

Does the ucta and
ucttr impede on the
freedom of contract
essay sample



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When discussing whether contract law impedes freedom of contract in favor of consumer protection, it is first important to define both freedom of contract and consumer protection in order to ensure a clear and thorough understanding is obtained. The discussion will advance to look into how the concept of freedom of contract originated and how contract law has shifted towards enhancing consumer protection. These grounds lay the foundation towards a complete understanding of the full notion of the essay.

The critical discussion will begin by illustrating how vitiating doctrines directly and indirectly restrict freedom of contract. Then proceed to look at how certain statutes and case law have made a big difference towards the restriction of freedom of contract and the enrichment of consumer protection. Furthermore, the essay will move to analyze the justification towards the shift by looking at two key reasons: standard form contracts and unequal bargaining power.

Finally, critically observe whether this movement is the right thing to do and the consequences that could follow as a result of restricting freedom of contract. The purpose of the content outlined below is not to just merely discuss the different grounds to the question at hand but to present an impartial essay through critical discussions and justifications with the use of different forms of research ranging from academic commentary to case law. This will ensure that the reader can understand the entirety of the context from start to finish and an impartial answer is reached.

The full concept of 'freedom of contract' is difficult to grasp within one single definition, however Mindy Whishart is clear in defining it to its simplest

form: " Freedom of contract demands that parties be given complete choice whether, when, and to what they bind themselves via contracts. " [1] The main purpose of this is to reach an extensive range of outcomes because parties do not want to be burdened with restrictions towards making good bargains, as what might be a good bargain to one party may not be to another.

It has also been stated that it is for the better of the economy " Contractual exchanges maximize individual and, overall wealth...parties will only contract to obtain something they value more. "[2] There is no current agreed legal definition of consumer protection, as it is not archaic within contract law. It can be defined as ' a concept, which aims to ensure fair competition and equal bargaining power in the marketplace in order to protect the consumer. The main issue is that consumers are most at risk towards unequal bargains because they do not possess ' equal negotiating power'[3] and recent consumer protection statutes such as the Unfair Contract Terms Act 1977[4] and common law aims to ensure this does not happen.

The origination of freedom of contract could be said to have been within the 19th century when the concept ' classical law of contract' was born. "

Classical Law contract reflects laissez-faire economic attitudes within the 19th century. [5] Personal freedom and wealth were defined as going hand in hand with the freedom of contract. [6] The view then was that each party was sovereign; it is up to them to decide what terms they wish to contract.

The law was said to play a minimal role in limitations and contract law should be clear. [7]

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Those notions were reinforced through the caricature paradigm contract. “ This presumed equality between parties, the contract is negotiated and therefore fair, contract has clear boundaries and contract parties act out of self interest and adopt an adversarial stance. [8] This model was the main model that resolved cases. The shift from freedom of contract towards consumer protection happened in the 20th century when the UCTA 1977 first came into force.

There were a lot of conflicting views, such as that of Lord Wilberforce and Lord Diplock in 1980. [9] However those conflicting discussions did not last long, because individuals soon sensed and agreed that there was a need for equality, fairness to facilitate the market, even for those small businesses and not hinder our economy.

Therefore it is clear that freedom of contract has shifted to a huge extent to uphold the key principles of equality and fairness. It is crucial to illustrate the vitiation doctrines that were used to limit freedom of contract and partially protect any type of consumer before UCTA 1997 and UTCCR 1999 came into force and treated the main root of the problem. The duress doctrine serves the purpose of declaring a contract void if entered in through illegitimate pressure.

For example if an individual holds a knife to your throat and says ‘ sign or I will kill you’, that contract would not be enforced through the use of this vitiation doctrine. Lord Wilberforce stated in *Barton v Armstrong*[10]: “ In life...many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act.

Absence of choice in this sense does not negate consent in law: for this the pressure must be one of the kind which the law does not regard as legitimate. [11]

This suggests that there is a small gap towards what can be considered as duress, possibly extreme circumstances such as the knife illustration. The House of Lords clearly established what the claimant must show in, *Universe Tankships v International Transport Workers*. [12] Firstly the greater the unfairness of the claim, the more likely a threat was used towards illegitimate pressure. Secondly, the claimant must have entered into the contract as a result of the threat and finally that individual must not have had a possible alternative. [13]

In addition, the second vitiation doctrine is that of undue influence which is similar to duress but deals with abuse of relationships of trust and confidence. In *Royal Bank of Scotland Plc. v Etridge (No 2)*[14], Lord Clyde stated that undue influence included: “ cases of coercion, domination, victimization and all the insidious techniques of persuasion. ”[15] In short, it is important to mention that pre-existing relationships do not matter but the manipulation of a relationship of trust to obtain an advantage is legitimate for use under this doctrine.

