Short Answer Question Document

1. **Question**: In *Archer v Cutler* what were Mrs Cutler's defences?

- 1. **Common law defence:** Mrs Cutler lacked contractual capacity and that Mr Archer knew she was of unsound mind: "…at the time the defendant signed the agreement she was, to the knowledge of the plaintiff**,** of unsound mind and incapable of understanding the nature of the bargain"
- 2. **Equitable doctrine:** Mrs Cutler was induced to enter the agreement by the undue influence of Mr Archer.
    - NOTE: the court found that they do not need to make a finding on this defence: "In view of the decision which I have reached on the first two defences already discussed in this judgment, it is not necessary for me to reach any decision on the third defence of undue influence."
- 3. **Equitable doctrine of unconscionable bargain:** "the contract should be set aside as a catching and unconscientious bargain"

2. **Question:** Why is it important that Mr Archer had to know about Mrs Cutler's condition?

- Both counsel agreed that the common law rule from the decision in *Imperial Loan Co v Stone* still stood, that is:

  "When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about".

3. **Question:** Why did McMullin J find that Mr Archer did not know of Mrs Cutler's dementia despite the irrefutable medical evidence that she was severely demented (i.e. that she was unable to understand the nature of the bargain)?

- Cutler's son-in-law and the Justice of the Peace (appointed as a result of his integrity and honesty) took it that Cutler understood the declarations. Furthermore, Cutler's daughter, who saw Cutler practically every day, was of the view that Cutler was of sound mind (as to make sense of and sign the declarations). It is therefore difficult to argue that Archer should have known, as he saw Cutler less frequently than her daughter. Hence the declarations are self-defeating, one cannot provide declarations proving that she lacks mental capacity if she has to have the mental capacity to sign the declarations.
- So McMullin J was forced to find that Archer didn't know.
  There was further evidence from Dr McDonald on cross-examination that a layperson, aware that Cutler was living independently, on receiving a phone call about the sale of her property which he followed up to the point where an agreement was executed, "absolutely" might be unaware of her disability.

4. **Question:** What do the textbooks cited by McMullin J tell us about 'unfairness'?

- They do not define unfairness. When a judge cites an authority it is important to read an authority to find if it supports what the judge says it does. This is because often the authorities cited don't match up with what the judge says.

5. **Question:** What is a problem with McMullin J using Lopes LJ's judgment in *Imperial Loan* to support his extension of the common law rule on contractual capacity?

- Unfairness is used to describe situations where the lunatic seller sells at undervalue or the lunatic buyer buys at overvalue. But this rubric doesn't work with a contract of surety (as in *Imperial Loan*). The person is not buying or selling something, he is guaranteeing a contract: his guarantee is neither "overvalued" or "undervalued". So it is unclear how McMullin J uses *Imperial Loan* to support his new point of law on unfairness.

6. **Question:** How does McMullin J find 'unfairness' in *Archer v Cutler*?

- McMullin J looks to *York Glass Co* and find three indicia of unfairness:
  1. No independent advice
  2. Price was greatly in excess of value (or selling greatly undervalue)
  3. No reasonable degree of inequality between the parties
- As Cutler had no independent advice, the sale price was at a significant undervalue and there was a reasonable degree of inequality between Archer and Cutler, the contract was unfair.

7. **Question:** What is the test for unconscionable bargain after *Archer v Cutler*?

1. There must be a weakness (concerning the party's ability to look after their interests)
2. The stronger party must be at least suspicious of that weakness (they do not need to know). E.g. Archer was suspicious of Cutler's age and eccentricities (living in a garage).
3. The sale must be undervalued.
4. The weaker party lacks independent advice.

8. **Question:** What are the overriding principles of when the law should intervene?

- The common law intervenes to protect the rights of the ***wronged*** party.
- Equity will intervene when the ***wrong-doing*** party's conscience needs alleviating.

9. **Question:** Why do the Privy Council say it was almost inevitable that the trial court would find that the trial judge would follow *Archer v Cutler*?

