W.23 (2) - UNDUE INFLUENCE AND MORTGAGES

Chapter 23 of the book explains that the equitable doctrine known as "undue influence" has become of increasing importance in the law of mortgages in recent years. This is largely because it has increasingly been used, by those having an interest in a property, to resist an application for possession and sale where the mortgagee has defaulted on mortgage repayments. Here the relevant law is covered in more detail.

23.1 The basic issue

Of recent years, the professional mortgagees (e.g., building societies and banks) have been increasingly concerned about the position of people, such as the mortgagor's family and friends, who occupy the property with the mortgagor at the date of the mortgage and may have rights to the property, which can be enforced against the mortgagee. Accordingly, the practice has grown up of asking a spouse or anyone else the mortgagee identifies as being resident in the premises to sign a document postponing his or her rights to those of the mortgagee. Also, where there are co-owners the mortgagee will have to seek the signatures of all involved (typically a husband and a wife or a couple who are living together).

However, in recent years, those who have signed in this way only later to discover that a loan was being used for a purpose they had not anticipated (for example, to invest in a business rather than for home improvements), or where later there has been a default on the mortgage, have often sought to argue that they are not bound by the mortgage despite having signed the mortgage or some document acknowledging the mortgagee's priority.

The basis on which such claims are made is the equitable concept known as 'undue influence'. This is not a rule which is specific to land law but is a general principle that arose as part of the equitable jurisdiction to see that there was fair play between the parties. Accordingly, it might more properly be regarded as being better dealt with in a text on equity and trusts rather than land law and you may also come across it in the law of contracts. However, in recent years its importance in the law of mortgages particularly (and in relation to some other interests in land) has become so considerable, that it is appropriate to give an explanation here of the operation of the equitable principles. In addition, this area of law provides an interesting example of the interaction between various aspects of land law and equitable principles, in that it is necessary first to establish what rights (if any) parties have in relation to the land in question, then to determine the normal order of priorities and then to decide whether that normal order is in some way disrupted by the application of the equitable principles relating to undue influence (and, as you will see below, the extent to which the various parties to a transaction are implicated in any undue influence that may have gone on).

23.2 Origin of the concept

This equitable concept grew up in order to supplement the common law defence of duress, which originally was restricted to quite extreme cases (such as where a signature was obtained only by threat of serious personal violence). The basic idea behind the doctrine of undue influence is that a person should not be held to a transaction if he or she has been induced to enter into that transaction due to the exercise of power over him or her by someone with whom he or she had a relationship of confidence or trust.

Traditionally, the undue influence doctrine has often been brought into play when a husband persuaded his wife to enter into a transaction that was to the benefit of the husband but not of the wife. This is, however, far from being the only situation in which this issue arises and it could be relevant in some instances in the case of an unmarried couple like the Mumps, whose story is described in the book.

Another example may be where an elderly person is persuaded to a transaction by relatives upon whom he or she is dependent. In *Langton* v *Langton*, *The Times*, 24 February 1995, the transfer of his estate in his home made by a man of 80, who had recently had two serious operations, to his son and daughter-in-law who had lived with him, was set aside on the basis of undue influence. The case is somewhat unusual because an extra factor that had led to the transfer was that the son had earlier served 13 years in prison for the murder of his mother and had only recently been reconciled with his father, following the son's release from prison. The circumstances taken as a whole were regarded as such as to place the son and daughter-in-law in a position in which they had an unusual sway over the decisions of the father.

However, while in many cases the existence of trust arises from an existing relationship, it may also arise in the particular circumstance of a case. In *Macklin* v *Dowsett* [2004] EWCA Civ 904 the Court of Appeal found on the facts that a relationship of dependency had been created (this was not a mortgage case) in a case in which Mr Dowsett faced losing his home if he did not grant an option to the Macklins.

23.3 When does undue influence arise?

In the case of *Allcard* v *Skinner* (1887) 36 ChD 145, Lindley LJ indicated that there were two key elements to undue influence: these were a relationship of trust and some evidence of abuse of that trust. Thus, he indicated that, in the case of a gift, the mere evidence of a gift between the parties would not be enough; there must be something in the facts to suggest that the gift could not be accounted for as an act of friendship or according to some other ordinary motive. In *Allcard*, the gift was of nearly all the property of a nun and it was made to her Mother Superior (for the religious order). The court viewed this relationship and the nature of the gift as in themselves suggestive of undue influence. (However, the court's view may have been influenced by the fact that religious orders were still regarded with suspicion in England at that date and in fact the disposition was a normal way of a nun ensuring that she complied with her vow of poverty.)

23.4 *O'Brien*

In modern times the catalyst for an outburst of undue influence cases was *Barclays Bank* v *O'Brien* [1994] 1 AC 180. The facts involve the fairly typical situation in which the O'Brien's matrimonial home was in joint names but Mr O'Brien wanted to use the property as security for an overdraft facility for his business. Mrs O'Brien attended the bank's premises and signed the needed paperwork but subsequently, when the mortgage repayments were not being met and the bank wished to enforce its security, claimed that the mortgage was not binding upon her interest in the property because she had been induced to sign the paperwork either as a consequence of undue influence or misrepresentation and the bank had actual or constructive notice of the position. In fact the case was decided upon the basis of misrepresentation but in it Lord Browne-Wilkinson set out in detail the rules that he regarded as relevant to undue influence. He also categorised types of undue influence into classes:

→ Class 1—cases of actual undue influence
→ Class 2—cases of presumed undue influence, which he sub-divided further into:

- ⊃ Class 2(A)—cases in which the relationship between the parties was such that the presumption of undue influence was raised as a matter of law (such as the doctor–patient relationship);
- ⊃ Class 2(B)—cases in which undue influence was presumed if the complainant established that a relationship existed under which the complainant usually reposed trust and confidence in the other party (cases such as husband and wife fell into this category).

