Neutral Citation No: [2025] NICA 73	*Ref:* **McC12805** *ICOS Nos:* **19/7075; 19/9691; 19/9696/A01; 20/078504** *Hearing dates:* **15-16/09/25** *Delivered:* **18/12/2025**
Judgment: approved by the court for handing down (subject to editorial corrections)	

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT (COMMERCIAL LIST)

_____

Between:

ROBERT BUNTING

Plaintiff/ Respondent

and

EXCEL–A-RATE BUSINESS SERVICES LIMITED

Plaintiff/Respondent/Cross-Appellant

and

EAMON BLANEY

First Defendant

-and-

CARMEL BLANEY

Second Defendant/Appellant

_____

Mr Alistair Fletcher (instructed by Mills Selig Solicitors) for Robert Bunting
Joseph Aiken KC and Maria Mulholland (instructed by Diamond Heron Solicitors) for Excel
Eamon Blaney was unrepresented and non-participating
Carmel Blaney was self–representing and participating

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Before: McCloskey LJ, McBride J and Huddleston J

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GLOSSARY

Ardcarmon/ the company:	Ardcarmon Ltd
CB:	Carmel Blaney
EB:	Eamon Blaney
Excel:	Excel – A – Rate Business Services Limited
Quartisan:	Ardcarmon's restaurant
RB:	Robert Bunting
The premises:	35 Ardenlee Avenue, Belfast

McCloskey LJ (*delivering the judgment of the court*)

Preface

This is the unanimous judgment of the court on all issues, except one. My conclusion that CB's guarantees Nos 5 – 6 and 9 are not enforceable by Excel against her is the minority view of the court, given the majority view of McBride and Huddleston JJ in the separate judgment ([2025] NICA 72) which prevails on this issue.

I. Introduction

[1] There are before this court a notice of appeal and a respondent's notice under Order 59, rule 6 of the Rules of the Court of Judicature (Northern Ireland) 1980 ("RCJ"). Thus, there are, in substance, two inter-related appeals to be determined. Each arises out of the judgment delivered in the Commercial Court on 13 December 2024 and two corresponding orders of the same date.

[2] The parties to these appeals are (in no particular hierarchy):

(a) Excel – A – Rate Business Services Limited ("Excel").

(b) Robert Bunting ("RB").

(c) Eamon Blaney ("EB").

(d) Carmel Blaney ("CB").

[3] Following the judgment and the two associated orders of 13 December 2024, there occurred, in succession, two steps generating the proceedings before this court. First, CB served a notice of appeal. Second, a respondent's notice on behalf of Excel followed.

II. The First Instance Proceedings

[4] There were four separate cases at first instance. In chronological sequence:

(i) By a writ of summons endorsed with statement of claim, issued on 31 January 2019 (2019/9691 – the "first case"), Excel sued EB and CB for liquidated damages of £24,861.21 "…on foot of personal guarantees provided by the defendants to the plaintiff for lending facilities supplied to Ardcarmon Limited…"

(ii) By an originating summons issued on the same date (2019/9696 - the "second case") Excel applied under RCJ Order 88 for an order requiring EB and CB to

deliver to Excel possession of 35 Ardenlee Avenue, Belfast, a dwelling house (the "premises").

(iii) By a further writ of summons endorsed with statement of claim, issued on 11 November 2020 (2020/78504 - the "third case"), Excel sued CB for £163,329.35 "…being monies due and owing on foot of the guarantees and indemnities between the plaintiff and the defendant in respect of the liabilities owed to the plaintiff by Ardcarmon Limited (in liquidation)."

(iv) By a further originating summons dated 23 January 2019 (2019/007075 - the "fourth case") RB sought an order against EB, pursuant to RCJ Order 88, requiring delivery of the premises pursuant to a charge dated 21 October 2016 the parties whereto were RB and EB (2019/7075).

[5] The four cases specified above were brought in different divisions of the High Court. Ultimately, all proceeded in the Commercial list, where they progressed and were determined in consolidated fashion, culminating in a single, unified judgment. As the foregoing resume indicates, two of the three parties concerned, namely Excel and CB, are dissatisfied with this judgment. In the sole case in which neither of these litigants is a party (the fourth case – 2019/7075), brought by RB against EB, CB was added as a party and her notice of appeal encompasses this case. There is no respondent's notice.

[6] In the notice of appeal on behalf of CB dated 23 January 2025, all of the above four cases are identified. The single respondent's notice, which is on behalf of Excel, is in respect of three of the four cases only. It excludes the fourth case (2019/7075), in which Excel was not a party.

III. An Overview

[7] There is a valuable overview in the judgment under appeal at paras [1] – [2]:

> [1] On 23 January 2019 Robert Bunting ("RB") issued proceedings against Eamon Blaney ("EB") seeking delivering up of 35 Ardenlee Avenue, Belfast, ("the Premises"). The Premises comprised unregistered land and the Registry of Deeds records EB as being the sole legal owner. RB alleged that EB had borrowed money from him and various of his Associates ("the Associates") in 2016 to finance the Quartisan Restaurant ("Quartisan") which carried on business at Waring Street, Cathedral Quarter, Belfast. Quartisan was owned by Ardcarmon Ltd ("the Company") in which both EB and Carmel Blaney ("CB"), the wife of EB, were directors. EB, however, was the sole shareholder. The total sums borrowed comprised a loan of £90,000 lent by RB himself in June 2016; a second loan of

> £20,000 may have been lent by RB himself in August 2016; a further loan of £100,000 was lent by RB and the Associates; and finally, £36,000 was lent by RB personally pursuant to a loan agreement dated 16 July 2017. That would mean that the total sum borrowed from RB and the Associates was some £246,000 or thereabouts. However, there is some uncertainty about this as the affidavit evidence is somewhat unclear. There is no doubt that well over £200,000 was lent by RB and the Associates.
>
> [2] There were also various sums of money due to a number of companies controlled by David Ballan ("DB"), which went under the title of Excel-A-Rate ("EAR"). These sums were guaranteed by EB and CB and secured by a mortgage dated 14 December 2017 on the Premises."

IV. The Judgment and Orders Under Appeal

[8] The judgment at first instance records the following, with appropriate accompanying particulars:

(a) Excel was represented by counsel.

(b) RB was represented by counsel.

(c) CB was self-representing (and participated actively).

(d) EB, described as an "undischarged bankrupt", was unrepresented and non-participating.

[9] At para [9] the judge stated that the issues requiring adjudication of the court were fourfold, namely:

(i) Does CB have a beneficial interest in the premises?

(ii) If yes, what is the extent of such interest?

(iii) If yes, does such interest rank in priority to the interests of (a) RB and/or (b) Excel?

(iv) If yes, is RB and/or Excel entitled to have the premises sold in lieu of partition?

Before this court the parties are agreed regarding this formulation of the issues.

[10] At para [107] the judge, referring expressly to his preceding specification of the issues at para [9], made the following conclusions:

> "(i) On the basis of the objective consideration of their words and conduct, I deduce a common intention that CB and EB should share in the beneficial ownership of the Premises under a common intention constructive trust.
>
> (ii) In the absence of any agreement, express or inferred, as to the respective shares, I impute that each will be entitled to that share which the court considers fair having regard to the "whole history of dealing between them in relation to the property" and which I assess at 65% to EB (and his trustee in bankruptcy) and 35% to CB.
>
> (iii) On the basis of the evidence adduced before this court, RB and EAR had constructive notice of CB's interest in the Premises and, therefore, took subject to that interest.
>
> (iv) Partition is not a practical solution and given CB's minority equitable interest, I direct that there should be a sale of the Premises in lieu of partition, but that this should be stayed for eight weeks to permit EB and CB to find alternative accommodation."

[11] The judgment has two further elements. First, at para [108]:

> "In the absence of agreement I direct that the matter can be referred back to me (or the Master) for the taking of accounts and inquiries in respect of what sums are due and owing by CB and/or EB to RB and EAR, if these cannot be agreed."

Second, at para [109], a ruling that the court's determination of costs would await the completion of accounts and enquiries.

[12] At para [91] the judge purported to determine two issues which did not belong to the list at para [9] above. These concerned two mortgages executed by EB. The first of these is dated 21 October 2016, noted at para [4] (iv) above (EB/RB). The second is the EB/Excel mortgage dated 14 December 2017. The premises were the security specified in each. The judge concluded that both mortgages were procured by undue influence, adding that the EB/Excel mortgage was also vitiated by misrepresentation, "… because CB was not informed of the mortgage in favour of RB."

[13] Following the sequence employed above, the first of the two orders under appeal relates exclusively to the second of the four cases, i.e. the originating summons of *Excel v EB and CB*. The second relates to the fourth of the cases, in which the parties were RB and EB. These orders are in identical terms:

> "Given the evidence adduced before this court, I have reached the following conclusions on the central issues identified at the outset of this judgment in para [9]:
>
> *(i)* On the basis of the objective consideration of their words and conduct, I deduce a common intention that CB and EB should share in the beneficial ownership of the Premises under a common intention constructive trust.
>
> *(ii)* In the absence of any agreement, express or inferred, as to the respective shares, I impute that each will be entitled to that share which the court considers fair having regard to the "whole history of dealing between them in relation to the property" and which I assess at 65% to EB (and his trustee in bankruptcy) and 35% to CB.
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> *(iii)* On the basis of the evidence adduced before this court, RB and EAR had constructive notice of CB's interest in the Premises and, therefore, took subject to that interest.
>
> *(iv)* Partition is not a practical solution and given CB's minority equitable interest, I direct that there should be a sale of the Premises in lieu of partition, but that this should be stayed for eight weeks to permit EB and CB to find alternative accommodation.
>
> In the absence of agreement I direct that the matter can be referred back to me (or the Master) for the taking of accounts and inquiries in respect of what sums are due and owing by CB and/or EB to RB and EAR, if these cannot be agreed.
>
> I will also hear the parties on the conclusion of this case on the issue of what should be the appropriate order for costs given my conclusions. This hearing on the issue of costs will take place after all relevant accounts and inquiries have concluded. The court encourages a collaborative approach to this issue, and, in the event of any dispute, the

> court will take into account any Calderbank offers or such like, in reaching its final conclusion as to what is the appropriate order for costs should be."

No order was made in respect of either the first or the third case (see para [128ff] infra).

[14] The several conjoined proceedings at first instance had one final chapter. In the wake of service of the notice of appeal and respondent's notice, documented above, there was a further listing before the trial judge, on 31 March 2025. In the briefest summary this court, following further enquiry, has ascertained that this listing was in essence at the instigation of the parties, stimulated by their contention that the judgment and orders at first instance were incomplete as they had not addressed and determined all of the issues requiring determination. Thus, this listing had the purpose of securing further orders from the Commercial Court. These aims were not achieved, no further orders materialising.

[15] As a result, the contours and boundaries of what is before this court are ineluctably shaped by the judgment and orders of the Commercial Court outlined above, together with the single notice of appeal and the single respondent's notice. Given the foregoing, and as was made clear through its successive case management listings and orders, this court has, from the outset, been mindful of its extensive powers under section 38 of the Judicature (NI) Act 1978.

V. The Defences At First Instance

[16] In the first case (*Excel v EB and CB – the first guarantees claim*), the defence of CB contained the following material averments: it was admitted that the two defendants, husband and wife, were directors of Ardcarmon (in liquidation); the default judgment secured by Excel against EB on 27 February 2019 and EB's subsequent bankruptcy adjudication were also admitted; as was the winding up of Ardcarmon by order of the court dated 14 March 2019. Next, the execution by CB of the guarantees and indemnities specified in paras [9]–[11] of the amended statement of claim (the "guarantees and indemnities") was admitted. This was followed by three positive averments: CB had executed the guarantees and indemnities "at the behest of" EB, who "required" her to do so; CB relied on the doctrine of non est factum; and further, or alternatively, CB was "induced" to execute these instruments "by the undue influence of" EB.

[17] In the second case (*Excel v EB and CB – the possession claim*), in which the initiating process was an originating summons (supra), there was extensive inter-partes sparring by the medium of affidavits, which included three sworn by CB and two sworn by EB. In the amended statement of claim, the primary remedy sought by Excel was an order for possession of the premises and certain alternative remedies were claimed. There was no defence on behalf of EB.

[18] The defence served on behalf of CB in the second case mirrored that served by her in the first case (ibid), with the following additional material averments: EB did not involve CB in his business affairs; the execution by CB of a deed of consent and postponement ("DCP") on 6 December 2017 was not disputed; CB was unaware that EB had previously, on 21 October 2016, mortgaged the family home in favour of RB and "…the documentation produced to her was fraudulent"; Excel had knowledge of "this" from on or about 30 November 2017, which it did not communicate to CB; Excel's affidavit grounding the originating summons was not candid; "…these proceedings and the alleged mortgage are a nullity, for fraud"; CB, having married EB on 5 January 2002, thereafter "…made a significant contribution to the matrimonial home" by implication from her employment earnings; and CB claimed "…an equitable interest amounting to a 60% share in her matrimonial home…" This pleading ended in these terms: should the court find EB's share of the matrimonial home to be well charged to Excel, the property should be partitioned or any court ordered sale in lieu of partition should have a stay of execution of five years or absent any stay CB and the three children of the family (now aged 22, 20 and 18) should be allowed to reside in the property "…until all litigation regards [sic] these issues have [sic] been concluded."

[19] In the third case (Excel v CB – the second guarantees claim), in which CB is the sole defendant, her defence followed the pattern of her defence in the first case, with the exceptions that (a) there was no plea of non est factum and (b) there was the novel averment that her husband (EB) "…did not involve her in his business affairs and, when legal action was threatened or begun, …hid all correspondence addressed to her and concealed the true nature of the situation."

