Neutral Citation Number: [2023] EWHC 2386 (Ch)

Appeal No. CH-2022-000239

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
On appeal from the order of His Honour Judge Mitchell in the County Court at Bournemouth & Poole dated 8th December 2022 (Claim Number H00BH712)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

27th September 2023

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

CATHERINE WALLER-EDWARDS

Appellant/ Second Defendant

and

ONE SAVINGS BANK PLC

Respondent/ Claimant

- -
- -

Marc Beaumont (instructed by direct access) for the Appellant/Second Defendant
Antonia Halker (instructed by Equivo Limited) for the Respondent/Claimant

Hearing date: 10th July 2023

- -

JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.30am on Wednesday 27th September 2023 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

Introduction

1. This is an appeal by the Second Defendant in this action, Catherine Waller-Edwards (**"the Appellant"**), against an order of His Honour Judge Mitchell (**"the Judge"**) made in the County Court at Bournemouth & Poole on 8th December 2022.

2. The respondent to the appeal is the Claimant in the action, One Savings Bank plc (**"the Respondent"**). The Defendants to the action were Nicholas Bishop (**"Mr Bishop"**) as First Defendant, and the Appellant as Second Defendant. Mr Bishop did not defend the action below and is not involved in the appeal.

3. In the action the Respondent sought an order for possession of the property known as Spectrum, 32B Beaucroft Lane, Wimborne, Dorset BH21 2PA (**"Spectrum"**) and certain adjoining land, pursuant to a legal charge dated 24th October 2013 and entered into between the Defendants and the Respondent (**"the Charge"**). By the Charge the Defendants granted the Respondent a first legal charge over Spectrum and the adjoining land, as security for a loan.

4. The action came on for trial before the Judge on 5th December 2022. The Judge delivered his judgment (**"the Judgment"**), at the conclusion of the trial, on 8th December 2022. By his order of 8th December 2022 (**"the Order"**), consequential upon the Judgment, the Judge made an order for possession of Spectrum and the adjoining land in favour of the Respondent, together with a money judgment for the sums outstanding under the Charge, and an order for costs. The Order was made against both Mr Bishop and the Appellant (together **"the Defendants"**).

5. The Appellant's case is that her consent to the Charge was procured by the undue influence of Mr Bishop who was, at the time of the Charge, the partner of the Appellant. The Appellant's case is that the Respondent was put on inquiry in respect of this undue influence but failed to take any of the steps required to avoid being fixed with constructive notice of the undue influence, with the consequence that the Appellant is entitled to have the Charge set aside, as between herself and the Respondent.

6. For the reasons set out in the Judgment the Judge decided that the consent of the Appellant to the Charge had been procured by the undue influence of Mr Bishop, but also decided that the Respondent was not put on inquiry in respect of the undue influence and thus avoided being fixed with constructive notice of the undue influence. In consequence the Judge decided that the Charge was enforceable by the Respondent against the Appellant, and made the Order.

7. In this appeal (**"the Appeal"**) there is no challenge to the Judge's decision that the Appellant's consent to the Charge was obtained by the undue influence of Mr Bishop. The Appellant's case in the Appeal is that the Judge was wrong to decide that the Respondent was not put on inquiry in respect of the undue influence. Further or alternatively, the Judge was wrong to reject the Appellant's argument that the Respondent was fixed with constructive notice of the undue influence by virtue of the operation of the exempting provision in Section 199(1)(ii)(b) of the Law of Property Act 1925.

8. The Judge refused permission to appeal against the Order, but permission to appeal was granted by Meade J, by an order made on 17th March 2023.

9. At the hearing of the Appeal the Appellant was represented by Marc Beaumont, counsel, and the Respondent was represented by Antonia Halker, counsel. I had the benefit of skeleton arguments from both counsel, in addition to their oral submissions. I am grateful to both counsel for their clear and helpful written and oral submissions.

10. In this judgment references to Paragraphs (with the capital letter) are, unless otherwise indicated, references to the paragraphs of the Judgment. Italics have been added to quotations.

The factual background

11. In order to understand the issues raised by the Appeal it is necessary to provide a summary of the factual background. In setting out this summary I am indebted to the Judge, who gave a detailed account of the relevant facts and evidence in the Judgment. What follows is largely, but not exclusively drawn from the Judgment. My summary includes some details which I have gleaned from the documents put before me in the Appeal.

12. I should mention, at this stage, that the Judge heard *"at length"* (to quote the Judge at Paragraph 32) from the two witnesses who gave oral evidence at the trial. The first of these witnesses was Mr Richardson, group head of the underwriting department of the Respondent, who gave evidence at the trial on behalf of the Respondent. The second witness was the Appellant, who gave evidence on her own behalf. The Judge reviewed and summarised the evidence of these witnesses at Paragraphs 33-81. The Judge was at pains to emphasize that his summary was not a rehearsal of all the evidence, but only particular aspects of that evidence; see Paragraph 33. The summary is, nevertheless, a detailed and thorough summary. In setting out this summary, I take the Judge to have accepted the evidence of the witnesses, as the Judge summarised that evidence, save to the extent that the Judge indicated to the contrary. I make the same assumption in relation to the remainder of the Judgment, so far as the Judge dealt with the evidence of the two witnesses.

13. Returning to the narrative, the Appellant met Mr Bishop in late 2011 when she was, as the Judge found, at a vulnerable period in her life. They commenced a relationship shortly thereafter. The Appellant was then living in a property known as 60 Pilford Heath Road, Wimborne (**"Pilford"**), which she owned in her sole name. Pilford was mortgage free. The Judge accepted the evidence of the Appellant that she was then financially independent with significant savings, amounting to around £150,000.

14. Mr Bishop was a local builder and developer and he was in the process of constructing three properties at 32 Beaucroft Lane, which were partially built. One of these properties was Spectrum. In February 2012 Mr Bishop proposed to the Appellant that she should exchange Pilford and a sum of £150,000 for Spectrum, as built. The Appellant agreed. The Appellant's evidence was that this was the first of a series of transactions into which the Appellant was induced to enter by the undue influence of Mr Bishop.

15. In terms of values, the Judge recorded the Appellant's evidence that, at the time of this exchange transaction (**"the Exchange"**), Pilford was worth around £570,000 to £600,000, and Spectrum was expected to be worth around £750,000, once completed.

16. As I understand the position the property subject to the Charge comprises Spectrum itself, title to which is registered under title number DT403500, and an adjoining parcel of land registered under title number DT324994. It is not clear to me when this adjoining parcel of land was acquired or how it came to be included in the property subject to the Charge. These matters are not directly relevant to what I have to decide in the Appeal. In the remainder of this judgment my references to Spectrum should be taken to include the adjoining parcel of land if, at the relevant time to which I am referring, the adjoining parcel of land was in the same ownership as Spectrum.

17. When the Exchange came to be effected, it turned out that Spectrum was subject to an existing charge in favour of a Mr Higgins (**"the Higgins Charge"**), securing a sum of £78,000, which Mr Bishop did not have the means to pay off. The Appellant was however persuaded to proceed with the Exchange, which was completed on 25th May 2012. Each of the Defendants was represented by separate solicitors in relation to the Exchange. The Appellant was given a second charge over Spectrum, for the sum of £150,000, pending completion of the construction work on Spectrum. As I understand the position, the intention behind this second charge was that it secured the sum of £150,000 which the Appellant had agreed to pay as part of the Exchange, in the event that Spectrum was not finished by 30th August 2013. Also pending completion of the construction work on Spectrum, the Defendants began living together as a family at Pilford, with the Appellant's two children and Mr Bishop's child.

18. During the summer of 2012 Mr Bishop indicated to the Appellant that he needed to borrow more money to finance his construction work. The sum secured against Spectrum by the Higgins Charge was increased to £160,000. This extended loan was completed on 20th August 2012. The Defendants were represented by solicitors in relation to this extension of the Higgins Charge, but both Defendants were represented by the same solicitors. The solicitors in question were Ellis Jones Solicitors (**"Ellis Jones"**), who had acted for Mr Bishop in relation to the Exchange. The solicitor within Ellis Jones who had acted for Mr Bishop in relation to the Exchange, and acted for the Defendants in relation to the extension of the Higgins Charge was a Mr Matthew Clake (**"Mr Clake"**).

19. The Appellant moved into Spectrum in September 2012, although the construction work was not all complete at that stage. Later in 2012 the Appellant's evidence was that she was persuaded to enter into a further charge over the Property, in place of the Higgins Charge. This further charge was executed in December 2012, in favour of Martin Simon Properties Limited (a company under the control of Mr Higgins), securing the sum of £170,000. Ellis Jones, by Mr Clake, again acted for both Defendants in relation to the grant of this further charge (**"the MSP Charge"**). At the same time the legal title to Spectrum was put into the joint names of the Defendants (it is not clear in whose name it had previously been registered), with a declaration of trust in place which stated that the beneficial interest in Spectrum was held by the Defendants as tenants in common, in the ratio of 99:1 in favour of the Appellant. I assume that Ellis Jones, by Mr Clake, also acted for both of the Defendants in relation to this transaction.

20. In the summer of 2013 the sum secured by the MSP Charge was increased by £50,000, to £220,000. The Judgment records that Martin Simon Properties Limited changed its name at that time to MSP Capital Limited.

21. In or about May 2013 an approach was made to the Respondent for a remortgage of Spectrum. The sum sought by way of remortgage was £440,000. The Respondent was however only prepared to loan the sum of £384,000. The remortgage was completed on 24th October 2013. Ellis Jones, by Mr Clake, acted for all three parties, that is to say Mr Bishop, the Appellant and the Respondent in relation to this remortgage transaction. So far as the sum of £384,000 loaned on the security of the Charge was concerned, £233,801.76 was required to pay off the MSP Charge. The bulk of the residue of the loan, in the sum of £142,000, was used to pay Mr Bishop's wife, with whom Mr Bishop was involved in divorce proceedings. The letter of instruction to (I assume) Mr Clake to make this payment was included in a supplemental bundle of documents for the hearing of the Appeal. The letter is written in manuscript and is undated. The letter is listed in the supplemental bundle of documents as the manuscript instruction of Mr Bishop to Ellis Jones. The letter was written by Mr Bishop (see Paragraph 80), but was signed by both of the Defendants. The letter records that the payment to Mrs Bishop was to cover part payment of a mortgage in respect of a property in Wimborne. The evidence of the Appellant was that this was a further document which she signed under pressure from Mr Bishop. What was left of the remortgage loan, after payment of this sum of £142,000, went to Mr Bishop.

22. In the remainder of this Judgment I will refer to the transaction which comprised the remortgaging of Spectrum by the Charge as **"the Remortgage"**. I will refer to the loan which was made pursuant to the Remortgage, and was secured by the Charge, as **"the Remortgage Loan"**. I will refer to the sum of £142,000 which went to Mrs Bishop (or the former Mrs Bishop) as **"the Divorce Payment"**.

23. On a point of detail, it is not clear what happened to the second charge over Spectrum which the Appellant was granted as part of the Exchange. I assume that it must have been released at some stage. On a further point of detail, the precise sum released to the solicitors by the Respondent, by way of the Remortgage Loan, was £383,975; see the telegraphic transfer form of 24th October 2013. The minor discrepancy with the figure of £384,000 is not important in the Appeal, and I will proceed on the basis that the amount of the Remortgage Loan was £384,000.

24. Following completion of the Remortgage, on 24th October 2013, the relationship between the Defendants came to an end. Mr Bishop moved out of Spectrum in mid to late 2014. The Appellant remained in occupation of Spectrum but, by this time, she had a limited income and no savings, while her home (Spectrum) was heavily mortgaged. It appears that Mr Bishop, who was initially paying the sums due in respect of the Remortgage Loan, tried to persuade the Appellant to agree to more borrowing secured against Spectrum, which the Appellant refused. At some point the Defendants fell into arrears with the payments due in respect of the Remortgage Loan. This eventually resulted in the Respondent commencing this action, on 4th November 2021, seeking possession of Spectrum. Possession was sought on the basis that the Defendants were in arrears with the payments due in respect of the Remortgage Loan. Possession was also sought on the basis that the Defendants were in breach of an obligation under the Charge by personally residing in Spectrum. The relevant obligation required Spectrum to be let within 30 days

of completion of the Remortgage. The reason for this obligation was that the Remortgage Loan had been made on the condition that Spectrum would be let within 30 days of completion of the Remortgage.

25. It is to be noted that while cases of this kind almost always involve distressing circumstances, the facts of the present case are particularly sad. When the Appellant commenced her relationship with Mr Bishop she was the sole owner of her own home, which was mortgage free. She also had reasonably substantial personal savings. By the time the relationship ended, and as result of the series of transactions into which the Appellant was persuaded by Mr Bishop, the Appellant was left in a heavily mortgaged home, which she was not herself supposed to be occupying under the terms of the Charge, with no personal savings and lacking the means to maintain the payments due in respect of the Remortgage Loan.

The Judgment

26. As the Judge identified, at Paragraph 30, the real issue in the case was undue influence, which (subject to an additional issue to which I shall come) broke down into two parts or issues. First, there was the question of whether the Appellant could establish either actual or presumed undue influence. Second, there was the question of whether the Respondent was put on inquiry as to this undue influence, if undue influence was established, so as to be fixed with constructive notice of the undue influence. As the Judge pointed out, there would normally be a third issue to be considered; namely whether the relevant mortgage lender, if put on inquiry, took steps sufficient to avoid being fixed with constructive notice. In the present case it was common ground that the Respondent had taken no such steps, so that the Respondent was fixed with constructive notice (assuming undue influence) if it was put on inquiry.

