IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(SIR JOHN KNOX sitting as a High Court Judge)

CHANF 97/0490/3

Royal Courts of Justice
The Strand
London WC2

Wednesday 4th November, 1998

B e f o r e:

LORD JUSTICE EVANS
LORD JUSTICE MORRITT
LORD JUSTICE CHADWICK

- - - - - -

DAVIES

Respondent

- v -

NORWICH UNION LIFE INSURANCE SOCIETY

Appellant

- - - - - -

(Computer Aided Transcript of the Palantype Notes of
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Official Shorthand Writers to the Court)

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MR M BRIGGS QC and MR G COOPER (Instructed by Norwich Union Group Legal, Surrey Street, Norwich NR1 3DR) appeared on behalf of the Appellant

MR J GAUNT QC and MR N O'BRIEN (Instructed by Messrs Robinson Jarvis & Rolf, Ryde, Isle of Wight PO33 2AP) appeared on behalf of the Respondent

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J U D G M E N T
(As approved by the Court)

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Wednesday 4th November, 1998

JUDGMENT

LORD JUSTICE EVANS: Lord Justice Chadwick will give the first judgment.

LORD JUSTICE CHADWICK: This is an appeal against the order made on 31st January 1997 by Sir John Knox, sitting as a Judge of the Chancery Division, whereby he ordered that the appellant (then The Norwich Union Life Insurance Society and hereafter "Norwich Union") pay to the respondent, Kay Alison Davies, a sum representing her one half share in the proceeds of sale of property known as Tuckers Farmhouse, Gatcombe, Isle of Wight, with interest from 14th January 1994.

The claim against Norwich Union arose in the following circumstances. Until 14th January 1994 Mrs Davies and her former husband, Trevor Lloyd Davies, were the registered owners of the property, Tuckers Farmhouse. They had purchased the property in October 1986 from their own funds and without the assistance of a mortgage. They held the property as beneficial joint tenants. In December 1989 they executed a charge in favour of Norwich Union to secure its guarantee of Mr Davies' liabilities as a Name at Lloyd's. By 1992 their marriage was in difficulties. Mrs Davies had commenced proceedings for divorce. A decree *nisi* was made on 26th April 1993. It was clear that the property, which had been the matrimonial home, would have to be sold as part of the financial arrangements to be made following the breakdown of the marriage. By December 1993 they had found a buyer for the property (together with an adjoining paddock which they also owned) at a price of £264,000. They were ready to exchange contracts. The solicitors acting for Mrs Davies realised that she might be entitled to set aside the charge, in so far as it affected her interest in the property, on the grounds identified in Barclays Bank Plc v O'Brien [1994] 1 AC 180. They asked Norwich Union to agree that the charge over the property would be released on completion of the sale on terms that the proceeds of sale were paid into a joint account (itself subject to a charge in favour of Norwich Union)

to await resolution of that claim. Norwich Union was unwilling to accept that arrangement. Mrs Davies was faced with the choice between losing what was seen as an advantageous sale and allowing the proceeds of sale to be applied to the discharge of Norwich Union's liability to Lloyd's under its guarantee. Under protest she agreed to the latter course. The sale was completed in January 1994.

Mrs Davies commenced these proceedings by writ issued on 26th August 1994. She sought a declaration that the charge which she had executed in December 1989 was not enforceable against her beneficial interest in the property or against her interest in the proceeds of sale. She sought, also, an order requiring Norwich Union to pay to her a sum representing one half of the net proceeds of sale.

The action was tried by Sir John Knox in January 1997. The Judge identified three issues (transcript: page 32B-E): (i) whether Mrs Davies was induced to execute the Norwich Union charge by the exercise by Mr Davies of undue influence; if so, (ii) whether the charge was enforceable by Norwich Union as against Mrs Davies; and, if not, (iii) whether, having given her consent to a sale in 1993 on terms that the proceeds would be applied to discharge Norwich Union's liabilities under its guarantee to Lloyd's, Mrs Davies was entitled to recover from Norwich Union a sum representing one half of those proceeds, or any other sum. The Judge decided each of those issues in favour of Mrs Davies. He declared that the charge of December 1989 was not enforceable against her beneficial interest in the property; or against her interest in the proceeds of sale. He ordered that Norwich Union should pay to her £112,415.22 - that being a sum equal to one half of that part of the proceeds of sale (after deduction of a rateable proportion of the cost and expenses of sale) as was attributable to the charged property - together with interest from 14th January 1994 - that being the date on which the sale was completed.

Norwich Union appeals against the decisions of the Judge on each of these three issues. It is convenient to consider the issues in turn.

Was the execution of the charge procured by undue influence?

The circumstances in which the charge was executed in December 1989 may be summarised as follows:

(1) Mr Davies had become an underwriting member at Lloyds with effect from 1st January 1987. In order to do so he had arranged for his potential liabilities as such to be secured by two guarantees, each for £62,500, to be given by Manufacturers Hanover Trust Company ("MHT"). That arrangement would, of course, give rise to a corresponding liability on him to indemnify MHT in respect of any monies which it had to pay to Lloyd's under its guarantees. His indemnity was, itself, to be secured by a charge over the matrimonial home, Tuckers Farm, which he had just purchased with his wife. That charge ("the MHT charge") was executed by Mr and Mrs Davies on or about 17th December 1986. On the basis of that charge, MHT gave guarantees to Lloyd's which are dated 1st January 1987.

