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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 29 October 2004

BEFORE:

HIS HONOUR JUDGE HEGARTY QC

- - - - - - - - - - -

WRIGHT

CLAIMANT

-v-

HODGKINSON

DEFENDANT

- - - - - - - - - - -

Tape Transcript of Smith Bernal Wordwave Limited
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(Official Shorthand Writers to the Court)

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PENELOPE REED (Instructed by Arnold Thomson) appeared on behalf of the CLAIMANT

DOV OHRENSTEIN (Instructed by Shoosmiths) appeared on behalf of the DEFENDANT

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JUDGMENT
(As Approved by the Court)

HIS HONOUR JUDGE HEGARTY QC:

1. This is a claim by which Mr Donald Dalgleish Wright seeks to set aside a lifetime gift of a joint interest in his dwelling-house and adjoining land to the defendant, Mark Hodgkinson, on the grounds of undue influence.

2. Mr Wright is a retired farmer, now aged 82. He is a bachelor with only one sister, no dependents, and no nephews or nieces. Until some time in the mid-1980s he was a tenant of a farm, known as Newnham Lodge Farm, Newnham, Northamptonshire. In 1979, in anticipation of his retirement, he bought a property known as Brookside, Badby Road, Newnham ("the property"). This comprised a dwelling-house, outbuildings and about five acres of agricultural land. He moved into the property and occupied it as his home in about 1983. A year or two later he erected a new three-bay outbuilding on the property to the rear of the house and he used it to store his vehicles and machinery.

3. It was about 25 years ago, whilst he was still actively farming at Newnham Lodge Farm, that Mr Wright first got to know Mr Hodgkinson, who is a much younger man, now aged 45, married with young children. Mr Hodgkinson and his father occasionally helped Mr Wright with haymaking and similar seasonal farm work.

4. Mr Hodgkinson also carried on business on his own account as a sole trader by way of hiring out and selling farming and other types of machinery, and by repairing cars and other vehicles.

5. From the early 80s or thereabouts Mr Wright allowed him to store some of his vehicles and equipment at Newnham Lodge Farm, and after he moved to the property he allowed him to use the rear part of it for the same purpose. From that time onwards Mr Hodgkinson has continued to use the outbuildings and land behind the dwelling-house on the property for the purposes of his business, which has expanded to some degree over the years, though the extent to which it has done so has been constrained by the fact that it is essentially a one-man business, albeit with some assistance from his father, and also by the fact that some at least of his activities were carried out off site. But he has never been asked to pay any rent for the use of the property.

6. As Mr Wright suggested one of the reasons for this, at least initially, may have been a hard-headed desire not to create any sort of tenancy of any part of his land. As a farmer he would have been well aware of the difficulties which a landowner might face in evicting a sitting tenant. But, as time went by and the relationship between the two men developed, I doubt if this was a consideration which continued to play any significant part in Mr Wright's thinking. So, I think that in some considerable measure the permission which he gave to Mr Hodgkinson to use part of the land rent-free reflects the generosity which, as Mr Hodgkinson himself acknowledged, Mr Wright was capable of displaying.

7. But I do not think that this generosity was wholly altruistic. There is no doubt whatever that Mr Wright enjoyed the company of the younger man, and that, despite the disparity in their ages, they had become really quite close friends.

8. Such was the nature of the relationship which developed between them that they clearly felt able to trust each other to make this informal arrangement work, and over many years it obviously did work well. There was no strict demarcation of the areas occupied by the two men, nor does there seem to have been any detailed agreement as to the nature and extent to which Mr Hodgkinson would contribute to overheads. In practice, however, he helped Mr Wright out with maintenance and other odd jobs about the property, and occasionally made payments towards the electricity, and perhaps other services, though Mr Wright was not a man who was disposed to press for money, at least from someone he knew well and liked.

9. But Mr Wright's feelings of friendship towards Mr Hodgkinson did not end with this arrangement for the use of property. In the latter part of 1993 he decided to leave the property to Mr Hodgkinson by will. On 15 September 1993 he consulted his solicitor, Mr Paul Gilbert, who was then a partner in the firm of Johns Gilbert & Frankton, of 3 Regent Place, Rugby, and gave him instructions to prepare a new will on his behalf.

10. Mr Gilbert came to see Mr Wright at the property and made a manuscript attendance note. That shows, amongst other things, that Mr Wright had a good idea of the value of the property and of his other assets, and that the estimate of the latter was rather greater than the estimate of the former. It also shows that he was given at least some fairly general advice as to the impact of inheritance tax on his estate. But the most important feature of his instructions was, of course, his wish to leave the property to Mr Hodgkinson. This is emphasised by the terms of the covering letter, which Mr Gilbert wrote to him on 23 September 1993, enclosing a copy of the draft will. That was in these terms:

> "Further to my meeting with you in Newnham last week, as arranged I am enclosing a copy of your proposed new Will. I appreciate that your main concern at this point of time is to provide for your freehold property to go to Mark Hodgkinson. I have provided for the division of your remaining estate in the way that we discussed. Finally we agree that you can at any time amend these provisions.
>
> I look forward to hearing from you when the Will is approved, in which case perhaps you will make arrangements if possible to call to see me to sign it."

11. On 1 October 1993 it appears from a further attendance note that Mr Wright telephoned Mr Gilbert with instructions to vary certain of the dispositions contained in the draft, though these did not affect the devise in favour of Mr Hodgkinson.

12. A few days later, on 4 October 1993, he attended Mr Gilbert's offices to execute the will, clause 3 of which read as follows:

> "I GIVE AND DEVISE (subject to the payment of its proportional share of Inheritance Tax) my freehold property Brookside, Badby Road, Newnham aforesaid including the buildings adjoining with approximately five acres of land to MARK HODGKINSON of 7 Hillside, Flore, Northamptonshire, absolutely."

13. At some stage, though he denied it, Mr Wright told Mr Hodgkinson that he had decided to leave the property to him by will. Mr Hodgkinson's evidence on this point was supported by evidence from his father and by way of a subsequence attendance note recording discussions with another partner in the firm of Johns Gilbert & Frankton on 21 September 1999. This is a document to which I shall have to return in due course. For present purposes it suffices to state that it records a discussion in the course of which Mr Wright stated that he had told Mr Hodgkinson that he would be receiving the whole of the property when he died.

14. In fact, I think it is highly likely that the occasion that led to this discussion was as described by Mr Hodgkinson at

paragraph 4 of his witness statement. It appears that in October 1994 Mr Hodgkinson received some £60,000 by way of compensation for an industrial injury. He and his wife already had their own home at 7 Hillside Road, Flore, Northants, and were thinking of using the money to purchase a larger property. They were particularly interested in a converted public house in a nearby village. According to Mr Hodgkinson, he mentioned this to Mr Wright, as he thought he would be interested to hear it, and indeed he was, as he had known it in its days as a public house.

15. But the conversation then turned to the future. Mr Wright suggested to Mr Hodgkinson that he and his wife should not buy another house. He told them about his intention to leave the property to him by will, and made a proposal to the effect that it should be developed in such a way to allow both of them to live there.

16. The obvious purpose of such a proposal was to ensure that as he grew older Mr Wright would have someone he liked and trusted living at the property who would be able to provide companionship, help and assistance, particularly as his physical and mental capacities declined with age.

17. Mr Hodgkinson, unsurprisingly, told his father about this. Mr Hodgkinson senior had also known Mr Wright for many years. After learning about this testamentary gift, father and son took Mr Wright out for a meal to celebrate, and to thank him for his generosity. According to Mr Hodgkinson senior he was subsequently told by Mr Wright himself that he wanted his son and wife to move into the property because they were good friends and they would be able to look after him when he got older.

18. Now Mr Wright would have little, if any, of this, but I am quite sure that he did inform Mr Hodgkinson of the gift, and I think Mr Hodgkinson and his father gave truthful and broadly accurate evidence as to the proposal made by Mr Wright.

19. It is not entirely clear when this matter was first broached by Mr Wright, but I think it is likely to have been at least some weeks after the award of compensation to Mr Hodgkinson, probably in the early part of 1995.

20. Mr and Mrs Hodgkinson responded favourably to the proposal, and they appreciated that it would involve financial commitments on their part in extending and modernising Mr Wright's house, so as to provide suitable and separate accommodation, both for them and for Mr Wright. Furthermore, according to Mr Hodgkinson, Mr Wright was concerned about the possible impact of inheritance tax on the disposition of his estate.

21. So Mr and Mrs Hodgkinson decided to take some legal advice. Mr Hodgkinson made an appointment with a Mr George, a partner in Shoosmiths of Northampton, and went to see him on 28 November 1995. According to Mr Hodgkinson he told Mr Wright of his intention to take legal advice and left it to him as to whether he wished to come along, but he decided not to do so.

