Judgments - Royal Bank of Scotland v. Etridge (AP)

HOUSE OF LORDS

Lord Bingham of Cornhill Lord Nicholls of Birkenhead Lord Clyde Lord Hobhouse of Wood-borough Lord Scott of Foscote

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

BARCLAYS BANK PLC (RESPONDENTS) v. HARRIS (FC) (EXECUTOR OF BERYL IRIS HARRIS (DECEASED) (APPELLANT)

MIDLAND BANK PLC (RESPONDENTS) v. WALLACE AND ANOTHER (AP) (APPELLANT)

ROYAL BANK OF SCOTLAND (RESPONDENTS) v. ETRIDGE (APPELLANT)

NATIONAL WESTMINSTER BANK PLC (RESPONDENTS) v. GILL AND ANOTHER (AP) (APPELLANT)

UCB HOME LOANS CORPORATION LIMITED (RESPONDENTS) v. MOORE AND ANOTHER (AP) (APPELLANT)

(CONJOINED APPEALS)

GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND (RESPONDENTS) v. BENNETT AND ANOTHER (AP) (APPELLANT)

KENYON BROWN (RESPONDENT) v. DESMOND BANKS & CO (APPELLANTS)

BARCLAYS BANK PLC (RESPONDENTS) v. COLEMAN AND ANOTHER (FC) (APPELLANT)

ON 11 OCTOBER 2001

[2001] UKHL 44

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the great advantage of reading in draft the opinions prepared by each of my noble and learned friends.

2. The transactions which give rise to these appeals are commonplace but of great social and economic importance. It is important that a wife (or anyone in a like position) should not charge her interest in the matrimonial home to secure the borrowing of her husband (or anyone in a like position) without fully understanding the nature and effect of the proposed transaction and that the decision is hers, to agree or not to agree. It is important that lenders should feel able to advance money, in run-of-the-mill cases with no abnormal features, on the security of the wife's interest in the matrimonial home in reasonable confidence that, if appropriate procedures have been followed in obtaining the security, it will be enforceable if the need for enforcement arises. The law must afford both parties a measure of protection. It cannot prescribe a code which will be proof against error, misunderstanding or mishap. But it can indicate minimum requirements which, if met, will reduce the risk of error, misunderstanding or mishap to an acceptable level. The paramount need in this important field is that these minimum requirements should be clear, simple and practically operable.

3. My Lords, in my respectful opinion these minimum requirements are clearly identified in the opinions of my noble and learned friends Lord Nicholls of Birkenhead and Lord Scott of Foscote. If these requirements are met the risk that a wife has been misled by her husband as to the facts of a proposed transaction should be eliminated or virtually so. The risk that a wife has been overborne or coerced by her husband will not be eliminated but will be reduced to a level which makes it proper for the lender to proceed. While the opinions of Lord Nicholls and Lord Scott show some difference of expression and approach, I do not myself discern any significant difference of legal principle applicable to these cases, and I agree with both opinions. But if I am wrong and such differences exist, it is plain that the opinion of Lord Nicholls commands the unqualified support of all members of the House.

4. In agreement with all members of the House, I would allow the appeals of Mrs Wallace, Mrs Bennett and Desmond Banks & Co and dismiss those of Mrs Etridge and Mrs Gill, in each case for the reasons given by Lord Scott. I would allow the appeal of Mrs Harris, bearing in mind that this is an interlocutory case, for the reasons given by Lord Hobhouse of Woodborough. I would allow the appeal of Mrs Moore and dismiss that of Mrs Coleman, in each case for the reasons given by Lord Scott.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

5. Before your Lordships' House are appeals in eight cases. Each case arises out of a transaction in which a wife charged her interest in her home in favour of a bank as security for her husband's indebtedness or the indebtedness of a company through which he carried on business. The wife later asserted she signed the charge under the undue influence of her husband. In *Barclays Bank Plc v O'Brien* [1994] 1 AC 180

your Lordships enunciated the principles applicable in this type of case. Since then, many cases have come before the courts, testing the implications of the *O'Brien* decision in a variety of different factual situations. Seven of the present appeals are of this character. In each case the bank sought to enforce the charge signed by the wife. The bank claimed an order for possession of the matrimonial home. The wife raised a defence that the bank was on notice that her concurrence in the transaction had been procured by her husband's undue influence. The eighth appeal concerns a claim by a wife for damages from a solicitor who advised her before she entered into a guarantee obligation of this character.

Undue influence

6. The issues raised by these appeals make it necessary to go back to first principles. Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress. Originally this was narrow in its scope, restricted to the more blatant forms of physical coercion, such as personal violence.

7. Here, as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced', in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (*Huguenin v Baseley* 14 Ves 273, 300). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.

8. Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage. An example from the 19th century, when much of this law developed, is a case where an impoverished father prevailed upon his inexperienced children to charge their reversionary interests under their parents' marriage settlement with payment of his mortgage debts: see *Bainbrigge v Browne* (1881) 18 Ch D 188.

9. In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this

trust by preferring his own interests. He abuses the influence he has acquired. In *Allcard v Skinner* (1887) 36 Ch D 145, a case well known to every law student, Lindley LJ, at p 181, described this class of cases as those in which it was the duty of one party to advise the other or to manage his property for him. In *Zamet v Hyman* [1961] 1 WLR 1442, 1444-1445 Lord Evershed MR referred to relationships where one party owed the other an obligation of candour and protection.

10. The law has long recognised the need to prevent abuse of influence in these 'relationship' cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type: see *Treitel, The Law of Contract*, 10th ed (1999), pp 380-381. For example, the relation of banker and customer will not normally meet this criterion, but exceptionally it may: see *National Westminster Bank Plc v Morgan* [1985] AC 686, 707-709.

11. Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.

12. In *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200 your Lordships' House decided that in cases of undue influence disadvantage is not a necessary ingredient of the cause of action. It is not essential that the transaction should be disadvantageous to the pressurised or influenced person, either in financial terms or in any other way. However, in the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous. The issue is likely to arise only when, in some respect, the transaction was disadvantageous either from the outset or as matters turned out.

Burden of proof and presumptions

13. Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.

14. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a

satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.

15. The case of *Bainbrigge v Browne*, 18 Ch D 188, already mentioned, provides a good illustration of this commonplace type of forensic exercise. Fry J held, at p 196, that there was no direct evidence upon which he could rely as proving undue pressure by the father. But there existed circumstances 'from which the court will infer pressure and undue influence.' None of the children were entirely emancipated from their father's control. None seemed conversant with business. These circumstances were such as to cast the burden of proof upon the father. He had made no attempt to discharge that burden. He did not appear in court at all. So the children's claim succeeded. Again, more recently, in *National Westminster Bank Plc v Morgan* [1985] AC 686, 707, Lord Scarman noted that a relationship of banker and customer may become one in which a banker acquires a dominating influence. If he does, and a manifestly disadvantageous transaction is proved, 'there would then be room' for a court to presume that it resulted from the exercise of undue influence.

16. Generations of equity lawyers have conventionally described this situation as one in which a presumption of undue influence arises. This use of the term 'presumption' is descriptive of a shift in the evidential onus on a question of fact. When a plaintiff succeeds by this route he does so because he has succeeded in establishing a case of undue influence. The court has drawn appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff. The use, in the course of the trial, of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position. These cases are the equitable counterpart of common law cases where the principle of res ipsa loquitur is invoked. There is a rebuttable evidential presumption of undue influence.

17. The availability of this forensic tool in cases founded on abuse of influence arising from the parties' relationship has led to this type of case sometimes being labelled 'presumed undue influence'. This is by way of contrast with cases involving actual pressure or the like, which are labelled 'actual undue influence': see *Bank of Credit and Commerce International SA v Aboody* [1990] I QB 923, 953, and *Royal Bank of Scotland Plc v Etridge (No 2)* [1998] 4 All ER 705, 711-712, paras 5-7. This usage can be a little confusing. In many cases where a plaintiff has claimed that the defendant abused the influence he acquired in a relationship of trust and confidence the plaintiff has succeeded by recourse to the rebuttable evidential presumption. But this need not be so. Such a plaintiff may succeed even where this presumption is not available to him; for instance, where the impugned transaction was not one which called for an explanation.

18. The evidential presumption discussed above is to be distinguished sharply from a different form of presumption which arises in some cases. The law has adopted a sternly protective attitude towards certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where, moreover, substantial gifts by the influenced or vulnerable person are not normally to

be expected. Examples of relationships within this special class are parent and child, guardian and ward, trustee and beneficiary, solicitor and client, and medical adviser and patient. In these cases the law presumes, irrebuttably, that one party had influence over the other. The complainant need not prove he actually reposed trust and confidence in the other party. It is sufficient for him to prove the existence of the type of relationship.

19. It is now well established that husband and wife is not one of the relationships to which this latter principle applies. In *Yerkey v Jones* (1939) 63 CLR 649, 675 Dixon J explained the reason. The Court of Chancery was not blind to the opportunities of obtaining and unfairly using influence over a wife which a husband often possesses. But there is nothing unusual or strange in a wife, from motives of affection or for other reasons, conferring substantial financial benefits on her husband. Although there is no presumption, the court will nevertheless note, as a matter of fact, the opportunities for abuse which flow from a wife's confidence in her husband. The court will take this into account with all the other evidence in the case. Where there is evidence that a husband has taken unfair advantage of his influence over his wife, or her confidence in him, 'it is not difficult for the wife to establish her title to relief': see *In re Lloyds Bank Ltd, Bomze v Bomze* [1931] 1 Ch 289, at p 302, per Maugham J.

Independent advice

20. Proof that the complainant received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all the circumstances. In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is about to do. But a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case.

Manifest disadvantage

21. As already noted, there are two prerequisites to the evidential shift in the burden of proof from the complainant to the other party. First, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant. Second, that the transaction is not readily explicable by the relationship of the parties.

22. Lindley LJ summarised this second prerequisite in the leading authority of *Allcard v Skinner,* 36 Ch D 145, where the donor parted with almost all her property. Lindley LJ pointed out that where a gift of a small amount is made to a person standing in a confidential relationship to the donor, some proof of the exercise of the influence of the donee must be given. The mere existence of the influence is not enough. He continued, at p 185:

> 'But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift.'

In *Bank of Montreal v Stuart* [1911] AC 120, 137 Lord Macnaghten used the phrase 'immoderate and irrational' to describe this concept.

23. The need for this second prerequisite has recently been questioned: see Nourse LJ in *Barclays Bank Plc v Coleman* [2001] QB, 20, 30-32, one of the cases under appeal before your Lordships' House. Mr Sher QC invited your Lordships to depart from the decision of the House on this point in *National Westminster Bank Plc v Morgan* [1985] AC 686.

24. My Lords, this is not an invitation I would accept. The second prerequisite, as expressed by Lindley LJ, is good sense. It is a necessary limitation upon the width of the first prerequisite. It would be absurd for the law to presume that every gift by a child to a parent, or every transaction between a client and his solicitor or between a patient and his doctor, was brought about by undue influence unless the contrary is affirmatively proved. Such a presumption would be too far-reaching. The law would out of touch with everyday life if the presumption were to apply to every Christmas or birthday gift by a child to a parent, or to an agreement whereby a client or patient agrees to be responsible for the reasonable fees of his legal or medical adviser. The law would be rightly open to ridicule, for transactions such as these are unexceptionable. They do not suggest that something may be amiss. So something more is needed before the law reverses the burden of proof, something which calls for an explanation. When that something more is present, the greater the disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be regarded as rebutted.

25. This was the approach adopted by Lord Scarman in *National Westminster Bank Plc v Morgan* [1985] AC 686, 703-707. He cited Lindley LJ's observations in *Allcard v Skinner*, 36 Ch D 145, 185, which I have set out above. He noted that whatever the legal character of the transaction, it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the parties' relationship, it was procured by the exercise of undue influence. Lord Scarman concluded, at p 704:

> 'The Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted *an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it.*' (Emphasis added)

26. Lord Scarman attached the label 'manifest disadvantage' to this second ingredient necessary to raise the presumption. This label has been causing difficulty. It may be apt enough when applied to straightforward transactions such as a substantial gift or a sale at an undervalue. But experience has now shown that this expression can give rise to misunderstanding. The label is being understood and applied in a way which does not accord with the meaning intended by Lord Scarman, its originator.

27. The problem has arisen in the context of wives guaranteeing payment of their husband's business debts. In recent years judge after judge has grappled with the baffling question whether a wife's guarantee of her husband's bank overdraft, together with a charge on her share of the matrimonial home, was a transaction manifestly to her disadvantage.

28. In a narrow sense, such a transaction plainly ('manifestly') is disadvantageous to the wife. She undertakes a serious financial obligation, and in return she personally receives nothing. But that would be to take an unrealistically blinkered view of such a transaction. Unlike the relationship of solicitor and client or medical adviser and patient, in the case of husband and wife there are inherent reasons why such a transaction may well be for her benefit. Ordinarily, the fortunes of husband and wife are bound up together. If the husband's business is the source of the family income, the wife has a lively interest in doing what she can to support the business. A wife's affection and self-interest run hand-in-hand in inclining her to join with her husband in charging the matrimonial home, usually a jointly-owned asset, to obtain the financial facilities needed by the business. The finance may be needed to start a new business, or expand a promising business, or rescue an ailing business.

29. Which, then, is the correct approach to adopt in deciding whether a transaction is disadvantageous to the wife: the narrow approach, or the wider approach? The answer is neither. The answer lies in discarding a label which gives rise to this sort of ambiguity. The better approach is to adhere more directly to the test outlined by Lindley LJ in *Allcard v Skinner*, 36 Ch D 145, and adopted by Lord Scarman in *National Westminster Bank Plc v Morgan* [1985] AC 686, in the passages I have cited.

30. I return to husband and wife cases. I do not think that, *in the ordinary course*, a guarantee of the character I have mentioned is to be regarded as a transaction which, failing proof to the contrary, is explicable only on the basis that it has been procured by the exercise of undue influence by the husband. Wives frequently enter into such transactions. There are good and sufficient reasons why they are willing to do so, despite the risks involved for them and their families. They may be enthusiastic. They may not. They may be less optimistic than their husbands about the prospects of the husbands' businesses. They may be anxious, perhaps exceedingly so. But this is a far cry from saying that such transactions as a class are to be regarded as prima facie evidence of the exercise of undue influence by husbands.

31. I have emphasised the phrase 'in the ordinary course'. There will be cases where a wife's signature of a guarantee or a charge of her share in the matrimonial home does call for explanation. Nothing I have said above is directed at such a case.

A cautionary note

32. I add a cautionary note, prompted by some of the first instance judgments in the cases currently being considered by the House. It concerns the general approach to be adopted by a court when considering whether a wife's guarantee of her husband's bank overdraft was procured by her husband's undue influence. Undue influence has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused. Statements or conduct by a husband which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances should not, without more, be castigated as undue influence. Similarly,

when a husband is forecasting the future of his business, and expressing his hopes or fears, a degree of hyperbole may be only natural. Courts should not too readily treat such exaggerations as misstatements.

33. Inaccurate explanations of a proposed transaction are a different matter. So are cases where a husband, in whom a wife has reposed trust and confidence for the management of their financial affairs, prefers his interests to hers and makes a choice for both of them on that footing. Such a husband abuses the influence he has. He fails to discharge the obligation of candour and fairness he owes a wife who is looking to him to make the major financial decisions.

The complainant and third parties: suretyship transactions

34. The problem considered in *O'Brien's* case and raised by the present appeals is of comparatively recent origin. It arises out of the substantial growth in home ownership over the last 30 or 40 years and, as part of that development, the great increase in the number of homes owned jointly by husbands and wives. More than two-thirds of householders in the United Kingdom now own their own homes. For most home-owning couples, their homes are their most valuable asset. They must surely be free, if they so wish, to use this asset as a means of raising money, whether for the purpose of the husband's business or for any other purpose. Their home is their property. The law should not restrict them in the use they may make of it. Bank finance is in fact by far the most important source of external capital for small businesses with fewer than ten employees. These businesses comprise about 95 percent of all businesses in the country, responsible for nearly one-third of all employment. Finance raised by second mortgages on the principal's home is a significant source of capital for the start-up of small businesses.

35. If the freedom of home-owners to make economic use of their homes is not to be frustrated, a bank must be able to have confidence that a wife's signature of the necessary guarantee and charge will be as binding upon her as is the signature of anyone else on documents which he or she may sign. Otherwise banks will not be willing to lend money on the security of a jointly owned house or flat.

36. At the same time, the high degree of trust and confidence and emotional interdependence which normally characterises a marriage relationship provides scope for abuse. One party may take advantage of the other's vulnerability. Unhappily, such abuse does occur. Further, it is all too easy for a husband, anxious or even desperate for bank finance, to misstate the position in some particular or to mislead the wife, wittingly or unwittingly, in some other way. The law would be seriously defective if it did not recognise these realities.

37. In *O'Brien's* case this House decided where the balance should be held between these competing interests. On the one side, there is the need to protect a wife against a husband's undue influence. On the other side, there is the need for the bank to be able to have reasonable confidence in the strength of its security. Otherwise it would not provide the required money. The problem lies in finding the course best designed to protect wives in a minority of cases without unreasonably hampering the giving and taking of security. The House produced a practical solution. The House decided what are the steps a bank should take to ensure it is not affected by any claim the wife may have that her signature of the documents was procured by the undue influence or other wrong of her husband. Like every compromise, the outcome falls short of achieving in full the objectives of either of the two competing interests. In particular,

the steps required of banks will not guarantee that, in future, wives will not be subjected to undue influence or misled when standing as sureties. Short of prohibiting this type of suretyship transaction altogether, there is no way of achieving that result, desirable although it is. What passes between a husband and wife in this regard in the privacy of their own home is not capable of regulation or investigation as a prelude to the wife entering into a suretyship transaction.

38. The jurisprudential route by which the House reached its conclusion in *O'Brien's* case has attracted criticism from some commentators. It has been said to involve artificiality and thereby create uncertainty in the law. I must first consider this criticism. In the ordinary course a bank which takes a guarantee security from the wife of its customer will be altogether ignorant of any undue influence the customer may have exercised in order to secure the wife's concurrence. In *O'Brien* Lord Browne-Wilkinson prayed in aid the doctrine of constructive notice. In circumstances he identified, a creditor is put on inquiry. When that is so, the creditor 'will have constructive notice of the wife's rights' unless the creditor takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained: see [1994] 1 AC 180, 196.

39. Lord Browne-Wilkinson would be the first to recognise this is not a conventional use of the equitable concept of constructive notice. The traditional use of this concept concerns the circumstances in which a transferee of property who acquires a legal estate from a transferor with a defective title may nonetheless obtain a good title, that is, a better title than the transferor had. That is not the present case. The bank acquires its charge from the wife, and there is nothing wrong with her title to her share of the matrimonial home. The transferor wife is seeking to resile from the very transaction she entered into with the bank, on the ground that her apparent consent was procured by the undue influence or other misconduct, such as misrepresentation, of a third party (her husband). She is seeking to set aside her contract of guarantee and, with it, the charge she gave to the bank.

40. The traditional view of equity in this tripartite situation seems to be that a person in the position of the wife will only be relieved of her bargain if the other party to the transaction (the bank, in the present instance) was privy to the conduct which led to the wife's entry into the transaction. Knowledge is required: see *Cobbett v Brock* (1855) 20 Beav 524, 528, 531, per Sir John Romilly MR, *Kempson v Ashbee* (1874) LR 10 Ch App 15, 21, per James LJ, and *Bainbrigge v Browne*, 18 Ch D 188, 197, per Fry J. The law imposes no obligation on one party to a transaction to check whether the other party's concurrence was obtained by undue influence. But *O'Brien* has introduced into the law the concept that, in certain circumstances, a party to a contract may lose the benefit of his contract, entered into in good faith, if he *ought* to have known that the other's concurrence had been procured by the misconduct of a third party.

41. There is a further respect in which *O'Brien* departed from conventional concepts. Traditionally, a person is *deemed* to have notice (that is, he has 'constructive' notice) of a prior right when he does not actually know of it but would have learned of it had he made the requisite inquiries. A purchaser will be treated as having constructive notice of all that a reasonably prudent purchaser would have discovered. In the present type of case, the steps a bank is required to take, lest it have constructive notice that the wife's concurrence was procured improperly by her husband, do not consist of making inquiries. Rather, *O'Brien* envisages that the steps taken by the bank will reduce, or even eliminate, the risk of the wife entering into the transaction under any misapprehension or as a result of undue influence by her husband. The steps are not concerned to discover whether the wife has been wronged by her husband in this way. The steps are concerned to minimise the risk that such a wrong may be committed.

42. These novelties do not point to the conclusion that the decision of this House in *O'Brien* is leading the law astray. Lord Browne-Wilkinson acknowledged he might be extending the law: see [1994] 1 AC 180, 197. Some development was sorely needed. The law had to find a way of giving wives a reasonable measure of protection, without adding unreasonably to the expense involved in entering into guarantee transactions of the type under consideration. The protection had to extend also to any misrepresentations made by a husband to his wife. In a situation where there is a substantial risk the husband may exercise his influence improperly regarding the provision of security for his business debts, there is an increased risk that explanations of the transaction given by him to his wife may be misleadingly incomplete or even inaccurate.

43. The route selected in *O'Brien* ought not to have an unsettling effect on established principles of contract. *O'Brien* concerned suretyship transactions. These are tripartite transactions. They involve the debtor as well as the creditor and the guarantor. The guarantor enters into the transaction at the request of the debtor. The guarantor assumes obligations. On the face of the transaction the guarantor usually receives no benefit in return, unless the guarantee is being given on a commercial basis. Leaving aside cases where the relationship between the surety and the debtor is commercial, a guarantee transaction is one-sided so far as the guarantor is concerned. The creditor knows this. Thus the decision in *O'Brien* is directed at a class of contracts which has special features of its own. That said, I must at a later stage in this speech return to the question of the wider implications of the *O'Brien* decision.

The threshold: when the bank is put on inquiry

44. In *O'Brien* the House considered the circumstances in which a bank, or other creditor, is 'put on inquiry.' Strictly this is a misnomer. As already noted, a bank is not required to make inquiries. But it will be convenient to use the terminology which has now become accepted in this context. The House set a low level for the threshold which must be crossed before a bank is put on inquiry. For practical reasons the level is set much lower than is required to satisfy a court that, failing contrary evidence, the court may infer that the transaction was procured by undue influence. Lord Browne-Wilkinson said ([1994] 1 AC 180, 196):

> 'Therefore in my judgment a creditor in put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.'

In my view, this passage, read in context, is to be taken to mean, quite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts.

45. The Court of Appeal, comprising Stuart-Smith, Millett and Morritt LJJ, interpreted this passage more restrictively. The threshold, the court said, is somewhat higher. Where condition (a) is satisfied, the bank is put on inquiry if, but only if, the bank is aware that the parties are cohabiting or that the particular surety places implicit trust and confidence in the principal debtor in relation to her financial affairs: see *Royal Bank of Scotland Plc v Etridge (No 2)* [1998] 4 All ER 705, 719.

46. I respectfully disagree. I do not read (a) and (b) as factual conditions which must be proved in each case before a bank is put on inquiry. I do not understand Lord Browne-Wilkinson to have been saying that, in husband and wife cases, whether the bank is put on inquiry depends on its state of knowledge of the parties' marriage, or of the degree of trust and confidence the

particular wife places in her husband in relation to her financial affairs. That would leave banks in a state of considerable uncertainty in a situation where it is important they should know clearly where they stand. The test should be simple and clear and easy to apply in a wide range of circumstances. I read (a) and (b) as Lord Browne-Wilkinson's broad explanation of the reason why a creditor is put on inquiry when a wife offers to stand surety for her husband's debts. These are the two factors which, taken together, constitute the underlying rationale.

47. The position is likewise if the husband stands surety for his wife's debts. Similarly, in the case of unmarried couples, whether heterosexual or homosexual, where the bank is aware of the relationship: see Lord Browne-Wilkinson in *O'Brien's* case, at p 198. Cohabitation is not essential. The Court of Appeal rightly so decided in *Massey v Midland Bank Plc* [1995] 1 All ER 929: see Steyn LJ, at p 933.

48. As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on inquiry. On the other side of the line is the case where money is being advanced, or has been advanced, to husband and wife jointly. In such a case the bank is not put on inquiry, unless the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes. That was decided in *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200 .

49. Less clear cut is the case where the wife becomes surety for the debts of a company whose shares are held by her and her husband. Her shareholding may be nominal, or she may have a minority shareholding or an equal shareholding with her husband. In my view the bank is put on inquiry in such cases, even when the wife is a director or secretary of the company. Such cases cannot be equated with joint loans. The shareholding interests, and the identity of the directors, are not a reliable guide to the identity of the persons who actually have the conduct of the company's business.

The steps a bank should take

50. The principal area of controversy on these appeals concerns the steps a bank should take when it has been put on inquiry. In *O'Brien* Lord Browne-Wilkinson, at [1994] 1 AC 180, 196-197, said that a bank can reasonably be expected to take steps to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice. That test is applicable to *past* transactions. All the cases now before your Lordships' House fall into this category. For the *future* a bank satisfies these requirements if it insists that the wife attend a private meeting with a representative of the bank at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice. In exceptional cases the bank, to be safe, has to insist that the wife is separately advised.

51. The practice of the banks involved in the present cases, and it seems reasonable to assume this is the practice of banks generally, is not to have a private meeting with the wife. Nor do the banks themselves take any other steps to bring home to the wife the risk she is running. This has continued to be the practice since the decision in *O'Brien's* case. Banks consider they would stand to lose more than they would gain by holding a private meeting with the wife. They are, apparently, unwilling to assume the responsibility of advising the wife at such a meeting. Instead, the banking practice remains, as before, that in general the bank requires a wife to seek legal advice. The bank seeks written confirmation from a solicitor that he has explained the nature and effect of the documents to the wife.

52. Many of the difficulties which have arisen in the present cases stem from serious deficiencies, or alleged deficiencies, in the quality of the legal advice given to the wives. I say 'alleged', because three of the appeals before your Lordships' House have not proceeded beyond the interlocutory stage. The banks successfully applied for summary judgment. In these cases the wife's allegations, made in affidavit form, have not been tested by cross-examination. On behalf of the wives it has been submitted that under the current practice the legal advice is often perfunctory in the extreme and, further, that everyone, including the banks, knows this. Independent legal advice is a fiction. The system is a charade. In practice it provides little or no protection for a wife who is under a misapprehension about the risks involved or who is being coerced into signing. She may not even know the present state of her husband's indebtedness.

53. My Lords, it is plainly neither desirable nor practicable that banks should be required to attempt to discover for themselves whether a wife's consent is being procured by the exercise of undue influence of her husband. This is not a step the banks should be expected to take. Nor, further, is it desirable or practicable that banks should be expected to insist on confirmation from a solicitor that the solicitor has satisfied himself that the wife's consent has not been procured by undue influence. As already noted, the circumstances in which banks are put on inquiry are extremely wide. They embrace every case where a wife is entering into a suretyship transaction in respect of her husband's debts. Many, if not most, wives would be understandably outraged by having to respond to the sort of questioning which would be appropriate before a responsible solicitor could give such a confirmation. In any event, solicitors are not equipped to carry out such an exercise in any really worthwhile way, and they will usually lack the necessary materials. Moreover, the legal costs involved, which would inevitably fall on the husband who is seeking financial assistance from the bank, would be substantial. To require such an intrusive, inconclusive and expensive exercise in every case would be an altogether disproportionate response to the need to protect those cases, presumably a small minority, where a wife is being wronged.

54. The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned.

55. This is the point at which, in the *O'Brien* case, the House decided that the balance between the competing interests should be held. A bank may itself provide the necessary information directly to the wife. Indeed, it is best equipped to do so. But banks are not following that course. Ought they to be obliged to do so in every case? I do not think Lord Browne-Wilkinson so stated in *O'Brien*. I do not understand him to have said that a personal meeting was the only way a bank could discharge its obligation to bring home to the wife the risks she is running. It seems to me that, provided a suitable alternative is available, banks ought not to be compelled to take this course. Their reasons for not wishing to hold a personal meeting are understandable. Commonly, when a bank seeks to enforce a security provided by a customer, it is met with a defence based on assurances alleged to have been given orally by a branch manager at an earlier stage: that the bank would continue to support the business, that the bank would not call in its loan, and so forth. Lengthy litigation ensues. Sometimes the allegations prove to be well founded, sometimes not. Banks are concerned to avoid the prospect of similar litigation which would arise in guarantee cases if they were to adopt a practice of holding a meeting with a wife at which the bank's representative would explain the proposed guarantee transaction. It is not unreasonable for the banks to prefer that this task should be undertaken by an independent legal adviser.

