17/85

IN THE PRIVY COUNCIL No.56 of 1984

ON APPEAL
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

THOMAS BRUCE HART Appellant

- and -

JOSEPH O'CONNOR,
PAUL MICHAEL O'CONNOR and
FRANCIS JOSEPH O'CONNOR Respondents

CASE OF APPELLANT PURSUANT TO RULE 25

THE CIRCUMSTANCES OUT OF WHICH THE APPEAL ARISES — RECORD

1. The Respondents are the Trustees of the Estate of John O'Connor late of Waikakahi, farmer, who died in 1911 leaving a will in which he left his estate to his nine children in equal shares but subject to a life interest in favour of his wife, Lavinia, whom he appointed trustee, but reserving the right to his eldest son, John Joseph O'Connor (referred to throughout the proceedings as Jack), to become a trustee of the estate when he attained the age of 21 years. In 1926 Jack, having attained that age some years before, became a trustee along with his mother Lavinia and from 1950 on, when Lavinia died, until 2 March 1982 when an order of the High Court was made removing him from office and appointing the Respondents as trustees in his place, Jack acted as sole trustee of the estate and in that capacity entered into the agreement for sale and purchase which the Respondents challenged in this litigation. P.100,11.1-16

2. Originally the estate owned three blocks of land near Waimate and these formed its main assets. But a few years after John's death one of these was sold and another block purchased in its place. From that time on the three blocks were farmed as one and remained as assets of the estate. The three blocks comprise an area of approximately 32 hectares of freehold land (known as the Willowbridge property), and two areas of leasehold land, one of approximately 112 hectares and the other of approximately 67 hectares (known as the Greenhill property). The Appellant and his family own farm lands adjoining the Greenhill property and some land close to Willowbridge.

P.100,11.17-28

3. Although the beneficiaries of John's estate, who were all sui juris when Lavinia died in 1950, were entitled to call for the distribution of the estate on her death they (with the exception of their brother William who was paid out his share) agreed that the three properties should be farmed by Jack and two of his brothers, Dennis and Joe, for their own benefit. Thereafter the three brother farmed the properties in partnership and lived in houses on the farm. Dennis, a bachelor, who lived with Joe and his wife, died on 23 January 1979; Jack died on 14 July 1981.

P.101,11.1-10

4. By 1976 when Jack was about 83 years of age, Dennis 82, and Joe 71 it was becoming apparent that the brothers were too old to continue farming and early in 1977 it was proposed that Frank and Paul, Joe's two sons and the only males in the O'Connor family in that generation, should be approached to see if they wished to purchase the properties, if that were financially possible for them. The three properties had been in the O'Connor family for many years, one at least of them from before the turn of the century, and Joe was anxious that Frank and Paul should take them over. There were discussions between Jack and his brothers and Mr R.J. Henderson, a solicitor, whose firm, Henderson, MacGeorge, Wood & Blaikie, had long acted for the estate, wrote to Frank and Paul to explore the possibility of them taking over the farming operations.

P.101,11.11-25

5. Unfortunately Paul could not be readily located and for this reason and possibly others there were never any negotiations in a real sense for the sale of the farm to the boys before a proposal was made that the Appellant, a neighbour

and long time resident in the District, should purchase the farm outright rather than lease it which he had first proposed to do. The Appellant's solicitor was Mr Henderson's partner, Mr B.A. MacGeorge, and the latter acted for the Appellant in the negotiations. Thus partners in the same firm acted at the same time for both the estate and the Appellant in their dealings over what proved to be the vital issue of the sale of the farm. Moreover, at the end of August 1977 when Mr MacGeorge was away on holiday, Mr Henderson saw the Appellant in his office by chance when the latter proposed that he purchase it. An agreement for sale and purchase of the farm to the Appellant was then prepared by Mr Henderson who obtained Jack's signature to it at Jack's home on 29 August 1977. He then handed the agreement to Mr MacGeorge on his return to the office so that the Appellant could sign it. While Cook J found as a fact that Mr MacGeorge was the Appellant's solicitor Mr Henderson played a material part in bringing about the agreement for sale and purchase which is alleged to have been so much to the Appellant's advantage. The agreement was signed by the Appellant on 1 September 1977 and so the agreement for sale and purchase which is the subject of these proceedings came into being. P.102

6. Reference should now be made to the form of consent to the sale of the farm signed by Joe and Dennis in Mr Henderson's office on 25 August 1977. On this day there was an interview between Mr Henderson and Joe and Dennis in which the latter two signed a document which purported to be a consent to a "sale or lease" of the property to the Appellant. The document was a consent in principle only and did not contain any terms of sale or lease. Subsequently Joe denied that the document had contained the words "sale or" when he signed it, a denial for which the Judge found a good deal of support in the evidence. The words "sale or" were an obvious insertion in the body of the document but just when they were inserted was a matter of contention. Mr Henderson denied that the disputed words had been inserted after Joe and Dennis had signed the document and gave an explanation accounting for their presence which Cook J did not find very convincing. But he was not prepared to make a finding of forgery against Mr Henderson. P.103,11.1-18

7. When these proceedings were first instituted in the High Court in May 1980 the Respondents sued

Jack as first defendant and the Appellant as second defendant. At that stage Jack was still the trustee of the estate. But after the making of the order on 2 March 1981 removing Jack from his trusteeship and appointing the Respondents as trustees in his stead the pleadings were amended. When the claim was finally heard in the High Court the Respondents sued in their capacity as trustees of the estate and in their personal capacities as well. In these amended pleadings the Respondents also named themselves as first defendants. The Appellant remained as a defendant. Whether or not it was competent for the Respondents in their personal capacity and their capacity as trustees to sue themselves as trustees, no objection was taken to this course and counsel who appeared for the three trustees in their capacity as defendants was given leave to withdraw at the hearing. The hearing then proceeded as though the Appellant was the only defendant. And that is the basis upon which the matter proceeded in the Court of Appeal.

