THE ELDERLY, THEIR HOMES AND THE UNCONSCIONABLE BARGAIN DOCTRINE

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(1) INTRODUCTION

Britain has an aging population: although overall population growth in the last 35 years was just eight per cent, the elderly population (persons aged over 65) grew by 31 per cent,[1] and with birth rates falling and increasing numbers of people living into very old age, recent statistics have shown that the proportion of the population of England who are aged over 65 years of age is likely to grow from 15.6% in 2000 to 19.2% by 2021.[2] As the 'baby-boomer generation'[3] reach retirement age, policy analysts are increasingly concerned with the implications for economic and social policies:[4] "[t]he economic and social wellbeing of the growing elderly population is, therefore, an important issue for society in general and for policy-makers in particular."[5]

Policy questions relating to the elder population are recognised in a range of legal contexts – from medical law to estate planning, housing and social welfare to guardianship and disability rights[6] - where it is recognised that the elderly may be

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[1] Social Trends 37, (available online at http://www.statistics.gov.uk/cci/nugget.asp?ID=949).

[2] Statistics available online at http://www.statistics.gov.uk/cci/nugget.asp?id=949

[3] 'Baby boomers' is the term used to describe those people born between 1946 and 1964, when post-World War II optimism led to a surge in population; see for example, J Harkin & J Huber, *Eternal Youths: How the Baby boomers are having their time again* (2004, Demos).

[4] See for example, SA Nyce & SJ Schieber, *The Economic Implications of Aging Societies: The Costs of Living Happily Ever After* (2005, CUP); A Tinker, 'The Social Implications of an Aging Population' (2002) 123 *Mechanisms of Aging and Development* 729; P Wallace, *Agequake: Riding the Demographic Rollercoaster Shaking Business, Finance and Our World* (1999, N Brearley Publishing); J Tavares Alvarez, *Reflections on an Agequake* (1999, UN-NGO Committee on Aging).

[5] NK Kutty, 'The Scope for Poverty Alleviation among Elderly Home-owners in the United States through Reverse Mortgages' (1998) 35 *Urban Studies* 113.

[6] For example, in the UK, Solicitors for the Elderly is a national organisation of lawyers who specialise in elder law, and who describe their key objectives as: "to develop expertise in areas of public and private law relevant to our clients' needs and where there is at present a skills shortage. These include: Consent, capacity and substituted decision-making; Financial planning, including retirement and long-

vulnerable to discrimination, disadvantage, neglect or abuse. Yet, in addition to the vulnerability associated with aging *per se*, a range of social, economic, and political trends in recent decades have also ensured that this elderly population may face a specific set of risks in relation to financial transactions affecting their homes. This paper considers elderly homeowners as a potentially 'vulnerable population' in relation to financial transactions. While recent research has challenged the suggestion that economic decision making is impaired by age,[7] this paper argues that, distinct from the question of capacity for decision making, a series of contextual factors have exposed elderly homeowners to a new type of systemic vulnerability around financial transactions.

(2) ELDER VULNERABILITY IN FINANCIAL TRANSACTIONS

It is, of course, not only elders who face risk in respect of homeownership, even before the credit crunch and mortgage meltdown that has followed the sub-prime lending crisis since 2006. Following the boom and slumps in the UK housing market from the 1980s to the mid 1990s, Ford *et al* argued that a series of circumstances including economic recession, but also relating to changes to social, economic and political structures, had rendered home-ownership a much riskier undertaking that it hitherto had been.[8] Even in a benign economic climate, with historically low interest rates, there was evidence of: "…a set of more enduring socio-economic transformations which have raised the 'normal' level of risk associated with home-ownership compared to that which pertained in earlier periods."[9] Adding to this the impact of the 'credit crunch' and the threat of global recession, the 'riskiness' of entering financial transactions affecting the home has been brought into particularly sharp relief.

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term care; Housing and social and health care issues; Dealing with abuse."; see http://www.solicitorsfortheelderly.com/public/index.php

[7] S Kovalchik, CF Camerer, DM Grether, CR Plott & JM Allman, 'Aging and Decision Making: A Comparison between neurologically healthy elderly and young individuals' (2005) 58 *Journal of Economic Behaviour and Organisation* 79; *cf* E Peters, ML Finucane, D G McGregor & P Slovic in PC Stern & LL Carstensen (eds), *The Aging Mind: Opportunities in Cognitive Research* (2000, National Academy Press).

[8] J Ford, R Burrows & S Nettleton, *Home Ownership in a Risk Society: A social analysis of mortgage arrears and possessions* (Bristol, Policy Press, 2001), Preface, vi.

[9] *Ibid*, p44.

This paper suggests that, alongside these 'typical' risks, the elderly can be viewed as a particularly vulnerable population in relation to financial transactions. The business of financial services for elderly consumers is booming in Britain. Old age can be a time of low income, as life events including retirement or the death of a spouse can considerably reduce the income of these elders, giving rise to a 'pension gap' between pensioners' incomes and their cost of living.[10] Furthermore, increasing longevity has created a large population of fixed income citizens of moderate means, with fewer wage earners, and more likely to be reliant on public or private pensions, private investments or savings. This period of life may also coincide with increasing costs, which UK elders are increasingly expected to fund through private means rather than relying on social welfare.[11]

Another important characteristic of the aging baby-boomers is that, while for much of the twentieth century the elderly were *less* likely to own their own homes than other demographic groups this figure has been increasing steadily with many elder households now owning their homes mortgage free: 56% of those aged over 75 are outright owners, with a further 3% owning subject to a mortgage; while 64% of the 65-74 cohort are outright owners, with a further 9% owning subject to a mortgage.[12] Overall, 75% of retired persons are owner-occupiers (against 70% in the general population).[13] Yet, alongside significant asset holding, elderly homeowners may find themselves 'house-rich but income-poor'.[14] This creates a substantial population for whom release of equity from their homes will be a potentially attractive (or useful or necessary) strategy to generate income in their elder years.[15] Wealth tied up in the

[10] For studies analysing the economic needs of elders, see S Middleton, R Hancock, K Kellard, J Beckhelling, V Phung and K Perren, *Measuring Resources in Later Life: a review of the data* (Joseph Rowntree Foundation, 2007); and K Hill, K Kellard, S Middleton, L Cox and E Pound, *Understanding Resources in Later Life: views and experiences of older people* (Joseph Rowntree Foundation, 2007).

[11] Thus, in relation to nursing care, for example, in many cases, private means must be exhausted before public funds become available; see generally, SJ Smith, *Banking on Housing: Speculating on the role and relevance of housing wealth in Britain* (Paper prepared for the Joseph Rowntree Foundation Inquiry into Home Ownership 2010 and Beyond, 2005).

[12] Social Trends 31 (2001),Table 10.7; see also R Forrest, P Leather & C Pantazis, *Home Ownership in Old Age: The Future of Owner-Occupation in an Ageing Society* (1997, Oxford, Anchor Trust).

[13] Social Trends 34 (2004), Table 10.9.

