Royal Courts of Justice.

30th July 1974

B e f o r e :

THE MASTER OF THE ROLLS (Lord Denning)
LORD JUSTICE CAIRNS
and
Sir.ERIC SACHS.

Between:

LLOYDS BANK LIMITED	**Plaintiff Respondent**
and	
HERBERT JAMES BUNDY	**Defendant Appellant**

(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters, Ltd., Room 392, Royal Courts of Justice, and 2, New Square, Lincoln's Inn, London, W.C. 2.)

Mr. L. PRICE, Q.C., and Mr. GEORGE SHILLINGFORD (instructed by Messrs. Oswald Hlckson, Collier & Co., agents for Messrs. Trethowans of Salisbury) appeared on behalf of the Appellant Defendant.
Mr. J.M. RANKIN, Q.C., and Mr. NEIL BUTTER (instructed by Messrs. Jonas and Parker) appeared on behalf of the Respondent Plaintiff.

APPEAL BY DEFENDANT FROM HTML VERSION OF JUDGMENT OF HIS HONOUR JUDGE MCLELLAN ON 6TH JUNE, 1973, AT SALISBURY COUNTY COURT.
ROYAL COURTS OF JUSTICE.
DATE: TUESDAY, 30TH JULY, 1974
BEFORE
THE MASTER OF THE ROLLS (LORD DENNING)
LORD JUSTICE CAIRNS
AND
SIR.ERIC SACHS.
HTML VERSION OF JUDGMENT

THE MASTER OF THE ROLLS: Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want to get him out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Going out means ruin for him. He was granted legal aid. His lawyers put in a defence. They said that, when he executed the charge to the bank he did not know what he was doing: or at any rate not the circumstances were such that he ought not to be bound by it. At the trial his plight was plain. The Judge was sorry for him. He said he was a "poor old gentleman". He was so obviously incapacitated that the Judge admitted his proof in evidence. He had a heart attack in the witness-box. Yet the Judge felt he could do nothing for him. There is nothing, he said, "which takes this out of the vast range of commercial transactions". He ordered Herbert Bundy to give up possession of Yew Tree Farm to the bank.

Now there is an appeal to this Court. The ground is that the circumstances were so exceptional that Herbert Bundy should not be held bound.

The events before December 1969.

Herbert Bundy had only one son, Michael Bundy. He had great faith in him. They were both customers of Lloyds Bank at the Salisbury branch. They had been customers for many years. The son formed a company called M.J.B. Plant Hire Ltd.

It hired out earth-moving machinery and so forth. The company banked at Lloyds too at the same branch.

In 1961 the son's company was in difficulties. The father on 19th September 1966 guaranteed the company's overdraft for £1300 and charged Yew Tree Farm to the bank to secure the £1500. Afterwards the son's company got further into difficulties. The overdraft ran into thousands. In May 1967 the assistant bank manager, Mr. Bennett, told the son the bank must have further security. The son said his father would give it. So Mr. Bennett and the son went together to see the father. Mr. Bennett produced the papers. He suggested that the father should sign a further guarantee for £5,000 and to execute a further charge for £6,000. The father said that he would help his son as far as he possibly could. Mr. Bennett did not ask the father to sign the papers there and then. He left them with the father so that he could consider them over night and take advice on them. Th6 father showed them to his solicitor, Mr. Trethowan, who lived in the same village. The solicitor told the father the £5,000 was the utmost that he could sink in his son's affairs. The house was worth about £10,000 and this was half his assets. On that advice the father on 27th May 1969 did execute the further guarantee and the charge, and Mr. Bennett witnessed it. So at the end of May 1967 the father had charged the house to secure £7500.

The events of December 1969.

During the next six months the affairs of the son and his company went from bad to worse. The bank had granted the son's company an overdraft up to a limit of £10,000, but this was not enough to meet the outgoings. The son's company drew cheques which the bank returned unpaid. The bank were anxious. By this time Mr. Bennett had left to go to another branch. He was succeeded by a new assistant manager, Mr. Head. In November 1969 Mr. Head saw the son and told him that the account was unsatisfactory and that he considered that the company might have to cease operations. The son suggested that the difficulty was only temporary and that his father would be prepared to provide further money if necessary.