- Although the High Court of New Zealand is not bound by previous High Court decisions, the Privy Council said this in practical, pragmatic way because after *Archer v Cutler* was decided, McMullin J was promoted to the Court of Appeal. Cook J would have known that the case might be appealed and that McMullin J might be the one taking the case.

10. **Question:** Why did the Court of Appeal reverse Cook J's finding of laches?

- Although there was a 3 year delay before suing, the only person who could have brought this action was the sole trustee, Jack O'Connor. As he was of unsound mind, he was not in a state to go to court. Furthermore, the O'Connors *did* go to see a lawyer at first. But they went to the same law firm that Mr Henderson worked at, so they were seeking legal advice about action against Mr Henderson from colleagues of Mr Henderson himself. Eventually they went to new lawyers and some legal process was made.
- Also, Mr Hart knew that the O'Connors sought to set the contract aside. So Hart should not complain about the money he invested into the property – he ran the risk that he would lose that money when he spent it on the farm.

11. **Question:** What were the four grounds of appeal to the Privy Council made by Mr Hart?
    1. (A) Whether *Archer v Cutler* was rightly decided; that is to say, whether a contract by a person of unsound mind, whose incapacity is unknown to the other contracting party, can be avoided (**at law**) on the ground that it is "unfair" to the party lacking capacity (or those whom he represents), there being no imputations against the conduct of the other contracting party.
    2. (B) If *Archer v Cutler* was rightly decided, whether the High Court and the Court of Appeal were correct in finding that the sale of agreement was "unfair" to Jack
    3. (C) If *Archer v Cutler* was wrongly decided, whether the respondent trustees were entitled to have the contract set aside (**in equity**) as an "unconscionable bargain" notwithstanding the complete innocence of Mr Hart.
    4. (D) If *Archer v Cutler* was rightly decided and the Courts below correctly found that the sale agreement was "unfair", whether the sale agreement would escape rescission because it was impossible to achieve restitution in integrum.
- The Privy Council focus on (A) and (C).

12. **Question:** When will equity step in and relieve a party?

- If you've been victimised, equity will set that contract aside. However equity will not step in and will not relieve a party from a contract, simply as a result from contractual imbalance (unless there is some form of victimisation as well).
- I.e. **contractual imbalance alone will not be grounds to set a contract aside (in equity).**
- However, contractual imbalance may create a presumption of procedural unfairness. If it is presumed that there has been procedural unfairness, **it is down to the stronger party** to show that the contract was formed without victimisation.

13. **Question:** What would have been the result in *Archer v Cutler*, had *O'Connor v Hart* applied?

- Mrs Cutler would have failed in common law as *Archer* had no actual knowledge or constructive knowledge of her mental disability. However, irrespective of the common law, McMullin J **did** find that there was an unconscionable bargain. So equity may still intervene and set the contract aside under the equitable doctrine of unconscionable bargain.

14. **Question**: In *Archer v Cutler* the court made a declaration rescinding the contract, i.e. they granted the remedy of rescission of the contract, because it was a breach of common law (in terms of contractual capacity). Would a court applying the law following *O'Connor v Hart* grant the remedy of rescission?
I.e. Would a court grant the remedy of rescission in *Archer v Cutler* if it applied the law set out in *O'Connor v Hart*?

- Under common law, a court following the law set out in *O'Connor v Hart* would not have granted the remedy of rescission. In *O'Connor v Hart*, the Privy Council reversed McMullin J's extension of the common law back to the pre-existing test which required that the contract could only be set aside if the party seeking to enforce the contract had actual or constructive knowledge of the other party's lack of contractual capacity. It was a finding of fact by the judge that Mr Archer did not have actual or constructive knowledge of Mrs Cutler's lack of contractual capacity because the Justice of the Peace, son-in-law and her daughter believed she had the capacity to sign declarations at a time shortly after she had signed the contract with Mr Archer. Furthermore, her medical professional, Dr McDonald, gave evidence that it was "absolutely" possible that someone in a position similar to Mr Archer could have conversed with Mrs Cutler and not have known of her incapacity. Because Mr Archer did not have actual or constructive knowledge, the common law test for lack of contractual capacity could not be satisfied and the remedy of rescission could not be granted.

