Judgment: Royal Bank of Scotland Plc v Etridge (No 2)

FEMINIST JUDGMENTS

Rosemary Auchmuty

***Royal Bank of Scotland v Etridge (No 2) and other appeals* [2001] UKHL 44**

1. My Lords, we are all aware that the problem of undue influence in mortgage transactions is a serious one. It is serious for people who are pressured into a financial commitment they do not want. It is serious for lenders who want to be able to rely on their legal rights under a contract. And it is serious because it happens a lot. When this House last considered the matter, in *Barclays Bank v O'Brien* [1993] 4 All ER 417, Lord Browne-Wilkinson noted that there had been no fewer than eleven decisions on this matter in eight years. In that landmark decision, their Lordships not only acknowledged the potential liability of lenders for mortgage contracts obtained through the exercise of undue influence by one mortgagor upon another, they also laid down practical guidelines to enable lenders to avoid liability. It was hoped that this would settle the question, but the reverse has happened. Since then, the Court of Appeal has heard more than 20 undue influence cases, and they keep on coming. It is indicative of the extent of the problem that we are called upon today to decide no fewer than eight conjoined appeals, all involving wives alleging that they signed mortgage agreements under the undue influence of their husbands.

The *O'Brien* Guidelines

2. When Lord Browne-Wilkinson gave the decision of the House of Lords in *O'Brien* eight years ago, he explained that the challenge before the courts was to provide not simply an analysis of the law but a set of workable guidelines for lenders which would balance the important function of releasing capital for business purposes on the security of the family home with the protection of vulnerable wives from exploitation by their husbands. He gave considerable attention to equity's longstanding role in the protection of married women, for centuries disadvantaged in law and now,

though formally equal, still disadvantaged in terms of access to economic resources. After lengthy examination of the case law, however, he rejected the need for a 'special equity' or automatic presumption of undue influence in the case of married women, though he readily accepted that 'the risk of undue influence affecting a voluntary disposition by a wife in favour of a husband is greater than in the ordinary run of cases where no sexual or emotional ties affect the free exercise of the individual's will' (at 424). I would add here that sexual or emotional ties are not the only factors affecting the free exercise of a wife's will: there may also be social or even physical pressure (or the threat of it) or economic dependence upon the husband so great as to make disagreement with his wishes a practical impossibility.

3. Whilst accepting the greater risk of undue influence to married women, and couching the whole of his opinion in terms of 'wives' and 'husbands' (a style replicated, I note, in the opinions of your Lordships in the present case), Lord Browne-Wilkinson emphasised that the equity should, in line with social change, be equally available to unmarried cohabitants, including same-sex couples, as well as people in other relationships where one party reposes 'trust and confidence' in the other.
4. By declining to make married women a special case requiring special protection, the House of Lords in *O'Brien* reinforced an important point of principle: that of the equality of the sexes and the irrelevance of marital status in the application of legal and equitable principles. This is, I am sure, correct, for differential treatment has usually proved to be an impediment to the advancement of women. But the knowledge that women enjoy formal equality should not blind us to the fact that almost all the case law concerns married women and that, for historical, social, and cultural reasons, there are special pressures upon women in marriage. As Lord Browne-Wilkinson wisely observed: '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'. He went on:

> "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 many wives are still subjected to, and yield to, undue influence by their husbands. Such women can reasonably look to the law for some protection when their husbands have abused the trust and confidence reposed in them' (at 422).

The guidelines in practice

5. The rule laid down in *O'Brien* for the protection of these wives was that a lender would automatically be put on notice if (1) the proposed mortgage was manifestly not to the wife's financial advantage, and (2) there was a substantial risk that the husband had obtained his wife's consent through undue influence or negligent misrepresentation (at 429). Lenders could avoid being fixed with constructive notice of undue influence by conducting a personal interview with the wife in which they made clear to her the risk she was running and advised her to take independent legal advice.
6. Lord Browne-Wilkinson clearly anticipated resistance from banks and building societies to the extra duties thenceforth expected from them. He noted that 'Mr Jarvis QC for the bank urged that this is to impose too heavy a burden on financial institutions. I am not impressed by this submission' (at 430). He regarded the personal interview as essential for the wife's protection because 'a number of decided cases show that written warnings are often not read and are sometimes intercepted by the husband' (at 431). Such is the power of the nation's lending industry, however, that the requirement of a personal interview with the wife was never adopted. Lenders continued to use their existing Code of Banking Practice according to which wives were advised to seek independent legal advice as to the nature and effect of the transaction, and banks received the solicitor's confirmation that they had been so advised. They avoided

the requirement of the interview because, as Stuart-Smith LJ frankly observed in this case in the Court of Appeal (,, it was 'likely to expose the bank to far greater risks than those from which it wishes to be protected'.