On 17th December 1969 there came the occasion which, in the Judge's words, was important and disastrous for the father. The son took Mr. Head to see his father. Mr. Head had never met the father before. This was his first visit. He went prepared. He took with him a form of guarantee and a form of charge filled in with the father's name ready for signature. There was a family gathering. The father and mother were there. The son and the son's wife. Mr. Head said that the bank had given serious thought as to whether they could continue to support the son's company. But that the bank were prepared to do so in this way:

(i) The bank would continue to allow the company to draw money on overdraft up to the existing level of £10,000, but the bank would require the company to pay 10% of its incomings into a separate account. So that 10% would not go to reduce the overdraft. Mr. Head said that this would have the effect "of reducing the level of borrowing". In other words, the bank was cutting down the overdraft.

(ii) The bank would require the father to give a guarantee of the company's account in a sum of £11,000 and to give the bank a further charge on the house of £3,500, so as to bring the total charge to £11,000. The house was only worth about £10,000, so this charge for £11,000 would sweep up all that the father had.

On hearing the proposal, the father said that Michael was his only son and that he was 100% behind him. Mr. Head produced the forms that had aleady been filled in. The father signed them and Mr. Head witnessed them there and then. On this occasion, Mr. Head, unlike Mr. Bennett, did not leave the forms with the father: nor did the father have any independent advice.

It is important to notice the state of mind of Mr. Head and of the father. Mr Head said in evidence:

"Defendant asked me what in my opinion the company was doing wrong and company's position. I told him. I did not explain the company's affairs very fully as I had only just taken over the account.... The son said that company had a number of bad debts. I was not entirely satisfied with this. I thought the trouble was more deep seated .... It did not occur to me that there was any conflict of interest. I thought there was no conflict of interest. I would think the defendant relied on me implicitly to advise him about the transaction as bank manager. I knew he had no other assets except Yew Tree Cottage."

The father said in evidence:

"I always thought Mr. Head was genuine. I have always trusted him....No discussion how business was doing that I can remember. I simply sat back and did what they said."

The solicitor, Mr. Trethowan, said of the father: "He is straightforward. Agrees with anyone. I doubt if he understood all that Mr. Head explained to him."

So the father signed the papers. Mr. Head witnessed them and took them away. The father had charged the whole of his remaining asset, leaving himself with nothing. The son and his company gained a respite. But only for a short time. Five months later, in May 1970, a receiving order was made against the son. Thereupon the bank stopped all overdraft facilities for the company. It ceased to trade. The father's solicitor, Mr. Trethowan at once went to see Mr. Head. He said he was concerned that the father had signed the guarantee.

In due course the bank insisted on the sale of the house. In December 1971 they agreed to sell it for £7,500 with vacant possession. The family were very disappointed with this figure. It was, they said, worth much more. Estate agents were called to say so. But the Judge held it was a valid sale and that the bank can take all the proceeds. The sale has not been completed, because Herbert Bundy is still in possession. The bank have brought these proceedings to evict Herbert Bundy.

The General Rule.

Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of

forces. There are many hard cases which are caught by this rule. Take the case of a poor man who is homeless. He agrees to pay a high rent to a landlord just to get a roof over his head. The common law will not interfere. It is left to Parliament. Next take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and it is guaranteed by a friend. The guarantor gives his bond and gets nothing in return. The common law will not interfere. Parliament has intervened to prevent moneylenders charging excessive interest. But it has never interfered with banks.

Yet there are exceptions to this general rule. There are cases in our books in which the Courts will set aside a contract, or a transfer of property, when the parties have not met en equal terms - when the one is so strong in bargaining power and the other so weak - that, as a matter of common fairness it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them.

I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the Court.

III The Categories.

The first category is that of "duress of goods". A typical case is when a man is in a strong bargaining position by being in possession of the goods of another by virtue of a legal right, such as, by way of pawn or pledge or taken in distress. The owner is in a weak position because he is in urgent need of the goods. The stronger demands of the weaker more than is justly due: and he pays it in order to get the goods. Such a transaction is voidable. He can recover the excess, see Astley v. Reynolds (1731) 2 Stra. 915; Green v. Duckett (1883) 11 Q.B.D. 275. To which may be added the cases of "colore officii", where a man is in a strong bargaining position by virtue of his official position or public profession. He relies upon it so as to gain from the weaker - who is urgently in need - more than is justly due, see Pigott's case cited by Lord Kenyon L.J. in 2 Espinasse at pages 723-4; Parker v. Bristol & Exeter Railway Co. (1851) 6 Exch. 702; Steele v. Williams (1853) 8 Exch. 625. In such cases the stronger may make his claim in good faith honestly believing that he is entitled to make his demand. He may not be guilty of any fraud or misrepresentation. The inequality of bargaining power - the strength of the one versus the urgent need of the other - renders the transaction voidable and the money paid to be recovered back, see Maskell v. Horner (1915) 3 K.B. 106.