(2) In December 1988 MHT, at the request of Mr Davies, agreed to increase the amount of its guarantees to Lloyds to a total of £150,000. Before doing so, MHT sought and obtained the acknowledgement of Mrs Davies that she was aware of that change. The increased guarantee took effect from 1st January 1989.

(3) In or shortly before December 1989, Mr Davies decided to move his Lloyd's guarantee from MHT to Norwich Union. The reason was, it seems, that (unlike MHT) Norwich Union charged no annual fee for the facility. On 4th December 1989 Norwich Union issued a facility letter for a proposed guarantee in the amount of £150,000. The facility letter required security to be provided by a first charge over Tuckers Farm. Mr Davies instructed his solicitor, Mr Hibbert of James Eldridge & Sons, to act for him in the transaction. An attendance note made by Mr

Hibbert records:

> "Telcon Trevor Davies. He is changing over his Lloyds Guarantee from Manufacturers Hanover Trust to Norwich Union. Very urgent - deadline end of month. Norwich Union are sending him all the forms direct, once signed they will drop in here for returning to N.U. Deeds of Tuckers held by M.H.T. N.U. will be asking us to confirm the title and that forms have been brought in."

(4) On 7th December 1989 the solicitors to Norwich Union wrote to Mr Hibbert. The heading to the letter is "The Norwich Union Life Insurance Society and TL Davies: Lloyds Bank Guarantee Replacement Plan." The problem is identified in the first two paragraphs of the letter.

> "Your above named client has applied to the Norwich Union Life Insurance Society ("the Society") for a Lloyds Guarantee under the above scheme to be secured by a charge over real property and an assignment of a life policy or policies and whilst an Offer of Guarantee has been issued by the Society it is unlikely that the necessary legal requirements of the Society can be met in time to issue the relevant Guarantee by the deadline of end of December laid down by Lloyds.
>
> With a view to overcoming this problem the Society are prepared to issue the relevant Guarantee to Lloyds before the deadline subject to my receiving the enclosed letter of undertaking duly completed and signed by your client and the enclosed form of Charge completed and executed by the estate owners. To enable the deadline to be met, such documents will require to be in my possession by Friday 15th December."

The letter went on to describe the information that Mr Hibbert would need in order to complete the charge. This included a request that the amount of the guarantee be inserted under "Initial guarantee" - the figure to be that which appeared in the Society's offer. The letter continued:

> "Your client and any other party to the deed (eg chargors of the property if different) should execute the deed at the foot of page 2 and their signatures should be witnessed."

(5) On 11th December 1989 Norwich Union sent to Mr Davies a revised facility letter in substitution for the letter of 4th December 1989. The revised letter offered a guarantee facility

in the amount of £225,000.

(6) On 12th December 1989 Mr Hibbert returned the form of undertaking which had been sent to him under cover of the letter of 7th December 1989, "together with legal charge duly executed and completed as far as possible". The legal charge had been completed by the insertion of the amount of £225,000 in part V.

(7) The legal charge was executed by Mr Davies and by Mrs Davies. Their signatures appeared, on the face of the document, to have been witnessed by Mr Hibbert. Mrs Davies' evidence as to the circumstances of execution, which was accepted by the Judge, is set out in paragraphs 13 and 14 of the witness statement which she signed on 3rd December 1996:

> "13. My husband appears to have changed the arrangements guaranteeing his liability to Lloyds. He moved the account to the Norwich Union. I know that my husband had a solicitor acting for him in these transactions. I did not discuss the Norwich Union's charge with him. I did not go into his offices to sign the agreement. I received no advice from him. I was not told to obtain independent legal advice.
>
> 14. I believed that I signed the agreement in the charge documents in the kitchen at Tuckers Farm. Mr Davies simply said to me "Kay sign this" and passed me papers to sign. I did as he asked. This was typical of the way the arrangements worked in our household. I had over the years of the marriage come to accept Mr Davies' decisions since I felt I had no choice but to agree."

The Judge found the following facts in relation to the Norwich Union charge: (a) that Mr Davies had signed the charge in Mr Hibbert's office on 12th December 1989; (b) that Mr Hibbert wrote in his name as witness and gave the document to Mr Davies for Mrs Davies' signature to be added; (c) that Mr Davies took the document home and asked his wife to sign it; (d) that Mrs Davies asked her husband what the document was; (e) that Mr Davies told her that it was a charge for the Norwich Union in connection with Lloyd's which was to take the place of the earlier charge in favour of MHT; (f) that Mr Davies took the Norwich Union charge back

to Mr Hibbert's office and gave it and the undertaking as to title to a member of Mr Hibbert's staff; and (g) that the documents were sent off to Norwich Union without further input from Mr Hibbert.

