[HOUSE OF LORDS]

NATIONAL WESTMINSTER BANK Plc. . . . APPELLANTS

AND

MORGAN . . . . . RESPONDENT

1984 Dec. 10, 11, 12, 13;
1985 March 7

Lord Scarman, Lord Keith of Kinkel, Lord Roskill, Lord Bridge of Harwich and Lord Brandon of Oakbrook

Undue Influence—Presumption—Banker and customer—Mortgage payments on customer's house in arrears—Building society seeking possession—Bank manager offering short-term loan subject to charge on house—Whether case for presumption of undue influence

In 1974, M. and the second defendant, his wife, bought a house on mortgage. The mortgage payments fell into arrears, and in 1977 the building society began proceedings for possession. M., whose business was in difficulties, asked the plaintiff bank to refinance the building society loan, and the bank agreed to a short term bridging loan of £14,500, subject to a legal charge on the house in joint names. M. signed the charge, and in February 1978 the manager of the bank branch called at the house for the purpose of obtaining the wife's signature. The atmosphere during his visit was tense, and the wife was concerned about the effect of the charge, but she signed it. M. failed to repay the loan, and the bank brought proceedings for possession. The wife's defence was that in obtaining her signature to the charge the bank manager had exercised undue influence over her. The deputy judge found that M. and his wife had been desperately anxious not to lose their home and that the transaction had not been manifestly disadvantageous to the wife, who had known that there was no other way of saving the house; that the manager had not put pressure on her to sign the charge; that the circumstances had not been such as to call for him to advise her to take legal advice before signing; and that there had not been such a confidential relationship between the bank and the wife as to give rise to a presumption of undue influence. He accordingly rejected the wife's defence and made an order for possession. The Court of Appeal allowed an appeal by the wife.

On appeal by the bank:—

Held, allowing the appeal, that the principle that justified the setting aside of a transaction on the ground of undue influence was the victimisation of one party by the other, and before a transaction could be set aside for undue influence, whether in reliance on evidence or on the presumption of the exercise of undue influence, it had to be shown that the transaction had been wrongful in that it had constituted a manifest and unfair disadvantage to the person seeking to avoid it; that evidence of the mere relationship of the parties was not sufficient to raise the presumption of undue influence without also evidence that the transaction itself had been wrongful in that it had 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

A exercised to procure it; and that, on the facts, the deputy judge had been entitled to find that the relationship between the wife and the bank had never gone beyond the normal business relationship of banker and customer and that the transaction had not been disadvantageous to the wife (post, pp. 704G—705A, 706B–C, 707B, 709C–E, 710A–C).

Bank of Montreal v. Stuart [1911] A.C. 120, P.C. and *Poosathurai v. Kannappa Chettiar* (1919) L.R. 47 I.A. 1, P.C. applied.

Allcard v. Skinner (1887) 36 Ch.D. 145, C.A. and *Lloyds Bank Ltd. v. Bundy* [1975] Q.B. 326, C.A. considered.

Per curiam. (i) The doctrine of undue influence has been sufficiently developed not to need the support of a principle of "inequality of bargaining power" which by its formulation in the language of the law of contract is not appropriate to cover transactions of gift where there is no bargain. And even in the field of contract it is questionable whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power (post, pp. 708A, B–C, 710A–C).

Dictum of Lord Denning M.R. in *Lloyds Bank Ltd. v. Bundy* [1975] Q.B. 326, 339, C.A. disapproved.

(ii) There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence (post, pp. 709F, 710A–C).

(iii) The relationship between banker and customer is not one which ordinarily gives rise to a presumption of undue influence; in the ordinary course of banking business a banker can explain the nature of the proposed transaction without laying himself open of a charge of undue influence (post, pp. 707D–F, 710A–C).

Decision of the Court of Appeal [1983] 3 All E.R. 85 reversed.

The following cases are referred to in the opinion of Lord Scarman:

Allcard v. Skinner (1887) 36 Ch.D. 145, C.A.
Bank of Montreal v. Stuart [1911] A.C. 120, P.C.
Lloyds Bank Ltd. v. Bundy [1975] Q.B. 326; [1974] 3 W.L.R. 501; [1974] 3 All E.R. 757, C.A.
Ormes v. Beadel (1860) 2 Gif. 166
Poosathurai v. Kannappa Chettiar (1919) L.R. 47 I.A. 1, P.C.

The following additional cases were cited in argument:

Archer v. Hudson (1844) 7 Beav. 551
Backhouse v. Backhouse [1978] 1 W.L.R. 243; [1978] 1 All E.R. 1158
Brocklehurst, decd., In re The Estate of [1978] Ch. 14; [1977] 3 W.L.R. 696; [1978] 1 All E.R. 767, C.A.
Campbell Discount Co. Ltd. v. Bridge [1962] A.C. 600; [1962] 2 W.L.R. 439; [1962] 1 All E.R. 385, H.L.(E.)
Commonwealth Bank of Australia v. Amadio (1983) 57 A.L.J.R. 358
Coomber, In re [1911] 1 Ch. 723, C.A.
Craig, decd., In re [1971] Ch. 95; [1970] 2 W.L.R. 1219; [1970] 2 All E.R. 390
Cresswell v. Potter (Note) [1978] 1 W.L.R. 255
Dent v. Bennett (1839) 4 My. & Cr. 269
Fry v. Lane (1888) 40 Ch.D. 312
Gibson v. Jeyes (1801) 6 Ves.Jun. 266

Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575, H.L.(E.)
Hoghton v. Hoghton (1852) 15 Beav. 278
Huguenin v. Baseley (1807) 14 Ves.Jun. 273
Johnson v. Buttress (1936) 56 C.L.R. 113
Matthew v. Bobbins (1980) 41 P. & C.R. 1, C.A.
Pauling's Settlement Trusts, In re [1964] Ch. 303; [1963] 3 W.L.R. 742; [1963] 3 All E.R. 1, C.A.
Prees v. Coke (1871) L.R. 6 Ch.App. 645
Rhodes v. Bate (1866) L.R. 1 Ch.App. 252
Tate v. Williamson (1866) L.R. 2 Ch.App. 55
Tufton v. Sperni [1952] W.N. 439; [1952] 2 T.L.R. 516, C.A.
Turner v. Collins (1871) L.R. 7 Ch.App. 329
Warnink (Erven) Besloten Vennootschap v. J. Townend & Sons (Hull) Ltd. [1979] A.C. 731; [1979] 3 W.L.R. 68; [1979] 2 All E.R. 927, H.L.(E.)
Yerkey v. Jones (1939) 63 C.L.R. 649
Zamet v. Hyman [1961] 1 W.L.R. 1442; [1961] 3 All E.R. 933, C.A.

APPEAL from the Court of Appeal.

By particulars of claim dated 17 January 1980 the plaintiffs, National Westminster Bank Plc., claimed against the defendants, David Albert Allen Morgan and Janet Morgan (his wife), possession of the freehold property known as Crossmoor Meadows, East Lyng, Taunton, Somerset, pursuant to the terms of a legal mortgage between the defendants and the plaintiffs dated 8 March 1978. On 29 August 1980 the registrar made an order for possession. The second defendant was given leave to appeal out of time against that order, and a new trial was ordered. By her defence and counterclaim, dated 26 January 1982, the second defendant contended that her signature to the mortgage had been procured by the undue influence of the plaintiffs by their servant or agent, one Barrow, and/or by exploiting their confidential and/or fiduciary position in relation to her as her bankers to exert undue influence on her and counter-claimed, inter alia, a declaration that the mortgage was not a good and subsisting document, alternatively was not a good and subsisting document in respect of herself. On 4 and 5 November 1982, the deputy judge, Mr. C. S. Rawlins, rejected the second defendant's defence of undue influence and made an order for possession. The first defendant, who had entered no defence to the action, died on 9 December 1982. The second defendant appealed to the Court of Appeal (Dunn and Slade L.JJ.) who on 29 June 1983 allowed the appeal and declared that the legal charge was not a good and subsisting charge in respect of the legal interest in the property or in respect of the second defendant's beneficial interest therein on 8 March 1978. The Court of Appeal refused the plaintiffs leave to appeal, but on 10 November 1983 the Appeal Committee of the House of Lords (Lord Diplock, Lord Fraser of Tullybelton and Lord Brandon of Oakbrook) allowed a petition by the plaintiffs for leave to appeal. They appealed.