The second category is that of the "expectant heir." A man is so placed as to be in need of special care and protection and yet his weakness is exploited by another far stronger than himself so as to get his property at a gross undervalue. The typical case is that of the "expectant heir". But it applies to all cases where a man comes into property, or is expected to come into it - and then being in urgent need -another gives him ready cash for it, greatly below its true worth, and so gets the property transferred to him, see Evans v, Llewellyn (1787) 1 Cox Eq. Cas. 333. Even though there be no evidence of fraud or misrepresentation, nevertheless the transaction will be set aside, see Fry v. Lane (1888) 40 Ch. D. 312., where Mr. Justice Kay said (at page 522):

"The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction."

The third category is that of "undue influence" usually so called. These are divided into two classes as stated by Lord Justice Cotton in Allcard v. Skinner (1887) 36 Ch. D. at page 171. The first are those where the stronger has been guilty of some fraud or wrongful act - expressly so as to gain some gift or advantage from the weaker. The second are those where the stronger has not been guilty of any wrongful act, but has, through the relations which existed between him and the weaker, gained some gift or advantage for himself. Sometimes the relations are such as to raise a presumption of undue influence, such as parent over child, solicitor over client, doctor over patient, spiritual adviser over follower. At

other times a relation of confidence must be proved to exist. But to all of them the general principle obtains which was stated by Lord Chelmsford, Lord Chancellor, in Tate v. Williamson (1861) L.R. 2 Ch. App 55) at page 6l:

"Wherever the persons stand in such a relation that? while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted, to obtain an advantage at the expense of the confiding party, the person so availing himself of his position, will not be permitted to obtain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

Such a case was Tufton v. Sperni (1952) 2 T.L.R. 516, C.A. The fourth category is that of "undue" pressure. The most apposite of that is Williams v. Bayley (1866) L.R. 2 H.L. 200, where a son forged his father's name to a promissory note, and, by means of it, raised money from the bank of which they were both customers. The bank said to the father, in effect:

"Take your choice - give us security for your son's debt. If you do take that on yourself, then it will all go smoothly: if you do not, we shall be bound to exercise pressure."

Thereupon the father charged his property to the bank with payment of the note. The House of Lords held that the charge was invalid because of undue pressure exerted by the bank. Lord Westbury said at page 218:

"A contract to give security for the debt of another, which is a contract without consideration. Is above all things a contract that should be based upon the free and voluntary agency of the individual who enters into it."

Other instances of undue pressure are where an employer - the stronger party -had employed a builder - the weaker party - to do work for him. When the builder asked for payment of sums properly due (so as to pay his workmen) the employer refused to pay unless he was given some added advantage. Vice-Chancellor Stuart said:

"When an agreement, hard and inequitable in itself, has been executed under pressure on the part of the party who executes it, the Court will set it aside",

see Ormes v. Beadel (1860) 2 Giff. 166 at page 174 (reversed on another ground, 2 de G.F. & J- 333; D. & C. Builders Ltd. v. Rees (1966) 2 Q.B. at page 623.

The fifth category is that of salvage agreements. When a vessel is in danger of sinking and seeks help, the rescuer is in a strong bargaining position. The vessel in distress is in urgent need. The parties cannot be truly said to be on equal terms. The Court, of Admiralty have always recognised that fact, The fundamental rule is that if the parties have made an agreement, the Court will enforce it, unless it is manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it and decide what is fair and just", see Akerblom v. Price (1881) 7 Q.B.D. 129 at page 133 by Lord Justice Brett applied in a striking case The Port Caledonia and The Anna(1903) P. 184, when the rescuer refused to help with a rope unless he was paid £1,000