56. I shall return later to the steps a bank should take when it follows this course. Suffice to say, these steps, together with advice from a solicitor acting for the wife, ought to provide the substance of the protection which *O'Brien* intended a wife should have. Ordinarily it will be reasonable that a bank should be able to rely upon confirmation from a solicitor, acting for the wife, that he has advised the wife appropriately.

57. The position will be otherwise if the bank knows that the solicitor has not duly advised the wife or, I would add, if the bank knows facts from which it ought to have realised that the wife has not received the appropriate advice. In such circumstances the bank will proceed at its own risk.

The content of the legal advice

58. In *Royal Bank of Scotland Plc v Etridge (No 2)* [1998] 4 All ER 705, 715, para 19, the Court of Appeal set out its views of the duties of a solicitor in this context:

> 'A solicitor who is instructed to advise a person who may be subject to the undue influence of another must bear in mind that it is not sufficient that she understands the nature and effect of the transaction if she is so affected by the influence of the other that she cannot make an independent decision of her own. It is not sufficient to explain the documentation and ensure she understands the nature of the transaction and wishes to carry it out: see *Powell v Powell* [1900] 1 Ch 243, 247, approved in *Wright v Carter* [1903] 1 Ch 27. His duty is to satisfy himself that his client is free from improper influence, and the first step must be to ascertain whether it is one into which she could sensibly be advised to enter if free from such influence. If he is not so satisfied, it is his duty to advise her not to enter into it, and to refuse to act further for her in the implementation of the transaction if she persists. In this event, while the contents of his advice must remain confidential, he should inform the other parties (including the bank) that he has seen his client and given her certain advice, and that as a result he has declined to act for her any further. He must in any event advise her that she is under no obligation to enter into the transaction at all and, if she still wishes to do so, that she is not bound to accept the terms of any document which has been put before her: see *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144.'

59. I am unable to accept this as an accurate formulation of a solicitor's duties in cases such as those now under consideration. In some respects it goes much too far. The observations of Farwell J in *Powell v Powell* [1900] 1 Ch 243, 247, should not be pressed unduly widely. *Powell v Powell* was a case where strong moral pressure was applied by a stepmother to a girl who was only just twenty one. She was regarded as not really capable of dealing irrevocably with her parent or guardian in the matter of a substantial settlement. Farwell J's observations cannot be regarded as of general application in all cases where a solicitor is giving advice to a person who may have been subject to undue influence.

60. More pertinently, in *In re Coomber, Coomber v Coomber* [1911] 1 Ch 723, 730, Fletcher Moulton LJ summarised the general rules applicable to cases of persons who are competent to form an opinion of their own:

> 'All that is necessary is that some independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and the consequences of the act. It is for adult persons of competent mind to decide whether they will do an act, and I do not

> think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing.'

61. Thus, in the present type of case it is not for the solicitor to veto the transaction by declining to confirm to the bank that he has explained the documents to the wife and the risks she is taking upon herself. If the solicitor considers the transaction is not in the wife's best interests, he will give reasoned advice to the wife to that effect. But at the end of the day the decision on whether to proceed is the decision of the client, not the solicitor. A wife is not to be precluded from entering into a financially unwise transaction if, for her own reasons, she wishes to do so.

62. That is the general rule. There may, of course, be exceptional circumstances where it is glaringly obvious that the wife is being grievously wronged. In such a case the solicitor should decline to act further. In *Wright v Carter* [1903] 1 Ch 27, 57-58, Stirling LJ approved Farwell J's observations in *Powell v Powell* [1900] 1 Ch 243, 247. But he did so by reference to the extreme example of a poor man divesting himself of all his property in favour of his solicitor.

63. In *Royal Bank of Scotland Plc v Etridge (No 2)* [1998] 4 All ER 705, 722, para 49, the Court of Appeal said that if the transaction is 'one into which no competent solicitor could properly advise the wife to enter', the availability of legal advice is insufficient to avoid the bank being fixed with constructive notice. It follows from the views expressed above that I am unable to agree with the Court of Appeal on this point.

64. I turn to consider the scope of the responsibilities of a solicitor who is advising the wife. In identifying what are the solicitor's responsibilities the starting point must always be the solicitor's retainer. What has he been retained to do? As a general proposition, the scope of a solicitor's duties is dictated by the terms, whether express or implied, of his retainer. In the type of case now under consideration the relevant retainer stems from the bank's concern to receive confirmation from the solicitor that, in short, the solicitor has brought home to the wife the risks involved in the proposed transaction. As a first step the solicitor will need to explain to the wife the purpose for which he has become involved at all. He should explain that, should it ever become necessary, the bank will rely upon his involvement to counter any suggestion that the wife was overborne by her husband or that she did not properly understand the implications of the transaction. The solicitor will need to obtain confirmation from the wife that she wishes him to act for her in the matter and to advise her on the legal and practical implications of the proposed transaction.

65. When an instruction to this effect is forthcoming, the content of the advice required from a solicitor before giving the confirmation sought by the bank will, inevitably, depend upon the circumstances of the case. Typically, the advice a solicitor can be expected to give should cover the following matters as the core minimum. (1) He will need to explain the nature of the documents and the practical consequences these will have for the wife if she signs them. She could lose her home if her husband's business does not prosper. Her home may be her only substantial asset, as well as the family's home. She could be made bankrupt. (2) He will need to point out the seriousness of the risks involved. The wife should be told the purpose of the proposed new facility, the amount and principal terms of the new facility, and that the bank might increase the amount of the facility, or change its terms, or grant a new facility, without reference to her. She should be told the amount of her liability under her guarantee. The solicitor should discuss the wife's financial means, including her understanding of the value of the property being charged. The solicitor should discuss whether the wife or her husband has any

other assets out of which repayment could be made if the husband's business should fail. These matters are relevant to the seriousness of the risks involved. (3) The solicitor will need to state clearly that the wife has a choice. The decision is hers and hers alone. Explanation of the choice facing the wife will call for some discussion of the present financial position, including the amount of the husband's present indebtedness, and the amount of his current overdraft facility. (4) The solicitor should check whether the wife wishes to proceed. She should be asked whether she is content that the solicitor should write to the bank confirming he has explained to her the nature of the documents and the practical implications they may have for her, or whether, for instance, she would prefer him to negotiate with the bank on the terms of the transaction. Matters for negotiation could include the sequence in which the various securities will be called upon or a specific or lower limit to her liabilities. The solicitor should not give any confirmation to the bank without the wife's authority.

66. The solicitor's discussion with the wife should take place at a face-to-face meeting, in the absence of the husband. It goes without saying that the solicitor's explanations should be couched in suitably non-technical language. It also goes without saying that the solicitor's task is an important one. It is not a formality.

67. The solicitor should obtain from the bank any information he needs. If the bank fails for any reason to provide information requested by the solicitor, the solicitor should decline to provide the confirmation sought by the bank.

68. As already noted, the advice which a solicitor can be expected to give must depend on the particular facts of the case. But I have set out this 'core minimum' in some detail, because the quality of the legal advice is the most disturbing feature of some of the present appeals. The perfunctory nature of the advice may well be largely due to a failure by some solicitors to understand what is required in these cases.

Independent advice

69. I turn next to the much-vexed question whether the solicitor advising the wife must act for the wife alone. Or, at the very least, the solicitor must not act for the husband or the bank in the current transaction save in a wholly ministerial capacity, such as carrying out conveyancing formalities or supervising the execution of documents and witnessing signatures. Commonly, in practice, the solicitor advising the wife will be the solicitor acting also for her husband either in the particular transaction or generally.

70. The first point to note is that this question cannot be answered by reference to reported decisions. The steps a bank must take once it is put on inquiry, if it is to avoid having constructive notice of the wife's rights, are not the subject of exposition in earlier authority. This is a novel situation, created by the *O'Brien* decision.

71. Next, a simple and clear rule is needed, preferably of well nigh universal application. In some cases a bank deals directly with a husband and wife and has to take the initiative in requiring the wife to obtain legal advice. In other cases, a bank may deal throughout with solicitors already acting for the husband and wife. The case of *Bank of Baroda v Rayarel* [1995] 2 FLR 376 is an example of the latter type of case. It would not be satisfactory to attempt to draw a distinction along these lines. Any such distinction would lack a principled base. Inevitably, in practice, the distinction would disintegrate in confusion.

72. Thirdly, here again, a balancing exercise is called for. Some features point in one direction, others in the opposite direction. Factors favouring the need for the solicitor to act for the wife alone include the following. Sometimes a wife may be inhibited in discussion with a solicitor who is also acting for the husband or whose main client is the husband. This occurred in *Banco Exterior Internacional v Mann* [1995] 1 All ER 936: see the finding of the judge, at p 941F-G. Sometimes a solicitor whose main client is the husband may not, in practice, give the same single-minded attention to the wife's position as would a solicitor acting solely for the wife. Her interests may rank lower in the solicitor's scale of priorities, perhaps unconsciously, than the interests of the husband. Instances of incompetent advice, or worse, which have come before the court might perhaps be less likely to recur if a solicitor were instructed to act for the wife alone and gave advice solely to her. As a matter of general understanding, independent advice would suggest that the solicitor should not be acting in the same transaction for the person who, if there is any undue influence, is the source of that influence.

73. The contrary view is that the solicitor may also act for the husband or the bank, provided the solicitor is satisfied that this is in the wife's best interests and satisfied also that this will not give rise to any conflicts of duty or interest. The principal factors favouring this approach are as follows. A requirement that a wife should receive advice from a solicitor acting solely for her will frequently add significantly to the legal costs. Sometimes a wife will be happier to be advised by a family solicitor known to her than by a complete stranger. Sometimes a solicitor who knows both husband and wife and their histories will be better placed to advise than a solicitor who is a complete stranger.

74. In my view, overall the latter factors are more weighty than the former. The advantages attendant upon the employment of a solicitor acting solely for the wife do not justify the additional expense this would involve for the husband. When accepting instructions to advise the wife the solicitor assumes responsibilities directly to her, both at law and professionally. These duties, and this is central to the reasoning on this point, are owed to the wife alone. In advising the wife the solicitor is acting for the wife alone. He is concerned only with her interests. I emphasise, therefore, that in every case the solicitor must consider carefully whether there is any conflict of duty or interest and, more widely, whether it would be in the best interests of the wife for him to accept instructions from her. If he decides to accept instructions, his assumption of legal and professional responsibilities to her ought, in the ordinary course of things, to provide sufficient assurance that he will give the requisite advice fully, carefully and conscientiously. Especially so, now that the nature of the advice called for has been clarified. If at any stage the solicitor becomes concerned that there is a real risk that other interests or duties may inhibit his advice to the wife he must cease to act for her.

Agency

75. No system ever works perfectly. There will always be cases where things go wrong, sometimes seriously wrong. The next question concerns the position when a solicitor has accepted instructions to advise a wife but he fails to do so properly. He fails to give her the advice needed to bring home to her the practical implications of her standing as surety. What then? The wife has a remedy in damages against the negligent solicitor. But what is the position of the bank who proceeded in the belief that the wife had been given the necessary advice?

76. Mr Sher contended that, depending on the facts, the solicitor should be regarded as the agent of the bank. Commonly, what happens is that the bank asks the solicitor acting for the husband to undertake the conveyancing formalities on behalf of the bank. The bank also asks the solicitor to undertake the further task of explaining the nature and effect of the documents to the wife,

and then confirming to the bank that he has done so. In carrying out these requested tasks, it was submitted, the solicitor is acting for the bank. The bank requires the solicitor to advise the wife, not for her benefit, but for the benefit and protection of the bank. Any deficiencies in the advice given to the wife should be attributed to the bank. In this regard, it was submitted, the solicitor's knowledge is to be imputed to the bank. A certificate furnished by the solicitor to the bank should not prejudice the position of the wife when, as happened in several cases, the contents of the certificate are untrue. If the solicitor has not given the wife any advice, her rights should not be diminished by the solicitor telling the bank that she has been fully advised.

77. I cannot accept this analysis. Confirmation from the solicitor that he has advised the wife is one of the bank's preconditions for completion of the transaction. But it is central to this arrangement that in advising the wife the solicitor is acting for the wife and no one else. The bank does not have, and is intended not to have, any knowledge of or control over the advice the solicitor gives the wife. The solicitor is not accountable to the bank for the advice he gives to the wife. To impute to the bank knowledge of what passed between the solicitor and the wife would contradict this essential feature of the arrangement. The mere fact that, for its own purposes, the bank asked the solicitor to advise the wife does not make the solicitor the bank's agent in giving that advice.

78. In the ordinary case, therefore, deficiencies in the advice given are a matter between the wife and her solicitor. The bank is entitled to proceed on the assumption that a solicitor advising the wife has done his job properly. I have already mentioned what is the bank's position if it knows this is not so, or if it knows facts from which it ought to have realised this is not so.

Obtaining the solicitor's confirmation

79. I now return to the steps a bank should take when it has been put on inquiry and for its protection is looking to the fact that the wife has been advised independently by a solicitor.

(1) One of the unsatisfactory features in some of the cases is the late stage at which the wife first became involved in the transaction. In practice she had no opportunity to express a view on the identity of the solicitor who advised her. She did not even know that the purpose for which the solicitor was giving her advice was to enable him to send, on her behalf, the protective confirmation sought by the bank. Usually the solicitor acted for both husband and wife.

Since the bank is looking for its protection to legal advice given to the wife by a solicitor who, in this respect, is acting solely for her, I consider the bank should take steps to check *directly with the wife* the name of the solicitor she wishes to act for her. To this end, in future the bank should communicate directly with the wife, informing her that for its own protection it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. She should be told that the purpose of this requirement is that thereafter she should not be able to dispute she is legally bound by the documents once she has signed them. She should be asked to nominate a solicitor whom she is willing to instruct to advise her, separately from her husband, and act for her in giving the necessary confirmation to the bank. She should be told that, if she wishes, the solicitor may be the same solicitor as is acting for her husband in the transaction. If a solicitor is already acting for the husband and the wife, she should be asked whether she would prefer that a different solicitor should act for her regarding the bank's requirement for confirmation from a solicitor.

The bank should not proceed with the transaction until it has received an appropriate response directly from the wife.

(2) Representatives of the bank are likely to have a much better picture of the husband's financial affairs than the solicitor. If the bank is not willing to undertake the task of explanation itself, the bank must provide the solicitor with the financial information he needs for this purpose. Accordingly it should become routine practice for banks, if relying on confirmation from a solicitor for their protection, to send to the solicitor the necessary financial information. What is required must depend on the facts of the case. Ordinarily this will include information on the purpose for which the proposed new facility has been requested, the current amount of the husband's indebtedness, the amount of his current overdraft facility, and the amount and terms of any new facility. If the bank's request for security arose from a written application by the husband for a facility, a copy of the application should be sent to the solicitor. The bank will, of course, need first to obtain the consent of its customer to this circulation of confidential information. If this consent is not forthcoming the transaction will not be able to proceed.

(3) Exceptionally there may be a case where the bank believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will. If such a case occurs the bank must inform the wife's solicitors of the facts giving rise to its belief or suspicion.

(4) The bank should in every case obtain from the wife's solicitor a written confirmation to the effect mentioned above.

80. These steps will be applicable to future transactions. In respect of past transactions, the bank will ordinarily be regarded as having discharged its obligations if a solicitor who was acting for the wife in the transaction gave the bank confirmation to the effect that he had brought home to the wife the risks she was running by standing as surety.

The creditor's disclosure obligation

81. It is a well-established principle that, stated shortly, a creditor is obliged to disclose to a guarantor any unusual feature of the contract between the creditor and the debtor which makes it materially different in a potentially disadvantageous respect from what the guarantor might naturally expect. The precise ambit of this disclosure obligation remains unclear. A useful summary of the authorities appears in *O'Donovan and Phillips on the Modern Contract of Guarantee*, 3rd ed (1996), at pp 122-130. It is not necessary to pursue these difficult matters in this case. It is sufficient for me to say that, contrary to submissions made, the need to provide protection for wives who are standing as sureties does not point to a need to re-visit the scope of this disclosure principle. Wives require a different form of protection. They need a full and clear explanation of the risks involved. Typically, the risks will be risks any surety would expect. The protection needed by wives differs from, and goes beyond, the disclosure of information. The *O'Brien* principle is intended to provide this protection.

A wider principle

82. Before turning to the particular cases I must make a general comment on the *O'Brien* principle. As noted by Professor Peter Birks QC, the decision in *O'Brien* has to be seen as the progenitor of a wider principle: see 'The Burden on the Bank', in Restitution and Banking Law (ed Rose, 1998), at p 195. This calls for explanation. In the *O'Brien* case the House was concerned with formulating a fair and practical solution to problems occurring when a creditor

obtains a security from a guarantor whose sexual relationship with the debtor gives rise to a heightened risk of undue influence. But the law does not regard sexual relationships as standing in some special category of their own so far as undue influence is concerned. Sexual relationships are no more than one type of relationship in which an individual may acquire influence over another individual. The *O'Brien* decision cannot sensibly be regarded as confined to sexual relationships, although these are likely to be its main field of application at present. What is appropriate for sexual relationships ought, in principle, to be appropriate also for other relationships where trust and confidence are likely to exist.

83. The courts have already recognised this. Further application, or development, of the *O'Brien* principle has already taken place. In *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 the same principle was applied where the relationship was employer and employee. Miss Burch was a junior employee in a company. She was neither a shareholder nor a director. She provided security to the bank for the company's overdraft. She entered into a guarantee of unlimited amount, and gave the bank a second charge over her flat. Nourse LJ, at p 146, said the relationship 'may broadly be said to fall under [*O'Brien*]'. The Court of Appeal held that the bank was put on inquiry. It knew the facts from which the existence of a relationship of trust and confidence between Miss Burch and Mr Pelosi, the owner of the company, could be inferred.

84. The crucially important question raised by this wider application of the *O'Brien* principle concerns the circumstances which will put a bank on inquiry. A bank is put on inquiry whenever a wife stands as surety for her husband's debts. It is sufficient that the bank knows of the husband-wife relationship. That bare fact is enough. The bank must then take reasonable steps to bring home to the wife the risks involved. What, then, of other relationships where there is an increased risk of undue influence, such as parent and child? Is it enough that the bank knows of the relationship? For reasons already discussed in relation to husbands and wives, a bank cannot be expected to probe the emotional relationship between two individuals, whoever they may be. Nor is it desirable that a bank should attempt this. Take the case where a father puts forward his daughter as a surety for his business overdraft. A bank should not be called upon to evaluate highly personal matters such as the degree of trust and confidence existing between the father and his daughter, with the bank put on inquiry in one case and not in another. As with wives, so with daughters, whether a bank is put on inquiry should not depend on the degree of trust and confidence the particular daughter places in her father in relation to financial matters. Moreover, as with wives, so with other relationships, the test of what puts a bank on inquiry should be simple, clear and easy to apply in widely varying circumstances. This suggests that, in the case of a father and daughter, knowledge by the bank of the relationship of father and daughter should suffice to put the bank on inquiry. When the bank knows of the relationship, it must then take reasonable steps to ensure the daughter knows what she is letting herself into.

85. The relationship of parent and child is one of the relationships where the law irrebuttably presumes the existence of trust and confidence. Rightly, this has already been rejected as the boundary of the *O'Brien* principle. *O'Brien* was a husband-wife case. The responsibilities of creditors were enunciated in a case where the law makes no presumption of the existence of trust and confidence.

86. But the law cannot stop at this point, with banks on inquiry only in cases where the debtor and guarantor have a sexual relationship or the relationship is one where the law presumes the existence of trust and confidence. That would be an arbitrary boundary, and the law has already moved beyond this, in the decision in *Burch*. As noted earlier, the reality of life is that relationships in which undue influence can be exercised are infinitely various. They cannot be

exhaustively defined. Nor is it possible to produce a comprehensive list of relationships where there is a substantial risk of the exercise of undue influence, all others being excluded from the ambit of the *O'Brien* principle. Human affairs do not lend themselves to categorisations of this sort. The older generation of a family may exercise undue influence over a younger member, as in parent-child cases such as *Bainbrigge v Browne,* 18 Ch D 188 and *Powell v Powell* [1900] 1 Ch 243. Sometimes it is the other way round, as with a nephew and his elderly aunt in *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127. An employer may take advantage of his employee, as in *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144. But it may be the other way round, with an employee taking advantage of her employer, as happened with the secretary-companion and her elderly employer in *In re Craig, Decd* [1971] Ch 95. The list could go on.

87. These considerations point forcibly to the conclusion that there is no rational cut-off point, with certain types of relationship being susceptible to the *O'Brien* principle and others not. Further, if a bank is not to be required to evaluate the extent to which its customer has influence over a proposed guarantor, the only practical way forward is to regard banks as 'put on inquiry' in every case where the relationship between the surety and the debtor is non-commercial. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety. As a measure of protection, this is valuable. But, in all conscience, it is a modest burden for banks and other lenders. It is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual. If the bank or other creditor does not take these steps, it is deemed to have notice of any claim the guarantor may have that the transaction was procured by undue influence or misrepresentation on the part of the debtor.

88. Different considerations apply where the relationship between the debtor and guarantor is commercial, as where a guarantor is being paid a fee, or a company is guaranteeing the debts of another company in the same group. Those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees.

89. By the decisions of this House in *O'Brien* and the Court of Appeal in *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, English law has taken its first strides in the development of some such general principle. It is a workable principle. It is also simple, coherent and eminently desirable. I venture to think this is the way the law is moving, and should continue to move. Equity, it is said, is not past the age of child-bearing. In the present context the equitable concept of being 'put on inquiry' is the parent of a principle of general application, a principle which imposes no more than a modest obligation on banks and other creditors. The existence of this obligation in all non-commercial cases does not go beyond the reasonable requirements of the present times. In future, banks and other creditors should regulate their affairs accordingly.

The particular cases

90. I have had the advantage of reading in draft a copy of the speech of my noble and learned friend Lord Scott of Foscote. He has summarised the facts in the eight appeals. My views on the particular cases are as follows.

(1) Midland Bank Plc v Wallace

I would allow this appeal. The bank was put on inquiry, because this was a case of a wife standing as surety for her husband's debts. As the evidence stands at present, Mr Samson's

participation in the transaction does not assist the bank. He was not Mrs Wallace's solicitor. Deficiencies in the advice given by a solicitor do not normally concern the bank. That is the position where the solicitor is acting for the wife, or where the solicitor has been held out by the wife to the bank as her solicitor. But where the solicitor was not acting for the wife, the bank is in the same position as any person who deals with another in the belief that the latter is acting on behalf of a third party principal when in truth he is not. Leaving aside questions of ostensible authority or the like, the alleged principal is not bound or affected by the acts of such a stranger. The remedy of the bank lies against the (unauthorised) 'agent'. If the bank has suffered provable loss, it has a claim for damages for breach of implied warranty of authority. This action should go to trial.

(2) Barclays Bank Plc v Harris

This is another interlocutory appeal, against an order striking out Mrs Harris' defence. It is common ground that for striking out purposes Mrs Harris has an arguable case on undue influence. The bank was put on inquiry, because Mrs Harris was standing as surety for the debts of the company, S T Harris (Powder Coatings Consultant) Ltd. I consider Mrs Harris has an arguable case that Wragge & Co never acted for her. In this respect the case is similar to *Wallace*. This case should go to trial.

(3) UCB Home Loans Corporation Ltd v Moore

This is another interlocutory appeal. For the reasons given by my noble and learned friend Lord Hobhouse of Woodborough, I would allow this appeal.

(4) Royal Bank of Scotland v Etridge, (5) National Westminster Bank Plc v Gill, (6) Barclays Bank Plc v Coleman, (7) Bank of Scotland v Bennett, and (8) Kenyon-Brown v Desmond Banks & Co.

I agree with Lord Scott that, for the reasons he gives, the appeals of Mrs Bennett and Desmond Banks & Co should be allowed. The appeals of Mrs Etridge, Mrs Gill and Mrs Coleman should be dismissed.

LORD CLYDE

My Lords,

91. I have had the opportunity of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead and agree with it. I add a few observations of my own because of the importance of the appeals which we have heard.

92. I question the wisdom of the practice which has grown up, particularly since *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 of attempting to make classifications of cases of undue influence. That concept is in any event not easy to define. It was observed in *Allcard v Skinner* (1887) 36 Ch D 145 that "no court has ever attempted to define undue influence" (Lindley LJ, at p 183). It is something which can be more easily recognised when found than exhaustively analysed in the abstract. Correspondingly the attempt to build up classes or categories may lead to confusion. The confusion is aggravated if the names used to identify the classes do not bear their actual meaning. Thus on the face of it a division into cases of "actual" and "presumed" undue influence appears illogical. It appears to confuse definition and proof. There is also room for uncertainty whether the presumption is of

the existence of an influence or of its quality as being undue. I would also dispute the utility of the further sophistication of subdividing "presumed undue influence" into further categories. All these classifications to my mind add mystery rather than illumination.

93. There is a considerable variety in the particular methods by which undue influence may be brought to bear on the grantor of a deed. They include cases of coercion, domination, victimisation and all the insidious techniques of persuasion. Certainly it can be recognised that in the case of certain relationships it will be relatively easier to establish that undue influence has been at work than in other cases where that sinister conclusion is not necessarily to be drawn with such ease. English law has identified certain relationships where the conclusion can prima facie be drawn so easily as to establish a presumption of undue influence. But this is simply a matter of evidence and proof. In other cases the grantor of the deed will require to fortify the case by evidence, for example, of the pressure which was unfairly applied by the stronger party to the relationship, or the abuse of a trusting and confidential relationship resulting in for the one party a disadvantage and for the other a collateral benefit beyond what might be expected from the relationship of the parties. At the end of the day, after trial, there will either be proof of undue influence or that proof will fail. and it will be found that there was no undue influence. In the former case, whatever the relationship of the parties and however the influence was exerted, there will be found to have been an actual case of undue influence. In the latter there will be none.

94. The second point relates to the steps which were suggested in *Barclays Bank plc v O'Brien* [1994] 1 AC 180 as being appropriate for the lender to escape constructive notice of the wrongdoing in question. I agree that what was suggested in the case was not intended to be prescriptive. So far as past cases were concerned it was said (Lord Browne-Wilkinson, at p 196) that the creditor "can reasonably be expected to take steps to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice". Those two courses of action were reflected in the Scottish case of *Smith v Bank of Scotland* 1997 SC(HL) 110, 122 by the suggestion which I made in relation to the corresponding situation under Scots law that "it would be sufficient for the creditor to warn the potential cautioner of the consequences of entering into the proposed cautionary obligation and to advise him or her to take independent advice". That statement echoed what was understood to be the existing practice recognised by banks and building societies and it seemed to me that steps of that kind ought to be enough to enable the creditor to counter any allegation of bad faith. But Lord Browne-Wilkinson proposed more stringent requirements for the avoidance of constructive notice in England for the future. These were that the creditor should insist

> "that the wife attend a private meeting (in the absence of the husband) with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice" (see p 196).

He also recognised, at p 197, that there might be exceptional cases where undue influence was not simply possible but was probable and advised that in such cases the "the creditor to be safe will have to insist that the wife is separately advised".

95. One course is for the lender himself to warn the surety of the risk and to recommend the taking of legal advice. But there may well be good reasons, particularly for banks, to feel it inappropriate or even unwise for them to be giving any detailed form of warning or explanation, and to take the view that it is preferable for that matter to be managed by a solicitor acting for the wife. It is certainly possible to suggest courses of action which should be sufficient to

absolve the creditor from constructive notice of any potential undue influence. Thus in the summary at the end of his speech Lord Browne-Wilkinson said, at p 199:

> "unless there are special exceptional circumstances, a creditor will have taken such reasonable steps to avoid being fixed with constructive notice if the creditor warns the surety (at a meeting not attended by the principal debtor) of the amount of her potential liability and of the risks involved and advises the surety to take independent legal advice."

