

IN THE MATTER of a Civil Appeal

BETWEEN **GUSTAV & CO LIMITED**

Appellant

AND **MACFIELD LIMITED**

Respondent

Hearing 11 March 2008

Court Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel S P Rennie for Appellant
J G Matthews and K W Clay for Respondent

CIVIL APPEAL

10.04am

Elias CJ Thank you.

Rennie May it please the Court, counsel's name is Mr Rennie. I appear for the appellant.

Elias CJ If Your Honours please my name is Matthews. I appear with my learned friend Mr Clay for the respondent.

Elias CJ Thank you Mr Matthews, Mr Clay. Yes Mr Rennie.

Rennie May it please the Court, I have prepared a schedule of parties and their roles and with the Court's leave would like to hand that up and go through it by way of introduction.

Elias CJ Thank you.

Rennie Beginning please the Court with Mr Parkinson. He was diagnosed with terminal liver cancer in April 2003 and given advice from Associate Professor Robinson that he had six to nine months to live. He had received a pay-out of \$1 million under a Life Insurance Policy in May/June 2003 which was ultimately the source of the payment of the deposit on 23 January 2004. He confirmed the contract on that day and paid a deposit of \$500,000. He died shortly afterwards on 15 February 2004.

Tipping J It should be 23 January shouldn't it in line 6.

Rennie Yes Sir, that's correct. The second party is Associate Professor Robinson. She was an Oncologist who diagnosed and treated Mr Parkinson. Her opinion was that from mid-October 2003 Mr Parkinson's ability to preserve his own interests were severely diminished because of the combination of pain and drugs he was taking. The Court of Appeal held this disability was confirmed by circumstances in which Mr Parkinson confirmed the contract inter alia. A redevelopment of some \$100 million was far greater than any previous development in which he had been involved and he did not consult advisors as was his usual practice and was proceeding incautiously and with no exit strategy. The appellant Gustav was incorporated in 2001 with Mr Parkinson as sole director and with the bulk of the shares held by trustee shareholders Mr Jones and Mr Brown who represented the interests of Mr and Mrs Parkinson. Gustav had net assets of negative approximately \$5,176 and positive \$114,03 as at 31 March 2003 and 2004 respectively. It contracted to purchase the building known as the Union Centre on 3 November 2004, sorry it should be 2003, I apologise for that, for \$12.3 million which involved a redevelopment of potentially \$100 million and was conditional on due diligence terms. It had no ability to finance the purchase at \$12.3 million. Macfield owned the Union Centre, which the Court may be aware, is situated at the corner of Colombo and Armagh Streets in Christchurch. It connects through to the Oxford Terrace and I have given the Court a reference to a photograph of the building and its footprint. The shares in Macfield were held by two trusts representing the interests of Mr Butterfield and Mr McKenzie. Mr Jones also held shares in Macfield as a trustee. Mr McKenzie met with Mr Parkinson in early December 2003 at a place known as the Boulevard and he said Mr Parkinson had just had treatment, was suffering from that

treatment, looked frail and wore slippers. Mr McKenzie denied he knew the prognosis, but the evidence if it should become necessary is in my contention that he had been informed by the agent Mr Thiele. Mr Thiele was a land agent, as I've said, employed to selectively market the property in September 2003. He selected a number of developers not including Mr Parkinson, but they showed no interest in acquiring at the asking price of \$12.3 million. He was also Mr Parkinson's next door neighbour and lived with a Miss Standish. He introduced Mr Parkinson to the property. He was then already aware of his diagnosis from Easter 2003. He had also observed the physical deterioration in Mr Parkinson and on the day of confirmation he went to Mr Parkinson's house and said he saw him in a jaundiced state. His partner, as I've said, was a Miss Standish. She had been instructed by Mr Parkinson when he was advised by Mr Jones that he acted for Macfield. Her role was limited to conveying aspects. She did not advise in relation to financing or viability and had no knowledge of the JV arrangements or the market value of the land. Mr Jones was the traditional solicitor for Gustav. The evidence was that he had acted for Mr Parkinson for some 20 years and regarded him as a friend. He was also the traditional solicitor for Macfield. He was a trustee shareholder of Gustav and as I've said along with the accountant Mr Brown, held 990 out of 1,000 shares. He was also a trustee shareholder of Macfield. He was aware of Mr Parkinson's diagnosis and had been involved in preparing documentation which enabled Mr Parkinson to receive \$1 million under a Life Insurance Policy earlier in 2003, and of course he acted for the respondent in the transaction. Mr Leggat was a partner of Mr Jones. He acted for the appellant Gustav in connection with the joint venture arrangements with MIP. The evidence was that those joint venture arrangements were not concluded and were in a hopeless state at the date of confirmation. He also provided some advice to Gustav in November 2003 in relation to some leases over the property. Mr Harris was a director of the Valuation firm of Fright Aubrey Limited in Christchurch. He had advised Mr Parkinson on 4 December 2003 that the market value was \$8.43 million and he gave evidence in the High Court. Mr Sellers was in the same firm. He had given Macfield a report dated the 17 September 2003 and prior to the contract which provided advice to Macfield that the market value was \$8.86 million and he did not give evidence in the High Court. However if it pleases the Court I will now move to deal with the points. I have prepared a skeleton outline of my address if the Court wishes to have that.

Elias CJ Yes that's fine thank you.

Rennie The first point I wish to focus on is the issue of Mr Parkinson's disability. In my note at para.4 I have taken in the extract from the Court of Appeal's judgment in which the Court described the disability as follows. His ability to assess and act in his best interests in relation to the transaction

was significantly diminished at the time the contract was due for confirmation.

Tipping J Is there any finding as exact as that in relation to the date when the contract was entered into

Rennie No Sir.

Tipping J No.

Rennie The Court's view was supported of course by the evidence of Dr Robinson. I've given you the reference. Her opinion was not challenged in the High Court. Her further opinion also not challenged is that the disability had existed from mid-October 2003. There is in my learned friend's submission reliance on the appearance of Mr Parkinson to others, in particular that he had mental acuity, I say and submit that that evidence is corroborative of the same assertion made by Mr McKenzie, but it does not detract from the unchallenged opinion of Associate Professor Robinson, and ignores what in my submission is the crucial knowledge which Macfield had in relation to price to which I will make reference shortly. The type of disability we are here dealing with is correctly described in my submission in the *Borg Warner* case and I have given in my outline the reference in the High Court decision to that, wherein that case it was described as a disability requiring positive evidence of understanding notwithstanding an appearance of mental acuity. I now move to deal with the first point on appeal which is a point made by my learned friend and that is the time for assessment of the condition. I have taken in the well-known extract from *O'Connor v Hart*, emphasising that the principle focuses on circumstances. In this case as I say in point 6 of my outline, the benefit was a contract for sale of land made unconditional and which contained a very wide judicial condition. In my submission there should be no absolute requirement for the circumstances to be limited to those at the date of the contract.

Tipping J That way of putting it suggests that you are accepting that the primary focus is on the date of the entry. Is that what you're intending to convey or not?

Rennie No I'm not intending to convey that Sir. There is a moving focus which includes the date of the contract and in this case also the date of confirmation.

Tipping J If a contract's not, let's just take a hypothesis, if a contract is not an unconscionable bargain at the date when it's entered into, on what principle does it become unconscionable? On what principle should the

conscience of the other party be effected later? Some relevant change in circumstance or what?

Rennie Yes, the change in circumstances I'm going to shortly take you through but in particular in this case where you have a contract subject to a number of very wide due diligence terms it requires effectively a continuing judgment to be made up and to the date the contract is confirmed.

Elias CJ Is it suggested that in respect of any of the conditions which would have enabled withdrawal from the contract that this was material?

Rennie All of the

Elias CJ The due diligence terms and I haven't gone back to have a look at what they were, but how is it said that the impairment affected the appraisal of those conditions?

Rennie The conditions all called for a judgement as to the wisdom of the transaction in my submission.

Blanchard J What ability did Macfield have to withdraw from the contract during the period when it was conditional?

Rennie It had no ability to withdraw from the contract.

Blanchard J Did it have an ability to withdraw from the contract when it was made unconditional?

Rennie No it did not.

Blanchard J So it would have had to have acted in breach of contract to refuse to permit a semi-cardusa Gustav to confirm the contract and to refuse to accept the deposit?

Rennie Subject, yes that's correct Sir, but subject to the issue of it being a major transaction under the Companies Act.

Tipping J But leaving that point aside

Rennie Yes.

Tipping J Which is a feature of this case but wouldn't necessarily be a feature of other cases, this is a point that troubles me Mr Rennie, on what principle can Macfield, having bound itself unbind itself? Are you saying it can take advantage or ought to take the point for the other side? You see I'm having real difficulty understanding how this was going to happen in

practical terms as well as legal terms. Are they going to have to say to the other side look sorry, we're not taking your deposit; we're not accepting your confirmation because you're not up to it putting it colloquially?

Rennie Yes.

Tipping J Is that what you're advancing?

Rennie In terms of whether you're up to it the only inquiry that needs to be made is do you have a special resolution of shareholders?

Tipping J You're coming back to the special point?

Rennie Yes, yes.

Tipping J Which may have a bearing on this particular case, but speaking generally for the time for assessing unconscionable bargains.

Rennie Yes.

Tipping J And ignoring the Companies Act point. I'm not at the moment grasping entirely how you say Macfield should have played its cards.

Rennie Well notwithstanding it is bound into the contract. I submit that does not prevent in any event Macfield from making any inquiries it may have needed to make in order to cleanse its conscience about the contract it's

Tipping J But let say it makes inquiries and its conscience becomes even more troubled, what can it legally do?

Rennie Well I accept the position that Macfield can do nothing. It is bound into the contract. I'm not saying it could get out of the contract. What I am saying is that it could in equity make inquiries and depending on what those inquiries revealed might then dictate what it did.

Tipping J Well let say it made inquiries Mr Rennie and the position looks to it as though Mr Parkinson really didn't have enough horsepower, what does it do then? It's already taken the deposit. Does it have to offer to call the deal off and refund the deposit?

Rennie It could do so obviously. It could say I have reason to believe in these circumstances

Tipping J But has it got a duty to do so in equity, that's the point. Of course it could do so, but are you saying it has a duty in equity to say to the other party no,

I'm not willing to proceed because I think this is an unconscionable bargain, here's your 500 back?

Rennie I don't think it can go that far.

Blanchard J Well how can it be said to have acted unconscionably if effectively it's got to take the money?

Rennie Well in this case an inquiry would have led it to my major transaction point whether or not there was a special resolution. If there wasn't a special resolution then it might not have been

Blanchard J Well it might have led them to that and equally they might not have thought of that point.

Rennie Well Mr Jones would have thought of the point. He had to think of the point. He had

Blanchard J Mr Jones wasn't acting for Gustav.

Rennie No but Mr Jones had as a trustee shareholder a need to know the position in relation to the special resolution.

Blanchard J Well has this point ever been taken by Macfield.

Rennie Point taken by Macfield?

Blanchard J Sorry, has this point ever been taken by Gustav?

Rennie Yes, the point was taken in the Court of Appeal but it's not mentioned at all in the judgment.

Blanchard J This is all news to me.

Rennie Well it's in my submission Sir.

Blanchard J It's not raised as a ground of appeal.

Rennie Not of itself, but it's within the third point relating to inquiries.

Blanchard J But if Gustav has never taken the point successfully in a direct way, can it take it in an indirect way and say this point which we've failed on ourselves you should have taken?

- Rennie Well in my submission Sir, it arises out of the aspect of the judgment below dealing with inquiries. What inquiries, if any, could have been made? I'm saying
- Blanchard J But if Gustav itself has taken the point and it's failed in some way that I don't know anything about because it's not before us, how can it be said that an inquiry by Macfield would have led to a different result?
- Rennie Because if the premium of 39% was justifiable and the Court of Appeal on this point said it was possibly justifiable within the context of the joint venture arrangement, then the inquiries relative to that would have included in my submission whether or not there was a special resolution enabling Gustav to enter into the contract.
- Blanchard J Well for myself I have difficulty seeing how you can succeed on this point when the Court of Appeal has rejected it and it's never been as far as I know one of the grounds to come to this Court.
- Tipping J The grounds are focused first of all on the time point, at what time does the respondent have to have knowledge of the appellant's disability, in other words obviously what was the extent of the disability at that time and what knowledge was there and this is what I thought we were arguing about at the moment as a matter of principle. Never mind the specifics of this transaction, is there a rule that can be laid down? If so what is it or should the thing be left looser if you like on your, I think you used the expression, continuing focus throughout. But that is a point as I understand it that's quite divorced from the specifics of this particular case which you're going to no doubt come to later. If you are unable to identify what Macfield could have done about it at the time when the contract was confirmed, isn't that a strong pointer to the proposition that the time ought to be the time of when the contract was made, not when it was confirmed? I'm not saying that's an absolute, because the contract might be varied. Say the price is materially altered against the weaker party by variation, then that might be a reason to focus on that time but if the material ingredients of the transaction have not altered at all between entry and confirmation, what is the principle that allows you to say that the focus should be on the date of confirmation? That's what I'm struggling with Mr Rennie, before we get on to all these other esoteric issues.
- Rennie Yes, I don't take the position any further than saying that the principle in *O'Connor v Hart* is flexible enough to require a continuing focus on circumstances up to and including the time when the benefit, or any benefit, under the contract is received.
- Elias CJ That might be so if there was something that the other party had to do but your saying there was nothing under the contract that Macfield had to do?

Rennie I agree.

Elias CJ Can you just give me the reference, sorry, to the agreement for sale and purchase, I haven't looked at it, in the case. It doesn't matter. Perhaps Mr Matthews can look it up and let me know. You carry on.

McGrath J Your point is of when in responding to Justice Tipping's request for the principle, you've really come back to *O'Connor v Hart* and is it that aspect of *O'Connor v Hart* that refers to passive acceptance that you rely on?

Rennie Yes Sir.

McGrath J So I think you're really saying are you that this fits within the passive acceptance principle, and that's the principle on which

Rennie Well yes, yes, that's right.

McGrath J Yes. Passive acceptance of a benefit in unconscionable circumstances?

Rennie Correct Sir.

Tipping J So do you agree as a starting point Mr Rennie that one looks at it at the date of entry, and if it's unconscionable at that time, end of problem?

Rennie Yes.

Tipping J If it's not do you look at something that might move the conscience of the stronger party at anytime up to completion? Is that your

Rennie Correct, yes.