(8) On receipt of the undertaking and the charge the Norwich Union dated the charge 21st December 1989 and issued a guarantee to Lloyd's in the amount of £225,000. The guarantee is expressed to have taken effect from 1st December 1989. On receipt of the Norwich Union guarantee the MHT guarantees were cancelled.

The judge reminded himself of the well-known passage in the speech of Lord Browne-Wilkinson in Barclays Bank v O'Brien [1994] 1 AC 180 at pages 189B-190A. In particular he noted that where the complainant (i) proved the existence of a relationship under which she had reposed trust and confidence in the person said to have exercised influence over her and (ii) established that the transaction was to her manifest disadvantage, the transaction would be set aside unless the person seeking to uphold it could show by evidence that the trust and confidence had not been abused.

The Judge recorded that it was conceded by Norwich Union that Mrs Davies had established that she did repose trust and confidence in her husband in relation to the conduct of financial affairs. He posed the test for "manifest disadvantage" in the words used by Lord Scarman in National Westminster Bank Plc v Morgan [1985] 1 AC 686 at page 704G-H:

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

The Judge then said this (transcript: pages 35E-36E):

> "In my view it was as disadvantageous as that. I accept Mr Cooper's submission that one should, in testing this question, compare the whole of the situation under the MHT charge with the whole of the situation under the Norwich Union charge, and it would not be right just to select one facet of the matter alone. The facet which Mr Cooper sought to persuade me should not be the sole subject of consideration was the £75,000 increase in the guarantee to Lloyds given by Norwich Union as compared with that given by MHT.
>
> While I accept that this is not the only matter to be considered in making a necessary comparison, I do consider that increase as a substantial detriment to Mrs Davies. ...
>
> I have no doubt that the very significant increase in the amount charged initially upon Tuckers Farm was a major detriment to Mr Davies, the amount raised to 75 per cent of somewhat outdated valuation of £300,000 rather than the original 50 per cent which MHT had stipulated for, and the result was to leave Mrs Davies with a very much smaller margin if things went wrong at Lloyds than she had enjoyed when the MHT charge was in force."

The Judge took the view that what he described as the "significantly increased chance of Mrs Davies losing her home" far outweighed the rather marginal advantages from Mrs Davies' point of view of the Norwich Union's scheme over the MHT scheme. The Judge accepted that the transaction was to Mrs Davies' manifest disadvantage. His findings led to the presumption that undue influence had been exercised by Mr Davies. In the absence of any evidence to rebut the presumption that the trust and confidence which she reposed in her husband had been abused, the Judge decided the first issue in favour of Mrs Davies.

Mr Briggs QC, who appeared as leading counsel for Norwich Union on this appeal, criticised what he submitted was the Judge's failure to have sufficient regard to the fact that (as he alleged) under the MHT charge, as under the Norwich Union charge, the amount secured by the guarantee could have been increased without reference to Mrs Davies. Further, it was said, the Judge failed to give any reason for disregarding that feature in holding that the increase of the amount of the guarantee from £150,000 to £225,000 was to her manifest disadvantage.

In my view those criticisms are misconceived. For the reasons which I shall give, I am not persuaded

that, if MHT had chosen to increase the amount of its guarantee to Lloyd's without obtaining Mrs Davies' consent, it could have relied on the MHT charge as against her for the increased amount. But, whether or not, as a matter of law, MHT could have relied on the charge as security for an increased guarantee, as a matter of fact it was not doing so in December 1989. This is because MHT had not increased its Lloyd's guarantee beyond the amount of £150,000 to which it had obtained Mrs Davies' consent at the end of the previous year. The execution of the Norwich Union charge had a dramatic effect on Mrs Davies' position in the circumstances as they actually existed. The position immediately before the execution of the charge in December 1989 was that Mr and Mrs Davies' contingent or prospective liability under the MHT charge was limited to £150,000. As between Mr and Mrs Davies the burden would fall primarily on his share in the property. So she was at risk only to the extent that Mr Davies' one half share in the property fell short of £150,000. The property had been valued at £300,000 in 1988. On the basis that that remained the value of the property in December 1989, the amount for which Mrs Davies was at risk was minimal. But, once the Norwich Union charge had been executed and the £225,000 guarantee given, the position changed to the detriment of Mrs Davies. As between Mr and Mrs Davies the burden of the contingent or prospective liability (now increased to £225,000) would still fall primarily on Mr Davies' share in the property; but, on the assumption that the value of the property remained unchanged at £300,000 and that Mr Davies' share would therefore not exceed £150,000, the whole of the additional £75,000 fell on Mrs Davies' share. Her position, therefore, changed from one in which there was only a minimal risk that, even if the guarantee were called in full, her share in the property would be affected; to one in which, if the guarantee were called in full, she would now lose 50 per cent of her share in the property. It is, to my mind, no answer to say (even if it were correct as a matter of law) that there was always a possibility, inherent in the terms of the MHT charge, that MHT might increase its guarantee at the request of Mr Davies, without obtaining the consent of Mrs Davies, and so unilaterally increase her exposure to risk. The fact was that that had not happened by December 1989; and it was no more than speculation to suggest that it might have happened at some time in the future. MHT's conduct in relation to the increase to £150,000 which had