P.103,l.18 - p.104,l.11

8. In the amended pleadings the Respondents alleged that the agreement for sale and purchase was entered into by Jack when he was of unsound mind and that the Appellant knew or ought to have known of that condition; that whether or not he knew of that condition the agreement was unfair to the estate in that it provided for no deposit to be paid by the Appellant, that the consideration payable under the agreement, $179,780, was inadequate and insufficient in that it was not payable in cash until 1 September 1979 (some two years after the Appellant had taken possession); that the agreement represented an unconscionable bargain in all the circumstances; and that Jack had acted without proper deliberation and not in conformity with his position as a trustee and without consulting the beneficiaries in the estate. As no relief was sought against Jack the latter allegation became of historical relevance rather than a separate head of liability and the case for the Respondents proceeded in the High Court on lack of capacity, unfairness and unconscionability. The Respondents sought a declaration that there was no valid agreement for the sale and purchase of the farm; alternatively that if the agreement was held to be valid that it be set aside for want of mental capacity on Jack's part as vendor, unfairness and unconscionability. They sought an order for the possession of the farm which meanwhile had passed into the possession of the Appellant in terms of the agreement.

P.104,l.12 - p.105,l.10

RECORD

9. The Appellant denied these allegations and pleaded that if the Respondents had ever had any right of action in respect of their several allegations then they had affirmed the agreement by acquiescence, waiver, or election. And he alleged that the action was barred for laches. In essence the Appellant's case was that Joe had been a party to the sale arrangements and had approved them; that he had also approved the sale of all the livestock on the farm including his own interest therein and had been paid out his share of it; that the Appellant and/or his family had in good faith performed their part of the agreement for sale by taking possession of the farm and paying outgoings thereon and the price of the stock, in allowing Jack and his wife, Joe and his wife, and Dennis to have the free use and possession of these dwellings for their lives; and that he and his family in good faith and reliance on the agreement had materially altered their position. P.105,11.11-27

10. In his judgment Cook J found that Jack did not have contractual capacity at the time he entered into the agreement for sale and purchase even if the matters arising for decision had been adequately explained to him by Mr Henderson, which he found was not the case; that while he thought that the Appellant must have wondered about Jack's competence to undertake business of any complexity he was not able, on the evidence, to find that the Appellant knew that Jack lacked the degree of capacity sufficient to enable him to understand the nature of the bargain he had made; that Jack did not receive proper and independent advice upon matters material to the sale, and that in the circumstances in which the negotiations were conducted Jack, Joe and Dennis were at a disadvantage; and that a substantially higher price for the farm might have been obtained and the chance to obtain the best price had been thrown away. He held that the transaction was unfair. He found for the Respondents on the issue of incapacity and unfairness and would have made the orders sought by the Respondents but for the defence of laches which he upheld. He therefore dismissed the claim.

P.43,1.13 - p.53,1.37
P.53,11.38-41
P.56,11.2-8 and p.60,11.23-28
P.62,1.1-p.66,1.12
P.66,1.13-p.68,1.4
P.84,11.1-8
P.92,1.29-p.96, 1.20

11. The Respondents appealed to the New Zealand Court of Appeal against this judgment on the finding that the estate's claim was barred by laches. Counsel for the Appellant, while contending that Cook J. was right in holding that

the claim was barred by laches, argued on the cross-appeal that the Judge was wrong in his findings that Jack lacked the requisite contractual capacity and that the agreement was unfair. And they sought to uphold the judgment on the further and rather general grounds, which Cook J found it unnecessary to consider, namely, that the Respondents had acquiesced in, affirmed, or were estopped from denying the validity of the agreement, or they had failed to rescind a voidable agreement when they knew or ought to have known that the Appellant was acting on the validity of the agreement to his detriment and that they had acquiesced in or elected to continue with the agreement or were estopped from resiling from it when they knew or ought to have known that the trustee was incapable of acting as such or failed to take proper steps to have him removed. Further, they submitted that as the agreement had been made by Jack as trustee the title of the Appellant was unimpeachable in terms of s 22 of the Trustee Act 1956, and that in all the circumstances rescission should not be ordered as restitution could not now be made.

P.106,11.22-p.107,1.18

12. In the Court of Appeal McMullin J., delivering the judgment of the Court on 5 May 1983 (reported in [1983] N.Z.L.R.280) surveyed the evidence relating to Jack's lack of contractual capacity and concluded that the finding of lack of capacity made by Cook J. was amply supported by the evidence. That finding is not challenged before the Board.

