

*Stephen Waddams, Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment*, (Cambridge, Cambridge University Press), 235 pp (hb), price: £85.

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This book reinvigorates the debate about the place of substantive fairness in contract law. Its central argument is that it is time we recognised a general judicial power to relieve against highly unreasonable contracts. The book suggests that in fact the courts have been modifying such contracts for a long time both in equity and at common law, but that anomalies, inconsistencies and gaps remain, which make the recognition of a residual judicial power to modify contracts on this ground desirable; and it invokes the concept of unjust or disproportionate enrichment as a justification for judicial intervention. The book is elegantly and succinctly written, and the breadth and depth of Professor Waddams' scholarship is apparent. He mounts a strong challenge to the received wisdom that questions of fairness are predominantly the preserve of equity, substantive fairness must inevitably defer to the need for certainty, and the freedom to make bad contracts requires courts to enforce such agreements to their full extent even when enforcement 'results in the extravagant enrichment of the advantaged party.' (p7)

The first part of the book offers an account of the ways in which equity and the common law already address substantive unfairness. Equity's approach to questions of fairness in a contractual setting is well traversed ground. Nevertheless, chapter 2 usefully reveals a longstanding judicial concern to prevent the unjust or disproportionate enrichment of the party seeking to enforce the contract as underlying equitable rescission for mistake, misrepresentation, undue influence and unconscionable bargains, and relief against penalties and forfeiture. Chapter 3 convincingly argues that 'the presence of highly unreasonable terms, particularly where they confer a disproportionate benefit on the disadvantaged party' is centrally relevant to the unenforceability of contracts at common law for duress (p52). Further support for this argument may be found in 'lawful act' duress, such as *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718 and *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm).

Chapter 4 explores how the doctrines of interpretation and implication of terms have also been deployed as techniques for controlling highly unreasonable results. It focuses on the recent Supreme Court decision in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 as an example of the limits to the courts' willingness to use the doctrine of interpretation in this way. The case concerned a fixed service charge clause in a lease which contained a formula for calculating the amount payable and regular increases. As Professor Waddams explains, its primary purpose was to ensure that maintenance expenses were fairly allocated between lessees of a property and the lessor; yet strictly interpreted it imposed a fixed service charge subject to annually compounded increases, which would subject the lessees 'to lifelong and ruinous obligations that they could not avoid even by abandoning the leases' (p55). Although Professor Waddams accepts that interpretation could not be a satisfactory basis for a power to intervene and modify the effects of the contract in *Arnold* (p69), he argues that it is precisely the type of case where the courts have and *should* exercise a residual power 'to modify contractual provisions that have disproportionate and extravagant results'. (p56) The chapter draws analogies between the equity's readiness to grant relief for penalty and

forfeiture clauses 'where the primary purpose was to secure payment of another obligation' (ibid), and suggests that the power to intervene for which he argues could be justified as falling within the powers of the court as a court of equity or on the basis that it is necessary to avoid an abuse of rights or unjust enrichment.

Chapters 5 and 6 also focus on common law doctrines. Chapter 5 argues that although in principle we conceive of a contractual right as giving a right to performance, that right is cut down by the rules of remoteness and the frequent denial of punitive damages and gain-based awards, and the line is drawn at the point where enforcement would lead to highly unreasonable results. Chapter 6 tackles the topical and urgent question of the conclusiveness of documents in the digital age. It argues that we often elide the two senses in which 'contract' may be understood: as an agreement and as the document containing that agreement, and that the exceptions to the parol evidence rule show the courts' willingness to modify contractual documents to avoid highly unreasonable results. It concludes that the elision of sanctity of contract with sanctity of contractual documents and the extension of these ideas to electronic documents (where actual consent is rare), has 'stretched the concept of agreement beyond breaking point'. (117) In Professor Waddams' view, the recognition of a power to modify highly unreasonable contracts could operate as an exception to the conclusiveness of contractual documents and address some of these problems.