IV. The General Principles.

Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power". By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for his own excessive sum may be moved

solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being "dominated" or "overcome" by the other, One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases. Applying it to the present case, I would notice these points:-

(1) The consideration moving from the bank was grossly inadequate. The son's company was in serious difficulty. The overdraft was at its limit of £10,000. The bank considered that its existing security was insufficient. In order to get further security, it asked the father to charge the house - his sole asset - to the uttermost. It was worth £10,000. The charge was for £11,000. That was for the benefit of the bank. But not at all for the benefit of the father, or indeed for the company. The bank did not premise to continue the overdraft or to increase it. On the contrary, it required the overdraft to be reduced. All that the company gained was a short respite from impending doom

(2) The relationship between the bank and the father was one of trust and confidence. The bank knew that the father relied on it implicitly to advise him about the transaction. The father trusted the bank. This gave the bank much influence on the father. Yet the bank failed in that trust. It allowed the father to charge the house to his ruin.

(3) The relationship between the father and the son was one where the father's natural affection had much influence on him. He would naturally desire to accede to his son's request. He trusted his son. There was a conflict of interest between the bank and the father. Yet the bank did not realise it. Nor did it suggest that the father should get independent advice. If the father had gone to his solicitor - or to any man of business - there is no doubt that any one of them would say: "You must not enter into this transaction. You are giving up your house, your sole remaining asset, for no benefit to you. The company is in such a parlous state that you must not do it."

These considerations seem to me to bring this case within the principles I have stated. But, in case that principle is wrong, I would also say that the case falls within the category of undue influence of the second class stated by Lord Justice Cotton in Allcard v. Skinner. I have no doubt that the assistant bank manager acted in the utmost good faith and was straightforward and genuine. Indeed the father said so. But beyond doubt he was acting in the interests of the bank - to get further security for a bad debt. There was such a relationship of trust and confidence between them that the bank ought not to have swept up his sole remaining asset into its hands - for nothing -without his having independent advice. I would therefore allow this appeal.

LORD JUSTICE CAIRNS: I have had some doubt whether it was established in this case that there was such a special relationship between Mr. Bundy and the bank as to give rise to a duty on the part of the bank, through Mr. Head, to advise Mr. Bundy about the desirability of his obtaining independent advice. In the end, however, for the reasons given by my Lord, Sir Eric Sachs, in the judgment which he is about to deliver and which I have had the opportunity of reading, I have reached the conclusion that in the very unusual circumstances of this case there was such a duty. Because it was not fulfilled, the guarantee can be avoided on the ground of undue influence. I therefore agree that the appeal should be allowed, the judgment for the plaintiff set aside and judgment entered for the defendant.

Sir ERIC SACHS: At trial in the County Court a number of complex defences were raised, ranging from non est factum, through undue influence and absence of consideration to negligence in, and improper exercise of, the bank's duty when contracting for the sale of the relevant property. It is thus at the outset appropriate to record that in this Court no challenge has been offered to any of the conclusions of the learned County Court Judge on law or on fact save as regards one aspect of one of the defences - appropriately pleaded as undue influence. As regards that defence, however, it is clear that he vitally misapprehended the law and the points to be considered and that moreover he apparently fell into error

- as his own notes disclose - on an important fact touching that issue. In the result this Court is thus faced with a task that is very far from being easy.

The first and most troublesome issue which here falls for consideration is as to whether on the particular and somewhat unusual facts of the case, the bank was, when obtaining his signatures on the 17th December 1969, in a relationship with Mr. Bundy that entailed a duty on their part of what can for convenience be called fiduciary care. (The phrase "fiduciary care" is used to avoid confusion with the common law duty of care -a different field of our jurisprudence.)

As was pointed out in Tufton's case (1957) 2 T.L.R. 516, the relationships which result in such a duty must not be circumscribed by reference to defined limits; it is necessary to "refute the suggestion that to create the relationship of confidence the person owing a duty must be found in the recognisable garb of a guardian, trustee, solicitor, priest, doctor, manager or the like" (Lord Evershed, Master of the Rolls, at page 522). Everything depends on the particular facts, and such a relationship has been held to exist in unusual circumstances as between purchaser and vendor, as between great uncle and adult nephew, and in other widely differing sets of circumstances. Moreover, it is neither feasible nor desirable to attempt closely to define the relationship, or its characteristics, or the demarcation line showing the exact transition point where a relationship that does not entail that duty passes into one that does (of. Mr. Justice Ungoed-Thomas in re Craig deceased (1971) Ch. at page 104).

