

If *Archer v Cutler* were decided today, it would be necessary to consider whether the sale of land fell under the equitable doctrine of unconscionable bargain, using Tipping J's 5 prong test from *Bowkett*. This was applied in *Attorney-General for England and Wales v R* and upheld by the Supreme Court in *Gustav*. Archer would be seeking the equitable remedy of specific performance as the land is not fungible and damages would be inadequate *Loan Investment Corporation of Australasia v Bonner*.

Limb one: Weakness – this limb is compulsory

The weaker party, Cutler, must have a serious disadvantage vis-à-vis the stronger party, Archer. Cutler must be at a special disadvantage, for instance because of illness, ignorance, inexperience, impaired faculties, age or infirmity of body or mind *Blomley*. This list is non-exhaustive *Diprose*.

A weakness is a disabling condition or circumstance which seriously affects the weaker party's ability to act in his/her best interests, *Blomley*, and prevents him/her from exercising his/her rational and independent judgment *Nichols*. Multiple factors may form a weakness *Gustav*.

On the facts Cutler was old, eccentric and diagnosed by the psychiatrist as having advanced senile dementia. Although she was able to live independently and go on long walks, her senile dementia (which she was estimated to have had for 14 years) reduced her "ability to make realistic appraisals of facts in order to make conscious judgments" and at the time of contracting there was a danger that she "might make impulsive decisions with little prudent knowledge of the full nature and consequences" of her actions.

Conclusion: These weaknesses are not only encapsulated under the *Blomley* list, but the cumulative effect of such would also prevent Cutler from exercising her rational and independent judgment as per Somers J in *Nichols*. Therefore we must look at the conduct of the stronger party *Nichols*.

Limb Two: Knowledge - this is compulsory

Archer must have actual or constructive knowledge of Cutler's weakness *Bowkett*. This must be at the time of contracting *Gustav*. There will be constructive knowledge if a reasonable person in the shoes of Archer ought to have known of Cutler's weakness, that is, the cumulative effect of her age, eccentricities and senile dementia.

Actual knowledge

Although Archer was somewhat aware of her age and eccentricities (he knew she voluntarily chose to live in a cramped garage), he did not know that Cutler was suffering from advanced senile dementia.

Constructive knowledge

Psychiatrist, Dr McDonald, indicated that, at the time of contracting, anyone who had a short conversation with Cutler would have regarded her as "an old lady in need of care and protection". Archer had more than a short conversation with Cutler, so on this evidence alone he ought to have known.

However, McDonald also indicated that a person, who was aware that Cutler lived independently, and who received a call from her about the sale of property and executed an agreement for sale of that property, would "absolutely" be unaware of Cutler's weakness.

Furthermore, Cutler's daughter (who saw Cutler "practically every day"), son-in-law and Justice of the Peace, all considered her *compos mentis* 12 days after the day of contracting, when she signed three declarations. If Cutler's daughter did not know of her weakness, Archer (who saw Cutler less frequently) cannot be found to have constructive knowledge.

Conclusion: Although somewhat suspicious of her age and eccentricities, Archer had no actual nor constructive knowledge of her senile dementia which was the true disabling factor.

As this is a mandatory limb and is not satisfied, there would likely be no unconscionable bargain. However I will continue to examine the next three limbs.

Limb Three: Victimisation – this is compulsory

Archer must take advantage of Cutler's disability *Bowkett*. Victimisation may be either active extortion or passive acceptance of a benefit *O'Connor*. Passive acceptance will occur in circumstances known or ought to be known to the stronger party where he has an obligation under equity to say: no I cannot in all good conscience accept the benefit of this transaction at all, or unless you have full independent advice *Bowkett*. Active extortion may be pressuring, overreaching or conduct which falls below the standards demanded by equity *O'Connor*.

Active extortion

As Cutler initiated the transaction, it cannot be said that Archer actively extorted the bargain.

Passive acceptance

On one hand Archer accepted a bargain, providing significantly inadequate consideration (at least \$7k below the true value) and was the only party with legal advice. He also dictated the terms of the contract to Cutler and moved hastily to make the contract unconditional. However, it was Archer who increased the price of the transaction to \$17k (from \$15k). Furthermore, in light of the relevant government roll valuation of \$12700, the difficulty of valuing pieces of land in the area, the fact that Cutler was willing to sell to Condon for \$15k and a similar nearby piece of land sold for \$17k, Archer was unaware he was getting such a lopsided bargain at the time of contracting. It is therefore difficult to find him guilty of passive acceptance.

Conclusion: Overall Archer did not victimise Cutler. As this is a mandatory limb and I have found it not satisfied, there would likely be no unconscionable bargain. However I will continue to examine the next two limbs.

Limb Four: Inadequacy of consideration – this is not compulsory

Knowledge or constructive knowledge of the inadequacy of consideration is not mandatory, but may point to an unconscionable bargain *Bowkett*. A large inadequacy of consideration may give rise to a presumption of procedural unfairness, putting the onus on the stronger party to prove otherwise *O'Connor*. The more startling the inadequacy of consideration the less substantial the disability may need to be and vice versa *Bowkett*.

Contractual Imbalance

The transaction is lopsided because the price sold for (\$17k) was at least \$7k below the true value of the land (at least \$24k).

Knowledge of contractual imbalance

Actual knowledge: Archer did not actually know of the contractual imbalance- he thought it was a "fair price" for the land.

Constructive knowledge: Perhaps as a landowner of a similar sized block Archer should have known of Cutler's land's value. However, the stronger argument is that Archer ought not to have known about the value in light of the acting Government Roll valuation (\$12700); the general difficulties experienced in valuing such land; the fact a nearby property sold for \$17k and because Cutler was prepared to sell for \$15k.

Conclusion: On balance, it is evident that there was a marked inadequacy of consideration. However Archer did not know, nor ought to have known, of the contractual imbalance and therefore this limb is not satisfied. As this limb is not a mandatory limb it would still be possible to find an unconscionable bargain. However if there is no significant imbalance in consideration then it is unlikely that any issue of unconscionability will arise.

Limb Five: Procedural Impropriety – this is not compulsory

The absence of independent advice is tantamount to a procedural impropriety *Bowkett*. Although this limb is not mandatory, if the weaker party received full independent advice it is unlikely that any issue of unconscionability will arise *Gustav*. If the weaker party has had adequate independent advice their "disability will normally be deemed to have been overcome" *Bowkett*.

Conclusion; Cutler did not receive adequate independent advice. Archer did and further he dictated the way she accepted the contract.

Conclusion on unconscionable bargain:

On consideration of all five limbs, giving extra weight to the first three compulsory limbs, it is more strongly argued that there was no unconscionable bargain. Archer had no knowledge of Cutler's dementia and did not victimise her in any way.

Extra limb: Was the transaction fair, just and reasonable?

Despite my finding of no unconscionable bargain, we must also consider the extra sixth limb which asks whether the transaction was overall fair, just and reasonable *Gustav*.

Cutler is left off in a worse position as a result of her mental illness, this may not be fair. However, equity looks at the conduct of the stronger party. Overall Archer has acted fair, just and reasonably. He didn't victimise Cutler; he exercised a degree of good faith and even increased the price. On balance the transaction is fair, just and reasonable.

Following the NZ law of 2017, the court would find there was no unconscionable bargain and grant Archer the equitable remedy of specific performance.