The facts are set out in the opinion of Lord Scarman.

Peter Scott Q.C., Charles Falconer and *Philip Brook Smith* for the plaintiffs. The essence of undue influence is the unconscionable abuse of influence that one person has over another applied so as to preclude the

A exercise of free and deliberate judgment. It is a species of fraud. It is founded on the principle that it is right and expedient to protect persons from being "victimised" by others; the doctrine "has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud": *per* Lindley L.J. in *Allcard v. Skinner* (1887) 36 Ch.D. 145, 183.

B Although the evidential burden may shift in the course of a case, the onus is on the party alleging it to make out a plea of undue influence. It will usually be set up against the clear and unequivocal terms of a conveyance, deed or other written document. The onus is, therefore, on him who asserts the plea, and the standard of proof should be consistent with the gravity of the allegation.

C The person relying on a plea of undue influence ("the donor") must show that: (a) a special relationship existed with the other party to the transaction (or with someone who induced the transaction for his own direct or indirect benefit); (b) that relationship gave rise to a capacity to influence the donor; (c) the influence was exercised; (d) its exercise was undue; (e) its exercise caused the transaction; (f) the transaction is one that cannot be accounted for on the ground of the ordinary motives on which ordinary men act (the "manifest disadvantage" point).

D Where the necessary relationship is shown to have existed and the transaction cannot be accounted for as aforesaid, the law may presume until the contrary is shown that the transaction was one caused by undue influence.

The elements (a) to (f) above have to be made out in every case of undue influence, whether it be of the first or the second class referred to

E by Lindley L.J. in *Allcard v. Skinner,* at p. 181. In the first class of case, they must be proved by direct evidence. In the second class of case, a limited presumption may operate.

The special relationship referred to in paragraph (a) above has been variously called a dominant, fiduciary, or confidential, relationship. It might perhaps be termed an influential relationship. Whatever it is called, it is essential to a plea of undue influence to show that such a

F relationship existed, in the sense (*per* Lindley L.J. in *Allcard v. Skinner,* at p. 181 of "some close and confidential relation to the donor." This special relationship has certain characteristic features. First, it must be one that by its nature or development gives the donee the power of influence over the donor. The relationship may be one within a settled category of influence, *viz.* parent/child as in *Archer v. Hudson* (1844) 7

G Beav. 551; clergyman/widow as in *Huguenin v. Baseley* (1807) 14 Ves.Jun. 273; surgeon/patient as in *Dent v. Bennett* (1839) 4 My & Cr. 269; solicitor/client as in *Gibson v. Jeyes* (1801) 6 Ves.Jun. 266; or religious and spiritual adviser/adherent as in *Allcard v. Skinner*; but not husband/wife (see *Bank of Montreal v. Stuart* [1911] A.C. 120, 137). Alternatively, it may arise when one party has come to occupy or assume a position of ascendency, power or domination over the other: a

H position which is reflected in dependence or trust on the part of the other.

Secondly, the existence of the power of influence is a product of the confidence that the donor has in the donee. Trust or confidence is not

enough. The power is based on an assumption by the donor that the donee will not act in a manner inconsistent with the welfare of the donor as objectively viewed. That assumption must be justified, and the donee must be aware that it is being made if a plea of undue influence is to succeed. There can be no fraudulent and unconscionable behaviour, nor any presumption of such, if these elements are absent.

Thirdly, the power of influence must (at least in cases where a presumption of undue influence is relied on) carry with it a corresponding obligation implied by law to advise the donor *in his own interests* or otherwise to protect him. Absent this obligation, the doctrine of undue influence cannot legitimately be applied: see, e.g., *per* Lindley L.J. in *Allcard v. Skinner,* at p. 182. The *extent* of the obligation depends on the circumstances of the case, but (at least in all such cases) the donor must show an entitlement to receive objective advice from the donee, or at least to treat such advice as is in fact proffered as objective advice: see *Tufton v. Sperni* [1952] W.N. 439.

Fourthly, the relationship arises as something distinct from the transaction itself, i.e. from circumstances dehors the transaction impugned. The doctrine is concerned with the possible abuse of the relationship *in relation to* the transaction impugned.

Finally, the relationship must necessarily be such that the influence to which it gives rise cannot legitimately be exercised so as to obtain a direct or indirect advantage for the dominant party. In considering a plea of undue influence it will thus be pertinent to consider whether the transaction in question gave rise to a conflict of interest between the parties in the sense that in the circumstances it involved both the possibility of advantage to party A and a legitimate expectation on the part of party B that party A would look after his (party B's) interests to the exclusion of his own. The co-existence of these factors is usually inconsistent with the very nature of a business relationship. Even when, in such a context, advice as to the wisdom of the transaction is expressly sought or proffered, remedies available for the erroneous advice do not without more include a right to avoid the transaction on the grounds of undue influence.

Dominance is of the essence, and it is *undue* influence. One finds that, in cases where undue influence has been found, the courts have looked at all the circumstances (not just of the transaction but at the totality of the relationship) and said that on those facts the presumption arose: see *Archer v. Hudson,* 7 Beav. 551; *Allcard v. Skinner,* 36 Ch.D. 145; *Tufton v. Sperni* [1952] W.N. 439; and *Poosathurai v. Kannappa Chettiar,* L.R. 47 I.A. 1.

[Lord Scarman. It may be common ground that this case is within Cotton L.J.'s second class in *Allcard v. Skinner*?]

Price Q.C. The second defendant puts her case within Cotton L.J.'s second class of confidential relationship, but not within one of the specified categories within that class (e.g. doctor/patient).

Scott Q.C. continuing. The exercise of the influence will often be a matter of inference from the proximity and relationship of the parties at or about the time of the transaction and the nature of the transaction but it remains an important element of the plea, particularly where the

party asserting undue influence bases his case on what the other party did or did not say in relation to the transaction.

The influence must be shown to have been *unduly* exercised. Influence is often indeed usually exercised disinterestedly to promote the interests of the party subject to it (*Hoghton v. Hoghton* (1852) 15 Beav. 278 and *Poosathurai v. Kannappa Chettiar,* L.R. 47 I.A. 1). Undue influence may involve the giving (or withholding) of advice that is inconsistent with the obligation objectively to advise the donor (see above) so as to obtain a benefit for the influential party. It is not enough that advice bona fide given proves to be erroneous. Such advice may give rise to remedies in negligence under the doctrine of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 or for misrepresentation at common law or under the Misrepresentation Act 1967, but it is not a species of fraud that entitles one party to set aside the transaction on the grounds of undue influence.

Proof that influence once proved to exist was exercised *unduly* may be based on a presumption if, but only if, certain conditions are satisfied.

The requirement that the exercise *caused* the transaction impugned speaks for itself. Causation is an essential element in a plea of undue influence. Questions such as from whom the idea of the gift or bounteous arrangement originated are relevant here.

