16. Unconscionability and unfairness

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This chapter is concerned with unconscionability, good faith, and inequality of bargaining power. It is often stated that there are no such general doctrines in English Law. Concerns about uncertainty clearly play a part in this, and there is a tension between freedom of contract and intervening in the bargain reached by the parties on the basis of its substantive unfairness. There has, of course, been legislative intervention in relation to the use of unfair exemption clauses and unfair terms, more generally, in the consumer context (see Chapters 10 and 11) and, before such legislation, in particular, judges were prepared to manipulate common law rules on incorporation and construction (see Chapter 9) to deal with unfairness. This chapter principally deals with cases in which the courts have intervened in a contract, or refused to enforce it, where one party had some weakness in his or her position, in relation to the other, and that other has gained unduly advantageous terms.
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