Tutorial Questions and Answers – LAWS211

Question: Following Archer v Cutler a court can set aside a contract as an unconscionable bargain even if the stronger party has been completely innocent. Discuss.

- Following *Longmate,* McMullin J found that there was an unconscionable bargain despite Mr Archer not victimising Cutler: she initiated negotiations; he raised the price; neither party were aware of land's true value; and he was not aware of her senile dementia. Therefore a court following *Archer v Cutler* could rescind a contract under the equitable doctrine of unconscionable bargain despite the stronger party being completely innocent.

Question: Outline the three indicia of "unfairness" to a person of unsound mind in Archer v Cutler.

- 1. No independent advice
- 2. Price was greatly in excess of the value
- 3. No reasonable degree of equality between the contracting parties.

In *Archer v Cutler* all three were satisfied. The price was significantly below the land's true value. Cutler had no independent legal advice but Archer did. While both were elderly unsophisticated people, Archer had a complete mental grasp of the details of the transaction; Cuter did not.

Question: Outline what the textbooks at p395 of Archer v Cutler say an "unfair" contract is.

- From the extracts cited by McMullin J, it is unclear whether the unfairness mentioned is in reference to a common law defence of lack of contractual capacity or a defence in equity. Regardless, none of the quotes explain what an "unfair" contract is.

Question: Why does McMullin J describe the declarations signed by Mrs Cutler as self-defeating?

- Cutler was in the same mental condition when the declarations were signed on January 15th 1977 as on January 3rd when the contract was formed. The declarations stated that Cutler had no knowledge of the transaction, implying she was not fit to contract. However, as she appeared fit to sign the declarations to the Justice of the Peace (who said if he had not thought Cutler understood the declarations he would not have taken them); her son-in-law; and her daughter (who saw Cutler practically every day), Archer (who saw Cutler "much less") "should have had no reason to suspect" her contractual capacity.

Question: What is the test for unconscionable bargain following Archer v Cutler?

- Following Archer v Cutler, the test for the equitable doctrine of unconscionable bargain seems to be an amorphous one:

Firstly, the weaker party must be at a serious disadvantage vis-à-vis the other.
Secondly, the stronger party must be at least suspicious of the weaker party's disadvantage.
Thirdly, the weaker party must lack independent advice.
Fourthly, the sale must be made at a significant undervalue.
There doesn't need to be victimisation of the weaker party (as per Longmate v Ledger, no "arts" need be used to induce the contract.)

Question: According to the Privy Council in O'Connor v Hart [1985] 1 NZLR 159 a contract entered into by a person of unsound mind is only voidable in equity: that is, where the conduct of the other party amounts to equitable fraud, victimisation or "other description of unconscionable doings" that justifies the intervention of equity. Discuss.

- This is not true. A contract entered into by a person of unsound mind is also voidable in common law if the stronger party has knowledge of that unsoundness of mind ***Imperial Loan***. In *Archer v Cutler*, it was found that "both editions of *Cheshire* and *Fifoot* would allow of constructive knowledge as well as actual knowledge by one party of the other's disability." Constructive knowledge is where the stronger party ought to have known of the contractual capacity, that is, where a reasonable person in the shoes of the stronger party should have known in the circumstances.

Question: The different conclusions in Archer v Cutler [1980] 1 NZLR 386 and O'Connor v Hart [1985] 1 NZLR 159 concerning the unconscionable bargain issue can be justified on the ground that in the latter, as the Privy Council pointed out, "Mr Hart had no means of knowing or cause to suspect that Jack [O'Connor] was not in receipt of and acting in accordance with the most full and careful [legal] advice", whereas in the former it is obvious that Mr Archer was well aware that Mrs Cutler had no legal advice at all. Discuss.

- Mr Hart was unaware of Jack's lack of effective advice, whereas Archer was aware that Cutler had no advice. This factual distinction is a *contributing* factor to why there were distinct conclusions in the cases. However the Privy Council emphasise the need for victimisation in cases of unconscionable bargain. In *Archer v Cutler*, it was found that Archer did not victimise Cutler. So McMullin J's decision is difficult to reconcile with *O'Connor v Hart*. If the Privy Council were deciding *Archer v Cutler* they may have found that Mr Archer was not liable for unconscionable bargain, despite Cutler's lack of legal advice.