been agreed in December 1988 suggested that MHT would not have thought it sensible to increase Mrs Davies' exposure to risk without first informing her. She would have had an opportunity to object. For my part, I would regard it as very unlikely (whatever might be the strict legal position) that a responsible bank, in 1989, would incur additional exposure under a Lloyd's guarantee at the request of a husband in circumstances where that might lead to the need to rely on security over the matrimonial home as against a wife who had made her objections known in advance; very unlikely, because there would be a strong possibility that such a course would lead to trouble in enforcing the security. The true analysis, as it seems to me, is that the transaction into which Mrs Davies entered in December 1989 made real a contingent liability which had otherwise been only a speculative possibility. In my view, the Judge was fully entitled to hold that the transaction was to her manifest disadvantage, in the sense which he explained.

The Judge accepted (transcript pages 35G-36B) the submission of Mr Cooper, who appeared for Norwich Union at the trial, that:

> "... under both the MHT charge and the Norwich Union charge, the other three parties concerned, that is to say, Mr Davies, Lloyd's and the giver of the guarantee to Lloyds, if they agree to do so, could increase the amount of the guarantee to Lloyds and the consequent amount of the charge on Tucker's Farm without Mrs Davies being consulted or informed, let alone able to object."

It is clear that that was the effect of the Norwich Union charge. The "Borrower" is named as Mr Davies alone. Mr and Mrs Davies, together, are described as "the Chargor". The operative provisions include the following:

> 1 (a) By the Security and Trust Deed the Borrower covenanted with Lloyds to procure a Guarantee of his liabilities undertaken thereby
> (b) From time to time the Borrower may undertake extended liabilities and be requested by Lloyds to procure additional guarantees.
>
> 2. In consideration of the legal charge assignment and covenants hereinafter

contained the Lender has agreed to guarantee to Lloyds the due payment of the Aggregate Sum of Guarantee.

3. As security for the Aggregate Sum of Guarantee the Chargor as beneficial owner charges the property by way of legal mortgage to the Lender and the Assignor as Beneficial Owner assigns the policy or policies to the Lender."

The "Aggregate Sum of Guarantee" for that purpose is defined in condition 1 in the schedule of conditions to the charge. It means:

> "... the total of the Initial Guarantee and any additional amounts outstanding under the Guarantee as varied or extended and any amounts outstanding under any other guarantees given to Lloyds by the Lender on behalf of the Borrower."

Under those provisions Mrs Davies was not entitled to object to an increase in the amount of the Lloyd's Guarantee. She was not entitled to be informed or consulted about whatever arrangements her husband might make with Norwich Union and Lloyd's in this respect. But, as it seems to me, the position under the MHT charge was not so clear.

The MHT charge is dated 17th December 1986. It was executed by Mr Davies and Mrs Davies who were, together, described as "the Borrower". Clause 6(11) provided that where there were two or more parties included in the expression "the Borrower" that expression:

> "... shall throughout include such two or more parties and shall where the context so requires or admits be read and construed in the plural and in such case all covenants herein expressed or implied on the part of the Borrower should be deemed to be joint and several covenants by such parties."

Clause 1 of the MHT charge contained an all monies covenant by the Borrower in these terms (so far as material):

> "The Borrower hereby covenants with the Bank that he the Borrower will on demand in writing pay to the Bank all such sums of money as now are or as shall from time to time be owing by the Borrower or by the Borrower jointly with any other or others in partnership or otherwise and whether as principal or surety to the Bank ..."

Clause 2 contained a charge by the Borrower to secure all monies from time to time payable under that covenant.

If the expression "the Borrower" is to be read and construed in the plural for the purposes of Clause 1, the effect would be as if the clause read:

> "[Mr and Mrs Davies] hereby covenant with the Bank that [they] will on demand in writing pay to the Bank all such sums of money as now are or as shall from time to time be owing by [them] or by [them] jointly with any others in partnership, etc ..."

So read, the clause would not be apt to cover Mr Davies' separate debt. To achieve that result it is necessary either to read the expression "owing by them" as if it were "owing by them or either of them"; or to read the expression "the Borrower" as referring only to Mr Davies. The former construction requires words to be read into the clause which are not there. The latter construction requires the expression "the Borrower" to bear a different meaning in Clause 2 from that which it bears in Clause 1. It is not necessary to decide which, if either, construction a court might be persuaded to adopt in order to avoid the conclusion that the legal charge did not achieve the objective which it might have been expected to have. It is enough to note that, as a matter of language, the position under the MHT charge is not as free from doubt as Mr Cooper's submission to the Judge would suggest.

But the difficulties which that submission must overcome do not end there. The MHT charge was executed pursuant to a facility letter dated 4th November 1986 addressed to Mr Davies alone. The facility offered was:

> "A guarantee ("the Guarantee") in the form of the annexed copy in support of your liabilities to Lloyd's in a sum not exceeding £125,000 ..."