22. Both in the pleadings and in cross-examination, however, Mr Wright denied all knowledge of the fact that Mr and Mrs Hodgkinson had taken any sort of advice on this proposal. But I think it is likely that he was told about it, at least after the event.

23. Be that as it may, Mr George advised Mr Hodgkinson that Mr Wright could change his will at any time. Accordingly, the mere fact he had made a will in Mr Hodgkinson's favour would not afford any sufficient protection if he committed himself to Mr Wright's proposal. Mr George also gave Mr and Mrs Hodgkinson some advice about inheritance tax and capital gains tax.

24. There were obviously very many ways in which a proposal of the kind put forward by Mr Wright could have been implemented with due regard to the interests of both parties. But it is unclear how far any such matters were discussed in the course of what appears to have been a fairly short interview with Mr George. The only roughly contemporaneous record of what may have been discussed is in the form of some manuscript notes made by Mr Hodgkinson on the back of an envelope, which was addressed to Mr Wright. But the evidence as to how and when this document came into existence was also unclear. It was, in fact, produced by Mr Wright who said that he had simply found it on his windowsill. But that can hardly be the full story.

25. According to Mr Hodgkinson's witness statement, it records the various alternatives which were discussed with Mr Wright some time after the consultation with Mr George. I am bound to say that this seems intrinsically likely. And if the discussion was at the property that would seem to provide a fairly obvious explanation as to why the notes were written on an envelope addressed to Mr Wright.

26. But in the course of his oral evidence, if I understood him correctly, Mr Hodgkinson seemed to be saying that the notes were made before or, at least in part, during the discussions with Mr George, rather than at a later stage. However, in my judgment, it is much more likely they were made after Mr Hodgkinson had been to see Mr George, not only for the reasons which I have already mentioned, but also because the contents seemed to be based upon some sort of legal input. Indeed, that feature also suggests that they were made whilst Mr George's advice was still fresh in Mr Hodgkinson's memory.

27. According to Mr Wright, the envelope had contained plans which were only prepared at a rather later date, probably in the latter part of 1996. That may well be so, but the envelope itself does not bear any postmark or the name of a

sender, so it is not possible to determine whether the plans actually came with it.

28. Accordingly, I think it is more probable than not that the notes would have been made fairly shortly after the meeting with Mr George, though it is undoubtedly possible that they were made at or about the time when detailed plans for an extension for the property were being prepared in the latter part of 1996 or early 1997. But even if that were so I do not think that it would have any significant bearing on the issues I have to resolve in this action.

29. But it is not easy to extract any clear and coherent picture as to what was discussed between Mr Hodgkinson and Mr Wright on the basis of these notes. Certainly they include some brief observations about inheritance tax and possible savings, which might result from a disposition made over seven years prior to the donor's death. They also appear to refer to the possible sale or gift to Mr Hodgkinson of a half share in the property, and to the security that Mr Hodgkinson would then enjoy as a joint owner. There is also reference to the devise of a half share by will, and a rather opaque reference to a tenancy at a rent.

30. I think it is likely that one of the principal suggestions that was discussed between the two men after the consultation with Mr George was that Mr Wright should make over a half share in the property to Mr Hodgkinson in order to provide him with some security for any commitment he entered into as a result of Mr Wright's proposal. Up to a point Mr Hodgkinson accepted that this was so. He was certainly concerned to obtain some sort of security for any financial commitment which he might have to make if he accepted the proposal made by Mr Wright. Furthermore, in cross-examination, Mr Hodgkinson's father confirmed that his son wanted some sort of protection; and he believed that he had given him some advice to the effect that he needed to consider his own interests and those of his family, though he had not discussed any specific means by which such protection might be put in place.

31. Indeed, it was effectively common ground on the face of the pleadings that Mr Hodgkinson was concerned about the need for security before expending any money on the property and that he raised these concerns with Mr Wright.

32. Though Mr Hodgkinson was prepared to accept in cross-examination that the possibility of a joint tenancy may have been discussed with Mr George, he was reluctant to accept that he had discussed it with Mr Wright himself. As I have already pointed out, however, Mr Hodgkinson's manuscript notes on the envelope addressed to Mr Wright clearly referred to the possibility of a sale or gift of a half share in property. And, as he said in his witness statement, and as I think is likely, the notes record the various possible courses of action which were discussed with Mr Wright after he had taken advice from Mr George.

33. So, I think it is probable that there was some discussion between the two men as to the possibility of providing the appropriate security for Mr Hodgkinson by way of an immediate transfer to him of a half share in the property. Indeed, as will be seen, that is entirely consistent with what subsequently occurred.

34. But the proposal was not pursued with any great urgency. During 1996 a series of applications for planning permission were made in respect of existing or proposed activities or developments at the property. One was for a certificate of lawful use in relation to Mr Hodgkinson's business activities. That was made by Mr Hodgkinson and supported by Mr Wright and a number of neighbours. Another was made by Mr Wright for the purposes of building an additional bay connected to the outbuildings at the rear. Both of these applications were successful.

35. Eventually, however, on or about 5 September 1996, an application was made in the name of Mr and Mrs Hodgkinson for permission to carry out major works of extension to the house itself. A Mr Graham Soame was instructed to prepare and submit the application, together with the necessary drawings. His terms of engagement, dated 20 August 1996, were signed by Mr and Mrs Hodgkinson and their signatures were witnessed by Mr Wright.

36. Planning permission was eventually granted on 12 February 1997 and Mr Soame's fees, which apparently amounted to £796.65, were paid by Mr Hodgkinson. However, Mr Soame's services were then dispensed with, and Mr Ralph Berrel was appointed to survey the house and outbuildings and prepare working drawings, to engage a structural engineer, and to lodge a submission for Building Regulations approval.

37. The circumstances in which Mr Berrel was appointed in the place of Mr Soame remain somewhat unclear. According to Mr Hodgkinson neither he nor Mr Wright liked the layout prepared by Mr Soame. I see no reason not to accept that evidence. But it was also Mr Hodgkinson's evidence that Mr Wright discussed these plans with a friend and neighbour, Mr Rod Clutton, though I do not know the basis of this assertion, and Mr Clutton himself had no recollection of it. Insofar as it is material, however, I am not prepared to find that Mr Clutton played any part in these matters.

38. Be that as it may, Mr Berrel was instructed by Mr and Mrs Hodgkinson in connection with what he understood to be a large extension intended to provide accommodation for them and their family. He also understood that Mr Hodgkinson was going to inherit the property and would be funding the extension.

39. In order to carry out his commission Mr Berrel visited the property on a number of occasions. He found that Mr Wright was perfectly welcoming, and never questioned nor challenged his presence. Mr Berrel then prepared his drawings which clearly show that what was proposed was a substantial extension which could provide separate accommodation for another family, although there was also to be an extension to the existing living room used and

occupied by Mr Wright.

40. Furthermore, in February 1997, a valuer, instructed by Mr Hodgkinson, visited the property and prepared a short report dated 18 February 1997, which valued the property in its then condition in the sum of £90,000. Mr Wright recalled this, but appears to have made no objection, even though he said he had not authorised it. But I think it is likely that he was made aware of the valuation figure of £90,000, as that was the figure he subsequently gave to his solicitor. I should add that, according to Mr Hodgkinson, the purpose of the valuation was to determine the value of the property before any work was carried out upon it.

41. According to Mr Wright, it was from this time onwards that Mr Hodgkinson began to exert pressure on him to give him some security if he was going to spend money on the property. In fact, as I have already observed, I think it is likely that this had already been raised before the plans had been drawn up and planning permission obtained.

42. It seems to me to be highly likely that Mr Hodgkinson did continue to raise the question from time to time once it had initially been broached, and I think this may well have happened more frequently once the plans had been prepared and Building Regulations approval had been obtained. But I am quite unable to hold that this was done so vigorously or frequently as to exert such pressure on Mr Wright as to cause him to embark on a course of action which was not in accordance with his wishes.

43. Eventually, on 15 May 1997, the two men consulted a solicitor, Mr Geoffrey Charles Kennedy, a partner in the firm of Johns Gilbert & Frankton. They had, of course, already acted for Mr Wright in connection with other matters, such as the 1993 will, and Mr Wright regarded them as his solicitors, though he normally dealt with Mr Gilbert of that firm.

44. According to Mr Hodgkinson, he and Mr Wright had discussed the desirability of seeing a solicitor in connection with the provision of security, and Mr Wright had suggested contacting Johns Gilbert & Frankton. Indeed, it was Mr Hodgkinson's evidence that he had told him that Mr Gilbert had retired and suggested that he should make an appointment with Mr Kennedy at a time suitable for both of them.

45. Mr Wright gave a different account. He said that Mr Hodgkinson pestered him almost on a daily basis to contact his solicitors and eventually asked him directly who his solicitor was. On being informed it was Mr Gilbert (not Mr Kennedy) Mr Hodgkinson took it upon himself, without Mr Wright's authority, to fix an appointment and then took him in to see Mr Kennedy.

