

17/85

IN THE PRIVY COUNCIL

No. 56 of 1984

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O N A P P E A L  
FROM THE COURT OF APPEAL OF NEW ZEALAND

---

B E T W E E N:

THOMAS BRUCE HART

Appellant

- and -

JOSEPH O'CONNOR, PAUL MICHAL O'CONNOR  
and FRANCIS JOSEPH O'CONNOR

Respondents

---

RECORD OF PROCEEDINGS

VOLUME I

---

MOON, BEEVER & HEWLETT,  
24/25 Bloomsbury Square,  
London WC1A 2PL.

Solicitors for the  
Appellant

ALLEN & OVERY,  
9 Cheapside,  
London EC2V 6AD.

Solicitors for the  
Respondents

IN THE PRIVY COUNCIL

No. 56 of 1984.

ON APPEAL FROM

THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :-

THOMAS BRUCE HART

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O'CONNOR and FRANCIS JOSEPH  
O'CONNOR

Respondents

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RECORD OF PROCEEDINGS

VOLUME I

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LONDON WC1A 2PL.  
Solicitors for the Appellant

ALLEN & OVERY,  
9 CHEAPSIDE,  
LONDON EC2V 6AD..  
Solicitors for the Respondents

ON APPEAL FROM  
THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :-

THOMAS BRUCE HART

Appellant

-and-

JOSEPH O'CONNOR, PAUL MICHAEL O'CONNOR  
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RECORD OF PROCEEDINGS

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IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

No. 29/80

In the High  
Court of New  
Zealand  
Timaru  
Registry

BETWEEN JOSEPH O'CONNOR of Morven,  
Waimate, Retired Farmer PAUL  
MICHAEL O'CONNOR of Waimate  
Shearer and FRANCIS JOSEPH  
O'CONNOR of Ashburton, Shearer

Statement  
of Claim

Plaintiffs

A N D JOHN JOSEPH O'CONNOR of Morven,  
Waimate, Retired Farmer

21st May 1980

10

First Defendant

A N D THOMAS BRUCE HART of Waikakahi,  
Waimate, Farmer

Second Defendant

STATEMENT OF CLAIM

Wednesday the 21st day of May 1980

The plaintiffs by their solicitor say:

1. THE plaintiff the said JOSEPH O'CONNOR is a retired  
farmer residing at Morven, Waimate.

20 2. THE plaintiffs the said PAUL MICHAEL O'CONNOR and  
FRANCIS JOSEPH O'CONNOR are his sons aged 31 and 32  
years respectively.

3. THE first defendant is a retired farmer residing  
at Morven, Waimate.

4. THE plaintiff the said Joseph O'Connor is a son of  
JOHN O'CONNOR late of Waikakahi, Farmer deceased the said  
deceased having died on or about the 6th day of June 1911.

30 5. PROBATE of the last Will and Testament of the said  
deceased was granted in the Supreme Court of New Zealand  
at Timaru on the 8th day of June, 1926, to the first

defendant JOHN JOSEPH O'CONNOR of Morven, retired farmer as one of the executors and trustees named in the said Will, the first defendant being the eldest son of the said deceased.

In the High  
Court of New  
Zealand  
Timaru  
Registry

6. THE Will of the said deceased provided (inter alia) for the deceased's residuary estate to be held by his trustee following the death of the deceased's widow LAVINIA ALICE O'CONNOR "in trust to pay and divide the same equally to and amongst my children who being male shall attain the age of twenty years or being female shall attain that age or marry".

Statement of  
Claim

21st May 1980

(Cont'd)

7. THE deceased's widow the said LAVINIA ALICE O'CONNOR died on the 26th day of October 1950.

8. THE principal assets in the estate are farm lands situated at Morven, South Canterbury of which the first defendant is registered as proprietor being more particularly described as -

FIRST an estate in fee simple in all that piece of land containing 30.970 hectares or thereabouts being Lot 6 on Deposited Plan 2129 and all the land described in Certificate of Title Volume 387 Folio 47 (Canterbury Registry)

AND SECONDLY an estate of leasehold under and by virtue of Leases in Perpetuity Numbers 919 and 920 in all those pieces of land containing 179.7815 hectares more or less being Sections 8 and 9 Block III Waitaki District and all the land described in Certificates of Title Volume 181/98 and Volume 181/99 (Canterbury Registry).

9. THE residuary estate of the said deceased has not yet been distributed in terms of the said Will and the

plaintiff the said Joseph O'Connor has a vested interest in the estate as to a one-ninth (1/9th) part or share while the plaintiffs the said Paul Michael O'Connor and Francis Joseph O'Connor also have a vested interest in the estate having been left such interest by their uncle Denis O'Connor deceased.

In the High  
Court of New  
Zealand  
Timaru  
Registry

Statement of  
Claim

10. THE said Will further provides that "I hereby declare it to be my wish (but without intending to bind my trustees thereto) that my trustees shall not dispose of my farm unless they shall deem it advantageous to my estate or in the best interests of my family so to do until the time for distribution shall arrive".

21st May 1980  
(Cont'd)

11. THAT the first defendant holds the said farm lands on trust for the beneficiaries under the said Will.

12. THAT the first defendant in or about August 1977 entered into an agreement to sell the said farm lands to the second defendant THOMAS BRUCE HART of Waikakahi farmer acting as agent for members of the second defendant's family, they owning lands adjoining the said farm lands.

13. THAT the consideration payable for the said farm lands pursuant to such agreement (being \$180,000.00) was insufficient and inadequate. It was payable in full in cash on the 1st day of September 1979 while the Government Valuation of the said farm lands at that date was \$217,200.00.

14. THAT the said agreement was also unfair in that it did not provide for any deposit to be paid by the purchaser but gave the second defendant immediate possession of the farm lands excepting a residence thereon occupied by the plaintiff the said JOSEPH O'CONNOR subject

to payment of interest by the purchaser at 11½ per annum on the unpaid purchase price pending settlement two years after the date of possession having been given and taken.

In the High  
Court of New  
Zealand  
Timaru  
Registry

15. THAT the first defendant did not have proper mental capacity to enter into such an agreement and was of unsound mind and incapable of understanding the full implications of the agreement at the time the agreement was purported to be made.

Statement  
of Claim

10 16. THAT the solicitors acting in the sale transaction for the first defendant were at the same time representing the second defendant as purchaser and no independent legal advice was taken by the first defendant.

21st May 1980  
(Cont'd)

17. THAT in terms of the said Will the first defendant should have given an adequate opportunity to the plaintiffs the said PAUL O'CONNOR and FRANCIS O'CONNOR and any other appropriate descendants of the said deceased to farm the said lands and to seek to acquire the family interests therein before the lands were sold to a party outside the deceased's family but the first defendant did not do so despite the fact that express interest to this end had  
20 been shown by the plaintiffs to the first defendant.

18. THAT the first defendant has acted in regard to the said lands without proper deliberation and not in conformity with his position as a trustee and without consulting the beneficiaries in the estate of the said deceased as to the terms of the agreement.

19. THAT the second defendant as purchaser of the farm lands pursuant to the said agreement at the time of the formation of the agreement knew or ought to have known on  
30 reasonable grounds of the matters detailed in paragraphs

11 to 17 (inclusive) of this Statement of Claim.

WHEREFORE the plaintiff seeks -

- (1) A declaration that there is no valid agreement for the sale and purchase of the said farm lands between the first defendant and the second defendant
- (2) Alternatively, if the agreement be held to be valid that it be rescinded for want of mental capacity on the part of the first defendant and for unfairness
- (3) An order restraining the first defendant from completing the transaction evidenced by the Agreement for Sale and Purchase
- (4) An order that the second defendant forthwith yield up possession of the said lands
- (5) An order that the second defendant pays the estate of JOHN O'CONNOR deceased such amount as may be fixed by this court as a consideration for use and enjoyment of the said farm lands
- (6) Such other further relief as this Court deems fit
- (7) The costs of and incidental to this action.

In the High  
Court of  
New Zealand  
Timaru  
Registry

Statement  
of Claim

21st May 1980  
(Cont'd)

10

20

This statement of claim is filed by JAMES LEYBOURNE  
DOUGLAS WALLACE solicitor for the plaintiffs whose address for service is at the offices of Messrs. Gresson Richards Mackenzie & Wallace, Solicitors, 12 The Terrace, Timaru.

L.S.

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

No. A.29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN J. O'CONNOR, P.M. O'CONNOR and  
F.J. O'CONNOR

Plaintiffs

A N D J.J. O'CONNOR

First Defendant

A N D T.B. HART

Second Defendant

Statement of  
Defence by  
Second  
Defendant

1st July 1980

10

STATEMENT OF DEFENCE BY SECOND DEFENDANT

Tuesday the 1st day of July 1980

The second defendant by his solicitor says:

1. THE second defendant admits the allegations contained in paragraphs 1, 2, 3 and 4 of the statement of claim.

2. THE second defendant does not know the truth or otherwise of the allegations contained in paragraphs 5, 6 and 7 of the statement of claim and therefore denies the same.

20

3. THE second defendant does not know what assets comprise the estate of the said deceased and therefore denies the allegations contained in paragraph 8 of the statement of claim.

4. THE second defendant has no knowledge of the allegations contained in paragraphs 9 and 10 of the statement of claim and therefore denies the same.

5. THE second defendant denies the allegations contained in paragraph 11 of the statement of claim.

6. THE second defendant admits the allegations contained

in paragraph 12 of the statement of claim.

7. THE second defendant admits that the said agreement for sale provides for payment of the purchase price in full and in cash on 1st September 1979 and further admits that the purchase price for such land as determined and fixed under the said agreement totalled \$179,780.00 but save as is hereby expressly admitted the second defendant denies each and all the allegations contained in paragraph 13 of the statement of claim.

10 8. THE second defendant denies that the agreement was unfair and denies that the right to occupy a dwelling was limited to the plaintiff JOSEPH O'CONNOR and to one dwelling only but save as is hereby denied, admits each of the other allegations contained in paragraph 14 of the statement of claim.

9. THE second defendant denies the allegations contained in paragraph 15 of the statement of claim.

20 10. THE second defendant admits that the same firm of solicitors acted for the first defendant and the second defendant in respect of the said agreement for sale but denies that the first defendant was not independently advised in respect of the said agreement and all matters preliminary and consequent thereto.

11. THE second defendant does not know the truth of the allegations contained in paragraphs 17 and 18 of the statement of claim and therefore denies the same.

30 12. THE second defendant denies the allegations contained in paragraph 19 of the statement of claim save as are expressly admitted previously in this statement of defence in respect of paragraphs 11 to 17 (inclusive) of the

In the High Court of New Zealand Timaru Registry

Statement of Defence by Second Defendant

1st July 1980 (cont'd)



statement of claim.

AND FOR A FURTHER DEFENCE the second defendant by his solicitor says:

13. THE second defendant repeats the admissions denials and allegations contained in paragraphs 1 to 12 inclusive hereof.

14. THAT the plaintiff the said Joseph O'Connor was a party to the said sale agreement and approved the same.

10 15. THAT the plaintiff the said Joseph O'Connor by the said agreement and otherwise approved the sale of all livestock depastured on the said farm land including his own interest therein to the second defendant and was in 1977 paid the agreed purchase price thereof by the second defendant.

16. THAT the plaintiffs PAUL MICHAEL O'CONNOR and FRANCIS JOSEPH O'CONNOR were not parties to the said sale agreement and have no interest or right of action in respect of the same.

20 17. THAT the second defendant and/or his family have in good faith performed their part of the agreement for sale namely by taking possession, paying interest, paying rates, insurance premiums and Crown Land rentals, paying for the said livestock in the sum of \$22,184.00 and taking possession of the same, allowing the first defendant and his wife, the plaintiff Joseph O'Connor and his wife and the said DENNIS O'CONNOR (the latter until his death) to have free use and possession for their lives of the dwellings situated upon the said farm lands and by improving the said farm lands all with the knowledge of  
30 the first defendant, and the plaintiff Joseph O'Connor.

In the High Court of New Zealand Timaru Registry

Statement of Defence by Second Defendant

1st July 1980 (Cont'd)



18. THE second defendant and his family have in good faith and in reliance upon the said agreement for sale since the formation thereof materially altered their position.

In the High Court of New Zealand Timaru Registry

19. IF the plaintiffs or any of them have any right of action against the second defendant or in respect of the said agreement for sale arising from any one or more of the allegations in the statement of claim (which is denied) then and in such case they have by virtue of their laches lost the same.

Statement of Defence by Second Defendant

10

1st July 1981

(Cont'd)

This statement of defence is filed by RONALD JAMES DE GOLDI solicitor for the second defendant whose address for service is at the offices of Messrs. Hugh Smith and Mill, solicitors, 18 Butler Street, Timaru.

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

No. 29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN J. O'CONNOR, P.M. O'CONNOR  
and F.J. O'CONNOR

Plaintiffs

A N D J.J. O'CONNOR

First defendant

A N D T.B. HART

Second Defendant

Statement  
of Defence  
of First  
Defendant

7th September  
1981

10

STATEMENT OF DEFENCE OF FIRST DEFENDANT

Monday the 7th day of September 1981

The first defendant by his solicitor ADRIAN JOHN PHILIP  
MORE says:

1. BY order of the High Court at Timaru on the 2nd day  
of March 1981 the abovenamed first defendant was removed  
as trustee in the estate of John Joseph O'Connor late of  
Morven, Retired Farmer Deceased and the abovenamed Joseph  
O'Connor, Paul Michael O'Connor and Francis Joseph O'Connor  
being the plaintiffs in this action were appointed as new  
trustees in the said estate.

20

2. JOHN Joseph O'Connor named in the writ and statement  
of claim as the first defendant died at Waimate on or  
about the 14th day of July 1981.

3. THE said Joseph O'Connor, Paul Michael O'Connor  
and Francis Joseph O'Connor in their capacity as trustees  
in the said estate and as first defendants in this action  
acknowledge that they will abide the decision of this  
Honourable Court in respect of the prayer for an order  
restraining them from completing the transaction evidenced

by the agreement for sale and purchase more particularly referred to in the statement of claim and therefore respectfully consider that they are not required to plead to the statement of claim.

In the High  
Court of  
New Zealand  
Timaru  
Registry

Statement  
of Defence  
of First  
Defendant

This statement of defence is filed by ADRIAN JOHN PHILIP MORE solicitor for the first defendant whose address for service is at the offices of Messrs. Petrie Mayman Timpany & More, 11 Strathallan Street, Timaru.

7th September  
1981 (cont'd)

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

No. 29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN J. O'CONNOR, P.M. O'CONNOR  
and F.J. O'CONNOR

Plaintiffs

A N D J. O'CONNOR, P.M. O'CONNOR  
and F.J. O'CONNOR as Trustees  
in the Estate of JOHN O'CONNOR  
deceased

First Defendant

A N D T.B. HART

Second Defendant

Memorandum  
for His  
Honour the  
Judge from  
Counsel for  
the First  
Defendant

29th October  
1981

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MEMORANDUM FOR HIS HONOUR THE JUDGE FROM  
COUNSEL FOR THE FIRST DEFENDANT

MAY IT PLEASE YOUR HONOUR

Counsel for the first defendant has been giving consideration to his involvement in the above action.

The only remedy that the plaintiffs seek against the first defendant is an order restraining the first defendant from completing the sale of the farm to the second defendant.

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Counsel can advise Your Honour that the first defendants do not oppose the making of such an order.

As pleaded in the statement of defence of the first defendant, the first defendant does not require to plead to the balance of the relief sought in the claim.

Counsel respectfully submits that the main issue arising out of the action is the validity of the agreement and that that issue should be argued as between the plaintiffs and the second defendant. Counsel is concerned that if he is required to attend what may be a lengthy action to determine

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this issue, then the costs of the trial may be unnecessarily increased.

Counsel has filed a Notice under Rule 99(N) of the Code of Civil Procedure as between the first and second defendants as in the event of the plaintiffs being successful in their action to set aside the agreement, then the first defendant would be seeking damages from the second defendant for its use and occupation of the farm property against the interests of the first defendant. Such a

10 claim will apparently only arise if the plaintiffs are successful in having the agreement set aside.

Counsel therefore respectfully suggests that the trial to be heard in November this year be limited to the issue involving the validity of the agreement and that if the plaintiffs are successful on that issue then the issue of damages be reserved for further hearing if it cannot otherwise be resolved.

If the above propositions are acceptable to Your Honour then counsel would propose to seek leave to withdraw

20 from the hearing in November.

DATED at Timaru this 29th day of October 1981

"Illegible"

Counsel for the First Defendant

TO: The Registrar, High Court, Timaru  
AND TO: The abovenamed plaintiffs  
AND TO: The abovenamed second defendant

In the High  
 Court of  
 New Zealand  
 Timaru  
 Registry

Memorandum  
 for His  
 Honour the  
 Judge from  
 Counsel for  
 the First  
 Defendant

29th October  
 1981 (Cont'd)

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

A. No. 29/80

In the High Court of New Zealand Timaru Registry

BETWEEN J. O'CONNOR, P.M. O'CONNOR  
and F.J. O'CONNOR

Plaintiffs

Amended Statement of Claim

A N D J. O'CONNOR, P.M. O'CONNOR  
and F.J. O'CONNOR

First Defendants

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A N D T.B. HART

Second Defendant

Undated

.....D STATEMENT OF CLAIM

          day the          day of          1981

The plaintiffs by their solicitor say:

1. THE plaintiff the said JOSEPH O'CONNOR is a retired farmer residing at Morven, Waimate.

2. THE plaintiffs said said PAUL MICHAEL O'CONNOR and FRANCIS JOSEPH O'CONNOR are his sons born on the 8th day of November 1948 and 26th day of October 1947 respectively.

3. THE plaintiffs pursuant to an order made in this Court on the 2nd day of March 1981 were appointed trustees in the estate of JOHN O'CONNOR late of Waikakahi, Farmer deceased (hereinafter called "the deceased") he having died on or about the 6th day of June 1911.

4. IN this action the plaintiffs sue in their personal capacity and also in their capacity as trustees in the estate of the deceased.

5. THE plaintiffs were so appointed as trustees in

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place of JOHN JOSEPH O'CONNOR late of Morven, Waimate, retired farmer, now deceased, who died at Waimate on the 14th day of July 1981 (hereinafter referred to as "the former trustee"). The former trustee was the eldest son of the deceased.

In the High  
Court of  
New Zealand  
Timaru  
Registry

Amended  
Statement  
of Claim

6. THE plaintiff the said Joseph O'Connor is the youngest son of the deceased.

7. PROBATE of the last Will and Testament of the deceased was granted in the Supreme Court of New Zealand at Timaru on the 8th day of June 1926 to the former trustee as one of the executors and trustees named in the said Will.

Undated (Cont'd)

8. THE Will of the deceased provided "inter alia" for the deceased's residuary estate to be held by his trustee following the death of the deceased's widow LAVINIA ALICE O'CONNOR "in trust to pay and divide the same equally to and amongst my children who being male shall attain the age of twenty one years or being female shall attain that age or marry".

9. THE deceased's widow the said Lavinia Alice O'Connor died on the 26th day of October 1950.

10. THE principal assets in the estate are farm lands situated at Morven, South Canterbury being more particularly described as -

FIRST an estate in fee simple in all that piece of land containing 30.970 hectares or thereabouts being Lot 6 on Deposited Plan 2129 and all the land described in Certificate of Title Volume 387 Folio 47 (Canterbury Registry).

AND SECONDLY an estate of leasehold under and by virtue

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of Leases in Perpetuity Numbers 919 and 920 in all those pieces of land containing 179.7815 hectares more or less being Sections 8 and 9 Block III Waitaki District and all the land described in Certificates of Title Volume 181/98 and Volume 181/99 (Canterbury Registry).

In the High  
Court of  
New Zealand  
Timaru  
Registry

Amended  
Statement  
of Claim

11. THE residuary estate of the deceased has not yet been distributed in terms of the said Will and the Plaintiff the said Joseph O'Connor has a vested interest in the estate as to a one sixth (1/6th) part or share while the Plaintiffs the said Paul Michael O'Connor and Francis Joseph O'Connor also have vested interests in the estate having each been left one-third of the sixth interest held by their Uncle Denis O'Connor deceased subject to a life interest in favour of their mother. Other direct descendants of the deceased hold the remaining shares in the estate.

Undated  
(Cont'd)

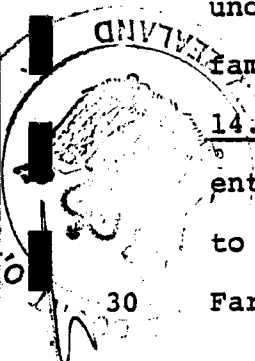
12. THE said Will further provides that "I hereby declare it to be my wish (but without intending to bind my trustees thereto) that my trustees shall not dispose of my farm unless they shall deem it advantageous to my estate or in the best interests of my family so to do until the time for distribution shall arrive".

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13. THAT since the deceased's death the said farm lands have been held on trust for the beneficiaries under the said Will and have been farmed by the deceased's family.

14. THAT the former trustee in or about August 1977 entered into an agreement to sell the said farm lands to the second defendant THOMAS BRUCE HART of Waikakahi, Farmer acting as agent for members of the Second

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Defendant's family, they owning lands near the said farm lands (hereinafter called "the agreement").

In the High Court of New Zealand Timaru Registry

15. THAT the consideration payable for the said farm lands pursuant to the agreement (being \$179,780.00) was insufficient and inadequate in that it was payable in full in cash on the 1st day of September 1979 while the Government Valuation of the said farm lands at that date was \$217,200.00 taking into account the lessee's interest. Moreover, when the agreement was presented to the Inland Revenue Department for stamping a special valuation was ordered by the Revenue from the Valuation Department and that a valuation of \$207,500.00 or thereabouts was placed on the farm lands at or about the 1st day of September 1977.

Amended Statement of Claim

Undated  
(Cont'd)

16. THAT the agreement was also unfair in that it did not provide for any deposit to be paid by the purchaser but gave the second defendant immediate possession of the farm lands excepting residences thereon occupied by the plaintiff the said Joseph O'Connor and the former trustee respectively subject to payment of interest by the purchaser at 11% per annum on the unpaid purchase price pending settlement two years after the date of possession having been given and taken. Moreover, it gave the second defendant two months credit for livestock.

17. THAT the former trustee did not have proper mental capacity to enter into such an agreement and was of unsound mind and incapable of understanding the full implications of the agreement at the time the agreement was purported to be made.

18. THAT the solicitors acting in the sale transaction for the former trustee were at the same time representing the second defendant as purchaser and no independent that is to say disinterested or sound, legal advice was given or taken by the former trustee.

In the High  
Court of  
New Zealand  
Timaru  
Registry

Amended  
Statement  
of Claim

19. THAT in terms of the said Will the former trustee should have given an adequate opportunity to the plaintiffs the said Paul Michael O'Connor and Francis Joseph O'Connor and any other appropriate descendants of the deceased to farm the said lands and to seek to acquire the family interests therein before the lands were sold to a party outside the deceased's family but the former trustee did not do so despite the fact that express interest to this end had been shown by the plaintiffs to the former trustee. By way of particulars in support of this allegation the plaintiffs say that the said Paul Michael O'Connor and Francis Joseph O'Connor should have been given reasonable opportunity to canvass their family for financial assistance to purchase the farm lands, particularly those of their relatives who had interests in the estate which owned the farm. They should have been given adequate opportunity to apply to and obtain a loan decision from the Rural Banking and Finance Corporation and other farm lending institutions. The "other appropriate descendants" referred to are members of the O'Connor family being descendants of the said John O'Connor deceased and including Margaret O'Connor, wife of John O'Connor of Timaru, Public Servant and daughter of the plaintiff Joseph O'Connor. The "express interest" that the plaintiffs showed to the first defendant

Undated  
(Cont'd)

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included a meeting in June 1977 at the offices of Messrs. Wilson, Watters & Co., the solicitors for the former trustee in his capacity as trustee/owner of the farm lands referred to in a letter from such solicitors to the former trustee dated 20th June 1977. As to the matter of proposals made by the plaintiffs to buy the said farm property the details were not finalised but the general proposals are set out in the letter dated 20th June 1977 referred to above.

In the High  
Court of  
New Zealand  
Timaru  
Registry

Amended  
Statement  
of Claim

10 20. THAT by reason of the matters hereinbefore set forth the plaintiffs say -

Undated  
(Cont'd)

- (a) That the agreement was entered into by the former trustee when he was of unsound mind and that the second defendant knew or ought to have known of the unsoundness of mind, or
- (b) That whether or not the second defendant had the knowledge referred to in the preceding sub-paragraph the agreement was unfair to the estate of the deceased, or
- 20 (c) That the agreement represents an unconscionable bargain in favour of the second defendant in all the circumstances.
- (d) That the former trustee acted in regard to the said lands without proper deliberation and not in conformity with his position as a trustee and without consulting the beneficiaries in the estate of the said deceased as to the terms of the agreement.

WHEREFORE the plaintiff seeks -

- 30 (1) A declaration that there is no valid agreement

for the sale and purchase of the said farm lands  
between the former trustee and the second defendant.

- (2) Alternatively, if the agreement is held to be valid  
that it be set aside for want of mental capacity  
on the part of the former trustee or for unfairness.
- (3) An order that the second defendant forthwith yield  
up possession of the said lands.
- (4) An order that the second defendant pays the estate  
of the deceased such amount as may be fixed by  
this Court as a consideration for use and enjoyment  
of the said farm lands.
- (5) Such other further relief as this Court deems fit.
- (6) The costs of and incidental to this action.

In the High  
Court of  
New Zealand  
Timaru  
Registry

Amended  
Statement  
of Claim

Undated  
(Cont'd)

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This amended statement of claim is filed by JAMES LEYBOURNE  
DOUGLAS WALLACE solicitor for the plaintiffs whose address  
for service is at the offices of Messrs. Gresson Richards  
Mackenzie & Wallace, Solicitors, 12 The Terrace, Timaru.

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

A. No. 29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN J. O'CONNOR, P.M. O'CONNOR and  
F.J. O'CONNOR

Plaintiffs

A N D J. O'CONNOR, P.M. O'CONNOR and  
F.J. O'CONNOR

First Defendants

A N D T.B. HART

Second Defendant

Supplementary  
Statement of  
Defence by  
the Second  
Defendant  
to Amended  
Statement  
of Claim

Undated

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SUPPLEMENTARY STATEMENT OF DEFENCE BY THE SECOND  
DEFENDANT TO AMENDED STATEMENT OF CLAIM

The second defendant by his solicitor says:

1. HE repeats the admissions denials and allegations contained in paragraphs 1 to 19 inclusive of his statement of defence.

2. HE denies that the agreement for sale and purchase was unfair for the reasons alleged in paragraph 16 of the amended statement of claim or any of them or for any other reason.

3. HE denies the allegations set out in paragraph 20 of the amended statement of claim.

AND AS A FURTHER GROUND OF DEFENCE he repeats the admissions denials and allegations contained in paragraphs 1 to 3 hereof and says:

4. IF the plaintiffs or any of them have any right of action against the second defendant or in respect of the said agreement for sale arising from any one or more of the allegations in the amended statement of

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claim (which is denied) then and in such case they  
have affirmed the said Agreement either by acquiescence  
waiver or election.

In the High  
Court of  
New Zealand  
Timaru  
Registry

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Supplementary  
Statement of  
Defence by  
the Second  
Defendant  
to Amended  
Statement  
of Claim

Undated  
(Cont'd)

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

A. No. 29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN J. O'CONNOR, P.M. O'CONNOR and  
F.J. O'CONNOR

Plaintiffs

A N D J. O'CONNOR, P.M. O'CONNOR and  
F.J. O'CONNOR

First Defendants

A N D T.B. HART

Second Defendant

Agreed  
Statement  
of Facts

Undated

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AGREED STATEMENT OF FACTS

1. This Memorandum of agreed statement of facts relates only to the roles played by Messrs. Wallace and De Goldi in relation to the within transaction, and is not to limit from enquiry the action taken, or not taken, by Messrs. Watson, Henderson, MacGeorge or Joseph O'Connor or such other persons as Your Honour may consider relevant.

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Nor is the overall view of the case to be limited by this agreed statement of facts which should be considered by Your Honour along with such other evidence as may be relevant.

2. Messrs. Gresson Richards Mackenzie & Wallace were instructed to act for the plaintiffs in October 1979. They took over the matter from Messrs. Campbell Evatt and Company.

3. Messrs. De Goldi and Cadenhead were instructed as counsel for the second defendant, Mr T.B. Hart, in  
November 1979.

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4. Mr J.L.D. Wallace of Messrs. Gresson Richards Mackenzie & Wallace first contacted Mr B.A. MacGeorge by telephone on Friday 26th October 1979. Mr MacGeorge's version of that telephone conversation is recorded by minute dated 29th October, 1979 (copy attached).

In the High  
Court of  
New Zealand  
Timaru  
Registry

Agreed  
Statement  
of Facts

5. That on 7th November, 1979 Mr Wallace saw Mr R.T. Henderson at Waimate, said he regarded it as inappropriate for Mr Henderson's firm to continue to act for the O'Connor estate and in December 1979 Messrs. Petrie, Mayman, Timpany & More commenced to represent the estate.

Undated  
(Cont'd)

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6. That on 7th November, 1979, Mr Wallace saw Mr MacGeorge at Waimate. Mr MacGeorge's record of that interview is recorded in his diary note dated 12th November, 1979 (copy attached).