P.108,1.14-p.111,1.24

13. McMullin J. next proceeded to discuss the Appellant's submission that the bargain made between Jack and the Appellant was not unfair. His Honour narrated the terms of the agreement signed by the Appellant on 1 September 1977 (when possession was given), and then discussed the evidence of increase of value of the three blocks, and the Appellant's submission that there were advantages to the estate in the form which the transaction took.

P.111,1.25-p.115,1.3

14. His Honour stated that if there were advantages to the O'Connor brothers from the way in which the agreement was drawn these appeared to be entirely accidental. His Honour considered that in certain respects the agreement contained "abnormal terms".

P.115,1.24

P.117,11.18-20

RECORD

15. On the question of unfairness the Court concluded that in the present case there was a combination of factors which made the transaction unfair and voidable. These were:

1. the method of fixing the price;

2. the actual value fixed;

3. the time given for payment;

4. the difference in the relative bargaining positions of the parties;

5. the lack of truly independent and competent advice. P.121,ll.17-22

16. McMullin J. discussed unconscionability as a separate ground for avoiding a contract and stated that it was not necessary for the Court to decide whether or not the transaction was unconscionable. P.121,l.26-p.122,l.8

17. McMullin J. stated that the law as set out in Archer v Cutler [1980] 1 N.Z.L.R. 386 is "the law of New Zealand". P.123,ll.1-8

18. His Honour next set out the history of events relevant to the finding of laches made by Cook J. in the High Court. After discussing the legal authorities on the meaning of laches, His Honour concluded that the delays in issuing proceedings were not those of the Respondents against whom the defence was raised. In any event His Honour concluded that the Appellant did not have an equity which on balance outweighed the Respondents' rights. The Appellant will not dispute the New Zealand Court of Appeal's conclusion on laches. P.124,l.3-p.127,l.8 P.127,l.9-p.128,l.18 P.131,ll.23-26 P.132,l.20-p.136,l.21

19. His Honour considered that when the position of the parties was brought into balance justice could be done by rescinding the contract subject to compensation being paid to the Appellant. P.136,ll.18-21

20. McMullin J. stated that neither inflation nor the opportunity which the Appellant had lost to buy land elsewhere constituted an insuperable difficulty in the way of restitution. P.137,l.22-p.138,l.21

21. McMullin J. held that the defences of acquiescence, estoppel and election must also fail. The Appellant will not present any argument to the Board based on those defences. P.138,l.22-p.141,l.14

RECORD

P.141,l.15-p.142,l.17

22. Finally, McMullin J. discussed a defence based on section 22 of the Trustee Act 1956 and held that it could not assist the Appellant. The Appellant will not assert the contrary before the Board on this appeal.

P.142,l.18-p.143,l.5

23. In conclusion the Court of Appeal allowed the present Respondents' appeal by holding that the defence of laches had not been made out by the present Appellant. In all other respects the judgment of Cook J. in the High Court was confirmed and the present Appellants' cross-appeal was dismissed. The Court made a declaration that the agreement for sale and purchase of 1 September 1977 was rescinded "for want of capacity on the part of Jack O'Connor and for unfairness". The case was remitted to the High Court for determination of the amount of compensation to be paid to the Appellant.

24. On 22 July 1983 Cook J. heard a motion by the Respondents for immediate possession of the land and supplementary orders relating to the removal of caveats lodged by the Appellant. Cook J. declined to order immediate possession in advance of the calculation and actual payment of the compensation ordered by the Court of Appeal, but made certain other orders by consent.

Pp.151-183
P.146

25. On 3, 4, 5 and 6 October 1983 Cook J. heard evidence and submissions in relation to the amount of equitable compensation and on 16 December 1983 delivered a Supplementary Judgment fixing the compensation at $58,201.92 (as against the net amount claimed by the Appellant, namely $291,751.92).

P.153,l1.18-22

26. In his reasons for his Supplementary Judgment Cook J. found as a fact that both Roger and Donald Hart, two of the Appellant's farming sons, "proceeded as if there was no threat to his occupancy of the land and did work which he would not have undertaken had that occupancy been limited to a leasehold estate for a short term of years."

27. Both valuers for the Appellant adopted a "before and after" approach to the valuation problem, namely value of the property in 1983 (more precisely 10 June 1983) less value of the property in 1977. This method, if adopted, allowed the Appellant the benefit of inflationary increase in the value of the property as well as betterment calculated in 1983 money values.

RECORD

28. Cook J. concluded that it would be proper to take $170,000 as representing the value of the three blocks of land (excluding the dwelling and associated buildings) as at 1 September 1977. This figure is not challenged by the Appellant before Your Lordships' Board. P.155

29. The valuers for the Appellant and the Respondents were in substantial agreement that the property (i.e. the three blocks) "today" (meaning 10 June 1983) was worth $435,000. That figure is not challenged by the Appellant before Your Lordships' Board. P.155,11.26-7

30. Cook J. discussed at length the authorities on restitutio in integrum, and concluded that he was unable to see that there could be restitutio in integrum, a return to the status quo ante, if the Appellant was found to be entitled to the rise in value flowing from no effort of his but from the inflationary factors which had occurred between 1977 and 1983. His Honour accordingly held that in determining the allowance which should be made to the Appellant "inflationary increase in value is to be excluded". Pp.156-163 P.163,11.20-7

31. Cook J. next turned to the question of improvements made by Roger and Donald Hart. His Honour surveyed the nature of the work done by them, finding as a fact that they had worked hard on the properties from the outset. P.164,11.1-3