[20] In the fourth case (RB v EB – RB's possession claim), in which RB is the sole plaintiff, the pleadings have the following noteworthy features. First, in the originating summons EB is the sole defendant. Second, in the statement of claim both EB and CB are identified as defendants (presumably following the formal joinder of CB as second defendant,) and EB is described as "the sole registered owner" of the premises. It is averred that CB was a director of Ardcamon from 29 August 2014 to 28 February 2019 and "...worked in the business prior to its closure." It is essential to enumerate the remaining significant features of this pleading:

(a) In 2016 and 2017 there were successive loan agreements in respect of amounts totalling £230,000, the parties whereto were Mr Blaney and certain identified "associates" (on the one hand) and EB (on the other).

(b) RB was appointed "security trustee" on behalf of the "associates."

(c) The security for the loans was a charge over the premises.

(d) EB defaulted in repayments.

(e) On 13 June 2019, further to an Order 88 originating summons issued by RB against EB, the Chancery Court made an order for possession in respect of the premises.

(f) In the course of ensuing enforcement action there was voluntary forbearance by RB following the assertion by CB of a 50% beneficial interest in the premises.

(g) This interest, if established, did not override the interest of RB qua chargee.

(h) And in the event of CB establishing any interest in the premises the court should make an order for sale in lieu of partition.

[21] In the fourth case there was no defence on behalf of EB. The defence served by CB contains the following material averments:

(i) A denial that CB worked in the business at any time prior to its closure.

(ii) The assertion of a 60% beneficial interest in the property.

(iii) A denial that RB was entitled to an order for possession of the property.

(iv) In the alternative to (iii), an order staying any order for possession.

VI. Notice of Appeal

[22] As noted, there is a single notice of appeal and a single respondent's notice. In CB's notice of appeal there are three grounds. These are embraced by the averment that the trial judge was "in error." The three grounds are:

(i) The finding that CB had only a 35% beneficial interest in the premises "…was unsupported by the evidence"; CB's true interest was 50% or such proportion as the court deems equitable in all the circumstances.

(ii) The order for possession and sale of the premises subject to a stay of execution of eight weeks only is unsustainable: "...the court should in all the circumstances have stayed the order for possession permanently, in order to do justice, having held that the plaintiffs were negligent in their dealings with the appellant."

(iii) "The appellant made a number of applications to join Logan and Corry solicitors as a third party to both actions [sic] on the grounds that they conspired with [EB] to conceal transactions from the appellant, resulting in the loss of the appellant's family home. Despite promising to consider these applications, the judge ignored them, resulting in loss to the appellant."

[23] The notice of appeal requests this court to make the following orders:

(a) That "…both plaintiffs' claims be struck out on the basis of **ex turpi causa non oritur actio**."

(b) That CB has a 50% equitable interest in the premises or "…such portion that the court deems equitable in all the circumstances."

(c) That "…any order for possession against [sic] the premises be stayed, pursuant to the powers available to the court in Article 49 of the Property (NI) Order 1997."

[24] In response to this court's direction, CB has compiled the following list of issues supposedly not addressed at first instance (verbatim):

(i) "Stay Application

(ii) Costs

(iii) Security of Costs re R Bunting & Associates as they are in Czech Republic and other European countries

(iv) Typographical Error Correction

(v) Transcripts"

VII. The Respondent's Notice

[25] It is appropriate to preface consideration of the respondent's notice on behalf of Excel with the relevant procedural rule. RCJ Order 59, rule 6(1) provides:

> "(1) A respondent who, having been served with a Notice of Appeal, desires –
>
> (a) To contend on the appeal that the decision of the court below should be varied, either in any event or in the event of the appeal being allowed in whole or in part, or
>
> (b) To contend that the decision of the court below should be affirmed on grounds other than those relied upon by that court, or
>
> (c) To contend by way of cross-appeal that the decision of the court below was wrong in whole or in part.

(d) Must give notice to that effect, specifying the grounds of his contention and, in a case to which paragraph (a) or (c) relates, the precise form of the order which he proposes to ask the Court to make."

[26] The two forms of relief which Excel seeks via its respondent's notice are:

(i) An order that any beneficial interest of CB in the premises is subject to the mortgage of Excel.

(ii) Judgment in favour of Excel against CB in the amount of £162,648.91 due and owing pursuant to ten personal guarantees given by CB to Excel.

The notice is in two parts. The first contains 19 grounds of appeal. The second contains 12 "further grounds…to the extent necessary." Careful analysis of the content of both is required.

[27] Of the 19 grounds comprising the first part of the respondent's notice:

(i) 13 are formulated in the terms of a contention that the trial judge "erred in fact and law" in making specified findings (see grounds 1–3 and 5–12).

(ii) The fourth ground contends that the judge "…erred on the facts and law…by failing to distinguish [specified] facts and circumstances…"

(iii) The 13th ground contends that the judge "…erred in law…" in making the conclusion contained in para [91] of his judgment.

(iv) The 14th and 16th grounds contend that the judge "erred in law" in specified respects.

(v) The 17th ground contends that the judge failed to take into account a specified piece of the sworn evidence of CB.

(vi) The 19th ground contends that the judge "…failed to take account of, and the judgment is silent on,…" a specified instrument.

[28] As already noted, the second part of the respondent's notice, consisting of 12 grounds, employs the somewhat unusual linguistic formula of "to the extent necessary", without explanation or elaboration. The breakdown of these grounds is the following:

(i) Ground 20 complains that the trial judge "…failed to give a ruling" on whether Excel is entitled to a money judgement against CB in respect of ten personal guarantees executed by her.

(ii) The 21st ground contends that the judge "…failed to address [specified] questions necessary for determining the aforementioned money judgement claim."

(iii) The 22nd ground contends that the judge "…failed to take account of…" specified "undisputed facts."

(iv) Grounds 23–26 contend that the judge "…failed to take account of, and the judgment is silent on,…" specified items of documentary evidence.

(v) While ground 26 begins with the contention that the judge "…has erred in law in failing to give account to …" a specified "fact", this bulky pleading is of the omnibus and rolled – up variety, it later embodies the contention "the learned judge erred in failing to find…" and ends with the quite separate contention "the judgment does not address these points."

(vi) Grounds 27 – 30 contend that the judge "…failed to take account of, and the judgment is silent on,…" certain specified pieces of sworn evidence and certain specified documentary evidence.

(vii) Ground 31 contends that the judge "…failed to address and rule on…" specified "arguments" on behalf of Excel.

(viii) Ground 31 contends that the judge "…failed to address and rule on…" two further "arguments" on behalf of Excel.

[29] The vague linguistic formulation in the respondent's notice noted at the beginning of the preceding paragraph is illuminated by the following contextual features. At the time when it was compiled the judgment of the Commercial Court had been promulgated in draft, the final order of the court was awaited, a further listing before the judge was contemplated and CB had served her notice of appeal. Furthermore, a procedural time limit had to be observed. Summarising, there was a possibility that, in certain eventualities, it might not be "necessary" for Excel to pursue any or all of the 12 grounds of appeal contained in the second part of the respondent's notice. In the event, no eventuality of this genre materialised. As a result, all 32 grounds in the notice are live. This is subject to the important qualification that appropriate refinement and clarification were required by the court during the case management phase of this appeal: see infra.

[30] In response to this court's direction, Excel provided the following list of issues supposedly not addressed at first instance:

> (a) "Whether Excel is entitled to a money judgment against Carmel Blaney in respect of some or all of the ten personal guarantees that CB executed in favour

of Excel as security for the borrowings of Ardcarmon Limited, the company of which CB was a director.

(b) Whether paragraph 105 of the judgment under appeal contains an error, in that a reference to the abbreviation for Carmel Blaney (CB) should in fact be an abbreviation for Eamon Blaney (EB).

(c) What further account or enquiries may be necessary.

(d) What Order for costs should be made in the proceedings between Robert Bunting and Mr and Mrs Blaney.

(e) Subject to the decision of the Court on whether CB is liable pursuant to some or all of the ten personal guarantees, what order for costs should be made in the proceedings between Excel and Mr and Mrs Blaney."

VIII. Grounds of Appeal Generally

[31] This court has composed a separate judgment, to be considered in conjunction with this judgment, containing guidance to practitioners on the composition of grounds of appeal: see [2025] NICA 67. This guidance is intentionally framed in general terms. It is not confined to appeals to this court under RCJ Order 59, rule 1 or respondent's notices under Order 59, rule 6(1). It applies to all appeals of every species at every tier of the legal system. In practice, much of the case management business of the Northern Ireland Court of Appeal concerns poorly formulated grounds of appeal. It is time consuming and wasteful of resources.

[32] In light of the alarming frequency of defective notices of appeal and respondent's notices, the aforementioned magnanimity of this court will have to be reconsidered. This court is aware that a much stricter approach to these matters is taken in neighbouring jurisdictions.

[33] In the present case, Excel was the beneficiary of this court's established generous practice. This allowed Excel to provide three successive versions of its respondent's notice. It did so in the context of an extensive ruling pointing out the multiple defects in the extant pleading. In biblical terms, the seed fell on veritably stony ground. Excel's amended respondent's notice was as inadequate as its predecessor. Regrettably, this materialised at a very late stage. It required a further ruling and order of this court on the first day of the scheduled substantive hearing. The stance before the court adopted by Excel's legal representatives was that of declining any further opportunity of rectification which the court might provide. This exposed Excel to the risk of having its respondent's notice struck out.

[34] This court gave Excel one further opportunity. Following a full wasted day, a third incarnation of the respondent's notice and Excel's belated core propositions eventuated. There was a notable improvement. As this court observed, the lesson to be learned from this episode is that in pleadings, notices and every form of communication in every type of litigation the golden rule is clear, coherent and concise language.

IX. Factual Matrix

[35] The salient facts – a mixture of the uncontested, the incontestable and findings by the trial judge - are addressed in both the body of this judgment and the judgment under appeal. As will become clear, it is not the function of this appellate court to resolve contested factual issues, and we have determined this appeal without doing so (and see further [49] infra).

X. The Judgment Under Appeal

[36] Some further analysis of the judgment under appeal is required. The judge's assessment of the reliability and veracity of the sworn evidence of EB and CB is contained in paras [14] – [17] of the judgment:

> "[14] Before dealing with the four central issues identified above, it is important that I make clear my conclusions about the main witnesses who gave evidence before me and whom I had the opportunity to see and hear answer some searching questions. The credibility of all of the witnesses, and I stress all the witnesses, played an important role in the conclusions which I have reached. Much of the evidence was contested and there was little agreement among the parties even as to the background facts.
>
> [15] After careful observation of the witnesses giving evidence, I concluded that most of them did their best to try and give a truthful account of what had happened. I appreciate that the events with which we are concerned occurred some years ago and that witnesses can become confused with the passage of time. Memories are fallible and events can take on a different perspective when viewed with hindsight. I recognise, for example, that it was in RB's interest to recover as much capital and accrued interest as possible. However, he struck me as straightforward, and I had no reason to conclude that he was "gilding the lily." He was "a dear old friend" of EB and he had pursued his claim, I thought, more in sorrow

> than in anger. Further, I did not feel that DB of EAR or the witnesses who gave evidence on EAR's behalf, including Claire Collinge, Ken Finlay and Mrs Finlay, were trying to mislead the court. However, there were witnesses who I had expected to be called. For example, I would have expected to hear from those recipients of the sums of money making up the disputed amount of approximately £47,100 or thereabouts, relied on by the Blaneys as being part of the purchase price for the Premises, so that I could confirm that the payments were either direct or indirect contributions towards that purchase price of the Premises. At the very least affidavits could have been filed on their behalf. Where appropriate, I will draw such adverse inferences as may be justified by the non-appearance of witnesses I would have expected to give evidence."

[37] The judicial assessment of EB follows at para [16]:

> "EB seemed to say what he thought was required to save the premises and escape from a set of circumstances which were very much of his own making."

[38] The judge then assessed the evidence of CB, at para [17]:

> "I found CB to be resourceful, determined and capable. I do not consider her to be a dishonest person, but her testimony was, at times, unreliable and inconsistent. She was clearly under a great deal of pressure to try and save the Premises, the family home. *She was not a witness upon whom the court could place any degree of confidence on issues which placed the Premises at risk*."
>
> [Emphasis added.]

[39] The judge then proceeded to "…highlight a number of different and inconsistent versions given by CB on what was a very material issue, namely how and what amount it is alleged she contributed to the purchase of the Premises." The judge next detailed certain "inconsistent and contradictory accounts [which] served only to undermine her credibility and reliability." Next the judge, preceded by illustrations based on specified elements of the sworn evidence of CB and EB, stated at para [23]:

> "Both EB and CB displayed a visceral desire to remain in the Premises and, accordingly, their testimonies deserved the closest of scrutiny."

[40] It is important to accurately categorise those aspects of the judgment under appeal addressed in the two immediately preceding paragraphs (and any comparable passages). These do not have the status of findings of fact. They are, rather, evaluative assessments, or judgements, by the first instance court of the credibility and reliability of specified elements of the sworn evidence adduced. From the perspective of this appellate court, [15] – [23] of the judgment under appeal have the laudable merit of expressing, in unambiguous terms, the judge's substantial reservations about the reliability and veracity of the sworn testimony of CB and EB.

[41] We next turn to examine the remainder of the judgment in the exercise of identifying its material findings of fact. The first of several chapter headings is "Does CB have a beneficial interest in the premises?" This section of the judgment is initially devoted to a series of reported decisions, mainly emanating from the House of Lords. This is followed by the judge's recitation of the following findings of fact, at paras [69] - [70]:

(i) CB's earnings augmented the family resources and assisted EB in discharging the mortgage repayments.

(ii) CB's contribution "…allowed the purchase of a mobile home in which the family holidays were taken."

(iii) CB, when not in employment, "…was able to devote herself wholeheartedly to the care of the children and to the many tasks that running a family home involved and which would otherwise have required the employment of outside paid help."

