

## What Would You Do If You Got Ripped Off at a Beauty Centre? (Part I)

(Relevant to AAT Examination Paper 6 –  
Fundamentals of Business Law)

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### The scenario<sup>1</sup>

I received a phone call from my friend Jenny. She asked me in a desperate voice whether she could stay in my apartment for a week in order to avoid debt collectors sent by the bank to which she owes over \$220,000 credit card payment.

The reason for the debt goes back to a beauty centre advertisement. The beauty centre offered an \$888 weight loss programme which guaranteed that the participants would lose 15 pounds in weight within one month or they would get a full refund. Jenny was sceptical about the advertisement but she eventually joined the programme because of the remarkable persuasive skills of centre's saleswomen.

The first time Jenny received her weight loss treatment, she was surrounded by a crowd of beauty consultants. She was told to take her clothes off and lay on a massage bed, covered with creams and ointments and had nowhere to escape. The beauty consultants told Jenny that the \$888 program was merely an advertising gimmick and in order to lose 15 pounds within a month she would have to join a bronze programme for \$2,888.

Jenny politely refused the offer but the beauty consultants just kept asking again and again. During the two-hour treatment, Jenny was asked more than 30 times to join the bronze programme until she finally agreed.

To cut a long story short, each time Jenny received a treatment from the beauty centre, she was pressurized to upgrade the programme, from a \$2,888 bronze

programme to a \$6,888 silver programme, from a \$6,888 silver programme to a \$12,888 gold programme and so forth. Within a month, Jenny joined an \$188,888 diamond programme as her personality was not strong enough to resist the hard-sale tactics.

She paid \$188,888 in a single lump sum which was charged to her credit card. Jenny later regretted spending so much money and asked the beauty centre to cancel the diamond programme. Unsurprisingly the centre refused.

Jenny got laid-off from her company few months ago and was unable to meet the minimum payment on her credit card, so she was chased by the bank's debt collector.

\$188,888 was the principal amount of debt that Jenny incurred for the diamond programme. The rest of the debt was interest, administration expenses and collection fees charged by the bank. (Clearly the bank had hired a very expensive debt collection agency.)

### Statutory relief against an unconscionable contract

I let Jenny stay at my place to dodge the debt collectors and I took some time to consider whether Jenny could bring any legal action against the beauty centre and/or against the bank. The first thing I could think of was the relief under unconscionable contracts.

Jenny may rely on the Unconscionable Contracts Ordinance<sup>2</sup> (UCO) as a statutory cause of action to set

<sup>1</sup> This scenario is fictional; any resemblance to an actual event is coincidental.

<sup>2</sup> Cap 458 passed on 20 December 1994 and came into force in October 1995. This Ordinance was enacted in light of the UK's Unfair Contract Terms Act 1977

aside the contract by reason that the contract was tainted by unconscionability.

The application of the UCO is restricted to contracts involving the sale of goods or supply of services. It only applies where one of the contractual parties deals as a consumer.<sup>3</sup> This includes our case, since Jenny was clearly a customer receiving a service rendered by the beauty centre.

The powers conferred to the court to grant relief if it finds a contract to be unconscionable include that the court may:

- refuse to enforce the contract, section 5(1)(a)
- enforce the remainder without the unconscionable part, section 5(1)(b)
- limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable result, section 5(1)(c)

There are three requirements for the court to give relief under the doctrine of unconscionable bargain<sup>4</sup>:

- The bargain must be oppressive to the complainant in overall terms
- It only applies when the complainant was suffering from bargaining weakness
- The wrongdoer knowingly taken advantage of the complainant's weakness.

In summary, unless the wrongdoer was aware of the weakness of the complainant and had taken advantage of her weakness, the contract could not be said to be unconscionable and could not be set aside.

## Factors to determine unconscionability

### Under statute

The UCO does not provide an exact definition or exhaustive list of examples of unconscionability though it lists out five considering factors to determine whether the

<sup>3</sup> Section 3(1)

<sup>4</sup> *Shum Kit Ching v Caesar Beauty Centre Ltd* CFI [2003] 3 HKLRD 422; [2003] 3 HKC 235 applied Chitty on Contracts, 28th ed, para 7-078

contract was unconscionable:

- The relative strength of the parties' bargaining position, section 6(1)(a)
- Whether the result of the conduct engaged was reasonably necessary for the protection of the legitimate interest of the engager, section 6(1)(b)
- Whether the consumer was able to understand the relevant contractual document, section 6(1)(c)
- Whether any unfair tactics, pressure or undue influence was exerted on the consumer, section 6(1)(d)
- Whether the consumer could obtain identical or equivalent goods or services from someone else, section 6(1)(e)

Section 6(1) states that in determining whether a contract or part of a contract was unconscionable relating to the contract at the time it was made, the court may regard other things than the factors listed in section 6(1)(a) to section 6(1)(e). So what are the "other things" for the court to take into account?