27. So far as undue influence was concerned, and after summarising the relevant law, the Judge reviewed the history of the relationship between the Appellant and Mr Bishop, and the history of the transactions in which the Appellant and Mr Bishop were involved, starting with the Exchange. On the basis of this review the Judge found that there was a relationship of trust and confidence between the Defendants at all material times, *"which relationship was sadly abused by Mr Bishop"*; see Paragraph 105.

28. The Judge then went on to consider whether the relevant transactions called for an explanation. The Judge decided that they did. At Paragraph 108 the Judge considered the transactions prior to the Remortgage. I set out his findings in full:

> *"108. Ms Halker is right to say on behalf of the Claimant that the property swap in itself did not call for an explanation. Indeed, Ms Waller-Edwards' own evidence on that point, concurs. However, what does call for an explanation is the retention of Mr Higgins' charge. In reality, Ms Waller-Edwards was taking ownership of a property with a mortgage. That is a fairly startling proposition in itself and cries out for an explanation. From then on, there are a series of remortgage transactions involving Mr Higgins or MSP. If these were simply extending the existing borrowing in terms of duration, that would be one thing, but what was actually happening was successive increases in the borrowing. None of the proceeds of which went to Ms Waller-Edwards. In effect, Mr Bishop was extracting more and more cash from Ms Waller-Edwards' property and that again, in my judgment, plainly calls for an explanation."*

29. The Judge then considered the Remortgage itself, at Paragraph 110:

> *"110. Ms Halker argues that this has a very straightforward explanation, being primarily the need to redeem the MSP mortgage* [the MSP Charge]. *If that was the only purpose of the Claimant's charge, then I would undoubtedly agree. However, that was only part of the story. At least in equal measure, this was another money-raising venture for Mr Bishop. It was a vehicle for him to be able to pay off his former wife. If raising a substantial sum on Ms Waller-Edwards' property for the benefit of Mr Bishop's ex-wife does not call for an explanation, I am not sure what would."*

30. The overall conclusion of the Judge on the first issue, at Paragraphs 111 and 112, was that the Appellant had succeeded in demonstrating presumed undue influence:

> *"111. Accordingly, in my judgment, on the available evidence, both limbs of presumed undue influence are well met. This means that the evidential burden of showing a satisfactory explanation for what transpired falls to the Claimant.*
>
> *112. The Claimant has no evidence of its own in this respect and cannot displace that burden. I am therefore satisfied that Ms Waller-Edwards' case of undue influence as between herself and Mr Bishop is made out."*

31. The Judge then continued to the question of whether the Respondent was put on inquiry in respect of this undue influence. Earlier in the Judgment, at Paragraphs 34-52, the Judge summarised the oral evidence of Mr Richardson, group head of the underwriting department of the Respondent who, as I have said, gave evidence at the trial on behalf of the Respondent. The evidence of Mr Richardson was that the Respondent's understanding of the Remortgage was that the Defendants were a couple who jointly owned a property, who were looking to remortgage the property in order to pay off an existing mortgage debt and purchase another property. The Remortgage was a buy to let mortgage, in the sense that the payments due under the Charge would be funded by letting out Spectrum. The Respondent did not know that £142,000 from the Remortgage Loan (the Divorce Payment) was going to Mrs Bishop. Nor did the Respondent know that 99% of the beneficial interest in Spectrum was owned by the Appellant.

32. In terms of the Respondent's knowledge of funds from the Remortgage Loan going directly to Mr Bishop, the Judge recorded the following evidence of Mr Richardson, at Paragraph 47:

> *"47. He accepted that the Bank well knew that £20,000 was needed for redemption of car finance and £19,000 to Mr Bishop's credit card. Indeed, that was a condition of the mortgage offer. He said it was not uncommon for a joint application to be made to consolidate debts and for debts to be in one party's name, or greater debt to be attributable to one party than the other. In this case, Mr Bishop was the major wage earner, so it was not unusual that debts were in his name."*

33. I should also set out the Judge's summary of the remaining part of Mr. Richardson's evidence on the knowledge of the Respondent, at the time of the Remortgage, at Paragraphs 48-52:

> *"48. As far as he was concerned, or as far as the Bank was concerned, the parties were in a relationship with joint expenditure. He expected that anything*

untoward to the contrary would have been identified by the brokers who put the package together before it came to the Bank.

49. *He said based on the documents that he had seen he did not see this as a transaction caused by undue influence. He said the only debts that the Bank knew about were the car finance and the credit card loan[1] together with the existing borrowing that was secured. He accepted the Bank had not checked that the balance of the mortgage advance was in fact used to buy another property and, as I say, he did not know that those proceeds in fact had gone to Mrs Bishop. It was not what the Bank was told the money was being used for. He had expected that the credit debts would have been cleared by the solicitors as part of the mortgage condition.*
50. *The Bank did not know about and had not seen the Declaration of Trust at the time, giving Ms Waller-Edwards 99% of the beneficial interest and did not know that the MSP loan, by the time of completion of the mortgage advance, was two months in arrears. He said if they had known there were arrears, then they would not have "done the loan".*
51. *When he was asked about the likelihood of a further purchase, he said the balance of the mortgage proceeds in this case could well have been used as a deposit and possibly the Defendants, as far as the Bank were concerned, were using another mortgage on the property to be bought. He accepted he had not seen any evidence of that. He said the current practice in similar circumstances was to require proof of any new mortgage, but regulations have changed since 2013, and that was not the position then. I think the regulations changed in 2016 or 2017.*
52. *He was taken finally to page 99, the mortgage application, or taken back to that in re-examination. He was referred to box 42 which set out what the Bank was being told the re mortgage was about. It also referred to an existing mortgage in the sum of £200,000. The credit cards were put at £16,000 and the bank loan at £24,000, relating to the car. That is how the Bank understood the debt consolidation figure of £240,000 arose, as opposed to being anything to do with a divorce settlement."*

34. Returning to the Judge's analysis of the issue of whether the Respondent was put on inquiry, the Judge commenced with a review of the law. The Judge then set out his own analysis of the nature of the Remortgage in the following terms, at Paragraphs 119-121:

"119. The instant case that I am dealing with is not on the face of it what would be called a surety-type case.

120. Indeed, it is only a surety, or only has an element of a surety case at all, if one takes into account the intended payment of Mr Bishop's credit debts. Those credit debts were in respect of the car finance and the credit card, and they totalled £39,000. That was in contrast to the total lending of £385,000, of which £233,000 was being used to discharge the existing MSP mortgage, which was a joint liability.

121. Therefore, the credit debts of Mr Bishop represented not much more than 10% of the borrowing. To my mind, whilst to a limited extent the instant situation could be described as hybrid, overall, the pattern of borrowing is much more consonant with what was being considered in Pitt than the straightforward surety case in Etridge."

35. The Judge then went on to consider Mr Beaumont's argument that there were a number of red flags raised, which should have put the Respondent on inquiry; see Paragraph 122. The Judge considered these alleged red flags, in turn, at Paragraphs 124-136. The Judge was not persuaded that any of the matters raised by Mr Beaumont had the effect of putting the Respondent on inquiry. The Judge expressed his final conclusions on the issue of whether the Bank was put on inquiry in the following terms, at Paragraphs 137-138:

> *"137. The question in the end is whether the fact that the re-mortgage was, to a minor extent, in part, to repay Mr Bishop's credit debts should have put the Bank on inquiry. This is a matter of fact and degree but in the end, I do not accept that the fact that just over 10% of the total borrowing was to go to Mr Bishop's credit debts, tip this case into one akin to a surety case.*
>
> *138. As far as the Bank knew, in the main this joint remortgage was to pay off an existing joint mortgage and to free up funds that go towards another purchase. This was very far from an Etridge surety situation. The Bank knew nothing of the history going back to the house swap and had no idea that the excess funds were destined to go to Mr Bishop's ex-wife, or indeed any idea of the Declaration of Trust that existed as to beneficial interests in Spectrum. Therefore, for all those reasons, I am driven to conclude that the Bank was not put on inquiry."*

36. There was one further issue for the Judge to deal with, which was what the Judge described as Mr Beaumont's alternative case based on Section 199 of the Law of Property Act 1925 (**"Section 199"**). This alternative case, which I think is correctly described as a further or alternative case, was that the Respondent was fixed with constructive notice of the undue influence by virtue of the operation of the exempting provisions in sub-paragraphs (a) and/or (b) of paragraph (ii) of Section 199(1). Section 199(1) provides as follows:

> *"(1) A purchaser shall not be prejudicially affected by notice of—*
>
> *(i) any instrument or matter capable of registration under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, which is void or not enforceable as against him under that Act or enactment, by reason of the non-registration thereof;*
>
> *(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; or*
>
> *(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent."*

37. The argument of Mr Beaumont, as recorded in the Judgment, was that the Respondent was fixed with notice of the true purpose for which Mr Bishop intended to use the sum of £142,000 from the Remortgage Loan (the Divorce Payment); namely to pay Mrs Bishop. This was in turn sufficient to put the Respondent on inquiry in respect of the

undue influence. Mr Beaumont argued that the Respondent was fixed with notice of the Divorce Payment and its true destination by virtue of the exemptions to Section 199(1) contained in sub-paragraph (a) and/or sub-paragraph (b) of Section 199(1)(ii). The Judge rejected this argument. So far as sub-paragraph (a) was concerned, the Judge did not consider, in the light of his analysis of the issue of whether the Respondent was put on inquiry, that there were any further inquiries which ought reasonably to have been made.

38. So far as sub-paragraph (b) was concerned, the Judge recorded the argument of Mr Beaumont in the following terms, at Paragraph 142:

> *"142. Despite originally accepting in his skeleton that (2)(b) did not avail Ms Waller-Edwards because the solicitor, Mr Clake, was acting both for the Bank and her simultaneously, Mr Beaumont has revised that view in closing, of course, as he is entitled to do and submits that because the Claimant's standard instructions to the solicitor required Mr Clake to report any information that may affect the Claimant's ability to lend, and that is at page 250 of the bundle, and because the solicitor came to know latterly that the excess funds were destined to go to Mrs Bishop, then the Bank was fixed with constructive knowledge of that, in effect a form of imputed knowledge."*

39. The Judge rejected this argument. On the basis of the two authorities to which he was referred, the Judge approached sub-paragraph (b) on the basis that the question of whether the knowledge of Mr Clake was to be imputed to the Respondent depended upon the retainer by reason of which Mr. Clake came by the relevant information. The Judge's findings in this respect, in Paragraph 144, were as follows:

> *"144. Here it is plain that the solicitor knew of the divorce proceedings and the financial settlement between Mr and Mrs Bishop, by reason of the solicitor's retainer with Mr Bishop and accordingly, that knowledge, it seems to me, is not to be imputed to the Bank. The solicitor's instructions to dispense the excess proceeds to Mrs Bishop, again, it seems to me comes from their retainer with Mr Bishop and/or Ms Waller-Edwards. Again, that is not to be imputed to the Bank. I accept that by the time of the final instructions, the Bank's retainer was in place but the information as to the divorce proceedings and the financial settlement, was plainly was acquired long before the solicitors were instructed by the bank."*

40. The judge's conclusion on sub-paragraph (b), at Paragraph 146, was in the following terms:

> *"146. In this case, plainly the information that is relevant for this purpose all came to be acquired, as I say, by reason of the retainer between the solicitor and Mr Bishop and/or Ms Waller-Edwards, so section 199 in either respect does not therefore avail Ms Waller-Edwards' case."*

41. The Judge thus concluded that although undue influence had been established, as between the Defendants, the Respondent was not fixed with constructive notice of that undue influence. The Respondent was not put on inquiry, and the knowledge of the solicitors that the Divorce Payment was going to Mrs Bishop could not be imputed to the Respondent. As such the Appellant's rights against Mr Bishop, arising out of that undue influence, were not enforceable against the Respondent. Given that there was no prospect of the Appellant being able to clear the arrears in respect of the Remortgage Loan, and given that there was no prospect of the Appellant herself being able to achieve a sale of

Spectrum, the Judge concluded that the possession order had to be made. The Judge concluded the Judgment in the following terms, at Paragraph 150:

> *"150. Therefore, in the end, whilst the Court clearly has great sympathy for Ms Waller-Edwards' situation, and having been through it in great detail, and accepts her case as against Mr Bishop, the Court has no option but to accede to the Claimant's case for a Possession Order and to enter Judgment for the sum outstanding under the mortgage. That leaves a situation probably still to be resolved as between Mr Bishop and Ms Waller-Edwards as to the eventual net proceeds, but that is not for these Proceedings."*

The grounds of the Appeal

42. As I have said, there is no challenge to the Judge's decision that the consent of the Appellant to the Charge/Remortgage was procured by the undue influence of Mr Bishop. Broadly, the grounds of the Appeal divide into two parts. First, the Appellant contends that the Judge was wrong to decide that the Respondent was not put on inquiry. I will refer to this ground as **"the Inquiry Issue"**. Second, the Appellant contends that the Judge was wrong to decide that the Respondent was not fixed with constructive notice of the undue influence by virtue of sub-paragraph (b) of Section 199(1)(ii). I will refer to this ground as **"the Section 199 Issue"**. As I understand the position, the Appellant's case on sub-paragraph (a) of Section 199(1)(ii) is not pursued in the Appeal.