46. How this came about, and, more particularly, what occurred during the meeting with Mr Kennedy, are matters of considerable importance for the resolution of this case, and I heard evidence from all three participants.

47. The first of the three witnesses was Mr Wright himself. I am sorry to say that I had serious reservations about the reliability of his evidence. I am very conscious of the fact that he is now quite elderly and somewhat frail, with little vision in his right eye. I did not, however, get any obvious indication that his intellect was in any way impaired. He certainly seemed quite capable of understanding questions and documents which were put to him. But, at the very least, his recollection was wholly unreliable and in some measure distorted by his present feelings towards Mr Hodgkinson.

48. Most notably, he refused to accept that he could ever have wished to benefit Mr Hodgkinson. When confronted with the clearest evidence to the contrary such as his 1993 will, and a later will dated 27 May 1998, neither of which had been disclosed by him until a very late stage, his constant refrain was that he had no recollection of the matters in question.

49. It was suggested on behalf of Mr Hodgkinson that, at least in parts, his evidence was deliberately untruthful. I confess that in the case of a younger man I may have been driven so to hold. But after making due allowance for his age and the insidious effects of his present attitude to Mr Hodgkinson, upon his recollection of prior events, I am not prepared to hold this was so. Nonetheless, I approach his evidence with great care on any contested matter.

50. Mr Hodgkinson gave a much better account of himself and, by and large, I am inclined to accept that his evidence was not only truthful but also fairly reliable. But, of course, he has a major interest in the outcome of this litigation, not only because of the gift whose validity is directly challenged by Mr Wright, but also because of the business which he carries on from the property, and which, it seems, he would find it difficult to relocate. So, in assessing his evidence, I bear in mind the natural tendency of such a witness to put a favourable gloss on matters in dispute.

51. Mr Kennedy retired from full-time practice as a partner in Johns Gilbert & Frankton in 1999. I had no real reservations about his evidence, save that, of course, he inevitably had only a limited recollection of his dealings with Mr Wright prior to his retirement. Subject to this caveat, I consider that his evidence should, in general, be accepted.

52. I think it is important to emphasise that these events took place over seven years ago when Mr Wright himself was that much younger. In the course of his oral evidence Mr Kennedy commented on the contrast between the demeanour, bearing and faculties of Mr Wright, as he recalled them, and as he now saw them in the course of his evidence at trial. He considered that when he saw him in 1997 he seemed to be entirely capable of making his own decisions. I see no reason not to accept that evidence.

53. Furthermore, given my assessment of Mr Wright and Mr Hodgkinson, I do not think that Mr Wright was the passive and supine object of Mr Hodgkinson's manipulations that he seemed to portray himself as.

54. I do not doubt that there was a side to his nature which manifested itself in generosity to those whom he liked and a reluctance to insist on his strict rights. Both of these facets of his character were exhibited in his dealings with Mr Hodgkinson until the relationship soured. And one of his friends and neighbours, Mr Rod Clutton, gave general evidence to the like effect.

55. But there is plainly another side to his character which does not shrink from confrontation. That is also evidenced by his attitude towards Mr Hodgkinson over the last few years. By way of example, he chopped down trees planted by Mr Hodgkinson to screen the workshop area, and removed a fence which Mr Hodgkinson replaced them with.

56. Mr Clutton summed it up in this way in a letter which he wrote to Mr Hodgkinson on 1 March 2002 in the course of some valiant, generous, but ultimately unsuccessful attempts at mediation:

> "I gather that things have not improved since then and that Don continues to seek ways to make life difficult for you…
>
> You will be aware that Don has little to occupy him other than to plot and scheme as to how he can cause you aggravation; he also has a reasonable amount of money to fund litigation; he spends little and has no one to leave it to other than the cancer charity…
>
> My concern is that this has become obsessive and indeed corrosive for Don and is not the best way to spend his retirement. I do not believe that I can persuade him to accept the current situation and I am certain that his relationship with you is set to deteriorate further."

While Mr Clutton somewhat distanced himself from these sentiments on the basis that in this letter he was trying to win Mr Hodgkinson's confidence, rather than set out his own personal views about Mr Wright, I nonetheless consider that there is a considerable element of truth in what he said about Mr Wright.

57. I am not persuaded, at least at this stage, that Mr Wright was reluctant to implement the proposal that his house should be extended and that Mr Hodgkinson should be given some sort of legal security for the anticipated expenditure. If he had been, I do not believe that he would simply have gone along with the preparation of detailed plans, the obtaining of planning permission, or the valuation of his property, as he so clearly did. Indeed, as will be seen, some of the work embodied in the plans was subsequently carried out.

58. Likewise, I do not accept that Mr Hodgkinson made an appointment with Mr Kennedy without Mr Wright's agreement, or that he simply took him off to see Mr Kennedy in the way Mr Wright described.

59. But I must now return to what actually occurred at the meeting with Mr Kennedy. It is common ground that Mr Hodgkinson was present throughout the discussion, which seems to have lasted between about a quarter of an hour and half an hour. Nonetheless, Mr Kennedy clearly regarded Mr Wright, and not Mr Hodgkinson, as his client, though, as he accepted, this may have been influenced by the fact that the appointment was booked in the name of Mr Wright.

60. Nonetheless, it was Mr Wright who was the owner of the property and the person to whom the firm's fee note was ultimately directed, and he was also the person who paid it. But it should perhaps be noted that in cross-examination Mr Hodgkinson accepted that they were both seeking advice from Mr Kennedy.

61. Mr Wright suggested that Mr Kennedy and Mr Hodgkinson must have had some private discussions before the meeting took place. This allegation appears to be founded on the proposition that Mr Kennedy seemed to be well acquainted with what he described as "the background" to the meeting. In fact, according to Mr Hodgkinson, he also gained a similar impression. But both Mr Kennedy and Mr Hodgkinson denied any such prior discussion, and I reject the suggestion made by Mr Wright. But it is quite likely, though he could not recollect it, that Mr Kennedy had retrieved the file containing Mr Wright's will before the meeting took place, and so was able to glean something of the relationship between the two men, as evidenced by the testamentary gift of the property.

62. Mr Kennedy's recollection was that Mr Wright did most of the talking. He told Mr Kennedy that Mr Hodgkinson was carrying on business from the property and spent a great deal of time there. He had become friendly with the younger man and had "taken him under his wing". In the course of his oral evidence he added that, though he was not sure of the precise relationship between the two men, it became clear to him that they were close friends.

63. He also stated that at some stage, so far as he could recall, he had been told that Mr Hodgkinson was proposing to spend some money on the property and that Mr Wright wanted to protect Mr Hodgkinson's interests by giving him a share in the property. He may have been told in this context that he had already executed a testamentary gift of the property in Mr Hodgkinson's favour, though that would, in any event, have been apparent from the will.

64. But Mr Kennedy was very clear that the initiative for a lifetime gift came from Mr Wright himself. In his witness statement he referred specifically to the transfer of a one-half share, though in one passage in his oral evidence he gave the impression that Mr Wright had not finally decided on the extent of the interest to be transferred.

65. Be that as it may, Mr Kennedy took the view that he was being given clear instructions by Mr Wright, no doubt with Mr Hodgkinson's agreement, to arrange for the transfer of a half share in the property to Mr Hodgkinson. He did not consider that he was being asked to give any advice as to the merits or the implications of such a transfer; nor did he consider that there was anything about Mr Wright's words or demeanour then, or in his subsequent dealings with him, which led him to think that he had any doubts or reservations about these instructions; and he saw no reason to arrange to speak to him privately about the proposed transfer in order to make sure it was what he really intended.

66. He regarded his task as a fairly limited one. In accordance with his normal practice he advised Mr Wright of the differences between a joint interest and an interest in common, pointing out, in particular, the right of survivorship which applied in the former case, but not in the latter. He did not know whether he would have explained how a joint tenancy might be severed, or the effect of severance. Be that as it may, although he could not recall with total clarity, he thought that Mr Wright's response was that as he had already decided to leave Mr Hodgkinson the property in his will he might as well give him a joint interest, rather than an interest in common.

67. In Mr Kennedy's view he had clear instructions to prepare the appropriate documents for the purposes of a transfer of the property into joint names and that was the purpose of the extremely brief attendance note that he made of the meeting.

68. Mr Hodgkinson's recollection was somewhat different from Mr Kennedy's. He believed that it was Mr Kennedy who had suggested that there should be either a joint tenancy or a tenancy in common and had recommended a joint tenancy, apparently because of Mr Wright's intention to leave the property to him by will. He also believed that Mr Kennedy had pointed out that this would give Mr Wright himself some protection in the perhaps unlikely event of Mr Hodgkinson pre-deceasing him.