Tipping J Proposition.

Rennie Yes Sir.

Tipping J But it has to be something capable of impacting on the conscience of what traditionally is called the stronger party, is that fair?

Rennie Yes, yes.

Tipping J Yes.

Elias CJ Is there dissonance then between your reliance on the premium in the purchase price which you've just referred to and the subsequent stage at which matters become unconscionable?

Rennie Well the answer's no, because the price is there and it doesn't alter. It's not a case where there is any variation of that

Tipping J But that's the Chief Justice's point I think.

Rennie I am going to come and say to you though that these circumstances which make it unconscionable were known at the time of the contracts and I'm only at this point endeavouring to make the point that the principle is wide enough to allow a continuing focus on circumstances after the date of a conditional contract.

Tipping J But something has to happen surely. If it's not bad at the beginning, something has to happen which moves the conscience of the stronger party sufficiently to entitle the weaker party to relief.

Rennie That's correct Sir.

Tipping J That much you accept?

Rennie Yes Sir, and

Tipping J But what is that something?

Rennie That is the Boulevard meeting where he meets Mr Parkinson in December, observes him to be frail and knows he has just undergone treatment and sees him in slippers.

Tipping J So you've got a duty to disavow a bargain that was good when you entered into it but has become bad through some circumstance over which you've had no control?

Rennie Correct. I wouldn't go so far as to say it is hard and fast to disavow. I think, or I submit your conscience should at least lead you to the point of attempting to disavow. For example putting to the other side perhaps these further circumstances have come to my attention.

Anderson J And who would give consideration to that advice?

Rennie Correct, correct.

Anderson J Then who would?

Rennie Who would?

Anderson J Yes, if Macfield had said well we're really having doubts now about your ability to evaluate the position

Rennie Yes.

Anderson J Who would they say that to?

Rennie Well for a start Sir the trustee shareholders who held the majority of the shares. Are you aware of this transaction? Are you agreeable to it?

Blanchard J This is going to lead to some pretty interesting jurisprudence. One can think of examples where the property market falls rapidly between contract and condition, and the condition doesn't allow someone to get out on that basis, or where somebody who is well when they enter into a contract as purchaser becomes very unwell, maybe even dies, before the point at which the contract becomes unconditional and again I'm positing a situation in which the condition is one that simply gets fulfilled like a zoning change.

Rennie Yes.

Blanchard J This is pretty radical.

Rennie Well this is a case Sir with some very very unusual circumstances and also some very unusual mixing of roles by advisors, now that's the first thing I would say

Blanchard J Well that's maybe a different point and I certainly wouldn't want anyone to think that I didn't have the greatest sympathy for Mrs Parkinson in the situation that she has found herself, but we've got to apply the law, we can't just go on sympathy.

Rennie I know, I appreciate that Sir.

Blanchard J And we've got to think on the impact on other cases.

Rennie Yes.

Tipping J We're talking here about a supervening event aren't we or circumstance? Something that comes along after the contract is formed which is now said to make it unconscionable the bargain. We have the law of frustration; we have the law of equity that you don't specifically perform. You can withhold specific performance if it's become inequitable to order performance because of supervening events. Do we need another doctrine that will fit somewhere in the middle of all that? It's not sufficient for frustration. Obviously declining specific performance doesn't get you out

of the need to pay damages. That has to be recognised, but are you arguing for some sort of mini frustration?

Rennie No I'm not arguing for a mini frustration, I'm arguing Sir as you put the point to me before, that after the contract there may be circumstances arise which now make it unconscionable to retain the bargain, and I am not suggesting that requires a new principle and I'm saying it's merely an application of an existing principle.

Blanchard J How are we going to define those circumstances given the variety of situation which are likely to arise?

Rennie Well in my submission Sir definition in this area is unnecessary and that each case ought to be judged on its own facts and as I've said this case is one with very very unusual facts.

Blanchard J I think if we went along with that the commercial community would throw up their hands in horror because they'd never know where they were.

Rennie Well that's often said in cases like this and the counter often said is that the precedent bank built up by cases on their circumstances is sufficient to give certainty.

McGrath J The Court of Appeal wasn't so concerned with a principle that would apply in all conditional contracts. It seemed to think it was significant that this case was akin to an option. In other words that the purchaser after contract had to make a further judgment as to whether it would operate – would cause the contract to have come into operation if I can put it colloquially. Has that enabled you to marry the principles in a way that wouldn't cause the commercial community to throw up its hands in horror?

Rennie Well if it's near to an option as Your Honour observes, that's true, I'd agree with that.

Tipping J How near?

Elias CJ Well that's why I thought that concentrating on the terms of the agreement might be absolutely critical because although there is statements that it was pretty near to an option, I'd like to see how may

Blanchard J I wouldn't want it to be thought that I would take a different attitude if it was an option.

Elias CJ No, no, I realise that.

Blanchard J And indeed Lord Hoffman when he was at first instance in a case called *Spiro or Sperro v Glen Crown* said that you have to look at things from both sides and when you look at option contracts from the vendor's perspective it really is analogue to a conditional contract.

Tipping J 'An option to buy land can properly be described as a contract for the sale of that land conditional on the exercise of the option'.

Blanchard J My brother's obviously been looking at the same case.

Elias CJ Or someone has.

Tipping J Well it may have been someone else earlier.

Rennie My learned friend's helpfully given me the reference to the contract. It's at volume 4, page 106.

Elias CJ Thank you.

Tipping J The point is with an option just to throw another thought into the mix, Mr Rennie, the person who's bound to convey on the exercise of the option is in exactly the same position as the person who's bound to convey on the fulfilment of the conditional contract. It's as simple as that. And I think Mr Matthews makes a similar point in his submission, although without reference to the *Spiro* case. His instincts must be good.

Anderson J It's rather hazardous for a person in position of Macfield if they said we're not going to allow you to complete this contract because we think you're not up to it, and if they're wrong they repudiate it.

Rennie I agree with that Sir.

Blanchard J And what would Mr Parkinson have said on the 23 January? Would he have given the same answer that he gave when the valuer tried to tell him that it wasn't a very good deal?

Rennie But in this case Sir it wasn't Mr Parkinson's right to give the answer.

Tipping J I think that's where we start trespassing into company law.

Rennie Yes.

Tipping J Yes. But as a matter of general principle I think we're going to create all sorts of difficulties if we say that there's some general equitable duty to disavow after a bargain has been made. If there is supervening circumstances that truly add to the weight on the stronger party's

conscience that's a different matter, but I don't know that you can show that here other than perhaps the possibility that they should have appreciated he was getting sicker. But he was already bound subject to the conditions. He couldn't use increasing sickness could he to get out of the contract legitimately for failure of a condition. Maybe he could and maybe that's what they should have done – I don't know. I think that was the Chief Justice's point. Is there a condition that they could have said well we'll declare this contract conditions not satisfied because he's now become sicker, when it was perfectly obvious at his entry he was going to become sicker.

Rennie I don't seek to argue that Sir.

Tipping J I'm trying to help Mr Rennie really

Rennie Yes I know.

Tipping J To look as to what possible routes there are for your client.

Rennie Well to have an absolute requirement to disavow is not on, but there's certainly preliminary steps short of that and here I'm suggesting one of those steps might have been to inquire of the shareholders in the small company, and particularly one where majority of the shares are held are held by a lawyer and an accountant.

Anderson J Well it's not a situation where Macfield have to do something and might in conscience inform themselves before they act. They simply have to exist, because it's a passive position they're in.

Rennie That's true Sir, but the principle captures passive acceptance and in my submission, passive retention.

Anderson J Well that gets back to the issue discussed earlier in practical terms what could they do? Are they obliged to say no, take it out of our bank account?

Rennie No, I don't think I can take it any further than to say a step, a reasonable step to take in the circumstances of this case, was to make inquiry of the majority shareholders.

Elias CJ Does it all come down to that? It comes down to the application of that provision in the Companies Act?

Rennie And allied to that is the mixed role that the Solicitor, Mr Jones, held in this case where in essence as a trustee shareholder he had a need and probably

a duty to know about the transaction on one side and on the other side he's acting for Macfield, the vendor, and has a duty to disclose it.

Blanchard J Well he had a duty to know about Gustav. He did know about it, he was one of the people who negotiated it.

Rennie Mr Jones?

Blanchard J Yes.

Rennie No he didn't negotiate the contract.

Blanchard J Didn't he?

Rennie No. He prepared it I think but I don't think he negotiated it.

Blanchard J Alright, well he prepared it?

Rennie Yes.

Blanchard J So he certainly knew about it?

Rennie Oh yes.

Blanchard J Presumably approved it.

Rennie There's no evidence that Mr Jones approved the transaction. I think the evidence is to the effect that all he did was when he received this contract was he informed Mr Parkinson that he'd need to go to another solicitor.

Tipping J Just help me a little bit more. My brother McGrath referred to the Court of Appeal's akin to an option remark

Rennie Yes.

Tipping J Which I must confess does seem to have been the underpinning of the reasoning. Is there any other reasoning in the Court of Appeal's judgment which you can invoke to support this concept of a continuing assessment if you like? Normally it will only arise won't it at a turning point when

Elias CJ Something has to happen.

Tipping J Something has to happen. I mean you can't have some sort of general supervisory, something has to happen, something that's going to effect the course of the transaction, whether it proceeds or not or if there's some

major variation or something, but is there anything in the Court of Appeal that you wish to

Rennie No Sir.

Tipping J No, thank you.

Elias CJ I am troubled by this akin to an option emphasis, because looking at the conditions in the agreement for sale and purchase, and even though there's a term that the purchaser is not obliged to state any reasons for lack of satisfaction of any condition, there is plenty of case law that says you have to make a bone fide attempt finance and I don't understand that any of these conditions are being said not to have be met. I mean how's

Rennie Just to address that point

Elias CJ Yes.

Rennie They were met in the that the contract was confirmed but the evidence was that in respect of some of them there was no steps taken at all. So when Your Honour says met

Tipping J Or waived.

McGrath J Yes.

Elias CJ Yes, yes.

Tipping J But of course waiver is the unilateral Act. It doesn't involve the participation of the other party. I was just thinking whether you could pin anything on that, the decision to waive, but we're back into the option point aren't we? What's the position, are you able to argue that even if the correct time was the date of time of entry, is it part of your argument that the bargain was unconscionable even at that time?

Rennie Exactly Sir, yes.

Tipping J Yes.

Rennie I'm only on this first point endeavouring to deal with the issue as one of principle and I don't seek to take my argument on this branch any further than to say that within *O'Connor* there is enough flexibility to focus on the circumstances in which the bargain is received and retained and my submission is in a case of a conditional contract there need not be the absolute position that it must be the date of the contract and not the date of the confirmation, and I accept Your Honour Justice Tipping's point that

after that there needs to be some trigger that sets the conscience on its way.
But looking at my

Elias CJ Sorry, you say that that trigger is in the meeting at the Boulevard?

Rennie That's the only evidence I have that the trigger to rely on is Mr McKenzie's observations of his physical appearance in December and also the physical observations by his land agent Thiele throughout the period and particularly in the period leading up to the confirmation.

Elias CJ Well what role did Thiele though at this stage of the contract?

Rennie He had no formal role. He role such as it was, was to ensure I guess whatever needed to be done to get it to confirmation was done, but other than that there's nothing in the evidence apart from his observing the physical deterioration in this man. If the Court pleases I'm at page 3 of my skeleton, point 9 and there I've made a note of the point that I've just made to the effect that I say in any event the date makes little difference in this case because at the time of the contract Mr Parkinson was already the disability and Macfield had in my submission the critical combined knowledge about price and Mr Parkinson's circumstances which if the Court pleases I now move on to address. I terms of the knowledge of the disability, and looking at the first issue of price, the Court of Appeal held on any view of it the price which Gustav agreed to pay contained a substantial premium. Now Macfield knew prior to the contract that the consideration of \$12.3 million was 39% more than the market value of \$8.86 million assessed by its own valuer in September 2003. It did not call its valuer as a witness to say otherwise and as I said in my introduction, that valuation was close to the market value assessed by Mr Harris of \$8.43 million, who was called to give evidence. Now that consideration can in my submission be fairly described as a gross over-value, and in that regard I rely on an observation to the similar effect by Justice Fullagar in *Blomley v Ryan*, who His Honour described as a gross under-value, a variation of something approaching 30% less than true value.

Blanchard J Was that a case where the victim, if I can put it that way, had an appreciation of values generally?

Rennie Yes there was some history in the negotiations of him rejecting offers and seeking a higher price than he ultimately agreed to.

Tipping J But he'd drunk himself rather soporific hadn't he?

Rennie Exactly. Precisely the words used I think.

Tipping J Oh really.

Elias CJ It's a great Australian case.

Rennie It is, and if it pleases the Court I will take you now to the passage that I

Elias CJ There was a dissent wasn't there? Didn't Justice Kitto dissent? Someone dissented. It can't have been that clear.

Tipping J But that you see, are we just moving off this question of price now Mr Rennie or not?

Rennie No.

Tipping J Right well I'll keep quiet then thank you.

Rennie In my bundle of authorities the relevant passage is at page 138 of the bundle, page 405 of the case, and my reason for bringing this to your attention is for two reasons. One to support my contention of a gross over-value and secondly I rely on it to support the proposition that price can lead to an inference of disadvantage and an unfair use of that, and the passage that I particularly refer to is at the bottom of page 405 starting 'but inadequacy of consideration while never of itself a ground for resisting enforcement will often be a specially important element in cases of this type. It may be important in either or both of two ways, firstly as supporting the inference that a position of disadvantage existed and secondly as tending to show that an unfair use was made of the occasion. And where as here intoxication is the main element relied on is creating the position of advantage, the question of adequacy or inadequacy of consideration is I think likely to be a matter of major and perhaps decisive importance'. And on the following page at 406, His Honour in the second paragraph describes the price as a 'gross under-value' and looking down that page gives the values and refers to the contract price in the middle of this passage says 'on this figure the defendant was getting 9 thousand pounds or something approaching 30% less than the true value of what he was selling'. It's a point Your Honour Justice Tipping also made in the *Bowkett* decision, the reference I've given to my note at point 13 where Your Honour said in that case 'the inadequacy of consideration may be so startling as to justify a presumption of procedural impropriety'.

Tipping J I think I was using that phrase 'procedural impropriety' as a sort of shorthand in terms of *O'Connor and v Hart* wasn't I for not just literal procedure but something that's gone wrong with the process?