32. Cook J. concluded that the total value of the improvements was $90,000; he held that nothing should be specifically allowed under the heading of Lotus Crop; and that no separate amount could properly be awarded as compensation for loss of assistance by way of Rural Bank loan and from various governmental schemes. His Honour also discussed the inconclusive evidence as to the opportunities to purchase other farm properties lost by Roger and Donald in consequence of their commitment to the three blocks of land which the Appellant considered that he had purchased. The Appellant will not dispute any of this reasoning before Your Lordships' Board. P.178,1.16 Pp.178-9 Pp.179-180 Pp.180-1

33. Cook J. concluded that the net amount of equitable compensation payable by the Respondents to the Appellant was $58,201.92, and made a formal order that possession of the land was to be given up by the Appellant to the Respondents on 31 March P.182

1984 upon payment by the Respondents of that sum by way of compensation.

34. From that judgment of Cook J. the Appellant appealed to the Court of Appeal ("the compensation appeal"). The appeal was limited to the allocation of the inflationary increase. In the Court of Appeal, McMullin J., delivering the judgment of the Court on 20 July 1984, first surveyed the history
Pp.185-9 of the litigation.

P.190,ll.15-20 35. The Court held that it would be wrong in principle to deprive the O'Connor Estate of part of the value of its land when what had happened was that the exchange value of the land in constant dollar terms had changed as a result of inflation.

P.192 36. For that and other reasons the Court of Appeal dismissed the compensation appeal with costs.

37. The Court of Appeal of New Zealand on 16 October 1984 ordered that final leave to appeal to Her Majesty in Council from the Judgments of the Court of Appeal delivered on 5 May 1983 and 20 July
P.194 1984 be granted to the Appellant.

CONTENTIONS TO BE URGED BY THE APPELLANT

38. The Appellant submits:

A. The Court of Appeal was wrong to adopt the law as previously stated by McMullin J. in Archer v Cutler [1980] N.Z.L.R. 386. Archer v Cutler incorrectly extends the law.

The true proposition of law is that stated by Lord Esher M.R. in Imperial Loan Co. v Stone [1892] 1 Q.B.599, 601, but modified by the qualification that if the other party has taken advantage of the incapacity of the person of unsound mind when concluding the contract, the contract may be set aside by a court of equitable jurisdiction, even if the other party had no actual or constructive knowledge of that unsoundness of mind. If there was no such knowledge, and no such taking advantage (for brevity referred to as "overreaching"), the contract of a person of unsound mind proved to have been unable to understand the "general nature of what he is

is doing" (Gibbons v Wright (1954) 91 C.L.R. 423, 437) is not avoidable, and must stand.

B. On the facts of this case the Appellant acted blamelessly throughout. He did not know of Mr Jack O'Connor's senile dementia at or before the date of execution of the contract on 1 September 1977. There was nothing which raised or should have raised the Appellant's suspicions. He did not in fact wittingly or unwittingly take advantage of Jack's senile dementia. Consequently, the Court of Appeal was wrong to rescind the contract.

C. Alternatively, if the law be as stated by McMullin J. in Archer v Cutler and by the Court of Appeal in this case, the contract, while containing some unusual features, was not an objectively unfair one, particularly in light of the fact that independent legal advice was available to Jack. On the Court of Appeal's view of the law, it was still wrong to rescind the contract. It was a fair contract.

D. Alternatively, the circumstances were such that it should have been regarded by the Court of Appeal as impossible to achieve restitutio in integrum, and the Court should have declined to rescind the contract for that reason.

E. If, contrary to submissions A, B, C and D the Court of Appeal did not fall into error in rescinding the contract, it erred in deciding that the amount of equitable compensation to be paid by the Respondents to the Appellant upon surrender of possession on 31 March 1984 had been properly fixed by Cook J. at $58,201.92. An amount representing the inflationary increase in the value of the land between 1977 and 1983 should have been added to that sum and not excluded.

39. In development of Submission A, the Appellant submits:

RECORD

The decided Commonwealth cases before Archer v Cutler are inconsistent, on balance, with McMullin J's conclusion in that case that "a contract entered into by a person of unsound mind is voidable at his option if it is proved either that the other party knew of his unsoundness of mind or, whether or not he had that knowledge, the contract was unfair to the person of unsound mind" ([1980] 1 N.Z.L.R. 386, 401, l.46). There is no case of high persuasive authority, and certainly no decision of this Board, or of the House of Lords, to that effect. In the present case it is stressed that the Court of Appeal did not examine the precedents afresh. McMullin J., delivering the Court's judgment, merely stated that "the law as set out in Archer v Cutler on unfairness of bargains made between a person who lacks contractual capacity through unsoundness of mind and another who has no knowledge of that incapacity is the law of New Zealand." Whether there is an additional requirement that the contract be fair has been the subject of conflicting views by the textbook writers, is not clearly settled by the English cases, and now comes before the Board as an important issue of principle for authoritative resolution.