69. Now that is not all that difficult to reconcile with Mr Kennedy's account, and I think it simply reflects a different aspect of the same discussion. Somewhat more difficult to reconcile with Mr Kennedy's evidence, however, was Mr Hodgkinson's evidence that he had not specifically discussed the possibly of joint tenancy with Mr Wright and that he went to see Mr Kennedy with an entirely open mind to see what options might be available.

70. Thus he stated in cross-examination that if a charge over the property, or a smaller share, had been proposed, that might have been acceptable to him. But after they had explained the background to him, Mr Kennedy effectively took over and told them that what they wanted was either a joint tenancy or a tenancy in common, before going on to explain the difference. So, according to Mr Hodgkinson, the suggestion that there should be a transfer to him of an interest in the property came from Mr Kennedy, not from Mr Wright. That would, no doubt, be consistent with Mr Hodgkinson's evidence that he had not previously discussed with Mr Wright, at least in any serious way, the transfer to him of a share in the property in order to provide the requisite security. But as I have already observed, I take the view that he must already have raised this with Mr Wright as at least one of the possible ways of dealing with the matter in the light of his discussions with Mr George.

71. But Mr Wright's evidence was even more strikingly different from Mr Kennedy's. According to him, Mr Kennedy simply told him that what he wanted was a joint tenancy and gave him no explanation of what this meant, or of the legal implications of such a regime. He assumed that the phrase referred to some sort of lease, and that he had just been given some very general preliminary advice which would be followed in due course by a more detailed report of some kind.

72. Mr Wright's contention that he was not aware of the nature of a joint tenancy was set out in express terms in reply to request for further information, signed and verified by him, and dated 15 March 2004. The request was to this effect:

> "If it is the Claimant's case that Mr Kennedy misled the Claimant as to the true effect of the transfer of the Property, please state what the claimant thought the effect of a proposed transaction was."

Mr Wright's answer was this:

> "As the Claimant had previously been a tenant farmer on a farm in the village, he was familiar with the term 'tenant' in this sense and was therefore under the mistaken belief that a 'joint tenancy' was of a similar type to this and that the defendant was being given a tenancy of the workshops the Defendant was then using."

But I cannot accept his evidence about this. It seems to me to be quite clear that he must have been perfectly well aware long before June 2000, when he stated that he had first found out about it, that he had, in fact, transferred a share of the property to Mr Hodgkinson shortly after the appointment with Mr Kennedy on 15 May 1997.

73. In order to see why, it is necessary to consider what happened after that meeting. In the first instance Mr Wright was asked to let Mr Kennedy have the deeds to the property; and he did so within a few days. Mr Kennedy then prepared the draft transfer and sent it to Mr Wright under cover of a short letter on 21 May 1997. It reads as follows:

"Dear Mr Wright,

I enclose the Transfer of your property into joint names for signature by you and Mark Hodgkinson in the presence of an independent witness which excludes Mr Hodgkinson's Wife. Please return the document after signature undated in the enclosed SAE."

This quite clearly refers to a transfer into the joint names of himself and Mr Hodgkinson.

74. The transfer itself was similarly plainly headed "Transfer of whole" and, of course, it provided for such a transfer into joint names. This was then signed as a deed by Mr Wright in the presence of a witness. After the transfer had been executed by both men and returned to Mr Kennedy on or about 28 May 1997, he submitted it to the Land Registry for registration. The Registry raised two questions: one as to value, and the other as to certain charges which appeared to affect the property. As a result, Mr Kennedy spoke to Mr Wright by telephone on 16 July 1997 and was told that the value of the property was £90,000, which was, of course, the value placed upon it by the valuer instructed by Mr Hodgkinson in February 1997, and that the land charges entry probably related to a road improvement scheme.

75. According to Mr Kennedy there was no suggestion of any concern about the transaction on Mr Wright's part, or any reluctance to go through with the transaction. The transfer was then registered and a copy of the land certificate was forwarded to Mr Wright on 29 June 1997, together with the firm's account. Mr Kennedy's covering letter reads as follows:

"Dear Mr Wright,

The Transfer into joint names has now been registered at the land registry, the enclosed copy of the land certificate is for your information. We also enclose your account. Do you wish us to keep the title deeds in safe custody on your behalf?"

Once again, there is a clear reference to a transfer into joint names, and the land certificate would have recorded this.

76. If that were not clear enough, the account sent with the letter charged a fee of £117.50, inclusive of VAT, plus disbursements, and I quote:

"For acting on your behalf in connection with the transfer by way of gift of Brookside, Badby Road, Newnham, into the joint names of yourself and Mark Hodgkinson."

When these documents were put to him Mr Wright could not accept that he had fully understood their implications, or indeed that he had ever properly read them.

77. During the course of the trial a letter was produced from Mr Wright himself to Mr Kennedy dated 7 August 1997. It is written in a clear and steady hand and reads as follows:

"Dear Mr Kennedy,

Enclosed please find cheque £277.50 in settlement of your account re transfer of the above property into the joint names of myself and Mark Hodgkinson.

As regards my deeds, currently held by you, I would prefer to hold these myself, and will telephone your office before arranging to collect them on one of my infrequent visits to Rugby.

Thank you for your help in this matter.

Yours sincerely

Donald D Wright."

78. This letter shows beyond any real doubt that Mr Wright must have read Mr Kennedy's letter of 29 July 1997 and must have fully appreciated that it referred to a transfer into the joint names of Mr Hodgkinson and himself. On its face, it also seems to be the work of a man who was perfectly capable of understanding property transactions of this kind.

79. But, if that were possible, the position becomes even clearer when one considers his subsequent testamentary dispositions. On 8 May 1998 Mr Wright came to see Mr Kennedy once again, but on this occasion he came on his own for the purposes of making a new will. One of the changes to be made was to clause 3. In the 1993 will, it will be recalled, the equivalent clause devised the entirety of the property to Mr Hodgkinson. But the new will, no doubt reflecting the 1997 transfer, whether or not it was strictly necessary to do so, provided simply for a gift of Mr Wright's share in the property, rather than the whole. According to Mr Kennedy, he and his client discussed this change. So he must have appreciated that he now owned only a share in the property. But he never raised any query or concern about the earlier transfer and the new will was duly executed by Mr Wright on 27 May 1998.

80. Mr Kennedy retired in 1999 and Mr Frankton of the same firm thereafter dealt with Mr Wright. On or about 25 August 1999 Mr Wright wrote a note which appears to comprise instructions for a codicil to his will, so as to incorporate a new bequest. Once again, it is clearly and firmly written and uses the technical term "codicil".

81. On 23 September 1999 Mr Wright came to see Mr Frankton with his sister, initially, it would seem, to discuss the estate of his sister's late husband. But after those matters had been discussed the conversation turned to Mr Wright's own will. First of all, Mr Wright spoke about the new bequest and probably gave Mr Frankton the manuscript note to which I have already referred. But what happened then was of some potential importance. Mr Frankton made an attendance note, the material parts of which read as follows:

> "…once we had dealt with that matter, Mr Wright then said that he wanted to make some changes to his Will. He started out by saying that he wanted to a legacy of £10,000 to a friend of his, Mrs Judy Reader. I confirmed that this could easily be done by adding a Codicil to his Will. However, he then launched into a lengthy explanation of the position regarding his property at 'Brookside'. Apparently he has owned this property for many years. A Mr Mark Hodgkinson used to do a lot of work with him and helped him out with his farm. On at least one occasion in the past he discussed with Paul Gilbert the possibility of making a lifetime gift of the property to Mr Hodgkinson, but Paul Gilbert always put him off the idea saying it could well lead to difficulties. However, more recently, possibly in 1998 when he made the Will, he appears to have succumbed and transferred the property into the joint names of himself and Mr Hodgkinson in equal shares by way of gift. Unfortunately this has caused problems not so much with Mr Hodgkinson but with his wife. Apparently soon after the gift took place Mrs Hodgkinson sent round a surveyor to value the property. At one time she told Mr Wright's friend Mrs Reader that she was not to come on to the property. It seems clear that Mrs Hodgkinson in particular wants Mr Wright out of the property. I understand that Mr Wright has in the past said to Mr Hodgkinson that he would be receiving the whole of the property when Mr Wright died and Mrs Hodgkinson is clearly trying to jump the gun. Apparently Mrs Hodgkinson recently asked for her name to be put on the deeds and Mr Wright refused.
>
> The bottom line of all this is that Mr Wright no longer wants to leave his remaining half share of 'Brookside' to either Mr or Mrs Hodgkinson. He is talking in terms of leaving his half share to be divided up between possibly three local charities. Nevertheless, he would still like Mr Hodgkinson to have first refusal should he wish to buy out the other beneficiary's half share of the market value within say six months of the date of death. I said that all things were possible and that I could draft a Will or Codicil to accommodate this. I did express some reservation about leaving the half share amongst several small charities. I said that if for example if Mr Wright left the half share to one large national charity they would have far more financial muscle to ensure that the arrangement worked. My concern is that as soon as Mr Wright dies the Hodgkinsons will immediately move into the property and may fail or refuse to buy up the other half share. This would deliver a problem both for the Executors and to the charitable beneficiaries. However, in principle there is no reason why Mr Wright could not do it this way if he wanted to do so.
>
> However, Mr Wright has not yet made up his mind for definite who he wants to leave his half share to. He has instructed me for the time being simply to prepare a Codicil to his Will to make the gift of £10,000 to Judy Reader. He is going to give further thought to the proposed gift of the half share in 'Brookside' and will let me have his instructions."