7. This state of affairs was, I am afraid, tolerated by the courts. By the time the appeals in the current proceedings reached the Court of Appeal, lenders had succeeded in shifting the entire burden of ensuring that the wife's consent was freely obtained to the solicitors they instructed to advise her. Lenders were not required to be concerned with the quality of the advice those solicitors gave, or even whether it had been given at all. They were entitled to assume that the advising solicitor had acted independently, professionally and competently – even though, in the very series of cases in which these principles were laid down, many solicitors quite evidently had not done so. They were entitled to go ahead and process the transaction without waiting for the solicitor to confirm that the advice had been provided. This was the position we had reached when the eight appeals presently under discussion came to this House.
8. I do not think that this was a satisfactory state of affairs. The purpose of Lord Browne-Wilkinson's guidelines was to ensure that banks took a modicum of care when lending to businessmen on the security of the family home. That care had been so reduced as to be virtually non-existent. A bank could discharge its duty to a surety-wife simply by including a sentence in a standard communication advising her to take independent legal advice. In fact, it was worse: in *UCB Home Loans Corp Ltd v Moore* (one of the appeals before this House), the Court of Appeal held itto be sufficient that a lender *reasonably believed* that a wife had received advice from an independent legal adviser, even when the lender did not request it and did not require a confirmatory letter from the solicitor.
9.

New guidelines

10. I therefore welcome the new guidelines laid down by my noble and learned friend Lord Nicholls of Birkenhead, whose opinion I have had the advantage of reading in draft, as to the steps that lenders need to take to avoid being fixed with constructive notice of undue influence, and the duties of solicitors in advising sureties in these kinds of actions. I agree, too, with his widening of the categories of relationships to which automatic protection will be available to all those which are 'non-commercial' in character. Reform was clearly needed, and implementation of these guidelines should provide a solution to many of the problems we have experienced up till now.

11. There will no doubt be protests from both lenders and solicitors that the new guidelines impose duties too onerous, responsibilities too great. We have heard this many times before. I well remember the cries of anguish from conveyancing solicitors following *Williams & Glyn's Bank v Boland* [1981] AC 487 when it became clear that they could no longer assume that the lady of the house had no separate interest in the property, and that they would have to ask her about her rights, lest their client be caught by her overriding interest. Too much work, they said! Too costly! And embarrassing, too, because they would need to enquire about the lady's relationship to the legal owner. But the House of Lords of the time were not deterred. Lord Wilberforce pointed out that 'What is involved is a departure from an easy-going practice of dispensing with enquiries as to occupation beyond that of the vendor and accepting the risks of doing so' (at 508). Lord Scarman described the difficulties anticipated as 'exaggerated': 'solicitors exist to provide the service which the public needs. They can – as they have successfully done in the past – adjust their practice, if it be socially required' (at 510). That is exactly what happened: they adjusted their practice. Twenty years on, we hear no more complaints about the intolerable burden, and we see no evidence that mortgagees or solicitors have suffered, financially or in any other way.

12. In the lamentable series of undue influence cases before us, however, the co-owner wife continues to be cast as an impediment to the smooth running of the mortgage industry – a clog in the wheel of capitalism – just as she was in *Boland*. The cases have much in common, for having to make separate enquiries of a wife is a similar kind of conveyancing burden to having to give her separate advice. It was so much easier when property was held by men alone, and wives' interests could be ignored. But if the gender equality that Lord Browne-Wilkinson stressed is to be truly supported, then wives must be treated with respect. Their priorities are often different from those of husbands and mortgagees. Too often, it seems to me, those priorities disappear from the case narratives because they are seen as irrelevant to the 'real' issues. Too often their interests are unthinkingly elided with those of their husbands, as they used to be in the family home cases before *Boland.* This may be because most English j judges find it hard to imagine what a woman's life is like. But there is another reason. It is clearly easier for the mortgage industry to operate on the basis that wives only want what their husbands want, and the courts have been reluctant to interfere.

13. Whenever it is suggested that banks and building societies should show more responsibility in their lending practices, the institutions respond by threatening to withhold or limit easy access to capital. The fact that this has never actually occurred has not prevented the courts, in the years since *O'Brien,* from being perhaps excessively careful not to tread on the lenders' toes. As a consequence, mortgages are more freely and casually available than ever before. That businesses should be able to raise capital on the security of the family home is regarded as axiomatic. I note that your Lordships accept it without question. I, however, do not. Is lending on the scale and of the sort we see in the case law so obviously defensible? Most, if not all, of the wives before us would rather have kept their homes than take the kinds of risks their husbands took. Yet the courts have been zealous to ensure that equity's role of protecting the

weak and vulnerable is subordinated to the requirements of business. The duty of care has not been allowed to curtail the free availability of capital raised on the security of the home.

