

**Redefining Contractual Capacity? The UN *Convention on the Rights of Persons with Disabilities* and
the Incapacity Defence in English Contract Law**

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How can the incapacity defence in contract law coexist with the concept of universal legal capacity advanced by the UN *Convention on the Rights of Persons with Disabilities* (CRPD)? In the absence of clear guidance from the CRPD on the link between legal capacity and mental capacity, and given the silence of this Convention on the concept of contractual capacity, this article stresses the need to redefine contractual capacity in a manner that responds not only to economic interests (eg upholding the security of transactions) but also to social interests (including the protection of values such as dignity). The discussion insists that incapacity and disability must never be conceptually equated and calls for a definition of contractual incapacity that moves beyond the medical condition of individuals (whether this is known by or apparent to the other contracting party) and which considers the circumstances of the transaction. These arguments are explored in the context of English contract law, focusing on the question of contractual validity when a party lacked the mental capacity to understand the transaction and the other party was unaware of the incapacity and acted in good faith.

Introduction

Entering into legally binding agreements with others is instrumental in advancing one's personhood.¹

As recognised in Article 12 CRPD,² all persons have a right to equal recognition as persons before the

* I would like to thank Mike Varney, Kelvin Johnstone and the anonymous reviewers for constructive comments. Any errors and omissions are my own.

¹ G. Quinn, 'Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD' (HPOD Conference, Harvard, 2010).

² G.A. Res. 61/611, 13 December 2006, A/61/611, 15 IHRR 255.

law³ and to the equal enjoyment of legal capacity in all aspects of life.⁴ Implied in this provision is the equal right to enter into legally binding agreements and to have these recognised. Article 12 CRPD has the potential to play a significant contribution in tackling the historical disadvantage and the barriers to participation in society faced by persons with disabilities in general and persons with cognitive disabilities in particular.⁵ Such disadvantages include legal barriers when disability is equated with incapacity, leading to a denial of legal capacity and the institution of guardianship systems and substituted decision making.⁶ These reflect a perception of people as objects of care for whom decisions must be made, rather than as subjects of human rights who may require support in making their own decisions.⁷ The denial of legal capacity has been equated with the 'civil death' of the persons concerned.⁸ Persons whose decisions have no legal force are left without the opportunity to make their own choices and depend instead on the actions of others.⁹ They are denied their individuality and are deprived of their personal autonomy and dignity,¹⁰ becoming 'non-persons' under the law.¹¹ By recognising the right of persons with disabilities to enjoy legal capacity on an equal basis with others, Article 12 CRPD provides persons with a 'sword' to advance their individual wishes and with a 'shield' against unwanted interference from others.¹² In addition, by

³ CRPD, Art 12(1).

⁴ Ibid, Art 12(2).

⁵ M. Oliver, *The Politics of Disablement* (Basingstoke: Palgrave Macmillan 1990); S. Herr et.al. (eds.) *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (Oxford: OUP 2003).

⁶ M. Bach, 'The Right to Legal Capacity under the UN Convention on the Rights of Persons with Disabilities: Key Concepts and Directions for Law Reform', Toronto, Institute for Research and Development on Inclusion and Society (IRIS 2009), p 1; A. Dhanda, 'Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disabilities' (2008) 5 Sur: Intl J Hum Rts 43, p 47; A. Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?' (2007) 34 Syracuse J.Int'l L.& Com. 563, p 568; A. Nilsson, 'Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities' Issue Paper, Council of Europe, February 2012, p 8; P. Weller, 'The Convention on the Rights of Persons with Disabilities and the Social Model of Health: New Perspectives' (2011) 21 J.M.H.L. 74, p 77.

⁷ R. Dinerstein, 'Implementing Legal Capacity under Article 12 of the UN *Convention on the Rights of Persons with Disabilities*: The Difficult Road from Guardianship to Supported Decision-Making' (2012) 19 Human Rights Brief 8, p 9.

⁸ Lawson, above n 6, p 569.

⁹ Dinerstein, above n 7, p 9.

¹⁰ O. Lewis, 'Advancing Legal Capacity Jurisprudence' (2011) 6 E.H.R.L.R. 700, p 709.

¹¹ Nilsson, above n 6, pp 4-6; A. Kanter, 'The Promise and Challenge of the United Nations *Convention on the Rights of Persons with Disabilities*' (2007) 34 Syracuse J.Int'l L.& Com. 287, p 302.

¹² Quinn, above n 1, p 10.

acknowledging that some persons with disabilities may require support in exercising legal capacity,¹³ Article 12 CRPD recognises the interdependence between people.¹⁴ This provision embodies the ethos of the CRPD for the full and equal enjoyment of human rights and fundamental freedoms by everybody¹⁵ and has the potential to engender significant transformations within the legal frameworks of States Parties,¹⁶ although the scope of Article 12 CRPD remains unclear and its implementation will prove challenging.¹⁷ Referring to the absence of a clear demarcation between the concepts of legal capacity and mental capacity, Bartlett rightly notes that ‘an awkward silence’ remains at the heart of the CRPD.¹⁸

Whilst considerable academic discussion regarding the implementation challenges posed by Article 12 CRPD involve the medical context,¹⁹ this article explores the concept of capacity in a contractual context focusing on English contract law. Although the United Kingdom has ratified the CRPD in 2009, this Convention is not incorporated into domestic law and would prove of limited direct assistance in domestic courts. *In R (on the application of NM) v Islington LBC*,²⁰ Sales J. notes that the CRPD is ‘an unincorporated international treaty’ which ‘does not have direct effect in English law’,²¹ while in *R (on the application of MA) v Secretary of State for Work and Pensions*,²² Laws LJ warns that ‘some

¹³ CRPD, Art 12(3).

¹⁴ Dhanda, above n 6, p 47.

¹⁵ CRPD, Art 1.

¹⁶ Quinn, above n 1.

¹⁷ L. Kerzner, ‘Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective’, In *from the margins: new foundations for personhood and legal capacity in the 21st century*, University of British Columbia, April 2011; A. Dhanda, ‘Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?’ (2007) 34 *Syracuse J.Int’l L.& Com.* 429.

¹⁸ P. Bartlett, ‘The United Nations *Convention on the Rights of Persons with Disabilities* and Mental Health Law’ (2012) 75 *MLR* 752, p 767.

¹⁹ See, for example, E. Flynn, ‘Mental (in)Capacity or Legal Capacity: A Human Rights Analysis of the Proposed Fusion of Mental Health and Mental Capacity Law in Northern Ireland’ (2013) 64 *NILQ* 485; F. Morrissey, ‘The United Nations *Convention on the Rights of Persons with Disabilities*: A New Approach to Decision-Making in Mental Health Law’ (2012) 19 *E.J.H.L.* 423; S. Wildeman, ‘Protecting Rights and Building Capacities: Challenges to Global Mental Health Policy in Light of the Convention on the Rights of Persons with Disabilities’ (2013) 41 *Journal of Law, Medicine and Ethics* 48.

²⁰ *R (on the application of NM) v Islington LBC* [2012] EWHC 414 (Admin).

²¹ *Ibid*, [98].

²² *R (on the application of MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (QB).

caution is required as regards the use to be made of unincorporated international conventions'.²³ Yet, even if the CRPD is not incorporated into domestic law, its relevance as an instrument ratified by the United Kingdom cannot be overlooked. As stated by Carnwath LJ in *AH v West London Mental Health Trust*,²⁴ '[b]y ratifying a Convention a state undertakes that wherever possible its laws will conform to the norms and values that the Convention enshrines'.²⁵ The recognition of universal legal capacity in the CRPD²⁶ and its emphasis on upholding values such as the protection of human dignity²⁷ raise important questions about the impact of the CRPD for the incapacity defence in contract law. Whilst this defence is deemed compatible with the CRPD if it can be invoked by anyone and the concepts of incapacity and disability are not equated,²⁸ the Convention does not provide guidance on the definition or scope of the incapacity defence. This article suggests that to be compatible with the CRPD ethos, any examination of the incapacity defence in contract law must consider not only economic factors (such as the security of transactions), but also social factors (including the protection of values such as dignity). This requires a move beyond the medical condition of the party alleging incapacity (and whether this was known by, or apparent to the other contracting party), to also assess environmental factors (such as the circumstances of the transaction). The article seeks to demonstrate why such an approach is necessary and explores how this could be accommodated within the parameters of English contract law.

The article focuses on the common law approach regarding the validity of a contract between a party who lacked the mental capacity to understand the transaction (hereafter A) and another party who was unaware of the incapacity and acted in good faith (hereafter B). The reasons for focusing on this

²³ Ibid, [80]. See also *Hainsworth v Ministry of Defence* [2014] EWCA Civ 763, [30]; *JH Rayner v Department of Trade and Industry* [1990] 2 AC 418.

²⁴ *AH v West London Mental Health Trust* [2011] UKUT 74 (AAC).

²⁵ Ibid, [16].

²⁶ CRPD, Art 12(1).

²⁷ Ibid, Art 3(a).

²⁸ Bach, above n 6, pp 4-5.

issue are twofold. Firstly, whilst recognising the significance of the *Mental Capacity Act* (MCA) 2005²⁹ in defining capacity,³⁰ its relevance for contracts for necessary goods and services³¹ and the potential influence of this definition beyond such contracts,³² it is important to also recognise the potential influence that the common law can have on the way in which capacity-related issues are addressed at statutory level. In fact, as recognised by Andrews J. in *Aster Healthcare v Shafi*,³³ the economic focus reflected in section 7 MCA (regarding contracts for necessary goods and services) is rooted on the common law rule on necessities and its concern for upholding the security of transactions.³⁴ This may suggest that the insufficient emphasis on social values (including concern for protecting dignity) reflected in the common law approach was replicated at statutory level. Any attempt to reconceptualise contractual capacity to reflect both economic and social values should not rely solely on top down measures which would reform the MCA to reflect CRPD values, but should also call for a revolution from within, in which the common law approach to the incapacity defence reflects such values and moves beyond a focus on the medical conditions of individuals to consider the circumstances of the transaction.

Secondly, questions regarding the validity of a contract between A and B raise important policy issues, as they may require courts to make a choice between two innocents. An extreme approach would provide absolute protection to one of these parties and disregard the interests of the other.³⁵ At one end of the spectrum, such contracts would always be void, to safeguard A's interests.³⁶ At the other end of the spectrum, such contracts would always be valid, to protect B's interests and uphold

²⁹ *Mental Capacity Act* 2005, c. 9 [hereafter MCA].

³⁰ *Ibid*, ss 2 and 3.

³¹ *Ibid*, s 7.

³² *Re MM (an adult)* [2007] EWHC 2003 (Fam) [79-80].

³³ *Aster Healthcare v Shafi* [2014] EWHC 77 (QB), as confirmed in [2014] EWCA Civ 1350.

³⁴ *Ibid*, [49] (per Andrews J.). See *Re Rhodes* [1890] 44 Ch Div 94.

³⁵ P. Watts, 'Contracts made by Agents on Behalf of Principals with Latent Mental Incapacity: The Common Law Position' (2015) 74 CLJ 145.