82. This document clearly marks a significant turning point in the relationship between Mr Wright and Mr Hodgkinson. But for present purposes there are two features of considerable importance. The first is that, if accurate, it clearly demonstrates that Mr Wright was very well aware at that time that he had made a lifetime gift of a half share in the property to Mr Hodgkinson by way of a transfer into joint names, though he did not have the precise date at his fingertips. The second point is that the attendance note also seems to show that Mr Wright had considered making such a gift to Mr Hodgkinson before the two men went to see Mr Kennedy in 1997 and had discussed the possibility with Mr Gilbert, seemingly on more than one occasion, and had been discouraged from doing so.

83. Mr Frankton was called to give evidence. He had no independent recollection of the meeting, though he accepted that it was unlikely that Mr Wright was at that stage alleging that any undue pressure had been brought to bear upon him to make the gift, or that he was seeking advice about it, as, for example, with a view to having it set aside. If he had, he would have made a note to that effect.

84. When asked in cross-examination about his use of the word "succumbed" in connection with the gift, he could give no explanation for it, but still maintained that he did not have any reason to think that Mr Wright had been subjected to any pressure.

85. Mr Gilbert was also called as a witness. He retired in 1996 and had, of course, prepared the 1993 will. He also had little, if any, independent recollection of these matters. In particular, he could not recall ever having given advice to Mr Wright in connection with a proposed lifetime gift. If he had done so, he would have warned him about the risks involved, as it would have meant that he would have lost effective control of his property. But in such circumstances he would normally make an attendance note, and there appears to be no record of any such advice.

86. For completeness, I should add that Mr Wright was recalled and asked about these matters, but he denied ever

asking for, or receiving, any advice from Mr Gilbert about a lifetime gift of the property, and continued to assert that he did not make such a gift to Mr Hodgkinson.

87. On this material I am quite unable to reach any clear conclusion as to whether Mr Wright did, in fact, seek advice from Mr Gilbert. He could have done so, either at or about the time of the1993 will, or subsequently, after Mr Hodgkinson had broached the subject of security. But if he did, the absence of any letter, attendance note, or other contemporaneous documentation, and, indeed, the wording of Mr Frankton's own attendance note of 23 September 1999, suggest that any advice given to him was informal and was unlikely to have involved any detailed explanation of the "difficulties" involved.

88. After the meeting on 23 September 1999, Mr Frankton wrote to Mr Wright on 24 September 1999, enclosing a draft codicil in accordance with Mr Wright's instructions. But his letter went on to deal with the position of Mr Hodgkinson. The relevant passage reads as follows:

> "I refer to our discussion regarding the half share in 'Brookside', which, under the terms of your existing Will, is to be given to Mr Mark Hodgkinson. I understand that you have decided to make a gift of your half share to someone other than Mr and Mrs Hodgkinson and I look forward to hearing from you when you have decided who is to be the beneficiary of that half share. I can then prepare either a further Codicil or do the Will again to incorporate all of these changes.
>
> I understand that even though you are intending to give your half share in 'Brookside' to someone other than Mr Hodgkinson, you are still willing to give him an option to purchase that half share at market value at the date of your death provided he comes up with the money within six months of the date of death. If he cannot or will not do that the property would have to be sold and divided up accordingly."

That, of course, is entirely consistent with his previous attendance note.

89. Mr Wright duly executed the codicil and returned it together with an undated letter, in which he gave instructions that his half share in the property should be left to the Imperial Cancer Research Fund. Mr Frankton then prepared a new will, incorporating Mr Wright's wishes, and suggested that he destroy any copies of his previous will and codicil once he had executed the new one.

90. The will was executed by Mr Wright on 4 October 1999, and provided for his share in the property to go to the Imperial Cancer Research Fund. There was no provision for Mr Hodgkinson to have any right of pre-emption, or any similar opportunity to acquire that share.

91. So I am quite satisfied that Mr Wright was perfectly well aware of the fact that the document which he executed on or about 28 May 1997 constituted the transfer of a share in the property to Mr Hodgkinson, and I reject his evidence to the contrary.

92. I return, therefore, to the meeting with Mr Kennedy on 15 May 1997. I do not think it is likely that Mr Kennedy simply volunteered the suggestion of a joint tenancy. On the contrary, I think it is distinctly more likely than not that, as Mr Kennedy said, Mr Wright indicated at a fairly early stage that he wanted to transfer a share in the property to Mr Hodgkinson. That would explain why the discussion appears to have focused on the question as to whether this could best be achieved by way of a joint tenancy or a tenancy in common.

93. By the same token, this meant that, apart from a fairly brief explanation of the difference between the two regimes, there was no discussion about any other way in which Mr Hodgkinson might be provided with security, whether for his business or for any expenditure on the property. Thus, no consideration was given to the possibility of a charge over the property, or of the grant of a limited interest, or of an interest in part only of the property. Similarly, there seems to have been little, if any, discussion of the implications of a joint tenancy, other than survivorship. No advice appears to have been given as to what might happen if the parties fell out, or if Mr Hodgkinson failed to carry out any works of improvement at the property, or to move into residence so as to provide company and support for Mr Wright in his old age. Mr Kennedy did not think that he would have said anything about the possibility of either side forcing a sale of the property in such circumstances, though Mr Hodgkinson thought he recalled some mention of it (though I doubt if he was right about that) nor was there any discussion of any possible tax implications of the disposal of a share in the property, or its potential effect on inheritance tax.

94. So Mr Kennedy simply went ahead with the fairly routine conveyancing process of arranging a transfer of the property into joint names in accordance with what he understood to be his instructions, and received no subsequent signal from Mr Wright that this was not what he wanted, or that further advice was required.

95. It is somewhat more difficult to determine precisely what discussions had previously taken place between Mr Wright and Mr Hodgkinson as to the possibility of the transfer of a half share in the property to Mr Hodgkinson, or whether Mr Wright had come to a firm decision to make such a gift to him before the interview with Mr Kennedy, or whether he had informed him of any such decision.

96. As I have already said, I think it is very likely that the transfer of a half share was at least one of the options raised by

Mr Hodgkinson in his discussions with Mr Wright, after he had received advice from Mr George, and, despite my general appraisal of Mr Hodgkinson's evidence, I thought he was somewhat coy about this. I find it difficult to think that the matter was not discussed on more than one occasion, and I think it likely that Mr Wright had decided that he would like to make such a lifetime gift before they went to see Mr Kennedy. But I suspect that he would also have given some indication of such an intention to Mr Hodgkinson before the visit to Mr Kennedy. If he had announced this further act of generosity for the first time during that meeting, I would rather have expected Mr Kennedy to have recalled it, and Mr Hodgkinson to have expressed his gratitude, rather as he had done when he first learned of the testamentary gift. But I do not feel able to make a positive finding to that effect. It is perfectly possible that Mr Wright kept his own counsel on this matter, as he seems to have done, for some time at least, in relation to the gift by will, and I do not think that the objective probabilities in themselves are sufficient to establish the contrary.

97. I have already dealt in some measure with subsequent events, and I think it is possible to deal with other relevant matters fairly shortly. Within a very short space of time after the transfer had been executed and registered, part of the work detailed in Mr Berrel's plans were started. This involved an extension of Mr Wright's sitting-room on the ground floor of his house. This was largely carried out at Mr Hodgkinson's expense. He paid for most, although perhaps not all, of the materials, and for the workmanship. He also contributed a substantial amount of his own time and labour. If one includes the various sums expended on architect's and local authority fees and the like, the total cost to Mr Hodgkinson, excluding his own labour, amounted to a little under £10,000.

98. For completeness, Mr Hodgkinson also claims to have spent more than £4,000, once again excluding his own labour, on improvements to the outbuildings and the surrounding area behind the house, where he carried on his business.

99. So it would seem that once he had the security he was looking for, Mr Hodgkinson spent a not insignificant sum on improving the property and invested a fair amount of his own time and labour to the same end.

100. But Mr Wright was not particularly grateful. He did not welcome the disruption involved, and did not consider that the extension added significantly to the amenities of the property. So, whatever enthusiasm he might have had for the remaining and more extensive parts of the project, it rapidly cooled.