But matters of banking practice are principally matters for the banks themselves in light of the rights and liabilities which the law may impose upon them. I would not wish to prescribe what those practices should be. One can only suggest some courses of action which should meet the requirements of the law. These are not matters of ritual, the blind performance of which will secure the avoidance of doom, but sensible steps which seek to secure that the personal and commercial interests of the parties involved are secured with certainty and fairness. Necessarily the precise course to be adopted will depend upon the circumstances. In the Scottish case of *Forsyth v Royal Bank of Scotland Plc* 2000 SLT 1295 it appeared to the creditor that the wife had already had the benefit of professional legal advice. In such a case, it may well be that no further steps need be taken by the creditor to safeguard his rights. Of course if the creditor knows or ought to know from the information available to him that the wife has not in fact received the appropriate advice then the transaction may be open to challenge.

96. Thirdly, I agree that it is not fatal that the solicitor is also the solicitor who acts for the party for whose benefit the guarantee or the charge is being effected, that is to say the husband in cases where the wife is granting the deed in question. If there is any question of any conflict of interest arising, or if the solicitor feels that he cannot properly act for the wife in the matter of giving the advice, then he will be perfectly able to identify the difficulty and withdraw. Again it should be stressed that the wife's consultation with her solicitor is a serious step which is not to be brushed off as a mere formality or a charade. It is in the interests of all the parties involved that the wife should appreciate the significance of what she has been asked to sign so that the transaction may not only appear to be fair but also in fact to be freely and voluntarily undertaken.

97. I agree that the appeals in the cases of Mrs Wallace, Mrs Bennett, Mrs Moore and Desmond Banks & Co be allowed. I have had some hesitation about the case of Mrs Harris but following in particular the view expressed by Lord Scott of Foscote I consider that the appeal in her case should also be allowed. I consider that the other appeals should be dismissed.

LORD HOBHOUSE OF WOODBOROUGH

My Lords,

Introduction:

98. These appeals have come before your Lordships in order to enable the workings of the judgments of your Lordships' House in *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 and *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200 to be considered. The leading speech in both of those cases was, with the agreement of the House, that of Lord Browne-Wilkinson. His speeches are in my respectful opinion a masterly exposition of principles designed to give structure to this difficult corner of the law and to provide practical solutions to the problems to which it gives rise whilst recognising the conflict between the interests of the commercial community and the

need to protect vulnerable members of society from oppression or exploitation. These problems and conflicts are real and should not be ignored. The value of the transactions takes them outside the scope of the existing statutory protection and the solution therefore has to be found in the application of equitable principles formulated by judges. Experience in litigation since 1993 has not been encouraging. Disputes have continued to come before the courts; the determination of those disputes has not always carried conviction. Before your Lordships no party has sought to challenge the authority of Lord Browne-Wilkinson's speeches, subject to the criticism of one point of categorisation derived from *BCCI v Aboody* [1990] 1 QB 923, criticism which I, like the rest of your Lordships, consider to be justified; the point of categorisation has been the source of much of the confusion which has ensued.

99. I therefore propose to take the speech of Lord Browne-Wilkinson in *O'Brien* as my starting point. Some of what he said was novel. Some has been criticised as departing from fully conventional equitable principle. It is true that other approaches had been adopted in other cases, including in the Court of Appeal in that case. But the purpose of such judgments of this House is to settle the law and enable certainty to be re-established. That should again be the objective of your Lordships on these appeals. Doubt should not be cast upon the authority of *O'Brien*. There is a need for some clarification and for the problem areas to be resolved as far as possible. But the essential structure of *O'Brien* is in my view sound and Lord Browne-Wilkinson fully took into account the practical implications.

100. To the end that lenders, those advising parties and, indeed, judges should have clear statements of the law on which to base themselves, I will state at the outset that in this speech I shall agree with my noble and learned friend Lord Nicholls and, specifically, the guidance which he gives concerning the role of the burden of proof, the duties of solicitors towards their clients (paragraphs 64-68, and paragraph 74), and the steps which a lender which has been put on enquiry should take paragraph 79). I would stress that this guidance should not be treated as optional, to be watered down when it proves inconvenient (as may be thought to have been the fate of Lord Browne-Wilkinson's equally carefully crafted scheme). Nor should it be regarded as something which will only apply to future transactions; it has represented, and continues to represent, the reasonable response to being put on enquiry. The purpose of guidance is to provide certainty for those who rely upon and conform to the requirements of that guidance: it is not a licence to excuse unreasonable conduct on the ground that no judge had previously told them in express terms what was not an adequate response. If the relevant solicitor was not in fact acting for the wife and had not been held out by the wife as doing so, the conduct of that solicitor will not avail the lender. Once a lender has been put on enquiry, mere assumptions on the part of the lender will not assist him. I will, in the course of this speech and without qualifying the scope of my agreement with Lord Nicholls, mention certain points in the hope that it will add to the clarity and accuracy of the analysis. I must also express my gratitude to my noble and learned friend Lord Scott of Foscote, whose speech I have read in draft, for his summary of the facts of the eight individual cases before the House.

O'Brien:

101. The speech of Lord Browne-Wilkinson followed a four part scheme. First, he characterised the law of the enforceability of suretyship contracts and security as between lenders to a husband or his company and a wife as being an application of the equitable principle of undue influence. Secondly, he sought to categorise the undue influence into classes drawn from *Allcard v Skinner* (1887) 36 Ch D 145, *Turnbull & Co v Duval* [1902] AC 429 and *BCCI v Aboody* (*v.s.*) giving rise to presumptions. Thirdly, he provided a formulation to answer the question whether the lender had been put on enquiry as to the risk of undue influence:

> "a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction." (p.196)

Fourthly, he laid down steps which if taken would enable the lender to say that he had taken reasonable steps to satisfy himself that the "surety entered into the obligation freely and in knowledge of the true fact". (p.198) His speech thus provides a structured scheme for the decision of cases raising the issue of enforceability as between a lender and a wife. It can be expressed by answering 3 questions:

(1) Has the wife proved what is necessary for the court to be satisfied that the transaction was affected by the undue influence of the husband?

(2) Was the lender put on enquiry?

(3) If so, did the lender take reasonable steps to satisfy itself that there was no undue influence?

> It will be appreciated that unless the first question is answered in favour of the wife neither of the later questions arise. The wife has no defence and is liable. It will likewise be appreciated that the second and third questions arise from the fact that the wife is seeking to use the undue influence of her husband as a defence against the lender and therefore has to show that the lender should be affected by the equity - that it is unconscionable that the lender should enforce the secured contractual right against her.

102. Difficulties have arisen in relation to each of these three questions. I will take the questions in turn. The most important difficulties relate to the first and third questions.

(1) Presumed Undue Influence:

103. The division between presumed and actual undue influence derives from the judgments in *Allcard v Skinner*. Actual undue influence presents no relevant problem. It is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce his legal rights against the other. It is typically some express conduct overbearing the other party's will. It is capable of including conduct which might give a defence at law, for example, duress and misrepresentation. Indeed many of the cases relating to wives who have given guarantees and charges for their husband's debts involve allegations of misrepresentation. (*O'Brien* was such a case.) Actual undue influence does not depend upon some preexisting relationship between the two parties though it is most commonly associated with and derives from such a relationship. He who alleges actual undue influence must prove it

104. Presumed undue influence is different in that it necessarily involves some legally recognised relationship between the two parties. As a result of that relationship one party is treated as owing a special duty to deal fairly with the other. It is not necessary for present purposes to define the limits of the relationships which give rise to this duty. Typically they are fiduciary or closely analogous relationships. A solicitor owes a legal duty to deal fairly with his client and he must, if challenged, be prepared to show that he has done so. In *Pitt* at p.209, Lord Browne-Wilkinson referred to

> "the long standing principle laid down in the abuse of confidence cases viz the law requires those in a fiduciary position who enter into transactions with those to whom they owe fiduciary duties to establish affirmatively that the transaction was a fair one."

Such legal relationships can be described as relationships where one party is legally presumed to repose trust and confidence in the other - the other side of the coin to the duty not to abuse that confidence. But there is no presumption properly so called that the confidence has been abused. It is a matter of evidence. If all that has happened is that, say, a client has left a small bequest to his family solicitor or that a solicitor has made a reasonable charge for professional services rendered to the client, no inference of abuse or unfair dealing will arise. But if a solicitor has bought property from his client and it is properly put in issue that the purchase was at an under-value or that the client's consent may have been improperly obtained, the solicitor will have to show that the price was fair and that the client's consent to the transaction was freely given in knowledge of the true facts. The solicitor has to justify what he has done. He has a burden of proof to discharge and if he fails to discharge it he will not have succeeded in justifying his conduct. Thus, at the trial the judge will decide on the evidence whether he is in fact satisfied that there was no abuse of confidence. It will be appreciated that the relevance of the concept of "manifest disadvantage" is evidential. It is relevant to the question whether there is any issue of abuse which can properly be raised. It is relevant to the determination whether in fact abuse did or did not occur. It is a fallacy to argue from the terminology normally used, "presumed undue influence", to the position, not of presuming that one party reposed trust and confidence in the other, but of *presuming* that an abuse of that relationship has occurred; factual inference, yes, once the issue has been properly raised, but not a *presumption*.

105. The Court of Appeal in *Aboody* and Lord Browne-Wilkinson classified cases where there was a legal relationship between the parties which the law presumed to be one of trust and confidence as "presumed undue influence: class 2(A)". They then made the logical extrapolation that there should be a class 2(B) to cover those cases where it was proved by evidence that one party had in fact reposed trust and confidence in the other. It was then said that the same consequences flowed from this factual relationship as from the legal class 2(A) relationship. Lord Browne-Wilkinson said at pp.189-190

> "In a Class 2(B) case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned."

There are difficulties in the literal application of this statement. It describes the other party as a "wrongdoer" without saying why when it is expressly postulated that no wrongdoing may have occurred. He treats trust and confidence as indivisible. His actual words are: "a relationship under which the complainant *generally* reposed trust and confidence in the wrongdoer" (*emphasis supplied).* But a wife may be happy to trust her husband to make the right decision in relation to some matters but not others; she may leave a particular decision to him but not other decisions. Nor is it clear why the mere "existence of such relationship raises the presumption of undue influence". Where the relevant question is one of fact and degree and of the evaluation of evidence, the language of presumption is likely to confuse rather than assist and this is borne out by experience.

106. That there is room for an analogous approach to cases concerning a wife's guarantee of her husband's debts is clear and no doubt led to Lord Browne-Wilkinson saying what he did. The

guarantee is given by the wife at the request of the husband. The guarantee is not on its face advantageous to the wife, doubly so where her liability is secured upon her home. The wife may well have trusted the husband to take for her the decision whether she should give the guarantee. If he takes the decision in these circumstances, he owes her a duty to have regard to her interests before deciding. He is under a duty to deal fairly with her. He should make sure that she is entering into the obligation freely and in knowledge of the true facts. His duty may thus be analogous to that of a class 2(A) fiduciary so that it would be appropriate to require him to justify the decision. If no adequate justification is then provided, the conclusion would be that there had been an abuse of confidence. But any conclusion will only be reached after having received evidence. This evidence will inevitably cover as well whether there has in fact been an abuse of confidence or any other undue influence. The judge may have to draw inferences. He may have to decide whether he accepts the evidence of the wife and, if so, what it really amounts to, particularly if it is uncontradicted. Since there is no legal relationship of trust and confidence, the general burden of proving some form of wrongdoing remains with the wife, but the evidence which she has adduced may suffice to raise an inference of wrongdoing which the opposite party may find itself having to adduce evidence to rebut. If at the end of the trial the wife succeeds on the issue of undue influence, it will be because that is the right conclusion of fact on the state of the evidence at the end of the trial, not because of some artificial legal presumption that there must have been undue influence.

107. In agreement with what I understand to be the view of your Lordships, I consider that the so-called class 2(B) presumption should not be adopted. It is not a useful forensic tool. The wife or other person alleging that the relevant agreement or charge is not enforceable must prove her case. She can do this by proving that she was the victim of an equitable wrong. This wrong may be an overt wrong, such as oppression; or it may be the failure to perform an equitable duty, such as a failure by one in whom trust and confidence is reposed not to abuse that trust by failing to deal fairly with her and have proper regard to her interests. Although the general burden of proof is, and remains, upon her, she can discharge that burden of proof by establishing a sufficient *prima facie* case to justify a decision in her favour on the balance of probabilities, the court drawing appropriate inferences from the primary facts proved. Evidentially the opposite party will then be faced with the necessity to adduce evidence sufficient to displace that conclusion. Provided it is remembered that the burden is an evidential one, the comparison with the operation of the doctrine *res ipsa loquitur* is useful.

(2) Put on Enquiry:

108. However described, this is an essential step in the reasoning of Lord Browne-Wilkinson. The wife becomes involved at the request of her husband. It is he who, in these types of case, is the source of the undue influence and commits the equitable wrong against her. But the party with whom the wife contracts and to whom the wife accepts obligations is the lender. It is the lender who is seeking to enforce those obligations. Therefore there has to be some additional factor before the lender's conscience is affected and he is to be restrained from enforcing his legal rights. The solution adopted by Lord Browne-Wilkinson was to formulate a principle of constructive notice. He did so in terms which were not as restrictive as the established principles of constructive knowledge. However, there is a structural difficulty in his approach. Notice of the risk of undue influence is not an all or nothing question. Situations will differ across a spectrum from a very small risk to a serious risk verging on a probability. There has to be a proportionality between the degree of risk and the requisite response to it. Lord Browne-Wilkinson expressed it in terms of a "substantial risk" (p.196). But, then, in describing the requisite response he stated (p.197) that he had been considering "the ordinary case where the creditor knows only that the wife is to stand surety for her husband's debts". This is, as my noble

and learned friend Lord Nicholls has said, a low threshold. There are arguments which would favour a higher threshold. It would enable a more positive approach to be taken to the response. It would avoid calling for a response when the level of risk did not really justify it. But the advantage of this low threshold is that it assists banks to put in place procedures which do not require an exercise of judgment by their officials and I accept Lord Nicholls's affirmation of the low threshold. This, however, is not to say that banks are at liberty to close their eyes to evidence of higher levels of risk or fail to respond appropriately to higher risks of which they have notice.

109. Needless to say the question whether the bank has been put on enquiry has to be answered upon the basis of the facts available to the bank. Does the bank know that the wife is standing surety for her husband's debts? This should be an easy question for the bank to answer. The bank should know who the principal debtor is and what is the purpose of the facility. Likewise the bank should know of any factors which are likely to aggravate the risk of undue influence. Paradoxically the best place at which to start to assess the risk of undue influence is to consider the true nature of the transaction and examine the financial position of the principal debtor and the proposal which he is making to the bank. These are the facts which the bank has most readily to hand and, if it finds that it lacks relevant information, it is in a position to get it and has the expertise to assess it. A loan application backed by a viable business plan or to acquire a worthwhile asset is very different from a loan to postpone the collapse of an already failing business or to refinance with additional security loans which have fallen into arrear. The former would not aggravate the risk; the latter most certainly would do so. The bank is as well placed as anyone to assess the underlying rationality of the debtor's proposal. It will be the bank that will have formed the view that it is not satisfied with the debtor's covenant and the security he can provide and it will be the bank that has called for additional security. The bank will also probably be aware what has been the previous involvement, if any, of the wife in the husband's business affairs.

110. The position therefore is that in relation to any guarantee by a wife of her husband's debts (or those of his company) the bank is put on enquiry and accordingly will have to respond unless it is to run the risk of finding that the guarantee and other security provided by the wife are unenforceable. If it becomes aware of any aggravation of the risk of undue influence, its response must take that into account. More will be required to satisfy it that the wife's agreement has been properly obtained.

The Practical Situation:

111. Before turning to discuss what are the reasonable steps to be taken by a lender who had been put on enquiry, I will pause to look at some of the practical aspects. Lord Browne-Wilkinson clearly regarded these as important (pp.197-8). He drew attention to the Report of the Review Committee on Banking Services under the chairmanship of Professor Jack which reported in 1989 (Cm.622) which noted that "there are cases of guarantors losing their houses because of open ended commitments that they entered into, without understanding or advice" (?13.22) and recommended that banks should adopt a standard of best practice which would require them to "ensure that prospective guarantors, whether or not they are customers, are adequately warned about the legal effects and possible consequences of guarantees, and about the importance of receiving independent advice" (recommendation 13.5). The Committee was concerned with the lack of the understanding on the part of guarantors of the onerous contractual obligations arising from the signature of the forms used by banks for guarantees or charges. The printed documentation used by banks is of such length, complexity and obscurity that it is unlikely to be read let alone understood by private guarantors who lack legal training or appropriate business experience. They are treated by banks as contracts of adhesion

discouraging any attempt to modify any of their terms. They are often unduly favourable to the bank and excessively onerous to the surety. The surety will probably be made a principal debtor and liable without limit for very onerous rates of interest and charges. The liability may be an "all moneys" guarantee covering without limit any future advances not merely the advances intended to be guaranteed. Thus, quite apart from the question of undue influence, the signature of such documents may not represent any reality of informed consent. The need to guard against lack of comprehension is important and applies in any event to a non-business surety. But it is not the same as guarding against undue influence. It may be a first step but it is a fallacy to confuse the two. Comprehension is essential for any legal documents of this complexity and obscurity. But for the purpose of negativing undue influence it is necessary to be satisfied that the agreement was, also, given freely in knowledge of the true facts. It must be remembered that the equitable doctrine of undue influence has been created for the protection of those who are *sui juris* and competent to undertake legal obligations but are nevertheless vulnerable and liable to have their will unduly influenced. It is their weakness which is being protected not their inability to comprehend. I regret that I must specifically disagree with my noble and learned friend Lord Scott when (in his summary) he treats a belief on the part of a lender that the wife has understood the nature and effect of the transaction as sufficient to exonerate the lender from enquiry or as treating this as the effect of the scheme laid out by Lord Nicholls in the paragraphs to which I have referred earlier.

112. A further point of relevance which has been commented on in the past and should be commented upon again has been the use by banks of forms under which the surety gives an unlimited guarantee or charge. This was what banks ordinarily asked for. Indeed, the guarantees obtained in the cases from which these appeals arise, are unlimited. Banks have acknowledged that such guarantees are likely to be unnecessary and unjustifiable where private sureties are sought. They should be subject to a stated monetary limit on the surety's liability and any legal adviser should so advise a private client. Where a bank has nevertheless obtained an unlimited guarantee from a wife, it should ask itself how that can be if the wife has in truth been independently advised. Would anyone who had a proper regard to the wife's interests ask her to sign an unlimited guarantee or charge?

113. Lord Browne-Wilkinson stressed the need for the wife to be seen and communicated with *separately* from her husband. This was clearly appropriate since, if the purpose is to satisfy oneself that the wife is acting freely in knowledge of the true facts, an interview in the presence of the husband is unlikely to achieve this objective if she has been improperly influenced by him. Lord Browne-Wilkinson concluded that the requirement of a personal interview did not impose such an additional administrative burden as to make the bank's position unworkable (p.198). What the banks appear to find difficult is entrusting the conduct of such an interview to one of their own officers as opposed to entrusting it to an outside agent. This is sad but probably derives from a wish to avoid getting directly involved in imparting information and maybe opinions to an individual whose interests are likely to conflict with their own and with whom they may subsequently be in dispute. Lord Browne-Wilkinson contemplated that the banks might use a representative to do what he considered necessary and this would imply that they would be responsible for their representative. The banks have not done this. They have used solicitors. They have denied any responsibility even for a complete failure of the solicitor whom they have instructed to carry out their instructions and have nevertheless sought to hold the wife to her signature so obtained. I doubt that this is what Lord Browne-Wilkinson had in mind.

114. The use of solicitors has given rise to further practical (and, to a limited extent, legal) problems. The first is ensuring that the solicitor is in possession of the relevant facts as known

to the bank. The advantage of an officer of the bank conducting the interview with the wife is that he has the file and access to the relevant facts. The solicitor on the other hand may have nothing except the documents which are to be signed. It is within the control of the bank what it sends to the solicitor. If the solicitor is to conduct the interview with the wife, the bank must give him the information. The next difficulty is that the bank's information about the affairs of its customer is confidential and the bank may need to obtain the husband's consent to give this information to the solicitor and the wife. However, if the husband refuses to give his consent, this would be a clear indication to the bank and the solicitor that something may be amiss and that it ought not to rely upon the wife being bound. A further point is that contracts of suretyship are not contracts of the utmost good faith. There is no general duty of disclosure: see the authorities cited by my noble and learned friends in their speeches, to which I would add the speech of Lord Clyde in *Smith v Bank of Scotland* 1997 SLT 1061. Seeing that the solicitor is adequately informed is not the performance of a *duty* owed by the bank to the wife. It is simply a necessary step to be taken by the bank so that it may be satisfied that the wife entered into the obligation freely and in knowledge of the true facts.

115. Another consequence of using solicitors is the risk of confusion about what the solicitor's role is to be. The solicitor will normally have been instructed by the bank to act for it. The solicitor will often already be acting for the husband. The solicitor may not be acting for the wife at all, let alone separately and independently from the solicitor's other clients. Similarly, the solicitor's instructions may simply be to explain to the signatories the character and legal effect of the documents. This is a low order of advice which can be given solely by reference to the formal documents to be signed. It is also important to appreciate that the solicitor's role may simply be to witness a signature. Such a role involves no necessary relationship whatsoever between the solicitor and the signatory. Indeed they may have or represent conflicting interests. The solicitor may simply have been instructed by one party to see and be prepared to provide evidence that the relevant document was signed and delivered by the other party. Seeing that a solicitor has witnessed a signature itself means nothing. Even when a solicitor is instructed to explain the character and legal effect of a document, he will not without more concern himself at all with the interests of the wife or whether she is accepting the obligations freely and with knowledge of the true facts. Under these circumstances it is scarcely surprising, as the facts of these cases and many others show, that wives are still signing documents as a result of undue influence. The involvement of a solicitor has too often been a formality or merely served to reinforce the husband's wishes and undermine any scope for the wife to exercise an independent judgment whether to comply. Lord Browne-Wilkinson observed at [1994] 1 AC p.188,

> "The number of recent cases in this field shows that in practice many wives are still subjected to, and yield to, undue influence by their husbands. Such wives can reasonably look to the law for some protection when their husbands have abused the trust and confidence reposed in them."

The result of the practice of relying upon solicitors' certificates has been described by Sir Peter Millett (as he then was) in his lecture to the Chancery Bar Association (114 LQR 214 at p.220), referring to an article by Sir Anthony Mason (110 LQR 238),

> "What Sir Anthony Mason has described as 'ritual reliance on the provision of legal advice' is foreign to the traditional approach of a court of equity and is manifestly failing to give adequate protection to the wife or cohabitant who acts as surety. We have substituted an inappropriate bright line rule for a proper investigation of the facts and have failed the vulnerable in the process. The Australians are turning to the jurisdiction to relieve against harsh and unconscionable bargains as an alternative, and there is much

> merit in this approach. It is certainly better than allowing the bank to assume that the surety has received adequate legal advice, an assumption which the bank almost always knows to be false."

The crux of this situation is that the bank requests the solicitor to give a certificate which the bank then treats as conclusive evidence that it has no notice of any undue influence which has occurred. But the wife may have no knowledge that this certificate is to be given and will not have authorised the solicitor to give it and, what is more, the solicitor will deny that he is under any obligation to the wife (or the bank) to satisfy himself that the wife is entering into the obligations freely and in knowledge of the true facts. The law has, in order to accommodate the commercial lenders, adopted a fiction which nullifies the equitable principle and deprives vulnerable members of the public of the protection which equity gives them.

116. Lord Browne-Wilkinson contemplated a two stage exercise, the first stage being an interview between the lender and the wife (for which the lender would be responsible) and the second being the wife taking independent advice from a solicitor (for which the lender would not be responsible). The practice of banks has been to run these two stages together thus creating confusion about the role of the solicitor. I accept that the best solution is that adopted by Lord Nicholls in his speech. The solicitor in communicating with and advising the wife should be doing so solely as her solicitor. The solicitor's certificate which the bank asks for is something which the bank is asking the wife to procure and which the solicitor is providing as her solicitor. I am satisfied that, provided that the guidance which Lord Nicholls gives (in the paragraphs which I have identified at the outset of this speech) is complied with, the wife will have a reasonable chance of receiving the protection she may need. But it will be appreciated that an essential feature of the scheme is that the wife has to be aware of what is going on, that the bank is asking for the certificate and why, that she is being asked to instruct a solicitor to advise her and that she is being asked to authorise the solicitor to provide the certificate. This is a far cry from the situation which has been tolerated in the past where the wife has not appreciated that she had any solicitor or was being advised and did not know of the existence of the certificate or its significance; indeed it has been that type of situation which has given rise to the most scandalous cases.

117. Illuminating evidence was given at the trial of the *Gill* action relevant to what was practical from the bank's point of view. The bank there was the National Westminster Bank. The bank manager gave evidence. In answer to direct questions he accepted without qualification that he foresaw the potential for undue influence by a husband where his wife is being asked to stand surety for the debts of her husband's business. His solution was to procure that the wife received *separate* legal advice. In saying this he was following the practice of his bank as set out in a document (which he produced during his evidence in chief) with which he said he was already familiar in December 1988 (that is to say well before *O'Brien* in the House of Lords) headed "Charged Security - Separate Legal Advice - Action Sheet". It includes the following passages -

> "The security may be voidable if undue influence can be established. Therefore, great care is needed when there is any likelihood that a potential guarantor or third-party chargor may be unduly influenced by a borrower.
>
> Undue influence may exist where there is a special relationship between the parties, eg: husband and wife ... Do not regard the above list as exhaustive. The background always requires careful thought ...

... where the guarantor/chargor is a customer of the Bank ... - the Bank has a duty, where any doubts exist, to INSIST that independent legal advice is given regarding: (a) the nature of the guarantee/charge, (b) the viability of the underlying proposition - advise the guarantor/chargor to obtain full details from the principal debtor, whose consent is required before disclosures, as to the underlying transaction, can be made to the grantor/chargor or legal advisor. Always consider, in detail, the circumstances surrounding a transaction, as undue influence may arise where direct security is taken for joint borrowing, eg (i) joint borrowing for purposes ostensibly in the interest of only one of the borrowers ...

Where there is any suspicion of undue influence, the Manager must ensure that all guarantors/third-party chargors take separate legal advice from a firm of solicitors nominated by the guarantor/chargor.

Send the charge form directly to the solicitor concerned ... - To avoid a conflict of interest, ensure that the witnessing solicitor is not also acting for the borrower. In such circumstances another solicitor, who may be a partner in the same firm, must be used." (emphasis as in the original)

118. My Lords I have quoted from this document because it discloses the response of a major high street bank to the question of undue influence. It does not seek to play down the risk. It puts husbands and wives at the top of the list. It requires that independent/separate legal advice be taken by the guarantor/chargor. It stresses the importance of having regard to the viability of the underlying proposition or transaction and where necessary obtaining full details from the principal debtor. It requires that the solicitor be the solicitor nominated by the guarantor/chargor and that the actual solicitor must not be acting for the borrower as well. These points are all of practical as well as legal importance. Banks were prepared to accommodate them. They did not need to be told that they had to by Lord Browne-Wilkinson. It represented a pragmatic response to the practical as well as the legal questions. In some respects, the National Westminster Bank "action sheet" goes quite a bit further than what is required by Lord Nicholls. It shows that the speech of Lord Nicholls does not require banks to go further than they had already been prepared to go before *O'Brien* and that what Lord Nicholls requires is and was in fact reasonable and practical.

(3) Reasonable Steps:

119. Lord Browne-Wilkinson favoured a personal interview with the wife conducted in the absence of the husband by a representative of the bank. The wife would then be urged to take independent/separate legal advice. It followed that the bank would be responsible for the first of these steps but not the second. The banks were not following this course. They were not doing anything themselves. They were instructing a solicitor, asking him to supply a formal certificate limited to comprehension and that is all. This is what had given rise to the fiction of free and informed consent where none existed and no steps had been taken to discover the true position.