- However, under equity, the remedy of rescission may have been granted if they found the sale to be an unconscionable bargain. It is unclear whether the Privy Council would have found an unconscionable bargain in *Archer v Cutler*. The emphasis on the need for victimisation by Mr Hart may suggest that Archer did also not do enough to constitute 'victimisation' in the eyes of the Privy Council. His ignorance to the contractual imbalance and his increasing of the price paid would be difficult to class as passive acceptance in unconscionable circumstances, let alone active extortion.

15. **Question:** What is the test for unconscionable bargain following *O'Connor v Hart*?:
- Limb 1. There must be a weakness (*Blomley v Ryan*).
- Limb 2. There must be actual or constructive knowledge of that weakness
- Limb 3. There must be some form of victimisation (taking advantage of the weakness; an unconscientious use of power; overreaching)
    - (1) active extortion of the bargain: i.e. going out there yourself to get the bargain
    - (2) passive acceptance of the bargain (i.e. the party knows of the weakness and knows they are getting a really good deal)
- Limb 4. Contractual imbalance
    - Sometimes a contract will be so imbalanced that it will give rise to a **presumption** of procedural unfairness = an unconscionable bargain.
    - If so, the onus will reverse to the stronger party to show that there was no procedural unfairness.

16. **Question:** What might be a scenario when equity says you are passively accepting a bargain?

- The price of the sale was undervalued/overvalued (contractual imbalance). However, this fact alone will not be sufficient for equity to step in.
- Lack of independent advice. If they do get independent advice, equity will not be interested, because the stronger party's conscience does not need alleviating (as they had independent advice).

17. **Question:** What would be the result in *O'Connor v Hart* (the facts being the same) if the court were to apply the rule as per Prichard J?

- The test for unconscionable bargain as per Prichard J has two limbs:
- Limb one: **Was there a marked inadequacy of consideration**?
  This is satisfied in *O'Connor v Hart* as there was a factual finding of contractual imbalance: the land was found to be undervalued by $17500.
- Limb two: **Were there circumstances which placed the *defendant* at a disadvantage**?
  In *O'Connor v Hart* the weaker party was Jack O'Connor, but the *defendant* was Mr Hart. There were circumstances which placed Jack O'Connor at a disadvantage such as his age, lack of contractual capacity and bad legal advice from Mr Henderson. But because he is not the defendant, this limb cannot be satisfied.
  If the limb is to be interpreted such that the "weaker party" must be at a disadvantage, rather than strictly the "defendant", then the limb would be satisfied as Jack O'Connor was at a disadvantage.
- Conclusion: According to the strict words used by Prichard J there could not be an unconscionable bargain in *O'Connor v Hart* because Mr Hart was the defendant. However if the rule is to mean 'the weaker party', then there *would* be an unconscionable bargain as there was a marked inadequacy of consideration and Jack O'Connor was at a weakness.

18. **Question:** Suppose you were counsel for Mr Nichols, how could you argue that Mrs Cutler did not have a weakness?

- It is said that Mrs Jessup was ignorant about property rights, but this seems infeasible given that she is a landlady who owns a block of 12 flats on the her property in question. Secondly, she is an actively employed, registered nurse. In this job she is undoubtedly in control of administering aid and important medicine to patients. It is unlikely someone who is 'unintelligent and muddleheaded' would be trusted in such a position. Finally, she had advice from both her architect son and an insurance company representative. The mere fact she is in contact with an insurance company representative speaks to the fact that she is not ignorant about property nor "swayed by irrelevant considerations".

19. **Question:** What is wrong with McMullin J's statement: "The judgment was delivered on 21 March 1985, two months before the Privy Council delivered its reasons in *O'Connor v Hart*, an appeal from a judgment of this Court on a case which turned, in part, on whether a transaction involving land amounted to an unconscionable bargain."?

- Here McMullin J is saying that the Court of Appeal did decide that there was an unconscionable bargain. **But** the Court of Appeal in *O'Connor v Hart* decided that there was

no need to make a decision on whether there was an unconscionable bargain.

