Nichols v *Jessup* - *Unconscionability in New Zealand after O'Connor* v *Hart*

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The author examines the essential elements for equitable relief from unconscionable bargains in the law of New Zealand. He concludes that, although there are no clear statements in recent decisions of the Privy Council and the New Zealand Court of Appeal, it is possible to formulate some general propositions. A requirement of "taking advantage" is clearly settled to mean the striking of a bargain knowing or having cause to suspect that the other party is suffering from a disability. The requirement of "inadequacy of consideration" remains, however, unresolved. Holborow suggests the adoption of a "sliding scale" approach, thus allowing inadequacy of consideration to be weighed alongside the victimisation to arrive at an overall conclusion on the "good conscience" or otherwise of the transaction.

I. INTRODUCTION

The branch of equitable fraud giving relief from unconscionable bargains has never been an area of equity yielding easily to definition. The lack of certainty in the area has, indeed, been endorsed by recent high authority. Lord Scarman, in the course of his speech in *National Westminister Bank PLV* v *Morgan*[1], observed that[2]

> Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case.

The comment gives weight to the arguments for maintaining general concepts in equity that can be applied to a wide variety of situations. There is, nevertheless, a difference between having a general definition which can have wide application and having no definition at all. Recognition of the general outlines of the elements that a complainant will need to prove in order to satisfy a court that a bargain is unconscionable will not undermine the general application of the doctrine of unconscionability.

The objective of this paper, in response to the unwillingness of the courts to define unconscionability, is to identify the essential elements of the jurisdiction, with

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1 [1985] AC 686 (HL).
2 Ibid 709.

particular reference to the recent cases of *O'Connor* v *Hart*[3] and *Nichols* v *Jessup*[4]. The possibility of formulating a test of unconscionability from these pivotal cases will then be broached.

There have in the past been attempts to assign to the doctrine of unconscionability a fixed definition. Kay J in *Fry* v *Lane*[5] reviewed the earlier decisions and held that equity would set aside a purchase if it was "made from a poor and ignorant man at considerable undervalue, the vendor having no independent advice"[6]. The onus then shifted to the purchaser to prove that the transaction was fair, just and reasonable. It will be noticed that this definition contains two commonly identified elements of unconscionability. First there must be serious inequality of bargaining power, as shown through poverty, ignorance or other disabilities. This element has been variously described as the weaker party being at a "special disadvantage"[7] or "serious disadvantage"[8] to the other, or the weaker party operating under a "special disability"[9] or not being "equal to protecting himself"[10]. Secondly there is the element of inadequacy of consideration, the "considerable undervalue" mentioned in *Fry* v *Lane*, which would normally be shown by the fact that a considerably higher price could have been obtained. Sheridan[11] identifies the element of inadequacy of consideration as a necessary part of a finding of unconscionability:[12]

> ... the resulting bargain must be unfair; that is, the inequality of the parties must be reflected in the inequality of the exchange.

Goff and Jones reiterate the requirement[13]. Australian commentators[14], however, admit the possibility of finding unconscionability without any inadequacy in the consideration flowing from the stronger party. The authorities cited for this view are the decisions of

3 [1985] 1 NZLR 159 (PC).
4 [1986] 1 NZLR 226 (CA) 3.
5 (1888) 40 Ch D 312.
6 Ibid 322.
7 M Cope *Duress, Undue Influence and Unconscientious Bargains* (Law Book Co Ltd, Sydney, 1985) 134; I J Hardingham "Unconscionable Dealing" in PD Fin (ed) *Essays in Equity* (Law Book Co Ltd, Sydney, 1985) 3; *Commercial Bank of Australia Ltd* v *Amadio* (1983) 151 CLR 447, 462 per Mason J (HC of A).
8 R Goff & G Jones *The Law of Restitution* (3ed, Sweet and Maxwell, London, 1986) 258.
9 *Commercial Bank of Australia Ltd* v *Amadio* (1983) 151 CLR 447, 474 per Deane J.
10 M Cope, above n7, 138; L A Sheridan *Fraud in Equity* (Pitman, London, 1957) 84.
11 L A Sheridan, above n9.
12 Ibid 84 - 85.
13 Above n8, 258.
14 M Cope, above n7, R D Meagher, W M C Gummow, J R F Lehane *Equity Doctrines and Remedies* (2ed, Butterworth, Sydney, 1984) 387; I J Hardingham, above n7, 4.

the High Court of Australia in *Blomley* v *Ryan*[15] and *Commercial Bank of Australia* v *Amadio*[16]. In the latter case Deane J observed:[17]

> In most cases where equity courts have granted relief against unconscionable dealing, there has been inadequacy of consideration moving from the stronger party. It is not, however, necessary that that should be so.

Apart from the issue of whether it is always necessary to prove inadequacy of consideration to support a finding of unconscionability there is another issue raised by Kay J's definition in relation to the modern conception of unconscionability. It does not include the third commonly identified element of unconscionability, that the stronger party takes advantage of the weaker party's position. As Sheridan[18] notes there is some difficulty in ascertaining precisely what forms of behaviour by a stronger party constitute "taking advantage". Goff and Jones formulate the element as one party's weakness being "exploited by the other in some morally culpable manner"[19], whereas Mason J in *Amadio* merely required that the stronger party knew or ought to have known of the weaker party's special disadvantage[20]. Deane J in the same case required that the disability be "sufficiently evident" to the stronger party to make it unconscientious for the stronger party to procure or accept the weaker party's consent to the transaction[21].

In recent New Zealand decisions on unconscionability the tests applied to decide whether the stronger party has taken advantage of the weaker party have been similar to those applied in *Amadio*. In *Archer* v *Cutler*[22] McMullin J held that for a transaction to be set aside there must be a serious disadvantage on one side of which the other party unconscientiously takes advantage[23]. Nevertheless McMullin J set aside the transaction in question even though the stronger party did not set out with the intention of taking advantage of the weaker party[24]. The stronger party's knowledge of the weaker party's advanced years and eccentricity were held to be enough to constitute taking advantage. The situation could be described as one in which the stronger party ought to have known of the weaker party's disadvantaged position.

15 (1956) 99 CLR 362.
16 Above n9.
17 Above n9, 475 per Deane J.
18 Above n11, 85.
19 Above n8, 258.
20 Above n9, 462 per Mason J.
21 Above n9, 474 per Deane J.
22 [1980] 1 NZLR 386.
This case has been misinterpreted as not involving any element of taking advantage by the stronger party (SR Emmar "Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law" (1987) 3 Anglo-American LR 191, 200) Apart from the fact that McMullin J actually mentioned the taking advantage element it can be seen that the knowledge the plaintiff had of manifestations of weakness in the defendant in this case falls within the definition of "taking advantage" element in *O'Connor* v *Hart* - knowledge of or cause to suspect disability.
23 Ibid 403.
24 Ibid 404.

The majority of the Court of Appeal in *Moffat* v *Moffat*[25] directly applied the principles expressed in *Amadio*. The case concerned a separation agreement Mrs Moffat had executed in a state of ill health and anxiety without obtaining independent advice. The agreement provided that the husband would be entitled to the matrimonial home, both parties believing that the house was not an asset of great value due to the burden of debt on the property. It was later discovered there was an equity of $11,000 in the property and Mrs Moffat brought proceedings to set aside the transfer of the property to Mr Moffat. The Court of Appeal found that the agreement was unconscionable. Somer J said that a bargain will be unconscionable:[26]

> ... if the other party to the transaction was under a disability or disadvantage sufficiently serious to make it unfair to allow it to stand in favour of one who knew or ought to have known of that condition.