120. Given the state of the authorities since the speeches in *O'Brien* and *Pitt* were delivered and the need to provide fresh guidance, I agree that your Lordships should adopt the scheme spelled out by Lord Nicholls. The central feature is that the wife will be put into a proper relationship with a solicitor who is acting for her and accepts appropriate duties towards her. Likewise the bank or other lender must communicate directly with the wife to the end that that relationship is established and that any certificate upon which it may seek to rely is the fruit of such a professional relationship.

121. If the bank follows this procedure then the fiction of independent advice and consent should be replaced by true independent advice and real consent. It will probably be less onerous for the lender than what was required by Lord Browne-Wilkinson and the National Westminster "action sheet". It will also be observed that it is consistent with the duty of the solicitor towards his client, the wife. He will appreciate that he cannot give the statement and certificate unless it conforms to the reality. Similarly, the wife will not be left in ignorance of what has been going on and will know what she is entitled to get from the solicitor.

122. It also resolves the question of what knowledge of the solicitor will affect the bank either under the common law or under s.199 of the Law of Property Act 1925. The solicitor in question will not be acting for the bank. Any knowledge the solicitor acquires from the wife will be confidential as between the two of them. If it renders untruthful the statement or certificate, the solicitor cannot sign them without being in breach of his professional obligation to the wife and committing a fraud on the bank. The wife's remedy will be against the solicitor and not against the bank. If the solicitor does not provide the statement and certificate for which the bank has asked, then the bank will not, in the absence of other evidence, have reasonable grounds for being satisfied that the wife's agreement has been properly obtained. Its legal rights will be subject to any equity existing in favour of the wife.

INDIVIDUAL CASES

123. Turning to the individual appeals, the cases fall into 3 different categories. There are three cases - *Harris*, *Wallace* and *Moore* - which have not got beyond the interlocutory stage, the wives' pleadings having been struck out as disclosing no defence to the banks' claims for possession. There are four cases - *Etridge*, *Gill*, *Coleman* and *Bennett* - which have proceeded to trial and in which, at trial and/or on appeal, the wife has been unsuccessful. Finally there is a single case - *Kenyon-Brown* - in which the wife was suing her solicitor for damages for breach of duty. Your Lordships are in favour of allowing the appeals in *Kenyon-Brown*, *Harris*, *Wallace*, *Moore* and *Bennett*: I agree. I also agree that the appeals in *Etridge*, *Gill* and *Coleman* should be dismissed. There is an important distinction to be drawn between cases which have been tried where the parties have been able to test the opposing case and the trial judge was able to make findings of fact having seen the critical witnesses and evaluated the evidence. By contrast, in those cases where the lender is applying for an immediate possession order without a trial or to have the defence struck out, the court is being asked to hold that, even if the wife's allegations of fact be accepted, the wife's case is hopeless and bound to fail and that there is no reason why the case should go to trial. This conclusion is not to be arrived at lightly nor should such an order be made simply on the basis that the lender is more likely to succeed. Once it is accepted that the wife has raised an arguable case that she was in fact the victim of undue influence and that the bank had been put on enquiry, it will have to be a very clear case before one can say that the bank should not have to justify its conduct at a trial.

Kenyon-Brown:

124. I take this case first because it falls into a different category to the others. The wife was claiming damages against a firm of solicitors on the basis that, under the undue influence of her husband, she had entered into an adverse suretyship transaction for the benefit of her husband, which also involved charging a cottage which they jointly owned, and that the solicitors had failed to give her appropriate advice to prevent this happening. The guarantee was unlimited. The wife was unable to give specific or reliable evidence in support of her case against the solicitors but relied upon the fact that the transaction was manifestly disadvantageous to her and upon the duty of the solicitor, as stated by the Court of Appeal in *Etridge No2* [1998] 4 All

ER 705 at para 19, to satisfy himself that she was free from improper influence. The certificate which the solicitor gave to the lender was that he had given her legal advice. In *Kenyon-Brown*, the majority of the Court of Appeal, in disagreement with the trial judge, considered that this led inexorably to the conclusion that the solicitor must have been negligent. I agree with your Lordships that the conclusion of the Court of Appeal was not justified upon the evidence adduced at the trial. The burden of proof was upon the wife to establish that the solicitor had been negligent. She could not say that she had not been given comprehensive advice which included a full warning of the consequences of her entering into the transaction. She could not contradict that he had told her specifically that the mortgage would only benefit her husband and was without limit. He was her solicitor and advised her as his client. The judge was right: she failed to make out her case against the solicitor on the facts. If she had been able to give reliable evidence and be clearer about what she said had happened and had been in a position to challenge the solicitor's attendance note, she might have succeeded. The solicitor's duty towards her was as stated by my noble and learned friend Lord Nicholls. It seems that it was substantially observed and in so far as the solicitor might be criticised, no causative relevance was established.

Wallace:

125. This was an interlocutory case. The bank claimed the possession of a flat in Priory Road, Hampstead, which was jointly owned by Mr and Mrs Wallace. The bank claimed possession on the basis of an all monies legal charge signed by the husband and the wife against which the bank had advanced money to the husband. It was accepted that she had an arguable case that she had been unduly influenced to sign by her husband. The bank did not at any stage communicate with the wife or anyone acting for her. It sent the charge to its own solicitor with instructions to attend to the necessary formalities in the signing of the charge. The husband and wife went together to the bank's solicitor's office. The wife's case was that she was there 3 or 4 minutes at most; she signed as directed by the solicitor; there was no other discussion; her impression was that the solicitor had been instructed by the bank merely to take and witness her signature. On this case the bank had no basis for rebutting the risk that her signature had not been properly obtained. It had no basis for any belief that she had been separately advised by a solicitor who was acting for her. The only solicitor of which the bank knew was a solicitor acting for itself alone which had in a side letter to the bank, of which the wife knew nothing, told the bank no more than that the documents had been explained. The wife clearly had an arguable case for defending the possession action. The reasoning of the Court of Appeal in arriving at the contrary conclusion was that the bank was (or, perhaps, would have been) entitled to assume that the solicitor had been acting as the wife's solicitor and had discharged his duty to her as her solicitor. As stated, this assumption would have been without foundation. I agree that this appeal should be allowed.

Harris:

126. This was also an interlocutory case. The judge struck out her defence and counterclaim as disclosing no arguable defence to the bank's action for the possession of the house owned jointly by the husband and wife where they lived. The husband had, through the medium of two companies, two businesses one of which had effectively failed leaving him with a heavy personal liability. He consulted solicitors, Wragge & Co, to find a way of carrying on his other business. They advised him to negotiate a new facility with the bank with new security. The outcome was an offer from the bank of new finance for the second company secured by unlimited guarantees from both the husband and wife and a legal charge on their house. The bank was clearly put on enquiry. It was accepted that for striking out purposes the wife had an

arguable case on undue influence. The relevant question was therefore whether the bank took reasonable steps to satisfy itself that the wife's agreement had not been improperly obtained. Wragge & Co were only known to the bank as the husband's solicitors. The bank took no steps to communicate with the wife who was allowed to remain in ignorance of what precisely was the position between her husband and the bank. The wife was never told that she would be required to be separately advised nor that she should instruct a solicitor to certify to the bank that she had been so advised. In her pleading the wife had pleaded that the solicitors were acting for the bank, her husband and herself. However before the judge the affidavit sworn by her solicitor in the action (Mr Holt of Evans Derry Binnion) in response to the bank's striking out application deposed (para 6) -

> "It is important to note that insofar as my client is concerned Wragge & Co were not her solicitors. Wragge & Co were solicitors who had been instructed by Mr Harris personally previously and he had a personal connection with one of the partners at that [firm]."

The wife therefore has an arguable case that Wragge & Co were never her solicitors and that the case is in this respect the same as the *Wallace* case. There is however a further feature of this case. The bank wrote to Wragge & Co, knowing them only as the husband's solicitors, asking them, among other things, "to explain the nature of the document to both parties and confirm to us that independent legal advice has been given". The letter in reply from Wragge & Co did not give the bank that confirmation, a fact which the bank did not pick up until about nine months later. The bank then wrote to Wragge & Co pointing this out and asking for confirmation that independent legal advice had nevertheless been given. On receiving this further letter, the partner at Wragge & Co commented: "I do not think that independent legal advice was given." On this, it would appear that the bank appreciated that it needed confirmation that the wife had been independently advised. Patently it did not get it. The bank realised that it had not got it and that she may well never have been independently advised. This was clearly a case where the judge should have allowed the case to go to trial. The wife had an arguable defence on more than one ground. The Court of Appeal dismissed the wife's appeal giving only brief reasons - "The solicitors were acting for Mrs Harris and the bank were entitled to assume that they had given appropriate advice and were entitled to accept the solicitors' letter as confirmation that this had been done." These reasons fly in the face of the evidence and cannot be supported. This appeal should be allowed.

Moore:

127. This is the third of the interlocutory cases. It is less clear cut than the other two. But it is not a case in which it should be said, in my judgment, that no trial is justified and that, on the basis of her pleaded case, the wife is bound to fail in her defence of the possession action. It is accepted for present purposes that she has an arguable case of undue influence and misrepresentation by her husband. Her case is that she had in fact instructed no solicitors to act for her and received no advice whatsoever. The charge was unlimited in amount. The loan transaction was not wholly straightforward in that, whilst it included the refinancing of indebtedness which was already secured on the matrimonial home in Pangbourne, it was as to 3/5ths composed of a substantial additional advance to the company run by the husband which was already in financial trouble (and was to fail within two years). In this connection, the company and the husband used an independent insurance broker, Mr Zerfahs and his brother (a credit broker), as a go-between with the lender. The lender had no direct communication with the wife, nor did Mr Zerfahs communicate with her. Were it not for one fact, this would be a case which fell into the same category as *Wallace*. The potential saving fact for the lender was

that the husband had started his deception by persuading his wife to sign the mortgage application form in blank. One of the boxes in the form was "solicitor's details". The husband, who was the primary applicant, filled this in with the name of the solicitors who had been instructed by Mr Zerfahs without informing the wife or obtaining her authority: "Quiney & Harris (Nigel Whittaker)" and their address in Wootton Bassett near Swindon. As a result, on the face of the form sent to the lender there was a single solicitor who was to act on behalf of both applicants. The wife says that the husband had not obtained her authority to fill in the form in this way; it is agreed that the husband undoubtedly filled in other parts of the form fraudulently. Having received instructions from Mr Zerfahs, the solicitors, without obtaining confiration from the wife, referred to her and her husband in correspondence as "our clients". The lender did not obtain any assurance that the wife had received independent advice before signing. It is the wife's case that she received no advice at all. This is a disturbing case. It may turn out (if there is a trial) that the wife is an unreliable witness and that her case cannot be accepted. But, for present purposes, the lender's case has to depend wholly upon an estoppel arising from her having signed the application form in blank and, it is argued, an inference that she had been separately advised as an independent client by the solicitor. I do not believe that this is a sound basis for disposing of this case without a trial. The true facts need to be known. She was the victim of misrepresentation; the solicitors purported to act on her behalf without any authority to do so; the only document which the lender saw did not suggest anything other than a joint retainer; the lender never checked the position with the wife or sought any confirmation that she was being separately advised. Discovery of documents and a morning in the County Court would have sorted the matter out more expeditiously and cheaply. I agree that this appeal should be allowed.

Royal Bank of Scotland v Etridge:

128. This is a case which, after some delay and contested interlocutory proceedings, went to a trial before Judge Behrens. The wife gave evidence. The judge found that, on the evidence, she had not been the victim of any actual undue influence. However he went on to deal with the case on the basis of *presumed* undue influence. On appeal, the Court of Appeal upheld the Judge's finding of no actual undue influence; nor did she at either level obtain a finding in her favour that she had been induced to sign by any misrepresentation. Accordingly, on the correct view of the law, her case failed *in limine* and none of the other points arose. Judgment was rightly entered for the bank. On this ground, I agree that this appeal should be dismissed. This case provides an object lesson in the dangers of attempting a summary resolution of issues of mixed law and fact without having ascertained the facts.

Gill:

129. This too is a case which went to trial. The evidence discloses what might have been a case of misrepresentation which possibly could have led to the wife succeeding. The transaction was presented in a fashion which may have led the wife and the solicitors mistakenly to believe that only an advance of £36,000 was involved, not a probable £100,000. However, be that as it may, the case advanced by the wife at the trial was that she had been the victim of actual undue influence. This case was rejected by the Judge and, in any event, there was evidence that the extended scope of the transaction is something which she would in fact have supported and was not causative. Therefore this case is, in the critical respect, similar to the *Etridge* case. She failed to prove the allegation necessary to found her case. I agree that this appeal should be dismissed.

Coleman:

130. In this case there was a trial which was not confined to a simple claim by the bank against the wife; it involved also her husband (who in addition counterclaimed against the bank) and third parties joined by the wife. With some reluctance I agree that the wife's appeal should be dismissed. This is not because of any inherent lack of merit in her case; she has been appallingly badly served. It is because to set aside the judgments entered against her below would be contrary to the grounds upon which her case was conducted at the trial and in the Court of Appeal. The wife and her husband were members of the Hasidic Jewish community. This factually involved a relationship of complete trust and confidence between the wife and her husband in relation to financial matters. I agree with Lord Scott that it is a case where, having drawn the appropriate inferences, actual undue influence was in fact established. The wife was being asked to charge her home to secure advances to her husband for the purpose of enabling him to engage in property speculation, he being unable to offer the bank adequate other security. It was also a case where the bank was clearly put on enquiry. The relevant point which should have been considered was therefore whether the bank took steps of the kind referred to by Lord Nicholls (para 79) (or in the National Westminster document) in order to protect itself from being affected by any such undue influence. But at the trial the dealings between the bank and the wife and the solicitor were not covered by documentary evidence and seem not to have been the subject of direct oral evidence either. The wife simply said that she went to the solicitor's office at the request of her husband and that all the managing clerk, whom they saw there, did before witnessing her signature was to ask her in the presence of her husband if he, her husband, had explained the documents to her. Her account (which the judge accepted) gives a pertinent reminder of the gap between theory and reality and illustrates the type of charade which, as Sir Peter Millett has observed (*sup*), lenders well know may occur and should not be tolerated or sanctioned by equity. However, at the trial, the wife's case was that the elderly solicitor for whom the managing clerk worked was acting as her solicitor. She joined what she thought were the appropriate persons as third parties suing them for breach of professional duty. The elderly solicitor had died. The trial judge dismissed her claim against the third parties holding that she had sued the wrong persons. There was a further unusual feature of the case. The bank had asked for a certificate in the unusual terms: "I confirm that this document was signed in my presence and that the full effect of its contents have been explained to and were understood by Miriam Mara Coleman, *and she has signed this document of her own free will."* (*emphasis supplied.*) It was this certificate that the managing clerk signed. If the bank were entitled to believe that this certificate was supplied by the wife's own solicitor instructed by her, the bank might have had a basis for believing that the wife's consent had been properly obtained. I venture to doubt whether any reasonable banker would have put this construction upon the available evidence but in view of the course of the proceedings before the trial judge and the basis upon which the wife's case was then put it would not be permissible now to allow this appeal upon an inconsistent and untested basis. The greater part of the time at the trial seems to have been taken up with the dispute between the husband and the bank. As between the wife and the bank, the judgments in the courts below were primarily concerned with aspects of the problem of *presumed* undue influence which do not now arise and with the question of the adequacy of a certificate signed by a legal executive as opposed to a solicitor which must depend on the facts of each case.

Bennett:

131. I agree that this appeal should be allowed. The existence of the ranking agreement was important and qualified the transaction as it was disclosed to the surety. I do not wish to add anything to what is to be said about this point by Lord Scott. This suffices for the allowing of the appeal. It is accordingly unnecessary to say anything about the undue influence issues.

LORD SCOTT OF FOSCOTE

My Lords,

Introduction

132. Eight appeals have been heard together. In seven of these appeals, the appellant is a wife who agreed to subject her property, usually her interest in the matrimonial home, to a charge in favour of a bank in order to provide security for the payment of her husband's debts, or the debts of a company by means of which her husband carried on business. In each of these cases the bank has commenced proceedings for possession of the mortgaged property with a view to its sale and the wife has defended the claim by alleging, first, that her agreement to grant the charge to the bank was brought about by undue influence or misrepresentation, or both, on the part of her husband, and, secondly, that, in the circumstances, the chargee bank ought not to be allowed to enforce the charge against her. In each of these cases the question has been raised whether the bank should be treated as having had notice of the impropriety, or alleged impropriety, of the husband. In each of these cases the bank has had some reason to believe that a solicitor had acted for the wife in the transaction in question. So the question has arisen as to the extent to which the solicitor's participation, or believed participation, has absolved the bank of the need to make any further inquiries about the circumstances in which the wife was persuaded to agree to grant the charge, or to take any further steps to satisfy itself that her consent to do so was a true and informed consent.

133. Four of these seven cases, *Etridge, Gill, Coleman* and *Bennett* went to a full trial, with evidence and cross-examination. The other three, *Harris, Wallace* and *Moore*, have come to your Lordships' House as a result of interlocutory applications; in *Harris* and in *Moore*, an application to strike-out the relevant parts of the wife's defence; in *Wallace*, an application by the bank for summary judgment for possession.

134. In each of these seven cases, the submissions on behalf of the wife have been based upon the principles expressed by Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 and, to a lesser extent, in *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200.

135. The eighth appeal before the House, *Kenyon-Brown v Desmond Banks & Co*, is a case in which the wife is suing the solicitor who acted for her in such a transaction as I have described. She alleges breach of duty by the solicitor. One of the issues in the seven *wife v bank* appeals that your Lordships are invited to consider relates to the extent of the duty lying upon a solicitor who acts for a wife who is proposing to grant a charge over her property as security for her husband's, or his company's, debts. It was, therefore, thought convenient to add the *Kenyon-Brown* appeal to the seven other appeals so that all could be heard together.

136. Five of the seven *wife v bank* appeals, namely, *Etridge*, *Harris*, *Moore*, *Wallace* and *Gill*, were heard together by the Court of Appeal (Stuart-Smith, Millett and Morritt LJJ). In each, the Court of Appeal dismissed the wife's appeal against the order for possession made by the Court below (see *Royal Bank of Scotland Plc v Etridge (No 2)* [1998] 4 All ER 705). In *Bennett*, the Court of Appeal (Auld, Chadwick LJJ and Sir Christopher Staughton) allowed the bank's appeal against the judgment below in favour of the wife and made an order for possession (see [1999] 1 FLR 1115). The Court of Appeal placed strong reliance on passages in the judgment of the court given by Stuart-Smith LJ in *Etridge (No 2)*. In *Coleman*, the Court of Appeal (Nourse, Pill and Mummery LJJ) [2001] QB 20 dismissed the wife's appeal against the possession order made below.

137. In *Kenyon-Brown v Desmond Banks & Co*, the Court of Appeal (Peter Gibson and Mance LJJ, Wilson J dissenting) [2000] PNLR 266 allowed the wife's appeal and, in expressing the extent of the defendant solicitor's duty to her, placed strong reliance on *Royal Bank of Scotland Plc v Etridge (No 2).*

138. In deciding these appeals it is necessary in my opinion, first, to analyse and explain the principles formulated by Lord Browne-Wilkinson in *O'Brien.* The case law since *O'Brien* has, in my view, disclosed some misconceptions about these principles.

The O'Brien principles

139. It is convenient to start with a look at the problems that had to be addressed in *O'Brien* and at Lord Browne-Wilkinson's solution to them.

140. There had been an increasing number of cases in which wives had sought to avoid the charges they had given to banks or finance houses in support of their husbands' debts. In many, probably in most, of the cases that had come to court, the wives had not read, or, if they had, had not understood the document they had signed. Many of the wives protested that they had signed because excessive pressure to do so had been brought to bear on them by their husbands; others said that their husbands had misrepresented the amount of the secured debts, the time during which the charge would remain in force or some other material matter. In most cases the wife emphasised, in explaining her willingness to sign the charge, the trust and confidence she had had in her husband. This trust and confidence, it was said, had led her to succumb to his pressure to sign and to be the more easily misled by his misrepresentations. Lord Browne-Wilkinson in *O'Brien* said, at p 188:

> "although the concept of the ignorant wife leaving all financial decisions to the husband is outmoded, the practice does not yet coincide with the ideal. In a substantial proportion of marriages it is still the husband who has the business experience and the wife is willing to follow his advice without bringing a truly independent mind and will to bear on financial decisions. The number of recent cases in this field shows that in practice many wives are still subjected to, and yield to, undue influence by their husbands. Such wives can reasonably look to the law for some protection when their husbands have abused the trust and confidence reposed in them."

141. Lord Browne-Wilkinson emphasised, however, the importance of keeping a sense of balance in deciding what degree of protection should be afforded. He pointed out that "a high proportion of privately owned wealth is invested in the matrimonial home . . . ." and referred to "the need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile". He added, at p 188:

> "If the rights secured to wives by the law renders vulnerable loans granted on the security of matrimonial homes, institutions will be unwilling to accept such security, thereby reducing the flow of loan capital to business enterprises. It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions."

Each of these considerations is as relevant and important today as it was when *O'Brien* was decided.

142. One of the difficulties is that the protection the wife needs in these cases is a remedy against the bank, or other lender, to whom she is offering the suretyship security. It is not protection against her husband, who has allegedly procured her to do so by some wrongdoing, that is the problem. The law has no difficulty in providing an oppressed or deceived wife with a remedy against the wrongdoing husband. But, in most of the cases with which the House is now concerned, the husband is supporting his wife in her attempt to prevent the bank from enforcing its security. They stand together in attempting to save the family home. In these circumstances, Lord Browne-Wilkinson held that the requisite protection for wives against the banks should be provided by the application of the doctrine of constructive notice. He had in mind that in certain circumstances constructive notice of the husband's impropriety towards his wife could be imputed to the bank.

143. The doctrine of notice is a doctrine that relates primarily and traditionally to the priority of competing property rights. Lord Browne-Wilkinson described the operation of the doctrine in this way, at pp 195-196:

> "the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or to take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it."

This is a classic statement of the operation of the doctrine of notice in order to determine the priority of property rights.

144. Banks and other lenders who take charges from surety wives are certainly purchasers of property rights. But they acquire their rights by grant from the surety wives themselves. The issue between the banks and the surety wives is not one of priority of competing interests. The issue is whether or not the surety wife is to be bound by her apparent consent to the grant of the security to the bank. If contractual consent has been procured by undue influence or misrepresentation for which a party to the contract is responsible, the other party, the victim, is entitled, subject to the usual defences of change of position, affirmation, delay etc, to avoid the contract. But the case is much more difficult if the undue influence has been exerted or the misrepresentation has been made not by the party with whom the victim has contracted, but by a third party. It is, in general, the objective manifestation of contractual consent that is critical. Deficiencies in the quality of consent to a contract by a contracting party, brought about by undue influence or misrepresentation by a third party, do not, in general allow the victim to avoid the contract. But if the other contracting party had had actual knowledge of the undue influence or misrepresentation the victim would not, in my opinion, be held to the contract (see *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259, 277-280 and *Banco Exterior Internacional SA v Thomas* [1997] 1 WLR 221, 229). But what if there had been no actual knowledge of the third party's undue influence or misrepresentation but merely knowledge of facts or circumstances that, if investigated, might have led to actual knowledge? In what circumstances does the law expect a contracting party to inquire into the reasons why the other party is entering into the contract or to go behind the other party's apparent agreement, objectively ascertained, to enter into the contract? These are the questions that Lord Browne-Wilkinson had to answer in *O'Brien*. They are contractual questions, not questions relating to competing property interests.

145. Care must, in my opinion, be taken in applying principles evolved in cases in which the issue has been whether a purchaser was bound by some pre-existing equitable interest in the purchased property to cases in which the issue is whether a contracting party can safely rely on the other contracting party's apparent consent. Among other things, the onus is different. If a purchaser acquires property over which there is an existing equitable interest, for example, an equitable charge, it is up to the purchaser to show that he is a purchaser without notice and so is not bound by the equitable interest. He must show that his conscience is clear. But if a contracting party, A, acquires an interest under a contract with another contracting party, B, and B wishes to escape from the contract on the ground that his consent to it was procured by the undue influence or a misrepresentation of a third party, A can rely on B's apparent consent to the contract and it is for B to show that A had actual or constructive notice of the undue influence or misrepresentation. It is, in my opinion, important to recognise that constructive notice, in cases such as those now before the House, is serving a different function from that served by constructive notice in its traditional role and is not necessarily subject to the same rules.

146. In particular, it must be recognised that in the *bank v surety wife* cases the constructive notice that is sought to be attributed to the bank is not constructive notice of any pre-existing prior right or prior equity of the wife. The husband's impropriety, whether undue influence or misrepresentation, in procuring his wife to enter into a suretyship transaction with the bank would not entitle her to set it aside unless the bank had had notice of the impropriety. It is notice of the husband's impropriety that the bank must have, not notice of any prior rights of the wife. It is the notice that the bank has of the impropriety that creates the wife's right to set aside the transaction. The wife does not have any prior right or prior equity.

147. In a case where the financial arrangements with the bank had been negotiated by the husband, no part in the negotiations having been played by the wife, and where the arrangements required the wife to become surety for her husband's debts, the bank would, or should, have been aware of the vulnerability of the wife and of the risk that her agreement might be procured by undue influence or misrepresentation by the husband. In these circumstances the bank would be "put on inquiry", as Lord Browne-Wilkinson put it. But "on inquiry" about what? Not about the existence of undue influence, for how could any inquiry reasonably to be expected of a bank satisfy the bank that there was no undue influence? "On inquiry", in my opinion, as to whether the wife understood the nature and effect of the transaction she was entering into. This is not an "inquiry" in the traditional constructive notice sense. The bank would not have to carry out any investigation or to ask any questions about the reasons why the wife was agreeing to the transaction or about her relationship with her husband. The bank would not, unless it had notice of additional facts pointing to undue influence or misrepresentation, be on notice that undue influence or misrepresentation was to be presumed. It would simply be on notice of a risk of some such impropriety. What Lord Browne-Wilkinson had in mind was that the bank should be expected to take reasonable steps to satisfy itself that she understood the transaction she was entering into. If the bank did so, no longer could constructive notice of any impropriety by the husband in procuring his wife's consent be imputed to it. The original constructive notice would have been shed. If, on the other hand, a bank with notice of the risk of some such impropriety, failed to take the requisite reasonable steps, then, if it transpired that the wife's consent had been procured by the husband's undue influence or misrepresentation, constructive knowledge that that was so would be imputed to the bank and the wife would have the same remedies as she would have had if the bank had had actual knowledge of the impropriety.

148. Under Lord Browne-Wilkinson's scheme for the protection of vulnerable wives it is the bank's perception of the risk that the wife's consent may have been procured by the husband's misrepresentation or undue influence that is central. The risk must be viewed through the eyes of the bank. Some degree of risk can, usually, never be wholly eliminated. But it can be reduced to a point at which it becomes reasonable for the bank to rely on the apparent consent of the wife to enter into the transaction and to take no further steps to satisfy itself that she understood the transaction she was entering into. Lord Browne-Wilkinson thought that, in order to reach this point, the bank should itself give the wife an explanation of the nature and effect of the proposed transaction and should advise her to take independent legal advice. The function of these steps would be to try and ensure that the wife understood what she was doing in entering into the proposed transaction and that her consent to do so was an informed consent. But whether these steps would always be necessary, or would always be sufficient, would depend on the facts of the particular case. Lord Browne-Wilkinson was not legislating; he was suggesting steps that, if taken, would in the normal case entitle a bank to rely on the wife's apparent consent, evidenced by her signature to the document or documents in question.

149. In each of the *wife v bank* appeals now before your Lordships, the transactions pre-dated *O'Brien* and the bank did not have the advantage of the guidance provided by Lord Browne-Wilkinson. The question to be asked in each of these cases, therefore, is whether at the time the security was granted to the bank, the bank's perception of the risk that the grant might have been procured by the husband's impropriety was such as to have required the bank to take some additional steps to satisfy itself that she understood the nature and effect of the transaction.

150. Since Lord Browne-Wilkinson's constructive notice route for providing protection to vulnerable wives who agree to become sureties for their husband's debts was substantially based on the risk that the wife might have been subjected to undue influence by her husband, it is necessary to review the principles of undue influence on which he built that protection.