On the other hand, whilst disclaiming any intention of seeking to catalogue the elements of such a special relationship, it is perhaps of a little assistance to note some of the elements which have in the past frequently been found to exist where the Court has been led to decide that this relationship existed as between adults of sound mind. Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded. In addition, there must, of course, be shown to exist a vital element of what in this judgment will for convenience be referred to as confidentiality. It is this element which is so impossible to define and which is a matter for the judgment of the Court on the facts of any particular case.

Confidentiality, a relatively little used word, is being adopted, albeit with some hesitation, to avoid the possible confusion that can arise through referring to "confidence". Reliance on advice can in many circumstances be said to import that type of confidence which only results in a common law duty to take care -a duty which may co-exist with but is not coterminous with that of fiduciary care. "Confidentiality" is intended to convey that extra quality in the relevant confidence that is implicit in the phrase "confidential relationship" (cf. per Lord Chelmsford, Lord Chancellor, Tate v. Williamson (1861) 2 Ch. App. 55, at page 62; Lord Justice Lindley, Allcard v. Skinner (1887) 36 Ch. D. at page 181; and Mr. Justice Wright, 1893 1 Ch. at page 751), and may perhaps have something in common with "confiding" and also "confident", when, for instance, referring to someone's "man of affairs". It imports some quality beyond that interest in the confidence that can well exist between trustworthy persons who in business affairs deal with each other at arms length. It is one of the features of this element that once it exists, influence naturally grows out of it (cf. Lord Evershed, Master of the Rolls, Tufton's case at page 323, following Lord Chelmsford, Tate v. Williamson at page 61).

It was inevitably conceded on behalf of the bank that the relevant relationship can arise as between banker and customer. Equally, it was inevitably conceded on behalf of Mr. Bundy that in the normal course of transactions by which a customer guarantees a third party's obligations, the relationship does not arise. The onus of proof lies on the customer who alleges that in any individual case the line has been crossed and the relationship has arisen.

Before proceeding to examine the position further, it is as well to dispose of some points on which confusion is apt to arise. Of these the first is one which plainly led to misapprehension on the part of the learned County Court Judge. Undue influence is a phrase which is commonly regarded - even in the eyes of a number of lawyers - as relating solely to occasions when the will of one person has become so

dominated by that of another that, to use the learned County Court Judge's words, "the person acts as the mere puppet of the dominator". Such occasions, of course, fall within what Lord Justice Cotton in Allcard v. Skinner (1887) 36 Ch. D., at page 171 described as the first class of cases to which the doctrine on undue influence applies. There is, however, a second class of such cases. This is referred to by Lord Justice Cotton as follows:-

"In the second class of cases the Court interferes not on the ground that any wrongful act has been committed by the donee but on the ground of public policy and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

It is thus to be emphasised that as regards the second class the exercise of the Court's jurisdiction to set aside the relevant transaction does not depend on proof of one party being "able to dominate the other as though a puppet" (to use the words again adopted by the learned County Court Judge when testing whether the defence was established) nor any wrongful intention on the part of the person who gains a benefit from it; but on the concept that once the special relationship has been shown to exist, no benefit can be retained from the transaction unless it has been positively established that the duty of fiduciary care has been entirely fulfilled. To this second class, however, the learned Judge never adverted and plainly never directed his mind.

It is also to be noted that what constitutes fulfilment of that duty (the second issue in the case now under consideration) depends again on the facts before the Court. It may in the particular circumstances entail that the person in whom confidence has been reposed should insist on independent advice being obtained or ensuring in one way or another that the person being asked to execute a document is not insufficiently informed of some factor which could affect his judgment. The duty has been well stated as being one to ensure that the person liable to be influenced has formed "an independent and informed judgment", or, to use the phraseology of Lord Evershed, Master of the Rolls in Zomet v. Hyman (1961) 1 W.L.R. 1442, "after full, free and informed thought." (The underlining in each case is mine.) As to the difficulties in which a person may be placed and as to what he should do when there is a conflict of interest between him and the person asked to execute a document, see Bank of Montreal v. Stuart 1911 A.C. at Page 139.