P.123,11.3-7

40. This issue is of importance because of the large numbers of persons of unsound mind who seek to dispose of their property, the ageing nature of the population in many Commonwealth countries including New Zealand, and the increased knowledge of the nature of senile dementia - a disease which progresses relentlessly but which permits the sufferer to appear to be normal and rational one day, but irrational and unable to understand the nature of what he is doing, or business transactions in particular, on the next. The problem is not assisted by statute in New Zealand. As McMullin J. rightly observed in Archer v Cutler, "both the Mental Health Act 1969 and the Aged and Infirm Persons Protection Act 1912, while making some provision for the administration of the patient's property, do not bear directly on his contractual capacity. One must look to the common law for that." (Archer v Cutler [1980] 1 N.Z.L.R. 386, 393, l.6).

P.48

41. This present Submission may rightly be approached by Your Lordships on the basis that

there are no differentiating social factors as between England and New Zealand. Moreover, Submission A relates to the correct enunciation of the common law, unembarrassed by statutory differences between England and New Zealand. While there are no doubt important differences between the Mental Health Act 1959 (U.K.) and the Mental Health Act 1969, none of them has any relevance to the present case. It is accordingly submitted that Your Lordships need feel no hesitation in overruling Archer v Cutler, as requested by the Appellant, if Your Lordships see fit to do so. The actual decision in Archer v Cutler can be justified on the alternative ground that the facts disclosed an unconscionable bargain ([1980] 1 N.Z.L.R. 386, 402-404). It is submitted that the rules as to when a contract is voidable for incapacity are entirely separate from, and should not be conflated with, the equitable doctrine of unconscionable bargain - which can operate where one party is in, for example, an unequal bargaining position vis-a-vis the other, and does not depend upon his being of unsound mind.

42. As to the pre-Archer v Cutler cases, argument will be addressed to the Board in amplification of the following propositions:

(i) In Molton v Camroux (1848) 2 Exch.487 Pollock C.B's reference to "fair and bona fide" contracts was, in context, a reference to contracts entered into by the other party without fraud or overreaching: it was not a reference to the terms of the contract as such (although if those terms are grossly unfair to the incapax that will constitute important evidence of overreaching). When in the Court of Exchequer Chamber Patteson J. said that "unfairness of any kind" was negatived by the facts, the context shows that this meant that "no advantage was taken of the lunatic", i.e. there was no overreaching.

(ii) In the leading case of Imperial Loan Co. v Stone [1892] 1 Q.B.599 a majority of the Court of Appeal (as McMullin J. correctly noted: [1980] 1 N.Z.L.R. 386, 398, l.34 and l.46) did not regard the fairness of the contract as a condition of its enforceability against a person of unsound mind. Fry L.J., who alone spoke of the necessity for "a fair

contract", was in a minority, and his remarks were obiter.

(iii) In York Glass Co. Ltd v Jubb (1925) 134 L.J.36 the actual ratio of the case before the Court of Appeal followed the formulation of the law enunciated by Lord Esher M.R. in the Imperial Loan case. The alternative defence of want of fairness examined by the Court raised issues about the terms of the contract, e.g. the reasonableness of the price, but was discussed on equitable principles. In other words, the alternative defence was really invoking the separate doctrine of unconscionability. Warrington L.J's remarks were deliberately inconclusive, and in any event were obiter for his Lordship acknowledged that "the contract here was a fair one for a fair and reasonable price."

(iv) If the three English decisions are taken together, they contain some tentative suggestions which on a superficial reading appear to be to the contrary, but the weight of authority favours the true proposition of law as advanced in Submission A. McMullin J. with respect misrepresented their effect when he concluded: "But the passage cited from Lopes L.J. and the dicta of Pollock C.B. in Molton v Camroux, of Patteson J. on appeal in the same case, of Sir Ernest Pollock M.R. in York Glass Co. v Jubb and of Sargant L.J. in the same case would suggest that proof of unfairness of a bargain entered into by a person of unsound mind, even though that unsoundness be not known to the other party, will suffice to avoid it." ([1980] 1 N.Z.L.R. 386, 400 ll.49-54).

(v) In Wilson v The King [1938] 3 D.L.R 433 the divergences between the three Justices weaken the persuasive value of the decision. The dominant reason in the judgments of Duff C.J.C. and Davis J. (in favour of setting aside the purchase) was that advantage had been taken of the lunatic. The ratio thus depended on a finding that overreaching had occurred. Consequently Wilson v King was misconstrued by the British Columbia Court of Appeal in Hardman v Falk [1955] 3 D.L.R. 129. But Robertson J.A. stated the law correctly at 133 of that decision (a passage not quoted by

McMullin J. in Archer v Cutler) when he said: "Courts of equity will not interfere if a contract with a lunatic is made in good faith without any knowledge of the incapacity of the lunatic and no advantage is taken."

(vi) Tremills v Benton (1892) 18 V.L.R. 607 is consistent with the Appellant's submission. The motif of the judgments of the Full Court of Victoria is that in the absence of knowledge of the other party's unsoundness of mind relief can be given if there was overreaching akin to fraud or if the separate doctrine of unconscionability applies. The Court of Appeal in the present case erred when it viewed Tremills v Benton as an authority for the rule that McMullin J. developed in Archer v Cutler. In so doing it confused (a) the fairness of the terms of a contract, irrespective of how they were reached; with (b) questions of bullying or harassment or other unfair methods taking advantage of the other party's incapacity - the circumstances in which the contract was negotiated and concluded. The actual terms of the contract are not necessarily of significance in (b).