The facility letter required that the facility be secured "on an unlimited first Legal Charge over the freehold property known as Tuckers Farm". Mrs Davies was required to, and did, countersign her husband's acceptance of the facility in the following terms:

> "I hereby confirm my agreement to the above facility and for Tuckers Farm, Gatcombe, Isle of Wight being held as collateral."

Her agreement, as evidenced by her signature to the facility letter, was to a proposal that the matrimonial home, in which she had a joint interest, should stand as collateral security for a guarantee facility in the amount of £125,000. For MHT to have proceeded on the basis that, by executing the legal charge, she had accepted that her interest in the property could be treated as security for any amount that MHT, Lloyds and Mr Davies might choose to agree without further reference to her - and could, if they chose to increase the amount of the guarantee to an amount equal or greater than the value of the property for the time being, be wholly extinguished - would have been, at the least, very unwise. In the events which happened, MHT was careful not to proceed on that basis. Before agreeing to an increase in the guarantee to £150,000, MHT sought and obtained Mrs Davies' consent. In my view MHT were right to take that course. I am very far from satisfied that the submission that the position under the MHT charge was the same as that under the Norwich Union charge - in the sense that, under either charge, Mr Davies and the guarantor could increase the amount of the guarantee to Lloyd's and the consequent exposure of Mrs Davies to risk without Mrs Davies being consulted, informed or able to object - could be made good.

For those reasons, as well as those given by the Judge, I am left in no doubt that this was a case in

which it was right to conclude that the execution of the Norwich Union charge had been procured by undue influence. It seems to me that the facts fall squarely within the test posed by Lord Scarman in National Westminster Bank v Morgan [1985] 1 AC 686 at page 704G-H to which the Judge referred. It is, perhaps, helpful to note the passage in the speech of Lord Scarman which follows immediately after that which I have already cited:

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

This, as it seems to me, was a transaction which constituted such an advantage taken of his wife by Mr Davies, in whom (as was conceded) she reposed trust and confidence, that, failing proof to the contrary, it was only explicable on the basis that undue influence had been exercised to procure it.

Whether the charge was enforceable by Norwich Union as against Mrs Davies?

In relation to this, the second issue, the Judge referred to a passage in the speech of Lord Browne-Wilkinson in Barclays Bank v O'Brien at page 196D-E:

> "Therefore a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is not on its face to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind, that in procuring the wife to act as surety, the husband has committed a legal or equitable wrong which entitles the wife to set aside the transaction.
>
> It follows that unless the creditor who is put on inquiry takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained, the creditor will have constructive notice of the wife's rights."

In the light of that guidance the Judge observed, correctly in my view, that the general test, which fell

to be applied in the present case, was clear:

> "Has the creditor, in this case the Norwich Union, taken reasonable steps to satisfy itself that the wife's agreement has been properly obtained?"

The judge analysed, in some detail, the well-known trilogy of cases: Massey v Midland Bank [1995] 1 All ER 929, Banco Exterior International v Mann [1995] 1 All ER 936 and Bank of Baroda v Rayarel [1996] 27 HLR 387. He expressed the view (transcript: page 49A-B) that it was essential, if a lender was to avoid having constructive notice on the strength of the intervention of a solicitor, for the lender to have taken steps to see that a solicitor either is acting for the proposed surety, or is assuming the duty of giving the proposed advice concerning the transaction. He decided the second issue against Norwich Union for two reasons. First, that Norwich Union had failed to supply Mr Hibbert, the solicitor acting in the transaction, with the knowledge which it had that the MHT charge in support of a guarantee of £150,000 was being replaced by a charge in support of a guarantee by Norwich Union of £225,000. He said this (transcript: page 52D-E):

> "If the lender does not properly instruct the solicitor on whose advice the lender wishes to rely in avoiding constructive notice, there is inevitably a fatal flaw in the solicitor's advice due to the lender's failure, and the lender cannot, in my view, rely upon advice given by an inadequately instructed solicitor."

Secondly, he held that there was a critical difference between the lender taking steps to see that a solicitor gives advice to a proposed surety regarding an intended transaction, and a lender writing to the solicitor for a principal debtor enclosing a form of charge and requiring to it be "completed and executed by the estate owners". He concluded that Norwich Union did not do enough to avoid having constructive notice of the undue influence presumed to have been exercised on Mrs Davies by Mr Davies; and that she was therefore entitled to the declaration which she sought.

Since the date when the judgment was delivered in this case, this Court has re-examined the authorities, and given guidance, in the appeals heard with Royal Bank of Scotland v Etridge (unreported: 31st July 1998). In relation to notice, this Court said this (transcript: page 20, paragraph 41):

> "... the issue is ... whether, in the light of the facts known to the bank, including the availability of legal advice, any risk of the wife having an equity [to set aside the transaction] reasonably appeared to have been dispelled."