14. If these cases tell us anything, it is that lenders are too careless in the dispensing of their funds to businesses. To those who say that it is not the role of the courts to stop them – that this is a matter of government policy, and the solution lies in the hands of Parliament – I would reply that this House should certainly express its disquiet about the way things are going. It ill behoves the judiciary to bow to pressure from commercial interests as I believe it has done. The law should by all means try to facilitate the smooth and safe transfer of loan moneys into worthy projects. But let us not absolve the lender of every element of risk. *Some* of the burden must fall on those who seek to gain the most. Likewise, some of the court's protection must be reserved for those who need it most: the wives, who have so much to lose. Otherwise the 'balance' of which so many judges have spoken, echoing Lord Browne-Wilkinson in *O'Brien*, is an empty term, for it is so heavily weighted in favour of the lenders and against the surety wives.

The appeals

15. I turn now to the eight substantive appeals. As far as five of them are concerned, I am in agreement with your Lordships as to the outcome. I would allow the appeals of Mrs Harris, Mrs Wallace, Mrs Moore and Mrs Bennett, for the reasons given by my noble and learned friends Lord Nicholls of Birkenhead and Lord Scott of Foscote. I note, however, that Mrs Harris died in March of this year. I do not see how Mr Harris can continue resisting the bank's claim for possession of his home on the basis of his own undue influence over his wife. This would hardly comply with the equitable maxim about clean hands, even as relaxed by this court in *Tinsley v Milligan* [1994] 1 AC 340. To succeed, Mr Harris would be forced to rely on his own wrongdoing, and that is not permitted. I would also allow the appeal of Desmond Banks & Co, though with some regret. I

accept that here there is no evidence that the solicitor did not discharge his duty, such as it was at the time, to Mrs Kenyon-Brown. I would note, however, that, had the guidelines devised by my noble and learned colleague Lord Nicholls been in force at the relevant time, that duty would have been a more rigorous one and Mrs Kenyon-Brown might well have succeeded in obtaining damages from the solicitor to the extent of her loss .

Royal Bank of Scotland plc v Etridge

16. On the other three appeals I must respectfully disagree with your Lordships. I shall begin with Mrs Etridge, who has the misfortune to give her name to what may well come to be seen as a case laying down a fair and important point of law, but one from which she will not herself benefit. This is the sixth court in which aspects of her case have been argued, from the original claim for possession by the bank, through three Court of Appeal judgments and a re-trial, to the present hearing. There were two claims in Mrs Etridge's case: first, that the unlimited bank charge to which Mrs Etridge agreed should be set aside because of presumed undue influence; and second, that Mrs Etridge was entitled to damages from the solicitors who failed to advise her as to the true nature of the documents she signed.

17. In 1988 the Etridges purchased a new family home, the Old Rectory, with funds raised partly from the sale of their old home, Harewood House, and partly from loans from the Royal Bank of Scotland and a separate trust fund. Both loans, as well as an overdraft facility for Mr Etridge's business, were secured by charges on the Old Rectory. The bank asked their own solicitors to explain the effect of the charges to Mrs Etridge, who was the legal owner of the Old Rectory, before obtaining her signature. The nominated solicitor obtained the signature but, as the evidence established, gave her no explanation of the charge; he told the bank, however, that he had. Mrs Etridge subsequently claimed to have had no idea that the document she signed was a legal charge and no idea of its

extent. Mr Etridge fell behind with the mortgage repayments and both the trustees and the bank sought possession of the Old Rectory. Mrs Etridge resisted possession on the ground that her consent to the mortgage had been obtained through her husband's undue influence and contended that the bank were fixed with constructive notice of that undue influence since she had received no advice whatsoever as to the nature and effect of the transaction she was entering into.

18. Possession was granted but, on appeal, the Court of Appeal held in *Royal Bank of Scotland plc v Etridge (No 1)* [1997] 3 All ER 628 that the solicitor was the agent of the bank for the purpose of giving advice to Mrs Etridge and thus his knowledge of the fact that he had not given that advice must be imputed to the bank. On a re-trial, however, His Honour Judge Behrens ordered possession on the ground that the bank were entitled to rely on the solicitor's confirmation that he had given the appropriate advice. This decision was upheld by the Court of Appeal in *Royal Bank of Scotland plc v Etridge (No 2)* [1998] 4 All ER 705. Mrs Etridge appeals to this House against that decision and also against the decision of a different Court of Appeal in *Etridge v Pritchard Englefield* [1999] PNLR 839 that the solicitors, while negligent in failing to advise her, owed her only nominal damages, as she would have entered into the transaction even if she had received proper advice.

