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DELIMITING THE EXTENT OF THE APPLICABILITY OF THE EQUITABLE PRINCIPLE OF UNCONSCIONABLE BARGAINS IN CONTRACTS OF ADHESION

1. Introduction

It is a common phrase in commercial transactions that a "party should be held to his bargain". This implies that agreements which are neither contrary to the law, nor fraudulently entered into, are to be observed by parties in every manner and detail. The rationale behind this is that parties are allowed, within the law, to regulate their rights and liabilities themselves. The entire law of contract revolves around this legal circumference, and this injects certainty, purpose, orderliness and sanctity into commercial transactions.

In the absence of fraud, mistake, duress, illegality, or undue influence, an agreement entered voluntarily by parties must be honoured in good faith. A court is not expected to be a meddlesome interloper by engaging itself in the act of writing or rewriting agreements or bargains for parties.[2] However, where a bargain is seen to be unconscionable or where there has been equitable fraud, victimisation, overreaching or other such palpable inequity or unfairness which shocks the conscience, equity will be justified to come to the assistance of the affected party to avoid the bargain.[3]

This paper considers the meaning and nature of contracts of adhesion; the length and breadth of the equitable principle of unconscionable bargains; and specific instances

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2 See, Willaims v. Williams & Ors. (2014) LPELR – 22642 (CA) at p. 42.
3 See the views of Honourable Justice Uwaifo, JSC, in the case of Alhaji Musa Bua v. Bashiru Dauda (2003) 13 NWLR (Pt. 838) 657 (SC) at p. 683, paras. C – F.

where the sanctity and inviolability of contracts of adhesion will triumph over the equitable principle of unconscionable bargains.

2. Meaning and Nature of Contract of Adhesion

A contract of adhesion is a "standard form contract" where parties are not equal in their bargaining positions. It is a contract that is concentrated in relatively few hands and the terms are usually not negotiated between the parties. In such a situation, the party with the bargaining power dictates the terms while the weaker party is presented with a form and asked to "sign here"; and he does. This presents the weaker party in the transaction with a "take it or leave it" opportunity.[4]

While the categories of contracts of adhesion are not closed but remain flexible,[5] some examples are worthy of mention. They include Contract of Air Carriage;[6] Sublease Agreement;[7] Copyright Agreement with a music publisher;[8] Contract between Artistes, particularly Composers and Musicians, on the one end, and their Business Managers, Recording Companies or Publishing Houses, on the other end;[9] Mortgage and Loan Agreements; Rental Agreements; Medical Contracts with a healthcare provider; Insurance Contracts; Housing Agreements; and Automated Teller Machine (ATM) Card Agreements.

3. Meaning and Nature of Unconscionable Bargains

This term is an offshoot of the equitable jurisdiction of a court[10] and it is used to describe a contract, transaction or bargain that does not depict an arm's length

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4 See the case of Sonnar (Nigeria) Limited & Anor. v. Partenreedri M. S. Nordwind Owners of the Ship M. V. Nordwind & Anor. (1987) LPELR – 3494 (SC) at pp. 26 – 27, paras. C – D, per Honourable Justice Kayode Eso, JSC.

5 This flexibility has created room for the emergence of Electronic Contracts of Adhesion. The most notable forms of Electronic Contracts of Adhesion are the Browse-wrap Contract; the Click-wrap Contract; and the Sign-in-wrap Contract.

6 See the case of KLM Royal Dutch Airlines v. Anthony Idehen (2017) LPELR – 43575 (CA) at pp. 36 – 37, paras. C – B, where Honourable Justice Abimbola Osarugue Obaseki-Adejumo, JCA, commented as follows: "*The contract on Air Carriage is fee-based actual adhesion contract. When a passenger has purchased a ticket, he gives his consent to the terms, conditions and suggested route hereof. Likewise the airline is bound by the relevant terms and conditions applicable to it. The contract is certified by the passenger's ticket and baggage check, of which these terms and notifications are a part*." See also, Air France v. Mutiu Adeola Olundegun (2017) LPELR – 44951 (CA) at pp. pp. 25 – 29, paras. B – B.