7. That on 20th November, 1979, Mr MacGeorge wrote to Mr Wallace (copy attached).

8. In May 1980 on behalf of the O'Connors as plaintiffs, Mr Wallace filed the present Writ. At that point in time no proceedings had been issued by the defendant,

20 Mr Hart.

"T.M. Gresson"

Counsel for the Plaintiffs

"R.J. De Goldi"

Counsel for Second Defendant



Mr MacGeorge

20th November 1979

Messrs. Perry, Gresson, Richards and Mackenzie,  
Barristers and Solicitors  
P.O. Box 244  
TIMARU.

ATTENTION: Mr Wallace

In the High  
Court of  
New Zealand  
Timaru  
Registry

Agreed  
Statement  
of Facts

Mr MacGeorge

Dear Sirs

10 re: Estate J. O'Connor - Joseph O'Connor - Your Client -  
T.B. Hart & Others

Further to your discussion with the writer on the 7th  
November 1979, such discussion being without prejudice,  
we write to advise that we have taken up with our client  
purchasers the possibilities indicated to us in view of  
the stated opposition of Mr Joseph O'Connor to the purchase  
being completed.

Undated  
(Cont'd)

20 We advise that after full discussion and consideration,  
the instructions given to us are to proceed to enforce  
the contractual agreement that our clients have with the  
estate of J. O'Connor. We are instructing a barrister  
to commence suitable proceedings.

We would mention that settlement was tendered to the  
vendor estate on 1st September 1977 and our clients have  
remained willing and ready to settle at any point  
since but notice has been given to Mr Henderson that  
if settlement on behalf of the estate is not effected  
by the 30th November 1979 then legal proceedings to  
enforce the agreement can be expected.

30 Our clients are perfectly firm that they have acted in  
good faith at all points and are prepared to let the

Court decide the matter.

We see no prospect whatsoever in attempting any further discussions in the matter.

Yours faithfully

HENDERSON, MacGEORGE & WOOD

"R.A. MacGeorge"

In the High  
Court of  
New Zealand  
Timaru  
Registry

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Agreed  
Statement  
of Facts  
Undated  
Mr MacGeorge  
continued

MEMORANDUM: RE T.B. HART

In the High  
Court of  
New Zealand  
Timaru  
Registry

Mr J. Wallace of Perry Gresson Richards & Mackenzie  
Solicitors called and saw me Wednesday the 7th November  
and advised that he had instructions from his client  
Mr Joe O'Connor to oppose the Hart purchase. All steps  
necessary would be taken to so oppose any action on our  
part. I informed him that we had attended settlement  
and were ready to proceed, had raised considerable mortgage  
money and could not allow matters to go on any further  
10 now that we had been advised that there would be  
opposition.

Mr Wallace pointed out that one of the main reasons for  
the opposition was that the nephews Paul and I think John  
considered they had not had sufficient opportunity to try  
and purchase the property in their own right and that if  
they could be afforded such opportunity some solution to  
the matter acceptable to all parties may be possible.

Mr Wallace suggested some kind of leasing proposal and I  
said I was not hopeful that these arrangements would be  
20 acceptable to our clients but I would discuss this and  
the possibility which had occurred to me as we were  
talking was of "over-laying" contracts. I immediately  
rang Mr Hart as I did for the following two days and  
could not raise him. It appeared that he may be at the  
Christchurch annual AMP Show.

BAM 12.11.79

Agreed  
Statement  
of Facts  
Undated  
Memorandum  
Re T.B. Hart

MEMORANDUM FOR FILERe: T.B. Hart

I had better examine the question of the stamp duty objection and payment of duty in the near future.

BAM: 7/11/79

MEMORANDUMFILE T.B. HART

10 Mr Wallace of Perry Gresson Richards & Corrang on the afternoon of Friday 26th October to say that Mr Lindon Watson had passed over the O'Connor matter to him and that he would like to come down to have a 'without prejudice' discussion over the matter. I said I would be agreeable to this and would pass this on to Mr Henderson. Mr Wallace said he would try and get down the following week or if not the week after. I impressed on him the need to move quickly as I was not in the position to wait a great deal longer myself.

BAM 29-10-79

In the High  
Court of  
New Zealand  
Timaru  
Registry

Agreed  
Statement  
of Facts  
Undated  
Memorandum  
for File  
Re: T.B. Hart

Memorandum  
File T.B. Har

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

A. No. 29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN J. O'CONNOR, P.M. O'CONNOR and  
F.J. O'CONNOR

Plaintiffs

A N D J. O'CONNOR, P.M. O'CONNOR and  
F.J. O'CONNOR

First Defendants

A N D T.B. HART

Second Defendant

Motion for  
Orders  
Abridging  
Time and  
Joining  
Additional  
Defendant  
under Rule  
90

8th February  
1982

MOTION FOR ORDERS ABRIDGING TIME AND JOINING  
ADDITIONAL DEFENDANT UNDER RULE 90

TAKE NOTICE that counsel for ROBERT THOMAS HENDERSON  
of Waimate, Barrister and Solicitor, WILL MOVE this  
Honourable Court on Monday the 8th day of February 1982  
at 10 a.m. in the forenoon or so soon thereafter as  
counsel may be heard FOR ORDERS:

1. Pursuant to Rule 594 of the Code of Civil  
Procedure abridging the time appointed by  
the said rules for the hearing of this  
application to 10 a.m. on Monday the 8th  
day of February, 1982;
2. Pursuant to rule 90 of the Code of Civil  
Procedure the said Robert Thomas Henderson  
of Waimate, Barrister and Solicitor, be  
joined as third defendant in this action;

UPON THE GROUNDS that such abridgement of time and  
joinder are necessary to enable the court effectually  
and completely to adjudicate upon and settle all

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the questions involved in this action AND UPON THE  
FURTHER GROUND that the justice of the case requires  
 such order.

DATED at Timaru this 8th day of February 1982

"Illegible"

Counsel for the said  
 Robert Thomas Henderson

TO: The Registrar of the High Court at Timaru;

AND TO: The abovenamed Plaintiffs;

10 AND TO: The abovenamed First Defendants;

AND TO: The abovenamed Second Defendant.

In the High  
 Court of  
 New Zealand  
 Timaru  
 Registry

Motion for  
 Orders  
 Abridging  
 Time and  
 Joining  
 Additional  
 Defendant  
 under Rule  
 90

8th February  
 1982 (Cont'd)

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

A. No. 29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN J. O'CONNOR, P.M. O'CONNOR and  
F.J. O'CONNOR

Plaintiffs

Ruling of  
Cook J.

A N D J. O'CONNOR, P.M. O'CONNOR and  
F.J. O'CONNOR

First Defendants

8th February  
1982

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A N D T.B. HART

Second Defendant

Dates of hearing: 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th,  
12th, 15th, 16th, 17th, 18th & 19th  
February 1982

Counsel: T.M. Gresson & J.L.D. Wallace for  
Plaintiffs and First Defendant  
A.J.P. More for First Defendant (withdraws)  
R.J. De Goldi & J. Cadenhead for Second  
Defendant  
C.B. Atkinson joined Defence Counsel on  
12th February 1982.

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Ruling: 8th February 1982

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RULING OF COOK J.

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This purports to be an application under Rule 90,  
not by either party, but by a person who seeks to be  
joined as a defendant and the application arises from  
the fact that the defendants have pleaded as a positive  
defence that the plaintiff, Joseph O'Connor, had given  
consent to the sale.

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The actual allegation is:

"THAT the Plaintiff the said Joseph O'Connor  
was a party to the said Sale Agreement and  
approved the same."



and Joseph O'Connor has denied that he agreed to a sale and states further that a form of consent - which was certainly not a consent to the particular transaction but, at best, to the principle of selling or leasing and contained the words "sale or lease" did not contain the words "sale or" when he signed it.

In the High.  
Court of  
New Zealand  
Timaru  
Registry

\_\_\_\_\_  
Ruling of  
Cook J.

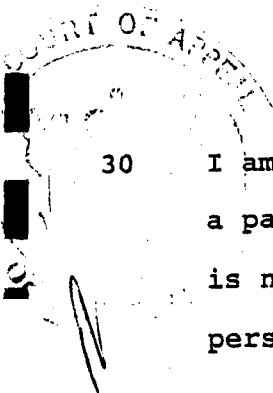
Not only was that evidence given but also evidence by Inspector West to the effect - and I put this very briefly - that words had been added at a later time than the time of signing and were in the same handwriting as the person who wrote the memorandum. The evidence pointed to Mr Henderson - who, at that time, was acting for the estate - as being responsible. As the defence was taken by surprise, I directed that cross-examination of the inspector be postponed until they had time to instruct an expert to examine the file.

8th February  
1982 (Cont'd)

Then followed the application by Mr Henderson to be joined as a defendant. I am unable to see, however, that he is in a position to make such an application, though no doubt it is open to the Court to make an order in appropriate circumstances without an application by either party. Rule 90 provides for:

"... the name of any person who ought to have been joined, or whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions in the action be added, whether a plaintiff or defendant."

I am unable to see that the presence of Mr Henderson as a party is required to do what the Rule states. There is no allegation in the statement of claim against him personally, nor that he acted as agent for the defendant.



If he were joined, there would be forced upon the plaintiffs an entirely new course of action which they do not seek to bring. Nor am I able to see that, had the defendants had prior warning of the nature of the allegation contained in the evidence, it would have been a proper case for joining Mr Henderson as third party.

As to the use made of the evidence, that must depend upon the pleadings and any questions arising can be determined at the time. It was suggested that a reply to the defence allegation referred to should have been made. There is no express requirement in our Rules for such a reply and, while I do not wish to make a finding which could be construed as deciding that there is never an obligation to file such a statement, I cannot say that there was such an obligation in this case, though it would have been much better if the plaintiffs had, in some way or another, indicated to the defendants the nature of the allegations which would emerge. I think the surprise factor has been taken care of by the postponement of the cross-examination and the opportunity given to the defence to employ an expert. The order sought is refused.

"J.P. Cook J"

In the High  
Court of  
New Zealand  
Timaru  
Registry

Ruling of  
Cook J.

8th February  
1982 (Cont'd)

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

A No. 29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN J. O'CONNOR, P.M. O'CONNOR and  
F.J. O'CONNOR

Plaintiffs

A N D T.B. HART

Defendant

Notice of  
Further  
Particulars  
of Plaintiffs'  
Claim

10th February  
1982

NOTICE OF FURTHER PARTICULARS OF  
PLAINTIFFS' CLAIM

10 TO: The Defendant

TAKE NOTICE that the plaintiffs say, that in addition to the particulars of unfairness contained in paragraph 16 of the statement of claim, the agreement was unfair in that it was entered into between the former trustee and the defendant on the basis that Joseph and Denis O'Connor had consented to the sale of the O'Connor Estate farm lands, which consent is denied. The said Joseph O'Connor and Denis O'Connor in writing consented on the 25th of August 1977 to the lease of the Estate farm  
20 but the words "sale or" were added to the Memorandum of Consent without their authorisation.

DATED this 10th day of February 1982

"T.M. Gresson"

Solicitor for the Plaintiffs

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

No. A. 29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN JOSEPH O'CONNOR,  
PAUL MICHAEL O'CONNOR  
and FRANCIS JOSEPH O'CONNOR

Reasons for  
Judgment  
of Cook J.

Plaintiffs

A N D JOHN JOSEPH O'CONNOR

17th May  
1982

First Defendant

A N D THOMAS BRUCE HART

Second Defendant

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Dates of Hearing: 2nd, 3rd, 4th, 5th, 8th, 9th, 10th,  
11th, 12th, 15th, 16th, 17th, 18th,  
and 19th February, 1982.

Counsel: T.M. Gresson & J.L.D. Wallace for  
Plaintiffs and First Defendant  
A.J.P. More for First Defendant (withdraws)  
R.J. De Goldi & J. Cadenhead for Second  
Defendant.  
C.B. Atkinson joined Defence Counsel  
on 12th February 1982.

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Judgment: 17th May 1982.

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REASONS FOR JUDGMENT OF COOK J.

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John O'Connor, late of Waikakahi, Farmer, died in 1911 leaving a will in which he provided that, following the death of his wife, his estate should go to his nine children equally. It appears that there can have been little if anything in the estate other than a farm property comprising three separate pieces of land not far from Waimate. One block was sold and another purchased in its

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place a few years after his death and from then on the land, which is the subject of this action, one area of freehold and two areas held under lease in perpetuity, remained in the name of the trustee. John O'Connor's widow died in about 1950, but the estate was not then realised and distributed; by common agreement between the beneficiaries (apart from one son, William, who was paid out his share) three of the sons, who for convenience will be referred to as Jack, Dennis and Joe, farmed the property partnership taking all the proceeds for themselves. By 1976 it was becoming apparent that they were too old to continue the farming operation and, at the end of that year, their approximate ages would have been Jack 83, Dennis 82 and Joe 71. At that time Jack was the sole trustee and continued to be until March 1981 when, a few months before his death, he was removed from office and replaced by Joe O'Connor and his two sons, Frank and Paul, the three plaintiffs in this action.

Early in 1977 there were certain discussions and, certainly so far as the three brothers were concerned, it was proposed that Frank and Paul should be approached to see if they would wish to purchase and, assuming they did so wish, whether this would be a practical financial possibility. They were written to by Mr Henderson, the solicitor to the estate, and some delay occurred but basically it appears that they wished to purchase if arrangements could be made. Nothing had been achieved in this direction, however, when in July 1977 the defendant, Mr Bruce Hart, put forward a proposition for leasing the three pieces of land but with an option in his favour to

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purchase at any time during the lease.

It is to be understood that Mr Henderson was in partnership with Mr B. MacGeorge and that, while the former had acted for the O'Connor estate and for individual members of the O'Connor family, having taken them over as clients from a former member of the firm, Mr Wilson, who had retired, Mr MacGeorge acted for Mr Hart and, accordingly, the parties on either side were clients of the same firm.

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10           Upon receipt of a memorandum from MacGeorge, Henderson got in touch with Jack again and the outcome was that, early in August, the proposal to Frank and Paul that they might buy was withdrawn and Joe and Dennis were informed by letter that their brother, Jack, had agreed to lease the property, but reserving the right for the three brothers and, in the case of Jack and Joe who were married, their wives, to go on living in the homes they had occupied for so long. From that point things moved quickly. Mr Hart suggested that the property should be sold to him rather than that he be granted a lease with an option.

20           There was an interview between Henderson and Joe and Dennis in which the latter two signed a piece of paper which purported, when subsequently produced, to be their consent to a "sale or lease" of the property by Jack to the defendant, though without any indication of the terms; subsequently the plaintiff, Joe, with some evidence to support his contention, denied that it had contained the words "sale or" when signed. Four days later Jack signed a form of agreement for sale prepared by Henderson which

30           the latter then handed to his partner to peruse on behalf

of and to discuss with Mr Hart. The document signed by Jack constituted an offer to sell and was promptly accepted by Mr Hart and dated the 1st September 1977.

The plaintiffs now seek to upset this agreement. When the proceedings were issued in 1980, Jack O'Connor was still alive and, in his capacity as trustee of the estate, named as first defendant. However, after that and not long before his death, as already mentioned, the plaintiffs were appointed trustee in his place and accordingly, by consent, Jack O'Connor was struck out as a defendant with a reservation whereby counsel for his estate could still be heard on the question of costs. Consequently reference in this judgment to the defendant will be to the Second Defendant, Mr Hart.

In an amended statement of claim filed in November 1981, the plaintiffs alleged that the consideration payable under the agreement between Jack and the defendant was insufficient and inadequate in that it was payable in full in cash on 1st September 1979 (i.e. two years after possession of the property was given and taken pursuant to the agreement) while at that date the Government valuation for the farmland, i.e. the capital value of the freehold block and the lessee's interest in the two leasehold properties, was \$217,000. It was further pleaded that the agreement was unfair in that it did not provide for any deposit to be paid by the purchaser but gave him immediate possession of the farmlands (excepting the residences occupied by the plaintiff, Joe O'Connor and his wife and Jack O'Connor), subject only to payment of interest by the purchaser at 11% on the unpaid purchase price pending

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settlement two years after the date of possession. There then followed certain allegations:-

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"17. THAT the former trustee did not have proper mental capacity to enter into such an agreement and was of unsound mind and incapable of understanding the full implications of the agreement at the time the agreement was purported to be made.

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10 "18. THAT the Solicitors acting in the sale transaction for the former trustee were at the same time representing the Second Defendant as purchaser and no independent, that is to say disinterested or sound, legal advice was given or taken by the former trustee.

20 "19. THAT in terms of the said Will the former trustee should have given an adequate opportunity to the Plaintiffs the said Paul Michael O'Connor and Francis Joseph O'Connor and any other appropriate descendants of the deceased to farm the said lands and to seek to acquire the family interests therein before the lands were sold to a party outside the deceased's family but the former trustee did not do so despite the fact that express interest to this end has been shown by the Plaintiffs to the former trustee. ...."

It was then claimed:-

"20. THAT by reason of the matters hereinbefore set forth the Plaintiffs say:-

- 30 (a) That the agreement was entered into by the former trustee when he was of unsound mind and that the Second Defendant knew or ought to have known of the unsoundness of mind or,
- (b) That whether or not the Second Defendant had the knowledge referred to in the preceding sub-paragraph the agreement was unfair to the estate of the deceased, or,
- 40 (c) That the agreement represents an unconscionable bargain in favour of the Second Defendant in all the circumstances;
- (d) That the former trustee acted in regard to the said lands without proper deliberation and not in conformity with his position as a trustee and without consulting the beneficiaries in the estate of the said deceased as to the terms of the agreement."



And upon these grounds the plaintiffs sought:-

- "(1) A declaration that there is no valid agreement for the sale and purchase of the said farm lands between the former trustee and the Second Defendant.
- (2) Alternatively, if the agreement is held to be valid that it be set aside for want of mental capacity on the part of the former trustee or for unfairness."

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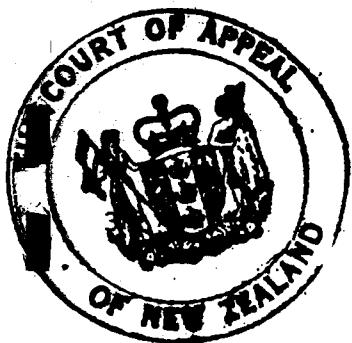
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It should be noted that, at the time when the hearing commenced, the estate was beneficially owned as follows: - the estate of Jack O'Connor a one-sixth share, Joe O'Connor a one-sixth share, Frank and Paul and their sister Margaret a one-sixth share between them and two brothers and two sisters of Joe O'Connor a one-eighth share each.

For the defence, following a general denial of the allegations of the plaintiffs, it was pleaded:-

- (1) that Joe O'Connor was a party to the sale agreement and approved it;
- (2) that he also approved the sale of all livestock including his own interest therein and was paid his share of the purchase price;
- (3) that Mr Hart and/or his family had in good faith performed their part of the agreement for sale, by taking possession, paying interest, paying rates, insurance premiums and Crown Land rentals, paying for the said livestock in the sum of \$22,184.00 and taking possession of the same, allowing Jack and his wife, Joe and his wife and Dennis to

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have free use and possession for their lives of the dwellings mentioned and by improving the farm lands, all with the knowledge of the Plaintiff, Joseph O'Connor;

- (4) that Mr Hart and his family had, in good faith and in reliance upon the said agreement for sale, materially altered their position.

It was further pleaded for the defence that if the plaintiffs did have any right of action it had been lost by virtue of their laches; alternatively, that they had affirmed the agreement either by acquiescence, waiver or election.

(1) Capacity to contract:

The evidence upon which this question has to be determined is in part that of laymen, non-medical people who saw Jack, frequently in some cases and at intervals in others, during a period of time prior to and after the signing of the contract: that of his own doctor who saw him during the same period of time, and the observations of the surgeon, Mr McKenzie, made after Jack's admission to hospital in 1978. There was no-one who examined him for the express purpose of determining the question at the time or within a few months of the event. For the purposes of the trial, Doctor Begg, Medical Superintendent of Sunnyside Hospital, made an extensive study of the evidence available in order to form an opinion as to Jack's condition at the end of August, 1977 and, for the defence, Doctor Dobson attended the hearing and read relevant evidence and expressed an opinion in the light of the evidence which he had read, including that of Doctor Begg, and also from

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some information gained from the Timaru Hospital.

Jack O'Connor was 84 or 85. There appears to be no doubt that he was no longer capable of the physical effort necessary to continue the work with machinery on the farm which had been his contribution to the partnership. Physical decline is not the same as mental incapacity, however, and evidence which goes no further than his physical state must not be taken to mean that he failed in other respects. The general tenor of the evidence of Joe O'Connor was that Jack was failing mentally; that he had some good days but was "generally messed up" in his mind so far as business was concerned. He described him as quite good on the day of the meeting in April 1977, but said he deteriorated quite a lot after that. He mentioned that Mr Henderson had said to him at one time, which appears to have been about July 1977, that Jack was coming to his office in the morning to sign up papers - "which I guarantee he doesn't know the meaning of in the afternoon or has forgotten them". It was put to him in cross-examination that Mr Henderson would deny this, but he stood firm. He described Jack as mixed-up and having reached a stage where he would not have understood; that Mr Henderson had, on more than one occasion, said that Jack would come in in the morning to sign documents and in the afternoon wouldn't have a clue what he had done and that that described Jack's condition. He was criticised for thinking on the one hand, that Jack was no longer fit to be trustee but, on the other for standing back and doing nothing to have him replaced, but I see this as quite understandable. Had he had due warning what it was

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proposed should be done in respect of the farm - a question which will have to be given separate consideration and I am not prepared to accept that he had - and continued notwithstanding to do nothing to stop Jack from so acting, the position might be different but I do not find that to have been the situation.

Jack had been visited by his daughter, Bernadette Heaney, who found cause for considerable concern. She described him as forgetful, losing weight, neglecting himself and doing strange things such as making blunders with machinery, which had always been his particular interest on the farm; failing to understand the difference between a new motor-mower and an old one, hiding things about the house, including money, although he had always been careful previously. He had ceased going to Mass and had changed in many ways. Clearly things were not all well at home and she witnessed rows between him and her mother. She found quite a few empty whiskey bottles and decided that, at that particular time, he might have been drinking as much as half a bottle a day whereas, previously, he had been content with a glass of ale with his dinner. She was concerned as to his handling of business affairs and felt that they were getting out of hand. Following her return to Levin, and after receiving a phone call from her mother, she telephoned Mr Henderson, a fact which is substantiated by a memorandum he made, and maintained that she said to him that she was concerned about his health and his ability to administer the farm at that stage because of his mental state; such a remark was not recorded in Henderson's memo, however.

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Mr Lang, the accountant to the estate, giving evidence for the defence, said that at the meeting in April 1977 Jack had looked normal to him. He had seen him again late in the year when he went to his house for information for tax returns when he said that, in a discussion of one and a half to two hours, he was able to follow the matters they were talking about - "nothing complicated".

It does seem that when he saw him he discovered unrepresented cheques and at least one substantial account that had been paid twice. He agreed that things were in a bit of a mess.

The defence placed some stress on the fact that Mr Armstrong, the valuer, appointed to value the property for the purposes of the agreement, when he went to the property for this purpose and spoke to Jack, saw nothing abnormal in his speech or response to his questions. It seems that they did have some discussion, but mainly about machinery.

Of the medical witnesses, Doctor Eton had been Jack's medical practitioner at the relevant times, indeed, for the last ten years of his life. He had recorded on 25th July 1977:-

"25/7/77 - He and his wife have visited me because they are worried about some legal problems that Mr O'Connor signed some statement which, at the time, he didn't understand or agree to and they are worried this was done when he didn't understand. Mr O'Connor at the present time does appear to be a bit confused. ...I think probably right now he is in a mild to moderate senility and he is probably not capable of understanding complicated business affairs."

His comment when giving evidence was that, while it was hard to say, he thought Jack could understand simple, straightforward affairs, but there would be things he did

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not understand; simple business, by which I understand him to mean a straight-forward question, do you or do you not want to sell your farm, but not anything complicated. On a later occasion, on the 3rd August, he examined Jack on what he described as a routine matter, for a driving licence, a test which he had passed before. He noticed then that he was very alert and that he passed his medical examination quite satisfactorily. He explained that the test was in three parts - an eye-sight test, a hearing test and an examination of the heart and lungs and he maintained that a person in a mild to moderate senility could still pass a driving test. He was cross-examined fairly closely on this particular examination and said that Jack presented no evidence of senility on that day - quite alert and normal. It appears that he did not see him again until January 1978 when he recorded that Jack was getting very senile and, following that interview, referred him to Mr McKenzie, a surgeon in Timaru for a hernia from which Jack was suffering.

Mr McKenzie first saw him in February 1978 but it was not until October of that year that he was admitted to hospital. It was then found that his state was such that an operation for urinary trouble, which had been contemplated, should not proceed as it would be unlikely he would be able to cope with the treatment following his operation. Mr McKenzie said that they could not get him to understand the reason for it and that the degree of dementia at that stage was quite marked.

Turning to the evidence of Doctor Begg, he had not

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only listened to the relevant evidence but had sighted certain documents and had interviewed members of the O'Connor family, in particular Joe O'Connor and Bernadette Heaney, Jack's daughter, and had also had consultations with Doctor Eton and Mr McKenzie and seen the notes and records from the Timaru and Waimate Hospitals. He referred to the process of aging and how it may develop into senile dementia. He explained that this means loss of mental power and is parallel with the loss of brain substance, but is more than that. He would divide it into what he called a chronic brain syndrome; into a loss of intellectual powers with loss of memory and reasoning capacity and the loss of emotional stability and that these two interact. He said there were two major features which cause trouble; that there is a loss of initiative, an excessive habituation, either the person will carry on persistently in old habits or become quite careless and quite apathetic, with a loss of ability to understand. He mentioned the failings that would be manifest in old people diseased in this way and linked them with what he had learnt of Jack O'Connor. He went on to say that the onset of senile dementia is a gradual process, not easily recognised at the beginning; that it is progressive and follows a steady downhill course, as Joe O'Connor had described, as there are loss of nerve cells in the brain and accordingly, despite fluctuations, good days and bad days as had been described, the mental capacity is reduced. He said, further, that while a person might be more alert one day - as he appeared to have been on the day he went for his driving licence test - and less alert on another, this does not alter the fact that his

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loss of brain cells, brain shrinkage and total loss of capacity which gradually progresses. He expressed the view that the dementing process may begin in the seventies, that it often does but is universal in the eighties. In his view, Doctor Eton's diagnosis of senility he would have classified according to an international code as "moderate to severe". He stated that the ability to calculate is one that falls off and was positive in his opinion that, in July/August 1977, the ability to comprehend the financial consequences of a deal would have been quite beyond Jack and, in that state of health, suffering as he was from dementia, he would be unable to comprehend the implications for his nephews or other members of the family and any claims they might have; that Jack was liable to be influenced by others and would have been an easy prey at that time.

His evidence wavered little under cross-examination, but he commented particularly on the effect alcohol would have upon Jack. He said he believed that Jack had a senile-dementing process, as he had described, and that, in the circumstances of anxiety he found himself in, he increased his drinking of alcohol and, if he did so to the extent that Mrs Heaney had estimated, this was likely to enhance the loss of brain substance at quite a rapid rate.

Doctor Dobson had had access to the medical notes of Doctor Eton and discussed with a doctor at the Timaru Hospital the case notes held there. In addition he had read the notes of evidence of the witnesses who spoke as to Jack's state of mind. The conclusion which he reached was that Jack, a man of 80 odd years at the time in question,

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was suffering or had experienced the normal aging process which would have slowed his capacity for his brain to function. He later stressed the manner in which his mental capacity was reported to have fluctuated, which he regarded as inconsistent with a slowly, progressive deterioration as is found with senile dementia. He placed reliance on the significance of Doctor Eton's case notes and attributed the fluctuation to the stress resulting from the bad relationship with his wife, coupled with the alcohol consumption which Mrs Heaney reported. He concluded his evidence-in-chief with the following statement:-

"I have thought about this and it seems to me that what Mr Jack O'Connor had to consider were the issues, in the first instance, the necessity to sell the farm, secondly, the importance of obtaining a fair price, thirdly to make suitable arrangements to be made for the housing of himself and his other two brothers after the farm had been sold, fourthly he would need to sell to a financially competent person to ensure income for himself and his brothers and fifthly, bear in mind the request of his deceased father, the family estate, if possible, be kept in the family. He had to bear these in mind when making a decision to sell and he would need to have plenty of time and be under no pressure and he would consider this at his leisure and it seems to me that this process would be well within his competence bearing in mind the information available to me."

I did find that a somewhat surprising statement for a medical expert to make on the limited information that could be available to him. However, he did qualify it to some extent. He agreed that in January 1978 Jack's mental functioning was severely impaired and that he would then have been under a degree of disability and, indeed, that the same state of affairs existed in December 1977. He amplified this by saying that, sometime about December 1977 and

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January 1978, Jack began the terminal phase of his life with the several disorders from which he finally died. He agreed further that on occasions Jack was having "bad days" and had had difficulty in recalling some events in the past. He agreed that he could not be certain that Jack would have fully understood the terms of a relatively complicated contract entered into at the end of August, 1977; that his opinion was based on the fragments of information provided. Finally, he stated that it was a matter of speculation how well a man of 80 could consider the matters which were mentioned in the quotation from his evidence-in-chief given above; he assumed that such a person would seek advice from professional advisers and, having got competent advice, he would be able to understand the discussion that would ensue.

