IN THE SUPREME COURT OF NEW ZEALAND

SC 39/2007
[2008] NZSC 47

	BETWEEN	GUSTAV & CO LIMITED Appellant
	AND	MACFIELD LIMITED Respondent

Hearing: 11 March 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

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

Judgment: 20 June 2008

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs in the sum of $15,000 plus all reasonable disbursements, to be fixed if necessary by the Registrar.

REASONS

(Given by Tipping J)

Introduction

[1] This appeal concerns an agreement for the sale and purchase of substantial commercial premises in Christchurch. Both the High Court[1] and the Court of

[1] *Gustav & Co Ltd v Macfield Ltd* (High Court, Christchurch, CIV 2004-409-001606, 15 July 2005, John Hansen J).

Appeal[2] refused the purchaser's application to set the agreement aside as an unconscionable bargain. The purchaser appeals to this Court. The agreement, which is dated 3 November 2003, was entered into between the appellant, Gustav & Co Ltd, as purchaser, and the respondent, Macfield Ltd, as vendor. The person who negotiated the agreement for Gustav was its sole director, Mr David Parkinson. At the time he was suffering from terminal liver cancer. He died on 15 February 2004. The price payable under the agreement was $12.35 m. Gustav claims that this figure was substantially in excess of fair market value. Its contention that the contract represents an unconscionable bargain rests essentially on Mr Parkinson's ill health, and what Gustav claims to be the excessive price it agreed to pay.

[2] The first issue which must be addressed arises on Macfield's cross-appeal. It concerns the time as at which the Court determines whether a transaction is unconscionable. The point arises because the agreement between the parties was conditional upon Gustav performing due diligence in respect of the premises which were the subject of the agreement. A series of detailed conditions had to be satisfied in this respect. Whereas the contract was entered into on 3 November 2003, it was not declared unconditional by Gustav until 23 January 2004. On that date Gustav also paid to Macfield the sum of $500,000 by way of part payment of the deposit. The question is whether the Court should assess the unconscionability of the contract as at the date it was entered into or as at the date it was declared unconditional. Both the High Court and the Court of Appeal decided that the appropriate date was the later one, namely when the contract was declared unconditional. Macfield challenges that conclusion. It is appropriate to deal with this point before considering Gustav's appeal and its contention that this Court should hold that the contract was unconscionable and should be set aside and a consequential order made for the refund of the sum paid by way of deposit.

The time issue

[3] The Judge in the High Court said he was prepared to examine the matter as at the date the contract was declared unconditional, in spite of the fact that it would be

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2 *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205.

possible to argue that "contractually the benefit arose when the parties reached agreement that was documented".[3] His Honour did not discuss the timing issue any further, probably on the pragmatic basis that he was going to hold that the contract was not unconscionable, even if the issue was examined at the later date.

[4] The Court of Appeal held that "in the circumstances of this case" the High Court had been right to take the date of confirmation as the appropriate one.[4] The Court of Appeal's reasoning is best set out in the Court's own words. Their Honours said that their conclusion was based on two inter-related reasons:

> [47] First, there is support for this approach in the authorities. In *O'Connor v Hart* Lord Brightman, delivering the reasons of the Privy Council, said that victimisation can consist "either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances": at 171. In *Contractors Bonding Ltd v Snee* (at 173) Richardson J highlighted the latter alternative (passive acceptance) and said (at 174):
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> > At the end of the day equity will intervene to deprive parties of their contractual rights where they have unconscionably obtained benefits or have accepted benefits in unconscionable circumstances. That is where they would be acting unconscientiously in receiving or *retaining* their bargain. (Emphasis added)
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> [48] Second, this approach best reflects the reality of the contractual position in this case. The due diligence clause in the contract was a wide one. It identified a range of matters that Gustav was entitled to examine prior to confirmation and gave Gustav considerable scope to withdraw from the contract. The contract contemplated that the purchaser would undertake its detailed assessment of the property (including its development potential) after the contract was entered into and before it was confirmed. In effect, prior to confirmation Gustav had something akin to an option to purchase. As the post-contract, pre-confirmation period was the critical period for the exercise of judgment by the purchaser, it was the period during which Mr Parkinson needed to have the capacity to assess and protect his own interests.
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> [49] Mr Matthews argued that it was not appropriate to take the point of confirmation because Macfield as vendor had no role to play at that point, that is, it had no discretion whether or not to accept the confirmation. If Gustav chose to confirm, Macfield was obliged to accept.
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> [50] That is, of course, correct. But it does not resolve the matter. Although it may, ultimately, have been obliged to accept the confirmation if Gustav persisted, that did not prevent Macfield from making some further

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3 At para [147].
4 At para [46].

