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Case No: B2/09/2654

**IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LAMBETH COUNTY COURT
HIS HONOUR JUDGE WELCHMAN**

Royal Courts of Justice
Strand, London, WC2A 2LL
23/06/2010

Before:

**LADY JUSTICE ARDEN
LORD JUSTICE JACKSON
and
MR JUSTICE MORGAN**

Between:

ANNULMENT FUNDING COMPANY LIMITED Appellant

- and -

**CHRISTOPHER WILLIAM COWEY
SACHA FAIRFAX COWLAM** Respondents

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
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Official Shorthand Writers to the Court)

**Ms Nicola Allsop (instructed by HBJ Gately Wareing LLP) for the Appellant
Mr Cowey and Ms Cowlam appeared in person**

Hearing date : 17th May 2010

HTML VERSION OF JUDGMENT

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Mr Justice Morgan :

The facts in outline

1. Mr Cowey and Ms Cowlam are an unmarried couple. They have a long established relationship and they have a teenage son, who was born in 1995. They are the joint registered proprietors of a house at 11 South Croxted Road, Dulwich, London, SE21 ("the house"). It is common ground that Mr Cowey and Ms Cowlam both have a beneficial interest in the house. It has been assumed in this litigation that they are equal beneficial owners. It has not been necessary, either in the court below or in this court, to determine whether this assumption is correct or whether Ms Cowlam might have a share greater than one half. Accordingly, for present purposes, I will proceed on the basis that they are equal beneficial owners.
2. The house has been, and still is, subject to a first charge in favour of Cheltenham & Gloucester plc. At the date of the events with which this case is concerned, the value of the house had been assessed at £800,000 and the amount due to the first chargee was a little under £370,000. Therefore, the equity at that time was some £430,000 and a half share of that equity was worth £215,000.
3. A bankruptcy order was made in relation to Mr Cowey on 5th May 2006. The petitioning creditor was the Inland Revenue which was owed a little over £100,000. In the middle of 2007, the amount required to pay off all of Mr Cowey's creditors, together with disbursements, fees and charges, was of the order of £120,000.
4. On or following Mr Cowey's bankruptcy, on the appointment of his trustee in bankruptcy, all of Mr Cowey's property vested in his trustee in bankruptcy pursuant to section 306 of the Insolvency Act 1986. That property included his half share in the house. The legal title remained vested in Mr Cowey and Ms Cowlam, who held it on trust for the trustee in bankruptcy and for Ms Cowlam, in equal shares.
5. In the ordinary way, Mr Cowey would have been discharged from bankruptcy on 5th May 2007, pursuant to section 279 of the Insolvency Act 1986. We were not shown any documents which established that this did happen but counsel for the Claimant told the court that there was no reason to think otherwise. Although Mr Cowey was discharged from bankruptcy in that way, the bankrupt's estate, including the half share in the house, remained vested in his trustee in bankruptcy, who was entitled to seek to realise that asset, for the benefit of the creditors. There was no specific evidence in this case that the trustee had made an application for an order for sale, or for an order for possession, of the house. However, the Claimant submitted to us that it was to be expected that the trustee in bankruptcy would wish to seek such orders and that the court would in the ordinary case make such orders: see Insolvency Act 1986, s. 335A. Mr Cowey and Ms Cowlam did not contend otherwise.
6. Given that Mr Cowey needed some £120,000 to pay off his creditors and fees and charges, and that he had a half share in a house, where his half share was worth £215,000, Mr Cowey appears to have been advised to consider seeking an annulment of the bankruptcy. Mr Cowey appears to have received some general advice on that subject from an accountant and a solicitor.
7. The Claimant, as its name suggests, carries on the business of providing bridging finance to persons who are bankrupt but who (in the absence of the bankruptcy) would own property which could potentially be mortgaged to raise sufficient funds to obtain an annulment of the bankruptcy. The basic idea is that the Claimant provides to a bankrupt the funds which are needed to obtain the annulment (and to pay further fees) and, following annulment, the former bankrupt will be able to obtain a mortgage from another lender who will advance monies to pay the debt due to the Claimant and, normally, pay off any prior charge on the property. The property can then be the subject of a first charge

to the new mortgage lender. The funds advanced by the Claimant will be short term funds and will be at a level of interest which reflects that fact and the further fact that the borrower is not in a position to borrow elsewhere. The intention is that this high rate of interest payable will be replaced by more conventional rates of interest pursuant to a long term mortgage on the property in question.