101. Mr Hodgkinson himself did not seem particularly concerned about this. He had made a start on the work so as to retain the benefit of planning permission; and he may well have been happy enough to postpone any substantial further expenditure.

102. But this moratorium seems to have been associated with a more general cooling of the relationship between the two men. Mr Wright seems, particularly, to have resented what he regarded as somewhat presumptuous behaviour on the part of Mr Hodgkinson's wife. He was also unhappy with the fact that Mr Hodgkinson's business was expanding somewhat, so that he needed to make extensive use of the outbuildings and the surrounding area. This cooling of the relationship was reflected in the changes which Mr Wright made to his will in 1999.

103. But matters got worse as time passed by. At some stage Mr Wright discussed the situation with Mr Clutton who was very surprised to learn of the transfer. Indeed, he gained the impression that Mr Wright had no real idea of its implications. It may be that it was as a result of his discussions with Mr Clutton that he sought further advice from Mr Frankton on or about 14 June 2000.

104. On this occasion Mr Frankton realised that the 1997 transfer had created a joint tenancy and advised him to sever it. This advice was confirmed in a letter of 16 June 2000, a redacted version of which was put before me. Acting upon that advice, on or about 19 June 2000, Mr Wright served a notice of severance upon Mr Hodgkinson. On receipt of this notice Mr Hodgkinson himself consulted solicitors who wrote to Johns Gilbert & Frankton enquiring about Mr Wright's intentions. This received a comparatively emollient reply by way of a letter dated 25 August 2000, in which it was said that Mr Wright's present intention was to leave his own half share in the property to a charity, subject to a proviso that Mr Hodgkinson should be allowed to remain in occupation for up to 50 years, subject to payment of a market rent. That did not, of course, reflect the actual dispositions made by his 1999 will.

105. Indeed not long afterwards, Mr Wright made a new will, dated 25 October 2000, in which he specifically directed that his trustees should not sell his share, or any part of the property, to Mr Hodgkinson, or anyone acting on his own behalf. So, this represented a further twist in the downward spiral of Mr Wright's hostility towards Mr Hodgkinson.

106. It seems that Mr Hodgkinson was not informed of this until a further dispute arose about the payment for water and electricity. On 30 October 2001, Mr Frankton wrote directly to him, informing him that he must make arrangements for an independent supply of these services or they would be disconnected from the outbuildings used by Mr Hodgkinson. Various other grievances were raised in the letter, and he was informed in general terms of the nature of the dispositions now made by Mr Wright. The letter concluded with the following passage:

> "Finally, it does seem to us upon reviewing what happened in 1997 that the probable intention of the parties was not put into effect. We cannot see the reason why the whole of the property would have been put into your joint names as joint tenants. We appreciate that you had been occupying the commercial area of Brookside for some time prior to the Deed of Gift and that you have continued to occupy the same extent of premises since the Deed of Gift. If anything it seems to us that the intention of the parties would have been to

transfer to you that part of Brookside which was occupied exclusively by you. That would quite easily have been achieved even if you needed a right of way over Mr Wright's retained land. We have advised our client to consider an application of the court to rectify what we believe was a mistake on the part of both parties, or at least of our client. No doubt you will let us have your views on that suggestion.

107. There followed further desultory correspondence between Mr Wright's solicitors and Mr Hodgkinson. By and large, as it seems to me, Mr Hodgkinson conducted this correspondence with restraint and dignity, suggesting on more than one occasion that the property could be partitioned.

108. But, despite the good offices of Mr Clutton, all attempts to resolve the dispute proved unsuccessful. Eventually, Mr Wright consulted fresh solicitors, and on 5 November 2003 they wrote to Mr Hodgkinson raising, for the first time, allegations of undue influence and threatening proceedings. Up until that time the only challenge to the validity of the gift seems to have been the rather half-hearted suggestion made by Mr Frankton in his letter of 30 October 2001, and repeated in a later letter, that Mr Wright might be entitled to rectify the transfer.

109. In the event, the present proceedings were eventually commenced on 14 January 2004, and are based solely on allegations of undue influence.

110. It is against the background of my factual findings, that I must now consider whether the allegation of undue influence is made out.

111. The classic, modern exposition of the law is to be found in the speech of Lord Nicholls of Birkenhead in Royal Bank of Scotland Plc-v-Etridge (No. 2) [2002] 2 AC 773 at paragraphs 8 to 24 on pages 795 to 799. The passage is so well-known that I need not lengthen this judgment by quoting extensively from it.

112. Lord Nicholls recognised two categories of cases. The first of these is where the transaction in question has been brought about by overt acts of improper pressure or coercion. This is sometimes, for convenience, referred to as "actual undue influence". The other category is where the relationship between the parties is such that one has acquired a measure of influence or ascendancy over another which provides scope for him to take unfair advantage of the relationship, even without any specific, overt acts of persuasion.

113. It is in the context of this latter category of cases that the presumption referred to by Lord Nicholls commonly comes into play, hence the convenient shorthand use of the phrase "presumed undue influence" to describe such cases. As Lord Nicholls observed, there are two different types of presumption which may arise, but I am not concerned in this case with those relationships which fall into the special class referred to at paragraph 18 of his opinion.

114. What is contended, however, in the present case is that the nature of the relationship between Mr Wright and Mr Hodgkinson, and the nature of the transaction itself, are such as to raise an evidential presumption, shifting the burden to Mr Hodgkinson of adducing evidence to show that he did not abuse the relationship by preferring his own interests to those of Mr Wright in relation to the transfer.

115. In order to rebut the inference which might otherwise be drawn in such cases, evidence may be adduced to show that the transaction was carried into effect only after independent advice had been taken from a solicitor, or some other suitable adviser. But, as Lord Nicholls pointed out at paragraph 20, proof of such advice in itself does not necessarily show that the transaction was free of the exercise of undue influence. Whether or not it suffices for that purpose is a question of fact.

116. Now, of course, as Mr Ohrenstein, on behalf of Mr Hodgkinson, reminded me, the legal burden of proving undue influence still rests upon the party seeking to set aside the transaction. And, at the end of the day, the court must consider the entirety of the evidence in order to determine whether undue influence has been established either directly or by way of inference. That is undoubtedly correct, as Lord Nicholls himself pointed out.

117. But it is important to see how the principles identified in Royal Bank of Scotland Plc-v-Etridge (No.2) have been interpreted and applied in other cases. I start with the observations of Sir Martin Nourse in Hammond-v-Osborn [2002] WTLR 1125, at paragraph 1 of his judgment on page 1127 of the report, where he said this:

> "The striking feature of this appeal has been the revelation of continuing misconceptions as to the circumstances in which gifts or other transactions will be set aside on the ground of presumed undue influence, a class of case in which as Cotton LJ observed in Allcard-v-Skinner [1887] 36 Ch D 145 171:
>
> > 'the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom, being abused.'
>
> Here it is conceded that there was both a relationship of trust and confidence between donor and donee and a gift so large as together to give rise to the presumption. So the question is whether the presumption is rebutted by proof that the gift was 'the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the court in holding that the gift was the result

of a free exercise of the donor's will', (Per Cotton LJ ibid), or, to put it more shortly, whether it is proved that the gift was made by the donor 'only after full, free and informed thought about it'. See Zamet-v-Hyman [1961] WLR 1442 1446, Evershed MR."

Ward LJ made similar observations at paragraphs 45 to 47 of his judgment, at page 1141 of the report.

118. This classic statement of principle cited by Sir Martin Nourse from the great case of Allcard-v-Skinner [1887] 36 Ch D 145 171 has been recognised in other cases, both before and after Royal Bank of Scotland Plc-v-Etridge (No 2) [2002] 2AC 773. Thus it was cited with approval by the Privy Council in Inche Noriah-v-Omar [1929] AC at 131 to 132, and more recently in Niersmans-v-Pesticcio 1 April 2004 [2004] EWCA Civ 372, where, at the outset of his judgment Mummery LJ quoted the observations of Sir Martin Nourse in Hammond-v-Osborn which I have already read.

119. It follows that in such cases, in order to raise the presumption, it is not necessary to prove that the donee has preferred his own interests and has not behaved fairly to the donee. That submission was made by counsel in Hammond-v-Osborn in reliance on paragraph 14 of the speech of Lord Nicholls in Royal Bank of Scotland Plc-v-Etridge (No 2) [2001] 2AC 773, but was firmly rebuffed by Sir Martin Nourse at paragraph 31 of his judgment in these words:

> "That is not what Lord Nicholls said. What he said, and what he meant, was that once the presumption is raised it is presumed, unless and until it is rebutted, that the donee has preferred his own interests and has not behaved fairly to the donee."

He continued as follows at paragraph 32:

> "Even if it is correct to say that Mrs Osborn's conduct was unimpeachable, and that there was nothing sinister in it, that would be no answer to an application of the presumption. As Cotton LJ said in Allcard-v-Skinner (see paragraph one above) the court does not interfere on the ground that any wrongful act has, in fact, been committed by the donee, but on the ground of public policy, which requires it to be affirmatively established, that the donor's trust and confidence in the donee has not been betrayed or abused."