> enquiries of those associated with Gustav prior to acceptance, if such were required as a matter of conscience.

[5] For the reasons which follow, we find ourselves unable to accept the conclusion reached on this point by the Courts below. The correct approach is to examine whether the transaction is unconscionable at the date it is entered into. If, however, at a later date, the transaction is varied to the detriment of the party claiming that the contract is unconscionable, the Court must assess whether the variation makes the contract unconscionable as at the date the variation is agreed. Subject to that reservation, the Court's focus should be on the date when the contract or other transaction is entered into in the sense of becoming binding, either conditionally or unconditionally.

[6] It is not necessary, for present purposes, to do more than summarise the basis upon which unconscionable transactions are subject to equitable intervention. The Court of Appeal dealt fully and accurately with the authorities which discuss the relevant general principles and no issue was raised in this Court regarding those principles. Equity will intervene when one party in entering into a transaction, unconscientiously takes advantage of the other. That will be so when the stronger party knows or ought to be aware, that the weaker party is unable adequately to look after his own interests and is acting to his detriment. Equity will not allow the stronger party to procure or accept a transaction in these circumstances. The remedy is conscience-based and, in qualifying cases, the Court intervenes and says that the stronger party may not take advantage of the rights acquired under the transaction because it would be contrary to good conscience to do so. The conscience of the stronger party must be so affected that equity will restrain that party from exercising its rights at law. All necessary consequential orders may be made in aid of the primary remedy.

The approach of the Court of Appeal

[7] The time issue must be addressed against that background. The Court of Appeal was influenced first by the concept of "passive acceptance" deployed by

Lord Brightman in *O'Connor v Hart*[5] and then picked up by Richardson J in *Contractors Bonding Ltd v Snee*.[6] Richardson J also adopted the terminology of "unconscientious receipt" or "retention".[7] We consider that the Court of Appeal was misled by these references in its approach to the timing issue. The concept of passive acceptance or receipt means only that equity may tell the stronger party: you should not have accepted the opportunity presented to you by the weaker party. You should not have accepted the weaker party's assent in terms of which you obtained these contractual rights. It is acquiring contractual rights rather than receiving performance of the contract which is the subject of the passive acceptance concept. The time focus is thus on entry into the transaction. The contrast is with active procurement or "extortion", as Lord Brightman put it.[8] The reach of equity goes beyond that situation and covers cases where the weaker party initiates the transaction. Richardson J's reference to "retaining" the bargain was designed to reflect the fact that equity will, in appropriate circumstances, set aside a transaction, thereby preventing the stronger party from retaining the benefits acquired under it. The concept of retention also relates to contractual rights rather than the subject matter of the contract.

[8] The terminology on which the Court of Appeal relied should not be construed as signalling that the time for the unconscionability assessment is other than the time when the transaction was entered into. That is the date when the contractual or other rights in issue come into existence, whether those rights be conditional or unconditional. Performance or fulfilment of conditions to which the transaction is subject is governed by the ordinary law of contract to which the parties must adhere upon entry into their bargain.

[9] The Court of Appeal's second reason for preferring the date when the contract became unconditional was the proposition that, in effect, prior to confirmation of the fulfilment of the conditions "Gustav had something akin to an option to purchase".[9] This is what the Court had earlier called "the reality of the

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5 [1985] 1 NZLR 159 at p 171 (PC).
6 [1992] 2 NZLR 157 at pp 173 – 174 (CA).
7 At p 174.
8 At p 171.
9 At para [48].

contractual position".[10] In adopting this approach, the Court seems to have thought that what mattered, from the point of view of Mr Parkinson's capacity, was when Gustav, rather than Macfield, became contractually bound.