Taking all the evidence into account, I am left with the firm impression that, at the relevant times, when decisions had to be made by Jack in relation to the farming operation of the partnership and the correct course to take in respect of the farm lands and stock, he may have been able to understand such minor matters as might come up for decision day by day but that, not only was he old and failing physically, facts which are undoubted, he was suffering to some degree, whether mild to moderate, or moderate to severe, from senile dementia, which was possibly assisted to an extent by alcohol. That this dementia produced not only bad days but a state of confusion in his mind which would not have permitted him to grasp and understand the questions in issue and the

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decisions to be made in connection with matters of importance; in particular, the disposal of the farm lands.

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It becomes a question, therefore, whether this constituted a lack of capacity to enter into the contract of the 1st September 1977.

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The subject of lack of mental capacity was most thoroughly considered in Archer v. Cutler [1980] 1 NZLR 386 by McMullin J. As to the test to be applied he accepted that:-

"The common law test of contractual incapacity is whether the party, at the time of entering into the disputed contract was suffering from such a degree of mental disability that he was incapable of understanding the nature of the contract."

and in applying it he said:-

"On the evidence of Dr McDonald, I have no doubt that on 3 January 1977, the defendant was suffering from such a degree of mental disability that she was incapable of understanding the nature of the contract. She may well have understood that the document she signed related to her land but she would not have understood its terms, nor would she have been capable of determining the sufficiency of the price even if these matters had been explained to her."

He made reference to Gibbons v. Wright (1954) 91 CLR 423 from which I would extract the following passage from the judgment of Dixon C.J., Kitto J. and Taylor J. (at page 437):-

"The learned Chief Justice was clearly right in treating the validity of the instruments in suit as depending upon the possession by Ethel Rose Gibbons and Olinda Gibbons of a degree of understanding relative to the nature of that which they were doing. The law does not prescribe any fixed standard of sanity as prerequisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that

each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation. The case of Ball v. Mannin (1829) 1 Dow. & Cl. 380 (6 E.R. 568); 3 Bli N.S. I (4 E.R. 1241) though somewhat confusedly reported, is an authority in point .....

The principle which the case supports, and for which Boughton v. Knight (1873) L.R. 3 P. & D. 64, at p.72; Jenkins v. Morris (1880) 14 Ch.D. 674; Birkin v. Wing (1890) 63 L.T. 80 and Estate of Park (1954) P.112 may also be cited, appears to us to be that the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained. As Hodson L.J. remarked in the last-mentioned case, 'one cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject-matter of the particular case' (1954) P.112, at p.136."

In this case, as I see it, the nature of the transaction, which it was necessary for Jack O'Connor to understand, is more than the bare fact that certain areas of land were being sold to a certain person. It was a transaction entered into by him in his capacity as a trustee and with all the responsibility which rests upon a trustee when trust property is sold; it entailed due consideration of such questions as the way in which a sale should be made, the price which should be fixed and the terms upon which the sale should be made.

I am satisfied, upon the balance of probabilities that Jack O'Connor did not have contractual ability to enter into such a transaction at that time and would not have had a proper understanding of the matters for decision, even if they had been adequately explained to him. I may say that I am satisfied also that they were not so explained, but that aspect is set aside for the

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meantime.

(2) Grounds for avoiding the contract:

Clearly, lack of capacity, of itself is not enough to give grounds for avoiding the contract. This aspect was considered in particular detail by McMullin J. in Archer v. Cutler. There appears to be no difficulty in accepting that one test to be applied is that formulated in Imperial Loan Co. v. Stone [1892] 1 Q.B. 599 - that before a contract entered into by a person lacking capacity may be avoided at that person's option, the lack of mental capacity must be known to the other party. Beyond that, however, is the question of unfairness. McMullin J. reviewed the authorities where the element of fairness was regarded as a factor to be taken into account and came to the conclusion:-

"Sanctity of contract and the need to maintain certainty in the contractual relationships may suggest that where one contracting party is of unsound mind the contract should not be avoided unless the other party either knows or ought in the circumstances to know that the party with whom he is dealing is of unsound mind. But one may question the sanctity of a contract made with a party whose unsoundness of mind is such as to render that party incapable of understanding the nature of the bargain and one may wonder whether certainty of contractual relationships will be much impaired by allowing unfairness of the bargain to be set up on behalf of a party whose contractual capacity is so impaired. On the facts of this case, as I have found them, I must resolve the very question which the High Court of Australia was able to leave open in Gibbons v. Wright. I find nothing in policy or principle to prevent me from holding that a contract entered into by a person of unsound mind is voidable at his option if it is proved either that the other party knew of his unsoundness of mind, or whether or not he had that knowledge, the contract was unfair to the person of unsound mind. In Imperial Loan Co v. Stone the fairness of the bargain was not in issue and, with respect, the

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judgments of Lord Esher MR and Fry LJ must be read against the background of a fair bargain. But there are earlier and later dicta of Judges of great eminence which would suggest that fairness is material."

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This, I understand, to be accepted by either side as a true statement of the law to be applied to the present case.

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(3) Knowledge of the defendant:

10 Mr Hart had, of course, known the O'Connors for many years. He farmed the neighbouring property and had seen Jack from time to time, rather in a neighbourly way discussing farming conditions and so on than in a social sense. He must have known the approximate ages of the brothers and by 1977 the problems that had developed for them in carrying on the farming operation. Already a portion of the land was being leased in some informal way by Mr Hart, or members of his family, in order to reduce the burden on the O'Connors. For many years he had hoped to acquire the property having realised, not long after he had started farming himself, that it would work in well with his own property. It was entirely understandable that he should make an approach in the hope of staking his claim and in the hope, also, that, should the land have to be disposed of, he might be granted prior consideration. Mr Hart appears to be an able farmer and a competent businessman and I have no doubt that he took such steps as he thought advisable to secure the land and was fully aware that Jack and his brothers could not carry on much longer, but this does not mean that he had knowledge that Jack O'Connor was lacking

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adequate capacity when the time came for arrangements to be made. While one cannot but think that Mr Hart must have wondered how competent Jack might be to undertake business of any complexity, on the evidence before me I would not be able to find that his knowledge was such that he knew that Jack lacked capacity sufficient to enable him to understand the nature of the bargain which he entered into.

10 It is submitted for the plaintiffs, however, that, even if Mr Hart did not know himself, of his own knowledge, Henderson, in respect of the final transaction must have known of Jack's lack of capacity so that the defendant must be regarded as being fixed with that knowledge. For this and for other reasons, which will arise subsequently, it is desirable to review the evidence of the association between Mr Hart and Henderson particularly as there is conflict between the two.

20 Mr Hart's evidence was to the effect that at the last discussion he had with Jack, this having occurred after he had received a phone call from Jack's wife about the end of July or early August, he was asked if he was interested in leasing the property. He then went to see MacGeorge, whom he described as his solicitor, and the outcome was the memorandum dated the 27th July 1977 (number 33 on the Henderson file) in which MacGeorge put forward proposals for a lease for a term of five years, with a right of renewal for five years, and with an option to the lessee to purchase at any time during the term of the lease at a price to be fixed before its commencement;

30 the lessee was also to purchase the sheep at valuation.

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Apparently this was at a time shortly before MacGeorge was about to go on holiday and Mr Hart said that later he received a phone call from Henderson asking if he would go in to see the latter and, when he did, he was told that there would be a leasing arrangement between Jack and himself. He said this would have been early to middle August. According to Mr Hart they discussed the situation of the houses and the appointment of a valuer to value the stock; the understanding was that it was on a five year term with a right of renewal, and Henderson said he would submit details to MacGeorge. According to MacGeorge, the day upon which he went on leave was the 12th August so it may be that the conversation between Henderson and Mr Hart was shortly after he had left.

It seems that prior to this discussion Henderson must have seen Jack. The memorandum is dated the 27th July 1977; and a note was made on it by Henderson, under the heading "Attg Jack", as follows:-

1. Rental - valuer
2. Stock - CFCA McRae
3. Term
4. Withdrawing offer to Frank and Paul, have had long enough."

A letter went to each of the nephews on the 3rd of August. On the same day a memorandum went to MacGeorge in which Henderson said that he had seen Jack who agreed in principle to virtually every proposal which had been put forward, with the exception that he would like to limit the length of the lease to three years with the right of renewal for three years and that he would have the right

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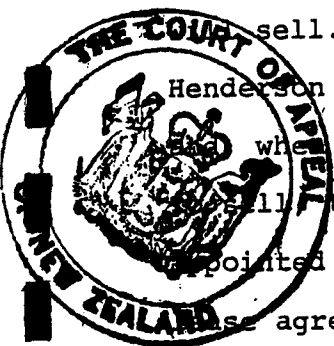
to live on the property for his lifetime. It mentioned, further, that Jack hadn't mentioned his brothers, Joe and Dennis, so far as wishing to live on the property for their lifetime was concerned, but that he felt that Bruce Hart should sort that out with Joe before a final conclusion was arrived at. He said he hoped to see Bruce Hart "possibly even before you get this memo", so clearly there was some contact between them, even though MacGeorge was there. As mentioned MacGeorge was due to go on leave on 12th August and this memorandum appears to discount any suggestion that there would have been no contact between Henderson and Mr Hart but for that fact. Accordingly, whether Mr Hart is correct in his recollection that the conversation between him and Henderson regarding the lease was after MacGeorge's departure may or may not be correct.

The next time they were in conversation was described by Mr Hart as approximately a week later i.e. a week after the discussion regarding a lease; that he then happened to be in the foyer of MacGeorge's office and he met Henderson passing from the office to his own room as Mr Hart was paying an account. Mr Hart said, "I am not happy with the lease arrangement. Would you see if O'Connor sell." According to his account, he next heard when Henderson phoned him asking him to go to the office again when he complied, he was told that Jack had agreed that an independent valuer for the land would be appointed and the same arrangement as considered in the agreement applied to the housing, that is, the O'Connors were to have the use of the houses for life,

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either the husbands or wives. He agreed to those suggestions. The next step was for Henderson to draw up the purchase agreement and submit it to MacGeorge. The agreement was drawn up and signed by Jack on the 27th August and then submitted to MacGeorge. He must have perused it and seen Mr Hart, for the document was signed and dated the 1st September.

Henderson's account is somewhat different. Mr Hart had spoken to him early in the year. He put it as being prior to the 4th March, when he wrote to Jack suggesting that something should be done about the farm. The cause for the concern, which prompted the letter had come from a phone call which he had had with Mrs Jack O'Connor and from a word with Mr Hart. According to Henderson, the latter said he would like to lease the property, should nothing be resolved and should Joe's sons not take over. When the memorandum of the 27th July came from MacGeorge, he discussed it with Jack almost immediately, i.e. on the 29th. Letters followed on the 3rd of August to Frank and Paul and on the 4th to Joe and Dennis saying what was proposed. According to his recollection, in the fourth week of August, he had two or three discussions with Jack and that Jack instructed him to see if Mr Hart would buy. He said that he thereupon rang up Mr Hart, who indicated that he would like time to think about it. Accordingly he discussed with Jack a sale rather than a lease and he believed that these conversations were within a few days prior to the 25th August.

Setting aside various matters, including an interview with Joe and Dennis in which Henderson claims they consented

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to a sale being made to Mr Hart, Henderson put a proposal to him on the 26th August, a Friday. He said that Mr Hart first wanted time to think and then on the 29th, the following Monday, said that he would like him to proceed and draw up the contract and send it to MacGeorge.

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It is apparent that there was a direct contact between Henderson and Mr Hart early in the year and having given due consideration to which account is likely to be correct, I am disposed to accept Mr Hart's recollection of the sequence of events as more accurate. Despite the contacts that there were between them, however, I am not satisfied that Mr Hart regarded Henderson as his solicitor or otherwise as his agent. It was to MacGeorge that he looked for advice and to carry out any instructions he might give. While there is quite a strong argument that Henderson was acting as agent for Mr Hart when he conveyed to Jack the suggestions from Hart that Jack should sell, I am not satisfied that such an agency did exist or that Mr Hart can be said to have had knowledge of Jack's incapacity by reason of the fact that it must have been apparent to Henderson.

It is difficult after this lapse of time, with the somewhat conflicting evidence and with Jack no longer alive, to say where the truth really lies, but I am unable to find that Mr Hart had such knowledge of Jack's incapacity in August 1977 that it would enable Jack's successors as trustee of the estate to avoid the contract.

(4) Fairness:

Accordingly, it is necessary to consider whether

there was an absence of fairness.

In Archer v Cutler McMullin J. pointed out that definitions of "fair" and "fairness" in the present context have not been attempted by the Courts, but that a number of indicia have been suggested to test its presence. He mentioned those that were taken into account in York Glass Co. v Jubb (1925) 134 L.T. 36. In respect of the case he was considering he said (at p. 402):-

"In the present case there are a number of factors which may be regarded as indicia of unfairness. I emphasise, however, that the unfairness of which I speak is of an objective kind because I do not believe that the plaintiff set out to work a fraud on the defendant. The indicia to which I refer are:

- (1) The price was significantly below the true value of the land.
- (2) The defendant had no independent legal advice; the plaintiff did.
- (3) While both the plaintiff and the defendant were elderly unsophisticated people and on that account may be regarded as on an equal footing, the plaintiff had a complete mental grasp of the details of the transaction; the defendant did not. The disparity in their mental capacity casts the differences in their bargaining positions in strong relief."

In the present case the matters which fall to be considered in order to ascertain whether or not the contract may be said to be fair, are the following:-

The nature of the advice available to Jack O'Connor.

The relative bargaining positions of the parties.

The consideration from the purchaser and the terms of the contract generally.

I propose to deal with these in turn, but interposing two other matters before considering the third.

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(a) The advice available - While there was a solicitor to the estate with whom Jack O'Connor had interviews on a number of occasions during the relevant period of time up to the signing of the contract document, it is difficult to see that he received proper advice. Certainly there was the meeting in April 1977 when the three brothers, Jack, Joe and Dennis discussed the future with Mr Wilson, a retired partner of the firm from whom Mr Henderson had taken over the work for the O'Connor estate with Henderson himself and Mr Lang, the accountant to the estate. According to the evidence, there must have been general discussion regarding sale of the property and the alternatives open to the estate. Mr Wilson recollected that Jack's main concern was where they would live if the farm was sold, but that he recognised that they had reached a stage when they were unable, successfully, to carry on farming operations. From Joe's evidence and the memorandum prepared by Henderson after the conference, it is clear that the possibility of selling to an outsider or of leasing was considered, but the final decision was that Paul and Frank should be given an opportunity to purchase should that be a practical possibility and there is nothing to indicate that any advice was given or sought as to the manner in which a sale to an outsider might be made.

The matters upon which Jack clearly would have needed advice, setting aside any question of his capacity to understand it, must have been as to his duty as a trustee to obtain the best price possible for the sale of the beneficiaries, the proper manner in which to set about

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finding a purchaser, whether a sale should be by auction or by private treaty; whether the three blocks should be sold as one property or offered separately, what starting price should be set, if a sale by treaty, or what reserve if the sale should be by auction. In some cases a vendor may not need such advice. In others having received it, he will be able to apply his mind to the points on which decisions must be made. A person who has not sufficient capacity to understand the questions involved may nevertheless receive sound and competent advice and, despite an inability to make a proper judgment, acquiesce in what his adviser proposes to him with a perfectly satisfactory result. In the present case I am unable to see that Jack received any advice at all. It seems, that it was he that proposed to Mr Hart that the latter might lease the property and I cannot think that this meant more than a lease. It is to be recalled that according to his own evidence, Mr Hart had first suggested leasing early in 1977 and I take that to mean a lease simpliciter, without a right to the lessee to purchase. After Jack's suggestion, Mr Hart went to MacGeorge and a proposition in the form of the "without prejudice" memorandum of the 27th July 1977 came to Henderson. The latter saw Jack immediately and was able to send a memorandum to MacGeorge on the 3rd August 1977 saying that he had seen Mr O'Connor who agreed in principle to "virtually ever proposal which has been put forward with the exception that he would like to limit the length of the lease to three years with a right of renewal for three years and secondly that he would have the right to live on the property for a lifetime."

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He made reference to the possibility that the other brothers would wish to go on living in the house occupied by them and it has been noted already that he hoped to see Bruce Hart immediately "even before you get this memo". It is apparent that they had already discussed the matter for the memorandum concluded - "As discussed with you I will raise the issue with him then". As the proposals included the following:-

10           "8. Mr Hart would also like a clause included to purchase at any time during the term of the Lease or the renewed term at a price to be fixed before the commencement of the Lease. This right to be at the option of the Lessee and not mandatory."

and as I can only read the memorandum referred to as stating that Jack agreed to this, I cannot believe that he was properly advised upon this point at that time.

20           Henderson did say in evidence that, as to the price being fixed before the commencement of the lease, what he had in mind was that a valuation should be made at the outset and used as a base so that, should the option to purchase be exercised, a further valuation could then be made and it would be possible to make an allowance for improvements arising from work done by the Harts. I find this difficult to understand. The paragraph of the memorandum quoted above makes it quite clear what the proposal was. There is no note upon the

30           memorandum, as with certain other details, that it was not acceded to and nothing in the return memorandum to MacGeorge indicates that there was not agreement with what surely must be regarded as a most important aspect

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of the arrangement.

When the proposal was made by Mr Hart that he should buy, the situation appears to have been not dissimilar so far as giving Jack advice is concerned. Whichever version one accepts of the manner in which the possibility of an outright sale was raised, it seems that the only advice Jack received from Henderson was that it would be a feasible way to conclude matters. While basic terms were worked out quite quickly, there is no suggestion that any other way of finding a purchaser for the property was considered or that any advice was given beyond suggesting that Mr Armstrong would be a suitable valuer. It is not insignificant that the terms, with some modification as to insurance which is not material, were immediately accepted by Mr Hart; indeed, they might have been designed expressly to suit him, relieving him as they did from any need to raise any portion of the purchase price of the land for two years. On this aspect it is interesting to note that Mr Hart said that this term was not included as a result of any suggestion from him, but that he found it in the agreement when he first saw it after it had been signed by Jack. At that stage he had not tried to ascertain whether he could have raised the purchase money at that time. As to the valuer, Mr Hart said that Henderson suggested to him that a single valuer should be used and that the valuer's price should be final.

It is impossible to accept that the offer made to Mr Hart came following proper advice. Indeed, one may

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go further and wonder, when the outcome of the discussion between Jack and Mr Henderson had produced an offer which was so eminently suitable to Mr Hart, whether such advice as Jack may have been given was independent and disinterested. Henderson may not have been acting for Mr Hart in the sense that he was Mr Hart's agent to arrange a transaction, but Mr Hart was a client of the firm and Henderson may well have had his interests in mind. I am satisfied that there was a lack of independent advice and that in this respect there is an indication that there was an element of unfairness in the bargain.

(b) The relative bargaining positions:

While this is not a case where the parties to a contract came to an arrangement themselves without intermediaries, where one might exert undue persuasion upon the other, I see the relative bargaining positions of importance. Quite apart from his lack of capacity, Jack O'Connor was old, his physical health was not good; clearly he had to find some solution to the problem of carrying on the farm, but the matter which was uppermost in his mind must have been the need to retain his home. As already noted, this was mentioned in Mr Wilson's evidence as Jack's main preoccupation when the meeting was held in April. One notes also that, on the 24th June, 1977, Jack had signed a memorandum regarding a sale to Frank and Paul and included in this was the statement - "I would have right to reside in property for life". Whatever one may make of Henderson's explanation that references in his memorandum written on 23rd June, 1977 should have been

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to Mrs Jack O'Connor and not Jack himself, it is surely clear that by the afternoon of the 24th, the day upon which he signed the memorandum containing the statement quoted above, his memory was not clear as to what he had done. A week later, on the 1st July, Henderson is reassuring him:-

"Your main worry seems to be the fact that if the sale to Frank and Paul proceeds you will have to leave your house. There is no suggestion that you should leave the house even although a sale take place. In fact it has been specifically provided that in any scheme of re-arrangement you and your wife have the right for life to live in the house which you now occupy."

I cannot but think that in July, when he suggested to Mr Hart that the latter might take a lease of the property, the same thought was uppermost in his mind. On the other hand, Mr Hart was a very much younger, vigorous man. He had acquired a number of properties and had experience as a county councillor outside the farming world and the experience acquired from a farming operation. He had wanted the O'Connors' property ever since he started farming next-door, a very natural attitude. A run-down property so close at hand, in the hands of three elderly men, must have seemed very attractive to him with young sons wishing to farm. I am satisfied that he had conveyed to the O'Connors his suitability as a purchaser or lessee and that their state of mind was such that they did not contemplate anyone else. They were by no means on an equal footing and this operated notwithstanding that the terms of the arrangement come to were conveyed - one could not say they were

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negotiated - by the two solicitors as their intermediaries  
 While this is not a factor which, of itself, demonstrates  
 that the bargain was unfair, it is to be borne in mind  
 when considering the terms of the agreement.

(c) Paul's and Frank's position:

As indicated, before turning to the terms of the  
 bargain there are two aspects which it is necessary to  
 touch upon of which this is the first.

In the amended statement of claim it was alleged:-

10 "19. THAT in terms of the said Will the  
 former trustee should have given an adequate  
 opportunity to the Plaintiffs the said Paul  
 Michael O'Connor and Francis Joseph O'Connor  
 and any other appropriate descendants of the  
 deceased to farm the said lands and to seek  
 to acquire the family interests therein  
 before the lands were sold to a party outside  
 the deceased's family but the former trustee  
 did not do so despite the fact that express  
 20 interest to this end had been shown by the  
 Plaintiffs to the former trustee.

By way of particulars in support of this  
 allegation the Plaintiffs say that the said  
 Paul Michael O'Connor and Francis Joseph  
 O'Connor should have been given reasonable  
 opportunity to canvass their family for  
 financial assistance to purchase the farm  
 lands, particularly those of their relatives  
 who had interests in the estate which owned  
 30 the farm. They should have been given  
 adequate opportunity to apply to and obtain  
 a loan decision from the Rural Banking and  
 Finance Corporation and other farm lending  
 institutions. The 'other appropriate  
 descendants' referred to are members of the  
 O'Connor family being descendants of the said  
 John O'Connor deceased and including Margaret  
 O'Connor, wife of John O'Connor of Timaru,  
 Public Servant and daughter of the Plaintiff  
 40 Joseph O'Connor. The 'express interest' that  
 the Plaintiffs showed to the First Defendant  
 included a meeting in June 1977 at the offices  
 of Messrs Wilson, Watters & Co., the Solicitors  
 for the former trustee in his capacity as  
 Trustee/owner of the farm lands referred to in  
 a letter from such Solicitors to the former  
 trustee dated 20th June 1977. As to the matter  
 of proposals made by the Plaintiffs to buy the

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said farm property the details were not finalised but the general proposals are set out in the letter dated 20th June, 1977 referred to above."

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and a considerable amount of evidence was adduced in an attempt to demonstrate that, had Frank and Paul been given an opportunity to purchase the property, it would have been possible for them to do so. While no particular submissions were made on this aspect, my understanding is that the plaintiffs relied on this fact as an element of unfairness. Whether or not Frank and Paul could have raised the necessary finance; whether, if they could have done so, it would have been a feasible proposition for them to have taken over the property and for accommodation and an income to have been provided for the older generation, I do not find it necessary to decide; if, indeed, it should be possible to do so on the evidence presented.

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While it may well have been unfair to Frank and Paul, as between them and the estate and Jack, the trustee, that a decision should have been made in April 1977 that they be given an opportunity to purchase and that, following certain misunderstandings as to the order of events to follow, this opportunity should quite peremptorily be withdrawn, without giving them any real chance to ascertain what might be possible, I am unable to see that this was something that could be considered as introducing an element of unfairness into the bargain between the estate and Mr Hart.

I should not like to think that in a transaction between a person lacking capacity and one who had no

knowledge of that fact, questions of "unfairness" must of necessity, relate entirely to the terms of the bargain between them. One can imagine the situation where such a person, owning some object or property quite irreplaceable and which he had no true intention to sell, might be prevailed upon to part with it. The fact that a full purchase price may have been given in return would not, to my mind, remove the element of unfairness from the bargain. Possibly in the present case if all the beneficiaries, the real owners of the property, had agreed to a proposition whereby Paul and Frank should buy and a point had been reached where the necessary finance was available but, despite this, Jack O'Connor, lacking mental capacity, had agreed to sell elsewhere, a situation of unfairness might have been demonstrated, but that is not the case here. Whatever sympathy one may have for Paul and Frank, that may not be taken into account when testing the contract between Jack and Mr Hart.

(d) The consent form:

The second matter cannot but cause great concern. On 25th August, 1977, Joe and Dennis were called to Henderson's office and this was at a time when the proposal by Mr Hart that he should purchase the land must have been under consideration by Jack and Henderson. They had previously been informed by letter from Henderson, dated 4th August, that Jack had agreed to lease the farm lands to Mr Hart and there was at this time a request for an assurance in writing that they were prepared to join in selling the stock; that is, the stock belonging to the estate and to the partnership. It was mentioned that the term of the

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lease was three years with a right of renewal for three years, with an option to purchase at any time within that period and it must have been some time between that letter and the 25th August that the suggestion of immediate sale was raised. When giving evidence, Joe made it apparent that the reference to an option to purchase did not mean very much to him. He regarded it as some sort of right of first refusal in the event of a decision to sell; presumably, to someone other than Paul and Frank.

10 He was not opposed to the lease as he thought it would give his sons an opportunity to take over at a later date when the lease ran out. As to the visit to Henderson on the 25th August he said:-

20 "The purpose of the meeting, the sale of the sheep. Bruce had offered to take over the sheep and we had no property as it had been leased. We couldn't hold the sheep if we leased the place so we signed that. That was the main purpose of what we signed, for lease and sale of the sheep to Bruce. I referred to the lease. The lease - that didn't include my house nor Jack's house. We were to stay on in the house in the meantime in fact I think we had it for life. Mr Henderson told me that Hart didn't want the house. As to any discussion about a sale of the farm - there was none. The lease yes, but not a sale. That discussion that day would have lasted no more than an hour."

30 He said further that prior to signing a document of consent he did not really read it; that Henderson read it to them and he knew the gist of it:-

"The meeting with Mr Henderson on 25th August, Mr Henderson read the contents of this document to us. When he read it to us, he did not refer to the farm being sold. He said, Bruce would like to purchase if he possibly could but we didn't take much notice of that as we were not selling anyway."

The document in question, which undoubtedly was signed on

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that day, is as follows:-

25.9.77

"We hereby agree to the proposed sale or lease of the O'Connor estate properties to Mr T.B. Hart or his nominee AND to the sale of the sheep to him at a valuation made by C.F.C.A. Ltd, possession being 1.9.77.

'Joe O'Connor'

'D. O'Connor''

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Joe maintains that the words "sale or" were not there when he and Dennis signed. Before going on to the other evidence relating to this consent form and Henderson's explanation and account of the interview with Joe and Dennis, it is convenient to record Joe's reaction when he received a letter from Henderson written on the 30th August and commencing with the words:-

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"We have to advise that Jack has now signed up the sale of the properties to Bruce Hart. Possession is to be given and taken on 1st September 1977 and payment deferred until 1st December 1979."

Joe said that when he read that letter:-

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"I was at home. Sitting on the chair in the livingroom. My reaction when I read the first paragraph of this letter, I then threw it down on the floor. I said, Jack might have signed this but I have not or words to that effect. My wife was there at the time. I was so adamant that I wasn't going to sign it as it referred to the sale of the land which we had never ever thought of. We had never ever had any intention, Dennis or I, of selling. The letter in the last paragraph Mr Henderson requested me to sign 'a more formal agreement'. My reaction to that request - as far as I was concerned, all we had was an agreement to lease not to sell."

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This is borne out by Mrs O'Connor:-

"I remember my husband receiving this letter, we were both sitting in the livingroom at home.

After my husband received the letter he was going through his mail and I was reading the paper and that comes through at 1pm everyday. All of a sudden, he is a very placid man, and he jumped out of his chair and said 'Look at that'. He flung it across the room with all the energy he could muster. I didn't know what was in the letter. I picked it up and read it."

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Later she went to see Henderson but this was not until December 1977 when she met a nephew of her husband's and together they decided to go and see Henderson:-

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"He just told us I couldn't do anything about it. The place is definitely sold. I wanted to confirm with him as I couldn't believe what I had read."

Returning to the form of consent, which is in Henderson's handwriting, it is apparent that the words "sale or" were not written at the same time as the rest of the text and it is agreed by all concerned that that is so. Inspector West, the chief documents examiner and handwriting expert in the Police Department in New Zealand, had examined the piece of paper and the file from which it had come and deduced that the text without the words "sale or" had first been written by Henderson; that the paper, while not on the file, had been signed by Joe and Dennis; that it had been subsequently placed on the file and at a later time the words "sale or" had been added. There is no need to trace the full line of reasoning, but it should be explained that there were positive indications that at some stage the papers on the file immediately above the form of consent had been folded back firmly, as if to permit access to the consent form, and on a paper on the file below the consent an



indentation could be discerned of the words "sale or", but of no other part of the wording of the consent.