43. I will need to go into the detail of Mr Beaumont's arguments on the Inquiry Issue later in this judgment. For present purposes the first part of the grounds of appeal can be summarised in the following terms:
    (1) The general rule is that a creditor is put on inquiry where the relationship between surety and debtor is non-commercial.
    (2) In the present case it was obvious to the Respondent that the relationship between the Appellant and Mr Bishop was non-commercial.
    (3) It was also obvious to the Respondent that the Appellant was, in the Remortgage offering her property, comprising what the Respondent thought was a half interest in Spectrum, as security for Mr Bishop's debts. Those debts, as the Respondent understood the position, amounted to £39,500, comprising the sum required to pay off a car loan in Mr Bishop's name and debts due on Mr Bishop's credit card. The Judge recorded this figure as £39,000 at Paragraph 47; comprising £20,000 required for redemption of the car loan, and £19,000 for debts owed on Mr Bishop's credit card. The discrepancy is not important, and I will proceed on the basis that Mr Beaumont was right to refer to the total figure as £39,500.
    (4) The threshold for placing the Respondent on inquiry was a low one. The threshold was clearly crossed in circumstances where, to the knowledge of the Respondent, the Appellant was effectively standing as surety for the sum of £39,500. This sum was being lent to pay off Mr Bishop's personal indebtedness, and was thus being lent for the sole benefit of Mr Bishop.
    (5) Once the Respondent was put on inquiry in relation to the £39,500, this was sufficient to put the Respondent on inquiry in relation to the remainder of the Remortgage Loan. It was incumbent upon the Respondent to investigate the risk of undue influence in relation to the remainder of the Remortgage Loan, which the Respondent did not do. In consequence, the Respondent was fixed with constructive notice of the undue influence of Mr Bishop, and the Appellant's rights against Mr Bishop arising out of that undue influence are enforceable against the Respondent.

44. Turning to the Section 199 Issue it will, again, be necessary to go into the detail of Mr Beaumont's arguments later in this judgment. The formal grounds of appeal advanced a case on both of sub-paragraphs (a) and (b) of Section 199(1)(ii). In his skeleton argument for the Appeal however Mr Beaumont concentrated upon sub-paragraph (b). As I have said, my understanding is that the case on sub-paragraph (a) was not pursued in the Appeal. Subject to this point the second part of the grounds of appeal can, for present purposes, be summarised in the following terms:
    (1) In relation to the Remortgage Mr Clake was instructed by Mr Bishop to send the sum of £142,000 (the Divorce Payment) to Mrs Bishop. When the Remortgage Loan monies arrived with Mr Clake he was under an express and discrete contractual duty, to the Respondent alone, to report to the Respondent the destination for the Divorce Payment which had been instructed by Mr Bishop.
    (2) In breach of this duty, Mr Clake did not report to the Respondent the intended destination of the Divorce Payment.
    (3) In these circumstances Mr Clake became aware of the intended destination of the Divorce Payment whilst acting for the Respondent. Using the language of sub-paragraph (b), Mr Clake became aware of this information while acting *"as such";* that is to say as solicitor for the Respondent.
    (4) In these circumstances knowledge that the Divorce Payment was being paid to Mrs Bishop falls to be imputed to the Respondent. The Respondent was thus aware that the Appellant would not receive any of the Divorce Payment (the sum of £142,000), which was being used for the sole benefit of Mr Bishop, and was effectively standing as surety for Mr Bishop in respect of this sum, in addition to the sum of £39,500 of which the Respondent was already aware.
    (5) This imputed knowledge was ample to put the Respondent on inquiry, but the Respondent took no steps to avoid being fixed with constructive notice of the undue influence exercised by Mr Bishop in relation to the Remortgage. This in turn leads to the same result as the first ground of appeal. The Respondent was thereby fixed with constructive notice of the undue influence of Mr Bishop, and the Appellant's rights against Mr Bishop arising out of that undue influence are enforceable against the Respondent.

<u>The Inquiry Issue – the law</u>

45. In a case where the consent of one of the borrowers to a mortgage has been procured by a legal wrong, such as misrepresentation or undue influence, the borrower who is the victim of this legal wrong will, in most cases, have a right to have the mortgage transaction set aside, as against the borrower who committed the legal wrong. The question which then arises is whether the mortgage lender is also affected by this legal wrong or, putting the matter the other way round, whether the borrower's right to have the mortgage set aside, as against the other borrower, can also be enforced against the mortgage lender. This question was considered by the House of Lords in *Barclays Bank v O'Brien* [1994] 1 AC 180. In that case the first and second defendants, who were husband and wife, agreed to execute a second mortgage over their matrimonial home as security for overdraft facilities extended by the plaintiff bank to a company in which the husband, but not the wife had an interest. The wife signed the mortgage deed without reading it and without the benefit of any legal advice, in reliance upon her husband's false representation that the second mortgage was limited to £60,000 and would last only three weeks. When the company's overdraft exceeded £154,000 the bank sought to enforce the second mortgage. The House of Lords decided that the bank was bound by

the wife's rights arising out of the husband's misrepresentation, with the consequence that the second mortgage could only be enforced against her to the extent of £60,000, which was the limit of the second mortgage as represented by the husband.

46. In the conclusions to his speech Lord Browne-Wilkinson considered the position of a wife who had been induced to stand as surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong. As his Lordship explained, at 195F-G:

> *"In my judgment, if the doctrine of notice is properly applied, there is no need for the introduction of a special equity in these types of cases. A wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong has an equity as against him to set aside that transaction. Under the ordinary principles of equity, her right to set aside that transaction will be enforceable against third parties (e.g. against a creditor) if either the husband was acting as the third party's agent or the third party had actual or constructive notice of the facts giving rise to her equity. Although there may be cases where, without artificiality, it can properly be held that the husband was acting as the agent of the creditor in procuring the wife to stand as surety, such cases will be of very rare occurrence. The key to the problem is to identify the circumstances in which the creditor will be taken to have had notice of the wife's equity to set aside the transaction."*

47. Lord Browne-Wilkinson then continued with an explanation of the circumstances in which the mortgage lender would be fixed with notice of the wife's equity to set aside the transaction. As he explained, at 195H-196A:

> *"The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it. Therefore where a wife has agreed to stand surety for her husband's debts as a result of undue influence or misrepresentation, the creditor will take subject to the wife's equity to set aside the transaction if the circumstances are such as to put the creditor on inquiry as to the circumstances in which she agreed to stand surety."*

48. This left the question of when the creditor was put on inquiry. Lord Browne-Wilkinson's answer to this question was based on the special relationship between spouses, and the willingness of the law to presume undue influence as between spouses. As he pointed out, the informality of dealings between spouses raises a substantial risk that the husband will not properly have explained the transaction to the wife. Given these considerations, Lord Browne-Wilkinson's answer to the question of when a creditor was put on inquiry was in the following terms, at 196E:

> *"Therefore in my judgment 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 on its face not 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 that entitles the wife to set aside the transaction.
It follow 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."

49. His Lordship then went on to explain the steps which a creditor would need to take, in order to avoid being fixed with constructive notice of a wife's right to have the relevant transaction set aside. This is not directly relevant in the Appeal, as it is common ground that, if the Respondent was put on inquiry as to the Appellant's rights against Mr Bishop, the Respondent did not take any of the steps which would have been required to avoid being fixed with constructive notice of these rights.

50. In this section of his speech Lord Browne-Wilkinson was considering the position of spouses. He went on however to consider the position of other persons. In particular, his Lordship considered the position of cohabitees. He concluded that the principles which he had identified in relation to spouses should also apply to cohabitees, where the creditor was aware of the cohabitation of principal debtor and surety. As he explained, at 198D:

"I have hitherto dealt only with the position where a wife stands surety for her husband's debts. But in my judgment the same principles are applicable to all other cases where there is an emotional relationship between cohabitees. The "tenderness" shown by the law to married women is not based on the marriage ceremony but reflects the underlying risk of one cohabitee exploiting the emotional involvement and trust of the other. Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this. Legal wives are not the only group which are now exposed to the emotional pressure of cohabitation. Therefore if, but only if, the creditor is aware that the surety is cohabiting with the principal debtor, in my judgment the same principles should apply to them as apply to husband and wife."

51. An example of a case where the mortgage lender was not put on inquiry is *CIBC Mortgages plc v Pitt* [1994] AC 200, which was decided by the House of Lords at the same time as *Barclays Bank v O'Brien*. The first and second defendants were husband and wife. The husband persuaded the wife to remortgage the matrimonial home as security for a loan to be used to purchase shares on the stock market. The plaintiff mortgage lender offered to make a loan on the security of the defendants' house, on the basis that the loan was to be used for the purchase of a second home. The wife signed the remortgage documents without reading them, and was unaware that the stated purpose of the loan was the purchase of a second home. The remortgage transaction was completed and the remortgage loan was made. The loan monies were paid over to the solicitors who were acting for the plaintiff and the defendants (the husband and wife) in the remortgage transaction. The solicitors paid the loan monies into the joint account of the husband and wife. The husband's share dealings were unsuccessful, and the husband fell into arrears with the payments due on the loan. This resulted in the plaintiff lender bringing possession proceedings against the husband and wife. The wife raised defences of undue influence and misrepresentation. The wife established that her consent to the remortgage had been obtained by the undue influence of her husband, but was unsuccessful in establishing that the plaintiff was affected by this undue influence.

52. In his speech in the House of Lords Lord Browne-Wilkinson addressed the question of whether the wife could establish that the plaintiff was in some way affected by the wrongdoing of the husband. As against her husband the wife was entitled to have the remortgage transaction set aside, on the basis of the undue influence which had been established. This left the question of whether these rights could be enforced against the plaintiff mortgage lender. Lord Browne-Wilkinson quoted a substantial extract from the judgment of Peter Gibson LJ in the Court of Appeal in the case. In particular, his Lordship quoted, at 210E-F, the following extract from the judgment of Peter Gibson LJ:

> *"By reason of the O'Brien case, I must accept that in a case where a wife provides security for a husband's debts, the creditor, unless it takes steps to ensure that the wife understands the transaction and that her consent was true and informed, may be affected by any undue influence exerted by the husband to procure the wife's actions, even if the creditor has no knowledge of the undue influence; but that is explicable on the basis that such a transaction, favouring a husband at the expense of his wife, on its face puts the creditor on notice of the possibility of undue influence by the husband. By parity of reasoning, if there is a secured loan to a husband and wife but the creditor is aware that the purposes of the loan are to pay the husband's debts or otherwise for his (as distinct from their joint) purposes, the creditor, without taking precautionary steps, may be affected by the husband's misconduct."*

53. In his judgment in the Court of Appeal Peter Gibson LJ went on to say that it was clear, on the facts of the case, that the plaintiff had no actual knowledge of the acts of the husband which constituted the undue influence. Nor was there anything to put the plaintiff on notice that the remortgage transaction was anything other than a routine transaction for the benefit of both husband and wife. On that basis the plaintiff could not be affected by the husband's wrongdoing. Lord Browne-Wilkinson agreed with this conclusion. As he explained, at 211C-F:

> *"What, then, was known to the plaintiff that could put it on inquiry so as to fix it with constructive notice? So far as the plaintiff was aware, the transaction consisted of a joint loan to husband and wife to finance the discharge of an existing mortgage on 26 Alexander Avenue, and as to the balance to be applied in buying a holiday home. The loan was advanced to both husband and wife jointly. There was nothing to indicate to the plaintiff that this was anything other than a normal advance to husband and wife for their joint benefit.*
>
> *Mr. Price, for Mrs. Pitt, argued that the invalidating tendency which reflects the risk of there being Class 2(B) undue influence was, in itself, sufficient to put the plaintiff on inquiry. I reject this submission without hesitation. It accords neither with justice nor with practical common sense. If third parties were to be fixed with constructive notice of undue influence in relation to every transaction between husband and wife, such transactions would become almost impossible. On every purchase of a home in the joint names, the building society or bank financing the purchase would have to insist on meeting the wife separately from her husband, advise her as to the nature of the transaction and recommend her to take legal advice separate from that of her husband. If that were not done, the financial institution would have to run the risk of a subsequent attempt by the wife to avoid her liabilities under the mortgage on the grounds of undue influence or misrepresentation. To establish the law in that sense would not benefit the average married couple and would discourage financial institutions from making the advance."*

54. At 211G Lord Browne-Wilkinson drew the following distinction between what he referred to as cases of joint advance and surety cases:

> *"What distinguishes the case of the joint advance from the surety case is that, in the latter, there is not only the possibility of undue influence having been exercised but also the increased risk of it having in fact been exercised because, at least on its face, the guarantee by a wife of her husband's debts is not for her financial benefit. It is the combination of these two factors that puts the creditor on inquiry."*

55. The principles established in *Barclays Bank v O'Brien* were further considered by the House of Lords in *Royal Bank of Scotland plc v Etridge (No. 2)* [2001] UKHL 44 [2002] 2 AC 773. The House of Lords heard appeals in eight cases, each arising out of a transaction in which a wife had charged her interest in her home in favour of a bank as security for her husband's indebtedness or the indebtedness of a company through which the husband carried on business. In each case the wife later asserted that her consent to the relevant mortgage transaction had been procured by the undue influence of the husband.