His Honour held that the mental and physical strain Mrs Moffat was under must have been apparent to Mr Moffat and that he or his solicitor ought to have been aware of the imbalance in the agreement; and that the agreement was therefore unconscionable[27]. Hardie Boys J also found the transaction unconscionable on the ground that Mrs Moffat's disability was sufficiently evident to Mr Moffat to make it unconscientious for him to hold Mrs Moffat to the transaction[28]. Thus a majority based their decisions on "taking advantage" coupled with inadequacy of consideration.

McMullin J held that it was not necessary to establish a conscious attempt by the stronger party to over-reach the weaker party for a bargain to be found unconscionable[29], but did not make any mention of the knowledge of the stronger party in his decision. His Honour cited *Fry* v *Lane* with approval[30], suggesting that taking advantage is not to be considered a necessary element of a finding of unconscionability, in contradistinction to the majority of the Court and the principles enunciated in *Amadio*.

Prichard J at first instance in *Nichols* v *Jessup*[31] held that there was no necessary requirement of unscrupulous dealing and that there merely had to be "a marked inadequacy of consideration coupled with circumstances that placed the defendant at a disadvantage"[32] for the transaction to be held unconscionable. Thus although a majority in the Court of Appeal in *Moffat* v *Moffat* supported the principles enunciated in *Amadio* there was still some confusion over whether "taking advantage" is necessarily required for a finding of unconscionability. Prichard J's requirement of inadequacy of consideration also put him at odds with the Deane J's dicta in *Amadio*.

25 [1984] 1 NZLR 600 (CA).
26 Ibid 606.
27 Ibid 607.
28 Ibid 608.
29 Ibid 605.
30 Ibid 604.
31 Unreported, 1985, Auckland High Court, A 1381/83.
32 Ibid 12.

The decision of the Privy Council in *O'Connor* v *Hart* was reported just after Prichard J delivered his judgment in *Nichols* v *Jessup*. A superficial reading of the decision in *O'Connor* v *Hart* would suggest the approach adopted by the Privy Council is inconsistent with the approach taken in previous New Zealand cases. *O'Connor* v *Hart* can be read as requiring some degree of moral fraud or unscrupulousness on the part of the stronger party to a transaction before it can be held voidable as an unconscionable bargain. If this requirement is to be gleaned from the Privy Council's advice it would represent a fundamental change of direction for the doctrine of unconscionability in New Zealand. Thus the interpretation the Court of Appeal attached to the advice of the Privy Council in *O'Connor* v *Hart* when *Nichols* v *Jessup* was appealed become important in ascertaining the outlines of the doctrine of unconscionability in New Zealand.

The statements made in *O'Connor* v *Hart* must be treated with a degree of care. Unconscionability was not treated as a key issue in the case, the major part of the advice being concerned with over-ruling an abberation in the New Zealand law established, ironically, by *Archer* v *Cutler* concerning the evidential requirements to be fulfilled before a contract can be set aside for the contractual incapacity of one party. This paper aims to ascertain exactly what test the Privy Council applied in *O'Connor* v *Hart* in deciding whether the bargain in that case was unconscionable, before the approach taken by the Court of Appeal in *Nichols* v *Jessup* and at the resulting rehearing of the case, *Nichols* v *Jessup No 2*[33], are evaluated. The decisions will be analysed with a view to resolving the issues of whether "inadequacy of consideration" is a necessary requirement in a finding of unconscionability and what can constitute "taking advantage".

II. O'CONNOR v HART

O'Connor v *Hart* concerned the purchase of land farmed by three elderly brothers, Jack, Dennis and Joe O'Connor. The land was part of a trust estate which became distributable in 1950, the beneficiaries being the testator's nine children. Jack O'Connor was one of these children and was sole trustee of the estate. Distribution of the estate was deferred and by 1976 it was clear that the three brothers were too old to continue farming the land. It was decided at a family meeting in April 1977 that a sale to Joe's sons was a likely possibility, but Jack was against selling the land to them. In July 1977 Mr Hart, a farmer of neighbouring land, expressed an interest in leasing the O'Connor land with an option to purchase. He asked his solicitor to broach this possibility with Mr Henderson, the solicitor acting for the O'Connor estate and a member of the same firm. In August 1977 Mr Hart told Mr Henderson he would prefer to purchase the land outright. A few days later Mr Henderson told Mr Hart that Jack had agreed to sell and assured him that Dennis and Joe were agreeable to the sale. A purchase agreement was drawn up by Mr Henderson, submitted to Mr Hart's solicitor, and signed by Jack. The agreement provided that Mr Hart would purchase the land at a price to be determined by an independent valuer, with Jack, Joe and Dennis having a right to retain possession of their respective houses for life.

33 [1986] 1 NZLR 237.

News of the sale came as a great shock to Joe, but it was not until 1980 that Joe and his sons issued proceedings against Jack as trustee and Mr Hart as purchaser. In 1981 Joe and his sons were appointed as trustees for the estate in place of Jack, and Jack died soon afterwards. The action was then reconstituted as a suit by the trustees against Mr Hart, seeking to set aside the agreement on the grounds of Jack O'Connor's lack of mental capacity to contract or alternatively that the agreement was an unconscionable bargain. In interpreting the case it is essential to distinguish between these two issues.

In the High Court the case was decided on the issue of contractual capacity raised by the O'Connors and the defence of *laches* raised by Mr Hart. Cook J found that Jack O'Connor lacked mental capacity to contract and applied the rule in *Archer* v *Cutler*:[34]

> ... a contract entered into by a person of unsound mind is voidable at his option if it is proved either that the other party knew of his unsoundness of mind or, whether or not he had that knowledge, the contract was unfair to the person of unsound mind.

He found that even though Mr Hart did not know of Jack O'Connor's incapacity, the agreement was unfair and could be set aside. The defence of *laches* was, however, upheld and judgment was given for Mr Hart. In the Court of Appeal the finding of *laches* was reversed, but Cook J's judgment was upheld in all other respects, and the contract was set aside, the result was that the case was remitted to the High Court to determine compensation payable to Mr Hart for improvements made to the land. Mr Hart's appeal against this award was dismissed in the Court of Appeal and a further appeal was made to the Privy Council, the main issues being whether the principle in *Archer* v *Cutler* correctly stated the law on capacity to contract and whether the agreement could be set aside in equity as an unconscionable bargain.[35]

The advice of the Privy Council was delivered by Lord Brightman. In answer to the first issue his Lordship overruled *Archer* v *Cutler* and held that where one party's lack of capacity to contract is unknown to the other, the contract cannot be set aside for unfairness "unless such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane"[36]. As it was conceded that there was no knowledge of Jack O'Connor's lack of capacity on the part of Mr Hart[37], the defence of lack of contractual capacity failed, and the O'Connors had to rely on unconscionability, the particular branch of equitable fraud which they pleaded.

34 Above n22, 401.
35 Above n3, 164-5.
36 Ibid 174.
37 Ibid 164.

Lord Brightman decided that the bargain was not unconscionable, there being:[38]

> no equitable fraud, no taking advantage, no over-reaching or other description of unconscionable doings that might have justified the intervention of equity.

The facts supporting this finding were that Mr Hart had acted in complete innocence, being unaware of Jack's unsoundness of mind, that he "had no means of knowing or cause to suspect" that Jack was not being fully independently advised, and that he did not impose the terms of the contract on Jack O'Connor. Lord Brightman concluded that the O'Connors had "failed to make out any case for denying to Mr Hart the benefit of a bargain which was struck with complete propriety on his side"[39]. This emphasis in the analysis of the facts raises two issues. The first is whether moral unscrupulousness on the part of the stronger party is necessary for a finding of unconscionability. The second closely related issue is whether inadequacy of consideration is also necessary.