If the transaction was one reasonably to be accounted for on the grounds on which ordinary persons act the court will not intervene; alternatively it will not do so simply on the ground that the donor had no independent advice. The mere existence of a confidential relationship is not enough: *Rhodes v. Bate* (1866) L.R. 1 Ch.App. 252, 258: *Allcard v. Skinner,* 36 Ch.D. 145, and *In re Craig, decd.* [1971] Ch. 95; see *Bank of Montreal v. Stuart* [1911] A.C. 120, 137; *Poosathurai v. Kannappa Chettiar,* L.R. 47 I.A. 1, 4. In no reported case (apart from the present one) has relief been granted on the basis of undue influence in the absence of manifest disadvantage to the party influenced, and neither public policy nor any other consideration suggests that this requirement should be abandoned.

The presumption that influence has been unduly exercised can arise where: (a) the influential relationship described above is shown to exist, and (b) the transaction is one that cannot be accounted for on the ground of the ordinary motives on which ordinary men act: see *per* Dixon J. in *Johnson v. Buttress* (1936) 56 C.L.R. 113, 134–135. Its effect is that the court will presume that the dominant party exercised undue influence to procure the transaction: *Poosathurai v. Kannappa Chettiar,* L.R. 47 I.A. 1, and *Allcard v. Skinner,* 36 Ch.D. 145, 181 and 190, *per* Lindley L.J. at p. 181, and Bowen L.J., at p. 190. (It is not, as suggested by Cotton L.J. in his dissenting judgment in *Allcard's* case, at p. 171, a presumption of influence.) Contrast *Turner v. Collins* (1871) L.R. 7 Ch.App. 329, 339, *per* Lord Hatherley L.C. The presumption of undue influence is a "tool of the lawyer's trade . . .": *In re The Estate of Brocklehurst, decd.* [1978] Ch. 14, 43, *per* Bridge L.J.; see also *In re Pauling's Settlement Trusts* [1964] Ch. 303, 336. If the court has before it all the circumstances of the relationship and the transaction between the

parties there is no need to resort to the presumption, which can by unnecessary or inappropriate application lead to an unjust result. The presumption cannot, for example, operate when it appears from the whole of the evidence that the terms of the transaction were *not* the product of the exercise of undue influence. Furthermore, where the presumption of undue influence applies, "It will be found that in none of those relations is it natural to expect the one party to give property to the other. That is to say, the character of the relation itself is never enough to explain the transaction and to account for it without suspicion of confidence abused": *Yerkey v. Jones* (1939) 63 C.L.R. 649, 675 (Dixon J.).

The foundation of the decision by the Court of Appeal in the present case is *Lloyds Bank Ltd. v. Bundy* [1975] Q.B. 326. The judgment of Sir Eric Sachs (with which Cairns L.J. agreed and which contains the ratio decidendi of the case) is wrong in law for the following, amongst other, reasons: (i) it was wrong to find an influential relationship or one of "confidentiality" between the bank and old Mr. Bundy; (ii) the relationship between the bank and old Mr. Bundy was not such as to give rise to a presumption of undue influence; (iii) the element of confidence or trust was emphasised without due regard to the other necessary elements including dominance and a duty to advise, neither of which were present on the facts; (iv) no or insufficient importance was attached to the intrinsic nature of the relationship between banker and customer in a lending transaction. In such circumstances, the customer is not justified in assuming that the banker will act in a manner consistent only with the welfare of the customer to the exclusion of his own interests. The *American Law Institute Restatement of the Law,* Second, Contracts 2d (1981), vol. 1, s. 177, pp. 490–492, supports the correct approach. For different reasons, the views of Lord Denning M.R. are wrong. His primary view, at p. 339c, is that it is possible to reconcile various strands of the law under the heading "inequality of bargaining power" and that this will, in cases where the other requirements of such a doctrine are met, suffice to enable the court to set aside a transaction that it regards as unfair even without proof of wrongdoing. Such a reconciliation is not justified, nor is it either necessary or desirable. It causes the court to embark on a task of assessing fairness for which it is ill-equipped, overlooks the value of the different elements that rightly have been held on highest authority to be the basis of relief in cases of duress, salvage agreements, unconscionable bargains and other cases that Lord Denning seeks to amalgamate and attempts a task that, if it is to be attempted at all, is more appropriate for the legislature with the assistance of the Law Commission. His secondary view is open to the same objections as that of Sir Eric Sachs.

The present case is wrongly decided for the following, amongst other, reasons: (i) it is expressly based on the reasoning in *Bundy*; (ii) see paras. (i) to (iv) above, which apply, mutatis mutandis, to the present case; (iii) it was wrong to reject the requirement of manifest disadvantage (or other means of determining whether the transaction was not explicable on the basis on which ordinary men act); (iv) in approaching the issue in (iii) above the Court of Appeal should have

considered the transaction as a whole and given full weight to the fact that the bank was precluded from relying on the charge to any extent inconsistent with Mr. Barrow's assurance to the second defendant; (v) if the Court of Appeal had considered the transaction on the basis set out in (iv) above (or alternatively even if they had approached it on the basis of the words of the deed itself), they would (or should) have concluded that the transaction was not manifestly disadvantageous to the second defendant; (vi) in the circumstances a presumption of undue influence could not rightly be said to arise; (vii) it was wrong to attach weight to the fact that Mr. Barrow came round to the property. That had no, or no appreciable, evidential weight. Further, Dunn L.J. was wrong when he found, [1983] 3 All E.R. 85, 91, that "on the evidence of the manager himself, the wife was relying on his guidance and advice whether or not she should sign the document." Mr. Barrow gave no such evidence. The wisdom of the transaction was not discussed. The second defendant did not assert that she relied on such advice. Dunn L.J. focused on the deficiencies of the first defendant's business abilities, but that was not a relevant factor unless the total effect of the transaction was that the second defendant was guaranteeing the first defendant's business debts. He also failed to consider the practical and legal consequences of the transaction as a whole; he proceeded on the basis that the terms of the document were the only matter for consideration. Slade L.J. was wrong to place any or any substantial reliance on the facts: (a) that it was at the first defendant's suggestion that Mr. Barrow went to the property with the document; (b) that the second defendant asked for and was given advice on the terms of the document. His eight points, at pp. 92–93, were misconceived; alternatively, he attached too much weight to them. On the basis of the findings of fact of the deputy judge the Court of Appeal should have concluded that the impugned transaction had not been caused by the existence or by the exercise of influence by the bank in any sense relevant to a plea of undue influence, still less by the abuse of any influential relationship between the bank and the second respondent.

Unfortunately, in *Lloyds Bank Ltd. v. Bundy* [1975] Q.B. 326, as in the present case, the Court of Appeal did not look at the county court judge's judgment as a whole. In both cases, the Court of Appeal reversed the judge on a matter that was essentially one of fact for him: see *Bank of Montreal v. Stuart* [1911] A.C. 120. If the bank manager thinks that the transaction is fair and gives honest advice, it is unlikely that he will be taking an unfair advantage. [Reference was made to *Poosathurai v. Kannappa Chettiar,* L.R. 47 I.A. 1 and *Campbell Discount Co. Ltd. v. Bridge* [1962] A.C. 600.]

The plaintiffs' propositions on *Lloyds Bank Ltd. v. Bundy* may be developed as follows. 1. On the facts, the Court of Appeal should not have found that a confidential relationship existed between Mr. Bundy and the bank. 2. There was no suggestion that any influence of any party other than the bank caused Mr. Bundy to enter into the transaction, or, if there was, it was not supported by the facts as found by the county court judge. 3. The Court of Appeal misapprehended the effect of the evidence and unjustifiably substituted their own view

of the facts for that of the judge, both as to the existence of the alleged relationship and in relation to the extent of the disadvantage considered to have been suffered by Mr. Bundy. 4. The connection between the influence of the bank and Mr. Bundy's decision to enter into the transaction was absent. 5. The Court of Appeal misapprehended the effect of the advice given by the assistant manager, which was confined, on the facts, to explaining the nature of the transaction and providing information to enable Mr. Bundy to decide whether or not to enter into the transaction.