(iv) While there was "…very much a joint enterprise in which they were both partners although, given the scale and nature of the direct financial contributions made by EB, he was and remained the senior partner."

[42] These findings of fact are followed by the judge's conclusions on the first of the four questions formulated by him, noted in para [9] above:

> "…they shared a common intention in respect of which CB acted to her detriment such that CB would enjoy a proprietorial interest in the premises. I, therefore, conclude that the premises are held by EB (and his trustee in bankruptcy) on a common interest constructive trust for both himself (and his creditors) of the one part and CB of the other."

[43] The next chapter heading in the judgment is "The size of CB's beneficial share in the premises." In this context, the judge reiterated his substantial reservations about the reliability of the sworn testimony of both CB and EB. Having considered certain authorities, the judge then formulated the following findings of fact, at para [77]:

> "It is simply not possible, on the evidence, to find any express agreement or to infer any common intention as to what the respective shares of EB and CB should be. There is no doubt that EB's direct financial contributions far exceeded any of those made by CB. However, CB did make some telling contributions."

A further finding of fact, of imputation of intention, follows at para [78]:

> "[78] The court having carried out that survey of the whole course of dealing between the parties as recommended by the Law Commission and taking into account the various contributions, both direct and indirect made by the parties, it is determined that it should impute an intention that the beneficial ownership should be shared on the basis that EB (and his Trustee in Bankruptcy) own 65% and CB owns 35% of the beneficial ownership of the Premises."

[44] The next chapter heading in the judgment is "Priority of Interests." In this context, the judge specifically addressed CB's claims of undue influence and misrepresentation. These claims, the judge observed, if established would accord to CB's beneficial interest in the premises priority over the other claims asserted.

[45] In this context, the judge made the following further specific findings of fact:

(i) Neither Excel nor RB "…had actual knowledge of any wrongdoing on the part of EB which influenced the conduct of CB."

(ii) CB was "...in thrall to EB."

(iii) CB "…did not know that the mortgage* in favour of [RB] was secured on the Premises. She thought that the security which had been offered related solely to Quartisan." [* This must denote the 2016 EB/RB mortgage]

(iv) CB "…did not concern herself with the granular detail of the scheme."

(v) Neither RB nor Excel "…took adequate steps to check with [CB] that she had been independently advised by a solicitor…"

(vi) The solicitors advising CB did not have "…all the relevant financial information they required to enable them to give her the advice she needed including all the documents relating to EB's indebtedness."

(vii) The same solicitors did not provide to either Excel or RB "a written confirmation upon which they could rely to satisfy them that CB had been independently advised."

(viii) "The attendance note of 6 December 2017 in respect of [Excel's] Deed of Postponement makes it clear that no figures were ever discussed and…further confirms that [the solicitor – "PM"] did not have sufficient financial information to provide any meaningful advice to CB."

(ix) Adequate independent advice in respect of the EB/RB mortgage was not given to CB.

[46] Based on the immediately preceding findings of fact, the judge made the conclusion that two mortgages had been procured by undue influence: see para [12] above. He concluded, secondly, that the EB/RB mortgage had been procured by a misrepresentation on behalf of Excel. He concluded, thirdly, that the DCP was vitiated by undue influence.

[47] The next succeeding chapters of the judgment, entitled "Partition or sale or some other order" and "Conclusion" contain no further findings of fact.

XI. The Issues For This Court

[48] As appears from the above, the transaction of the appeal and cross-appeal before this court has been protracted, and avoidably complicated, for the reasons appearing. The three participating parties having been accorded full opportunity to contribute to this exercise, they have formulated what each contends are the issues for determination by this court:

[i] CB

CB's three grounds of appeal, the orders sought, and her list of suggested outstanding issues are rehearsed at paras [22] - [24] above.

[ii] Excel

(Verbatim)

> "1. Adopting the same form of numbering as paragraph 9 of the 13 December 2024 judgment, Excel-A-Rate's position is as follows:
>
> (i) Does CB have a beneficial interest in the Premises?
>
> Excel-A-Rate agrees that this was an issue for the court to decide.

(ii) If CB does have a beneficial interest in the Premises, what is the size of that interest?

Excel-A-Rate agrees this was an issue for the court to decide.

(iii) If CB does have a beneficial interest in the Premises does this rank in priority to the interests of:

(a) RB; and/or

(b) EAR in the Premises

Excel-A-Rate agrees that these were issues for the court to decide.

(iv) If CB does have a beneficial interest in the Premises is RB and/or EAR entitled, given the nature of that interest, to have the Premises sold in lieu of partition?

Excel-A-Rate agrees that this was an issue for the court to decide.

Issues for the court to decide not belonging to the trial judge's list

2. The issues to be determined not belonging to the judge's paragraph [9] list are as follows:

(i) Whether Excel-A-Rate is entitled to a money judgment against Mrs Blaney in respect of some or all of the ten personal guarantees that Mrs Blaney executed in favour of Excel-A-Rate as security for the borrowings of Ardcarmon Limited, the company of which Mrs Blaney was a director.

(ii) If so, what is the principal sum due to Excel-A-Rate.

(iii) If Excel-A-Rate is entitled to a money judgment against Mrs Blaney, whether Excel-A-Rate is also entitled, in addition to the principal sum due, to interest, and, if so, at what rate?"

Linked to the foregoing, it is further contended on behalf of Excel that the notice of appeal and respondent's notice combine to raise the following issues requiring adjudication of this court:

(i) The legality and enforceability of ten personal guarantees executed by CB in favour of Excel.

(ii) Whether the mortgage over the premises of 14 December 2017, the parties whereto were Excel and EB, was vitiated by undue influence.

(iii) Whether the DCP dated 6 December 2017, in respect of any beneficial interest of CB in the premises, executed by CB in favour of Excel, was vitiated by undue influence.

(iv) Whether CB has any beneficial interest in the premises and, if so, the extent thereof. Excel submits that the trial judge committed no error in answering this question affirmatively and measuring the interest at 35%.

(v) Whether (a) Excel has a valid and enforceable third ranking mortgage in respect of the premises for its total claim of circa £242,000 and (b) it has a valid and enforceable DCP giving it priority over CB's beneficial interest in the premises.

(vi) Whether the order for the sale of the premises is vitiated by error of law.

[iii] RB

(Verbatim)

> "Mr Bunting's position is that, at least insofar as his claim was concerned given that Mr Bunting was not involved in the Excel-A-Rate lending, the learned trial judge correctly identified the correct issues for determination. The Property was registered in the sole name of Mr Blaney hence it was necessary to first ascertain whether Mrs Blaney had a beneficial interest at all. If she did then the size of that interest had to be determined, then the question of whether that interest had priority over Mr Bunting's charge. Finally, if Mrs Blaney had a beneficial interest in the Property that was not subject to Mr Bunting's charge then Mr Bunting's alternative claim of sale in lieu of partition needed to be adjudicated upon."

XII. The Role of the Appellate Court

[49] The role and limitations of this appellate court are well settled. They were comprehensively addressed in the judgment of this court in *Kerr v Jamison* [2019] NICA 48, at paras [35]–[37]:

"[35] Some basic dogma must be recognised at this juncture. This is not a court of first instance. It is rather an appellate court. The adjectives perverse, irrational and aberrant have a legal grounding, being traceable to a series of principles to be derived from the decided cases. The jurisdiction of the Court of Appeal to review findings of both fact and law is clear. See for example *Ulster Chemists v Hemsborough* [1957] NI 185 at [186]– [7]. Where invited to review findings of primary fact or inferences the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility: see for example *Kitson v Black* [1976] 1 NIJB at 5–7. The review of the appellate court is more extensive where findings are made at first instance on the basis of documentary and/or real evidence. However, even where the primary facts are disputed the appellate court will not overturn the judge's findings and conclusions merely because it might have decided differently: *White v DOE* [1988] 5 NIJB 1. The deference of the appellate court will of course be less appropriate where it can be demonstrated that the first instance judge misunderstood or misapplied the facts. See generally *Northern Ireland Railways v Tweed* [1982] 15 NIJB at [10] - [11]."

[36] There is a valuable exposition of the role of this court in *Heaney v McAvoy* [2018] NICA 4 at [17]– [19]:

> "[17] Generally an appeal is by way of rehearing. The rehearing is conducted by way of review of the trial, including any documentary evidence, and the trial testimony is not re-heard. In most appeals the hearing consists entirely of submissions by the parties and questions put to the parties by the judges. New evidence is not generally admissible unless it can be shown that it is relevant and that the evidence could not with reasonable diligence have been brought before the original trial.
>
> [18] The Court of Appeal is entitled to review findings of fact as well as of law but the burden of proof is on the appellant to show that the trial judge's decision of fact is wrong. On a review of findings made by a judge at first instance, the

> rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The first instance hearing on the merits should be the main event rather than a try-out on the road to an appeal.
>
> [19] Even where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and contemporaneous documents without oral testimony, the first instance judgment provides a template and the assessment of the factual issues by an appellate court can be a very different exercise. Impressions formed by a judge approaching the matter for the first time may be more reliable than the concentration on the appellate challenge to factual findings. Reticence on the part of the appellate court, although perhaps not as strong where no oral evidence has been given, remains cogent (see *DB v Chief Constable* [2017] UKSC 7)."

The judgment continues at [20]:

> "The foregoing principles are clearly of material significance in this case. The trial judge had the advantage of hearing the oral evidence of the appellants on the Tomlin Order issue. He considered the appellants to be both unreliable historians eager to mould the facts to their objective as opposed to telling the unvarnished truth. He gave examples in respect of the Order that they said the Court of Appeal had made and the alleged admission by their former solicitor that he was guilty of misrepresentation. There is no indication that the judge did not take all the circumstances surrounding the evidence into account, that he misapprehended the evidence or that he had drawn an inference which there was no evidence to support. In light of the judge's conclusions we see no basis upon which we could interfere with his refusal to set aside the Tomlin Order."

[37] This was noted and applied in a comparatively recent decision of this court: *Herron v Bank of Scotland* [2018] NICA 11 at [24]. This court's formulation of the correct

approach in *Heaney v McAvoy* took cognisance of the guidance contained in *DB v Chief Constable of PSNI* [2014] NICA 56 at [78]– [80]. There Lord Kerr stated at [80]:

> "The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent."

To paraphrase, reticence on the part of an appellate court will normally be at its strongest in cases where the appeal is based to a material extent on first instance findings based on the oral evidence of parties and witnesses.'"

[50] In *Breslin v Murphy* [2013] NICA 75 this court, differently constituted, stated at para [8]: "…The principles may be summarised briefly as follows:

(a) Time and language do not permit exact expression of judicial findings and are surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (see Lord Hoffman in Brogan v Medeva plc [1996] 38 BMLR).

(b) Where there is no misdirection by the judge on an issue of fact conclusions on issues of fact are to be presumed correct and will only be reversed if the Court of Appeal is "convinced his view is wrong."

(c) It must be clearly shown that the judge did not take all the circumstances and evidence into account, misapplied evidence or drew an inference which there was no evidence to support.

(d) A judge's judgment must be read in bonam partem.

(e) Provided he deals with the substantial issues in the case and reaches supportable factual conclusions and does not neglect to take account of matters that might affect those conclusions his findings on disputed facts cannot be disturbed."

XIII. CB's First Ground of Appeal: the Beneficial Interest Issue

[51] CB's first ground of appeal has the following series of purely factual ingredients: she asserts that she was the owner of another dwelling house (Wynchurch Park, Belfast); she further asserts that the premises were acquired pursuant to an

agreement between CB and EB that (a) CB would sell Wynchurch Park, (b) the proceeds would be devoted to purchasing the premises and (c) CB and EB would become joint owners of the premises; the final assertion being that CB proceeded to sell Wynchurch Park and the proceeds of sale were directed to the purchase of the premises.

[52] The second core element of this ground of appeal has the following factual assertions: CB has lived all her married life in the premises; she continued to work until 2006, when her third child was born; in giving up her work she relinquished her right to earn her own savings and to generate her own pension and sacrificed her career progression; the result being that her pre-existing 50% equitable interest if anything increased. Summarising, this ground of appeal focuses on (a) events preceding and surrounding the sale of Wynchurch Park and the purchase of the premises and (b) events thereafter involving CB, her family and the premises.

[53] As regards the other two participating parties, the brief submission on behalf of Excel is that the trial judge committed no error in either determining that CB has a beneficial interest in the premises or in measuring this interest at 35%. The submissions on behalf of RB, who has not pursued any appeal or cross - appeal, are more elaborate. His central submission is that there is no basis for interference by this court with either (a) the trial judge's assessment that CB has a 35% beneficial interest in the premises or (b) the judge's determination that an order for sale of the premises with a stay of eight weeks should be made. The submissions of Mr Fletcher, of counsel, draw attention to one particular – and uncontested – aspect of the factual matrix, namely EB had purchased the premises before he was married to CB and before CB had sold her dwelling house at Wynchurch Park. It is further submitted that the trial judge's self-directions in law are unimpeachable and that he made no material error of fact. The breadth of the discretion available to the trial judge is also emphasised.

XIV. CB's First Ground of Appeal: Governing Legal Principles

[54] A brief preface is appropriate. We refer to, without repeating, our rehearsal of the relevant evaluative assessments and material findings of fact by the judge in paras [36] – [47] above. The judge observed that a person such as CB typically (though not exhaustively) establishes a beneficial share in the ownership of premises by proving that she is a beneficiary under a common intention constructive trust. The judge then embarked upon the task of identifying the legal principles to be applied.

[55] There is a lengthy line of high level authority, all of which was traced by the trial judge: *Petitt v Petitt* [1970] AC 777; *Gissing v Gissing* [1971] QC 886; *McFarlane v McFarlane* [1972] NI 59; *Lloyds Bank v Rosset* [1991] 1 AC 107 and, ultimately, *Stack v Dowden* [2007] 2 AC 432. A review of these decisions illuminates the capacity of the common law to evolve with the passage of time, responding to new or altered social conditions.