56. For the purposes of the Appeal *Etridge* is most relevant in relation to what the House of Lords had to say on the question of when a mortgage lender is put on inquiry. In his speech in the House of Lords, at [44], Lord Nicholls summarised the effect of the decision in *Barclays Bank v O'Brien*, in relation to when a mortgage lender is put on inquiry, in the following terms:

> *"44 In O'Brien the House considered the circumstances in which a bank, or other creditor, is "put on inquiry". Strictly this is a misnomer. As already noted, a bank is not required to make inquiries. But it will be convenient to use the terminology which has now become accepted in this context. The House set a low level for the threshold which must be crossed before a bank is put on inquiry. For practical reasons the level is set much lower than is required to satisfy a court that, failing contrary evidence, the court may infer that the transaction was procured by undue influence. Lord Browne-Wilkinson said [1994] 1 AC 180,196:*
>
> > *"Therefore in my judgment a creditor in 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 on its face not 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 that entitles the wife to set aside the transaction."*
>
> *In my view, this passage, read in context, is to be taken to mean, quite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts."*

57. Lord Nicholls then went on, at [45]-[47], to express his disagreement with the way in which the Court of Appeal, in *Etridge*, had interpreted the passage quoted by Lord Nicholls from the speech of Lord Browne-Wilkinson in *O'Brien*:

> *"45 The Court of Appeal, comprising Stuart-Smith, Millett and Morritt LJJ, interpreted this passage more restrictively. The threshold, the court said, is somewhat higher. Where condition (a) is satisfied, the bank is put on inquiry if, but only if, the bank is aware that the parties are cohabiting or that the*

particular surety places implicit trust and confidence in the principal debtor in relation to her financial affairs: see Royal Bank of Scotland pic v Etridge (No 2) [1998] 4 All ER 705,719.

46 I respectfully disagree. I do not read (a) and (b) as factual conditions which must be proved in each case before a bank is put on inquiry. I do not understand Lord Browne-Wilkinson to have been saying that, in husband and wife cases, whether the bank is put on inquiry depends on its state of knowledge of the parties' marriage, or of the degree of trust and confidence the particular wife places in her husband in relation to her financial affairs. That would leave banks in a state of considerable uncertainty in a situation where it is important they should know clearly where they stand. The test should be simple and clear and easy to apply in a wide range of circumstances. I read (a) and (b) as Lord Browne-Wilkinson's broad explanation of the reason why a creditor is put on inquiry when a wife offers to stand surety for her husband's debts. These are the two factors which, taken together, constitute the underlying rationale.

47 The position is likewise if the husband stands surety for his wife's debts. Similarly, in the case of unmarried couples, whether heterosexual or homosexual, where the bank is aware of the relationship: see Lord Browne-Wilkinson in O'Brien's case, at p 198. Cohabitation is not essential. The Court of Appeal rightly so decided in Massey v Midland Bank pic [1995] 1 All ER 929: see Steyn LJ, at p 933."

58. Lord Nicholls summarised the position in the following terms, at [48]-[49]:

"48 As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on inquiry. On the other side of the line is the case where money is being advanced, or has been advanced, to husband and wife jointly. In such a case the bank is not put on inquiry, unless the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes. That was decided in CIBC Mortgages v Pitt [1994] 1 AC 200.

49 Less clear cut is the case where the wife becomes surety for the debts of a company whose shares are held by her and her husband. Her shareholding may be nominal, or she may have a minority shareholding or an equal shareholding with her husband. In my view the bank is put on inquiry in such cases, even when the wife is a director or secretary of the company. Such cases cannot be equated with joint loans. The shareholding interests, and the identity of the directors, are not a reliable guide to the identity of the persons who actually have the conduct of the company's business."

59. Lord Nicholls then went on to consider the steps which a bank should take when put on inquiry, in order to avoid being affected by the rights of the wife or other person whose consent to the relevant mortgage transaction was procured by a legal wrong. The guidance provided by Lord Nicholls is, as with *O'Brien*, not directly relevant in the Appeal, given the failure of the Respondent to take any such steps.

60. *O'Brien*, *Pitt* and *Etridge* were not the only cases cited to me on the Inquiry Issue. Reference to these three cases is however sufficient to set the scene, in terms of the law, for my analysis of the Inquiry Issue. I now turn to that analysis.

61. For ease of reference I will use the shorthand expression **"the *O'Brien* principles"** to refer generally to the principles, established in *O'Brien*, *Pitt* and *Etridge*, which govern the circumstances in which a mortgage lender is fixed with constructive notice of the rights of one borrower, as against another borrower, to have a mortgage transaction set aside on the grounds of undue influence, misrepresentation or some other legal wrong.

The Inquiry Issue – analysis

62. In his skeleton argument for the Appeal, at paragraph 30, Mr Beaumont identified the error said to have been made by the Judge in the following terms:

> *"30. The appeal is put in this way: the learned judge erred in law in failing to find that the Respondent was "on inquiry", because in Etridge at [86], the general rule was propounded that the creditor is put "on inquiry" where the relationship between the surety and debtor is non-commercial."*

63. Mr Beaumont supported this by reference to the speech of Lord Nicholls in *Etridge*, at [87]-[89], where his Lordship was dealing with the question of what steps a mortgage lender should take to avoid being fixed with constructive notice of the fact that the consent of one of the borrowers was procured by the legal wrong of the other borrower. In particular, Lord Nicholls said this, at [87] (the underlining and bold print are as added by Mr Beaumont in his skeleton argument):

> *"87 These considerations point forcibly to the conclusion that there is no rational cut-off point, with certain types of relationship being susceptible to the O'Brien principle and others not. Further, if a bank is not to be required to evaluate the extent to which its customer has influence over a proposed guarantor,* ***the only practical way forward is to regard banks as "put on inquiry" in every case where the relationship between the surety and the debtor is non-commercial****. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety. As a measure of protection, this is valuable. But, in all conscience, it is a modest burden for banks and other lenders. It is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual. the bank or other creditor does not take these steps, it is deemed to have notice of any claim the guarantor may have that the transaction was procured by undue influence or misrepresentation on the part of the debtor."*

64. There is, it seems to me, a risk of confusion here. In the present case it does not seem to have been in dispute before the Judge that the relationship between the Appellant and Mr Bishop was non-commercial, and was or should have been recognised by the Respondent as non-commercial. Given the relationship between the Appellant and Mr Bishop it would have been surprising if this point had been in issue.

65. The fact that the relationship between the Appellant and Mr Bishop was non-commercial was not however sufficient to put the Respondent on inquiry. As the House of Lords made clear in *O'Brien*, *Pitt* and *Etridge* and, in particular, as appears from what was said by Lord Nicholls in the bold and underlined section quoted above, what is also required is a relationship of surety and debtor between the borrowers. What qualifies as such a relationship is the question which lies at the heart of the Inquiry Issue, to which I shall come. At this stage however it is important to keep in mind that a mortgage lender is not put on inquiry simply because it is aware that the relationship between the borrowers is

non-commercial. This is a necessary condition for the application of the *O'Brien* principles, but it is not, on its own, sufficient.

66. In this context Mr Beaumont referred me to the decision of the Court of Appeal in *First National Bank plc v Achampong* [2003] EWCA Civ 487, specifically at [22], [23] and [27]. He submitted that *Achampong* was a case where the Court of Appeal regarded the mortgage lender as on inquiry from the sole fact that the relationship in question was non-commercial. I do not accept this submission. In the relevant part of his judgment in this case, with which Arden LJ (as she then was) agreed, Blackburne J was considering the first ground of appeal in the case. The issue raised by the first ground of appeal was whether the bank, although put on inquiry, was not fixed with notice of the undue influence which had occurred because it knew that Mrs Achampong, who was claiming that the relevant mortgage was not enforceable against her on the basis of this undue influence, had had a solicitor acting for her in the mortgage transaction. In rejecting this first ground of appeal Blackburne J noted that the principles in *O'Brien* and *Etridge* could apply in a case where, as in *Achampong*, the undue influence was exercised not by the person in the position of principal debtor, but rather was exercised by one of the two persons, who were the effective guarantors of the principal debtor, against the other. Blackburne J explained the position in the following terms, at [23]:

> *"Here, the relationship between debtor and guarantor was, on its face, non-commercial. The bank, as the judge held, was put on inquiry. The fact, that, as it happened, the undue influence which the judge found to have existed came not from Mr Owusu-Ansah (in effect the debtor) but from Mr Achampong (as one of the co-guarantors) did not the less put the bank on inquiry. Why Mr Achampong should have pressured his wife into executing the legal charge, as the judge held had happened and against which finding there is no appeal, is and must remain a matter of speculation. It may be no more than a coincidence that, shortly after the transaction was completed, Mr Achampong left this country for Ghana as did Mr Owusu-Ansah."*

67. It will be noted that Blackburne J made reference to the relationship between debtor and guarantor. It is quite clear, from this and other parts of the judgment, that Blackburne J recognised the need for an effective relationship of debtor and guarantor before the *O'Brien* principles could operate.

68. Accordingly, I do not accept the submission of Mr Beaumont that the Respondent was put on inquiry in the present case simply by virtue of its knowledge that the relationship between the Appellant and Mr Bishop was non-commercial.

69. With this point cleared away, I can turn to the issue which Mr Beaumont put at the centre of his oral submissions and which lies at the heart of the Inquiry Issue; namely whether there was, to the knowledge of the Respondent, a surety element in the Remortgage, with the Appellant in the effective position of surety, and Mr Bishop in the effective position of principal debtor. If there was, so Mr Beaumont submitted, this surety element, combined with the non-commercial nature of the relationship between the Appellant and Mr Bishop, was sufficient to put the Respondent on inquiry.

70. Mr Beaumont submitted that the present case was a mixed purpose case. So far as the knowledge of the Respondent was concerned, it knew that £39,500 of the Remortgage Loan was for the sole benefit of Mr Bishop, in that it was to be used to pay off his personal

debts. Indeed, it was a condition of the Remortgage Loan that it was to be used to pay off his personal debts. In relation to this sum, at least, the Appellant was acting as effective surety of Mr Bishop, in the sense that she was charging what the Respondent thought was her half share of Spectrum as security for this sum.

71. Mr Beaumont drew my attention to the very modest income which the Appellant, to the knowledge of the Respondent, had at the time of the Remortgage. Mr Beaumont submitted that the question which the Respondent should have been asking itself was why the Appellant was offering up her interest in Spectrum, so that Mr Bishop could pay off his personal debts, as security for a sum (£39,500) which was over five times what Mr Beaumont told me was the Appellant's modest income at the time (£7,000 per annum). All this was sufficient to put the Respondent on inquiry.

72. As I have already noted, the Appellant's case on the Inquiry Issue was put to the Judge on a fairly broad basis. Mr Beaumont contended that the Remortgage had raised a number of red flags which were sufficient to put the Respondent on inquiry; see in particular Paragraph 122. In the Appeal however Mr Beaumont concentrated on the issue of what he contended was the surety element of the Remortgage, based on the fact that, so far as the Respondent was aware, the sum of £39,500 was provided to pay off Mr Bishop's personal debts. I should however make it clear that Mr Beaumont's argument included the submission that there were plenty of clues in the present case in respect of the risk of undue influence and, to borrow Mr Beaumont's language, plenty to have caused the *"antennae"* of a reasonable lender to be *"tweaked"*.

73. The Judge did not consider that the present case was, on the face of it, a surety-type case. His reasoning on this point can be found in Paragraphs 119-121, which I have already quoted, but which I repeat for ease of reference:

> *"119. The instant case that I am dealing with is not on the face of it what would be called a surety-type case.*
>
> *120. Indeed, it is only a surety, or only has an element of a surety case at all, if one takes into account the intended payment of Mr Bishop's credit debts. Those credit debts were in respect of the car finance and the credit card, and they totalled £39,000. That was in contrast to the total lending of £385,000, of which £233,000 was being used to discharge the existing MSP mortgage, which was a joint liability.*
>
> *121. Therefore, the credit debts of Mr Bishop represented not much more than 10% of the borrowing. To my mind, whilst to a limited extent the instant situation could be described as hybrid, overall, the pattern of borrowing is much more consonant with what was being considered in Pitt than the straightforward surety case in Etridge."*

74. Ultimately, the Judge saw the answer to the question of whether there was a sufficient surety element as one of fact and degree. As the Judge stated, at Paragraphs 137 and 138 (which I again repeat for ease of reference):

> *"137. The question in the end is whether the fact that the re-mortgage was, to a minor extent, in part, to repay Mr Bishop's credit debts should have put the Bank on inquiry. This is a matter of fact and degree but in the end, I do not accept that the fact that just over 10% of the total borrowing was to go to Mr Bishop's credit debts, tip this case into one akin to a surety case.*

> *138. As far as the Bank knew, in the main this joint remortgage was to pay off an existing joint mortgage and to free up funds that go towards another purchase. This was very far from an Etridge surety situation. The Bank knew nothing of the history going back to the house swap and had no idea that the excess funds were destined to go to Mr Bishop's ex-wife, or indeed any idea of the Declaration of Trust that existed as to beneficial interests in Spectrum. Therefore, for all those reasons, I am driven to conclude that the Bank was not put on inquiry."*

75. The authorities to which I have referred above do not give any direct guidance in relation to cases where only part of a mortgage loan is, to the knowledge of the creditor, provided for the sole benefit of one of two borrowers. Nor, in this context, was my attention drawn to any authority which provides direct guidance on this question. In the concluding paragraph to his skeleton argument Mr Beaumont stated that there did not appear to be any authority dealing with the question of *"what might be termed a hybrid case in which a not insignificant part of the mortgage advance (at least viewed from the standpoint of the innocent partner's means) was clearly for the culpable partner's sole benefit"*. I found this surprising, as one would have expected such *"hybrid"* cases to have arisen since *O'Brien* and *Pitt*.