As to unconscionable bargains, see *Halsbury's Laws of England,* 4th ed., vol. 16 (1976), para. 1233; *Prees v. Coke* (1871) L.R. 6 Ch.App. 645; *Fry v. Lane* (1888) 40 Ch.D. 312; *Backhouse v. Backhouse* [1978] 1 W.L.R. 243; and *Cresswell v. Potter (Note)* [1978] 1 W.L.R. 255.

As to the statutory position, the House of Lords has said that the law should develop in parallel with statutory provisions: see *Warnink (Erven) Besloten Vennootschap v. J. Townend & Sons (Hull) Ltd.* [1979] A.C. 731, 743, *per* Lord Diplock. There are many consumer protection Acts, e.g. Hire Purchase Acts, the Fair Trading Act 1973, the Consumer Credit Act 1974, the Banking Act 1979, the Competition Act 1980, the Insurance Companies Act 1982, etc.

There was no suggestion at the trial that the undue influence was that of the first defendant via the bank manager.

Lord Denning M.R.'s assessment in *Matthew v. Bobbins* (1980) 41 P. & C.R. 1 was made on the transaction as a whole.

The plaintiffs rely on *In re The Estate of Brocklehurst, decd.* [1978] Ch. 14.

Leolin Price Q.C. and *Peter St. John Langan Q.C.* for the second defendant. It was not contended on behalf of the second defendant in the Court of Appeal, and it will not be contended before the House of Lords, that any *actual* undue influence was used by the plaintiffs acting through Mr. Barrow. Nor have the plaintiffs contended that, in the event of the presumption of undue influence being found to arise, there is evidence (such as a recommendation to the second defendant that she should take independent legal advice) that would support a finding that the presumption has been rebutted. The issues for decision thus fall within a narrow compass: (1) Does the presumption of undue influence arise whether or not the transaction that is impugned is one that is manifestly disadvantageous to the party who relies on the presumption? (2) If (contrary to the contentions that will be advanced on behalf of the second defendant on issue (1)) the presumption only arises where the transaction is a manifestly disadvantageous one, was the transaction in this case manifestly disadvantageous to the second defendant? (3) Were the circumstances of this case such as to give rise to the presumption?

Issue (1) is a question of law. The presumption arises out of a relationship classified as fiduciary, and so arises whether or not the transaction impugned is one that can be said to be disadvantageous to the party who relies on the presumption. The doctrine of undue influence is only one facet of the intervention of equity to protect the weak against the strong. Equity intervenes to prevent the possible abuse of a relationship and does so as a matter of public policy. Such abuse

A can occur, as Slade L.J. observed, p. 92, even though the resulting transaction is one which provides reasonably equal benefits for both parties: see *Allcard v. Skinner,* 36 Ch.D. 145, 171, *per* Cotton L.J.; *Lloyds Bank Ltd. v. Bundy* [1975] Q.B. 326, 342, *per* Sir Eric Sachs.

Issue (2) is a matter of inference from the facts. It was not directly dealt with in the judgments of Dunn and Slade L.JJ., presumably in the light of their decision on issue (1). The transaction here was one that B was manifestly disadvantageous to the second defendant. Before she executed the plaintiffs' charge, her liability could not exceed the amount owing to Abbey National together with the limited amount for which the charge taken by the plaintiffs in July 1977 provided security. Afterwards there was no express limit on her liability, which was, in view of the wide terms of the plaintiffs' standard form and the guarantees that were C or might be given by her, outside her control. This disadvantage cannot be made to disappear by any concession or assertion made by or on behalf of the bank in these proceedings: her signature had been obtained to an unlimited charge and what Mr. Barrow had said to her was inaccurate and inconsistent with the document.

Issue (3) is a question of mixed law and fact. As to the law, there is, cannot be and should not be any definitive classification of those D relationships in which the presumption of undue influence arises. The key authorities are: *Tate v. Williamson* (1866) L.R. 2 Ch.App. 55; *Allcard v. Skinner*; *Tufton v. Sperni* [1952] W.N. 439 and *Lloyds Bank Ltd. v. Bundy*. On the facts, it will not be contended that anything that occurred between the plaintiffs and the second defendant prior to February 1975 gave rise to a relationship of confidentiality. The E relationship did arise during her discussion with Mr. Barrow on that day, this being the cumulative effect of the eight points enumerated by Slade L.J. and of the following additional factors. No previous appointment was made for the interview, but Mr. Barrow arrived at the house without previous warning and sought the second defendant's immediate execution of a document (in the plaintiffs' standard form of legal mortgage) which Mr. Barrow, on behalf of the plaintiffs, had F prepared ready for her execution, and which the first defendant had already executed; she was (in Mr. Barrow's words) "upset," and she obviously had no period of calm in which to review her position or prepare her mind in relation to the important transaction that was being proposed to her by Mr. Barrow; she made clear to Mr. Barrow that she did not wish their discussion to be in the first defendant's presence or G hearing, but the first defendant was nevertheless "hovering around"; she made it clear that she did not want a mortgage that would cover any business debts; and nothing appears to have been said about the sums involved, or differences between the Abbey National mortgage and the new mortgage to the plaintiffs, or the possibility that it might be in her interest to let Abbey National sell the property. Particular emphasis is placed on Slade L.J.'s point (7), at p. 93, namely that she sought Mr. H Barrow's advice and that he took it on himself to give advice. By the time of that interview there was no possibility of the Abbey National taking possession. The second defendant's need at that interview (not before) cried out aloud for careful, independent advice (see *per* Sachs

L.J. in *Lloyds Bank Ltd. v. Bundy* [1975] Q.B. 326, 345) and, indeed, for calm, collected consideration. The question is whether there was a *risk* of greater disadvantage to the second defendant than there would have been if she had taken independent advice. Slade L.J. was right [1983] 3 All E.R. 85, 92c–d. One has to see whether the degree of benefit takes the transaction out of the general run of commercial transactions.

As to *Lloyds Bank Ltd. v. Bundy*, (1) what is supported on behalf of the second defendant is the judgment of Sir Eric Sachs (concurred in by Cairns L.J.). The wider formulation of principle attempted by Lord Denning M.R. is not relied on. (2) The essential objection to the *Bundy* decision, from the point of view of any lending institution, is that a confidential relationship was found to exist between the bank and Mr. Bundy. (3) There might be some force in this objection if the decision implied that the relationship of banker and customer was invariably confidential. It is not, as the Court of Appeal has twice (in *Bundy* and in the present case) recognised. The relationship is always commercial in nature. Sometimes, in circumstances that may be easy to recognise, the relationship has the additional characteristic of confidentiality. (4) Indeed, beyond the confines of certain family relationships (e.g. parent and child), it may be doubted whether the existence of a relationship that may be placed in a particular category will, without additional and special features, be treated as confidential. Thus: (i) doctor/patient. Quaere, whether the relationship is confidential as between a man with a broken wrist and the doctor who attends him at a hospital emergency department; contrast the on-going relationship that one may have with one's general practitioner. (ii) Minister of religion/adherent. Quaere, whether this will ever by itself be a relationship that is confidential; more is required, e.g. as in the relationship of confessor/penitent or one of similar "spiritual direction." (5) So also with banks. Sometimes, not always, and perhaps less frequently than in other classes of relationship, a bank and its customer will be in a relationship of confidentiality that places the bank under special duties to the customer. (6) That the relationship may sometimes, but only sometimes, be one of confidentiality strikes a fair balance as between banker and customer. If the relationship were to be always treated as confidential, an unjust imposition would be placed on banks; e.g. if a bank is approached for a loan by a wealthy and intelligent businessman, accompanied at all material discussions by his accountant, it would be wrong to place the bank under any duty higher than that of telling the truth. If the relationship were never to be treated as confidential, the law would be failing in its duty to protect those vulnerable persons whom equity has traditionally protected: for examples one need go no further than Mr. Bundy and the second defendant here. (7) The decisions of the Court of Appeal in *Bundy* and the present case do not place banks under any unreasonable burden in practice. All that a bank need do is to insist on a would-be guarantor or mortgagor *either* taking independent advice *or* being given an opportunity to obtain such advice before signing the relevant document. This could be laid down in simple instructions to bank officers. (8) As a matter of general policy, the need to protect an intending borrower to this limited

