***Archer v Cutler* [1980] 1 NZLR 386 (SC) McMullin**
Extended law: **CLD lack of K capacity = established**
- Prior to *Archer* a K made by a person who lacked capacity could only be voidable if the enforcing party either knew or ought to have known of the lack of capacity
- The extension = void a K if it was unfair despite the other party's knowledge of capacity

Extension problematic: equitable extension of a CL D
Prima facie a slam dunk: BOK → entitled to a remedy
Equitable doctrine of UB: = established
1. Two parties to the contract
2. A stronger and a weaker party
a) A weakness is a lower threshold than capacity as there are many circumstances than may apply
b) Unable to look after their own interest in respect of the contract (***Blomely***)
3. The stronger party unconcientiously takes advantage of the weaker: creates a presumption of fraud (equitable fraud)
4. The other party must have A/C knowledge
5. Other factors: sale at undervalue + no advice
Following, courts can set aside K as an UB even if the stronger party has been completely innocent: Cutler initiated, Archer increased $, Archer no knowledge of undervalue, no arts, no knowledge of dementia
- *Judge*: increase price to save himself, knew of age (older), eccentricity, lack of independent advice

ED Undue Influence: **no findings** made given the findings on the other two defences = K struck down
Remedy: rescission (Cutler won), Archer sought SP as rescission wouldn't grant road access

***O'Conner v Hart* [1985] 1 NZLR 159 (Privy Council)**
NZHC endorses *Archer* – decided K unfair but rescission defended by laches
NZCA twice endorses *Archer* but it is not good law
CLD Lack of Capacity: Jack lacked capacity
Unfairness: Privy Counsel disagrees with "profound respect" and reaffirms the common law; only voidable with actual or constructive knowledge of lack of capacity. Can strike down K if case calls for equitable relief (softening of the CL).
Knowledge: Hart did not have a/c knowledge
ED Unconscionable bargain: not in this case
Dealt with briefly, fell on knowledge
1. A weakness (***Blomely***)
2. A stronger party knows of the weakness *unclear whether constructive knowledge suffices
3. Victimisation: active extortion (intention strong) or passive acceptance (accept benefit knowing shouldn't)
4. Where there is a K imbalance there is a presumption of fraud (strongly un-balanced bargain urges a party to seek whether should accept)
5. Lack of advice may be relevant to procedural improp
NZ Law: can be unique but not in this case
Law of unfairness
1. Procedural unfairness = victimisation
2. Contractual imbalance – where extreme a presumption of procedural unfairness is engaged that amounts to victimisation and equity will intervene

→ ***Archer*** deals with the two indifferently
→ unfairness not a factor unless it amounts to equitable fraud which would have enabled void ability

***#1 Nichols v Jessup* (1985) NZHC Prichard J**
Honesty: equitable relief can be granted even in the absence of guilty behaviour if there has been a marked inadequacy of consideration and circumstances placing the weaker party at a disadvantage
- Nichols not guilty of bad faith

Defendant succeeded by virtue of a decision that comes perilously close to granting of an indulgence

Fair, Just, Reasonable
Finds it illogical

Unconscionable Bargain
1. Inadequacy of consideration
2. Circumstances placing D at disadvantage

***#2 Nichols v Jessup* [1986] NZCA**
Real issue: ***O'Connor*** reasons not heart at time trial
Cooke P
UB: bargain of improvident character made by a poor/ ignorant person acting w/o independent – not FJR
Definition poor instrument – depends on the facts
Contractual imbalance can be a factor
McMullin J
Requires improper mental element by the party seeking to take advantage of the bargain
Defends himself – Archer correctly decided on its own facts (not accurate, what said at NZCA)
Somers J
Not protecting foolish, conduct of stronger party, time of K, outlines three compulsory limbs
ED Unconscionable bargain:
1. UB will depend on the facts: must "cry out" for equitable relief – careful in commercial - tender moral
2. The conduct of the stronger part is crucial
3. Not for relief of the foolish but relief for the weak

1. A significant disability of the weaker party
a) A weak and strong party
b) ***Blomely*** factors
i. Not a closed class (***Bowkett***
2. Stronger party has knowledge of the disadvantage
3. Victimisation or taking advantage
OPTIONAL
4. Inadequacy of consideration
5. Procedural impropriety