### Under common law

Under common law, judges consider the following factors:

- The disability of the consumer, being easily persuaded to spend money, and the disparity of the sophistication, experience and age between the victim and the alleged wrongdoer<sup>5</sup>
- The difference between the price offered by the alleged wrongdoer and the price offered by another seller under a similar position<sup>6</sup>
- The size, colour, style, and the font of the words in the written contract<sup>7</sup>
- If the contract contained a clause that was onerous, whether the alleged wrongdoer adopted any measure to draw the complainant's attention to this<sup>8</sup>
- The consumer been given a proper opportunity to realize the existence, to read and to comprehend the terms of the contract; also whether the consumer had to

<sup>5</sup> *Shum Kit Ching v Caesar Beauty Centre Ltd* [2003] HKC 235

<sup>6</sup> *Lo Wo and Others v Cheung Chan Ka Joseph and Anor* [2001] 3 HKC 70

<sup>7</sup> *Shum Kit Ching v Caesar Beauty Centre Ltd* [2003] HKC 235

<sup>8</sup> *Ibid*

make a choice in a hasty fashion<sup>9</sup>

- Any proper opportunity to seek independent advice<sup>10</sup>
- Whether there was any real negotiation or bargaining on the terms of the service or whether it was a take-it-or-leave-it situation (i.e. a standard-form contract)<sup>11</sup>
- Whether the contract was a standard contract drafted solely the interests of the company<sup>12</sup>

No single factor is conclusive. The court must look into the totality of all the circumstances relevant to all the above factors in reaching its decision.<sup>13</sup>

### Action Jenny may be able to take

The credit card agreement and the weight loss agreement are agreements of supply of service. Thus the UCO applies in this situation.

### Action against the bank

For discretionary relief under section 5(1)(a)-(c) of UCO, some factors would help Jenny to establish an unconscionable contract case against the bank:

Firstly, the bank's bargaining strength, its knowledge and experience on credit card products are far greater than Jenny's. Secondly, the credit card service has been oligopolized by the major banking institutions and all of their contracts contain terms in relation to recovering debt, reimbursement of collection expenses which are substantially similar. Thirdly, these standard form contracts are written on a take-it-or-leave-it basis, drafted solely in the best interests of the bank. Fourthly, the cardholder agreement clauses were so onerous that they allowed the bank to run up administrative charges without imposing an upper limit and allowing it to contact an expensive debt collector<sup>14</sup>. Fifthly, the bank did absolutely

nothing to draw Jenny's attention to these clauses; even worst those clauses were written in small print<sup>15</sup>.

### Against the beauty centre

Here are some of the factors that would help Jenny to establish an unconscionable contract against the beauty centre:

Jenny was an unsophisticated young person with little social experience and a weak character, leaving her unable to resist persuasion. Under her current financial and poor bargaining position, I believe she may have a claim against the beauty centre if she can prove other unconscionable factors such as: (1) there was no genuine need to upgrade the plan from \$888 to \$188,888 in such a haste; (2) the terms of the contract were written with the best interests of the beauty centre but the worst interests of the consumer in mind; (3) the written contract was printed in a small font that discouraged reading; (4) the beauty consultants failed to explain the detrimental part of the contract to Jenny; and (5) unfair pressure was exerted.

I have not seen the weight loss contract and I do not have the exact details of communication between Jenny and the beauty centre at the time the contract was made. Therefore, I will have to talk to her tonight in order to make a further evaluation on her legal position.

If Jenny succeeds in her claim that the contract was unconscionable against the beauty centre, the court may exercise its power under section 5 of the UCO by altering the whole contract or deleting the unconscionable parts so as to enable Jenny to get a full/partial refund.

If Jenny succeeds in her claim against the bank, the court may delete the onerous part of the contract or make an alteration so as to reduce the collection expenses to a conscionable level. **T/D**

9 *Lo Wo and Others v Cheung Chan Ka Joseph and Anor* [2001] 3 HKC 70

10 *Lo Wo and Others v Cheung Chan Ka Joseph and Anor* [2001] 3 HKC 70; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200

11 *Heng Seng Credit Card Ltd v Tsang Nga Lee* [2000] 3 HKC 269

12 *Ibid*

13 *Shum Kit Ching v Caesar Beauty Centre Ltd* [2003] HKC 235

14 *In Hang Seng Credit Card Ltd v Tsang Nga Lee* [2000] 3 HKC 269, the court held that the cost provision requiring customers to indemnify all the cost of recover payment without upper limit was unconscionable.

15 Aside from the unconscionability issue, the court may sever an onerous clause in a contract solely on the ground that the visibility of the words was not conspicuous. In *Interfoto Picture Library v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348 the court refused to incorporate a clause that required the defendant to pay an expensive late charge into the contract because the plaintiff failed to take reasonable steps to bring such an unreasonable term to the defendant's attention.