[10] The first difficulty with the Court's reasoning is that it introduces a potentially awkward inquiry into how close a conditional contract must be to an option for the focus to shift from date of entry to date of confirmation. The second difficulty is that, for present purposes, equating a conditional contract with an option presupposes that the position would have been different if the transaction had been framed as a true option. That is not so. If Macfield had given Gustav an option to purchase, exercisable no later than 23 January 2004, the unconscionability issue ought still to have been assessed as at 3 November rather than 23 January. 3 November was the date at which, pursuant to a true option, Macfield would have bound itself to sell the property, subject only to Gustav exercising the option.

[11] If Gustav had exercised its option on 23 January, Macfield would have put itself into breach by declining to accept the validity of its exercise. In material terms an option in this present context would have been no different from a conditional contract. The Court of Appeal erred if it looked at the matter from Gustav's side of the transaction rather than from Macfield's side. It is Macfield's conscience which must be affected. In that respect, once Macfield had entered into the transaction (whether as a conditional contract or an option) there was nothing more for it to do which could have amounted to conduct on its part which rendered the bargain unconscionable.

[12] This reasoning is supported by the decision of Hoffmann J in *Spiro v Glencrown Properties Ltd* concerning the legal nature of an option.[11] That case involved an option to buy and sell land with two contracts, one granting the option, and the other concerning its exercise. The issue was whether each contract had to be signed by both parties so as to comply with s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (UK), which was the then current equivalent in England of the Statute of Frauds. In the course of deciding that only the first

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10 At para [48].
11 [1991] 2 WLR 931 (ChD).

transaction required both signatures, Hoffmann J held that, for the purposes of the Act, the contract granting the option could and should be regarded as a conditional contract for the sale of land. His Lordship said:[12]

> An option to buy land can properly be described as a contract for the sale of that land conditional upon the exercise of the option. A number of eminent judges have so described it.

His Lordship then referred[13] to the speech of Lord Macnaghten in *Helby v Matthews*[14] and to the judgment of Jenkins LJ in *Griffith v Pelton*.[15] Reasoning similar to that adopted by Hoffmann J, as well as a similar outcome, is appropriate in this case for the purpose of determining what we are calling the time issue.

[13] There is a further difficulty with the Court of Appeal's reasoning to which we should refer. It concerns the Court's reference to Macfield making further inquiries. The Court of Appeal recognised that Macfield was bound to accept the confirmation "if Gustav persisted".[16] Their Honours did not discuss on what basis Macfield was entitled, let alone obliged, not to accept Gustav's confirmation at the outset. All they said was that inquiries were required as a matter of conscience. The Court's premise seems to have been that Macfield had an obligation, presumably of an equitable kind, to try to persuade Gustav that it should not go on with the transaction on account of its unconscionability. This must have been on the basis that the posited further inquiries might suggest that Mr Parkinson was suffering from a qualifying disadvantage, and the purchase price was demonstrably too high.

[14] Even if the correct focus had been on the date of confirmation, we do not consider that Macfield had any duty to make the suggested inquiries. Those inquiries could only have been relevant to Macfield's knowledge of the effect of the disadvantage from which Mr Parkinson was suffering. If Mr Parkinson had been suffering from a qualifying disadvantage the question would have been whether Macfield knew or ought to have known that this was the case. Failure to make inquiries might have been relevant to whether Macfield should have known of the

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12 At p 933.
13 At pp 933 – 934.
14 [1895] AC 471 at p 482.
15 [1958] Ch 205 at p 225 (CA).
16 At para [50].

qualifying disadvantage from which we are, for present purposes, assuming Mr Parkinson was suffering. But that does not mean that Macfield was obliged to make those inquiries after it was contractually bound. In any event, on the facts, such inquiries as the Court of Appeal considered should have been made would have led nowhere.