³⁶ G. Spark, *Vitiating of Contracts: International Contractual Principles and English Law* (Cambridge: CUP 2013), p 57.

the security of transactions. While early English law had witnessed a shift from the former extreme³⁷ to the latter (*Beverley's case*),³⁸ nineteenth century English law attempted to provide a more balanced stance.³⁹ The prevalent approach, outlined in *Moulton v Camroux*⁴⁰ and reinforced in *Imperial Loan v Stone*⁴¹ (*Imperial Loan*) allows such contracts to be voidable if A can prove both that he lacked the mental capacity to understand the transaction and that B knew about the incapacity.⁴² Despite attempts to find a middle ground,⁴³ this is an imbalanced approach which sets the bar too high for A, as it seems to insist on B's actual knowledge of the mental incapacity. Twentieth century contract law witnessed an attempt by the New Zealand Court of Appeal in *Archer v Cutler*⁴⁴ (*Archer*) to shift the balance in A's favour, by stating that an unfair agreement could be invalidated for want of mental capacity, irrespective of B's knowledge of the incapacity.⁴⁵ Despite the merits of providing A with an additional tool to invalidate a contract on grounds of incapacity, this perspective is also imbalanced, as it overlooks B's interests. This approach was ultimately rejected by the Privy Council in *Hart v O'Connor*,⁴⁶ which confirmed the rule in *Imperial Loan* and criticised *Archer* for being 'illogical'.⁴⁷ The twenty-first century decision of the Supreme Court in *Dunhill v Burgin*⁴⁸ (*Dunhill*) provides hope that a balanced approach can be adopted, although this matter is far from being settled. The hope for a balanced approach is pinned on Lady Hale's confirmation that B's knowledge of incapacity required in *Imperial Loan* is not limited to actual knowledge and can also include constructive knowledge.⁴⁹ Yet, Lady Hale's dictum in *Dunhill* has been met with some reservation by academic commentators, who question the basis and scope of such an extension of the grounds for

³⁷ Henry of Bracton, *De Legibus Et Consuetudinibus Angliæ* (*The Laws and Customs of England*), c. 1210-1268. Spark, above n 36, p 57.

³⁸ *Beverley's Case* (1603) 4 Co. rep. 123b.

³⁹ Watts, above n 35, 145.

⁴⁰ *Moulton v Camroux* (1848) 2 Exch 487, [501].

⁴¹ *Imperial Loan v Stone* [1892] 1 QB 599.

⁴² *Ibid*, [601].

⁴³ Watts, above n 35, p 145.

⁴⁴ *Archer v Cutler* [1980] 1 NZLR 386.

⁴⁵ *Ibid*, [401].

⁴⁶ *Hart v O'Connor* [1985] AC 1000.

⁴⁷ *Ibid*, [1027].

⁴⁸ *Dunhill v Burgin* [2014] UKSC 18.

⁴⁹ *Ibid*, [25].

invalidating contracts for want of capacity.⁵⁰ This article calls for a wide interpretation of ‘constructive knowledge’ that considers the circumstances of the transaction and protects not only economic interests but also social values, including dignity. The discussion considers competing policies and reflects on the relevance of social values in a context dominated by economic interests.

The CRPD and the concepts of universal human dignity and universal capacity

The CRPD and Article 12 have been the subject of extensive academic scrutiny.⁵¹ This discussion focuses on the need to ensure that any attempt to address implementation challenges associated with Article 12 CRPD must be guided by a framework of principles that reflect citizenship values (including the protection of human dignity) and assesses how these values can inform our understanding of contractual capacity.

The Convention, which is the first binding international human rights instrument focused specifically on the rights of persons with disabilities,⁵² reframes the interest of persons with disabilities in terms of human rights⁵³ and reflects a perception of people as subjects of human rights (rather than as objects of care),⁵⁴ will full entitlements in society (rather than disempowered victims).⁵⁵ It emphasises the equal worth of all human beings, aims to ensure ‘full and equal enjoyment of all

⁵⁰ J. Chitty et al (eds), *Chitty on Contracts* (London: Sweet & Maxwell, 32nd edn, 2015); E. Peel, *Treitel on the Law of Contract* (London: Sweet & Maxwell, 14th edn, 2015).

⁵¹ For a more detailed discussion of the CRPD, see OM Arnardóttir and G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Brill 2009); E Flynn, *From Rhetoric to Action: Implementing the UN Convention on the Rights of Persons with Disabilities* (CUP 2011). On Article 12 CRPD, see Bartlett, above n 18; P. Gooding, ‘Navigating the ‘Flashing Amber Lights’ of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns’ (2015) 15 H.R.L.Rev. 45; A. Arstein-Kerslake and E. Flynn, ‘The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law’ (2016) 20 Intl J Hum Rts 471.

⁵² Kanter, n 11 above, p 288.

⁵³ R Kayess and P French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 H.R.L.Rev. 1. See CRPD, Art 1.

⁵⁴ Lawson, above n 6, p 584. See CRPD Art 12(1).

⁵⁵ D. Smith, ‘Who Says You’re Disabled? The Role of Medical Evidence in the ADA Definition of Disability’ (2007) 82 Tul.L.Rev. 1, 71.

human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity⁵⁶ and calls for ‘respect for difference’ and for the ‘acceptance of persons with disabilities as part of human diversity and humanity’.⁵⁷ The Convention tackles human rights abuses experienced by persons with disabilities, including the denial of legal capacity on the basis of disability⁵⁸ and adapts the application of established human rights to circumstances particular to persons with disabilities.⁵⁹ It reaffirms the move away from a medical model of disability (focused on the medical condition of individuals) to a predominantly social model that perceives disability as a socially-constructed phenomenon,⁶⁰ resulting from ‘the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others’.⁶¹ It focuses on adapting society to accommodate various abilities rather than on adapting individuals to society⁶² and perceives social inclusion and respect for individual autonomy as mutually complementary goals.⁶³

Persons with disabilities are often confronted by other people’s misconceptions about disability, resulting in a ‘misrecognition’ of their identity.⁶⁴ The CRPD provides a framework for change from misrecognition to recognition, promoting respect for human diversity.⁶⁵ The citizenship value of human dignity plays a key role in achieving this objective, as it is inherent in every person and its recognition aims to ensure that ‘everyone is treated as having value or worth’.⁶⁶ It contributes towards ensuring substantive equality, which proactively tackles ‘systemic’ forms of discrimination

⁵⁶ CRPD, Art 1.

⁵⁷ Ibid, Art 3(d).

⁵⁸ T. Melish, ‘The UN Disability Convention: Historic Process, Strong Prospects and Why the U.S. Should Ratify’ (2007) 14 Human Rights Brief 1, p 7.

⁵⁹ Kayess and French, above n 53, p 3.

⁶⁰ S. Fraser Butlin, ‘The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?’ (2011) 40 ILJ 428.

⁶¹ CRPD, para (e), Preamble.

⁶² Lawson, above n 6, p 572.

⁶³ H. Bielefeldt, ‘New Inspiration for the Human Rights Debate: The Convention on the Rights of Persons with Disabilities’ (2007) 52 NQHR 397, p 398.

⁶⁴ H. Hanish, ‘Recognising Disability’, in J. Bickenbach et.al. (eds.) *Disability and the Good Human Life* (CUP, 2014), p 124. See C. Taylor, *Philosophical Arguments* (Harvard University Press, 1995), p 226.

⁶⁵ Ibid.

⁶⁶ S. Fredman, ‘Equality: A New Generation?’ (2001) 30 ILJ 145, p 155.

entrenched in society.⁶⁷ Closely linked to universal human dignity is the concept of universal legal capacity, which refers to the ability of all people to hold and exercise rights and duties.⁶⁸ These concepts should be interpreted in light of each other,⁶⁹ recognising their overlap in the pursuit of respect for everyone. The key for ensuring a clear understanding of these concepts is through social dialogue,⁷⁰ including consultation with disabled people's user led organisations.

Article 12 CRPD, which reaffirms the right of people with disabilities to equal recognition as persons before the law⁷¹ and to the equal enjoyment of legal capacity in all aspects of life,⁷² has been commended as 'the beating heart of the Convention',⁷³ with the potential to 'effect revolutionary changes'.⁷⁴ It plays a key contribution to the paradigm shift in the perception of persons with disabilities from objects of care to subjects of rights,⁷⁵ from substituted decision-making and denial of legal capacity to supported decision-making and the recognition of the right of persons with disabilities to enjoy legal capacity on an equal basis with others⁷⁶ and from exclusion to inclusion in all aspects of life.⁷⁷ It refers explicitly to, inter alia, the equal right of persons with disabilities to control their own financial affairs and to have access to financial credit.⁷⁸ It also recognises that some people may require support in exercising legal capacity⁷⁹ and calls for safeguards to prevent abuse (eg undue influence) in the provision of support.⁸⁰ While the adoption of Article 12 represents a victory for persons with disabilities, the practical implications of

⁶⁷ Ibid, p 154.

⁶⁸ ComRPD, General Comment No. 1: Article 12 (Equal Recognition before the Law), 19 May 2014, UN Doc. CRPD/C/GC/1, para 13.

⁶⁹ For similar arguments regarding the concepts of dignity, equality and liberty, see S. Baer, 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' (2009) 59 U.Toronto L.J. 417.

⁷⁰ D. Réaume, 'Discrimination and Dignity' (2003) 63 Louisiana L.Rev, 1, p 51.

⁷¹ CRPD, Art 12(1).

⁷² Ibid. Art 12(2). See Dhanda, above n 17, 457; Dhanda, above n 6, 46-48.

⁷³ Nilsson, above n 6, p 14.

⁷⁴ Lawson, above n 6, p 595.

⁷⁵ CRPD, Arts 1 and 12(1).

⁷⁶ Ibid, Art 12(2) and (3).

⁷⁷ Melish, above n 58, p 9.

⁷⁸ CRPD, Art 12(5).

⁷⁹ Ibid, Art 12(3).

⁸⁰ Ibid, Art 12(4).

implementing this provision suggest that ‘the hard part begins!’⁸¹ This difficulty is augmented when considering the implications of universal legal capacity in the area of contract law, given the silence of the Convention regarding its application in the contractual sphere and the absence of guidance from the Committee on the Rights of Persons with Disabilities (ComRPD) on the link between legal, mental and contractual capacity. However, despite this silence, the CRPD has the potential to be a benchmark in guiding a re-examination of legal concepts such as contractual capacity in light of the values pursued by the Convention, including dignity.

The implementation of Article 12 CRPD would not require an abandonment of the incapacity defence in contract law. In fact, in a framework which recognises universal legal capacity (the ability possessed by everyone to hold and exercise rights and duties)⁸² and distinguishes this from mental capacity (the decision making skills of an individual, which vary from person to person and may be influenced by external factors),⁸³ the exercise of universal legal capacity could be facilitated by an effective legal framework where parties can rely, when appropriate, on defences such as contractual incapacity. However, the effectiveness of the incapacity defence in contract law depends on a range of factors. Bach rightly notes that as the incapacity defence in contract law may be invoked by anyone, this defence is compatible with Article 12 CRPD, but incompatibility would arise if incapacity and disability were conceptually equated.⁸⁴ Concerns about incompatibility with the CRPD could arise, even in a disability neutral concept of incapacity, if differential treatment on the basis of mental capacity had a disproportionate impact on people with disabilities,⁸⁵ leading to an allegation of indirect discrimination on the basis of disability.⁸⁶ This could amount to a breach of Article 12(2)

⁸¹ Dinerstein, above n 7, p 8. See also J. Dawson, ‘A Realistic Approach to assessing Mental Health Laws’ compliance with the UNCRPD’ (2015) 40 Int’l J.L.& Psychiatry 70.