[56] While *Stack* is factually different from the present case, Baroness Hale's composition of the following inexhaustive list of factors is of general application:

(a) Any advice or discussions at the time of the transfer which illuminated the parties' intentions;

(b) The reason why the property was acquired in the parties' joint (or single) names;

(c) The purpose for which the house was acquired;

(d) The nature of their relationship;

(e) Whether they had children for whom they both had responsibility to provide a home;

(f) How the parties arranged their finances both initially and subsequently; and

(g) How the parties discharged the outgoings of the property and other household expenses.

Examples of other factors which may be taken into account are offered in *Snell's Equity* (34th ed), para 25 - 043.

[57] Consonant with the theme of developing the law, Lord Walker made the following notable contribution, at para [34]:

> "In those cases (it is to be hoped, a diminishing number) in which such examination is required the court should, in my opinion, take a broad view of what contributions are to be taken into account. In *Gissing v Gissing* [1971] AC 886, 909G, Lord Diplock referred to an adjustment of expenditure "referable to the acquisition of the house." 'Referable' is a word of wide and uncertain meaning. It would not assist the development of law to go back to the sort of difficulties that arose in connection with the doctrine of part performance, where the act of part performance relied on had to be "uniquely referable" to a contract of the sort alleged…"

[58] Some commentary is appropriate at this juncture. One of the central themes arising from these passages and other passages in the speeches of their lordships is that of fact sensitivity. In short, every case belonging to this field will be intensely and unavoidably fact sensitive. The exercise of applying the relevant legal principles must be preceded by appropriate findings of fact. A second theme draws attention to the role of the trial judge. Fundamentally, in every case of this kind the question for the trial judge is whether there exists, in the judge's estimation, an evidential

foundation sufficient to warrant the making of the relevant inference. This formulation at once brings to mind the concepts of judicial discretion, judicial evaluative assessment and the degree of deference to be afforded by an appellate court to the trial judge: see para [49] above. The factors considered appropriate by the court in each fact sensitive individual case serve to inform both the enquiry as to common intention (the beneficial ownership issue) and, where relevant, the measurement of the parties' beneficial shares in the ownership of the disputed property.

[59] The jurisprudence at the highest judicial level continued to evolve. In *Jones v Kernott* [2011] UKSC 53, the Supreme Court took the opportunity to revisit *Stack v Dowden*. As recorded by Lord Walker and Lady Hale, in a joint judgment, at para [2], the Supreme Court set itself the task of providing "*some clarification*" of the principles laid down in *Stack v Dowden* in a context where neither party was suggesting departure.

[60] The Supreme Court reaffirmed certain well-established dogma, namely the principle that equity aligns with the law and, in this case, both legally and in terms of equity, the husband and wife were considered joint tenants. However, the court held that this presumption can be rebutted by demonstrating either:

(a) that the parties had a distinct shared intention at the time of acquiring the property, or

(b) that they subsequently developed a shared intention to alter their respective shares.

[61] Furthermore, in situations where it is evident that either (i) the parties did not originally intend to jointly own the property, or (ii) they had altered their initial intention but there is no direct or inferred evidence to determine their specific intentions regarding the property shares, the court will determine what it considers to be a fair share for each party based on their overall interactions and dealings related to the property.

[62] The majority confirmed that while the starting point in cases of the purchase of the family home in joint names is that of joint tenancy it is different in cases where the property is bought in the name of one party only. The Supreme Court, by a majority, ruled that the following principles apply:

(i) the starting point where a family home is bought in joint names is that they own the property as joint tenants in law and equity;

(ii) that presumption can be displaced by evidence that their common intention was, in fact, different, either when the property was purchased or later;

(iii) common intention is to be objectively deduced (inferred) from the conduct and dealings between the parties;

(iv) where it is clear that they had a different intention at the outset or had changed their original intention, but it is not possible to infer an actual intention as to their respective shares, the court is entitled to impute an intention that each is entitled to the share which the court considers fair having regard to the whole course of dealing between them in relation to the property; and

(v) each case will turn on its own facts; financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended or fair: para [51].

[63] This discrete field of the law has consistently been marked by much debate, as the majority in *Jones* recognised. Thus, it comes as no surprise that the Supreme Court was narrowly divided, with two dissenting judgments. For the purposes of this appeal, the decision in *Jones*, binding on this court by virtue of the doctrine of precedent, marks the end of the jurisprudential trail pertaining to CB's first ground of appeal.

[64] *Jones* highlights the importance of considering the entire course of dealings between the parties and their contributions to the disputed property. It also underscores the flexibility of constructive trusts (previously noted judicially) in achieving an equitable outcome. Furthermore, it reiterates the factors of the specific facts and circumstances and the conduct of the parties in dispute, already noted in this judgment.

XV. CB's First Ground of Appeal Determined

[65] The complaint enshrined in the first of CB's grounds of appeal is that the trial judge's assessment that she had a beneficial interest in the premises to an extent of (only) 35% is "… unsupported by the evidence". Against the background of the review of the first instance judgment which we have conducted above and our exposition of the framework of relevant legal principle, we resolve this ground of appeal in the following way.

[66] The trial judge's consideration of the relevant jurisprudence, in particular the decided cases binding upon him as a matter of precedent, and his associated self-directions on the law were the subject of exhaustive exposition by him, at paras [24] – [80] of his judgment. Any attempted digest of these passages is, inevitably, no adequate substitute for careful reading.

[67] In our judgement, the trial judge's self-directions in law on the first and second issues to be determined by him, namely whether CB had a beneficial interest in the premises and, if "yes", the extent of such interest, are flawless. In short, no relevant binding authority was neglected, no legal principle to be derived from binding

authorities was overlooked, misunderstood or distorted and no immaterial principle of law intruded. Thus, the trial judge's construction of the legal framework governing what he had to decide was impeccable.

[68] The next step for this appellate court entails consideration of the formulation of this ground of appeal: see para [22] (i) above. CB's contention is that the trial judge's assessment of a 35% beneficial interest in the premises was "… unsupported by the evidence". This formulation raises the question of the threshold for intervention by this court. This discrete issue is well settled, by binding authority: see para [55] supra.

[69] The evidence bearing on the first and second issues before the judge – see para [9] above – emanated from CB and EB. The judge expressed significant reservations about this evidence, as noted above. Furthermore, he made material findings of fact, some of which were positively favourable to CB. In addition, there is no sustainable suggestion that the judge regarded, misunderstood or distorted any material evidence. Nor is it contended that his determination of the beneficial interest issue was, having regard to the evidence, one which no reasonable judge could have properly made Furthermore, as stated in *Kerr v Jamison* (supra) at para [35]:

> "Where invited to review findings of primary fact or inferences, the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility …."

[70] We consider that, properly analysed, this ground of appeal resolves to a mere disagreement with an exercise of judicial evaluative assessment on the part of the trial judge. By well-established principle, a simple disagreement of this kind does not provide a valid ground of appeal to this court: and see also our sister judgment at [2025] NICA 67.

[71] For all of the preceding reasons, CB's first ground of appeal cannot succeed. This is the unanimous conclusion of this court.

XVI. CB's Second Ground of Appeal

[72] The second ground of appeal challenges the stay of execution of eight weeks applied by the trial judge to the order for possession and sale of the premises. CB contends that the judge should have granted a permanent stay. This is based upon the factor of the judge "… having held that the plaintiffs [Excel] were negligent in their dealings with the appellant".

[73] This ground of appeal invites a brief riposte on the part of this court. First, the judge's determination of the appropriate stay of execution lay comfortably within his margin of appreciation and did not entail any of the types of misdemeanour identified in paras [67] and [69] above or our sister judgment. Fundamentally, as highlighted by

Mr Fletcher, it entailed the exercise of a judicial discretion, deriving from Article 49 of the Property (NI) Order 1997 and the Partition Acts (see in this context *Larmour v Larmour* [2023] NICH 4 at [82]ff and *Official Receiver for Northern Ireland v O'Brien* [2012] NICH 12.)

[74] Second, the suggestion that the judge held that Excel was "negligent" in its dealings with CB is misconceived. There was no claim in negligence by CB against Excel at first instance: see our review at paras [4]–[6] and [16]–[19] above.

[75] Third, while the judge made certain findings adverse to Excel – see paras [45] - [46] above – none of these has the status of a finding of negligence on the part of Excel. Fundamentally, there is absent from the judgment a determination that Excel owed to CB a duty of care of specified content and a finding that Excel breached this duty in particularised respects.

[76] Fourth, and finally, the extent of the judge's duty in this respect was to take into account the judicially criticised conduct of Excel as one of several facts and factors to be weighed in exercising his discretion in measuring the appropriate length of stay of execution. There is no evidence, direct or inferential, that he failed to do so.

[77] For the reasons given CB's second ground of appeal is devoid of merit. This is the unanimous conclusion of this court. We would add that the sustainability of the findings of the trial judge adverse to Excel will be reviewed in a later section of this judgment in our consideration of Excel's respondent's notice.

XVII. CB's Third Ground of Appeal

[78] The third ground of appeal complains, in substance, that the trial judge failed to determine "a number of applications" by CB to bring third party proceedings against a firm of solicitors ("LC"). The documentary evidence makes clear that this firm was engaged to provide legal advice to CB, EB and the company in November/December 2017. While there is nothing in Excel's submissions addressing this ground of appeal, we consider that it invites the following response.

[79] First, in the first and third of the four actions/proceedings underpinning this appeal – see para [4] above – CB was at liberty prior to serving her defences to bring third party proceedings against the solicitors concerned without leave of the court: per RCJ Order 16, rule 1. In the second of the four cases, Excel's originating summons for possession against CB and EB, there is no provision in the relevant regime of the RCJ, Order 7, requiring CB to secure the leave of the court to bring third party proceedings. In the fourth of the four cases, this issue does not arise.

[80] Second, while before this court it is uncontentious that the issue of third party joinder was raised by CB at first instance, the cases proceeded to trial without any application by CB for an adjournment to facilitate third party proceedings.

[81] Third, there has at no stage been any impediment to CB bringing separate proceedings against the solicitors concerned. Fourth, this was not an instance of judicial oversight. On the contrary, the judge made clear that he did not consider third party proceedings appropriate. Fifth, this was a case management ruling. Such rulings engage a broad judicial discretion and belong to the outer limits of intervention by this appellate court: see our sister judgment and *Re Cameron* [2020] NIQB 11 at para [12]:

> "There are multiple judicial discretions exercisable in civil proceedings. Many of these are of the procedural variety. The exercise of the discretion to stay proceedings probably belongs to the outer limits of the notional spectrum. This has been recognised by the UKSC in *Prince Abdulaziz Bin* [2014] UKSC 64 at [13]:
>
> > "… Accordingly, at least as at present advised, I consider that the view taken by Vos J and the Court of Appeal, namely that a direction requiring personal signing of disclosure statements reflected the normal practice, was correct. However, that is not, in my view, the essential question when it comes to challenging paras 14 and 15 of the Order. The essential question is whether it was a direction which Vos J could properly have given. Given that it was a case management decision, it would be inappropriate for an appellate court to reverse or otherwise interfere with it, unless it was "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree" as Lewison LJ expressed it in *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743, para 51."

[82] The UKSC approved the approach of Lewison LJ in *Broughton v Kop Football (Cayman) Limited* [2012] EWCA Civ 1743 at [51]:

> "Case management decisions …Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit

> where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."

[83] Furthermore, the judge's ruling unfolded in a context of four conjoined cases, a multiplicity of parties and an abundance of factual and legal issues: in short, a paradigm setting for the engagement of of a broad judicial discretion. Fifth, and finally, the presentation of this ground of appeal has not engaged with the governing principles and we consider in any event that they militate against CB.

[84] For the reasons given we consider that the third ground of appeal has no merit. This is the unanimous conclusion of this court.

XVIII. Excel's Respondent's Notice: The 'Etridge' Line of Authority

[85] In its final incarnation this notice, having struggled to navigate the choppy waters traced above, focusses upon two positive judicial conclusions and two judicial omissions. The two positive judicial conclusions thus impugned are (i) the DCP of 06 December 2017 was vitiated by undue influence and (ii) the EB/Excel mortgage of 14 December 2017 was similarly contaminated. The omissions concern the absence from the first instance judgment of any determination of Excel's two guarantees claims (see para [4] above). We shall address the omissions first, with the preface that they did indeed occur.

[86] It is convenient to begin with *Barclays Bank v O'Brien* [1994] 1 AC 180, which features extensively in *Etridge*. The speech of Lord Browne-Wilkinson represented the unanimous decision of the House of Lords. At p186, the issue posed for the court was formulated thus:

> "Shortly stated the question is whether a bank is entitled to enforce against a wife an obligation to secure a debt owed by her husband to the bank where the wife has been induced to stand as surety for her husband's debt by the undue influence or misrepresentation of the husband."

[87] There, the matrimonial home was in the joint names of husband and wife and subject to a mortgage to a building society. To address the mounting financial difficulties of the husband's accountancy business, he and the society manager agreed that the business' overdraft limit would be increased to a sum almost five times greater than the original mortgage figure subject to (a) the husband's personal guarantee of the company's indebtedness and (b) a second charge on the matrimonial home. Next, the husband signed the guarantee and legal charge at the society's premises. The following day, the wife accompanied her husband to the same location where she signed the legal charge and a "side letter" (both signatures witnessed) in the presence of her husband and a clerical employee. She received no explanation of the effect of

the documents and no recommendation that she should obtain independent legal advice.

[88] Some years later, in the light of the company's ever increasing indebtedness to the society possession proceedings based on the legal charge were initiated. The wife raised the defences of undue influence and misrepresentation on the part of her husband. The trial judge found that the husband had misrepresented to the wife the amount of the financial advance (£60,000 rather than £135,000). Notwithstanding, he made an order for possession against the wife, holding that the society could not be held responsible for her husband's misrepresentation. As the case proceeded through the appellate stages, the wife's defence was based on misrepresentation only.