8. In the present case, there was a meeting on 3rd July 2007 between a Mr Davies of the Claimant and Mr Cowey and Ms Cowlam. The meeting was also attended by an accountant and a solicitor instructed by Mr Cowey. The judge found that the accountant and the solicitor did not take the lead in the meeting and, in evidence at the trial, they sought to distance themselves from involvement in the detail of the discussion at this meeting.
9. At the meeting on 3rd July 2007, Mr Cowey and Ms Cowlam signed a document appointing Insol Financing Sourcing Limited to act as a mortgage broker on their behalf to find "a recognised financial institution" who would lend an appropriate sum. Although the document does not say so, the intention was to obtain an offer of mortgage finance to enable repayment of the Claimant's intended loan and redemption of the existing first charge on the house. The document recorded that Insol Financing Limited would charge a fee of £10,000 plus VAT in the event that such mortgage finance was arranged. Mr Davies of the Claimant company was connected with Insol Financing Sourcing Limited.
10. On or about 25th August 2007, Mr Cowey and Ms Cowlam signed a document, prepared by the Claimant, which accepted the Claimant's offer of an advance of £138,000 to be secured by a second charge over the house. The rate of interest was stated to be nil for the first three months and at the rate of 1.5% per month thereafter, with the first payment of interest being due in November 2007.
11. Also on or about 25th August 2007, Mr Cowey and Ms Cowlam signed a mortgage deed in favour of the Claimant, whereby they created a second charge over the house to secure the repayment of an advance from the Claimant of £138,000, together with interest as described above.
12. On or about 7th September 2007, a sum of approximately £124,000 was advanced to solicitors acting for Mr Cowey. The monies advanced were to be used exclusively for the purpose of Mr Cowey paying his creditors, together with the other fees and charges, and obtaining an annulment of his bankruptcy.
13. On or about 7th September 2007, the Claimant managed to register the charge granted to it by Mr Cowey and Ms Cowlam against the registered title to the house, even though Mr Cowey's bankruptcy had not by that date been annulled. There was an issue in the county court as to the effectiveness of that registration, in particular at the later stage after Mr Cowey's bankruptcy was annulled. The judge held that the registration was effective and there has been no challenge to that conclusion on this appeal. Accordingly, I say nothing further about that matter.
14. On 22nd November 2007, Mr Registrar Nicholls, sitting in the Bankruptcy Court in London, annulled Mr Cowey's bankruptcy. The order recited that the Registrar was satisfied that the bankruptcy debts and expenses had been paid or secured for. The annulment order made consequential orders, including an order as to the vacation of the registration of the bankruptcy against the registered title to the house.
15. Insol Financial Sourcing Limited made considerable efforts to find a mortgage lender who would provide the funds needed to repay the Claimant and to redeem the first and second charges over the house. Those efforts were unsuccessful. There were various reasons for this failure. One reason was the amount of the loan requested. Another was Mr Cowey's credit rating as someone against whom a bankruptcy order had been made, even though that order had been annulled. Another was the unexpected change in the attitude of lenders to providing finance, on mortgage terms, which prevailed in late 2007. The fact that the annulment in this case was not achieved until 22nd November 2007 did not help in that respect.
16. The result of the above was that the loan from the Claimant, which was intended to be a short term bridging loan, was not repaid as a result of a remortgage of the house. The Claimant called in their loan. It was not repaid.