[15] To impose a duty to make inquiries would also be highly problematic from a practical point of view. The Court of Appeal did not say what sort of inquiries it had in mind and to whom they should have been addressed. It should be noted that at the date of confirmation Macfield knew that Gustav was in receipt of legal advice. A duty to make inquiries could only be imposed on the basis that Macfield might have been obliged to put itself into breach if those inquiries suggested that Mr Parkinson was disadvantaged. It is not clear, with respect, on what premise the Court of Appeal considered that Macfield might have had some obligation to seek to persuade Gustav that the transaction was contrary to its interests. In short, we do not consider the Court of Appeal's dismissal of Mr Matthews' argument on the basis that its correctness did not prevent Macfield from making further inquiries can be sustained. The words "prior to acceptance" at para [50] of the Court of Appeal's judgment demonstrate the difficulty in the Court's approach. There was nothing for Macfield to "accept" when Gustav confirmed the fulfilment of the conditions.

Further analysis

[16] Mr Matthews referred to a number of other points in support of a time of entry approach. He rightly submitted that nowhere in the Privy Council's judgment in *O'Connor v Hart* is there any suggestion that their Lordships considered that in the case of a conditional contract the appropriate time to assess the matter was when the contract was declared unconditional. Furthermore, as Mr Matthews also pointed out, in *Contractors Bonding Ltd v Snee* Richardson J expressly said that "the fairness of the bargain must be considered at the date it was made".[17] The words from his judgment, upon which the Court of Appeal relied, cannot therefore have been intended to be understood in the way the Court of Appeal interpreted them. The

[17] At p 174.

same approach is implicit in the judgment of Somers J in *Moffat v Moffat*.[18] That judgment appears to have been the source of Richardson J's reference[19] to "receiving or retaining".[20] Furthermore, in *Nichols v Jessup* Somers J spoke of the Court inquiring into what the stronger party knew or ought to have known "at the time the bargain was entered into".[21]

[17] Further support for the approach we favour comes from the judgment of Wilson J in *Commercial Bank of Australia Ltd v Amadio*,[22] one of the leading Australian cases on the subject of unconscionable bargains. Wilson J framed the question as being whether it would be unconscientious for the stronger party to procure or accept "the weaker party's assent" to the impugned transaction.[23] That is the nub of the matter. The concept of assent is clearly referable to the time when the weaker party becomes conditionally or unconditionally bound, rather than the time when the weaker party declares a conditional contract unconditional.

[18] In *Elia v Commercial and Mortgage Nominees Ltd*, Gault J focused on the circumstances existing when the transaction was "documented".[24] This, in context, was a clear reference to making the necessary assessment at the date when the contract was entered into. In *Commercial Bank of Australia Ltd v Amadio*, Mason J, when discussing the facts of the transaction at issue, examined the weaker party's ability to assess whether "entry into the transaction was in [that party's] best interests".[25]

[19] In her book *Unconscionable Bargains*,[26] Mindy Chen-Wishart, while not addressing the timing issue directly, adopts an approach which clearly proceeds on the basis that the date of entry is the correct time at which to assess unconscionability allegations. She refers variously to the need for a special

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18 [1984] 1 NZLR 600 (CA).
19 In *Contractors Bonding Ltd v Snee* at p 174.
20 At p 606.
21 [1986] 1 NZLR 226 at p 235 (CA).
22 (1983) 151 CLR 447.
23 At p 474. It is significant that Fridman's *The Law of Contract in Canada* (5th ed, 2006) also focuses on the obtaining of assent as the basis of the conduct which gives rise to an unconscionable bargain, p 320.
24 (1988) 2 NZBLC 103,296 at p 103,304 (HC).
25 At p 464.
26 Chen-Wishart, *Unconscionable Bargains* (1989).

disability "at the time of contracting";[27] the quality of the decision "to enter into" the challenged contract;[28] the complainant's condition "at the time of the contract";[29] the complainant's comprehension and rationality "in entering the bargain";[30] and, finally, the stronger party's conduct "in concluding the agreement".[31] Nowhere is there any suggestion that in the case of conditional contracts the focus should be on the date of confirmation.

[20] No other text book on the law of contract of which we are aware has any discussion on the subject of the time when unconscionability issues are addressed.[32] Nor have we been able to find any authority which suggests there is any difference in this respect between a conditional and an unconditional contract.