The central part of the book considers the appropriate basis for a power to modify highly unreasonable contracts. Chapter 7 discusses unconscionability, good faith and abuse of rights as possible grounds for the recognition of such a power and rejects them on the basis that although it may be possible to give unconscionability and good faith an objective meaning which would ground a power to avoid inequitable results, all three concepts can be interpreted restrictively to indicate wrongdoing. It argues that long as these concepts can be interpreted restrictively, none of them can do the work that would be necessary to ground a power to relieve against contracts that are highly unreasonable in a substantive sense, ie because they produce a disproportionately disadvantageous result for one party. This begs the question *why* a contract should be treated as highly unreasonable, and chapter 8 offers unjust enrichment as a justification. In doing so, it again draws parallels between *Arnold v Britton* and cases of relief from penalties and forfeiture, on the basis that in all three situations the mischief is that one party is unjustly enriched by the enforcement of a contractual clause that was ostensibly intended to achieve another purpose. The chapter goes on to examine the relationships between unjust enrichment and contract law on the one hand, and equity on the other, and suggests that considerations of unjust enrichment have always been highly relevant in both contexts.

The final part of the book asserts that the power for which Professor Waddams argues should be a judicial power rather than based on legislation (chapters 9-11). He concludes that contracts should be enforced unless they are 'highly unreasonable' and argues that a useful guide for the definition of this term lies in the avoidance of disproportionate enrichment (chapter 13).

Irrespective of whether one agrees with Professor Waddams as to where the line should be drawn between fairness and contractual certainty (for a review of the book which endorses the orthodox preference for certainty, see Morgan, [2020] 136 LQR 169, 172), this

book is a rich and thought-provoking contribution to private law scholarship, which makes some important and valuable points. For example, it neatly brings out the fact that concerns about unjust enrichment run through contractual doctrine and equitable principles. This is an important point which is underexplored in English law. It suggests that the Birksian bright line between unjust enrichment on the one hand and contract and equity, respectively, on the other, may be dimmer than previously thought. The discussion about electronic contracts and the need for contract law to adapt its traditional document-focused approach to doctrines such as interpretation, the extrinsic evidence rule and rectification is also significant and valuable. Inevitably, private law lags behind technological change, but the importance of developing doctrine sensibly to meet the needs of contracting parties cannot be understated.

Three additional points made by Professor Waddams prompt further discussion. First, whilst he suggests that the basis of the jurisdiction for which he argues is rooted in the old powers of the Court of Chancery to relieve against unfairness, he rejects the use of the language of conscience to describe the basis of equitable intervention. In his view, such language is outdated because of its moral overtones and not particularly reliable in its meaning. However, if we accept that equity acts to supplement and complement rather than undermine the common law, the language of conscience is arguably not merely of historical significance and, properly understood, it does useful work in private law. It helps us to understand the moral significance of factual knowledge in the recognition and enforcement of equitable duties; and it reminds us that the latter will be enforced and the exercise of contractual rights will be restrained only when there are good moral reasons for doing so. At the same time, its moral overtones alert us to the need for specificity of equitable (and moral) principle at doctrinal level. In these ways, it bolsters the authority of equity where it makes incursions into legal certainty in the interests of fairness (on this see: S. Agnew, 'The Meaning and Significance of Conscience in Private Law' (2018) 77 CLJ 479; and I. Samet, *Equity: Conscience Goes to Market* (OUP, 2018)).

Second, Professor Waddams argues that the ideas of unconscionability, good faith and abuse of rights are all capable of being interpreted narrowly to imply wrongdoing, the courts should have a power to relieve against substantive unfairness *per se*, and the term 'highly unreasonable' is more reliably apt to describe the basis for judicial intervention in such cases. It is worth noting that although equity has long been concerned with substantive fairness, it is rarely concerned *solely* with inequality of exchange. For example, whilst substantive unfairness is clearly relevant in some cases of equitable rescission (eg undue influence, unconscionable bargains), it is usually accompanied by some form of shabby conduct by one party, either in the form of active exploitation or simply by seeking to go ahead with the contract despite her knowledge that there are difficulties relating to the other party's consent. Even in a doctrine such as common mistake, where the only unfairness may appear to be substantive, the idea of unconscionability captures the defendant's moral fault in seeking to take advantage of the mistake by insisting on the enforcement of her strict contractual rights. Therefore, the implication of morally unacceptable conduct that flows from the use of the language of unconscionability is significant, and it fits with the idea that equity's role as a gloss on the common law is essentially self-limiting. Absent some moral fault on the part of the defendant in the creation or enforcement of her contractual rights, equity is usually reluctant to intervene. A similar point may be made regarding the concepts of bad faith and abuse of rights: they indicate that the law is reluctant to intervene on the