***#3 Nichols v Jessup (No 2)* 1986 NZHC Prichard J**
K imbalance overwhelming in this case

Unconscionable conduct required
- Did not resile from views of moral fraud
- Still found a way to convict

Retraction F/J/R statement

Passive assessment investigation made at wrong time
- Also points to facts which suggest AE

***Bowkett v Action Finance* [1992] NZHC Tipping**
Presents test for UB
Interlocutory hearing: is there a serious case? Arguable case for UB as significant disability, imputed knowledge and inadequacy of consideration
Unconscionable Bargain: prompted
Equitable fraud is where the weaker party is under a disability sufficiently serious to make it unfair to allow the bargain to stand in favour of one who a/c know
Definition: actually important
Rationale for intervention
- Equity relieve rigours of CL
- Not relief for the foolish but weak
- Tread carefully commercial
- Not tender moralistic basis
- Must call loudly for equitable relief
- Cumulative weight of all factors

First three compulsory
Knowledge: can be imputed

***Gustav & Co Ltd v Macfield* [2007] NZCA Arnold J**
Equity did not require M to make further enquiries, to impose such an obligation would extend the doctrine of unconscionable bargain beyond the existing limits and would run the risk of creating unacceptable uncertainty in commercial transact.

Unconscionable Bargain
Time: agree with NZHC – confirmation
Weakness: yes, at the time of confirmation
Knowledge: not of the effect of the drugs

NZHC
Weakness: no
Imbalance of consideration: not really
Procedural unconscionability: negated, wouldn't have changed his mind

***Gustav & Co Ltd v Macfield Ltd* [2008] NZSC**
Tipping J
Unconscionable Bargain
Time: should be at time of contracting unless variation, at time of confirmation nothing M could do, obliged to accept confirmation
Passive acceptance: it is acquiring K rights rather than receiving performance of the K
Weakness: at time of contracting Mr P was not unable to adequately care for Gustav's interests – business acumen had not deserted him

→ suggests no contractual imbalance: rationalised, no pressure on Mr P
→ acted honestly
→ no victimisation

***Bridgewater v Leahy* [1998] HCA**
Must treat as if Bill alive and effect on wife and daughters is irrelevant
Focus on conduct of the stronger party
Minority → NO UB – no weakness
Should have pursued Successions Act
Unconscionable Bargain
Substantial undervalue
No weakness: understood, wishes etc
No procedural impropriety – no amount of advice would have changed his mind
Majority → UB = emotional dependence
Disagreed about Succession Act
Unconscionable Bargain
Substantial undervalue
Weakness: emotional dependence
Knowledge + more than passive acceptance, at a crucial junction iniative came from Neil + K imbalance + PIM
Remedy: setting aside part of a trans is unknown at equity – HC had difficulty
→ minority disagree; defeat the intention of the trans. + leave appellants better off

Sources of Contract Law

1. Common Law	Ancient customary law enforced by the Kings Courts Strict pleading rules- sometimes giving risk to unconscionable outcomes
2. Equity	Origin of unconscionable bargain: where a stronger party has taken advantage of a weaker parties special disadvantage, court will strike down K as unfair = exception to the sanctity of K
3. Statue	Expressly outlined in statute