[21] Mr Rennie, for Gustav, did his best to support the reasoning of the Court of Appeal but, with respect, we do not consider it can be supported. Mr Rennie also argued that on policy grounds this equitable remedy should be kept flexible. Room should be left to take into account circumstances occurring after the transaction is entered into. We have already accepted that material variations should be examined for unconscionability as at the date upon which they are agreed, but beyond that we would not be prepared to go. Once a transaction is entered into, whether conditionally or unconditionally, the parties thereafter take the risk of adverse changes in fortunes and circumstances, subject, of course, to the doctrine of frustration. Whether conditions are fulfilled or not is something which, as we have said earlier, must be addressed on ordinary contractual principles. If a contract is not unconscionable at the time it is entered into, it would be inconsistent with the deliberately limited scope of the doctrine of frustration to allow a further avenue of release, under what might be called supervening unconscionability. Any such doctrine would risk undermining contractual rights which have been properly acquired. That would be to the detriment of the security of contractual relationships.

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27 Page 28.
28 Page 32.
29 Page 46.
30 Page 50.
31 Page 71.
32 See, for example, Burrows, Finn and Todd, *Law of Contract in New Zealand* (3rd ed, 2007), pp 369 – 374; *Chitty on Contracts* (Vol 1, 29th ed, 2004), paras [7–111] – [7–124]; *Cheshire and Fifoot's Law of Contract* (8th Aust ed, 2002), paras [15.1] – [15.11]; Fridman *The Law of Contract in Canada* (5th ed, 2006), pp 319 – 331.

[22] It follows that in the present case the facts relevant to the unconscionability issue must be examined as at 3 November 2003 when the contract was entered into. There was a variation but it was entirely favourable to Gustav. The focus in the Courts below was on the later date. It is therefore necessary for this Court to make the required assessment without any direct help from the decisions below, albeit they are of clear indirect assistance.

Unconscionability as at 3 November 2003

[23] The first key issue concerns the extent of Mr Parkinson's ability to look after Gustav's interests. More specifically, it concerns the extent to which his illness disadvantaged him in that respect. The second key issue concerns the extent of Macfield's knowledge, or the knowledge it should have had, of any disadvantage from which Mr Parkinson was suffering. In short, the evidence falls well short of establishing that as at 3 November 2003 Mr Parkinson was suffering from any disadvantage which made him unable adequately to look after Gustav's interests. Mr Parkinson was an experienced businessman and property developer. As we will later recount, a substantial number of people who had business dealings with him in the period between 3 November and 23 January all considered that, although the effects of his illness were clearly apparent in physical terms, he still had a good grasp of business affairs and was well able to look after Gustav's interests.

[24] That was the conclusion reached by John Hansen J, even against his focus on the later date. It is a strong inference from this evidence, and the trial Judge's appraisal of it, that Mr Parkinson was in no worse position at the earlier date and, if anything, must have been in a better condition. That being so the question of Gustav's knowledge does not arise. There was, as at 3 November, no relevant disadvantage. While Macfield knew Mr Parkinson had cancer there is no basis for any finding that it knew or should have known that Mr Parkinson's illness affected his ability adequately to look after Gustav's interests – because it did not. John Hansen J was not satisfied that the real estate agent, Mr Thiele, had told Mr McKenzie of Macfield that Mr Parkinson's cancer was terminal. Mr Thiele

himself learnt of the terminal nature of Mr Parkinson's illness in a private capacity and had no obligation to pass the information on to Macfield.

[25] Furthermore, the due diligence conditions were framed so as to allow Gustav considerable time and scope to assess the viability of the transaction and to make up its own mind with legal assistance whether it wished to proceed. This underlines the lack of anything unconscionable in the terms of the transaction itself, either at the time it was entered into or indeed at any time.

Unconscionability as at 23 January 2004

[26] Strictly speaking, the conclusion that Mr Parkinson was not suffering from any disadvantage as at 3 November disposes of the appeal. We will nevertheless examine the unconscionability issue as at 23 January because of the support which doing so provides for the conclusion we have reached as to the earlier date. The key questions are again the extent and effect of Mr Parkinson's disadvantage at the later date and what knowledge Macfield had or ought to have had of it. The findings of the High Court are of central importance on these issues.

