Fair Dealing
in
Contract Formation

An Analysis of Exploitation in the Procurement of Bargain Transactions

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A thesis submitted for the degree of Doctor of Philosophy of The Australian National University

June 1993
Except where otherwise acknowledged, this thesis comprises my own work.

R. A. Bigwood

June 1993
This thesis is dedicated to the memory of my mother

MAVIS JEAN BIGWOOD

(25 November 1928 — 1 May 1990)

Her selflessness and unbiased dedication to her children and fellow persons, her disappointed commitment to life, and especially her splendid patience, are reflected in these pages.
'For myself, as soon as I have got going on a few of what I take to be capital sources, the itch becomes too strong and I begin to write—not necessarily at the beginning, but somewhere, anywhere. Thereafter, reading and writing go on simultaneously. The writing is added to, subtracted from, re-shaped, cancelled, as I go on reading. The reading is guided and directed and made fruitful by the writing: the more I write, the more I know what I'm looking for, the better I understand the significance and relevance of what I find."

'Imagine that an experimenter feeds a subject a randomly generated sequence of numbers: 3, 17, .... She requests that the subject identify the rule that generates them. Of course, no rule exists; the experimenter used a random-number table. Nevertheless, the subject will identify the rule, or at least she will report a rule. Any sequence is consistent with infinitely many rules. The interesting result, however, is that the subject becomes psychologically addicted to her rule. Indeed she may deny that a proffered number belongs to the sequence, postulating observational error. When the experimenter reveals that no rule exists, the subject disbelieves her."

'All names of good and evil are images; they do not speak out, they only hint. He is a fool who seeks knowledge from them. Whenever your spirit wants to speak in images, pay heed; for that is when your virtue has its origin and beginning."

---

a note on gender neutrality

The writer is generally sympathetic and supportive toward those who seek and who strive for equality between the sexes. Accordingly, I have been earnest to maintain gender neutrality in my use of language in this thesis. I have, I think, been successful in achieving that end in the first three chapters. However, from Chapter Four onwards, it becomes cumbersome to repeat "himself or herself", and so forth. Fearing, nonetheless, that I will be charged with (reverse?) sexism, I have, unless the circumstances clearly dictate to the contrary, taken the liberty of assuming throughout that the exploiter/victimiser is male and his victim is female. Whilst it should be obvious that such an assumption will create some tension at various points, advantages may be seen in the fact that roughly equal time will be allocated to males and females, and pronominal reference will in most instances be disambiguated.
acknowledgements

It should be obvious that in the production of a work of this size, and over such duration as was required to complete it, much assistance has been rendered to the writer by numerous persons and institutions. Of course, I should like to mention them all here severally, but the task is almost a Ph.D. in itself. In any event, if I were to attempt such a mission, my greatest fear is that I would sin so egregiously by failing to scribe a name that deserves here to be recorded. Rather than to risk such an omission, you shall all remain anonymous. To those whose names do not feature expressly on this page, you know who you are, and I record my sincerest gratitude.

In particular, and not as a matter of course, I acknowledge the assistance of my Supervisory Committee, consisting of Professor Paul Finn (of the Law Department, R.S.S.S., The Australian National University), Professor Jim Davis (of the Faculty of Law, The Australian National University), and Mr Nicholas Seddon (also of the Faculty of Law, The Australian National University), to all of whom I am most grateful. I found Paul Finn’s principal supervision invariably to be excellent, and his comments and criticisms incisive and challenging. His (not “undue”) influence on the final product is palpable. I thank Nick Seddon, too, for his good humour, stimulating debate, assistance and commentary, and for welcoming me on so many occasions into his family home. All the usual caveats apply.

I would also like to acknowledge my colleague, Mr Jonathan Aleck, for his abiding friendship and selflessness; and the several members of my family for their relentless support. Ms Anne-Marie Gaudry should be enumerated in a similar capacity.

Special mention and thanks goes out to Dr. David Lee for his friendship and assistance, and especially to Mrs Wendy Cosford, who cast an expert editorial eye over an entire earlier draft.

These past four or so years have been impecunious times for me. I should like in closing, therefore, to mention and to thank those who alleviated the problem with their financial support and assistance: The Australian National University; The Trustees of the Spencer Mason Trust (twice); The New Zealand Law Society; The Legal Research Foundation Inc. (N.Z.); The A.G.C. Young Achievers Foundation (N.Z.); and The Hon. Mr Justice P. G. Hillyer.
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abstract

This is a thesis about broad ideas and tendencies in our law of contract. In particular, its investigative burden is the emergent idea of "good faith and fair dealing" in the law relating to the formation of contracts.

Chapter One is concerned with the historically chequered germination of good-faith considerations in contract law. It shows how the development of modern contract law has been strongly influenced by the dominant ideological paradigms of other academic systems and disciplines. The chapter describes a progressive, universal acceleration of "good faith and fair dealing" themes in twentieth-century contract jurisprudence, concluding that the issue today falls squarely in Australia's legal agenda.