Question: Discuss the following: "It is noteworthy that those facts [in Archer v Cutler] did not include a finding of over-reaching on the part of the purchaser who sought to enforce the bargain. Therefore it seems that their Lordships [in O'Connor v Hart] regard the findings of the trial Judge … as to price and terms of sale as being insufficient in the absence of over-reaching to support a finding that the bargain was unconscionable."- *Nichols v Jessup [1986] 1 NZLR 226, 234 per McMullin J*

- McMullin J's statement implies that the Privy Council considered Cook J's findings on the fairness of the terms of the contract when they decided there was no unconscionable bargain. However, the Lords only look at the first and third grounds of appeal, (A) and (C). They do not look at (B), and therefore they do not look at whether the sale of agreement was 'unfair' as suggested by McMullin J. So this statement is flawed, the Privy Council does not necessarily find that price and terms of sale are insufficient in the absence of over-reaching to find an unconscionable bargain. Moreover, Cooke P's judgment contradicts McMullin J's point: "…although in the event the Judicial Committee heard no argument on whether the sale agreement was fair… their account of the facts at the beginning of the judgment is full enough to show that, even though Cook J found that a substantially higher price might well have been obtained, the agreed price and terms were not patently unfair. There appears to be nothing in *O'Connor v Hart* contrary to the view that a gross disparity of consideration, if it ought to have been evident to a purchaser, may be one factor in deciding whether in all the circumstances of a particular case he has made an unconscionable bargain." (pg 228-229).

Question: Discuss the following: "Moreover, while overruling Archer v Cutler [1980] 1 NZLR 386 as an authority for the proposition that a contract entered into by a person of unsound mind is voidable at that person's option if it is proved that the contract was unfair to the person of unsound mind, even though the other party did not know of that unsoundness, the Privy Council recorded that it was accepted by the appellant's counsel that Archer v Cutler was correctly decided on its own facts." - *Nichols v Jessup [1986] 1 NZLR 226, 234 per McMullin J*

- This statement is incorrect. During the Privy Council's summary of the procedural history, they recorded that, when challenging the Archer v Cutler rule in the Court of Appeal, counsel for Hart accepted "that it was correctly decided on its facts". However, the Archer v Cutler decision was not accepted by counsel for Hart in the Privy Council. Rather the first issue on appeal to the Privy Council in fact questioned whether Archer v Cutler was rightly decided or not.

Question: The proposition of law stated in Archer v Cutler (though not the actual decision in that case) was overruled in O'Connor v Hart.

- Strictly the statement is true. The Privy Council overruled the proposition of law that a contract made with a lunatic could be set aside if unfair, regardless of the stronger party's knowledge of that lunacy. If the Privy Council were to decide Archer v Cutler they would have found that there was no defence of lack of contractual capacity available for Cutler as under the common law test proposed by the Privy Council, the stronger party must have had actual or constructive knowledge of the lack of capacity. McMullin J found that Archer did not have knowledge (actual or constructive). Even Cutler's own daughter (along with the Justice of the Peace and son-in-law) thought that Cutler was fit to understand and sign the declarations. Furthermore the medical professional gave evidence suggesting that it would be possible for someone in Archer's shoes to not realise Cutler had senile dementia. Because there was no knowledge, the common law test would fail.

However, the actual decision of the case (to deny specific performance and rescind the contract) could still be made out by means of finding an unconscionable bargain. In Archer v Cutler there was a difference in bargaining position and lack of legal advice. Therefore it is arguable that the Privy Council may have come to the same conclusion as McMullin J on the facts of Archer v Cutler. However the Privy Council's emphasis on victimisation in O'Connor v Hart may make this unlikely, as Archer did not victimise Cutler.

Question: In Archer v Cutler [1980] 1 NZLR 386 at McMullin J says:
"If then one party is at a serious disadvantage vis-à-vis the other and that other unconscientiously takes advantage of this, there is a presumption of fraud. But this presumption may be rebutted by showing that the transaction is fair, just and reasonable."
Do you think that the authorities on p403 support this statement?