A. The Unconscionable Behaviour Requirement

The decision in *O'Connor* v *Hart* was based on the lack of unconscionable behaviour on Mr Hart's part. The case turned on the interpretation of the "taking advantage" requirement. The critical findings of fact, that Mr Hart's lack of knowledge of Jack's unsoundness of mind and Mr Hart's lack of knowledge or cause to suspect that Jack was not receiving full advice, suggest that the Privy Council would have found Mr Hart's behaviour unconscionable if he had knowledge of the relevant disability on the part of the stronger party to show the requisite taking of advantage. As long as the stronger party has "cause to suspect" the other party is at a disadvantage, taking advantage is established.

The principle seems to be the same as that enunciated in *Amadio* and *Moffat* v *Moffat*: that it is necessary to show that the stronger party knew or *ought to have known* of the disability for there to be jurisdiction to set aside the transaction. If it is said of the stronger party that she or he had cause to suspect the other party was in a weak bargaining position, it could also be said that the stronger party ought to have known of the weaker party's position. If facts were present in a situation which could give rise to a suspicion of a disadvantage, awareness of the same facts could put the stronger party in a position where he or she ought to have known of the disability. In each case the test requires actual knowledge of facts that would lead an ordinary person to infer that the other party was at a disadvantage. In *O'Connor* v *Hart* awareness of unsoundness of mind and lack of independent advice were relevant to the finding of unconscionable behaviour. The test is not, therefore, purely objective for it looks to the knowledge the stronger party actually possessed, not what the reasonable person would have known in the circumstances.

38 Ibid 174.
39 Idem.

The validity of this interpretation will depend on how consistent it is with the comments made earlier on in Lord Brightman's advice in relation to contractual capacity. His Lordship said:[40]

> In the opinion of their Lordships it is perfectly plain that historically a Court of equity would not restrain a suit at law on the ground of "unfairness" unless the conscience of the plaintiff was in some way affected. This might be because of actual fraud (which the courts of common law would equally have remedied) or constructive fraud, ie conduct that falls below the standards of equity, traditionally considered under its more common manifestations of undue influence, abuse of confidence, unconscionable bargains and frauds on a power. (Cf *Snells Principles of Equity* (27th ed, 1973) pp 545 et seq.) An unconscionable bargain in this context would be a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction. "Fraud" in its equitable context does not mean, or is not confined to, deceit; "it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties"; *Earl or Ayelsford v Morris* (1873) 8 Ch App 484, 490. It is victimization, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.
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> Their Lordships have not been referred to any authority that a Court of equity would restrain a suit at law where there was no victimization, no taking advantage of another's weakness and the sole allegation was contractual fraud. It seems to their Lordships quite illogical to suppose that the Courts of common law would have held that a person of unsound mind, whose affliction was not apparent, was nevertheless free of his bargain if a contractual imbalance could be demonstrated which would have been of no avail to him in equity.

The passage is part of the reasoning establishing that mere inadequacy of consideration ("contractual imbalance") is not enough to set aside the contract of a person lacking contractual capacity at common law. In summary Lord Brightman reasons that if equity requires proof of victimization before the weaker party's contract can be set aside then it is illogical for the common law not to require such proof. It is the characterization of this victimization that is of interest for present purposes.

The first sentence of the passage states the basic principle that "unfairness" (ie inadequacy of consideration) cannot alone provide ground for equitable relief from an action at law. The additional element of an effect on the plaintiff's conscience is required, which at equity is not limited to actual fraud. It may consist of constructive fraud, into which relief from unconscionable bargains is classified. This head of equity is then defined in line with the *Fry* v *Lane* definition as "a bargain of an improvident character made with a poor and ignorant person acting without independent advice". This conception of unconscionability seems to be inconsistent with the emphasis in the final findings of fact on the state of mind of Mr Hart - his knowledge of certain facts. The inconsistency disappears when the definition is then extended to include what is

40 Ibid 171.

viewed as a fundamental element of fraud in equity - victimization. The victimization may be the "active extortion of a benefit", which in the context of unconscionable bargains would describe the situation where the stronger party sets out with the intention of taking advantage of the weaker party. The victimization may also be the "passive acceptance of benefit in unconscionable circumstances", which must refer to the situation where the stronger party knows of or has cause to suspect the other party's weaker position. Thus the conception of the taking advantage requirement in this passage is consistent with the principles derived from the final passages of Lord Brightman's advice.

The analysis of unconscionability in this passage makes it clear that the taking advantage element is not restricted to culpable behaviour or moral unscrupulousness on the part of the stronger party. It is not necessary to show immoral behaviour, or active extortion; what is required is a bargain which in the circumstances could weigh on the conscience of the stronger party. It will weigh on conscience if the stronger party is aware of facts that suggest the weaker party is disadvantaged.

Before proceeding it is necessary to point out the technical meaning of the reference to the conscience of the stronger party. Making unfair contracts with weaker parties may not weigh on the conscience of the unscrupulous purchaser at all. It would be absurd for the classification of a contract as unconscionable to depend on the subjective moral standards of the stronger party. What Lord Brightman is referring to when he speaks of the conscience of the stronger party is the conscience of the court putting itself in the stronger party's position in an attempt to ascertain whether the plaintiff's actions are in accord with "good conscience".

On this analysis it would be against good conscience for the stronger party to accept a benefit from a weaker party, at detriment to the weaker party, if the stronger party is aware that the weaker party is suffering from a disability and is not up to protecting himself of herself. By knowingly attempting to enforce an improvident bargain with someone who is not up to protecting himself or herself the stronger party would be, in reality, taking advantage of the weaker party. This is part of what Lord Brightman was referring to when he spoke of "passive acceptance of a benefit in unconscionable circumstances".

It is also against conscience for the stronger party, aware of outward manifestations of disability at the time of contracting, to insist on enforcing a contract disadvantageous to a weaker party. It is important to bear in mind that it is in reality the conscience of the court that must be affected. A court of equity would hold that being aware of facts manifesting the possibility that the other party is not up to protecting himself or herself, the stronger party must make a thorough check on the ability of the weaker party to look after his or her interests otherwise the doubt that the contract was not obtained fairly would weigh on the conscience of the stronger party - in reality the court in the position of the stronger party. This is the rationale for holding that a mere cause to suspect the other party's disability will be enough to satisfy the "taking advantage" requirement and not requiring proof of the presence of actual suspicion of the disadvantage.

This extension of the taking advantage requirement assumes the presence of inadequacy of consideration. If the bargain struck is a fair one, with full value flowing from each side, knowledge or suspicion of disadvantage will not affect the conscience of the court. In such a situation, although the weaker party is not equal to protecting himself or herself, the stronger party has not taken advantage of the weakness and struck an unfair bargain, but has actually given the weaker party full value. Such a bargain could never be unconscionable. This suggests that Lord Brightman must have assumed the presence of inadequacy of consideration when deciding the issue of taking advantage. Indeed, the definition of unconscionability appearing in the advice includes the element of a "bargain of an improvident character", which affirms the importance of inadequacy of consideration in deciding whether a bargain is unconscionable. It is interesting to note, however, that inadequacy of consideration was not expressly mentioned in the findings of fact supporting the decision on unconscionability. As will be seen, this prompted the Court of Appeal to re-assert the status of inadequacy of consideration as an element of unconscionability in *Nichols* v *Jessup*.