17. On 17th April 2008, the Claimant brought the present proceedings against Mr Cowey and Ms Cowlam. The claim against both Defendants was for possession of the house and for payment of the full amount of the loan, plus interest. The claim was based exclusively on the terms of the charge granted by Mr Cowey and Ms Cowlam to the Claimant.
18. Mr Cowey and Ms Cowlam defended the claim on various grounds. It is not necessary to refer to all of the matters relied upon in their Defence. Amongst the matters pleaded, it was alleged that: (1) Ms Cowlam reposed trust and confidence in Mr Cowey; (2) the transaction with the Claimant was not readily explicable and was manifestly disadvantageous to Ms Cowlam; (3) the charge should be presumed to have been entered into by Ms Cowlam as a result of undue influence by Mr Cowey; (4) the Claimant was on notice of the undue influence for various reasons, including the fact that the Claimant knew that Ms Cowlam had not been independently advised and that the Claimant had not taken any steps to avoid being fixed with such notice; and (5) the Claimant could not rebut the presumption that the charge was not the result of the exercise by Ms Cowlam of her own free will. Ms Cowlam pleaded that she had a right in equity to have the charge set aside.
19. The claim was tried before H H Judge Welchman in the Lambeth County Court on 3rd and 4th August 2009 and 9th October 2009. The first two days were taken up with oral evidence. The Claimant was represented by Ms Allsop, who also appeared in this court. Mr Cowey and Ms Cowlam were not represented but they had a McKenzie friend, a Mr Bennett, and the judge allowed Mr Bennett to make submissions on the third day of the trial. Mr Cowey and Ms Cowlam both gave evidence and were cross-examined by counsel for the Claimant. The judge heard submissions from the Claimant's counsel and from Mr Bennett on the third day of the trial. The judge gave an *ex tempore* judgment at the end of the third day, Friday 9th October 2009. The judge finished delivering his judgment at 6.20 p.m. In summary, he decided that Ms Cowlam had succeeded in establishing that she had entered into the charge in favour of the Claimant as the result of the undue influence of Mr Cowey and that the Claimant was bound by that fact so that the charge should be set aside as against Ms Cowlam. The judge directed that consequential matters would have to be dealt with at a later hearing.
20. The matter came back before the judge on 11th and 12th November 2009. On the first of those two days, the judge heard argument as to whether, even if the charge were set aside as against Ms Cowlam, she was nonetheless liable, as a joint debtor with Mr Cowey, to repay the loan which the Claimant had made. The judge held that she was not liable in that way. The judge gave a short judgment giving the reasons for his conclusion. On the next day, the judge dealt with other consequential matters and, in particular, with the position of Mr Cowey. The judge gave the Claimant permission to appeal against his finding that Ms Cowlam had entered into the charge as the result of the undue influence of Mr Cowey. He refused to give the Claimant permission to appeal against his finding that Ms Cowlam was not liable as a joint debtor pursuant to an unsecured loan. On 25th January 2010, Aikens LJ gave the Claimant permission to appeal on this second point.
21. The Claimant now appeals on the points identified above. The Claimant is again represented by Ms Allsop of counsel. Strictly speaking, the appeal is only in relation to the position of Ms Cowlam but the outcome of the appeal may also affect Mr Cowey. For example, if the charge is not set aside against Ms Cowlam, it will be a legal charge binding the full legal and beneficial interests in the house and it is to be expected that the Claimant would obtain an order for possession of the house to enable it to sell the same. Conversely, if the charge were to remain set aside as against Ms Cowlam, it cannot be a legal charge binding the entire legal and beneficial interests in the house and the rights of the parties would have to be looked at in a different way. We were not addressed on what should happen if the charge remains set aside and I say nothing on that subject.
22. Mr Cowey and Ms Cowlan appeared in person on this appeal but, as before, they are accompanied by Mr Bennett. The court acceded to an application from Ms Cowlam that Mr Bennett should be allowed to make submissions to the court on her behalf. However, the court did not give permission to Mr Bennett to speak on behalf of Mr Cowey as the court considered that there was a conflict of interest between Mr Cowey and Ms Cowlam, even though both they and Mr Bennett appeared to consider that Mr Cowey and Ms Cowlam had the same interests in upholding the judgment below. Mr Bennett had previously provided the court with a detailed written argument extending to 31 pages. In the event,

after hearing oral submissions from Ms Allsop, the court indicated that it did not need to hear oral submissions from Mr Bennett or from Mr Cowey or Ms Cowlam and we reserved our judgments.