20. **Question:** What is the test for weakness from *Nichols v Jessup*?

- The test for a weakness: Does this weakness/disability prevent the (so called) weaker party from exercising a rational and independent judgment? As per Somers J (Nichols v Jessup).
- "What had to be determined was whether on 2 March 1982, when agreement was apparently reached about the right-of-way, the defendant as under some significant disability which prevented her from exercising a rational and independent judgment."

21. **Question:** How is contractual imbalance relevant?

- Contractual imbalance can go towards the first limb, as the greater the contractual imbalance is the more likely the courts will find there was a weakness. It can go to the third limb as the contractual imbalance can help establish victimisation.

22. **Question:** What is the test for an unconscionable bargain per Somers J?

- Limb One: Was the defendant under some significant disability which prevented her from exercising a rational and independent judgment?
- Limb Two: Whether the plaintiff was aware of it or, in the circumstances, ought reasonably to have known of it?
- Limb Three: Would it be unconscionable to enforce the bargain?

23. **Question:** Is there anything interesting about Prichard J citing *Snell's* interpretation of the law?

- *Snell's Principles of Equity* explains that equity will not set aside a contract made by a weak party, that is lop-sided against them and where they have no independent advice if it's satisfied that the transaction was fair, just and reasonable. This test is identical to the passage he cited in *Nichols v Jessup (No. 1)* from *Meagher, Gummow and Lehane on Equity, Doctrines and Remedies*. Yet in *Nichols v Jessup (No.1)* he criticised the test saying that he found it "illogical". What makes this worse is that *Snell's Principles of Equity* in fact cites *Meagher, Gummow and Lehane* as authority.

24. **Question:** What problem must Prichard J overcome in order to find that there was an unconscionable bargain?

- In *Nichols v Jessup (No.1)*, Prichard J made a finding of fact that at the time the contract was made Mr Nichols "did not consciously set out to take advantage of the defendant's ignorance." And he "did not appreciate just how great would be the advantage to him in financial terms, or that the proposal presented no real advantage" to Ms Jessup. He said that he found "nothing dishonourable, unscrupulous or improper in the plaintiff's conduct." We know that equity looks to the conduct of the stronger party.

25. **Question:** In *Nichols (No.2)* what does Prichard J rely on in order to find that there was an unconscionable bargain and what are his arguments?

- He could not find that there was any active extortion by Mr Nichols so he had to find that there was passive acceptance in unconscionable circumstances. Prichard J looks to Mr Nichols' attempts to get Ms Jessup to resign the memorandum, despite her reluctance. He found that "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". However Mr Nichols persisted on going directly to Ms Jessup (firstly through his father-in-law and then personally), without inquiring as to whether she had a solicitor to whom the memorandum could be submitted. He finds that Nichols therefore passively accepted the bargain in unconscionable circumstances.
- "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 and who I am sure must have reflected, between October 1981 and July 1982, upon the respective advantages and disadvantages of the arrangement, was content to passively accept the benefit of a transaction which on any objective was so manifestly one-sided."

26. **Question:** What is wrong with Prichard J's reasoning?

- There may have been a benign reason for Mr Nichols not going through a solicitor: namely to avoid paying extra legal fees.
  Furthermore, per Somers J, the relevant time that we look at the conduct of the stronger party is at the time of contracting. At the time of contracting Prichard J made the finding that Nichols was unaware of the gross disparity in exchange value. In contrast, the alleged unconscientious conduct of intentionally avoiding solicitors occurred *after* the time of contracting, so it is therefore irrelevant to the "unconscionable dealing".

27. **Question:** What is the test for assessing an interim injunction?

- 1. Does the plaintiff have a *serious* case (arguable case)?
- 2. Who has the balance of convenience?
    - Looking at the effects on parties if an interim injunction is not granted, who will suffer the most harm?
- 3. What is the overall justice of the case?
- On the facts, the Bowketts had the balance of convenience and the overall justice, so the continuation of an interim injunction hinged on them having an arguable case.

28. **Question:** Say, the price that Mrs Cutler received was well above valuation, i.e. rather than being $7000 undervalued it was $7000 overvalued, would the court still find an unconscionable bargain?