Stress was placed in argument for the bank on the effect of the word "abused" as it appears in the above cited passage in the judgment of Lord Justice Cotton and in other judgments and textbooks. As regards the second class of undue influence, however, that word in the context means no more than that once the existence of a special relationship has been established, then any possible use of the relevant influence is, irrespective of the intentions of the persons possessing it, regarded in relation to the transaction under consideration as an abuse - unless and until the duty of fiduciary care has been shown to be fulfilled or the transaction is shown to be truly for the benefit of the person influenced. This approach is a matter of public policy.

One further point on which potential confusion emerged in the course of the helpful addresses of Counsel stemmed from submissions to the effect that Mr. Head, the assistant bank manager, should be cleared of all blame in the matter. When one has to deal with claims of breach of either common law or fiduciary care, it is not unusual to find that Counsel for a big corporation tends to try and focus the attention of the Court on the responsibility of the employee who deals with the particular matter rather than on that of the corporation as an entity. What we are concerned with in the present case is whether the element of confidentiality has been established as against the bank: Mr. Head's part in the affair is but one link in a chain of events. Moreover, when it comes to a question of the relevant knowledge which will have to be discussed later in this judgment, it is the knowledge of the bank and not merely the personal knowledge of Mr. Head that has to be examined.

Having discussed the nature of the issues to which the learned County Court Judge should have directed his mind, it is now convenient to turn to the evidence relating to the first of them - whether the special relationship has here been shown to exist at the material time.

Mr. Rankin stressed the paucity of the evidence given by Mr. Bundy as to any reliance placed by him on the bank's advice - and a fortiori, as to its quality. In cases of the type under consideration the paucity, or sometimes absence, of such evidence may well occur; moreover such evidence, if adduced, can be suspect. In the present case it is manifest that at the date of the trial Mr. Bundy's recollection of what happened was so minimal as to be unreliable, though not the slightest attack was made on his honesty. Indeed, his condition at trial was such that his sketchy proof was admitted into evidence. The learned Judge's reference to him as "poor old Mr. Bundy" and to his "obvious incapacity" are in point on this aspect of the matter. It is not surprising in such a case for the result to depend on the success of the cross-examination of some witness called for the party against whom the special relationship is pleaded.

Prime reliance was accordingly placed by Mr. Price on answers given by Mr. Head when under cross-examination by Mr. Shillingford, in the forefront came an answer which, unfortunately was misapprehended by the learned Judge, who thus came to make a vitally erroneous entry in his notebook. That answer as amended in the notes before us, with the assent of the Judge, is agreed to have been:-

"I would think the defendant relied on me implicitly to advise him about the transaction as bank manager."

It is to be observed that in the Judge's original note there is to be found the following, which was erased when the above quoted answer was substituted:-

"Q. Defendant relied on you to advise Company as to the position in the transaction? A. No".

(The underlining of the word "Company" is mine - to emphasise the distinction between the answer as noted and the answer now agreed to have been given.)

In the face of that vital answer Mr. Rankin found it necessary to submit that the words "as bank manager" were intended to confine the reliance to the explaining of the legal effect of the document and the sums involved as opposed to more general advice as a confident. I reject that submission. Taking Mr. Head's evidence as a whole, it seems plain that Mr. Bundy was, for instance, worried about, considered material, and asked questions about the company's affairs and the state of its accounts; and was thus seeking and being given advice on the viability of the company as a factor to be taken into account. (The vital bearing of this factor on the wisdom of the transaction is discussed later in this judgment.) Moreover, the answer to the Judge followed immediately after

"Q. Conflict of interest. A. No, it didn't occur to me at that time. I always thought there was no conflict of interest.".

That question and answer (which was in itself immediately preceded by questions on the company's viability) do more than merely indicate a failure on the part of Mr. Head to understand the position: they indicate that at that stage of the cross-examination the questions being addressed to Mr. Head related to the wider issue of the wisdom of the transaction. Moreover what happened on 17th December 1969 has to be assessed in the light of the general background of the existence of the long-standing relations between the Bundy family and the bank. It not infrequently occurs in provincial and country branches of great banks that a relationship is built up over the years, and in due course the senior officials may become trusted counsellors of customers of whose affairs they have an intimate knowledge. Confidential trust is placed in them because of a combination of status, goodwill and knowledge. Mr. Head was the last of a relevant chain of those who over the years had earned, or inherited, such trust whilst becoming familiar with the finance and business of the Bundys and the relevant company: he had taken over the accounts from Mr. Bennett (a former assistant manager at Salisbury) of whom Mr. Bundy said, "I always trusted him."