⁸² ComRPD, General Comment No. 1, para 13.

⁸³ Ibid. See Arstein-Kerslake and Flynn, above n 51, p 474.

⁸⁴ Bach, above n 6, p 5.

⁸⁵ Flynn, above n 19, p 497; E. Flynn and A. Arstein-Kerslake, ‘Legislating Personhood: Realising the Right to Support in exercising Legal Capacity’ (2014) 10 Int. J.L.C. 81, p 87.

⁸⁶ CRPD, Arts 2, 5 and 12. See W. Martin et.al., ‘Achieving CRPD Compliance. Is the *Mental Capacity Act* of England and Wales Compatible with the *UN Convention on the Rights of Persons with Disabilities*? If Not, What

(which reaffirms the right to equal enjoyment of legal capacity), read in conjunction with Article 5 CRPD (which prohibits ‘all discrimination on the basis of disability’), including any discriminatory measure that has the ‘purpose or effect’ of interfering, inter alia, with the right to equal recognition before the law.⁸⁷ However, the incapacity defence in contract law could be objectively justified within this framework. Whilst the CRPD provides ‘no schema of defence against charges of indirect discrimination’,⁸⁸ Martin et.al. note that the differential treatment which leads to a disproportionate impact on persons with disabilities may be permitted if based on reasonable and objective justifications and pursues a legitimate aim under the Convention.⁸⁹ A measure that has disproportionate impact on people with disabilities must meet a three parts test to demonstrate that it serves ‘a legitimate aim’ under the CRPD, relies on an ‘objective basis’, which constitutes ‘a reasonable means’ for achieving the relevant aim.⁹⁰

The incapacity defence in contract law, if reconceptualised in light of the values pursued by the CRPD, could meet all three parts of this test. Firstly, such defence could pursue ‘a legitimate aim’, as the Convention seeks not only to empower people with disabilities (eg respect for individual autonomy)⁹¹ but also to protect individuals in situations of risk⁹² or exploitation.⁹³ A broad reading of Article 11 (to include serious risk not confined to humanitarian emergencies) and Article 16 (to include passive exploitation), read in conjunction with Article 3(a) CRPD (respect for dignity) would support a framework which protects A who has entered into a grossly imbalanced transaction, without the mental capacity to understand its nature, in the absence of support such as independent

Next? An Essex Autonomy Project Position Paper’, Report submitted to the UK Ministry of Justice, 22 September 2014, p 16.

⁸⁷ Ibid.

⁸⁸ Martin et.al, above n 101, p 7.

⁸⁹ Ibid. Martin et.al. support this conclusion with reference to the UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20: ‘Non-Discrimination in Economic, Social and Cultural Rights (Art 2(2) ICESCR’, (2009), E/C.12/GC/20, para 13; UN Human Rights Committee, General Comment No. 18: ‘Non-discrimination’ (1989), HRI/GsEN/1/Rev.9 (Vol. I), para 13.

⁹⁰ Martin et.al, above n 101, p 7.

⁹¹ CRPD, Art 3(a).

⁹² Ibid, Art 11.

⁹³ Ibid, Art 16. See Martin et.al, above n 101, p 30.

legal advice and in the presence of passive unacceptable conduct from B. Secondly, a reconceptualised incapacity defence could rest on an objective basis. To be compatible with the CRPD ethos, this defence must move beyond A's medical condition (and whether this was known by or apparent to B), to include an assessment of environmental factors such as the circumstances of the transaction. Finally, the basis of this defence could be a reasonable means for achieving a relevant aim. The CRPD provides little guidance on how to balance protection of individual autonomy with potential interventions to safeguard dignity.⁹⁴ As highlighted by Martin et.al., 'the core' of the autonomy concept lies in the notion of self-determination',⁹⁵ but if A cannot understand the implications of a particular transaction, it is difficult to argue that A exercised autonomy to enter into that transaction.⁹⁶ A reconceptualised incapacity defence in contract law could provide a safety net in such circumstances.

The starting point should always be a presumption of contractual capacity and parties should have access to support in exercising capacity⁹⁷ (eg accessible information,⁹⁸ assistance with understanding the implications of a decision)⁹⁹ and could include informal and formal support arrangements.¹⁰⁰ Support may be 'particularly important' when signing a contract, to enable informed decision making.¹⁰¹ The support for exercising legal capacity must, inter alia, respect A's 'rights, will and

⁹⁴ Dawson, above n 81, p 71.

⁹⁵ Martin et.al, above n 101, p 9.

⁹⁶ Ibid. See also J. Craigie, 'Against a Singular Understanding of Legal Capacity: Criminal Responsibility and the *Convention on the Rights of Persons with Disabilities*' (2015) 40 Int J Law Psychiatry 6, p 8.

⁹⁷ CRPD, Art 12(3). E. Flynn and A. Arstein-Kerslake, 'The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?' (2014) 32 Berk J Intl L 124, p 131.

⁹⁸ P. Gooding et.al, 'Assistive Technology as Support for the exercise of Legal Capacity' (2015) 29 Int'l Rev.L.Computers & Tech. 245, p 251; T. Minkowitz, 'Abolishing Mental Health Laws to Comply with the *Convention on the Rights of Persons with Disabilities*' in B. McSherry and P. Weller, *Rethinking Rights-Based Mental Health Laws* (Oxford: Hart 2010), p 160.

⁹⁹ L. Series, 'Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms' (2015) 40 Int'l J.L. & Psychiatry 80, p 85.

¹⁰⁰ ComRPD, General Comment No. 1, para 17. See W. Martin et.al., 'Three Jurisdictions Report: Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK, An Essex Autonomy Project Position Paper', 6 June 2016, p 52; Arstein-Kerslake and Flynn, above n 51, p 476; Flynn, above n 19, p 498; Gooding, above n 51, p 46.

¹⁰¹ A. Arstein-Kerslake, 'An Empowering Dependency: Exploring Support for the Exercise of Legal Capacity' (2016) 18 *Scandinavian Journal of Disability Research* 77, p 81.

preferences', be free of conflicts of interest or undue influence and be 'proportional and tailored' to A's circumstances.¹⁰² These safeguards seek to balance the objectives of empowerment and protection but fail to clarify how to address 'troubling situations' where a person's decision places him at a 'serious risk' that he does not understand.¹⁰³ Such concerns should not be confined to risks involving personal safety but should also include situations where A's decision to enter into a grossly imbalanced transaction places him at a serious financial risk that he does not understand.

A further hurdle when seeking to defend the incapacity defence in contract law is encountered when evaluating such a defence in light of ComRPD's interpretation of Article 12 CRPD.¹⁰⁴ The arguments are likely to meet some difficulty, given the absolute stance adopted by ComRPD when insisting that mental capacity assessments based on functional tests (which may question whether A had the ability to use and weigh information and understand the implications of his decision), which may result on denial of legal capacity, are incompatible with Article 12.¹⁰⁵ ComRPD focuses on the provision of support in exercising legal capacity, which should not 'hinge on mental capacity assessments'.¹⁰⁶ Furthermore, ComPRD stresses that everyone has legal standing (to hold rights) and legal agency (to exercise rights) and these strands cannot be separated.¹⁰⁷

ComPRD is correct in stressing that legal capacity comprises legal standing and legal agency, and in its insistence for supported decision making.¹⁰⁸ Yet, whilst ComRPD focuses on the provision of support when this may be needed to exercise legal capacity and on the necessary safeguards within this framework of support, it fails to consider the position where decisions are taken outside this

¹⁰² CRPD, Art 12(4); ComRPD, General Comment No. 1, para 20. See Martin et.al, above n 87, p 38.

¹⁰³ Series, above n 100, p 87.

¹⁰⁴ ComRPD, General Comment No. 1.

¹⁰⁵ Ibid, para 15.

¹⁰⁶ Ibid, para 29(i).

¹⁰⁷ Ibid, para 14.

¹⁰⁸ Ibid. See Martin et.al, above n 101, p 24; P. Gooding and C. O'Mahony, 'Laws on Unfitness to stand Trial and the *UN Convention on the Rights of Persons with Disabilities*: Comparing Reform in England, Wales, Northern Ireland and Australia' (2016) 44 *IJLCJ* 122, p 136; Flynn, above n 19, p 486.

framework of support by a party who lacks the mental capacity to understand the nature and consequences of his decision and the need for support, resulting in a grossly imbalanced transaction to his detriment. The need to respond to such concerns would justify, in exceptional circumstances, a departure from ComRPD's 'hard-line' interpretation of Article 12,¹⁰⁹ which goes much further than the Convention's requirement for ensuring that persons with disabilities enjoy legal capacity 'on an equal basis with others'.¹¹⁰ An incapacity defence in contract law available to all could play an important role in such circumstances. Abolishing this defence because of its potential implications for A's legal agency in that particular transaction and because of its reference to functional aspects of mental capacity, would lead to 'an impoverished legal system'.¹¹¹ It would leave a vacuum that cannot be filled by other doctrines such as undue influence or unconscionability (as noted in the next section in the context of English contract law).

Far from providing A with 'an excuse'¹¹² from his compliance with contractual obligations, a reconceptualised incapacity defence to reflect CRPD values would recognise the 'relevance of both personal and environmental factors' that affect decision making¹¹³ and would consider both economic and social interests. The concept of personhood that emerges from the Convention values individual autonomy and independence¹¹⁴ but also considers human diversity,¹¹⁵ universal human dignity¹¹⁶ and recognises the importance of support and interdependence between people¹¹⁷ to facilitate participation and inclusion.

¹⁰⁹ S. Callaghan and C. Ryan, 'An Evolving Revolution: Evaluating Australia's Compliance with the *Convention on the Rights of Persons with Disabilities* in Mental Health Law' (2016) 39 U.N.S.Wales L.J. 596, p 604.

¹¹⁰ CRPD, Art 12(2). See Dawson, above n 81, 73.

¹¹¹ Dawson, above n 81, 71-73.

¹¹² T. Minkowitz, 'Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond' (2014) 23 Griffith L.Rev. 434, p 455.

¹¹³ Ibid. See also K. Booth Glen, 'Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond' (2012) 44 Colum. Hum. Rts. L. Rev. 93, p 98.

¹¹⁴ CRPD, Art 3(a) and para (n) Preamble.

¹¹⁵ Ibid, Art 3(d).

¹¹⁶ Ibid, Arts 1 and 3(a).

¹¹⁷ Ibid, Art 12(3). See Dhanda, above n 6, p 50.