7 See, Brandscapital Limited v. Chief Adebola Disu-Ige & Ors (2018) LPELR – 44812 (CA).

8 See, Clifford Davis Management v. W. E. A. Records (1975) 1 W. L. R. 61 at p. 65.

9 See, Schroeder Music Publishing Co. Ltd. v. Macaulay (1974) 1 W. L. R. 1308 at p. 1315.

10 This equitable principle of "Unconscionability" holds sway in many Common Law jurisdictions. In Civil Law jurisdictions, the legal doctrine of "Abusive Clauses" has been developed and applied in places such as Colombia and Poland to promote the same objectives and purposes. In Netherlands

transaction.[11] Put differently, it is a transaction that is fraught with unfairness and lack of honesty in the terms and conditions of the bargain, portraying that one party had taken advantage of the other.[12] In the case of **Alhaji Musa Bua v. Bashiru Dauda**,[13] the Supreme Court extensively commented as follows:

> *There are cases where a bargain is seen to be unconscionable or where there has been equitable fraud, victimization, taking of advantage, overreaching or other such palpable inequity or unfairness which affected the conscience of the plaintiff and which might justify the intervention of equity to come to his assistance to avoid the bargain. In the case of Hart v. O. Connor (1985) AC 1000 at 1024; (1985) 2 All ER 880 at 89 1-892, Lord Brightman delivering the judgment of the Privy Council observed thus:*
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> > *"In the opinion of their Lordships it is perfectly plain that historically* ***a court of equity did not restrain a suit at law on the ground of 'unfairness' unless the conscience of the plaintiff was in some way affected****. This might be because of actual fraud (which the courts of common law would equally have remedied) or* ***constructive fraud, i.e. conduct which falls below the standards demanded by equity, traditionally considered under its more common manifestations of undue influence, abuse of confidence, unconscionable bargains and frauds on a power*** *..... **An unconscionable bargain in this context would be a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction**. 'Fraud' in its equitable context does not mean, or is not confined to, deceit: 'it means an unconscientious use of the power arising out of [the] circumstances and conditions [of the contracting parties] see Earl of Aylesford v. Morris (1873) LR 8 Ch App 484 at 490-*

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and Indonesia, it is called the doctrine of "Abuse of Circumstances (*Misbruik Van Omstandigheden*)".

11 See, Brandscapital Limited v. Chief Adebola Disu-Ige & Ors (2018) LPELR – 44812 (CA), per Honourable Justice Ogakwu, JCA.

12 See the case of Tonique Oil Services Limited v. Virgin Forest Energy Limited (2021) LPELR – 53305 (CA) at p. 26, paras. C – E, per Honourable Justice Balkisu Bello Aliyu, JCA.

13 (2003) 13 NWLR (Pt. 838) 657 (SC).

491, [1861-73] All ER Rep 300 at 303. It is victimization, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances."[14]

4. <u>How to identify an Unconscionable Bargain in a Contract of Adhesion:</u>

Most times, resort is had to principles laid down by case law in ascertaining an unconscionable term in a contract of adhesion. In **Gillespee Bros. and Co. Ltd. v. Roy Bowles Transport Ltd.**,[15] the "*Reasonableness Test*" was suggested by Lord Denning as an objective standard to easily provide an answer to the intractable problems posed by contracts of this nature. In this case, Lord Denning considered an unreasonable indemnity clause in a contract and questioned whether courts are meant to permit a party to enforce an unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable. In providing a pathway for progress on this point, Lord Denning opined:

> *When it gets to this point, I would say as I said many years ago, '…. There is the vigilance of the common law which, while allowing freedom of contracts, watches to see that it is not abused.' It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so.*[16]

The test to identify unconscionable bargain was better expressed in the case of **Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd**.,[17] where it was observed that three elements have to be present and identifiable before a court can interfere in a contract on the ground of unconscionability. These vital elements are set out below:

(i) It must be shown that one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that the circumstances existed of which unfair advantage could be taken.

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14 Page 683, at paras. C – H, per Honourable Justice Uwaifo, JSC (emphasis mine).