The judgments in the county court

23. It is necessary to refer in some detail to the findings of fact and the reasoning of the judge in the judgments he gave on 9th October 2009 ("the first judgment") and 11th November 2009 ("the second judgment"). I will confine myself to those parts of the judgments which bear on the present appeal, which is restricted to questions of undue influence, and I will not rehearse those facts which were more relevant to other issues in the court below.
24. In his first judgment, the judge set out the background to the transaction and the position of the various parties. He described the meeting on 3rd July 2007 and he considered the submissions as to what transpired at that meeting and he made his findings on them. He considered what was said about the loan from the Claimant being a secured loan. He considered the evidence as to a discussion about Ms Cowlam having legal advice at a later stage of the transaction. He held that Mr Davies of the Claimant had not misrepresented the position when describing the Claimant's proposal. I will refer later to the judge's findings about the understanding of Mr Cowey and Ms Cowlam on that subject.
25. The judge accepted Mr Cowey's evidence that he did not want a bridging loan. He thought he was certain to secure a remortgage on conventional mortgage terms. The judge held, in a number of places in his judgment, that Mr Cowey and Ms Cowlam did not understand the nature of the transaction they were entering into with the Claimant. They thought that the loan from the Claimant was for a short period only, until Mr Cowey's bankruptcy was annulled when they would enter into a conventional long term first mortgage on the house. Further, they did not think that they were granting a second charge over the house to the Claimant.
26. At paragraph 40 of the first judgment, the judge referred to the pressure which Ms Cowlam was under. In that paragraph, the judge is referring to the pressure of the situation rather than to specific pressure placed on her by Mr Cowey.
27. At paragraph 46 of the first judgment, he referred to Mr Cowey's understanding of the transaction which showed that Mr Cowey did not understand the transaction he was entering into. The judge also referred to Mr Cowey explaining to Ms Cowlam the reasons why she had to go along with the transaction. The judge also found that Ms Cowlam did not understand the transaction. Although the judge did not spell this out, it seems to me to be an inevitable inference that if Mr Cowey was explaining the transaction to Ms Cowlam at a time when he misunderstood it, his explanation to her must have involved a misrepresentation to her as to the nature of the transaction. That is not to say that Mr Cowey knowingly deceived Ms Cowlam but it seems to me that he must have misled her on this critical matter.
28. At paragraph 48 of his first judgment, the judge again referred to the pressure on Ms Cowlam in a way that suggests he is referring to the pressure from the financial situation in which she and Mr Cowey found themselves.
29. At paragraph 51, the judge referred to Mr Cowey being despairing and desperate about his situation. At paragraph 52, the judge referred to the pressure of the situation but also to the pressure placed by Mr Cowey on Ms Cowlam. At paragraph 54, the judge referred to Ms Cowlam's anxiety and concern and the fact that she did not understand the nature of the transaction in question.
30. The judge then considered whether Mr Cowey and Ms Cowlam were misled by the Claimant. He held that they were not. However, he found in a number of places in his first judgment that they had misunderstood the transaction and, as it seems to me, Ms Cowlam's misunderstanding of the transaction was contributed to by Mr Cowey conveying to her his own misunderstanding of it.
31. At paragraph 59 of his first judgment, the judge accepted evidence from Ms Cowlam that she was not in any sense financially sophisticated.

32. At paragraph 60, the judge found that Mr Cowey was placing actual pressure on Ms Cowlam to make her enter into the transaction that he very badly wanted to enter into. This pressure did not amount to deceit. At paragraph 61, the judge described the nature of the pressure applied by Mr Cowey and held that it was "undue pressure". Mr Cowey "caused" Ms Cowlam to follow him "blindly". Mr Cowey was in the ascendancy, he took advantage of Ms Cowlam and caused her to enter into a transaction which was very much against her interests.

33. The judge then dealt with other matters. He began his detailed discussion of whether there was undue influence at paragraph 70, continuing until paragraph 78. The judge began by summarising the submissions of Ms Allsop as to what was required before a mortgagee was fixed with undue influence practised by, for example, one borrower on the other borrower. He correctly directed himself that unless there was undue influence in fact, questions about constructive notice and independent legal advice did not arise. He then recorded Ms Allsop's submissions as to the facts. At paragraph 71 of his first judgment, the judge said that Ms Allsop had submitted:

"This is a case where the court could find and, indeed, should find, as a matter of fact, not [on] the basis of any presumption, but on the basis of the evidence that there had not been any undue influence. We went through the evidence to which I have already referred on that topic as to what had been said in evidence."

34. The judge then referred to Barclays Bank plc v O'Brien [1994] AC 180 and Royal Bank of Scotland plc v Etridge (No. 2) [2002] 2 AC 773. It is obvious that Ms Allsop had, rightly, taken the judge with care through those authorities, in particular, the second of them and she had made a number of submissions to the judge, which she repeated in this court, as to the propositions of law which they established. The judge then set out some extracts from Etridge (No. 2), which were of direct relevance. In particular, he referred to paragraphs 13, 14, 21 and 32 from the speech of Lord Nicholls in that case. Three things emerge from this. The first is that the judge had been rightly reminded of the legal principles which he was to apply; secondly, that there was no issue about the legal principles; and thirdly, it is to be inferred (in the absence of any clear pointer to the contrary) that the judge did indeed apply those principles to his findings of fact.

35. At paragraph 76 of his first judgment, the judge stated that he considered that he had the advantage of hearing both Mr Cowey and Ms Cowlam give their evidence. He then found that Mr Cowey had exercised influence over Ms Cowlam and pressured her into the transaction. At paragraph 77, he referred to a number of considerations which showed that he was working through the considerations identified as relevant in the speech of Lord Nicholls in Etridge (No. 2) at [13], a paragraph dealing with actual undue influence. He then described the effect of the transaction on Ms Cowlam as placing a "colossal burden" on her.