The CRPD provides a benchmark to recognise, inter alia, the interdependence of people¹¹⁸ and the interconnection of rights, bringing together civil and political rights as well as economic, social and cultural rights, to create 'hybrid rights'.¹¹⁹ When operating in the private sphere and entering into contracts, people should always be perceived as citizens, with all the economic, political and social values that this entails.¹²⁰ Thus, citizenship values, including the protection of dignity, must permeate all areas of law, including contract law. Similar to the vision of contract law in Lorenzetti's fourteenth century painting '*Il Buon Governo*' (tr. the good government),¹²¹ as interpreted by Teubner,¹²² this area of law can embrace a multidimensional role (including economic and social spheres), reflecting the interrelatedness between public and private law and the interdependence of human beings bound together through contracts (a bond depicted as a rope running through people's hands).¹²³ In this strongly integrated society, the role of contract law is to facilitate private transactions and connect people in mutual relations.¹²⁴ Whilst this vision contrasts with conventional approaches that reflect a unidimensional role for contract law (as facilitator of market transactions within the economic sphere and perceives individuals as economic actors in pursuit of self-interest),¹²⁵ it is close to the inter-relational approach adopted by the CRPD, which provides a new lens for re-examining existing legal concepts.¹²⁶ Seen through this lens, the concept of contractual capacity must take into account environmental factors such as the circumstances of the transaction and must consider alongside economic values, social values such as human dignity.

Mental incapacity in English contract law: a tale of two innocents?

¹¹⁸ Lewis, above n 10, p 704.

¹¹⁹ D. MacKay, 'The United Nations Convention on the Rights of Person with Disabilities' (2007) 34 *Syracuse J.Int'l L.& Com.* 323, p 330. See CRPD, para (c), Preamble.

¹²⁰ See T. Marshall, *Citizenship and Social Class, and Other Essays* (Cambridge: CUP 1950).

¹²¹ A. Lorenzetti, *Il Buon Governo*, 1338 painting, Palazzo Pubblico di Siena.

¹²² G. Teubner, 'Contracting Worlds: The Many Autonomies of Private Law' (2000) 9 *Social and Legal Studies* 399, pp 400-402.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Series, above n 100.

This section focuses on a narrow issue: the question of validity of contracts entered into between A (who lacked the mental capacity to understand the transaction) and B (who was unaware of the incapacity and acted in good faith). Whilst this is a narrow focus, it raises wider policy questions about the relevance of social values (including dignity) in an area of law currently dominated by economic values (concerned with the security of transactions). The discussion also adopts a narrow scope, examining in detail only the common law approach to this aspect of contractual capacity. Whilst recognising the relevance of the *Mental Capacity Act* (MCA) 2005 in defining capacity regarding contracts for necessary goods and services¹²⁷ and its potential influence in areas currently covered by the common law,¹²⁸ the discussion sees this influence as a two-way street. Given the impact of the common law in shaping section 7 MCA and in replicating the economic focus reflected in the common law jurisprudence,¹²⁹ there is potential that a redefined concept of contractual capacity under the common law (considering both economic and social values and looking at the circumstances of the transaction) could influence positively the assessment of contractual capacity in areas governed by the MCA. Due to the focus of this discussion, the reference to contracts covered under the MCA (including contracts with parties whose property is subject to the control of the court¹³⁰ and contracts for necessary goods and services)¹³¹ will be brief.¹³²

English contract law relies on a prima facie presumption that all adults have capacity to contract.¹³³

Consequently, a contract involving a party who lacked the mental capacity to understand the transaction would be valid unless, inter alia, this party's property or affairs were subject to the

¹²⁷ MCA 2005, ss 2, 3 and 7.

¹²⁸ *Re MM*, above n 32.

¹²⁹ *Re Rhodes*, above n 34; *Aster Healthcare v Shafi*, above n 33.

¹³⁰ MCA 2005, s 15.

¹³¹ *Ibid*, s 7.

¹³² For a more detailed discussion of these issues, see Chitty, above n 50, 9-099 (property and affairs under the control of the court) and 9-096 (liability for necessaries). For a more detailed discussion of the concept of capacity under the MCA 2005, see J. Herring and J. Wall, 'Autonomy, Capacity and Vulnerable Adults: Filling the Gaps in the *Mental Capacity Act*' (2015) 35 LS 698.

¹³³ Chitty, above n 50, 9-001.

control of the court¹³⁴ or the other party to the transaction had knowledge of the mental incapacity.¹³⁵ Even if the contract falls within one of these exceptions and the subject matter involves a necessary good or service, the party alleging incapacity must still pay a reasonable price for these necessities.¹³⁶ Under the MCA test, a person is considered to lack capacity regarding a certain matter if, 'at the material time', he was 'unable to make a decision for himself in relation to the matter, because of an impairment of, or a disturbance in the functioning of, the mind or brain'.¹³⁷ Under the common law test, the party must prove that, at the time of entering into the contract, 'he was so insane' that 'he did not know what he was doing'.¹³⁸ The level of understanding required for upholding the validity of a transaction depends on the nature of that transaction.¹³⁹ The MCA test for determining lack of capacity is 'broadly consistent' with the common law test¹⁴⁰ and may be adopted even in cases not covered by this Act, if this is 'appropriate' and the courts have 'regard to' the existing common law principles.¹⁴¹ Parallels can be drawn between the MCA and the common law approaches in seeking to protect the interest of the person who lacked the mental capacity to understand the transaction.¹⁴² However, questions should be raised on the extent to which this protection is guided by a framework of citizenship values, including dignity. An effective interpretation of contractual capacity under common law that takes into account both economic and social factors and looks beyond the medical condition of individuals to consider the circumstances of the transaction, could act as a positive influence in the way capacity is constructed under the MCA.

¹³⁴ MCA 2005, ss 2 and 3.

¹³⁵ *Imperial Loan v Stone*, above n 41. See Peel, above n 50, 12-054.

¹³⁶ MCA 2005, s 7.

¹³⁷ MCA 2005, s 2(1). See also MCA 2005, s 3(1).

¹³⁸ *Imperial Loan v Stone*, above n 41, [601].

¹³⁹ *Manches v Trimborn* (1946) 115 LJKB 305; *Re Beany* [1978] 1 WLR 770; *Masterman-Lister v Jewell* [2002] EWCA Civ 1889.

¹⁴⁰ Peel, above n 50, 12-053.

¹⁴¹ *Re MM*, above n 32, per Munby J.

¹⁴² See the Lord Chancellor's Foreword to the *MCA Code of Practice*, 2007 (regarding the MCA 2005); See *Barclays Bank v Schwartz*, *The Times*, August 2, 1995 (regarding the common law).

The issue of mental incapacity in English contract law has been noted for its ‘topsy-turvy’ history.¹⁴³ Influenced by the approach adopted in Roman Law, Bracton’s thirteenth century account of English law noted that contracts with parties who lacked the mental capacity to understand the transaction were void.¹⁴⁴ This provided complete protection to A who, in the absence of mental capacity to understand the contract, could not have consented to that transaction to voluntarily assume contractual obligations.¹⁴⁵ However, as this approach allowed mere proof of incapacity to invalidate the contract, it was criticised for being subjective, encouraging fraudulent claims, undermining the security of transactions and failing to consider B’s interests.¹⁴⁶ A few centuries later, the balance shifted to the other extreme. The desire to limit the opportunities where parties could escape their contractual obligations on grounds of mental incapacity coincided with the development of trading and commerce in England.¹⁴⁷ Writing in the sixteenth century, Chief Justice Coke noted that no adult could avoid a contract by pleading his own incapacity (or ‘stultifying’ himself).¹⁴⁸ This approach was the basis for the seventeenth century decision in *Beverley’s case*¹⁴⁹ and ensured that A was ‘absolutely liable for his alleged contract’.¹⁵⁰ This provided certainty, protected B’s expectations and strengthened the security of transactions,¹⁵¹ but was criticised for going ‘too far’, ‘bringing about injustice’¹⁵² and being ‘absurd’ and ‘mischievous’, as it overlooked A’s interests.¹⁵³

Nineteenth century contract law witnessed an attempt to find a middle ground between the interests of both parties. In *Moulton v. Camroux*¹⁵⁴ (*Moulton*), Pollock CB commented that the rule in *Beverley’s Case* ‘has been relaxed’ and that ‘unsoundness of mind’ could constitute a good defence

¹⁴³ Watts, above n 35.

¹⁴⁴ Bracton, above n 37. See Spark, above n 36, p 57.

¹⁴⁵ Spark, above n 36, p 58.

¹⁴⁶ Watts, above n 35, p 145; Spark, above n 36, p 58; See *Archer v Cutler*, above n 44, [396].

¹⁴⁷ W. Cook, ‘Mental Deficiency and the English Law of Contract’ (1921) 21 *Colum.L.Rev.* 424.

¹⁴⁸ Chief Justice Coke (1552-1634). See Cook, above n 149, p 429.

¹⁴⁹ *Beverley’s Case*, above n 38, [1603].

¹⁵⁰ Cook, above n 149, p 429.

¹⁵¹ *Ibid.*

¹⁵² See *Archer v Cutler*, above n 44, [396].

¹⁵³ Cook, above n 149, p 431, quoting J. Story, *Commentaries on Equity Jurisprudence* (Boston: Little, Brown and Co, 13th edn, 1886), p 239.

¹⁵⁴ *Moulton v Camroux*, above n 40.

to set aside a contract if A could show that he lacked the capacity to enter into a contract and this was known by B.¹⁵⁵ However, courts would not set aside a contract if B was unaware of the incapacity and contracted fairly and in good faith, the contract was executed and the parties could not be restored to their original position.¹⁵⁶ On appeal, this decision was affirmed in the Exchequer Chamber by Patteson J.¹⁵⁷ While Pollock CB noted that courts would not set aside a contract where B was unaware of the incapacity and contracted fairly, he did not state explicitly that the unfairness of a contract could justify invalidating it, irrespective of B' knowledge.¹⁵⁸ The focus on the security of transactions was made clear in *Imperial Loan v Stone*¹⁵⁹ (*Imperial Loan*), where fairness was mentioned briefly in only one of the three judgements delivered in the Court of Appeal. Lopes LJ stated that 'to avoid a fair contract on grounds of insanity', A had to prove both his own mental incapacity and B's knowledge of the incapacity.¹⁶⁰ Yet, Lopes LJ did not state explicitly that fairness was a condition for enforcing a contract and that an unfair contract could be set aside irrespective of whether B was aware of the incapacity.¹⁶¹ Unlike Lopes LJ, Fry LJ and Lord Esher MR made no reference to fairness in their judgements. Both judgements indicated that B's knowledge of A's mental incapacity was an essential element for rendering a contract voidable. Furthermore, Lord Esher noted that in the absence of such knowledge, the contract was valid irrespective of whether it was executory or executed.¹⁶² To prove his lack of capacity at the time of entering into a contract, A must show that 'he was so insane...that he did not know what he was doing'.¹⁶³ A must prove both his lack of capacity and that B 'knew him to be so insane as not to be capable of understanding what he was about'.¹⁶⁴ This set a high threshold for invalidating a contract for want of capacity.

¹⁵⁵ *Ibid*, 501.

¹⁵⁶ *Ibid*, 503.

¹⁵⁷ *Moulton v. Camroux* (1849) 4 Exch 17, [17-19]. See H. Goudy, 'Contracts by Lunatics' (1901) 17 LQR 147, p 152.

¹⁵⁸ See discussion in *Archer v Cutler*, above n 44, [400] and *Hart v O'Connor*, above n 46, [1020].