The fact that Mr. Bundy may later have referred to Mr. Head as being "straight" is not inconsistent with this view — see also the statement of Mr. Trethowan, that "Defendant is straightforward. Agrees with anyone." Indeed more than one passage in Mr. Bundy's evidence is consistent with Mr. Head's vital answer.

It is, of course, plain that when Mr. Head was asking Mr. Bundy to sign the documents, the bank would derive benefit from the signature, that there was a conflict of interest as between the bank and Mr. Bundy, that the bank gave him advice, that he relied on that advice, and that the bank knew of the reliance. The further question is whether on the evidence concerning the matters already recited there was also established that element of confidentiality which has been discussed. In my judgment it is thus established. Moreover reinforcement for that view can be derived from some of the material which it is more convenient to examine in greater detail when considering what the resulting duty of fiduciary care entailed.

What was required to be done on the bank's behalf once the existence of that duty is shown to have been established? The situation of Mr. Bundy in his sitting room at Yew Tree Farm can be stated as follows. He was faced by three persons anxious for him to sign. There was his son Michael, the overdraft of whose company had been, as is shown by the correspondence, escalating rapidly; whose influence over his father was observed by the Judge - and can hardly not have been realised by the bank; and whose ability to overcome the difficulties of his company was plainly doubtful. Its troubles were known to Mr. Head to be "deep-seated"! There was Mr. Head, on behalf of the bank, coming with the documents designed to protect the bank's interest already substantially made out and in his pocket. There was Michael's wife asking Mr. Head to help her husband.

The documents Mr. Bundy was being asked to sign could result, if the company's troubles continued, in Mr. Bundy's sole asset being sold, the proceeds all going to the bank, and his being left penniless in his old age. That he could thus be rendered penniless was known to the bank - and in particular to Mr. Head. That the company might come to a bad end quite soon with these results was not exactly difficult to deduce (less than four months later, on 3rd April 1970, the bank were insisting that Yew Tree Farm be sold).

The situation was thus one which to any reasonably sensible person, who gave it but a moment's thought, cried aloud Mr. Bundy's need for careful independent advice. Over and above the need any man has for counsel when asked to risk his last penny on even an apparently reasonable project, was the need here for informed advice as to whether there was any real chance of the company's affairs becoming viable if the documents were signed. If not, there arose questions such as, what is the use of taking the risk of becoming penniless without benefiting anyone but the bank; is it not better both for you and your son that you, at any rate, should still have some money when the crash comes; and should not the bank at least bind itself to hold its hand for some given period? The answers to such questions could only be given in the light of a worthwhile appraisement of the company's affairs - without which Mr. Bundy could not come to an informed judgment as to the wisdom of what he was doing.

No such advice to get an independent opinion was given; on the contrary, Mr. Head chose to give his own views on the company's affairs and to take this course, though he had at trial to admit: "I did not explain the company's affairs very fully as I had only just taken over." (Another answer that escaped entry in the learned Judge's original notes.)

On the above recited facts? The breach of the duty to take fiduciary care is manifest. It is not necessary for Mr. Bundy to rely on another factor tending to show such a breach. The bank knew full well that Mr. Bundy had a well-known solicitor of standing, Mr. Trethowan, who usually advised on important matters -including the previous charge signed in May 1969, only seven months earlier. Indeed, on that occasion the bank seems very properly to have taken steps which either ensured that Mr. Trethowan's advice was obtained or at least assumed it was being obtained. It is no answer that Mr. Head, relatively a newcomer to the Bundy accounts at the Salisbury branch, may not personally have known these matters -it is the bank's knowledge that is material. Incidentally, Mr. Head had discussed the relevant accounts with his manager.