36. At paragraph 78 of his first judgment, the judge said this:

"I find that Mr Cowey acted with gross irresponsibility in this matter. He did not consider his own position with the care that he ought to have done. That is something that he will bear the consequences for, but his cavalier view of the financial matters in his understandable drive and desire to get out of the situation he was in, caused him to influence, unduly in my judgment and inappropriately, his partner so that she entered into this transaction. I find that there was actual undue influence in this case, but I also find as an alternative finding that really having regard to the passage in Lord Nicholls' speech, which I have referred to, that the circumstances where the transaction was, in my judgment, very much against the interests of Ms Cowlam. If in fact, contrary to my finding, Ms Allsop is right or the view prevails that this is not a case of actual undue influence, although I find that it is, the circumstances are such as to give rise to the inference that it is as an alternative finding. When one looks at the circumstances in the situation here and what unfolded, the correct and proper inference, which has not been rebutted in my judgment, means that there was undue influence."

37. At paragraphs 79 to 82 of his first judgment, the judge then made his findings as to whether the Claimant was fixed with notice of the undue influence and he held that it was. It is not necessary to give further detail of his reasoning in this respect as it is not challenged on appeal.

38. The judge's second judgment dealt with a submission from the Claimant that even though the charge was to be set aside in equity against Ms Cowlam, she should remain bound by the loan from the Claimant to Mr Cowey and to Ms Cowlam, which the Claimant described as a joint loan. Ms Allsop relied on the way that the matter had been pleaded in one part of the Defence. She also said that the court had a "discretion" to sever the transaction between the unsecured loan and the grant of security, so that it was only the latter part of the transaction which was to be set aside. The judge was urged to consider the transaction as falling into two separate parts. He rejected that, giving brief reasons for regarding the transaction as a single transaction.

The Claimant's case on appeal

39. The Claimant has put its case on appeal in different ways. The first way appeared from the grounds of appeal and from the Claimant's skeleton argument; the second way appeared in the course of Ms Allsop's oral submissions.
40. I will refer, first, to the grounds of appeal in the Appellant's Notice. I will number them in what I consider is the most appropriate way. The first ground of appeal contends that it was not open to the judge to find that there was actual undue influence when the Defence relied upon an inference of undue influence or presumed undue influence.
41. The second ground of appeal is that there was no, or no sufficient, evidence to enable the judge to make a finding of actual undue influence.
42. The third ground of appeal is that it was wrong in law to make a finding of presumed undue influence in the alternative to a finding of actual undue influence.
43. The fourth ground of appeal is that the judge had applied the wrong test for presumed undue influence and that he had failed to address the question of whether Ms Cowlam had reposed trust and confidence in Mr Cowey and the separate question as to whether the transaction called for an explanation. This was linked to an earlier statement in the grounds of appeal that the judge had given no adequate reasons for his finding of Mr Cowey's ascendancy over Ms Cowlam.
44. The fifth ground of appeal was that the judge failed to consider in sufficient detail whether any presumption of undue influence had been rebutted.
45. The sixth ground of appeal is that the judge was wrong not to sever the loan from the security in respect of it; the Claimant relies upon the terms of the Defence and what it says was the effect of the evidence.
46. In Ms Allsop's skeleton argument, these grounds of appeal are repeated but with some variations.
47. When Ms Allsop opened the Claimant's appeal, she stressed that she did not intend to invite the court to reverse any finding of primary fact by the judge. That seemed to me at the time, and since, to be a considerable departure from the way in which the matter had been put in the grounds of appeal and in the skeleton argument. Before hearing this submission, it had seemed to me that some of the grounds of appeal, notably the second, involved a challenge to the judge's findings of primary fact.

The first ground of appeal

48. The first ground of appeal contends that it was not open to the judge to find that there was actual undue influence when the Defence relied upon an inference of undue influence or presumed undue influence.
49. When considering this ground of appeal, it is helpful to have in mind the way in which actual undue influence and presumed undue influence were described by Lord Nicholls in Etridge (No. 2) at [13] - [17], as follows:

13 Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence

rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.

14 Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn.

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

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

17 The availability of this forensic tool in cases founded on abuse of influence arising from the parties' relationship has led to this type of case sometimes being labelled "presumed undue influence". This is by way of contrast with cases involving actual pressure or the like, which are labelled "actual undue influence": see *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, 953, and *Royal Bank of Scotland plc v Etridge (No 2)* [1998] 4 All ER 705, 711-712, paras 5-7. This usage can be a little confusing. In many cases where a plaintiff has claimed that the defendant abused the influence he acquired in a relationship of trust and confidence the plaintiff has succeeded by recourse to the rebuttable evidential presumption. But this need not be so. Such a plaintiff may succeed even where this presumption is not available to him; for instance, where the impugned transaction was not one which called for an explanation.