B. The Inadequacy of Consideration Requirement

Lord Brightman's view of the place of the inadequacy of consideration element in the doctrine of unconscionability can be traced through a discussion appearing in the initial part of the advice[41]. It is stated that the stigma of unfairness embraces two distinct concepts. The first is procedural unfairness, which refers to the unfair manner by which a contract is brought into existence. The second is contractual imbalance, which refers to the terms of a contract being more favourable to one party than another. In the context of unconscionability the requirements of inequality of bargaining power and taking advantage relate to procedural unfairness. Contractual imbalance is the same as the inadequacy of consideration element. After drawing the distinction between the two concepts Lord Brightman made the following comment:[42]

> The two concepts may overlap. Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness, such as undue influence or some other form of victimization. Equity will relieve a party from a contract which he has been induced to make as a result of victimization. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing.

This passage can be interpreted as laying down a general rule in the area of equitable fraud that contractual imbalance will not, alone, provide grounds for setting aside the contract unless it is so extreme as to raise a presumption of procedural unfairness. Thus in a case where there was a strong indication that the terms of the contract were fair and reasonable it would necessary to show that the stronger party's actions amounted

41 Ibid 166.
42 Idem.

to victimisation, without any proof of contractual imbalance, before the jurisdiction to set the contract aside could be exercised.

The issue remains as to what type of victimisation will be enough in itself to impugn a contract in equity without proof of contractual imbalance. It would appear that the definition of the "victimisation that constitutes fraud in equity referred to later in the advice; the "active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances"[43]. In relation to unconscionability, however, it has been shown that for mere knowledge or suspicion of disability to be against good conscience there must be some contractual imbalance[44]. In the same way mere knowledge or suspicion of disability could not be described as victimisation without contractual imbalance. Making a contract which is fair on its terms with a person known to be suffering from a disability is not victimisation. This points towards the conclusion that the victimisation required before a contract may be set aside as unconscionable without any contractual imbalance will be actual victimisation - the active or conscious extortion of a benefit from a weaker party. This must be the victimisation to which Lord Brightman is referring.

This approach can be compared to Spanogle's[45] influential analysis of the doctrine of unconscionability. Spanogle identified the distinction between contract formation abuses (procedural abuse) and substantive abuses (contractual imbalance). Spanogle, reviewing the approach taken before the introduction of the unconscionability provisions in the Uniform Commercial Code, observed that:[46]

> A sliding scale was used: the harsher the terms, the less concerned the court seemed about the methods used to create those terms.

The sliding scale approach also meant that as the formation or procedural abuses became more serious, the level of substantive abuse or contractual imbalance to be proved to make a finding of unconscionability possible would be lower[47]. Thus "different substantive standards are applicable in situations involving different procedural abuses in the contract"[48], the more serious the procedural abuse, the less serious the substantive abuse would need to be for the court to exercise the jurisdiction. Spanogle was of the opinion that procedural abuse was not sufficient in itself to make a bargain unconscionable[49], but this opinion was grounded in the particular working of the UCC.

43 Ibid 171.
44 See Part II B above.
45 JA Spanogle "Analysing Unconscionability Problems" (1969) 117 UPaLR 931.
46 Ibid 950.
47 Ibid 968.
48 Ibid 947.
49 Ibid 943.

Lord Brightman is in essence adopting an approach similar to Spanogle's sliding scale by stating that:

(1) extreme contractual imbalance is enough in itself to set aside a contract for unconscionability, if it raises a presumption of procedural unfairness, and implying that:

(2) procedural abuse may be so severe as to warrant a finding of unconscionability without proof of contractual imbalance.

On each end of the scale procedural or substantive abuse will be enough in itself to support a finding of unconscionability, but inside the extremes both abuses would appear to be necessary. It is important to bear in mind, however, that contractual imbalance in itself will not be grounds for finding a bargain unconscionable unless the imbalance is great enough to raise a presumption of procedural unfairness. Such a presumption would be made on the basis that contractual imbalance was so extreme that it could only have resulted from procedural unfairness. Thus there must always be some procedural unfairness present, as is suggested by the paramount importance assigned to the "taking advantage" element in the Privy Council's advice.

Thus when Lord Brightman's statements are carefully analysed it becomes apparent that the element of inadequacy of consideration has not been excluded from the doctrine of unconscionability; its relevance will depend on the severity of the procedural abuse alleged.

In summary, *O'Connor* v *Hart* affirmed the necessity of taking advantage by a stronger party to support a finding of unconscionability, and although inadequacy of consideration was not given much attention in Lord Brightman's advice its position was implicity affirmed by the statements of principle his Lordship made.

III. NICHOLS v JESSUP

Nichols v *Jessup* was an action for specific performance of an agreement to grant mutual rights of way over land in Auckland. Mr Nichols was the owner of a block of land behind Mrs Jessup's. The only access to the road from Mr Nichols' land was across a strip of land 3.66 metres wide running beside Mrs Jessup's property. Mr Nichols became interested in obtaining a right of way over Mrs Jessup's land and negotiations went on for a period of months in a series of what the trial judge called "friendly discussions". Mr Nichols drew up a scale plan showing the proposed right of way. He showed this to Mrs Jessup and they both signed it in the presence of her son, an architecture student, to show their mutual approval of the arrangement. Mr Nichols then went abroad leaving his father-in-law to finalise the transaction. He returned to find that his father-in-law had been unsuccessful in his attempt to obtain Mrs Jessup's signature to the formal documents. Mr Nichols persisted in his approaches to Mrs Jessup, and eventually the memorandum of transfer was signed at the local post office and witnessed by the postmaster.

The agreement provided that Mrs Jessup would provide a right of way over the part of her land adjoining Mr Nichols' access strip with Mr Nichols granting an easement over his access strip to Mrs Jessup. The effect of the agreement would have been that Mr Nichols would have a right of way right up to Mrs Jessup's windows and would be able to develop his land, while Mrs Jessup would have lost the right to park in her driveway. A registered valuer gave evidence that the arrangement would increase the value of Mr Nichols' land by $45,000 and reduce the value of Mrs Jessup's by $3,000.

The judge at first instance, Prichard J, found that the consideration received by Mrs Jessup was grossly inadequate but was "satisfied that the plaintiff [Mr Nichols] did not set out to take advantage of the defendant's ignorance"[50] and that he was unaware of the great advantage of the agreement conferred on him and the detriment the agreement would cause to Mrs Jessup. Of Mrs Jessup he said:[51]

> My impression is that she is ignorant about property rights, that she is unintelligent and muddleheaded and that her judgment in matters of business is likely to be swayed by wholly irrelevant considerations.

On the basis of *Archer* v *Cutler* and *Fry* v *Lane* he held that the granting of relief on the basis of unconscionability was not conditional on a finding of moral fraud or unscrupulousness[52]. Reviewing recent authorities and relying on *Fry* v *Lane* he held that for a bargain to be proved unconscionable the defendant merely had to show "a marked inadequacy of consideration coupled with circumstances that placed the defendant at a disadvantage"[53] completely leaving aside the requirement of taking advantage.

It is worth noting at this point that *Archer* v *Cutler* cannot be relied on as authority for the proposition that no taking advantage is required for a finding of unconscionability. As has been seen McMullin J actually stated the requirement[54].