15 (1973) Q. B. 400. It is important to note that the "*Reasonableness Test*" laid down in *Gillespee's Case* was cited and approved by the Nigerian Supreme Court in the case of Sonnar (Nigeria) Limited & Anor. v. Partenreedri M. S. Nordwind Owners of the Ship M. V. Nordwind & Anor. (1987) LPELR – 3494 (SC) at pp. 26 – 27, paras. G – A, where Honourable Justice Kayode Eso, JSC, held: "*In this country, there could be a recourse to the common law for, in Gillespee Bros. and Co. Ltd. v. Row Bowles Transport Ltd. 1973 Q.B. 400 Lord Denning suggested the reasonableness test. An objective test of reasonableness could easily be an answer to the problem posed by contracts of the nature that imports inequality in the parties.*"

16 Page 416, per Lord Denning, M. R.

17 (1983) 1 W. L. R. 87.

(ii) It must be shown that this weakness of one party has been exploited by the other party in some morally culpable manner.

(iii) It must be shown that the resulting transaction has been not merely hard or improvident, but overreaching and oppressive.[18]

While identifying an unconscionable bargain in a contract of adhesion, courts will appraise such a contract through the lens of two important subsets of unconscionability: Procedural Unconscionability and Substantive Unconscionability. This position was buttressed in the Halsbury's Laws of England[19] as follows:

> ***Where by reason of the unfair manner in which it was brought into existence ('procedural unfairness') as where it was induced by undue influence, or where it came into being through an unconscientious use of the power arising out of the circumstances and conditions of the contradicting parties****; in such cases equity may give a remedy; but where by reason of the fact that the terms of the contract are more unfavourable to one party than to the other ('contractual imbalance'), contractual or inadequacy of consideration is not, however, in itself a ground for relief in equity, but it may be an element in establishing such fraud as will avoid the transaction, or* ***the transaction may be so unconscionable as to afford in itself evidence of fraud****.*
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> *A bargain cannot be unfair and unconscionable, however, unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say in a way which affects his conscience, as by taking advantage of the weakness or necessity of the other.[20] (Emphasis mine)*

(a) Procedural Unconscionability: This approach is concerned with the assessment of the civility and reasonableness of the journey that led to the consummation of the contract of adhesion. It appraises the formation process of the said contract and seeks to ascertain, for example, whether the contract

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18 Supra, pp. 94 – 95, per Peter Millett, QC (sitting as a deputy High Court Judge).

19 Halsbury's Laws of England, 4th Edn., Reissue, Vol. 16, Equity, cited in AdvocateKhoj, '*Unconscionability at Common Law in United Kingdom*' (AdvocateKhoj, Law Library) <https://www.advocatekhoj.com/library/lawreports/unfair/46.php?Title=Unfair%20(Procedural%20and%20Substantive)%20Terms%20in%20Contract&STitle=Unconscionability%20at%20Common%20Law%20in%20United%20Kingdom> accessed 3 October 2024.

20 Ibid, at para. 673.

was made predominantly from a position of oppression or wrongdoing. This can be deciphered by locating, for example, elements that portray undue influence, duress or undue advantage in the formation of the contract.

(b) Substantive Unconscionability: This approach concentrates on the purport and substance of the actual terms contained in the contract of adhesion in the light of the perceived weakness of the other party. It x-rays the terms of the contract to ascertain whether they are so morally reprehensible as to afford evidence of fraud. This can be deciphered by ascertaining, for example, whether there are unfair exemption clauses or excessive prices in the contract.

5. <u>Duty of a party relying on the principle of Unconscionable Bargains:</u>

Where a party intends to rely on facts establishing the equitable principle of unconscionable bargains, such a party must plead and prove this assertion with sufficient and credible evidence.[21] The law requires a party who relies on a special defence to specifically plead it[22] and this requirement extends to equitable defences.[23]

In fact, Order 15 Rule 7(1) and (2) of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018, mandates that grounds for defence which makes an action unmaintainable; or which makes a transaction void or voidable; or which if not raised will take the opposing party by surprise, must be specifically pleaded. For emphasis, the said provision states as follows:

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21 See the following cases: Brandscapital Limited v. Chief Adebola Disu-Ige & Ors. (2018) LPELR – 44812 (CA) at pp. 19 – 27, paras. B – C; and Tonique Oil Services Limited v. Virgin Forest Energy Limited (2021) LPELR – 53305 (CA) at p. 26, para. G.