76. In *O'Brien* Lord Browne-Wilkinson referred to a wife agreeing to stand surety for her husband's debts. His discussion of the position of persons other than wives was framed on the same basis of such other person standing surety for the debts of the person with whom a relationship of trust and confidence existed. In *Pitt* Lord Browne-Wilkinson drew a distinction between cases of *"joint advance"* and cases of *"surety"*. In the latter case, as he explained, there is an increased risk of undue influence having been exercised, which serves to put the mortgage lender on inquiry *"because, at least on its face, the guarantee by a wife of her husband's debts is not for her financial benefit. It is the combination of these two factors that puts the creditor on inquiry."*. In *Etridge* Lord Nicholls drew the distinction in the following terms, at [48]:

> *"48 As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on inquiry. On the other side of the line is the case where money is being advanced, or has been advanced, to husband and wife jointly. In such a case the bank is not put on inquiry, unless the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes. That was decided in CIBC Mortgages v Pitt [1994] 1 AC 200.*

77. In each of these cases their Lordships did not, at least in express terms, contemplate an intermediate case, where part of the relevant mortgage loan was being provided for the sole benefit of the husband, and remainder of the loan was being provided for the joint benefit of husband and wife. It seems to me that the closest one gets to a discussion of this kind of situation is Lord Nicholls' consideration in *Etridge*, at [49], of the position where the wife becomes surety for the debts of a company whose shares are held by husband and wife:

> *"49 Less clear cut is the case where the wife becomes surety for the debts of a company whose shares are held by her and her husband. Her shareholding may be nominal, or she may have a minority shareholding or an equal shareholding with her husband. In my view the bank is put on inquiry in such*

> *cases, even when the wife is a director or secretary of the company. Such cases cannot be equated with joint loans. The shareholding interests, and the identity of the directors, are not a reliable guide to the identity of the persons who actually have the conduct of the company's business."*

78. Mr Beaumont submitted that if their Lordships had intended to confine the *O'Brien* principles to cases where the entirety of the loan was for the benefit of the husband, or even to cases where the majority of the loan was for the benefit of the husband, they could easily have said so. The fact that they did not indicated that the *O'Brien* principles could perfectly well apply in a case, such as the present case, involving less than the majority of the loan being for the benefit of the husband or, as in the case of Mr Bishop, the person in the position of the husband.

79. I accept this submission, in principle. Whether it applies to the present case is a question to which I shall come. As a matter of general principle it seems to me that the *O'Brien* principles are not confined to those cases where the wife or other person is acting as surety for the entirety of the relevant mortgage loan. The principles are clearly more flexible than that. It seems to me that they are capable of extending to mortgage transactions where the position is less straightforward than the wife or other person acting as surety for the entirety of the relevant mortgage loan. Indeed, this may be said to follow from Lord Nicholls' analysis of the position, in *Etridge* at [49], of a wife becoming surety for the debts of a company in which she holds shares. On this basis it seems to me that the *O'Brien* principles are capable of extending to what I would call a partial surety case, where the wife or other person is acting as surety in respect of a part only of the mortgage loan. As I understood the submissions of Ms Halker, she did not argue to the contrary.

80. In support of what I have said in my previous paragraph it seems to me that it is helpful to go back to the principles explained by Lord Browne-Wilkinson in *O'Brien*, as further elaborated by Lord Nicholls in *Etridge*. As Lord Browne-Wilkinson explained in O'Brien, at 196E:

> "*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 on its face not 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 that entitles the wife to set aside the transaction."*

81. Essentially therefore, what puts the mortgage lender on inquiry, where the relevant relationship is a non-commercial one, is the fact that, to the knowledge of the mortgage lender, the relevant mortgage transaction is not, on its face, to the financial advantage of the wife or other person in an equivalent position. This seems to me to be capable of encompassing what I have referred to as a partial surety case.

82. In this context I should also make reference to another authority cited by Mr Beaumont, albeit in the context of a different part of his argument. The authority in question is the decision of Judge Rich QC (sitting as a judge of the High Court) in *Midland Bank plc v Greene* [1994] 2 FLR 827. In this case Mr and Mrs Greene charged their jointly owned property to the bank. The principal purpose of this mortgage transaction was to provide funds in connection with the purchase of a leasehold interest and then a freehold interest in property. The facts of the case are not entirely clear from the judgment. In particular, it is not clear whether the loan secured by this charge was by way of remortgage in respect

of a previous loan which had been used for the relevant property investment, or whether the current loan was provided for the relevant property investment. Nor is the identity of the property which was the subject of this investment clear. What however does seem to be clear is that the relevant property investment was not for the sole benefit of the husband.

83. The charge granted to the bank did however contain an all-moneys security provision, which meant that the charge also operated to secure future lending by the bank. The charging clause provided that Mr and Mrs Greene charged their property as security for the following future lending (as the relevant provision is quoted in the judgment of Judge Rich):

> *". . . in consideration of the bank at the request of the mortgagor [that is to say, Mr and Mrs Greene] making or continuing advances or otherwise giving credit or affording banking facilities for as long as the bank may think fit to [Mr] Greene (hereinafter called "the principal") and upon the terms that the bank shall be secured as hereinafter appearing the mortgagor'"*

84. The charge thus operated to secure future lending by the bank to Mr Greene alone. It appears from the judgment that the charge also secured an existing overdraft of Mr Greene, which existed at the time of the charge, in addition to the funds relating to the property investment. The bank did lend further sums to Mr Greene on the security of the charge. Arrears accrued in respect of these borrowings, which ultimately resulted in the bank commencing possession proceedings. By the time of the hearing of the possession proceedings Mr Greene had died. Mrs Greene defended the proceedings on the basis that her consent to the charge had been procured by the undue influence of her late husband, and that the bank was fixed with constructive notice of her rights against her late husband arising out of this undue influence.

85. In considering the question of undue influence the judge considered the question of whether the mortgage transaction could be considered to be to the manifest disadvantage of Mrs Greene. After making reference to the distinction between a loan case and a surety case, as drawn by Lord Browne-Wilkinson in *Pitt*, the judge said this, at page 833 of the report:

> *"I accept that I have to look at the transaction as a whole. I accept, further, that Mr Greene's primary objective, at the particular time of the 1978 and 1979 mortgages, was to procure respectively loans to purchase first the leasehold and then the freehold interests. They were not, however, his exclusive interest; as I have pointed out, there were other debts. Moreover, the actual charge that was taken was to secure not merely advances which had been made for such purposes, but also for all moneys and all future debts. And the loan, if loan it was - because in fact the money for the purchase of the freehold had been advanced before the execution of the 1979 mortgage - was only upon terms of a guarantee, both of other existing debts of the husband, apparently lent to him independently of any sums borrowed to purchase either the leasehold or the freehold of the property and, secondly, upon terms of a potential risk in regard to future debts."*

86. Looking at the transaction as a whole, the judge came to the following conclusions, in the context of the question of manifest disadvantage, at page 835 of the report:

> *"I think that a mortgage granted on terms which included such a surety obligation, at any rate as a real element in the terms, was indeed, unless there is evidence to*

the contrary, to the manifest disadvantage of the wife - in this case Mrs Greene. The obligation is therefore to be treated, in this case where Mrs Greene placed reliance upon Mr Greene, as having been procured by Mr Greene's undue influence and the bank are therefore unable to enforce it because they are fixed with constructive notice of Mrs Greene's right to set it aside, unless they took reasonable steps to satisfy themselves that she entered into the transaction freely and in knowledge of the true facts. That, at least, is the general principle; its specific applicability to the circumstances of this case, I will of course have to consider more fully.

I should just add this, in having set out that conclusion. Miss McAllister urged upon me that I should not confuse the issue as to whether a transaction is, indeed, manifestly disadvantageous, with the question as to whether or not the bank had constructive notice of the presumed undue influence. But it is the nature of the transaction, as being the acceptance of a surety obligation, which, without proof to the contrary, makes it, in my judgment, proper to treat the transaction as manifestly disadvantageous; and likewise, it is that same feature that fixes the bank with constructive notice of the possibility of undue influence."

87. The judge then turned to the question of what Mrs Greene was entitled to set aside, and upon what terms. This question was not an easy one to answer in the case, because the bank had, as the judge found, made significant advances, at least part of which had been to the profit or for the enjoyment of Mrs Greene. The judge ultimately decided to make a form of order which compelled Mrs Greene to pay off that part of the borrowing which could not be said to have been for the benefit of Mr Greene alone.

88. I have dealt with *Greene* at some length, both because it seems to me to be a relevant authority in the context of what I am referring to as partial surety cases, and because it is relevant to a specific argument of Mr Beaumont, made on the facts of the present case, to which I shall need to come. For present purposes however, *Greene* is relevant because the judge was dealing with a case where the relevant lending was not all for the benefit of the husband. The wife was only in the position of a surety for her husband's debts in relation to part of the lending. As such, *Greene* seems to me to support the view that the *O'Brien* principles are perfectly capable of applying to a partial security case.

89. This however leaves the questions (i) of how one identifies partial surety cases to which the *O'Brien* principles can legitimately be applied and, subject to the answer to this first question, (ii) whether the Judge was right to decide that the Respondent was not put on inquiry in the present case.

90. It seems to me that the answer to the first question must necessarily be a fact sensitive one, by which I mean that it must depend upon the facts of the relevant case. It seems to me that this was essentially what the Judge was saying, in Paragraph 137, where he referred to the question of whether the fact that the Remortgage was, *"to a minor extent, in part to repay Mr Bishop's credit debts should have put the Bank on inquiry"*. The Judge said that this was a matter of fact and degree. It seems to me that the identification of partial surety cases to which the *O'Brien* principles can legitimately be applied can be characterised as a matter of fact and degree. Indeed, I understood Mr Beaumont to accept the Judge's characterisation of the Inquiry Issue, in Paragraph 137, as a matter of fact and degree.

91. Mr Beaumont's quarrel was with the answer given by the Judge to this question of fact and degree. Mr. Beaumont's submission was that the question to be answered in this context was whether the surety element of the Remortgage was significant; meaning more than de minimis or (avoiding the Latin) trivial. As I have said, I understood Mr Beaumont to accept that what was significant was a matter of fact and degree, but in his submission £39,500 was a significant sum and a significant proportion of the Remortgage Loan. As such, the fact that the Respondent knew that this sum was being used for the sole benefit of Mr Bishop was amply sufficient to put the Respondent on inquiry, when combined with the Respondent's knowledge of the non-commercial nature of the relationship between the Appellant and Mr. Bishop. In support of this submission Mr Beaumont pointed out that £39,500 was around 10% of the Remortgage Loan, which constituted a significant proportion of the Remortgage Loan. He also pointed out that the Respondent was aware that some £233,000 of the Remortgage Loan was to be used to discharge the MSP Charge. In terms therefore of the part of the Remortgage Loan which would actually be available to the Appellant and Mr Bishop (some £152,000), the Respondent's understanding of the position was that just over a quarter of this residual sum (£39,500) would be used to pay off Mr Bishop's debts. This reinforced the significance of the sum of £39,500 as a proportion of the Remortgage Loan.

92. In support of this submission Mr Beaumont reminded me that the threshold for when a mortgage lender is put on inquiry is a low one; see Lord Nicholls in *Etridge* at [44] and Lord Hobhouse in *Etridge* at [108].

93. Mr Beaumont also pointed out that if one looked at what was secured by the Charge, one could see that the Charge was *"a continuing security for the payment or discharge of all moneys payable to the Bank by the Borrower"*; see clause 2 of the Charge. This placed the Appellant *"at the mercy"* (to use Mr Beaumont's phrase) of yet more borrowing secured by the Charge, for any purpose. Such purposes included the discharge of Mr Bishop's further personal debts. As Mr Beaumont put matters the sky was the limit, under the terms of the Charge, in relation to the future personal borrowing of Mr Bishop, which the Appellant would be required to underwrite. In support of this part of his argument Mr Beaumont relied upon the decision of Judge Rich in *Greene*, which I have discussed above. The submission was that the Appellant was guaranteeing the future debts of Mr Bishop in the same way as Mrs Greene did in *Greene*.

94. It seems to me that, in deciding whether the present case is a partial surety case, where the Respondent knew or should have known that the Appellant was acting as effective surety for Mr Bishop's personal debts, the exercise is not simply a numbers exercise. I do not think that this question is answered simply by asking what proportion of the Remortgage Loan the sum of £39,500 represented. Instead, it is necessary to look at the transaction constituted by the Remortgage as a whole, as Judge Rich did in *Greene*; see the extract from his judgment in *Greene* which I have quoted above, at page 833 of the report. In looking at the Remortgage as a whole, and considering whether the Appellant accepted what amounted to a surety obligation in respect of Mr Bishop's personal borrowing, the overriding consideration seems to me to be whether the Remortgage was or should have been perceived by the Respondent as a transaction which was not to the financial advantage of the Appellant.

95. The Judge did not consider that the fact that just over 10% of the Remortgage Loan was to go to Mr Bishop's credit debts tipped the case into one akin to a surety case (Paragraph 137). Was the Judge correct in coming to this conclusion?

96. In my view, the Judge was correct in coming to this conclusion. I say this for the following reasons.

97. The starting point is that the present case is, as the Judge observed at Paragraph 138, very far from an *Etridge* surety situation. The same applies if one compares the present case with *O'Brien*. On any view of the matter, and so far as the Respondent's knowledge was concerned, the Appellant was not simply underwriting, as surety, the borrowing of Mr Bishop.

98. For the reasons which I have already set out, this is not fatal to the Appellant's case that the Respondent was put on inquiry. The fact that the Remortgage did not involve a loan for the sole benefit of Mr Bishop does not preclude the application of the *O'Brien* principles. Rather, it becomes necessary to look at Remortgage as a whole, as the transaction was or should have been known to the Respondent.

99. It is clear from the part of the Judgment where the Judge considered the Inquiry Issue that the Judge did carry out the exercise of looking at the Remortgage as a whole. In carrying out this exercise the Judge made material findings of fact.