This categorisation has been subsequently heavily criticised but you will need to note the concepts because many of the cases refer to the Lord Browne-Wilkinson's classes at length and because they may still be of importance at least in part.

For some time the case law developed by means of piling refinement upon refinement upon this class structure. A notable example of this tendency is to be found in *Bank of Credit and Commerce International SA* v *Aboody* [1990] 1 QB 923.

23.5 *Etridge*

Following *Barclays Bank plc* v *O'Brien* there was a considerable increase in the number of cases in which wives, unmarried partners, children and others in situations of confidence sought to argue that they had signed away their rights under the influence of another. Over a relatively short time, there were a number of cases in which the courts attempted to apply the principles laid down in *O'Brien*. Unfortunately, however, those decisions did not always seem consistent and it was clear that there remained confusion about the law on this issue. This led to the major step of the House of Lords hearing, as conjoined appeals, a total of eight cases in which undue influence had been alleged and seeking to establish some clear principles for the future. These landmark decisions now form the basis of this area of law: see *Royal Bank of Scotland* v *Etridge* (and conjoined cases) [2002] 2 AC 773.

At paragraphs 34–37 Lord Bingham of Cornhill stated the essence of the modern problem that gave rise to these cases:

> 34. The problem considered in *O'Brien*'s case and raised by the present appeals is of comparatively recent origin. It arises out of the substantial growth in home ownership over the last 30 or 40 years and, as part of that development, the great increase in the number of homes owned jointly by husbands and wives. More than two-thirds of householders in the United Kingdom now own their own homes. For most home-owning couples, their homes are their most valuable asset. They must surely be free, if they so wish, to use this asset as a means of raising money, whether for the purpose of the husband's business or for any other purpose. Their home is their property. The law should not restrict them in the use they may make of it. Bank finance is in fact by far the most important source of external capital for small businesses with fewer than ten employees. These businesses comprise about 95 per cent of all businesses in the country, responsible for nearly one-third of all employment. Finance raised by second mortgages on the principal's home is a significant source of capital for the start-up of small businesses.
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> 35. If the freedom of home-owners to make economic use of their homes is not to be frustrated, a bank must be able to have confidence that a wife's signature of the necessary guarantee and charge will be as binding upon her as is the signature of anyone else on documents which he or she may sign. Otherwise banks will not be willing to lend money on the security of a jointly owned house or flat.
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> 36. At the same time, the high degree of trust and confidence and emotional interdependence which normally characterises a marriage relationship provides scope for abuse. One party may take advantage of the other's vulnerability. Unhappily, such abuse does occur. Further, it is all too easy for a husband, anxious or even desperate for bank finance, to misstate the position in some particular or to mislead the wife, wittingly or unwittingly, in some other way. The law would be seriously defective if it did not recognise these realities.
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> 37. In *O'Brien*'s case this House decided where the balance should be held between these competing interests. On the one side, there is the need to protect a wife against a husband's undue influence. On the

other side, there is the need for the bank to be able to have reasonable confidence in the strength of its security. Otherwise it would not provide the required money. The problem lies in finding the course best designed to protect wives in a minority of cases without unreasonably hampering the giving and taking of security. The House produced a practical solution. The House decided what are the steps a bank should take to ensure it is not affected by any claim the wife may have that her signature of the documents was procured by the undue influence or other wrong of her husband. Like every compromise, the outcome falls short of achieving in full the objectives of either of the two competing interests. In particular, the steps required of banks will not guarantee that, in future, wives will not be subjected to undue influence or misled when standing as sureties. Short of prohibiting this type of suretyship transaction altogether, there is no

way of achieving that result, desirable although it is. What passes between a husband and wife in this regard in the privacy of their own home is not capable of regulation or investigation as a prelude to the wife entering into a suretyship transaction.

23.5.1 Not just married couples

Although all eight of the *Etridge* conjoined cases concerned wives who had given up their rights at the instance of their husbands, the court recognised that this issue arose equally for unmarried couples, including gay couples (see para. 47) (the case pre-dated civil partnerships and the possibility of marriage for same sex partners). All these are examples of cases in which, in particular instances, undue influence is possible. However, they are also all cases of relationships in which an adult might reasonably make a decision that was not entirely in her or his best interests in order to provide support to a partner. Thus it was emphasised that the *Etridge* principles apply to all non-commercial transactions where there may be a relationship of trust (see, for example, Lord Nicholls at para. 87). Hence the need for great care in balancing the conflicting interests of a lender and a person who has been disadvantaged by a document he or she has signed.

23.5.2 The O'Brien "cases"

In *Etridge* Lord Clyde mounted a strong attack on the attempt to classify cases of undue influence. He said (paras. 92 and 93):

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

93. There is a considerable variety in the particular methods by which undue influence may be brought to bear on the grantor of a deed. They include cases of coercion, domination, victimisation and all the insidious techniques of persuasion. Certainly it can be recognised that in the case of certain relationships it will be relatively easier to establish that undue influence has been at work than in other cases where that sinister conclusion is not necessarily to be drawn with such ease. English law has identified certain relationships where the conclusion can prima facie be drawn so easily as to establish a presumption of undue influence. But this is simply a matter of evidence and proof. In other cases the grantor of the deed will require to fortify the case by evidence, for example, of the pressure which was unfairly applied by the stronger party to the relationship, or the abuse of a trusting and confidential relationship resulting in for the one party a disadvantage and for the other a collateral benefit beyond what might be expected from the relationship of the parties. At the end of the day, after trial, there will either be proof of undue influence or that proof will fail and it will be found that there was no undue influence. In the former case, whatever the relationship of

> the parties and however the influence was exerted, there will be found to have been an actual case of undue influence. In the latter there will be none.