22 See, Afolabi v. Ola (2016) LPELR – 40186 (CA) at p. 30, para. D.

23 The Supreme Court in the case of Adebanjo v. Brown (1990) 3 NWLR (Pt. 141) 661 (SC) at pp. 677 - 678 departed from its earlier position in Ibenwelu v. Lawal (1971) 1 All NLR 23 (SC) at p. 24 by holding that it is not necessary to plead an equitable defence in a special form so long as it is stated in a manner to show that it is relied upon. This free-flowing position was followed by the Supreme Court and the Court of Appeal in a plethora of cases, including the following: Abisi v. Ekwealor (1993) 6 NWLR (Pt. 302) 643; Nigerian Bank for Commerce and Industries v. Integrated Gas (Nig.) Ltd. & Anor. (2005) 1 SCNJ 104 at p. 117; and First City Monument Bank PLC v. Benbok Limited (2014) LPELR - 23505 (CA). However, the Supreme Court in the recent case of Rufus Isaac v. John Odigie Imasuen (2016) LPELR - 26066 (SC) at pp. 8 - 10, paras. F - B; pp. 12 - 13, paras. E - D; and at pp. 15 - 16, paras. E - A, reverted to its previous position that equitable defences, when raised, must be specifically pleaded. This current position of the law on the need to specifically plead equitable defences has been religiously followed by the Court of Appeal in two recent cases: Fidelix O. Nweke v. Godwin Garba Chagwa & Anor. (2022) LPELR - 58833 (CA) at pp. 38 - 44, paras. F - B; and at pp. 47 - 49, paras. E - E; and Daniel Magaji Abubakar v. Sule Ibrahim & Ors. (2022) LPELR - 58303 (CA) at pp. 11 - 17, paras. B - A.

a) *All grounds of defence or* ***reply which makes an action unmaintainable or if not raised will take the opposing party by surprise … shall be specifically pleaded****.*

b) *Where a party raises any ground* ***which makes a transaction void or voidable …..by any enactment or common law, he shall specifically plead it****.*[24] *(Emphasis mine)*

Where a party fails to specifically plead a special or an equitable defence, such a party cannot import same into his legal submissions before the Court. Any attempt to transgress this settled position of the law will end with the Court discountenancing such a belated importation.[25] In the case of **Hajiya Lami Misa v. Bashiru Ahmad**,[26] the Court of Appeal held that:

> ***A defendant such as the Appellant is not entitled to rely upon a defence which is based upon a fact not pleaded in the statement of defence****. The facts a defendant alleges and relies upon must be stated specifically in the statement of defence by way of special defence.* ***The onus is on the defendant to specifically plead in the statement of defence that there exists a failure of a condition precedent to found the plaintiffs claim. He must plead facts necessary for raising a special defence and any condition precedent which is necessary to show that the plaintiff's action is not maintainable to avoid surprise to the plaintiff****. See Isaac vs. Imaseun (2016) LPELR – 26066 SC pages 8 – 10 per Muhammad JSC and the decision of this Court in Shell Pet. Dev. Co. Vs. Burutu L. G. C. (1998) 9 NWLR (Pt. 565) 318 and Musa vs. Isa (2001) 13 WRN 187.*
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> *….* ***It is clear from the foregoing that the Appellant did not plead the issue of Governor's consent. He wrongly sought to import it in his arguments. The Court below should have discountenanced it****.*[27] *(Emphasis mine)*

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24 See also, Order 15 Rule 7(1) and (2) of the new High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2025 which will come into effect on 3rd March, 2025.

25 See, Rufus Isaac v. John Odigie Imasuen (2016) LPELR - 26066 (SC) at pp. 8 - 10, paras. F - B.

26 (2018) LPELR – 44247 (CA).

27 Hajiya Lami Misa, at p. 18, paras. B – F and at p. 20, para. A, per Honourable Justice James Shehu Abiriyi, JCA.

6. Instances where the Equitable Principle of Unconscionable Bargains will not apply

As a handmaid of equity, the principle of unconscionable bargains is not cast in stone. Its application is delimited or outrightly rendered inapplicable by certain factual circumstances and these circumstances apply to contracts of adhesion. Some of them are discussed below.