[89] The wife was successful at both appellate stages. Lord Browne-Wilkinson highlighted the settled legal rule that where a wife has been induced to enter into the relevant transaction by her husband's misrepresentation, her equity to set aside the transaction will be enforceable against the creditor if either the husband was acting as the creditor's agent or the creditor had actual or constructive notice: at p187. He described these, in shorthand, as the "agency theory" and the "special equity theory". His review of the authorities yielded the analysis that the law in this sphere had been founded on obscure and possibly mistaken foundations, giving rise to artificial distinctions and conflicting decisions, continuing at p195:

> "In my judgement, your lordships should seek to restate the law in a form which is principled, reflects the current requirements of society and provides as much certainty as possible."

[90] Rejecting the "special equity" theory, Lord Browne-Wilkinson continued, at p195:

> "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…
>
> … 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 enquiry as to the circumstances in which she agreed to stand surety.*"
>
> [Emphasis added.]

A creditor is thus put on enquiry where two conditions are satisfied:

> "(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 follows that, unless the creditor who is put on enquiry 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."

[91] Lord Browne-Wilkinson then addressed the question of the "reasonable steps" to be taken by the creditor. The action thus required of the creditor will be –

> "… to take steps to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice."
> (at p196)

His Lordship considered that these steps should be taken at a private meeting attended by the wife (alone) and a representative of the creditor (a requirement which the House subsequently erased in *Etridge:* infra). Lord Browne-Wilkinson considered that this development of the principles of constructive notice –

> "… will hold the balance fairly between on the one hand the vulnerability of the wife who relies implicitly on her husband and, on the other hand, the practical problems of financial institutions asked to accept a secured or unsecured surety obligation from the wife for her husband's debts."
> (at p197)

[92] Lord Browne -Wilkinson expressed the new rule in these terms:

> "In the normal case, a financial institution will be able to lend with confidence in reliance on the wife's surety obligation provided that it warrants her (in the absence of the husband) of the amount of her potential liability and of the risk of standing surety and advises her to take independent advice."

Notably, the House specifically rejected the argument that this would impose an excessive burden on financial institutions.

[93] There are two further noteworthy features of the speech of Lord Browne-Wilkinson. At p199 he stated:

> "…. Unless there are special exceptional circumstances, a creditor will have taken such reasonable steps to avoid being fixed with constructive notice if …… [as per above]."

He added:

> "I should make it clear that in referring to the husband's debts I include the debts of a company in which the husband (but not the wife) has a direct financial interest."

The wife was therefore considered to be entitled as against the bank to set aside the legal charge on the matrimonial home securing her husband's liability to the bank.

[94] Within less than a decade, the House revisited the main issues addressed in *O'Brien* in *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773. This case featured another dimension of the typical scenario, with the spotlight switching to the lending financial institution. As Lord Bingham observed, at para [2], the transactions giving rise to the conjoined appeals were "… commonplace but of great social and economic importance". There were eight conjoined appeals. Each of the cases had its origins in 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 he carried on business. Subsequently the wife claimed that she had signed the relevant charge under the undue influence of her husband. In seven of the eight appeals the bank pursued an order for possession of the matrimonial home, with the wife raising the defence that the bank had been on notice that her concurrence in the underlying transaction had been procured by her husband's undue influence.

[95] The House of Lords decided, first, that where a wife sought to impugn a transaction into which she had entered on the ground of her husband's undue influence their relationship did not fall within a special category of case where an irrebuttable presumption of trust and confidence arose. However, if she was able on the facts of the particular case to establish that she had placed trust and confidence in her husband in the management of her financial affairs and that the impugned transaction was not explicable in the ordinary way she could rely on a presumption, rebuttable, which, as an evidential forensic tool, shifted the burden of proof to her husband.

[96] Since the fortunes of husband and wife were ordinarily bound up together, a guarantee given by the wife with a charge on her interest in the matrimonial home to secure her husband's debts was not plainly to her disadvantage so as to be explicable only on the basis that the transaction had been procured by his undue influence. Thus,

in such cases, some additional factual ingredient would be required in order to establish undue influence.

[97] The next question of law determined was that of when the bank would be "put on inquiry" of possible undue influence. It is in this context that the stage 1/stage 2 analysis is engaged. Here, it is necessary to consider [44]–[49] of the leading judgment of the House, that of Lord Nicholls:

> "[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 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."
>
> *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."*
>
> [Emphasis added.]

Pausing, we consider that this last sentence applies in full to the present case: CB and EB were wife and husband; CB's status in relation to the ten guarantees was that of surety wife; the debts which she was guaranteeing were those of a company whose shareholding was fully owned by her husband; and these were, therefore, "her husband's debts".

[98] In the single sentence highlighted, Lord Nicholls formulated the test applicable in husband/wife cases in admirably simple terms. He continued at para [46]:

> "The test should be simple and clear and easy to apply in a wide range of circumstances."

Then repeating:

> "…. A creditor is put on enquiry when a wife offers to stand suety for her husband's debts".

The lack of simplicity in the approach espoused by the Court of Appeal was a main reason for his disagreement with their decision. It is instructive to examine briefly what that approach was.

[99] First, in the judgment of Stuart-Smith LJ, expressing the unanimous decision of the Court of Appeal, the context is helpfully illuminated at para [3]:

> "Unfortunately, as the number of cases which have come before the courts since *O'Brien's* case demonstrates, the protection which ought to be afforded to the wife by the provision of independent legal advice has in many cases proved elusory. The advice which the wife has received has often been perfunctory, limited to an explanation of the documents and yet inadequate to dispel her misunderstanding of the real extent of the liability which she was undertaking and not directed to ensure that she was entering into the transaction of her own free will rather than as the result of illegitimate pressure from her husband or blind trust in him."

[100] The court considered Lord Browne-Wilkinson's statement at page 196 (supra) to comprise two factual conditions: where condition (a) is satisfied, the bank is put on enquiry if, but only if, it 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: per Stuart-Smith LJ at para [36].

[101] In *Etridge*, the House of Lords disagreed with the Court of Appeal's interpretation. Per Lord Nicholls at para [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."

In particular, the approach of the Court of Appeal had been too narrow and restrictive.

[102] Notably, all of the appeals in *Etridge* pre-dated the decision in *O'Brien*. Thus, as the Court of Appeal noted at paras [39]–[40], none of them involved a meeting between a bank official and the surety wife. Stuart-Smith LJ cautioned that a personal interview of this kind "is likely to expose the bank to far greater risks than those from which it wishes to be protected". He further noted that post-*O'Brien* banks had contented themselves with following the Code of Banking Practice by requiring the wife (a) to obtain independent legal advice and (b) to provide written confirmation that she had done so.

[103] At paras [47]–[49], Lord Nicholls gave consideration to three other surety situations, namely the husband who stands surety for his wife's debts, joint loans to a husband and wife and, finally, the surety wife who guarantees the debts of a company whose shares are held by husband and wife. We do not dilate on any of these situations since none of them applies to the present appeals. It suffices to highlight that nothing in these passages detracts from the simple rule enunciated by Lord Nicholls in the preceding passages. Quite the contrary: in paras [46] and [48] Lord Nicholls repeated the rule, while describing the case of a surety wife guaranteeing her husband's debts as "a straightforward case".

[104] On this topic, Lord Hobhouse, under the rubric "Put On Inquiry", stated, at para [110]:

> "The position therefore is that in relation to any guarantee by a wife of her husband's debts (or those of his company) the bank is put on inquiry and accordingly will have to respond unless it is to run the risk of finding that the guarantee and other security provided by the wife are unenforceable. If it becomes aware of any aggravation of the risk of undue influence, its response must take that into account. More will be required to satisfy it that the wife's agreement has been properly obtained."

I consider that Lord Hobhouse's formulation of the relevant rule, while expressed in terms different from those of Lord Nicholls, is in substance the same. There is no

inconsistency. It follows from the foregoing that Excel was "put on inquiry" as regards all ten of CB's personal guarantees.

[105] The third question of law determined in *Etridge* concerned the content of the "reasonable steps" duty on the bank in cases where the "put on inquiry" requirement is satisfied i.e. the "stage 2" issue. At paras [53]–[54] Lord Nicholls, drawing heavily on practical reality, formulated the "reasonable steps" principle:

> "My Lords, it is plainly neither desirable nor practicable that banks should be required to attempt to discover for themselves whether a wife's consent is being procured by the exercise of undue influence of her husband. This is not a step the banks should be expected to take. Nor, further, is it desirable or practicable that banks should be expected to insist on confirmation from a solicitor that the solicitor has satisfied himself that the wife's consent has not been procured by undue influence. As already noted, the circumstances in which banks are put on inquiry are extremely wide. They embrace every case where a wife is entering into a suretyship transaction in respect of her husband's debts. Many, if not most, wives would be understandably outraged by having to respond to the sort of questioning which would be appropriate before a responsible solicitor could give such a confirmation. In any event, solicitors are not equipped to carry out such an exercise in any really worthwhile way, and they will usually lack the necessary materials. Moreover, the legal costs involved, which would inevitably fall on the husband who is seeking financial assistance from the bank, would be substantial. To require such an intrusive, inconclusive and expensive exercise in every case would be an altogether disproportionate response to the need to protect those cases, presumably a small minority, where a wife is being wronged.
>
> …
>
> The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned."

[106] Lord Nicholls next addressed the question of what was actually required of a bank in the discharge of its duty to take reasonable steps to satisfy itself that the practical implications of the proposed transaction had been meaningfully "brought home" to the wife. At para [55] he rejected unequivocally the suggestion that the bank had to provide the necessary information directly to the wife (e.g. via a meeting). Rather, and summarising:

> "[54] The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned."

Adding:

> "[56] I shall return later to the steps a bank should take when it follows this course. Suffice to say, these steps, together with advice from a solicitor acting for the wife, ought to provide the substance of the protection which *O'Brien* intended a wife should have. Ordinarily it will be reasonable that a bank should be able to rely upon confirmation from a solicitor, acting for the wife, that he has advised the wife appropriately.
>
> [57] The position will be otherwise if the bank knows that the solicitor has not duly advised the wife or, I would add, if the bank knows facts from which it ought to have realised that the wife has not received the appropriate advice. In such circumstances the bank will proceed at its own risk."

[107] At para [79], Lord Nicholls, revisiting this issue, spelled out the detail of the content of the bank's "reasonable steps" duty:

> "***Obtaining the Solicitor's Confirmation***
>
> [79] I now return to the steps a bank should take when it has been put on inquiry and for its protection is looking to the fact that the wife has been advised independently by a solicitor.
>
> (1) … Since the bank is looking for its protection to legal advice given to the wife by a solicitor who, in this respect, is acting solely for her, I consider the bank should take steps

to check directly with the wife the name of the solicitor she wishes to act for her. To this end, in future the bank should communicate directly with the wife, informing her that for its own protection it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. She should be told that the purpose of this requirement is that thereafter she should not be able to dispute she is legally bound by the documents once she has signed them. She should be asked to nominate a solicitor whom she is willing to instruct to advise her, separately from her husband, and act for her in giving the necessary confirmation to the bank. She should be told that, if she wishes, the solicitor may be the same solicitor as is acting for her husband in the transaction. If a solicitor is already acting for the husband and the wife, she should be asked whether she would prefer that a different solicitor should act for her regarding the bank's requirement for confirmation from a solicitor. The bank should not proceed with the transaction until it has received an appropriate response directly from the wife.

(2) … the bank must provide the solicitor with the financial information he needs for this purpose. Accordingly it should become routine practice for banks, if relying on confirmation from a solicitor for their protection, to send to the solicitor the necessary financial information. What is required must depend on the facts of the case. Ordinarily this will include information on the purpose for which the proposed new facility has been requested, the current amount of the husband's indebtedness, the amount of his current overdraft facility, and the amount and terms of any new facility. If the bank's request for security arose from a written application by the husband for a facility, a copy of the application should be sent to the solicitor. The bank will, of course, need first to obtain the consent of its customer to this circulation of confidential information. If this consent is not forthcoming the transaction will not be able to proceed.

(3) Exceptionally there may be a case where the bank believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will. If such a case occurs the bank must inform the

> wife's solicitors of the facts giving rise to its belief or suspicion.
>
> (4) The bank should in every case obtain from the wife's solicitor a written confirmation to the effect mentioned above"."

[108] Para [79], read as a whole, depicts what Lord Nicholls clearly considered to be the ordinary, typical case. This is confirmed particularly by subparagraph (3) where Lord Nicholls identifies what he considers to be an "exceptional" case viz one where the bank believes or suspects that the wife has been misled by her husband or is not entering into the relevant transaction freely. Lord Nicholls further made emphatically clear that imputation to the bank of knowledge of the advice provided by a solicitor to the wife is misconceived: see paras [77]–[78]. This aspect of the decision of the Supreme Court, in common with the rest, is imbued with much pragmatism.

[109] Summarising, the essential ingredients of the bank's "reasonable steps" duty in the ordinary case are fourfold:

(i) Communicating directly with the wife, informing her that the bank will require written confirmation from a solicitor in specified terms and explaining the purpose of this requirement, further requesting her to nominate a solicitor for this purpose.

(ii) Awaiting an "appropriate response directly from the wife".

(iii) Providing the wife's solicitor with the "necessary financial information", in the terms explained.

(iv) Receiving from the wife's solicitor of the "written confirmation" in the terms specified in (i).

[110] Pausing, while there is a substantial degree of symmetry between *O'Brien* and *Etridge*, the latter decision of the House illuminates and develops the former. Arguably the main distinction between the two is the clarification provided by Lord Nicholls that a meeting between the lender and the surety wife in order to discharge the lender's obligation is not required: see para [55]. To this extent, it may be said that, in the lender's favour, *Etridge* modified the "reasonable steps" which it must take. Second, as emphasised by Lord Bingham at para [3], the steps required of the lender are "minimum" requirements which must be observed.