120. It also follows that it is no sufficient answer in such a case to show that the donor knew what he was doing and intended to do it. In Hammond-v-Osborn Ward LJ dealt with this point at paragraphs 39 to 41 of his judgment.

121. The importance of legal advice in rebutting the presumption which might otherwise arise has also received attention in a number of cases. Indeed it was specifically considered by Lord Nicholls at paragraph 20 of his speech in Royal Bank of Scotland Plc-v-Etridge (No 2) [2002] 2AC 773 at 798.

122. In Inche Noriah-v-Omar [1929] AC 127 at 135 to 136 the Privy Council dealt with the point in this way:

> "The decision in each of these cases seems to their Lordships to be entirely consistent with the principle of law as laid down in Allcard-v-Skinner. But their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted; nor are they prepared to affirm that independent legal advice, when given, does not rebut the presumption, unless it was shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of a transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment that has already been recited of Cotton LJ, and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say it, it must be given with a knowledge of all the relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor."

123. In Hammond-v-Osborn [2002] WTLR 1125 at page 1157 Sir Martin Nourse, in the passage at paragraph 1 of his judgment which I have already referred to, described the evidential burden upon the donee, in cases of this kind, as one which required him to show that the gift was made by the donor, "only after full, free and informed thought about it". Subsequently, at paragraph 26 of his judgment, pages 1135-1136 of the report, he returned to the same point.

124. So, I conclude that what must be shown, once the evidential presumption arises is that the gift was made after full, free and informed thought. Whilst the Privy Council left the door ajar to other possible ways of establishing this, the usual course is to seek to show that the donor received independent legal advice, from which it can be safely concluded that he so acted.

125. But, of course, the mere fact that legal advice is obtained cannot suffice, unless it is proper to infer that it must have

led to a decision based upon full, free and informed thought.

126. But before concluding this review of the relevant case law, I should also note that there was some debate before me as to whether the nature of the transaction in itself may tend to establish both of the ingredients identified by Lord Nicholls at paragraph 14 of his opinion in Royal Bank of Scotland Plc-v-Etridge (No 2) as being normally sufficient to raise the evidential presumption of undue influence. Can the nature of the transaction be treated in itself as evidence of a relationship of trust and confidence?

127. For my part, I think it can be a factor. I do not consider that Lord Nicholls was laying down any mechanical approach as to the circumstances which may give rise to an inference which may have to be rebutted. In that very paragraph of his speech he referred to these ingredients as being "normally" sufficient to discharge the burden of proof of establishing undue influence in the absence of satisfactory evidence to the contrary.

128. But in the immediately preceding paragraph he described the evidence required to discharge the burden in more general terms, in these words:

> "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."

129. So, in an appropriate case the very nature of the transaction may assist the court in determining whether the relationship between the parties was one which was susceptible to the type of abuse which this aspect of the doctrine of undue influence is intended to restrain. As a matter of fact, that appears to have been the approach adopted by Sedley LJ in his very short judgment in the recent case of Macklin-v-Dowsett 14 June 2004 [2004] EWCA Civ 904.

130. Finally, I conclude this section of my judgment by referring to a passage in the judgment of Mummery LJ in Niersmans-v-Pesticcio 1 April 2004 [2004] EWCA Civ 372. At paragraph 4 he referred to current social trends, which were leading to what he described as "a renewed interest in the law governing the validity of lifetime dispositions of houses, both in and outside the family circle, by the elderly and the infirm". He continued:

> "The transfer of a house is a substantial transaction. A house is the most valuable asset that most people own. If a transfer is made by one person on the dependent side of a relationship of trust and confidence to a person in whom trust has been placed, it must be shown by the trusted party that the disposition was made in the independent exercise of free will after full and informed consideration. The court may grant relief to the transferor, even though the transfer was not made as the result of any specific reprehensible conduct on the part of the trusted transferee."

131. Now, the present case, it is alleged on behalf of Mr Wright that the 1997 transfer should be set aside, either on the grounds of actual undue influence, or by reason of presumed undue influence, to use the convenient shorthand expressions. I need to take up no time with the former. There is, in my judgment, no satisfactory evidence whatever of overt acts of improper pressure or coercion on the part of Mr Hodgkinson.

132. The real question is whether the evidential presumption arises in this case, and, if so, whether sufficient evidence has been adduced to rebut it.

133. Notwithstanding my observations as to the inferences which may be drawn from the nature of the transaction itself, I start with the question as to whether there was a relationship of "trust and confidence, reliance, dependence or vulnerability", to adopt the words of Lord Nicholls at paragraph 11 of his speech in Royal Bank of Scotland Plc-v-Etridge (No 2) [2002] 2AC 773 at 795, whilst bearing in mind his cautionary observation that there is no single touchstone for determining whether the principle is applicable.

134. The relationship between the two men was clearly a close one. That was something which particularly struck Mr Kennedy in the fairly short meeting he had with them on 15 May 1997. But it was not merely a social friendship. As Mr Hodgkinson himself accepted in cross-examination, the two men trusted each other. That trust and friendship manifested itself in various ways. Mr Wright permitted Mr Hodgkinson to occupy part of his land, and make use of his water and electricity supply without any form of written agreement, trusting him not to abuse his generosity, and to make a fair contribution to the cost of services.

135. In the period leading up to the transfer in 1997, whoever may have been responsible for the initial proposal, it was envisaged by both men that Mr Hodgkinson would spend money on extending the property with a view of moving into the house to provide company and assistance for Mr Wright as he grew older. This is a further manifestation of the degree of trust that the two men had in each other at that time.

136. As it seems to me, the relationship was an unusual one, marked by obvious feelings of generosity on the part of Mr Wright towards Mr Hodgkinson, which went well beyond the norm. Those feelings did not arise, as is often the case, from any emotional relationship or ties of kinship between the two men, and may, in part, have been wholly altruistic. But, I think it is nonetheless likely that Mr Wright's generous impulses towards Mr Hodgkinson were motivated, at least in part, by his expectation or hope that the younger man would repay him by providing company and support in his old

age. Indeed, one of the most marked features of the relationship was the disparity in the ages of the two men.

137. In my judgment, that relationship was one which was potentially susceptible to abuse. I consider, therefore, that the first of the two ingredients which Lord Nicholls considered might normally raise an evidential presumption of undue influence is made out.

138. But what of the transaction itself? I am bound to say that in my judgment it is one which calls out for an explanation. Whilst I do not know the precise extent of Mr Wright's remaining assets, the transfer of a half share in the property, which included a five-acre field as well as his own dwelling-house, represented, on any view, a substantial gift. On the basis of the valuation of 18 February 1997 it would have been worth approximately £45,000 at that time, disregarding the comparatively modest additional value of the field.

139. But more importantly it involved the transfer of, in effect, a half share in his home. That meant that he had given up sole ownership and control of the home in which he lived, and hoped to live until the end of his days. But in return he got nothing beyond the expectation that some works of improvement would be carried out to the house, and the hope that Mr Hodgkinson would provide company, support and assistance in the years to come.

140. So I take the view that a case has been made out which requires to be rebutted by evidence that there was no abuse by Mr Hodgkinson of the influence he had over Mr Wright as a result of their relationship, and that he did not prefer his own interests over those of Mr Wright.

141. In order to discharge the evidential burden that is placed upon him, Mr Hodgkinson must, therefore, show, on the evidence as a whole, that the transfer to him was the result of, full, free and informed thought on the part of Mr Wright.

142. For that purpose Mr Hodgkinson relied primarily, but not exclusively, on the fact that advice was taken from Mr Kennedy. But in reality Mr Kennedy gave little in the way of advice. That was, no doubt, because he took the view that he was being given clear instructions to prepare a transfer of a half share in the property, and that the only advice that was required was as to whether this should be implemented by way of a joint tenancy or a tenancy in common.

143. All that Mr Hodgkinson wanted, it would seem, was security for any expenditure. That was neither unreasonable nor in any way ignoble. But what he actually got was much more than that, namely a half share in the property, which, as it happened, was quite disproportionate in value to the expenditure which he subsequently incurred, without any binding commitment on his part to carry out any works or to provide any other services.

144. But no consideration was given by Mr Kennedy to other possible ways in which the interests of both parties could be recognised and protected, as, for example, by way of a charge on the property to cover expenditure, coupled, perhaps with the grant of some sort of limited interest, so as to give Mr Hodgkinson security for the purposes of his business.