Presumption of undue influence

19. Judge Behrens at first instance found no evidence of actual undue influence but accepted that the presumption of undue influence arose because of the relationship of 'trust and confidence' between Mrs Etridge and her husband and because she left all financial decisions to him. My noble and learned friend Lord Scott of Foscote (in a speech I have been privileged to read in draft) has been critical of the way the judge and the Court of Appeal dealt with the presumption of undue influence. With respect, I have difficulty accepting his argument. Lord Scott says that, if the judge finds no evidence of undue influence, then the presumption is

rebutted. That is not how I understand presumptions to work. The presumption of undue influence exists precisely to deal with those situations where evidence of actual undue influence is hard to find, but where there are nevertheless reasons to doubt that the consent of the surety has been freely obtained. Lord Scott says there is no undue influence here because there was no evidence of abuse by Mr Etridge of the couple's relationship or of bullying of Mrs Etridge in order to persuade her to support his decisions. That may be so; but that was not the point. Where the presumption of undue influence arises – as the judge accepted it did in this case – then the onus is shifted to the presumed influencer to demonstrate that undue influence was not present. It is not up to the alleged victim, or indeed the judge, to find evidence of actual undue influence. I see no evidence from Mr Etridge rebutting the presumption. It is one thing for a husband to handle the family finances, quite another for him to conceal from his wife, whose consent he needed for a further plunge into unnecessary risk (they did not *need* to buy a new house), the extent of the proposed borrowing and his existing indebtedness. The presumption of undue influence might have been rebutted by evidence that Mrs Etridge gave her consent in full knowledge of what she was doing. That knowledge could have come from her own understanding of the transaction, from her husband, the bank, or the solicitor. But Mrs Etridge did not have full knowledge; her husband had deliberately withheld relevant facts from her, and no one else told her.

Manifest disadvantage

20. In his excellent analysis of the law, my noble and learned friend Lord Nicholls has finally laid to rest the debate about whether the transaction must be to the 'manifest disadvantage' of the complainant for a presumption of undue influence to arise. It is enough for the surety to be in a non-commercial relationship with the principal debtor for the presumption to arise. Disadvantage remains, however, evidentially relevant to establishing whether the presumption has been rebutted.

Unfortunately, ‘manifest disadvantage’ has frequently been interpreted in ways that betray a lack of understanding of (or sympathy with) the priorities of the wives in these cases. In Mrs Etridge’s case, the trial judge and the Court of Appeal were united in finding that this transaction was not of manifest disadvantage to her, a view shared by my noble and learned friends Lord Nicholls and Lord Scott. While there were some aspects which were clearly disadvantageous, there were others which, they say, were advantageous. Without the loans from the bank and the trust, the Etridges would not have been able to purchase their new home. And while the bank charge was an unlimited one (and thus on the face of it disadvantageous), this was no different from the charge that the bank had held over the old family home. Moreover, it allowed money to be injected into Mr Etridge’s business, upon whose profits the family lived.

21. I must respectfully differ from this assessment of the disadvantage to Mrs Etridge of this transaction. The judge at first instance accepted that she had no idea she was creating charges over the new house (just as she had not known that a charge existed over the old house) and was ‘wholly unaware’ of the extent of Mr Etridge’s existing liabilities. It should also be noted that Harewood House was sold for £240,000, while the Old Rectory was purchased for £505,000. There was, therefore, a great deal more money to lose should the bank call in its unlimited charge on the new property by comparison with the old.

22. Mrs Etridge was, in short, in total ignorance of the fact that she was in imminent danger of losing her home should her husband’s business fail. I am sure she knew that the bank could possess and sell the property if the couple defaulted on the mortgage repayments – everyone knows that – but she clearly had no idea of the likelihood that this would happen. In the event, the Etridges defaulted within 18 months, which demonstrates only too clearly how precarious their financial situation was at the time of the conveyance, and how a sensible person in full knowledge of the facts might well have refused to agree to its terms.

23. Was Mrs Etridge such a ‘sensible person’? From the facts, she was a woman who conformed to the social mores of the time and place in which she grew up and married. She was born in 1938 – that is, before the second world war, when ideas of women’s role were very different from today’s. She trained and worked as a physiotherapist before her marriage, in 1970, at the age of 32. For a short while she ran a restaurant with her husband. Then the children arrived – four of them, born between 1971 and 1977 – and she gave up work to devote herself to domestic and family life. With four children so close together she would have had her hands full when they were young. At the time of the events in this case, the children were aged between eleven and 17 – a very demanding stage, as any parent of teenagers will tell you. At this age they are out and about and busy with a thousand different activities, but not yet fully independent. They must be ferried from place to place. They need help with their school work, their social lives, the problems of growing up. With her husband preoccupied with his business, Mrs Etridge would have done the lion’s share of the parenting and homemaking – a full-time job.