A extent is likely to become greater. As persons other than solicitors in private practice take over a certain amount of conveyancing business, the use of an "in-house" solicitor in the lending institution to do the conveyancing work for the borrower may also increase, and with such increase will come the need for genuinely independent advice. (9) Further, the *Bundy* principle is now established in other common law jurisdictions (e.g. Canada and Australia), and for the House of Lords to B overrule *Bundy* would destroy this developing consistency of approach.

The second defendant agrees with Sachs L.J. in *Lloyds Bank Ltd. v. Bundy* [1975] Q.B. 326, 347 that the question is whether Mr. Barrow crossed the line into the area of confidentiality. [Reference was made to *Allcard v. Skinner,* 36 Ch.D. 145; *Commonwealth Bank of Australia v. Amadio* (1983) 57 A.L.J.R. 358; *Poosathurai v. Kannappa Chettiar,* C L.R. 47 I.A. 1; *Bank of Montreal v. Stuart* [1911] A.C. 120, 137; *Zamet v. Hyman* [1961] 1 W.L.R. 1442; *Huguenin v. Baseley,* 14 Ves.Jun. 273; *Matthew v. Bobbins,* 41 P. & C.R. 1; *In re Coomber* [1911] 1 Ch. 723 and *Cresswell v. Potter (Note)* [1978] 1 W.L.R. 255.]

Scott Q.C. in reply. The *American Law Institute Restatement of the Law,* Second, Contracts 2d, vol. 1, s. 177, pp. 490–492, defines undue influence as "unfair *persuasion* of a party . . ." "Confidence" and D "confidentiality" are not of assistance in coming to a conclusion on the principles involved. They have so many overtones. It is really a question of whether there is an influential relationship.

As to the second defendant's submissions, it is not open to her to challenge or seek to qualify the judge's findings of fact. On those findings, if the Court of Appeal are correct, the result is a startling one. E That is not a bad test. Negligence was specifically abandoned below. There was never any suggestion that the manager did not have authority; if he did not have express, then he had implied, authority. [Reference was made to *Gibson v. Jeyes,* 6 Ves.Jun. 266; *In re Craig, decd.* [1971] Ch. 95; and *In re the Estate of Brocklehurst, decd.* [1978] Ch. 14, 39, 41 (Bridge L.J.).]

F Their Lordships took time for consideration.

7 March. LORD SCARMAN. My Lords, the appellant, the National Westminster Bank Plc., seeks against Mrs. Janet Morgan, the respondent in the appeal, an order for the possession of a dwelling house in Taunton. The house is Mrs. Morgan's family home. She acquired it jointly with her husband, and since his death on 9 December 1982 has G been the sole owner. The bank relies on a charge by way of legal mortgage given by her and her husband to secure a loan granted to them by the bank. The manner in which Mrs. Morgan came to give this charge is at the heart of the case. The only defence to the bank's action with which your Lordships are concerned is Mrs. Morgan's plea that she was induced to execute the charge by the exercise of undue influence on the part of the bank. The bank, she says, procured the charge by H bringing to bear undue influence upon her at an interview at home which Mr. Barrow, the bank manager, sought and obtained in early February 1978.

The action was heard in the Bridgwater County Court in November

1982. The deputy judge, Mr. C. S. Rawlins, delivered a careful judgment in which after a full review of the facts he rejected the defence of undue influence and made the possession order sought by the bank. He also rejected Mrs. Morgan's counterclaim for equitable relief.

Mrs. Morgan appealed. The Court of Appeal reversed the judge, dismissed the bank's claim, and granted Mrs. Morgan relief in the shape of a declaration that the legal charge was not a good and subsisting charge.

The bank appeals with the leave of the House. Two issues are said to arise: the first, the substantive issue, is whether Mrs. Morgan has established a case of undue influence: the second, said to be procedural, is whether, if she has, she ought properly to be granted equitable relief, and the nature of any such relief. The two issues are, in truth, no more than different aspects of one fundamental question: has Mrs. Morgan established a case for equitable relief? For there is no longer any suggestion that she has a remedy at law. Unless the transaction can be set aside on the ground of undue influence, it is unimpeachable. The House is not concerned with the claim for damages for negligence raised by Mrs. Morgan in her counterclaim but not pursued by her in the Court of Appeal: nor has any case of misrepresentation been advanced.

In the appeal the bank invites the House to review the decision of the Court of Appeal in *Lloyds Bank Ltd. v. Bundy* [1975] Q.B. 326. The case, it would appear, has been widely misunderstood—though not, I hasten to add, by the judges of our courts. The majority of the court in that case addressed themselves to its very special facts and held that the customer's banking transaction (a legal charge on the home, as in this case) was procured by undue influence exercised by the bank manager: but Lord Denning M.R. preferred to base his judgment on inequality of bargaining power. Because this difference of approach may have led to some confusion, I have no doubt that the House should accede to the bank's invitation. Whether the bank is correct in its submission that the majority decision was wrong in law is, however, another matter, to which I shall return later in my speech.

The facts of the case

There is no dispute as to the primary facts: they were agreed by counsel in the county court. Mr. and Mrs. Morgan bought the house on 17 September 1974 with the assistance of two loans secured by a first and a second mortgage. The first was a charge by way of legal mortgage to the Abbey National Building Society to secure a loan of £12,800: the second was a legal charge to an investment company to secure a loan of £4,200. The total of £17,000 thus borrowed almost certainly approximated at the time to the value of the property: and the consequence of the two loans was to saddle the property with a burden of debt, the servicing of which was to cause Mr. Morgan great difficulty. The mortgage repayments soon fell into arrears.

Mr. Morgan was in business as an earth-moving contractor, a business which he conducted first through a company, Highbell Ltd., and later through a company named D. A. Morgan Contracts Ltd. The business was under-capitalised and subject to alarming fluctuations of fortune. Highbell ceased to trade in July 1975.

Between 1975 and 1977 Mr. Morgan banked at the Basingstoke branch of the National Westminster, though he and his family were living at Taunton. He was frequently in overdraft upon his personal account, so that Basingstoke asked the North Street, Taunton branch to try to collect what was due. On at least six occasions Mr. Barrow, the North Street manager, visited the Morgan house in an attempt to collect the debt. Certainly on one occasion he had a discussion with Mrs. Morgan when she told him that the house was on the market and that the debt would be repaid. The trial judge found as a fact that during this period Mrs. Morgan's relationship with the bank was a business one, that the family was in financial difficulty, and that husband and wife were concerned about their inability to maintain the mortgage repayments.

In June 1977 Mr. Morgan put a proposal to Basingstoke: it was to borrow from the bank sufficient to pay off the second mortgage, and to set up a new company (D. A. Morgan Contracts Ltd.) which he declared to have a rosy future.