[14] K Rowlingson, '"Living Poor to Die Rich"? Or "Spending the Kids' Inheritance"? Attitudes to Assets and Inheritance in Later Life' (2006) 35 *Journal of Social Policy* 175; J Bull & J Poole, *Not Rich, Not Poor: A Study of Housing Options for Elderly People on Middle Incomes* (1989, Oxford: SHAC/Anchor Housing Trust).

[15] See generally, R Hancock, 'Can Housing Wealth Alleviate Poverty among Britain's Older Population?' (1998) 19 *Fiscal Studies* 249.

home is currently regarded as: "…more 'spendable' now than it will be ever again."[16] Owned homes are increasingly regarded as a repository of financial value, with the expectation that: "…the asset value of housing…accumulates over the life course, provides a cushion (in the form of low housing costs) for old age, and flows on to the next generation through inheritance.";[17] or, if the next generation cannot wait for inheritance, by releasing equity and gifting capital, or by acting as surety for the debts of their adult children.[18]

While there are many reasons – financial, political and personal – why elders may wish to release capital or income from their homes to fund expenses in later life, the use of an owned home in this way also raises interesting issues about the tensions between the preservation of the home as a dwelling place for old age – extensively analysed in the 'aging in place' literature[19] - and the use of the home as a financial asset, for the elder or for inheritance. Notwithstanding the importance of retaining their 'place' for elders' autonomy, independence, identity, and continuity in community,[20] empirical research has recently highlighted the pragmatism with which elders typically approach issues relating to equity release and the need to use their homes as an asset, to release capital or income for expenses in their old age:[21]

> Previous research suggested that people wished to keep their housing assets intact during their later life, not so much in order to pass on these assets to the next generation but because they feel they have an 'inalienable right' to their housing wealth. People in this position might be

[16] Smith, *supra* n14, p2.
[17] *Ibid*, p11.
[18] This is described by Fiona Burns as 'intergenerational debt'; see for example, F Burns, 'Protecting elders: Regulating intergenerationally transmitted debt in Australia', (2005) 28 *International Journal of Law and Psychiatry* 300.
[19] For example, GD Rowles & H Chaudhury, *Home and Identity in Late Life: International Perspectives* (Springer, 2005); G Mowl, R Pain & C Talbot, 'The ageing body and homespace' (2000)32 *Area* 189; PC Kontos, 'Resisting Institutionalization: Constructing Old Age and Negotiating Home' (1998)12 *Journal of Aging Studies* 167. Rowles and Chaudhury suggested, for example, that: "Especially with the loss of social roles, retirement, physical frailty, and environmental changes, for many older adults the past experience of home may hold different meanings."; p11. For a discussion of the relationship between aging in place and housing law, see J Pynoos, C Nishita, C Cicero, and R Caraviello, 'Aging in Place, Housing, and the Law' (2008) 16 *Elder Law Journal* (forthcoming).
[20] See GD Rowles & H Chaudhury, 'Home and Identity in Late Life: International Perspectives', in Rowles and Chaudhury, *supra* n19; Frank Oswald and Hans-Werner Wahl, 'Dimensions of the Meaning of Home in Later Life', in Rowles and Chaudhury, *supra* n19; Robert L Rubinstein & Kate de Medeiros, 'Home, Self, and Identity' in Rowles and Chaudhury, *supra* n19.
[21] K Rowlingson & S McKay, *Attitudes to inheritance: A Literature Review and Secondary Analysis of Data* (2004, Joseph Rowntree Foundation); Rowlingson, *supra* n14; see also IF Megbolugbe, J Sa-Aadu & JD Shilling, 'Oh, Yes, the Elderly Will Reduce Housing Equity under the Right Circumstances' (1997) 8 *Journal of Housing Research* 53.

> living a frugal lifestyle in order to preserve their housing assets. They will be 'living poor in order to die rich'.[22]

Rowlingson notes that: "[t]he social policy concern here is that people might be impoverishing themselves and potentially damaging their health by not taking advantage of the assets they have."[23] However, the elders interviewed in this 2004 study typically took a balanced approach to the tensions between 'home as asset' and 'home as inheritance', leading Rowlingson to conclude that:

> …people are more pragmatic about their property. Ideally, they would like to be able to maintain their property intact – both for their own purposes and in order to bequeath – but they are aware that their income in later life is likely to be fairly low. Rather than expecting the state to resolve this issue by substantially increasing pension incomes, people seem to expect that they themselves may have to access their housing equity at some point in the future to maintain a reasonable living standard.[24]

This conclusion appeared to point to greater scope for the use of equity release products, if consumers were to become sufficiently confident in the products on offer: "[t]he options currently available to access equity are generally undesirable to many people at present, but they are not strictly averse to the principle of unlocking housing equity."[25]

While lack of consumer confidence in the sector has long acted as a barrier to market growth in this area,[26] recent changes in the regulatory framework relating to equity release products has meant that consumer confidence seems likely to rise. This paper argues, however, that notwithstanding the increase in regulation, there are a number of important issues relating to legal responses, particularly in light of the particular and specific vulnerabilities that elderly homeowners experience in relation to financial transactions affecting their homes, which could be usefully considered. Financial products such as equity release schemes are often explicitly targeted at elderly

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[22] Rowlingson, *supra* n14, p176.
[23] *Ibid*.
[24] *Ibid*, p187.
[25] *Ibid*, 187-8.
[26] See D Hirsch, Consultation Response to HM Treasury: 'Regulating home reversion plans', (February 2004); available online at www.jrf.org.uk/knowledge/responses/docs/homereversion.asp; see also R Terry and R Gibson, *Overcoming obstacles to equity release* (2006, Joseph Rowntree Foundation, Ref 1939).

consumers, and this also raises important questions about the ways in which any protection which might be available under the law is suitable to meet the needs of vulnerable elders. While current legal approaches to vulnerable elders in the context of financial transactions are limited, we argue that there is considerable potential, within existing legal doctrine, to better map law's response onto the reality of the elder's contextual experience of using their homes to raise capital, to ensure adequate legal protection against unscrupulous or unconscionable transactions. In section 3 we outline the regulatory context within which creditors are governed in England and Wales, and assess the extent to which recent developments in the jurisdiction of the Financial Services Authority will effectively address the vulnerability which has been acknowledged in this context. Section 4 then proceeds to examine the role which the doctrine of undue influence and the unconscionable bargain doctrine might play in this context.

(3) THE REGULATORY APPROACH

In Parliamentary debates preceding the extension of the Financial Services Authority's regulatory 'umbrella' to include equity release, a number of key headlines were emphasised, including that: "We must bear it in mind that the purchase of a home is the biggest financial investment that any individual or family makes. Given that the problem affects people who have already paid off a mortgage and are now in retirement, it compounds the vulnerability of the people taking out the schemes…"[27] Yet with equity release *per se* increasingly recognised as an important mechanism for improving quality of life for elderly homeowners,[28] much depends on the nature of the product, the context and terms of the transactions, and, the present authors would argue, on the 'conscionability' of the bargain struck between the creditor and the elderly homeowner.