50. What that passage establishes is that an issue as to whether there was undue influence involves an issue of fact. The party asserting that there has been undue influence can call direct evidence which supports such a finding. Alternatively, that party can call evidence of other matters which justify the inference that undue influence was used. Either way, the party is attempting to prove the fact of undue influence.

51. In this case, Ms Cowlam was seeking a finding that undue influence had been used. She pleaded that there were facts which justified the inference that undue influence had been used. Once she did that, it was open to either Mr Cowey or the Claimant to rebut that inference. Mr Cowey did not attempt to rebut the inference.
52. At the trial, the case put forward by the Claimant as recorded by the judge in paragraph 71 of his first judgment, was that the judge should make findings on the basis of the actual facts and not on the basis of a presumption. Ms Allsop took the judge in detail through the evidence. She submitted that the right finding of fact to make on the basis of that evidence was that there had been no undue influence. She submitted that if the judge found that there was no undue influence, then it followed that the court should not infer undue influence as the result of applying a presumption.
53. On this appeal, Ms Allsop referred us to a passage in the speech of Lord Scott in Etridge (No. 2) at [219]. She relied on this passage in support of her third ground of appeal but, as the passage discusses the range of possible findings following a trial, it is relevant to refer to it in connection with the first ground of appeal also. Lord Scott said:

219 The presumption of undue influence, whether in a category 2A case, or in a category 2B case, is a rebuttable evidential presumption. It is a presumption which arises if the nature of the relationship between two parties coupled with the nature of the transaction between them is such as justifies, in the absence of any other evidence, an inference that the transaction was procured by the undue influence of one party over the other. This evidential presumption shifts the onus to the dominant party and requires the dominant party, if he is to avoid a finding of undue influence, to adduce some sufficient additional evidence to rebut the presumption. In a case where there has been a full trial, however, the judge must decide on the totality of the evidence before the court whether or not the allegation of undue influence has been proved. In an appropriate case the presumption may carry the complainant home. But it makes no sense to find, on the one hand, that there was no undue influence but, on the other hand, that the presumption applies. If the presumption does, after all the evidence has been heard, still apply, then a finding of undue influence is justified. If, on the other hand, the judge, having heard the evidence, concludes that there was no undue influence, the presumption stands rebutted. A finding of actual undue influence and a finding that there is a presumption of undue influence are not alternatives to one another. The presumption is, I repeat, an evidential presumption. If it applies, and the evidence is not sufficient to rebut it, an allegation of undue influence succeeds.

54. In the present case, there had been a full trial. In the words of Lord Scott, the judge had to decide on the totality of the evidence whether undue influence had been proved. As recorded by the judge in his first judgment, that is what the Claimant specifically invited the judge to do. That is what the judge did. There was nothing procedurally unfair in the judge determining whether all of the evidence led him to find that actual undue influence had been established. In my judgment, the Claimant cannot complain about the course taken by the judge. The Claimant's real complaint is that the judge found that there was undue influence whereas the Claimant had hoped to persuade the judge otherwise.
55. I would reject the first ground of appeal.

The second ground of appeal

56. The second ground of appeal is that there was no, or no sufficient, evidence to enable the judge to make a finding of actual undue influence. This ground of appeal also asserts that the judge's findings were against the weight of the evidence. The Claimant does not assert that the judge failed to apply the correct legal principles as to what amounts to undue influence.
57. I initially expected that the Claimant, in order to make good this ground of appeal, would ask the court to consider the oral evidence which was before the judge and, in particular, the oral evidence of Mr Cowey and Ms Cowlam. However, Ms Allsop told us that she did not challenge any of the judge's findings of primary fact. If there is no challenge to the judge's findings of primary fact and there is also no challenge to the legal principles which the judge applied, it is difficult to see how this ground of

appeal can be put forward. Further, Ms Allsop did not argue that the judge's reasons were inadequate and that the matter should be remitted to him so that he could expand the reasoning in his judgment.