- McMullin J's statement suggests that the unconscientious taking advantage of the other party's disadvantage would result in a "presumption of fraud", and that *only after* this unconscionability is established can the stronger party rebut the claim by saying that the transaction is fair, just and reasonable. [In contrast, *O'Rorke v Bolingbroke* says "… in the case of dealings with uneducated ignorant persons, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract."
Likewise *Fry v Lane* says: "The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was 'fair, just and reasonable'."]

However, *O'Rorke v Bolingbroke* and *Fry v Lane* suggest that once the factual findings of apparent weaknesses are made out, the onus shifts on to the stronger party to prove that, despite these findings, the transaction was in fact fair, just and reasonable. In other words, this is rebutted before the finding of unconscionability is presumed. There is nothing to suggest that after finding unconscionability, the stronger party must then try and show that the transaction was in fact fair, just and reasonable. This may be impractical as it is unlikely that the transaction was fair, just and reasonable if it is found to be unconscionable and vice versa.

Question: What did the Privy Council say about 'fair, just and reasonable" as a defence?

- In *O'Connor v Hart* the Privy Council say very little about "fair, just and reasonable". However they do say: "An unconscionable bargain in this context would be a bargain of an improvident character made by a poor and ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction." This would suggest that the Privy Council agree with the reasoning from *O'Rorke v Bolingbroke* and *Fry v Lane*, not McMullin J, namely that consideration of whether the transaction is "fair and reasonable" comes *before* the finding of unconscionability, as a way to rebut victimisation. This differs from McMullin J's suggestion that "fair, just and reasonable" is considered as a separate factor *after* finding unconscionability.

Question: In *Nichols v Jessup* Cooke P says some of what the Privy Council said in *O'Connor v Hart* has a "degree of vagueness uncharacteristic of Chancery jurisprudence."
Do you agree? What test did the Privy Council establish for unconscionable bargain in *O'Connor*?

- I would agree that *O'Connor v Hart* provides a vague explanation of unconscionable bargain and it is difficult to outline a test for unconscionable bargain from the judgment.

Unconscionable Bargain test from the Privy Council in *O'Connor v Hart*:

- Limb One: Is there a weakness?
    - What is a weakness – check *Blomley v Ryan*
        - Something that affects your ability to serve your interests
        - E.g. illness, ignorance, inexperience, impaired faculties, financial need
- Limb Two: Is there actual or constructive knowledge of that weakness?
    - Would a reasonable person in the shoes of the stronger party have known of the weakness?
- Limb Three: Victimisation
    - Did the stronger party take advantage of that weakness through:
        - Active extortion of a benefit? Or
        - Passive acceptance of a benefit in unconscionable circumstances? (e.g. Mr Archer)
- Limb Four: Contractual Imbalance
    - Is the contractual imbalance of gross disparity such that there is a presumption of unconscionable behaviour?
- Limb Five: Lack of independent advice
  Equity will not find that there was an unconscionable bargain if the weaker party has had independent advice, because this would mean that the stronger party's conscience does not need alleviating.

Question: Comment critically on the reasoning and conclusion of Pritchard J in the following passage from his judgment in *Nichols v Jessup* (No 2) [1986] 1 NZLR 237, 240.

“It has to be remembered that it was not until July 1982 that Mrs Jessup was finally prevailed upon to sign the memorandum of transfer which would give effect to the plaintiff’s proposal. In the meantime, Mrs Jessup had clearly evinced reluctance to proceed with the transaction: she had, on several occasions, declined to sign the formal document when it was presented to her, at the plaintiff’s request, by the plaintiff’s father-in-law. A memorandum of transfer granting mutual rights-of-way is the sort of document which in the normal course is submitted by the solicitors acting for one party to the solicitors acting for the other; and yet the plaintiff persisted in making direct approaches to Mrs Jessup to get the document executed (through his father-in-law and, eventually, in person), without ever inquiring whether she had a solicitor to whom the document should be submitted. It is difficult to avoid the conclusion that the plaintiff deliberately refrained from making a suggestion which would have brought Mrs Jessup’s solicitor into the matter. If that is a cynical view of his conduct, I think it has to be said, at the very least, that the plaintiff, who was well aware of the defendant’s weaknesses, upon the respective advantages and disadvantages of the arrangement, was content to passively accept the benefit of a transaction which on any objective view was so manifestly one-sided. I would hold that he did so in circumstances which can fairly be described as unconscionable.”

