* contributes to the collapse of a precise notion of fiduciary relationship, a collapse earlier evidenced by such cases as *Nocton* v. *Ashburton*[67] and *Hedley Byrne.*[68]

How may the unequal bargain doctrine presumption be rebutted? The answer hangs on word-play; if any element required by the doctrine can be shown to be absent, the doctrine does not apply. But the cases, such as they are, talk of rebuttal by proof of independent advice. The scope of this requirement is not entirely clear. Does it exclude good, but not independent, advice? In *Lloyds Bank* would the presumption have been rebutted if Mr Head had given good advice that the plaintiff refused to follow? Does it include independent but poor (uninformed) advice, whether or not known to the other contracting party to be poor? In *McKenzie,* would the presumption have been rebutted had the plaintiff obtained outside advice known to the defendant to be unreliable? To Mr Justice Stark, the concept of independent advice appears to go as far as entailing a corollary duty to disclose:

> [T]heir special knowledge of Lawrence's affairs and of his crooked dealings fixed them with an obligation towards the plaintiff to ensure that the plaintiff in mortgaging her farm was really doing what she wished to do ... .[69]

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[65] *Supra,* note 4, 765.

[66] D.W.M. Waters, *The Constructive Trust* (1964) 67-72. Professor Waters suggests of *Re Diplock* [1947] Ch.716, [1948] Ch.465, that the "mistaken payment and mistaken receipt was enough to create a fiduciary relationship between the payors and payees"; *ibid.,* 71.

[67] [1914] A.C. 932.

[68] *Hedley Byrne & Co.* v. *Heller and Partners Ltd* [1964] A.C. 465.

[69] *Supra,* note 35, 652.

If one may be permitted a *cri de coeur*, what will be left of the traditional and well-understood law of contract when this development is taken together with others? What is left after cases like *High Trees*,[70] *Jackson* v. *Horizon Holidays Ltd*,[71] *Harbutt's Plasticine*,[72] and *Lloyds Bank*?[73] Is contract dead, as Professor Gilmore suggests?[74] And is the Master of the Rolls the executioner?

V

I earlier suggested that in the law of contract Lord Denning has sought to organize a huge mass of precedent around certain great principles. The effect is reform; the technique is substantially that of codification. The Judge has in part taken on the task that the body seeking to advise the legislature — the Law Reform Commission — has, by all reports, given up. When my colleague Professor Hahlo wrote that "the prospect of a codification of the law of contracts has receded into the nebulous future",[75] he may well have had his eye fixed on the wrong place; he obviously did not think of the possibility of codification by judicial pronouncements.[76]

Some may scoff at the suggestion that Lord Denning has marked civilian tendencies. But consider the evidence. In *High Trees*, Denning J. made reference to "a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such";[77] they really, said Denning, were illustrations of promissory estoppel. In *Smith and Snipes Hall Farm Ltd* v. *River Douglas Catchment Board*,[78] Denning L.J., casting about here and there, mentioned covenants running with the land, *Dutton* v. *Poole*,[79]

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[70] *Central London Property Trust Ltd* v. *High Trees House Ltd* [1947] K.B. 130.

[71] [1975] 3 All E.R. 92.

[72] *Harbutt's Plasticine Ltd* v. *Wayne Tank and Pump Co.* [1970] 1 All E.R. 225.

[73] *Supra*, note 4.

[74] G. Gilmore, *The Death of Contract*, (1974).

[75] H. R. Hahlo, *Codifying the Common Law: Protracted Gestation* (1975) 38 M.L.R. 23, 26.

[76] Professor Hahlo has drawn my attention to *The Governor and Company of the Bank of England* v. *Vagliano Brothers* [1891] A.C. 107, 144-145 and *Robinson* v. *Canadian Pacific Railways Co.* [1892] A.C. 481, 487, where in Professor Hahlo's opinion, the House of Lords defines the word "Code" as connoting a statute which deals with a branch of the law exhaustively, excluding reference to earlier authority.

[77] *Supra*, note 70, 134.

[78] [1949] 2 K.B. 500.

[79] (1677) 2 Lev. 210.

undisclosed principals, trusts and section 56 of the *Law of Property Act, 1925*,[80] and offered these diverse areas of the law as examples of a principle with deeper roots than that of privity — "the principle that a man who makes a deliberate promise which is intended to be binding ... must keep his promise".[81] In *Beswick* v. *Beswick*, the Master of the Rolls, after a similar review of disparate principles, concluded that privity "is only a rule of procedure".[82] In *Karsales (Harrow) Ltd* v. *Wallis*, after referring cursorily to recent cases and enunciating his own disclaimer clause ("[n]otwithstanding earlier cases which might suggest the contrary"),[83] he stated the "general principle that a breach which goes to the root of the contract disentitles the party from relying on the exemption clause".[84] Denning's brilliant defense of this principle in *Harbutt's Plasticine*[85] is well known. The inventory can go on — *Lewis* v. *Averay*,[86] *Solle* v. *Butcher*,[87] *Gallie* v. *Lee*,[88] and others.

Lord Denning is not only a reformer; he is a reformer employing a distinctive and effective technique, remarkably similar to the civilian technique for reorganizing and changing the law. *Lloyds Bank* v. *Bundy* is but the latest example of this great Judge at work.

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[80] *Supra*, note 6.
[81] *Supra*, note 79, 514.
[82] [1966] 3 W.L.R. 396, 407.
[83] [1956] 1 W.L.R. 936, 940.
[84] *Ibid.*, 941.
[85] *Supra*, note 72.
[86] [1971] 3 All E.R. 907.
[87] [1950] 1 K.B. 671.
[88] [1969] 1 All E.R. 1062.