Rennie Yes.

Tipping J Yes.

Rennie Now, so I'm now going to leave the price point Your Honours and I want to then move and say the inference arising from the price is supported also in this case by the fact that Macfield had already approached a number of major property developers which did not include Mr Parkinson and knew from that source there was no interest at the asking price of \$12.3. It is also supported by the knowledge which Macfield had about Mr Parkinson's health and his own circumstances. The first is of course that he had terminal cancer. Now on this point I've noted at 15(a) of my outline that in my submission Mr Butterfield and Mr McKenzie did know themselves that the cancer was terminal because Mr Thiele told them. It hasn't featured in the judgments because of the acknowledgement that well at least their solicitor and land agent both knew, but I say

Blanchard J I'm sorry I don't quite understand that reference to the land agent. That's Mr Thiele is it?

Rennie Yes Sir.

Blanchard J And it's acknowledged that he knew?

Rennie Yes Sir.

Elias CJ And that he told Butterfield and McKenzie.

Rennie My learned friend will take issue with me on that. That's not acknowledged.

Blanchard J Are you going to take us to that reference?

Rennie Yes Sir. Now the first reference that I need to take you to is at page 48 of bundle 3. At para.3 of Mr Thiele's brief he says it was in Easter 2003 David told me he had liver cancer. He told me that his prognosis wasn't very good and that he only had six to nine months to live. And then if the Court please move through this bundle to page 62, where the cross-examination on this point in the High Court appears, at line 32 of the notes of evidence,

Q "David's prognosis that he told you about in Easter 2003 would be a matter you would regard as relevant to this transaction?"

A Certainly.

Q Consistent with your practice you reported that to Mr McKenzie or Macfield or Mr Butterfield?

A At the time of registering his interest in the property yes I believe so.

And then turning the page to line 5,

Q I am just trying to focus on what Mr McKenzie's reaction was to you, if you are able to recall when you told him of Mr Parkinson's prognosis?

The answer is not clear, but the next question.

Q I thought we had got to the point of establishing that David had told you of his prognosis in Easter as recorded in para 3 of your brief?

A Yes

Q You then agreed with me that you passed on that prognosis to Mr McKenzie and I think you said at about the time of your appointment.

A Yes.

Tipping J He goes on and says when McKenzie's reaction "Well I believe that Ian [that's McKenzie] had had a discussion with David [that's Parkinson] and that David had I think told him that he had cancer. It doesn't quite answer I suppose.

McGrath J Line 25 also.

Tipping J What about the point Mr Rennie that Mr Parkinson himself was of the view that the difference in price between what it might theoretically be worth and what he was paying could easily be absorbed over a \$100m transaction. Is that, where would you say that fits into the picture? In other words, he knew, in a sense it could be said that, it wasn't through ignorance or inadvertence, he knew and he was deliberately paying a bit over the odds because he reckoned it was a marvellous site and that it was a pretty small difference, if you like, in the whole picture. Now that suggests that the man was still, he may not have been right, but he was certainly able to address the sort of issues that one would wish to consider when getting a feel for whether this was unconscionable.

Rennie I accept Sir that generally in a transaction like this, if it were to be swallowed if you like into a \$100m development with a substantial joint venture partner, it is capable of being justified. Here, in answer to your Honour's question though, that judgment he made was at a time when he was already diagnosed as being unable to look after his own interests and the evidence shows that in fact he did nothing, the joint venture arrangements were a complete mess, without one, no written arrangement, no financing, nothing. So, in the round Sir, the circumstances of this case are such that the idea that it could be swallowed was nothing more than that.

McGrath J Doesn't this point go though to the relevance of the apparent difference between value, as a valuer certifying it, and what Mr Parkinson was prepared to pay, the significance of this difference of 39% that you are

emphasise. It makes me wonder whether you can really reason in those terms, when what you are doing is buying a property, not that is going to operate in business terms like a farm as previously, but you are buying a property for development. Shouldn't you be working out the percentage on the basis of the total cost of the development including the land and then looking at whether the difference in the land is reasonable there. I think that the development nature of the property weakens your argument, I suggest, of the difference between valuation and price paid.

Rennie It, the development was one option for the property Sir. It wasn't the only option. It hadn't been for some years, it produces a rent role and is an investment property.

Blanchard J But he wasn't buying it for that, he was buying it for development purposes.

Rennie Well he took no, apart from very informal arrangements with potential joint venture partners, he did nothing.

McGrath J But he had to have a joint venturer or he wouldn't have been able to afford to buy it, and the only joint venturer who would have come into it would surely have been someone who was interested in the development.

Rennie Well that has another issue attached to it. The property is not capable, a substantial part of the property, perhaps if I can just take you to the property to show you this point.

Blanchard J Just before you do that, did he ever say to anyone that he was buying the property in order to keep it as an investment?

Rennie No.

Blanchard J So he bought it as a development?

Rennie He bought it with the intention of entering into, yes, the answer is yes.

Blanchard J I'm sorry I interrupted what you were doing.

Rennie I just want to pick up on that point your Honour. The, can I show you the building, it is in the Volume 4 at page 149, there's a rather poor picture of it but if your Honours know Christchurch at all, you will probably be aware of that's the building I am talking about. It is the, there is a multi storeyed building to the left and one to the right. That is a photo taken from Armagh Street towards the Courts, looking back at the corner. The building in issue is this two storey building that wraps the corner. And can I ask you then to go to page 166 where there is the footprint of the

building. You can see by reference to this that it stretches through into Oxford Street. Now the evidence in the High Court and in the valuation was that the bit that could be developed was the bit fronting Oxford Street. The larger bit on the corner of Colombo and Armagh could not be developed because it was subject to a number of leases, many of which did not have demolition clauses in it. So whilst it was, as your Honour Justice Blanchard said, it was bought for development but development as such was limited. The immediate development was limited to the Oxford Street Oxford Terrace part.

Tipping J What was the latest expiry date of the lease so to speak? How long before you could actually knock that building down, assuming that is what you wanted to do? Do you have any feel for that.

Rennie I think the valuer's evidence was seven years, seven years odd.

Tipping J It was approximately what I thought it was too. Wasn't there evidence that quite a lot of time and energy and effort had gone into accumulating this whole site and it was regarded as a pretty, one of the last remaining excellent development sites in this general area.

Rennie Yes, it was again one, you will correct me if I am wrong, there were two separate purchases over the course of about a five or six year period.

Tipping J And, without wanting to go into detail, the valuation methodology adopted by the valuers to get to their 8 point whatever was what, discounted cashflow. Did it take into account development potential in some reasonable manner.

Rennie No.

Tipping J No, well you see this is where the thing starts to get a bit remote from the *Blomley v Ryan* where you have got some sort of fairly quick comparators but this one is a rather more elusive I would suggest Mr Rennie perhaps. Taking up on a point my brother McGrath was making, that if the valuers haven't brought anything into account for development potential of a pretty premium site I just wonder how reliable this percentage comparison of yours is. Admittedly, everyone accepts there was a premium. Nearly \$3m over 9 sounds pretty grim, on one view of it. But is it quite as simple as that?

Rennie The evidence was that as is value is the \$8m figure, yes it is capable to development but it would take extensive work in getting in dealing with the leasing issues. As I have said, I think the valuer has used a figure, a period of seven years.

Tipping J Funnily enough, I would be more troubled were it not for the joint venture aspect, with the idea of someone who is dying taking on a project on this kind at all, let alone price. But the other party, Macfield, was perfectly entitled to think, were they not, that the joint venture arrangement was satisfactorily in place. They had no obligations to satisfy themselves as to that.

Rennie No they, well Mr Jones, as their solicitor, ought to have known about these matters. I say

Blanchard J Which matters?

Rennie He had to know about two matters in my submission. The shareholder resolution point and also the state of the MIP joint venture arrangements. Yes I accept that a man in this, in this man's condition.

Blanchard J How did Mr Jones, with his Macfield solicitor's hat, come to know about the MIP situation, which didn't involve Macfield.

Rennie No his evidence was that he didn't have any actual knowledge of the state of those arrangements.

Tipping J Well what business was it for him to go inquiring, with his Macfield hat on.

Rennie Well there wasn't any business of him to go inquiring with his Macfield hat on. He certainly had a business to go

Tipping J I'm trying to get something affixed to the conscience of Macfield. That is what I am looking at, and if they were entitled to the view that this joint venture was all splendid, you know it's in place, it is satisfactory, I don't see how, my worry about the project as a whole, if you like, which I am not sure where that would lead me, is very much reduced.

Rennie Well Sir they didn't have any knowledge of the, the contract doesn't refer to the need to have joint venture arrangements.

Tipping J I thought there was some, was that not apparent to, I may have made an assumption Mr Rennie which

Rennie I don't think it was apparent Sir.

Tipping J It wasn't apparent.

Blanchard J What did Macfield know about Mr Parkinson's finances generally at the time of contracting?

- Rennie They knew they the evidence was that a group of approximately ten prominent developers in Christchurch were selected as potential purchasers of this building. It is a substantial building. Any contemplated development of it would require a big player. Mr Parkinson was not part of the group identified as potential purchasers. So, on a first cut if you like your Honour, he wasn't
- Elias CJ He wasn't a likely purchaser.
- Rennie He wasn't a likely purchaser.
- Elias CJ There's a long way though from being poor and ignorant and the sort of adjectives the case has used.
- Rennie Yes. To answer your Honour's question, there is no evidence that they had express knowledge of the financial position of Gustav. The best that I have got is that in a small place like Christchurch he wasn't nominated as one of the potential ten.
- Blanchard J But if it thought about it, and they clearly must have, in order to decide that it was worth entering into a contract with him, it would have naturally occurred to them that he might be going to get a joint venture partner in on the deal. I mean developers operate like that quite frequently. The trick is to secure the site and then you figure out how you are going to fund it, provided you have got enough time in order to do that. In other words, you don't have to settle immediately. And indeed might they not have thought that he had the wherewithal to complete the purchase of the site. \$12m sounds like a lot of money to you and me perhaps Mr Rennie but in the property development world it is not that large a sum. And Mr Parkinson apparently had a reputation as being a successful property developer. Presumably had funds available, borrowing capacity.
- Rennie This transaction at \$12m Sir in this particular market is a very substantial one. Mr Parkinson's previous involvement was in developments, I think the evidence was, for a total of \$4m. He was nowhere near in the league to take on this. Yes I accept what your Honour says that these sorts of transactions can customarily be dealt with on a joint venture basis and potentially Mr Parkinson might have been able to do that, had he locked in his arrangements with MIP. But he certainly would not be regarded as a person who was likely to be able to take this on, fund it and develop it, with terminal cancer.
- Tipping J Mr Rennie just as a matter, if you wouldn't mind, I have just been looking up the contract and the next document into the bundle immediately following it is a Harris Fright Aubrey valuation, 4 December, it starts at

p 117 and on p 119 in his summary, his 8.43 is Value As Is, and his Redevelopment Land Value (so-called) is 10.63. Now that was the sort of matter that I was trying to get a grip on a few minutes ago. Doesn't that really make some difference to the premium issue. I have just picked that one at random because it just happened to be the next one after the, the next document after the copy of the contract. Is there something I am missing there.

Rennie That is the value, assuming the buildings were knocked over.

Tipping J Right.

Blanchard J And that took account of the leases didn't it.

Tipping J I think it did.

Blanchard J On the, on page 118 the valuer refers to the spreadsheets comprising the tenancy schedule.

Tipping J The only tenancies without a demolition clause will be, and then they are the ones identified, fronting Armagh Street and are not to be incorporated in the initial redevelopment of the site. That's on page one, main paragraph. So it is a little bit more sophisticated this inquiry than just the 8.43.

Blanchard J While we are on the subject of price, there are some references, I think in the Court of Appeal judgment, to conditional offers that were made I think after Mr Parkinson's death. Some of them involve having to do arithmetic because there are offers for bits but it looks as though those totalled not too far short of the price here and then there was another conditional offer from somebody called I think Meath Nominees at \$12.5m. What can you tell us about those?

Rennie Meath Nominees did not give evidence in the High Court. It is true that there was a highly conditional contract at the time of the hearing for that figure of \$12m.

Blanchard J \$12.5m I think it was.

Rennie You might be right Sir yes.

Blanchard J Highly conditional. Any more conditional than this agreement was in September?

Rennie I think it might have been in the same category.

Tipping J You would have a general due diligence for something like this, for something like this.

Rennie Yes I think so Sir. But this all put to the valuer, Mr Harris, the general emphasis being that the value of this property was actually higher and that he wasn't seeing things in the property that the developer had seen, an opportunity valuer I think from memory it was put to him. But in the High Court his evidence didn't move off the market value of the \$8m figure. So, and he said that the presence of a conditional contract didn't influence him at all in terms of his market value. The other contract I think Sir was of the same ilk and didn't, I am fairly confident it was as conditional as the others. Again that was put to the, Mr Harris, who was fairly firm of the view that these sorts of contracts would not should not be taken in account in assessing market value.

Is there anything further about this market value or development value issue that I can assist you further Sir.

So I was dealing with the factors which in my submission support the inference of a disadvantage which the price throws up. I have dealt with the knowledge of terminal cancer, the knowledge of physical deteriorating, the knowledge the additional knowledge is that Macfield had was that Mr Parkinson was taking on a long term development and far more substantial than anything he had previously undertaken and that he was without sufficient resources.

Tipping J I am not sure how you can quite say that. What do you base that on Mr Rennie, that they have knowledge that he didn't have sufficient resources. I take it you are meaning actual knowledge here.

Rennie Yes.

Tipping J I mean if that can be demonstrated that is

Elias CJ Where is this sorry.

Tipping J At page 5 of the synopsis point (d). Because this takes us back into a discussion I think you were having with Justice Blanchard a few minutes ago. He had to raise the money to buy the premises. That is all I am saying.

Rennie That's all I am saying. The Court of Appeal put it slightly, perhaps, Gustav was a one man company which did not itself have the resources to complete the transaction.

Blanchard J No that is an objective assessment. We have got to look at what Macfield knew at the various stages.

Rennie Well that is the knowledge attributed by the Court of Appeal to Macfield.

Blanchard J How did Macfield have that knowledge?

Rennie Well the Courts put this as a group knowledge, if you like, being the knowledge of Mr Thiele, Mr Jones, and Macfield.