Equity

- **Origin** (difference to common law)
  - Inherited from England, developed to supplement the common law
  - Reaction to strict rules of common law; unconscionable outcomes subjects petitioned King for justice according to King's conscience
    - Initially heard by King with counsel of advisors
    - Appointed Lord Chancellor (skilled in law) to hear petitions and practice of petitioning the Lord Chancellor directly developed
- **Rules**
  - Initially the *morality* of the King, based on good conscience and order
  - Problems developed of inconsistent application of remedy to similar facts ('equity varies with the length of the Chancellors foot'
  - Development to *rules* and principles to deal with the inequity of the common law → development of Equity as a distinctive body of English law
    - Court concerned with:
      - 1. Enforcing the rights of the wronged party (common law)
      - 2. Alleviating the conscience of the wrongdoing party (equity)
      - Result in most cases of UB is debatable as most cases that come to court are difficult (limitations) → look to overall justice
- **Public/Private distinction**
  - Public: deals with the powers, rights, obligations of government
    - Constitutional law, administrative law, criminal law
  - Private: creates and enforces rights of individuals when acting together
    - Contract, tort, property
    - Common law and equity are private laws
- **Jurisdiction**
  - **1. Exclusive Jurisdiction**
    - Primary importance: trusts
      - Property owned at law by A, held in equity for the benefit of B = separates control and ownership of assets from beneficial ownership
    - Origin of trusts: crusades; Knights left possessions with others to administer on their behalf (no concept of trust in common law – purely equitable)
  - **2. Auxiliary Jurisdiction** → "equitable remedy of __"
    - *Granting remedies in aid of existing common law institution* (BOK) instead of leaving parties to possibly inadequate common law remedies (damages)
      - Developed a serries of equitable remedies
      - Court only intervene in auxiliary equitable jurisdiction *if damages inadequate*
    - Specific performance: court order for wrongdoing party to perform K (typical in transferring land/property)
    - Injunction: court order to stop behaviour that infringes/breaches K (common in tort cases of nuisance where damages inadequate)
    - Rescission: 'order to rescind' court order in respect of the K to revert parties to position prior to signing the K (property, money) return to status quo ante
    - Account of profits: court order for wrongdoing party to return profits made of the inflicted party (where BOK on intellectual property) [WWE/WWF]
    - Equitable **defence** lasches: applies to equitable remedies/causes of action - cannot delay so much as to make in inequitable to grant relief = may have a longer or shorter time under equity
      - Common law: statute of limitations of 6yrs applies
- **Maxims of Equity**
  - Equity will not allow a wrong without a remedy
  - Equity follows the law not conflict
  - He who seeks equity must do equity

- Most come to equity with clean hand (a guilty party will not be rewarded)
- Acts in 'personam' against the person not property
- Equity assists the diligent (and vigilant) not the tardy (lasches)

- **Fusion: Common Law + Equity**
  - Originally applied in different courts
    - Common law: Exchequer, Pleas, Kings Bench
    - Equity: Court of Chancery
      - Slower (*Jandice v Jandice*: so long whole estate legal fees)
  - 1873 Judicature Acts: courts apply common law and equity
    - Prior: BOK was not remedied with equitable remedies, struck down where application to the wrong court or alleged UB in common law
  - Effect: New law of combination v procedural application of both
    - Separate: originally held to be the case, Lord Ashburner 'streams run side by side, do not mingle'
      - Textbook reaction: 'low water mark', Diplock did not explain how equity vanished and consequences of disappearance, misguided
    - Together: 1970s Lord Diplock (*United Scientific Co*) 'surely mingled by now' which was controversial + Lord Cooke (*Day v Meade*) agreed

Equitable Remedies

- A common law cause of action; can still seek an equitable remedy
  - ***Archer***: BOK remedy can be equitable as plaintiff sought specific performance
- Equitable Defences
  - Only apply to equitable remedies
  - Laches

    - Specific performance: court order for wrongdoing party to perform K (typical in transferring land/property)
    - Injunction: court order to stop behaviour that infringes/breaches K (common in tort cases of nuisance where damages inadequate)
    - Rescission: 'order to rescind' court order in respect of the K to revert parties to position prior to signing the K (property, money) return to status quo ante
    - Account of profits: court order for wrongdoing party to return profits made of the inflicted party (where BOK on intellectual property) [WWE/WWF]
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      - Common law: statute of limitations of 6yrs applies

Unconscionable Bargain

1. Origin

- Equity protected young male aristocratic heirs who got into severe gambling debt and responded by selling interest in the estate at undervalue
  - 1750: 'unconscionable conduct always be inferred from circumstances; the weakness and extortion of this'
  - 19th C: equitable protection of a heir's interest in their estate simply because of insufficient price was seen as contrary to the purpose of contract
- Industrial revolution, growth of capitalism – this equitable doctrine upset the security of transactions which required people to live up to the bargain
  - Altered by statute: sale of interest in estate by heir would not be set aside simply by undervalue (must be youth, inexperience, desire or need to obtain money)

2. Development

- Development by the courts
- Know the method of reasoning in each case to identify the chain of reasoning

Bottom up approach

- Courts start with a rule (established in common law or equity) and develop the law moving from that initial rule: don't go to far but incrementally develop via logic/analogy
- Gradual development confined to specific facts/issues

Top down approach

- Courts take an overriding principle they will extract from a string of cases (inconsistent cases seen as deviant, are distinguished, overruled or ignored)

- Evident in restitution (common law: originally return of property to the party who had been wronged as the contract had been founded on the unjust enrichment of one party at the expense of the other party)
- Influential in UK, briefly AUS, not NZ

- Doctrine prior to UB: Relief from bargain where equity will intervene
  - (1) Weakness: one party to the transaction has a weakness
  - (2) Advantage: the other party to the transaction takes advantage of the weakness
    - ***Fry v Lane***: equity will intervene and set aside a contract where a purchase is made from a poor/ignorant man at considerable undervalue where the vendor had no independent advice
    - Settled the law till the 1980s, then explosion of UB cases

TEST: CLD Lack of Contractual Capacity

I. Issue

The issue in this case is whether X will be liable for Y in the situation where __.