The bank agreed subject to a legal charge to be given by both owners of the property, i.e., by Mrs. Morgan as well as Mr. Morgan. The bank suggested, very wisely and fairly, that Mrs. Morgan should take legal advice, which she did and for which the bank paid. The advice was that the amount to be secured should be limited to £6,000: and the bank accepted the limit.

A few days later (end of June 1977) the bank discovered that a possession order in respect of the house had been made by a court in favour of the second mortgagee. The trial judge found that Mrs. Morgan knew of this order when she executed the legal charge in favour of the bank.

The bank now had second thoughts. In the result it did not make the loan to Mr. Morgan, who was rescued by the generosity of his father who paid off the second mortgagee. The charge to secure £6,000 stood, however; and it continued as a support for the husband's borrowing, subject to the limit demanded and obtained by Mrs. Morgan. During these unhappy events husband and wife were, the judge found, desperately anxious not to lose their home.

In October 1977 a crisis arose on the first mortgage. The Abbey National warned the bank that they were starting proceedings for possession in default of payment of mortgage instalments. On 19 October 1977 Mr. Morgan transferred his personal account (in overdraft £588) to North Street. The Abbey National began their proceedings, alleging a debt of over £13,000. On 12 December 1977 Mrs. Morgan transferred her account to North Street. From this date onward the Morgans' banking transactions were with Mr. Barrow, the North Street manager.

A bank rescue operation was decided upon by Mr. and Mrs. Morgan, if they could arrange it. On 30 January 1978 Mr. Morgan asked the bank "to refinance" the Abbey National loan. By this time the society had obtained a possession order. Mr. Morgan told the bank that all he needed was a bridging loan of £14,500 for some five weeks. If the bank would pay off the society, he would arrange for the bank's repayment by

his company, which it would appear was currently in a prosperous phase and had, it was then believed, good prospects.

The bank accepted the proposal upon the recommendation of Mr. Barrow. He was informed of the approval by his area office by letter of 31 January 1978 in these terms:

> "D. A. A. Morgan and another: In reply to your letter of 30 January 1978 the following limit has been granted: £14,500 on current account to 7.3.78 on the short term bridging basis submitted, subject to completion of a new unlimited legal mortgage on NWB 1016 over Crossmoor Meadow to replace the existing limited second mortgage."

The "existing limited second mortgage" was the 1977 legal charge limited to £6,000. In place of it Mr. Barrow was being instructed to obtain an *unlimited* mortgage to secure a *loan limited* to £14,500. There was considerable discussion by counsel as to the true meaning of this approval. But it is really quite simple: the debt to be secured was the loan of a sum which Abbey National required to be paid if they were to call off their proceedings for possession and to discharge their mortgage: the security for the loan limited to £14,500 was to be a mortgage without express limit. The document of approval sent by the area office and quoted above limited the mortgage to the Abbey National debt and did not authorise Mr. Barrow to use the security to support any other lending transaction.

On 1 February 1978 Mr. and Mrs. Morgan signed an authority to the bank to pay off the Abbey National and to charge Mr. Morgan's personal account. The bank, however, required the mortgage to secure the loan to be in joint names (the property being in joint ownership). Between 3 and 6 February a joint account was opened. The details of the transaction were these. In the first week of February the debit of £14,207·22 was transferred from Mr. Morgan's personal account to the joint account, being the sum which the bank had paid to the Abbey National, and Mr. and Mrs. Morgan signed the legal charge, which is the transaction which Mrs. Morgan seeks in these proceedings to have declared null and void on the ground that it was procured by the bank's exercise of undue influence upon her. The charge bears the date 8 March 1978: no point arises on the discrepancy between this date and the date early in February when it was signed, the delay being attributable to the fact that the bank did not receive the deeds of the property from the Abbey National until the end of February.

There can be no doubt as to the terms of the charge: it was a charge to secure "all present or future actual or contingent liabilities" of Mr. Morgan to the bank. Mrs. Morgan had, therefore, signed a charge the terms of which were without limit and covered *all* the liabilities of Mr. Morgan to the bank. It was, however, plainly the intention of the bank, as it was also its instruction to Mr. Barrow, to treat the security as limited to the bridging finance (capital and interest) needed by the joint owners of the house to pay off the Abbey National and to obtain a period of time (about five weeks) in which to repay the bank. The bank had at no time sought to use the security for any other purpose.

A I now come to the heart of the case. It is not suggested—nor could it be—that prior to the interview at which Mrs. Morgan signed the charge the relationship between the bank and its two customers, Mr. and Mrs. Morgan, had been other than the normal business one of banker and customer. It was business for profit so far as the bank was concerned: it was a rescue operation to save their house so far as the two customers were concerned. But it is said on behalf of Mrs. Morgan that the B relationship between the bank and herself assumed a very different character when in early February Mr. Barrow called at the house to obtain her signature to the charge: Mr. Morgan had already signed.

The trial judge set the scene for the critical interview by these findings of fact: husband and wife were looking for a rescue operation by the bank to save the home for themselves and their children; they C were seeking from the bank only a breathing space of some five weeks; and Mrs. Morgan knew that there was no other way of saving the house.

Mr. Barrow's visit to the house lasted 15 to 20 minutes. His conversation with Mrs. Morgan lasted only five minutes. Mrs. Morgan's concern was lest the document which she was being asked to sign might enable the husband to borrow from the bank for business purposes. She D wanted the charge confined to paying off the Abbey National and to the provision of bridging finance for about five weeks. She told Mr. Barrow that she had no confidence in her husband's business ability and did not want the mortgage to cover his business liabilities. Mr. Barrow advised her that the cover was so limited. She expressed her gratitude to the bank for saving their home. The judge found that the bank was not E seeking any advantage other than to provide on normal commercial terms but at extremely short notice the bridging finance necessary to secure their home. He rejected the suggestion that Mrs. Morgan had any misgivings on the basis that she would prefer the house to be sold. He accepted that it was never the intention of Mr. Barrow that the charge should be used to secure any other liability of Mr. Morgan. The atmosphere in the home during Mr. Barrow's visit was plainly tense. F Mr. Morgan was in and out of the room, "hovering around." Mrs. Morgan made it clear to Mr. Barrow that she did not want him there. Mr. Barrow did manage to discuss the more delicate matters when he was out of the room.

Such was the interview in which it is said that Mr. Barrow crossed the line which divides a normal business relationship from one of undue G influence. I am bound to say that the facts appear to me to be a far cry from a relationship of undue influence or from a transaction in which an unfair advantage was obtained by one party over the other. The trial judge clearly so thought: for he stated his reasons for rejecting Mrs. Morgan's case with admirable brevity. He made abundantly clear his view that the relationship between Mr. Barrow and Mrs. Morgan never went beyond that of a banker and customer, that Mrs. Morgan had H made up her own mind that she was ready to give the charge, and that the one piece of advice (as to the legal effect of the charge) which Mr. Barrow did give, though erroneous as to the terms of the charge, correctly represented his intention and that of the bank. The judge dealt

with three points. First, he ruled upon the submission by the bank that the transaction of loan secured on the property was not one of manifest disadvantage to Mrs. Morgan since it provided what to her was desperately important, namely the rescue of the house from the Abbey National. He was pressed, of course, with the contrast between the unlimited terms of the legal charge and the assurance (to which at all times the bank adhered) by Mr. Barrow that the charge was limited to paying off the Abbey National and the bridging finance. He considered the balance to be between the "enormous" advantage of preserving the home from the Abbey National and the "essentially theoretical" disadvantage of the terms of the written charge, and accepted the submission that the transaction was not manifestly disadvantageous to Mrs. Morgan.