100. At Paragraph 136 the Judge recorded the following evidence of Mr Richardson:

> *"136. That brings me back to the credit debts because in the end that is the only arguable red flag. Mr Richardson was pressed about this. His evidence, as I have outlined, was that it was not uncommon in a joint application for there to be an element of credit debts in one party's name or the other, usually the major breadwinner; here of course, Mr Bishop. Having said that, I do accept that his reference to anything untoward being identified by the brokers was unrealistic."*

101. The Judge summarised the knowledge of the Respondent at Paragraph 138, in the following terms:

> *"138. As far as the Bank knew, in the main this joint remortgage was to pay off an existing joint mortgage and to free up funds that go towards another purchase. This was very far from an Etridge surety situation. The Bank knew nothing of the history going back to the house swap and had no idea that the excess funds were destined to go to Mr Bishop's ex-wife, or indeed any idea of the Declaration of Trust that existed as to beneficial interests in Spectrum. Therefore, for all those reasons, I am driven to conclude that the Bank was not put on inquiry."*

102. While my understanding of the position is that Mr Richardson was not involved in the Remortgage, his evidence of what was not uncommon in a joint application seems to me to have been material to the Judge's evaluation of the position. In terms of a consideration of whether the Remortgage, as it was known to the Respondent, was not to the financial advantage of the Appellant, the Respondent knew that the majority of the Remortgage Loan was to be used to discharge the MSP Charge. Given that the Defendants were jointly liable under the MSP Charge, and given that the Judge did not

consider that there was anything to put the Respondent on notice that the consent of the Appellant to the MSP Charge had been procured by undue influence, this refinancing element of the Remortgage was, at worst, financially neutral so far as the Appellant was concerned and might reasonably have been considered to be to the financial advantage of the Appellant, given that the refinancing constituted by the Remortgage would realise a larger sum for the Defendants than that secured by the MSP Charge, and would thereby provide the Defendants with the benefit of additional financing.

103. Beyond this, the Respondent's knowledge of the position, wrong as it might have been, was that the larger sum realised by the Remortgage would, with the exception of the sum of £39,500, be used towards the purchase of another property. If one did the arithmetic on these figures, as they were known to the Respondent, the actual sum which would be available for the purchase of another property was not large; being limited to some £110,000. I cannot see however that the Respondent was required to make further inquiries as to what property was going to be purchased or where the funds were to come from, if the purchase price exceeded £110,000, any more than the Respondent was required to secure confirmation that another property had actually been purchased; see the Judge's conclusion on this point at Paragraph 134. It seems to me that the Respondent was entitled to assume that the provision of funds, by the Remortgage Loan, for the purposes of the purchase of another property by the Defendants was, or at least was intended to be to the financial advantage of the Appellant.

104. This left the sum of £39,500 which was, to the knowledge of the Respondent, to be used to pay off Mr Bishop's personal debts. In the overall context of the Remortgage I cannot see that the Judge was wrong to reject the argument that this feature of the Remortgage placed the Appellant into a position of surety in respect of Mr Bishop's borrowing such as would justify the application of the *O'Brien* principles. Looked at in the round, I do not think that the Remortgage, as it was known to the Respondent, constituted a transaction in which the Appellant was properly viewed as being in a relationship of suretyship with Mr Bishop.

105. It seems to me that one can test this by comparing the present case with the facts of *Greene*, which I have set out above. In the present case it is correct to say that clause 2 of the Charge charged Spectrum *"as a continuing security for the payment or discharge of all moneys payable to the Bank by the Borrower"*. The Borrower was however defined to mean the Defendants. So far as I am aware, and in contrast to *Greene*, the Charge was not granted on terms that it was intended to act as security for further borrowing by Mr Bishop alone. Clause 2 of the Charge seems to me to be no more than a fairly standard all monies clause, of a kind normally found in a charge over land. The usual purpose of such provisions is to ensure that the relevant charge secures all sums due from the borrowers, thereby including sums such as unpaid arrears and costs. In *Greene* the equivalent clause was specifically directed to the provision of banking and credit facilities to Mr Greene, in respect of which facilities Mr Greene was very obviously the principal and Mrs Greene was very obviously the surety. The contrast with the present case is obvious.

106. Much the same contrast can be drawn with another case to which I was referred by Mr Beaumont. The case in question is *Hewett v First Plus Financial Group plc* [2010] EWCA Civ 312 [2010] 2 P.&C.R. 22. This was another case in which it was determined, by the Court of Appeal, that the wife's consent to a remortgage transaction had been

obtained by the exercise of undue influence by the husband. In this case however, and in relation to the question of whether the mortgage lender was put on inquiry, there was no dispute. The relevant remortgage had been entered into because additional financing was required to meet the husband's credit card debts, which had substantially increased since a previous remortgage by the husband and wife of their home. The previous remortgage had itself been required, in part, to pay off the husband's debts, and the further remortgage was required because the husband had no means of paying off his increased credit debts without the remortgage. In his judgment in the Court of Appeal Briggs J, as he then was, recorded the position in the following terms, at [15]:

> *"At an early stage during the trial, and as the result of late disclosure, First Plus very properly acknowledged that, having been aware that the re-mortgage was designed to secure payment of debts owed by Mr Hewett, rather than the Hewetts jointly, it was on notice of the risk of the exercise of undue influence by Mr Hewett against his wife. The Judge concluded that First Plus did nothing thereafter which came anywhere near compliance with the guidelines laid down by the House of Lords in Royal Bank of Scotland v Etridge [2001] UKHL 44; [2002] 2 A.C. 773, with the result that First Plus had constructive notice of any undue influence or misrepresentation practised by Mr Hewett upon his wife, if that could be proved."*

107. Again, the contrast with the facts of the present case seems to me to be obvious, and material.

108. I very much take Mr Beaumont's point that the threshold for a mortgage lender being put on inquiry is a low one, and that, as Lord Nicholls explained in *Etridge*, at [23], a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts. Ultimately however, and for the reasons which I have set out above, I am not persuaded that the Judge was wrong to classify the present case as one falling outside the category of cases identified by Lord Nicholls. As the transaction constituted by the Remortgage was known to the Respondent, I do not think that the transaction is correctly described either as a transaction which was not to the financial advantage of the Appellant or as a transaction where the Appellant was, by her participation in the Remortgage, correctly viewed as offering to stand surety for Mr Bishop's debts.

109. Pausing at this point, my conclusion is that the Judge was correct to decide that the Respondent was not, on the facts of this case as found by the Judge, put on inquiry in respect of the undue influence found by the Judge to have been exercised by Mr Bishop.

110. There is however a further reason why I would be slow to differ from the Judge in his conclusion that the Respondent was not put on inquiry. I can express this further reason more shortly.

111. I remind myself that this case comes before me by way of an appeal. I am not the trial judge. I accept that the conclusion of the Judge that the Respondent was not put on inquiry did not constitute a finding of fact by the Judge. If it did, my ability to interfere with the conclusion would be very limited. It does seem to me however that the Judge, in reaching this conclusion, was making an evaluation, on the basis of all the evidence which he read and heard at the trial. Even if I was minded to disagree with the Judge's conclusion, which I am not, I would be slow to do so unless the Judge had clearly made some error in the evaluation process, sufficient to undermine the conclusion of the evaluation process. I accept the submission of Ms Halker that the Judge did not make

any such error in the evaluative process, either as a matter of law or otherwise. It seems to me that the Judge correctly identified the question which he had to answer as one of fact and degree, and reached an answer to that question which was justified on the facts of the case, as found by the Judge. In these circumstances, I cannot see that I should interfere with the conclusion of the Judge, even if I had my doubts over the correctness of that conclusion (which I do not).

112. Drawing together all of the above analysis I conclude, in relation to the Inquiry Issue, that the Judge was correct to decide that the Respondent was not put on inquiry.

113. This conclusion is however subject to the Section 199 Issue, to which I now turn.

The Section 199 Issue – the law

114. For ease of reference I repeat the terms of Section 199(1):

> *"(1) A purchaser shall not be prejudicially affected by notice of—*
>
> *(i) any instrument or matter capable of registration under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, which is void or not enforceable as against him under that Act or enactment, by reason of the non-registration thereof;*
>
> *(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; or*
>
> *(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent."*

115. It is important to note that Section 199(1) operates to protect a purchaser from being prejudicially affected by notice of the matters referred to in paragraphs (i) and (ii). I understood it to be common ground in the present case that the Respondent did qualify as a purchaser in relation to the Remortgage, within the meaning of Section 199(1). In terms of the protection provided to a purchaser by Section 199(1), paragraph (ii) is particularly widely drafted, referring to *"any other instrument or matter or any fact or thing"*. Paragraph (ii) is however qualified in its effect by the exemptions in sub-paragraphs (a) and (b).

116. The operation of Section 199(1) was considered in *Halifax Mortgage Services Limited v Stepsky* [1996] Ch. 207. The defendants, who were husband and wife, applied to the plaintiff mortgage lender for a loan to be secured by a remortgage on the matrimonial home. The application form for the loan identified the solicitors acting for the defendants and stated that the purpose of the remortgage was the purchase of *"family shares in business"*, for the apparent benefit of both the defendants. In fact, the husband's true intention was to pay off the previous mortgage and use the balance of the loan to discharge his business debts. The plaintiff's offer of the loan to the defendants included

instructions to the defendants' solicitors, for the purposes of those solicitors also acting for the plaintiff in relation to the remortgage. Those instructions included a requirement to report any matter which ought to be brought to the attention of the plaintiff as lender and to ensure that all details shown on the offer of a loan were correct. The offer was made on 13th June 1990, and the offer was passed to the defendants' solicitors by the husband on 19th June 1990. It was therefore on 19th June 1990 that the defendants' solicitors received their instructions to act for the plaintiff. The husband had previously instructed the solicitors to act for himself and his wife on 12th June 1990. The solicitors failed to inform the plaintiff that the loan was not in fact for the joint benefit of the defendants. It was common ground that the solicitors were aware that the purpose of the remortgage was not to purchase shares for the benefit of both defendants, but rather to pay off the debts of the husband's business.

117. Following default in the repayments due in respect of the loan, the plaintiff commenced possession proceedings. The wife defended the proceedings on the basis that the plaintiff had constructive knowledge that she was in fact in the position of a surety for her husband's debts when the loan was made, and that her consent to the remortgage had been obtained by the misrepresentation or undue influence of her husband. This defence was not the subject of a full trial, because a possession order was made against the defendants on a summary basis by a master, pursuant to what was then the summary procedure under RSC Order 88.

118. On a first appeal the judge concluded that the plaintiff had not had either actual knowledge or constructive knowledge of the true purpose of the remortgage loan, unless such knowledge had been acquired through the solicitors. After considering authorities on imputed knowledge the judge concluded that the plaintiff did not, by the solicitors, have notice of the true purpose of the loan. There was then a further appeal to the Court of Appeal. At the hearing of this further appeal reference was made, apparently for the first time in the case, to Section 199. Counsel for the wife contended that the restriction on notice in Section 199(1) did not apply, so that the plaintiff was not to be treated as not prejudicially affected by notice of the true purpose of the loan. Counsel for the wife argued that knowledge of the true purpose of the loan came to the knowledge of the solicitors, acting for the plaintiff mortgage lender as such, when they were instructed to act on behalf of the plaintiff on 19th June 1990; being the date when the husband passed the remortgage offer (with its instructions to the solicitors) to the solicitors. The exemption in sub-paragraph (b) of Section 199(1)(ii) therefore applied, and Section 199(1) did not prevent the knowledge of the solicitors of the true purpose of the loan being imputed to the plaintiff.

119. This argument was not accepted by the Court of Appeal. In his judgment in the Court of Appeal, with which Kennedy and Ward LJJ agreed, Morritt LJ (as he then was) set out his reasons for rejecting this argument in the following terms, at 216B-C:

> *"I do not accept either of these submissions. In my view the section has to be applied in accordance with its terms to the facts of this case. There is no doubt that the information as to the true purpose of the remortgage loan imparted by the husband came to the knowledge of the solicitors on 12 June 1990 as the solicitors for the husband and wife alone for they were not instructed to act for the lenders until 19 June at the earliest. That knowledge once acquired remained with the solicitors and cannot be treated as coming to them again when they were instructed on behalf of the lenders. As counsel for the wife accepted, their knowledge cannot*

be treated as divided or disposed of and reacquired in that way. The conclusion seems to me to be inescapable, namely that knowledge of the relevant matters facts or things did not come to the solicitors as the solicitors for the lenders. Accordingly it did not come to them "as such." It was not disputed that the lender is a purchaser within the definition contained in section 205(1)(xxi) of the Law of Property Act 1925. Consequently section 199(l)(ii)(6) precludes the solicitors' knowledge of the relevant matters or facts being imputed to the lender."

120. As can be seen, the critical point in the reasoning of Morritt LJ was that knowledge of the true purpose of the remortgage loan did not come to the knowledge of the solicitors as solicitors for the plaintiff lender, following their instruction on 19th June 1990, but came to the solicitors in their capacity as solicitors for the husband and wife, pursuant to the instruction of the husband, on 12th June 1990. Accordingly, the relevant knowledge did not come to the solicitors, *"as such"* (ie, as solicitors for the plaintiff), within the meaning of sub-paragraph (b) of Section 199(1)(ii). The relevant knowledge could not be treated as re-acquired by the solicitors, in their capacity as solicitors for the plaintiff, on 19th June 1990.