Chapter Two enquires into the scope and meaning of good faith and fair dealing in contemporary contract jurisprudence. Eventually confining the enquiry strictly to the context of contract formation, it is concluded that good faith and fair dealing operates jurisprudentially as a general, organising principle or idea, which in practice produces a system of variable standards or norms of conduct administered through well-established and discrete legal and equitable doctrines that purport to "exclude" particular instances of "bad-faith" conduct in the procurement of bargain transactions. Whereas good faith and fair dealing seems to exclude quite heterogeneous forms of bad-faith behaviour in the contexts of contract performance and enforcement, as the notion applies to contract formation, it appears to demonstrate a much sharper point of focus and a more precise content. The chapter identifies the specific norm informing the idea of good faith and fair dealing in contract formation as "the duty to protect the vulnerable", or, as lawyers put it, "neighbourhood". It is concluded that the duty to protect the vulnerable in the precontractual setting gives rise, first and foremost, to a duty not to exploit those contracting parties whose interests are especially vulnerable to one's own choices and actions (to help or to hurt) in bargaining.

Chapter Three views bargaining as a unique interpersonal process in which parties with divergent interests engage in stylised reciprocal dealings with a view to reaching a valid or acceptable agreement concerning future action. The law of contract formation basically reflects this understanding of the process. The chapter describes an internal, process-driven "functionalist" ethic of bargaining. This ethic embraces a convergence of deontological and teleological sources of moral reasoning. According to the assumptions informing the ethic, the law views strategic bargaining practices, or "advantage-taking", as an accepted part of the bargaining "game".

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Correspondingly, under conditions of fair equality ("equilibrium bargaining conditions"), the law generally expects and requires parties to exercise individual responsibility in bargaining activity. However, where the opportunity to preserve one's own best interests is effectively closed off from one of the bargaining parties, or where social or moral norms are generally insufficient to constrain unacceptable exercises of interpersonal bargaining power, contract law has demonstrated a basic willingness to regulate what is ordinarily understood to be an externally unregulated process. This it essentially does by focusing on the "voluntariness" of the consent-rendering party. The voluntariness of that consent, however, is assessed relative to the strategic bargaining practices of the other party, who might have actively or passively procured or accepted the consent while aware of the first party's serious inability to participate in the particular bargaining game. Specifically, the chapter concludes, whether a party's consent is in law "consensual", hence "responsible", translates into the fundamental question of whether it has been exploitatively accepted or procured by the other party. A contract procured through exploitation will be defeasible at the option of the victim of such action.

Chapter Four argues that the concept of "exploitation" lies at the logical core of the traditional heads of relief in the context of contract formation. In particular, this applies to those doctrines traditionally considered to "police" the conduct of negotiations, and customarily collected under a broad "unconscionability" rubric. Exploitation, which involves illegitimate advantage-taking, or a wrongful use of one party's superior bargaining position relative to another, is purely a process-oriented conception. Substantive considerations, such as the relative distribution of benefits and burdens under the resultant contract, are relevant only to the extent that they evidence an alleged procedural abuse. The unfairness, or wrongness, in acts of exploitation resides in the self-interested exercise of one's bargaining power over another in circumstances where one is strongly duty-bound actually to protect—to have proper regard for the interests of—that other who is peculiarly susceptible to the exercise of such interpersonal power. Exploitation, the chapter argues, can be either "active" or "passive" depending on whether the superior party contributed causally to the other party's exploitable circumstances, or whether he merely accepted a contractual benefit while knowing or having reason to know of the peculiar circumstances giving rise to his strong moral-cum-legal obligation positively to assist that other party. In Australian law, these ideas are centrally exemplified through the unconscionable dealings doctrine in equity.

Chapters Five and Six are concerned with improper pressure or influence in contract formation as cardinal instances of actual or presumed "active" exploitation, or manipulation. Pressure may be wrongful of its own nature, such as where an illegitimate threat is made to "coerce" another's contractual assent (Chapter Five: duress), or by reason of some special
relationship of trust or responsibility in which the influencer stands to his victim, and on account of which the law is prepared to presume that the peculiar influence arising from the parties’ special relation was unduly exercised by the ascendant party receiving or directing the receipt of a contractual benefit within the scope of the relation (Chapter Six: relational undue influence).

Chapters Seven, Eight and Nine are concerned with exploitation of asymmetric information in the procurement of bargain transactions. Specifically, Chapter Seven considers “misleading or deceptive conduct” as an example of active exploitation. Subject to the minimal “justifiable reliance” criterion in this context, misleading conduct potentially jeopardises the integrity of the bargaining process and creates exploitable circumstances. Chapter Eight’s burden is unilateral mistake in equity, where it is argued that equity’s jurisdiction to grant relief for the exploitation of a known unilateral mistake is, analytically, a limited and specific manifestation of the unconscionable dealings jurisdiction considered in Chapter Four. Chapter Nine advances similar arguments in relation to nondisclosure in contract formation generally, although it concludes by emphasising the need for unconscionable dealings’s critical focus to be sharpened by a system of risk analysis in the context of so-called “transactional disadvantage”.

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