However, the other Lords of Appeal did not appear to be prepared to discard the whole classification: Lord Hobhouse said (at para. 99) that the essential structure was sound although there was a need for some clarification.

The key clarification appears to be that the Class 2(B) 'presumption' is not really a presumption at all (see also Lord Scott of Foscote at para. 161). It is for the person alleging undue influence to prove it. However, having raised sufficient evidence to establish a prima facie case, he or she may elect to sit back and invite the other party to adduce evidence to displace that case (though it would be best to make the strongest case possible, in case the other party can manage to challenge any aspects of the evidence).

23.6 No need for manifest disadvantage or wrongdoing

In some cases the courts have suggested that in order to establish undue influence it is necessary to show that the transaction in question is to the manifest disadvantage of the 'innocent' party. This test is not relevant to a case alleging actual undue influence because proof of actual abuse of trust is needed. In *CIBC Mortgages plc* v *Pitt* [1994] 1 AC 200 Lord Browne-Wilkinson (at pp. 208–9) said that he had no doubt that manifest disadvantage did not apply in a case of actual undue influence.

In *CICB* v *Pitt* Lord Browne-Wilkinson also seems to be questioning whether manifest disadvantage must always be established even in cases of presumed undue influence. While this seemed to be the view clearly taken in *National Westminster Bank plc* v *Morgan* [1985] AC 686, in *CICB* v *Pitt* (at p. 209) Lord Browne-Wilkinson said that, 'the exact limits of the decision in *Morgan* may have to be considered in the future'.

Fortunately, the decisions in *Royal Bank of Scotland plc* v *Etridge* gave the House of Lords the opportunity to review the apparent conflict between earlier decisions of that court in relation to the need or otherwise for manifest disadvantage when attempting to establish a case of undue influence. Manifest disadvantage was, of course, the second of the two elements of undue influence mentioned in *Allcard* v *Skinner* (1887) 36 ChD 145 (the first being a relationship of trust). Lindley LJ said (at p. 185):

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

It involves something in the facts that would make an ordinary person stop and think whether the gift or other act (such as signing mortgage papers) seemed surprising.

In *Etridge* the court was asked to abandon the need for this second element in undue influence cases and thus to depart from the House of Lords' decision in *National Westminster Bank* v *Morgan*. Lord Nicholls of Birkenhead rejected this approach and confirmed that such an element was needed. He said (at para. 27) that this principle made good sense and pointed out that the presumption could not apply to every Christmas or birthday gift.

However, he criticised the use of the term 'manifest disadvantage' used by Lord Scarman in *Morgan* as having been applied in a way not originally intended and advised that rather than concentrating on the term, in future greater attention should be given to the test as outlined by Lindley LJ in *Allcard* v *Skinner* and set out above. It is also worth noting that Lord Nicholls of Birkenhead was clear that manifest disadvantage was not an essential element in every case of undue influence. He said (at para. 12):

> In *CIBC Mortgages Plc* v *Pitt* [1994] 1 AC 200 your Lordships' House decided that in cases of undue influence disadvantage is not a necessary ingredient of the cause of action. It is not essential that the transaction should be disadvantageous to the pressurised or influenced person, either in financial terms or in any other way.

> However, in the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous. The issue is likely to arise only when, in some respect, the transaction was disadvantageous either from the outset or as matters turned out.

Perhaps the proper approach is to say that where any disadvantage that arises is not very great it may be easier to produce evidence to overturn the prima facie case of undue influence made out, but that this will be extremely difficult where the nature of the transaction itself is such that it 'shocks' the conscience of the court: see *Credit Lyonnais Bank Nederland NV* v *Burch* [1997] 1 All ER 144, at p. 152. It is also possible that there may be cases in which there is actual undue influence proved on the facts, even though the transaction in question does not appear on its face to be in any way suspicious. However, such cases are likely to be extremely rare.

Following *Etridge*, the Court of Appeal has adopted this approach as a standard approach and has emphasised that 'manifest disadvantage', in the sense that the phrase was once used, is unnecessary in order to establish undue influence.

For example, *Macklin* v *Dowsett* [2004] EWCA Civ 904 was not a mortgage case but illustrates the approach to be used. Mr Dowsett, after a series of transactions between him and the Macklins that had led to him having a right to live in a property rent free for life, had then signed an agreement under which in return for £5,000 he gave the Macklins power to end that right in three years' time, unless he had completed building a new bungalow on the property by that time. This was done in circumstances in which Mr Dowsett desperately needed to raise funds in order to build the bungalow or would have had to remain living in a caravan on the premises. Auld J agreed (at para. 30) that the court of first instance had erred in applying the test of whether the arrangement was manifestly disadvantageous to Mr Dowsett and said that the correct test was 'whether, in the circumstances, the agreement required explanation' and concluded that it did. In *Turkey* v *Adwah* [2005] EWCA Civ 382, in the case of a complex family arrangement, Buxton LJ endorsed the approach of the trial judge that:

> 'what a trial judge ought to be doing is trying to exercise his common sense and. . . to consider whether, given the circumstances and nature of the transaction, it says to the unbiased observer that absent explanation it must represent the beneficiary taking advantage of his position'.