Equity release schemes are generally marketed as products to enable elderly home owners to tap into the value of their homes – their 'equity' – without having to sell up altogether and move out. Although the terms of equity release products vary, the general idea is that the homeowner receives a payment of capital, the 'loan', which is

[27] *Ibid*.
[28] See discussion in section 2.

not scheduled for repayment by instalments, but which is secured against the equity which the borrower holds clear of any other secured debt in the owner-occupied home, and which accumulates until the property becomes 'available', when the elderly homeowner dies or decides to sell, at which point the creditor is entitled to execute its claim against the capital. There are as many equity release products on the market as the imaginations of credit suppliers can create, but two principal *types* of scheme have tended to dominate the UK market in recent years: (1) home reversion plans and (2) lifetime mortgages.

'Home reversion plans' involve the sale of a portion of the total value of the property to the product provider in exchange for a lump sum payment, or an income for life, or, in some cases, a combination of lump sum *and* income. This type of scheme utilises a form of co-ownership, since the 'vendor' continues to own a portion of the property as tenant in common with the 'purchaser' company. Both co-owners will benefit from any increase in value, proportionate to their shares, and the elderly occupier's share continues to be an inheritable asset for the purposes of his or her estate. These arrangements typically include an agreement as to occupation between the co-owners (the vendor-occupier and the purchaser-credit company) that allows the occupier to continue to live in the property, paying a peppercorn 'occupation rent', until they die or until the house is sold.[29] A 'lifetime mortgage', in contrast, is more readily comparable to a standard interest-only mortgage against equity in the property, although the 'borrower' does not make any repayments of interest during their lifetime; rather, the 'repayments' due are 'rolled up' – or added to the mortgage capital, with the whole debt to be paid off when the borrower dies or when the property is sold.

Until relatively recently, British consumers approached the prospect of equity release with some trepidation. It is likely that this lack of consumer confidence was significantly influenced by the negative publicity that followed the upsurge in reverse mortgages during a period of 'boom and bust' in the British housing market in the late 1980s and early 1990s, when many households lost their homes through

[29] In some cases the property may be sold in order to release the remaining equity to fund further expenses, for example the costs of nursing care.

repossession.[30] However, in recent years there has been a major growth in the equity release market in Britain, which is attributable to several factors. The first is the rise in self-regulation amongst equity release providers in Britain, the majority of whom (approximately 90%) are members of Safe Home Income Plans (SHIP). SHIP, which was launched in 1991, describes itself as 'dedicated entirely to the protection of planholders and promotion of safe home income and equity release plans.'[31] All participating companies pledge to observe the SHIP Code of Practice, which binds the companies to provide a fair, easy-to-understand and full presentation of their plans, and these providers also give their customers a 'no negative equity guarantee', which means that they are assured that they will never owe more than the value of their homes.[32] Founded with four member companies, there are now 21 member companies, estimated to supply about 90% of equity release funds by volume in the UK.[33] The equity release sector is now big business in Britain, with the market share of SHIP members to reach £1.279 billion in 2007, an 11% increase on full year figures for 2006.[34] Indeed, a recent survey of SHIP members has predicted that their total market share for 2010 could reach £2.19 billion.[35]

Alongside this self-regulation, considerable attention has recently been focused on government regulation of equity release. The 'lifetime mortgage' or 'reverse mortgage' sector has been regulated by the Financial Services Authority (FSA)[36] since it took over responsibility for regulation of the mortgage industry in October 2004,[37] and in April 2007 the FSA umbrella extended to cover home reversion plans

[30] 'During the 1980s [in the UK], equity release came under scrutiny and suffered a bad reputation due to poorly designed and marketed products that led to several court cases.'; C Huan & J Mahoney, 'Equity Release Mortgages' (2002) 16 *Housing Finance International* 29 at 33. This analysis uses the examples of home income plans and interest roll-up loans to identify weaknesses in equity release products in the UK, which led to escalating debt, left consumers vulnerable to rising interest rates and falling house prices, and led to forced sale of their homes.
[31] See http://www.ship-ltd.org/about/index.shtml
[32] A worst case scenario which would leave homeowners exposed to not only repossession but further personal actions to recover additional outstanding debt.
[33] See http://www.ship-ltd.org/bm~doc/08-dec-2007a.pdf
[34] See SHIP Press Release, 8 December 2007, available online at http://www.ship-ltd.org/bm~doc/08-dec-2007a.pdf
[35] *ibid*.
[36] The FSA is an independent, non-government body, given statutory powers by the Financial Services and Markets Act 2000, to regulate the financial services industry in the UK and it has four objectives under the Financial Services and Markets Act (FSMA) 2000: maintaining market confidence; promoting public understanding of the financial system; securing the appropriate degree of protection for consumers; and fighting financial crime.
[37] Brought under the FSMA 2000 by the Financial Services And Markets Act 2000 (Regulated Activities) Order 2001.

through the Regulation of Financial Services (Land Transactions) Act 2005,[38] with a view to filling a gap that existed in the regulation of equity release products. In considering this legislation, the government recognised that purchasing an equity release product is a major decision, with tax, inheritance and long-term financial planning implications,[39] and also, crucially, that the function of regulation in this context is specifically targeted at providing *information* and *advice*. On introducing the second reading of the Bill, Lord McKenzie stated that:

> Regulation is not designed to discourage people from purchasing these products, but to help them make informed choices, offer valuable consumer protection and ensure there is a level playing field in the equity release market, most of which already falls within the scope of the FSA mortgage regulation…these are not simple products to understand, hence the need to ensure that potential purchasers receive an appropriate level of advice.[40]

The touchstone of the legislative policy of this Act was emphasised once again in Lord McKenzie's closing comments when he claimed that the Bill would: "…open the door to important consumer protections to be extended to vulnerable and minority consumers, level the playing field in mortgage regulation, ensure that no artificial distortions go forward, bolster consumer confidence in those products and thus help to ensure that the markets continue to develop."[41]

As Lord McKenzie acknowledged in his speech, equity release products are generally both complex and expensive, and the provision of clearer information and advice for consumers - especially elderly consumers - to ensure that they are able to make informed decisions, is undoubtedly welcome. In addition, the requirements concerning the quality of information supplied by the equity release provider are copper-fastened by giving borrowers greater recourse to apply to the Financial Ombudsman Service to claim compensation if they believe they have been mis-sold a product.[42]

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[38] Regulation of Financial Services (Land Transactions) Act 2005.
[39] "Buying a home reversion plan is a huge financial decision involving the most important and sometimes only significant asset of elderly people. It can have significant implications for tax, benefits, inheritance and long-term financial planning, which need to be considered very carefully." HL Deb 17 October 2005 c. 554 (Lord McKenzie).
[40] *Ibid*.
[41] HL Deb 17 October 2005 c. 558 (Lord McKenzie).
[42] See Financial Services and Market Regulation Act 2000, Part XV.