The existence of the duty and its breach having thus been established, there remains the submission urged by Mr. Rankin that whatever independent advice had been obtained, Mr. 3undy would have been

so obstinately determined to help his son that the documents would any way have been signed. That point fails for more than one reason, of which it is sufficient to mention two. Firstly, on a question of fact it ignores the point that the independent advice might well have been to the effect that it would benefit the son better in the event of an almost inevitable crash if his father had some money left after it occurred - advice which could have affected the mind of Mr. Bundy. Secondly, once the relevant duty is established, it is contrary to public policy that benefit of the transaction be retained by the person under that duty unless he positively shows that the duty of fiduciary care has been fulfilled: there is normally no room for debate on the issue as to what would have happened had the care been taken.

It follows that the County Court judgment cannot stand. The learned Judge having failed to direct his mind to a crucial issue and to important evidence supporting Mr. Bundy's case thereon, at the very least the latter is entitled to an order for a new trial.

That would produce as an outcome of this appeal a prolongation of uncertainties affecting others beside Mr. Bundy, who still resides at Yew Tree Farm, and could hardly be called desirable even if one left out of account the latter's health and financial position. In my judgment, however, a breach by the bank of their duty to take fiduciary care has upon the evidence as a whole been so affirmatively established that this Court can and should make an order setting aside the guarantee and the charge of 17th December 1969.

I would add that Mr. Head was, of course, not guilty of any intentional wrongful act. In essence what happened was that having gone to Yew Tree Farm "in the interests of the bank" (as Mr. Rankin stressed more than once), he failed to apprehend that there was a conflict of interest as between the bank and Mr. Bundy, that he was in an impossible position when seeking to deal with questions of the type that he was being asked, and that he should have insisted on the obvious need for independent advice. In addition, it was unfortunate that he was - through some absence of relevant information from Mr. Bennett (who had previously dealt with the relevant accounts) - not aware of the way Mr. Trethowan had come to advise Mr. Bundy as regards the May 1969 guarantee and charge. Though I have not founded any part of this judgment on that facet of the case, I am yet inclined to view the bank's failure to suggest that Mr. Trethowan be consulted when they were pursuing their quest for Mr. Bundy's signature in such a potentially disastrous situation, as open to criticism and as something that might of itself have led to an adverse decision against the bank in this particular case.

The conclusion that Mr. Bundy has established that as between himself and the bank the relevant transaction fell within the second category of undue influence cases referred to by Lord Justice Cotton in Allcard v. Skinner is one reached upon the single issue pursued on behalf of the appellant in this Court. On that Issue we have had the benefit of cogent and helpful submissions on matter plainly raised in the pleadings. As regards the wider areas covered in masterly survey in the judgment of my Lord, the Master of the Rolls, but not raised arguendo, I do not venture to express an opinion - though having some sympathy with the views that the Courts should be able to give relief to a party who has been subject to undue pressure as defined in the concluding passage of his judgment on that point.

There remains to mention that Mr. Rankin, whilst conceding that the relevant special relationship could arise as between banker and customer, urged in somewhat doom-laden terms that a decision taken against the bank on the facts of this particular case would seriously affect banking practice. With all respect to that submission, it seems necessary to point out that nothing in this judgment affects the duties of a bank in the normal case where it is obtaining a guarantee, and in accordance with standard practice explains to the person about to sign its legal effect and the sums involved. When, however, a bank, as in this case, goes further and advises on more general matters germane to the wisdom of the transaction, that indicates that it may - not necessarily must - be crossing the line into the area of confidentiality so that the Court may then have to examine all the facts, including, of course, the history leading up to the transaction, to ascertain whether or not that line has, as here, been crossed. It would indeed be rather odd if a bank which vis-a-vis a customer attained a special relationship in some ways akin to that of a "man of affairs" - something which can be a matter of pride and enhance its local reputation - should

not where a conflict of interest has arisen as between itself and the person advised be under the resulting duty now under discussion. Once, as was inevitably conceded, it is possible for a bank to be under that duty, it is, as in the present case, simply a question for "meticulous examination" of the particular facts to see whether that duty has arisen. On the special facts here it did arise and it has been broken.

The appeal should be allowed.

Appeal allowed; judgment below set aside. Judgment for defendant on claim and counterclaim. Legal charge and guarantee dated 17th December 1969 set aside and these documents to be delivered up for cancellation. Appeal with costs in the Court of Appeal and defendant to have four-fifths of his costs in the County Court on the highest County Court scale; discretion to the Registrar as to items. Leave to appeal to the House of Lords refused.