23.6.1 Actual wrongdoing not necessary

It has also been made clear that actual wrongdoing on the part of the party benefiting from the transaction is not necessary for undue influence to be established. It is possible for an abuse of the trust and confidence reposed in a person to exist without that person knowingly doing wrong. This point was made by the Court of Appeal in *Hammond* v *Dobson* [2002] EWCA Civ 885, in which an elderly man had given a helpful neighbour all his life savings and in *Niersmans* v *Pesticcio* [2004] EWCA Civ 372 (per Mummery J at para. 20), a case in which an elderly and unwell man had given a property to his sister and in doing so had disadvantaged himself and his mother.

23.7 Displacing evidence of undue influence

In cases of alleged actual undue influence, the issue of displacing evidence does not arise because one is dealing with an established fact of undue influence and not a presumption. It would be for the applicant to establish that something has occurred that amounts to actual undue influence and the burden of proving this will be heavy, due to the quasi-fraudulent nature of such an event. Any evidence as to the absence of the undue influence will merely go to the heart of the claimant's case.

In *O'Brien* it was indicated that once evidence had been brought to establish a relationship of trust, there arose a rebuttable presumption of undue influence and that thereafter the burden of proof passed to the alleged influencer, who had to bring evidence to rebut that presumption.

This approach is strongly criticised in *Etridge*, in which it is made clear that this is not a matter of presumptions but of evidence and that it always lies on the person alleging undue influence to raise a prima facie case.

However, the distinction may in most cases be a fine one because normally the courts will be prepared to draw inferences from the fact of the relationship of trust and the apparently surprising nature of the transaction in question (this is where manifest disadvantage can play its part). Lord Bingham of Cornhill said that whether a transaction was brought about by undue influence was a matter of fact and to be proved by the person claiming to have been wronged. In the absence of evidence to the contrary, evidence as to a relationship of trust and confidence combined with a transaction that calls for explanation will suffice (see paras. 13 and 14).

Thus, while not all of their Lordships in *Etridge* seemed disposed to discard the whole of the *O'Brien* approach, it does seem that the distinction between real and presumed undue influence cases is reduced to a matter of the strength of the evidence.

The distinction may be most relevant in a case in which a relationship of trust clearly exists, but the transaction on its face is not in any way unusual. In such a case, the courts will not be ready to draw an inference of undue influence and thus the only chance of success arises if the person claiming to have been influenced can produce clear evidence that the apparently unexceptional transaction was in fact induced by actual undue influence.

In other cases, where there is a relationship of trust and something unusual in the transaction, the courts are likely to be prepared to conclude, on the evidence that undue influence arose in the case unless the alleged influencer can produce clear evidence to the contrary. The strongest expression of this is to be found in Lord Clyde's short speech at para. 93 (quoted above at para. 21.17.3). An example of the presumption being rebutted is *Pathania v Adedeji* [2010] EWHC 3085 (QB), a case in which the presumption of undue influence in the solicitor and client relationship was rebutted. This was a case in which the client would have lost a valuable property transaction had not the solicitor stepped in to assist with 'bridging' finance. The client was an educated man and experienced in property matters. The solicitor had discussed the transaction (a promissory note) with the client in detail and had given the client time to take independent advice. The client had then signed a document which said that he had actually taken such advice. (Note that there was a further decision in this case in the Court of Appeal, which is reported at [2012] EWCA Civ 485 (CA) but this does not affect the relevant portion of the earlier decision.)

The difference between the two types of cases may still have real effects, however, because in practice allegations of undue influence are most often made in cases in which the parties are the person claiming to have been influenced and a third party (usually a lender) such as a bank. In such a case, unless the alleged influencer can be produced as a witness and proves credible, the other party may be at a disadvantage when seeking to produce evidence to counter a prima facie case raised by the person saying she or he has been improperly influenced. In such cases, the inference drawn from the unusual (disadvantageous) nature of the transaction may suffice to decide the matter.

A pre-*Etridge* example is *Bank of Cyprus (London) Ltd v Markou* [1999] 2All ER 707, 717, which illustrates that whether a transaction is manifestly disadvantageous is determined by reference to the positions of the debtor and the surety and not from the position of the lender. This is more likely to be the case where the disadvantaged person obtains no benefit from the transaction. Thus if the loan is to benefit a family company from which the surety derives an income or in which he or she has a shareholding, the transaction may well not be manifestly disadvantageous unless the risk taken is disproportionate to the interest which the surety has. In this case the charge was to secure the bank account of the family company but at the time the mortgage was granted it was clear that the company was loss-making and had no assets. The company was controlled by the husband, though the wife was a shareholder. She only would receive a benefit from the company if her husband allowed this and she never had any drawings from the business. The wife had left school at 14 and English was her second language. It appeared that she had no idea what a mortgage of charge was. The mortgage secured unlimited drawings on the business account. Any independent person looking at the situation would have advised the wife that the transaction was wholly disadvantageous to her and that she should not enter into it.

23.8 Unconscionable bargains

If you read the *Langton* case mentioned above you will also find an interesting discussion of a second equitable principle which is related to undue influence. This is a principle that is sometimes described as being that of the 'unconscionable bargain'. This arises where there is some benefit to the person making the disposition but the transaction is so unfair (for example, the price paid is so low) that it can be regarded as the unconscientious exploitation of the weakness of a person in order for the recipient to obtain an undeserved benefit. You will realise that not all bargains at an undervalue can be attacked in this way because in general the law of contract is not interested in the adequacy of consideration. However, it may be brought into play where the facts indicate that there is some element of exploitation involved in the bargain made. In *Fry* v *Lane* (1889) 40 ChD 312, at p. 322, Kay J said:

> . . . 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.