24. The breadwinning role was Mr Etridge’s. He was a businessman – that was his calling and his area of expertise – and the family lived off his earnings. Mrs Etridge was neither uneducated nor unintelligent. She had had many years of earning her own money in a professional occupation. But she was not a businesswoman. For that reason, it made perfect sense to allow her husband to make all financial decisions. He had always provided for the family; she had no reason not to trust his judgment. She knew she was the legal owner of Harewood House, the house they were selling, and also that the Old Rectory, the house they were purchasing, was to be transferred into her name, for business reasons; she knew, therefore, that she must sign the documents of conveyance. She knew that a mortgage of £100,000 had been arranged and there would be papers to sign for that. But she did not read the documents because she thought she knew the contents and she would

probably not understand the obscure language in which they were couched in any event. Her behaviour was, therefore, both rational and unexceptional. She agreed to the legal charge because she thought that the chances of the bank calling in its loan were minimal and that, even if it did so, the charge was limited to £100,000. She thought this because nobody told her otherwise.

25. There is a wider principle at stake. When we talk of the 'advantage' of obtaining funds for the development of businesses, even those that provide the family income, we tend to forget that those funds are usually raised on the security, not of any old property, but of the family home. I need hardly reiterate – but I will, since it is so often overlooked – that a home has a particular significance for someone who, like Mrs Etridge, is a homemaker. It is not simply the domestic heart of the family and a shelter against the elements. It is her domain – *hers*, not his. Mr Etridge had his business affairs to occupy him. Mrs Etridge's job was to run the home. I doubt that she would wilfully have put that at risk. Most people have mortgages and most people expect to have a limited indebtedness to a bank at some stage in their lives. But Mrs Etridge knew that she and her husband had put considerable equity into the new house, and it seems to me inconceivable that the combined effect of this particular transaction – the potential loss of *all* their capital as well as their home – was something she would have contemplated with equanimity. It was a transaction that was manifestly disadvantageous to her. For this reason, and in light of the lack of any other evidence to do so, the presumption of undue influence was not rebutted.

Constructive notice

26. There remains the question of whether the bank were fixed with constructive notice of the undue influence affecting Mrs Etridge's signature of the loan guarantee. The bank requested Robert Gore & Co, the solicitors they had instructed to act for them, to explain the contents and effect of the legal charge to Mrs Etridge and to confirm to the bank that

she understood the same by signing the legal advice clause prior to witnessing her signature. In fact the duty solicitor, Mr Ellis, did not explain the contents and effect of the documents to Mrs Etridge – but he told the bank that he had.

27. The Court of Appeal held that the bank were 'entitled to assume that the solicitors had discharged their professional duties to Mrs Etridge whether or not [they] had actually seen the certificate indorsed on the respective legal charges before authorising the release of the money' (at para.22). In this case, the bank did not bother to wait for the solicitor's certificate before releasing the money. The certificate eventually came, falsely testifying that Mrs Etridge had received advice when, it fact, she had not. But by then completion had taken place. My noble and learned friend Lord Scott holds that, because the bank knew that there were solicitors acting for Mrs Etridge (albeit solicitors instructed by the bank), and because those solicitors assured the bank that they had advised her about the content and effect of the legal charge, the bank were entitled to be satisfied they were safe in relying on her apparent consent. In my view, if the bank paid out the money without waiting for the solicitor's assurance that she had been properly advised, they cannot be said to have relied on this assurance and they cannot be said to have avoided being fixed with constructive notice of any undue influence. It is irrelevant that the solicitor's certificate, when it arrived, was a meaningless fabrication. In my view, the bank were fixed with constructive notice of the presumed undue influence because they acted without confirmation that the consent had been freely given, and Mrs Etridge is entitled to have the charge set aside.

28. In making this finding, I am aware that I am departing from a substantial body of Court of Appeal jurisprudence, as well as the opinions of your Lordships in this House. In my view, however, if the purpose of the equitable rule is to try to ensure that consent is freely obtained, then the least a lender can do is to refrain from acting until they have been told that advice has been given and the surety understands what she is doing. I

accept that the bank cannot be bound by information they do not know – for instance, that the solicitor's advice had been poor (or non-existent) – since whether the bank has notice of undue influence can only be determined by how the transaction appears to them, as Stuart-Smith LJ explained in this case in the Court of Appeal (at para.41). But 'constructive notice', whether or not one accepts that this particular jurisdiction falls within the ambit of s.199 Law of Property Act 1925 (as Stuart-Smith LJ did), requires that the party who wishes to escape it at least ascertains that the appropriate inquiries have been answered. One cannot be excused from constructive notice by simply passing the buck to a solicitor or by recklessly going ahead with the transaction without waiting for confirmation from the advising solicitor.