The Court went, in Etridge, on to explain what needed to be done to dispel the risk (transcript: page 21, paragraph 44):

> "(1) Where the wife deals with a bank through a solicitor, whether acting for her alone or for her husband, the bank is not ordinarily put on inquiry. The bank is entitled to assume that the solicitor has considered whether there is a sufficient conflict of interest to make it necessary for him to advise her to obtain independent legal advice. It is not necessary for the bank to ask the solicitor to carry out his professional obligation to give proper advice to the wife or to confirm that he has done so. The bank is not ordinarily required to take any steps at all.
>
> (2) Where the wife does not approach the bank through a solicitor, it is normally sufficient if the bank has urged her to obtain legal advice before entering into the transaction. This is especially the case if the solicitor provides confirmation that he has explained the transaction to the wife and that she appears to understand it."

In the present case Mrs Davies did not deal with Norwich Union through a solicitor. Nor did Norwich Union urge her to obtain legal advice before entering into the transaction. Norwich Union had no reason to think that Mrs Davies had obtained any advice from a solicitor in relation to the charge which she executed in December 1989; and, in fact, she had not done so. The answer to the question posed by the judge - did Norwich Union take reasonable steps to satisfy itself that the wife's agreement has been duly obtained - has to be that it did not. On the facts, Norwich Union took no steps at all to satisfy itself that Mrs Davies' consent to the December 1989 charge had been properly obtained.

Mr Briggs seeks to overcome what might have appeared the substantial obstacle which arose from his client's failure to take any steps at all to satisfy itself that Mr Davies' consent had been properly obtained by an appeal to section 199(1)(ii)(a) of the Law of Property Act 1925. The subsection is in these terms, so far as material:

> "199(1) A purchaser shall not be prejudicially affected by notice of- ...
> (ii) any other instrument or matter or any fact or thing unless-
> (a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him."

It is said that the inquiry as to notice does not end with the question: did Norwich Union take reasonable steps to satisfy itself that Mrs Davies' consent to the transaction had been properly obtained? Norwich Union is only to be treated as having constructive notice of those facts which would have come to its knowledge if it had taken such steps as would have been reasonable in the circumstances. It is not to be treated as having constructive notice of matters which would not have come to its knowledge if it had taken those steps. So it is necessary to ask the further question: what would Norwich Union have been told if it had asked? But that, of course, begs the yet further question: what would it have been reasonable to ask in the circumstances, and of whom?

The following conclusions are not open to doubt: (i) if Norwich Union had asked Mrs Davies whether she had received advice from a solicitor in relation to the December 1989 charge, the answer would have been that she had not; (ii) if she had been asked whether she had retained or instructed a solicitor in relation to the charge, the answer would have been the same - she had not done so; (iii) if Norwich Union had asked Mr Hibbert whether he had given advice to Mrs Davies in relation to the charge, or had been retained or instructed by her in relation to the charge, the answer, again, would have been in the negative. But, it is said, none of those questions would fall within the description: "such inquiries and inspections had been made as ought reasonably to have been made by him". The only question

which Norwich Union needed to ask, so it is submitted, was that which was put to Mr Hibbert in the course of cross-examination by Mr Cooper at the trial (transcript: 20th January 1997, page 7, lines 24-28):

> "Q. Would it be fair to put it like this. That in relation to this transaction, the one we are dealing with, if it had appeared to you that Mrs Davies had some particular interest that required protection, you would have regarded it as part of your duty to her to draw attention to it."

It is, perhaps, no surprise that the answer to a question put in that form was:

> "A. That is right, yes."

That answer needs to be evaluated in the light of the fact that Mr Hibbert did not, in December 1989, address his mind to the question whether Mrs Davies was his client. This appears from his examination-in-chief (transcript: 20th January 1997, page 1, lines 12-18):

> "Q. Who was your client?
> A. That is a question which has been raised with me today, to which I have not, I think, previously given sufficient attention. The instructions I received came essentially from Mr Trevor Davies, although I think it is fair to say that because I had previously acted in various matters for him and for Mrs Kay Davies I would have regarded them both as my clients in a general sense."

I reject the submission that Norwich Union can avoid the consequences of its failure to make any inquiry - in circumstances which plainly called for an inquiry to be made - by reliance on what Mr Hibbert's answer might have been in December 1989 to a carefully crafted leading question. In the circumstances that Norwich Union had no reason to believe, in December 1989, that any solicitor was concerned in the transaction on behalf of Mrs Davies, the inquiry that ought reasonably to have been made was inquiry of her whether she had received advice from a solicitor as to her position. I accept, of

course, that if the answer to that inquiry were that she had received advice, then, in the absence of further facts raising a doubt, Norwich Union would not have needed to inquire further; in particular it would not have needed to inquire what advice she had received. But, on the facts in this case, the answer to that inquiry would have been that she had not received advice from a solicitor.

In my view, the judge was right to decide the second issue in favour of Mrs Davies.

Whether Mrs Davies was entitled to recover her share of the proceeds of sale from Norwich Union?