Prichard J found the requisite gross disparity of consideration. The defendant's ignorance, muddleheadedness and lack of independent *professional* legal advice were found to place her at the requisite disadvantage. Following *Fry* v *Lane* he went on to consider whether Mr Nichols had discharged the burden of showing the transaction to be fair, just and reasonable. He held that the burden had not been discharged. Thus, although the judge found "nothing dishonourable" in the plaintiff's conduct, the agreement was set aside as unconscionable. Nichols appealed.

50 Above n31, 13.
51 Ibid 15.
52 Ibid 10.
53 Ibid 12.
54 Above n22, 403.

Before the case was heard in the Court of Appeal *O'Connor* v *Hart* was decided, re-affirming the additional requirement of "taking advantage" - that the plaintiff knew of or had cause to suspect the defendant's disability. It will be noted that it is impossible to satisfy this element from the findings of fact made by Pritchard J's. Although he found no unscrupulous behaviour on Mr Nichols' part he made no findings on Mr Nichols' knowledge of Mrs Jessup's disability - her muddleheadedness and lack of independent advice.

This may explain why the Court of Appeal unanimously decided to order the case to be reheard by Prichard J, because no findings of fact were made which could be used to resolve the issue of whether Mr Nichols took advantage of Mrs Jessup.

Cooke P began by drawing attention to the lack of clarity in the area of unconscionability and then made two important observations about *O'Connor* v *Hart*. First he noted the main finding of the Privy Council in relation to Mr Hart's behaviour - that there was no element of culpability in his conduct. He interpreted this finding as an indication that:[55]

> it was not case where as a purchaser he either knew or ought to have known what he was taking advantage of any deficiency in the vendor's understanding of the transaction or mental capacity.

The comment identified the level of culpability which the Privy Council required to be proved before the transaction in *O'Connor* v *Hart* could be held unconscionable. It could therefore be viewed as a statement of the test to be applied in deciding whether the stronger party acted with the requisite "culpability". The test emphasises knowledge of facts pointing towards the weaker party's disadvantage, and in line with the Privy Council's extension of the test to situations where the stronger party had cause to suspect the other party was at a disadvantage, and in line with the Privy Council's extension of the test to situations where the stronger party had cause to suspect the other party was at a disadvantage, recognises situations where the stronger party ought to have known of the disadvantage. This statement of the "taking advantage" requirement does not clearly identify that the second element (where a party ought to have known of disadvantage) goes beyond a purely objective test that would involve imputing to the mind of the stronger party all the facts the reasonable person would have observed. Cooke P did, however, note that the requirement related to proof of culpability. This indicates that the test is aimed at establishing whether the agreement is against good conscience measured from the stronger party's state of knowledge and not merely a test of the conscience of a reasonable person fully aware of all the apparent manifestations of disability.

Cooke P used the lack of "culpability" in *O'Connor* v *Hart* to distinguish *Moffat* v *Moffat*, which Cooke P held to be consistent with *O'Connor* v *Hart*. It will be recalled that Somers J and Hardie Boys J both found that Mr Moffat knew of Mrs

55 Above n4, 228.

Moffat's disability in *Moffat* v *Moffat*, so that the finding of unconscionability in the case is consistent with *O'Connor* v *Hart*.

After recognising the definition of taking advantage established by *O'Connor* v *Hart*, Cooke P went on to discuss the inadequacy of consideration requirement. His Honour recognised that, as has already been seen, *O'Connor* v *Hart* is perfectly consistent with inadequacy of consideration being a part of a finding of unconscionability. He stated that:[56]

> [t]here 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.

An interesting aspect of Cooke P's statement regarding a gross inadequacy of consideration is his suggestion that such inadequacy "ought to have been evident to a purchaser" before it can be taken into account as a factor in determining unconscionability. The knowledge the stronger party has of inadequacy of consideration at the time of contracting will be important in deciding if she or he behaved unconscionably. In many cases concerning unconscionability the imbalance in the bargain will be manifest or inherent in the transaction undertaken and the stronger party will be well aware of it. The provision of a bank guarantee by a weaker party would be such a case - the bank will achieve greater security on their loans to a third party, but the weaker party will perhaps get nothing out of the transaction. When such awareness of imbalance is combined with knowledge of a disability the bargain may be against good conscience because the stronger party has accepted the benefit knowing that it was the result of the weaker party's disability. The stronger party has taken advantage of the weaker party, by accepting the benefit in unconscionable circumstances, and the bargain may be set aside as unconscionable.

In other cases, where the balance lies will be unclear before a detailed investigation is made - such as an independent valuation of land. Consider a situation, in essence similar to *Nichols* v *Jessup*, where a stronger party is purchasing land from another party known or suspected be suffering from a disability. The stronger party suggests a price, not knowing the true value of the land. This price is accepted by the weaker party, but a later independent valuation shows that the price paid by the stronger party represented a gross undervalue. Assume that it cannot be proved the stronger party set out to take advantage of the weaker party. In such a situation the stronger party does not know whether he or she is taking advantage of the disability because the stronger party is unaware of the imbalance at the time of contracting. Prima facie the contract is not against good conscience, because the stronger party is innocent of the unfairness of the price.

If, however, the lack of knowledge in the stronger party of the inadequacy of consideration is due to some default on the part of the stronger party - failure to

56 Ibid 229.

contract through a solicitor where it would be normal to do so, or closing his or her eyes to an obvious undervalue - the balance of conscience is less clear. If the stronger party had taken more care, he or she would have become aware of the imbalance at the time of contracting, and the transaction may then be set aside, knowledge of disability and knowledge of imbalance combining. In this situation Cooke P would allow the inadequacy of consideration to be taken into account if it ought to have been apparent to the stronger party - if a reasonable person in the position of the stronger party would have adverted to the inadequacy of consideration. It seems just solution, that sets a standard of care for persons dealing with other parties known to be weak. *Nichols* v *Jessup* involves an application of the test of knowledge of inadequacy of consideration, as Cooke P's later comments demonstrate. In relation to the test it can be seen once again that the principle applied focuses on the behaviour of the stronger party and not on the objective fairness of the bargain.

After making the above two observations Cooke P drew attention to Prichard J's reliance on *Fry* v *Lane* and *Archer* v *Cutler* as cases upholding the principle that no moral unscrupulousness was required for a finding of unconscionability. He held that Prichard J's reliance on *Fry* v *Lane* justified sending the case back to the High Court[57]. As has previously been noted the definition of unconscionability expounded in *Fry* v *Lane* did not include any reference to the "taking advantage" requirement expressly affirmed by *O'Connor* v *Hart* Prichard J's reliance on *Fry* v *Lane* meant that the "taking advantage" requirement was not considered and consequently no findings of fact were made on Mr Nichols' state of knowledge of Mrs Jessup's disability. The case thus had to be reheard so that the missing facts could be ascertained. Cooke P did not specifically draw attention to the failure to consider the "taking advantage" requirement but rested his decision to send the case back on Prichard J's reliance on authorities that had apparently been over-ruled. Thus the decision to send the case back does not explicitly support the position of the taking advantage requirement as a necessary element of unconscionability, although the implicit support for the principles derived from Lord Brightman's advice has been noted.

Finally, after consideration of the facts, Cooke P suggested the possible findings that could lead to a conclusion of unconscionability upon the rehearing of the case:[58]

> There may be room for the view that the defendant was swayed by muddleheadedness or gratitude or both to agree to an arrangement of no benefit to her, on terms very much against her interest; and that the plaintiff, although not setting out intentionally to exploit her, must have realised at some stage that there was real imbalance in the arrangement. Or that at the very least, especially in the light of his work as a real estate agent, he could have realised there was such an imbalance .... Moreover it would be open to the judge to conclude that the plaintiff must have been well aware of the defendant's characteristics and must have known or suspected that she was no judge of her own interests.