145. Furthermore, it does not seem that Mr Kennedy gave any advice as to the possible drawbacks of the proposed transfer. He did not address the question as to what might happen if Mr Hodgkinson did not repay Mr Wright's generosity, or if, for that or any other reason, they fell out. I think it is unlikely that he told them of the possibility that, in such circumstances, it would be open to either party to apply to the court under section 14 of the Trusts and Appointment of Trustees Act 1996, or of the powers which would be available to the court on such an application; nor was any thought given as to the possible tax implications of the proposed transfer.

146. So I do not consider that the advice given by Mr Kennedy was sufficient to enable Mr Wright to give full, free and informed consideration to the proposal to give a half share in his property to Mr Hodgkinson. That is not intended to be a criticism of Mr Kennedy, who had taken a certain view of his instructions, but a simply statement of fact as to the nature of the advice he gave.

147. I do not, of course, know what would or might have happened if Mr Kennedy had given full and detailed advice to Mr Wright about these matters. If I understood his evidence correctly, Mr Hodgkinson might very well have been content with some lesser form of security. As for Mr Wright, it is perfectly possible that he would still have wanted to make a gift of the kind which he did, in fact, make. There is no real doubt, in my judgment, that, despite his denials, he knew perfectly well that the transaction in question involved the gift of a share in the property and that he intended to make such a gift.

148. But unless it is shown, whether as a result of independent legal advice or otherwise, that his intention was the result of full, free and informed thought, it is no answer in a case such as the present to demonstrate that he intended to make the gift in question; nor is it a sufficient answer that he might have gone ahead, even if he had received full and proper advice.

149. In fact, the only evidence that Mr Wright may have known of the full legal implications of what he was doing is Mr Frankton's file note of 23 September 1999, which suggests that, according to Mr Wright himself, he had received some advice on the point from Mr Gilbert. But the evidence is really too slender to allow me to conclude that, assuming such advice had indeed been given, it would have sufficed to bring home to Mr Wright the full implications of the proposed gift; nor, for completeness, do I consider that this file note is sufficient to transfer the evidential burden back to Mr Wright.

150. The fact of the matter is that the question of security was first raised by Mr Hodgkinson for the perfectly legitimate purpose of protecting his own interests in the event that he spent money on the property with a view of moving into the house in due course. One of the possible ways in which he considered that this might be achieved, and which he raised with Mr Wright, was by way of the transfer of a half share in the property. Mr Wright appears to have decided to make such a gift; and he did so without the benefit of any legal advice which properly addressed the implications of such a transaction, or which considered any alternative solution, or which dealt with any of the safeguards which might be built into it.

151. I am not unsympathetic to Mr Hodgkinson, who appears to have been guilty of nothing worse than the willing acceptance of Mr Wright's generosity. He has also, as I previously observed, conducted himself with dignity and moderation since this dispute arose. He has also made it plain that he has no wish to interfere with Mr Wright's occupation of the house, so long as he wishes to remain there.

152. I have nonetheless come to the conclusion that there is sufficient evidence to raise a presumption of undue influence in this case, and that no sufficient evidence has been adduced to rebut it.

153. So it would seem to follow that the transfer must be set aside.

154. But Mr Ohrenstein submitted that it would not be right to do so in the particular circumstances of this case. He relied on a number of points for this purpose. The first was the doctrine of laches. I received only a limited submission on the doctrine. Miss Reed referred me to the following passage in Snell's Equity 30th Edition 2000 at paragraph 3.19:

> "Laches essentially consists of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim. Delay will accordingly be fatal to a claim for equitable relief if it is evidence of an agreement by the claimant to abandon or release his right, or if it has resulted in the destruction or loss of evidence by which the claim might have been rebutted, or if the claim is to a business (for the claimant should not be allowed to wait and see if it prospers), or if the claimant has so acted as to induce the defendant to alter his position on the reasonable faith that the claim has been released or abandoned. But apart from such circumstances delay will be immaterial. There can be no abandonment for a right without full knowledge, legal capacity and free will, so that ignorance or disability or undue influence will be a satisfactory explanation of delay."

155. In the present case, which is, of course, an undue influence case, it seems clear, despite his denials that Mr Wright realised that the transfer had, in fact, amounted to a gift of a half share in the property to Mr Hodgkinson. Even after the parties fell out, he did nothing to try to set it aside until the letter before action of 5 November 2003 after he had changed solicitors. The inference I draw is that he was unaware of the implications of the modern case law on undue influence until shortly before this letter.

156. Furthermore, Mr Hodgkinson must have known that his relationship with Mr Wright was in serious decline, at least from some time in 1999, and that it was most unlikely that the proposal for a further extension of the house would ever come to fruition during Mr Wright's lifetime, still less that he and his wife would go to live there. Yet further, at least from 30 October 2001, when Mr Wright's former solicitors made the comment about possible rectification, he must have known that Mr Wright's advisers were at least considering some form of challenge to the transfer.

157. In the meantime he continued to make use of the land at the rear for the purposes of his business, without paying any rent, and was not called upon to carry out any further work on the house. I do not see any sufficient evidence of any intention on Mr Wright's part to abandon or release any rights he might have had; nor do I consider that Mr Hodgkinson can be said to have altered his position in reliance on a reasonable belief that any such rights had been abandoned.

158. It is possible that if proceedings had been taken significantly earlier than they were, the evidence available may have been somewhat clearer in certain respects than it eventually was, but it is difficult to point to any specific evidence which might have been available to Mr Hodgkinson at an earlier date, and which is no longer available.

159. So, in my judgment the defence of laches fails.

160. Secondly, Mr Ohrenstein relied upon the doctrine of proprietary estoppel, citing to me the recent cases of Gillet-v-Holt [2001] Ch 210 and Jennings-v-Price [2002] EWCA Civ 159. He submitted that the evidence showed that Mr Hodgkinson relied upon Mr Wright's assurances that he would leave the property to him by will, and that in consequence he forbore from investing his accident compensation monies in another property, thereby losing the benefit of a rising market. (See paragraph 52 of his written closing submissions.)

161. This seems to me to be a very different case from the very limited allegation of estoppel at paragraph 17 of the defence, which is in these terms:

> "Further or in the alternative, by reason of the Claimant's delay in alleging undue influence and/or his encouraging the Defendant to carry out works to the Property and/or his acknowledgments of the Defendant's

interest in the Property:

(1) The Defendant is entitled to rely on the doctrine of laches; and/or

(2) The Claimant is estopped from denying the Defendant's interest in the Property."

Furthermore, there is no counterclaim seeking any declaration or consequential relief.

162. Without prejudice to any question as to whether any further claim can now be made, therefore, it seems to me that the only question on the face of the pleadings is whether Mr Wright is now precluded from having the transfer set aside because of the matters set out at paragraph 17 of the defence, particularly the encouragement which Mr Wright gave to Mr Hodgkinson's expenditure on the property.

163. Now I do not say that there may not be circumstances in which a person may be prevented from setting aside a transaction on grounds of undue influence, when he has stood by and allowed the other party to expend money on the property in reliance upon the validity of the transaction. But, given the policy underlying the presumption of undue influence, it seems to me that the court should exercise care before declining to set aside a transaction on such grounds. At least, as it seems to me, there would have to be sufficient proportionality between a reliance equity and the benefit conferred by the transaction which is sought to be set aside.

164. In the present case, however, I see no such proportionality on the evidence presently before me. Mr Hodgkinson's actual expenditure on the house after the transfer was less than £10,000, though, as I have also noted, he contributed his own time and labour. In addition, he spent money on the workshop area at the rear, though that has not been apportioned between the periods before and after the date of the transfer. But all that is much less than the value of the half share in the property, even at 1997 values.

165. As for the loss of opportunity to make some other investment in the housing market, this was neither pleaded, nor the subject of any detailed evidence. Furthermore, as I have already pointed out, the proposal for further expenditure on the property, and for its use as a home for Mr Hodgkinson and his family, was effectively dead by some time in 1999 at the latest. I do not see that I can properly quantify any equity which may arise on this basis and bring it into the equation.

166. In any event, as Miss Reed pointed out, Mr Hodgkinson has had the countervailing benefit of many years' rent-free occupation of the property for the purposes of his business, which ought also to be taken into account in determining the quantum of any equity of the kind contended for.

167. In the circumstances, I do not consider that it would be right to refuse to set aside the transfer on these grounds, without prejudice to any question as to whether Mr Hodgkinson may still be entitled to pursue a claim for some form of equitable interest in the property.

168. Finally, Mr Ohrenstein contended that Mr Wright had been untruthful in his evidence and had not, therefore, come to equity with clean hands. Despite my rejection of much of his evidence, for reasons which I have sought to explain, I have not felt able to conclude that he was being deliberately untruthful. Even if I had, however, I do not readily see why I should decline to grant him relief on those grounds.

169. I have not found this an easy case, but I have ultimately concluded that, in the light of the evidence, and having regard to recent case law and the policy underlying it, the transfer of 28 May 1997 must be set aside and all necessary consequential orders must be made for that purpose.