Blanchard J What Mr Jones knew about Gustav's finances would presumably be confidential information, which he couldn't pass to Macfield. Not only that, at least at the time of the signing of the contract Mr Jones would not have appeared to Macfield to have any qualms. If he had had qualms you would have expected him to do something to persuade them not to enter into the contract with Gustav or, if he didn't feel he could reveal what he was worried about, to ensure that independent legal advice was taken before the contract was signed.

Rennie Yes.

Elias CJ In any event why are Gustav's resources determinative or even particularly relevant anyway if the background to this was a development proposal.

Rennie I agree with your Honour. I mean, it would not matter if it didn't have sufficient resources if he could be swallowed, if you like, within a joint venture yes.

Tipping J It has to be insufficient resources to complete the purchase. Now that is, if you know someone is literally stony broke and you enter into a transaction with them, then maybe there are elements of unconscionability there but I would be very reluctant to introduce anything that gave an appearance that you had some sort of duty to make inquiries about this sort of thing. Help. Anyway it is probably tea-time.

Elias CJ Is it convenient to take the morning adjournment now.

Court adjourns 11.30 am

Court resumes 11.46 am

Elias CJ Yes Mr Rennie.

Rennie I want to move now to deal with the essentially the proposition that the price is justifiable or capable of being justified within the context of a joint venture arrangement for development. And I particularly want to focus on the position of Mr Jones. The Court of Appeal held that the premium

could be justifiable within the context of a joint venture or similar funding arrangement but held there was no duty to make any inquiries about that. In my submission the position of Mr Jones is critical at this point. He is, as I have said, a trustee shareholder in Gustav. He is also a solicitor in a fiduciary position with Macfield. For there to be a completed purchase within the context of a joint venture arrangement there had to be a special resolution of shareholders. Very obviously that includes Mr Jones. He knows there is no special resolution. An inquiry of him into the joint venture arrangements is not, in my submission, confidential. It is a very easy step for him to take, particularly given Mr Leggat's involvement in that part of the contract and being a partner of his. Now occupying this mixed role, I say, I make two points in a nutshell. First Mr Jones had to know this knowledge, had to get it and when he got it he was

- Tipping J We must infer inevitably that he knew. He must be taken to have known.
- Rennie Yes Sir. Once he knows that he is then, in my submission, bound to disclose it, fully and frankly, to Macfield. But he doesn't
- Elias CJ I am still grappling with why it matters at all.
- Rennie Because if
- Elias CJ What is the consequence.
- Rennie Well if the conscience of Macfield has moved to the point where well I have got this premium but it is justifiable let's say I can accept it if there is a joint, if it is to be swallowed within a joint venture arrangement, and then in my submission there is a need to inquire into those arrangements. Here the inquiry would inevitably have led to there being, there weren't in place the joint venture arrangements that the Court of Appeal said might justify the price paid in this transaction.
- Elias CJ Is this argument though solicitors of the shareholders. Is it said that it was unconscionable for Macfield to act contrary to section 129 because of the shareholders' interest. I don't quite understand why it is relevant.
- Rennie If the Macfield position is moved to the point where they are taken to know that they are in a position of passively receiving a benefit in unconscionable circumstances. But
- Elias CJ What are the unconscionable circumstances you are relying on here. How does the section 129, is it 129?
- Rennie Yes Ma'am.

Elias CJ How does that impact, how does it augment any unconscionability or provide any unconscionability, if known.

Rennie Because the impaired judgment to this point is that of Mr Parkinson. It was a transaction that necessarily required the judgment of shareholders. The relevance is that if the inquiry had been made, it would have been established that there had been no judgment of the shareholders.

Blanchard J That is asking one party effectively to do due diligence in that respect of the other, isn't it? Which would be pretty unusual.

Rennie Well in a sense yes but the transaction from inception was going to require a special resolution Sir.

Blanchard J Yes but that is usually the business of the party that has to have the special resolution. It is not the business of the other side.

Rennie Except that the section is clear in its terms that there must be a special resolution. So it is of intimate interest

Elias CJ But who is that for the benefit of, it is for the benefit of the shareholders isn't it?

Rennie Yes

Elias CJ Well you are acting for the company aren't you?

Rennie Yes. I am saying that this was a transaction that always required a special resolution. If the conscience has moved to a point where there needs to be some inquiry into the justification of this price in terms of a joint venture arrangement then the special resolution mechanism is the obvious way to get there.

Tipping J I wonder whether this Companies Act point is really a bit of a diversion. Is not your real point that the Court should impute knowledge of the joint venture failure, if you like, failure to Macfield via Jones.

Rennie Correct, that's my, as I have said in para 22, it's the second.

Tipping J Well I would have thought, with respect, that that is, I am not at all sure that the Companies Act point features in that. But you can explore that. I think there are difficulties in that proposition but I don't think the Companies Act point really aids that proposition. You are saying that Jones was standing in the middle, he must have known that the joint venture was a fizzer, therefore his knowledge of that should be imputed to Macfield because he was acting for Macfield in the transaction.

Rennie Yes I

Tipping J Now that raises quite a significant point. But I don't see how the Companies Act point fits, unless it is deemed to be some sort of separate point, standing entirely on its own, I don't see how it aids the imputation of knowledge point.

Rennie No I agree with that Sir. I am more looking at the special resolution point. If, as the Court of Appeal said, there was a need to inquire into the arrangements, then what I am suggesting an inquiry might have been "have you got a special resolution".

Tipping J Well I have to tell you that I think this view of the Court of Appeal that there was some equitable duty to inquire is debatable to say the least.

Elias CJ Suppose they came out, so are you not arguing that the fact there wasn't a special resolution um is an unconscionable circumstance, because that is what I thought you were contending for.

Rennie No I am not saying it is an unconscionable circumstance.

Elias CJ Right okay well that is, thank you.

Rennie But to move to his Honour's Justice Tipping's point, I am allied to this saying in any event, Macfield is fixed with the knowledge which Jones has or ought to have.

Blanchard J Why?

Rennie He is an agent of Macfield, the

Tipping J Is a shareholder in Gustav, and an agent of Macfield.

Rennie Yes.

Tipping Now why should there be cross-over in those circumstances as a matter of policy for the purpose of the unconscionable bargain jurisprudence because imputation of knowledge depends very much on the purpose for which you are imputing the knowledge. It seems to me to be inimical to the whole conscience basis of the remedy, to say that you are deemed to have knowledge that you don't actually have and therefore your conscience should have moved.

Rennie No I am saying the conscience has moved to this point. I say the conscience moved on the factors I have been talking about.

Tipping J You mean Mr Jones' conscience is what we are talking about is it, rather than the directors of Macfield?

Rennie Correct, Mr Jones, I am focusing on Mr Jones here and I am saying as a matter of policy his knowledge, which he either had or ought to have had about the joint venture arrangements or indeed whether the shareholders had approved the transaction, ought to be imputed to Macfield.

Blanchard J But if he had knowledge, for example about the joint venture arrangements, he would have only got that because of some association with Gustav. Macfield was not a party to the joint venture arrangements.

Rennie I accept that Sir.

Tipping J I would be very reluctant frankly to start introducing an imputed knowledge doctrine in such a fashion that the actual state of mind of the contracting party is not what you are focusing on but that you say their conscience should have moved because their agent knew something which they didn't know and which frankly I don't think the agent had any business to tell them.

Anderson J Or ought to have known. It is imputed constructive knowledge.

Elias CJ Well does the agent know.

Rennie I beg your pardon Ma'am .

Elias CJ Does he know? You say Jones must have known. But I am not sure that Jones must have known. He is just a trustee shareholder isn't he?

Rennie Yes.

Blanchard J He probably hasn't even put his mind to section 129.

Tipping J They think of little else in Hereford Street.

Rennie Your Honours are correct. Mr Jones, there is no evidence that Mr Jones turned his mind to section 129 at all. There is also no evidence that Mr Jones made any inquiries into the MIP arrangements, on the record, that's right.

Blanchard J When was section 129 first raised in this case?

Rennie In the Court of Appeal.

Blanchard J So there is no evidence about the situation in either a resolution or no resolution in the High Court.

Rennie I think that is correct Sir.

Blanchard J Well how can you raise this point.

Rennie Well except that there was no special resolution.

Blanchard J How do we know? It was never, they were never asked, presumably, whether there had been a section 129 resolution.

Tipping J We need a factual finding by the trial Judge that there was no such resolution.

Rennie I accept that Sir. I will have to look through the record. I am fairly confident you are right Sir, there was no

Blanchard J Well you can't raise the point, you have got no evidence. It is a bit rich to challenge them now in an appeal court to produce a piece of evidence that they weren't asked to produce, weren't asked about at all, in the High Court.

Rennie Yes Sir but I am assuming that I have moved the case to the point where in good conscience Macfield cannot retain the bargain. I am saying in order to cleanse the conscience some inquiry needs to be made, the onus being on Macfield to do that not me.

Blanchard J But we don't know what the answer would have been if an inquiry had been made.

Rennie I accept that.

Elias CJ And even if the answer is that no special resolution was entered into, surely that only shows that that is another bit, that's another reason why Jones didn't know that the joint venture was a fizzle. I don't understand how it is causative or material, if there isn't a joint, a special resolution.

Rennie Can I, I can't move the special resolution point any further than I have on the evidence and the observations the Court made are correct.

Blanchard J Well I think we should forget about section 129. It just doesn't come into the appeal.

Elias CJ Well I don't see how it could even if there was evidence.

Tipping J Well I shall settle for the first point.

Elias CJ It seems a total red herring.

Rennie I want to round off this point by talking, by saying that in my position is that Jones' knowledge, if the price or the transaction is somehow justifiable in the context of a joint venture arrangement then Jones knows or ought to know that those arrangements aren't in place and therefore can't justify the price.

Blanchard J But what Jones knows about a joint venture is something which he is not free to pass onto Macfield. How did Jones know about the joint venture?

Rennie Well he knows about the joint venture because his partner is involved in

Blanchard J His partner is advising the joint venturers, such information as he, well it didn't include Macfield.

Rennie No, include Gustav.

Blanchard J Yes, so he is advising Gustav and I think it is IMP about the joint venture. But what Mr Leggat learns while he is giving that advice is confidential to Gustav and MIP, he is not at liberty to tell Macfield about it. He may have a conflict of interest having acted on both sides but he is not at liberty to tell them and even if it is said well he had a duty the other way, he may have been caused to breach his duty to Gustav and MIP but he should have told Macfield. I, like my brother Tipping, would think it is very artificial to say that, for the purposes of unconscionability the conscience of Macfield, they should be deemed to have that information.

Rennie But well then in reply Sir Jones should not continue in the transaction.

Blanchard J Well that is probably true but he did.

Tipping J There is a very salutary decision of the House of Lords recently that says if you get yourself into this sort of bind, where you are bound to be breaching your duty to one party or the other, that is your problem for having got into the conflict. So I only throw that in on the basis that the remedy is not to assume that someone is going to breach the duty, a duty that arises where you have got conflicting loyalties.

Blanchard J But at any rate it would be very strange if, when considering what should have weighed on somebody's conscience, you impute to them knowledge that they didn't actually have, and that their agent was not supposed to tell them about.

Rennie Well the point I make in response to that, it is also strange that that conflict should in some way will allow Macfield effectively to hide behind it. It is knowledge Sir which is, which Jones has or ought to have. It is inconvenient to Macfield because it gives the answer to the inquiry that they should have made.

Blanchard J Well I am not sure I accept that but, just pursuing it a little further, is there any evidence that anyone from the Macfield side other than Mr Leggat had any knowledge about the position of the joint venture, as at 23rd of January.

Rennie There is no evidence of that.

Blanchard J And what did Mr Leggat know, other than presumably the draft document that he prepared hadn't been signed, did he have any knowledge about whether MIP were having second thoughts. Because I have the impression, and you will correct me if I am wrong, that as of that date MIP still looked as though they were going to conclude some form of joint venture.

Rennie They were working towards concluding that Sir.

Blanchard J And that at most Mr Leggat would have known that it hadn't actually been signed up but that MIP was still in the picture.

Rennie Yes and I would add to that Sir by saying also that MIP were focused on the Oxford portion of the property which was capable of immediate development and not the larger leased area. Mr Leggat certainly knows that as well.

Blanchard J So it still looks as though at that point there is likely to be a joint venture and the development will in some form be able to proceed.

Rennie I would suggest that the evidence didn't go that far.

Elias CJ But hope is a very big part of all of this isn't it.

Blanchard J Well it seems to me that Leggat wouldn't have known anything that was absolutely crucial at that date. In other words, he wouldn't have known something like that MIP had just torn up the paper and walked away. And, in any event, what Leggat knew was confidential.

Rennie Leggat knows that there are no arrangements in place to satisfy payment of the purchase price. The MIP, if that is the justification for the price, then there are no arrangements to meet it.

Blanchard J Okay, well you can't take that any further.

Rennie I cannot no.

Tipping J I don't want to prolong your submissions beyond what you want to do Mr Rennie, but I am intrigued by this suggestion in the Court of Appeal that there is a duty to inquire. As you able to give any support for that idea in the case law, either in relation to commencing, entering into a bargain or during its course. I can conceive of some circumstances where you are on sufficient notice of various things that it might be prudent to inquire but an equitable duty to inquire I find, and I am not quite sure the status of this inquiry thing in the Court of Appeal anyway, whether it was just a prudence obligation or an actual equitable duty, so that if you fail you are deemed to know what you would have found out if you had inquired. Are you able to give any sort of succinct help on that aspect of the case.

Elias CJ Does this all derive from the principles discussed by Peter Gibson J and Barden, is that where it comes from?

Rennie I don't think believe so Ma'am.

Tipping J I think it comes perhaps from the more underlying feeling of that you have constructive notice in some circumstances where equity casts on you a duty to inquire.

Elias CJ Yes, that is where I think it is from.

Tipping J But I am not sure whether it is actually one of the five Barden.

Elias CJ It is.

Tipping J Is it, is it.

Elias CJ But how does it meet unconscionable transactions.

Rennie There is your Honour, there is some reference in the authorities, a suggestion of a duty to inquire, I will, it is not springing out.

Tipping J Is there. Well perhaps subject to Mr Matthews you could just note, without elaboration, later in the day, you could note where the authorities are for me if you wouldn't mind, because I see this as one of the quite significant general points that seems to emerge from the Court of Appeal. The only other one which I think is of importance generally, is this akin to an option point, which we have dealt with.