- Strictly speaking, it doesn't matter that the consideration is not inadequate (the fourth limb is not mandatory), but practically speaking the court may not be willing to find an unconscionable bargain.

29. **Question:** Does Tipping J find an unconscionable bargain in *Bowkett*?

- As the case is merely deciding whether the interim injunction is continued, Tipping J makes no finding of an unconscionable bargain. However he suggests that there is an arguable case. "The whole circumstances were such that in my view it is clearly arguable that equity will say to Action Finance: you cannot accept the benefit of this transaction in all the circumstances, certainly without insisting that the intending mortgagors have independent advice." "Whether that will indeed be the view of the Court on full trial after all the evidence is heard remains to be seen but I cannot possibly hold that such proposition is not reasonable arguable."

30. **Question:** What does apportionment mean in the context of unconscionable bargain as Tipping J suggests?

- Where there is an unconscionable bargain, a weaker party that has been victimised. If apportionment arises the courts are essentially saying to the weaker party: "this is **partly your fault**" (even though you're under a weakness that means you cannot serve your own interests). Luckily, no court has followed this gratuitous piece of obiter by Tipping J.

31. **Question:** What evidence could be used to show that the transaction was fair, just and reasonable?

- Contractual imbalance (inadequacy of consideration), if in the favour of the weaker party, could be used to show that the transaction is fair just and reasonable. This is because it is possible that an unconscionable bargain can still be made out without marked inadequacy of consideration (the fourth limb is not compulsory).
- Thus there are circumstances where the court might find an unconscionable bargain even if it were actually fair, just and reasonable.

32. **Question:** Would the courts set aside the contract in *Archer v Cutler* if the third limb was made out, but instead of Mrs Cutler's property being $7k undervalued, it was $7k overvalued in her favour?

- They would likely find it was fair, just and reasonable and grant Archer the equitable remedy of specific performance.

33. **Question:** Say Macfield didn't cancel the contract, what could they have done?

- Macfield could have sued Gustav for breach of contract, seeking the equitable remedy of specific performance. Specific Performance would mean that Mrs Parkinson (Gustav) would have to pay the remaining $12million. However because they cancelled the contract themselves, they cannot sue for specific performance.

34. **Question:** There is this undisputed evidence from Associate Professor Robinson saying Mr Parkinson is ill, what else contributes to his weakness?

- Lack of independent advice; contractual imbalance.

35. **Question:** The Court of Appeal found that there was a weakness, why did the Supreme Court overrule this and find that "Mr Parkinson was suffering from little, if any disadvantage?

- The terms of the contract were all in Mr Parkinson's favour (the buyer's favour). If he wanted to get out of the contract, he could: there was no 'best endeavours' clause. These terms are indicative of someone who, at the time of contracting, could look after their own interests. His behaviour indicated that he was more than capable of providing, commercial, rational judgment.

36. **Question:** Was Mr Parkinson suffering from a potential weakness?

- There was undisputed medical evidence from an expert (Associate Professor of Oncology: Professor Robinson) who said that "Mr Parkinson's ability to look after his own interest was severely diminished". Furthermore there was a marked inadequacy of consideration. According to the valuers, the property was only worth around $8million – yet Mr Parkinson bought it for $12.35m, meaning there was contractual imbalance by around $4million.

- On the other hand: The terms of the bargain Mr Parkinson entered into were all in his favour (he could leave the contract with no 'best endeavours' clause), suggesting his actions at the time of contracting reflect his rational and independent judgment.
- Likewise the contractual imbalance is not as lopsided as the plaintiffs make out. The Supreme Court said that there was a premium on the property and cite the lower court that "developers in the market were of a view that the property warranted a premium price considerably above the valuations reached by Mr Harris".
- And although Mrs Parkinson may have said that her husband's health had deteriorated, she did not express concern to any persons as to his ability to conduct business affairs. She was not involved in any of the business dealings. According to those Mr Parkinson had business dealings with, they had no concerns in relation to his "mental state, acuity, acumen and rationality". He was the same old Mr Parkinson.
- Notably, the person who Mr Parkinson dealt with the most (in a business environment), his secretary Ms East, did *not* give any evidence. This suggests that it would be detrimental to *Gustav*'s case for her to give evidence *Jones v Dunkel*.