- Pritchard J is suggesting that Nichols' persistence in approaching Jessup to get her to re-sign the memorandum of transfer indicates that he must have been aware of Jessup's weaknesses (being inexperienced, unintelligent and muddleheaded). Pritchard J suggests that Nichols must have at some point become aware of the contractual imbalance and insisted that Jessup sign the memorandum. This amounted to passive acceptance of a bargain in unconscionable circumstances.

However this finding is irrelevant to the question of unconscionable bargain. It does not matter that the subsequent conduct *after* the contract is formed is unconscionable. The relevant time is when the contract was formed and the contract was not formed at the signing of the memorandum. Rather, the contract was formed before then, when the two agreed to the bargain. Signing the memorandum is not to do with contract formation, but contract performance. And, in fact, at the time of the contract's formation Nichols was not aware of the contractual imbalance, which goes against a finding of victimisation.
Pritchard J therefore misunderstands the doctrine of unconscionable bargain.

Question: “The courts often pay lip-service only to the notion that foolish people cannot obtain relief from transactions which are based on inadequate consideration or are otherwise improvident. Transactions have been set aside on the ground of unconscionability in situations where either (a) plaintiffs were not suffering from a special disadvantage or where (b) even if they were, by no stretch of the imagination could it be said that the defendants procured the benefits by victimising the plaintiffs or behaving unconscientiously.”

Assume that the above statement is true. State the precise respects in which support for it can be derived from the decisions in –

(a) Archer v Cutler [1980] 1 NZLR 386

NB – Do NOT simply restate or summarise the facts of these cases. You are to assume that the examiner is fully conversant with them. Your task is to highlight the particular features of the facts in each of the cases which provide support for the quoted statement

Answer:

The statement asserts that courts have consistently purported that the equitable doctrine of unconscionable bargain should not intervene in cases of mere foolishness, yet in practice they have found the doctrine will apply in cases where there appears to be no victimisation.
Archer v Cutler supports this proposition, finding an unconscionable bargain despite there being no victimisation by the alleged stronger party. McMullin J's reliance on Cutler's senile dementia at the time of contracting; her age and eccentricity; her lack of legal advice; and that the contract was at a substantial undervalue, fail to make out any victimisation on the part of Archer.

McMullin J made the factual finding that Archer did not have actual nor constructive knowledge of Cutler's mental capacity at the time of contracting, so it cannot be said that he took advantage of the fact. Cutler's senile dementia is the debilitating weakness, her age and eccentricities (which Archer did suspect) are of less importance. Furthermore, Archer was older than Cutler so it would seem infeasible for him to victimise Cutler on her age and eccentricity alone.

Archer was unaware that the land was selling for a substantial undervalue. "The Government Roll valuation" in force at the time of sale was only $12700, "and it is understandable that two persons with no professional expertise might well fix a value of $17000 as being a fair price particularly if, as the plaintiff alleges, the defendant had been prepared to sell to Mrs Condon at $15000." Likewise pieces of land in that area were difficult to value (evidenced by the large discrepancy in valuations by the professional valuers) and the $17000 price was based on a similar transaction.

As Cutler was the one who approached Archer, offering him the land, thereby demonstrating a degree of good will between the two, there is less of an obligation for Archer to advise Cutler to get legal advice.

I do not think *Archer v Cutler* was a case where the stronger party had the obligation in equity to say to the weaker party: "no, I cannot in all good conscience accept the benefit of this transaction in these circumstances…" *Bowkett.* Notwithstanding the absence of victimisation McMullin J found that there was an unconscionable bargain. This affirms the statement.