(vii) The Court of Appeal in the present case ignored Donaghy v Brennan (1900) 19 N.Z.L.R. 289 where at 302-303 Stout C.J. obiter in the Court of Appeal stated the law of New Zealand in terms identical with the Imperial Loan case.

(viii) If the law is as contended for by Appellant, it is consistent with the law on drunken execution of contract, as it should be : see 9 Halsbury's Laws of England, (4th ed.) para.299, adopted in New Zealand in Peeters v Schimanski [1975] 2 N.Z.L.R. 328, 335.

(ix) In McLaughlin v Daily Telegraph (No.2) (1904) 1 C.L.R. 243 - affirmed on appeal to the Privy Council, [1904] A.C.776 - the High Court affirmed the traditional rule, but recognised a qualification where there was any "unfairness of dealing" (Griffith J., 272, emphasis added).

43. Several of the better known textbooks are content to state the law in terms of Lord Esher M.R.'s rule in Imperial Loan Co. v Stone, e.g.

Cheshire & Fifoot's Law of Contract (10th ed., 1981), 402; 1 Chitty on Contracts (25th ed., para.595; and see 600: deeds may be set aside on equitable grounds "such as that the other party took advantage of his weakness of mind"; but cf Salmond & Williams on Contract (2nd ed., 1945) 321.

44. In Archer v Cutler McMullin J. considered that there were no policy reasons preventing him from adopting the new rule which he announced. ([1980] 1 N.Z.L.R. 386, 401, ll.35ff). On the contrary it is submitted that for the following reasons, to be elaborated at the hearing of the appeal, there are sound reasons of policy why the law should be authoritatively pronounced to be in accordance with Appellant's Submission A:

(i) The result promotes sanctity of contract; Archer v Cutler promotes uncertainty.

(ii) In the extreme case where a person of unsound mind signs a piece of paper in a frenzy, the purported contract is void, not voidable, on the balance of authorities, and in that case there is no difficulty in reconciling Appellant's Submission A with the underlying principles of the law of contract: see the distinction accepted by Dixon C.J. in Gibbons v Wright (1953-4) 91 C.L.R.423, 443, and Hudson, "Mental Incapacity in the Law of Contract and Property," (1984) Conv.32. When that situation is separately dealt with as a case of no or a void contract, the law for which Appellant contends represents a pragmatic qualification to the general theory of consensus ad idem, in the interests of enhancing confidence that courts will enforce apparently binding contracts -a value more fundamental than purist consensus notions.

(iii) If the law is as stated by McMullin J. in Archer v Cutler the courts will have to examine numerous cases of allegedly unfair contracts. This would not matter if the test was "so grossly unfair that to enforce the contract would be unconscionable". But that is not McMullin J's formulation. Hence, if a contract, objectively considered, is only marginally unfair, it is an "unfair contract". Different trial judges will reach widely divergent conclusions. Whenever one party to any contract has on balance the worse of the bargain that contract must be regarded as "unfair" to him.

(iv) There are no agreed indicia of "unfairness". Consequently it cannot even be said whether a small inadequacy of consideration, without more, amounts to unfairness. The law is thus rendered undesirably uncertain.

(v) There is a policy reason why the courts should not sanction a "must be fair" addendum to the traditional rule. Equity already has a powerful weapon at hand in its doctrine of unconscionable bargain. That doctrine applies "whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands." Blomley v Ryan (1956) 99 C.L.R. 362, 415. The most recent New Zealand Court of Appeal discussion occurs in Moffat v Moffat [1984] 1 N.Z.L.R. 600, 604. Reference will also be made to Commercial Bank of Australia v Amadio (1983) 57 A.L.J.R.358. The doctrine of unconscionable bargain is expanding, enabling remedies to be given in gradually widening classes of cases with reference to factors such as "economic coercion" and inequality of bargaining power." Wherever a case of mental incapacity unknown to the other party arises, it will be competent for the court to examine it alternatively under the doctrine of unconscionable bargain, and normal for it to be asked to do so. But "unconscionable" connotes a great deal more than "unfair". It is not "unconscionable" merely to strike a very favourable bargain. If Archer v Cutler is correct, the principled development of the doctrine of unconscionable bargain is undercut and imperilled.

(iv) If the law is as stated by McMullin J. in Archer v Cutler the law is undesirably harsh on wholly innocent purchasers in the position of the present Appellant, who, the Court of Appeal agreed, did not "set out to take Jack at a disadvantage. Indeed it was agreed by counsel that in a sense he was a victim of circumstances himself." P.115,11.12-15

RECORD

(v) - As Lord Roskill has recently reiterated in Export Credits v Universal Oil Co. Ltd [1983] 1 W.L.R.399, 403: "But it is not and never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain."

45. In development of Submission B, the Appellant submits:

Cook J. made clear, relevant findings. These were not attacked by the present Respondents in the Court of Appeal.

Certain matters relative to the Agreement for Sale and Purchase were not adequately explained to Jack O'Connor; but this failure was that of his own solicitor, Mr Henderson, and cannot in any way be attributed to the Appellant.

Cook J. declined to find that the Appellant's knowledge was "such that he knew that Jack lacked capacity sufficient to enable him to understand the nature of
P.56,11.6-8 the bargain which he entered into". Having surveyed the evidence, Cook J. was not satisfied that the Appellant regarded Mr Henderson as his solicitor or agent in relation to dealings with Jack O'Connor. Cook J. accordingly decided that the
P.60,11.12-14 Appellant could not be said to have had knowledge of Jack's incapacity by reason of the fact that it must have been
P.60,11.20-22 apparent to Henderson.