Lord Chelmsford illustrates the complete concept clearly in *Tate v Williamson*[17]: “ Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at

the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage.

This suggests that if the confidence is abused and used somehow to benefit the other party's advantage would render that contract void. The burden of proof lies on the claimant in cases of undue influence. [19] Although the vitiation doctrines and common law have played a crucial role towards consumer protection, parliament and legal commentators saw that there was a gap in the law and not enough restriction to the freedom of contract, which was causing uncertainty and an unequal balance of power within contract law.

The Unfair Contract Terms Act 1977[20] and The Unfair Terms in Consumer Contracts Regulations 1999[21] were introduced and made a huge sway towards consumer protection and treating the root of the problem as parliament intended. The UCTA 1977 is based on the exclusion of clauses if not reasonable at the date in time, whereas the UCCTR 1999 excludes terms, which are observed to be not for the purpose of 'good faith'. The main purpose both acts were brought into force was to extend the law to ensure consumers were being protected against large corporations and this happened to a wide extent.

Furthermore, it is already clear that UCTA 1977 is a key tool towards consumer rights and protection. When applicable in practice there are certain guidelines that must be followed. S11 sets out the reasonable test that must be strictly followed when applying to each case. "The term shall have been a fair and reasonable one to be included having regard to the

circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made. [22]

A key case to look at where the Supreme Court demonstrated the use of reasonableness in practice to an extent is, *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*. [23] The facts of the case are as follows: Finley Lock Seeds supplied George Mitchell Dutch winter cabbage seeds for ? 192. An invoice was sent which included an exclusion clause, limiting the liability to the replacement of ' any seeds or plants sold' if they were defective and excluding all loss or damage from the use of the seed. The crops failed as they were the wrong seeds and George Mitchell claimed ? 61, 513 for the loss of production.

The UCTA 1977 was not used because it was held that it would be deemed unfair, as the wrong seed sale was not Finney's intention. The main criticism towards this test is that there is no clear guidance towards what falls within the reasonable context and what does not; therefore we are left with companies unaware of whether their terms are acceptable. The only useful thing to do is look at common law and draft the exclusion clause in accordance with the reasonableness of that case.

Moreover, a clear and thorough test for reasonableness was recognized within the case of *Overseas Medical SL v Orient Transport SL*. 24] However first the facts and decision within the case involved: the case involved the loss of medical equipment which was being transported from overseas to the UK, the contractual term was an exempt form which tried to exempt the appellants from responsibility, however the court held that the clause was

unreasonable under the Act. The test for reasonableness is very descriptive and the courts must look at 8 key terms, such as the way in which the relevant condition came into being, look at equality of bargaining, practicality to go elsewhere and whether insurance was available.

This suggests that progress is being made in ensuring consumer protection is improved through the continuous use of the key statute and the reasoning of the rules. “ Decision to whether an exclusion term is reasonable...where the decision depends not merely on argument but also on the effect of oral evidence, the first instance Judge has the advantage of hearing such evidence at first hand. ”[26] The court of appeal judge goes further within the case and suggests that court of first instance play the best hand in reaching the right outcome for these cases.

The framework purpose is based on the analysis of good faith and under UTCCR 1999 states: “ A term is unfair where contrary to the requirement of good faith it causes a significant imbalance in the parties’ rights and obligations under the contract. ” Lord Bingham stated in DGFT v First National Bank[27], that there are two solid elements to establishing the test towards the protection of consumers. Firstly the case is about a loan agreement, which once the consumer defaulted became payable to the bank. However, the DG wanted an injunction to stop the bank using the term, because it was unfair. The contract term was found to be fair.

He illustrates it clearly: “ the requirement of good faith in this context is one of fair and open dealing. Openness requires that terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps...Fair

dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed"[28] In short, this suggests the clause must not be purely disadvantageous to the consumer, but clear and have a significant balance.

It must be said that this renders the statute clear, thorough and applicable in practice, which means it might be used more constantly within the future.