II. Law: the courts of equity will intervene where…

Archer established that a contract with a person of unsound mind can be set aside at their option fit he contract is not fair and bondafide, even if the other party was not aware of her incapacity
O'Connor: overruled that test, restricting it to where the weaker party lacked contractual capacity and the stronger party had actual or constructive knowledge

III. Test

1. Lack of Capacity + a/c Knowledge = voidable (*Molton v Camroux*)

- **Capacity**
  - Degree of mental disability that the weaker party is incapable of understanding the nature of the contract (***Boughton v Knight*** → adopted HCAU ***Gibbons v Wright***)
  - In this case _**X**_
- **Knowledge**
  - **a)** ***Imperial Loan Co***: **actual**
    - Esher: did not know what he was doing, binding unless he can prove the person whom he contracted knew him to be incapable of understanding the K
    - Lopes LJ: K is not voidable if the other party believed he was dealing with a person of sound mind – incapacity must be known to the stronger party
  - **b)** Cheshire and Fifoot: **constructive**
    - Other party ought to have known of lack of capacity

2. *Archer*: Lack of capacity + Unfairness (despite knowledge) → overruled *O'Connor*

- **Unfairness**: set aside K if not fair, even if the other party not aware of lack fo capacity (***Archer***)
  - → ***York Glass*** CA decided to set aside K on unfairness
    - 1. D had no independent legal advice
      - D had none, P did have some
    - 2. Price in excess of value
      - Price below true value
    - 3. No reasonable degree of equality between parties
      - Both elderly and unsophisticated, the P had a complete mental grasp of the transaction and the D did not – different bargaining positions
- ***O'Connor***: unfairness only renders a K voidable where such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the K even if sound mind

IV. DISCUSSION: Unconscionable bargain v Lack of Capacity

- Weakness is a lower threshold - is an inability to conserve your own interests by exercising rational/independent judgement
- However, lack of capacity is easier to establish as you must only satisfy weakness and knowledge whereas UB requires this in addition to other limbs
- Difference: 1. Ease, 2. Equity v Common Law (equity softens the harshness of CL)
- In ***Gustav*** K capacity would not have been made out; requires you do not understand the nature of the bargain
  - Harder to establish: requires psychiatric evidence

TEST

I. Issue

The issue in this case is whether _____.
The contract could be upheld or voidable via the common law doctrine of lack of contractual capacity or the equitable doctrine of unconscionable bargain.

II. Test: common law doctrine of Lack of K Capacity

A contract is voidable where one party had a lack of contractual capacity and the other party had actual or constructive knowledge of this (***Molton***)

- **Capacity**
  - Degree of mental disability that the weaker party is incapable of understanding the nature of the contract (***Boughton v Knight*** → adopted HCAU ***Gibbons v Wright***)
    → *higher threshold than equitable weakness*

  Archer: psychiatric evidence = no doubt suffering from degree of senile dementia making her incapable of understanding the nature of the bargain
- **Knowledge**

  c) ***Imperial Loan Co***: **actual**
    - Esher: did not know what he was doing, binding unless he can prove the person whom he contracted knew him to be incapable of understanding the K
    - Lopes LJ: K is not voidable if the other party believed he was dealing with a person of sound mind – incapacity must be known to the stronger party

  d) Cheshire and Fifoot: **constructive**
    - Other party ought to have known of lack of capacity
    - ***Archer***: no knowledge as she could have appeared capable to a lay person of dealing with her affairs
      - Self defeating evidence of statutory declarations supports lack of knowledge

III. Test: equitable doctrine of Unconscionable Bargain

Part One

The courts of equity will intervene where:

1. The facts of the case cry out for equitable relief (***Nichols***)
2. The relief is not for the foolish but the weak who have been taken advantage of (***Nichols***)
3. The inquiry is made at the time of contracting (***Gustav***)
4. The conduct of the stronger party is crucial (***Nichols***)
5. Equity must tread carefully when intervening in commercial relationships (***Bowkett***)
6. There will be no equitable intervention on a tender moralistic basis (***Bowkett***)

To decide whether or not the equitable doctrine unconscionable bargain will apply, I will apply the five limb ***Bowkett*** test which was implicitly approved by the NZSC in ***Gustav*** and endorsed in the ***AG for England and Wales***.