[27] This is an appropriate point at which to refer to Gustav's reliance on the proposition that the price Mr Parkinson committed it to pay was approximately $2 m above fair value. In short, the High Court found that Mr Parkinson was aware that he was paying a premium price but he considered it was justified on account of the development potential of the subject premises. The whole project which Mr Parkinson had in mind was worth in the vicinity of $100 m. In his view a $2 m premium could easily be accommodated within a project of that scale in order to obtain what was considered to be a very good development site.

[28] Mr Parkinson had in mind a joint development venture with another party. John Hansen J said that he was satisfied, on the evidence of two witnesses associated with the intended joint venturer, that throughout their dealings with Mr Parkinson:

> [42] they found he was astute and business like. They accept his physical frailty but said that some meetings lasted in excess of an hour and at all times he appeared in full grip of his mental faculties and showed astuteness

> and acumen. Particularly in relation to the premium paid for the site Mr Udale accepted the rationale explained by Mr Parkinson in his email. It was a rationale, given the size and complexity of this deal, that he agreed with.
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> [43] MIP [the proposed joint venturer] were looking at a substantial joint venture. It was probably in excess of a $30 million project for the apartments alone. They had every confidence in Mr Parkinson who clearly wished to put in place a joint venture that would allow the project to proceed, notwithstanding his inevitable death. I am quite satisfied they would not have proceeded unless they had every confidence in the transaction itself and the person they were dealing with.

[29] The Judge discussed the purchase price issue at some length. It is not necessary for me to do the same. After considering the valuation evidence, and the evidence of other relevant offers for the site or parts of it which were received by Macfield following the collapse of the transaction between itself and Gustav, the Judge concluded:

> [105] Although the contracts set out above were clearly conditional, what all of this evidence demonstrates is that developers in the market were of a view that the property warranted a premium price considerably above the valuations reached by Mr Harris.
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> [106] I accept that evidence and the rationale for it. What it demonstrates is that the disparity of price is not in fact as great as contended for by the Plaintiff which reduces the effect of a critical plank of the claim of unconscionability.
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> [107] For the sake of completeness I also note it was Mr McKenzie's view [he was a director of Macfield] that the property, because of its unique attributes, was worth the price. Clearly he has a vested interest but this confirms the other evidence.
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> [108] The vendors set a price. They did not pressure Mr Parkinson in any way and he obviously reached his own conclusions reflected in the contract price.

[30] On the disadvantage issue, the Judge carefully traversed the medical evidence and the evidence of a substantial number of other witnesses who had had relevant dealings with Mr Parkinson as regards this transaction and the proposed joint venture. Only one medical witness was called. She was Associate Professor Robinson, the oncologist responsible for Mr Parkinson's treatment throughout the relevant period. The Judge assessed the Professor's evidence as follows:

> [65] Professor Robinson was of the view that from about mid October 2003 his ability to preserve his own interests was severely diminished because of the combination of pain and the drugs he was taking. She also

considered that from mid October onwards he would look most unwell to anyone observing him and his lack of alertness and judgement could have been detected at a meeting. She said it would manifest itself by him tending to drop off during conversations, with his eyes going blank from time to time. She said he could have seemed alert for five to ten minutes but anything longer would be very difficult.

[66] Mrs Parkinson's description of her husband's deterioration and presentation accords with that of Professor Robinson. It is unnecessary to detail it.

[67] However, the evidence of both Professor Robinson and Mrs Parkinson as to how the late Mr Parkinson presented is at significant odds with the considerable number of witnesses called for the Defendant. I will turn to those witnesses shortly, but it is important to note concessions made by both Professor Robinson and Mrs Parkinson.

[68] It is clear that at the date the contract was entered into, although Mr Parkinson had received morphine treatment on admission to hospital, he was on codeine and Tramadol while at home. Professor Robinson conceded in cross-examination that at times when the pain was under control Mr Parkinson may have appeared his normal self. In that regard I take "normal self" to be the way he was before the onset of his terminal illness which has been amply described as vital, aware, business like with significant acumen and ability to protect his own interests.