46. In development of Submission C, the Appellant submits:

The Court of Appeal said:

"The essence of the finding of unfairness in regard to the terms of sale lies in the postponement of the payment of the
P.116,11.16-19 entire purchase price for two years".

But:

(a) This emphasis on postponement overlooks or downplays the pressing need

RECORD

of the Estate, and in particular of the three brothers as beneficiaries, who were now past farming, to give up possession, sell the stock but retain homes. The terms of the contract other than price, while certainly unusual, were directed to that end. Given that the beneficiaries had no pressing need for capital moneys, if a deposit had been paid immediately, or if the whole of the purchase price had been paid immediately, it would probably simply have been invested at the same rate of interest, and precisely the same result would have been achieved. According to Henderson, Jack was happy to give the Appellant two years to pay.

P.736,l.20

P.658,l.6

(b) The interest rate on the unpaid purchase money was 11%. This was the commercial rate in Waimate before the change in rates in the Henderson MacGeorge office which occurred later in September, and it compares favourably with the rates then being charged in South Canterbury generally. Interest calculated at that rate produced a figure which was more than twice the amount that would be yielded by a rental at 5% of value. Jack specifically accepted 11% as the rate and so instructed Henderson.

P.982,ll.1-4
P.657,ll.11-13

P.658,l.13
P.716,ll.16-20

(c) The Court of Appeal overlooked the point that it is common for a first mortgage to be left by a vendor for 4 or 5 years. It is uncommon for the whole of the purchase price to be left outstanding on mortgage. But in the present case the period of deferment was only 2 years, at the end of which the Appellant was required to find the full market price as assessed by Mr Donn Armstrong. There is a rough and ready similarity between leaving all the price outstanding for 2 years, with a commercial rate of interest being payable in the meantime, and the much more common leaving of two thirds of price for 4 or 5 years on first mortgage. What was actually done here had the advantage that the Estate retained title.

(d) In addition to those points, the contract had an unusual provision in favour of the vendor in that it allowed the beneficiaries of the estate (i.e.Joe and his wife and Dennis) to remain in farmhouses on the properties,

P.982,ll.11-15

when they were reluctant to shift from those homes which they had occupied all their lives.

(e) The Court of Appeal was very concerned at inflation erosion over the 2 years. But this is hardly evidence of unfairness. Inflation is a factor in all contracts involving payment of a fixed sum in the future. If the contract in issue were a simple investment one, whereby Jack advanced a fixed sum to Hart repayable in 2 years with market interest meantime, on repayment on maturity Jack would be paid that sum, and it would have less purchasing power then than it had when lent. It would be extraordinary to hold that that contract should be upset. Why then should the present contract be upset? It is in no different position.

47. The other factors relied on by the Court of Appeal in combination with that of deferment of purchase price were:

(i) the method of fixing the price;

(ii) the actual price fixed;

P.121,11.18-22 (iii) the difference in the relative positions of the parties.

As to (i) it is submitted that it is not unfair that the two parties to a contract should agree on a price being fixed by a third party who is a professional in the field. Henderson knew of Armstrong's reputation as a reputable valuer, and discussed the matter with Jack, who agreed on
P.657,11.13-24 Armstrong. There was a risk that either party might "lose" in the sense that Armstrong's valuation would be less favourable than the "true" valuation, but there was real advantage in having the matter settled quickly.

As to (ii), the fact that the Government Roll Valuation on 1 October 1978 was $44,720 more than Mr Armstrong's valuation on 9 September 1977 shows the trend of prices only. What Mr Armstrong had to fix was the value at 1 September 1977. His figure of $179,780 was not so different from either Mr Gilchrist's figure, or Mr Fitzgerald's figure of $202,000, that it should be regarded as fixing a totally inadequate market price.

As to (iii), it may be that Mr Henderson's advice to Jack was defective in that further questions should have been explored. The consequences should not be visited on the Appellant. The intervention of Mr Henderson, who gave unchallenged evidence that he asked Jack to agree to this and agree to that, and secured his concurrence, amounts to the intervention of a third party between the Appellant and Jack. Henderson's intervention restored, it is submitted, the difference in bargaining positions which would have been adverse to the Appellant's case had he been dealing with Jack directly. Pp.656-8

48. The Court of Appeal places emphasis on the lack of truly independent and competent advice. But Jack did have legal advice, even if that was not as full as it should have been, and it was "truly independent": the Court of Appeal was wrong to state the contrary. Jack had the advice of the Estate solicitor, who was familiar with the Estate and had long acted in the capacity. It is submitted that it is merely a question of professional ethics whether Henderson and MacGeorge should have acted on both sides of the transaction in September 1977. In fact Henderson acted for the Estate and MacGeorge for the Appellant. It is submitted that the "conflict of interest" that existed had no causal effect upon the advice that Jack in fact received. Furthermore, it is clear from the evidence that Jack did not just do whatever Mr Henderson suggested. When it came to changing his mind, and withdrawing the offer previously made to the boys, he made his position very clear, and Henderson acted on his instructions even although he did not fully agree with Jack's attitude. P.652,l.14

49. In any event a different position obtains when the person who is incapable of entering into a contract has his own solicitor to advise him on the contract. If that solicitor advises him negligently, an action for negligence lies against the solicitor. In principle any complaint about the solicitor's advice should be directed against the solicitor, not against the other party to the contract. There is some support in Clark v Malpas (1862) 45 E.R.1238; O'Rorke v Bollingbroke (1877) 2 App. Cas. 814, and Blomley v Ryan (1956) 99 C.L.R. 362 Cf also Lord Denning M.R's stress on the lack of independent advice when his Lordship took the doctrine of inequality of bargaining power as far

as any court has ever taken it, in Lloyd's Bank v Bundy [1975] Q.B. 326.