The justification toward the shift of consumer protection was because of the crucial issue with standard form contracts. It is clear that vitiating factors combat some form of unfairness but they are not usually applicable towards consumers that encounter standard form contracts. 29] The main problem is that traditional rules of contract were based on 'negotiation' and 'fairness', however the move towards standard form contracts has resulted in not embodying any of those crucial principles which has led consumers into forced consent in a way.

The reason is because they are almost always printed documents, which explicitly do not allow modifications and are clearly weighed to advantage that party. 30] In *Schroeder v Macaulay*[31], Lord Diplock stated that consumers were most at risk as he saw the standard form of contract as "a classic instance of superior bargaining power"[32] and that the courts should take specific care in ensuring it has not been abused. Lord Reid set out a clear picture of standard form contracts within *Suisse v NV*[33]: "In the ordinary way the customer has no time to read them, and if he did read

them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take-it-or-leave-it.

And if he then went to another supplier the result would be the same...”[34]

This suggests that there is no choice or room for bargaining, however as stated earlier the UCTA 1977 now protects all those contracted towards another’s standard form from unreasonable exemption clauses. Similarly, one of the other main justifications towards the movement towards consumer protection is the unequal bargaining power. Unequal bargaining power usually involves a huge organization and a consumer; the consumer’s need is far greater than that of the organization when it comes to the contract.

Therefore they will ensure they do their utmost to benefit themselves and create an unfair contract because they can. Lord Wilberforce touches on this within *Photo Production Ltd v Securicor Transport Ltd*[35], where he states: “... in matters generally, when the parties are not of unequal bargaining power and when risks are normally borne by insurance not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been parliaments intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions. [36]

This statement is impartial to a large extent as it does not discuss the leash which small businesses are kept on, neither does it go into discussing fairness. The reason is because at one end of the line there is a fair contract for both parties and then at the other end there is ‘greed’ for one party. This

is usually what happened before UCTA and UTCCR came into force and made a huge impact in the exclusion of terms and clauses. Finally, there is no doubt that restriction through legislation is the right way to approach freedom of contract.

If it were not encountered then it would cause injustices that we had before the legislation. For example a party that enters into an unfair contract to a big organization because of the inequality of bargaining power would just be both morally and socially wrong. There would be no success for small business because they will always have to grovel towards big organizations in order for a term to be adapted. The UCTA and UTCCR are key legislations that will always serve the purpose of fairness and justice within contract law.

The only way in which there will ever be consequences as a result of limiting freedom of contract is if the government introduces some form of legislation which is excessive, however that will not happen because it is for the greater good of the UK that businesses and our economy continue to grow. There has however been discussion of a reform towards the unifying of UCTA 1977 and UTCCR 1999. [37] Firstly, the reform will simplify the statute for the understanding of non-lawyers and all terms of contracts whether or not negotiated will be subject to a test of reasonableness.

Secondly, the test of reasonableness will be applied towards whether a clause is fair and reasonable and the burden of proof will lay on the party who seeks to rely on the clause. [39] There are more, however the notions I have suggested will end the collision that UCTA has with UTCCR [40] and make the complete legislation more enhanced to deal with consumer

protection. In conclusion, the above discussions have clearly demonstrated that contract law towards freedom of contract is slowly evaporating as the government has moved regarding different schemes to benefit those consumers whom fall at the feet of large organizations.

The origination of freedom of contract shows us that limits were not imposed and unjust decisions arose, however as soon as UCTA 1977 came into effect, it has helped ensure key cases are resolved and has widened the scope towards injustice. Consumers now have more of an ability to bring a claim against big organizations, than they did in the past when they were strictly attached to common law, duress and undue influence. However as discussed and suggested the complexity of the framework within the statutes for lay members is not exactly 'clear' and the reform could be the way forward.

In relation to the UTCCR 1999, the ability to void terms within contracts ensures that organizations are taking more care in drafting their contracts and the clear illustration by Lord Bingham means that no judge should have trouble in implementing. The justifications stated towards the favoring of restriction of freedom are all principles that as a result of contract law can no longer be said to be restricted anymore. Fairness towards attacking standard form contracts, and equal bargaining power are now possible as a result of the current legislation and common law.

In relation towards it has completely impeded against freedom of contract then the answer is no. The main reason being is because fully restricting freedom of contract would remove entrepreneurs, and nearly all form of business people as most of them are in the system for one purpose, wealth.

Whether a bounce back can be made from freedom of contract is debatable, however one thing is for sure; there will always be restrictions just as war and nuclear weapons have limits, so will freedom of contract.