This case does date, however, from a time of far less public education and the courts will not be so ready to apply the principle today, where someone has simply made a bad deal, but it may come into play in appropriate circumstances.

A modern example might be, for example, if the other party to the transaction is aware of some mental incapacity of the person in question and takes advantage of the position. *Hart* v *O'Connor* [1985] 1 AC 1000 (PC) indicates that knowledge by the other party of the incapacity is essential if the doctrine is to be established. This is because equity is intervening as a matter of conscience. See also *Boustany* v *Pigott* (1995) 69 P&CR 298, in which the Privy Council's decision may have been influenced by the facts: (1) that the person making the disposition was an elderly lady, whose affairs were generally managed by a relative because of her age and because (as the witnesses described it) she was 'slow', and (2) that the terms of the lease that she herself had granted were manifestly at odds with the explanation she had given herself for making the transaction. (See further Capper, *Undue influence and unconscionability: a rationalisation* (1998) 114 LQR 479.)

23.9 Why does a mortgagee need to be concerned?

If undue influence can be established, the complainant will have the right to have any transaction set aside as against the wrongdoer. However, the complainant's rights as against a third party mortgagee would normally be determined by the rules set out in the book and in W24.2 as to priorities between competing interests in land. Why then does the mortgagee need to worry if it has either obtained a release of that priority or if the complainant appeared to act as a full party to the transaction? (Mrs O'Brien actually signed the charge over her home as one of two co-owners and in all eight of the conjoined *Etridge* cases some document had been signed by the wife.)

The answer is that the courts have taken the view that the undue influence (where established) gives rise to 'an equity' to rescind the mortgage transaction itself in favour of the complainant, provided the mortgagee has notice of the problem.

Note that this is not a notice rule in the strict sense but notice is relevant as to whether the remedy available against the person who has influenced is also available against the lender. Therefore, undue influence is relevant in registered land: *Barclays Bank PLC v Boulter* [1998] 1 WLR 1, at p.11. The burden of proving undue influence lies on the person claiming it. However, in the case of a wife living with her husband who enters into a transaction which is manifestly disadvantageous to her, this burden is easily discharged - see the HL decision in the same case: [1994] 4 AllER 513.

One therefore has to consider what will constitute sufficient notice, to affect the third-party mortgagee. Since we are dealing with conscience, actual knowledge by the mortgagee of undue influence will clearly mean that the mortgagee cannot enforce against the person influenced, where the influencer would be unable to do so himself. However, such cases are uncommon because usually a mortgagee will have no personal contact with the person influenced. In such cases Lord Browne-Wilkinson in *O'Brien* relied on the concept of constructive notice, but applied in a slightly innovative way. However, this application of a wide version of constructive

notice was reviewed in the conjoined *Etridge* cases by the House of Lords, who gave guidance as to the steps that a mortgagee should take in order to protect itself.

It is worth noting, however, that as against a genuine third party to the transaction affected by the undue influence—as where A obtains B's consent to sale of the land by undue influence and then the purchaser mortgages the property to C—normal rules of priority will apply. If the land is registered, C will only be bound if the equity to rescind the transaction (s 116 LRA 2002) appears on the register or its holder is in actual occupation.

Further, the Court of Appeal has recently held in *Mortgage Express v Lambert* [2016] EWCA Civ 555 that the equity to set aside an unconscionable bargain is an interest that is capable of being overreached by two legal owners; by analogy, it seems that the equity to rescind a transaction for undue influence is also capable of being overreached in the same way. In that case, Mrs Lambert had sold her land to two fraudsters at a significant undervalue under the terms of an unconscionable bargain; the fraudsters had then mortgaged the land to Mortgage Express, which was aware of the low price obtained under the sale and so could be said to have constructive notice of the unconscionable bargain. Nevertheless, because it was not consent to the *mortgage* that had been obtained by undue influence, but only the sale by Mrs Lambert to the eventual mortgagors, notice was irrelevant. The later mortgage of the land by the fraudsters overreached Mrs Lambert's equity to set aside the sale and so she had no rights as against the mortgagee.

23.10 Passing the buck

One of the results of *O'Brien* had been that mortgagees took care to avoid any personal contact with a wife or other person in a relationship of trust, and 'passed the buck' to a legal adviser who signed a statement for the mortgagee saying that the person in question had had independent advice and had decided to authorise the transaction.

Unfortunately, as is illustrated by some of the conjoined *Etridge* cases, even where such statements had been obtained no proper advice had been given.

In *Coleman* (see *Etridge*, para. 130), Mrs Coleman's evidence was that a clerk from her husband's solicitors had simply asked her, in her husband's presence, whether her husband had explained the documents to her, without making any genuine attempt to ascertain whether she really knew what she was signing and its implications.

In *Samson*, the solicitor was acting for the bank rather than the husband or wife at the relevant point and only attested the wife's signature, having given no advice to her (see *Etridge*, para. 264).

In *Gill*, the solicitor did quite properly give full advice to the wife on the nature and effect of the document she was signing but both the solicitor and Mrs Gill were unaware that the charge would in fact secure a much larger loan than appeared to be the case from what they had been told. In that case the bank was, of course, aware of the full amount that would be covered by the security.

In a separate case, *National Westminster Bank plc* v *Amin* [2002] 1 FLR 735, heard by the House of Lords a little while after *Etridge*, a husband and wife were persuaded to allow their property to be used as security for an advance to their son. The bank had relied on a statement signed by a solicitor saying, 'I confirm that I have explained the terms and conditions to Mr and Mrs Amin'. However, Mrs Amin alleged this was impossible because neither she nor her husband spoke any English. In all these cases, the issue arises as to whether the mortgagee can claim to rely on the statement made by the lawyer in question, or whether the facts are such that the bank should be tainted by the behaviour of the influencer because there is something in the circumstances to give rise to the possibility or likelihood that the transaction has not been agreed to freely by the person influenced.