Undue influence

151. Undue influence cases have, traditionally, been regarded as falling into two classes, cases where undue influence must be affirmatively proved (Class 1) and cases where undue influence will be presumed (Class 2). The nature of the two classes was described by Slade LJ in *Bank of Credit and Commerce International SA* [1990] 1 QB 923, at p 953:

> "Ever since the judgments of this court in *Allcard v Skinner* . . . . a clear distinction has been drawn between (1) those cases in which the court will uphold a plea of undue influence only if it is satisfied that such influence has been affirmatively proved on the evidence (commonly referred to as cases of 'actual undue influence . . . ' 'Class 1' cases); (2) those cases (commonly referred to as cases of 'presumed undue influence . . . ' 'Class 2' cases) in which the relationship between the parties will lead the court to presume that undue influence has been exerted unless evidence is adduced proving the contrary, eg by showing that the complaining party has had independent advice".

152. This passage provides, if I may respectfully say so, an accurate summary description of the two classes. But, like most summaries, it requires some qualification.

153. First, the Class 2 presumption is an evidential rebuttable presumption. It shifts the onus from the party who is alleging undue influence to the party who is denying it. Second, the weight of the presumption will vary from case to case and will depend both on the particular nature of the relationship and on the particular nature of the impugned transaction. Third, the

type and weight of evidence needed to rebut the presumption will obviously depend upon the weight of the presumption itself. In *Allcard v Skinner* (1887) 36 Ch D 145 the presumption was a very heavy one. Correspondingly strong evidence would have been needed to rebut it. Even independent legal advice would not necessarily have sufficed. Lindley LJ, at p 184, made clear his view that without legal independent advice the presumption could not have been rebutted but went on to doubt whether independent legal advice would have sufficed "unless there was also proof that she was free to act on the advice which might be given to her". And in *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 Lord Hailsham LC said, at p 135:

> "their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted . . ."

154. The onus will, of course, lie on the person alleging the undue influence to prove in the first instance sufficient facts to give rise to the presumption. The relationship relied on in support of the presumption will have to be proved.

155. In *National Westminster Bank v Morgan* [1985] AC 686, 704 Lord Scarman, referring to the character of the impugned transaction in a Class 2 case, said:

> "it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence".

Lord Scarman went on:

> "In my judgment, therefore, the Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it."

With respect to Lord Scarman, the reasoning seems to me to be circular. The transaction will not be "wrongful" unless it was procured by undue influence. Its "wrongful" character is a conclusion, not a tool by which to detect the presence of undue influence. On the other hand, the nature of the transaction, its inexplicability by reference to the normal motives by which people act, may, and usually will, constitute important evidential material.

156. Lord Browne-Wilkinson in *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200 pointed out, plainly correctly, that if undue influence is proved, the victim's right to have the transaction set aside will not depend upon the disadvantageous quality of the transaction. Where, however a Class 2 presumption of undue influence is said to arise, the nature of the impugned transaction will always be material, no matter what the relationship between the parties. Some transactions will be obviously innocuous and innocent. A moderate gift as a Christmas or birthday present would be an example. A solicitor who is appointed by a client as his executor and given a legacy of a moderate amount if he consents to act, is not put to proof of the absence of undue influence before he can take the legacy. If the nun/postulant/novice in *Allcard v Skinner* had given moderate Christmas presents to the Mother Superior, or to the Sisterhood, no inference that the gifts had been procured by undue influence could be drawn and no presumption of undue influence would have arisen. It is, in my opinion, the combination of relationship and the nature

of the transaction that gives rise to the presumption and, if the transaction is challenged, shifts the onus to the transferee.

157. In *Aboody* [1990] 1 QB 923 Slade LJ split the Class 2 cases into two sub-divisions. He categorised, at p 953, the "well established categories of relationships, such as a religious superior and inferior and doctor and patient where the relationship as such will give rise to the presumption" as Class 2A cases, and confirmed that neither a husband/wife relationship nor a banker/customer relationship would normally give rise to the presumption. (See also *National Westminster Bank Plc v Morgan* [1985] AC 686, 703 and *O'Brien* [1994] 1 AC 180, 190). He continued, at p 953:

> "Nevertheless, on particular facts (frequently referred to in argument as 'Class 2B' cases) relationships not falling within the 'Class 2A' category may be shown to have become such as to justify the court in applying the same presumption."

In *O'Brien* Lord Browne-Wilkinson adopted Slade LJ's Class 2B category for the purpose of the surety wife cases that he was considering. He said, at pp 189-190:

> "Even if there is no relationship falling within Class 2(A), if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a Class 2(B) case, therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned."

158. In my respectful opinion, this passage, at least in its application to the surety wife cases, has set the law on a wrong track. First, it seems to me to lose sight of the evidential and rebuttable character of the Class 2 presumption. The presumption arises where the combination of the relationship and the nature of the transaction justify, in the absence of any other evidence, a conclusion that the transaction was procured by the undue influence of the dominant party. Such a conclusion, reached on a balance of probabilities, is based upon inferences to be drawn from that combination. There are some relationships, generally of a fiduciary character, where, as a matter of policy, the law requires the dominant party to justify the righteousness of the transaction. These relationships do not include the husband wife relationship. In the surety wife cases, the complainant does have to prove undue influence: the presumption, if it arises on the facts of a particular case, is a tool to assist him or her in doing so. It shifts, for the moment, the onus of proof to the other side.

159. Second, the passage cited appears to regard a relationship of trust and confidence between a wife and husband as something special rather than as the norm. For my part, I would assume in every case in which a wife and husband are living together that there is a reciprocal trust and confidence between them. In the fairly common circumstance that the financial and business decisions of the family are primarily taken by the husband, I would assume that the wife would have trust and confidence in his ability to do so and would support his decisions. I would not expect evidence to be necessary to establish the existence of that trust and confidence. I would expect evidence to be necessary to demonstrate its absence. In cases where experience, probably bitter, had led a wife to doubt the wisdom of her husband's financial or business decisions, I still would not regard her willingness to support those decisions with her own assets as an

indication that he had exerted undue influence over her to persuade her to do so. Rather I would regard her support as a natural and admirable consequence of the relationship of a mutually loyal married couple. The proposition that if a wife, who generally reposes trust and confidence in her husband, agrees to become surety to support his debts or his business enterprises a presumption of undue influence arises is one that I am unable to accept. To regard the husband in such a case as a presumed "wrongdoer" does not seem to me consistent with the relationship of trust and confidence that is a part of every healthy marriage.

160. There are, of course, cases where a husband does abuse that trust and confidence. He may do so by expressions of quite unjustified over-optimistic enthusiasm about the prospects of success of his business enterprises. He may do so by positive misrepresentation of his business intentions, or of the nature of the security he is asking his wife to grant his creditors, or of some other material matter. He may do so by subjecting her to excessive pressure, emotional blackmail or bullying in order to persuade her to sign. But none of these things should, in my opinion, be presumed merely from the fact of the relationship of general trust and confidence. More is needed before the stage is reached at which, in the absence of any other evidence, an inference of undue influence can properly be drawn or a presumption of the existence of undue influence can be said to arise.

161. For my part, I doubt the utility of the Class 2(B) classification. Class 2(A) is useful in identifying particular relationships where the presumption arises. The presumption in Class 2(B) cases, however, is doing no more than recognising that evidence of the relationship between the dominant and subservient parties, coupled with whatever other evidence is for the time being available, may be sufficient to justify a finding of undue influence on the balance of probabilities. The onus shifts to the defendant. Unless the defendant introduces evidence to counteract the inference of undue influence that the complainant's evidence justifies, the complainant will succeed. In my opinion, the presumption of undue influence in Class 2(B) cases has the same function in undue influence cases as *res ipsa loquitur* has in negligence cases. It recognises an evidential state of affairs in which the onus has shifted.

162. In the surety wife cases it should, in my opinion, be recognised that undue influence, though a possible explanation for the wife's agreement to become surety, is a relatively unlikely one. *O'Brien* itself was a misrepresentation case. Undue influence had been alleged but the undoubted pressure which the husband had brought to bear to persuade his reluctant wife to sign was not regarded by the judge or the Court of Appeal as constituting undue influence. The wife's will had not been overborne by her husband. Nor was *O'Brien* a case in which, in my opinion, there would have been at any stage in the case a presumption of undue influence.

The steps to be taken by the creditor bank

163. The protection that Lord Browne-Wilkinson proposed for the vulnerable surety wives is based upon the undoubted risk that in procuring his wife's consent to the transaction the husband might have used undue influence or made some material misrepresentation and upon the proposition that the bank must be taken to be aware of the existence of the risk. So the bank should take reasonable steps to satisfy itself that the wife understands what she is doing. The protection is not based upon the bank's knowledge of facts from which a presumption of undue influence arises. If, of course, a bank is aware of such facts, the steps the bank will then have to take in order to be able with safety to rely on the wife's apparent consent to the transaction may be considerable. In his dissenting judgment in *Banco Exterior Internacional v Mann* [1995] 1 All ER 936 Hobhouse LJ (as he then was) said, at p 948:

> "It must be remembered that the starting point of this exercise is that the wife's will is being unduly and improperly influenced by the will of her husband. The steps taken have to be directed to freeing her of that influence or, at the least, providing some counterbalance."

164. I respectfully agree that if the bank is indeed aware of facts from which undue influence is to be presumed, the steps to be taken would be of the sort Hobhouse LJ describes. But in the ordinary case the facts of which the bank is aware, or must be taken to be aware, point to no more than the existence of the inevitable risk that there may have been undue influence or some other impropriety and are not facts sufficient by themselves to give rise to a presumption of undue influence. In such a case the bank does not have to take steps to satisfy itself that there is no undue influence. It must take steps to satisfy itself that the wife understands the nature and effect of the transaction.

165. Lord Browne-Wilkinson made clear, at [1994] 1 AC 180, 197, that it would only be in exceptional cases "where a creditor has knowledge of further facts which render the presence of undue influence not only possible but probable" that a bank would, to be safe, have to insist that the wife be separately advised. In other cases it would suffice if the bank took steps "to bring home to the wife the risk she is running by standing as surety and to advise her to take separate advice" (p 196). He added that, as to past transactions - and each of the cases now before the House involves a past transaction - it would depend on the facts of each case whether the bank had satisfied the reasonable steps test. I would emphasise and repeat that the purpose of the steps, in the ordinary surety wife case, would be to satisfy the bank that the wife understood the nature and effect of the transaction she was entering into.

The problems

166. The application of the *O'Brien* principles has, in the appeals now before the House, given rise to some particular problems which are to be found, also, in most of the post *O'Brien* reported cases.

Solicitors' Advice

167. In a number of cases a firm of solicitors has been acting for the husband in the transaction with the bank and has acted also for the wife in connection with the grant of the security to the bank. In many cases, the same solicitor acting for the husband and the wife has been asked by the bank to act for it in connection with the completion of the security. A number of questions arise: for instance—

> 1. Does the fact that, to the knowledge of the bank, a solicitor is acting for the wife in the security transaction entitle the bank reasonably to believe that the solicitor will have given her an adequate explanation of the nature and effect of the security document she is to sign?
> 2. If so, are there, in the ordinary case, ie where there is no special reason for the bank to suspect undue influence or other impropriety, any other steps that the bank ought reasonably to take?
> 3. If the answer to question 1 is 'yes' and to question 2 is 'No', does the fact that the solicitor is also the husband's solicitor and is acting for the bank in arranging for completion of the security bar the bank from relying on the solicitor's role in acting for the wife?

> 4. In many cases the solicitor in whose offices the wife has signed the security document has confirmed, sometimes on the document itself and sometimes in a covering letter to the bank, that the nature and effect of the document has first been explained to the wife and that she has appeared to understand it and to be entering freely into the transaction, or to that effect. If in these cases the solicitor has in fact given no, or no adequate, explanation of the document to the wife, in what circumstances can the solicitor's knowledge of his failure be attributed to the bank?

168. As to question 1, the duty of a solicitor towards his client is, in every case, dependent on the instructions, express or implied, that he has received from his client. A solicitor acting for a client in connection with a proposed transaction under which the client is to become surety or give security for the debts of another will not necessarily have instructions to advise the client about the nature and effect of the transaction. In most cases such instructions, if not express, would, I think, be implied; but it is at least possible that the circumstances of the solicitor's retainer would not require him to give such advice. So, in my opinion, knowledge by a bank that a solicitor is acting for a surety wife does not, without more, justify the bank in assuming that the solicitor's instructions extend to advising her about the nature and effect of the transaction.

169. Normally, however, a solicitor, instructed to act for a surety wife in connection with a suretyship transaction would owe a duty to the wife to explain to her the nature and effect of the document or documents she was to sign. Exactly what the explanation should consist of would obviously depend in each case on the facts of that case and on any particular concerns that the wife might have communicated to the solicitor. In general, however, the solicitor should, in my opinion:

> (i) explain to the wife, on a worst case footing, the steps the bank might take to enforce its security;
> (ii) make sure the wife understands the extent of the liabilities that may come to be secured under the security;
> (iii) explain the likely duration of the security;
> (iv) ascertain whether the wife is aware of any existing indebtedness that will, if she grants the security, be secured under it;
> (v) explain to the wife that he may need to give the bank a written confirmation that he has advised her about the nature and effect of the proposed transaction and obtain her consent to his doing so.

170. I think the solicitor should, probably, begin by trying to discover from the wife her understanding of the proposed transaction. He, the solicitor, may then be in a position to remedy any misapprehensions and cure any misrepresentations.

171. A bank, proposing to take a security from a surety wife for whom a solicitor is acting, requires, first, confirmation that the solicitor's instructions do extend to advising her about the nature and effect of the transaction. Subject to that confirmation, however, the bank is, in my opinion, entitled reasonably to believe that the solicitor will have advised her on the matters to which I have referred and, accordingly, that she has had an adequate explanation and has an adequate understanding of the transaction.

172. As to question 2, there are, in my opinion, in the ordinary case and subject to the points about disclosure that I will make later, no other steps that the bank can reasonably be required

to take. In particular the bank does not, in order to be able safely to rely on the security being offered, have to advise the wife about the wisdom of her entry into the transaction, or about the bank's opinion of the financial state or business prospects of the principal debtor.

173. As to question 3, the fact that the solicitor is acting also for the bank in arranging for completion of the security does not, in my opinion, alter the answers to questions 1 and 2. The solicitor's role in acting for the bank is essentially administrative. He must see that the security document is validly executed and, if necessary, see to its registration. If there are documents of title to whose custody the bank, as chargee, is entitled, the solicitor will usually have to obtain them and hold them to the bank's order. But he has no consultative role vis a vis the bank. His duties to the bank do not, in my opinion, in the least prejudice his suitability to advise the wife.

174. If the solicitor is acting also for the husband, his role presents a little more difficulty. It is, after all, the existence of the risk of undue influence or misrepresentation by the husband that requires the bank to be reasonably satisfied that the wife understands the nature and effect of the transaction. If there is some particular reason known to the bank for suspecting undue influence or other impropriety by the husband, then, in my view, the bank should insist on advice being given to the wife by a solicitor independent of the husband (see Lord Browne-Wilkinson in *O'Brien*, at p 197). But in a case in which there is no such particular reason, and the risk is no more than the possibility, present in all surety wife cases, of impropriety by the husband, there is no reason, in my opinion, why the solicitor advising the wife should not also be the husband's solicitor. In the ordinary case, in my opinion, the bank is entitled to rely on the professional competence and propriety of the solicitor in providing proper and adequate advice to the wife notwithstanding that he, the solicitor, is acting also for the husband.

175. As to question 4, if the bank knows or has reason to suspect that the solicitor has not given the wife a proper explanation of the nature and effect of the security document, the bank should take some appropriate steps to remedy the failure. The failure of the solicitor to give the bank written confirmation that he has given the wife such an explanation will in many cases give the bank reason to suspect that he has not done so. In general, however, it will be reasonable for the bank to believe that the solicitor has properly discharged his professional duty.

176. Mr Sher QC, counsel for five of the wives, placed some reliance on section 199(1)(ii)(b) of the Law of Property Act 1925:

> "(1) A purchaser shall not be prejudicially affected by notice of— . . .
> (ii) any . . . matter or any fact or thing unless—
> (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such . . . ."

177. Mr Sher submitted that if a solicitor was instructed by a bank to arrange on its behalf for completion of a security to be granted by a surety wife, the solicitor was, for the purpose of any explanation or advice to be given to the wife, acting not only as the wife's solicitor but also as the bank's solicitor. That being so, the solicitor's knowledge of his own failure should, Mr Sher submitted, be attributed to the bank. Particularly, he submitted, this should be so if the solicitor's instructions from the bank had included a request that the solicitor give appropriate advice to the wife.

178. A distinction must, in my opinion, be drawn between the case where the solicitor, as well as having instructions from the bank, is solicitor for the wife and the case where the solicitor's

only instructions come from the bank and the bank is his only client. In the former case, the solicitor' s duty, so far as advice to the wife is concerned, is owed to her and her alone. The fact that a request for him to advise her may have been made by the bank is immaterial on this point. It follows that in advising her the solicitor is not acting as the bank's solicitor and section 199(1)(ii)(b) does not apply.

179. A different conclusion must, in my opinion, be reached if the solicitor in question never does become the wife's solicitor. The formation of a solicitor/client relationship may come about by express retainer or the retainer may be implied by conduct. But whichever it is, it is not a relationship which can be brought into existence by the solicitor unilaterally. In making these comments I have in mind the assumed facts in *Wallace* that are more fully set out below (see pp 92-94). Shortly stated, the bank asked the solicitor to arrange for completion of the security and to advise the wife about it, the solicitor represented to the bank that he had advised the wife, the bank had no reason to doubt that that was so, but in fact the solicitor had given no advice or tendered any other services to the wife, other than witnessing her signature, a service for which he charged the bank, and she had had no reason to and did not regard him as acting for her. In those circumstances, the solicitor was, in my opinion, acting for the bank alone and his knowledge that no one had given the wife any explanation or advice about the security document could properly be attributed to the bank. But, as I have said, in cases where the solicitor has become the wife's solicitor and owes her a duty to advise her about the security document, his knowledge of his own failure to discharge that duty cannot, in my view, be attributed to the bank.

180. In *Etridge (No 2)* [1998] 4 All ER 705, 721 Stuart-Smith LJ set out, in para 44, a number of propositions, (1) to (6), relating to legal advice to a surety wife. I respectfully agree with all these propositions, save that knowledge by a bank of special facts pointing to undue influence might require a different approach and that where the solicitor was acting only for the bank and had never become the solicitor for the wife, his knowledge of what had or had not taken place regarding advice to the wife might well be imputed to the bank.

181. At p 715, para 19 of the *Etridge (No 2)* judgment Stuart-Smith LJ expressed the view of the court as to the duty owed by a solicitor "instructed to advise a person who may be subject to the undue influence of another". He said:

> "It is not sufficient to explain the documentation and ensure that she understands the nature of the transaction and wishes to carry it out."

and:

> "His duty is to satisfy himself that his client is free from improper influence, and the first step must be to ascertain whether it is one into which she could sensibly be advised to enter if free from such influence."

182. These passages were cited and applied by Mance LJ in *Kenyon-Brown v Desmond Banks & Co* [2000] PNLR 266, 273. I must respectfully dissent. The duty thus described may be applicable in a case in which the solicitor has had something or other drawn to his attention which arouses suspicion that the wife may be the victim of undue influence. In the ordinary case, however, where there is no more than a normal relationship of trust and confidence, financial arrangements negotiated by the husband with the bank and the wife proposing to become surety for her husband's, or his company's, debts, there will be no presumption of undue influence and no reasonable basis for suspicion of its existence. There will be a risk, a

possibility, of undue influence or misrepresentation, but no more than that. The solicitor in such a case does not have a duty to satisfy himself of the absence of undue influence. His duty is accurately described as a duty to satisfy himself that his client understands the nature and effect of the transaction and is willing to enter into it.

Disclosure

183. One of the issues that has arisen in several of the cases is as to the extent of disclosure to the surety wife, or to the solicitor acting for her, that is required of the bank.

184. As to this, the wife's understanding of the nature and effect of the security document she is asked to sign should, obviously, be an informed understanding. It is necessary, it seems to me, to consider, first, the extent of the obligation of disclosure to a would-be surety that lies generally upon the creditor and, secondly, to consider whether any additional disclosure has to be made where a wife is proposing to stand surety for her husband's debts.

The general law

185. A suretyship contract is not a contract *uberrimae fidei.* In *Seaton v Heath* [1899] 1 QB 782 Romer LJ said, at p 793:

> "The risk undertaken is generally known to the surety and the circumstances generally point to the view that as between the creditor and surety it was contemplated and intended that the surety should take upon himself to ascertain exactly what risk he was taking upon himself."

186. But although a would-be surety is, in general, expected to acquaint himself with the risk he is undertaking, the creditor is under an obligation to disclose to the intending surety

> "anything which might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect" (per Lord Campbell in *Hamilton v Watson* (1845) 12 Cl & F 109 at 119).

187. This passage from Lord Campbell's judgment in *Hamilton v Watson* was cited by Vaughan Williams LJ in *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, 78. Vaughan Williams LJ continued, at p 79:

> "Lord Campbell, it is true, takes as his example of what might not be naturally expected an unusual contract between creditor and debtor whose debt the surety guarantees, but I take it this is only an example of the general proposition that a creditor must reveal to the surety every fact which under the circumstances the surety would expect not to exist, for the omission to mention that such a fact does exist is an implied representation that it does not."

188. The general proposition expressed by Vaughan Williams LJ was somewhat extended by King CJ in *Pooraka Holdings Pty Ltd v Participation Nominees Pty Ltd* (1991) 58 SASR 184. The duty of disclosure, said King CJ, extends to any unusual feature surrounding the transaction between the creditor and the surety (a) of which the creditor is or ought to be aware, (b) of which the surety is unaware, and (c) which the creditor appreciates, or in the circumstances

ought to appreciate, might be unknown to the surety and might affect the surety's decision to become a surety. This statement of the extent of the disclosure obligation may be too wide. But at least, in my opinion, the obligation should extend to unusual features of the contractual relationship between the creditor and the principal debtor, or between the creditor and other creditors of the principal debtor, that would or might affect the rights of the surety (see generally the discussion of this topic in *O'Donovan & Phillips*, The Modern Contract of Guarantee, 3rd ed (1996), at pp 122-131).

Disclosure to surety wives

189. In general, in my opinion, there is no greater obligation of disclosure owed by a bank, or other creditor, to a surety wife than to any other surety. There is, however, a difference. Where a wife is offering to stand as surety for her husband's, or his company's debts, the risk that her consent to do so may have been improperly procured, requires the creditor, if it is to be able safely to rely on her apparent consent, to take reasonable steps to satisfy itself that she understands what she is doing. In order to satisfy itself about this, and in order that her understanding may be an informed understanding, it may be necessary for the creditor to disclose the amount of any existing indebtedness that will be covered by the security. It may for the same reason be necessary for the creditor to disclose the amount of new money that is being made available to the principal debtor and will be covered by the security. The financial details to which I have referred would not, under the general law, have to be disclosed by a creditor to the would-be surety. They are details that the creditor could expect the surety, as part of the surety's risk assessment, to find out for himself. But the surety wife cases present their own special problems, as was recognised in *O'Brien*. In the surety wife cases, and in any other cases in which a creditor is placed on inquiry as to whether the surety's apparent consent to the transaction may have been procured by some impropriety of the principal debtor, the reasonable steps the creditor should take would generally include, in my opinion, disclosing to the surety the financial details to which I have referred. Failure to do so would not matter, of course, if the surety already knew the details or if the creditor had reason to believe that the surety knew. I should, perhaps, add that the failure of a creditor to have disclosed these details should not, without more, be taken, in relation to past transactions, to show that the creditor had failed to take reasonable steps.

190. The financial details to which I have referred would, if the creditor were a bank, normally be confidential. The bank would not be entitled to disclose them without the consent of its client, the principal debtor. However, in the surety wife cases I would regard the husband's proposal that the wife stand surety for his, or his company's, debts as constituting an implied authority to the bank to disclose those details to the wife. Express instructions to the contrary, if given by the husband to the bank, would constitute a warning to the bank of an extra risk that the husband might be abusing his wife's trust and confidence in him. I think that the bank, before it could safely rely on the wife's apparent consent to the suretyship, would then need to insist that she receive legal advice from a solicitor independent of her husband.

Summary

191. My Lords I think, given the regrettable length of this opinion, I should try and summarise my views about the principles that apply and the practice that should be followed in surety wife cases.

1. The issue as between the surety wife and the lender bank is whether the bank may rely on the apparent consent of the wife to the suretyship transaction.

2. If the bank knows that the surety wife's consent to the transaction has been procured by undue influence or misrepresentation, or if it has shut its eyes to the likelihood that that was so, it may not rely on her apparent consent.

3. If the wife's consent has in fact been procured by undue influence or misrepresentation, the bank may not rely on her apparent consent unless it has good reason to believe that she understands the nature and effect of the transaction.

4. Unless the case has some special feature, the bank's knowledge that a solicitor is acting for the wife and has advised her about the nature and effect of the transaction will provide a good reason for the purposes of 3 above. That will also be so if the bank has a reasonable belief that a solicitor is acting for her and has so advised her. Written confirmation by a solicitor acting for the wife that he has so advised her will entitle the bank to hold that reasonable belief.

5. So, too, a sufficient explanation of the nature and effect of the transaction given by a senior bank official would constitute good reason for the purposes of 3 above.

6. If there are any facts known to the bank which increase the inherent risk that the wife's consent to the transaction may have been procured by the husband's undue influence or misrepresentation, it may be necessary for the bank to be satisfied that the wife has received advice about the transaction from a solicitor independent of the husband before the bank can reasonably rely on the wife's apparent consent.

7. If the bank has not taken reasonable steps to satisfy itself that the wife understands the nature and effect of the transaction, the wife will, subject to such matters as delay, acquiescence, change of position etc., be able to set aside the transaction if her consent was in fact procured by undue influence or misrepresentation.

8. Subject to special instructions or special circumstances, the duty of a solicitor instructed to act for a wife proposing to stand as surety, or to give security, for her husband's debts is to try and make sure that she understands the nature and effect of the transaction.

9. In all surety wife cases the bank should disclose to the surety wife, or to the solicitor acting for her, the amount of the existing indebtedness of the principal debtor to the bank and the amount of the proposed new loan or drawing facility.

10. Subject to 9 above, a creditor has no greater duty of disclosure to a surety wife than to any other intending surety.

192. I am in full agreement with the analysis of the applicable principles of law and with the conclusions expressed in the opinion of my noble and learned friend Lord Nicholls of Birkenhead. I believe the analysis I have sought to give in this opinion and my conclusions are consistent with them.

193. I must now turn to the individual cases.

Royal Bank of Scotland Plc v Etridge

194. This case comes to the House after a full trial before Judge Behrens, sitting as a judge in the Queen's Bench Division.

195. Judge Behrens held that even if Mrs Etridge's consent to the bank's charge had been procured by the undue influence of Mr Etridge, the bank had had no notice, constructive or otherwise, of the undue influence. The Court of Appeal upheld him.

196. The relevant facts were these:

In August 1988 Mr and Mrs Etridge were living in Harewood House, Longparish, Hampshire. The property stood in Mrs Etridge's sole name. It was subject to a charge to the bank to secure the indebtedness to the bank of Anthony Thomas & Co, a company owned and controlled by Mr Etridge. A firm of solicitors, Memery Crystal, had acted for Mr and Mrs Etridge in connection both with the purchase and with the bank's charge.

197. By August 1988 Mr Etridge had an overdraft facility with the bank of £100,000. He had also borrowed £195,000 from the trustees of a private trust (the Ambetta trustees). This debt was not secured on Harewood House.

198. In August 1988 Mr and Mrs Etridge decided to sell Harewood House and purchase in its place The Old Rectory, Laverstoke, Hampshire. Mr Etridge was the contracting purchaser of The Old Rectory. The purchase price was £505,000. It was his and Mrs Etridge's intention that The Old Rectory would, on completion of the purchase, be conveyed to Mrs Etridge alone. Memery Crystal were instructed to act in the sale of Harewood House but another firm, Robert Gore & Co, were instructed by Mr Etridge to act in the purchase of The Old Rectory.