The first three limbs must be satisfied for a contract to be deemed unconscionable (***Bowkett***). The factors are not discrete silos, they can overlap

Part Two

Compulsory limbs are as follows:

1. Weakness

- The weaker party must be under a significant disability which prevents them from exercising rational and independent judgement (***Gustav***).
- The disability must be operating at the **time** of contracting unless the transaction is varied to the detriment of the weaker party (***Gustav***).
- A weakness must diminish the weaker party's ability to preserve their own interests (per Kitto ***Blomley***). Can include the ***Blomley*** factors, but they are not an exhaustive list (***Bowkett***).
  - Poverty or great financial need
  - Sickness
  - Age
  - Infirmity of body or mind
  - Drunkenness
  - Illiteracy or lack of education

- Lack of assistance or explanation where situation calls for it to be given
  - In some circumstances of procedural impropriety, advice is necessary (***Bowkett***)

- Contractual imbalance can be a factor, the more startling the imbalance, the less substantial the weakness needs to be
- The factors can be cumulative, according to the facts _**X**_ as the weaker party is suffering from ___. This does/doesn't amount to a 'significant' disability.
  - The weaker parties strengths can mitigate their disability (***Gustav***) if direct.
    - ***Nichols*** - findings of Mrs Jessup as nurse and landlord
    - ***Gustav*** was a developer, understood that the demolition clauses would have affected the value, effect of paying a premium → just being foolish
  - The more server the disability, the more likely unconscionability is found (***Bowkett***)
  - *Easier to establish than CLD of lack of K capacity*

Archer: senile dementia (+ eccentricity): couldn't imagine regarded as other than "need of care/protection"
O'Connor: analogy of facts (not ruled on) →age, irrationality of staying on the farm
Nichols per NZHC: rambling, confusion, "unintelligence and muddleheaded", swayed by totally irrelevant considerations no professional advice, ignorance of property rights *but she was registered nurse/landlord*
Bowkett *(interlocutory):* distinctly arguable - elderly, unversed in business, under pressure, no advice
Gustav per NZCA : qualifying disadvantage = effect of medication, pain, inability to accept the reality of his situation → per NZSC: no weakness as business acuity had not deserted him
Bridgewater per minority: NONE – understood nature of transaction, gave effect to longstanding wish, independent and determined, appreciated the value of the land, justified decision
Bridgewater per majority: emotional dependence, Bill had a tendency to fall in with Neil's wishes, quiet reserved man of limited education- put out his ability to change his testamentary arrangements
Diprose*:* emotional dependence of being love struck

2. Knowledge

- The stronger party must have actual or constructive knowledge of the disability (***Gustav***)
- Constructive knowledge is knowledge a stronger party ought to have known; where are reasonable man would have been alerted to the possibility of its existence (***Nichols***)
  - If the stronger party knew of contractual imbalance, there is constructive knowledge of a weakness; deal too good to be true (***Gustav***)
- Ordinary NZ not expected to know general effects of cancer and psychotropic drugs (***Gustav***)
- Knowledge may also be imputed where there is a principle/agent relationship (***Bowkett***)
  - Ms Webley's knowledge was deemed to be that of Action Finance
- _**Y**_ had/not knowledge of _**X**_'s disability. This is because ____
  - Focus: cumulatively, did they know if the weaker party could assess what was in their best interests? Look to similarities/differences of the parties

Archer = although no knowledge of unsoundness (+ did not set out to take advantage), aware of her age (72), eccentricity, lack of advice, disadvantaged bargaining position (regarded as unconscionable particularly when sale made at significant undervalue) *but is this good law: sale initiated by Cutler, price increased by Archer, Archer was older*
O'Connor: Hart had no knowledge or means to suspect (neighbour) + thought he was getting advice
Nichols per Cooke: open to conclude P must have been aware of D's characteristics (neighbour)
Bowkett *(interlocutory):* distinctly arguable AF knew (imputed): bankruptcy, no hope of servicing the loan
Gustav per NZCA, confirmed NZSC: Macfield had knowledge (imputed Mr Theile's) but not of the weakness → had no obligation to enquire to condition as this would extend the doctrine beyond where it has previously been taken and run the risk of creating unacceptable uncertainty in commercial transactions
→ per John Hansen J: lay people not expected to understand the physical and mental consequences of terminal cancer (people have experience with others suffering which is not the same)
Bridgewater: Neil knew because of close working relationship, tendency to fall in