¹⁵⁹ *Imperial Loan v Stone*, above n 41.

¹⁶⁰ *Ibid*, [602].

¹⁶¹ See discussion in *Archer v Cutler*, above n 44, [398-400] and *Hart v O'Connor*, above n 46, [1021].

¹⁶² *Imperial Loan v Stone*, above n 41, [601].

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid*.

Whilst twentieth century contract law revisited the question of balance between the interests of A and B, the approach adopted in *Imperial Loan* remained prevalent. In *York Glass v Jubb*¹⁶⁵ (*York Glass*), the Court of Appeal considered the question whether a contract concluded between A and B could be invalidated for being unfair. Although the case did not require this issue to be decided, Sargant LJ indicated that his mind was 'entirely open' to that question.¹⁶⁶ However, he did not go as far as saying that the unfairness of a transaction could justify setting it aside. The Privy Council decision in *Hart v O'Connor*¹⁶⁷ (*Hart*) confirmed the *Imperial Loan* approach and the preference for upholding the security of transactions. Lord Brightman rejected the conclusions reached by the New Zealand Court of Appeal in *Archer v Cutler*¹⁶⁸ (*Archer*), where McMullin J. stated that earlier decisions (including the judgements of Pollock CB in *Moulton*, Lopes LJ in *Imperial Loan* and Sargant LJ in *York Glass*) implied that an unfair transaction could be invalidated for want of capacity, irrespective of B's knowledge of the incapacity.¹⁶⁹ Lord Brightman considered the fairness-based approach adopted in *Archer* as being 'illogical' and 'unsupported by authority', and expressed concerns about its divergence from Australian and English contract law.¹⁷⁰ In assessing the validity of a contract between A and B, the 'unfairness' of the transaction did not constitute a ground for rendering the contract voidable, 'unless such unfairness amounts to equitable fraud'.¹⁷¹ The emphasis on B's knowledge of the incapacity as a condition for rendering the contract voidable seeks to protect B from hardship and reflects a preference for holding parties to their agreements.¹⁷² This approach can be defended for its focus on certainty and clear rules to facilitate transactions and for upholding the security of transactions. Yet, far from providing a 'middle course' that seeks to protect the interests of both parties,¹⁷³ this approach can be criticised for being 'harsh' on A.¹⁷⁴ It places insufficient

¹⁶⁵ *York Glass v Jubb* (1925) 134 LT 36.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Hart v O'Connor*, above n 46.

¹⁶⁸ *Archer v Cutler*, above n 44.

¹⁶⁹ *Ibid.*, 401. See discussion in *Hart v O'Connor*, above n 46.

¹⁷⁰ *Hart v O'Connor*, above n 46, [1027].

¹⁷¹ *Ibid.*

¹⁷² Peel, above n 50, 12-052.

¹⁷³ Watts, above n 35, 145.

¹⁷⁴ J. Smits, *Contract Law: A Comparative Introduction* (Cheltenham: Edward Elgar 2014), 99.

weight on A's interests and fails to assess the hardship caused to A by upholding a transaction that A entered into whilst lacking the mental capacity to understand its nature.¹⁷⁵ The rule adopted in *Imperial Loan* and confirmed in *Hart* may protect B from hardship, but it fails to 'look at the other side of the picture',¹⁷⁶ resulting in an imbalanced approach.

The requirement imposed in *Imperial Loan* on A to prove both his lack of capacity and B's knowledge of it, places a 'heavy burden' on A, particularly given the increased number of contracts where parties do not meet face to face.¹⁷⁷ Furthermore, *Imperial Loan* makes no reference to 'the character or degree of insanity' required to fall within the protection of the incapacity defence.¹⁷⁸ In addition, unlike *Moulton*, the decision in *Imperial Loan* makes no distinction between executory and executed contracts and the validity of a contract is upheld even in cases where *restitutio in integrum* is possible.¹⁷⁹ A may also be seen to be in need of protection.¹⁸⁰ As Lord Millett noted in *Barclays Bank v Schwartz*,¹⁸¹ mental incapacity may not only deprive A 'of understanding the transaction, but also deprives him of the awareness that he [does] not understand it'.¹⁸² When compared to B, A is 'in an unequal bargaining position' when negotiating a contract¹⁸³ and in a weaker position to protect his interests.¹⁸⁴ Furthermore, it is difficult to argue that A gave his free consent to enter into a legally binding agreement.¹⁸⁵ Contracts are voluntary agreements entered into by parties who give their free consent to be bound.¹⁸⁶ *Imperial Loan* and *Hart* failed to place sufficient weight on these principles and focused instead on holding parties to their agreements for the 'convenience of

¹⁷⁵ Goudy, above n 159, p 150.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ Cook, above n 149, 438.

¹⁸⁰ R. Brucken et.al. 'Mental Illness and the Law of Contracts' (1959) 57 Mich.L.Rev. 1020, p 1025.

¹⁸¹ *Barclays Bank v Schwartz*, The Times, August 2, 1995.

¹⁸² *Ibid.* See Chitty, above n 50, 9-001.

¹⁸³ Brucken, above n 182, p 1029.

¹⁸⁴ Goudy, above n 159, p 150.

¹⁸⁵ *Ibid.*

¹⁸⁶ Chitty, above n 50, 1-014.

trade'.¹⁸⁷ The other party's knowledge of the incapacity is not considered crucial when assessing the validity of contracts with minors.¹⁸⁸ At common law, such contracts are generally voidable (with a few exceptions, including contracts for necessary goods and services, for apprenticeships, education and services) and are not binding on the minor, but are binding on the other party.¹⁸⁹ Commenting on the courts' readiness to set aside such contracts, Goudy is right to question why the minor is preferred to the person lacking mental capacity.¹⁹⁰ Moreover, while *Imperial Loan* and *Hart* consider B's knowledge of the mental incapacity to be essential for setting aside a contract, such knowledge is not required in other jurisdictions, including Scotland.¹⁹¹

If A cannot set aside a contract by showing that B was aware of A's mental incapacity, *Imperial Loan* and *Hart* allow the possibility for the contract to be set aside on other grounds, including undue influence or unconscionability. These grounds of relief are available to any contracting party, irrespective of mental capacity. Judging the validity of these contracts by the same standards, without regard to the mental capacity of the contracting parties, may provide 'an attractive simplicity'.¹⁹² However, as Hudson rightly comments, this places A at a 'serious disadvantage' when compared with B.¹⁹³ The fact that A must show, as required in *Imperial Loan*, that 'he did not know what he was doing',¹⁹⁴ may 'prevent him from giving vital evidence' for any allegations of undue influence or unconscionability involving B.¹⁹⁵ As noted by Hudson, 'in providing his extreme mental impairment', A 'would simultaneously disable himself from giving credible evidence' regarding B's actions 'at the time of the transaction'.¹⁹⁶ Furthermore, the failure to show B's knowledge of the mental incapacity, which would prevent A from relying on the incapacity defence, may also prevent A

¹⁸⁷ Goudy, above n 159, p 150.

¹⁸⁸ *Ibid*, p 153.

¹⁸⁹ *Proform Sports Management v Proactive Sports Management* [2006] EWHC 2903 (Ch). See Chitty, above n 50, 9-007.

¹⁹⁰ Goudy, above n 159, p 153.

¹⁹¹ *Loudon v Elder's CB* (1923) SLT 226. See Smits, above n 176, p 98.

¹⁹² A. Hudson, 'Mental Incapacity Revisited' (1986) *Conv.* 178, p 184.

¹⁹³ *Ibid*.

¹⁹⁴ *Imperial Loan v Stone*, above n 41, 601.

¹⁹⁵ Hudson, above n 194, p 184.

¹⁹⁶ *Ibid*.

from relying on undue influence or unconscionability. If A seeks to rely on undue influence in the case of a relationship of influence and a transaction not readily explained by the parties' relationship,¹⁹⁷ but where B acted in good faith, Bigwood comments that A must also show that B had actual knowledge of A's mental incapacity.¹⁹⁸ Similarly, if unconscionability is pleaded by A when B acted in good faith, Devenney and Chandler note that passive unacceptable conduct can be attributed to B only if B had knowledge of A's incapacity.¹⁹⁹ Consequently, despite the availability of potential grounds of relief such as undue influence or unconscionability, if A is unable to show that B was aware of the incapacity, A is left unprotected.²⁰⁰ Yet, A should be entitled to a greater degree of protection than it was envisaged under the *Imperial Loan* framework.

In *Archer*, the New Zealand Court of Appeal recognised the importance of safeguarding A's interests. In a decision that 'clearly diverged' from the approach confirmed in *Imperial Loan*,²⁰¹ *Archer* established that in assessing the validity of a contract entered into by a party who lacked the mental capacity to understand its nature, courts should consider not only if B was aware of the incapacity, but also, irrespective of B's knowledge, whether the agreement was 'unfair' to A.²⁰² Factors which could indicate unfairness and which must be assessed objectively include the absence of independent legal advice for A, disparity in the parties' mental capacities, leading to an unequal bargaining position and a sale for a price significantly below the market value.²⁰³ Despite the absence of such classification in *Archer*, the first two factors could be associated with procedural fairness (concerned with the manner in which the contract was formed), whilst the latter could be equated with a concern for substantive fairness (focused on the contract terms).²⁰⁴ McMullin J.'s 'indicia of

¹⁹⁷ *Royal Bank of Scotland Plc v Etridge* [2001] UKHL 44; Peel, above n 50, 10-016; Chitty, above n 50, 8-060.

¹⁹⁸ R. Bigwood, *Exploitative Contracts* (Oxford: OUP, 2003), p 466.

¹⁹⁹ J. Devenney and A. Chandler, 'Unconscionability and the Taxonomy of Undue Influence' (2007) JBL 541. See *Fry v Lane* (1888) 40 ChD 312; *Cresswell v Potter* [1978] 1 WLR 255; *Alec Lobb v Total Oil* [1985] 1 WLR 173.

²⁰⁰ Smits, above n 176, p 99.

²⁰¹ *Imperial Loan v Stone*, above n 41, [601]. See Hudson, above n 194, p 178.

²⁰² *Archer v Cutler*, above n 44, [401].

²⁰³ *Ibid*, [402].

²⁰⁴ Hudson, above n 194, p 178.

unfairness' adopted in *Archer* mirrored the test of an unfair bargain considered in *York Glass*. Yet, unlike *York Glass*, the judgement in *Archer* was explicit in stating that a contract entered into by a person who lacked the mental capacity to understand its nature could be invalidated on grounds of its unfairness. In *Archer*, fairness prevailed over concerns for the security of transactions. Nevertheless, this victory for fairness was short-lived, as the subsequent decision in *Hart* saw a return to the traditional approach established in *Imperial Loan*. In *Hart*, Lord Brightman looked critically at the unfairness factors considered in *Archer*, arguing that McMullin J. dealt 'indifferently' with procedural and substantive fairness.²⁰⁵ Yet, when rejecting the fairness approach adopted in *Archer*, Lord Brightman focused explicitly on substantive unfairness (or 'contractual imbalance')²⁰⁶ and failed to engage sufficiently with the issue of procedural unfairness.²⁰⁷

The rejection of substantive fairness in *Hart* comes as little surprise. This concept is vulnerable to criticism for being uncertain, difficult to define and lacking a clear scope.²⁰⁸ Tiplady highlights the risk if this concept becomes an end in itself in contract law, 'judges will begin to make choices which they are ill equipped to make', with unpredictable consequences.²⁰⁹ In Tiplady's words, there is a danger that 'though they know the word to start the sorcerer's broom, they will be unable to control it'.²¹⁰ Reliance on substantive fairness as a ground for assessing the validity of a contract is also considered to challenge the principle of freedom of contract.²¹¹ Lord Denning's attempt in *Lloyds Bank v Bundy*²¹² to establish a fairness threshold for assessing the validity of contracts, when there is imbalance in the parties' bargaining position,²¹³ received little support in subsequent cases and was

²⁰⁵ *Hart v O'Connor*, above n 46, [1018]. See Hudson, above n 194, p 178.