23.10 Transaction can be set aside against mortgagee with notice

Once it can be shown that the mortgagee had actual or constructive notice of the undue influence, the transaction may also be set aside as against the mortgagee. Accordingly, were Mildred Mumps to approach her bank for an advance, even were Henry to be prepared to sign a document giving up any priority he may have as against the bank, this would not guarantee that the bank was safe in making the advance. The facts of co-habitation might in themselves give rise to a potential undue influence as between Henry and Mildred, if Henry were to be in the habit of placing trust and confidence in Mildred. Were Mildred to have resorted to threats, actual undue influence might be in play. However, all this would, of course, only be relevant were Henry to have rights in the property. In these circumstances a wise bank would not want to take risks because it would not know enough about what has gone on between Mildred and Henry in order to be sure:

> (a) whether Henry has rights in the property; and
> (b) whether:
> (i) the relationship does give rise to undue influence; or
> (ii) whether actual undue influence has occurred.

The question is what the bank can do to protect itself, because numerous cases demonstrate that getting Henry to sign away his rights would not, in itself, suffice.

23.11 What can a mortgagee do to protect himself or herself?

As we can see from *O'Brien*, it is not enough to rely for example on the overreaching provisions in the property legislation because the innocent party may have consented while acting as a consequence of undue influence and the rescission of that consent will unravel the entire transaction. What the mortgagee must do, in any case in which undue influence might be possible, is either to ensure that there is no undue influence or that, if there is, the circumstances are such that the undue influence cannot be attributed to him in any way.

23.11.1 Not safe to rely on mortgagor

If a mortgagee relies on the actual borrower to obtain the signature of the other party or parties this will usually *not* be safe for the mortgagee because it is easy for the borrower to misrepresent to the other party or parties what is intended: for an example of this see *TSB Bank plc* v *Camfield* [1995] 1 WLR 430. The duty imposed on the mortgagee is to take reasonable steps to ensure that any undue influence which may exist is counteracted by ensuring that other parties are aware of the consequences of signing a mortgage or a waiver of rights.

23.11.2 The *Etridge* 'rules'

In *Barclays Bank plc* v *O'Brien* the House of Lords seemed to be laying down a very detailed and specific set of steps to be taken by all lenders in order to ensure that they afforded themselves sufficient protection against a later claim of undue influence. Lord Browne-Wilkinson suggested in his speech that the lender will have satisfied the requirement to take reasonable steps to ensure that it does not have constructive notice of rights if it insists that the wife (the case assumes it is dealing with a wife) attends a private meeting with a representative of the lender; that the husband is not present at that meeting; and that at the meeting the wife is warned of the extent of her liability should there be default, warned of the risk she is running and urged to take independent legal advice.

However, later cases did not seem to require that these steps necessarily be taken but appeared to place more value on the wife actually taking legal advice, in which case the courts seem now to be prepared to leave it to the legal adviser to ensure that there is no conflict of interests and that the wife is properly advised.

Due to the considerable confusion about what did or did not constitute sufficient protection for the lender, the House of Lords returned to the issue of rules for lenders in *Etridge*. The essential principle to be applied is enunciated by Lord Nicholls of Birkenhead at para. 54:

> The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does

> not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned.

He considered that there was no obligation on a bank to see the wife (or other person in a relationship of trust––in what follows, references to 'the wife' include any such persons) itself (para. 55), and that ordinarily it will be reasonable to rely on a confirmation given by a solicitor, acting for the wife, that the solicitor has advised the wife appropriately. However, despite this, the lender was still at risk if it knew the advice had not been given or knew facts from which it should have realised that appropriate advice had not been received (paras 56 and 57). Furthermore, Lord Nicholls approved a statement made by Fletcher Moulton LJ in *In re Coomber* [1911] 1 Ch 723 at p. 730, in relation to persons who are competent to form an opinion of their own:

> All that is necessary is that some independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and the consequences of the act. It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing.

He was content that the solicitor should act both for a husband and the wife and that it was for the solicitor to determine whether any conflict of interest actually arose and to decline to act for one party if so (para. 74).

Lord Nicholls (at para. 74) gave further detailed guidance as to the steps a bank should take to protect itself. In essence, these are as follows.

> (1) The bank should communicate directly with the wife to obtain the name of her solicitor, suggesting that she may wish to obtain independent advice and explaining that her solicitor will have to confirm that she or he has explained the transaction to the wife in full, so that the wife cannot later dispute its effects on her.
> (2) The bank must also provide the wife or her solicitor with the financial information required to understand the transaction.
> (3) If the bank believes that the wife may have been misled by her husband or not be acting in accordance with her own free will it must inform her solicitor.
> (4) Finally, the bank must obtain written confirmation from the solicitor that full advice has been given and that the wife understands the nature of the transaction.

The effect of these rules will be to ensure that wives either obtain proper advice or are at least made aware that it is in their best interests to have independent advice. Any advisor used by the wife will be under a professional duty to advise properly and could be sued by the wife if he or she did not do so. This approach is summarised by Lord Hobhouse in *Etridge* as follows (at para. 120):

> The central feature is that the wife will be put into a proper relationship with a solicitor who is acting for her and accepts appropriate duties towards her. Likewise the bank or other lender must communicate directly with the wife to the end that that relationship is established and that any certificate upon which it may seek to rely is the fruit of such a professional relationship.