57 Ibid 230.
58 Ibid 231.

This exemplifies the conception of unconscionability to be derived from Cooke P's judgment. First, there is the element of proof of disadvantage for which Cooke P suggests Mrs Jessup's muddleheadedness and the fact the agreement was "very much against her interest". Secondly, knowledge or cause to suspect the disadvantage may be shown, for which Cooke P suggests knowledge of the imbalance in the arrangement and awareness of the defendant's characteristics. Thirdly, there is inadequacy of consideration and knowledge of that inadequacy - that Mr Nichols knew or ought to have known of the imbalance in the agreement. Mr Nichols' experience as a real estate agent would be a relevant factor in deciding whether he ought to have known of the imbalance in the agreement. It is unclear from the judgment whether these elements are considered to be necessary to justify a finding of unconscionability in every case or are all merely factors that may be taken into account in reaching a decision.

The approach adopted by Somers J was largely consistent with that of Cooke P. Somers J began his consideration of unconscionability by quoting the statement of principle he had made in *Moffat* v *Moffat*; that a bargain will be unconscionable[59]

> ...if the other party to the transaction was under a disability or disadvantage sufficiently serious to make it unfair to allow it to stand in favour of one who knew or ought to have known of that condition.

Somers J then went on to make some interesting comments about the taking advantage requirement[60]

> [A]t least in its antipodean statement, a party may be regarded as unconscientious not only when he knew at the time the bargain was entered into that the other party suffered from a material disability or disadvantage and of its effect on that circumstance; when a reasonable man would have adverted to the possibility of its existence.

It is necessary to make a distinction between the test Somers J is propounding in this passage and a purely objective test. Although Somers J appears to be treating the taking advantage requirement like a negligence test - what the reasonable person would know in the circumstances - it is important to note that the focus is on whether a reasonable person would have adverted to the *disadvantage*, not on whether the reasonable person would have observed all the facts in a situation which would point to a disadvantage. The test is the reasonable person in the circumstances of the stronger party, with knowledge only of the facts of which the stronger party was aware. Thus the test is subjective as regards the knowledge of facts that may lead to an inference that there was a *possibility* that the other party was at a disadvantage - consistent with the Privy Council's focus on whether there was actual *cause to suspect* disadvantage. Once this reasonable possibility of disadvantage is established the taking advantage requirement is satisfied by Somers J's test, just as under Lord Brightman's test a mere cause to suspect will be enough. In both cases the court is putting itself in the position of the stronger party to ascertain whether, on the facts known, the bargain was against

59 Above n26.
60 Above n4, 235.

good conscience. Also the cause to suspect or reasonable possibility of disadvantage will allow equity to impose on the stronger party a duty to enquire into the position of the other party, so that it can be said that the stronger party ought, in accordance with good conscience, to have made that enquiry. Thus Somers J's conception of the taking advantage requirement is consistent with the approach of the Privy Council and Cooke P.

Somers J then gave his reason for referring the case back to the High Court. He pointed out a fault in Prichard J's consideration of Mrs Jessup's mental state - that he considered her mental state at the time of the hearing and not at the time the memorandum of transfer was signed.

McMullin J's approach at first sight appears to differ from that of Cooke P and Somers J. His Honour cited the passage from Lord Brightman's judgment which gave a specific definition of unconscionability[61], set out at length above, and stated that[62]

> the passage just cited would suggest that a bargain may be unconscionable if made by a poor or ignorant person without advice because of its inherent unfairness *without any element of over-reaching* by one party.

This passage at first sight appears to be endorsing the view that it is not necessary to prove that there was any "taking advantage" by the stronger party before a bargain can be held unconscionable - that mere inadequacy of consideration and disability will be enough to satisfy a court that a bargain was unconscionable. It is important to note, however, that the concept of "over-reaching" means the circumvention or outwitting of another by cunning or artifice[63], and therefore only refers to the active extortion of a benefit by a stronger party. What McMullin J is suggesting in this passage is that it will not always be necessary to prove active victimisation before a bargain may be unconscionable. The comments made should not be read as denying the necessity of proving that the stronger party did in fact take advantage of the weaker party. As McMullin J recognises at the end of this judgment[64] *O'Connor* v *Hart* turned on the issue of taking advantage alone. The fact that the decision rested entirely on the state of knowledge of Mr Hart - the requirement of taking advantage - suggests that the absence of the taking advantage requirement was a conclusive ground for rejecting unconscionability. Thus the Privy Council were implicitly requiring that "taking advantage" be proved in every case, before the jurisdiction to set aside a bargain as unconscionable could be exercised.

61 Above n3, 171.
62 Above n4, 233.
63 Concise Oxford Dictionary (7ed, 1982) 730.
64 Above n4, 233

The emphasis on denying the necessity of proving actual extortion dominates McMullin J's judgment. After reviewing *Moffat* v *Moffat* and *Amadio* his Honour stated:[65]

> These cases... do not require proof of any active extortion of a benefit, an abuse of confidence... Accepting the benefit of an improvident bargain by an ignorant person acting without independent advice which cannot be shown to be fair, may be unconscionable. Such a transaction may affect the conscience of the party who benefits from it.

If is difficult to see how such a transaction could affect the conscience of a stronger party unless he was aware of facts that could affect the good conscience of the arrangement, facts that tended to show that the other party was not up to protecting herself. If the stronger party was totally unaware of the other party's disadvantage he could only consider that he had met with the other party on equal terms and that the other party had freely consented to the bargain. It could not be held that the stronger party's actions in not ensuring independent advice was received by the other party were against good conscience, for there was nothing the person knew which would suggest it might be necessary. It appears, once again that the purpose of the passage is merely to deny the necessity of proving active extortion and is not purporting to support a doctrine of unconscionability without the requirement of "taking advantage".

At the end of his judgment McMullin J refers to his own judgment in *Archer* v *Cutler* and draws attention to the Privy Council's acceptance that *Archer* v *Cutler* was correctly decided on its facts. He notes that these facts did not include a finding of over-reaching. In *Archer* v *Cutler* McMullin J described unconscionability thus:[66]

> If then one party is at a serious disadvantage *vis-a-vis* the other and the other unconscientiously takes advantage of this, there is a presumption of fraud.

In addition, his finding in *Archer* v *Cutler* that the plaintiff was aware of the defendant's advanced age and some manifestations of her eccentricity would appear to be consistent with a finding that the plaintiff had cause to suspect the defendant was at a disadvantage - satisfying the Privy Council's test of taking advantage. Thus it cannot be said, as Chen-Wishart[67] has contended, that McMullin J is opposed to the necessary requirement of "taking advantage".

McMullin J's reason for referring the case back to the High Court was the probability that the factors of taking advantage and over-reaching were not fully considered at the trial.

Overall, what is presented in *Nichols* v *Jessup* is a smorgasbord of imprecise statements of the elements for a finding of unconscionability that may be derived from *O'Connor* v *Hart*. Taking Cooke P's and Somers J's judgments together it is possible

65 Ibid 234.
66 Above n22, 403.
67 M Chen-Wishart "Unconscionable Bargains" [1987] N Z.L.J. 107, 108.

to state with some confidence that the definition of the "taking advantage" element is knowledge or cause to suspect the disability of the other party. McMullin J's judgment, when properly interpreted in the context of the case, cannot be read as opposing the element of taking advantage. It is also clear that inadequacy of consideration may be a relevant factor in a finding of unconscionability. In relation to "taking advantage" it is unclear whether it is considered a necessary part of a finding of unconscionability, as the Privy Council's advice suggests. Thus, although the elements of "taking advantage" and inadequacy of consideration are recognised, the judgments contain no clear statement indicating whether the elements are to be considered necessary requirements for a finding of unconscionability.

