



MONDAY ESSAY
With
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THE STRIKING DOWN OF EXPRESS CONTRACT TERMS: THE ROLE OF COURTS IN DOING SUBSTANTIAL JUSTICE

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INTRODUCTION

“The duty of the courts is to interpret...ensuring that justice is served...”

Many argue that courts are not allowed to impose its ideas of fairness on the parties of a contract. Rather, it is believed that courts should simply give effect to what it thinks the parties should have agreed after a reasonable interpretation of the written terms of the parties' agreement. This theory is flawed since courts, when implying terms into contracts, mostly give effect to their sense of fairness and justice. Courts mostly speak for the “reasonable man” and by so doing, represent the human conception of justice. Indeed, the whole process of construing and interpreting contracts is infused with the notion of fairness so that it is a major part of the function of the court, in contract cases, to strive to ensure some reasonable reciprocity. This has not been widely accepted as it is believed to conflict with traditional contract theory. It is submitted, however, that fairness of outcome is a very important part of the law of contract under common law and in Ghana generally. Thus, it is right for courts to hold that a contract is void for lack of fairness or better still, to hold that the contract is binding subject to the court adjusting the obligations of the parties so as to ensure that within the broad limits some sort of fairness occurs.

Striking down express contract terms - unconscionability and inequality of bargaining power

Courts do substantial justice within the general parameters of the contract itself through means such as interpretation, supplementation or minor adjustments. These methods permit the court to strike down or set aside the actual contract terms or even the entire contract itself. Since the law is concerned with substantial justice, there are occasions where it becomes necessary to override the actual terms of a contract, though it is something that courts are reluctant to do under the common law tradition. The advent of equity, however, has made this power of the court a reality in deserving cases.

Express contractual terms may be overridden by the courts on the basis that the term or contracts as a whole is simply “unconscionable” or that one party to the contract has extracted an extortionate and grossly unfair bargain by taking advantage of the other in some unfair or tricky way. Courts of equity since the 18th century, in particular, often set aside express contractual provisions on grounds of unconscionability. In the case of **CFC Construction Co (WA) Ltd, Rita Read v Attitsogbe [2005-2006] SC GLR 858**, the Supreme Court of Ghana defined an unconscionable contract as one which *“is by contract or gift, where on account of the special disability of one of the parties, the said party is placed at a serious disadvantage in relation to the other.”* The court construed as disability the following including *“poverty, or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.”*

These grounds, according to Ghanaian law, justify the court's intervention to strike down express terms of contracts on the basis of the doctrine of unconscionable bargain. Mere inequality of power, it may be argued, does not normally matter in a free and competitive market. Thus, it must be shown that a person has some coercive power usually arising from a monopoly position, or possibly from superior information so much so that inequality of bargaining power matters. So, even if some residual equitable power remains to strike down unconscionable contracts, there is no doubt that some very serious unfairness must be shown. There must indeed be some real use of bargaining power to take advantage of another person.

It was for these reasons that the Supreme Court in its unanimous judgment in the case of **Mensah & Others v Royal Beneficiaries Association** [2013-2014] 2 SC GLR 933 at pg. 945 struck down an express contract term as being unconscionable as follows, “*from the foregoing it does appear that the whole transaction was clearly unconscionable under the circumstances. The court like the other courts below is empowered by section II of the moneylenders Act 1941 (Cap 176) and section 1 of the Loans Recovery Act 1918 (Cap 175) to re-open the transaction giving rise to this action...we are of the view that the whole transaction which is obviously unconscionable should be re-opened for the court to impose its terms favourable under the circumstances.*”

The need for legislative reform and an Unfair Contract Terms Act in Ghana

Notwithstanding the role of the courts in proactively intervening to strike down express contract terms that are deemed unconscionable or on the basis of inequality of bargaining power, it is recommended that an Act specifically dealing with the problem of unfair contract terms be enacted. Though some Acts including the **Contracts Act, 1960 (Act 25)**, the **Sale of Goods Act, 1962 (Act 137)**, the **Illiterates Protection Act, 1912 (Cap 262)** and the **Lands Act, 2020 (Act 1036)**, amongst others, deal with some issues of unfairness in contract terms, it is imperative that a standalone Act be enacted to deal with all these issues conclusively.

The Act would give specific meaning to what unfair contract terms are by listing and identifying contract terms which prima facie would be deemed as contrary to the requirements of good faith and cause significant imbalance in the rights and obligations of parties to contracts. The Act would specify the types of contracts and terms that fall within its scope such as consumer contracts, exemption or limitation of liability clauses, penalties and forfeitures, agreements contrary to public policy, unconscionability and inequality of bargaining power, unfair indemnity clauses, amongst others.

The proposed Act would outline the test of unfairness by determining the parameters for measuring whether a term is unfair as well as specifying the factors to consider when assessing unfairness. Most importantly, the Act would deal with issues of enforcement and regulation by granting regulatory bodies power to investigate and enforce compliance and further allow parties to bring private actions to challenge unfair terms and to enforce compliance. The Act must provide penalties and sanctions for non-compliance such as fines, injunctions and other remedial actions.

By addressing these key aspects, a good Unfair Contracts Terms Act in Ghana would effectively protect consumers and parties to contracts, promote fair contract practices and further regulate the extent to which courts can unilaterally strike down express contract terms as a way of doing substantive justice.

Conclusion

Indeed, courts have the ability to strike down express contract terms as a way of achieving substantial justice as shown in the essay. Unconscionable contracts, which take advantage of unequal bargaining power are a stark reminder of the need for judicial intervention. By scrutinizing contract terms and considering the broader context of the agreement, courts can prevent exploitation and ensure that contracts are fair and reasonable. The role of courts in policing contract terms is not to undermine the principle of freedom of contract but rather to prevent its abuse. By striking down unconscionable terms, courts are in fact upholding the integrity of the contract itself.

As the courts have consistently demonstrated, the power to strike down express contract terms is an essential aspect of their jurisdiction and one that they will continue to exercise in pursuit of substantial justice. Ultimately, the responsibility of courts is not only to enforce contracts but also to ensure that they are fair, reasonable and just. By recognizing and addressing the problem of unequal bargaining power, courts can help to level the playing field and prevent exploitation in the absence of an Unfair Contract Terms Act in Ghana. As the law continues to evolve, it is essential that courts remain vigilant in their pursuit of substantial justice and that they continue to strike down express contract terms that are unconscionable and unfair.

God bless!



ABOUT THE AUTHOR

REGINALD NII ODOI is a Barrister and Solicitor of Ghana who obtained his Master of Laws (LLM) Degree from Harvard Law School in Cambridge, USA. He is also a proud alumnus of Kwame Nkrumah University of Science and Technology (KNUST) where he graduated with First Class Honors and notably served as the President of the Law Students' Union and the Legal Affairs Commissioner of the SRC, amongst others. He was called to the Ghana Bar in 2016. His research areas include Comparative Constitutional Law; Corporate & Commercial Law; International Investment Law and Arbitration and International Law. His goal is to contribute to re-envisioning the way effective lawyering could be done in today's world.