58. In case I have misunderstood what Ms Allsop meant when she said she did not challenge the judge's findings of primary fact, I have read the transcript of the oral evidence of Ms Cowey and Ms Cowlam. In doing so, I recognise that a reading of the transcript is not as satisfactory as hearing the evidence itself. I think that the judge was correct when he said that he had had an advantage as a result of seeing Mr Cowey and Ms Cowlam give their evidence.
59. On reading the transcript of the evidence of Mr Cowey and Ms Cowlam, together with their witness statements, I found that there was comparatively little by way of evidence on the subject of undue influence. There appeared to be a number of reasons for that. First, Mr Cowey and Ms Cowlam principally blamed the Claimant for their predicament. Secondly, Mr Cowey and Ms Cowlam still live together and there was probably a natural reluctance on Ms Cowlam's part when putting forward her case that her problems were the fault of Mr Cowey. Thirdly, although they had legal advice and assistance in connection with the earlier stages of this litigation, and although they had the assistance of a McKenzie friend at the trial, they were essentially acting in person at the trial and they may not have fully thought through what was needed to prove a defence of undue influence. On the other hand, they did give evidence as to the relevant events and that evidence included evidence that Mr Cowey had put pressure on Ms Cowlam to enter into the transaction. The judge plainly accepted their evidence on these critical matters.
60. Earlier in this judgment, I set out in some detail the specific findings which the judge had made on the question of actual undue influence. An important question was as to the extent of the pressure placed on Ms Cowlam by Mr Cowey and whether that pressure was undue and inappropriate. The judge was well aware, from the submissions made to him, that he had to distinguish between the general pressure on Mr Cowey and Ms Cowlam, which arose from the situation in which they were placed, and the specific pressure which Mr Cowey brought to bear on Ms Cowlam to ensure that she joined in the transaction. In my judgment, there was evidence on which the judge could make his essential findings as to the pressure, applied in this case by Mr Cowey, being undue pressure.
61. In any event, it seems to me that it was well open to the judge to hold that Mr Cowey had used undue influence in this case. Whatever pressure Mr Cowey did or did not apply it seems to me to be clear that Mr Cowey persuaded Ms Cowlam to enter into this transaction. When I summarised the judge's findings above, I explained that there was an inevitable inference that Mr Cowey had persuaded Ms Cowlam to enter into this transaction by explaining to her the nature of the transaction, as he understood it. Because he had himself misunderstood the transaction, his misleading explanation to her had contributed to her misunderstanding the transaction, as the judge clearly found that she had.
62. The judge did not refer to misrepresentation as distinct from other forms of undue influence. In Etridge (No. 2), some of the members of the House of Lords discussed undue influence and misrepresentation interchangeably, on the basis that undue influence can take different forms and misrepresentation is one of those forms. For example, Lord Nicholls said at [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. [my emphasis]
63. On the other hand, Lord Scott in Etridge (No. 2), was careful on numerous occasions throughout his speech to refer to "undue influence or misrepresentation".
64. In the present case, it does not seem to me to matter whether the facts of the present case are analysed as a case of undue influence, as a result of the undue pressure applied by Mr Cowey to Ms Cowlam, or as a case of misrepresentation, as a result of Mr Cowey unwittingly misleading Ms Cowlam as to the character of the transaction in which he was persuading her to join. It is clearly established that the

principles which apply as to when a lender is put upon inquiry, and as to the reasonable steps it should take to avoid being affected by notice, apply equally to cases of misrepresentation and to other cases of undue influence: see, for example, Barclays Bank plc v O'Brien [1994] 1 AC 180 which was, on its facts, a case of misrepresentation rather than some other form of undue influence.

65. In my judgment, on the judge's findings, which I would not disturb, together with my own conclusion that this was, at least, a case of unwitting misrepresentation, Ms Cowlam was entitled to set aside the transaction as against Mr Cowey. She was also entitled to set aside the transaction as against the Claimant, if it had constructive notice of Mr Cowey's conduct. The judge held that the Claimant did have the necessary constructive notice and there has been no appeal against that finding.
66. For these reasons, I would reject the second ground of appeal.
67. The third, fourth and fifth grounds of appeal concern the judge's alternative finding of presumed undue influence. In view of my conclusions on the first and second grounds of appeal, dealing with actual undue influence, the third, fourth and fifth grounds of appeal do not arise. However, I will deal briefly with the third ground of appeal as it has some implications for the first ground of appeal also.

The third ground of appeal

68. The third ground of appeal is that it was wrong in law to make a finding of presumed undue influence in the alternative to a finding of actual undue influence. The judge's findings were in paragraph 78 of his first judgment, which I have set out in paragraph 36 above.
69. Ms Allsop relied upon the passage from the speech of Lord Scott in Etridge (No. 2) at [219], which I have set out at paragraph 53 above. She said that it was not open to the judge to hold that there was no undue influence and then to infer that there had been.
70. I do not think that the judge was making the mistake asserted by Ms Allsop. This was not a case where the judge had made a finding that there was no undue influence. He had held in terms that there had been undue influence. What the judge was saying was that if the evidence had not supported his positive finding of undue influence, he would go on to consider whether it was proper to infer undue influence. He was not proceeding on the basis that he had made a finding that there had not been undue influence. It was not inconsistent for the judge to consider the matter in the alternative. It was strictly unnecessary for him to do so but he plainly thought that it would be helpful to the parties for him to indicate how he would have approached the matter if he had not made a positive finding of actual undue influence.
71. If it had arisen, I would have rejected the third ground of appeal.