Yet while this shift to a stronger regulatory framework for equity release products will go a long way to addressing many of the (sometimes catastrophic) difficulties encountered by British consumers who purchased these products in the 1980s and 1990s, the regulatory framework has limited scope. In particular, legal regulation through the FSA is directed primarily at disciplining the behaviour of the *creditor*. Under the Financial Services and Markets Act 2000, creditors sign up to the FSA's scheme in order to become 'authorised' – receiving the quality 'kite-mark' to signify products which consumers can trust. While the compensation scheme purports to provide a safety net for users of regulated services, there are three important points to note regarding the scope of the regulatory scheme: (1) the emphasis of the FSA scheme is on clear information and advice, to ensure an *informed* decision can be made; (2) the function of the regulatory protection offered by the FSA is largely to *avoid* claims by regularising the activities of the credit provider, although in cases where an authorised creditor breaches the rules of the scheme, for example rules requiring clear information, the remedy for the claimant is compensation only; and (3) that social and economic factors at work in this context, sometimes coupled with relational pressures, may still leave an *informed* elder in a vulnerable position. In other words, there remain a separate set of issues, not adequately addressed through regulatory schemes (which focus on governing creditor activities and the content of products), which are rooted in the social, economic and cultural contexts in which the 'purchase' of equity release products by elderly homeowners has been mainstreamed in Britain.

It is, therefore, pertinent to consider the wider protection – beyond regulation - afforded to the elderly in connection with equity release schemes. Indeed, the suggestion that the FSA is enjoying some considerable success in improving consumer confidence[43] makes this task particularly apposite. In section 4 we explore the nature, and extent, of the protection given to the elderly by the doctrine of undue influence and the unconscionable bargain doctrine in equity release schemes. In particular, we argue that the unconscionable bargain doctrine – a doctrine which is particularly sensitive to the terms of the transaction, the effectiveness of any

[43] 'Equity release – time to grow?' *Mortgage Finance Gazette* (May 2007), available online at http://www.mfgonline.co.uk/ccstory/20235/130/Equity_release_%E2%80%93_time_t

independent advice, informational inequalities and the vulnerabilities of the parties – may provide an appropriate vehicle for the protection of the elderly in this context.

(4) UNDUE INFLUENCE, THE UNCONSCIONABLE BARGAIN DOCTRINE AND THE PROTECTION OF ELDERS IN EQUITY RELEASE SCHEMES

(a) Introduction

The doctrine of undue influence may afford elders with a measure of protection in relation to financial transactions involving their home.[44] Indeed, although the doctrine of undue influence is often closely associated with relationships of trust and confidence,[45] it is clear that the operation of the doctrine is not confined to such relationships.[46] Thus in *Royal Bank of Scotland v Etridge*[47] Lord Nicholls, in the context of relational undue influence, noted that:

> …there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendency, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.[48]

However, the precise nature, and extent, of the protection given to the elderly by the doctrine of undue influence in relation to financial transactions involving their home will, of course, depend on the jurisprudential basis, and hence the essence, of the doctrine of undue influence. For example, *if* the doctrine of undue influence focuses

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[44] It has been noted above that the motivations for equity release may vary, to encompass pressure as a result of both the needs of the elder themselves, and the needs of adult children who may wish that the elder use an owned home to release equity to enable the adult offspring to 'cash in' their inheritance early, often to fund their own house purchase. In this regard, it is interesting to note that where a transaction has been procured by undue influence, or unconscionability, on the part of the other party thereto, the party subject to the influence, or unconscionable conduct, will, subject to certain bars, be entitled to have the transaction set aside. By contrast, where the transaction has been procured by the undue influence, or unconscionability, of a third party – perhaps the children of the elder - the position is more complex and may depend on the principles of notice as set out in *Royal Bank of Scotland v Etridge* [2001] UKHL 44. For an analysis of those principles in the context of transactions with the elderly see FR Burns, 'The elderly and undue influence inter vivos' [2003] 23 *Legal Studies* 251 and *Portman Building Society v Dusangh* [2000] 2 All E.R. (Comm) 221.

[45] *cf. Barclays Bank plc v O'Brien* [1994] A.C. 180.

[46] See *Allcard v Skinner* (1887) 36 Ch. D 145 and *Re Craig (decd)* [1970] 2 All ER 390.

[47] [2001] UKHL 44.

[48] *Ibid.* at [11].

solely on the *capacity* of the elderly person,[49] the protection provided by the doctrine of undue influence in equity release schemes is likely to be peripheral.[50] The vulnerability of elders in this context is more likely to stem from social and economic factors[51] rather than from a lack of capacity;[52] and an important question in this context is whether or not it is deemed appropriate for legal doctrine to respond to these social and economic contextual factors.

Yet, despite the Brobdingnagian amount of academic literature on the subject,[53] the jurisprudential basis of the doctrine of undue influence remains obscure.[54] Indeed in *Niersmans v Pesticcio*[55] Mummery LJ stated:

> The striking feature of this appeal is that fundamental misconceptions [about the doctrine of undue influence] persist, even though the doctrine is over 200 years old and its basis and scope were examined by the House of Lords in depth…less than 3 years ago in the well known case of Royal Bank of Scotland Plc v Etridge (No.2) [2002] 2 AC 773. The continuing confusions matter. Aspects of the instant case demonstrate the need for a wider understanding, both in and outside the legal profession, of the circumstances in which the

[49] *cf.* M Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrongdoing towards a Relational Analysis', in A Burrows and A Rodger (eds.), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, Oxford, 2006) at pp 207-211.
[50] See FR Burns, *supra* n44*,* at 253-255.
[51] See Section 2, above.
[52] See the text to n7 above.
[53] See, for example, P Birks and Y Chin, 'On the Nature of Undue Influence', published in J Beatson & D Friedmann (eds), *Good Faith and Fault in Contract Law*, (1995, Clarendon, Oxford); R Bigwood, 'Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'' (1996) 16 *OJLS* 503, J O'Sullivan, 'Undue Influence and Misrepresentation after O'Brien: Making Security Secure', in F Rose (ed), *Restitution and Banking Law*, (Mansfield Press, Oxford, 1998) pp42-69, B Fehlberg, *Sexually Transmitted Debt*, (Clarendon, Oxford, 1997) pp24-25, S Smith, *Atiyah's Introduction to the Law of Contract*, 6th edn, (Clarendon, Oxford, 2002) pp288-291, M Pawlowski & J Brown, *Undue Influence and the Family Home*, (Cavendish, London 2002) pp7-17, 27-30 and 205-212, M Oldham, '"Neither borrower nor lender be" – the life of O'Brien' (1995) *Child and Family Law Quarterly* 104, at 108-109, M Chen-Wishart, 'The O'Brien Principle and Substantive Unfairness' [1997] *CLJ* 60, D Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 *LQR* 479, Price, 'Undue Influence: finis litium' (1999) 115 *LQR* 8, L McMurtry, 'Unconscionability and Undue Influence: An Interaction?' [2000] 64 *Conveyancer and Property Lawyer* 573, Chen-Wishart, *supra* n49, & J Devenney & A Chandler, 'Unconscionability and the Taxonomy of Undue Influence' [2007] *Journal of Business Law* 541.
[54] See, generally, J Elvin, 'The Purpose of the Doctrine of Presumed Undue Influence', in Giliker (ed), *Re-examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (Martinus Nijhoff Publishers, Leiden, 2007). In *Portman Building Society v Dusangh* [2000] 2 All ER (Comm) 221 at 233 Ward LJ stated: "Professors Birks and Chin…see undue influence as being 'plaintiff-sided' and concerned with the weakness of the plaintiff's consent owing to an excessive dependence upon the defendant, and unconscionability as being 'defendant-sided' and concerned with the defendant's exploitation of the plaintiff's vulnerability. I do not find it necessary to resolve this debate."
[55] [2004] EWCA Civ 372.