Negligence

29. Mrs Etridge's second claim relates to the negligence of the solicitors who said they had advised her as the nature and effect of the legal charge she agreed to, but who did not do so. As a consequence of Mrs Etridge's successful appeal against possession by the bank in *Royal Bank of Scotland plc v Etridge (No 1)* [1997] 3 All ER 628, Robert Gore & Co (by this time merged with another firm, Pritchard Englefield) amended their defence to admit, as Mrs Etridge had argued all along, their liability to Mrs Etridge for breach of duty. On the re-trial, Judge Behrens found that the solicitors *were* in breach but that, on the balance of probabilities, Mrs Etridge would have signed the two charges even if she had had a full explanation of their content and effect. He awarded her nominal damages of £2.

30. Following the Court of Appeal's decision in the present case, Mrs Etridge sought leave to appeal on the negligence issue on the basis that the solicitor owed a wider duty to the surety than that which had been previously been considered. She contended that, given the manifest disadvantage of the transactions and her husband's existing indebtedness, the only proper advice the solicitor could have given was

that she should not sign the documents relating to the sale of Harewood House, the purchase of the Old Rectory and the legal charges. Had he done so, she submitted, she would not have agreed to any of the transactions. In *Etridge v Pritchard Englefield* [1999] PNLR 839 the Court of Appeal refused permission to amend her notice of appeal on the ground that the proposed amendments would introduce new arguments that had not been considered in the court below.

31. Morritt LJ (May and Tuckey LJJ agreeing) further held that Judge Behrens had been entitled on the evidence to conclude that Mrs Etridge would have signed the documents whatever advice she had been given. Because of a delay between the sale of the old house and the purchase of the new, the family had been given permission to continue to reside in the old home until completion on the new – but completion was dependent upon the signing of the charge. The 'exigencies' of the situation – the fact that the Etridges would have lost their deposit and the family would be homeless – would, the court considered, have impelled Mrs Etridge to agree to the charge.

32. I find it difficult to see how this finding was arrived at. It is true that, had Mrs Etridge refused to go ahead with the purchase of the Old Rectory, they would have lost their deposit of £50,505 – not a small sum by any means. But it pales into insignificance by comparison with the sum they eventually lost by entering into the purchase of a house worth ten times as much. As for the issue of homelessness, I regret to say that I regard this kind of pronouncement as evidence for the oft-repeated assertion that the judiciary is out of touch with ordinary people. If Mrs Etridge had refused to agree to the charge, the family would indeed have been without a home that they owned. But many people in England and Wales do not own their own home. What was there to stop the Etridges from renting for the time being? It is not difficult to find rental property. The rent payments, though doubtless substantial on a home large enough to accommodate a family of

six, would still have been less than the mortgage repayments on the Old Rectory.

33. For these reasons, I do not think that the case that Mrs Etridge would inevitably have agreed to the charge is made out. Her refutation of the suggestion would have been further strengthened if the court had accepted, as she submitted, that the undue influence she suffered dated from the time of the sale of Harewood House, rather than from the date of the signing of the legal charge on the Old Rectory. If the earlier date had been accepted, and she had been in a position to resist the sale of Harewood House, the issue of homelessness would not have arisen.

34. In any case, the nominal damages of £2 awarded to Mrs Etridge were clearly inadequate – the kind of award only made to wholly unworthy claims, which this was not. Who knows whether Mrs Etridge would really have signed the legal charge if she had understood its full effect? We can never know, because the situation did not arise. She was not put to the test of having to choose between her own interests and inclinations and the wishes of her husband, because she was never given the opportunity. That being the case, it is at the very least patronising, and may even constitute evidence of actual undue influence, to assume she would have signed the document anyway, even in full possession of the facts.

35. The solicitors had a duty to advise her; they failed in that duty, and they have admitted their failure. Lacking proper advice, and therefore in ignorance of what she was doing, Mrs Etridge signed the legal charge. As a consequence of signing, she suffered serious loss. To my mind, the case is clear. I would allow her appeal and remit the matter to the trial judge for the assessment of damages.

National Westminster Bank plc v Gill and another

36. Mrs Gill's husband wished to raise £100,000 secured on the family home to purchase new premises for his second-hand car business and associated business expenses. Mrs Gill was enthusiastic about the new premises but reluctant to secure the loan on the family home. She said in

evidence that she and her husband had a heated altercation about the matter. However, following a private meeting arranged by the bank with the family solicitor, in which the nature and effect of a legal charge were explained to her, she agreed to the transaction.

37. Unfortunately, both Mrs Gill and the solicitor were under the misapprehension – almost certainly implanted in their minds by Mr Gill – that the charge was limited to £36,000 (that being the amount needed to purchase the garage), rather than the £100,000 it actually was. £36,000 was, as Mrs Gill said, a sum they could easily afford. £100,000 was not. In the event, the business failed to prosper and the bank sought possession of the family home. Mrs Gill resisted possession on the ground that the bank had notice of the fact she had signed the documents under undue influence or as a result of misrepresentation by her husband.