The Chief Justice is just perhaps sharing that I may be on the wrong track Mr Rennie, because at para [86] of the Court of Appeal, they seems to actually come down in the end of the view that equity would not require Macfield to make further inquiry. So I don't quite know where that leads us in relation to some of the other discussion on the question of making inquiries. Thank you I hadn't noticed that.

Blanchard J What page is that?

Elias CJ 101.

Rennie Your Honour I think I am right in saying that there is some authority that talks about a duty to inquire and I will see if I can track that down for you.

Tipping J Well perhaps, you might like to bear in mind para [86] of the Court of Appeal's judgment too, which the Chief Justice has kindly pointed out.

Elias CJ In making para [85] they are making the point made by Justice Blanchard about confidentiality.

Blanchard J Actually I wondered about that date of early January because I think Mr Leggat was at a meeting on the 15th. Do we know whether he had any involvement with Gustav and IMP after the 15th of January.

Rennie Yes I can find that for you my friend or correct me if I am wrong but there were negotiations. The negotiations in which Mr Leggat was involved continued after the date of confirmation.

Blanchard J Ah what about the 15th and the date of confirmation.

Rennie I will have to search for that for you Sir.

Blanchard J Because what he discovered after the date of confirmation is not relevant.

Rennie My learned friend and I think we are right in saying to you Sir that the answer to your question was there was no evidence of his involvement between the, in those MIP arrangements, from the 15th to the date of confirmation. There was a two day meeting subsequent to that.

Blanchard J What was the upshot of the meeting on the 15th?

Rennie The upshot was, I think again I am right in saying, was that Mr Leggat then prepared a draft joint venture agreement.

Blanchard J So all he would have known by the 23rd, was that that joint venture agreement hadn't been signed?

Rennie Well yes he knows that. I think I am also right in saying Sir that he also knows that consequentially there are no funding arrangements in place to meet the purchase price.

Blanchard J But he doesn't know that MIP might be thinking of walking away, for example.

Rennie No. The Chief Justice has captured the assessment of this, it was a hope. It remained a hope. Now, just looking over my notes, I think I have covered, the Court has covered with me, the critical points that I wish to address. Unless the Court has anything further of me, I don't have any further submissions at this point.

My friend has just given me a reference that your Honour Justice Blanchard will want. Volume 4, 25.

Blanchard J Volume 4?

Rennie Page 188.

Blanchard J And what's that? It is Leggat's secretary sending Parkinson the joint venture agreement which follows. And that is on the 14th. But I think he was at a meeting on the 15th.

Rennie Yes.

Blanchard J Yes thank you.

Rennie Between us Sir we think it might have been the 13th, was the meeting, and that is because those in Mr Leggat's notes at volume 5, page 254.

Blanchard J So on the 13th there is a meeting discussing a proposed joint venture. On the 14th he prepares and sends over a joint venture agreement and

Rennie On the 15th there is a meeting involving the MIP people, and the reference for that is Volume 3, page 96.

Blanchard J And Leggat was at that meeting, is that right.

Rennie Yes.

Blanchard J But there is nothing after that prior to confirmation.

Rennie I don't believe so Sir but I will continue to look through the record. If I can find anything on it I will let you know.

Elias CJ Yes Mr Matthews.

Matthews If your Honours please. On the first issue, which is a legal point about the correct date at which to make the assessment of whether the transaction is unconscionable or otherwise, I have in my filed submissions set out that argument in quite some detail and in that submission I have referred to all of the cases which I have been able to locate and I have, as I indicated in that submission, looked at the matter quite extensively and set out the argument in some detail. For the purpose of delivering oral argument on it, it had not been my intention, unless your Honours wish me to do so, to take you through that on a line by line basis.

Elias CJ That is fine Mr Matthews.

Matthews Thank you your Honour. The crucial aspect of it is that the case has used this phrase “active extortion” which we are not talking about here but “passive acceptance” is the bit that has caused the interpretation problem upon which the appellant has found its case at three levels. My argument against that is well set out. When I say well, probably not but fully set out is what I meant. It stems back all the way to the *Earl of Aylesford v Morris* which is referred to in *O’Connor v Hart* and it works its way through *Blomley v Ryan* and into *Bowkett v Action Finance* and leads into a number of other cases which I have summarised in some detail.

And I have been quite unable to find any case at all where the proposal that the date of confirmation should be taken as the date for application of the criteria has had even any mention or argument, let alone found traction until this litigation.

Anderson J The idea of passive acceptance might work at the time something like a contract is performed, or even where there is no contract, but acceptance of a gift, when it is in one’s power to say no.

Matthews It is, and again it is at the time the transaction if you like a gift is made. But the point which the Court has canvassed at some length from all the Judges this morning has really said all that I can say on the point. And, as I have indicated too, in the *Bowkett v Action Finance* case Justice Tipping said out some indicia without in any way trying to set out a prescription but every one of those is consistent only with the determination at the date of the contract. And again I have given the reasons for which I make that submission in some detail.

Tipping J I think the concept of passive acceptance has got to be read with the headline concepts of victimisation and taking advantage. In other words, it just can’t be extracted as a sort of test in itself. It simply shows that you

can victimise or take advantage of someone without having actively extorted the benefit.

Matthews Well you could for example being a bank who hadn't teed up the elderly mother's guarantee as it were, they just said to the lender well look if you have got a guarantee for this loan because you are looking a bit shaky on your own, oh yes my mother will do this, she would love to, and the bank says well look that's up to you but with a suitable guarantee we will lend the money. They have never extorted it but they have passively accepted it. And of course there are cases where those situations should be set aside. Very much dependent of course on the level of knowledge that the bank had. And that is the passive acceptance, that is the quintessential passive acceptance situation. And in my submission

Tipping J Or someone comes in offering the guarantee, and it would be unconscionable to accept that offer. But you do.

Matthews You do, in the circumstances where you know enough about them to know that they don't know what they are doing.

Tipping J Do you agree or not Mr Matthews with the proposition that one, the concept of passive acceptance must still carry with it some connotations of victimisation or unconscionably taking advantage of something that is offered to you.

Matthews Yes I do agree with that, that has got to be right. Otherwise the doctrine founders, that's the whole foundation upon which the whole doctrine was initially based. And naturally it had to cover not just active extortion in order to allow equity to be brought to bear, as it were, in circumstances like this, where it could be equally contrary to conscience to go ahead with the transaction, as it would be to be extorting it in the first place.

Elias CJ It is a rather odd notion um to look at the payment of the deposit as the transaction. I just wonder whether really the case has sufficiently concentrated on what the transaction is here.

Matthews It has certainly concentrated on it in a lot of argument in front of a lot of forums Ma'am. Yes I accept that it would be odd to say that that was accepted so the transaction because it is not. It's merely the transaction continuing to take its course. And the Court has quite fully canvassed with my learned friend the fact that at that point there was nothing whatsoever that Macfield could do about it. Save, put itself, as I have said in the written submissions, palpably in a position of breach of contract. And then take it from there.

Tipping J Well what you would do, I suppose, Mr Matthews in order to avoid being in repudiation, assuming that there is some currency in what Mr Rennie suggests should be done, you would say well actually I am going to perform if you insist but I really don't think it is in your interests to assist. You wouldn't be in repudiation because you are not unequivocally declining to perform but it implies some duty to offer not to go ahead. That is where I am starting to get stuck. Does equity lay that duty upon you. Unless something has happened between bargain and performance, super added if you like makes it unconscionable, you can hardly just perform a bargain that wasn't unconscionable at the outset. That can hardly be unconscionable.

Matthews No that is precisely the respondent's position, it has been throughout. And that is why the respondent's evidence and cross-examination of the plaintiff's witnesses at trial was, as the Court may have observed, directed at this question of what Macfield not only did know but also was able to find out. What was there there to observe because what Mr Parkinson was doing was exhibiting himself mentally as being completely with it, if I may use the vernacular. He was frail certainly but, for example, my friend has mentioned the boulevard meeting which, from memory, was on the 18th of December or thereabouts, some four or five weeks before confirmation. Yes he was frail, he had been to treatment at the hospital and come to the meeting in Oxford Terrace. But he was sharp as a tack, I think was the phrase that was used in the evidence. And the evidence of everybody who was at that meeting was given in the Court. And to a man they said he was okay in the head.

Tipping J What meeting are we talking about Mr Matthews?

Matthews The boulevard meeting. And that was quite crucial because that was the only face to face meeting between one of the directors of Macfield and Mr Parkinson where business matters were discussed during the whole contract and confirmation period. And although he was frail and yes he was wearing slippers, but the evidence was he was as sharp as a tack. And it is not correct, with respect to my friend, to say that the inference about him being mentally frail can be drawn from the way he physically appeared. And I am sure the Court can accept that that's the position.

Tipping J Was that the only occasion on which Mr Parkinson came into face to face contact with either Mr Butterfield or Mr McKenzie.

Matthews Yes Mr Butterfield can be discounted at once. He had never met Mr Parkinson throughout the whole thing and nor for some years before and from my recollection I think he said he vaguely recalled meeting him some years before. But he played no part in it whatsoever. Mr McKenzie did see him occasionally in the foyer of the building. They both had

offices in the building which is directly across Armagh Street on the corner of Armagh and Colombo from this and occasionally he sees Mr Parkinson in the foyer, did not talk or pass the time of day, sort of hello David, that sort of pass the time of day stuff. This is the one meeting which did occur. It was called for the specific purpose of discussing the problems they were having with obtaining an Environment Court decision about building heights in Victoria Square. And we had Matthew Watson, the solicitor from White Fox who was advising all the building owners on this height problem and had done the Environment Court hearing. We had Mr Parkinson, Mr McKenzie, and we had a consultant who was to advise them on how they might subtly but significantly bear some pressure on the Court what was the best channel of communication to the Court to try and get this judgment which was holding up consideration of issues on a number of fronts. His name has escaped me for one moment but I am sure Mr Clay will remember it at any moment and I can tell you who it was.

But they were all there. They all gave evidence and they all said Parkinson was, in their own word, fine mentally. But looking frail. Now that is significant because the whole issue here is that the man was exhibiting himself to be quite different from the way that he was described as being by Professor Robinson. Clearly he was under an intensive and adverse pain and treatment regime which was causing him difficulties. And his cancer of course was advancing unhappily at a rapid rate. But he was, to all intents and purposes, performing extremely well. That is the way Professor Brigit Robinson was cross-examined and that is why she said that it would be quite possible for him to portray himself or exhibit himself in certain ways on some days. Because one was faced with fourteen people in fact who saw him and dealt with him on a professional level during the contract confirmation period, to a man, there was one woman in it, to a person said he exhibited himself as being absolutely fine.

Tipping J You are very cautious Mr Matthews.

Matthews I'm in slightly unfamiliar territory your Honour. Um

Tipping J You are saying there are fourteen people.

Matthews They said he came across absolutely fine. The guy's name was David Lynch, that is the other evidence. He too was at the boulevard meeting, he was the public relations consultant who knows about things how to lobby about, how to get judgments apparently.

Tipping J That is a very useful skill. **[laughter]** What court are we talking about?

Matthews Environment Court Sir yes yes.

One could take advice on how to do these things.

Matthews That is who was there at the meeting. Now there were fourteen people in total who dealt with him. And they ranged across a lot of people. For example, there was Hugh Matthews, yet another partner in White Fox & Jones. Parkinson rang him up during the New Year break at home and said I want to have a look at these leases, how do I get them, He went into the office on whatever day it was New Year's day or some such, I forget which but over the break, got the leases and took them around to Parkinson's house, because he didn't live far away, gave him the leases. I mean they were just there in their sort of shirts and tee-shirts stuff, didn't have a chat about them to any great extent, but said there they are, you can have a look through them yourself. And he said thank you very much. The evidence was I think he showed him his new motorbike that he had just taken delivery of or some such. That was Matthews.

We had a woman called Jan Spinetto. Jan Spinetto was with a firm called Thompson Wentworth. Thompson Wentworth was a letting agency who were employed by Macfield to deal with the leases on this property because there were quite a number of them, 8 or 10 of them I think from memory. Jan Spinetto dealt personally with inquiries from David Parkinson and answered his inquiries and gave him information about the building. He said he appeared to be absolutely fine. And I could take you through the whole of them. I am sure it is slightly off the track because my point is that in terms of Macfield, what did it know, behind the question of what did it know is also the question of what could it know? Because frankly if it had rung anyone or inquired of anyone of all 14 people who had anything to do with him at all including frankly his wife, they wouldn't have found out any more anyway. Because there was no indication coming out in the public forum anywhere than he was other than operating, as I think Mr Thiele put it, he had all his ducks in a row. I think that was Mr Thiele's, I've quoted the passage in my main submission.

So behind the question of what did they know is the question of what could they have known if they had made this inquiry of which we have been having some debate this morning.

Well I have drifted a little bit off the legal point I have to confess. Um but I, unless the Court wishes me to go to any specific aspect of the legal point, I don't have anything at this point which I can usefully add to the material which I have set out quite fully. Because this is a fundamentally important point as I think your Honours have observed in argument with Mr Rennie, that if the Court of Appeal judgment was to stand on this timing point this is an issue of some very, great significance for the commercial community and the legal profession because this is going to cause all sorts of interesting inquiries. For example, where you have a

director, a sole director of a company who, between contract and confirmation, has let's say a motorcycle accident and then becomes brain paralysed or for that matter dies. What is going to occur.

It is important I think to try to set aside the connotation that the Court of Appeal put, with respect, that this was a one man company. This was not a one man company. This was a family trust investment company which one man ran. But it was very clear that from the evidence that his wife knew a lot about what was going on and of course the day after he died I think she was instated as director. And remained there for the subsequent months that this transaction was involved. So it wasn't a man one company. The trusts were represented by two independent professionals, an accountant and a lawyer, both of whom gave evidence and both of whom gave an indication to the Court that they had no concerns with Mr Parkinson's mental acumen during any part of this period.

Mr Jones, the other man, who didn't feature much at the trial. The other trustee and I will have his name for you in a moment, he said that he was surprised

Tipping J Brown.

Matthews Brown, thank you Sir, that was the one. He said that he was a little concerned about the transaction because this was bigger than he had done before but he was unaware, and crucially because he was specifically asked about it in cross-examination, he was quite unaware that there was a negotiation for a joint venture going on. So whether he would have had the same concerns had he been fully in the picture, we don't know. But neither they nor Mrs Parkinson were sufficiently concerned about Mr Parkinson to be taking any steps.