6.1 Affirmation of the contract:

Where a party who has been badly hit by an unconscionable bargain affirms the contract of adhesion, he cannot afterwards seek to rescind same. Affirmation, in this context, occurs when the party subsequently either declares his intention to continue with the contract or does some act from which such an intention can be inferred.[28] However, where the affected party takes prompt legal action to rescind the contract, it does not amount to affirmation, even if in the interim, he continues in possession or management of the subject matter of the contract.[29]

6.2 Lapse of time (Laches and Acquiescence):

If a party discovers the unconscionable bargain and fails or neglects to take prompt steps to avoid the contract of adhesion, then such a party may not be able to set it aside subsequently. This is because a conscious delay presupposes a satisfaction and confirmation of the contract which was initially voidable. However, the timeframe in each case depends on the peculiarity of the contract and the time of discovery of the bad bargain. In the case of **Alhaji Musa Bua v. Bashiru Dauda**,[30] the Supreme Court held:

> *It is an equitable jurisdiction that the courts exercise to rescind such unconscionable transaction.* ***It follows therefore that reasonable steps must be taken to avoid a transaction*** *founded on undue* ***influence in order not to be caught by laches and acquiescence****: see Goldsworthy v. Bridewell (1987) Ch. 378 at 4 10; Nasr* ***v.*** *Rossek (supra) at page 551.* ***The respondent took prompt action to have the transaction set aside as soon as it dawned on him that he had become a victim*** *of the influence of the 1st defendant.[31] (Emphasis mine)*

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28 See, Long v. Lloyd (1958) 1 WLR 753.

29 See, Kupchak v. Dayson Holdings Co. Ltd (1965) 53 DLR 2d. 482.

30 (2003) 13 NWLR (Pt. 838) 657 (SC).

31 Ibid, at pp. 686 – 687, paras. G – A, per Honourable Justice Mohammed, JSC.

In the case of **First Bank of Nigeria PLC v. Funso Akinyosoye**,[32] the Court Appeal applied the maxim, "equity aids the vigilant and not the indolent"[33] and concluded thus:

> ***Equity aids the vigilant and not the indolent**. In the instant case, the delay by the respondent/cross-appellant for a period of eleven years before seeking to void the contract for the transfer of the two properties could not have been said to have been made timeously. **He waited for too long a time to raise it and the action was caught by laches and acquiescence. Moreso, as a legal practitioner, he was deemed to know the effect of the delay**.[34] (Emphasis mine)*

6.3 **Where the complaining party had Competent and Independent Advice:**

Where the complaining party had competent and independent advice, legal or otherwise, before proceeding to sign the contract of adhesion, the complaint of unconscionable bargain will be worthless.[35] Also, where the independent advice has been given, failure of the party to take it, does not affect the validity of the contract.[36] The deciding factor is that the advice was indeed given.[37] In the celebrated case of **Lloyd's Bank Ltd. v. Bundy**,[38] Lord Denning, while propounding the principle of "Inequality of Bargaining Power", addressed this point, as follows:

> *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 reliefs 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 ignorance or infirmity, coupled with undue influences or pressure*

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32 (2005) 5 NWLR (Pt. 918) 340 (CA).

33 This is expressed in Latin as *vigilantibus et non dormientibus lex succurrit*.

34 See, p. 398, at paras. B – C.

35 This is because the independent advice exterminates every tinge of undue influence, duress and/or inequality of bargaining power. The Court of Appeal confirmed this position in the case of Stephen O. Abatan v. Dr. Momodu Awudu (2004) 17 NWLR (Pt. 902) 430 (CA) at p. 443, paras. B - C, as follows: "*In order to rebut the presumption of undue influence, **evidence must be adduced to satisfy the court that the donor was acting independently of any influence from the donee and with full appreciation of what he was doing. The most usual though not the only way of rebutting the presumption is to prove that the donor had competent and independent advice**. See Morley v. Loughnan (1893) 1 Ch.D 736 at 752.*" (Emphasis mine)

36 See, Eni Eja Alobo, *Modern Nigerian Law of Contract* (University of Calabar Press, 2012) 379.

37 See, Asari E. Young, *Nigerian Law of Contract* (Clear Lines Publication Limited, 2004) 313.

38 (1975) Q. B. 326.

brought to bear on him by or for the benefit of the other.[39] *(Emphasis mine).*