199. The purchase of The Old Rectory was to be financed partly out of the proceeds of the sale of Harewood House and partly out of new money to be advanced by the bank. In addition, money was to be advanced by the Ambetta trustees. The financial arrangements were fairly complex and were negotiated by Mr Etridge. Mrs Etridge played no part in the negotiations.

200. The sale price of Harewood House was £240,000. The net proceeds, after the Anthony Thomas & Co overdraft charged on Harewood House had been repaid, were £142,000 or thereabouts. On the day of completion of the purchase of The Old Rectory, Mr Etridge drew £261,956 odd from the bank, thereby creating an overdraft of £119,915 odd. The £261,956, plus a further advance of £200,000 from the Ambetta trustees, enabled the amount due on completion to be paid. The debts owing both to the bank and to the Ambetta trustees were to be secured by charges over The Old Rectory. As between the two chargees, it was agreed that the bank would have priority in respect of £100,000 and interest thereon. Next would come the debt owing to the Ambetta trustees.

201. On 27 September 1988, the bank had instructed Robert Gore & Co to act for the bank in connection with the charge that the bank was to be granted over The Old Rectory. The letter of instructions said:

> "Re: Mrs S R Etridge
> Purchase of The Old Rectory, Laverstoke,
> Hampshire.
> We understand you act for the above and would advise that as security for existing facilities we require to take a First Legal Charge over the above property. For Land Registry purposes we are relying on the Legal Charge to the extent of £100,000.
> We enclose the documents detailed below and would ask that you act on our behalf in the completion of our security.
> Legal Charge

> Prior to execution, please ensure the property details are correct and inserting further details as may be required. Please explain the contents and effects of the document to Mrs Etridge, confirming she understands the same by signing the legal advice clause prior to witnessing her signature."

202. Similar instructions were given to Robert Gore & Co by the Ambetta trustees.

203. On 3 October 1988 Mr and Mrs Etridge attended the offices of Robert Gore & Co and saw Mr Ellis, an employed solicitor with the firm. Mrs Etridge signed all the documents relating to the acquisition of The Old Rectory, including the bank's charge and the Ambetta trustees' charge. The bank's charge was expressed to be a security for Mr Etridge's liabilities to the bank and was unlimited in amount. The Ambetta trustees' charge was expressed to be a security for Mr Etridge's liabilities to the trustees subject to a limit of £395,000. Mrs Etridge's signature was witnessed by Mr Ellis who endorsed the bank's charge with the words:

> "I hereby confirm that prior to the execution of this document I explained the contents and effect thereof to [Mrs Etridge] who informed me that he/she understood the same."

The Ambetta charge was endorsed with words to the same effect.

204. In fact, Mr Ellis gave Mrs Etridge no advice of any kind as to the nature or content of the documents she was signing. She signed the documents without reading them or seeking any explanation of them. Her evidence to Judge Behrens was that she did so, trusting her husband and quite unaware that she was creating charges over The Old Rectory. She said that she was wholly unaware of the extent of Mr Etridge's borrowings. Judge Behrens accepted this evidence.

205. The transfer of The Old Rectory to Mrs Etridge and the two charges were completed on 4 October 1988.

206. In April 1990 the bank, and in August 1991 the Ambetta trustees, demanded repayment of their respective secured loans. Both then commenced proceedings for, among other things, possession of The Old Rectory with a view to its sale.

207. Mrs Etridge's defence was that her signature to the charges had been procured by the undue influence of her husband, that the bank and the Ambetta trustees must be taken to have had constructive notice that that was so and that in consequence she was not bound by the charges. She contended, also, that the bank had constituted Robert Gore & Co its agents for the purpose of giving her advice about the charges and that Mr Ellis' knowledge that he had not done so should, therefore, be attributed to the bank.

208. As well as defending the proceedings brought against her by the bank and the Ambetta trustees, Mrs Etridge sued Robert Gore & Co for negligence. The three claims were tried together.

209. Judge Behrens held that even if there had been undue influence by Mr Etridge in procuring Mrs Etridge to agree to the grant of the two charges, notice of that impropriety could not be attributed either to the bank or to the Ambetta trustees. He held that both the bank and the Ambetta trustees had been entitled to rely on the confirmation, given by Mr Ellis by means of the endorsements on the charges, that Mrs Etridge had had the effect and contents of the charges explained to her (see p 19 of his judgment).

210. The judge held, also, that "on the evidence before me there was no actual undue influence . . . . ". He followed this finding, however, by holding that "subject to the manifest disadvantage point there was presumed undue influence within category 2B". As to manifest disadvantage, he held that there was no manifest disadvantage to Mrs Etridge in the charge granted to the bank. This was because the liabilities secured by the charge included £100,000 advanced by the bank to Mr Etridge to enable the purchase of The Old Rectory to be completed.

211. The judge held, however, that there was manifest disadvantage to Mrs Etridge in the charge granted to the Ambetta trustees because only £200,000 of the £395,000 secured by the charge had been advanced to enable the purchase of The Old Rectory to be completed.

212. It appears, therefore, that, subject to the judge's conclusion on constructive notice, he would have held that Mrs Etridge was bound by the bank charge but not bound by the Ambetta trustees' charge.

213. As to Mrs Etridge's breach of duty claim against Robert Gore & Co the firm admitted liability to Mrs Etridge for breach of duty but was satisfied on the evidence of Mrs Etridge herself that she would have signed the two charges even if she had had a complete and full explanation of their contents and effect. So he awarded her only £2 nominal damages.

214. On Mrs Etridge's appeal, the Court of Appeal rejected her challenge to the judge's finding that there had been no actual undue influence but agreed that, subject to manifest disadvantage, there was presumed undue influence within category 2B. The Court of Appeal agreed, also, that notwithstanding that the bank charge secured Mr Etridge's indebtedness to an unlimited amount, the charge was not to Mrs Etridge's manifest disadvantage. The Ambetta trustees did not challenge the judge's conclusion that their charge was to the manifest disadvantage of Mrs Etridge.

215. On the constructive notice issue, too, the Court of Appeal agreed with the judge.

216. Mrs Etridge appealed against the judge's conclusion that she was entitled only to nominal damages against Robert Gore & Co. The Court of Appeal dismissed her appeal on 28 April 1999 [1999] PNLR 839.

217. In the period during which the appeal to this House has been pending, terms of settlement have been reached between Mrs Etridge and the Ambetta trustees. So it is only her appeal in the bank's proceedings that is before the House for decision.

218. My Lords, the manner which first Judge Behrens and then the Court of Appeal dealt with the presumption of undue influence and with the part to be played by manifest disadvantage demonstrates, in my opinion, the tangle that the case law in this area has got into.

219. The presumption of undue influence, whether in a category 2A case, or in a category 2B case, is a rebuttable evidential presumption. It is a presumption which arises if the nature of the relationship between two parties coupled with the nature of the transaction between them is such as justifies, in the absence of any other evidence, an inference that the transaction was procured by the undue influence of one party over the other. This evidential presumption shifts the onus to the dominant party and requires the dominant party, if he is to avoid a finding of undue influence, to adduce some sufficient additional evidence to rebut the presumption. In a case where there has been a full trial, however, the judge must decide on the totality of the evidence before the court whether or not the allegation of undue influence has been proved. In

an appropriate case the presumption may carry the complainant home. But it makes no sense to find, on the one hand, that there was no undue influence but, on the other hand, that the presumption applies. If the presumption does, after all the evidence has been heard, still apply, then a finding of undue influence is justified. If, on the other hand, the judge, having heard the evidence, concludes that there was no undue influence, the presumption stands rebutted. A finding of actual undue influence and a finding that there is a presumption of undue influence are not alternatives to one another. The presumption is, I repeat, an evidential presumption. If it applies, and the evidence is not sufficient to rebut it, an allegation of undue influence succeeds.

220. As to manifest disadvantage, the expression is no more than shorthand for the proposition that the nature and ingredients of the impugned transaction are essential factors in deciding whether the evidential presumption has arisen and in determining the strength of that presumption. It is not a divining-rod by means of which the presence of undue influence in the procuring of a transaction can be identified. It is merely a description of a transaction which cannot be explained by reference to the ordinary motives by which people are accustomed to act.

221. In the present case, the judge's conclusion that there had been no actual undue influence was reached after considering all the evidence. There was evidence of the relationship between Mr and Mrs Etridge. Their relationship was, as one would expect of a married couple living together with the family income being provided by the husband's business activities and with financial decisions affecting the family being taken by the husband, a relationship of trust and confidence by her in him. But there was no evidence of abuse by Mr Etridge of that relationship, or of any bullying of Mrs Etridge in order to persuade her to support his decisions. Both the transactions under attack had been entered into in part in order to provide finance for the purchase of The Old Rectory and in part to obtain financial support for Mr Etridge in his business enterprises. Both had elements disadvantageous to her and elements that were to her advantage. To draw a distinction between the two charges as to inferences of undue influence that might be drawn was, in my opinion, unreal. In my view, the judge's conclusion that there had been no undue influence was well justified on the evidence. That conclusion should have been an end of the case.

222. Before your Lordships Mr Mawrey QC, counsel for Mrs Etridge, argued that Mrs Etridge's ignorance of the nature or contents of the documents she was signing and, in particular, her ignorance that she was charging The Old Rectory as a security for her husband's debts, enabled her to contend that she had been induced to sign by her husband's misrepresentation. Mr Etridge had had a duty to explain to her the nature of the transaction. His failure to do so constituted a misrepresentation by silence.

223. Mr Mawrey told us that misrepresentation had always been part of Mrs Etridge's case, and indeed it figures in her pleading. But there is no reference to it in Judge Behrens' judgment. He made no finding on misrepresentation. Nor did the Court of Appeal comment on the point. It is fair to conclude, therefore, that if the misrepresentation point was argued at all below, it could only have been very faintly. This is not surprising for the point is not sustainable. First, a misrepresentation must, if it is to lead to an equitable or legal remedy, have led to a false impression about some material matter being held by the victim. In the present case Mrs Etridge had no impression at all as to the nature of the documents she was signing. No false impression had been planted on her by Mr Etridge. Mr Etridge's silence did not lead her to form, or to continue to hold, any false impression. She did not bother to read the documents that were placed before her for signature, and no one explained them to her, so she did not know what

she was signing. But she was not persuaded to sign by any misrepresentation. Second, Judge Behrens found as a fact that if the nature and content of the documents had been explained to her, she would still have signed. So, if there had been any misrepresentation as to the nature and content of the documents, it had no relevant causative effect. The misrepresentation contention is, in my opinion, for both these reasons a hopeless one.

224. There was, therefore, nothing, no undue influence and no misrepresentation, to which constructive notice could attach.

225. As to constructive notice, the bank was of course aware that Mrs Etridge was offering her property, The Old Rectory, to secure her husband's indebtedness. The bank was, therefore, on notice of a risk that her consent to grant the security might have been improperly obtained by her husband. The bank had no particular reason to suspect either undue influence or misrepresentation but the risk, attendant in every case where a wife is being asked to stand surety for her husband's debts, was present.

226. But Mrs Etridge was, to the knowledge of the bank, being advised by Robert Gore & Co, solicitors. The solicitors confirmed to the bank, in the event falsely but the bank was not to know that that was so, that they had advised Mrs Etridge about the content and effect of the charge. That confirmation, from the bank's point of view, reduced the risk that Mrs Etridge's consent to grant the charge might have been improperly obtained. The possibility that there might have been some such impropriety could never be wholly eliminated. But the fact that to the bank's knowledge there were solicitors acting for Mrs Etridge, and the fact that they had told the bank that they had advised her about the content and effect of the charge, entitled the bank, in my opinion, to be satisfied that it was safe in relying on her apparent consent. There were no further steps that the bank could reasonably have been required to take.

227. Nor, in my opinion, can Robert Gore & Co's knowledge that they had failed to give Mrs Etridge the requisite advice be imputed to the bank. The solicitors were not the bank's agents for the purpose of advising Mrs Etridge.

228. In my opinion, therefore, Mrs Etridge's appeal fails and should be dismissed.

Barclays Bank plc v Harris

229. In this case there has not yet been a trial. Mrs Harris' appeal to your Lordships' House is against an interlocutory order striking-out her Defence and Counterclaim and giving judgment for the bank on its claim for possession. It must, therefore, be assumed that the primary allegations of fact pleaded by Mrs Harris are true.

230. Mr and Mrs Harris were in 1988 joint owners of The Old Rectory, Nether Whitacre, Coleshill, Warwickshire. They had purchased the property in 1976 for £39,000. By 1988 its value was in the region of £200,000. There were two mortgages on the property securing in total about £28,000.

231. Mr Harris was an industrial chemist. He carried on business through the medium of two companies. One, High Tec Powder Coatings Ltd (High Tec), carried on the business of industrial powder coatings producers and finishers. High Tec had an issued share capital of £10,000 divided into 10,000 £1 shares of which 2,499 were held by Mr Harris and 2,499 by Mrs Harris. Mr and Mrs Harris and their son, Peter, were directors of High Tec. But Mrs Harris took no actual part in the conduct of High Tec's business and is described in the company

documents as "Housewife". Mr Harris had given guarantees of High Tec's liabilities to the company's bankers and to its landlords. These guarantees were not secured on The Old Rectory.

232. Mr Harris' other company was S T Harris (Powder Coatings Consultant) Ltd (PCC). Mr Harris' services as a powder coatings consultant were made available to clients through the medium of PCC. PCC had an issued share capital of £2, of which one £1 share was held by Mr Harris and the other by Mrs Harris. They were the directors of PCC and Mrs Harris was the company secretary. As with High Tec, she took no part in PCC's business and was described in the company documents as "Housewife".

233. By 1988 High Tec was in serious financial difficulties. Mr Harris' potential liability under the guarantee he had given was £120,000. He consulted solicitors, Wragge & Co, about how to manage his personal liabilities arising from the failure of High Tec in a way that would enable him to continue to carry on business through PCC.

234. Acting on the advice of Wragge & Co, he arranged banking facilities with Barclays Bank under which the bank would refinance the £28,000 secured under the existing mortgages on The Old Rectory and would provide a loan facility of £100,000 to PCC. These details were not known to Mrs Harris. In return the bank required that a guarantee, unlimited in amount, of PCC's liabilities to the bank be given by both Mr and Mrs Harris and that their liability to the bank under this guarantee be secured by a first charge over The Old Rectory. Mr Harris agreed to this.

235. On 26 October 1988 the bank wrote to Mr Hamlett of Wragge & Co, who the bank knew to be acting for Mr Harris, enclosing the bank's standard form of legal charge and asking Mr Hamlett to arrange to have it signed by Mr and Mrs Harris. The letter asked Mr Hamlett to confirm that the title deeds to The Old Rectory would be held to the bank's order upon repayment of the existing mortgages and added: "under the circumstances, it would probably be easiest if you arrange to redeem the outstanding mortgages and register our charge in the usual fashion". The letter then referred to the guarantee that Mr and Mrs Harris were to give and continued:

> "I would ask you to explain the nature of the document to both parties and confirm to us that independent legal advice has been given . . ."

236. On 27 October 1988 Mr and Mrs Harris went to Wragge & Co's offices and had a meeting with Mr Hamlett. Mrs Harris' pleaded case is that her husband had told her that the bank had agreed to lend PCC some money temporarily, so that he could trade his way out of his financial predicament, that she attended the solicitors' offices at the request of her husband, that Mr Hamlett interviewed them together and showed them a number of legal documents and that her husband told her he wanted her to sign, asking her to trust him. She pleads that after some discussion between Mr Hamlett and her husband that she did not understand, each of them signed the legal documents. The legal documents included a guarantee and a legal charge of The Old Rectory. The legal charge secured Mr and Mrs Harris' liabilities to the bank under the guarantee.

237. Mrs Harris alleges in her pleading that Mr Hamlett was acting for the bank, Mr Harris and for herself (para 3(5) of her defence and counterclaim). But, as my noble and learned friend, Lord Hobhouse of Woodborough, has pointed out, her solicitor in these proceedings, Mr Holt of Evans Derry Binnion has stated in an affidavit of 28 May 1997 that "insofar as my client is concerned Wragge & Co were not her solicitors" (paragraph 6). Your Lordships should assume,

in my opinion, that Mrs Harris' defence will be amended so as to become consistent with that statement.

238. On 27 October 1988, Mr Hamlett wrote to the bank a letter which said, among other things:

> "I have explained to Mr & Mrs Harris in detail this morning the effect of the first charge over the property and of the unlimited personal guarantee."

249. It appears, however, that Mr Hamlett's 27 October letter may not have been received by the bank, or, after receipt, may have gone astray. On 29 June 1989 the bank wrote to him saying that they did not appear to have received from him the confirmation that they had asked for in their letter of 26 October 1988.

240. In her defence and counterclaim, Mrs Harris pleaded that her agreement to sign the guarantee and the legal charge had been obtained "in the premises" by her husband's undue influence, or, alternatively, that it was to be presumed that it had been so obtained. She pleaded that the bank was, or should have been, aware that the transactions were manifestly disadvantageous to her and that the bank had actual or constructive notice of the undue influence. She pleaded that, in the circumstances, the guarantee and the legal charge were not binding on her.

241. As I have said, Mrs Harris' defence and counterclaim were struck out by the deputy district judge. She appealed. Her appeal was heard by Judge Alton, in the Birmingham County Court, who dismissed the appeal. The judge identified two issues, namely:

> "whether the bank was potentially on constructive notice . . . of undue influence, presumed or actual by Mr Harris. Secondly, if so, whether it took reasonable steps to negative such notice."

It was conceded, for the purpose of the strike-out application , that the relationship of trust and confidence between Mr Harris and Mrs Harris brought the case into category 2B where undue influence was to be presumed. I doubt whether this concession was sound, for there was, I think, also a third issue that arose on the pleadings, namely, whether the facts and matters pleaded by Mrs Harris, "the premises" referred to in her defence and counterclaim, raised any presumption at all or could sustain any arguable case of undue influence. I will return to this issue.

242. On the first of the two issues she had identified, the judge concluded that Mrs Harris had pleaded an arguable case that the bank had had constructive notice of the presumed undue influence. But as to the second issue, she concluded that on the facts, either pleaded or not in dispute, the bank, in asking Wragge & Co to give appropriate advice to Mrs Harris, had taken reasonable steps to negative the constructive notice. She held, also, that Wragge & Co were not the bank's agents for any purpose other than to register the charge on the bank's behalf.

243. The Court of Appeal agreed with the judge on both the two issues, per Stuart Smith LJ:

> "The solicitors were acting for Mrs Harris in the transaction and the bank were entitled to assume that they had given appropriate advice and were entitled to accept the solicitors' letter as confirmation that this had been done." [1998] 4 All ER 705, 730).

244. In my opinion, on the premise that the solicitors were indeed Mrs Harris' solicitors, the Court of Appeal came to the correct conclusion. In reviewing their decision, however, I would

start with the third issue. Was this a case in which, on Mrs Harris' pleading, there was an arguable case of undue influence? The relationship of trust or confidence was certainly present. Mr Harris conducted the businesses from which the family income was derived. It was he who negotiated the financial arrangements with Barclays Bank. He did not explain the arrangements to his wife. He simply asked her to sign the legal documentation. But there is no pleaded allegation of misrepresentation. His statement, express or implied, that he would be able to trade his way out of his financial difficulties may have been an expression of over optimism but cannot be, and has not been, suggested to be a misrepresentation. There was no allegation of any bullying of Mrs Harris or of any pressure on her to sign that could be characterized as excessive. She signed, without knowing what she was signing, because she trusted him. This pleaded story does not, in my opinion, raise any presumption of undue influence. It does not, in the absence of any other evidence, justify an inference that Mr Harris brought undue influence to bear in order to persuade her to sign. Her agreement to do so is consistent with a normal, trusting, relationship between a married couple. Since, however, it was accepted below that, for striking-out purposes, Mrs Harris could rely on there being a presumption of undue influence, it would not be right to uphold the striking-out on this ground. The critical issue is the constructive notice issue.

245. As to constructive notice, the bank knew that Mrs Harris was agreeing to become surety for the debts of her husband's company, PCC. As in all such cases the bank was, or ought to have been, aware that there was a risk of misrepresentation or of undue influence. On the pleaded facts, the extent of the risk was not, in my opinion, very great. There were no special features to put the bank on inquiry. But the bank did, in order to protect itself against that risk, have to take reasonable steps to satisfy itself that the nature and effect of the documents she was to sign were properly explained to Mrs Harris.

246. The bank believed that Wragge & Co were acting not only for Mr Harris but also for Mrs Harris and would give Mrs Harris the requisite legal advice about the documents. Mr Hamlett's letter of 27 October, if the bank received it, would have confirmed that belief. But it does not appear that the bank's belief was derived from anything said or done by Mrs Harris. And Mrs Harris contends that Mr Hamlett was not her solicitor and in any event gave her no explanation about the nature and effect of the documents. If these contentions can be made good and if Mrs Harris does succeed in establishing undue influence it is at least arguable that she will succeed on the constructive notice issue. In my opinion, therefore, Mrs Harris' case must be allowed to go to trial. I would allow her appeal.

247. There is a further complication to which I should refer. Mrs Harris died on 22 March 2001 while the appeal to this House was pending. Her appeal abated in accordance with Standing Order X but a Petition for Reviver presented by Mr Harris, her executor, was granted as of course on 9 May 2001. In the hearing of the appeal before your Lordships no point was made as to any effect her death or Mr Harris' executorship might have on the bank's claim for possession of the Old Rectory or on the future course of the litigation. It may seem somewhat incongruous for Mr Harris to be relying on his own undue influence over his wife in order to defeat the bank's possession claim, but any difficulties or problems must be sorted out at trial or by applications made at first instance.

Midland Bank Plc v Wallace

248. In this case, too, there has not been a full trial. The bank, having commenced proceedings for possession of the mortgaged property, made an application for summary judgment. Master

Barratt gave Mrs Wallace leave to defend, but Lloyd J allowed the bank's appeal and made an order for possession. Mrs Wallace appealed. The Court of Appeal dismissed her appeal.

249. The property in question was a leasehold flat, Flat 1, 91, Priory Road, Hampstead. Mr and Mrs Wallace were the joint registered proprietors of the flat which was held for a term of 125 years from 25 December 1986.

250. The flat had been acquired by Mr and Mrs Wallace without the aid of a mortgage, but subsequently had been charged to Northern Rock Building Society to secure an £80,000 advance to Mr Wallace partly to pay off a previous loan from Coutts Bank and partly for his business purposes. By 1988 the Northern Rock money had been fully utilised and Mr Wallace wanted to raise more money. The bank agreed to advance £120,000. The advance was to be repayable on demand and was to be secured by an "all monies" legal charge over the flat. Mr Wallace accepted the bank's offer on 1 December 1988.

251. By a letter dated 13 December 1988 the bank asked a solicitor, Mr Sidney Samson, to "attend to the necessary formalities for us in the signing of the enclosed legal charge form by [Mr and Mrs Wallace]." The legal charge form enclosed with the letter contained, immediately above the space for the chargors' signatures, the following words in bold type:

> "This is an important legal document. The bank recommends that before signing it you should seriously consider seeking the advice of a solicitor or other professional adviser."

252. There was no evidence that Mr Samson had previously acted for Mr or Mrs Wallace. The inference was that Mr Samson was on the Bank's panel of local solicitors willing to accept instructions to act in connection with conveyancing transactions between the Bank and its customers.

253. Mr and Mrs Wallace went together to a meeting with Mr Samson in his offices. In her affidavit sworn on 13 February 1996 Mrs Wallace gave her evidence of what happened at that meeting. The relevant passages were set out in paragraph 5 of the judgment of Stuart-Smith LJ in the Court of Appeal [1998] 4 All ER 705, 735. It is not necessary for me to repeat the whole of the passages but the gist appears from the following excerpts:

> "12. As for the business loan itself, I was not involved at all . . . Eventually I was told that I had to go to a solicitor's office to execute the charge. I was directed to the office of Sidney Samson & Co. The firm had no connection with me . . . I was there three or four minutes at most. . . . I signed the document as directed by a solicitor. There was no other discussion. He did not begin to tell me what I was signing or to explain to me the consequences.
> 13. My impression in retrospect is that the solicitor had been instructed merely to take and witness my signature…I certainly did not regard the solicitor as independent as he was instructed by the bank."

254. Mr and Mrs Wallace signed the legal charge at their meeting with Mr Samson in his offices. He witnessed their signatures. Beneath Mrs Wallace's signature, Mr Samson wrote:

> "The same having first been explained to her and she appearing perfectly to understand it."

On Mrs Wallace's evidence this endorsement was untrue.

255. On 16 December 1988 Mr Samson wrote to the bank in the following terms:

> "In accordance with your instructions of the 13th instant, I have now seen Mr and Mrs Wallace. They have executed the documents and I have attested them stating that the documents have been explained. I enclose herewith a note of my fees."

256. The legal charge was dated 30 December 1988. The £120,000 was drawn down over a period between January and August 1989. The £120,000 was a loan to Mr Wallace alone. It was used by him to inject capital into the company, Capital Clinics Ltd, through which he ran private clinics.

257. Later in 1989 the bank made a further loan of £106,065 to Mr and Mrs Wallace jointly. The purpose of this loan was to enable the Northern Rock's prior charge to be redeemed. In March 1994 the bank commenced proceedings for recovery of the sums due in respect of the two loans and for possession of the flat and applied for summary judgment.

258. The question for the court was whether Mrs Wallace's affidavit disclosed an arguable defence to the bank's claim. Both before Lloyd J and before the Court of Appeal, and again before your Lordships, counsel for the bank conceded that Mrs Wallace had shown an arguable case of undue influence. For my part, I would agree that Mrs Wallace's affidavit, and in particular paragraph 11, disclosed a sufficiently arguable case that in persuading her to sign the legal charge and in overriding her reluctance to do so Mr Wallace had abused the trust and confidence that she had in him. Accordingly, the summary judgment application turned on the constructive notice issue.

259. As to constructive notice, the bank knew that Mr and Mrs Wallace were a married couple living together in the jointly owned flat that was to be charged to the bank. The bank knew that the £120,000 advance to Mr Wallace was to be used for his business purposes. The bank knew that the proposed charge was an "all monies" charge which would secure any further advances that the bank might make to Mr Wallace. In these circumstances, in my opinion, the bank was on notice of the existence of a risk that Mrs Wallace's consent to grant the charge might have been brought about by some impropriety, whether excessive pressure or misrepresentation, by Mr Wallace. The bank needed, therefore, to take reasonable steps to satisfy itself that Mrs Wallace was entering into the transaction "freely and in knowledge of the true facts" (see *O'Brien* [1994] 1 AC 180, 198).

260. Lloyd J decided the constructive notice issue in favour of the bank. He took the view that although Mr Samson, having accepted the instructions given him by the bank's letter of 13 December 1988, owed the bank a duty, that duty was to witness the signature of Mrs Wallace and to return to the bank the signed document, or, if she did not sign, the unsigned document. But the judge said "It was not, I think, any part of his function to inform the bank as to what passed between him and her by way of advice or indeed communications on her part seeking advice." As to the endorsement that Mr Samson had written under Mrs Wallace's signature, Lloyd J said that it "carries with it a sufficient representation that he [ie Mr Samson] had given all necessary explanation and advice to her", and added:

> "in this situation the risk of her not being properly advised is one which lies between her and Mr Samson and which cannot be passed on to the bank."

The Court of Appeal agreed.

261. I would agree that if Mr Samson had indeed been acting as Mrs Wallace's solicitor these conclusions and the reasons for them would have been unassailable. But Mrs Wallace's criticism of these conclusions has been based mainly on the proposition that Mr Samson was not her solicitor. She did not instruct him to give her any advice about the legal charge and he did not in fact give her any advice. Nor had the bank in its letter of 13 December 1988 asked Mr Samson to give her any advice about the legal charge. It had simply asked him to "attend to the necessary formalities for us". It is true, as the evidence stands, that Mrs Wallace never did instruct Mr Samson to give her advice and that he gave her none. It seems also to be true that Mr Samson never held himself out to Mrs Wallace as her solicitor with a duty to advise her. On her evidence, he simply witnessed her signature. Whether she noticed the endorsement he wrote beneath her signature is not clear. In my opinion, for summary judgment purposes, your Lordships must proceed on the footing that Mr Samson was not Mrs Wallace's solicitor. On whose behalf then was he acting? The answer must, in my opinion, be that he was acting on behalf of the bank from whom he received his instructions and to whom he submitted his fee note.