Secondly, he rejected the submission made on behalf of Mrs. Morgan that Mr. Barrow put pressure on her. In his view the pressure upon her was the knowledge that Abbey National were on the point of obtaining possession with a view to the sale of her home. It was, however, suggested that Mr. Barrow had made a mistake in the advice which he gave her as to the nature of the charge. Mr. Barrow's mistake was not as to the bank's intentions but as to the wording of the charge. He accurately stated the bank's intention and events have proved him right. I would add in passing that no case of misrepresentation by Mr. Barrow was sought to be developed at the trial and the case of negligence is not pursued. The judge recognised that Mr. Barrow did not advise her to take legal advice: but he held that the circumstances did not call for any such advice and that she was not harried into signing. She was signing to save her house and to obtain short-term bridging finance. "The decision," the judge said, "was her own."

Thirdly, he rejected the submission that there was a confidential relationship between Mrs. Morgan and the bank such as to give rise to a presumption of undue influence. Had the relationship been such as to give rise to the presumption, he would have held, as counsel for the bank conceded, that no evidence had been called to rebut it. He concluded that Mrs. Morgan had failed to make out her case of undue influence.

The Court of Appeal [1983] 3 All E.R. 85 disagreed. The two Lords Justices who constituted the court, Dunn and Slade L.JJ. (surely it should have been a court of three?) put an interpretation upon the facts very different from that of the judge: they also differed from him on the law.

As to the facts, I am far from being persuaded that the trial judge fell into error when he concluded that the relationship between the bank and Mrs. Morgan never went beyond the normal business relationship of banker and customer. Both Lords Justices saw the relationship between the bank and Mrs. Morgan as one of confidence in which she was relying on the bank manager's advice. Each recognised the personal honesty, integrity, and good faith of Mr. Barrow. Each took the view that the confidentiality of the relationship was such as to impose upon him a "fiduciary duty of care." It was his duty, in their view, to ensure that Mrs. Morgan had the opportunity to make an independent and

informed decision: but he failed to give her any such opportunity. They, therefore, concluded that it was a case for the presumption of undue influence.

My Lords, I believe that the Lords Justices were led into a misinterpretation of the facts by their use, as is all too frequent in this branch of the law, of words and phrases such as "confidence," "confidentiality," "fiduciary duty." There are plenty of confidential relationships which do not give rise to the presumption of undue influence (a notable example is that of husband and wife, *Bank of Montreal v. Stuart* [1911] A.C. 120); and there are plenty of non-confidential relationships in which one person relies upon the advice of another, e.g. many contracts for the sale of goods. Nor am I persuaded that the charge, limited as it was by Mr. Barrow's declaration to securing the loan to pay off the Abbey National debt and interest during the bridging period, was disadvantageous to Mrs. Morgan. It meant for her the rescue of her home upon the terms sought by her—a short-term loan at a commercial rate of interest. The Court of Appeal has not, therefore, persuaded me that the judge's understanding of the facts was incorrect.

But, further, the view of the law expressed by the Court of Appeal was, as I shall endeavour to show, mistaken. Dunn L.J., at p. 90, while accepting that in all the reported cases to which the court was referred the transactions were disadvantageous to the person influenced, took the view that in cases where public policy requires the court to apply the presumption of undue influence there is no need to prove a disadvantageous transaction. Slade L.J. also clearly held that it was not necessary to prove a disadvantageous transaction where the relationship of influence was proved to exist. Basing himself on the judgment of Cotton L.J. in *Allcard v. Skinner* (1887) 36 Ch.D. 145, 171, he said, at p. 92:

> "Where a transaction has been entered into between two parties who stand in the relevant relationship to one another, it is still possible that the relationship and influence arising therefrom has been abused, even though the transaction is, on the face of it, one which, in commercial terms, provides reasonably equal benefits for both parties."

I can find no support for this view of the law other than the passage in Cotton L.J.'s judgment in *Allcard v. Skinner* to which Slade L.J. referred. The passage is as follows, at p. 171:

> "The question is—Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes—First, where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the

court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

The transactions in question in *Allcard v. Skinner* were gifts: it is not to be supposed that Cotton L.J. was excluding the applicability of his observations to other transactions in which disadvantage or sacrifice is accepted by the party influenced. It is significant for the proper understanding of his judgment that gifts are transactions in which the donor by parting with his property accepts a disadvantage or a sacrifice, and that in *Allcard v. Skinner* the donor parted with almost all her property. I do not, therefore, understand the Lord Justice, when he accepted that Miss Allcard's case fell into the class where undue influence was to be presumed, to have treated as irrelevant the fact that her transaction was manifestly disadvantageous to her merely because he was concerned in the passage quoted to stress the importance of the relationship. If, however, as Slade L.J. clearly thought, Cotton L.J. in the last sentence quoted should be understood as laying down that the transaction need not be one of disadvantage and that the presumption of undue influence can arise in respect of a transaction which provides "reasonably equal benefits for both parties," I have with great respect to say that in my opinion the Lord Justice would have erred in law: principle and authority are against any such proposition.

Like Dunn L.J., I know of no reported authority where the transaction set aside was not to the manifest disadvantage of the person influenced. It would not always be a gift: it can be a "hard and inequitable" agreement (*Ormes v. Beadel* (1860) 2 Gif. 166, 174); or a transaction "immoderate and irrational" (*Bank of Montreal v. Stuart* [1911] A.C. 120, 137) or "unconscionable" in that it was a sale at an undervalue (*Poosathurai v. Kannappa Chettiar* (1919) L.R. 47 I.A. 1, 3–4). 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. 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.

A The principle justifying the court in setting aside a transaction for undue influence can now be seen to have been established by Lindley L.J. in *Allcard v. Skinner,* 36 Ch.D. 145. It is not a vague "public policy" but specifically the victimisation of one party by the other. It was stated by Lindley L.J. in a famous passage, at pp. 182–183:

> "The principle must be examined. What then is the principle? Is it
> B that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The courts have always repudiated any such jurisdiction. *Huguenin*
> C *v. Baseley* (1807) 14 Ves.Jun. 273 is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any
> D way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud."

When the Lord Justice came to state the circumstances which give rise
E to the presumption, he put it thus, at p. 183:

> "As no court has ever attempted to define fraud so no court has ever attempted to define undue influence, which includes one of its many varieties. The undue influence which courts of equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is
> F carried away by it, unless indeed such enthusiasm is itself the result of external undue influence. But the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it courts of equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual
> G exercise of such influence; and the courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible. The courts have required proof of its non-exercise, and, failing that proof, have set aside gifts otherwise unimpeachable."

H And in a later passage, at p. 185, he returned to the critical importance of the nature of the transaction:

> "Where a gift is made to a person standing in a confidential relation to the donor, the court will not set aside the gift if of a small

amount simply on the ground that the donor had no independent advice. In such a case, some proof of the existence of the influence of the donee must be given. The mere existence of such influence is not enough in such a case; see the observations of Turner L.J. in *Rhodes v. Bate* (1866) L.R. 1 Ch.App. 252, 258. But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift."

Subsequent authority supports the view of the law as expressed by Lindley L.J. in *Allcard v. Skinner.* The need to show that the transaction is wrongful in the sense explained by Lindley L.J. before the court will set aside a transaction whether relying on evidence or the presumption of the exercise of undue influence has been asserted in two Privy Council cases. In *Bank of Montreal v. Stuart* [1911] A.C. 120, 137 Lord Macnaghten, delivering the judgment of the Board, said:

"It may well be argued that when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational, as it was in the present case, proof of undue influence is complete. However that may be, it seems to their Lordships that in this case there is enough, according to the recognized doctrine of courts of equity, to entitle Mrs. Stuart to relief. Unfair advantage of Mrs. Stuart's confidence in her husband was taken by Mr. Stuart, and also it must be added by Mr. Bruce."