3. Victimisation

- The stronger party must victimise the other (***Gustav***) via active extortion or passive acceptance by the stronger of the weaker party (***O'Connor***)
  1. Active exploitation: using arts/overreaching (***Fry v Lane***)
  2. Passive acceptance: acceptance of the bargain in the circumstances where it is contrary to good conscience that the bargain should be accepted (***Bowkett***):
  - Creates an equitable obligation to refuse the benefit of the transaction till the weaker party has full and independent advice (***Bowkett***)

        - Knowledge of weakness makes it more likely (***Bowkett***)
        - Level of strength of that advice important: lawyer, insurance advisory, architect son (***Nichols***) *but would a lawyer actually be helpful?*
- Important whether or not the stronger party had independence advice: look at disparity
- K imbalance might support the inference of an unfair use of the occasion (***Blomely***)
- In the circumstances _Y_ did/not victimise of _X_
    - Active exploitation was/not engaged because ___
    - Passive acceptance was/not utilised because ___

Archer: sale instigated by Cutler, Archer raised the price, only legal advice was how to record
O'Connor: NONE: no overreaching or advantage taking – let the bargain proceed on Jack's terms
Nichols per Cooke P: suggested active extortion = ongoing negotiations, pursued by father-in-law and inevitable realisation by P that there was an imbalance of consideration (*but pressuring was after the fact = not relevant as look to the time of contracting*)
Nichols per Prichard J: passive acceptance as must have realised at some stage accepting a transaction that was manifestly one sided (*contrary to the facts raised; direct approach rather than through solicitors and did not inquire if D had legal advice → defending his earlier findings but still finding UB*)
Bowkett *(interlocutory):* no case for AE but PA arguable: should have insisted on advice - knew no hope of servicing whilst stronger party was increasing their financial position *but is that practical to expect?*
Gustav per NZSC: PA is acquiring K rights rather than receiving performance of the K, none in this case as M did not apply pressure (nothing on their conscience to refuse Gustav's assent) *arguable – value/ill*
Bridgewater per minority: Neil did not abuse close relationship, no haste in transaction
Bridgewater per majority: more than passive acceptance = Neil's initiative for the sale and terms, doesn't matter if no haste, Neil sought to offer a price that was "getting more equitable" which appears he recognised he would be acquiring land that was rising in value

Part Three

a) ***All three satisfied***: suggests an UB, other indicators of unconscionability include the following two factors that are outlined in ***Bowkett***…
~~***b)***~~ ***Not all satisfied***: as all three are not satisfied, it is unlikely there is an unconscionable bargain (***Bowkett***). However, if I am wrong the following two factors are indicators of unconscionability.

4. Contractual Imbalance

- UB likely where there is a marked **inadequacy of consideration** and the stronger party either **knew or ought to have known** (***Gustav***)
- Not mandatory but almost always present (don't sue unless want a remedy) (***Bowkett***)
- A "markedly lopsided bargain" creates a contractual imbalance (***O'Connor***)
- Includes where the benefit of consdiearation moves to a third party like ***Bowkett***
- The greater the weakness, the less the inadequacy of consideration needs to be (***Bowkett***)
- Consider the terms: value (independent valuer), who set the terms (***Gustav***)
    - Can assent to an imbalance (minority ***Bridgewater***)
- There was/not an imbalance in this case because ____
- _Y_ had/not knowledge of the imbalance because _____
    - If its very imbalanced the court will assume there is an unconscionable bargain and burden would shift to stronger party to prove its not UC (***O'Connor***) but wasn't even met in ***Bridgewater***