121. It might be thought, on the basis of this analysis, that the chronology of events was important in *Stepsky*, in the sense that the solicitors were instructed by the plaintiff a week after their instruction by the defendants. This however is not so. *Stepsky* was further considered by the Court of Appeal in *Barclays Bank v Thomson* [1997] 4 All ER 816. The case was again concerned with a wife's defence to possession proceedings brought by a mortgage lender. The wife contended that her consent to the relevant mortgage had been obtained by misrepresentation or undue influence, of which the bank had notice. The wife had been advised by the solicitors who also acted for the bank and the husband in relation to the transaction. The wife contended that the advice given to her by the solicitors was defective and that knowledge of this deficiency in the advice could be imputed to the bank.

122. This argument failed in the Court of Appeal. The bank had received an assurance from the solicitors that the wife had been properly advised in relation to the grant of the mortgage, and was aware of what she was entering into. The principal judgment in the Court of Appeal was given by Simon Brown LJ. Waite LJ agreed with the judgment of Simon Brown LJ. Morritt LJ gave a shorter judgment of his own agreeing, subject to one point, with Simon Brown LJ. The central conclusion of Simon Brown LJ was that there was no good reason why a bank should not be entitled to rely on the certificate of a solicitor that independent advice had been properly given to a signatory to a mortgage, notwithstanding that those solicitors were also acting for the bank. There was no room, in these circumstances, for the argument that any deficiencies in the advice could be imputed to the bank on the basis that the solicitors were acting as an agent for the bank. To the contrary, the solicitors were acting for the signatory, in discharge of their obligation to give independent advice to the signatory.

123. For present purposes the decision in *Thomson* is relevant for its consideration of *Stepsky*. In terms of the chronology in *Stepsky* Simon Brown LJ expressed the view, at page 826 of the report, that the decision in that case would not have been any different if there had not been a gap of a week between the instruction of the solicitors by the defendants and the instruction of the solicitors by the plaintiff mortgage lender. The relevant information

would still have fallen to be treated as coming to the solicitors in their capacity as solicitors for the defendants.

124. In his own judgment Morritt LJ also considered the effect of the statutory restrictions on notice in Section 199 upon the wife's claim to set aside the mortgage. At pages 828-829 of the report, Morritt LJ drew the following distinction between the role of the law of agency in identifying the capacity in which solicitors are acting, and the role of the law of agency in imputing to the principal knowledge of the non-fraudulent breach of duty of his agent:

> *"Thus where, as here, the solicitor on whose certificate the bank relies was in some respects the solicitor for the bank the question of whether or not knowledge or notice is to be imputed to the bank by virtue of the knowledge of that solicitor depends on whether the section applies in the circumstances of the case. In deciding whether or not it does the principles of the law of agency will be relevant on the questions whether vis-à-vis the bank the solicitor was 'his' and if so whether the bank's solicitor was acting 'as such' when acquiring the knowledge sought to be imputed to the bank. I do not think that the extent to which, if at all, and for what purposes the law of agency imputes to the principal knowledge of the (non-fraudulent) breach of duty of his agent arises in cases in which s 199(1)(ii)(b) of the 1925 Act applies. I would prefer not to express any view on whether in circumstances where s 199 does not apply such knowledge may or may not be imputed to the principal."*

125. In terms of the question of whether the solicitors in *Thomson* had been acting as the bank's solicitors when advising the wife, Morritt LJ was in no doubt that they had not. As he explained, at page 829 of the report:

> *"I have no doubt that Gwynn James & Co were not acting as the bank's solicitor when advising Mrs Thomson, notwithstanding that they did so at the request of the bank. The object of the exercise was that Mrs Thomson should obtain advice independent of the bank as well as independent of her husband. The professional obligations of Gwynn James & Co in relation to the advice they gave were owed to her and not to the bank. Provided that the bank was not put on notice by other matters within their knowledge that Gwynn James & Co had not performed their professional duty to give independent advice to Mrs Thomson they were in my judgment as entitled as the banks in Massey's case, Mann's case and Rayarel's case to rely on the solicitors' representation that they had. The extra ingredient relied on by counsel for Mrs Thomson is of no avail to her for although the solicitors may have been the solicitors for the bank in certain respects they were not acting in those respects when the knowledge relied on (and for present purposes required to be assumed) was acquired by them. I do not think that the decision of this court in Aboody's case is relevant to this question for the knowledge sought to be imputed to the bank related to the conduct of the husband and not the advice tendered to the wife. No doubt it was for that reason that no reference was made to s 199(1)(ii)(b)."*

<u>The Section 199 Issue – analysis</u>

126. As I have previously mentioned in this judgment, Mr Clake of Ellis Jones acted for all three parties in relation to the Remortgage; that is to say the Appellant, Mr Bishop and the Respondent. The Respondent's instruction of Ellis Jones was made by a letter to Ellis Jones, addressed to Mr Clake (misspelt as Clarke) at Ellis Jones, dated 6th September

2013. The letter of instruction enclosed what were described as *"our formal instruction in respect of the proposed mortgage advance for the above named client(s), together with all the associated documentation"*. The *"above named client(s)"* were identified as the Defendants.

127. The formal instruction comprised or included a set of standard form instructions. These standard form instructions included the following obligation on the part of the solicitors, at clause 6(b):

> *"In order to protect the Bank as your mortgagee client, as well as your firm, the Bank looks to you for protection against possible mortgage fraud and requires you to take the following steps where appropriate:"*
>
> *"(b) Report to the Bank if you become aware of any information that may affect the Bank's decision to lend or which is of concern to you. The application form contains the applicant's waiver of the right to claim solicitor/client confidentiality in the event of an offer of advance being made. Should the borrower(s) change their mind and refuse to permit disclosure of relevant information you must immediately inform the Bank that you can no longer act for him as well as the borrower."*

128. Mr Beaumont submitted in his skeleton argument that this was an express and discrete contractual duty owed by *"the solicitor"* to the Respondent. I took Mr Beaumont's reference to *"the solicitor"* to mean Mr Clake. Mr Beaumont submitted that the solicitor breached this duty at two points in the Remortgage, as follows:
    (1) At the point when Mr Bishop instructed Mr Clake to send the sum of £142,000 (the Divorce Payment) to Mrs Bishop, Mr Clake came under a duty to report to the Respondent the destination of the Divorce Payment, pursuant to clause 6(b) of the Respondent's standard form instructions. As I understood Mr Beaumont's submissions, this duty to report arose for at least two related reasons. First, the instruction from Mr Bishop to make the Divorce Payment to Mrs Bishop conflicted with the purposes for which the Remortgage Loan was being made, as identified by Mr Bishop to the Respondent. Second, the instruction from Mr Bishop to make the Divorce Payment to Mrs Bishop conflicted with the Respondent's requirement that Mr Bishop's personal debts of £39,500 be cleared. This could not be achieved using the monies provided by the Remortgage Loan, given the amount required to redeem the MSP Charge and the amount of the Divorce Payment. Mr Clake was required to report this situation to the Respondent, but did not do so.
    (2) For the same reasons, at the point when the Remortgage Loan monies were received from the Respondent by Mr Clake, he was obliged to report to the Respondent the intended destination of the Divorce Payment. Again, Mr Clake did not do so. Equally, Mr Clake was not entitled to use the monies provided by the Remortgage Loan for the making of the Divorce Payment, and was in breach of duty in doing so.

129. Mr Beaumont submitted that Mr Clake's knowledge of the Divorce Payment and its intended destination came to him whilst acting as solicitor for the Respondent, and solely by virtue of the Respondent's retainer. This was because Mr Clake came under an immediate duty, when this information reached him, to report the Divorce Payment and its intended destination to the Respondent. Mr. Clake thus received this information while acting *"as such"* (ie. as solicitor for the Respondent) within the meaning of sub-

paragraph (b) of Section 199(1)(ii). In these circumstances knowledge of the Divorce Payment and its intended destination can be attributed to the Respondent, notwithstanding the restriction in Section 199(1).

130. It seems clear to me that if knowledge of the Divorce Payment and its intended destination can be attributed to the Respondent, the landscape of the Inquiry Issue changes significantly. On this hypothesis the Respondent must be treated as having been aware that the Appellant was in fact underwriting the Divorce Payment. The Divorce Payment comprised the bulk of the Remortgage Loan remaining after taking into account the sum required to redeem the MSP Charge. Beyond this, the fact of the Divorce Payment meant that the balance of the Remortgage Loan, after redemption of the MSP Charge, was not going to be available for the purchase of another property by the Defendants. On this basis the Remortgage Loan was to the financial disadvantage of the Appellant. To my mind, if it can be shown that the Respondent did have knowledge of the Divorce Payment and its destination, prior to completion of the Remortgage Loan, that would have been sufficient to put the Respondent on inquiry, which would in turn have resulted in the Appellant's rights against Mr Bishop, arising out of the undue influence found by the Judge, being enforceable against the Respondent.

131. The analysis in my previous paragraph assumes however that there is a route by which it can be shown that the Respondent had the requisite knowledge of the Divorce Payment and its intended destination, prior to completion of the Remortgage Loan. This brings me back to the Section 199 Issue.

132. In support of his case that the information about the Divorce Payment and its intended destination must be treated as having come to Mr Clake in his capacity as solicitor for the Respondent, Mr Beaumont relied upon several authorities which deal with the position, in terms of imputation of a solicitor's knowledge to a client, in circumstances where the solicitor receives information which he is under a duty to communicate to his client, but fails to do so. I do not consider it necessary to go through each of these authorities. I think that the relevant law can most conveniently be taken from the judgment of Lewison J (as he then was) in *Meretz Investments NV v ACP Ltd* [2006] EWHC 74 (Ch) [2007] Ch 197. At [324] Lewison J stated the law in the following terms:

> *"324 The knowledge of one person may, in certain circumstances, be attributed to another person. This is generally known as imputed knowledge. However, it is not the same as constructive knowledge. The concept of imputed knowledge does not bear on the kind of knowledge possessed by one person that is attributed to another. The general rule of agency is that where in the course of any transaction in which he is employed on his principal's behalf, an agent receives notice or acquires knowledge of any fact material to that transaction, under circumstances in which it is his duty to communicate it to his principal, the principal will be precluded from relying on his personal ignorance of that fact; and he will be taken to have known of it (or to have had notice of it) as from the time when his agent ought to have communicated it to him if he had performed his duty with due diligence."*

133. Lewison J then continued, at [324], to quote what had been said by Browne-Wilkinson V-C (as he then was) in *Strover v Harrington* [1988] Ch 390:

> *"In Strover v Harrington [1988] Ch 390, 409—410, Sir Nicolas Browne-Wilkinson V-C said:*

> *"In this, as in all other normal conveyancing transactions, after there has been a subject to contract agreement the parties hand the matter over to their solicitors who become the normal channel for communication between vendor and purchaser in all matters relating to that transaction. In so doing, in my judgment the parties impliedly give actual authority to those solicitors to receive on their behalf all relevant information from the other party relating to that transaction. The solicitors are under an obligation to communicate that relevant information to their own clients. At the very least, the solicitors are held out as having ostensible authority to receive such information. Whether there be express or ostensible authority, the purchaser is in my judgment estopped from denying that he received the information relating to the transaction which has been communicated to his solicitors acting in the same transaction. In my judgment, such knowledge should be imputed to the principal.__*
>
> *325 I accept, therefore, that in a conveyancing transaction a solicitor's actual or "shut-eye" knowledge should be imputed to his client."*

134. At this point in the analysis it seems to me that it is important to separate out two questions. The first question is whether the knowledge of Mr Clake as to the Divorce Payment and its intended destination can be imputed to the Respondent. Assuming that the answer to the first question is yes, the second question is whether the restriction in Section 199(1) applies, so that the Respondent is prevented from being prejudicially affected by notice of this information. That second question effectively becomes the question of whether the exemption in sub-paragraph (b) of paragraph (ii) applies, which in turn becomes the question of whether the information about the Divorce Payment falls to be treated as coming to the knowledge of Mr Clake in his capacity as solicitor for the Respondent. If the information first came to Mr Clake in his capacity as solicitor for the Defendants or either of them, then *Stepsky* is authority for the proposition that the information cannot be treated as coming to Mr Clake again, when instructed for the Respondent.

135. At this point it seems to me that the Appellant's case runs into difficulties. In her oral submissions Ms Halker pointed out that Mr Beaumont was, in the Appeal, relying upon a number of new authorities in relation to the Section 199 Issue. I took this to be a reference to, or including *Meretz, Strover* and an earlier case relied upon by Mr Beaumont for the same purpose as these two authorities. The earlier case was *Wyllie v Pollen* (1863) 3 De G. J.& S. 596. I say this because the Judge states, at Paragraph 143, that he was taken to two authorities in the context of the Section 199 Issue; namely *Stepsky* and *Thomson*. In addition to this Ms Halker pointed out that the Judge was not invited to make findings in relation to the undated letter, signed by the Defendants, by which instructions were given to Mr Clake to make the Divorce Payment to Mrs Bishop. Ms Halker submitted that it was not even known when the letter was sent. It might have been sent, she suggested, after the Remortgage was completed. Nor was there any investigation as to Mr Clake's dealings with the Defendants in relation to the information about the Divorce Payment.