So to get back to what I was submitting about the commercial ramifications of this, you have a company in fact which is an investment company owned by two trusts, with independent trustees, which through the governance of its single director, makes a contractual commitment. If Macfield were then to say well I'm sorry but I gather that you have now got mental difficulties and we are not going to go ahead with this, the trustees would have certain rights which are self evident to replace the director and say well I am sorry but we not having that. And any semblance of commercial certainty in the contractual position in companies like this, which frankly I am sure the Court accept are dead standard arrangements, would fly out of the window. So there is actually a very serious issue at stake here quite outside the parties. And in my submission

Blanchard J That was why leave was granted.

Matthews Quite so Sir and the prime ground for that of course was this precise point. And then I, we could I'm sure everyone of us sit here and think of examples of the difficulties this would cause but in my submission it is not incumbent upon us to do this. The crucial thing is that there is absolutely no precedence for it. There is in my submission a principle for it and it is plainly wrong, with greatest respect to the Court. So

Anderson J Apparently excessive consideration is not crucial to the concept of unconscionability either. You have a contract on one thesis that, where the consideration is perfectly adequate each way. And on the approach of the appellant here, the person in the position of Macfield would be obliged to take steps to repudiate. There is grave danger for it.

Matthews It certainly does Sir. Every day of the week, I dare say every hour of the day, contracts were entered which do not align the valuer's views. Macfield simply was quite blunt about it and said we just don't share the valuer's view, period, that's the money we want for the land, if we can get it fine, if we can't fine too, we will hold onto it.

Anderson J Well that is a feature of development isn't it. People see the opportunity and exploit it. Others don't see it and miss out.

Matthews And don't. And that is exactly the view that these two very experienced property developers and investors, McKenzie and Butterfield, took of the matter. So they gave it to Thiele on the basis that we will see what you can do, that's what we want for it, if you can get it that's fine and that Thiele said quite candidly there are only a certain number of people in Christchurch with the financial clout to be able to rise to an offer like this, and he gradually went round them. I think that my friend might have said or implied this morning that he had gone round all of them before he got this contract. My recollection of the evidence without checking is that that is not quite right. Because it was certain in the evidence that he was to show a Mr Hutton the property on the very morning that the contract was finally signed up and he was cross-examined about why he was going to do given that the contract had been signed up. So certainly at least one of the ten, at any rate, was in behind Macfield. Also the fact that no-one bought it. The absence of evidence from every single one of them no inference can be drawn that they didn't buy on the grounds of price. For all we know, they might have thought it was dirt cheap but certainly didn't any cash. It is a lot of money.

However, I am straying and rambling a little bit off the track. And where I was going back to was this whole issue about the timing and the principle about it and the commercial ramifications of it remaining the way it is. And I don't.

Tipping J Can you just help on one point Mr Matthews. Where did this idea of akin to an option come from. Did that just appear in the judgment.

Matthews It appeared in the judgment. It was not mooted in argument. And to be frank your Honour I haven't established to my satisfaction quite what was meant by it. The analysis I did of it was that in any event it was twofold, first that a highly confidential contract was, sorry an option was in fact a confidential contract as far as the vendor was concerned.

Tipping J Because there is an assumption behind the proposition that an option would be different. That is where I think in part the problem lies. That if you can show that it is like an option you are home. But that doesn't follow.

Matthews No and it doesn't for two reasons. The first one is the one that your Honour raised this morning which is the fact that an option is in any event a conditional contract so far as the vendor is concerned or the grantee of the option is concerned, the two are akin in terms of the land owner's position. And the other one is the base which I have set out in a little bit more detail in my argument.

Elias CJ But the transaction is entered into when the option is exercised, that is the difference.

Blanchard J Not from the vendor's point of view.

Elias CJ No no I understand that but in any event the transaction is entered into for both parties at the time the option is exercised, the vendor can't withdraw from it. Um but

Matthews Unlike a right of first refusal Ma'am, it doesn't require any action on the part of the vendor to trigger the right to exercise the right of first refusal as it were. The vendor was completely silent on the whole subject and receives a letter through the mail I now exercise the right and that's that. And like a confirmation the contract is stuck with it.

Tipping J But you have in substance conditionally bound yourself to sell, the condition being the exercise of the option.

Matthews Yes that's exactly it. That is precisely it and that I think is no doubt the thinking behind the fact that a caveatable interest in land is created, just to completely divert you for one second, by an option. Because you have got an interest in land that is yours for the taking, as and when, provided you comply with the terms of the option.

- Elias CJ Which is the, sorry I just want to go back and have a look at what the Court of Appeal said. Which is the paragraph or paragraphs you particularly object to.
- McGrath J Page 90.
- Matthews It is the finding by the Court about the timing, and it will just take me a moment to
- Tipping J It is para [48] isn't it, at the top, this is where the akin to an option passage appears anyway.
- Matthews Yes, there is
- Tipping J And it is introduced by "second this approach best reflects the reality of the contractual position", which is an interesting concept.
- Matthews Well it is your Honour and not one with greatest respect to their Honours to be encouraged because the commercial community really, in my submission, can't function like that. As I said in my submission quite succinctly they could have entered an option, they did enter a contract. The fact is of course that by the way it would have made no difference, for the reasons I have just been debating with your Honours. But the passage your Honour that I object to, it starts at [45]. The first point to be considered in relation to Mr Parkinson's condition is the time at which it should be assessed – at the time the contract was made or at the time the contract was confirmed. In the circumstances of this case we consider the Judge was right to take the latter as the relevant time and they say so for two reasons. First they rely on *O'Connor v Hart*, and then they went on to say that it was an option.
- Now in the written submission I have gone through *O'Connor v Hart* and *Contractors Bonding v Snee* as an opening point, not because chronologically they are the first cases but because the Court, with the greatest respect, didn't interpret them in my submission correctly. For example, in *Contractors Bonding v Snee*, Justice Richardson, who is cited here in para [47] specifically said that the correct time is the date of the contract, and that is in my written submission at
- McGrath J So his observation about unconscientiously receiving or retaining the bargain has to be read in that context does it?
- Matthews In my submission your Honour this concept of retaining the bargain is a timing point.
- Tipping J Receiving or retaining is actually the same concept.

Matthews It is, it is a question of whether you are challenging it before you get it or when you have done it. Well Macfield was allegedly retaining. If they had been challenged injunctively in advance, they might have been prevented from receiving it. It is a timing point.

McGrath J It is a timing point but the timing is the time that the contract is entered into rather than in this case when the option is exercised, you want to call it an option.

Matthews That is certainly my submission. The citation of Justice Richardson is mentioned at the top of page 6 of my submissions, and it is at page 174 of the judgment. "The fairness of the bargain must be considered at the date it was made." So, with respect to the Court below, the very case on which they relied, one of the two cases on which they relied specifically, said the dead opposite.

Tipping J Well to be fair to Justice Richardson, he has been misinterpreted.

Matthews Yes he has. In his earlier passage.

Tipping J Yes.

Matthews Yes that is exactly it. He was, in my submission, quite clear in that earlier passage what he meant and if there was any doubt about it at all then the later one, which I have cited, has got to be seen as part of the same subject.

Blanchard J Yes well I think when the Court of Appeal in this case came to make its observation about akin to an option, they were really looking at it from the wrong perspective. They were looking at it entirely from the purchaser's perspective and from the purchaser's perspective it did have, because of the width of the condition, something of the aspect of an option, although not legally so. But what they should have been looking at is the perspective of the vendor. Because it was the vendor's conscience that was under consideration.

Matthews That is my submission precisely Sir and I think there is a real danger too, if I may just broaden the argument to some degree by this statement remaining in law, it is at para [46], in the circumstances of this case we consider the Judge was right to take the latter as the relevant time. With respect to their Honours this is a matter of principle, it's not a matter of circumstances of the case. And that is tricky from the point of view of a conveyancing lawyer because that is going to, should that stay in the law, cause difficulty, for self evident reasons given the debate that has passed this one.

McGrath J At para [50] it is starting to compound the difficulty isn't it. It is now speaking of Macfield ultimately being advised to accept the confirmation which is of the contract and whether further inquiries might be made prior to and now we have got the notion of full acceptance, which is really getting away from the unilateral nature of the of confirmation of the contract.

Matthews Precisely and that is not just the way the law is. It is unilateral and I mean I have tackled it more broadly in my submissions, as your Honour will have observed, because I have seen it is a question of what inquiries and of who. And one could advance that further. What will they have found out because the High Court had evidence from every single person from whom they might have made inquiries and a great deal from whom they wouldn't have made inquiries and every single person said as far as we are concerned he was absolutely fine.

I would ask the Court to have a look at a document in this context if I may, it is mentioned in para 33 of my submissions but it is in the bundle, case sorry, page 5, volume 5 page 42 and 43. This goes to the heart of the knowledge that Mr McKenzie had, who being the only director with any knowledge at all. This is an email from David Parkinson to Shanlon. Shanlon was the email address of Mr McKenzie who, on the 16th of January, was away on holiday and this was I believe a receive facility on a boat. And if I could just direct you to, perhaps I could invite the Court to have a look at that and particularly the second to last paragraph. "Ian I know we have been over the issue". Now that gives Mr Kenzie, gave Mr McKenzie, if one could put it this way, the clearest possible indication as to David Parkinson being and you can slip into the vernacular, but it is accurate commercially switched on knowing what he is doing, dealing with the issues and on a number of fronts, first of all deposit, secondly settlement and thirdly, and given that the emphasis placed in two or three respects by my learned friend on value, gives an indication of where he had reached in his own mind, despite having independent advice from a valuer, and the Court will also have read, because I have directed you to it in my submissions, the email that he sent back to the valuer indicating to the valuer that he didn't really need him to take the point any further. So he really

Tipping J Mr Matthews, just for completeness, let's assume this had been the other way round and McKenzie was trying to impose substantially more onerous terms on Gustav, then I imagine one would say that the unconscionability of that variation ought to be assessed at the time when that variation that, as it were, makes the transaction more onerous.

Matthews Without question.

Tipping J Yes.

Elias CJ Well I am sure that it is right or accurate to be speaking in terms of the transaction. I think there are different transactions. At that stage you would be talking about the transaction which is the variation.

Matthews Um there would be, it would be a novation or a new, it is a variation which has, as I understand it, the need to be supported by consideration. It amounts in effect to a new contract ...

Tipping J Well I am trying to get out of any astute later arguments that whether this was a variation or a new contract or a novation and so on. I am just saying that if the terms of the transaction as a whole, if you like, materially changed to the detriment of the weaker party, one wouldn't be foreclosing on the proposition that at that time you would assess their ability to accept the more onerous proposal.

Matthews That might depend, with respect your Honour, that's supposing that the contract was subject to the price being as per a valuation that was agreed back in October and in January through came the valuation, it was \$16m. And then the purchaser said yes I will go ahead but has stuck another \$4m on the top. Again though it is a pre-agreed formula back at the earlier date

Tipping J But that wouldn't be a variation.

Matthews No, it is not a variation but the way you are putting the question to me, with respect Sir, you said any modification of the contract or such, it would be very necessary to be precise on the fact that the actual

Tipping J I accept that immediately Mr Matthews. If there is a formula which it takes the price. It is quite different.

Matthews Quite different.

Anderson J That is not really all that relevant here is it because there is an unconscionable variation and you set it aside and you get back to the original contract.

Elias CJ But it does also mean that if the, it doesn't so highlight that the original price really needs to be assessed in its own terms, because there is no material different transaction at a later stage.

Matthews No.

Elias CJ It is only, the variation would have to be in terms of the substance of the variation, that would be the material transaction.

Tipping J It would have to be something that was materially more onerous.

Matthews Not necessarily price.

Tipping J Not necessarily price.

Matthews But it is a variation and if it revolves the conscience of the vendor at that point then the whole issue is up for re-consideration but of course it is not, but in terms of as it were trying to give it a definitive statement on this, I accept that argument without hesitation.

Elias CJ I don't think the whole issue would be up for reconsideration. I think what equity would then do is set aside the more onerous terms.

Matthews Possibly so.

Elias CJ And that is perhaps the answer to this concern about supervening creep, supervening events.

Tipping J Well this is entirely without prejudice to remedy, I am simply talking about the capacity to look at it again if there has been some supervening conduct on the part of the vendor here, which might be said in itself to introduce an unconscionable element. I don't think we would want to lay down a rule that you can never look at it beyond the date of entry, because contracts do get changed.

Matthews Well if the Court was going to proceed in that way, could I respectfully suggest that it would be very necessary to set that pathway up with clear parameters, because there is a real issue of commercial certainty at stake here in this case. And it certainly if it involves conduct on the part of the vendor, it has got to follow. But

Tipping J And it has got to logically to make the transaction if you like materially more onerous than what it was before. I wouldn't foreclose on anything but there has got to be something in the supervening situation that is capable in itself of making something that was not unconscionable before into something that is now unconscionable.

Matthews And we can speculate on the way in which that might occur but it wouldn't be helpful. It would be fairly unlikely and unusual, one would suggest, but who knows.

Tipping J I just think an absolute is not wise in this field. You never look beyond the date of the initial entry.

Matthews Because it is a new contract in effect, so you can't exclude the new contract.

Tipping J Well I don't think we are on a different wavelength at all Mr Matthews.

Matthews I am sure we are not Sir, I am sure we are not. That probably gets me to the next issue which really is to have a discussion with the Court about the value issue to the extent that you wish me to do so. Again I have covered it in some detail because again although there has been some emphasis on Mr Harris' view and the other valuer's written report about what the market value was, that was by no means the beginning and the end of the evidence, and I have covered it in some detail in my written submission.

Tipping J I personally wouldn't need anything other than what you thought it was desirable to add in the light of what has transpired so far this morning.

Matthews Well I can certainly

Tipping J I don't know whether other members feel the same way.

Elias CJ There are no additional references you want to take us to Mr Matthews.

Matthews I did make a note, I wonder if I might just take up a couple of moments.

Blanchard J Which page of your submissions are you at.

Matthews The valuation matter Sir is in the written submissions, it is my para 28. And it is also very well, well again a qualitative remark I am sorry, but fully described by Justice Hansen in the judgment in the High Court, starting at para [21] and go down to para [44], there was a lot of evidence about this issue.

Elias CJ Where is your para 28?

Blanchard J 23.