O'Connor: two years to pay made it favourable to stronger party
Nichols per Cooke P: town planning ordinances allows greater development of the land (+$45K) effect on defendant would reduce value by $3k → Prichard J "manifestly one sided"
Bowkett *(interlocutory):* dramatic inadequacy as Bowkett's derived nothing and AF knew of this
Gustav per John Hansen J: NONE - disparity not as great as counsel suggested – Mr P was aware he was paying a premium but wanted to acquire a highly desirable site, amount spread over lifespan
→ supported by NZSC: vendors set the price and did not pressure Mr P (+ conditional on due diligence)
Bridgewater per minority: NONE – Bill aware of value, did not regret it
Bridgewater per majority: YES – seriously inadequacy, transaction had the effect of putting out Bill's power to change his will

5. Procedural unfairness either demonstrated or presumed from the circumstance (***Gustav***)

- Can be demonstrated (***Gustav***) or presumed where there is a large K imbalance (***O'Conner***)
- Means a lack of independent advice (***O'Conner***)

- If there was independent advice, the disability will normally be deemed to have been overcome (***Bowkett*** → they're just being foolish)
- In this case _**X**_ did/not received independent advice because____

O'Connor: NONE: advice provided to either party, terms proposed by weaker party's lawyer
Bowkett *(interlocutory):* NONE *but shouldn't there be where advice not insisted on (not practical)*
Gustav per John Hansen J: layer acting for all parties not material – nothing to suggest this had any material impact on Mr P for his decision
Bridgewater per minority: strong desire – no amount of advice would have changed his mind
Bridgewater per majority: no party including Mr Pack suggested any party obtain independent advice

6. If these conditions are met, UB can be rebutted by the stronger party showing the transaction was fair, just and reasonable (***Gustav***)

- Likely difficult to show
- If the contract is F/J/R the contract will not be rescinded (***Gustav***, *Archer, Bowkett)*
  - The only way to show this is that there was a good deal in place (***Bowkett***)
- Equivalent to the 3rd limb of the interim injunction test – looks to overall justice (***Bowkett***)
- Unconscionable bargain was/not established on the facts
  - Was: to rebut the equitable doctrine _**Y**_ would have to show F/J/R: likely/not ___
  - Not: however, if UB was established, _**Y**_ would/not be likely to show the transaction was F/J/R because __
- In ***Nichols*** Prichard J says it is quite illogical to have a F/J/R argument if there is a case for unconscionable bargain. However, this ignored authority via precedent (***Blomely***, ***Fry v Lane***) and text books → later reversed his feelings
- ***Bridgewater*** probably should have fallen on this limb, the majority did not focus on what Bill wanted – must treat the case as if he was alive and the effect on his daughters was irrelevant

IV. Remedies

1. First consider common law remedy of damages
   a. Are they appropriate?
   b. Why are they not appropriate?
      i. Road access (***Archer***)
      ii. Staying on piece of land (***O'Connor***)
      iii. Can be too onerous (***Nichols***)
2. Are equitable remedies appropriate?
   a. For the K to be set aside = rescission, returns parties to status quo ante
   b. For K to be upheld = specific performance
3. Can give compensation in cases of recission
   a. NZCA ***O'Connor*** returned case to NZHC meaning Hart was allocated compensation for amount spent (not increase in value of the land)

V. Defences

Laches

Equitable remedies or causes of actions can be defended by laches (***Archer***). Equity favours the diligent over the tardy. Will apply as a defence where there has been such a delay in proceedings it would be unreasonable or prejudicial to the parties to apply the remedy (***Archer***).

- Does not apply when delay is fault of the courts (***Archer***) or fault of bad lawyer (***O'Connor***)