The fourth and fifth grounds of appeal

72. As I would reject the first and second grounds of appeal, it follows that the third, fourth and fifth grounds of appeal do not need to be considered. I have briefly dealt with the third ground of appeal because some of the points which are relevant to that ground overlap with the matters discussed in relation to the first ground of appeal.
73. The fourth and fifth grounds of appeal turn upon the judge's findings, in particular his findings of fact, as to whether Ms Cowlam had reposed trust and confidence in Mr Cowey and the separate question as to whether the transaction called for an explanation. As Ms Allsop stated that she did not dispute the judge's findings of primary fact, and as the legal principles in this area are clear and do not need to be restated and as these grounds of appeal will not affect the outcome of this appeal, I see no advantage in dealing with them.

The sixth ground of appeal

74. The sixth ground of appeal is that the judge was wrong not to sever the loan from the security in respect of it; the Claimant relies upon the terms of the Defence and what it says was the effect of the evidence.

75. The Claimant submits that the loan to Mr Cowey and Ms Cowlam is distinct from the charge over the house. It says that even if the charge was induced by undue influence (or misrepresentation), so that it must now be set aside against Ms Cowlam, the loan was not so induced and should be allowed to stand. The Claimant's submission appears to be based on the fact that Ms Cowlam thought that the loan from the Claimant was unsecured and so, if one set aside the charge in favour of the Claimant, Ms Cowlam would then be in the situation she expected that she would be in. The result would be that Ms Cowlam would be jointly liable to repay the loan but that liability would not be charged on her beneficial interest in the house. Although the Claimant did not say that this was its intention, a finding that Ms Cowlam was liable to repay the loan and a judgment against her to that effect would obviously open the door to the Claimant obtaining a charging order in relation to her beneficial interest in the house.
76. In my judgment, the Claimant's submission on this ground of appeal is inconsistent with the substance of the judge's findings as to the effect of the undue influence in this case. As I read those findings, there is no distinction to be drawn between the loan and the charge. Both the loan and the charge were disadvantageous to Ms Cowlam. She entered into both in the mistaken belief that she was entering into a short term loan which would be replaced at an early point by a conventional mortgage, at interest rates which were much less than the interest rates being charged by the Claimant.
77. The Claimant relies on that part of the Defence filed on behalf of Ms Cowlam, paragraph 10(a) of the Defence, where Ms Cowlam pleaded that what was intended at the meeting on 3rd July 2007 was that the Claimant would give Mr Cowey and Ms Cowlam an unsecured loan. However, this submission ignores the remainder of paragraph 10 of the Defence which goes on to plead that what was intended on 3rd July 2007 was that the Claimant or an associated company would organise a re-mortgage of the house as soon as Mr Cowey's bankruptcy was annulled so that the unsecured loan could then be repaid.
78. Ms Allsop cited the decision at first instance in Barclays Bank plc v Caplan [1998] 1 FLR 532, where the deputy judge held that one part of a transaction or series of transactions was not affected by undue influence, whereas another part was. He set aside the affected part but held that he should not set aside the other part of the transaction, which was not affected by undue influence. In particular, he held it would possible to sever the affected part from the unaffected part if it were possible to remove the affected part by the excision of the relevant wording (without the necessity of adding to or modifying the wording of what remained) and its removal did not alter the character of the instrument or the balance of rights and obligations contained in it.
79. In my judgment, in the present case both the loan and the charge were found by the judge to have been affected by the relevant undue influence. Further, if one adopts the alternative analysis of a misrepresentation as to the character of the transaction, both the loan and the charge were affected by misrepresentation. Accordingly, no question arises of severing a part of the transaction which is not affected by undue influence or misrepresentation.
80. I would reject the sixth ground of appeal.

Conclusion

81. I have rejected the first and second grounds of appeal which deal with the judge's finding of actual undue influence. The third, fourth and fifth grounds of appeal, in relation to presumed undue influence, do not therefore arise. I have also rejected the sixth ground of appeal, dealing with severance of the transaction.
82. It follows from the above that, in my judgment, this appeal should be dismissed.

Lord Justice Jackson:

83. I agree.

Lady Justice Arden

84. I also agree.

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