²⁰⁶ *Ibid*, [1027].

²⁰⁷ Hudson, above n 194, p 185.

²⁰⁸ S. Smith, 'In Defence of Substantive Fairness' (1996) 112 LQR 138; S. Thal, 'The Inequality of Bargaining Power Doctrine: The Problem of defining Contractual Unfairness' (1988) 8 OJLS 17.

²⁰⁹ D. Tiplady, 'The Judicial Control of Contractual Unfairness' (1983) 46 MLR 601, p 618.

²¹⁰ *Ibid*.

²¹¹ Thal, above n 210, p 21.

²¹² *Lloyds Bank v Bundy* [1975] QB 326.

²¹³ *Ibid*, [336-337].

disapproved by Lord Scarman in *National Westminster Bank v Morgan*.²¹⁴ Substantive fairness may, in reality, play an important role in assessing the validity of contracts but this has, so far, been 'disguised'.²¹⁵ Atiyah is correct to express concern that 'the extreme reluctance of courts to acknowledge openly' that substantive fairness is considered when evaluating the validity of a contract 'often obscures what is actually going on'.²¹⁶ On a similar note, Chen-Wishart comments that 'judicial articulations do not accurately reflect judicial actions',²¹⁷ implying a 'mass deception' by the courts when they insist that they are unconcerned with substantive fairness.²¹⁸ Yet, courts remain reluctant to evaluate openly the fairness of contract terms and, as Morgan suggests, 'perhaps honesty, in this instance, would be dangerous if it led to a general judicial power to regulate' contract terms.²¹⁹ *Archer's* main failing consists in its failure to articulate clearly how its fairness-based regime would work in practice, the relation between procedural and substantive fairness as part of this framework and the confines within which this regime would operate. By merely providing indicators of unfairness that included both procedural and substantive factors, without distinguishing between the two or articulating the limits of this proposed regime, *Archer* opened up the possibility that substantive unfairness alone may constitute a ground for invalidating a contract entered into with a party who lacked the mental capacity to understand the transaction. In an attempt to redress the imbalance created by *Imperial Loan*, which failed to provide effective protection to A's interests, *Archer* proposed a big step which proved too daring and ultimately resulted into a fall.

The twenty-first century decision of the Supreme Court in *Dunhill v Burgin*²²⁰ (*Dunhill*) provides reasons for cautious optimism that a middle ground can be found between the interests of A and B. In this decision, Lady Hale noted that B's knowledge of incapacity required in *Imperial Loan* was not

²¹⁴ *National Westminster Bank v Morgan* [1985] AC 686, [707].

²¹⁵ Thal, above n 210, pp 19-21.

²¹⁶ P. Atiyah, 'Contract and Fair Exchange' (1985) 35 UTLJ 1, p 9.

²¹⁷ M. Chen-Wishart, 'The *O'Brien* Principle and Substantive Unfairness' (1997) 56 CLJ 60, p 64.

²¹⁸ J. Morgan, *Great Debates in Contract Law* (London: Palgrave, 2nd edn, 2015), p 213.

²¹⁹ *Ibid*, p 214.

²²⁰ *Dunhill v Burgin*, above n 48.

limited to actual knowledge and that A could avoid a contract by showing that B 'ought to have known' about the incapacity.²²¹ Lady Hale presented the inclusion of both actual and constructive knowledge as the 'generally accepted' approach,²²² and this understanding was not contested by the other four Supreme Court justices (Lords Kerr, Dyson, Wilson and Reed), who agreed with Lady Hale's judgement. The inclusion of constructive knowledge brings the advantage of objectivity,²²³ as it allows questioning whether the reasonable person in B's position would have known about the incapacity.²²⁴ It also has the potential to balance the interests of A and B, because it extends the grounds where A could invalidate a contract for want of capacity (not limited to B's actual knowledge of the incapacity to include constructive knowledge) but continues to operate within limited confines (as some degree of knowledge is still required from B). In doing so, *Dunhill* avoids the pitfalls of the approach in *Archer*.

Whilst Lady Hale's comments in *Dunhill* have the potential to facilitate a balanced approach in cases involving contracts where A alleges mental incapacity, this matter is far from being settled. Lady Hale's interpretation of the *Imperial Loan* rule has been attacked for potentially resting on an unclear basis.²²⁵ A narrow interpretation of Lady Hale's comments, where B may be fixed with constructive knowledge only when the incapacity is apparent, but where actual knowledge is required where the incapacity is not apparent, is believed to be in line with earlier authorities.²²⁶ However, such an interpretation would be 'limited in its extent' and restricted in its significance.²²⁷ On the other hand, a broader interpretation of Lady Hale's formulation, where B is fixed with constructive knowledge when the circumstances surrounding the transaction put him 'on notice of the possibility' of mental incapacity, and he did not take steps to 'avoid being fixed with constructive knowledge', would

²²¹ *Ibid*, [25].

²²² *Ibid*.

²²³ *Ibid*.

²²⁴ Spark, above n 36, p 58.

²²⁵ Peel, above n 50, 12-055; Chitty, above n 50, 9-080.

²²⁶ Chitty, above n 50, 9-088.

²²⁷ *Ibid*, 9-081.

extend the significance of Lady Hale’s statement, but would face challenges for resting on less clear authorities.²²⁸ Yet, such authority could be found in *York Glass*, where Warrington LJ stated that ‘if circumstances are proved which are such’ that any reasonable person in B’s position ‘would have inferred from these circumstances’ that A lacked the mental capacity to understand the transaction, B ‘would be taken to know’ about the incapacity, even in the absence of actual knowledge.²²⁹ The strength of this authority for supporting a broad interpretation of Lady Hale’s formulation in *Dunhill* should not be weakened by the fact that reliance on *York Glass* ‘formed part of the alleged distinct and (possibly) equitable wider ground of avoidance on the basis of unfairness rejected by the Privy Council’ in *Hart*.²³⁰ *Archer* failed because it could have opened up the possibility for substantive fairness alone to justify invalidating a contract with a party who lacked the mental capacity to understand the transaction. Even in its broader interpretation, Lady Hale’s formulation in *Dunhill* cannot be equated with such proposition.

Lady Hale’s interpretation of the *Imperial Loan* rule to include both actual and constructive knowledge, and the potential significance of a broad understanding of constructive knowledge to include the circumstances of the transaction, would provide a welcome degree of balance between the interests of A and B. However, enthusiasm must be tempered by an acknowledgement of the context in which Lady Hale put forward her remarks.²³¹ In *Dunhill*, the Supreme Court was asked to decide, inter alia, whether the validity of a settlement of claim between a party who lacked the mental capacity to understand its nature and another party who was unaware of the incapacity, was determined by the general rule in *Imperial Loan*, or whether it was subject to the Civil Procedure Rules (CPR) (which required the court’s approval to be valid).²³² The Supreme Court held that the validity of such settlement of claim is to be determined in accordance with the CPR, rather than by

²²⁸ Ibid.

²²⁹ *York Glass v Jubb*, above n 167, [292]. See Chitty, above n 50, 9-082.

²³⁰ Chitty, above n 50, 9-082. See *Hart v O’Connor*, above n 46, [1024-1026].

²³¹ Ibid, 9-079.

²³² Civil Procedure Rules 1998/3132, Rule 21.10(1). See Chitty, above n 50, 9-084.

reference to the *Imperial Loan* rule, and Lady Hale's remarks about the latter were expressed obiter.²³³ However, despite the context of Lady Hale's remarks, their significance cannot be undermined. In *Josife v Summertrot Holdings*,²³⁴ Lady Hale's interpretation of the *Imperial Loan* rule was presented by the High Court as an accurate statement of the law for assessing the validity of contracts which fall under this rule.²³⁵

The broad interpretation of Lady Hale's formulation in *Dunhill*, which would allow a contract to be invalidated for want of capacity when B ought to have known about the incapacity from the circumstances of the transaction involves significant practical challenges.²³⁶ Such a reading of Lady Hale's interpretation of the *Imperial Loan* rule could require the courts 'to work out the circumstances' in which B 'should have known' of A's mental incapacity²³⁷ and this may prove particularly challenging in cases where the parties are not dealing face to face.²³⁸ Parallels have been drawn with the 'considerable litigation' regarding constructive notice in undue influence cases, following the House of Lords decision in *Barclays Bank v O'Brien*.²³⁹ On a similar note, a constructive knowledge test in incapacity cases 'could lead to certain types of factual circumstance' which would put B on notice about the possibility of A's mental incapacity, and which may be avoided 'by investigation or third party advice'.²⁴⁰ The use of constructive knowledge in Canada, as part of the test for invalidating contracts on grounds of incapacity, illustrates that such challenges are not insurmountable.²⁴¹ A three part test requires courts to consider whether A lacked mental capacity at the time of the contract, whether due to this condition, 'he was not capable of understanding the terms of the transaction and of forming a rational judgment of its effect upon his interests' and

²³³ Chitty, above n 50, 9-084.

²³⁴ *Josife v Summertrot Holdings* [2014] EWHC 996 (Ch).

²³⁵ *Ibid*, [19-20], per Norris J. See Chitty, above n 50, 9-078, footnote 359.

²³⁶ Chitty, above n 50, 9-079.

²³⁷ *Ibid*.

²³⁸ Watts, above n 35, 215.

²³⁹ *Barclays Bank v O'Brien* [1994] 1 A.C. 180. See Chitty, above n 50, 9-079.

²⁴⁰ Chitty, above n 50, 9-079.

²⁴¹ *Ibid*, footnote 361. See *Hardman v Falk* [1955] B.C.J. No. 199.

whether B had actual or constructive knowledge of such incapacity.²⁴² In assessing the latter part of the test, the courts may consider whether the circumstances surrounding the transaction 'ought to have put' B on inquiry regarding A's mental incapacity.²⁴³

A broad reading of Lady Hale's formulation in *Dunhill* would permit A to invalidate a contract on grounds of incapacity if A could show (i) B's actual knowledge of the incapacity, or (ii) B's constructive knowledge of the incapacity, if this was apparent or (iii) B's constructive knowledge of the incapacity, based on the circumstances of the transaction. The first two grounds involve fairness in its procedural form, as B either knew of the incapacity but decided to go ahead with the contract regardless of the lack of consent, or turned a blind eye to what any reasonable person would have recognised as incapacity, to secure the transaction despite the lack of consent. Such reliance on procedural unfairness is also present in *Imperial Loan*, although not explicitly articulated. The last of these grounds could involve fairness in both its procedural and substantive form, but unlike *Archer* (which could have opened up the possibility for substantive unfairness alone to justify invalidating a contract), unfairness based on the circumstances of the transaction could require either procedural unfairness alone, or substantive unfairness combined with procedural unfairness. If the trigger for assessing the unfairness of a transaction is based on substantive factors (eg grossly imbalanced contract terms to A's detriment),²⁴⁴ this would need to be supported by procedural factors (eg the absence of independent legal advice). Consequently, B would be fixed with constructive knowledge of the incapacity based on the circumstances of the transaction, not by reliance on substantive unfairness alone, but by reference to either procedural unfairness alone, or substantive unfairness in conjunction with procedural unfairness.