Standing alone, this raised more than grave suspicion against Henderson. The basic conclusions arrived at by Inspector West could not be faulted upon subsequent examination, though an allowance must be made for the extent of handling the file had received, but an explanation was forthcoming which did not run counter to Inspector West's findings, as opposed to his conclusions, but was based on a sequence of events which had not occurred to the Inspector and could hardly have been expected to occur to him. If I understand it correctly, Henderson's account is that he wrote out the form of consent without the words "sale or" and then pinned the form to the file sometime before Joe and Dennis called to his office and before the prospect of selling immediately to Mr Hart had been raised. At a point during the discussion, when he not only considered that a sale to Mr Hart was the most practical solution but that this fact was accepted by Joe and Dennis, he added the words "sale or" while the consent was still on the file, read the consent over to them and then removed it from the file and obtained their signatures.

Where the truth lies is not easy to say. The implications of the allegations against Henderson, arising from the evidence of Inspector West, coupled with the use he made of the consent form, are serious, no less than forgery, but an explanation has been given which must raise some element of doubt in one's mind. I am not

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prepared to make a finding against him of such grave import. Whether the words "sale or" were in the consent or not, from his own evidence, corroborated to a degree by that of his wife, and from the whole background of evidence leading up to the 25th August, I am satisfied that Joe would not have been prepared to consent to such a sale; nor did he understand that he was signing a form of consent upon which that construction could be put.

How sound a reason Henderson had for saying that a sale to Mr Hart was acceptable to Joe and Dennis, one cannot know. Dennis was in his eighties and all the indications are that he took little part in any discussion but followed Joe's lead. Joe must have been at least 71 and his state of health fluctuated. Possibly there were misunderstandings and possibly he and Henderson were at cross purposes, one talking of a lease and the other of a sale. Whatever the situation may have been, according to his own account, Henderson told Jack that they had consented and also showed the form of consent to Mr Hart who apparently wished to know whether they had. If it appeared that Jack and Mr Hart had been deliberately misinformed, it might well be that there was an element of unfairness in the contract as it seems improbable that Jack would have proceeded in the absence of belief that the two brothers with whom he had farmed for so long agree; I am unable so to find, however.

(e) Terms of the contract:

I turn now to the terms of the contract for the sale of the property to Mr Hart. In brief, these were:-

- (i) The purchase price to be the market value of the

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lessee's interest in the land held under lease in perpetuity and the freehold value of the freehold land, such values to be determined as at the 1st September 1977, by Don Armstrong, registered valuer, Timaru.

(ii) The purchase price was to be paid in cash on or before the 1st September 1979.

(iii) Possession to be given on the 1st September 1977.

(iv) Pending payment of the purchase moneys, interest at 11% per annum to be paid quarterly in arrears.

10 (v) The vendor to remain liable until the 1st September 1979 for local body and pest destruction rates and fire premiums.

(vi) Jack and his brothers Joe and Dennis and their wives to have the right to remain in possession of the houses so long as they wished, free of charge, but with responsibility at their own expense for proper maintenance repair and upkeep.

20 (vii) The stock, both the property of the partnership and the estate, to be sold also, possession to be given on 1st September 1977 and the price to be determined by a sole valuer, with payment of the purchase price not later than the 1st November 1977.

If there is unfairness it must be in the method of fixing the purchase price, the amount at which it was in fact fixed and the fact that the purchaser was given two years to pay. It was also suggested that Mr Hart was given two months to pay the purchase money for the stock, when a much shorter period was normal, but beyond noting that it appears to be yet another way in which he was

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favoured, standing alone, I do not see it as importing unfairness into the bargain. The same may be said of the rate of interest charged. If 11% was not in fact the appropriate rate in such circumstances and, as the circumstances were so unusual it would be difficult to say what was, it must have been sufficiently close to it not to be regarded as unfair. The method of fixing the value, the actual value fixed and the time granted Mr Hart to pay must all be considered together.

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10           If the proper market value of the property at that time was to be obtained, it is clear that the estate needed competent advice; advice which Henderson frankly accepts that he was not competent to give, but he must have known how best it could be obtained. There were three pieces of land and one question which clearly arose was whether they should be sold together as one property or separately. Then there was the question of the likely demand and whether the best result could be achieved by auction or private treaty. It was essential that a view

20           should first be formed as to the price the land might fetch when sold to best advantage. This could have been used either to set a starting price for negotiations or a reserve for auction. It was suggested that a stage had been reached where there was no time for such procedure no doubt there was little time to waste, but it seems that the principal and most pressing problem so far as the farming operation was concerned was Jack's inability to carry on the machinery work. I cannot but think that, had the matter been handled properly, some reasonable time

to follow normal procedures would have been available.

I turn first to the valuation made by Mr Armstrong and the evidence he gave for the defence. It should first be noted that he has had considerable experience in valuing in the district and is a practical farmer in his own right. His task was to determine the market value of the properties owned by the estate and, while he may have had some preliminary discussions with Henderson, his instructions were brief and he was given no details of the agreement beyond the fact that he knew Mr Hart was the purchaser. He valued the lessee's interests in the Greenhill blocks at \$81,188.00 and \$53,592 respectively and the freehold land at Willowbridge at \$45,000, making a total of \$179,780, the figure of \$180,000 being accepted for the purposes of the agreement. He made no allowance for the fact that the purchaser was to pay no sum on account by way of deposit and was to have two years before he need pay the purchase price, not being aware of that provision but, neither did he make any deduction for the life interest in the houses for Joe and Jack and their wives and for Dennis. For the purposes of the trial he endeavoured to assess the amount by which this might diminish the purchase price for the purposes of the trial and came up with a figure of \$15,000 which he expressed as "a bit of a stab". While one can accept that a farmer interested in purchasing might well endeavour to decide upon a figure in that way, it does seem that it must depend very much on the circumstances of any particular purchaser the extent to which he would regard such interests, in favour of people of the age of those in question, as

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detracting from the value. While it seemed generally accepted by those giving evidence on this aspect of the matter that a farmer wanting more land would pay some sort of premium to get suitable land adjoining his own, he had made no addition for this and stated in evidence that, having subsequently given thought to the question, he was unable to demonstrate to himself that such a premium is in fact attracted.

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10 Considerable mention was made of a sale, Goodson  
to Dickson, which had been entered into earlier in 1977  
but held up for some time before it was completed with the  
result that the information was not available to Mr  
Armstrong when he made his valuation. He accepted that,  
had he known of it, he might have increased the valuation  
of the Willowbridge property by \$10,000 to \$15,000.

20 Having started with a defence valuer, mention should  
next be made of the evidence of Mr Gilchrist, a registered  
valuer employed by Pyne, Gould, Guinness. He was  
instructed in 1981 and, without knowing the amount of Mr  
Armstrong's valuation, endeavoured to value the blocks of  
land, as he understood them to have been in September 1977.  
He arrived at figures as follows:-

Greenhill Blocks:

L.I.P. no. 919	\$78,150
L.I.P. 920	51,800
Willowbridge, freehold	54,000
	<u>\$184,050</u>

This was without allowance for the life interests which he considered would diminish the value by \$13,000, but, as he was well out in his understanding of the ages of the

life tenants, I think this figure must be discounted to some degree. While he knew of the Dickson Goodson sale and said that he was valuing with hindsight, I did not understand him to have taken into account subsequent sales in an endeavour to establish trends at the particular time.

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For the plaintiffs, evidence on this topic was first given by Mr Donaldson, the District Valuer at Timaru. He produced the Government valuations as at 1973 and 1978 and these showed the following figures:-

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<u>Name</u>	<u>G.V. 1 July 1973</u>	<u>G.V. 1 October 1978</u>	<u>1973/78 % Increase</u>
Willowbridge Block	\$25,800	\$70,000	+ 173%
Greenhill Blocks	83,650	154,500	+ 84.7%
Cumulative	109,450	224,500	+ 105%

The latter figures cannot, of course, be taken as giving a valid indication of what the market value may have been at a date twelve months and more before, but they are of interest as an indication of the trends which the Department saw over the period of time in question. In his opinion, other figures produced showed that there was a considerable lift in overall sale prices during or from the first six months of 1977 onwards. He considered that there was a premium which an established farmer would pay for land adjoining his own; also, that in the case of what he described as rather indifferently developed land people were prepared to pay what were relatively high prices having regard to the state of the land, the tax benefit

gained in developing such land being a contributing factor to this. He made no assessment of the effect the life interests would have, but agreed that different purchasers would see the position differently. When the agreement for sale and purchase was submitted to his department for an indication of the adequacy of the purchase price for stamp duty purposes, the amount apportioned to the lessee's interests in the Greenhill blocks appeared acceptable but the Willowbridge property was regarded as too low; consequently a special valuation was made at \$69,250. An objection to this was lodged by Mr Hart but the objection has never been disposed of; it is to be noted, however, that the Dickson Goodson sale was taken into account.

The principle valuer for the plaintiffs was Mr Fitzgerald, a valuer with considerable experience. He had been valuing for 9½ years and had come to Timaru in 1976 to establish his own practice in relation to both urban and rural properties in Canterbury. In this respect his experience, especially as a rural valuer in the district, was less than that of Mr Armstrong. I may say that I was impressed by each of the valuers and the manner in which they approached the task of valuing. While, no doubt, any valuer will have a tendency to stand firm upon an opinion which he has expressed and is loath to acknowledge that there is any flaw in it, I am satisfied that careful judgment was exercised by each.

Mr Fitzgerald did not have the advantage of knowing the property as it had been in 1977 and had to rely on information he had obtained, but he did obtain as much

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information as he could and made a most comprehensive analysis of sales in the district producing statistics showing the annual percentage rate of growth up to the time of the sale and subsequently. His conclusion was that the property, i.e. the three pieces of land regarded as one property, were worth \$202,000 at the 1st September 1977. He considered that the special terms - no deposit and two years to pay with 11% interest in the meantime - would have produced a higher figure. By the 1st

10 September 1979, the date set for payment, the value would have risen to \$272,000. He made an assessment of the effect of the life interests, taking into account the maintenance obligations upon the O'Connors and the fact that they were to pay rates (other than for irrigation water) during the two year period to the 1st September 1979 and arrived at a figure of \$4,500.

In arriving at his valuation, he did not allow any extra amount because Mr Hart was a neighbour, but accepted that neighbours may often justify to themselves payment of

20 a premium price for adjoining land. As has been noted, he valued the three lots as one property and then apportioned the total so that the figures read as follows:-

Greenhill Blocks:

L.I.P.	919	\$83,000
L.I.P.	920	58,000
Willowbridge freehold		61,000

but expressed the view that, had he valued each separately as if for separate sale, this might have increased each block value to the extent of 5% or 10%. It is to be

30 noted, also, that he only considered the evidence of sale

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that he considered would have been available to him at the relevant time had he been valuing them, although I see no reason why, for present purposes and in an endeavour to assess what might have been obtained had the market been properly tested, subsequent trends should not be taken into account.

Had he been selling at the time he would have offered the property in two parcels, the Willowbridge land as one and the Greenhill Blocks as the other, and his asking price would have been 15% or so above his valuation.

The object is not to determine at what sum a valuer should have assessed the market value of the property as at the 1st September 1977; it is to decide whether the contract entered into at that time was unfair to the estate. There are many factors which might have had a bearing on the price; the trend of sales, particularly in respect of the Willowbridge land at that time; the fact that no-one other than the Harts had any opportunity to show interest; that no attempt was made to see how high a price Mr Hart would have paid; then there are the particularly favourable conditions which were offered; two years before any payment, so that a purchaser could expect not only an increase in land value over the period but the benefit of such improvements as he might make in that time before he had to use the land as security for borrowed moneys; the fact that, if he already owned land, that land also was likely to have been increasing in value, further easing the task of

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financing. No-one can accurately assess what the result might have been had two or more competed keenly for the land. Taking these matters into consideration I can only conclude that a substantially higher price might well have been obtained and that, in any event, the chance to obtain the best price was thrown away. Consequently, I find that the contract was an unfair one. Had the matter of Jack O'Connor's lack of capacity and the unfairness of the bargain been raised promptly, I would see it as a proper case to make the order sought, but the defences raised by the defendant must be given due consideration.

(5) Defences:

As has been mentioned, the defendant pleaded that, if the plaintiff should have any right against him, or in respect of the agreement for sale, by virtue of their laches they had lost that right or, alternatively, that they had affirmed the agreement either by acquiescence, waiver or election. It is consequently necessary to look at the events which followed the signing of the agreement and entry into possession of the land by Mr Hart.

Joe's reaction to the news that Jack had entered into an agreement to sell has been noted. He appears to have thought that his signature was required, though the request that he sign was only in respect of the sale of stock. Before seeing Henderson, he waited until Dennis his brother, had come out of hospital and then, on the 27th October they went to Henderson's office where they were told that, Jack having signed, nothing could be done about it. Joe seemed to have been confused in his mind

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as to the true effect of the agreement and appeared to regard Hart's possession of the land and the purchase of the stock as being pursuant to a lease for two or three years; that no sale could eventuate until he and Dennis signed and, with the two or three year term to run, there was no need to hurry. However, on the 6th December 1977 a letter went from Henderson to all members of the family of Joe's generation, making clear reference to the sale and the terms upon which it had been made, and no-one reading it should have been left in any doubt about the matter. Joe agreed that he must have received the letter and that he did not speak to Mr Hart or get in touch with Henderson. The reason he gave at the hearing was that it had gone past that point and that he had by that time consulted another solicitor, but this in fact did not happen until a little later in the same month. At the time of the hearing Joe was alert and his memory appeared to be very reasonable for a person of his age, after the lapse of time. Certainly he had suffered from ill-health from time to time and a period in hospital for surgery early in 1978 appears to have had quite a marked effect upon his understanding for a time. In early December, however, he did receive a clear intimation of the situation, including knowledge of the amount of the purchase price of the land as fixed by Armstrong and the terms of the sale generally.

Eventually he consulted another solicitor, Mr Watson of Timaru, this being arranged through a son-in-law, John O'Connor. Mr Watson recalls the approach as having been made about Christmas 1977 and he immediately obtained

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information, primarily by searching the titles to the land and, on the 30th January 1978, wrote to John O'Connor with the information he had obtained suggesting he should see Joe. He saw Joe and Dennis early in February 1978 when he found that Joe still maintained that there was only a lease and that, if Henderson thought there was a sale, he had got things wrong. Joe's attitude then was that, while it was always his intention that his sons should follow him on the land, he was willing for them to wait for a period of a year or two. What information of the true situation Watson had at that time is not entirely clear. The letter of the 30th August 1977 from Henderson to Joe and Dennis giving the first advice that the farm had been sold is on his file, one of the earliest papers on it, but he did say that the papers were not necessarily in the correct order. It is to be expected however, that this would have been given to him at a fairly early stage and, while not including the details given in the letter of 6th December, clearly stated that the farm had been sold.

The first step taken by Watson was to lodge a caveat against the land on behalf of Joe. This said no more than that he was claiming estate or interest as beneficial owner by virtue of his late father's will, but from it no indication could be obtained as to the real reason for seeking to prevent the registration of instruments.

Henderson continued to act, certainly for the estate, and this did not deter him from telling Watson that he acted for the O'Connors and subsequently, in February, having a long discussion with Joe and Dennis. Following

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that discussion, on the 23rd February, he wrote to Joe and Dennis and also to Watson. In the former letter he stated:-

"You now accept the situation that Mr Hart (and his family) have purchased the O'Connor estate land with possession from 1st September 1977 and final payment on 31st August 1979."

He then went on to mention financial matters relating to their affairs and the estate. In the letter to Watson he said that they appeared to be quite satisfied that a proper sale had been concluded to Mr Hart.

It is unfortunate that Henderson should have continued to see Joe and Dennis. Whatever may be the practical problems which face solicitors in partnership in small centres, resulting in one partner acting for one side of a transaction and another partner for the other, when a situation such as the present one arose there should immediately have been a clear-cut division so that each party, or group with similar interests, was receiving separate and independent advice. At the same time I am unable to see that it can be said that, at this stage, Henderson was acting for Mr Hart. His activities seemed to have been restricted to the estate and certain members of the family.

Shortly after seeing Watson in February Joe had to go to hospital for surgery and, according to his wife, after coming out he was for a time very confused but, in the home environment, came out of this confusion fairly quickly. Watson saw him again in March when the latter went to Waimate for this purpose. He found then it was impossible to obtain instructions about the sale because

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Joe simply resisted any suggestion that there was one. On the other hand, Frank and Paul, while telling him they were keen to purchase, accepted that there had been a sale and were hard to persuade that something could be done about it. It should be mentioned that, despite the fact that the quarterly payments made by Hart through Henderson's firm and duly accounted for to Joe and Dennis were interest on the purchase money and expressed to be such, Joe insisted that the payments were for rent.

10           It was not until early May 1978 that Watson wrote to Henderson asking for a copy of the agreement for sale. This seems a long delay before obtaining essential information, but he was in a quandary with the absence of positive instructions from Joe and the fact that Henderson still played a part in advising the O'Connors. In June, Watson saw Henderson and discussed the matter with him and he may then have been shown the form of consent signed by Joe and Dennis, the fact that there was such consent had been mentioned in Henderson's letter of 23rd February.

20           Following this discussion with Henderson, Watson felt that he could not take the matter further without getting proper instructions from Joe. He regarded the position as protected by the caveat and the attitude seemed to be that the matter with the defendant would have to come to a head in September 1979, when settlement was due, and that there should be time before then for matters to be sorted out. He said:-

30           "Accordingly we decided that we should concentrate for the time-being on making sure that the family were in fact able to go ahead with the purchase before we took legal steps against either Mr Hart or the Estate."

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Further enquiries were made to see if it would be practicable for Frank and Paul to purchase and from time to time Watson was in touch with the O'Connors. In what appears to have been his first letter to Henderson, or the latter's firm, written on 16th November, 1978, he stated that his clients would consent to a lease to Mr Hart, not to a sale; that they wished to preserve their interests in the property for the benefit of Joe's sons and his daughter and son-in-law; that the payments they had received they considered to be by way of rent. The letter said further that Watson was instructed to maintain the caveats on the titles to the land and, if necessary to bring action to have the purported sale to the defendant set aside and to have the land vested in its beneficial owners. Up to this point the objection to the sale appears to have been solely on the grounds that there was some breach of trust on Jack's part but then, in a final sentence, almost as an afterthought it was stated:-

20 "Apart from the questions of trust it appears that Jack O'Connor lacked contractual capacity when he signed the agreement with Mr Hart."

This appears to be the first suggestion that this might have been the case, certainly in writing, though Watson did think that the point had been made in prior conversations, but there was still no allegation that the price was inadequate or that as between the estate and Mr Hart, there were elements of unfairness in the agreement. Watson did say in his evidence that it was at a relatively late stage, while he was still acting, that the possibility that the terms of the agreement were unfair to the estate

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was considered. A lengthy reply was received from Henderson and copies of this correspondence were sent by Watson to Joe, but not until February 1979. There were further discussions and on the 30th April Watson wrote to MacGeorge, making a firmer statement of intention to commence proceedings to set the contract aside "on the grounds of incapacity and breach of trust and, possibly fraud". There were further discussions, in particular one with Henderson on 16th July 1979, who recorded that Watson had said that he had firm instructions from Joe O'Connor and his family to lodge proceedings to upset the contract. It seems that it was considered that there were three matters to go before the Court - the appointment of a new trustee in the place of Jack, an application for directions as to the course the trustee of the estate should adopt and an action to upset the contract and Henderson agreed that it would be preferable if all matters were brought before the Court at once.

Towards the end of 1979, owing to pressure of work, Watson arranged for the firm of Gresson Richards MacKenzie & Wallace to take over the file and Mr Wallace of that firm was very quickly in touch with MacGeorge who noted, following a meeting on the 7th November 1979:-

"Mr Wallace pointed out that one of the main reasons for the opposition was that the nephews, Paul and I think, John, considered that they had not had sufficient opportunity to try and purchase the property in their own right and that if they could be afforded such opportunity some solution to the matter acceptable to all parties may be possible."

In May 1980, the writ was issued and contained the allegations (inter alia) that the consideration was

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inadequate; that the agreement was unfair in certain respects; that Jack did not have proper mental capacity to enter into such a contract and that there was no independent advice.

In the meantime, the defendant and his sons had started farming operations on the land immediately they had possession and entered upon a cultivation programme, which it was maintained took them three years before they started to see the result they were looking for. This involved a great deal of labour, upon which a figure cannot readily be placed, but the actual cost to them was estimated to be in the vicinity of \$20,000 a year, some \$80,000 over a three to four year period, without including depreciation of machinery, labour, fuel and material costs. A substantial portion of this, if not all, must have been expended prior to the issue of the writ. No profit could be made out of the property during this time. One can well understand that competent farmers, taking over a property which inevitably had become run-down, would so act. Mr Hart said that he first became aware that there was a challenge to the contract in November 1978 and that, when he had had discussion with Joe early in 1978 - he believed it was in January which would be before Joe went into hospital - Joe said nothing about the agreement or made any suggestion that the Harts were on the land only as lessee. Had they not understood that they had purchased the farm their work would have been greatly restricted, they would not have included any development programme and this one may well accept also.

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Such was the trend of events from the time of the agreement until proceedings were issued and the allegations in respect of the trustee's lack of capacity and the unfairness of the contract defined.

Lengthy submissions, for and against, were made in respect of the equitable defences of election and waiver and estoppel. Whatever may be the true distinction between them, I do not see any of them being made out in this case. The only positive acts on the part of Joe O'Connor, upon which such an interpretation could be placed, appear to be the receipt and retention by him of interest payments over two years; the payments by the defendant pursuant to the terms of the agreement whereby interest at 11% was to be paid on the purchase moneys. I am satisfied that the full implications of accepting interest were not apparent to Joe and that, in any event, he was not then a trustee of the estate. On the other hand the defendant would only have known that the payments were being received as interest by the firm of solicitors who acted for him and for the O'Connor estate; while I do not see this as precluding a claim it demonstrates the need for prompt notification to be given of the fact that the plaintiffs sought to avoid the contract and the grounds upon which they believed they could do so.

To my mind, if there is a good defence it does not lie in any election to treat the contract as valid, or waiver of the rights by the plaintiffs, or actions on their part or the part of any of them which estopped them from setting up rights which they would otherwise have had. The question is rather whether the plaintiffs' delay enables the defendant to set up the defence of laches; that is,

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whether in this case there has been such a combination of delay on the part of the plaintiffs and prejudice to the defendant that it would not be proper to grant the relief sought.

The nature of the defence may be found in the judgment of the Privy Council in Lindsay Petroleum Co. v. Hurd (1874) L.R. 5 P.C. 221, at 239:-

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10 " Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time, and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

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In Equity-Doctrine and Remedies (Meagher Gummow & Lehane) in respect of the extract from the Privy Council judgment, quoted above, there appears the following (para 3605):-

40 " In Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218 at 1279, Lord Blackburn gave his view that this was the most 'distinct and definite' statement of the equitable doctrine of laches to be found in decided authority, and few would dissent from that view."

And from the same source one finds in para 3606:-

" And finally, there are some cases which traditionally call for special promptitude:

claims to establish constructive trusts, to set aside contracts induced by undue influence .... and claims generally for the rescission of contracts are amongst them."

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In the present case there has been considerable delay. It is true that Joe O'Connor did raise objections to the sale, not immediately but before very long, but the whole tenor of the objections, when first raised and for a considerable time thereafter, was not upon the grounds that Jack lacked capacity or that the bargain as between the estate and the defendant was an unfair one, but against any disposal of the property before Frank and Paul had been given a chance to purchase, disposal, that is, other than a leasing of the land for a period of time which might enable them to put themselves in a position where purchase would be a practical possibility. Indeed, I wonder if, even now, that does not remain the real burden of the complaint and that, if it had become apparent at an early stage that Joe's sons had no prospect of purchasing the sale to the defendant on the terms upon which it was made might not have been regarded as acceptable. As already indicated, I am unable to see that this can be regarded as importing unfairness into the agreement. There is a power of sale in the will and any qualification of this power is no more than precatory and limited to the period prior to the time for distribution, long since past. By no stretch of the imagination can it be said that the will contained any provision whereby Joe's sons or, for that matter, any other member of the family, had any right to purchase. On the other hand, the interests of the various beneficiaries had long since vested

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and, while, as between them and the trustee, the former might well have expected to be consulted before such a major step was taken, that was a matter between them and Jack O'Connor, not a concern of a purchaser of the property.

Not until November 1978, over a year after the date of the agreement, was any positive suggestion in writing that Jack's capacity to enter into the contract might be raised as an issue. Possibly there was some prior mention of it in discussion, but nothing which could be accepted as evidence that the defendant, either directly or by his solicitor, MacGeorge, had notice of it. As already noted, the other aspect of the matter continued to be given prominence throughout and the references to lack of capacity or unfairness of bargain did not seriously come to the surface until the writ was issued in 1980.

On the other hand the defendant and his sons started immediately to develop the property and expended substantial sums of money in the process. It was strongly submitted for the plaintiffs that restoration of the parties to the original position could be achieved quite readily, in the case of the Harts by making allowance for betterment of the property during their period of occupancy. Evidence was given as to the increase in value which resulted from their development work, but it was agreed that submission on this aspect should only be made if it were decided that the plaintiffs had a right to avoid the contract. As I understand it, the evidence was designed to indicate what portion of the present value of the property could be regarded as arising from

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the development work and the money expended by the Harts as opposed to the general inflation in nominal value of farm land over the years in question. The figures varied substantially according to different valuers and, while this could no doubt be resolved, I am unable to see that a payment recognising betterment would put the defendant in the position in which he would have been had the contract not been entered into. No-one can really assess the worth of the work done by him and his sons which, had they not been tied to this contract, they might well have put into some other property, nor can one assess the opportunities lost to buy land elsewhere. Close on three years had elapsed prior to the writ being issued quite apart from time which has elapsed since and this cannot be made good.

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With some reluctance, as one cannot but feel a degree of sympathy for the plaintiffs, I find that the defence of laches must be held to have been made out and that consequently the plaintiffs' claim must fail. There must be judgment for the defendant. The defendant is entitled to costs according to scale, but questions may arise as to certificate and, if agreement cannot be reached, submissions may be made.

" Cook J "

Solicitors:

Messrs Gresson, Richards, Mackenzie & Wallace, Timaru for  
Plaintiffs & First Defendant

Messrs De Goldi & Cadenhead, Christchurch for Second  
Defendant.

In the High  
Court of  
New Zealand  
Timaru  
Registry

Reasons for  
Judgment  
of Cook J.

17th May 1982  
(cont'd)

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

No. A.29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN J. O'CONNOR, P.M. O'CONNOR and  
F.J. O'CONNOR

Plaintiffs

Judgment

A. N D T.B. HART

Defendant

17th May 1982

17th May 1982

JUDGMENT

10 This action coming on for trial on the 2nd, 3rd, 4th, 5th,  
8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th and  
19th days of February 1982 before His Honour Mr Justice  
Cook, after hearing Mr T.M. Gresson and Mr J.L.D. Wallace,  
Counsel for the Plaintiffs and Mr R.J. De Goldi, Mr J.  
Cadenhead and Mr C.B. Atkinson, Counsel for the Defendant,  
and the evidence then adduced IT IS ADJUDGED that  
there be judgment for the Defendant together with costs  
according to scale.

DATED at Timaru this 17th day of May 1982

"Cuthbertson"

20 L.S.

Deputy Registrar



IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

No. A.29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN J. O'CONNOR, P.M. O'CONNOR and  
F.J. O'CONNOR

Plaintiffs

A N D J.J. O'CONNOR

First Defendant

A N D T.B. HART

Second Defendant

Certificate  
as to  
Security

16<sup>th</sup> November 1982

16th November  
1982

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CERTIFICATE AS TO SECURITY

I, HOWARD BRUCE PERRY Registrar of the High Court of  
New Zealand at Timaru HEREBY CERTIFY that security for  
costs in the sum of SEVEN HUNDRED AND FIFTY DOLLARS  
(\$750-00) has been fixed by me in respect of the above  
appeal and that due security in that sum has been given  
to my satisfaction.

DATED at Timaru this 16th day of November 1982

"H.B. Perry"

Registrar

20 L.S.

TO: The Registrar of the Court of Appeal, Wellington.



BETWEEN JOSEPH O'CONNOR, PAUL  
MICHAEL O'CONNOR AND  
FRANCIS JOSEPH O'CONNORAppellantsAND THOMAS BRUCE HARTRespondentJudgment of  
the Court  
Delivered by  
McMullin J.

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Coram: Richardson J (presiding)  
McMullin J  
Jeffries J

Hearing: 21, 22, 23 February 1983

Counsel: A P C Tipping and T M Gresson for Appellants  
J Cadenhead and C B Atkinson for Respondent

Judgment: 5 May 1983

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JUDGMENT OF THE COURT DELIVERED BY McMULLIN J

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This appeal is brought from a judgment of Cook J delivered in the High Court on 17 May 1982 dismissing a claim brought by the appellants as trustees of the estate of John O'Connor deceased for an order setting aside an agreement for sale and purchase dated 1 September 1977 made between a former trustee of the estate and the respondent. The hearing in the High Court was lengthy and the record of the oral and documentary evidence is voluminous. The Judge was required to resolve a number of difficult factual issues and complicated legal questions. His lengthy judgment reflects the complex nature of both and the patient consideration which he gave to the case.