A. Nichols v *Jessup No. 2*

The lack of a clearly and concisely stated formulation of the specific requirements for unconscionability in the decision of the Court of Appeal is reflected in the judgment delivered by Prichard J on the rehearing of *Nichols* v *Jessup*. Prichard J did not resile from his original finding of a total absence of moral fraud on the part of Mr Nichols but, in the manner suggested in Cooke P's judgment, did find the agreement unconscionable.[68] The additional findings of fact on which this conclusion was based were that Mr Nichols was "well aware of the defendant's weakness" and that he "must have reflected... upon the respective advantages and disadvantages of the arrangement"[69]. Thus awareness of disability and awareness of inadequacy of consideration combined to show that Mr Nichols had cause to suspect Mrs Jessup's weaker bargaining position. The final decision falls in line with the Privy Council requirement of taking advantage, but inadequacy of consideration was not affirmed as a necessary element in a finding of unconscionability.

B. An Unconscionability Test?

Despite the lack of any clear statements giving even the barest outline of the general elements making up the doctrine of unconscionability, it is possible by considering *O'Connor* v *Hart* and *Nichols* v *Jessup* together, to formulate a general test of unconscionability. It should be clear that such a test in no way purports to restrict application of the jurisdiction, it merely attempts to find the medium between having no definition at all - an approach that seems to have found favour in our Court of Appeal - and having a definition so strict as to limit the scope and development of the jurisdiction. By adopting such a general outline of unconscionability it is hoped that some sense of direction can be given to what may seem to be a branch of equity having arbitrary application.

The most basic requirement for the jurisdiction to be exercised, found in every decision, is a position of weakness or disability in one party to the transaction. The decision in *O'Connor* v *Hart* has propounded the other necessary requirement for unconscionability - victimisation, the taking advantage requirement. This focuses upon

68 Above n33, 239.
69 Ibid 340.

the state of mind of the stronger party. "Taking advantage" must at the very least consist of knowledge or cause to suspect a disadvantage in the other party. "Cause to suspect" a disadvantage is to be judged upon the knowledge the stronger party had of facts pointing towards the other party's disadvantage. If these facts would lead to a suspicion of disadvantage in the mind of a reasonable person, then the taking advantage requirement is satisfied. Inadequacy of consideration or contractual imbalance may be a relevant consideration, but there is nothing in the decisions which suggests it will be necessary in every case.

It has been shown, however, that where there is merely knowledge of or cause to suspect disadvantage it is necessary for there to be inadequacy of consideration for the transaction in question to be unconscionable - to be against good conscience. This can be shown by considering a variation on the facts of *Nichols* v *Jessup*.

Take a situation where the facts are essentially the same as those found in *Nichols* v *Jessup* on the rehearing, Mr Nichols having full knowledge of Mrs Jessup's disability, but with the added fact that Mr Nichols paid full value for the right-of-way - $3000 for the depreciation to Mrs Jessup's property and say $20,000 extra for the permanent loss of her rights. It could not be said that Mr Nichols had acted against good conscience. Being aware of Mrs Jessup's disability he acted with the utmost propriety and ensured that he paid her in full for the rights she had given up. Both the elements of disability and knowledge of that disability ("taking advantage" under the Privy Council's definition) are present, yet it would be absurd to hold the transaction unconscionable. This shows how inadequacy of consideration may be a vital element in a finding of unconscionability. Unless knowledge of disability combines with some inadequacy of consideration there can be no finding of unconscionability.

Compare an example with the same facts as the previous example, but with the unrebutted testimony of a close friend of Mr Nichols that Mr Nichols had on several occasions stated that Mrs Jessup was falling for his ploy, and that he would have her sign in front of the postmaster to ensure that nobody found out how much he would make on the deal. If the court accepted the evidence that Mr Nichols had deliberately tried to take advantage of Mrs Jessup, it would not require any proof of inadequacy of consideration to hold that the bargain was unconscionable. In such a situation it could be said that Mr Nichols' actions in themselves made the bargain unconscionable, because it is against good conscience to deliberately attempt to take advantage of someone known to be at a disadvantage.

Thus it is contended that proof of inadequacy of consideration will be necessary to make a transaction unconscionable in some circumstances, where there is no proof of actual victimisation, but not in other circumstances where there is a conscious attempt to over-reach the other party.

The level of inadequacy of consideration required to prove a bargain unconscionable may vary with the type of "taking advantage" that is proved. Consider another variation on the facts of *Nichols* v *Jessup*; a situation where it was proved that Mr Nichols merely had cause to suspect Mrs Jessup's disability, having heard that she had suffered from mental instability in the past, and this was the only evidence of disability of which

Mr Nichols was aware. Assume also that Mr Nichols had paid Mrs Jessup $10,00 for the right-of-way. It can be seen that the finding of unconscionability would be made much more attractive in that case if Mr Nichols had actually known that Mrs Jessup was mentally unstable. In such a case the $38,000 imbalance (it will be recalled the transaction involved a $3,000 loss to Mrs Jessup and a $45,000 gain to Mr Nichols) would probably he great enough to justify the transaction being set aside, because Mr Nichols would have greater reason to suspect Mrs Jessup had not properly considered her interests. In the first case Mr Nichols had less reason to suspect Mrs Nichols was not up to protecting herself, and the court may require a greater imbalance before the bargain can be held unconscionable.

Thus the element of inadequacy of consideration can be incorporated in the doctrine of unconscionability impliedly formulated in *O'Connor* v *Hart* and *Nichols* v *Jessup*, in line with Spanogle's[70] sliding scale approach. The necessity of a finding of inadequacy of consideration, and the level of inadequacy of consideration, will depend on the type of victimisation or "taking advantage" that is proved.

This analysis raises the issue of whether inadequacy of consideration can be subsumed under a more general test of unconscionability that tests merely whether the stronger party has actually behaved in a manner inconsistent with good conscience. In the case of active victimisation or conscious over-reaching the test is automatically satisfied, the stronger party having behaved in a morally culpable manner. Inadequacy of consideration is necessary to satisfy the test only where there is no actual victimisation, and the stronger party's state of mind at the time of contracting is not enough in itself to make the bargain unconscionable. Whenever the "taking advantage" is merely knowledge of disability, it is necessary to combine this knowledge with inadequacy of consideration before it will be against good conscience. This is because, as is explained above, the stronger party's awareness of other party's weakness will not affect the conscience of the court unless the stronger party has obtained a benefit from the other party's weakness. Inadequacy of consideration operates only when it is necessary to make the behaviour of the stronger party in the circumstances amount to victimization. It is therefore an integral part of a wider question, which is the basis of the whole jurisdiction: was the transaction against good conscience? The end result of this line of reasoning is that inadequacy of consideration loses its identity as a separate factor to be taken into account in assessing whether a bargain is unconscionable, and becomes an integral element of the "good conscience" test. If the courts recognise that this is the test actually being applied it will no longer be necessary to admit that unconscionability is a doctrine with no definition, and the confusion surrounding and to some extent impairing the doctrine could be eradicated.