I have explained that, by the beginning of December 1993, following the breakdown of their marriage, Mr and Mrs Davies had found a purchaser for the property at Tuckers Farm. On 9th December 1993 solicitors acting for Mrs Davies in connection with her claim to financial provision in the matrimonial proceedings wrote to Norwich Union in the following terms, so far as now material:

> "We are instructed that Tuckers Farm is charged to Norwich Union in relation to a Guarantee for Mr Davies' liabilities as a Lloyds name.
>
> We have taken counsel's opinion and are of the opinion that the charge and Guarantee are ineffective against our client by reason of undue influence in accordance with the principles of Barclays Bank v O'Brien.
>
> We understand that there is a sale under way and that the solicitors acting for Mr and Mrs Davies on the sale wish to exchange contracts as quickly as possible with completion at the beginning of January 1994.
>
> We have no objection to the sale taking place and from the net proceeds of sale the costs of sale being paid. However, as we shall be applying to the court for a declaration that the Charge and Guarantee are void as against our client we must insist that the balance of the proceeds of sale be lodged in a joint deposit bearing account in the names of Mrs and Mrs Davies' respective matrimonial solicitors subject to the charge to Norwich Union.
>
> It is essential that the sale takes place at the present time as we understand that the sale price is very favourable and if the property is not sold at the present time it may sell for less at a later stage."

Norwich Union replied to that letter by fax on 14th December 1993:

> "I am instructed by my client to inform you that it is not prepared to accept a charge over the proceeds of sale of Tuckers Farm as alternative security to my clients' legal charge over that property on the terms set out in your letter. As I have advised the solicitors acting for the Name, my client is prepared to release his charge over the property concerned provided either (i) the release of my client's obligations under the Lloyds guarantee is first obtained by the Name or (ii) an alternative property acceptable to my client is offered by way of security.
>
> ... my Client will resist any attempt by your Client to challenge the validity of my Client's legal charge on any grounds."

Mrs Davies' solicitor, by fax of the same day, asked Norwich Union to reconsider the matter. In response Norwich Union wrote on 16th December 1993:

> "It is my client's normal practice in a situation such as this where a Name wishes to sell his property over which my clients have a charge to request that the Name complies with either option (i) or (ii) as set out in my previous letter of 14th December 1993. Obviously once the Name has indicated which option he will pursue then the discharge of the legal charge itself can be assured so long as the necessary solicitors' undertaking are given by the solicitors acting on behalf of the Name. It is not my client's practice to accept a cash deposit in lieu of options (i) and (ii) referred to and therefore the suggested solution put forward by yourselves is not acceptable to my clients."

The letter ended with the observation that Norwich Union were unable to assess Mrs Davies' contentions as to the invalidity of the charge since no evidence had been submitted in that respect. In the light of the assertion, in the previous letter, that Norwich Union would resist any attempt by Mrs Davies to challenge the validity of the legal charge on any grounds, it is difficult to see what purpose an assessment of the merits of her claim was to serve in the context of the consideration of an interim proposal which had been made by her solicitors.

On 17th December 1993 Mrs Davies' solicitors replied. They informed Norwich Union that, having regard to the state of the property market, Mrs Davies was left with no alternative but to agree to a sale of the property and that contracts were about to be exchanged. The letter continued:

> "However, please note that exchange and completion of the sale is completely without prejudice to our client's claim to set aside the Guarantee and charge to you on the basis that it was obtained by the undue influence of Mr Davies and without an adequate understanding of the nature and effect of the transaction by our client. The sale is therefore without prejudice to our claim for restitution of one half of the gross sale proceeds subject only to deduction of the costs of sale together with a claim for interest from the date of payment to you until the date of settlement of our claim against you."

Although it had been contemplated that contracts would be exchanged on 17th November 1993, there was, in fact, a short delay over the Christmas period. In the event contracts were exchanged on 5th January 1994 and completion took place on 14th January. The basis on which Norwich Union was prepared to release its charge appears from a letter to its solicitor from Mr Hibbert, dated 7th January 1994:

> "We are writing to confirm that contracts have now been exchanged for the sale of Tuckers Farm. We can by this letter give you our undertaking to forward the sum of £225,000 to the Corporation of Lloyd's immediately upon completion, and shall be obliged therefore if in consideration of that undertaking you can let us have Form 53."

What was proposed, as appears from the later passage in that letter, was that, on receipt of the sum of £225,000 from the proceeds of sale, Lloyd's would substitute that sum for the Norwich Union guarantee as security for Mr Davies' contingent liabilities as a Name; and that the Norwich Union guarantee would be released. But that proposal did not take account of a payment of £44,957 which had already been made by Norwich Union to Lloyds in November 1992 in response to a call under the guarantee. What happened in fact was described by the Judge in the following passage in his judgment (transcript: page 31F-H):

> "... completion took place on 14th January 1994. Of the net proceeds of sale £45,298.25 was paid to the Norwich Union and £180,043 to Lloyd's in discharge of the Norwich Union's guarantee to Lloyd's which was released. The difference between the amount of the call which the Norwich Union paid in November 1992 of £44,957 and the £45,298.25 paid to them was attributable to costs and interest. There was paid £32,725

> to Mr and Mrs Davies' order including £30.21 accrued interest, as the balance of the sale price after apportionments on completion."