37. **Question:** Did Macfield have actual or constructive knowledge of Mr Parkinson's alleged weakness?

    - Actual knowledge: The witnesses' evidence was that they did not know of Mr Parkinson's disability because he seemed to have the same business acumen.
    - Constructive knowledge: Although the medical evidence from Professor Robinson was that she would be surprised if Mr Parkinson was able to maintain apparent normality in longer meetings, Professor Robinson did accept that she would observe more than a layperson and that under pain control "Mr Parkinson may have appeared

his normal self." The Supreme Court found there was no constructive knowledge.

38. **Question:** Why was there no victimisation by Macfield in *Gustav*?

- Mr Parkinson initiated the negotiations, so there could not have been active extortion. There was no passive acceptance because: all terms of the contract were in Mr Parkinson's favour; the contractual imbalance was not as great as it was made out to be; and as far as Macfield were concerned, Gustav were getting adequate legal advice.

39. **Question:** Why didn't the court, in *Gustav*, consider the issue of legal advice?

- Counsel for the plaintiff never suggested that there was a conflict of interest during the cross-examination of Mr Leggat and Mr Jones, so they cannot raise the issue in final closing *Brown v Dunne*.

40. **Question:** In *Bridgewater* who handled the 1988 transaction legally?

- The same lawyer who did the will in 1985. At no stage did the lawyer advise Bill to obtain independent legal advice. However, the lawyer did get a doctor to examine Bill before the contract was made. The doctor said that Bill was of sound mind. In any respect, the trial judge made the finding that independent legal advice would not make a difference anyway.

41. **Question:** In *Bridgewater*, why did the plaintiffs only challenge the deed of forgiveness of debt?

- If they challenged the whole 1988 transaction and it was set aside then the property would go back to Bill York's estate and Neil would get his $150k back. Because the provision in the will was found to be valid, Neil could then go and exercise the option and buy the entire land for $200k. This would put the daughters in a worse position as it would mean that only the $200k would go to the estate. So by severing the deed of forgiveness from the whole, the wife and four daughters get the $150k (initially paid by Neil), the $200k that Neil will inevitably pay to get the remaining property in the will, and they will get the debt (now valid debt – not forgiven) of $550k.

42. **Question:** Why is the case called *Bridgewater*?

- One of the daughters had married and acquired her husband's last name: Bridgewater. The executor of the will was Mr Leahy, he was Bill's son-in-law. So, essentially the situation is four daughters suing one of the daughter's husbands.

43. **Question:** What was Bill York's weakness in *Bridgewater*?

- Bill York had a strong emotional dependence/attachment to Neil. "The relationship between Bill and Neil meant that, when Neil raised the question of using the proceeds of sale of the Injune land, they were meeting on unequal terms. Neil took advantage of this position to obtain a benefit through a grossly improvident transaction on the part of his uncle."

44. **Question:** What factors do the majority stress in their judgment, in *Bridgewater*?

- The majority focus, for the most part, on the relationship between Bill York and his family (mainly his daughters). However the fact that Bill York was a less than perfect husband/father is completely irrelevant to whether the transaction was an unconscionable bargain. Equity should look the conduct of the stronger party.

45. **Question:** In *Bridgewater*, what would the minority argue (in response to the majority) about Bill's behaviour towards his family?

- Bill was not entirely selfish. During Bill's lifetime he provided more than just basic accommodation: he bought "a hairdressing salon in Chinchilla for June, land for Kevin and Shirley in Dulacca and a house for Desley in Cairns".

46. **Question:** In *Bridgewater*, was there inadequacy of consideration?

- The portion of land was approximately $700k and the purchase price was $150k. Therefore there was inadequacy of consideration. However, the majority in the High Court of Australia say this is crucial. In contrast, contractual imbalance is not mandatory in New Zealand's jurisdiction.