IV. CONCLUSIONS

The fact that Prichard J in *Nichols* v *Jessup No 2* did not apply any clearly defined principles of unconscionability in deciding the final outcome of the case, and merely made the findings of fact that Cooke P's judgment suggested could amount to a finding

70 Above n45.

of unconscionability, demonstrates the continuing lack of clarity in this most opaque of equitable jurisdictions. Although there are general principles underlying the decision, it takes considerable depth of analysis to extract them. If anything has been made clear from the decisions of *O'Connor* v *Hart* and *Nichols* v *Jessup* , it is that equitable fraud will remain as difficult to define as it was when Sheridan[71] made a useful attempt over 30 years ago.

Despite the problems of interpretation, the issue of the definition of taking advantage appears to be resolved. There is general agreement between *Amadio*, *O'Connor* v *Hart* and *Nichols* v *Jessup* that taking advantage in the context of unconscionability means striking a bargain knowing or having cause to suspect that the other party is suffering from a disability.

Nevertheless the issue as to the requirement of inadequacy of consideration remains unresolved. It has been shown that an acceptable resolution of the issue may be achieved through the adoption of a "sliding scale" approach, which will allow inadequacy of consideration to be weighed alongside the victimisation to arrive at an overall conclusion on the "good conscience" or otherwise of the transaction.

V. ADDENDUM

Since this article was written there have been two cases heard in the High Court in which *O'Connor* v *Hart* and *Nichols* v *Jessup* have been considered and applied. These cases tend to confirm the view that the time has come for a clarification of the doctrine of unconscionability by formulation of a general test incorporating the elements identified in this paper.

The first case, *Elia* v *Commercial & Mortgage Nominees Ltd and Others*[72], concerned a complex set of transactions relating to the purchase of a rest-home by the plaintiff and his de facto wife. The purchase involved mortgages over the plaintiff's home and debentures over the rest-home to secure advances given by a group of companies, the defendants. The plaintiff claimed inter alia that the transactions involved should be set aside as unconscionable bargains. Gault J's judgment in the case is long and complicated; the section dealing with unconscionability is enigmatic. Nevertheless, careful analysis reveals that his Honour essentially applied the same approach as the Court of Appeal applied in *Nichols* v *Jessup*.

Facts were found by Gault J to support all the elements of unconscionability that have been extracted from *Nichols* v *Jessup* in this paper, although the specific elements the facts were establishing were not clearly identified in the judgment itself. Gault J found that the plaintiff was not really capable of understanding the transaction in detail or the risks inherent in the financial commitments[73] and lacked independent advice[74] (the disadvantage element). In addition his Honour found that the plaintiff obtained a half

71 Above n11.
72 Unreported 1988, Auckland High Court, CP 327/88.
73 Ibid 20.
74 Ibid 38.

share of an unviable rest-home business from the bargain, whereas the defendants obtained commercial loan transactions, security and other fringe benefits[75] (the inadequacy of consideration element). Finally his Honour found that the plaintiff's disadvantages would have been readily apparent to officers of the defendants, and that if the officers did not know or seek to ascertain the level of comprehension of the transactions they ought to have done so[76] (the "taking advantage" element).

It is encouraging that the elements are all considered in the judgment. This shows that the outline of unconscionability established by *O'Connor* v *Hart* and *Nichols* v *Jessup* can be derived and applied. What is lacking in this case is any attempt to balance the elements against each other in a general test of good conscience, and this is a direct result of the failure of the Privy Council and the Court of Appeal to identify this as the essential test. The elements are considered in isolation, as factors on a check-list (if the reader can identify them as such, for they are not clearly identified as vital aspects of a decision on unconscionability in the judgment). The judgment does however contain a very interesting and important statement of principle:[77]

> Each case is to be decided on its own facts. Unconscionability may be found where there is no gross disparity of consideration. However, where there is less imbalance in bargaining strength, or in benefits flowing from the contracts, it is unlikely that there will be a finding of unconscionable bargain without evidence of lack of propriety, over-reaching or unfairness on the part of the stronger party.

This is in effect a direct recognition of the sliding scale approach discussed above. Where gross inadequacy of consideration is not present there must be a greater element of "taking advantage" present in the situation for the transaction to be held unconscionable. This statement, however, incorporates an interesting refinement of Spanogle's sliding scale. Not only is inadequacy of consideration to be balanced against "taking advantage", but inequality of bargaining power - the disadvantage element - must also be put on the scales. Earlier in the paper disadvantage was considered a basic requirement that did not enter into the final balance between substantive and procedural abuses that decided whether the bargain in question was unconscionable. Here Gault J identifies the level of disadvantage - the inequality of bargaining power - as another weight on the sliding scale: the greater the inequality, the less the "taking advantage" required to impugn the transaction. This appears to be a sensible development in the good conscience test, and it will be interesting to see whether it is applied in future decisions.

The judgment in the second case, *Jenkins* v *NZI Finance Ltd and Others*[78], concerned an action brought by a Mr and Mrs Jenkins to set aside a mortgage over their joint family home inter alia on the ground of unconscionability. Tompkins J held that definitive statement of what constitutes an unconscionable bargain was to be found in the advice of the Privy Council in *O'Connor* v *Hart*, particularly the quotation from

75 Ibid 30-32.
76 Ibid 39.
77 Ibid 34-35.
78 Unreported, 12988 Hamilton High Court M 320/87.

Lord Brightman's judgment set out at length above[79]. His Honour commented that the passage[80]

> would suggest that a bargain may be unconscionable if made by a poor and ignorant person, without advice, because of its inherent unfairness and without any element of over-reaching by one party.

With all due respect to Tompkins J it is submitted that this interpretation is untenable. Lord Brightman plainly lays down the "taking advantage" requirement in his advice, over and above the inadequacy of consideration and disadvantage factors that merely show "inherent unfairness". The whole basis of the decision was the failure of the plaintiffs to establish "taking advantage". It appears that Tompkins J has reverted back to the obsolete *Fry* v *Lane* test - a bargain made from a poor and ignorant man at considerable undervalue, the complainant having no independent advice - which does not require proof of any "taking advantage". Nevertheless Tompkins J did consider the "taking advantage" requirement further on in his judgment. His Honour refused to uphold the plaintiff's submission that NZI passively accepted a benefit in unconscionable circumstances:[81]

> I am unable to find in NZI's conduct, any moral delinquency, nor that it acted in any way that could be described as dishonest, unscrupulous or improper.

This comment would appear at first sight to be a mis-interpretation of the "taking advantage" element, certainly a mis-interpretation of the "acceptance of a benefit in unconscionable circumstances" branch of that element as opposed to the "active extortion of a benefit" branch. "Taking advantage" does not necessarily involve moral delinquency, as has been shown above. It would appear that the failure of the appellate courts to lay down a concise and cogent definition of the "taking advantage" element has led to a misunderstanding of the relevant principles in this case. Nevertheless the decision is just and correct, Tompkins J finding that Mrs Jenkins was not a "poor and ignorant person" even if she was "without independent advice", which is in essence a finding that she was not labouring under a disadvantage.

Both cases demonstrate the problems caused by the continuing lack of any clearly defined test of unconscionability. Although the judges make extensive quotations from *O'Connor* v *Hart* and *Nichols* v *Jessup*, these are not helpful in coming to terms with the application of the various elements of unconscionability in a given fact situation. In *Elia* the principles are correctly applied, but are given no clear definition and are not drawn together in a unified test; in *Jenkins* it is suggested that the "taking advantage" requirement was misinterpreted. The time has come for the Court of Appeal to grasp the nettle and give the doctrine a definition, so that justice may not only be done but be seen to be done.

79 See text accompanying n40.
80 Above n78,47.
81 Ibid 53.