Matthews 23, page 23. I should indicate your Honours that I found to my horror in my final preparation for this case over the last few days that I had two page 20s, so this was not prepared by me personally, it was done by a contract publisher and if the photocopying is

Blanchard J I have only got one.

Elias CJ That is what you should have.

Blanchard J I hope I have got the good one.

Matthews Well I am just concerned to think I might have had somebody's else so to speak but anyway it is at page 20, and if I could invite the Court to consider the judgment of Justice Hansen at [21] to [44] because he canvasses at some length the evidence of Mr Udale and Mr Gibb from MIP, Mr Doig who is the general manage of Colliers Jarden who played no part in the transaction but put Mr Parkinson in touch with MIP to make the joint venture, and that evidence is that the value is not really quite as widely diverse from the sale price as is suggested.

Tipping J The premium not as great as

Matthews The premium is not as great. It is described as a million or two high. I think the way Mr Udale put it, in the context of a \$100m development it is neither here nor there and it is readily absorbed. Justice Hansen summarised that evidence with some care, and I would just suggest to the Court, if I respectfully might, that that is a good starting point because it is quite misleading to just pull one single element of the valuation or the value evidence out on a thread. Over the lunchbreak Ma'am I might take up your invitation to indicate if there is anything else I want to say about value, I don't think there is but I will just review the notes if I might.

Elias CJ Yes thank you Mr Matthews. We will take the lunch adjournment now.

Court adjourns 1:05 pm

Court resumes 2.17 pm

Elias CJ Yes thank you.

Matthews Your Honours please before the luncheon adjournment I indicate that I wished to take a moment to check whether there was anything else I wanted to say on the value issue and there are just a couple of points on that before I close on that point. The first was to respectfully take issue with para 34 of my learned friend's submission. He said, at that para 34, that the critical factor which the Court was not going to take into account was that it was only the respondent who knew of the substantial premium, as he described it. That, with respect, doesn't accord with the evidence if it is intended to be reflective of the position as at January. Certainly as at the date of the contract the only party who knew of it was the respondent but by the time the January date on which the appellant relies came round, not only did Mr Parkinson have independent valuation advice which he had dismissed, he had also discussion it with Mr Doig of Colliers Jarden and he had had the input of Messrs Udale and Gibb, all of which was given in evidence. So by the time the date for which the appellant contends came round that is not just the position on the evidence but it is of course correct as at the date of the contract.

Secondly, on the valuation matter, there is a document to which I would respectfully like to draw the Court's attention and it is in Volume 5 of the case at page 103. It is an email in which David Parkinson himself sent to Martin Udale, who was the general manager of MIP, on the 5th of December 2003. It was relatively early in their relationship and he headed it "Overview". But it is telling, and in para 6 he talks about the best residential apartment site is the Victoria Square development on Armagh. Now what that is your Honours which came out in evidence but might not be apparent to you at this point is that is the development that Mr Parkinson and his wife and a couple of other developers, investors were involved in, in building a high-end residential apartment complex in Armagh Street on the other Victoria Street frontage and again, if your Honours are familiar with Christchurch, you will have observed that that apartment complex has been put on what was used to be known as the old Farmers site, about two-thirds of the old Farmers site. Now that is a Parkinson development and David and his wife were engaged in that at the same time as this negotiation was going on. And of course Macfield was well aware of that. So that is a piece of knowledge about the sort of clout, if you like, of the Parkinson property development which they would have had in their minds when they agreed to this contract. But, for present purposes, it is referred to in para 6 of this document, "in my opinion the best residential apartment site is the Victoria Square development on Armagh. End values of 1.1M up to 2.3M reflect this. A future stage will sell at approx. \$800K to \$1M." Now that is talking about the apartment values on that site.

And then in number 7 he says "Oxford Terrace [which is part of the subject site] then steps up. "There is nothing else I am aware of that faces Nth West onto the river and enjoys a quiet street to the River. There are no buildings opposite us on the river, etc. etc. No bull its an "A"" which is shorthand for saying its top stuff. Then he works on "If Oxford works then as an Office retail development Colombo/Armagh becomes one of the only three sites that qualify as "A" for future development." That is a reference to the balance of the subject site. That is the Colombo/Armagh Street corner and the bit running down the back that you saw on the plan this morning.

And then at 9 he refers to "holding income", a point which again hasn't had any air play in Court so far. "I see the holding income as a bonus." Now the holding income, as my friend said, was on the balance of the site, not the Oxford Terrace frontage. So they were free to do a partial development on Oxford Terrace and then a joint holding income in the meantime. He saw it "as a bonus, possibilities including buying Hotel adjoining, building same, working in with Hotel etc. However the site stands nicely on its own and offers a two stage Office tower devo." Now

Hotel, you will have noticed your Honours, is a sort of a bite out of this site, a rectangular bite on the Colombo Street frontage, that is the old Ramada Hotel, it has got another name now which I don't recall.

And then at 10, "Like to have picked the site up for 1.5 to 2M cheaper, but owners are in a very cash position, have amalgamated the site for the first time since 1925 and were in fact the only ones in a position to have achieved that. They also provide an excellent covenant over the next 5 years for \$300,000 of total rental." So that I mention as further information that Mr Parkinson had, or views that he had, on the valuation issue and I simply mention it for the sake of completeness.

As I indicated before the Macfield directors did know that David Parkinson was involved in the Armagh Street residential development I referred to a few moments ago and that I think, in the absence of your Honours raising anything else with me on valuation, is all I have to say on that issue, apart from what is in my written submission.

The next matter, which again is fully summarised in my written submissions at paras 14 to 19, is the knowledge that Macfield actually had, or imputed to it, as at the date of the contract. On this one both the High Court and the Court of Appeal have made a finding that there cannot be any question of unconscionable conduct. I do not think, unless there are any questions the Court may have, that I can usefully add a great deal to the analysis I have undertaken at paras 14 to 19 of the written submission which I have presented. I am more than happy to go through that but again only at the risk of being repetitive, unless there are any points that the Court has. In that I summarise the evidence. It can be inferred from the fact that the summary of the evidence covers precisely two sides, how little evidence that there actually was at that date because even Mrs Parkinson

Tipping J Is there any difference in unconscionable bargain cases as opposed to contractual capacity cases between the state you are actually in and the state you appear to be in. Do you follow what I, I mean in contractual capacity cases it is the state you are actually in, appearances don't make any difference, save for the question of knowledge on it, but in unconscionable bargain cases I would have thought there was an argument for saying that for your conscience to move you have to know or be able to observe certain things. So it is not so much what the actual position was but how it appeared to others.

Matthews I think you have to have a foundation your Honour of an actual adverse state and then you have to have the knowledge as a second stage. Because the fact that you appear to be off the beam, so to speak, wouldn't give rise to an conscience issue unless you actually were off the beam as an underlying factor. So you have got a two stage inquiry in unconscionable

bargain cases. And the evidentiary foundation was laid as at the date of confirmation. He had significant mental difficulties, less so, significantly less so as at the date of the last involvement that he had in the contract.

Tipping J But the first stage is actual disability. The other stage comes under the rubric of knowledge.

Matthews The second rubric is the knowledge because if you don't know about it, you can't act unconscionably.

Tipping J No I have no questions on that.

Matthews As your Honour pleases.

Blanchard J This morning Mr Rennie told us that there was evidence that Mr Thiele had told Mr McKenzie, I think it was, about the terminal state of Mr Parkinson's cancer.

Matthews It was your Honour. Um the matter was, I am just looking for the passage right at the moment and I will just find the number if I might take a second, at para [157] of the High Court judgment Justice Hansen canvassed this "There was some evidence about it. Mr Thiele was cross-examined on it and he was not clear on it. And Mr McKenzie was adamant that he was not told." Justice Hansen said "Furthermore, while Messrs Thiele and Jones were aware the cancer was terminal I have not been satisfied to the requisite standard that Mr McKenzie was aware of this. Mr Thiele was quite vague as to whether or not he had told him. However, I accept that this knowledge can be imputed to Macfield as Messrs Thiele and Jones were Macfield's agents." That is how the High Court Judge made a finding of fact on it Sir, and that has not ever been specifically challenged on appeal but

Tipping J But there was no actual knowledge that it was terminal but the Judge felt able to impute that knowledge.

Matthews That is the way the Judge dealt with it Sir yes.

Blanchard J What did the Court of Appeal have to say on that point, did they deal with it?

Matthews I am not sure that I can answer that question just straightaway. I might just take a moment to find the answer to that Sir. I don't believe they upset that finding. It is certainly my recollection. The Judge, the Court of Appeal dealt with knowledge starting at para [63], and I am just working my way through that now. Yes [72] the Court of Appeal said "The Judge concluded that, although it had not been established that Macfield's

directors were aware that Mr Parkinson's cancer was terminal, Macfield's agents, Messrs Thiele and Jones, were aware of that, at para [157]. However, he went on to hold at [158] that they were under no obligation to inquire because they had no indication that Mr Parkinson's mental acuity was failing or faulty." And they didn't seek to upset that specifically your Honour but they went on at [75] to summarise the knowledge of the group as it were of Messrs Thiele and Jones together with Macfield, by imputation.

Tipping J This is where this question of duty to inquire came in. The crucial issue is whether given what they knew Macfield had a duty to inquire.

Matthews It is extremely open your Honour and it is difficult to see exactly what inquiry was intended by that phrase or from who.

Blanchard J And what and who is "they" in that sentence.

Matthews One assumes that, well one can't assume

Blanchard J How can Macfield have a duty to inquire about something that Macfield itself didn't know about.

Matthews Yes, and in any event it is important to just remember that the piece of knowledge that is under scrutiny in that sentence is the fact that the cancer was terminal. It is not knowledge about what effect either the cancer or the drugs or both might be having on Mr Parkinson because the only person who knew that was Mr Parkinson, sorry people who knew that were Mr Parkinson and his wife. Because Professor Robinson, Brigit Robinson, in cross-examination, was very clear that she told only them and no-one without her level of qualification and experience would be expected to know that. So it is only the knowledge that it is terminal. Now unhappily there are many people in the course of daily living who have terminal cancer and the mere fact of having terminal cancer is only but one fact in an equation and it doesn't imply to lay people, all of whom, as might be applied to all of the people concerned, that Macfield directors. Thiele and Jones, that that causes any form of mental difficulty whatsoever. And then you balance that evidence against the fact that they all said, that is to say McKenzie who dealt with him, Thiele and Jones, that as far as they were concerned he appeared to be fine, words to that effect. So that begs the question as to where that inquiry would have got to even if it had been made, skipping over, but not because it isn't an important point, the question is of whom one might have made the inquiry.

Well your Honours if I leave knowledge as at date of the contract aside and rely if I might on paras 14 to 19 of my written submission. Knowledge at the date of confirmation, again I quite fully summarised it at

para 26 of my submissions. It is probably not necessary for me to take the Court through that. That is where it is found. I have gone through the people in turn. Mr Butterfield of course knew nothing. Then I have dealt with Mr McKenzie. I have referred to the email of the 16th of January that I took the Court to this morning. That is the email relating to extending the confirmation date, halving the deposit and commenting on the cost price. I have indicated the Judge's finding in relation to not knowing that the cancer was terminal.

Then I have discussed Mr Thiele. I have actually quoted the two main passages from his evidence, they appear to be lucid, have a clear understanding of what he was doing, and then it appears as although he had all his ducks in a row, if you like, completed his due diligence, satisfied himself, happy to proceed on that basis. Now that is really my recollection of the day, I mean this was a combination of those three months due diligence and discussing this with David on that day, he was very clear in his mind, notwithstanding the fact that I agree he didn't look well. But he was very alert, knew exactly, well gave the appearance that he knew exactly what he was doing and he had that and then he moved onto another topic.

Mr Thiele actually went out to David Parkinson's house to see him that morning and he went with one of his colleagues and that was his observations of David on the very day that he gave the confirmation that was in the morning and I think, if my memory serves me correctly, confirmation was about midday. So that is contemporaneous observation of how he appeared to be at that time.

We move to Mr Jones and to Mr Leggat. In relation to Mr Jones, I have taken the Court to a number of documents. Now those documents I was unable to put the references in because the volumes weren't prepared at the time this was filed but by email on Friday I notified these to the Registrar, and I trust that they have made their way to Court. I am not sure whether they have or not.

- Elias CJ I haven't received it.
- Matthews Right, I gave them to Mr Thatcher by email on Friday but perhaps, they are a very short list, shall I just indicate them now.
- Elias CJ Yes that would be helpful.
- Matthews Number A, that is volume 5, page 89. B, is 5-204, C is 4-86, D is 4-205, 206. At page 206 I would just ask when your Honours come to look at it to note that in the final, this is a letter from Harman's, Kath Standage, the solicitor for Gustav, writing to Jones on a number of matters about the

leases but at the end of the letter there is also reference to another matter. "The purchaser would like to know whether following confirmation and payment of the deposit your client would be agreeable to the purchaser serving notices to vacate on the tenants of that property pursuant to the demolition clauses contained in the leases on the basis that the purchaser would reimburse the vendor for any rental that the vendor would have otherwise received from the tenants up until settlement date." That demonstrates in my submission is that it was clear to Mr Jones, on receipt of that, that Mr Parkinson was engaged on thinking about lateral aspects of the development, not just on approving the leases but on getting rid of the tenants so they could move forward with what he intended for the site. That was as recent as the 15th of January, just a week before settlement. So it is relevant to the issue of knowledge and that is why I have cited it.

E is 4-207 and 208, that's White Fox & Jones writing back to Harman & Co, and on the second page, it refers to the email that Mr Parkinson sent direct to Mr McKenzie which I took the Court through this morning, the one on the boat Shanlon.

F is 4-214. Again this is Kath Standage, the solicitor, indicating to Mr Jones that Mr Parkinson was working through the material he had received from Thompson Wentworth. Thompson Wentworth were the letting agents, as I indicated, that is Jan Spinetto was the witness from there.

The next one there is a typographical error, that should be the 23rd of January, not the 22nd. I apologise for that. And that is a fax of the 23rd of January, that is at 5-56. Again there is reference from Mrs Standage, Kath Ms Standage, "It is not our client's intention to change the current loading bay arrangements at the rear of the Vic & Whale," etc and there is some reference to an agreement between Mr McKenzie and Mr Parkinson about that. Again indicative of the knowledge that Mr Jones was being given about Mr Parkinson's personal participation in the final evolutionary parts of this contract.