50. In support of Submission D the Appellant submits:

The circumstances of this case were special indeed, as will be developed in argument. In particular:

(a) the action was commenced nearly three years after the contract was entered into;

P.758,l.25-p.759,l.28(Donald); and P.796,ll.12-21 (Roger) P.762, ll.17-20 (Donald)

(b) the Appellant's sons, Donald and Roger, farmed their respective parts of the property as though the Appellant, their father, was the unchallenged owner, and in a way different from that in which they would have farmed it had they merely been lessees, with a right of compensation for improvements at the end of the lease;

(c) in a practical sense the Appellant could not be restored to the status quo ante;

(d) if the Court of Appeal was, contrary to Submission E, right to exclude all inflationary increase from the amount of equitable compensation awarded to the Appellant, the consequences of rescission were so harsh in their impact upon the Appellant that a court of equity, whose first concern in this area is to do what is "practically just", having regard to the interests of both parties (see Lord Blackburn in Erlanger's case (1878) 3 App. Cas. 1218, 1278-9) should not have ordered it. It is submitted that the Court of Appeal has failed to balance the competing interests correctly.

51. In support of Submission E, the Appellant submits:

The conclusion reached by both Cook J., and the Court of Appeal in the compensation appeal, excluding from the compensation payable to the Appellant any inflationary increase in value does not achieve a

practically just result in the unique circumstances of this case.

52. Both Roger and Donald Hart made it plain that each proceeded, in Cook J's words, "as if there was no threat to his occupancy of the land and did work which he would not have undertaken had that occupancy been limited to a leasehold estate for a short term of years." P.153,11.18-22

53. If the Appellant's Submission E is correct the total compensation payable to the Appellant should start with the primary figure of $265,000 instead of the primary figure of $90,000 adopted by Cook J. in his Supplementary Judgment, and - since all other items would remain the same - the total compensation payable would be increased by $175,000 to $233,201.92.

54. Restitutio "must be considered with respect to the facts of each case": McCardie J. in Armstrong v Jackson [1917] 2 K.B. 822, 829.

55. It is submitted that Cook J. and the Court of Appeal have both failed to give any, or any sufficient, weight to the following particular circumstances:

(i) After the contract was signed on 1 September 1977 the Appellant became and remained, until rescission was ordered by the Court of Appeal in May 1983 the equitable owner of the property. The Appellant should not be equiparated with a lessee receiving compensation for improvements effected at the end of his lease.

(ii) The Appellant's sons farmed their parts of the property in the bona fide belief that the Appellant was the owner of the property.

They invested capital in anticipation of a long-term rather than a short-term return.

They farmed with the expectation of benefitting from any inflationary increase in the value of the proerty. P.805,11.8-21

(iii) No writ was issued until May 1980.

(iv) Before Archer v Cutler [1980] 1 N.Z.L.R.386 was decided, the law was generally

regarded by the legal profession as different from what McMullin J. held it to be. Therefore, the legal advice given to the Appellant that the Harts were safe, and could reasonably continue their chosen farming and long-term development programmes was sound when it was given.

(v) The Appellant is innocent of any wrongdoing and was not guilty of unconscionable conduct.

(vi) The Appellant has lost the opportunity to purchase other farm properties because of the financial commitment to this property. In equity the Appellant should be left in as good a position to purchase other properties after 31 March 1984 as he was after 1 September 1977. But in 1984 he must purchase in a market in which values are calculated in 1984 currency.

56. Reference will be made to F.A. Mann's The Legal Aspect of Money (4th ed., 1982) Chapter IV, and particularly at 124. The result for which the Appellant contends is consistent with the Court of Appeal's decision in Lowe v Commissioner of Inland Revenue [1981] 1 N.Z.L.R. 326, approved by the Privy Council in [1983] N.Z.L.R. 416.

57. The Appellant respectfully submits that this appeal should be allowed, and that the declaration made by the Court of Appeal that "the agreement for sale and purchase of 1 September 1977 is rescinded for want of capacity on the part of Jack O'Connor and for unfairness" should be cancelled. There should be an order that the Respondents forthwith deliver possession of the property to the Appellant. The Appellant should have costs in all three courts. Alternatively, if the declaration made by the Court of Appeal is not cancelled, Respondents should be ordered to pay the Appellant a further $175,000 by way of equitable compensation forthwith, with interest at 11% on $175,000 from 1 April 1984 to the date of this Board's advice to Her Majesty.

58. Those orders should be made for the following among other reasons.

REASONS

Those summarised in Submissions A - E as set out in paragraph 38 of this Case.

D.L. MATHIESON