262. The issue of constructive notice depends not on how Mr Samson's role appeared to Mrs Wallace, but on how his role appeared to the bank. If Mr Samson had not added the endorsement below Mrs Wallace's signature, the bank would, as I read the evidence, have had no reason to believe she had received any explanation about the legal charge. In that case the bank, on notice of the risk that Mrs Wallace's consent to the legal charge might have been improperly obtained by undue influence or misrepresentation by her husband, would have taken no steps at all to satisfy itself that her consent to the legal charge had been given "freely and in knowledge of the true facts" (*O'Brien*, at p 198).

263. Mr Samson's endorsement was, I would agree, a clear representation by him to the bank that he had acted as Mrs Wallace's solicitor for the purpose of giving her advice about the contents and effect of the legal charge. In the face of that representation, I would accept that the bank would ordinarily have been entitled to be satisfied that it could reasonably rely on Mrs Wallace's apparent consent to the transaction, evidenced by her signing of the legal charge.

264. But Mr Samson, on the occasion when Mr and Mrs Wallace attended at his offices in order to sign the legal charge, was acting as the bank's solicitor on the bank's instructions. He was not acting as Mrs Wallace's solicitor, nor, for that matter, as Mr Wallace's. In these circumstances, in my opinion, section 199(1)(ii)(b) of the Law of Property Act, 1925, comes into play. I have already set out the text of this statutory provision and discussed its implications in the type of cases that your Lordships are dealing with. On the evidence as it now stands Mr Samson knew that he had given no explanation to Mrs Wallace of the nature and effect of the legal charge. His failure was, since he was acting for the bank, the bank's failure.

265. Accordingly, in my opinion, if the facts alleged by Mrs Wallace in her affidavit are correct the bank never shed the constructive notice imputed to it.

266. I would, therefore, allow Mrs Wallace's appeal. The case must go to trial.

National Westminster Bank Plc v Gill

267. This is another case that comes to your Lordships' House after a full trial.

268. Mr and Mrs Gill were, in 1988, the joint owners of 60A, Queen's Park Avenue, Bournemouth, their matrimonial home. On 20 February 1989 they executed a legal charge under which the property was charged with payment of all Mr Gill's liabilities to the bank.

269. In December 1995, after demands by the bank for repayment of sums it had advanced to Mr Gill were not met, the bank commenced proceedings for possession of the property with a view to its sale. Mrs Gill's defence to the claim was that her consent to the legal charge had been procured by Mr Gill's undue influence and that the bank had had constructive notice of the impropriety. Both the trial judge, Mr Recorder Paulusz, and the Court of Appeal rejected the constructive notice allegation.

270. Mr Gill was a second hand car dealer carrying on business from home. In December 1988 he had the opportunity to acquire a garage business carried on from leasehold premises known as Gresham Garage. The purchase price was £40,000. He applied to the bank for a loan of £100,000 partly to fund the acquisition and partly to finance the garage and car sales business that he hoped to carry on from Gresham Garage.

271. On 19 December 1988 the bank made Mr Gill a written offer of the £100,000 loan. One of the terms of the offer was that the loan be secured by a second charge of 60A, Queen's Park Avenue. The bank did not have any communication with Mrs Gill about the proposed loan.

272. On 14 February 1989 Mr Gill contracted to purchase Gresham Garage for £40,000. He paid a £4,000 deposit. Completion was due on 20 February 1989. The sum due on completion was £36,799. Solicitors, Matthew & Matthew, were acting for Mr Gill in the transaction.

273. On 16 February 1989 the bank wrote to Matthew & Matthew and enclosed the form of legal charge, charging the matrimonial home as security for Mr Gill's liabilities to the bank, that they required Mr and Mrs Gill to sign. The letter said:

> "As [the document] is in relation to the sole liabilities of Mr Gill it will be necessary for Mrs Gill to receive separate legal advice as to the nature of the document and perhaps you would confirm that this is done prior to the signing of the form".

274. On Monday 20 February 1989, Mr Gill told Mrs Gill that she had to go with him to Matthew & Matthew for the purpose of having their signature to documents witnessed. At the solicitors' offices they saw Mr West, a legal executive, and Mr Richard Matthew, a partner. Important evidence of what happened on this occasion was given by Mrs Gill and by Mr West and Mr Matthew. Mr Gill was not called to give evidence. Where the evidence of Mrs Gill and that of Mr West and Mr Matthew conflicted, the Recorder preferred the evidence of the latter.

275. Mrs Gill gave evidence that there had been a heated altercation between herself and her husband when she discovered that she was being asked to sign a mortgage of the matrimonial home. She said that when the document was placed before her for signature she had asked what it was and that her husband had told her he needed her signature to be able to buy the garage. She said he had told her that the bank was lending him £36,000. She disputed Mr West's evidence that he had explained the document to her and said that neither Mr West nor Mr Matthew, with whom she had a conversation in a separate room in the absence of her husband, had given her any explanation about the nature of the document that was offered for her signature. Nonetheless, the Recorder found that Mr Matthew did, while he was alone with her, give her "a full and adequate explanation of the meaning of the document" and expressed himself as being "satisfied that Mrs Gill did receive proper and adequate advice". Mrs Gill told

the Recorder that she had had no alternative but to sign. The Recorder did not accept that evidence. He did find, on the contrary, that Mr Gill had spoken enthusiastically to her about the garage and its prospects and that she shared his enthusiasm.

276. It was, however, clear that neither Mr West nor Mr Matthew had known that the amount the bank had agreed to advance was £100,000. The amount secured by the legal charge was not expressed to be subject to any limit but the purchase price of Gresham Garage was only £40,000. So it is believable that Mrs Gill was under the misapprehension that the bank loan was to be £36,000 (£4,000 having already been paid as a deposit). It is believable also that Mrs Gill had obtained this misapprehension from what her husband had told her. The advice that, as the Recorder found, Mr West and Mr Matthew gave Mrs Gill did not go beyond explaining the nature and effect of the legal charge that she was being asked to sign. Neither was in a position to offer any advice about the commercial advantages or disadvantages of the purchase of the garage premises and business or about the wisdom of Mrs Gill agreeing to charge the matrimonial home with her husband's indebtedness to the bank.

277. Mr and Mrs Gill signed the legal charge on 20 February at Matthew & Matthew's offices and the solicitors then wrote to the bank in the following terms:

> "We confirm that the mortgage documentation supplied has been executed by Mr and Mrs Gill in accordance with your requirements, and we confirm that Mrs Gill was separately advised."

On this evidence Mr Recorder Paulusz, although he held that the case was one in which there was a presumption of undue influence, rejected the contention that the bank should be taken to have had constructive notice of the undue influence. The Court of Appeal agreed.

278. On the constructive notice point, I am in agreement with the Recorder and the Court of Appeal. The case was one in which the natural trust and confidence that the bank would have expected Mrs Gill to have, and that she did in fact have, in her husband, coupled with the nature of the transaction, namely, a charge over her property as security for his debts, raised the risk that her consent to the transaction might have been obtained by undue influence or misrepresentation. But the confirmation to the bank, that before signing the legal charge Mrs Gill had been separately advised by solicitors, as indeed she had been, and, by implication, that the advice had related to the nature and effect of the legal charge, entitled the bank to be satisfied that it could safely rely on her apparent consent to the transaction as being a true consent.

279. There is some basis in the evidence for thinking that Mrs Gill may have been induced to sign by her husband's misrepresentation that the loan agreed to be made by the bank was only £36,000. It does not appear, however, that any weight at the trial or in the Court of Appeal was sought to be placed on this misrepresentation. The emphasis seems to have been all on undue influence. Whatever may have been the reason for this, it cannot, in my opinion, affect the conclusion on the constructive notice issue. The legal charge secured Mr Gill's indebtedness to the bank whatever the amount of the indebtedness might be. Matthew & Matthew's confirmation to the bank that Mrs Gill had received separate advice was an implicit confirmation that she had been advised about the meaning and effect of the document - as, indeed, the Recorder found she had. That advice would have included advice that the amount of the current loan might in the future be increased.

280. I have earlier in this opinion expressed the view that in all cases the lender bank should inform the surety wife, or her solicitors, of the amount of the agreed facility and of any existing

indebtedness that would be secured under the proposed charge. If that had been done in the present case, it would have guarded Mrs Gill against a misapprehension about the amount of the agreed loan. But in the circumstances of this case, and in particular in view of the fact that no limit on the amount of the secured liability was expressed in the legal charge, the fact that the bank did not disclose this information does not, in my opinion, constitute a failure by the bank to take reasonable steps to satisfy itself that Mrs Gill's consent had not been improperly procured.

281. Finally, a comment on undue influence is prompted by the facts of this case. The Recorder held that although there was no actual undue influence, there was a presumption of undue influence since the case fell within category 2B. The Court of Appeal recorded these findings without comment. In my opinion, these findings disclose the same error to which I have referred previously in this opinion. By the end of the trial the Recorder, having heard all the evidence, had to decide whether or not undue influence had been established. Either the evidence did justify a finding of undue influence or it did not. On the evidence in the case a finding of undue influence would, in my opinion, have been unthinkable. Mrs Gill had been enthusiastic about the purchase of Gresham Garage. She knew she was signing a legal charge under which her home became security for her husband's debts to the bank incurred in acquiring the premises and business. She had been separately advised by a solicitor about the nature and effect of the document she was to sign. The highest her case can be put is that she would have liked more time to consider whether or not to sign. She said in evidence:

> "I did sign the documents put in front of me but with time for more reflection, and in less urgent circumstances, with proper advice to think about it, and time to consult a solicitor of my own, I would never have done so."

This is a quite inadequate basis, in my opinion, for a finding of undue influence. I do not think this was a case in which there was ever any evidence giving rise to the presumption of undue influence. But, if there was, by the end of the trial the presumption had been rebutted. In my opinion, Mrs Gill's appeal must be dismissed.

Barclays Bank Plc v Coleman

282. This, too, is a case where there has been a full trial. The mortgaged property, 52, Ashtead Road, Clapton, London E5, was purchased by Mr and Mrs Coleman on 9 July 1986 in their joint names. It was their matrimonial home. By a legal charge signed on 30 January 1991 they charged the property with the repayment of sums advanced by the bank for the purpose of enabling Mr Coleman to make some speculative property acquisitions in Uxbridge Road, Hayes, Middlesex and in Brooklyn, New York. In 1995, after the bank's demand for payment of the outstanding debt had not been met, the bank commenced proceedings for, among other things, possession of the property with a view to its sale. Mrs Coleman defended the proceedings by alleging that she had consented to the legal charge under the undue influence of her husband and that the bank had had constructive notice of that impropriety. The trial judge, Judge Wakefield, took the view that the legal charge was not to the manifest disadvantage of Mrs Coleman, that there was no presumption of undue influence and that undue influence had not been established. He expressed the view, also, that the bank had not taken reasonable steps to avoid constructive notice if there had been any undue influence. The Court of Appeal disagreed with the judge on both points, and therefore concurred with the judge in the result. First, the court held that the transaction was to Mrs Coleman's material disadvantage and that, in the circumstances, undue influence was to be presumed. But they held, secondly, that constructive notice should not be imputed to the bank. Before your Lordships Mr Jarvis QC,

for the bank, has not argued against the Court of Appeal's conclusion on the undue influence issue. He accepts that if the bank had constructive notice that Mrs Coleman's consent may have been improperly obtained, her appeal is entitled to succeed.

283. The relationship between Mr Coleman and Mrs Coleman is of significance. They are Hassidic Jews. Mrs Coleman's upbringing and education in a Hassidic community in the United States prepared her to expect and to accept a position of subservience and obedience to the wishes of her husband. The judge put it thus, at p 24 of his judgment:

> "The upbringing and education of Mrs Coleman prepared her principally for marriage within her own religious community and for a life of subservience to the wishes of her husband. I do not mean this in any derogatory sense. Hers may well have been a happy state, but it was one in which her husband's wishes and judgment in matters of finance and business were to be followed without question."

So it seems that the trust and confidence of a wife in her husband, which, notably in relation to family finances and family business matters, is a feature of very many marriages, is accentuated in a Hassidic marriage. It would, it seems, have been very difficult for Mrs Coleman to have questioned her husband's business or financial decisions or to have declined to comply with his wishes on such matters.

284. In 1989 Mr Coleman, having been made redundant from his job as a diamond cutter, began to carry on business on his own account as a property broker. Towards the end of 1990 he approached the bank for a loan to enable him to purchase two commercial properties in Uxbridge Road, Hayes. He already had some £200,000 on deposit with the bank and sought a loan from the bank to assist him in funding a purchase price of £250,000 for the Hayes properties. At about the same Mr Coleman became interested in buying a half-share in an apartment building in Brooklyn, New York. He wanted a US$ loan from the bank to assist him in financing this acquisition. The bank agreed in principle to make the loans but required a charge over 52, Ashtead Road as security.

285. In January 1991 the bank's security department prepared the form of legal charge and a certificate of occupancy that Mr and Mrs Coleman would be asked to sign. Mr Coleman informed the bank that Reuben Gale & Co would be the solicitors for them acting in the transaction. So the bank sent the documents to Reuben Gale & Co and Mr Coleman made an appointment for himself and his wife to attend at Reuben Gale & Co's offices. They went to the offices on a date somewhere between 9 and 15 January 1991. They were attended to not by a solicitor but by a legal executive, Mr David Spring, an employee of the firm. The legal charge was ready to be signed. Each of them signed it and Mr Spring witnessed each of their signatures. Mr Spring, in witnessing the signatures, signed above a stamp bearing the legend "D. Spring, Legal Executive, 240 Stamford Hill, London N16." On the page following the signature page there was a typed endorsement which read:

> "I confirm that this document was signed in my presence and that the full effect of its contents have been explained to and were understood by Miriam Mara Coleman, and she has signed this document of her own free will."

Mr Spring signed his name below this typed endorsement. Beneath his signature was placed the same stamp as had appeared beneath the signatures on the previous page. Below this stamp Mr Spring wrote "with R. Gale, 240 Stamford Hill, London N16. Solicitor."

286. The significance of these details is threefold. First, it would have been clear to the bank that Mr Spring was a legal executive and not a qualified solicitor. Second, it was clear that Mr Spring was purporting to act on behalf of Reuben Gale & Co, the firm of solicitors whose name had been given to the bank by Mr Coleman. Third, the endorsement entitled the bank to believe that a sufficiently qualified person had explained the contents of the legal charge to Mrs Coleman and that there had been no apparent reluctance on her part to sign.

287. Mr and Mrs Coleman also signed the certificate of occupancy, showing themselves as the only occupiers of the property. Here, too, Mr Spring counter-signed the document in confirmation that Mr and Mrs Coleman had signed in his presence.

288. In fact, Mr Spring had given Mrs Coleman no explanation whatever of the contents of the legal charge. The evidence at trial was that he had simply asked Mr Coleman if he, Mr Coleman, had explained the documents to his wife. The meeting had lasted only a few minutes. The bank's internal notes disclose the bank's own understanding of what had taken place at the meeting with Mr Spring. The relevant note reads:

> "Prior to the signing of the … documentation with regard to [the mortgaged property] Mrs Coleman attended a local firm of independent solicitors, whereby she received legal advice, as to the bank's Charge Forms content. Her signature was witnessed by those solicitors who confirmed that the document was signed of her own free will."

289. Mr Coleman's property speculations for which he had sought the bank's assistance turned out to be financially disastrous. He was unable to repay his borrowing from the Bank and proceedings by the Bank for possession of 52, Ashtead Road with a view to its sale followed.

290. Notwithstanding Mr Jarvis' concession to which I have already referred, I should, I think, make one or two comments about the undue influence issue. First, I agree that this was a case in which the relationship between Mr Coleman and Mrs Coleman, in the cultural context of the Hassidic community of which they formed a part, raised a serious question whether Mrs Coleman's consent to the granting of the legal charge was a true consent. She gave evidence that if she had had the content and effect of the legal charge explained to her, she might have declined to sign it. I doubt this. The thrust of her evidence as to her relationship with her husband was that she was bound to defer to him in the judgment of what should or should not be done about family finances or with family assets. It is not consistent with that evidence to suppose that a better understanding of the nature and effect of the legal charge would have brought her to refuse to comply with her husband's request that she sign.

291. I think the Court of Appeal was quite right in regarding this as a case in which there was a presumption of undue influence. But the presumption was not, in my opinion, attributable to the "manifest disadvantage" to Mrs Coleman of the legal charge. The legal charge, supporting her husband's business ventures on which he engaged in order to support his family, was no more disadvantageous to her than any transaction in which a wife agrees to become surety in order to support her husband's commercial activities. The presumption arose, in my opinion, out of their relationship, in which Mrs Coleman was not merely disinclined to second-guess her husband on matters of business, but appears to have regarded herself as obliged not to do so. In such a case, in my opinion, the rebuttal of the presumption would have needed legal advice from someone independent of the husband who could have impressed upon her that she should not sign unless she truly wanted to do so. In the circumstances, I agree with the Court of Appeal that a presumption, or inference, of undue influence arose and was not rebutted.

292. But in considering the issue of constructive notice, the question is not how the case appeared to Mrs Coleman, or to the person purporting to have given her the legal advice; it is how the case appeared to the bank. There was no evidence to show that the bank had knowledge of any greater risk of undue influence than might be present in any case in which a wife was apparently agreeing to become surety, or give security, for her husband's business debts. It would reasonably have appeared to the bank, from the typed endorsement on the legal charge, that Mrs Coleman had received advice from a legally qualified person acting for her, so as to enable her to understand the contents and effect of the document she was signing. The fact that the advice had been given by a legal executive and not by a qualified solicitor is not, in my opinion, material. An experienced legal executive in a firm with a conveyancing practice is well able to give full and adequate advice as to the contents and effect of a straightforward legal charge. The bank were entitled to believe that Reuben Gale & Co would not entrust such a task to a legal executive with insufficient experience to carry out the task properly. The bank had no reason to think that any special precautions needed to be taken in Mrs Coleman's case than would be requisite in any other case of a wife giving security for her husband's debts. In my opinion, the bank, having read the endorsement on the legal charge, was entitled to hold the reasonable belief that Mrs Coleman's consent to the granting of the legal charge had not been improperly obtained. There were no other steps that the bank could reasonably be required to have taken. Constructive notice of Mr Coleman's undue influence cannot, in my opinion, be imputed to the bank.

293. I would, therefore, dismiss Mrs Coleman's appeal.

UCB Home Loans Corporation Ltd v Moore

294. This case comes to your Lordships' House on an appeal by Mrs Moore against an order striking-out her Defence to UCB's claim to possession of Pangbourne Lodge, Tidmarsh Road, Pangbourne, Berkshire. The relevant facts, therefore, must be taken to be those pleaded by Mrs Moore, supplemented by such facts as are common ground between the parties. Mrs Moore and her husband, Mr Moore, were, in 1988, the joint owners of Pangbourne Lodge, their matrimonial home. Mr Moore carried on business through the medium of a company, Corporate Software Ltd. The company had 5000 issued shares of which 2557 were held by Mr Moore and 2443 by Mrs Moore. They were both directors. The conduct of the business, however, was under his control and although Mrs Moore worked for the company in a secretarial and administrative capacity, she did so under her husband's direction. Mrs Moore has pleaded that she was "accustomed to obey [Mr Moore's] directions in relation to the company's affairs . . . ." It is implicit in her pleading that she reposed trust and confidence in her husband in relation to financial and business matters.

295. In 1988 Mr Moore was seeking additional finance for the company and for that purpose enlisted the services of a Mr Zerfahs. Mr Zerfahs, who traded as Southern Assurance Services, was a registered insurance broker and had been the company's pension adviser for the past four years.

296. At the insistence of Mr Moore, and induced by his representations that the proposed mortgage transaction related to a "risk free" loan to the company, Mrs Moore signed in blank a mortgage application form. The details in this form were added without her knowledge and after she had signed. So she has pleaded.

297. The details contained in, or added to, the signed form included the following:

(i) The amount of the desired loan was £300,000;
(ii) The solicitors acting for Mr and Mrs Moore would be Quiney & Harris of 117 High Street, Wootton Bassett, Swindon; Mr Nigel Whittaker was named as the member of the firm who would be dealing with the matter;
(iii) Pangbourne Lodge would be offered as security for the loan;
(iv) The loan was required partly to re-finance existing borrowings charged on Pangbourne Lodge and partly for the business purposes of Corporate Software Ltd;
(v) Mr Moore was managing director of Corporate Software Ltd. His annual income was £106,000.
(vi) Mrs Moore was "Secretary/PA" of Corporate Software Ltd. Her annual income was £18,000.

The original amount entered on the form as Mr Moore's annual income appears to have been £36,000. The £36,000 had been altered to £106,000, a grossly inflated figure. That there had been some alteration to the original figure was apparent.

298. The mortgage application form, carrying both Mr and Mrs Moore's signatures, was sent to UCB. UCB agreed to make the loan on the security of a first charge over Pangbourne Lodge.

299. On 14 March 1989 Mr Zerfahs told Quiney & Harris that Mr and Mrs Moore wanted the firm to act for them in connection with the proposed transaction. Mr Zerfahs had no authority from Mrs Moore to do so. She never instructed the firm to act for her and at no stage did she meet or speak to any member of the firm about the proposed transaction.

300. On 14 March Quiney & Harris wrote to Southern Assurance Services saying, amongst other things, that they had written to Mr and Mrs Moore thanking them for their instructions. Mrs Moore's case is that she never saw any such letter. Quiney & Harris corresponded directly with Mr Moore and had several telephone conversations with him about the proposed transaction. They never received any confirmation from Mrs Moore of their instructions to act for her.

301. UCB, of course, believed from the contents of the mortgage application form that Quiney & Harris had been instructed by, and were acting for, both Mr and Mrs Moore. So, in a letter dated 5 May 1989, UCB asked Quiney & Harris to act for UCB in arranging for the legal charge to be executed. UCB did not ask the solicitors to give any advice to Mrs Moore. Quiney & Harris' letter to UCB in response referred to Mr and Mrs Moore as "our clients".

302. The legal charge was in due course executed and the £300,000 loan was made. £154,338 odd was applied in redeeming an existing first charge over Pangbourne Lodge held by BNP Mortgages Ltd. £52,925 odd was applied in discharging the company's overdraft liability to National Westminster Bank. The overdraft had been secured by a second charge over Pangbourne Lodge. The balance of the £300,000 loan was paid to the company.

303. The company was unsuccessful and went into liquidation in January 1992. In February 1994 UCB brought possession proceedings in the Reading County Court. Mrs Moore's defence alleged that her signature to the mortgage application form and her consent to the grant of the legal charge to UCB had been obtained by the undue influence of and misrepresentations made by Mr Moore. She gave further and better particulars of these allegations. UCB applied, on 30 May 1996, to strike-out those parts of the defence that resisted a possession order.

304. UCB contended that even if there had been undue influence or misrepresentation they had had no notice of it. The district judge dismissed the strike-out application. UCB appealed and Judge Holden allowed the appeal. He accepted, for the purposes of the strike-out, that Quiney & Harris had never been instructed by Mrs Moore and had given her no advice. He said:

> "For the purposes of the appeal before me I must accept [Mrs Moore's] version of the facts and assume that there was undue influence and that she received no advice from the solicitors and did not instruct them."

But he accepted UCB's case that they had had the reasonable belief, via the mortgage application form signed by Mrs Moore, that Quiney & Harris were acting for her and would give her whatever advice she needed. He said:

> "[UCB] reasonably believed that [Mr and Mrs Moore] had their own solicitors who were dealing with the transaction and it was quite reasonable for them to assume that in carrying out that function those solicitors would give proper advice to [Mrs Moore]."

In effect, he held that constructive notice of Mr Moore's undue influence or misrepresentation could not be imputed to UCB.

305. The Court of Appeal agreed with Judge Holden that Quiney & Harris' knowledge that they had given Mrs Moore no advice about or explanation of the legal charge could not be imputed to UCB. They agreed that there was nothing, in the circumstances, to put UCB on enquiry : per Stuart-Smith LJ [1998] 4 All ER 705, 731:

> "It was not necessary for [UCB] to give instructions to the solicitors to do what was already their duty; nor was it necessary to require certification that that has been done."

306. I have some sympathy with these conclusions but I do not think they could safely be reached on the striking out application. UCB knew that Mrs Moore was offering her share in the matrimonial home, Pangbourne Lodge, as security for the £300,000 loan to the company. But over two-thirds of the loan was to be applied in discharging existing indebtedness charged on Pangbourne Lodge. The balance was to go to the company in whose business Mrs Moore, as well as Mr Moore, played a part. UCB was, or should have been, aware of a risk that Mrs Moore's apparent consent might be tainted by undue influence or misrepresentation, but the risk would not have appeared to be a very great one. And the information that Mr and Mrs Moore had solicitors acting for them reduced the risk. It is not to the point that Mrs Moore had never instructed Quiney & Harris. UCB were not to know that that was so. They had been misled by the contents of the mortgage application form that Mrs Moore had signed in blank. It would be possible to argue that Mrs Moore, by signing in blank, had given an implied authority to her husband, or to his agent Mr Zerfahs, to complete the form on her behalf. It is enough, however, to conclude that UCB were entitled to take the mortgage application at its face value.

307. But the problem is that UCB did not know what Quiney & Harris' instructions were and had no reason to assume that their instructions extended to giving Mrs Moore advice about the nature and effect of the legal charge. The instructions may have been no more than to agree the form of the security documents and make arrangements for them to be executed. Quiney & Harris gave UCB no indication that they had given Mrs Moore any such advice and in fact they had not done so. In my opinion, therefore, on the evidence as it now stands UCB failed to take reasonable steps to satisfy itself that Mrs Moore understood the nature and effect of the legal charge.

308. Mr Sher QC, counsel for Mrs Moore, suggested that UCB should have been put on enquiry by the apparent alteration to the stated amount of Mr Moore's annual income. This, to my mind, is very much an after-the-event point. If there had been some other reason to question the genuineness of the mortgage application, the alteration of the annual amount would, I agree, have added to the suspicion. But there was no other reason and the alteration was, in my opinion, a long way below the threshold at which an intending lender is put on enquiry.

309. In my opinion, however, for the reason I have given Mrs Moore's appeal should be allowed. This case must go to trial.

The Bank of Scotland v Bennett

310. This is another case which comes to the House after a full trial. The bank is seeking to enforce its charge over the matrimonial home, 15, Elthiron Road, Fulham. The property was acquired by Mr and Mrs Bennett in May 1986 and transferred into their joint names. At all material times it has been subject to a first charge in favour of Halifax Building Society. On 5 September 1990, the property was transferred into Mrs Bennett's sole name. The bank's charge, a second charge, was dated 1 October 1991. The purpose of the charge was to secure the liabilities of Mr and Mrs Bennett under a guarantee dated 12 August 1991. The guarantee guaranteed payment to the bank, up to a limit of £150,000, of the sums owing to the bank by Galloway Seafood Co Ltd (the company).

311. In October 1993 the bank made a formal demand for payment by the company of the sums it owed the bank and, on failing to receive payment, appointed receivers of the company. The sum owed by the company to the bank was £270,000 or thereabouts. The bank followed up these steps by calling on Mr and Mrs Bennett for payment under the guarantee of the £150,000 with interest of £3,522 odd. Payment was not made and on 11 April 1994 the bank commenced proceedings for payment and for possession of 15, Elthiron Road with a view to its sale.

312. Mrs Bennett's defence to the bank's claims was that her signature, both to the guarantee and to the legal charge, had been procured by her husband's undue influence and that, in the circumstances, the bank must be taken to have had constructive notice of that impropriety. The trial judge, Mr James Munby QC, sitting as a deputy judge in the Chancery Division, found in Mrs Bennett's favour on the undue influence issue. He found, first, that Mrs Bennett had established actual undue influence [1997] 1 FLR 801, 827:

> "In my judgment the pressure and influence which, as I have found, Mr Bennett exerted on his wife both to procure her signature to the guarantee and to procure her signature to the charge was undue. This is a case in which, in my judgment, there was moral blackmail amounting to coercion and victimisation. Mrs Bennett was not, it seems to me, acting as a free and voluntary agent".