The next one H is 5-100. This is the one I think I referred you this morning, Ms Spinetto of Thompson Wentworth who indicated in that document that she had instructions direct from Mr Parkinson in relation to some lease issues.

And then as moves over the page to Mr Leggat. A is 5-255 and B is 5-254. That's the notes of the discussion, that's the top one of the two documents referred to, and then the joint venture agreement is 4-188 to 204. Those are important documents for this reason, quite apart from any question of whether Mr Leggat's knowledge is an issue for Macfield or not, because it has been put my learned friend that the joint venture was in

tatters at the point of confirmation. I will move to it in a second but patently obviously not so. And I will come to the evidentiary references to that in a moment.

Now the only other documents I was going to refer to in relation to knowledge at the time I have already referred to, and that is the document that Mr Parkinson himself said to Mr McKenzie, which is the email of the 16th of January, which is at 5-42. So those are the references to the knowledge. Um at that point I have moved on to deal with the value in my written submission and there isn't anything else I need to say about that, as I have indicated. So that is the sum total of who knew what, as it were, at the date of confirmation if the Court is minded to place its examination of material at that date contrary to the appellant's position.

When one turns to the third issue identified by this law for leave to appeal whether there was sufficient knowledge to require further inquiries to be made, I note that in the submissions made for the appellant reliance is placed solely on this issue on the value issue, on the basis that if the value was so far out of kilter with the registered valuer's opinion then there arises a presumption that it must be shown to be a fair contract. My submission on this is that the conclusions of the contract, sorry the Court of Appeal are correct on this point, and I don't really, unless there are any questions from the Court on this point, have anything specifically to add to the written submissions that I have made. Whatever the value position might be it is quite irrelevant in a commercial contract of this kind unless there is evidence of knowledge, actual qualifying disability and knowledge of it. So, given that we have canvassed that, I don't think that I can take that issue much further.

Now that being the position your Honours, I have just three or four more observations or points that I want to make from notes that I took during the course of the morning, all very brief but slightly disjointed and if I might briefly take you through those on a sort of a wrap-up. The first one was in the written submission of my friend, he mentioned the article by Enonchong, called *Dyress on Undue Influence and Unconscionable Dealing* which is in his authorities on 207. In my submission this case stops a long way short of what is described in Crowe and Ballard as rank fraud. It doesn't even approach a case of that category in my submission. What is actually needed in any event whatever the disparity and consideration may be, is the knowledge and the Enonchong article, in a passage at 209, makes it very clear that no question of value disparity can be of any relevance at all unless there is also the requisite knowledge.

Probably to deal briefly with a point I don't need to deal with I suspect but to be on the safe side, the Companies Act point, this was not raised in the pleadings of course nor was it raised in evidence at trial. Those who might

have been minded to give a shareholders' approval to this transaction were both called to give evidence and it wasn't put to them. So there is simply no evidence one way or the other, even as to whether there was a resolution. There could well have been. We simply don't know on the face of the trial record. So, and if there was or if there wasn't one, there would have been any number of ways in which this might be dealt with because at the point when the contract was confirmed they were well advanced with the JV negotiations with MIP and that being the position the actual vehicle to make the purchase wasn't even established at that stage. And on that basis who knows what the shareholders' resolution would have been necessary.

The second compendium point so to speak is that the evidence established that Mr Jones knew and because he was facilitated as himself that Mr Parkinson had received a little over a million dollars in cash as an early pay-out under a life policy and he had a million dollars in cash. So the question of how this land value was going to be settled, the deposit was going to be paid for that, and at least he was cashed up to that extent. There was also extensive evidence before the Court of the other developments that Mr Parkinson was involved in. Mr Parkinson did not conduct his empire through one vehicle Gustav. He conducted it through a different company for every single development. And there were some amazing sounding companies like Two Greens Hats Limited, and One Green Hat Limited, and other assorted names which undertook severally smaller developments of industrial and commercial properties on the sort of fringes of central Christchurch, Fitzgerald Avenue, Hornby and Ferry Road and the like. And nobody at any stage in the evidence pulled the whole lot together to see what the net worth of the Parkinson conglomerate would have been. So it is a bit difficult to simply rely on the net share worth of Gustav in this transaction, because it is not known that that would have been the purchasing body and it is certainly doesn't give an indication of the overall Parkinson position when one takes into account all the other developments, including the very substantial Armagh Street development that I referred to a minute or two ago, the apartment block that has since been completed.

And further I then indicated I would come back to it a second or two ago, the joint venture was certainly not in tatters. Mr Thiele gave evidence that he thought it had actually been agreed, that was his state of the knowledge on the matter, and then if I could take the Court very briefly to volume 3, the MIP witnesses were a Mr Udale, who was the general manager and Mr Gibb, who was a development manager from memory, and they gave evidence on this. I just want to take the Court briefly to Mr Udale, volume 3 at page 105, line 10, it was a re-examination of this witness, and I wonder if I could draw the Court's attention to lines 10 to 27. And it actually goes on from there, there were resource management matters,

funding, the level of confidence in relation to funding in which he said at the top of 141, “we liked the development opportunity, we thought it was a good development opportunity & our assessment of that opportunity was that it was sufficiently good that project finance at an appropriate time would not be difficult to arrange”. And the last outstanding matter was pre-sales and he deals briefly with that.

Now Mark Gibb went then on to give evidence and I don’t think it is necessary for me to take the Court through that but it was generally to say in effect, namely that it was all go as far as MIP were concerned. You will recall from this morning that Mr Leggat had just sent off to Mr Parkinson the latest draft of the joint venture agreement per the meeting and then of course there was the two day meeting to go over that and discuss it. So far from being in tatters it was all feeling, in my submission, on the evidence in the right order. Mr Jones did not in fact know anything about the arrangements with MIP. This was a point that came up this morning. If I take you, I need to take you at this point, but the reference is volume 3, page 131, line 9, and 132 line 18, he knew that there was something going on but he didn’t know the state of it or any details about it at all.

I think the final point that I noted to mention from this morning was in relation to my friend’s document that he handed in called Schedule Parties and their Roles ???, at 4B he refers to Mr McKenzie meeting Mr Parkinson at the Boulevard and referred to the fact that he had just had treatment and was suffering from it, looked frail but that’s only a very small part of the total evidence that was given about that meeting, as I indicated to the Court this morning.

That concludes the whole submissions that I have unless there are any other points that I can assist the Court with.

Elias CJ No thank you Mr Matthews.

Tipping J There is just one other, do you have a convenient reference Mr Matthews to the various offers that were made post the Parkinson death.

Matthews I beg your pardon Sir, I didn’t quite post?

Tipping J Post-Mr Parkinson’s death, weren’t there various offers made at around about the \$12m or \$11.5m or whatever, do you have a convenient reference to those.

Matthews I will have those Sir, it might just take us a moment to find them but I will locate those and indicate those perhaps when my friend has finished.

Tipping J It is just a matter of fact, that’s all.

Matthews My friend tells me that he is going to take you to the document, so I may be saved the task. As your Honour please.

Elias CJ Thank you Mr Matthews. Mr Rennie.

Rennie I just wish to reply on three points. The first relating to the joint venture arrangements, the second relating to value and the third generally with the point of conscience. As to the first point relating to the MIP arrangements, the reason for my submission that they were in no fit state at all is because of the evidence in volume 3 at 102 lines 25 to the bottom of the page. That evidence confirms there was no joint venture, there was still matters

Blanchard J Sorry who's evidence is this?

Rennie Cross-examination of Mr Udale Sir. No formal agreement, still matters to be agreed upon, hadn't agreed the price for the land, didn't know the construction costs, didn't have any pre-sales, and hadn't approached the bank or a financier and didn't have any project finance in place. The interest which MIP later had was in relation to the smaller part of the site fronting Oxford Terrace which, as I acknowledged in my opening submission, was the easy part of the development because it wasn't cluttered with leases.

On the second point, price and value, and with particular reference to Justice Tipping's inquiry, I can give you the reference to volume 2, page 86 which speaks is the cross-examination by my learned friend of the Mr Harris, who gave the only valuation evidence and at which these further offers are put to him. Beginning at the top of page 86, there is reference to the two written offers received by Mrs Parkinson that is put to her, in a suggestion to the valuer I mean, with the suggestion that they summed to a value of \$11.6m, answer "it really depends on what the background behind the offer is. it is an offer subject to a number of conditions. a number of developers and purchasers use the offer as just an opportunity to make a stake just to make a statement basically and then after they do their due diligence the offer might subsequently get amended. so an offer doesn't constitute the market to me as a valuer it needs to be an unconditional offer." And then further down the page in reference to one in relation at 10.6, Mr Harris confirms "on the major issues with this property [I'm at line 27] is that it has long term leases in place, lack of demolition clauses which I think if they are discovered during the due diligence phase it may well impact on how they proceed with the offer further after that." And then my learned friend, towards the bottom of the page, puts the proposition "This idea of an opportunity value, in other words a value to get your hands on the property", answer beginning at the bottom line of that page, "during the valuation process I went through possibly the best comparison sale I had was the block being used for

apartment blocks at 100 Armagh Street which has a lot of the same similarities as this block, fine out look opposite Victoria Square, that sold for between 2,500 and 2,600 dollars per square metre. in my analysis of the subject value I analysed the figure of the underlying value at 3,500 dollars a square metre. in my mind I was reflecting some of the special attributes the Union Centre has got.”

So my submission on this aspect of the case is that when you come to consider this issue there is only one value, and that is the market value as assessed by Mr Harris, of the \$8m figure that was mentioned this morning.

The third point and final point to respond on

Elias CJ There weren't, just following on from Justice Tipping's inquiry, there wasn't direct evidence then, there was only this.

Rennie Yes. If this property really was worth more than the \$8m odd figure assessed by the two valuers, then one would have expected them to be called and given us some evidence about what really was its value. Um the third point is perhaps, well it is a very interesting aspect of the case, is that when we, the Court comes to look at the issue of conscience, who's conscience is that to be. Here the interesting dimension is that there is a corporate personality involved and I give you this reference as well, volume 4 page 4, that is the search of Macfield, you will see there that Mr Jones, jointly with an accountant Mr Duns, owns all of the shares in Macfield. So when looking at the conscience in this area, and given that companies generally are not regarded as having their own personality, it should encompass, in my submission, the conscience of the directors and here in this case the shareholders. If the case is approached in that way then there is no reason, in my submission, why Mr Jones cannot be held to have ought to have known of

Tipping J Is it the reality Mr Rennie that the question of conscience is for the Court and the Court says if this is sufficiently unconscientious in the view of the Court then the conscience of the party will be affected. So although we tend perhaps to disguise that simple fact, the reality is that is this unconscionable from the point of view, the perspective of the Court, looking at it from the outside.

Rennie I appreciate that Sir but the very

Tipping J Does it really matter then whether it is the conscience of who particularly in the Macfield camp is focused on.

Rennie Well it is perhaps relevant to the, what inquiries ought to have been made and how they could have been made. I just want to make it clear that Jones, Mr Jones, for material purposes is really there in the Macfield camp.

Tipping J Well he is there under a lot, just because he's there um, we have to be a little bit more analytical than that don't we?

Blanchard J He wasn't a director was he?

Rennie No. He wasn't a director either. That distinction certainly is there. But looking at the issue of knowledge, if there is knowledge that was ascertainable on inquiry and it should relate to the joint venture agreement and/or the ability to finance, then Jones, Mr Jones, can obtain that information.

Tipping J Can he do it in a proper way. This idea of attributing or imputing knowledge from A across to B, where A is under a duty of confidence, I find rather difficult.

Rennie I appreciate that point and put to me this morning but it is, he may have perhaps that duty in relation to some activities but not others.

Tipping J You are raising this under the aegis of who's conscience, you are not suggesting it is Mr Jones' conscience.

Rennie No.

Tipping J No or any particular individual's conscience. It is the conscience that the Court ascribes

Rennie To the

Elias CJ To the vendor.

Tipping J To the vendor. Or to the vendor in good conscience to be allowed to hold this bargain if you like.

Rennie Those are the only three points I wish to respond on, unless the Court has any others.

Elias CJ Well thank you counsel for your assistance. Did you have something

Matthews Just that Justice Tipping had wanted a reference your Honour. For Justice Tipping the reference to the only contract that was in evidence was the Proctor one, which is in Volume 4 at page 224. There was evidence-in-

chief of Mr McKenzie saying that they had had a sale at \$12.5m, the document didn't go into evidence.

Tipping J Where was that evidence-in-chief, McKenzie.

Matthews It was on page 16 of volume 3, it is the reference that the document itself go, the agreement itself didn't go into evidence.

Tipping J Yeah thank you.

Matthews And then there was evidence of MIP endeavouring to buy part of the land from Gustav which was in a letter which is found in volume 5 at page 141.

Tipping J Thank you.

Matthews And then the evidence on the other contract that was presented by Mr Thiele, not presented by Mr Thiele, but obtained by Mr Thiele, but which was not presented because Gustav, through Mr Parkinson, declined to have it presented. That contract he gave about evidence about in chief but he was unable to locate the contract at the time of trial so it was not in fact put in evidence but he did give detailed evidence about that. And again I take you to volume 3 at page 15.

Blanchard J Page?

Matthews 15 Sir where he gives the evidence.

Elias CJ What are you looking for.

Blanchard J There was a reference in evidence to some numbers, casebook numbers, relating to the other contract that was presented. It seemed to have been in a bundle and I think the High Court Judge referred to it as being in a bundle as well.

Matthews I think Sir, could it possibly be that you are thinking of the evidence at volume 3, page 15. I am not sure

Blanchard J No, no, I noticed it when Mr Rennie was addressing us but he didn't refer to it.

Matthews Was it a sort of an accounting type of document Sir.

Blanchard J No, it looked as though it was the other agreement, the Meath Nominees agreement which I am sure Justice Hansen, I'm working from memory, I'm sure Justice Hansen referred to it as being in the bundle.

Matthews Yes I think that's right. Um I think

Blanchard J So it must have had a number and I think it was referred to in the evidence. I'm sorry I just can't now locate it. It may not be of great moment in any event.

Matthews I think your Honour, if my recollection serves me correctly, and it is two years ago so it may well not, but I think the final contract came in not long before the trial and was produced as a separate document. And I believe it was before the trial Judge.

Elias CJ So it may not be in the bundle?

Matthews I suspect it is not in the bundle Ma'am. That is my recollection as we speak.

Elias CJ Well thank you. We will take time to consider our decision in this matter.

Court adjourns 3:06 pm