²⁴² *Bank of Nova Scotia v Kelly* (1973), 5 Nfld. & P.E.I.R. 1, 9. See *Re Sullivan* (2000) PESCTD 8, 19; *Pirie Estate v Bank of Nova Scotia* (2015) NBBR 4, 13.

²⁴³ *Hardman v Falk*, above n 243, [16].

²⁴⁴ Atiyah, above n 218, 6; Morgan, above n 220, pp 212-214.

Such an approach could be accommodated within the current parameters of English contract law. It would not rely on a general principle of fairness, but rather be part of a piecemeal approach to ensure fairness, which is already a feature of English contract law. As noted by Bingham LJ in *Interfoto Picture Library v Stiletto Visual Programmes*,²⁴⁵ English law has ‘developed piecemeal solutions in response to demonstrated problems of unfairness’.²⁴⁶ Furthermore, such an approach would not undermine the importance of certainty in English contract law. B would be fixed with constructive knowledge of incapacity based on the circumstances of the transaction, only within a clearly defined framework which would establish when the substantive unfairness trigger would come into play (eg grossly imbalanced transactions to A’s disadvantage) and only when there is also proof of procedural unfairness (eg passive exploitation by B).²⁴⁷ A broad interpretation of Lady Hale’s formulation in *Dunhill* would not undermine freedom of contract, as it would be equated with a justifiable intervention in the parties’ contractual relations. Jessel MR’s discussion of freedom of contract adopted in *Printing and Numerical Registering Company v Sampson*²⁴⁸ states that adults with ‘competent understanding shall have the utmost liberty of contracting’ and ‘their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced’ by courts.²⁴⁹ Interventions may be justified when a contract has been entered into in the absence of such understanding due to mental incapacity, the obligations are not voluntarily assumed due the absence of consent and B had actual or constructive knowledge of the incapacity. Only a ‘particularly rigid conception’ of freedom of contract understands this principle to mean ‘unrestricted freedom to make contracts’, irrespective of moral considerations that ‘cry out for the imposition of some restrictions’²⁵⁰ and understands the role of contract law as limited to enforcing the parties’ agreements.²⁵¹ As Kimel correctly notes, a rigid conception of freedom of contract is ‘highly

²⁴⁵ *Interfoto Picture Library v Stiletto Visual Programmes* [1989] QB 433.

²⁴⁶ *Ibid*, [439].

²⁴⁷ Bigwood, above n 200, p 269; Morgan, above n 220, p 214.

²⁴⁸ *Printing and Numerical Registering Company v Sampson* (1874-75) LR 19 Eq 462.

²⁴⁹ *Ibid*, 465. See P. Davies, *JC Smith’s The Law of Contract* (Oxford: OUP, 2016), p 5.

²⁵⁰ D. Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford: Hart 2005), p 117.

²⁵¹ P. Atiyah, *An Introduction to the Law of Contract* (Oxford: Clarendon, 5th edn, 1995), p 8.

unrealistic', given the many forms in which the law intervenes to protect 'vulnerable contracting parties'.²⁵² The function of contract law is not limited to enforcing the parties' agreements, but includes, inter alia, the prevention of 'certain kinds of harm', considering values such as fairness.²⁵³

Questions concerning the validity of a contract between A and B may require courts to make a choice not only between two innocents, but also between two competing policies. They may involve a choice between releasing A from a transaction concluded without the mental capacity to understand its nature and to consent to it, balanced against upholding the security of transactions. A broad interpretation of Lady Hale's formulation in *Dunhill* may be seen to undermine 'the practical need for commerce to take place without traders and others requiring to consider the mental incapacity of their contracting parties where it is not apparent'.²⁵⁴ Nevertheless, a framework which considers the circumstances of the transaction and includes reference to grossly imbalanced contacts, may not be that objectionable. In fact, 'legal intervention over one sided bargains' may have considerable social benefits,²⁵⁵ as it may lead to a reduction in 'extreme claims in negotiations' and an increase in the number of contracts that parties are willing to enter into, resulting in 'a wealthier society'.²⁵⁶

An emphasis on social values would skew the balance between the narrow and broad reading of Lady Hale's formulation in *Dunhill* in favour of the latter. While the narrow interpretation reflects individualist values focused on leaving parties to look after their own interests, the broad interpretation of Lady Hale's statement reflects concern for wider community values, including fairness.²⁵⁷ It also moves the focus away from an individual-centred approach (assessing A's mental incapacity and whether this was known by, or apparent to B), to consider the environment in which

²⁵² Kimel, above n 252, p 119.

²⁵³ Atiyah, above n 253, p 35. See also M. Green, 'Proof of Mental Incompetency and the Unexpressed Major Premise' (1944) 53 *Yale L.J.* 271, pp 304-305.

²⁵⁴ Chitty, above n 50, 9-087.

²⁵⁵ Morgan, above n 220, 215.

²⁵⁶ *Ibid*; F. Buckley, *Just Exchange: A Theory of Contract* (London: Routledge, 2005), p 145.

²⁵⁷ Atiyah, above n 218, p 35.

the transaction was conducted (eg the gross imbalance of consideration, the absence of independent legal advice and whether courts should enforce such a transaction). Parallels can be drawn with discussions in the context of undue influence and unconscionability, which resist approaches centred only on A's absent consent or B's wrongful conduct, consider wider norms that govern how contracting parties should treat each other²⁵⁸ and assess the circumstances when the state would consider 'an exploitive contract' as 'an unworthy endeavour to support' and enforce.²⁵⁹

A broad reading of Lady Hale's statement in *Dunhill* becomes even more significant if we consider wider social factors. For example, a contract entered into by an elderly person who experiences memory loss (which could potentially be associated with a form of dementia) is likely to be problematic.²⁶⁰ McKendrick comments that such a situation raises 'an acute conflict of policy', as the need to protect such parties from exploitation must be weighed against the 'wish not to infantilise the elderly'.²⁶¹ The number of cases involving contracts with parties who may lack the mental capacity to understand the nature of the transaction is likely to grow, including because of an increase in the number of people who develop mental health conditions such as dementia.²⁶² Hudson correctly notes that in a legal framework where courts place more weight on upholding the security of transactions over considerations of fairness, the family members of such contracting parties may be tempted to take the management of financial affairs out of their hands, risking 'tension and distress'.²⁶³ A vision of contract law which overlooks fairness-based considerations and wider social concerns is unlikely to provide a satisfactory response to such situations.²⁶⁴

²⁵⁸ 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* (Oxford: OUP, 2006); Morgan, above n 220, p 208.

²⁵⁹ S. Shiffrin, 'Paternalism, Unconscionability Doctrine and Accommodation' 29 *Phil. & Pub. Aff.* 205, pp 227-228; Morgan, above n 220, p 208.

²⁶⁰ E. McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford: OUP, 7th edn, 2016).

²⁶¹ *Ibid.*

²⁶² Alzheimer's Society, *Dementia UK: Update*, 2014; Hudson, above n 194, p 181.

²⁶³ Hudson, above n 194, p 181.

²⁶⁴ *Ibid.*

Quo vadis: the story retold or a new story?

The CRPD has sparked the need to re-examine legal concepts in light of legal values pursued by the Convention, including the protection of human dignity. The exercise of universal legal capacity can operate more effectively in a legal framework where parties can rely, when appropriate, on legal concepts such as an incapacity defence in contract law that reflects not only economic but also social values. As Collins accurately states, ‘principles such as respect for the liberty and dignity of the individual’ should influence not only the public sphere, but should also ‘guide all legal regulation of civil society’.²⁶⁵ Once private law is perceived as ‘a form of social regulation’, it becomes legitimate to question whether particular concepts protect adequately individual autonomy and dignity.²⁶⁶ Collins concedes that the interplay between human rights law and private law could either lead private law to become more receptive ‘to arguments about fairness’ or stimulate instead ‘a restatement of a more liberal, laissez-faire approach in private law’, but that ‘both directions of development seem to be on the cards’.²⁶⁷ A key factor that may skew the outcome in favour of the former approach is the ability to develop ‘a balancing mechanism suitable for contract law’ that protects rights without undermining freedom of contract.²⁶⁸ This article has sought to identify this balancing mechanism with regards to contractual capacity.

The law regarding the validity of contracts entered into between A (who lacked the mental capacity to understand the nature of the transaction) and B (who was unaware of the incapacity and acted in good faith), has been described as ‘a battleground’ of conflicting policies.²⁶⁹ The most appropriate response in such circumstances is a balanced approach that protects the interests of both parties to the transaction. Yet, the history of this area of law has witnessed a shift from extreme responses

²⁶⁵ H. Collins, ‘The Impact of Human Rights Law on Contract Law in Europe’ Cambridge Legal Studies Research Paper 13/2011.

²⁶⁶ *Ibid*, p 3.

²⁶⁷ *Ibid*, p 4.

²⁶⁸ *Ibid*.

²⁶⁹ Brucken, above n 182, p 1025.

(which protected the interests of only one of the parties), to imbalanced approaches. The predominant approach, based on the nineteenth century Court of Appeal decision in *Imperial Loan*, illustrates such imbalance. In a desire to uphold the security of transactions, this decision has left A with a very high threshold to invalidate the contract for want of capacity. This approach, which fails to place sufficient weight on A's lack of consent,²⁷⁰ seems to require him to show not only his incapacity to understand the transaction, but also B's knowledge of it.²⁷¹ In an attempt to redress this imbalance, the New Zealand Court of Appeal decision in *Archer* permitted contracts to be invalidated for want of capacity, irrespective of B's knowledge, if the contract was unfair.²⁷² However, this decision failed to articulate the practical implications of an unfairness test and left B with insufficient means to protect his interests, resulting in yet another imbalanced approach. *Archer* ultimately failed due to its over-ambition.²⁷³ By opening up the possibility for substantive unfairness alone to invalidate the transaction, *Archer* went too far, seeking to disrupt too much of the current parameters of contract law.

The Supreme Court decision in *Dunhill* provides hopes that a middle ground can be found to protect the interests of both A and B. These hopes rest on Lady Hale's interpretation of the *Imperial Loan* rule, confirming that B's knowledge of incapacity is not limited to actual knowledge and can include constructive knowledge.²⁷⁴ Unlike *Archer*, this reflects a more realistic attempt to balance the interests of both contracting parties, based on a small but potentially significant step and working within the current parameters of English contract law. Hopefully, subsequent cases will clarify the meaning of constructive knowledge in a way that would secure a balanced approach between the interests of both contracting parties. It is important to exercise cautious optimism, as Lady Hale's formulation of the *Imperial Loan* rule is open to two potential interpretations. A narrow

²⁷⁰ Goudy, above n 159, p 150.