VI. Conclusion

TUTORIAL NOTES

- **Unfairness**
  - ***Archer***: says a contract with a person of unsound mind can be set aside at their option fit he contract is not fair and bondafide, even if the other party was not aware of her incapacity
    - *But,* cites ***Molton*** and textbooks which are not true authority for this
      - Unsure if procedural or substantive unfairness
      - Mixing equitable and common law doctrines
      - Asserts, does not explain and ignores contrary authority (***O'Connor***)
  - Price and terms of K → unfairness
    - Price and terms (K imbalance) go to whether or not there was overreaching on the part of the party who sought to enforce the bargain
    - No argument on this, was expressly left open 228, [50] NJ
  - Overruled in ***O'Connor*** – no longer good law- but it could not overturn the decision as it was not before the PC (could appeal and have it overturned)
  - "Would a NZ court in 2018 find the contract in ___ to be unfair" → apply facts of the case to the UB test "*see law written in my problem question"
    - ***Nichols***
      - Weakness: ignorance but questionable, some advice but K imbalance significant meaning disability does not have to be severe = yes
      - Knowledge: proximity = yes, counter factors = no, Prichard asserts he was "well aware" → ensure look to time of agreement
      - Victimisation: Prichard thinks passive acceptance but made analysis at time of K
        - Hard to find PA at time of K
      - Inadequacy = yes, procedural unfairness = probably
      - FJR: Prichard thinks illogical then changes mind
- **Contractual Capacity**
  - Lack of capacity **(unsound mind)** + knowledge → voidable at *common law*
  - **Weakness** → *voidable in equity*
    - where the conduct of the other party amounts to equitable fraud, victimisation or another description of unconscionable doings that justifies equitable intervention (***O'Connor***)
- **Unconscionable Bargain**
  - Innocence of stronger party
    - Following ***Archer***: set aside K even where stronger party has acted innocently
      - Innocence: C initiated, A raised price, no knowledge of value/dementia, no arts
      - Lack of innocence: knew age/eccentricity/lack of advice, raised price to look good
      - On balance was *innocent* as he was older and had no substantial advice
    - ***O'Connor:*** suggests moral fraud required → important to finding of no UB that Hart was an innocent actor – content to wait in wings: no equitable fraud, victimisation, taking advantage or overreaching + Jack advised/Hart no means to suspect he was not acting with, terms proposed by Jack not imposed by Hart
    - ***Nichols:***
      - NZHC(1) = UB = equitable relief can be granted without guilty behaviour if there is a marked inadequacy of consideration and circumstances placing the weaker party at a disadvantage
      - NZCA per Cooke P: no UB where acted honestly (***O'Connor***)
      - NZCA per McMullin J: appears not UB unless demonstrated some improper mental element by the party seeking to take advantage of the bargain
    - ***Gustav***: emphasis on the fact stronger party acted honestly
    - ***Bridgewater***: minority thought Neil acted honestly, majority disagreed
  - Focuses on the formation of the contract not performance (***Nichols***)
    - This means Prichard J's discussion of how Nichols pursued Jessup to sign the contract (suggesting this is AE is irrelevant)
  - Defining UB
    - ***Nichols*** per Cooke P – a poor instrument, depends on the fact of the case
    - ***Bowkett*** Tipping J – courts must accept some elucidation of the concept of UB, cannot throw up hands, although it is desirable to keep it flexible there must be some means to identify the equitable doctrine
  - Difference in ***Archer*** and ***O'Connor***
    - Lack of advice not a good basis to distinguish
    - Utilised different legal tests (*O'Connor* introduced victimisation: PA/AE for which advice can be evidence towards)

        - **Test in *O'Connor* = *vague***
            - Do not spend much time on it, do not set a test clearly before applying one, unclear whether or not constructive knowledge is equally as liable (less vague than ***Archer***)
    - Authorities that 'support' the premise in ***Archer*** pg 403 [13]
        - ***Earl of Aylesford***: support→ McMullin paraphrases statement: unconscientiously takes advantage of serious disadvantages raises a presumption of fraud that can be rebutted by showing the transaction is F/J/R
        - ***Fry v Lane***: not support→ doesn't talk about unconscionability; talk about the onus of showing F/R/J
        - ***O'Rorke***: not support→ doesn't talk about unconscionability; talks about how takes the burden
    - Fair Just Reasonable Test
        - Above authorities in ***Archer***
        - Practically difficult; how to show a fair, just and reasonable unconscientious advantage
        - Prichard J in ***Nichols*** comments that it is illogical test, that once it appears the stronger party has intentionally taken advantage of the weaker it is unlikely he can show his conduct is fair just and reasonable (changes his mind)
        - ***O'Connor*** PC sees it as a defence, something the stronger party would have to fail to prove for there to be an UB pg 171 [14]
    - Suffering detriment
        - It doesn't appear essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain (***Blomely*** per ***Archer***)
    - Time assessment
        - Look to the time time of contracting the point each party makes an assessment of the rationality of the other (***Gustav***); time of confirmation is too late as the other party cannot get out of it
            - Mr P suffering at the time of confirmation (CA), not suffering at time of contracting (SC – suggests same for time of confirmation)
- ***Archer***
    - ***O'Connor*** Privy Counsel recorded that appellants counsel noted ***Archer*** was correctly decided on its own facts
        - Hart's counsel said this in the NZCA, not the PC