Lord Scott took the matter further and set out the obligations that will fall on the wife's adviser (by reference to the case of a wife acting as a surety, though the principles should be applicable to most undue influence cases) as follows (para. 169):

> Normally, however, a solicitor, instructed to act for a surety wife in connection with a suretyship transaction would owe a duty to the wife to explain to her the nature and effect of the document or documents she was to sign. Exactly what the explanation should consist of would obviously depend in each case on the facts of

that case and on any particular concerns that the wife might have communicated to the solicitor. In general, however, the solicitor should, in my opinion:

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

In *Etridge* the House of Lords indicated that it was laying down the steps to be taken in future. The decision in *Governor and Company of the Bank of Scotland* v *Hill and Tudor (No. 2)* [2002] 29 EG 152 (NS), illustrates that in the case of a mortgage created before *Etridge* was decided the courts will be more liberal in relation to the steps taken by the chargee to protect himself. See also *UCB Corporate Services Ltd* v *Williams* [2002] 19 EG 149 (NS), which emphasises that a bank cannot rely simply on the fact that a person in Henry Mumps's position may have had legal advice (here the same solicitor acted for a husband and the wife, who later claimed to have been the subject of undue influence) and *Charter* v *Mortgage Agency Services Number Two Ltd* [2003] 15 EG 138 (NS), in which undue influence was established but the bank was not affected by it because there had been nothing in the facts to put it on notice.

If the RWB want to be sure that any rights Henry may have will not interfere with the RWB's rights to enforce their mortgage they would be well advised to advise Henry to take independent advice and to insist that they have a certificate from his lawyer confirming that the nature and effect of the mortgage have been explained to him. It should also be noted that, in the case of registered land, a signed release from a person in actual occupation may be of limited assistance in any event for reasons which have nothing to do with undue influence: see further on this *Woolwich Building Society* v *Dickman* (1996) 72 P&CR 470.

When you read the report in *Etridge* you will see how the court applied the principles set out in the report to each of the sets of facts in the eight conjoined cases. The case also provides a useful review of some of the case law on this area.

23.12 After *Etridge*

The most important post-*Etridge* case is *Smith v Cooper* [2010] 2 FLR 1521, which provides what many have found to be a helpful clarification of the correct approach after *Etridge.*

In *Smith v Cooper* the issue was the beneficial ownership of three properties: (1) a farm bungalow; (2) land adjoining the bungalow; and (3) a cottage. Miss Cooper was a divorced lady, who unfortunately suffered from depression and what became serious mental ill health. By the time the case reached the Court of Appeal Miss Cooper was unable to conduct her own affairs and the Official Solicitor acted on her behalf because she did not have sufficient mental capacity to conduct the proceedings. She had also been unable to give evidence when the case was heard at first instance in the County Court.

The proceedings were brought by Mr Smith, who was also divorced and who had come to know Miss Cooper. Following her divorce, Miss Cooper had used part of her divorce settlement to purchase the bungalow (1). After some time, Mr Smith moved into the property as well and in July 2004 Miss Cooper transferred the property into their joint names. At the same time, they purchased the adjoining land, (2), and this was conveyed into their joint names. The purchase price of (2) was paid by Mr Smith. In 2006 they bought the cottage (3). The purchase price comprised £15,000 cash provided by Mr Smith, a camper van that he had earlier given to Miss Cooper, and £100,000 raised by mortgaging property (1). They moved into the cottage (3) in September 2006 and property (1) was sold but the relationship was over by November 2006.

Subsequently, Miss Cooper being unwell and a dispute having arisen as to the ownership of the properties, Mr Smith brought a claim in the County Court, where the judge held that the facts raised a presumption of undue influence but that Mr Smith had rebutted this. Miss Cooper appealed.

The facts showed that during all the transactions Miss Cooper and Mr Smith had been represented by the same solicitor, who had required them to provide joint instructions. He had found this difficult on occasion, as Miss Cooper had seemed to keep changing her mind. At one point Miss Cooper's father had contacted the solicitor, saying that she was depressed but the solicitor had had no reason to assume that Miss Cooper was unable to give instructions and he was not aware of the background relating to her mental health and other circumstances. The solicitor had not advised Miss Cooper separately and had not advised her to seek independent advice. On each occasion, she had appeared to understand the transactions proposed and finally to agree to them.

The Court of Appeal agreed with the County Court judge that the presumption of undue influence did arise on the facts. However, Jacob LJ, said (at para 71) that the County Court –

> "... failed to address the question which then arose, namely whether Miss Cooper decided to enter into the relevant transactions ... of her own free will independent of the influence that Mr Smith was able to exercise over her."

The Court of Appeal concluded that there was in this case no evidence to rebut the presumption of undue influence because, although Miss Cooper had had the transactions explained to her by a solicitor, that advice had not been independent and there was nothing else in the facts to rebut the presumption.

This case is of particular interest because of the comments made by Jacobs LJ on a statement by Lord Nicholls in *Etridge,* which had given rise to some debate as to interpretation. Lord Nicholls had said (at para 14 of *Etridge*) –

> "Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for an explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof."