[111] Third, Lord Bingham expressly agreed with the opinions of both Lord Nicholls and Lord Scott, adding that if and insofar as those opinions contain any "significant difference of legal principle applicable to these cases" –

> "… it is plain that the opinion of Lord Nicholls commands the unqualified support of all members of the House."

[112] Lord Hobhouse, in turn, expressed his unqualified concurrence with Lord Nicholls, at para [100]. Ultimately, therefore, the opinion of Lord Nicholls is the authoritative one. I would add that if there is any discernible lack of symmetry in the opinions of the five members of the House, it is to be found in that of Lord Clyde. However, no argument based on the opinion of Lord Clyde has been developed before this court.

[113] Lord Hobhouse addressed the "reasonable steps" issue at paras [116] and [122]:

> "… I accept that the best solution is that adopted by Lord Nicholls in his speech. The solicitor in communicating with and advising the wife should be doing so solely as her solicitor. The solicitor's certificate which the bank asks for is something which the bank is asking the wife to procure and which the solicitor is providing as her solicitor. I am satisfied that, provided that the guidance which Lord Nicholls gives (in the paragraphs which I have identified at the outset of this speech) is complied with, the wife will have a reasonable chance of receiving the protection she may need. But it will be appreciated that an essential feature of the scheme is that the wife has to be aware of what is going on, that the bank is asking for the certificate and why, that she is being asked to instruct a solicitor to advise her and that she is being asked to authorise the solicitor to provide the certificate
>
> … *If the solicitor does not provide the statement and certificate for which the bank has asked, then the bank will not, in the absence of other evidence, have reasonable grounds for being satisfied that the wife's agreement has been properly obtained. Its legal rights will be subject to any equity existing in favour of the wife."*
>
> [Emphasis added.]

These passages must be read in conjunction with an earlier passage in the judgment of Lord Hobhouse at para [100]:

> "To the end that lenders, those advising parties and, indeed, judges should have clear statements of the law on which to base themselves, I will state at the outset that in this speech I shall agree with my noble and learned friend Lord Nicholls and, specifically, the guidance which he gives concerning the role of the burden of proof, the duties

of solicitors towards their clients (paragraphs 64-68, and paragraph 74), and the steps which a lender which has been put on enquiry should take paragraph 79). I would stress that this guidance should not be treated as optional, to be watered down when it proves inconvenient (as may be thought to have been the fate of Lord Browne-Wilkinson's equally carefully crafted scheme). Nor should it be regarded as something which will only apply to future transactions; it has represented, and continues to represent, the reasonable response to being put on enquiry. The purpose of guidance is to provide certainty for those who rely upon and conform to the requirements of that guidance: it is not a licence to excuse unreasonable conduct on the ground that no judge had previously told them in express terms what was not an adequate response. If the relevant solicitor was not in fact acting for the wife and had not been held out by the wife as doing so, the conduct of that solicitor will not avail the lender. Once a lender has been put on enquiry, mere assumptions on the part of the lender will not assist him."

[114] Lord Scott expressed the lender's duty at para [191] (1) – (4) thus:

"(1) The issue as between the surety wife and the lender bank is whether the bank may rely on the apparent consent of the wife to the suretyship transaction.

(2) If the bank knows that the surety wife's consent to the transaction has been procured by undue influence or misrepresentation, or if it has shut its eyes to the likelihood that that was so, it may not rely on her apparent consent.

(3) If the wife's consent has in fact been procured by undue influence or misrepresentation, the bank may not rely on her apparent consent unless it has good reason to believe that she understands the nature and effect of the transaction.

(4) Unless the case has some special feature, the bank's knowledge that a solicitor is acting for the wife and has advised her about the nature and effect of the transaction will provide a good reason for the purposes of (3) above. That will also be so if the bank has a reasonable belief that a solicitor is acting for her and has so advised her. Written confirmation by a solicitor acting for the wife that he has so

> advised her will entitle the bank to hold that reasonable belief."

This, broadly, chimes with Lord Nicholls at paras [77]–[78] and Lord Hobhouse at para [122].

[115] In the preceding paragraphs, I have addressed what is commonly described as "*Etridge* Stage 2" or the "*Etridge* protocol". I shall undertake infra the task of applying these principles to each of the transactions belonging to the matrix of this appeal. Before doing so, it is necessary to consider the recent decision of the Supreme Court in *Waller–Edwards v One Savings Bank* [2025] UKSC 22, which post-dates the judgment under appeal to this court. In *Waller-Edwards*, the Supreme Court, unanimously, reversed the English Court of Appeal.

[116] It is appropriate to begin with the single judgment of the Court of Appeal at [2024] EWCA Civ 302. In *Waller–Edwards*, it was accepted that the husband had exercised undue influence over the wife in procuring a matrimonial home remortgaging transaction executed by both. The Court of Appeal identified two categories of case:

(a) A "*surety*" case viz a non-commercial situation where, for example, the borrowers took secured borrowing on jointly owned property to pay off the debts of one of them – in such cases the lender would normally have constructive notice of the possibility of one borrower being unduly influenced by the other and would, therefore, be put on enquiry in *Etridge* terms.

(b) A "*hybrid*" case, where a loan was procured for the joint non-commercial purposes of two borrowers in a relationship: in such cases the lender would not normally have constructive notice of the possibility of one borrower being unduly influenced by the other and, therefore, would not be put on enquiry. In this type of case, unlike the first, the purpose of the loan is to benefit both persons.

[117] The Court of Appeal held:

(a) In a joint borrowing "surety" case the lender is put on enquiry only if aware that the loan is for the husband's purposes only.

(b) In the case of a "hybrid" non-commercial transaction, it is incumbent on the court to examine the transaction as a whole in order to decide whether, as a matter of fact and degree, the loan was made for the purposes of the borrower with the debts and not the joint purposes of the couple.

[118] At para [7] the court expressed the view that the central issue to be determined was novel, concerning –

> "… the situation in which the borrowers seek a loan partly for their joint non-commercial purposes and partly for the benefit of one borrower only (described before us as a 'hybrid' case)."

[119] On the facts, this was a "hybrid" case as approximately 10% of the loan was for the husband's sole benefit (to discharge personal debts) whereas around 90% of the loan was for the joint purposes of the couple (to purchase jointly a new home). The following short passage in para [36] encapsulates the unanimous decision of the court:

> "…. The approach that requires the court to look at the transaction as a whole and to decide on the facts whether it was really being made for the purposes of the borrower with the debts as distinct from their joint purposes accords with the substance of Lord Nicholl's speech in *Etridge*."

[120] On appeal, the Supreme Court reaffirmed the rule that banks and other lenders are put on inquiry that one party's agreement to the transaction may have been obtained by undue influence in every case where on the face of a three-way transaction, the wife, or other vulnerable partner in the relationship, is offering to stand surety for her husband's debts, or vice versa.

[121] The Supreme Court gave specific consideration to a particular type of transaction which it described as non-commercial loans sought by a husband and wife that are, on their face, partly for their joint benefit and partly for either the husband or wife's sole benefit and therefore to that extent apparently to the financial disadvantage of the other. This sort of transaction is described as a non-commercial "hybrid" transaction. It was necessary to identify the correct legal test for deciding when a lender is put on inquiry in a non-commercial hybrid loan transaction.

[122] The Supreme Court espoused the following bright line test: where the relationship is non-commercial, if it appears on the face of the transaction that one party to the relationship is offering or has offered to stand surety to any extent more than a de minimis extent for the other and, therefore, apparently to the surety's financial disadvantage, the lender is put on inquiry. The steps set out in the *Etridge* protocol must then be taken. See paras [3]–[5]. It follows that if a lender thus put on inquiry fails to follow the *Etridge* protocol the vulnerable party is entitled to set aside the transaction as against the lender.

[123] The fact and degree test adopted by the Court of Appeal was considered by the Supreme Court to be fallacious. The court observed that the level of risk is infinitely variable and not for the lender to judge on some fact-specific basis: para [52]. The Court of Appeal was also considered to have erred in focussing on the purpose to which the loan in question is devoted. The relevant question is not about who benefits from the money loaned. That is a matter which will not usually be apparent to the lender. Rather, the relevant question in this context is whether one borrower has, for

no personal gain, taken on a legal liability for which they are otherwise not responsible. That is the only relevant question and should be fully apparent from the face of the proposed transaction: para [53].

[124] The Supreme Court took the opportunity to explain and reinforce *Etridge No 2* as follows. *Etridge No 2* confirmed that surety transactions are more likely than others to be tainted by undue influence because on the face of the transaction the vulnerable party takes on a legal liability for the other's debt for no apparent personal gain. On the other hand, the risk in a joint borrowing transaction is much lower because, on the face of it, both parties are jointly liable for the debt and so both stand to benefit from it: paras [46]-[47].

[125] The Supreme Court further highlighted that given the heightened risk of undue influence in surety transactions, it is proportionate to oblige banks to follow the *Etridge* protocol to avoid being fixed with notice of the undue influence. On the other hand, in a joint borrowing transaction the risk of undue influence is sufficiently low to conclude that it would be unduly burdensome to borrowers to require the bank to take any additional steps: paras [48]-[49].

[126] The Supreme Court also emphasised that the approach adopted in *Etridge No 2* is binary. Either a creditor is on notice of the risk of undue influence and, therefore, must follow the *Etridge* protocol, or the creditor is not thus on notice and no steps are required. There is no scope for a nuanced or fact-sensitive approach. Either there is, on the face of the non-commercial transaction, a surety element giving rise to a heightened risk of undue influence, or there is not.

[127] Finally, the Supreme Court observed that the test is clear, promotes certainty and, most significantly, is easy to apply effectively in all non-commercial hybrid transactions. Furthermore, the onus of inquiry can be discharged simply and inexpensively in accordance with the *Etridge* protocol: paras [55]-[57]. We consider that *Waller* explains, reinforces and develops the *Etridge* "put on inquiry" principles. It reaffirms *Etridge* in all respects material to this appeal. In short, the two decisions coexist, without contradiction.

XIX. Respondent's Notice: The Salient Factual Matrix

[128] I must now consider the respondent's notice further. The central issue which this raises is that the judgment and orders at first instance failed to determine Excel's claims against CB in the first and third cases for a money judgement based on the ten personal guarantees executed by her in favour of Excel as security for the borrowings of Ardcarmon. A further essential feature of Excel's case is the contention that the judgment of the court below failed to engage with certain material evidence, some of it undisputed. These contentions are interrelated. Both are correct.

[129] Certain material facts must be outlined. While the period of frenetic commercial activity involving (inter alios) Excel, CB, EB and Ardcarmon between

November/December 2017 and December 2018 invites particular scrutiny, the broader context begins with certain objectively incontestable, or uncontested, facts belonging to the preceding three-year period. These are the following.

[130] CB was appointed a director of the company on 29 August 2014 (ultimately resigning on 28 February 2019). On 3 July 2015, during the period of CB's directorship, a deed of mortgage was executed between the Bank of Ireland and the company. On the same date, a life policy of EB was assigned to the same bank. CB (together with EB) was, qua company director, a signatory of both instruments. Approximately one year later, in October 2016, the controversial EB/RB mortgage materialised (see infra). During this period, it is asserted by Excel, unchallenged, that CB was a signatory of multiple company commercial transactions.

[131] Against the foregoing background, it is necessary to detail the executed commercial instruments pertaining to the period November 2017 to November 2018:

[November/December 2017]

(i) The three hire agreements dated 24 November 2017.

(ii) The loan agreement dated 24 November 2017.

(iii) The first four personal guarantees executed by CB on the same date.

(iv) The deed of consent and postponement ("*DCP*") dated 6 December 2017 (Excel/CB/EB).

(v) The mortgage dated 14 December 2017 (EB/Excel).

[February – May 2018]

(vi) CB's fifth guarantee, dated 20 February 2018.

(vii) The hire agreement dated 23 February 2018 (Excel/Ardcarmon).

(viii) CB's sixth guarantee, dated 22 March 2018.

(ix) Two further hire agreements (Excel/Ardcarmon) dated 28 March 2018 and 9 April 2018.

(x) CB's seventh guarantee, dated 29 April 2018.

(xi) CB's eighth guarantee, dated 29 April 2018.

(xii) A further loan agreement dated 1 May 2018 (Excel/Ardcarmon).

[July – November 2018]

(xiii) CB's ninth guarantee, dated 23 July 2018.

(xiv) Three further loan agreements (Excel/Ardcarmon) dated 27 July, 1 August and 1 November 2018 respectively.

(xv) CB's tenth (and final) guarantee, dated 1 November 2018.

In passing, while EB also executed a series of personal guarantees during the same period it is unnecessary to detail these.

[132] From the immediately preceding table the pattern of commercial activities involving Excel, the Ardcarmon company, CB and EB emerges with some clarity. This unfolded during the three separate phases identified above. In short, in a series of attempts to keep the ailing Ardcarmon company business afloat during a period of approximately 12 months, there was a succession of loan agreements and equipment hire agreements, supplemented by a mortgage, a DCP and multiple guarantees. Excel, qua lender, was a party to all of these agreements. CB executed a total of ten personal guarantees in favour of Excel in respect of each loan and equipment hire agreement. The first and third of Excel's three claims against CB are based on these guarantees (para [4] supra).

[133] At this juncture, it is necessary to consider the evidence relating to the involvement of two firms of solicitors in November/December 2017, whom we shall describe as "LC" and "MC". The relevant solicitor in the firm of MC was "PM". This discrete, but important, chapter begins with a letter dated 8 November 2017 from Excel to EB relating to his application for a loan of £32,500, intimating (inter alia) that personal guarantees would be required of both EB and CB. This was repeated in a second letter of the same date, confirming that the loan application had been successful. In a third letter of the same date, addressed to CB, a "guarantee form (for signature)" was enclosed. The letter ended:

> "We would advise you to take your own independent legal advice before signing the Guarantee".