38. The judge at first instance accepted that this was a case where there was a presumption of undue influence, but held that the bank were entitled to rely on the solicitor's certificate of confirmation that he had advised her as requested by the bank. Such advice having been given (and found in this case to have been competent), the bank were not fixed with constructive notice of any undue influence or misrepresentation. The Court of Appeal agreed ([1998] 4 All ER 705). In this House, too, my noble and learned friends Lord Nicholls and Lord Scott, whilst emphasising that lenders should inform solicitors advising wives of the amount of the proposed loan and of any existing indebtedness by the husband, nevertheless hold that the fact that the bank did not disclose this information here does not constitute a failure to take reasonable steps to ensure that Mrs Gill's consent was not procured through undue influence or misrepresentation.

39. I must respectfully disagree. Even if the adequacy of the legal advice is not a matter with which a bank should be concerned, since it must accept the solicitor's confirmation at face value, the same cannot be said when the solicitor was prevented from giving proper advice by reason of the

poor quality of his instructions from the bank. How can a person who is not himself in full possession of the facts advise a client in any useful or meaningful way? In this case, both solicitor and client imagined the charge to be limited to £36,000 rather than £100,000. Their discussion would, therefore, have revolved around the pros and cons of signing in terms of a particular level of risk, when, unknown to them, the risk was much greater. Not only was there more money to lose if the business failed to prosper, but the level of repayments that must be sustained to feed a mortgage of almost three times the envisaged amount would be very much higher. This situation seems to me analogous to that of a junior doctor who, told to seek a patient's consent before a routine operation, tells him or her that the risk of complications is relatively small, not knowing, because the surgeon has not told the junior doctor that this operation is not really routine, that its attendant risk will be much higher. Would the patient's consent be viewed as truly free and informed in such circumstances? I do not think so. A hospital that allowed this to happen would not be considered to have discharged their duty of care to their patient.

40. In Mrs Gill's case, as in this example, the fault did not lie with the professional who advised her; he was as misinformed as his client. The fault lay with the bank, who cannot be said to have taken all possible care to ensure that Mrs Gill's consent was freely obtained. I would therefore hold that the bank are fixed with notice of the undue influence or misrepresentation that may have induced Mrs Gill to enter into a transaction which, leading to the potential loss of her home – the thing she expressly feared – was clearly of manifest disadvantage to her. Accordingly, I would allow her appeal.

Barclays Bank v Coleman

41. I turn finally to the case of Mrs Coleman. She was the joint legal owner of the family home in Clapton, East London. Her husband, a diamond cutter, having lost his job, moved into property brokerage and then property

investment. In 1991 he bought two commercial properties in Hayes, Middlesex, and a half-share in an apartment block in Brooklyn, New York, the other half of which was owned by his wife's brother. The purchases were enabled by an 'all-moneys' charge on the family home. An all-moneys charge secures not only loans for property purchases but all future borrowings from the bank. All three investments failed, for the income from rent was never sufficient to meet the liabilities. In 1995 the bank sought to enforce their charge over the family home, and a possession order was granted.

42. Both Mr and Mrs Coleman appealed against possession, and both were unsuccessful. Mr Coleman's appeal need not concern us here. Mrs Coleman contended that her consent to the charge had been obtained by reason of her husband's undue influence and that the bank had not taken adequate steps to avoid being fixed with constructive notice of this. His Honour Judge Wakefield, sitting in the Central London County Court, agreed that the bank had not taken adequate steps to ensure that Mrs Coleman's consent had been freely obtained because, although she had received independent advice, it had been given by the solicitor's managing clerk, a legal executive, not the solicitor himself. In his view, however, the transaction had not been of 'manifest disadvantage' to Mrs Coleman and therefore undue influence was not established. He said:

> 'Perhaps the best that can be said is that Mr Coleman's departure from property broking to property speculation was a new departure and had risks which had not hitherto been undertaken by Mr Coleman. However, notwithstanding those risks, I take the view that he was providing for his family's livelihood' (*Barclays Bank plc v Coleman & another* [2000] 1 All ER 385, at 400).

43. In the Court of Appeal, Nourse LJ (with whom Pill and Mummery LJJ agreed) took exactly the opposite view on both points. On manifest disadvantage, after a lengthy analysis that prefigures this House's rejection of the requirement, he concluded that Judge Wakefield's view

was too narrow. Counsel for Mrs Coleman in the Court of Appeal suggested several reasons why the transaction was disadvantageous to her client, including the fact that her husband had significant other assets so there was no need for the bank to impose a charge on the family home at all. The factor that found favour with the Court of Appeal, and the rationale for their finding that the transaction had been of manifest disadvantage to Mrs Coleman, was the 'all-moneys' clause, which exposed her to unlimited risk. If the mortgage on the family home was unnecessary, the all-moneys clause was gratuitous: a charge to the extent of the existing borrowings would have sufficed. Mrs Coleman was therefore able to establish actual undue influence as against her husband. But this availed her little, since he was bankrupt.