The Judge decided the third issue - namely, whether in the light of the arrangements to which she gave consent in January 1994 (as evidenced by the undertaking given on her behalf by Mr Hibbert in his letter of 7th January 1994), Mrs Davies was entitled to seek restitution in respect of the half share of the proceeds of sale - in favour of Mrs Davies. In reaching that conclusion the Judge relied on the decision in Fraser v Pendlebury (1862) 31 LJCP 1. He held (transcript: page 57D-E):

> "It has been settled for well over 100 years that if a mortgagee, on being asked to release his security on payment being tendered of all that properly due under the mortgage, refuses to do so on the ground that he or she requires a larger sum, which the mortgage does not in fact entitle him to demand, and the mortgagor, in order to redeem his property pays the whole sum demanded under protest and brings proceedings to recover the excess, an action will lie for money had and received against the mortgagee."

Mr Briggs, on behalf of Norwich Union, does not suggest that that is not a correct statement of the law. He submits, however, that the principle has no application on the facts of the present case for one or both of two reasons. First, it is said that Norwich Union were not in possession of the facts necessary to enable Mrs Davies' claim to be evaluated. Secondly, that Norwich Union has acted to its own detriment in agreeing to a transaction at the request of Mrs Davies as a result of which it has lost whatever right it would otherwise have had to seek an indemnity from Mr Davies; so that, if it is required to repay Mrs Davies her one half share of the proceeds of sale, it will have suffered an irrecoverable loss.

In my view, neither of those supposed grounds of distinction is of any substance. Norwich Union were told, in the letter of 9th December 1993, that Mrs Davies was alleging that the execution of the charge had been procured by undue influence; and that she was relying on the principles identified in Barclays Bank v O'Brien. Those principles include an analysis of the circumstances in which a lender has constructive notice of undue influence exercised by a husband over a wife who charges her property as

security for his debts. If Norwich Union had thought it appropriate to consult its own files it would have realised that this was a case in which it had no reason to think that Mrs Davies was represented by a solicitor at the time of the execution of the charge; and in which it had made no inquiry at all to dispel any risk that Mrs Davies had not given a free and informed consent to the transaction. Further, as appears from its letter of 14th December 1993, Norwich Union felt able to reject Mrs Davies' claim out of hand without any investigation of its merits. It maintained its refusal to consider interim arrangements - as a matter of "normal practice" - after having been informed, by the letter dated 17th December 1993, that Mrs Davies' claim to set aside the charge was advanced "on the basis that it was obtained by the undue influence of Mr Davies and without an adequate understanding of the nature and effect of the transaction by [Mrs Davies]". It is, to my mind, fanciful to suggest that Norwich Union did not have a sufficient understanding of Mrs Davies' claim to enable it to address its mind properly to the question which it had to decide in December 1993 - namely, whether to agree to release its charge on terms that it would have an interim security, pending investigation and acceptance or determination of Mrs Davies' claim, over a cash deposit representing the proceeds of her share. Its refusal of the proposal put forward by Mrs Davies' solicitors was, in my view, high-handed and irrational; and it may be noted that Mr Briggs found himself unable to defend it.

Nor, as it seems to me, can Norwich Union place any reliance on the supposed loss of its rights of indemnity over against Mr Davies. It is said (correctly, in my view) that if the true analysis of the circumstances in which payment was made to Lloyd's out of the proceeds of sale in January 1994 is that Norwich Union were released from its guarantee by the action of Mr and Mrs Davies in providing Lloyd's with substitute security for Mr Davies' contingent liabilities as a Name, then there could no longer be any claim by Norwich Union against Mr Davies under his covenant in the charge. There could be no indemnity claim because Norwich Union were no longer under any obligation to make any payment to Lloyd's in respect of his debts. An alternative analysis of the circumstances in which payment was made to Lloyds in January 1994 - which was favoured by the Judge (transcript: page

65B) - is that Norwich Union should be treated as having made the payment itself out of monies which it received from Mr and Mrs Davies on the redemption of its charge. That analysis would, I think, lead to the conclusion that the indemnity claim against Mr Davies arose on payment and has not been lost. But it is neither necessary, nor (in the absence of Mr Davies) appropriate to decide the point. It is sufficient to place on record: (i) that Mr Briggs' submission in this court was that the claim had been lost; and (ii) that, on instructions, Mr Briggs informed us this morning that whether or not the claim against Mr Davies had been lost, Norwich Union was not proposing to pursue it. If the true position were that the claim had been lost, then that is a direct result of two factors; for both of which Norwich Union must bear responsibility. First, Norwich Union's refusal to agree to the interim arrangements proposed by Mrs Davies' solicitors - arrangements which would have preserved whatever claims it might have had against Mr Davies; and, secondly, Norwich Union's insistence that the proceeds of sale were paid direct to Lloyd's to secure the discharge of its guarantee, rather than accepting them as redemption monies and making its own arrangements with Lloyd's. In the circumstances it is not open to Norwich Union to rely on an allegation of change of position as a defence to Mrs Davies' claim to repayment under the principle explained in Fraser v Pendlebury.

For these reasons I would dismiss this appeal.

LORD JUSTICE MORRITT: I agree.

LORD JUSTICE EVANS: I also agree.

ORDER: Appeal dismissed with costs. Legal aid taxation of the respondent's costs.
(Order not part of approved judgment)

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