²⁷¹ *Imperial Loan v Stone*, above n 41, [601].

²⁷² *Archer v Cutler*, above n 44, [401].

²⁷³ See *Hart v O'Connor*, above n 46.

²⁷⁴ *Dunhill v Burgin*, above n 48, [25].

understanding of constructive knowledge (limited to situations where incapacity is apparent)²⁷⁵ would bring no significant changes and would merely retell the tale of imbalance associated with *Imperial Loan*. On the other hand, a broad interpretation of constructive knowledge (to include situations where B ought to have known about the incapacity, due to the circumstances of the transaction) would signal the beginning of a new story. This would be a story rooted on an existing, but insufficiently explored legal basis,²⁷⁶ setting the basis for a more balanced approach to protect the interests of both contracting parties. Lady Hale's dictum in *Dunhill* has brought this tale of two innocents to a key point. A narrow interpretation would be a step in the wrong direction. It would be a retrograde step for twenty-first century contract law, at a time when measures to protect the dignity of persons who lacked mental capacity are moving forward.

A reinterpretation of the *Imperial Loan* rule could also have implications for the law of agency, and may prove relevant when re-evaluating the potential of this area of law to provide a legal framework for some forms of supported decision making.²⁷⁷ While an assessment of these implications is outside the scope of this article, it is important to draw a brief parallel between the tale of two innocents discussed above and the more complex framework of an agency agreement,²⁷⁸ which could potentially involve three innocent parties.²⁷⁹ The interplay between economic and social concerns is also manifested in this context,²⁸⁰ although the balance seems focused on protecting A's interests, with limited protection conferred to the agent or the third party who transacted with A through an agent.

²⁷⁵ Chitty, above n 50, 9-088.

²⁷⁶ Warrington LJ in *York Glass v Jubb*, above n 167, [292].

²⁷⁷ See CRPD, Art 12(3) CRPD; ComRPD, General Comment No. 1, para 16. See, for example, the reference to support agreements in Arstein-Kerslake and Flynn, above n 51, p 481; L. Salzman, 'Guardianship for Persons with Mental Illness: A Legal and Appropriate Alternative?' (2011) 4 *SLU Journal of Health Law & Policy* 279, 307-310.

²⁷⁸ For a discussion of the complexity of agency agreements, see G. McMeel, 'Philosophical Foundations of the Law of Agency' (2000) 116 *LQR* 387.

²⁷⁹ This discussion refers only to the common law framework and makes no reference to powers of attorney under the *Powers of Attorney Act 1971* (c 27) or lasting powers of attorney under the MCA 2005. For a discussion of these issues, see Peel, above n 50, 16-113, 16-114; Chitty, above n 50, 9-102, 9-103, 31-105, 31-168, 31-172.

²⁸⁰ Watts, above n 35, p 140.

The Court of Appeal decisions in *Drew v Nunn*²⁸¹ (*Drew*) and *Yonge v Toynbee*²⁸² (*Yonge*) suggest that A's mental incapacity would terminate a contract of agency, rendering it void, irrespective whether the agent had knowledge of the incapacity.²⁸³ This view is also reflected in some of the earlier editions of *Bowstead and Reynolds on Agency*,²⁸⁴ indicating that the *Imperial Loan* rule does not apply to agency agreements and to contracts concluded by the agent on behalf of the principal.²⁸⁵ The agent may have apparent authority to bind the principal²⁸⁶ or may be liable to the third party for breach of warranty of authority.²⁸⁷ Whilst an exception from the *Imperial Loan* rule may seek to protect A's interests, a void contract overlooks A's will and preferences regarding the transaction. However, in the twentieth edition of *Bowstead and Reynolds on Agency*, Watts notes that the *Imperial Loan* rule should apply to agency agreements and that the other party (eg agent or third party)'s knowledge of incapacity could render the contract voidable.²⁸⁸ Furthermore, Higgins suggests that *Drew*²⁸⁹ and *Yonge*²⁹⁰ could be confined to their facts.²⁹¹

This area of law has been described as unsettled²⁹² and 'in a state of some confusion',²⁹³ requiring 'fresh examination'.²⁹⁴ Reconsideration was not offered in *Dunhill* (where the Supreme Court

²⁸¹ *Drew v Nunn* (1879) 4 QBD 661.

²⁸² *Yonge v Toynbee* [1910] 1 KB 215.

²⁸³ See also *Daily Telegraph v McLaughain* [1904] AC 776 (Privy Council); *Gibbons v Wright* 91 CLR 423 (High Court, Australia). See the reference to *Yonge v Toynbee*, above n 285 in *Dunhill v Burgin*, above n 48 [31]; See discussion in Chitty, above n 50, 31-038; P. MacDonald Eggers, *Vitiating of Contractual Consent* (Abingdon: Informa Law, Routledge 2016), p 131.

²⁸⁴ See F. Reynolds and B. Davenport, *Bowstead on Agency* (London: Sweet & Maxwell 13th edn, 1968), 14. See discussion in Watts, above n 35, p 153.

²⁸⁵ A. Hudson, 'Agency and Insanity' (1959) 37 Can. Bar Rev. 497, p 498.

²⁸⁶ *Drew v Nunn*, above n 284.

²⁸⁷ *Yonge v Toynbee*, above n 285; *Collen v Wright* 119 E.R. 1259.

²⁸⁸ P. Watts, *Bowstead & Reynolds on Agency* (London: Sweet & Maxwell, 20th edn, 2014), 2-009.

²⁸⁹ *Drew v Nunn*, above n 284.

²⁹⁰ *Yonge v Toynbee*, above n 285.

²⁹¹ P. Higgins, 'The Effect of Insanity on Agency Transactions' (1961) 1 UTasLawRw 5, p 569.

²⁹² *Ibid*; Watts, above n 291, 10-020; Watts, above n 35, 141.

²⁹³ *Dunhill v Burgin*, above n 48 [31] (per Lady Hale).

²⁹⁴ *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2015] EWCA Civ 18 [36] (per Richards LJ) [hereafter *Blankley*]; Chitty, above n 50, 31-038.

considered it ‘fortunate’ that the issue did not need to be addressed)²⁹⁵ and *Blankley* (where the Court of Appeal noted that it was unnecessary ‘to grasp the “hot potato” left on one side by the Supreme Court in *Dunhill*’).²⁹⁶ A potential response would be to confirm that the *Imperial Loan* rule extends to agency agreements.²⁹⁷ Yet, when the opportunity to re-examine this area of law does arise, a strict interpretation of the *Imperial Loan* rule may offer an unattractive alternative, as it provides an imbalanced approach to A’s detriment.²⁹⁸ On the other hand, a reinterpretation of the *Imperial Loan* rule (to provide a balanced approach between the interests of the contracting parties, to include constructive knowledge based on the circumstances of the transaction and to consider both economic and social concerns) may present this rule in a different light.

Conclusion

The recognition of universal legal capacity under Article 12 CRPD plays a key contribution to the paradigm shift in perceiving persons with disabilities from objects of care to subjects of rights,²⁹⁹ from paternalism to empowerment, from substituted to supported decision-making³⁰⁰ and from exclusion to inclusion in all aspects of life.³⁰¹ It enables everyone to participate in society, to enter into legally binding agreements and have these recognised.³⁰² The CRPD is less clear on the demarcation between the concepts of legal and mental capacity and on the compatibility between universal legal capacity and the incapacity defence³⁰³ in areas such as contract law. This led some jurisdictions to consider whether, in light of the CRPD, there is a need to move away from the incapacity defence in contract law, as questions concerning the validity of contracts can be assessed

²⁹⁵ *Dunhill v Burgin*, above n 48, [31].

²⁹⁶ *Blankley*, above n 297, [37].

²⁹⁷ *Ibid* [36]; Watts, above n 291, 10-020; Watts, above n 35, 148; Higgins, above n 294, 579.

²⁹⁸ Hudson, above n 288, 503.

²⁹⁹ CRPD, Arts 1 and 12(1).

³⁰⁰ *Ibid*.

³⁰¹ Melish, above n 58, p 9.

³⁰² Quinn, above n 1.

³⁰³ Bartlett, above n 18, p 767.

with reference to doctrines such as unconscionability and undue influence.³⁰⁴ Yet, the incapacity defence in contract law can coexist with the notion of universal legal capacity advanced by the CRPD, as long as it can be invoked by anyone and disability and incapacity are not conceptually equated³⁰⁵ and any disproportionate impact on persons with disabilities can be objectively justified as serving a legitimate aim under the CRPD, pursued through reasonable means.³⁰⁶ This article has called for an interpretation of contractual capacity which moves beyond the medical condition of individuals (whether this was known by or apparent to the other party to the transaction) and considers environmental factors (such as the circumstances of the transaction). The discussion has also stressed the need to redefine contractual capacity in a manner that addresses not only economic concerns (such as upholding the security of transactions) but also social values (including the protection of human dignity). These arguments were explored in the context of English contract law, with a focus on the question of assessing the validity of a contract between a party who lacked the mental capacity to understand the transaction and another party who was unaware of the incapacity and acted in good faith. This particular focus was chosen due to the policy implications of this question, requiring a reflection on the relevance of social values in a framework currently dominated by economic interests. The article sought to demonstrate not only how a redefined concept of contractual capacity can be accommodated within the parameters of English contract law, but also why this is important. The discussion highlighted the social arguments for legal intervention in the case of grossly imbalanced contracts³⁰⁷ and the important contribution that contract law can play in defining the wider social norms that govern how parties should treat each other.³⁰⁸ It has also stressed the potential increase in the number of parties which may seek to rely on the incapacity defence, including due to an increased number of people who develop mental health conditions such

³⁰⁴ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124, November 2014, 11.10.

³⁰⁵ Bach, above n 6, pp 4-5.

³⁰⁶ Martin et.al, above n 101, p 7.

³⁰⁷ Morgan, above n 220, p 215; Buckley, above n 259, p 145.

³⁰⁸ Chen-Wishart, above n 261; Morgan, above n 220, p 208.

as dementia³⁰⁹ and the need for an appropriate response from contract law which considers wider social concerns. Over the past decades, English contract law has witnessed a positive change in the language employed to refer to parties who lacked the mental capacity to understand the transaction they entered into. While earlier cases referred to ‘lunatics’,³¹⁰ more recent cases rightly refer to ‘persons’.³¹¹ It is important that this positive change in language is matched by a redefined vision of the incapacity defence, which moves beyond the medical condition of individuals and considers the circumstances of the transaction. An assessment of the substantive and procedural fairness of the transaction may translate into the language of contract law a concern for wider social values and respect for human dignity.³¹²

³⁰⁹ Alzheimer’s Society, above n 265; Hudson, above n 194, p 181.

³¹⁰ *Imperial Loan v Stone*, above n 41, [601].

³¹¹ *Dunhill v Burgin*, above n 48, [25]. See Chitty, above n 50, 9-075, footnote 336.

³¹² P. Birks, *Restitution: The Future* (Sydney: Federation Press, 1995), p 52.