[69] Mrs Parkinson, in relation to the time when the contract was signed, said in evidence-in-chief that she did not question Mr Parkinson's thinking. She thought that this particular purchase would give him bit of a spark and would provide him with something to work on and take his mind off his health. She does say that she was unaware of the purchase price and other matters which I will again turn to shortly.

[70] This shows on the evidence that Mrs Parkinson did not have concerns relating to Mr Parkinson at the time the agreement was signed, and Professor Robinson accepted that he could present as normal if his pain was under control. This accords with the evidence given by Mr Thiele, which I accept.

[71] The Professor also accepted in cross-examination that with her expertise and experience she would observe more than a layperson and would have much more knowledge than a layperson. She accepted that Mr Parkinson would present differently on different days, with the ability to have good and bad days. She accepted his optimism and determination. She also accepted it would be possible for Mr Parkinson to present as described by the other witnesses, but said she would be surprised if he was able to maintain apparent normality in longer meetings. Indeed Mr Matthews in cross-examination put this evidence to Professor Robinson of each of the witnesses in turn and she accepted the possibility of it but expressed surprise, particularly for longer meetings. She was less accepting of this for the meetings in January, particularly later in January, because at that time he was having fluid in his abdomen and had become jaundiced.

[72] Those concessions are important when I come to consider the evidence of the other witnesses as to their observations of Mr Parkinson.

[31] The Judge then turned to a detailed review of the other witnesses, who included solicitors, an accountant and experienced businessmen. The Judge first remarked:

> [74] As to his physical health, while there is a difference of degree, the evidence shows conclusively his significant physical decline over the period in question. A number of witnesses for both Plaintiff and Defendant had a degree of vested interest in these proceedings. Obviously Mrs Parkinson and Messrs Butterfield and McKenzie [directors of Macfield] have a much higher interest than anyone else.

[32] As to the position of Mrs Parkinson, the Judge found:

> [84] It is apparent, therefore, that Mrs Parkinson did not express any contemporaneous concern to any persons as to Mr Parkinson's ability to conduct business affairs and to enter into contractual relationships. All of the other evidence, which I have accepted, shows that he was able to conduct his affairs despite the nature and extent of his illness. That is clear from those witnesses who were cross-examined by Mr Rennie, and also those whose evidence was not challenged in any way. It is corroborated by the Plaintiff's own witness, Mr Brown, who was both a trustee of the Parkinson family trusts and accountant for Gustav.

[33] As regards all the other witnesses, John Hansen J expressed his conclusions in the following way:

> [80] I do not propose to go through all of the other witnesses in detail. What is clear from all of those witnesses is that they had no concerns in relation to Mr Parkinson's mental state, acuity, acumen and rationality. Indeed, they all speak of how alert and sharp he was in relation to business matters, notwithstanding his obvious physical state.

[34] Because we are discussing the position as at 23 January only to provide support for the conclusion we would draw as to the position on 3 November, it is not necessary to examine a number of other issues which featured in the judgments below. In particular, it is not necessary to examine what knowledge Macfield had of Mr Parkinson's condition, and its effect on him, as at 23 January. Nor is it necessary to address certain factual differences between the views of the High Court and those of the Court of Appeal. The Court of Appeal did, of course, ultimately uphold the High Court's view that the transaction was not unconscionable. It is, as we have said earlier, a strong inference that when the contract was entered into Mr Parkinson was suffering from little, if any, disadvantage. His customary business acumen had not deserted him. He had a rational reason for paying what he knew to be a premium for

one of the best development sites left in the central business district of Christchurch.

[35] Macfield nominated its price, applied no pressure on Gustav, and cannot be said to have indulged in any extortion or victimisation. There was nothing acting on Macfield's conscience requiring it to decline to accept Gustav's assent to the price it had nominated, or the transaction as a whole. We are satisfied on the evidence that this transaction fell significantly short of being unconscionable. The appeal must be dismissed with costs.

Solicitors:
Rhodes & Co, Christchurch for Appellant
Macfarlane Dougall Stringer, Christchurch for Respondent