> court will intervene to protect the dependant and the vulnerable in dealings with their property.[56]

In their seminal paper on the jurisprudential basis of the doctrine of undue influence, Professors Birks and Chin[57] argued that "the doctrine of undue influence is about impaired consent, not about wicked exploitation."[58] In so doing, Birks and Chin identified two models by which undue influence might be classified.[59] Under the first model – the so-called 'claimant-sided' approach – the emphasis is on the vulnerability of the claimant. In the context of equity release schemes, such an approach would focus on the potential vulnerability of the elder. By contrast, the second model identified by Birks and Chin – the so-called 'defendant-sided' analysis – is more concerned with the conduct of the other party to the transaction. In the context of equity release schemes, such an approach would often[60] focus on the conduct of the equity release provider. Thus, while concerns with 'wicked exploitation' resonate with a defendant-sided view of undue influence, the claimant sided approach would arguably be more responsive to the context in which the elder entered into the transaction, so that: "[I]t is not necessary for the party claiming relief to point to fraud or unconscionable behaviour on the part of the other."[61]

Birks and Chin's thesis in support of a claimant-sided approach to undue influence has gained *some* support in the case law.[62] Yet their overall thesis is not unproblematic: for example, it arguably tends towards a pathological view of 'trust',[63] and, within a claimant-sided framework, it may take an unduly restrictive, capacity driven, view of undue influence.[64] It also contrasts uncomfortably with the language employed both by the House of Lords in its landmark decisions of *National Westminster Bank plc v Morgan*,[65] *Barclays Bank plc v O'Brien*[66] and *Royal Bank of*

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[56] *Ibid.* at [2].
[57] Birks & Chin, *supra* n53.
[58] *Ibid*, at p126.
[59] It should, however, be noted that these models are contested: see, for example, Bigwood, *supra* n53.
[60] Although not always: see n44 above.
[61] Birks & Chin, *supra* n53 at p126.
[62] See, for example, *Hammond v Osborn* [2004] EWCA Civ 885, *Turkey v Awadh* [2005] EWCA Civ 382 and *Jennings v Cairns* [2003] EWCA 1935. *cf. Macklin v Dowsett* [2004] EWCA Civ 904 and *Dunbar Bank plc v Nadeem* [1998] 3 All E.R. 876 (discussed in A Chandler, 'Manifest Disadvantage: Limits of Application' (1999) 115 *LQR* 213).
[63] See Chen-Wishart, *supra* n49 at p208.
[64] *Ibid.*
[65] [1985] A.C. 686.

Scotland v Etridge (No 2),[67] and with more recent opinions of the Judicial Committee of the Privy Council[68] which adopt an unconscionability-based approach to undue influence.[69]

Perhaps the most troublesome aspect of Birks and Chin's thesis is the linking of the concept of unconscionability to a notion of 'wicked exploitation'. Unconscionability is a delicate concept and although few would argue that unconscionability requires malign intent, it is (perhaps) less obvious, given the connotations of conscience, that relief on the grounds of unconscionability can be claimant-sided relief and so focused on the potential vulnerability of, for example, an elder.[70] Nevertheless, relief on the ground of unconscionability *can* be claimant-sided relief, and this, as we shall see, can be demonstrated by reference to the case law on the unconscionable bargain doctrine - a doctrine which has both contextual and historical links with the doctrine of undue influence[71] - where many of the leading cases adopt a clear claimant-sided orientation.[72]

Indeed one of the current authors has argued[73] that the doctrine of undue influence is based on a notion of unconscionability which finds resonance in the unconscionable

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[66] [1994] A.C. 180.

[67] [2001] UKHL 44. In that case Lord Nicholls, at [6-7], stated: "Undue influence is one of the grounds of relief developed by courts of equity *as a court of conscience*. The objective is to ensure that the influence of one person over another is *not abused*. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter transactions, whether great or small. The law has set *limits to the means properly employable for this purpose*… Equity extended the reach of the law to other *unacceptable forms of persuasion*. The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced', in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (*Huguenin v Basely* (1807) 14 Ves. Jun. 273 at 300, [1803-1813] All E.R. Rep. 1 at 13). If the intention was produced by *unacceptable means*, the law will not permit the transaction to stand. The means used is regarded as an exercise of *improper or 'undue'* influence, and hence *unacceptable*, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will." (emphasis added). Lord Hobhouse added, at [103], that undue influence "is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other." Lord Bingham agreed with Lord Nicholls.

[68] See *R v Attorney-General for England and Wales* [2003] UKPC 22 and *National Commercial Bank (Jamaica) Ltd v. Hew's Executors* [2003] UKPC 51. The late Professor Birks acknowledged the difficulties that these decisions created for his thesis: see P Birks, 'Undue Influence as Wrongful Exploitation' (2004) 120 *LQR* 34.

[69] See further Devenney & Chandler, *supra* n53 at pp541-542.

[70] Devenney & Chandler, *supra* n53.

[71] See, for example, *Evans v Llewellin* (1787) 1 Cox CC 333.

[72] See below, n124-135 and text thereto.

[73] Devenney & Chandler, *supra* n53.

bargain doctrine in general, and specifically with cases such as *Evans v Llewellin*,[74] *Baker v Monk,*[75] *Fry v Lane,*[76] and *Cresswell v Potter*.[77] In particular, although we would argue that there is an (often overlooked) overriding unconscionability requirement to the doctrine of undue influence,[78] it can be argued that the existing elements of undue influence serve as a covert means of distinguishing between conscionable and unconscionable dealings.[79] For example, as we have noted, a finding of trust and confidence, reliance, dependency or vulnerability *may* be central to a finding of undue influence; but *how much* trust and confidence, reliance, dependency or vulnerability is required? Professors Birks and Chin were of the opinion that the influence needed to be "excessive"[80] and they were apparently adopting a high threshold.[81] Yet it is not at all clear that the relevant case law supports such an approach.[82] Indeed the relevant case law appears to take a more fluid approach to this aspect of undue influence[83] and it can be argued that this (quantitative) aspect of undue influence is used by the courts to covertly distinguish between conduct which they believe to be acceptable and conduct which they believe to be unacceptable.[84] Such a conclusion is made more tempting given that this quantitative enquiry is a question of law,[85] it is context-specific[86] and it is said to be informed by 'public policy'.[87] Support for such a view can be found in *Bank of Scotland v Bennett*:[88]

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[74] (1787) 1 Cox CC 333, 29 ER 1191.
[75] (1864) 4 De GJ & S 388; 46 ER 968.
[76] (1888) 40 ChD 312.
[77] [1978] 1 WLR 255n.
[78] See, for example, *National Westminster Bank plc v Morgan* [1985] 1 AC 686 at 709F-H where Lord Scarman stated: "I would wish to give a warning. There is no precisely defined law setting the limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules…A court in the exercise of this jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question of fact which depends on the facts of the case." See also *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876 and *Lloyds Bank plc v Lucken* [1998] 4 All ER 738.
[79] See further Devenney & Chandler, *supra* n53 at pp562-567.
[80] Birks & Chin, *supra* n73, p87.
[81] Chen-Wishart, *supra* n69, p208.
[82] See, for example, *Tate v Williamson* (1866) LR 2 Ch App 55.
[83] In *Bank of Scotland v Bennett* [1997] 3 FCR 193 at 216C James Munby QC, sitting as a Deputy Judge of the High Court, stated : "It is impossible to define, and difficult even to describe, at what point influence becomes, in the eye of the law, undue."
[84] Devenney & Chandler, *supra* n53, p562-564.
[85] *Re T (An Adult: Medical Treatment)* [1992] 2 FCR 861, 883B *per* Staughton LJ.
[86] *Mrs U v Centre for Reproductive Medicine* [2002] EWCA Civ 565.
[87] *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389 at 394-395 *per* Porter J. See also J Devenney & R Morgan, 'Mrs U v Centre for Reproductive Medicine' (2003) 25 *Journal of Social Welfare and Family Law* 74.
[88] [1997] 3 FCR 193.