On appeal, the Court of Appeal refused to disturb the deputy judge's conclusion on undue influence [1999] 1 FLR 1115, 1134. Chadwick LJ said that to reverse the judge's conclusion "would . . . be to give insufficient weight to the advantage which the judge had (and which this court does not have) of hearing the evidence given by the witness in person".

313. The deputy judge went on to consider, as an alternative to actual undue influence, Mrs Bennett's case based on presumed undue influence. He held that both the guarantee and the legal charge were manifestly disadvantageous to Mrs Bennett and that the relationship between her and her husband was one of sufficient trust and confidence to raise a presumption of undue

influence in relation to both transactions ([1997] 1 FLR 801, 828-830). He held that the presumption had not been rebutted.

314. On this aspect of the case, Chadwick LJ commented, at [1999] 1 FLR 1115, 1135, on the paradox that Mrs Bennett was contending, on the one hand, that she had signed the two documents because her will to resist had been overborne by her husband but, on the other hand, that her trust and confidence in her husband was such that if he asked her to sign she would do so. The point is the same as that to which I have referred in *Coleman* (see para 290 above).

315. The discussion about the presumption of undue influence was unnecessary. Once actual undue influence has been found at trial, the question whether, if the evidence had been confined to the relationship between the parties and the nature of the impugned transaction, undue influence would have been presumed and, if it would, whether it had been rebutted, becomes irrelevant. And if, after a full trial, the judge concludes that undue influence has not been established, that conclusion means either that there never was a presumption of undue influence or, if there was, that it has been rebutted.

316. The deputy judge's and the Court of Appeal's conclusions on the undue influence issue had the result that the outcome of the case appeared to depend on the constructive notice issue. It was accepted that the bank had had no actual notice of the undue influence. Should constructive notice be imputed to the bank? The deputy judge, after considering the facts of the case, concluded that the bank had been put on enquiry as to the circumstances in which Mrs Bennett had agreed to sign the guarantee and the legal charge and had failed to take reasonable steps "to satisfy itself that Mrs Bennett's agreement . . . was properly obtained" ([1997] 1 FLR 801, 807).

317. On this issue the Court of Appeal disagreed. Chadwick LJ said:

> "I am satisfied that the bank was entitled to take the view, on the totality of the facts known to it, that there was no real risk that Mrs Bennett's apparent consent to the transaction and, in particular, to the charge— had been obtained by improper conduct on the part of her husband." ([1999] 1 FLR 1115, 1143).

Mrs Bennett's appeal to the House challenges this conclusion.

318. I must now refer to the facts of the case relevant to the constructive notice issue. They are set out in detail in the judgments below. It is not necessary for present purposes to refer to more than the most important of them.

319. In 1990 Mr Bennett decided to purchase a fish processing business in south-west Scotland. He caused the company, Galloway Seafood Co Ltd, to be incorporated for that purpose. The initial capital of the company was £150,000, provided as to £50,000 by Mr Bennett and £100,000 by South West Scotland Investment Fund Ltd (SWIFT). Shares in the company were issued to SWIFT, Mr Bennett and Mrs Bennett.

320. Additional capital was needed in order to finance the purchase of the fish processing business and to provide the company with working capital. The bank agreed to allow the company overdraft facilities up to £100,000, supported by a guarantee from Mr Bennett. This guarantee, and Mr Bennett's potential liability under it, was the reason why the matrimonial home, formerly in joint names, was transferred into Mrs Bennett's sole name.

321. Mr Bennett had solicitors acting for him in connection with the transfer of the property to Mrs Bennett. They were Dickinson, Manser & Co of Poole. Mr Parkyn, a partner, dealt with the matter. The deputy judge's judgment records telephone conversations between Mr Parkyn and Mrs Bennett regarding the transfer.

322. Over a period from the end of 1990 to July 1991 Mr Bennett negotiated an arrangement with the bank under which the bank would increase the company's overdraft facility to £380,000. Mr Bennett intended that the money would be used to build a new factory on land which the company was to purchase or lease from Dumfries and Galloway Regional Council. The company's bank overdraft was to be secured by a fixed and floating charge over the company's new factory and business and by a joint and several guarantee of the company's debts to the bank, up to a limit of £150,000, to be given by Mr and Mrs Bennett. Their liability under this guarantee was to be secured by a second charge over 15, Elthiron Road. In addition, SWIFT agreed to advance £275,000 to the company. The advance was to be secured by a fixed charge over the company's new factory. Mr Bennett, SWIFT and the bank agreed that SWIFT's charge was to rank ahead of the bank's fixed and floating charges for a sum not exceeding £250,000.

323. Mr Bennett instructed Mr Parkyn to act in connection with the grant by Mrs Bennett of the second charge over 15, Elthiron Road. The instructions were given by telephone. Mr Parkyn's attendance note records:

> "(3) The seafood company in Scotland is on the threshold of building a new factory.
> (4) We can expect to hear from the Bank of Scotland in Dumfries (John Martin) who are looking for additional security of £150,000 on their home.
> (5) Confirm we would be willing to act."

It is to be noted that Mr Parkyn did not receive instructions to act in connection with the guarantee to be given by Mr and Mrs Bennett. It appears that he knew nothing about that transaction. Nor did he know anything about the financial arrangements between the company, the bank and SWIFT.

324. On 8 August 1991 Mr Parkyn received a standard form letter from the bank asking for confirmation that Mr Parkyn would act for the bank in connection with the second charge that the bank were to be granted by Mrs Bennett over 15, Elthiron Road to secure the liabilities to the bank of Mr and Mrs Bennett. The letter did not indicate the

nature of those liabilities. The letter said, also, this:

> "As your firm already acts for the mortgagor, the bank expects that you will advise the mortgagor on the nature and effect of the legal charge. . . . . Please also stress to the mortgagor that the legal charge is for all sums due by our aforesaid customers."

325. On 13 August 1991, Dickinson Manser & Co confirmed they were willing to act for the bank.

326. It had been arranged that Mr and Mrs Bennett would attend at the bank's Dumfries branch in order to sign the guarantee. But, in the event, Mrs Bennett was unable to keep the appointment and, instead, it was agreed that the guarantee would be sent to the bank's branch in the Haymarket, London, and would be signed there. It was signed there on 12 August 1991. Mrs Bennett received no legal advice regarding the guarantee, nor was she advised by the bank

to take legal advice about it before she signed, nor did the bank have any reason to suppose that she had received any legal advice about it.

327. On 14 August 1991 Mr Parkyn wrote to Mr Bennett about the instructions he had received from the bank regarding the second charge over 15, Elthiron Road. His letter said:

> "I confirm I have now received mortgage instructions from [the bank] for an advance of £150,000 to be secured by way of a second charge over the above property . . ."

328. The letter reveals a misunderstanding on Mr Parkyn's part of the nature of the liabilities to be secured by the second charge. The purpose of the charge was to secure the liabilities of Mr and Mrs Bennett under the guarantee, which Mr Parkyn had not seen and knew nothing about. The guarantee secured payment, up to a limit of £150,000, of the company's indebtedness to the bank.

329. On 17 September 1991, Mr Parkyn wrote to Mr and Mrs Bennett enclosing for their signature three documents, namely, the legal charge, a declaration of occupancy, and a consent to mortgage. Presumably Mr Parkyn had been sent these documents by the bank. He gave an explanation of these documents in his letter. As to the legal charge, the letter said:

> "the charge is intended to secure both your liabilities to the bank however they are incurred. I would point out that whilst the facility is for £150,000, the charge covers all liabilities to the bank whatsoever the amount . . . ."

330. There was, as Chadwick LJ pointed out ([1999] 1 FLR 1115, 1124) nothing in the letter to suggest that Mr Parkyn was aware that the charge was to secure his clients' liabilities as guarantors of the company's indebtedness to the bank. The judge accepted Mrs Bennett's evidence that she never saw this letter.

331. The three documents were signed by the requisite signatories on 1 October 1991. The deputy judge accepted Mrs Bennett's evidence that she did not receive any legal advice about the nature or effect of the documents and that, save as contained in the letter of 17 August 1991 that Mrs Bennett did not see, Mr Parkyn did not give any.

332. On 1 October 1991, Dickinson Manser & Co wrote to the bank as follows:

> "We write to advise you that completion . . . took place on 1 October 1991, and your instructions have been complied with . . . Except as noted below, there is no matter not already disclosed to you which we should draw to your attention in connection with this matter."

Nothing at all was "noted below".

333. This letter of 1 October 1991, read in the context of the bank's letter of 8 August 1991 (referred to in para 324 above), entitled the bank to suppose that Dickinson Manser & Co had advised Mrs Bennett on the nature and effect of the legal charge.

334. After completion of the legal charge the bank allowed the company to draw down on the £380,000 overdraft facility.

335. It is, in my opinion, important to emphasise that there was no evidence that Mr Parkyn knew about the guarantee that Mr and Mrs Bennett had signed. Nor, therefore, was there any reason for him to be aware that the second charge of 15, Elthiron Road was securing their liabilities as guarantors of the company's debts to the bank. The evidence justifies the inference that he thought they were principal debtors. Nor was there any evidence that Mr Parkyn knew anything about the charges that the company had given to the bank and to SWIFT respectively, securing the liabilities of the company to them. And, in particular, there was no evidence that either Mr Parkyn, or Mrs Bennett, knew about the ranking agreement under which SWIFT's charge was to rank ahead of the bank's charges for an amount not exceeding £250,000.

336. About seven months before taking the second charge over 15, Elthiron Road, the bank had received a valuation of the company's factory premises with the proposed new factory built thereon. The valuation was well below the likely construction costs that the company would incur in building the new factory. The bank did not disclose this information to Mrs Bennett or to Mr Parkyn and there is no reason to suppose that either of them was aware of it.

337. The bank had taken no steps at all to satisfy itself that Mrs Bennett's consent to giving the guarantee had been properly obtained. So the judge concluded that constructive notice of Mr Bennett's undue influence in procuring her consent to the guarantee should be imputed to the bank. He held that she was not bound by the guarantee.

338. The bank did not appeal against this conclusion. The reason the bank did not do so was that Mr Bennett remained bound by the guarantee. The legal charge secured his liabilities to the bank as well as those of Mrs Bennett. So if the bank could uphold the legal charge against Mrs Bennett, the company's debts for which Mr Bennett was liable under the guarantee would be secured by the legal charge whether or not Mrs Bennett was bound by the guarantee.

339. As to the question whether the bank had constructive notice of Mr Bennett's undue influence in procuring Mrs Bennett to consent to the legal charge, the deputy judge would, but for the bank's omission to disclose to Mr Parkyn, or to Mrs Bennett, the existence of the ranking agreement or the valuation of the company's factory premises, have regarded the bank as protected by its reasonable belief that Mrs Bennett had received appropriate legal advice about the nature and effect of the legal charge. He cited passages from the judgments in *Massey v Midland Bank Plc* [1995] 1 All ER 929, *Barclays Bank Plc v Thomson* [1997] 4 All ER 816, *Banco Exterior Internacional v Mann* [1995] 1 All ER 936 and *Midland Bank Plc v Serter* [1995] 1 FLR 1034 and concluded, correctly in my opinion, that the fact that Dickinson, Manser & Co had been acting not only for Mrs Bennett but also for Mr Bennett and for the bank itself did not detract from the reasonableness of the bank's expectation that the solicitors would have given Mrs Bennett adequate advice about the legal charge. He said [1997] 1 FLR 801, 834:

> "A bank is in no worse position merely because, to its knowledge, the solicitor is acting both for the prospective surety and for the debtor."

and, at p 835:

> "Unless a bank is put on notice by other matters within its knowledge that the solicitors have not performed their duty to give independent advice to the surety it is as much entitled [where the solicitor is acting also for the creditor] as in any other case to assume that the solicitors have been acting properly."

I agree with both those statements.

340. But the judge accepted, at p 840, the submission made by counsel for Mrs Bennett that because the bank had failed to disclose to Mr Parkyn, or to Mrs Bennett, the ranking agreement between the bank and SWIFT and had failed to disclose the disparity between the development cost and the ultimate value of the factory premises, the bank had failed "to show that it took reasonable steps to bring home to Mrs Bennett the risks she was running".

341. The judge treated the non-disclosure as a constructive notice point. His reasoning, I think, proceeded in this way:

> 1. The bank's knowledge of the relationship between Mr and Mrs Bennett and of the nature of the transactions she was entering into, ie the guarantee and the legal charge, put the bank on notice of the risk that her agreement to the transactions might have been procured by the undue influence of her husband.
> 2. The bank could avoid being on constructive notice of any such impropriety by taking reasonable steps to satisfy itself that Mrs Bennett understood the nature and effect of the transactions.
> 3. The bank's failure to disclose the material facts regarding the SWIFT ranking agreement and the value of the factory premises was a failure to take reasonable steps.
> 4. It was a failure to take reasonable steps because unless Mr Parkyn was given this information he could not be expected to give Mrs Bennett appropriate advice about the risks she was running.

342. The Court of Appeal disagreed. Chadwick LJ [1999] 1 FLR 1115, 1142 accepted that the facts in question

> "were facts which a competent adviser, advising Mrs Bennett as to the risk that the bank would need to have recourse to the security which she was providing, would need to know . . . . "

but held, at pp 1142-1143:

> "the judge was wrong to hold that the bank was required to bring those facts to the notice of Mr Parkyn or his client: or … to hold that … the bank was not entitled to assume that Mr Parkyn would become aware of those facts in the course of considering what advice he needed to give Mrs Bennett . . . . "

343. Chadwick LJ thought that the bank was entitled to assume that Mr Parkyn would inform himself of the nature of the liabilities secured by the legal charge, and, in doing so, would become aware that "those liabilities are themselves liabilities under a guarantee for a company's indebtedness to the bank" and that Mr Parkyn would then "inform himself as to the company's financial position". He continued:

> "That must, at the least, involve questioning the true value of the assets in the balance sheet and understanding the ranking of whatever charges have been created over those assets".

344. In my respectful opinion, this view of what a solicitor in the position of Mr Parkyn would inquire into and discover is unrealistic. Let it be supposed that Mr Parkyn had known about the guarantee. It is to be expected that he would have advised Mrs Bennett that the risk of the bank seeking to enforce the charge so as to recover the £150,000 would depend upon the fortunes of the company. He might have asked her if she was satisfied about the company's prospects. He

probably would have asked her if she knew anything about the company's existing indebtedness to the bank and the extent of its overdraft facility. If she did not know these things, he might have advised her to find out about them or have asked her if she wanted him to try and do so. But it seems to me highly unlikely that he would on his own initiative have examined the company's latest balance sheet — which would probably have been well out of date — or have inquired into the balance sheet values of its assets. I think it highly unlikely that, without special instructions to do so, he would have carried out a search in order to discover what charges were registered against the company. In the ordinary discharge of his duties as a solicitor advising Mrs Bennett about the nature and effect of the legal charge I do not believe he would have become aware either of the ranking agreement between the bank and SWIFT or of the valuation of the factory premises that the bank had obtained.

345. In my opinion, however, both the deputy judge and the Court of Appeal approached this question of disclosure from the wrong angle. The point was not, in my view, a constructive notice point. It was simply a disclosure point. Did the bank have an obligation to the proposed surety to disclose this information to the surety? If it did, what is the consequence of the non-disclosure?

346. In my opinion, the ranking agreement between the company, the bank and SWIFT falls within the general proposition expressed by Vaughan Williams LJ in *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, 79 (see para 186 above).

A surety who pays off the creditor is entitled to be subrogated to the rights of the creditor in respect of the debt in question. And if the creditor, in order to discharge the debt, has recourse to security provided by the surety, the same applies. So, in the present case, if Mrs Bennett had paid the bank the £150,000, or if the bank had obtained payment by realising its security over 15, Elthiron Road, Mrs Bennett would have been entitled to the benefit of the Bank's rights against the company in respect of the £150,000. These rights would have included the bank's rights under its fixed and floating charges. But those rights were subject to the ranking agreement.

347. Moreover the ranking agreement reduced the amount of the company's assets that would be available for the payment of the company's debts to the bank and correspondingly increased the likelihood that the bank would make a call on Mr Bennett or Mrs Bennett, or both, under the guarantee and would enforce its security over 15, Elthiron Road. The ranking agreement did affect the rights of Mrs Bennett as surety.

348. In my opinion, the bank ought to have disclosed to Mrs Bennett, or to the solicitor acting for her, the existence of the ranking agreement.

349. The deputy judge thought that the facts regarding the valuation of the factory premises should also have been disclosed by the bank. Here, I do not agree. It is, I think, up to an intending surety to satisfy himself about the value of the principal debtor's assets or the principal debtor's credit worthiness.

350. The bank's obligation to disclose the existence of the ranking agreement arose, in my opinion, under the general law applicable to suretyship contracts. Mr Jarvis QC, counsel for the bank, accepted that if the bank had an obligation to disclose the ranking agreement and if Mrs Bennett and Mr Parkyn were on 1 October 1991 unaware of it, Mrs Bennett was entitled to have the legal charge set aside.

351. I would allow her appeal on this ground.

Kenyon-Brown v Desmond Banks & Co

352. This is the solicitors' negligence case. The solicitors, appellants before your Lordships, are Desmond Banks & Co. The proprietor of the firm, Mr Desmond Banks, acted in the matters that have given rise to this litigation.

353. Mrs Kenyon-Brown, the respondent before the House, contends that Mr Banks acted negligently in failing to advise her properly on 12 January 1993, when she and her husband attended at his offices to sign a second legal charge of their jointly owned holiday cottage, Rock Cottage, Melplash, Bridport, to National Westminster Bank Plc. The charge secured Mr Kenyon-Brown's indebtedness to the bank.

354. In her statement of claim Mrs Kenyon-Brown pleaded that Mr Banks owed her a duty to advise her, before she signed the legal charge,

> "(i) that there was a conflict of interest between the plaintiff and Mr Kenyon-Brown in respect of the proposed mortgage; and/or
> (ii) that the said conflict might prevent or inhibit the defendants from disclosing or explaining all aspects of the transaction to the plaintiff or from giving advice to the plaintiff which would conflict with Mr Kenyon-Brown's interests; and/or
> (iii) that she could and/or should obtain advice from an independent solicitor in respect of the proposed mortgage; and/or
> (iv) that the proposed mortgage would confer no benefit upon her; and/or
> (v) as to the nature and effect of the mortgage."

She pleaded that Mr Banks had failed to give her advice in respect of these matters, or any advice about the proposed mortgage, and that in consequence she had suffered loss.

355. She quantified her loss as being one half of the sum of £55,000 then owing by Mr Kenyon-Brown to the bank.

356. Mr Banks accepted in his defence that he had owed Mrs Kenyon-Brown a duty to advise her "as to the meaning and effect" of the legal charge, but denied any breach of duty and denied, if there had been any breach of duty, that the breach had caused any loss. Directions were given for issues of liability to be tried before issues of damage. At trial, on the liability issues, the familiar two issues arose. What was the extent of the duty owed by Mr Banks? Had there been any breach of that duty?

357. The material facts can be quite shortly stated. Mr and Mrs Kenyon-Brown were directors of and shareholders in KB Insurance Brokers (London) Ltd (KB) and PM Insurance Services Ltd (PM). These companies were controlled by Mr Kenyon-Brown but Mrs Kenyon-Brown did play some part in the insurance businesses that they carried on.

358. In 1983 a controlling interest in each company was sold to Crusader Insurance Company Ltd (Crusader).

359. In 1986 Mr and Mrs Kenyon-Brown purchased Rock Cottage for £50,000 with the aid of a £30,000 advance from Nationwide Building Society secured by a mortgage of Rock Cottage.

360. In 1988 they purchased 53, Dene Road, Northwood, with the aid of a £30,000 advance from National Westminster Home Loans Ltd secured by a mortgage of 53, Dene Road.

361. Both properties were in their joint names. 53, Dene Road was their home. Rock Cottage was a holiday cottage.

362. In 1989 the opportunity to repurchase from Crusader the shares in KB and PM arose. As the deputy judge, Mr Peter Leaver QC, found:

> "Mrs Kenyon-Brown was very much against doing so, but was overborne by her husband and very reluctantly agreed to the repurchase."

363. Finance was needed for the repurchase of the shares and a loan from National Westminster Bank Plc to be secured by a second mortgage of 53, Dene Road was arranged. The loan was to be a loan to Mr Kenyon-Brown alone, not to the two of them jointly.

364. Mr Banks, who had acted for Mr and Mrs Kenyon-Brown in their purchase of 53, Dene Road, and had acted previously for KB and for PM, acted for them in connection with the grant to the bank of the second mortgage of 53, Dene Road.

365. By a letter of 13 November 1989 the bank asked Mr Banks to arrange for the legal charge to be signed by Mr and Mrs Kenyon-Brown and to confirm, when returning the signed document, that Mrs Kenyon-Brown had received legal advice about it. So Mr Banks arranged a meeting with her at his offices on 15 November 1989. His attendance note records the advice he gave her.

366. Mr Banks pointed out to her that the advance was to be to Mr Kenyon-Brown alone, not to the two of them jointly. Mrs Kenyon-Brown responded that she trusted her husband. Mr Banks was instrumental in arranging for the sum secured by the legal charge to be limited to £150,000. No allegation has been made that in advising Mrs Kenyon-Brown on this occasion Mr Banks was in breach of the duty he owed her.

367. The legal charge over 53, Dene Road was duly completed. It secured the liabilities to the bank of Mr Kenyon-Brown, subject to the agreed limit of £150,000.

368. By 1992, the bank was seeking further security in respect of Mr Kenyon-Brown's indebtedness and agreement was apparently reached between it and Mr Kenyon-Brown that it would be given a second charge over Rock Cottage. By a letter of 15 December 1992 the bank sent Mr Banks the proposed form of legal charge for signature by Mr and Mrs Kenyon-Brown. The letter said:

> "We shall be grateful if you will confirm that Legal Advice was given to Mrs Kenyon-Brown when the charge form is returned."

369. On 12 January 1993 Mrs Kenyon-Brown had a meeting with Mr Banks at his offices. His attendance note reads:

> "Advised on mortgage.
> — Jessica is happy to go along with it — doesn't want me to go into it in detail — even if money is borrowed by N alone to buy shares in KB in his name. Dene Road already mortgage. Copy mortgage to JKB. Mrs KB appeared to understand it fully and despite

> the terms of my warning to be totally unconcerned that the mortgage of property jointly owned by her would benefit her husband alone and be without limit."

370. As indicated by the attendance note, the form of legal charge contained no limit on the amount of Mr Kenyon-Brown's liabilities to the bank that would be secured.

371. The legal charge was duly completed and dated 12 January 1993.

372. At the trial, Mrs Kenyon-Brown was the only witness who gave oral evidence but the deputy judge said that he did not find her evidence about the events of 15 November 1989 or 12 January 1993 persuasive. He said:

> "Ultimately, I came to the conclusion that her evidence could not be relied upon."

He recorded, however, that she said that she could not contradict Mr Banks' attendance note of the 12 January 1993 meeting. He expressed his conclusions in the following passage:

> "In my judgment the evidence in the present case comes nowhere near proving that the defendant was negligent in the manner of which Mrs Kenyon-Brown complains. It is for Mrs Kenyon-Brown to satisfy me, on the balance of probabilities, that the defendant failed to discharge his duty to her properly in the ways of which she complains. Mrs Kenyon-Brown has failed to satisfy me that the defendant gave no advice. Indeed the attendance note . . . . makes it plain that the defendant did give advice. On Miss Smith's second submission, that the defendant should, in the light of the conflict of interests, have told her to go to another solicitor, I hold that the law does not require that she [sic] should do so. While it may, in some cases be prudent for a solicitor so to advise, it will depend upon the facts of the case as to whether it was negligent or not to do so. Although Mrs Kenyon-Brown told me that she was sure that if she had been advised to go to another solicitor she would have gone, I could not accept that evidence. I form the view that Mrs Kenyon-Brown was quite clear as to what she was doing by entering into the second mortgage, and wanted to do so notwithstanding the defendant's 'warning'."

373. These conclusions might be thought to have made the prospects of an appeal unpromising. But there was an appeal and the appeal succeeded (although Wilson J dissented) [2000] PNLR 266. The main judgment was given by Mance LJ. He based his reasoning substantially on the judgment of the Court of Appeal in *Etridge (No 2)* [1998] 4 All ER 705. He cited paragraphs 19 to 26 of Stuart-Smith LJ's judgment under the heading "Independent legal advice". In these paragraphs Stuart-Smith LJ was considering the advice that needs to be given where a solicitor is instructed to advise a person who may be subject to the undue influence of another. I have criticised the contents of these paragraphs in an earlier section of this opinion and shall not repeat the criticism here. The duty of a solicitor always depends on the extent of the instructions given to and accepted by him, either expressly or by implication, by conduct or otherwise. The normal duty of a solicitor instructed to advise a would-be surety, whether a wife of the principal debtor or anyone else, about the document or documents the surety is being asked to sign, is to explain the nature and effect of the document in order to try and make sure that the surety knows what he or she is doing. The particular circumstances of a particular case may add to or reduce the extent of the duty owed by the solicitor. There was, in my opinion, nothing in the circumstances which resulted in Mr Banks advising Mrs Kenyon-Brown about the proposed second mortgage of Rock Cottage to add to the normal duty that I have described. Mance LJ said that since Mr Banks knew that Mrs Kenyon-Brown reposed trust and confidence in her husband (see the contents of the attendance note of the 15 November 1989 meeting) and that

the second mortgage of Rock Cottage appeared to be entirely in Mr Kenyon-Brown's interests and was without limit of amount, he was on notice that "there might be undue influence". This is something that was never pleaded. It may be right that a solicitor who is advising a client about a transaction and has reason to suspect that the client is the victim of undue influence is placed under a duty to the client to try and protect her (see *Bank of Montreal v Stuart* [1911] AC 120, 138). But if a case of that sort is to be advanced against a solicitor, it must be pleaded. A solicitor does not have reason to suspect undue influence simply because he knows a wife has trust and confidence in her husband and is proposing to give a charge over her property to support his financial position. That she is willing to do so is consistent with a normal relationship between spouses. Mance LJ said, at p 281:

> "There is no suggestion, or likelihood in the light of Mr Banks' attendance note, that Mr Banks ascertained the amount outstanding (well in excess of the limit of liability in the second mortgage of 53, Dene Road), its origin and the circumstances in which it came to be outstanding, let alone the prospects of its repayment or of the additional security over Rock Cottage being called upon. Nor did he ask why Mrs Kenyon-Brown was willing to grant such additional security. Still less, therefore, did he know that her husband had told her that she would be bankrupted if she did not enter into the mortgage. Nor did he elicit the fact (about which she gave evidence) that she did not consider the marriage to have any long term future but wished, on the other hand, to avoid bringing it to an end until her son (aged 14 at the beginning of 1983) was older and to maintain a tolerable atmosphere at home in the meantime while she was living with Mr Kenyon-Brown. These are considerations which would have been central to an evaluation whether it made sense for the wife to enter into the mortgage and to a balanced decision whether to do so, made free of any undue influence by Mr Kenyon-Brown. Mr Banks did not know of them. Nor, therefore, could he either discuss them with Mrs Kenyon-Brown or, if he concluded in their light that a conflict of interest existed, suggest that she discuss them with another solicitor."

374. Save as to the amount of the then current indebtedness of Mr Kenyon-Brown to the bank, Mr Banks had, in my opinion, no duty or reason to make the enquiries referred to. Some of the enquiries, eg eliciting the fact that Mrs Kenyon-Brown did not consider her marriage to have a long term future, would have been an unpardonable impertinence. Mr Banks was entitled to treat Mrs Kenyon-Brown as a mature lady able to make up her own mind as to whether to allow her share in Rock Cottage to become security for her husband's debts. What he did need to do, and, on the judge's findings, did do, was to try and make sure that she understood the nature and effect of the document she was being asked to sign. Wilson J, in his dissenting judgment in the Court of Appeal, set out, at pp 288-289, in paragraphs lettered (a) to (i) the circumstances that, in his view, determined the extent of the duty owed by Mr Banks to his client. He concluded that Mr Banks had discharged that duty. I agree and would allow this appeal.