The appellants are the trustees of the estate of John O'Connor late of Waikakahi, farmer, who died in 1911 leaving a will in which he left his estate to his nine children in equal shares but subject to a life interest in favour of his wife, Lavinia, whom he appointed trustee, but reserving the right to his eldest son, John Joseph O'Connor (referred to throughout the proceedings as Jack), to become a trustee of the estate when he attained the age of 21 years. In 1926 Jack, having attained that age some years before, became a trustee along with his mother Lavinia and from 1950 on, when Lavinia died, until 2 March 1981 when an order of the High Court was made removing him from office and appointing the appellants as trustees in his place, Jack acted as sole trustee of the estate and in that capacity entered into the agreement for sale and purchase which is challenged in this litigation.

Originally the estate owned three blocks of land near Waimate and these formed its main assets. But a few years after John's death one of these was sold and another block purchased in its place. From that time on the three blocks were farmed as one and remained as assets of the estate. The three blocks comprise an area of approximately 32 hectares of freehold land (known as the Willowbridge property), and two areas of leasehold land, one of approximately 112 hectares and the other of approximately 67 hectares (known as the Greenhill property). The respondent and his family own farm lands adjoining the Greenhill property and some land close to Willowbridge.

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Although the beneficiaries of John's estate, who were all sui juris when Lavinia died in 1950, were entitled to call for the distribution of the estate on her death they (with the exception of their brother William who was paid out his share) agreed that the three properties should be farmed by Jack and two of his brothers, Dennis and Joe, for their own benefit. Thereafter the three brothers farmed the properties in partnership and lived in houses on the farm. Dennis, a bachelor, who lived with Joe and his wife, died on 23 January 1979; Jack died on 14 July 1981.

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By 1976 when Jack was about 83 years of age, Dennis 82, and Joe 71 it was becoming apparent that the brothers were too old to continue farming and early in 1977 it was proposed that Frank and Paul, Joe's two sons and the only males in the O'Connor family in that generation, should be approached to see if they wished to purchase the properties, if that were financially possible for them. The three properties had been in the O'Connor family for many years, one at least of them from before the turn of the century, and Joe was anxious that Frank and Paul should take them over. There were discussions between Jack and his brothers and Mr R J Henderson, a solicitor, whose firm, Henderson MacGeorge Wood and Blaikie, had long acted for the estate, wrote to Frank and Paul to explore the possibility of them taking over the farming operations.

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Unfortunately Paul could not be readily located and for this reason and possibly others there were never any negotiations in a real sense for the sale of the farm to the boys before a proposal was made that the respondent, a neighbour and long time resident in the district, should purchase the farm outright rather than lease it which he had first proposed to do. The respondent's solicitor was Mr Henderson's partner, Mr B A MacGeorge, and the latter acted for the respondent in the negotiations. Thus partners in the same firm acted at the same time for both the estate and the respondent in their dealings over what proved to be the vital issue of the sale of the farm. Moreover, at the end of August 1977 when Mr MacGeorge was away on holiday, Mr Henderson saw the respondent in his office by chance when the latter proposed that he purchase it. An agreement for sale and purchase of the farm to the respondent was then prepared by Mr Henderson who obtained Jack's signature to it at Jack's home on 29 August 1977. He then handed the agreement to Mr MacGeorge on his return to the office so that the respondent could sign it. While Cook J found as a fact that Mr MacGeorge was the respondent's solicitor Mr Henderson played a material part in bringing about the agreement for sale and purchase which is alleged to have been so much to the respondent's advantage. The agreement was signed by the respondent on 1 September 1977 and so the agreement for sale and purchase which is the subject of these proceedings came into being.

Reference should now be made to the form of consent to the sale of the farm signed by Joe and Dennis in Mr Henderson's office on 25 August 1977. On this day there was an interview between Mr Henderson and Joe and Dennis in which the latter two signed a document which purported to be a consent to a "sale or lease" of the property to the respondent. The document was a consent in principle only and did not contain any terms of sale or lease.

10 Subsequently Joe denied that the document had contained the words "sale or" when he signed it, a denial for which the Judge found a good deal of support in the evidence. The words "or sale" were an obvious insertion in the body of the document but just when they were inserted was a matter of contention. Mr Henderson denied that the disputed words had been inserted after Joe and Dennis had signed the document and gave an explanation accounting for their presence which Cook J did not find very convincing. But he was not prepared to make a finding of forgery against Mr Henderson.

20 When these proceedings were first instituted in the High Court in May 1980 the appellants sued Jack as first defendant and respondent as second defendant. At that stage Jack was still the trustee of the estate. But after the making of the order on 2 March 1981 removing Jack from his trusteeship and appointing the appellants as trustees in his stead the pleadings were amended. When the claim was finally heard in the High Court the appellants sued in their capacity as trustees of the estate and in their personal

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capacities as well. In these amended pleadings the appellants also named themselves as first defendants. The respondent remained as a defendant. Whether or not it was competent for the appellants in their personal capacity and their capacity as trustees to sue themselves as trustees, no objection was taken to this course and counsel who appeared for the three trustees in their capacity as defendants was given leave to withdraw at the hearing. The hearing then proceeded as though the respondent was the only defendant.

10 And that is the basis upon which the matter proceeded in this Court.

In the amended pleadings the appellants alleged that the agreement for sale and purchase was entered into by Jack when he was of unsound mind and that the respondent knew or ought to have known of that condition; that whether or not he knew of that condition the agreement was unfair to the estate in that it provided for no deposit to be paid by the respondent, that the consideration payable under the agreement \$179,780 was inadequate and insufficient in that  
 20 it was not payable in cash until 1 September 1979 (some two years after the respondent had taken possession); that the agreement represented an unconscionable bargain in all the circumstances; and that Jack had acted without proper deliberation and not in conformity with his position as a trustee and without consulting the beneficiaries in the estate. As no relief was sought against Jack the latter allegation became of historical relevance rather than a

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separate head of liability and the case for the appellants proceeded in the High Court on lack of capacity, unfairness and unconscionability. The appellants sought a declaration that there was no valid agreement for the sale and purchase of the farm; alternatively that if the agreement was held to be valid that it be set aside for want of mental capacity on Jack's part as vendor, unfairness and unconscionability. They sought an order for the possession of the farm which meanwhile had passed into the possession of the respondent  
 10 in terms of the agreement.

The respondent denied these allegations and pleaded that if the appellants had ever had any right of action in respect of their several allegations then they had affirmed the agreement by acquiescence, waiver, or election. And he alleged that the action was barred for laches. In essence the respondent's case was that Joe had been a party to the sale arrangements and had approved them; that he had also approved the sale of all the livestock on the farm including his own interest therein and had been paid out his  
 20 share of it; that the respondent and/or his family had in good faith performed their part of the agreement for sale by taking possession of the farm and paying outgoings thereon and the price of the stock, in allowing Jack and his wife, Joe and his wife, and Dennis to have the free use and possession of these dwellings for their lives; and that he and his family in good faith and in reliance on the agreement had materially altered their position.

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In his judgment Cook J found that Jack did not have contractual capacity at the time he entered into the agreement for sale and purchase even if the matters arising for decision had been adequately explained to him by Mr Henderson, which he found was not the case; that while he thought that the respondent must have wondered about Jack's competence to undertake business of any complexity he was not able, on the evidence, to find that the respondent knew that Jack lacked the degree of capacity sufficient to enable  
10 him to understand the nature of the bargain he had made; that Jack did not receive proper and independent advice upon matters material to the sale, and that in the circumstances in which the negotiations were conducted Jack, Joe and Dennis were at a disadvantage; and that a substantially higher price for the farm might have been obtained and the chance to obtain the best price had been thrown away. He held that the transaction was unfair. He found for the appellants on the issue of incapacity and unfairness and would have made the orders sought by the appellants but for  
20 the defence of laches which he upheld. He therefore dismissed the claim.

The appellants have appealed against this judgment on the one finding that stood between them and the entry of judgment in their favour, namely, the finding that the estate's claim was barred by laches. Counsel for the respondent, while contending that Cook J was right in holding that the claim was barred by laches, argued on the cross appeal that



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the Judge was wrong in his findings that Jack lacked the requisite contractual capacity and that the agreement was unfair. And they sought to uphold the judgment on the further and rather general grounds, which Cook J found it unnecessary to consider, namely, that the appellants had acquiesced in, affirmed, or were estopped from denying the validity of the agreement, or they had failed to rescind a voidable agreement when they knew or ought to have known that the respondent was acting on the validity of the agreement to his detriment and that they had acquiesced in or elected to continue with the agreement or were estopped from resiling from it when they knew or ought to have known that the trustee was incapable of acting as such or failed to take proper steps to have him removed. Further, they submitted that as the agreement had been made by Jack as trustee the title of the respondent was unimpeachable in terms of s 22 of the Trustee Act 1956 and that in all the circumstances rescission should not be ordered as restitution could not now be made.

It is convenient first to consider the findings of lack of contractual capacity and unfairness on which the respondent on the cross appeal contends that Cook J was wrong as these have at all times been at the heart of the case. In the High Court counsel on both sides accepted that the law on the avoidance of contracts for lack of contractual capability was correctly set out in Archer v Cutler [1980] 1 NZLR 386 - that a contract entered into by a

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person of unsound mind is voidable at the option of that person or his representatives if it is proved either that the other person knew of the unsoundness of mind or, whether or not he had that knowledge, the contract was unfair to the person of unsound mind. In this Court counsel for the respondent somewhat resiled from that position. Mr Atkinson, while accepting that Archer v Cutler was correctly decided on its facts, submitted that for a contract to be unfair, where there is no knowledge of the other party's lack of capacity, there must be overreaching behaviour on the part of the one who seeks to retain the bargain. Before considering that submission we propose to deal with the Judge's findings on lack of capacity and unfairness.

#### Contractual Capacity

Cook J heard both lay and expert evidence on the subject of Jack's mental capacity at the time that the agreement was signed. Some of the lay witnesses had known him for a long time. Two of the medical witnesses, Dr J W E Eton and Mr E R McKenzie, knew or had met him in his lifetime. Two others, Dr J A Begg and Dr J R E Dobson, had not; but they attended the hearing and heard the relevant lay and medical evidence given as to Jack's condition. In his judgment Cook J reviewed this evidence. It is not necessary to refer to it in more than summary form.

Jack was about 83 years of age when in 1976 his ability to carry on farming was questioned. He had become

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physically incapable of handling the machinery, the servicing of which had been his special contribution to the farming partnership. By 1977 Jack's health was a matter of concern. Mr Henderson wrote to Dennis and Joe on 6 April 1977 and raised the matter of Jack's "failing health" in regard to the future of the farm. There was evidence that he was also then failing mentally. His daughter, Mrs B M Heaney, had visited her father in January 1977. She thought that he was then completely "mixed up" and that he did not know what he was doing and in March 1977 she telephoned Mr Henderson to express her concern about her father's state of health. She said in evidence that her concern was for her father's mental state. Mr Henderson said that she mentioned only his physical state. On 25 July 1977 Jack was seen by his own doctor, Dr J W E Eton of Waimate. The latter recorded on that day "I think probably right now he is in a mild to moderate senility (sic) and he is probably not capable of understanding complicated business affairs". At the trial Dr Eton said that he thought that at this time Jack could understand simple straight forward affairs but not anything complicated. Dr Eton saw Jack again on 3 August 1977 when he examined him for his driving licence. He recorded "Very alert today and I have no hesitation in giving him a medical certifiactate". But he said in evidence that a person in a condition of mild to moderate senility could still pass a driving test. He saw him again on 16 January 1978 when he noted "Getting very senile". Dr Eton then referred Jack to Mr McKenzie, a

general surgeon at Timaru, for surgery. Jack was ultimately admitted to hospital on 9 October 1978 when he was recorded as being senile and his general state of health was such that surgery was not attempted.

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Dr J A Begg, Medical Superintendent of Sunnyside Psychiatric Hospital, agreed with Dr Eton's diagnosis of senility in July 1977 but thought that the condition was more advanced - moderate to severe rather than mild. He thought that Jack could have been an "easy prey" to  
10 influence in July and August 1977 and that at that time it would have been beyond him to comprehend the financial consequences of such a deal and its implications for his nephews and other members of the family.

There was evidence as to Jack's mental state from Mr Armstrong, a valuer, Mr Laing, an accountant, and Mr Henderson himself. They found nothing untoward about Jack's conduct in their dealings with him over his business affairs or the sale of the farm. But although Mr Henderson claimed that Jack had contractual capacity on 1 September  
20 1977 and referred to a telephone discussion on the point which he said he had had with Dr Eton, for some reason he saw fit on 29 August 1977, the very day that Jack signed the agreement, to have him sign a power of attorney; and the application made under the Land Settlement Promotion Act 1952 for consent to the sale of the farm to the respondent was signed by Mr Laing who held that power. Evidence was also given by Dr J Dobson, a psychiatrist, who thought that

with plenty of time for consideration the matters to which Jack would have needed to address his mind in regard to the sale were well within his competence. He regarded Jack as having an ageing brain rather than being senile.

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Cook J was clearly impressed by the evidence of Dr Begg and, on a bare perusal of the printed record, it is not surprising that he should have been. He correctly directed himself to the relevant test of contractual capacity - Was Jack suffering from such a degree of mental disability that he was incapable of understanding the transaction into which he had entered? - Cheshire & Fifoot's Law of Contract (9th ed) 428, citing Broughton v Knight (1873) L R 3 P D 64, 72; Gibbons v Wright (1954) 91 C L R 423; and Archer v Cutler [1980] 1 NZLR 386 at 392, 393. It was said that Cook J had overlooked both the extent to which the evidence of those who dealt with Jack at the relevant time negated any lack of capacity on his part and the extent or ambit of the matters which Jack had to appreciate about the bargain. That submission is without substance. It was for the Judge to weigh the evidence and express a preference for witnesses and he correctly apprehended the matters against which the matter of contractual capacity was to be measured. Far from being shown to be wrong, the finding of lack of capacity made by Cook J is amply supported by the evidence.

#### Fairness

In order to consider the submission that the bargain made between Jack and the respondent was not unfair it is

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necessary to examine the agreement for sale and purchase in more detail. The agreement was a most unusual one. It provided that the purchase price of the farm was to be the market value of the estate's interest in the two leasehold blocks and the one freehold block determined as at

1 September 1977 by Mr D Armstrong, Registered Valuer of Timaru. It provided for the payment of the purchase price in cash on or before 1 September 1979; for possession to be given to the respondent on 1/9/77; for the estate to remain  
10 liable for the rates and fire insurance premiums on the properties until 1 September 1979; for the respondent to pay interest on the unpaid purchase money at 11 per cent per annum; and for Jack, Dennis and Joe to have the right of occupying the houses on the farm as long as they wished. No deposit was to be paid.

Mr Armstrong valued the estate's interest in the Greenhill leasehold blocks at \$81,188 and \$53,592 and the Willowbridge freehold block at \$45,000, a total of \$179,780 and advised Mr Henderson of these figures on 9 November 1977.

20 He made no allowance to the estate for the fact that the agreement made no provision for the payment of a deposit or for the most unusual factor, to which we make further reference, that the purchaser was to have two years within which to pay the purchase price. Nor did he make any allowance in favour of the respondent for the right of occupation given to the O'Connor brothers by the agreement, nor for the fact that the respondent was to pay 11 per cent

interest pending payment of the purchase price. He was not aware of any of these factors. He was not to know of them. Mr Henderson had not mentioned them in instructing him.

The Government Roll Valuation in force at 1 September 1977 was that made on the last revision of the roll on 1 July 1973. The next revision was not due until 1 October 1978. But during the period between the two revisions values in the area and the values of these properties rose considerably. According to the evidence of Mr R M Donaldson, the District Valuer, the Government Roll Valuations at the respective dates were as follows:

	<u>1/7/73</u>	<u>1/10/78</u>	<u>73/78</u> <u>increase</u>
Willowbridge	25,800	70,000	173%
Greenhill	<u>83,650</u>	<u>154,500</u>	<u>84.7%</u>
<u>Total</u>	\$109,450 =====	\$224,500 =====	105% ===

Thus on 1 October 1978 the Government Roll Valuation was itself \$44,720 more than the amount which was fixed by Mr Armstrong on 9 September 1977 as the purchase price to be paid nearly a year later on 1 September 1979.

Further evidence of the value of the farm at 1 September 1977 was given at the hearing by valuers instructed in 1981 after the proceedings had been issued. Mr P J Gilchrist, called for the respondent, valued the farm as at 1 September 1977 at \$184,050. Mr E J Fitzgerald, called for the appellants, valued the farm at \$202,000 (if sold as one

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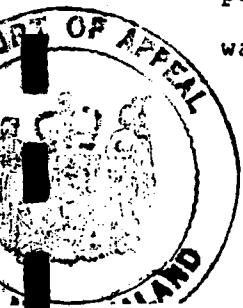
property) at 1 September 1977 and at 1 September 1979 at \$272,000. He considered that the special terms of the sale, namely no deposit with two years to pay, were not normal market conditions.

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There were other factors canvassed in the valuations. Mr Donaldson considered that an established farmer would pay more for land adjoining his own property. There was the provision of accommodation for the brothers. Various allowances were made for this factor. Cook J concluded  
10 that, taking all factors into account, a substantially higher figure might well have been obtained for the farm than was obtained and that, in any event, the chance to obtain the best price was thrown away.

Mr Atkinson made a number of submissions directed to the point that there were advantages to the estate in the form which the transaction took and that having regard to these the bargain was a fair one. He referred particularly to advantages which he submitted accrued to the estate through the deferment of the purchase price. He instanced  
20 the provision of rent free accommodation, the assurance of a fixed income in excess of any which would be obtained from leasing the properties, and the retention of the legal estate in the estate until all the purchase price was paid. And he submitted that in virtually every case where one party was found to have no knowledge of the other party's want of contractual capacity the unfairness held to have



existed had been of such a kind as to support a plea of unconscionable bargain, a feature which he said was absent in the present case.

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Three matters influenced Cook J to hold that the bargain was unfair - the price at which the land was sold and the terms of the sale which were so favourable to the respondent; the fact that such advice as Jack received was not independent in the sense that the respondent was a client of Mr Henderson's firm and Mr Henderson may well have had his interest in mind; Jack's lesser bargaining position, he being ill and somewhat incapacitated, while the respondent was much younger and more vigorous. But that is not to say that the respondent set out to take Jack at a disadvantage. Indeed it was agreed by counsel that in a sense he was a victim of circumstances himself.

It was said by Mr Atkinson that the terms of the agreement did not represent a grossly disadvantageous bargain to the estate. However, this ground of appeal is not to be resolved solely by a comparison between advantages and disadvantages on one side or the other. But we think it proper to note that if there were the advantages to the O'Connor brothers from the way in which the agreement for sale was drawn, as Mr Atkinson claimed, then they would appear to be entirely accidental. Mr Henderson did not claim that he drew the contract with these advantages in mind. And it seems that the interests of the elderly beneficiaries in obtaining at least a cash deposit and

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thereby allowing an early cash distribution by the estate were not explored; certainly there is no reference to it in the evidence. Nor is the question merely whether Mr Armstrong could reasonably have arrived at the figure of \$179,780 as being the value of the farm at 1 September 1977. That is not to say that his valuation is above criticism for Mr Armstrong made no allowance for the fact that this was a sale to an adjoining owner, that it was to the advantage of the estate to consider the sale of the properties in

10 separate lots and he was unaware of a comparable sale of land made in April 1977. Moreover, the amount of purchase price fixed by Mr Armstrong for the Willowbridge property, namely \$45,000 was regarded by the Inland Revenue Department as being inadequate when the agreement was being assessed for stamp duty and a special valuation was made at \$69,250, an increase of more than 50 per cent. The essence of the finding of unfairness in regard to the terms of sale lies in the postponement of the payment of the entire purchase price for two years. However conscientiously Mr Armstrong may

20 have approached his task he did so in ignorance of this important fact. In the result the respondent became entitled to purchase the farm at 1977 prices payable in 1979 currency. It is noteworthy that Mr Fitzgerald valued the farm at \$272,000 at 1/9/79 (some \$70,000 more than his valuation at 1/9/77) and that the Government Valuation had reached \$224,500 by 1 October 1978. These differences between valuers only serve to highlight the point that a single valuation is not the accepted way for a price to be fixed in a transaction negotiated between strangers.

Mr Atkinson submitted that the inflationary trend in land prices, apparent from the evidence of all the valuers, should not be taken into account in considering the adequacy of the price at 1 September 1977. He endeavoured to support this submission by reference to the refusal of the Courts to take into account inflationary trends in the assessment of damages for personal injuries. The analogy is not remotely valid. The rise in values between 1973 and 1978 as shown by the Government Roll values was, as Cook J noted, an indication of the trend which the Valuation Department saw over the period of time in question. But it needed no expert to say in 1977 that land values were likely to increase in the next two years as they had increased in the past (as reference to farm land price indices would have so clearly demonstrated) and that any vendor who with open eyes entered into a contract which effectively fixed the price of his farm two years ahead by those prevailing at the time of sale would be downright foolish. In this respect, and in its failure to provide for a deposit, the agreement for sale and purchase contained abnormal terms.

Although the Judge did not characterise the sale as being at a gross undervalue it is apparent that he did not regard the price as marginally insufficient. He said:

" The object is not to determine at which sum a valuer should have assessed the market value of the property as at the 1st September 1977; it is to decide whether the contract entered into at that time was unfair to the estate. There are many factors which might have

had a bearing on the price; the trend of sales, particularly in respect of the Willowbridge land at that time; the fact that no-one other than the Harts had any opportunity to show interest; that no attempt was made to see how high a price Mr Hart would have paid; then there are the particularly favourable conditions which were offered; two years before any payment, so that a purchaser could expect not only an increase in land value over the period but the benefit of such improvements as he might make in that time before he had to use the land as security for borrowed moneys; the fact that, if he already owned land, that land also was likely to have been increasing in value, further easing the task of financing. No-one can accurately assess what the result might have been had two or more competed keenly for the land. Taking these matters into consideration I can only conclude that a substantially higher price might well have been obtained and that, in any event, the chance to obtain the best price was thrown away. Consequently, I find that the contract was an unfair one."

In support of his submission that, in absence of knowledge by the party seeking to retain the benefit of a contract that the other party lacked the mental capacity to

make it, the bargain must be shown to be an unconscionable one, involving overreaching conduct by the benefiting party, and that mere unfairness will not suffice Mr Atkinson placed some reliance on the judgment of the Full Court of Victoria in Tremills v Benton (1892) 18 V L R 607. He argued that this case established that the concept of unfairness involved an element of overreaching by the party seeking to take advantage of the bargain; that mere inadequacy of consideration of itself was not sufficient to constitute 10 unfairness. And he said that as the Judge had acquitted the respondent of any knowledge of Jack's incapacity the element of overreaching was lacking.

Tremills v Benton was an action to set aside deeds obtained from a person by undue influence and at a gross undervalue and at a time when he was to the knowledge of the other party of unsound mind. The trial Judge found that there was no undue influence and that the party was in full possession of his faculties, although labouring under an insane delusion with respect to his son. But he found that 20 the other party had no knowledge of this. There remained the question as to whether the contract was a fair and bona fide one. There are passages in each of the three judgments delivered which would suggest that inadequacy of consideration will not amount to unfairness avoiding a bargain unless it is so great as to be unconscionable and to amount to an overreaching akin to fraud.

It is, of course, plain enough that inadequacy of consideration itself will not in most cases constitute

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unfairness. Opinions as to value of land are notoriously various. Valuers may genuinely differ in their assessments. As Sir Ernest Pollock M R said in York Glass Co Ltd v Jubb (1925) 134 L T 36:

" In the difficult matters of valuation 'quot homines tot sententiae' is an observation not to be overlooked."

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The Courts will not protect a fool from his bargain nor intervene in a transaction merely because it is unreasonable.

10 Adequacy of consideration has never been a fundamental of a valid contract. Generally a bargain is not to be upset which is the result of the ordinary interplay of forces. Lloyds Bank Ltd v Bundy [1975] Q B 326, 336. But inadequacy of value may be "... an important ingredient in considering whether a person did exercise any degree of judgment in making a contract or whether there is a degree of unfairness in accepting the contract ..." per Page-Wood V C in Wiltshire v Marshall (1866) 14 L T 396, 397.

20 We would regard the several ways in which the Judges put the position in Tremills v Benton as being illustrative of the ways in which unfairness may be seen. And there is no suggestion in the judgments in York Glass Co Ltd v Jubb which is discussed at some length in Archer v Cutler that there must be conduct on the part of the defendant amounting to overreaching on his part. Fairness and unfairness are better demonstrated than defined. As was pointed out in

Archer v Cutler at 402 definitions of "fair "and "fairness" in this context have not been attempted by the Courts; rather a number of indicia have been suggested to test its presence. As a general rule it may not be easy to say where the line between fairness and unfairness should be drawn. They are so much matters of fact and degree. But it may not be difficult to say in a given case whether the line has been crossed. A bargain may be unfair for a variety of circumstances. In the present case Cook J mentioned three

10 factors which he used as an index of unfairness. Mr Atkinson submitted that these factors were not in themselves enough to establish unfairness; that there had to be more - an attempt by one party to take advantage of the other, an overreaching. Overreaching and unfairness are often associated in decisions on equitable fraud and it would be hard to imagine a case of overreaching which was fair. But we would hesitate to lay down rigid criteria. In the present case there was a combination of factors; the method of fixing the price, the actual value fixed, the time given

20 for payment, the difference in the relative bargaining positions of the parties, and the lack of truly independent and competent advice. In combination, these made the transaction unfair and voidable even though the Judge found that it was not proved that the respondent knew that Jack lacked contractual capacity.

Unconscionability on its own is recognised by equity as a ground for avoiding a contract. In view of his



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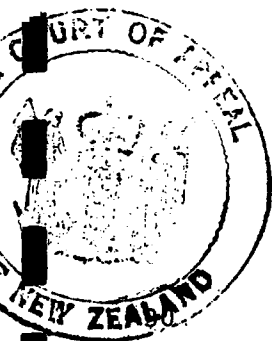
findings on unfairness Cook J did not find it necessary to examine the separate allegation that the bargain was unconscionable. Unconscionability as a separate ground for avoiding a contract is a somewhat amorphous concept. Its metes and bounds are not defined. Cook J has not made any finding upon it and it is not necessary for this Court to do so for the purposes of deciding this appeal nor to decide whether or not the transaction was unconscionable. That was a separate cause of action. It is sufficient to note that a bargain may be set aside for unconscionability even if there is no want of contractual capacity, which was not the case here. Fullagar J said in Blomley v Ryan (1958) 99 C L R 362, 405:

" The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious advantage vis a vis the other. It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain."

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The same opinion was expressed in Archer v Cutler where the authorities are reviewed. We now take the opportunity of saying that the law as set out in Archer v Cutler on unfairness of bargains made between a person who lacks contractual capacity through unsoundness of mind and another who has no knowledge of that incapacity is the law of New Zealand. Cook J rightly treated it as such and correctly applied it to the circumstances of this case. We reject the refinement contained in the submissions made for  
10 the respondent and on the law and the facts uphold the Judge's findings that the bargain was unfair. It is therefore unnecessary to consider other matters mentioned by Mr Tipping as grounds upon which the agreement might be considered as unfair.

Acquiescence, Waiver, Election, and Laches

The matters upon which Cook J found in the appellants' favour can now be put to one side and the defences raised at the trial examined. Cook J found that whatever the true distinction between the defences of acquiescence, waiver,  
20 election, none of them had been made out. He thought that the only positive acts on the part of Joe O'Connor which might be interpreted as election, waiver, or estoppel were his receipt and retention of the interest payments made on the outstanding purchase price over the two years in which these had been made to him. But the Judge thought that the full implications of accepting this interest were not apparent to Joe and that in any event at the time the

payments were made to him Joe was not a trustee. But he held that the defence of laches was established.

It is now necessary to review the history of relevant events in order to consider the submissions made by the appellants against the finding of laches. This is also relevant to the submissions of the respondent in respect of the rejected defences of acquiescence, waiver, and election. The status of Joe, Frank and Paul is important to the issue of laches. When the agreement for sale and purchase was executed Joe was a beneficiary in, but not a trustee of, his father's estate. At that time Frank and Paul were neither beneficiaries nor trustees. They became beneficiaries in expectancy when Dennis died on 23 January 1979. But probate of his will was not granted until 21 May 1980. Jack remained as trustee until 2 March 1981 when he was removed from that office and Joe, Frank and Paul were appointed in his place.