> At the end of the day the question of whether or not there has, in any particular case, been actual undue influence involves a *value judgment*.[89]

Given the controversy surrounding the jurisprudential basis of the doctrine of undue influence, in the remainder of this paper we will explore the nature, and extent, of the protection given to the elderly, in relation to financial transactions involving their home, by the unconscionable bargain doctrine. In particular, we will consider the protection which this doctrine might provide in the context of elders entering into equity release schemes.

(b) The Cartography of the Doctrine of the Unconscionable Bargain Doctrine

The unconscionable bargain doctrine is of considerable antiquity[90] and, in recent times, it has undergone a renaissance in Australia and New Zealand.[91] By contrast, during the same period, the unconscionable bargain doctrine has operated more modestly in England and Wales,[92] although, as we have seen, it is arguable that the doctrine of undue influence has been, to an extent, mimicking the unconscionable bargain doctrine. Indeed one commentator has described the unconscionable bargain doctrine as a "living fossil"[93] in England and Wales. Moreover, the parameters of the

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[89] *Ibid* at 220D (emphasis added).

[90] See *Chesterfield v Jansen* (1750) 2 Ves. Sen. 125 at 130 and, generally, LA Sheridan, *Fraud in Equity* (Pitman, London, 1957). See also *Proof v Hines* (1735) Cases Talbot 111 and D.E.C. Yale (ed.) *Nottingham's Chancery Cases* 72 Seldon Society xcvi, n.3. Many of the early cases involved 'expectant heirs': see, for example, *Earl of Ardglasse v Muschamp* (1684) 1 Vern. 273. It is clear that the doctrine in favour of 'expectant heirs' and the general unconscionable bargain doctrine developed separately: see, for example, *Webster v Cook* (1866-7) L.R. 2 Ch. 542 and the Sale of Reversion Act 1867 (now Law of Property Act 1925, s 174). However, it is not clear whether or not these two doctrines had a common genesis: in *O'Rourke v Bolingbroke* (1877) App. Cas. 814 the Lord Chancellor was of the opinion that the general doctrine was borne of the rule in favour of 'expectant heirs', but the converse is not unarguable - see Fletcher, 'Unconscionable Transactions' [1974] *QLJ* 1. Today it seems that 'expectant heirs' will not be treated as *sui generis*: see *Re Brocklehurst (deceased)* [1978] 1 A.C. 438. *cf. Benyon v Cook* (1875) L.R.10 Ch. App. 389.

[91] See D Capper, 'Undue Influence and Unconscionability: A Rationalisation' (1998) 114 *L.Q.R.* 479, I Hardingham, 'The High Court of Australia and Unconscionable Dealing' (1984) 4 *Ox.J.L.S.* 275 and A Finlay, 'Unconscionable Conduct and the Business Plaintiff: Has Australia Gone too Far?' [1999] *Anglo-American Law Review* 470.

[92] See Devenney & Chandler, *supra* n53 and *cf. Cresswell v Potter* [1978] W.L.R. 258n, *Portman Building Society v Dusangh* [2000] 2 All E.R. (Comm) 221 at 233, *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All E.R. 144, *Royal Bank of Scotland v Etridge (No.2)* [2001] EWCA Civ 1466, *Irvani v Irvani* [2000] 1 Lloyd's Rep.412, *Barclay's Bank plc v Goff* [2001] EWCA Civ 635, and *Jones v Morgan* [2002] EWCA Civ 565.

[93] J Ross-Martyn, 'Unconscionable Bargains' (1971) 121 *N.L.J.* 1159.

unconscionable bargain doctrine are faint,[94] although in *Alec Lobb (Garages) Ltd v Total Oil GB Ltd*,[95] Peter Millett Q.C., sitting as a Deputy Judge of the High Court, was able to distil three elements from the case law:

> …if the cases are examined, it will be seen that three elements have almost invariably been present before the court has interfered. First, one party has been at a serious disadvantage to the other…secondly, this weakness of the one party has been exploited by the other in some morally culpable manner...and thirdly, the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive. Where there has been a sale at an undervalue, the under-value has almost always been substantial, so that it calls for an explanation...In short, there must, in my judgment, be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself (though the former may often be inferred from the latter in the absence of an innocent explanation) — which in the traditional phrase ~ shocks the conscience of the court," and makes it against equity and good conscience of the stronger party to retain the benefit of a transaction he has unfairly obtained.[96]

However, as this passage suggests, these elements should not be viewed in an excessively technical manner; the courts adopt a holistic, qualitative approach to determining whether or not a transaction is unconscionable.[97] Moreover, as we will argue below, the application of these elements is loaded with normative assumptions.

(c) Vulnerability

Central to the operation of the unconscionable bargain doctrine are conceptions of vulnerability,[98] sometimes referred to in the relevant case law by the nomenclature of

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[94] See J Devenney 'A Pack of Unruly Dogs: Unconscionable Bargains, Lawful Act (Economic) Duress and Clogs on the Equity of Redemption' [2002] *JBL* 539.
[95] [1983] 1 All E.R. 944.
[96] *Ibid* at 961e-g. The Court of Appeal largely avoided discussion of the unconscionable bargain doctrine: see [1985] 1 All ER 585.
[97] Capper, *supra* n110 at p496, approved in *Portman Building Society v Dusangh* [2000] 2 All E.R. (Comm) 221.
[98] It is reasonably clear that inequality of exchange ('substantive unconscionability') is insufficient, *per se*, to ground relief under the unconscionable bargain doctrine: see, for example, *Maynard v Moseley* (1676) 3 Swans. 651; *Wood v Fenwick* (1702) Pr. Ch. 206; *Floyer v Sherard* (1743) Amb. 18; *Lukey v O'Donnel* (1805) 2 Sch. & L. 395; *Longmate v Ledger* (1860) 2 Giff. 157; *Burmah Oil Co. Ltd. v Governor of Bank of England* (1981) 125 S.J. 528 (where Walton J. reinforced the primary principle of