On this, Jacob LJ comments –

> "60. It is plain from his speech that he was using the phrase 'a transaction which calls for explanation' as shorthand for the formula in *Allcard v Skinner.*
>
> 61. If that is shown, as Lord Nicholls said, the presumption of undue influence applies, that is to say, the court will presume that the transaction was procured by undue influence exercised by one party over the other, in other words by the abuse by the one of the position of influence that he has over the other. In such a case it is then up to the one party to prove that the transaction was not procured by an abuse of his position of influence but was rather the free exercise of the will of the other party as a result of full, free and informed thought. Lord Nicholl's phrase 'in the absence of satisfactory explanation' in paragraph 14 of *Etridge* refers to the dominant party satisfying this burden of showing that the transaction was not procured by undue influence. Full understanding of the transaction is of course necessary but by no means sufficient, because the problem is lack of independence, not lack of understanding. As s said by Buxton LJ in *Turkey v Awadh* [2005] EWCA Civ 382 at paragraph 15:
>
> 'He would normally discharge that burden - as, for instance, now at least in husband and wife cases - by showing that the Defendant entered into the matter with his will fully unconstrained, usually with the benefit of independent legal advice.'."

23.13 Does legal advice always work to remove influence?

The answer is that usually legal advice will make all the difference and evidence that it has been given will rebut the presumption of undue influence **but** this is not invariably the case. Each case will depend upon its own facts. What is important is whether the advice puts the person advised into such a position that they can make a decision freed from the influence of the influencing person. This point was made by Mummery J in *Niersmans v Pesticcio* [2004] EWCA Civ 372, at para 23-

> "The participation of a solicitor is not, however, a precaution which is guaranteed to work in every case. It is necessary for the court to be satisfied that the advice and explanation by, for example, a solicitor was relevant and effective to free the donor from the impairment of influence on his free will and to give him the necessary independence of judgement and freedom to make choices with the full appreciation of what he was doing."

This is why *Etridge* provides such a detailed analysis of the content of the rebutting advice that should be given.

23.14 Other post *Etridge* cases

The following cases indicate some of the issues that have been considered but this is very far from being a complete list. Undue influence is certainly a growth area!

In *Daniel v Drew* [2005] EWCA Civ 507, *The Times* May 18 2005, the Court of Appeal pointed out that one had to consider in an undue influence case whether the persuasion exercised or advice given by the alleged influencer had invaded the free will of the person said to have been influenced to accept or reject the persuasion or advice. Accordingly, it was important to consider the vulnerability of the person said to have been influenced and the forcefulness of the personality of the alleged influencer. This was not, however, a mortgage case but a case in which a nephew had procured that his elderly (and, it appears, nervous) aunt retired as trustee of a family trust of a farm.

In *Abbey National Bank plc v Stringer* [2006] EWCA Civ 338 a second charge on a property executed by a vulnerable mother at the behest of her son and to his sole advantage was set aside. In this case the mother spoke very little English, could not read English and the transaction was clearly to her disadvantage and could not be presumed to arise simply from the natural affection of a mother for her child. Although she had signed the documents in the presence of a solicitor, this did not assist the bank because the solicitor had not explained the effect of the documents to her.

In *Brown v Stephenson* [2013] EWHC 2531 (Chancery Division), Brown first executed a declaration of trust in relation to three properties, then transferred them into joint names with Stephenson and finally transferred them into Stephenson's sole name. Later she applied to have all the transactions set aside, relying on her dyslexia, medical problems, her financial problems and what she described as Stephenson's "aggressive and bullying behaviour". The evidence was that Brown (who was in her 70's but accustomed to business matters) had received advice that she should not sign the documents. The court concluded that it was not clear that there had been any undue influence and that, even if there had been, the transfers were a free exercise of will, following relevant advice. This case again illustrates that making a bad decision for oneself is not in itself enough to establish undue influence.

23.15 Remedies

Normally, the appropriate remedy is found by invalidating the transaction obtained by undue influence, as against the influencing person and any other party to that transaction with notice (actual or implied) of the undue influence. However, in some cases the matter can be more complex.

Thus, if the influenced person acts as a surety but receives no benefit at all from the transaction, the transaction may be rescinded: *T.S.B. Bank PLC v Camfield* [1995] 1 WLR 430. In that case the husband (innocently) told his wife that the maximum liability under the surety she signed was £15,000 but in fact it was unlimited and in time

the sums advanced rose to £47,315. Here the wife was able to rescind the charge and was not even liable in relation to the £15,000 for which she had accepted liability.

If a surety has received some benefit from the transaction, rescission is possible if the surety can make restitution to the lender for the benefit actually received: *Dunbar Bank PLC v Nadeem* [1998] 3 AllER 876. Note, however, that in this case the Court of Appeal held that the transaction in question was not manifestly disadvantageous to the wife. The charge in question provided the purchase price for a lease in the joint names of a husband and wife, as well as securing the personal debts of the husband. Since the wife had obtained an equity of redemption in the leasehold property the transaction was not manifestly disadvantageous to her.

In *Smith v Cooper* (above) the situation was more complex because Mr Smith had obtained a series of transactions by means of undue influence but had also made some actual financial investment himself. The Court of Appeal's approach to the correct remedy in these circumstances was to undo the influenced transactions **but** to give Mr Smith an interest in the properties proportionate to his actual investment. He thus benefitted from any increase in value of the properties to the extent of his proportion, which would not have been the case had the transactions simply been invalidated. This is a practical approach where, as here, the properties have been disposed of to a third party who has no notice of the troubled background to the interests in the property. The interests become proportionate interests in the proceeds of sale.

Note that the Court of Appeal expressly said that this is not an application of the principles of a resulting trust, where the intention of the parties is important. That is because the undue influence vitiates the intention of the influenced person. Here the issue is the need to produce a result that is fair and reasonable in all the circumstances.

This is a complex area of law and it is not confined to the law of mortgages. In recent years there has been a "growth industry" in cases because often an allegation of undue influence is the only way to defend a family home against a mortgagee if the mortgagor cannot keep up repayments. Accordingly, cases of this type are likely to continue to arise.