44. The more serious question was whether the bank were fixed with notice of the undue influence. Here again the Court of Appeal disagreed with Judge Wakefield. They held that the bank were entitled to rely on the legal executive's certificate of confirmation of advice given to Mrs Coleman because delegation to legal executives in solicitor's firms was a widespread, normal and entirely proper practice.

45. Three features of this case call for further attention. The first is the matter of the all-moneys charge. These have featured repeatedly in the undue influence case law. Yet it is almost impossible to envisage any situation in which a wife would freely agree to her home being used as security for an unlimited guarantee of her husband's debts. In almost every case, this would clearly be disadvantageous to her. No solicitor with her interests at heart would advise a wife to sign such a charge. No lender, if they thought about it, could seriously believe that a woman who did had done so of her own free will. When the bank received Mrs Coleman's signed charge, they should immediately have been put on notice that she had not been properly advised. But of course these processes are so routine and normal, such thought would never have crossed the relevant official's mind. My view is that unlimited guarantees of this kind should not be used

in these circumstances. If they ceased to be available – or were only employed in exceptional situations – then banks would have to adopt more prudent policies in regard to business loans, fewer homes might need to be repossessed, and we would not have to devote so much court time to these unfortunate undue influence cases.

46. The second feature to note in this case is that, once again, the appointed legal officer claimed to have advised the wife, when in fact he had not. The trial evidence indicates that, in a meeting of very short duration, the managing clerk merely asked Mr Coleman if he had explained the documents to his wife and, on being assured that he had, requested Mrs Coleman's signature. The judge accepted this evidence; and it is perhaps for this reason that he held that the duty Lord Browne-Wilkinson imposed on lenders, to make sure that sureties received competent legal advice, should be delegated no further than to accredited solicitors. Certainly what happened to Mrs Coleman was the very mischief that Lord Browne-Wilkinson sought to avoid. I do not wish to cast aspersions on all legal executives, many of whom are, I am sure, as knowledgeable and competent as many solicitors. But the fact remains that legal executives are often employed to do the more routine, less contentious work of a solicitor's practice. The duty of explaining to a wife that, if she signs the documents her husband wants her to sign, she may lose her home, is, with respect, not a routine or uncontentious task. It is one that should be reserved for qualified solicitors with their more rigorous training and wider experience of complex work. I am in full agreement with the trial judge here, and would hold that the bank could not discharge their duty of care towards Mrs Coleman by accepting confirmation for advice given by a legal executive.

47. My finding is reinforced by the knowledge that there was so much in this case to put the bank on inquiry that undue influence might be present. This brings me to its third noteworthy feature. The bank knew that Mr and Mrs Coleman were Hasidic Jews, with very traditional views as to the roles

of husband and wife. In accordance with her religious principles, Mrs Coleman left business and financial decisions to her husband and concerned herself with domestic responsibilities. For that very reason, however, she would have been loath to expose her home to unnecessary risk. She testified in court that, had she been given proper advice as to the meaning and effect of the legal charge, she would not have agreed to it. My noble and learned friend Lord Scott doubts this. His view is that, for religious and cultural reasons, Mrs Coleman would have found it impossible to disagree with her husband. He thinks she would have felt she had to do what he asked her to do. Neither of us has the benefit of personal acquaintance with Mrs Coleman in order to form any assessment of her character and degree of subservience to her husband. But she has certainly been prepared to say in court that she would have refused to go along with his plans, so either she is more independent-minded than my noble and learned friend Lord Scott allows, or she is only pleading undue influence because her husband put her up to it. We do not know the truth of the matter. But I do not think it is for this court to make assumptions about how individuals will behave based on a general and incomplete knowledge of religious and cultural norms. The trial judge, who saw the witnesses, accepted that Mrs Coleman would normally go along with her husband's wishes. But this was partly because it was necessary to demonstrate a relationship of 'trust and confidence' to establish presumed undue influence. She might not have done so in this case, where her home was at stake and there were other assets against which to secure the loans. As with Mrs Etridge, we shall never know, since she was never given an opportunity to make an informed choice.

48. In my view, then, the bank were clearly put on notice that undue influence was possible in this case. Undue influence was, in fact, found. By accepting written confirmation from the solicitor's managing clerk, a legal executive, rather than the instructed solicitor himself, the bank failed to take adequate steps to ensure that Mrs Coleman's consent was freely

obtained. I hold that they are fixed with constructive notice of the undue influence and that she is entitled to have the charge set aside. Accordingly, I would allow her appeal.