'special' or 'serious' disadvantage.[99] Thus relief *may* be granted under the unconscionable bargain doctrine where a person has entered into a contract as the result of drunkenness[100] or mental deficiency.[101] Yet, as we have already suggested,[102] *if* relief hovers around questions of capacity, the protection provided by the unconscionable bargain doctrine to elders, in the context of financial transactions involving their home, is likely to be limited. For example, in *Investors Compensation Scheme v West Bromwich Building Society*[103] - a case with particular significance in the context of equity release schemes, as it involved 'Home Income Plans' executed with elderly consumers - the Court stressed that:

> …although able to understand concepts such as the borrowing of money on security and the payment of interest, the claimants were not financially sophisticated people and not in a position, without the advice of persons more expert than themselves, properly to judge the risks involved in embarking on a Home Income Plan…[104]

Moreover, as we have already noted,[105] it is important to appreciate that the vulnerability which an elder might experience in this context may stem from a variety of social and economic factors. It is equally important to recognise that the provision of *information* and *advice* – as envisaged under the statutory regulation of this area – is not a panacea for the range of social and economic vulnerabilities in this area.[106]

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pacta sunt servanda; *Rowan v Dann* (Unreported) 21 February 1991, Ch. D; *Clarion Limited v National Provident Institution* [2002] 1 W.L.R. 1888. *cf. Keen v Stuckely* (1721) Gil. 155 and *Walter v Dalt* (1676) 1 Ch. Ca. 276 where an alternative view is advanced. See also LA Sheridan & G Keeton, *Fraud and Unconscionable Bargains* (Barry Rose, Chichester, 1985) pp.9-10; *cf.* C Barton, 'The Enforcement of Hard Bargains', (1987) 103 *M.L.R.* 118. Gross inequality of exchange may, however, give rise to a presumption of fraud: *Rowan v Dann* (Unreported) 21 February 1991, Ch. D.

[99] See, for example, *Alec Lobb (Garages) Ltd v Total Oil* [1983] 1 W.L.R. 87. See also LA Sheridan, *Fraud in Equity,* (Pitman, London, 1957) pp73-86; *cf. Boustany v Pigott* (1993) 69 P. & C.R. 298 where relief was granted without an explicit identification of a 'special disadvantage'.

[100] See, for example, *Dunnage v White* (1818) 1 Swan. 137; *Griffin v Devenille* (1781) 3 P.Wms. 130.

[101] See, for example, *Price v Berrington* (1851) 3 Mac. & G. 486 and *York Glass Co Ltd v Jubb* (1925) 134 L.T. 36.

[102] See above section 2.

[103] [1999] Lloyd's Rep PN 496.

[104] *Ibid*, at 513.

[105] Above, section 2.

[106] See section 3.

It is, however, clear that the unconscionable bargain doctrine is sensitive to socio-economic factors. Thus in *Fry v Lane*[107] Kay J. felt able to extract the following principles from previous case-law:

> [W]here a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction. This will be done even in the case of property in possession and *a fortiori* if the interest is reversionary.[108]

The relevance of socio-economic factors is also vividly demonstrated by *Cresswell v Potter*[109] where Megarry J. sought to update the guidance laid out in *Fry v Lane*: "the euphemisms of the 20th century may require the word 'poor' to be replaced by 'member of the lower income group' or the like, and the word 'ignorant' by less highly educated."[110] It is also clear that old age is a relevant, if perhaps unquantifiable, factor in the case law.[111]

Notwithstanding the foregoing it will be fascinating to observe how, if at all, some of the ideas discussed above - such as the idea that the homes of the elderly are repositories of capital to fund their expenses in old age – impact on the court's conceptions of vulnerability in this context.[112] Certainly in the context of the analogous doctrine of undue influence, Burns has noted ostensible differences in the case law in respect of the court's approach to establishing a relationship of trust and confidence between an elder and their offspring.[113] In particular, Burns notes that in some cases an elderly parent-child relationship was sufficient to establish a relationship of trust and confidence;[114] whereas in other cases more was required.[115]

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[107] (1888) 40 Ch. D. 312.
[108] *ibid* . at 322.
[109] See also *Mountford v Callaghan* (unreported, 29th September 1999, Q.B.D.) and, in particular, *Growden v Bean* (unreported, 26 July 1982, Q.B.D.).
[110] *ibid* .
[111] See, for example, *Clark v Malpas* (1862) 4 De G.F. & J. 401, 45 ER 1238; *Baker v Monk* (1864) 4 De G.J. & S. 388; 46 E.R. 968; and *Portman Building Society v Dusangh* [2000] 2 All E.R. (Comm) 221.
[112] *cf.* Burns, *supra* n44, pp272-273.
[113] *Ibid.*
[114] See, for example, *Love v Love* (unreported, 11 March 1999, CA).
[115] See, for example, *Davies v Dobson* (unreported, 7 July 2000, Ch. D).

(d) Transactional Outcomes

The unconscionable bargain doctrine is also sensitive[116] to the terms of the transaction.[117] This may be particularly significant in the context of equity release schemes where the focus of statutory regulation is on the provision of information and advice, rather than transactional outcomes. Moreover, the analogy with the former manifest disadvantage requirement in the context of undue influence suggests that the assessment of transactional outcomes will be influenced by normative assumptions.[118] If so, it will be intriguing to observe how some of the ideas discussed above - such as the idea that the homes of the elderly are repositories of capital to fund their expenses in old age – impact on the application of the unconscionable bargain doctrine in this context.[119] Likewise, in situations where an elderly parent attempts to assist adult offspring onto the housing ladder, it will be intriguing to observe how ideas, such as the advancement of the interests of offspring, impact on the application of the unconscionable bargain doctrine in this context. A glimpse of these socio-culturally charged issues can be seen in *Portman Building Society v Dusangh*.[120] In that case an old, illiterate man mortgaged his home to support the business ventures of his son. In refusing to utilise the unconscionable bargain doctrine the Court placed heavy reliance on its view that the transaction was not to the manifest disadvantage of the father. Simon Brown LJ stated:

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[116] In *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1983] 1 All E.R. 944 Peter Millett QC, sitting as a Deputy Judge of the High Court, felt that substantive unconscionability was a pre-requisite of relief under the unconscionable bargain doctrine. However, it appears that this is not necessarily the case: see, for example, *Cooke v Clayworth* (1811) Ves. 12; 34 E.R. 222.

[117] See J Devenney, *An Analytical Deconstruction of the Unconscionable Bargain Doctrine in England and Wales* (unpublished Ph D thesis, University of Wales, Cardiff, 2003) pp287-312. There is some uncertainty as to whether or not the unconscionable bargain doctrine is relevant in the context of gifts. In *Langton v Langton* [1995] 2 FLR 890 – a case involving an elder - AWH Charles, sitting as a Deputy Judge of the Chancery Division, held that the unconscionable bargain doctrine was not relevant in the context of gifts. In so doing the learned judge appears to have been seduced by the shorthand title of the doctrine. Indeed there is earlier authority, which was not considered by the learned judge, supporting both positions: see *Henshall v Fereday* (1873) 29 LT 46 and *Mousley v Reid* [1974] EG 17. It seems that the unconscionable bargain doctrine does apply to suretyship transactions: see *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All E.R. 144. In such transactions the surety *may* not get any benefit from the transaction and, therefore, such transactions *might* be regarded as analogous to gifts.

[118] Devenney & Chandler, *supra* n53 at pp564-566.