6.4 **Where the complaining party has already benefitted from the contract:**

Where the complaining party has already benefitted from the contract of adhesion, any attempt by such a party to raise and rely on the principle of unconscionable bargains will be taken by the Court as a ploy to evade accountability and liability. This position is validated by the fact that the law finds it fraudulent and even unconscionable for a party to turn around and challenge a contract he has benefitted from. In the case of **Socacic West Africa Nigeria Limited v. Accessfield Nigeria Limited**,[40] the Court of Appeal had this to say:

> ***A party who has taken benefit of a contract cannot turn around from his contractual undertakings and obligations in a bid to obviate his liabilities****. See MATAB OIL & GAS LTD V. F. F. S. LTD. (2020) 17 NWLR (Pt. 1752) CA.* ***Turning around to challenge a contract which one has benefitted from seems to me like fraud****, as parties are bound by their agreement.*[41] *(Emphasis mine)*

Again, in the case of **Mrs. Philip Adebola Adewunmi & Ors. v. Adedoyin Okunade & Ors.**,[42] the Court of Appeal restated that:

> ***A party cannot in law and in equity be allowed to take benefit under a document and then run round to challenge the legality of the same document****. She cannot eat her cake and have it back again. See Ajuwon & Ors vs. Governor of Oyo State & Ors. (2021) LPELR – 55339 (SC); Nasko & Anor vs. Bello & Ors. (2020) LPELR – 52530.*[43]

6.5 **Allegation of inadequacy of consideration or Contractual favoritism of a particular party:**

Where the allegation is merely that the terms of the contract of adhesion are more unfavourable to one party than to the other or that the terms of the contract reeks of inadequacy of consideration, the principle of unconscionable bargains will not apply.[44]

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39 Ibid, at p. 339.

40 (2021) LPELR 56405 (CA).

41 Ibid, at p. 34, paras. A – C, per Honourable Justice Uchechukwu Onyemenam, JCA.

42 (2021) LPELR – 56212 (CA).

43 Ibid, at p. 36, paras. A – B, per Honourable Justice M. I. Sirajo, JCA (emphasis mine).

44 See the restatement of this position concerning "contractual imbalance" in Halsbury's Laws of England (n19) above.

The Court of Appeal in the case of **First Bank of Nigeria PLC v. Funso Akinyosoye**,[45] commented on this point, thus:

> ***The mere fact that a transaction is based on an inadequate consideration or is otherwise improvident, unreasonable or unjust is not, in itself, any ground upon which the transaction can be set aside as invalid. The law in general leaves every man at liberty to make such bargains as he pleases; and however improvident, unreasonable or unjust such bargains or disposition may be, they are binding on every party to them unless he can prove affirmatively the existence of one of the recognized invalidating circumstances*** *such as fraud or undue influence. In the instant case, given the respondent's status, standing and position, being fully aware of the situational implication of the circumstances, it cannot be said that the appellant exerted dominance over the respondent.*[46] *(Emphasis mine)*

6.6 **<u>Bill of Lading and other high-class contracts on international standards:</u>**

There are some "high-class contracts" that the law has elevated to the enviable pedestal of arm's length contracts, irrespective of their actual terms. Bills of Lading and other contracts on international standards fall within this category. This remains the situation because courts of law believe that the stakes are too high for a party to enter such high-class contracts as an underdog or a weakling. In the case of **Sonnar (Nigeria) Limited & Anor. v. Partenreedri M. S. Nordwind Owners of the Ship M. V. Nordwind & Anor.**,[47] the Supreme Court confirmed the existence of this exclusive category in the following words:

> *However,* ***in so far as the law of Bill of Lading is concerned, these are contracts on international standard and I think one could hardly fault the reasoning of the Court in The Makefjell supra****:*
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> *"When a clause of this kind is introduced into a contract it must be supposed that the parties consider that, in general, trial in the places mentioned in the clause is more convenient than trial elsewhere."*

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45 (2005) 5 NWLR (Pt. 918) 340 (CA).

46 Ibid, at p. 384, paras. E – F. See also, the views of Lord Scarman on this point in the case of National Westminster Bank v. Morgan (1985) 1 All ER 821.