On 30 August 1977 Mr Henderson wrote to Joe and Dennis advising them that Jack had "signed up" the sale of the farm to the respondent. In fact the respondent did not sign it until 1 September 1977. The letter indicated that Joe's signature to a more formal agreement to the sale of the stock on the farm to the respondent was necessary. Joe's reaction to that letter was one of shocked surprise. He was then, and thereafter remained, adamant that he had never agreed to sell the farm to the respondent; only to lease it. Throughout the dispute he maintained that he had agreed to a

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lease only and that the rental payments which he received from the solicitors were payments by way of rental under the lease. On 27 October 1977 Joe, in company with Dennis who had been in hospital for a time, called on Mr Henderson. They expressed concern at the sale. Mr Henderson did not suggest to the brothers that they should get independent advice but told them that if Jack as the trustee wished to sell the farm that was the end of the matter. In December 1977 Mrs Mary O'Connor, Joe's wife, saw Mr Henderson to see  
10 if anything could be done about the sale. She was advised by him that nothing could be done. About this time Joe's son-in-law spoke to his neighbour, a Mr L Watson, a Timaru solicitor, about the family's problems. On 3 February 1978 Mr Watson lodged a caveat against the titles to the farm to protect the position. The caveat was expressed in somewhat general terms. It was lodged in the name of Joe claiming an estate or interest under his deceased father's will. The  
20 respondent and his solicitor, Mr MacGeorge, became aware of the caveat on 10 February 1978. On 21 February 1978 Dennis and Joe saw Mr Henderson again; they were still troubled about the sale of the farm but they seemed to have been persuaded by him that they must resign themselves to the sale. On 3 May 1978 Mr Watson asked Mr Henderson for a copy of the agreement for sale and purchase. In the next few months Mr Watson was at work having discussions with Mr Henderson and with Joe and Dennis. Then Joe became ill for a time. On 16 November 1978 Mr Watson wrote to Mr Henderson repeating Joe's claim that Joe and Dennis had

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agreed to lease the farm but not to sell. The letter informed Mr Henderson that Joe and Dennis would continue to treat the payments received from the respondent as rent for use of the farm but without prejudice to their claim that the purported sale was a nullity; that the caveat would be maintained against the titles to the farm and that, if necessary, an action would be brought to have the purported sale to the respondent set aside. The letter asserted that Jack lacked contractual capacity at the time that the agreement was signed. Mr Watson thought that throughout 1978 there was a chance of a settlement being negotiated and some prospect that the respondent would accept a lease of the farm but the year passed without that being accomplished.

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Between February and April 1979 Mr Watson was engaged in researching the problem further. On 20 April 1979 he advised Mr MacGeorge that he was instructed to issue proceedings, and on 30 April 1979 wrote again advising that if a settlement were not reached proceedings to set aside the agreement would be issued on the grounds of want of capacity, breach of trust, and fraud. But on 4 May 1979 Mr MacGeorge wrote to Mr Watson saying that the respondent stood firm on the agreement for sale and purchase of the land. On 16 April 1979 there was a conference between Mr Watson and Mr MacGeorge as to who would bring proceedings and the possibility that the respondent might bring proceedings for specific performance was suggested. In August 1979, Mr Evatt, Mr Watson's senior partner, died and,

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with the increase in his workload, Mr Watson found himself unable to carry on acting in the matter with the result that in October 1979 the appellants' present solicitors were instructed. The respondent's solicitors then advised that they would instruct a barrister to commence the proceedings. But none were in fact issued until May 1980 when the appellants issued proceedings against Jack and against the respondent.

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10 It is now convenient to deal with the defence of laches on which Cook J decided the case against the appellants. The nature of that defence was defined by Viscount Radcliffe delivering the advice of the Privy Council in Nwakobi v Nzekura (1964) 1 WLR 1019 at 1026:

" Laches is an equitable defence, and to maintain it and obtain relief a defendant must have an equity which on balance outweighs the plaintiff's right."

20 The significance of delay was explained by Lord Penzance in the House of Lords in Erlanger v New Sombrero Phosphate Co [1878] 3 A C 1218:

30 " Lapse of time may so change the condition of the thing sold, or bring about such a state of things that justice cannot be done by rescinding the contract subject to any amount of allowances or compensations. This is one aspect of delay, ... But delay may also imply acquiescence, and in this aspect it equally bars the Plaintiff's right, for such a contract as is now

under consideration is only voidable  
and not void."

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There can be no dispute about these statements of principle. The important question is whether the lapse of time between 1 September 1977 and the issue of the proceedings raises an inference of acquiescence on the appellants' part. It was submitted that before laches can operate as a defence the delays upon which the defence is based must be shown to be those of the appellants. For this submission the appellants relied on the dicta of Sir Barnes Peacock in delivering the judgment of the Judicial Committee in Lindsay Petroleum Co v Hurd (1874) L R 5 P C 221, 242. And in Erlanger v New Sombrero Phosphate Co Lord Penzance distinguished between the possible laches of one shareholder in the company and the company itself and said that the great bulk of shareholders were not to be deprived of their relief because a few of them had not been sufficiently prompt in taking steps to obtain that relief.

Mr Tipping submitted that the only laches which could defeat the appellants' claim were those of the appellants Joe, Frank and Paul in their capacity as trustees because only the personal representatives of John O'Connor's estate had the right to bring an action to set aside the agreement to which the estate was a party; that Jack was the personal representative of the estate and the only person who had the right to sue until he was removed from office; that he had laboured under a disability from no later than February

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1978, when counsel for the respondent acknowledged that he lacked capacity, until his death; that the appellants did not become trustees until after proceedings had been brought. In short it was submitted that laches could not operate to bar the claim of those who acted without knowledge, capacity, and freedom.

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It seems that in the High Court this submission was not made in such specific terms; the defence of laches was there advanced on the more general basis that there had been  
10 delay in the issue of proceedings and that during the course of that delay the respondent had altered his position to his detriment. The question of whether some persons could lose their right to equitable relief because of the laches of another was not canvassed. But in this Court Mr Tipping, who was not counsel in the High Court, argued for what might be called a two-stage approach. Under this the Court is required first to see whether the delays were truly those of the persons against whom the defence is raised. If they are not then the defence of laches need not be considered  
20 further. But if they are, then the second stage becomes relevant. At this second stage the Court must undertake a balancing exercise between the claimant and the defendant. In the High Court Cook J seems to have been invited to examine the matter as if the second stage were the only issue.

Mr Tipping's submission proceeded on this basis:  
That because the contract was made by Jack, as sole trustee,



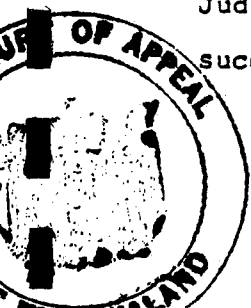
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only his conduct was relevant during the time (September 1977 to March 1981) that he retained the trusteeship and that the conduct of Joe, Frank and Paul was not relevant until they became trustees in March 1981; that before Joe, Frank and Paul were appointed trustees they had no status to litigate on behalf of the estate and so any delays on their part could not be held to be laches against any of the beneficiaries; that no one beneficiary could litigate on behalf of all the beneficiaries in the estate to have the agreement set aside; and Jack's delay could not be held to bar the claim of the estate during the time in which his conduct was relevant because, on the Judge's findings, Jack lacked capacity for the whole of that time.

The case for which the appellants contend in this Court is well founded. In Schulze v Tod [1913] A C 213 the House of Lords decided that the defence of mora, as the doctrine of laches is called in Scotland, arising out of delay which might have been a bar to an action by the trustees suing in their own right and interest did not operate against the trustees suing on behalf of the beneficiaries. A similar view was taken by the Privy Council in Wright v Morgan [1926] A C 788, a case in which a life tenant who sued for herself and her infant children, the remaindermen, had full knowledge of the breach of trust and had stood by for many years. A defence of laches was raised. The Judicial Committee concluded that the defence could not succeed against the infant beneficiaries since the transac-



tion was not affected by their knowledge and the life tenant succeeded in recovering her interest in spite of her own delays. And see the judgment of Davey J A in Toornross v Crocker (1956) 3 D L R (2d) 9, a decision of the British Columbia Court of Appeal, at 33 and 34. The effect of the relevant authorities is summed up in Snell's Principles of Equity (27th ed) p 35 as follows:

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" There can be no abandonment of a right without full knowledge, legal capacity and free will, so that ignorance or disability or undue influence will be a satisfactory explanation of delay. Moreover, unlike estoppel, laches is a personal disqualification and will not bind successors in title."

On the application of these principles to this case three propositions may be stated:

- (1) Laches are not imputed while there is any want of capacity.
- 20 (2) It cannot be said that Jack and, through him, the estate had the requisite freedom and capacity to allow laches to operate.
- (3) Even if Joe had been guilty of laches, the estate would not thereby be bound and the other beneficiaries deprived of their rights. In this regard it was not suggested that all the beneficiaries were guilty of laches.

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Cook J was, as indicated, encouraged to take a global view of the matter of the equities from the time the agreement was signed down to the hearing. Hence he examined Joe's conduct against the steps taken by the respondent and his sons to improve the farm from the time they first took possession of it. Undoubtedly the respondent and his family have expended a great deal of time and money in improving a run-down farm and in changing the emphasis in the farming operations from predominantly grazing to predominantly cropping. Much of this work was apparently done without the prospect of an immediate profit. It was these factors which caused the Judge to think that a payment recognising the undoubted betterment which had been achieved would not put the respondent in the position he would have been in had he not entered into the contract. Hence he thought that it was impossible to assess the value of the work which the respondent and his family would have done had they not been tied to this contract or to assess their lost opportunities.

20 Notwithstanding our acceptance of Mr Tipping's first argument we go on to consider the second of his two-stage approach. In this it will be necessary to discuss whether the respondent has an equity which on balance outweighs the appellants' right remembering that the respondent has the onus of showing that laches applied. Counsel for the respondent concentrated on the position of Joe, Frank and Paul. But in the case of Frank and Paul the period of time

in which they could be guilty of laches was limited because it was not until January 1979 that Dennis died and Frank and Paul became entitled to an interest in John O'Connor's estate. Probate of his will was granted in May 1980, the very month in which the writ was first issued.

The position of Joe, with whom Dennis may be identified, requires examination from an earlier date. Between September 1977 and November 1978, when Joe first saw Mr Wallace, Joe was in receipt of advice from Mr Henderson who had been the family solicitor for many years and seems to have regarded himself as continuing in that role even after Joe had sought Mr Watson's advice. Mr Henderson intended that the advice he gave to Joe and Dennis should be accepted by them and there was no reason why at that stage Joe should not have acted on it. In that period the tenor of Mr Henderson's advice was that Joe could do nothing about the contract. In October 1977, and again in February 1978, Mr Henderson told Joe that nothing could be done about upsetting the transaction. Joe was unwell from February to November 1978 and Mr Watson had difficulty in obtaining clear instructions from him during this time. On 16 November 1978 Mr Watson wrote to the solicitors alleging that Jack lacked contractual capacity at the material time and that, if necessary, proceedings would be brought to obtain an order setting aside the sale. That letter soon came to Mr MacGeorge's notice because on 27 November 1978 he wrote in reply referring to it and calling for the removal of the caveat.

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money and effort resulting in considerable betterment to them. There has also been an increase in the land values associated with inflation. There were considerable differences of opinion between the valuers on the amount to be allowed for betterment. Cook J thought that these could be resolved but he was unable to see that a payment which recognised the betterment which the respondent had brought about could ever put him in the position in which he would have been had the contract not been entered into in the first place.

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It is not, however, necessary that there should be exact restitution. Equity does not require that the parties be restored precisely to the state they were in before the contract. It is sufficient if the Court can do what is just in the circumstances. Erlanger v New Sombrero Phosphate Co, 1278-79; Spence v Crawford [1939] 3 All E R 271, 279, 288. The status quo is considered to be sufficiently restored if the rights of the parties can be equitably adjusted by taking account of profits, making allowances for depreciation, and making other similar allowances to do what is practically just. Stanley Stamps v Brodie [1914] 34 NZLR 129, 168; Alati v Kruger (1955) 94 C L R 216, 223.

Although the matter will undoubtedly be difficult, the problems of assessing what is the proper amount to be allowed to compensate the respondent for the improvements he has effected should be no greater than those encountered in this country at the end of a long term lease under which a

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lessee is entitled to compensation for improvements effected by way of fencing, grassing, cultivation, reticulation of water, provision of shelter and the like. Counsel informed us that at the trial it was agreed that the question of assessing compensation to the respondent and its quantum should be reserved for consideration at a subsequent hearing in the event of the Court setting the agreement aside. For this reason the appellants did not tender detailed evidence on that issue. Difficult though it may be, restitution is not impossible. The method of farming may have changed but the properties have not changed in character. No third party is affected and the compensation can be reckoned in monetary amounts. But the improvements which by the expenditure of capital and labour the respondent and his family have effected to the farm should not be assessed in a niggardly way; the approach to be taken in compensating them for the present value of their work should not be parsimonious. For these reasons we think that when the position of the parties is brought into balance justice can be done by rescinding the contract subject to compensation being paid to the respondent.

It is convenient to deal at this point with an associated submission advanced by Mr Cadenhead in this Court, but not, so it seems, before Cook J, namely, that the agreement was not capable of rescission by the trustees because of their inability to offer restitution. Where parties are of full capacity, he who seeks to avoid the contract must

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elect to do so and communicate his election to the other party. That is so because rescission is the act of the party seeking to set the contract aside; until there is an election to that end, the contract remains on foot. It follows that rescission is effective from the date it is communicated to the other side and not from the date of any judgment in subsequent litigation which may in some cases be brought to obtain the assistance of the Court. (Cheshire and Fifoot's Law of Contract 9th ed 265). Where a party  
10 lacks capacity and cannot therefore make a decision to rescind, the Court takes on itself the decision to set the contract aside. The proceedings when first issued were placed on this footing but after Joe, Paul and Frank had been appointed as trustees they were able to assert as trustees the avoidability of the agreement. It follows that the question of restitution has to be considered at the date of appointment of the appellants as trustees. But whether that date or the date of the hearing in the High Court or the date of hearing in this Court is the relevant  
20 date, there can be no doubt that restitution can in fact be effected.

Two matters we have not referred to in specific terms were said to impose insuperable difficulties in the way of restitution. One was inflation. The other was the opportunity which the respondent had lost to buy land elsewhere. The respondent is, of course, entitled to have inflation taken into account when his claim to betterment is

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considered. It is in the present day value of the improvements which reflect inflationary rises in the costs of materials and labour that the respondent claims for betterment will be reckoned. But as he has not been called upon to pay any part of the purchase price it is difficult to see how inflation can otherwise be a relevant consideration.

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Cook J thought that the opportunities to buy land elsewhere which the respondent had lost could not be made good.

10 There is, however, very little material which would support a claim for lost opportunity. There is no suggestion in the evidence that the respondent would or might otherwise have bought a specific property. According to the evidence of the District Valuer there have been very few sales in the district over the period with the result that there have been very few opportunities to lose. Had there been some real evidence to establish that the respondent had selected the estate farm in preference to others which would have been suitable for a farming investment there may have been  
20 some basis to the claim for lost opportunity. As it is, the matter has been left on an entirely speculative basis.

It remains to consider the defences which the respondent by way of cross appeal contended were available to support the judgment under appeal, although not dealt with separately in the judgment, namely, acquiescence, estoppel, and election. It was of the essence of these defences that the appellants had by their conduct acquiesced





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in the agreement or elected to continue with it, or failed to rescind it when they knew or ought to have known that the respondent was acting on the agreement to his detriment. The precise lines of demarcation between estoppel, acquiescence and election are not easy to draw. It is more important to look at the circumstances which give rise to the defences than the name by which they are called. Their substance has already been discussed under the defence of laches. For the reasons discussed in dealing with that defence, the defences of acquiescence, estoppel and election must also fail.

The respondent also raised two other defences. They are somewhat allied to the earlier defences. First, it was contended that by acquiescence, affirmation, or election the appellants had allowed Jack to proceed with the agreement when they knew or ought to have known that he was incapable of acting as trustee, and that they failed when they knew of his condition to remove him from his position as such. There is an element of overlap between these defences and laches. They all emphasise the desirability of promptitude. As Lord Blackburn said in Erlanger v New Sombrero Phosphate Co: "And a Court of Equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by." 1279

Mr Cadenhead, who argued this part of the case, divided the period of supposed acquiescence into two; that leading up

to the execution of the agreement and that after it was executed. The Judge made a specific finding on Joe's conduct in regard to the first period in that he was not prepared to accept the criticism made that Joe had stood back and taken no steps to have Jack replaced when he had no warning that Jack was prepared to sell the farm to the respondent. Joe at all times refused to contemplate the sale of the farm to the respondent. He was prepared to consider a lease only and it was while Joe thought that the sale of the farm to his sons was under consideration that Jack in fact entered into the agreement with the respondent. Mr Cadenhead said that the issue was not whether Joe or Dennis had warning of what was eventually to happen to the farm but rather that they had allowed Jack to act as trustee for the estate when they knew he was incapable of so acting. We reject this submission. Jack's condition was a deteriorating one. The respondent claimed that at the time when the agreement was signed he had no reason to believe that Jack lacked contractual capacity, and in this he was upheld by the Judge. Mr Henderson's evidence was to the same effect. If the respondent and Mr Henderson thought Jack was capable of exercising proper judgment why should not Joe. Moreover, there seems no reason why he and Dennis should think that Jack contemplated a sale to the respondent as distinct from a lease when their discussions with the estate's solicitor had been directed to a sale within the family.

Mr Cadenhead referred to Joe's alleged lack of activity after the agreement was signed. Broadly, he claimed that although Joe and Dennis knew that the respondent had taken possession of the farm, had made improvements to it, and had paid interest on the unpaid purchase money, they did nothing to disabuse him of his trust in the contract. The short answer to this submission is that Joe, who was acting for himself and Dennis in these matters, made his protest on more than one occasion to Mr Henderson as the estate's solicitor about the contract and later instructed Mr Watson about the matter. Joe's line of communication with the respondent was through the firm of which Mr Henderson was a member. There was no need for him to make a further approach to the respondent.

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Secondly, it was said that the agreement for sale and purchase had been executed by Jack as trustee in professed exercise of a power to sell the property and in that situation the title of the respondent as a purchaser was unimpeachable because of s 22 of the Trustee Act 1956. The judgment is silent on this point although counsel for the respondent said that it was raised at the hearing. The decision of the Judge upon laches made it unnecessary for him to consider it.

Section 22, as it was originally enacted in 1956, was repealed and replaced by the section in its present form by s 10(1) of the Trustee Amendment Act 1968. The original s 22 was taken from s 17 Trustee Act 1925 (U K). But its

present form seems to be derived from the administration statutes. See s 8 of the Administration Amendment Act 1879, s 8 Administration Act 1908, and s 17 Administration Act 1952. This last section was repealed by s 10(2) of the Trustee Amendment Act 1968 and no corresponding section appears in the Administration Act 1969.

Section 22 cannot assist the respondent. Its purpose is not to protect a transaction made with a trustee who lacks contractual capacity. If the position were otherwise  
 10 a third party who entered into an unfair bargain with a trustee whose contractual capacity was known to him would be in a better position than one who dealt with an incapacitated owner dealing with his own property. The thrust of the section is to relieve persons dealing with trust property from the burden of enquiring as to whether a power of sale exists and the manner in which it should be exercised.

The appeal is allowed by holding that the defence of laches was not made out by the respondent. In all other  
 20 respects the judgment is confirmed and the cross appeal is dismissed. A declaration is made that the agreement for sale and purchase of 1 September 1977 is rescinded for want of capacity on the part of Jack O'Connor and for unfairness. The case is remitted to the High Court for determination of the amount of compensation to be paid to the respondent. The appellants are entitled to costs on the appeal and cross appeal which we fix at \$2750, this sum to take account of

In the High  
 Court of  
 New Zealand  
 Timaru  
 Registry

—  
 Judgment of  
 the Court  
 Delivered by  
 McMullin J.

5 May 1983  
 (Cont'd)

the interlocutory proceedings heard in this Court on 26 November 1982. The appellants will have the costs of printing the case and other disbursements to be fixed by the Registrar including the travelling and accommodation expenses of two counsel for the substantive hearing.

In the High  
Court of  
New Zealand  
Timaru  
Registry

—  
Judgment of  
the Court  
Delivered by  
McMullin J.

5 May 1983

(Cont'd)

*Richardson*

Solicitors:

Gresson Richards MacKenzie & Wallace, Timaru, for  
Appellants

De Goldi & Cadenhead, Christchurch, for Respondent

IN THE COURT OF APPEAL OF NEW ZEALANDNo.C.A.166/82In the High  
Court of  
New Zealand  
Timaru  
RegsitryBETWEEN JOSEPH O'CONNOR, PAUL  
MICHAEL O'CONNOR and  
FRANCIS JOSEPH O'CONNORAppellantsA N D THOMAS BRUCE HARTRespondentJudgment  
of Court  
of Appeal

5 May 1983

JUDGMENT OF COURT OF APPEAL  
Thursday the 5th day of May 1983BEFORE THE RIGHT HONOURABLE MR JUSTICE  
RICHARDSON (PRESIDING)  
THE RIGHT HONOURABLE MR JUSTICE  
McMULLIN  
THE HONOURABLE MR JUSTICE JEFFRIES

THIS APPEAL coming on for hearing on the 21st, 22nd and 23rd February 1983 AND UPON HEARING Mr A.P.C.Tipping and Mr T.M. Gresson of Counsel for the Appellants and Mr J. Cadenhead and Mr C.B.Atkinson of Counsel for the Respondent THIS COURT DOTH HEREBY ORDER that the appeal be allowed by holding that the defence of laches was not made out by the Respondent and that in all other respects the judgment of His Honour Mr Justice Cook in the High Court be confirmed and the cross-appeal dismissed AND THIS COURT DOTH HEREBY DECLARE that the Agreement for Sale and Purchase of 1 September 1977 is rescinded for want of capacity on the part of Jack O'Connor and for unfairness AND THIS COURT DOTH REMIT the case to the High Court for determination of the amount of compensation to be paid to the Respondent AND THIS COURT DOTH FURTHER ORDER that the Respondent shall pay the Appellants costs in the sum of \$2,750.00 together with the costs of printing the case and other disbursements to be fixed

by the Registrar including the travelling and accommodation expenses of two counsel for the substantive hearing.

BY THE COURT

Registrar

In the High  
Court of  
New Zealand  
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—  
Judgment  
of Court  
of Appeal

5 May 1983

(Cont'd)

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

No. A.29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN JOSEPH O'CONNOR, PAUL  
MICHAEL O'CONNOR and  
FRANCIS JOSEPH O'CONNOR  
Plaintiffs

Full Particulars  
of the Quantum  
of Defendant's  
Claim for  
Compensation

A N D THOMAS BRUCE HART  
Defendant

4th September  
1983

10

FULL PARTICULARS OF THE QUANTUM OF  
DEFENDANT'S CLAIM FOR COMPENSATION

1. The property comprises 3 areas, namely:

- Block I - 112.60378 hectares
- Block II - 66.17781 hectares  
(The Greenhill Blocks)
- Block III - 30.9710 hectares  
(The Willowbridge Block)

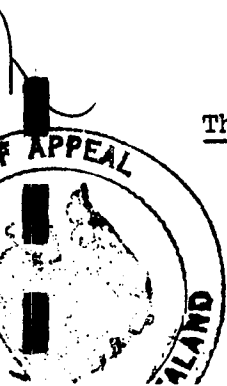
2. Block I. Condition of Paddocks.

Area in Specialist Lotus crop	23 hectares
Area in Specialist White Clover	20 "
Area in Greenfeed oats for stock	17 "
Area being prepared for grain	25 "
Area in pasture/grazing gorse	25 "
Area in gorse/buildings/waste	3 "
	<u>113</u>

20

This compares with 1977 cover of

New grass in fair condition	7 hectares
Gorse infested areas	11.5 "
Poor pastures	91.5 "
Building waste	3 "
	<u>        </u>





3. Block II. Condition of Paddocks

Area in good pasture	23 hectares
Area in Greenfeed oats	12 "
Area in crop stubble	12 "
Area in Specialist White Clover	10 "
Area in Winter feed/rape/stubble	7 "
Waste buildings/gorse	3 "
	<u>67</u> "

In the High Court of New Zealand Timaru Registry

Full Particulars of the Quantum of Defendant's Claim for Compensation

This compares with the 1977 cover of

10	New grass in fair only condition	10 "
	Poor pasture	28 "
	Fair pasture	20 "
	Waste, gorse, yards, buildings	9 "
		<u>67</u> "

4th September 1983 (Cont'd)

4. Block III is now a good cropping area as a result of using good cultivation techniques and a balanced cropping rotation incorporating restorative crops such as white clover and peas.

5. Valuation of Property as at September 1977.

20	Block No. I : Net value of improvements	3,300	
	Land value	69,500	
	<u>CAPITAL VALUE</u>		72,500
	Block No. II : Net value of improvements	2,700	
	Land value	41,500	
	<u>CAPITAL VALUE</u>		44,200
	Block No. III : Net value of improvements	1,300	
	Land value	43,800	
	<u>CAPITAL VALUE</u>		45,100
30	<u>COMBINED CAPITAL VALUE</u>		<u>\$161,800</u>

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Registry

From this total the Crown Rental Value for Blocks I  
and II should be deducted:

Crown Rental Value Block I	4,312	
Crown Rental Value Block II	<u>2,808</u>	
		<u>\$7,120</u>

Full Particulars  
of the Quantum  
of Defendant's  
Claim for  
Compensation

The net capital value would therefore be \$154,680 rounded  
to say \$155,000.

6. Valuation of Property as at 10th June, 1983.

Greenhill Block No. 1

10	Net value of improvements	25,900	
	Land Value	<u>168,000</u>	
	<u>CAPITAL VALUE</u>	193,980	say 194,000

4th September 1983  
(Cont'd)

Greenhill Block No. 2

	Net value of improvements	13,500	
	Land Value	<u>104,000</u>	
	<u>CAPITAL VALUE</u>	117,500	117,500

Willowbridge Block

	Value of improvements	2,700	
	Land Value	<u>128,000</u>	
20		130,700	<u>130,700</u>
	<u>COMBINED CAPITAL VALUE</u>		<u>\$442,200</u>

7. Add disturbance for Lotus crop:

	Establishment cost of Lotus	10,100
	Loss of Income (12 months)	<u>22,000</u>
		<u>\$32,100</u>

8. Calculation of Rental based on 5 1/2% of Current  
Market Value of Property - On the basis of 3 yearly  
rent review, the rentals on the property excluding  
30 the dwellings would be:

September 1977 to September 1980

Rental Value \$161,500 @ 5.1/2%	26,646
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September 1980 to June 1983

Rental value of say \$250,000 @ 5 1/2%	
\$13,750 per annum for 2 years 9 months	37,812

Total Rental for period September

<u>1977 to June 1983</u>	<u>\$64,458</u>
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In the High  
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Full Particulars  
of the Quantum  
of Defendant's  
Claim for  
Compensation

9. Calculation of Rates Liability - Actual rates

paid by the Harts amount to \$13,281.16. On the basis of  
the increase in rates being paid by the lessor as  
detailed above the Harts would have been liable for  
a total of \$11,435.82, an overpayment having been made  
of \$1,845.34.

4th September 1983  
(Cont'd)

10. Other Payments made by Harts

Annual interest paid upon terms of 1977 contract being 11% of the purchase price paid two payments of \$19,975	39,950
--	--------

Insurance Mr B. Hart advises that he has paid insurance on one of the dwellings totalling	472.20
---	--------

<u>County Water Capital Charges</u> - four instalments of \$83.97 each have been paid totalling	335.88
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<u>Lands and Survey Rentals</u> - the equivalent of 5 years rental from September 1977 to June 1983 have been paid	1,820.00
--	----------

11. Reinstatement -

Two hundred and nine metres of boundary fence  
between Greenhill Block two and the neighbouring  
property owned by Mr R. Hart have been removed. An

10

20

30

allowance of \$1.50 per metre would liberally compensate for the O'Connors share in the fence i.e. \$313.

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12. Summary and Computation of Compensation to Harts:

A.	Value of property in 1983	435,000	
	<u>Less</u> Value of property in		
	1977	<u>155,000</u>	280,000.00
<u>Plus</u> B	Disturbance for Lotus		32,100.00
<u>Plus</u> C	Overpayment in rates		1,845.34
<u>Plus</u> D	Repayment of Insurance on buildings		472.20
10 <u>Plus</u> E	Repayment of County capital water work charges		335.88
<u>Plus</u> F	Repayment of Lands & Survey rent		1,820.00
<u>Plus</u> G	Repayment of interest paid		<u>39,950.00</u>
			356,523.42
<u>Less</u>	Rental as calculated	64,458.50	
	Allowance for rein- statement of boundary fence	<u>313.00</u>	<u>64,771.50</u>
	<u>COMPENSATION CLAIMED</u>		<u>\$291,751.92</u>

Full Particulars  
of the Quantum  
of Defendant's  
Claim for  
Compensation

4th September 1983  
(Cont'd)

20 DATED at Wellington this 4th day of September, 1983.

"D.L. Mathieson"

Counsel for the Defendant

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

No. A.29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN JOSEPH O'CONNOR, PAUL MICHAEL  
O'CONNOR and FRANCIS JOSEPH  
O'CONNOR

Plaintiffs

Reasons for  
Supplementary  
Judgment of  
Cook J.

A N D THOMAS BRUCE HART

Defendant

16th December 1983

Hearing: 3rd, 4th, 5th and 6th October 1983

10 Counsel: A.P.C. Tipping and J.L.D. Wallace for plaintiffs  
D.L. Mathieson for defendant

Supplementary Judgment: 16 December 1983

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REASONS FOR SUPPLEMENTARY JUDGMENT  
OF COOK J.

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The Court of Appeal, having found that the defence  
of laches had not been made out by the defendant, made  
a declaration that the agreement for sale and purchase  
of 1st September 1977, made between the late Jack O'Connor  
and the defendant, is rescinded for want of capacity on the  
20 part of Jack O'Connor and for unfairness and remitted the  
case for determination of the amount of compensation  
to be paid to the defendant.