[119] See Burns, *supra* n64, pp272-273.

[120] [2000] 2 All ER (Comm) 221.

> "…it was not manifestly disadvantageous to this appellant that he should be able to raise money…so as to benefit his son…I would agree... But I simply cannot accept that building societies are required to police transactions of this nature to ensure that parents… are wise in seeking to assist their children…In short, the conscience of the court is not shocked."[121]

This was echoed by Ward LJ, who added that:

> …it was a case of father coming to the assistance of the son. True it is that it was a financially unwise venture…and the father's home was at risk. But there was nothing…which comes close to morally reprehensible conduct or impropriety. No unconscientious advantage has been taken of the father's…paternal generosity…The family wanted to raise money: the building society was prepared to lend it. One shakes one's head, but with sadness…alas not with moral outrage. [122]

(e) Independent Advice

Many of the leading cases on the unconscionable bargain doctrine make some reference to the relevance of independent advice, although there is very little discussion of the precise role of independent advice in this context.[123] For present purposes, it will suffice to note that independent advice is not regarded as a panacea in this context.[124]

(f) Theoretical Framework

The precise nature, and extent, of the protection given by the unconscionable bargain doctrine to the elderly in relation to financial transactions involving their home is, of course, linked to the theoretical framework within which the foregoing elements operate. In *Hart v O'Connor*[125] the Privy Council located the unconscionable bargain

[121] *Ibid*, at 228-230.
[122] *Ibid*, at 234.
[123] See J Devenney, *An Analytical Deconstruction of the Unconscionable Bargain Doctrine in England and Wales* (unpublished Ph D thesis, University of Wales, Cardiff, 2003) pp271-283.
[124] See, for example, *Backhouse v Backhouse* [1978] 1 All E.R. 1158 at 1166 *per* Balcombe J.
[125] [1985] 2 W.L.R. 944 at 958.

doctrine under the umbrella of the rather elusive notion of procedural unconscionability.[126] Birks and Chin, as noted above, argued that unconscionability is defendant-sided relief and, in so doing, they linked the concept of unconscionability to a notion of 'wicked exploitation'. Yet, as one of the current authors has argued elsewhere,[127] many of the cases on the unconscionable bargain doctrine – particularly, although by no means exclusively,[128] those from the eighteenth and nineteenth century[129] - reveal a strong claimant-sided flavour. Whilst we do not wish to rehearse those arguments here, the words of Turner LJ in *Baker v Monk*[130] bear repetition given the valuable insight they offer into the operation of the unconscionable bargain doctrine:

> *I say nothing about improper conduct on the part of the Appellant; I do not wish to enter into the question of conduct*. In cases of this description there is usually exaggeration on both sides, and I am content to believe that in this case there has been no actual moral fraud on the part of the Appellant in the transaction; but, for all that, in my judgment an improvident contract has been entered into.[131]

Such a view seems to find some resonance with the notion of "passive acceptance" outlined by the Privy Council in *Hart v O'Connor*.[132] In fact, if the cases which adopt a claimant-sided approach are further analysed, at least two different approaches are evident within them: the 'causal-connection' approach and the 'status' approach.[133] The essence of the causal-connection approach is that the resultant bargain is causally linked to the claimant's vulnerability.[134] By contrast, the essence of the status approach is that a court has the power to relieve particular sections of society from

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[126] *Ibid.*, at 958. See also R Clark, 'The Unconscionability Doctrine Viewed from an Irish Perspective' (1980) 31 *N.I.L.Q.* 114, especially at p.122.
[127] Devenney & Chandler, *op cit*, at pp544-548.
[128] See, for example, *Cresswell v Potter* [1978] 1 WLR 255n.
[129] See M Chen-Wishart, *Unconscionable Bargains*, (Butterworths, Sydney, 1989) p18 who argues that the conduct of the defendant was "largely irrelevant" in these cases.
[130] (1864) 4 De G.J. & S. 388; 46 E.R. 968.
[131] *Ibid* at 425 (emphasis added). See also *Evans v Llewellin* (1787) 1 Cox CC 333 and *Clark v Malpas* (1862) 31 Beav 80; 54 E.R. 1067; affirmed on appeal, (1862) 4 De GF & J 401; 45 ER 1238. It is not impossible to argue that a defendant-sided approach is evident in *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 2 WLR 944 although that is questionable: see Devenney & Chandler, *supra* n73, pp547-548.
[132] [1985] 2 W.L.R. 944 at 958.
[133] See Devenney, *supra* n94.
[134] See, for example, *Multiservice Bookbinding Ltd v Marden* [1979] 1 Ch 84.

some forms of improvident bargain despite the fact that there is not necessarily a causal connection between the resultant bargain and the claimant's position.[135] Such an approach is, perhaps, surprising although there are also hints of such an approach within the doctrine of undue influence in relation to relationships formerly described as 2A relationships.[136] It remains to be seen, in the context of the unconscionable bargain doctrine, whether or not a 'status approach' will be adopted in relation to elders and equity release schemes.

(5) CONCLUSION

There is a growing awareness of issues relating to the elderly, their homes and the transactions into which they enter. In particular, there has been increased concern in relation to the use of equity release schemes. Such schemes have dramatically increased in recent years and, given the social and economic factors at work here, an elder may be vulnerable in this context. Although recent statutory regulation of this area is to be welcomed, it is important to appreciate the limitations of this regulation. In particular, the statutory regulation of this area is targeted at providing *information* and *advice* whereas it is crucial to recognise that the social and economic factors at work here, sometimes coupled with relational pressures, may still leave an *informed* elder in a vulnerable position. As a result the equitable doctrine of undue influence *may* have an important role to play in providing a measure of legal protection for elderly homeowners who engage in these financial transactions. However, the jurisprudential basis of the doctrine of undue influence is keenly disputed and *if* the views of Birks and Chin prevail the doctrine of undue influence will hover around questions of capacity. Moreover, *if* the doctrine of undue influence focuses *solely* on the *capacity* of the elderly person, the protection provided by the doctrine of undue influence in such situations is likely to be limited. Accordingly, this paper has suggested that the unconscionable bargain doctrine - a doctrine which is particularly

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[135] See, for example, *Cresswell v Potter* [1978] 1 WLR 255n and *Evans v Llewellin* (1787) 1 Cox CC 333.

[136] It has been argued elsewhere that there are questions surrounding the legitimacy of this category of relationships, see Devenney & Chandler, *supra* n53, pp556-558; *cf.* Burns, *supra* n44, pp264-265. Yet, *if* the law is to recognise a category of '2A relationships' there are cogent arguments to suggest that the relationships between an elder and their adult offspring, an elder and their financial adviser and an elder and their carer should be, for the reasons outlined in sections 2 and 3, included in such a category, at least in the current context.

sensitive to the terms of the transaction, the effectiveness of any independent advice, informational inequalities and the vulnerabilities of the parties – has an important role to play in this context. However, the precise protection afforded by the unconscionable bargain doctrine in this context will, for example, depend on the application of the normative assumptions underpinning the assessment of transactional outcomes; and these *may* be informed by ideas such the contemporary political idea that the homes of the elderly are repositories of capital to fund their expenses in old age.