On the face of the same document, and following the last mentioned sentence, one finds this form of declaration:

> "I confirm that I have … taken independent legal advice …
>
> Signed: … Mrs Carmel Mary Blaney ... date: 24/11/17"

[134] Next, separate copies of the (first) loan agreement, each of them recording the security provided by the guarantees of EB and CB, were signed by EB and CB. On the same date, CB executed the first three of her ten guarantees, each relating to the first

three hire agreements. The next material development was the execution by CB of the fourth guarantee which is dated 8 November 2017. In the execution section, one finds CB's signature accompanied by the statement that the deed was executed by her in the presence of a solicitor ("PM") in the firm of MC. PM's signature, name, occupation and address are all detailed. It is appropriate here to interpose the observation that there is no dispute about any of the aforementioned facts.

[135] The involvement of the solicitor PM, just noted, is illuminated by a letter dated 17 November 2017 from Excel's solicitors to the firm of LC solicitors, containing (inter alia) the statement that CB "… will … require separate legal representation in respect for [sic] the guarantee to be entered into". Some days afterwards LC confirmed in writing that they would arrange for CB "… to have separate legal representation in the matter". A subsequent letter dated 27 November 2017 from LC to Excel confirmed that CB had received "independent legal advice" from PM. This letter enclosed a series of executed instruments. One of these was CB's fourth guarantee, while another is described as "mortgage document, in duplicate, duly executed by [EB]". The documentary evidence also includes a bill of costs transmitted by MC to LC, by letter dated 24 November 2017 (or 5 December 2017: the exact date is immaterial), relating to the legal advice provided by PM to CB on that date.

[136] The package of executed legal instruments in the first phase (i.e. November/December 2017) of extensive commercial dealings among the parties continued to expand. The DCP (Excel/CB/EB) materialised next, on 6 December 2017. This was directly linked to the first Excel/EB loan agreement and the Excel/EB mortgage (see para [131]). By this instrument, CB agreed to postpone any interest she may have in the premises so as to confer priority of interests on Excel:

> "It is a term of the loan that the rights of any occupier of the Property will be postponed to the rights of the Lender under the Mortgage …
>
> The Occupier [CB] is in occupation of the Property and has agreed to postpone such rights and interests as the Occupier may have or may acquire in the property …. to the rights to [sic] the Lender and to [sic] the Mortgage."

CB's signature was witnessed by "NM", another solicitor in the firm of LC.

[137] Next in sequence came the aforementioned deed of mortgage, dated 14 December 2017, the parties whereto were EB and Excel. By this deed the premises were mortgaged in favour of Excel, as further security for Excel in respect of EB's "secured liabilities", which were defined as "… all the monies now or at any time and from time to time due or owing to the lender by the mortgagor …" This signalled the conclusion of the first phase of the relevant commercial activities and associated legal instruments.

XX. The Deed of Consent and Postponement

[138] Excel's respondent's notice challenges the trial judge's conclusion that the DCP was vitiated by the undue influence exercised over CB by her husband, EB. This conclusion determined the third of the four issues in the judge's list at para [5] of his judgment.

[139] The impetus for the DCP was evidently Excel's realisation that CB was an occupier of the premises over which it was procuring a mortgage as security for monies it had loaned to EB/Ardcarmon and, therefore, a person with a possible equitable interest therein which could take priority over Excel's security. CB received legal advice concerning the DCP prior to execution and she signed it in the presence of her solicitor: see paras [134]–[135] above.

[140] In making his conclusion, the judge did not find any overt acts or instances of undue influence on the part of EB. His findings were that CB was "in thrall to" EB, had complete confidence in EB's ability to make the business venture successful and was "swept along by" her husband's enthusiasm. This was, therefore, undue influence of a subtle species. The judge did not find that EB's undue influence over CB was to be inferred. Rather, the linguistic term formulated by the judge was "the presumed undue influence of EB".

[141] A revisitation of some basic dogma is appropriate at this stage. This topic was considered recently by the Privy Council in *Nature Resorts v First Citizen's Bank* [2022] UKPC 10 where, in the joint judgment of Lord Briggs and Lord Burrows, one finds the following at para [10]:

> "Putting to one side illegitimate threats (which are nowadays better viewed as falling within the doctrine of duress: see *Times Travel (UK) Ltd v Pakistan International Airline Corpn* [2021] UKSC 40; [2021] 3 WLR 727, paras 8-9 and 89-90) undue influence is concerned with a situation where, by reason of the relationship between them, one party (B) has such influence over the other (A) that A does not exercise a free judgment, independent of B, in relation to the making of a transaction between A and B (or, in a three-party situation, between A and a third party, C)."

At para [11], the judgment emphasises that undue influence is unitary in nature:

> "Ever since *Allcard v Skinner* (1887) 36 Ch D 145, it has been commonplace to divide undue influence into two categories: actual and presumed. But in *Etridge* the House of Lords made clear that undue influence is a single concept. It does not have two different forms. The correct analysis of the two categories is that they refer to different

> ways of proving undue influence. Presumed undue influence refers to where the person alleging undue influence relies on an evidential presumption. Actual undue influence refers to where the person alleging undue influence relies on direct proof (of A's conduct, within a relationship with B, which led to B not exercising a free and independent judgment)."

[142] At para [12] the two essential requirements for establishing the rebuttable presumption of undue influence are formulated in these terms:

> "As *Etridge* also made clear, there are two requirements for establishing the (rebuttable) presumption of undue influence. First, there must be a relationship of influence. This may be established on the facts. But in respect of some relationships there is what is commonly referred to as an irrebuttable legal presumption (but is more appropriately referred to as a legal rule) that the relationship is one of influence (but note not undue influence). Examples of such relationships are doctor and patient (*Mitchell v Homfray* (1881) 8 QBD 587), spiritual adviser and follower (*Allcard v Skinner*), parent and young child (*Lancashire Loans Ltd v Black* [1934] 1 KB 380) and, of direct relevance to the facts of this case, solicitor and client (*Wright v Carter* [1903] 1 Ch 27). The second requirement is that the transaction must not be readily explicable on ordinary motives. The House of Lords preferred this test, which uses the words of Lindley LJ in *Allcard v Skinner*, to a test of whether the transaction was manifestly disadvantageous which had been put forward by Lord Scarman in *National Westminster Bank plc v Morgan* [1985] AC 686, 703-707. The underlying idea behind the test is that the nature and/or contents of the transaction must make one conclude, in the context of the relationship of influence, that, absent evidence to the contrary, undue influence has been exercised. A contract between A and B which is substantively very unfair to A stands on one side of the line: a Christmas present by A to B stands on the other side of the line."

[143] A shift in the burden of proof occurs where these two requirements are satisfied, as para [13] makes clear:

> "If those two requirements are satisfied, so that there is a presumption of undue influence, the burden of proof shifts and it is for the party seeking to uphold the transaction to

> rebut the presumption by showing that A was not acting under undue influence (ie that A exercised free and independent judgment) when entering into the transaction. Although neither necessary nor conclusive, the main method of rebuttal is to show that A obtained the fully informed and competent independent advice of a qualified person, most obviously a lawyer: see *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 and *Etridge*."

Finally, their Lordships emphasised that undue influence need not be tantamount to a civil wrong: para [15].

[144] Notably, the Privy Council did not identify any asymmetry between their approach and that of the House of Lords in *Etridge*. Indeed, the Privy Council majority observed, at para [1], that the law on undue influence had been "rigorously and helpfully analysed" in the earlier decision. In *Etridge*, on the issue of burden of proof, Lord Nicholls stated pithily at para [13]:

> "*Burden of Proof and Presumptions*
>
> …
>
> "[13] Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule."

Lord Nicholls continued:

> "The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case."

[145] Lord Hobhouse, for his part, made the subtle, but crucial, distinction between a relationship giving rise to a presumption of influence (on the one hand) and proof of undue influence (on the other). Where a "presumption" relationship exists, there is a presumption of influence, but no presumption of undue influence. See generally paras [103]–[104]. In the pithy words of Lord Hobhouse:

> "It is a matter of evidence"

Lord Hobhouse also specifically addressed the husband/wife relationship, at para [106]:

> "[In] cases concerning a wife's guarantee of her husband's debts … The guarantee is given by the wife at the request of the husband. The guarantee is not on its face advantageous to the wife, doubly so where her liability is secured upon her home. The wife may well have trusted the husband to take for her the decision whether she should give the guarantee. If he takes the decision in these circumstances, he owes her a duty to have regard to her interests before deciding. He is under a duty to deal fairly with her. He should make sure that she is entering into the obligation freely and in knowledge of the true facts. His duty may thus be analogous to that of a class 2(A) fiduciary so that it would be appropriate to require him to justify the decision. If no adequate justification is then provided, the conclusion would be that there had been an abuse of confidence. But any conclusion will only be reached after having received evidence. This evidence will inevitably cover as well whether there has in fact been an abuse of confidence or any other undue influence. The judge may have to draw inferences. He may have to decide whether he accepts the evidence of the wife and, if so, what it really amounts to, particularly if it is uncontradicted. *Since there is no legal relationship of trust and confidence, the general burden of proving some form of wrongdoing remains with the wife,* but the evidence which she has adduced may suffice to raise an inference of wrongdoing which the opposite party may find itself having to adduce evidence to rebut. If at the end of the trial the wife succeeds on the issue of undue influence, it will be because that is the right conclusion of fact on the state of the evidence at the end of the trial, not because of some artificial legal presumption that there must have been undue influence."
>
> [Emphasis added.]

Lord Nicholls expressed himself in similar vein, at paras [13] – [15].

[146] It is necessary to revisit one discrete aspect of *Etridge* at this juncture. The House of Lords addressed directly the interaction between the conduct of the lending financial entity and the legal advice provided to the surety wife. Fundamentally, *Etridge* makes clear that the content of the legal advice given to the surety wife is not a matter for the lending bank: see per Lord Nicholls at paras [53]–[56], [64] ff and, most explicitly, at [77]:

> "The bank does not have, and is intended not to have, any knowledge of or control over the advice the solicitor gives the wife …."

Adding at [78}:

> "In the ordinary case, therefore, deficiencies in the advice given are a matter between the wife and her solicitor. The bank is entitled to proceed on the assumption that a solicitor advising the wife has done his job properly. I have already mentioned what is the bank's position if it knows this is not so, or if it knows facts from which it ought to have realised this is not so."

To like effect, see per Lord Hobhouse at paras [119]–[122], Lord Nicholls, at para [57] recognised certain exceptions:

> "The position will be otherwise if the bank knows that the solicitor has not duly advised the wife or, I would add, if the bank knows facts from which it ought to have realised that the wife has not received the appropriate advice. In such circumstances the bank will proceed at its own risk."

Neither of these exceptions arises in the present case.

[147] In passing, while in both *National Westminster Bank v Morgan* [185] AC 686 and the venerable authority of *Allcard v Skinner* [1887] 36 Ch. E 145 one finds the language of *victimisation*, in the latter case Lindley LJ cautioned (at 183) that there can be "infinite varieties" of undue influence. Thus, any temptation to exhaustive definition is to be avoided.

[148] Guided by the framework of legal principle traced above, my analysis of the DCP issue is as follows. There was no presumption of influence in the relationship of CB and EB as this was a relationship of husband and wife. Accordingly, CB could not pray in aid this evidential presumption. However, I consider that in substance the judge adopted this flawed presumption in his analysis. This flows from my construction of the words used by him. This error overshadows this section of his judgment.

[149] Absent a presumption of either influence or undue influence, it was incumbent upon CB to discharge what Lord Hobhouse described at para [106] as "the general burden of proving some form of wrongdoing ..." One of the methods of doing this was to adduce evidence sufficient to raise an inference of wrongdoing on the part of EB. If uncontradicted by EB to the satisfaction of the court, this could justify a finding

of undue influence. The judge did not apply this analytical framework. This is a further vitiating factor in his analysis and conclusion.

[150] I agree with the trial judge that Excel was "put on inquiry" (in *Etridge* terms) and its duty of "reasonable steps" therefore crystallised. As noted, CB received advice from her solicitor concerning the DCP and she signed it in the presence of her solicitor, to Excel's knowledge. This was precisely what the *Etridge* protocol required. However, the judge did not engage with the legal significance of this. Rather, he embarked upon an enquiry into the adequacy of CB's legal advice. The judge in substance accepted CB's claim that her legal advice had been "grossly inadequate" (see para [91]). In my estimation, this approach was fallacious, on account of the judge's failure to engage with the three-stage analysis of Lord Hobhouse in *Etridge* and for the following additional reasons.

[151] First, this part of the judgment contains much speculation about the documents and information which were, and were not, available to CB's solicitor, NM. This is a material shortcoming. Furthermore, the only evidence available to the judge about CB's legal advice was the sworn testimony of CB and the documentary materials noted above. This of itself constrained the breadth of any permissible judicial enquiry. In addition, a particular feature of the context is self-evidently important: the judge, having specifically deferred (without determining) the issue of possible third party proceedings against CB's legal solicitors, embarked upon a professional negligence type inquiry and adjudication in their absence.

[152] Next, as regards the sworn testimony of CB, the judge did not engage with his earlier findings about the unfavourable nature of her evidence as a whole: see paras [38]–[39] above. In particular, the judge did not balance his assessment at para [17] that "… she was not a witness upon whom the court could place any degree of confidence on issues which placed the premises at risk", his ensuing identification of inconsistencies and contradictions in her evidence and his self-directing ordnance that her evidence "… deserved the closest of scrutiny". There is a clear tension in consequence, which clouds this section of the judgment and the conclusion made.