He now claims compensation in a total sum of  
\$356,523-42, but reduced by a figure representing rental  
for the period while possession has been held of the

property, \$64,458-50 to 1 July 1983, and an allowance for reinstatement of a boundary fence, \$313, leaving a net amount of \$291,751-92.

Counsel were in agreement that a proper determination of the problem involved three major issues:

- (1) The value of the property at 1st September 1977, the date of the agreement and the time when the defendant took possession.
- (2) The correct approach to be adopted in determining the amount of compensation; in particular, whether the O'Connor estate or the defendant is to have the benefit of the increase in value arising from the inflation in land values over the period.
- (3) The value to be placed on non-structural improvements which have been made.

Background Information:

The agreement for sale and purchase was signed on the 1st September 1977 and the defendant went into possession almost at once. While he did not sign the agreement as such, he was acquiring the land with a view to it being taken over by two of his sons, Donald Hart and Roger Hart. It is to be remembered that the property, the subject of the agreement, comprised three blocks of land:

Section 8 Block 3 Waitaki Survey District,  
112.60378 hectares, lease in perpetuity.

Section 9 Block 3 Waitaki Survey District,  
66.7781 hectares, lease in perpetuity.

Lot 6 DP 2129 Block 3 Waitaki Survey District,  
30.9710 hectares, freehold.

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(Cont'd)

These three pieces of land had been referred to in different ways by different witnesses, but I shall give them the references which seem to have been most commonly used; Block 8, Block 9 and Willowbridge.

Donald Hart had already been on Willowbridge for some months under a short-term lease from the O'Connor estate; he took over that area and, a few months after the agreement was signed, Block 8 also. This was not solely on his own account, as he entered into partnership with his father, the defendant, to farm those areas and other land.

Roger Hart took over Block 9 and farmed it on his own account in conjunction with land he already owned which lay adjacent.

He started immediately to do what he considered to be the necessary development work in order to follow the type of farming he wished to carry on; initially cropping. Each made it plain that he proceeded as if there was no threat to his occupancy of the land and did work which he would not have undertaken had that occupancy been limited to a leasehold estate for a short term of years.

The principal item of compensation that is sought by the defendant is calculated by him in the following way:

Value of properties in 1983	\$435,000
Less value of property in 1977	155,000
	<u>\$280,000</u>

It should be noted that, in assessing the value of the property in 1977 and today, the house and associated

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buildings on Block 8 and 9 have been excluded; they have been occupied by members of the O'Connor family throughout. This explains why the 1977 value used in the defendant's calculation of the compensation he should receive is lower than the value set in that year for the purposes of the sale. As indicated above, the first question to be determined is the value in 1977 which forms the base for many of the other calculations.

Value in 1977:

10 Happily, this does not present any great problem. Mr Armstrong, the principal witness for the defendant on the valuation aspects of the claim, arrived at a net capital value (after making due allowance for the Crown rental value) of \$155,000. Mr Gilchrist, the second valuer to give evidence, who had not had the advantage of seeing the property in 1977, but did make a valuation for the first hearing which, for the whole property (including house and other buildings), was a few thousand dollars above that of Mr Armstrong, made an

20 assessment for the present hearing, on the same basis as Mr Armstrong, at \$156,550. For the plaintiffs, Mr Fitzgerald, who did not accept the before and after approach adopted by the defendant valuers as the proper one to determine the compensation, made his assessment of the 1977 figure and he put this at \$175,000.

30 One factor, which was debated at considerable length at the first hearing, was the influence that a sale of land near Willowbridge at about the relevant time should have had upon the valuations made, that of Mr Armstrong in particular, had it occurred in time for information

In the High  
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to have been available when he valued the O'Connors' land in 1977. I do not propose to traverse this evidence again. Mr Armstrong accepted at the second hearing, as he had at the first, that, if he had considered that sale in an analysis of sales evidence, he would have increased his figure for the Willowbridge Block by \$10,000 to \$15,000.

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I think it is proper that, in determining the starting value, such an allowance should be made and his value increased accordingly. All the valuers appeared to be competent (though at times they did stray into the realms of advocacy); indeed, I was impressed by them all and the careful consideration they have given to the problem. Taking the various opinions into account, I think it would be proper for present purposes, to take the sum of \$170,000 as representing the value of the three blocks of land (excluding the dwelling and associated buildings) as at 1st September 1977.

Basis of Approach:

By far the most important and difficult question that immediately arises is that of the increase in value which has occurred, not by reason of any action of the plaintiffs or the defendant over the last six years, but by inflation. As an indication of the importance of this question to the issue of compensation, the valuers are in substantial agreement that the properties today are worth \$435,000 and the estimates of how much of the difference between \$170,000 and that sum represents pure inflation range from \$165,000 (Mr Armstrong) to almost the full amount (Mr Fitzgerald).

The defendant says that he is entitled, as the basic measure of his compensation, to the whole of the increase in the value of the property; the plaintiffs, on the other hand, say that the defendant is entitled only to the betterment that he has brought about, but so as to allow him the present day value for improvements effected. Neither suggested that there was any half-way house which could allow for a sharing of this aspect of the increase in value.

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10 I turn to the principles which apply. In discussing rescission, Meagher Gummow & Lehane, in Equity: Doctrines and Remedies (paras. 2401 to 2404), refer to rescission in four senses; with the first two equity is not concerned, then follow the types of case where, first, the right to rescind arises from matters which affect the contract in its formation and render it voidable at law by the party aggrieved; and, secondly, the term rescission is used as describing the setting aside of dispositions and transactions (not limited to  
20 contracts) which, in the eyes of equity are improperly procured by innocent but material misrepresentation or other means. In the case of the two latter, it is stressed that the result of rescission is to dissolve the contract or set aside the disposition or transaction as the case may be ab initio, but coupled with rescission must go restitution, restitutio in integrum. As stated in para. 2407:

30 "However, where the contract has been wholly or partly executed the common law recognises that if the contract is to be treated as never made then each party must get back what he has given under the contract and in other respects

be put in the same position as if there had been no contract. In other words, each party is entitled to restitutio in integrum. The reasons for this rule are given by Compton J. in Clarke v. Dickson (1858) E1 B1 & E1 148 at 154-5; 120 ER 463 at 466:

10           When once it is settled that a contract induced by fraud is not void, but voidable at the option of the party defrauded, it seems to me to follow that, when that party exercises his option to rescind the contract, he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract .... That is founded on the plainest principles of justice ....  
 20           The true doctrine is, that a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition."

Having commented on the narrow view taken by the common law, the text continues:

30           "2409 Chancery administered its remedies in accordance with the maxim that those seeking equity must do equity. It also followed the law and thus recognized the right of a party to rescind his contract for fraudulent misrepresentation or deceit and in so doing it required of him that he perform the equity of restitution. But as to what degree of restoration was required by its standards, equity took a less stringent view to the common law. It did not require that the status quo ante be restored in all respects, but rather that 'practical justice' be done between the parties. And the remedies of equity, particularly that of accounting, were sufficiently developed and flexible to achieve this result in many cases where this could not be so at law. Thus in its concurrent jurisdiction equity was  
 40           better equipped than the common law and it followed that plaintiffs succeeded there who would at law have failed. Equity in such cases treated the plaintiff's act of rescission as ineffective at law but as revesting rights in equity at that time and could decree full relief at the time of the subsequent suit. Further, in cases where the impugned contract or transaction was not oral but constituted in writings executed by the parties, equity could, as part of its relief,  
 50           order delivery-up for cancellation."

In the High Court of New Zealand Timaru Registry

Reasons for Supplementary Judgment of Cook J.

16th December 1983

(Cont'd)

16th December 1983

(Cont'd)

While the decided cases tend to be concerned with contracts which have been rescinded at the instance of one party upon the grounds of fraud by the other, I do not understand the principles to be applied in determining what will constitute restitution and what allowance, if any, should be made to the other party to vary according to whether or not there has been fault on the part of that other. While it may be that, where there was no deceit or intention to defraud, e.g. in cases of innocent misrepresentation, the Court would be "less ready to pull a transaction to pieces" (Spencer v. Crawford [1939] 3 All ER 271 at 288), I understand this to mean that the Court will be less ready to order restitution at all, not that it will view the terms of restitution in a different way. If there has been fraud, it may be that an action for deceit will lie to recover loss resulting, (Brown v. Smidtt (1924) 34 CLR 160, to which further references will be made). As stated in Stoneham on Vendor and Purchaser, para. 1610:

"The rescinding party cannot obtain compensation for all collateral losses, which he may have sustained by reason of the fact that he entered into the contract, such as losses incurred in carrying on a business, but only such compensation as will restore the status quo ante in relation to the subject matter of the contract. Such collateral losses can only be recovered in an action for deceit, which is applicable to a case of fraudulent misrepresentation, but no such action lies for, and damages cannot be recovered for innocent misrepresentation. Where a purchaser who had been let into possession pending completion, obtained a decree for rescission of the contract on the ground of innocent misrepresentation, he was charged with an occupation rent in favour of the vendor and was allowed to keep the proceeds of his farming."

The rights of the parties are expressed basically to be as follows in Williams on Vendor and Purchaser 4 Ed. 818:

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(Cont'd)

10 "If a contract for the sale of land is set  
aside, on the ground of fraud, after completion,  
the vendor rescinding is entitled, not only to be  
restored to the possession of the land, but also  
to recover the amount of the rents and profits  
thereof during the time when the purchaser was in  
possession; and the purchaser must account for  
all rents and profits which he has received, and  
will be charged with an occupation rent for any  
part of the land which he has occupied himself.  
The vendor is also entitled to recover his expenses  
incurred in connection with the sale, or with  
enforcing his right to set it aside, such as money  
paid to redeem some mortgage which the purchaser  
has made. On the other hand, the vendor must  
return the purchase-money with interest at the  
rate of  $\frac{1}{4}$  per cent. per annum. And the purchaser  
will be entitled to an allowance for all necessary  
outgoings and also, it seems, for substantial  
20 repairs and lasting improvements."

Once again, the reference is to rescission arising from  
fraud. Chitty on Contracts 25th Ed. - General Principles  
at 447, contains the following:

30 "Restitutio in integrum. The purpose of rescission-  
is to restore the status quo ante, and it was said  
by Bowen L.J. in Newbigging v. Adams (1886) 34 Ch.D  
582, 595 that 'there ought ... to be a giving back  
and a taking back on both sides'. Thus the remedy  
will not lie if the parties are not in a position  
to make restitutio in integrum. In Clarke v.  
Dickson (1858) E.B. & E. 148, 154 Crompton J. said  
that when a party 'exercises his option to rescind  
the contract, he must be in a state to rescind;  
that is he must be in such a situation as to be  
able to put the parties into their original state  
before the contract."

40 "Alteration of subject-matter. Clearly, it is  
impossible to make substantial restitution if  
something transferred under the contract has  
altered its character. Thus in Clarke v. Dickson  
(1858) E.B. & E. 148 rescission was refused where  
a partnership, in which the representee had been  
induced to take shares, had been converted into a  
limited liability company, for the existing shares  
were wholly different from those which he originally  
received .... On the other hand, if property  
has retained its substantial identity,  
restitution may be ordered even though it has  
deteriorated or depreciated or cannot be restored  
50 in its original state. Thus in Adam v. Newbigging  
(1888) 13 App. Cas. 308 the respondent was induced  
by an innocent misrepresentation to become a partner  
in a business which was insolvent and which  
subsequently failed. He was held to be entitled

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10 to rescind and to have his capital repaid although  
the business to be restored was worthless. Two  
further comments may be useful: first, in appropriate  
cases the court may order the plaintiff to pay  
compensation on account of any deterioration that  
has occurred, in accordance with the principle that  
this is preferable to allowing the defendant to  
retain all the advantages of property transferred  
under the contract. The point was put by Roche J.  
as follows: 'The principle of restitutio in integrum  
did not require that a person should be put back  
into the same position as before; it meant that he  
should be put into as good a position as before'.  
Secondly, it seems that the courts are more willing  
to exercise their discretionary powers and to order  
restitution in a case of fraud than in a case of  
innocent misrepresentation."

As I see it, equity seeks to restore the parties to the  
same position, or one which, as nearly as may be, is as  
20 good as the same, in which they were immediately prior  
to the contract; no better and no worse. If property  
which has to be returned by a purchaser to a vendor  
has improved in the interval by reason of the activities,  
whether the expenditure of money or actual work performed  
by the purchaser, the latter is entitled to an allowance  
to off-set the gain which would otherwise accrue to  
the vendor. The purchaser is entitled, of course, to a  
full return of the consideration which has moved from  
him; in the ordinary situation, the sum he has paid to  
30 the vendor. Beyond that, equity permits the purchaser  
to retain for his own benefit whatever may have come to  
him from a proper use of the land, but he must allow  
the vendor the rent which the latter might reasonably  
have received from the land over the same period had  
there not been a sale. The question is fully discussed  
in Brown v. Smidtt (supra) at 164:

40 "The parties being relieved of the contractual  
obligations, each must give back all that he  
obtained under the contract. Where the property  
the subject matter of a contract remains unchanged,

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no difficulty arises. Where it has been wholly or substantially destroyed by the default of the party seeking rescission, there can be no rescission because there can be no restitution. But where the property has been improved or deteriorated by the act of the purchaser, and yet remains in substance what it was before the contract, equity adjusts the rights of the parties by awarding money compensation to one or the other, and so substantially putting each party in the position which he occupied before the contract was made. Lord Blackburn in Erlanger's Case (1878) 3 App. Cas., at pp. 1278-1279 said:

"It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration . . . . And . . . the practice has always been for a Court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract."

and later at 165:

"And putting the parties in the position they were in before the contract, replacing them in statu quo, does not involve replacing them in the same position in all respects, but only in respect of the rights and obligations created by the contract which is rescinded. A party, in case of rescission, cannot ask the Court to award him compensation for all collateral losses which he may have sustained by reason of the fact that he entered into the contract, such as losses incurred in carrying on a business (Newbigging v. Adam (1886) 34 Ch.D. 582; (1888) 13 App. Cas. 308; Whittington v. Seale-Hayne (1900) 82 L.T. 49, but only such compensation as will restore the status quo ante in relation to the subject matter of the contract. Such losses could, in this case, only be recovered in an action of deceit."

No case was brought to my attention where an increment in value arising from a cause which has such universal effect as inflation has ever had to be considered, i.e. an increment in value which in no way can be said to result from the actions of one party or the other. Perhaps some assistance can be gained from cases where the asset,

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the subject of the transaction, has deteriorated in value between the time of the contract and the date at which rescission and restoration have been decreed; i.e. deterioration through no fault of the person in possession who, upon rescission being ordered, is required to return it to the other party and entitled to receive back the consideration which had passed from him. In Armstrong v. Jackson [1917] 2 K.B. 822, where a right to rescind a contract for the sale and purchase of shares arose in the purchaser by reason of the fact that the sharebroker had sold his own holding in the particular company without disclosing the fact, it had been argued that no decree should be made as the circumstances had so changed through the lapse of time so that the plaintiff could not restore that which he had received from the defendant. The shares at that time had stood at nearly three pound for each five shilling share whereas, at the time of the trial, they were worth five shillings only. As there stated by McCardie J., at 829:

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"The phrase 'restitutio in integrum' is somewhat vague. It must be applied with care. It must be considered with respect to the facts of each case. Deterioration of the subject-matter does not, I think, destroy the right to rescind nor prevent a restitutio in integrum. Indeed, it is only in cases where the plaintiff has sustained loss by the inferiority of the subject-matter or a substantial fall in its value that he will desire to exert his power of rescission. Such was the state of things in Rothschild v. Brookman 5 Bli. (N.S.) 165. Such, I infer, was the state of things in Gillett v. Peppercorne 3 Beav. 78, where the plaintiff alleged that he had paid extravagant prices for the shares. Such too, I infer, was the state of things in Oelkers v. Ellis [1914] 2 K.B. 139. If mere deterioration of the subject-matter negated the right to rescind, the doctrine of rescission would become a vain thing."





There was, of course, no suggestion that, in order to effect restitution, the purchaser should make good the fall in value.

The whole accent is upon the restoration of the status quo ante, with such adjustments as may be warranted to ensure that that situation, so far as may be possible, is achieved; adjustments which are necessitated by acts of the parties, so that one does not derive an unjust advantage at the expense of the other by reason of something which that other has done. In the present case, the status quo means that the farmland was the property of the O'Connors and the defendant had, or had the ability to raise, the sum of \$189,000. Had the land depreciated in value because of economic trends and through no fault of the defendant, there could be no suggestion that he should have to make this good. Had the O'Connors not made the sale but retained the land, the inflation in value would still have occurred and would have accrued to them.

I am unable to see that there can be restitutio in integrum, a return to the status quo ante if the defendant is found to be entitled to the rise in value flowing from no effort of his but from the inflationary factors which have occurred over the years in question. As to the approach to be taken in determining the allowance which should be made to the defendant, I must find that inflationary increase in value is to be excluded. The defendant is, of course, entitled to fair and proper recompense for the improvements which he, whether directly or indirectly through his sons, has made to the land.

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Improvements:

No doubt the Harts worked hard on the properties from the outset. Donald Hart described Block 8 as having been run down and he gave many details in support of this contention; as mentioned, he farmed the block as if he owned it and claimed that all decisions, the long-term ones, were made on the assumption that, despite the challenge to the validity of the agreement, occupancy would not be disturbed. He explained the different approach he would have adopted had his rights to the land been those of a lessee only. He removed gorse fences and clumps of gorse from the property (though the evidence overall was that, apart from fences, as much gorse remained as there had been in 1977). He cultivated with tractors doing continual grubbing, deep ripping and levelling of the whole area. He spoke of the first stage as being cultivation, the second as a time of building up fertility and, the third, getting the farm really producing. A considerable amount of fencing was done, there the objective being to create a sub-division of the area which would mean better control of grazing. Fertiliser was sown, water reticulation made good.

In similar manner, he tackled the Willowbridge block and Roger Hart Block 9 which he was farming. Much information was given as to the moneys expended, work done, the yields obtained and the improvements obtained, but I do not propose to go into these; it is necessary to rely upon the conclusions of the expert witnesses.

What must not be overlooked is that they were farming for

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their own benefit and reaping reward for their efforts. No figures giving any real indication of the return over the years were available and this is understandable; the blocks were not farmed independently and, consequently, there were no separate accounts. Mr Engelbrecht, a farm management consultant, upon the basis of his general experience and knowledge of that type of farming, made an estimate on a theoretical basis of the annual cash surplus he would have expected from the three properties. This was done on the basis of a calculation of a likely return, less the expenses of producing the gross income, an exercise which he volunteered to be very speculative and indicated to him that there would have been a surplus between \$58,000 and \$71,000. I understand Donald Hart to accept that, subject to certain modifications, those figures were assessed on correct data. He said in respect of the income from the partnership with his father that in the first two years there had been a loss, in 1981 a profit. However, such figures are of no real assistance without detailed accounts to study. The point to be borne in mind is that they were farming the properties and making a return from them.

To determine the betterment question, it is not a matter of what was spent or what work was done, but at what figure the improvements resulting may add to the value of the properties today, or what figure may properly be put upon the improvements as representing their value now, whether this is fully reflected in the market or not; to decide this I turn to the evidence of the valuers.

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Mr Armstrong produced two studies, the first based on a "before and after" valuation, as he believed the fair compensation which the Hart family should receive would include both the value of the improvements and the inflation in the value of the land; in addition, he considered certain disturbance factors, in particular, a crop of Maku Lotus and these will be dealt with as separate items. As already mentioned, he found the "after" valuation to be \$435,000 but, as he did not in that report distinguish between improvements effected by the Harts and inflation, its help in deciding this matter is limited.

There is the alternative report, however, taking a different approach and excluding inflation. This was prepared on the basis that a 1983 value was assessed for the property but as if the property had remained in substantially the same general state and condition as it was in 1977. Apart from the actual condition of the property at that time, as viewed by him when he made his original valuation in that year to determine the sale price under the contract, Mr Armstrong considered that there were four factors which had a bearing upon the amount a property in such a state would fetch on the market today. These he put as being the fact that in June 1983 the farming economy was depressed, farm investment was virtually at a stand-still and the market activity in rural properties was very slow. He considered there was, and still is, no incentive to develop run-down properties. Further, that subsidised development grants such as the Land Development Encouragement Loans

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and the Livestock Incentive Schemes were no longer available; that the Land and Income Tax Amendment Bill 1982 had virtually eliminated "Queen Street farmers" who no longer had the attraction of substantial tax write-offs and finally, that the farming community, by reason of the depressed state of the economy, did not find themselves with substantial tax problems and accordingly would not be as strong bidders for the property as they would have been some years earlier.

10 He considered further that a potential purchaser would heavily discount the property in its unimproved state, unimproved that is as compared with the state to which he considered the Harts had brought it. His assertions in this respect were by no means accepted by other witnesses. He then made an assessment of the present day cost of producing the improvements he regarded as necessary on the three blocks to bring them to their present state and arrived at a round figure of \$100,000. As to the validity of this figure, I would only note at  
20 this point that all the components would not appear to represent purely capital expenditure and that a considerable amount must be of the nature of farm expenses which would be deductible against revenue and sooner or later have a corresponding effect upon income tax. However, I accept it as a real attempt on his part to arrive at a figure which enables one to isolate purely inflationary factors and assess the worth of improvements made.

He then calculated as follows:

1983 valuation of the property	
as it is today	\$435,000
Less cost of effecting improvements	100,000
	<u>\$335,000</u>

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In other words, he considered that in its 1977 state it would sell today for \$335,000 and that increase in value which may be regarded as betterment arising from the work done by the Harts would be the \$100,000 whereas inflation over a 1977 value of \$170,000 would account for \$165,000.

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The second valuer for the defendant was Mr P.J. Gilchrist of Pyne, Gould, Guinness, Trust Department. For the first hearing he had prepared a valuation as at 1st September 1977 but his inspection for this purpose had not been until July 1981. A further report was produced to the second hearing for the purpose of giving his "before and after" valuations; the properties, without dwellings and associated buildings, as at 1st September 1977 and at 10th June 1983. He stressed that his report had been prepared independently of Mr Anderson but, not having seen the land in 1977, he had had to ascertain from Mr Hart a general description of the three blocks as they were at that time; he then proceeded to value on the basis that they had been in a run-down state not having been well-farmed for a number of years. The figures produced were as given at the first hearing but after making deductions for the dwellings and other buildings:

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Willowbridge	\$54,000
Block 8	64,150
Block 9	38,400
	<u>\$156,550</u>

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He then turned to the value as at June 1983 and arrived  
at figures as follows:

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Willowbridge	\$116,000
Block 8	220,950
Block 9	129,050
	<u>\$466,000</u>

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So far as the difference between the two is concerned,  
no distinction is made between increase in value arising  
from improvements and that which may be attributed to  
inflation and consequently the report is of limited  
assistance; accordingly, I do not propose to refer to  
the reports in any further detail merely recording the  
figures arrived at. Mr Gilchrist was in difficulty with  
the 1977 values, not having seen the property at that  
time but having to rely on Mr Hart to describe the  
condition to him. I have already indicated that I consider  
that, for present purposes, having regard to Mr Armstrong's  
figures and his concession regarding a possible increase  
in the value of the Willowbridge block when compared  
with Mr Fitzgerald's assessment, a figure of \$170,000  
should be taken.

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For the O'Connors, Mr Fitzgerald approached the  
problem in a somewhat different manner. While he was in  
agreement with the opinion of Mr Armstrong as to the  
value of the property as it now stands and quite close  
to him in his assessment of the 1977 value which he put

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at \$175,000, they were at variance when it came to making an assessment of the present day value had the property remained in the same condition as it was in 1977; where Mr Armstrong found that difference to be of the order of \$100,000, that the improvements which had been made by the Harts had increased the property in market value to that extent, Mr Fitzgerald could only put a figure of \$13,000 on such betterment. He recognised, however, that such a figure would not do justice between the parties; as he said in his evidence in chief, that this approach was far too restrictive and did not give a fair answer for the work that had been effectively done by the Harts but now had to be yielded up to the O'Connors.

In his valuation report he said that he considered that the quantum of compensation should reflect in fair balance, the effective worth of the improvements carried out by the Harts and to be yielded up to the O'Connors and, conversely, the fact that the O'Connors should pay reasonably for effective improvements they would receive, but should not have to pay for what they already owned from the outset or for anything they would not be receiving. He accepted that, in assessing the worth and what should reasonably be paid, the assessment must be made in 1983 currency terms. Approaching the matter on this basis he made allowances as follows:





<u>Block 8</u> , fencing troughs and new pipe for the water supply	\$14,000
<u>Block 9</u> , fencing, repair of sheep yards, nova flow drainage of wet area	6,100
<u>Willowbridge</u> , reposting to back boundary fence	150
	<hr/> \$20,250 <hr/>

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10 In connection with the fencing, he had deducted an  
average figure of ten per cent for wear and tear but  
acknowledged that, with much of the fencing having been  
erected very recently, this was perhaps not fully justified.  
If this were added back, it would increase the figure  
mentioned by approximately \$2,000.

20 His prepared report did not put a figure on one  
important factor - general improvement to the land  
itself; but when giving evidence he said that, for what  
he described as the appearance improvement, he would  
"think along the lines of increasing land value" by \$50  
to \$100 per hectare. He said "nearer the higher figure  
for Block 8 and the lower for Block 9". I did not  
understand this to apply to Willowbridge, so this would  
mean for Blocks 8 and 9 a total of 178 hectares; if one  
takes the higher figure, a further \$17,800. If  
Willowbridge should be included, then there would be a  
further \$3,000, a total for the value of the improvements  
of \$40,000 to \$43,000.

30 While his approach was a different one from that  
of Mr Armstrong, in his second report the latter did  
make an assessment of the cost of doing much of the  
same work as Mr Fitzgerald allowed for. Their comparative

figures may be set out as follows:

Cost of refencing:

Armstrong	\$15,600
	6,900
	<u>\$22,500</u>
Fitzgerald	\$13,229
	5,787
	<u>\$19,016</u>

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10 After adding back ten per cent to the latter figure,  
say, \$21,000. They were very close on this item.

Water Supply:

Armstrong	\$2,700
	1,600
	<u>\$4,300</u>
Fitzgerald	\$850

20 I do not think it is possible to find that either of  
these figures was wrongly based; in any event in the  
overall picture the difference is not very material. It  
would seem reasonable to take figures between those  
assessed say, \$22,000 for the fencing and \$3,000 for  
the water supply.

The substantial difference between them relates  
to the improvement to the land itself. As stated,  
Mr Fitzgerald was prepared to allow \$50 to \$100 per  
hectare which produced the figures mentioned; Mr Armstrong  
in making his assessment of the amount a potential  
purchaser would estimate that he would have to spend  
to develop the property if it were on the market in  
1983 in its 1977 state, allowed items as follows:

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Block 8:

Cost of clearing up reverted pastures, cultivating and top-working and ploughing	\$16,800
Secondary cultivation and drilling	5,600
Lime, super seed	15,100
Cost of drainage, land levelling and sundry, say	1,000

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Section 9:

For similar types of work in respect of Block 8	\$23,544
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Willowbridge:

Similar work	\$6,000
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making a total of approximately \$68,000, or a figure of approximately \$340 per hectare for Blocks 8 and 9 and Willowbridge. Before giving further thought to the substantial difference between them, however, consideration should be given to other evidence relating to the property.

Listening to some only of the evidence, especially the Harts' account of the state of the property when they took over, the description of the work that had been done, the fences renewed, the cultivation undertaken, the fertiliser spread, one tended to get the impression that a vast transformation had taken place, that three run-down inadequately farmed areas of land had been changed into first-class, highly productive units. Not all were of that view, however. Mr Stephen O'Connor, a member of the O'Connor family but with no personal interest in the outcome, who had visited the farm over the years quite frequently, considered that in 1977 it was a well-farmed unit. He remembered his uncles as

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good farmers, although age was beating them in the end. He said that the Harts had a different approach, big operators with a bigger turn-over, while the O'Connors' was a low-style operation with less expense and smaller turnover; that the property was now different because it had been turned to cropping. He himself is a stock farmer and, if he took over the property today, his concern would be as to the cost of putting it back into pasture. In his view the ground could not go on being

10 cropped for ever and, if he had his choice, he would take it in its 1977 condition. He stoutly maintained that he would pay \$435,000 for it in that condition, if it were in that condition today. I do not doubt his sincerity, but cannot but think that a certain degree of family pride was showing through; also, of course, a quite different approach to farming than that of the Harts. I do not think very much direct assistance can be gained from his evidence, but it does help to see the situation in better perspective.

20 Mr Englebrecht, who is a farm management consultant, gave evidence in respect of the O'Connors' case. Having visited the property twice in 1983, listened to the evidence at the second hearing and investigated relevant information available from research in regard to soil types, fertility requirements and so on, he gave his impressions of the properties. In relation to development he commented on soil fertility, fertiliser use, weed control, cash cropping programme, cropping rotation and livestock involvement. He considered that,

30 if the properties had been in the condition which he

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pictured from the information given him by the Harts, an intensive cash cropping programme, which he said was what they had followed, would have been inappropriate. He could not believe that the land had been in such a run-down condition as they claimed; if it had been, they could not have carried out the intensive programme with any degree of success, particularly with the fertiliser and lime useage programmes which they followed.