In *Poosathurai v. Kannappa Chettiar,* L.R. 47 I.A. 1, 3 Lord Shaw of Dunfermline, after indicating that there was no difference upon the subject of undue influence between the Indian Contract Act 1872 and English law quoted the Indian statutory provision, section 16(3):

"Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears on the face of it, or on the evidence, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in the position to dominate the will of the other."

He then proceeded, at p. 4, to state the principle in a passage of critical importance, which, since, so far as I am aware, the case is reported only in the Indian Reports, I think it helpful to quote in full:

"It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid. Where the relation of influence, as above set forth, has been established, and the second thing is also made clear, namely, that the bargain is with the 'influencer,' and in itself unconscionable, then the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously

kept separately advised in the independence of a free agent. These general propositions are mentioned because, if laid alongside of the facts of the present case, then it appears that one vital element—perhaps not sufficiently relied on in the court below, and yet essential to the plaintiff's case—is wanting. It is not proved as a fact in the present case that the bargain of sale come to was unconscionable in itself or constituted an advantage unfair to the plaintiff; it is, in short, not established as a matter of fact that the sale was for undervalue."

The wrongfulness of the transaction must, therefore, be shown: it must be one in which an unfair advantage has been taken of another. The doctrine is not limited to transactions of gift. A commercial relationship can become a relationship in which one party assumes a role of dominating influence over the other. In *Poosathurai's* case, L.R. 47 I.A. 1 the Board recognised that a sale at an undervalue could be a transaction which a court could set aside as unconscionable if it was shown or could be presumed to have been procured by the exercise of undue influence. Similarly a relationship of banker and customer may become one in which the banker acquires a dominating influence. If he does and a manifestly disadvantageous transaction is proved, there would then be room for the court to presume that it resulted from the exercise of undue influence.

This brings me to *Lloyds Bank Ltd. v. Bundy* [1975] Q.B. 326. It was, as one would expect, conceded by counsel for the respondent that the relationship between banker and customer is not one which ordinarily gives rise to a presumption of undue influence: and that in the ordinary course of banking business a banker can explain the nature of the proposed transaction without laying himself open to a charge of undue influence. This proposition has never been in doubt, though some, it would appear, have thought that the Court of Appeal held otherwise in *Lloyds Bank Ltd. v. Bundy*. If any such view has gained currency, let it be destroyed now once and for all time: see Lord Denning M.R., at p. 336F, Cairns L.J., at p. 340D, and Sir Eric Sachs, at pp. 341H–342A. Your Lordships are, of course, not concerned with the interpretation put upon the facts in that case by the Court of Appeal: the present case is not a rehearing of that case. The question which the House does have to answer is: did the court in *Lloyds Bank Ltd. v. Bundy* accurately state the law?

Lord Denning M.R. believed that the doctrine of undue influence could be subsumed under a general principle that English courts will grant relief where there has been "inequality of bargaining power" (p. 339). He deliberately avoided reference to the will of one party being dominated or overcome by another. The majority of the court did not follow him; they based their decision on the orthodox view of the doctrine as expounded in *Allcard v. Skinner,* 36 Ch.D. 145. The opinion of the Master of the Rolls, therefore, was not the ground of the court's decision, which was to be found in the view of the majority, for whom Sir Eric Sachs delivered the leading judgment.

Nor has counsel for the respondent sought to rely on Lord Denning M.R.'s general principle: and, in my view, he was right not to do so. The doctrine of undue influence has been sufficiently developed not to need the support of a principle which by its formulation in the language of the law of contract is not appropriate to cover transactions of gift where there is no bargain. The fact of an unequal bargain will, of course, be a relevant feature in some cases of undue influence. But it can never become an appropriate basis of principle of an equitable doctrine which is concerned with transactions "not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act" (Lindley L.J. in *Allcard v. Skinner,* at p. 185). And even in the field of contract I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task—and it is essentially a legislative task—of enacting such restrictions upon freedom of contract as are in its judgment necessary to relieve against the mischief: for example, the hire-purchase and consumer protection legislation, of which the Supply of Goods (Implied Terms) Act 1973, Consumer Credit Act 1974, Consumer Safety Act 1978, Supply of Goods and Services Act 1982 and Insurance Companies Act 1982 are examples. I doubt whether the courts should assume the burden of formulating further restrictions.

I turn, therefore, to consider the "ratio decidendi" of Sir Eric Sachs's judgment. In so far as Sir Eric appears to have accepted the "public policy" principle formulated by Cotton L.J. in *Allcard v. Skinner,* I think for the reasons which I have already developed that he fell into error if he is to be understood as also saying that it matters not whether the transaction itself was wrongful in the sense explained by Lindley L.J. in *Allcard v. Skinner,* by Lord Macnaghten in *Bank of Montreal v. Stuart* [1911] A.C. 120, 137 and by Lord Shaw of Dunfermline in the *Poosathurai* case, L.R. 47 I.A. 1, 4. But in the last paragraph of his judgment where Sir Eric turned to consider the nature of the relationship necessary to give rise to the presumption of undue influence in the context of a banking transaction, he got it absolutely right. He said [1975] Q.B. 326, 347:

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

been crossed. It would indeed be rather odd if a bank which vis-à-vis a customer attained a special relationship in some ways akin to that of a 'man of affairs'—something which can be a matter of pride and enhance its local reputation—should not, where a conflict of interest has arisen as between itself and the person advised, be under the resulting duty now under discussion. Once, as was inevitably conceded, it is possible for a bank to be under that duty, it is, as in the present case, simply a question for 'meticulous examination' of the particular facts to see whether that duty has arisen. On the special facts here it did arise and it has been broken."

This is good sense and good law, though I would prefer to avoid the term "confidentiality" as a description of the relationship which has to be proved. In truth, as Sir Eric recognised, the relationships which may develop a dominating influence of one over another are infinitely various. There is no substitute in this branch of the law for a "meticulous examination of the facts."

A meticulous examination of the facts of the present case reveals that Mr. Barrow never "crossed the line." Nor was the transaction unfair to Mrs. Morgan. The bank was, therefore, under no duty to ensure that she had independent advice. It was an ordinary banking transaction whereby Mrs. Morgan sought to save her home; and she obtained an honest and truthful explanation of the bank's intention which, notwithstanding the terms of the mortgage deed which in the circumstances the trial judge was right to dismiss as "essentially theoretical," was correct: for no one has suggested that Mr. Barrow or the bank sought to make Mrs. Morgan liable, or to make her home the security, for any debt of her husband other than the loan and interest necessary to save the house from being taken away from them in discharge of their indebtedness to the building society.

For these reasons, I would allow the appeal. In doing so, I would wish to give a warning. There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting-point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case.

I propose, therefore, that the House order as follows: (1) that the appeal be allowed; (2) that possession of the house be given within 28 days of the date of judgment in this House; (3) that no order be made as to costs in the Court of Appeal or in this House save for a legal aid taxation of the respondent's costs.

LORD KEITH OF KINKEL. My Lords, I agree that this appeal should be allowed for the reasons set out in the speech of my noble and learned friend, Lord Scarman.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Scarman. I respectfully and entirely agree with it and for the reasons he gives I would allow this appeal.

LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech by my noble and learned friend Lord Scarman, with which I fully agree, I would allow this appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Scarman. I agree with it, and for the reasons which he gives I would allow the appeal.

Appeal allowed.
Possession to be given within 28 days.
No order as to costs in House of Lords or Court of Appeal save legal aid taxation of second defendant's costs.

Solicitors: Wilde Sapte for Osborne Clarke, Bristol; Park Nelson & Doyle, Devonshire for Clarke Willmott & Clarke, Taunton.

M. G.