136. Ms Halker's complaints about the lack of investigation of what happened, and when, in relation to the information contained in the undated letter of instruction are borne out by the Judgment. At Paragraph 142 the Judge recorded that Mr Beaumont had accepted, in

his skeleton argument for trial, that sub-paragraph (b) of Section 199(1)(ii) did not avail the Appellant because Mr Clake was acting both for the Respondent and the Appellant simultaneously. According to Paragraph 142, Mr Beaumont revised his view in the following circumstances:

> *"Mr Beaumont has revised that view in closing, of course, as he is entitled to do and submits that because the Claimant's standard instructions to the solicitor required Mr Clake to report any information that may affect the Claimant's ability to lend, and that is at page 250 of the bundle, and because the solicitor came to know latterly that the excess funds were destined to go to Mrs Bishop, then the Bank was fixed with constructive knowledge of that, in effect a form of imputed knowledge."*

137. It is not clear whether the Judge accepted that, subject to the Section 199 Issue, Mr Clake's duty to report meant that knowledge of the Divorce Payment and its intended destination was to be imputed to the Respondent. I do not read the Judgment as containing a conclusion to this effect, or as containing the findings of fact which would be required to support this conclusion. Mr Beaumont drew my attention to a number of documents which were before the Judge and were either included in the supplemental bundle of documents prepared for the hearing of the Appeal, or were provided to me by Mr Beaumont after the hearing. These documents included a transcript of what I understood to be part of Mr Richardson's evidence at the trial, and the Appellant's witness statement dated 7th October 2022. As I understood the position, I was referred to this witness statement on the basis that it established that the undated letter instructing Mr Clake to make the Divorce Payment was sent prior to completion of the Remortgage.

138. The first of the two questions which I have identified above, as questions relevant to the Section 199 Issue, is the question of whether the knowledge of Mr Clake as to the Divorce Payment and its intended destination can be imputed to the Respondent. If the answer to this question is no, then the Section 199 Issue does not arise. On that hypothesis the Respondent does not need to rely upon Section 199(1), in order to avoid being fixed with notice of the Divorce Payment and its intended destination.

139. In the absence of findings by the Judge in relation to this first question, and in circumstances where the first question does not appear to have been the subject of investigation in the evidence heard at the trial, I am doubtful that it is open to me to answer this first question for myself. It may be said that the obligation of Mr Clake to report matters pursuant to paragraph 6(b) of the Respondent's standard form instructions is not in dispute. It may be said that the failure of Mr Clake to report the Divorce Payment and its intended destination to the Respondent was a clear breach of the obligation to report. It may be said that the undated letter of instruction, requiring the Divorce Payment to be made to Mrs Bishop, must have been sent to Mr Clake before completion of the Remortgage. It may be said that with these facts established, the conclusion must follow, as a matter of law, that Mr Clake's knowledge of the Divorce Payment and its intended destination must be imputed to the Respondent. I remain however sceptical that it is open to me, as an appeal judge, to make the findings of fact necessary to support the Appellant's case that Mr Clake's knowledge of the Divorce Payment must be imputed to the Respondent. In particular, I note that the Judge did not hear evidence from Mr Clake or from anyone at Ellis Jones. One would have expected such evidence to be very relevant to the question of whether there was a breach of the duty to report.

140. I do not think however that it is necessary, at least at this stage, to make a final decision on the first question because the Judge did supply a clear answer to the second question. It will be recalled that if the answer to the first question is yes, the second question is whether the Section 199(1) prevents the Respondent from being prejudicially affected by notice of the Divorce Payment and its intended destination. This in turn resolves itself into the question of whether the information concerning the Divorce Payment falls to be treated as coming to the knowledge of Mr Clake in his capacity as solicitor for the Respondent. If the information first came to Mr Clake in his capacity as solicitor for the Defendants or either of them, then *Stepsky* is authority for the proposition that the information cannot be treated as coming to Mr Clake again, when instructed for the Respondent.

141. In relation to the second question, the Judge made the following findings in Paragraph 144, which I have set out earlier in this judgment but which I repeat for ease of reference:

> *"144. Here it is plain that the solicitor knew of the divorce proceedings and the financial settlement between Mr and Mrs Bishop, by reason of the solicitor's retainer with Mr Bishop and accordingly, that knowledge, it seems to me, is not to be imputed to the Bank. The solicitor's instructions to dispense the excess proceeds to Mrs Bishop, again, it seems to me comes from their retainer with Mr Bishop and/or Ms Waller-Edwards. Again, that is not to be imputed to the Bank. I accept that by the time of the final instructions, the Bank's retainer was in place but the information as to the divorce proceedings and the financial settlement, was plainly was acquired long before the solicitors were instructed by the bank."*

142. I agree with Ms Halker that the reporting duty to which Mr Clake is said to have been subject is a separate matter to identification of the retainer pursuant to which knowledge of the Divorce Payment and its intended destination was acquired by Mr Clake. This follows from my own separation of the two questions which I have identified above. In relation to the identification of the retainer by which knowledge of the Divorce Payment and its intended destination was acquired, the Judge found that *"the solicitor"* knew of the divorce proceedings and the financial settlement between Mr and Mrs Bishop by reason of *"the solicitor's"* retainer by Mr Bishop. The Judge also found that *"the solicitor's instruction"* to dispense the Divorce Payment to Mrs Bishop came from his retainer by Mr Bishop and/or the Appellant. The Judge also found that although the Respondent's retainer was in place by the time of the final instructions, the information as to the divorce proceedings and the financial settlement was plainly acquired long before *"the solicitors"* were instructed by the Respondent.

143. The Judge's language in Paragraph 144 may be said to be ambiguous, in the sense that the Judge refers to *"the solicitor"* and to *"the solicitors"*. I do not think that this matters in this context. Mr Clake was a partner (strictly a member) of Ellis Jones Solicitors LLP. Although it is convenient to refer to the Respondent and the Defendants as having instructed Mr Clake in relation to the Remortgage, I do not think that this is technically correct. It seems to me that the respective instructions in relation to the Remortgage were given by the respective parties (meaning Mr Bishop, the Appellant and the Respondent) to the firm (strictly the limited liability partnership) of Ellis Jones. Mr Clake was not a sole practitioner. Rather, Mr Clake was the fee earner at the firm who was responsible for dealing with the Remortgage on behalf of his firm. As such, it seems to me that the Judge's references to *"the solicitor"* are correctly read as references to Mr Clake, acting

on behalf of the firm of Ellis Jones, while references to *"the solicitors"* are correctly read as references to the firm of Ellis Jones. The important point is however that the Judge made findings that knowledge of the Divorce Payment and its intended destination was acquired by Ellis Jones, or by Mr Clake if one concentrates on Mr Clake, pursuant to the retainer of Ellis Jones by Mr Bishop and/or the Appellant.

144. The Judge reiterated these findings at Paragraph 146, where he said this:

> *"146. In this case, plainly the information that is relevant for this purpose all came to be acquired, as I say, by reason of the retainer between the solicitor and Mr Bishop and/or Ms Waller-Edwards, so section 199 in either respect does not therefore avail Ms Waller-Edwards' case."*

145. Ms Halker submitted that, on the basis of *Stepsky*, Paragraph 146 was the end of the Appellant's case on the Section 199 Issue. I agree with Ms Halker. In Paragraph 146 the Judge made a clear finding that the relevant information, in relation to the Divorce Payment and its intended destination, came to be acquired by reason of the retainer between *"the solicitor"* and Mr Bishop and/or the Appellant. It does not matter whether this reference to *"the solicitor"* was a reference to Mr Clake individually or Ellis Jones. The point was that the relevant information did not come to the knowledge of the solicitor by reason of the retainer by the Respondent. In such circumstances, for the reasons explained by Morritt LJ in *Stepsky*, the relevant knowledge cannot be treated as coming to the solicitor again, on the instruction of the solicitor by the Respondent. I cannot see that this principle ceases to apply, simply because the relevant information is information which the solicitor is under a duty to disclose to the mortgage lender at the point when the borrower discloses the information to the solicitor. The information still comes to the solicitor by virtue of his retainer by the borrower, which is not sufficient to engage the exemption in sub-paragraph (b) of Section 199(1)(ii).

146. Mr Beaumont submitted that the Judge was wrong to find that the solicitor, Mr Clake, had already acquired knowledge of the Divorce Payment when acting for Mr Bishop in his earlier matrimonial proceedings. Mr Beaumont asserted that Mr Clake did not act for Mr Bishop in those earlier proceedings. Someone in a different department of Ellis Jones acted for Mr Bishop in the earlier proceedings. As such, so Mr Beaumont submitted, the Judge's reasoning could not stand.

147. There are, as it seems to me, at least three difficulties with this submission.

148. First, it seems to me that the findings of the Judge in Paragraphs 144 and 146 are findings of fact. As I have already noted, the Judge read and heard all the evidence at the trial. I have not had the same advantage. It is not clear to me on what basis I can or should overturn the Judge's findings of fact, let alone make different findings of fact. As the appeal judge I am in no position to do this. The position might be different if it could be demonstrated that the Judge went wrong in his approach to the Section 199 Issue, in such a way as vitiate his findings of fact in Paragraphs 144 and 146, but I cannot see any basis for saying that the Judge made an error of this kind.

149. Second, I am not clear why it is directly relevant that Ellis Jones had previously acted for Mr Bishop in his divorce proceedings. The Judge's findings, in both Paragraph 144 and 146, were that the information in respect of the Divorce Payment came to Ellis Jones/Mr Clake (the distinction does not seem to me to matter this purpose) by reason of their

retainer with Mr Bishop and/or the Appellant. It seems to me that the Judge was, in these findings, referring to the retainer of Ellis Jones by Mr Bishop and/or the Appellant in relation to the Remortgage itself.

150. This seems to me to be confirmed by the Judge's reference to *Thomson*, in Paragraph 145. In *Stepsky* the solicitors were under a duty to report to the plaintiff mortgage lender the true purpose of the mortgage loan or, if the defendant borrowers would not consent to such disclosure, to inform the plaintiff that they could no longer continue to act. The information as to the true purpose of the loan came to the solicitors on 12th June 1990, when they were instructed by the borrowers. The solicitors were instructed by the plaintiff a week later, on 19th June 1990. It might therefore have been said that the present case is different because, at least on Mr Beaumont's case and assuming that I have understood that case correctly, the duty to report the Divorce Payment and its intended destination to the Respondent arose at the point when the instruction to make the Divorce Payment was given by Mr Bishop in the undated letter of instruction, at which point Ellis Jones were already acting for the Respondent. In *Thomson* however Simon Brown LJ stated, at page 826 of the report, that the chronology in *Stepsky* was not the decisive factor. What mattered was the retainer pursuant to which the relevant information was acquired by the solicitors. This was the point made by the Judge in Paragraph 145. As I have said, it seems to me that the Judge was, in his findings in Paragraphs 144 and 146, referring to the retainer of Ellis Jones by Mr Bishop and/or the Appellant in relation to the Remortgage itself, not to a previous retainer.

151. Third, and finally, if one assumes, contrary to my view, that Mr Beaumont is right to say that the Judge was referring, in Paragraphs 144 and 146, only to a previous retainer of Ellis Jones by Mr Bishop, it is not clear to me that Mr Beaumont was correct in drawing a distinction between the knowledge of different members of the same firm of solicitors, either as a matter of fact or as a matter of law. This of course illustrates the difficulties of an appeal court being invited to make its own findings of fact, without having read and heard the evidence which was before the trial judge. The reality is that an issue of this kind required proper exploration and argument before the Judge. It is not an issue which I can or should attempt to resolve in the Appeal. For the reasons which I have already set out, I do not think that this issue actually arises, given the terms of the Judge's findings in Paragraphs 144 and 146. If and insofar as it may arise, I do not consider that I am in any position to interfere with the Judge's findings.

152. Drawing together all of the above analysis, my conclusion is that the Judge was correct to decide that Section 199(1) operated so as to prevent the Respondent from being fixed with knowledge of the Divorce Payment and its intended destination. I conclude that the Judge was correct to decide that the exemption in sub-paragraph (b) of Section 199(1)(ii) did not apply on the facts of this case.

153. I should add that the exemption in sub-paragraph (b) was only relevant in the present case if one assumed that, but for Section 199(1), knowledge of the Divorce Payment and its intended destination would have been imputed to the Respondent, by virtue of Mr Clake's knowledge. It will be recalled that this was the first of the two questions relevant to the Section 199 Issue which I identified above. In my analysis of the Section 199 Issue, as set out above, I have not found it necessary to make a final decision on this first question of whether Mr Clake's knowledge did fall to be imputed to the Respondent. As I have said, the Judge does not appear to have made a decision on this first question. The

question does not appear properly to have been explored at the trial. As I have also noted, the Judge did not hear from Mr Clake as a witness at the trial, or from anyone else at Ellis Jones. I therefore assume that the trial proceeded without Ellis Jones having had the opportunity to respond, before the Judge, to Mr Beaumont's case that they were in breach of their duty to the Respondent. Putting together all of these circumstances, and if the first question had been relevant to my analysis, I would not have been prepared to make my own decision that Mr Clake's knowledge of the Divorce Payment and its intended destination fell to be imputed to the Respondent.

154. In overall summary, I conclude that the Judge was correct in his decision on the Section 199 Issue.

The outcome of the Appeal

155. For the reasons which I have set out in this judgment the Appeal falls to be dismissed.

156. I will hear further from the parties, if and insofar as necessary, on the terms of the order to be made consequential upon this judgment. In the usual way the parties are encouraged to agree as much as they can in this respect, subject to my approval of such terms.

Postscript

157. It would not be right to leave this judgment without reiterating a point which I have made earlier in this judgment. As I have already said, while cases of this kind almost always involve distressing circumstances, the facts of the present case are particularly sad. In common with the Judge, I have considerable sympathy for the Appellant. I also pay tribute to Mr Beaumont's determined advocacy on behalf of the Appellant. Ultimately however, and for the reasons which I have set out in this judgment, I have no option but to dismiss the Appeal.