I shall not go through the details of the evidence which he gave as to fertiliser use and fertility factors but his broad conclusions, as I understand them, were that Willowbridge would be at a very similar condition as to fertility, compared with what he imagined it to be in September 1977 with a higher average Ph level and probably phosphate levels. He noted, however, that couch grass was still present in paddocks and on some fence lines. As to Block 8, he thought there would be little difference, Ph levels he would expect to be down a little and phosphate about the same. In Block 9, he considered that the Ph levels must be quite significantly lower after the cash cropping programme and phosphate levels lower than they had been. While stressing the fertility is not just to be gauged from soil tests, which are only one aspect of the matter, the tests did suggest to him that the farm was not in a high fertility state. Overall, he did not consider any long-term development had occurred, the objective of intensive cash cropping being to create cash relatively quickly. He summarised his conclusions as to the soil aspects of the farm today as against its condition in 1977; that

on balance there is probably a slight improvement at Willowbridge, but little or no change on the other two properties. If anything, one might expect a slight decline in the two latter ones.

While the force of his conclusions may have been blunted to some extent in cross-examination, he stood firm in expressing his general view as to the property. He repeated that he would consider that the Willowbridge property had gained a little in fertility and that the other two blocks would be below or about par. If he were a sheep farmer purchasing the property he would be faced immediately with costly regrassing programme and a period of time to allow the pastures to develop to full production; whereas, if he was entering a cash-cropping programme, it would concern him that there had been the cash-cropping programme practised during the last few years. He would be concerned as to the fertility levels facing him in the next two or three years. Overall, he considered there had been little improvement.

Questions such as this could be debated interminably by experts without resulting in agreement. I find his evidence of importance, however, as throwing a different light on the question, but one which must not blind one to the other views that have been expressed by competent people. The general impression left with me is that the properties, Blocks 8 and 9 in particular, while needing considerable work in refencing, control of weeds, reticulation of water and so on, as farming land capable of producing would not have been in as bad a state as some have indicated; that the Harts approached

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the farming operation with an entirely different philosophy of farming, with the accent strongly on cash-cropping; that that was not a wrong concept of the manner in which the land should be farmed, but it was not the only correct way; that much of the work done and the money expended was for the production of crops, from which they received a benefit, with some advantage to the land, but no substantial improvement which will carry through into the future.

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10 After these general observations, I return to the allowance which should be made for land improvement and the difficult approaches to the problem; by Mr Fitzgerald, putting a per hectare amount on appearance, and by Mr Armstrong, assessing what a particular purchaser would have in mind as to the expense which he would have to meet to put the land in its present condition. As already indicated, the highest figure which Mr Fitzgerald's formula would produce, taking the greater amount and in respect of all the land, is \$43,000, while Mr Armstrong produces a figure of \$68,000. I am impressed by and respect the opinions of both valuers, but I incline towards accepting a figure closer to that of Mr Armstrong than that of Mr Fitzgerald. Mr Armstrong has had a much longer association with the property and is the only one of the experts to see it in 1977. In his report then he said of Block 8, that the property had not been well-farmed for a number of years and was in a run-down state. Of Block 9 he made similar comments and said both pastures and fencing would require substantial input to bring them up to the productive level of surrounding

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properties; on Willowbridge there was no adverse comment,  
he recorded that the soils were all, except for  
approximately 2 acres, suited to an intensive farming  
system all being highly fertile. Perhaps some allowance  
should be made for the fact that a good deal, if not all,  
the work which he lists would appear to be income rather  
than capital expenditure, though possibly it would be a  
few years before a purchaser would see this reflected  
in his tax demands. Overall, I would accept Mr Armstrong's  
10 figures discounted to a small extent to recognise  
this factor and the views of others. I fix this item at  
\$60,000. Consequently the total for improvements must  
be this sum, plus the sum of \$25,000 for fencing and water  
reticulation, to which I would add, as did Mr Armstrong,  
a further \$5,000 for minor items of improvements and  
contingencies, \$90,000 in all. I turn now to other  
aspects of the compensation sought.

Lotus crop:

20 The particulars of the quantum of the claim included  
an item for disturbance or, in other words, the loss of  
the value of a crop of Lotus. This was assessed as  
follows by Mr Armstrong:

Establishment cost	\$10,100
Loss of income for 12 months	22,000
	<u>\$32,100</u>

Mr Armstrong had considered that, as a specialist crop,  
this could not readily be reflected in the value  
placed upon the property on which it is growing. However,  
fluctuations in the market, even between the time when  
30 he prepared his report and the date of the hearing,





affected the validity of the figures upon which he made his assessment of an appropriate amount to claim. It was generally accepted that, by reason of the substantial drop in market value of the seed and the uncertain nature of the market, if Mr Donald Hart had the opportunity of harvesting and disposing of the current crop of seed, nothing further was warranted. That will be possible if, as agreed, possession of the property is not given until 31st March 1984 and consequently nothing need be allowed under this heading.

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Loss of Financial Assistance:

Not as separate items, but in support of the general proposition that the Harts should be entitled to the benefit of the increase in value arising from inflation, it was urged that:

- (a) Mr Roger Hart had lost the opportunity of taking up a loan offer by the Rural Bank of \$55,080 as a net interest rate of 7 1/2%.
- (b) Because of the difficulties in respect of obtaining title to the property, the Harts were unable to take advantage of the Land Development Encouragement Loan Scheme which ran from a date in 1978 until 31st March 1981.
- (c) Neither could they take advantage of the Livestock Incentive Scheme which also operated during the period under consideration.

There was much evidence one way and another, particularly in relation to the Harts' eligibility to obtain assistance from the two latter schemes and as to the monetary advantage that would have accrued to them had Mr Roger

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Hart obtained his loan and moneys had been advanced under the schemes. As to that aspect I would only comment that, so far as the Rural Bank loan is concerned, I doubt if it has been satisfactorily proved that a similar loan may not be granted in the future should it be sought in respect of another property or that, if granted, the cost to the borrower would, of necessity, be materially greater; nor am I satisfied, in the light of the conflicting views expressed as to eligibility, that the Harts or any of them could in fact have secured loans under the Land Development or the Livestock Incentive Schemes. Apart from that, however, I am unable to see that any separate claim for compensation is tenable. No doubt it was a proper argument to use in support of the claim to inflation but, standing alone, one can only say at best the claims would be akin to a claim for damages arising from a breach of contract. That is not the situation here, the objective being to restore the status quo. I am unable to see that any separate amount can properly be awarded as compensation.

Opportunities Lost:

While no particular point was made of it by counsel at this hearing, there was some evidence of opportunities to buy other land which had not been taken and, in view of the stress that was laid upon this at an earlier stage, some mention should be made of it. Donald Hart said he had considered three properties, possibly more, but three came to mind. While he said that he had enough on his plate with the development of the O'Connor land and that, with his commitments, he

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did not have the money that the vendor of one property required, he certainly considered the possibility and did enter into negotiations, to a point in one case where he must have been close to buying. Indeed, he agreed that he was "pipped at the post". While the belief which he maintains he held, that he would be able to retain the O'Connor property, no doubt influenced him to a degree, I do not get the impression that there was any property which he undoubtedly would have purchased had the agreement with the late Jack O'Connor been the subject of challenge within a short time of its execution. As to Roger Hart, he merely said that he would not have liked to have purchased other farmland in the area, I presume he meant in preference to Block 9. He did think, however, that, had he wished to, it would have been financially possible to do so. Overall, I do not think the factor of lost opportunities was as great as earlier it might have appeared.

Other Items:

20 The following items are claimed by the Harts concerning which I do not understand there to be any dispute.

Overpayment of rates	\$1,845-34
Repayment of insurance on buildings	472-20
Repayment of County capital water work charges	335-88
Repayment of Lands & Survey rent	1,820-00
Repayment of interest paid	39,950-00
	<u>\$44,423-42</u>

30 As against that, the O'Connors are entitled to certain

credits:

For rent:

As calculated in the statement of claim i.e. from 1 September 1977 to 1 June 1983	\$64,458-50
From 1 June 1983 to 31 March 1984, the further sum of	11,450-00
For reinstatement of boundary fence	313-00
	<u>\$76,221-50</u>

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Supplementary  
Judgment of  
Cook J.

16th December  
1983 (Cont'd)

10 Compensation payable:

The net amount is therefore as follows:

Compensation for improvement to land	\$90,000-00
For other items	44,423-42
	<u>134,423-42</u>
Less credit	76,221-50
	<u>\$58,201-92</u>

As stated at the outset, the Court of Appeal made a declaration that the agreement for sale and purchase of 1st September 1977 is rescinded and remitted the case to this Court for determination of the amount of compensation to be paid to the plaintiffs. As to the giving of possession, it is agreed that the appropriate date is the 31st March 1984, in the meantime the land to be farmed by the defendant in a proper and husbandlike manner. Accordingly, an order is now made that possession of the land is to be given up by the defendant to the plaintiffs on the 31st March 1984 upon payment by the plaintiffs of the sum of \$58,201-92 by way of compensation.

30 As to costs, the primary question was that relating

to inflation and, as the O'Connors have been successful on that aspect, they should have some costs in respect of this second hearing which I fix at \$1,500. I record that included in the order there may have to be an award of costs to the plaintiffs in respect of the first hearing. That point is reserved.

"J.P. Cook J"

Solicitors:

Messrs. Gresson, Richards, Mackenzie & Wallace, Timaru

10 for plaintiffs

Messrs. De Goldi & Cadenhead, Christchurch, for defendant.

In the High  
Court of  
New Zealand  
Timaru  
Registry

Reasons for  
Supplementary  
Judgment of  
Cook J.

16th December 1983

(Cont'd)

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

No. A.29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN JOSEPH O'CONNOR, PAUL MICHAEL  
O'CONNOR and FRANCIS JOSEPH  
O'CONNOR

Plaintiffs

Formal  
Judgment  
(Compensation)

A N D THOMAS BRUCE HART

Defendant

16th December  
1983

JUDGMENT

10 This action coming on for trial on the 3rd, 4th, 5th,  
and 6th days of October 1983 before His Honour Mr  
Justice Cook, after hearing Mr A.P.C. Tipping and  
Mr J.L.D. Wallace, Counsel for the Plaintiffs and  
Mr D.L. Mathieson, Counsel for the Defendant, and the  
evidence then adduced, IT IS ADJUDGED that the Plaintiffs  
recover possession of the land described in the Statement  
of Claim subject to the land being given up by the  
Defendant to the Plaintiffs on the 31st day of March,  
1984 upon payment by the Plaintiffs to the Defendant  
20 of the sum of \$58,201-92 for compensation for farm  
improvements and that the Defendant pay to the Plaintiffs  
by way of costs the sum of \$1,500-00.

DATED at Timaru this 16th day of December 1983

L.S.

"H.B. Perry"

Registrar

BETWEEN THOMAS BRUCE HARTAppellantA N D JOSEPH O'CONNOR, PAUL MICHAEL  
O'CONNOR, FRANCIS JOSEPH  
O'CONNORRespondentsJudgment of  
the Court  
of Appeal  
Delivered by  
McMullin J.

20 July 1984

Coram Woodhouse P  
Richardson J  
McMullin J

Hearing 14 June 1984

Counsel D.L. Mathieson for appellant  
A.P.C. Tipping and J.L. Wallace for respondents

Judgment 20 July 1984

---

JUDGMENT OF THE COURT DELIVERED BY McMULLIN. J

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The earlier judgment of this Court (Richardson J,  
McMullin J and Jeffries J) delivered on 5 May 1983 ([1983]  
NZLR 280) upheld the conclusion of the trial Judge that Jack  
O'Connor, the trustee of the O'Connor estate, did not have  
contractual capacity when he entered into the agreement for  
the sale of the farm to the purchaser, Mr Hart, and that the  
bargain which it represented was unfair by reason of such  
factors as the method of fixing the price, the actual value  
fixed, the relative bargaining positions of the parties, the  
lack of truly independent and competent advice for Jack

O'Connor and the delayed payment of the entire purchase price for two years in a time of high inflation. Since the vendor's absence of capacity to contract was not known to the purchaser the question was whether the marked unfairness of the bargain warranted setting the agreement aside on the principle enunciated in Archer v. Cutler [1980] 1 NZLR 386.

In the High  
Court of  
New Zealand  
Timaru  
Registry

Judgment of  
the Court  
of Appeal  
Delivered by  
McMullin J.

20 July 1984  
(Cont'd)

In that case it was held that there were no considerations of policy or principle precluding the Court from holding that a contract entered into by a person of  
10 unsound mind is voidable at his option if it is proved either that the other party knew of his unsoundness of mind or, whether or not he had that knowledge, the bargain was unfair. On the basis that this principle should be adopted for New Zealand this Court expressly approved Archer v. Cutler. In the result it made a declaration that the agreement for sale and purchase was rescinded.

At that point it became necessary to refer the case back to the High Court for the determination of the amount of compensation to be paid to the purchaser. In October 1983  
20 Cook J heard evidence directed to that one issue and in a supplementary judgment delivered on 16 December 1983 he fixed the compensation payable to Mr Hart at \$58,201-92 to be paid on 31 March 1984, which was also fixed as the date when Mr Hart was to give up possession of the farm. At the hearing it was agreed by the valuers that there would be no increase in value between the date of hearing and 31 March 1984.





It is necessary to refer, but only briefly, to events which took place between 1 September 1977, when the agreement for sale and purchase was executed, and 31 March 1984 when Mr Hart returned possession of the land to the O'Connor estate. After the agreement was signed Mr Hart or members of his family took possession of the farm almost at once. One of his sons, Donald, took over the Willowbridge property and Block 8 of the Greenhill property. From that time on Donald and his father farmed those areas in partnership. Another son, Roger, took over Block 9 of the Greenhill property and farmed it in conjunction with adjoining land he already owned.

Judgment of  
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Delivered by  
McMullin J.

20 July 1984  
(Cont'd)

The elderly O'Connor brothers had used the farm for pastoral farming while the estate farmed it, but with their increasing age it was allowed to run down to some extent. The Harts adopted a different style of farming. A certain amount of conversion work was necessary to accommodate the farm to this. After taking over the property they sprayed to eradicate weeds, drained and levelled paddocks, put in a new fenceline and improved the fertility of the soil. They claimed they farmed the land as if they had certainty of ownership; not as mere lessees who were looking for immediate gains.

Cook J found the value of the three blocks (excluding the dwelling and associated buildings which were disregarded in the calculations as they remained in the occupation of

the O'Connor family) to be \$170,000 as at 1 September 1977 and \$435,000 as at the date of their return to the O'Connor estate. He found that the greater part of this increase in value from \$170,000 to \$435,000 had occurred, not as a result of the actions of either Mr Hart or the O'Connors, but because of inflationary increases over these years.

In the High  
Court of  
New Zealand  
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Registry

Judgment of  
the Court  
of Appeal  
Delivered by  
McMullin J.

20 July 1984  
(Cont'd)

Mr Hart claimed to be entitled to the whole of the increase of \$265,000 between the values on the two dates. The O'Connors maintained that he was entitled only to the betterment to the property he had brought about through the improvements that he and his family had made to it. So the principal question which Cook J had to decide was whether it was Mr Hart or the O'Connor estate which was entitled to the benefit of the increase in nominal dollar terms brought about by inflation.

The Judge resolved this question in favour of the O'Connors. He fixed the allowance to be made to the Harts for improvements they had effected at \$60,000 plus \$25,000 for fencing and water reticulation, and \$5,000 for minor items of improvements and contingencies - a sum of \$90,000 in all. But from this he allowed various deductions making a final figure of \$58,201-92 to be paid to Mr Hart. He held that the parties would most nearly be restored to the position they were in immediately prior to the contract if the O'Connor estate kept the benefit of the inflationary increase in value because this inflationary increase had occurred for reasons completely unconnected with the

endeavours of the parties; that by a payment for betterment alone Mr Hart would receive all the recompense to which he and his sons were entitled.

It was accepted by both counsel that on the rescission of the agreement, the Court had to restore the status quo ante and put the parties back where they were before the contract was made, and that, had the land not increased so dramatically in value due to inflationary pressures between 1977 and 1983, there would be no difficulty in doing this.

Mr Mathieson contended that the circumstances of the present case were so novel as not to be covered by any direct authority and that in such circumstances the Court could do what was "practically just" only by giving Mr Hart the benefit of what he called the "inflationary increase" in the value of the farm; that to do otherwise would not achieve a practically just result. In support of this contention it was said that on the execution of the agreement on 1 September 1977 Mr Hart became the owner of the equity in the land, and remained so until the order of the Court setting it aside; that he was more than a lessee; that he and his sons conducted their affairs and farmed the land on the basis that they were long term owners, investing capital in anticipation of a long term rather than a short term return; that the delay between 1 September 1977 and May 1980 when the claim was made distinguished this claim from all others where the dispute had begun immediately or

In the High  
Court of  
New Zealand  
Timaru  
Registry

Judgment of  
the Court  
of Appeal  
Delivered by  
McMullin J.

20 July 1984  
(Cont'd)

shortly after the sale had been avoided; that Mr Hart was innocent of any wrong doing; and that he had lost the opportunity to purchase other farms in areas where, had purchases been made, the Hart family would today have an equity based on the same inflated values.

But considerations of that kind cannot produce a satisfactory legal answer. The O'Connor estate was never able to use the proceeds of the sale to buy other land because the purchase price was not due to be paid until two years after the agreement had been signed, and because of the dispute between the parties it was never in fact paid. Although to hold that Mr Hart is not entitled to the increase in constant dollar figures in the value of the land between 1977 and 1983 may in a sense work some hardship for Mr Hart who may think it unjust, it would be wrong in principle to deprive the O'Connor estate of part of the value of its land where what has happened is that the exchange value of the land in constant dollar terms has changed as a result of inflation. Money is both a store of value and a medium of exchange. In the first sense the land remains unchanged. It is only that the depreciation of the currency has affected its exchange value in constant dollar terms. Why should the estate pay to Mr Hart the inflationary increase which would have occurred whoever was the owner? In a sense inflation runs with the land; it is a concomitant of ownership of the inflated asset. And, looked at more broadly, the same principle must apply to inflation and deflation alike. If there had been an overall decrease in value in the intervening years,

In the High  
Court of  
New Zealand  
Timaru  
Registry

Judgment of  
the Court  
of Appeal  
Delivered by  
McMullin J.

20 July 1984  
(Cont'd)

due to factors beyond the control of the parties, the O'Connor estate would have had to accept the drop in value without recompense by Mr Hart. Just as the O'Connor estate would have to accept a fall in value, so it is entitled to the benefit of any upswing in value.

In the time that Mr Hart was in possession he paid no part of the purchase price; he was not required to pay any deposit under the contract; and settlement was not required to be effected before 1 July 1979. The lodging of the  
 10 caveat and the intervention of the proceedings effectively brought an end to the possibility of settlement. To confer on Mr Hart the benefit of an inflationary increase in land under a contract which has been rescinded by the Court for want of capacity and for which he has never paid would be to deprive the O'Connor estate of an incident of the one constant factor - the land.

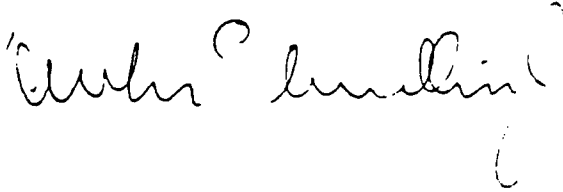
In his argument Mr Mathieson also sought to reinforce his argument by likening the rescission of the agreement to a compulsory sale back to the O'Connor estate. That,  
 20 however, is not analogous. By declaring that the agreement was rescinded for want of capacity the Court effectively annulled the contract, leaving the legal estate where it had always been and revesting the equitable estate in the owners of the legal estate.

In the High  
 Court of  
 New Zealand  
 Timaru  
 Registry

Judgment of  
 the Court  
 of Appeal  
 Delivered by  
 McMullin J.

20 July 1984  
 (Cont'd)

We think that Cook J was right in the decision he reached in his judgment of 16 December 1983. The appeal from it is accordingly dismissed. The respondents are entitled to costs in the sum of \$1,000 together with disbursements to be fixed by the Registrar including the reasonable travelling and accommodation costs of one counsel.



Solicitors:

Hogg, Gillespie, Carter & Oakley, Wellington, for appellant  
Gresson, Richards, Mackenzie & Wallace, Timaru, for respondent

In the High  
Court of  
New Zealand  
Timaru  
Registry

Judgment of  
the Court  
of Appeal  
Delivered by  
McMullin J.

20 July 1984  
(Cont'd)

IN THE COURT OF APPEAL OF NEW ZEALAND      No. C.A.17/84

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN      THOMAS BRUCE HART

Appellant

Judgment  
of Court  
of Appeal

A N D      JOSEPH O'CONNOR, PAUL  
MICHAEL O'CONNOR,  
FRANCIS JOSEPH O'CONNOR

20 July 198

Respondents

JUDGMENT OF COURT OF APPEAL  
Friday the 20th day of July 1984

10      BEFORE      THE RIGHT HONOURABLE MR JUSTICE WOODHOUSE, PRESIDENT  
THE RIGHT HONOURABLE MR JUSTICE RICHARDSON  
THE RIGHT HONOURABLE MR JUSTICE McMULLIN

THIS APPEAL coming on for hearing on the 14th day of June  
1984 AND UPON HEARING Mr D. L. Mathieson of Counsel for the  
Appellant and Mr A. P. C. Tipping and Mr J. L. Wallace of  
Counsel for the Respondents THIS COURT DOTH HEREBY ORDER  
that the appeal be and the same is hereby dismissed AND THIS  
COURT DOTH FURTHER ORDER that the Appellant shall pay the  
Respondents costs in the sum of \$1,000.00 together with  
20      disbursements to be fixed by the Registrar including the  
reasonable travelling and accommodation costs of one counsel.

BY THE COURT

"K. J. Keisenberg

EAL OF THE COURT OF APPEAL

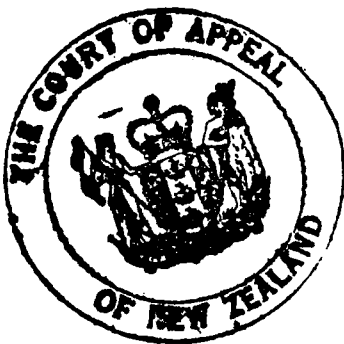
Registrar

IN THE COURT OF APPEAL OF NEW ZEALANDC.A. 156/82  
C.A. 17/84In the Court of  
Appeal Order grant  
ing final leave to  
Appeal to Her Maj.  
esty. In CouncilBETWEENJOSEPH O'CONNOR  
PAUL MICHAEL O'CONNOR  
FRANCIS JOSEPH O'CONNOR

16th October 1984

AppellantsANDTHOMAS BRUCE HARTRespondentTuesday the 16th day of October 1984BEFORE The Right Honourable Mr Justice McMullin, presiding  
The Honourable Mr Justice Somers  
The Honourable Mr Justice Eichelbaum

UPON READING the Notice of Motion of the Respondent dated the 11th day of October 1984 and the Affidavit of Elizabeth Mary Riddet of Wellington, Law Clerk, AND UPON HEARING Mr D. L. Mathieson of Counsel on behalf of the Respondent and Mr J. L. D. Wallace of Counsel on behalf of the Appellant not opposing THIS COURT HEREBY ORDERS that final leave to appeal to Her Majesty in Council from the Judgment of this Court delivered on 5 May 1983 and from the Judgment of the Court delivered on 20 July 1984 be and is hereby granted to the Respondent.



By the Court

K J Keisenberg  
REGISTRAR



IN THE COURT OF APPEAL OF NEW ZEALANDC.A.166/82  
C.A. 17/84In the High  
Court of  
New Zealand  
Timaru  
RegistryBond as  
Security  
for Appeal  
UndatedBETWEEN JOSEPH O'CONNOR  
PAUL MICHAEL O'CONNOR  
FRANCIS JOSEPH O'CONNORAppellantsAND THOMAS BRUCE HART  
Respondent

10 WHEREAS the Court of Appeal of New Zealand, by order dated  
20 July 1984, granted leave to the above Respondent to appeal  
to Her Majesty in Council from its judgments delivered on  
5 May 1983 and 20 July 1984 UPON TERMS that, within three  
months from that order, he should provide security, in the  
sum of \$2,000, for the due prosecution of the appeal, and the  
payment of all such costs as may become payable to the  
Appellants (being the Respondents in the Privy Council) in  
the event of his not obtaining an order granting him final  
leave to appeal, or of the appeal being dismissed for non-  
20 prosecution, or of Her Majesty in Council ordering him to  
pay the said Appellants' costs of the appeal, as the case may be.

THEREFORE, KNOW ALL MEN, by these presents, that I,  
THOMAS BRUCE HART of Waimate, Farmer and DONALD LAWSON HART  
of Waimate, Farmer, as surety, and our executors, administrators  
and assigns, are jointly and severally bound to the Registrar  
for the time being of the Court of Appeal of New Zealand in  
the sum of \$2,000.

In the High  
Court of  
New Zealand  
Timaru  
Registry

THIS BOND becomes void if the Respondent duly prosecutes his appeal to Her Majesty in Council, and pays all such costs as may become payable to the Respondent in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of Her Majesty in Council ordering him to pay the Appellants' costs of the appeals, as the case may be.

\_\_\_\_\_  
Bond as  
Security  
for Appeal

Undated  
(Cont'd)

IN WITNESS WHEREOF we have signed our names this  
day of \_\_\_\_\_ 1984.

10      SIGNED by THOMAS BRUCE                    )  
          HART in the presence of:                )

SIGNED by DONALD LAWSON                )  
          HART in the presence of:                )

IN THE COURT OF APPEAL OF NEW ZEALAND

In the High  
Court of  
New Zealand  
Timaru  
Registry

C.A. 166/82  
C.A. 17/84

Affidavit  
of Donald  
Lawson Hart

BETWEEN JOSEPH O'CONNOR  
PAUL MICHAEL O'CONNOR  
FRANCIS JOSEPH O'CONNOR

Undated  
(Cont'd)

Appellants

AND THOMAS BRUCE HART

Respondent

10 I, DONALD LAWSON HART of Waimate, Farmer, make oath  
and say as follows:

1. I AM the person who executed the annexed bond as  
surety for the principal debtor THOMAS BRUCE HART,  
on behalf of the above-named Respondent, in the  
sum of \$2,000, for the due prosecution of his  
appeal to Her Majesty in Council for the payment  
of costs according to the conditions set out in  
it.

20 AFTER PAYMENT of my just debts and liabilities  
I DECLARE that I am well and truly worth in real  
and personal estate several times the sum of \$2,000.

SWORN at Waimate )  
this day of )  
1984, )  
before me: )

IN THE HIGH COURT OF NEW ZEALAND  
TIMARU REGISTRY

No. A.29/80

In the High  
Court of  
New Zealand  
Timaru  
Registry

BETWEEN J. O'CONNOR, P.M. O'CONNOR  
and F.J. O'CONNOR

Plaintiffs

A N D J.J. O'CONNOR

First Defendant

A N D T.B. HART

Second Defendant

Notes of  
Evidence  
Taken Before  
the Hon.  
Mr Justice  
Cook

Dated  
(Cont'd)

10 Hearing: 2 February 1982

Counsel: T.M. Gresson and J.L.D. Wallace for  
plaintiffs (and first defendant)  
A.J.P. More for first defendant (withdraws)  
R.J. De Goldi and J. Cadenhead for  
second defendant.

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NOTES OF EVIDENCE TAKEN BEFORE  
THE HON MR JUSTICE COOK

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Produced by consent - High Court Order appointing new  
trustees dated 2nd March (EXHIBIT "1"); Probate of the  
20 Will of John O'Connor (EXHIBIT "2"); Probate of Will  
of Lavinia O'Connor (EXHIBIT "3"); Death Certificate of  
Lavinia O'Connor (EXHIBIT "4"); Probate of the daughter,  
Lavinia (EXHIBIT "5"); Probate of Dennis O'Connor  
(EXHIBIT "5"); Titles of the O'Connor and Hart property  
(EXHIBIT "6"); Copy of Agreement for Sale and Purchase  
(EXHIBIT "7"); Power of Attorney (EXHIBIT "8") Map of

Land & Survey Department (EXHIBIT "9"); copy of  
Mr Armstrong's valuation (EXHIBIT "10"); Volumes 11,  
12, 13 and 14 Messrs. Henderson's and MacGeorge's Files  
(EXHIBITS "11", "12", "13" and "14"); Government  
Valuations for the O'Connor land (EXHIBIT "15") (6  
sheets).

ADJOURNED 11.25 a.m.

In the High  
Court of  
New Zealand  
Timaru  
Registry

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Notes of  
Evidence  
Taken Before  
the Hon.  
Mr Justice  
Cook

(Cont'd)

O N        A P P E A L  
FROM THE COURT OF APPEAL OF NEW ZEALAND

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B E T W E E N:

THOMAS BRUCE HART

Appellant

- and -

JOSEPH O'CONNOR, PAUL MICHAL O'CONNOR  
and FRANCIS JOSEPH O'CONNOR

Respondents

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RECORD OF PROCEEDINGS

VOLUME I

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MOON, BEEVER & HEWLETT,  
24/25 Bloomsbury Square,  
London WC1A 2PL.

Solicitors for the  
Appellant

ALLEN & OVERY,  
9 Cheapside,  
London EC2V 6AD.

Solicitors for the  
Respondents