basis of inequality of exchange where neither party has acquired or sought to exercise her rights in a morally dubious way. If the courts *are* to intervene on the ground that a contract is 'highly unreasonable', then such a term must also be clearly explained, and a justification for intervention on that basis must be provided.

Third, Professor Waddams draws heavily on what he perceives to be a parallel between the facts in *Arnold v Britton* and the courts' approach to relief against penalties and forfeiture in support of his argument that the justification for intervention may be found in the principle against unjust enrichment. He argues that one of the objections to the strict enforcement of contractual provisions in forfeiture and penalty cases is 'the undue or disproportionate enrichment of the claimant, who may recover far more by strict enforcement than could reasonably have been expected from the ostensible purpose of the forfeiture or penalty clauses (that is, to give security for performance of the other party's principle obligation).' (p 15) By analogy, he suggests that the enforcement of the contract in *Arnold* conferred a disproportionate enrichment on the lessor in circumstances where the purpose of the clause was to allocate the maintenance expenses for the property fairly, and thus it was an appropriate case for the grant of relief on the ground that the contract was 'highly unreasonable'.

Superficially the analogy drawn by Professor Waddams is apt but the justification for which he argues requires more analysis. Arguably, the focus on the disproportionate enrichment of the party seeking to enforce a penalty clause is more to do with upholding the normative values of contract law than inequality of exchange *per se*. Integral to contract law is the idea that if a contract is breached, specific performance is usually not available but the next best thing – in the form of expectation damages – will be awarded. Thus, contract law measures and preserves the performance interest. To the extent that a penalty clause wildly exceeds the damages that the common law would award for breach, it diverges from this norm, and thus to uphold the clause would undermine the normative integrity of contract law itself. This helps to explain the prominence of the language of 'legitimate interest' relating to the performance of the primary obligation in *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67, [2016] AC 1172, eg [32] (Lord Neuberger). It is also consistent with Prince Saprai's treatment of penalties in his book, *Contract Law Without Foundations: Towards a Republican Theory of Contract Law* (OUP, 2019) (pp 163-70). Arguably, it is this normative feature – rather than inequality of exchange *per se* - which makes the enrichment arising from the enforcement of the penalty clause unjust. Similar arguments may be made about forfeiture clauses (see eg Saprai, p 170). It follows that the concern relating to penalty and forfeiture clauses is not that *any* contractual clause is being used for a purpose other than that for which it was intended. Rather, it is that a particular type of clause – one that is designed to secure the performance of a primary obligation (by stipulating that if that obligation is breached, a certain sum becomes payable or a right to certain sum already received is forfeited) - is being used for ulterior purposes.

In light of the above, the analogy with *Arnold v Britton* is not as straightforward as Professor Waddams' account suggests. In that case, the contested clause was simply a service charge clause containing a formula for calculation of the charge and relevant increases. It was *not* a clause designed to secure the performance of a primary obligation in the same way as a penalty or forfeiture clause. Therefore, even though the enforcement of

the clause resulted in a gross inequality of exchange, something more is required to explain why the enrichment of the lessor could be said to be 'unjust'. The lesson here perhaps is that inequality of exchange is not necessarily synonymous with substantive unfairness (Sapraï at p 121) *or* unjust enrichment. Therefore, if the case is to be made for a residual power to relieve against highly unreasonable contracts on the ground of undue or disproportionate enrichment, further analysis may be required to work out the basis for and parameters of such a jurisdiction.