[153] Fundamentally, I consider this part of the judgment and the conclusion made to be unsustainable for the reasons rehearsed in paras [148] – [152] above. I would not, therefore, support the judge's finding of undue influence. I am mindful of the contrary majority view of McBride and Huddleston JJ on this discrete issue. Their assessment, in the terms of Lord Hobhouse's three stage approach in *Etridge*, is that the judge answered the first question correctly but then committed the error of failing to address and determine the next two questions. While we differ as regards the first question, and subject thereto, I endorse fully the majority's approach to the next two questions. In short, the judge did not engage with the incontestable evidence that Excel (having been automatically put on inquiry) had taken the steps required by the *Etridge* protocol. Crucially, CB had received independent legal advice, a fact known to Excel. The judge did not adopt or apply this framework. On this alternative basis, I arrive at

the same conclusion, namely the DCP is valid and enforceable. Thus, the majority and minority judgments of this court have the same *terminus*, albeit by differing routes.

[154] However, the effect of the majority judgment on this issue, entailing the endorsement of the judge's finding of undue influence which I have rejected, is that, logically, the ten guarantees executed by CB also satisfied the first of Lord Hobhouse's three tests. This requires the second and third tests to be considered. I shall proceed on this basis.

XXI. The First Four Guarantees: Conclusions

[155] I would determine Excel's claim against CB based on the first four guarantees specified in the respondent's notice in the following way. I begin with a finding which applies to all guarantees. It is incontestable that Excel was "put on inquiry" as regards all of CB's ten personal guarantees. Thus, the *Etridge* 'Stage 1' test was satisfied.

[156] I turn, therefore, to apply the *Etridge* 'Stage 2' test (or "protocol") to the first four guarantees, which poses the fundamental question: what did the "reasonable steps" duty owed to CB on the part of Excel entail? The answer is found in those passages from *Etridge* reproduced and considered in detail above. I have, in para [109] above, summarised the essential elements of the *Etridge* Stage 2 "reasonable steps" duty imposed on the lender in this type of case.

[157] With reference to the first four of CB's ten guarantees, the key facts are that Excel communicated with CB in the requisite *Etridge* terms, communicated with CB's solicitor in the *Etridge* terms and received the necessary confirmation of the provision of legal advice by the solicitor to CB. In this way, Excel's "reasonable steps" duty was discharged.

[158] It follows that CB's first four personal guarantees are enforceable and Excel is entitled to judgment accordingly, amount to be assessed. This is the unanimous conclusion of the court.

XXII. CB's Guarantees 5 – 10: General

[159] The second and third of the three phases identified above entailed the execution by CB of six further personal guarantees. Each was provided as security for a further six finance agreements (equipment hire and loans) between Excel and EB on behalf of the company. Throughout this period CB remained a director of the company.

[160] There are material distinctions between the evidential framework bearing on the first four guarantees and that relating to the second six guarantees. In particular, while it is incontestable that CB received legal advice in respect of the relevant legal instruments executed by her during the first phase, she was not in receipt of <u>any</u> legal advice regarding the instruments executed by her belonging to the second and third

phases. Furthermore, there are certain further material factual distinctions to be considered. As a result, these six further guarantees belong to three separate groups:

(a) Guarantees 5 & 6;
(b) Guarantee 9;
(c) Guarantees 7, 8 & 10.

These will be examined separately.

XXIII. CB's Guarantees 5 & 6

[161] The material ingredients of the evidential framework pertaining to these two guarantees are, briefly, the following. By letter dated 20 February 2018 Excel forwarded to CB a copy of a further hire agreement, unexecuted (Excel/Ardcarmon) and a draft deed of guarantee (the fifth). The letter stated, "We would advise you to take your own independent legal advice before signing the Guarantee" and, further, that CB should do so "… ONLY if you are prepared to be legally bound by the terms of the Guarantee and the Agreement". In response to the former exhortation, CB confirmed in writing that she had taken independent legal advice and appended her signature and a date. The execution of the hire agreement, containing the signatures of both CB and EB, and the fifth guarantee, followed. This occurred some two/three months following the preceding commercial activities among the same parties. Around one month later, the execution by CB of the fifth guarantee followed precisely the same letter from Excel and the same certification and signature of CB.

[162] The factual matrix pertaining to the sixth guarantee was different. On this occasion CB received from Excel a letter in all material respects identical to the two preceding letters. In contrast to those predecessors, CB's response, again signed and dated, was that she had <u>not</u> taken independent legal advice. These events unfolded some few months following execution of the immediately preceding guarantee (the fifth).

[163] I refer to my digest of the *Etridge* "reasonable steps" duty in para [109] above. In short, as regards guarantees 5 and 6, <u>none</u> of the stipulated steps was taken by Excel. Summarising:

(i) Excel did not communicate with CB informing her that it would require written confirmation from a solicitor in specified terms and explaining to her the purpose of this requirement.

(ii) Excel did not request CB to nominate a solicitor for this purpose.

(iii) CB did not inform Excel of the identity of a solicitor who could advise her about the proposed transaction.

(iv) Excel did not provide any solicitor engaged by CB with the "necessary financial information".

(v) Excel did not receive from any solicitor the necessary certification, or "written confirmation".

[164] The main submission advanced on behalf of Excel is that these serial breaches of the *Etridge* protocol are of no moment and can effectively be overlooked, or excused, on the ground that Excel had complied with the protocol in respect of the first four guarantees belonging to the first phase identified above. The further submission on behalf of Excel invokes the words "in the absence of other evidence" in the judgment of Lord Hobhouse at para [122]. It is suggested that CB's representation that she had obtained independent legal advice in respect of the fifth and sixth guarantees constituted such "other evidence".

[165] I consider these arguments to be confounded by the principles rehearsed, repeatedly so, in the passages from *Etridge* and *Waller-Edwards* reproduced in extenso above. In my view, the factual analysis in paras [161]–[163] above demonstrates that there were wholesale breaches by Excel of the *Etridge* protocol regarding guarantees 5 and 6. I am unconvinced that there were legally permissible alternatives to strict adherence to the *Etridge* protocol, for the following reasons. I am particularly mindful of the strong adjuration in both *Etridge* and *Waller-Edwards* of simple, bright line rules. Simplicity and certainty were considered by our highest court to be of paramount importance. The decisions in both cases are also littered with references to practical realities. Furthermore, one of the dominant principles in play is that of *reasonableness*. The lender is required to take *simple and reasonable* steps at *Etridge* Stage 2. The steps decreed represent what were considered to be a reasonable compromise, a fair balance, between the interests of the bank and those of the wife/partner surety. I consider *Etridge*, copper fastened by *Waller – Edwards,* to be determinative of what these steps should be. The language of the relevant passages in the judgments is unforgiving and uncompromising. They admit of no exceptions or modifications: the very essence of bright line rules. They prescribe a strict and exacting code. The decision of the House, reaffirmed without material qualification by the Supreme Court in *Waller-Edwards*, extinguishes all debate about the content of the steps required. This was its intention and effect. It is a paradigm illustration of the functioning of the highest UK court in our common law system. The first of Excel's two submissions must be rejected accordingly.

[166] I reject the second of Excel's submissions for essentially the same reasons. This argument relies on the bare, unevidenced and unsupported assertion of CB that she had obtained legal advice. (In passing, it is agreed by all that this was a misstatement). This manifestly lacked the buttressing of the multiple safeguards enshrined in the *Etridge* protocol. Furthermore, as my analysis of all the judgments in *Etridge* and *Waller-Edwards* makes clear, the words of Lord Hobhouse ("other evidence") must be examined in the full context to which they belong. The central theme of that context is the unequivocally and repeatedly stated requirement that in every case to which the

Etridge protocol applies full adherence by the lender to its terms is the inalienable and unqualified duty thereby triggered: this could not have been more clearly stated by Lord Hobhouse in para [100]. Finally, adherence to the *Etridge* protocol would have exposed the fact that CB had not received any legal advice in respect of these two guarantees. This in my view is one of the kinds of mischief which the protocol is designed to prevent.

[167] For all of the preceding reasons I am unable to agree with the alternative approach espoused in the judgment of McBride J (with whom Huddleston J agrees), which yields the conclusion that guarantees 5 and 6 are valid and enforceable. For the reasons given I consider this irreconcilable with both *Etridge* and *Waller – Edwards*. Furthermore, it savours of the nuanced and fact sensitive approach expressly decried in *Waller – Edwards*.

[168] The conclusion which inexorably follows, in my view, is that in consequence of Excel's serial breaches of the *Etridge* protocol as regards CB's guarantees 5 & 6, borrowing the language of Lord Hobhouse in *Etridge* at para [122], Excel did not "… have reasonable grounds for being satisfied that the wife's agreement has been properly obtained", with the further result that Excel's legal rights are "… subject to any equity existing in favour of the wife". While Excel might have believed that CB had, per her certification, obtained legal advice, (a) there was no evidence to this effect (b) there was no such finding by the trial judge and (c) much more was required of Excel by the *Etridge* protocol. Thus the "reasonable grounds" contemplated by Lord Hobhouse did not exist.

[169] It follows that in my opinion CB's fifth and sixth guarantees are not enforceable at the suit of Excel. Paras [161]–[168] explain my disagreement with McBride and Huddleston JJ on this issue.

XXIV. CB's Guarantee No 9

[170] The factual matrix pertaining to the ninth guarantee was unique among all ten guarantees. On this occasion CB received from Excel a letter in all material respects identical to the two preceding letters (see para [162] above). CB, upon forwarding the executed guarantee to Excel, represented that she had <u>not</u> received legal advice. These events unfolded some three months following execution of the immediately preceding guarantee (the eighth).

[171] I consider that the analysis and reasoning in paras [161]-[168] apply mutatis mutandis. Logically, the consequence specified in para [169] must follow. Therefore, in my opinion CB's ninth guarantee is not enforceable at the suit of Excel. Paras [161]–[168] explain my disagreement with McBride and Huddleston JJ on this issue.

XXV. CB's Guarantees 7, 8 & 10

[172] It is necessary to consider the final three guarantees – numbers 7, 8 and 10 - through the lens of the different evidential matrix pertaining to them. These three guarantees belong to the third of the three phases identified above. In all three incarnations of Excel's respondent's notice, it is asserted:

> "CB signed the further six personal guarantees [i.e. Nos 5 – 10], having elected not to take the advice of Excel to obtain legal advice."

This statement is repeated twice in Excel's skeleton argument. It is manifestly incorrect as regards guarantees 7, 8 and 10.

[173] Factually, the salient distinguishing feature of these three guarantees is that they were executed without the Excel "warning/recommendation" letter, note above, which had been a feature of the context of the other seven guarantees, or anything comparable. Applying the first stage of the *Etridge* analysis, in common with all ten guarantees, Excel was incontestably "put on inquiry" of possible undue influence affecting CB, a person offering to stand surety for her husband's debts and receiving nothing in return.

[174] Thus the *Etridge* 'Stage 2' was triggered and the protocol applied. What steps did Excel take in this respect? The answer is 'none'. The *Etridge* protocol was simply airbrushed. This is determinative of this issue. The analysis in paras [161]-[168] above applies fully. It follows that in my opinion none of these three guarantees – 7, 8 and 10 - is enforceable by Excel. This is the unanimous conclusion of the court.

XXVI. The Validity of the EB/Excel Mortgage

[175] The final ground in Excel's respondent's notice challenges the judge's conclusion that the EB/Excel mortgage of 14 December 2017 was vitiated by undue influence. This ground can be resolved succinctly.

[176] The relevant passage in the judgment is evidently founded on the premise that CB was a party to this mortgage. This, of course, is fallacious. As already noted, the only parties to this mortgage were EB and Excel. Moreover, the judgment makes no findings about either the suggested undue influence or the miscreant concerned. The evident misconceptions that CB was a party to this mortgage and EB was the miscreant suffice on their own to confound the judge's conclusion of invalidity. To this we would add that none of the multiple claims before the court of first instance was based on this mortgage and none of the pleadings raised the issue of its validity. Finally, this mortgage did not belong to the matrix of any of the four issues enumerated by the judge for adjudication (see para [9] above).

[177] For the foregoing reasons, this discrete conclusion of the trial judge is unsustainable. This is the unanimous conclusion of the court.

XXVII. Sundry and Ancillary Issues

[178] With reference to CB's list of issues at para [24] above:

(i) *Stay Application:* the parties will have the opportunity to address this issue before finalisation of the order of this court.

(ii) *Costs:* ditto.

(iii) *Security of Costs re R Bunting & Associates as they are in Czech Republic and other European countries:* this issue has not been pursued before this court.

(iv) *Typographical Error Correction*: we are an appellate court fundamentally concerned with errors of law. This is a paradigm issue for the parties to resolve and agree and, further, one which has presented no obstacle to this court's determination of the appeal and cross-appeal.

(v) *Transcripts*: this is not a live issue.

XXIX. Summary of Conclusions

[179] The conclusions which follow are unanimous, with the exception of (e). These are:

(a) CB has a beneficial interest in the premises measured at 35%.

(b) CB's "stay order" ground of appeal is dismissed, while this issue may be revisited afresh as noted in [178] (i) above.

(c) CB's "third party proceedings" ground of appeal is dismissed.

(d) Excel is entitled to judgment against CB in respect of the first four guarantees identified above, amount to be assessed.

(e) (By a majority) Excel will have judgment against CB in respect of guarantees 5 – 6 and 9, amount to be assessed.

(I would hold, in the minority, that Excel's claim against CB based on guarantees 5 – 6 and 9 be dismissed.)

(f) CB will have judgment against Excel as regards guarantees 7, 8 and 10.

(g) The deed of consent and postponement ("DCP") is not vitiated by undue influence and is valid and enforceable in law.

(h) The EB/Excel deed of mortgage is valid and enforceable in law.

[180] Any ancillary issues of substance will be addressed in our final order, having first received the parties' representations.