47 (1987) LPELR – 3494 (SC).

> ***The parties are at arm's length in contracts of this nature. They are arrangements, too sophisticated to import an underdog. They are arrangements about high class contracts. And that is why both parties to this case agree that subject to exceptions, Pacta Servanda Sunt.***[48] *(Emphasis mine)*

6.7 **Lack of knowledge of the incapacity of the other contracting party:**

Where a party acted in complete innocence and was unaware of the incapacity of the other contracting party, then, there is no unconscionable bargain. In the case of **Thomas Bruce Hart v. Joseph O'Connor**,[49] the Court refused to set aside the contract based on unconscionable bargains, in the following words:

> *This issue must also be answered in the negative, because **Mr. Hart was guilty of no unconscionable conduct**. Indeed, as is conceded, **he acted with complete innocence throughout. He was unaware of Jack's [ie O'Çonnor's] unsoundness of mind**…. There was no equitable fraud, no victimisation, no taking advantage, no over-reaching or other description of unconscionable doings which might have justified the intervention of equity….*[50] *(Emphasis mine)*

6.8 **Where the complaining party or his Solicitor prepared the contract:**

Where a contract or an agreement was prepared by a party or his solicitor, such a party cannot turn round and allege unfair terms or unconscionable bargain in the absence of fraud, mistake, deceit or misrepresentation. In the case of **Mrs. Felicia Aguomuo v. Edo Co-operative Federation Limited**,[51] the Court of Appeal extensively held as follows:

> *In the instant case, **the contention of the learned counsel for the Appellant is that clause 2(a) of Exhibit B (Tenancy Agreement) which sought to fix rent payable by the subtenants in each of the 12 room stores at N2000 is to the extent of such fixture oppressive, and unfair to the Appellant and therefore unconscionable and ought not to have been relied on and enforced by the trial Court**. …. The said paragraph 2(a) might have been inelegantly drafted without taking into consideration the dynamics of our economic system having regard to the fluctuating*

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48 Ibid, at p. 27, paras. A – E, per Honourable Justice Kayode Eso, JSC.
49 (1985) UKPC 1.
50 Ibid, at p. 13, per Lord Brightman.
51 (2020) LPELR – 50381 (CA).

nature of the Naira and that rents hardly remain static except where strictly stated as in this case. ***Ironically, from the evidence and submission of counsel, the appellants counsel was honoured with the privilege of preparing the tenancy agreement and he found it expedient to so incorporate paragraph 2(a) which the Respondent endorsed and executed without much ado.*** *…. In this regard* ***the contention by learned counsel for the Appellant that paragraph 2(a) of Exhibit B is oppressive, unfair and therefore unconscionable and should therefore not be enforced is not sustainable. Moreso, that there is no evidence of fraud, deceit or misrepresentation and that the whole agreement was prepared by the Appellants counsel who signed same with the Respondent without any proof of compulsion****.*[52] *(Emphasis mine)*

7. Conclusion and Recommendation

Since the equitable principle of unconscionable bargains in contracts of adhesion is predicated on the notion of "*the strong pushing the weak to the wall*", it becomes necessary for a party to maintain an objective balance in the formation and execution of contracts of adhesion. It is noteworthy that the application of the equitable principle of Unconscionable Bargains in Contracts of Adhesion is not a one-way affair. It can be delimited or outrightly rendered inapplicable by certain factual circumstances, some of which include affirmation of the contract; lapse of time; presence of independent advice; reaping or taking benefits from the contract; lack of knowledge of the incapacity of the other contracting party; and where the contract is a Bill of Lading or other high-class contracts on international standards. Consequently, a party that intends to rely on the equitable principle of Unconscionable Bargains in Contracts of Adhesion must pay great attention to the length and breadth of the said principle and the factual situation of his case.

In this wise, this author recommends the use of the "*Independent Advice Clause*" in contracts of adhesion. A basic draft of this clause is set out below:

> *Party XYZ warrants and represents that he has been advised by Party ABC with respect to the negotiation and execution of this Agreement to seek counsel from an independent expert of his own choice in the concerned field and that he has done so.*

[52] Ibid, at pp. 17 – 18, paras. F – A; at p. 19, paras. B – D; and at pp. 20 – 21, paras. E – A.

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