The trouble is that the necessary intention to support adverse possession is an artificial construct. As well as being artificial, it is challengingly subtle. An intention to "possess" but not to own, an intention to exclude everyone else, including the paper owner, but only as far as is reasonably practicable and only so far as the processes of the law will allow, is precise to an extreme. It bears little relationship to how people think in real life, nor is it expressed in language that ordinary people use to describe or explain their intentions. It seems very likely, from his actions and from his statement, that Michael Graham intended to farm the fields as part of his farm, and from day to day intended to keep the rest of the world out of the fields. But the reality gap between how people actually think and express their thoughts, and the convolutions of the judicially required intention, allowed the Court of Appeal room to manoeuvre. No doubt it wished to find for Pye. The result seems fair, but the analysis by which the result was achieved seems strained and implausible.

The Grahams are seeking leave to appeal to the House of Lords and the Appeal Committee is presently considering their petition. It is to be hoped that the House of Lords will indeed hear an appeal, so that the whole question of the necessary intention to found a claim in adverse possession can be fully considered.

LOUISE TEE

UNDUE INFLUENCE AND PARALLEL PROCEEDINGS

THE relationship between ancillary relief and undue influence was considered by the Court of Appeal in *First National Bank plc* v. *Walker* [2001] 1 F.L.R. 505. The case is a warning to practitioners that unless carefully advised, divorcing clients may be precluded as a result of ancillary relief proceedings from alleging an *O'Brien* defence of undue influence in subsequent possession proceedings. The facts of *Walker* were that husband and wife were joint tenants of the matrimonial home. Three mortgages of the house had been executed: first and third mortgages in favour of Barclays Bank and Lloyds Bank, and the disputed second charge in favour of First National Bank (FNB). This disputed mortgage, created in 1991, was to secure a loan made for the sole business purposes of Mr. Walker and his then partner. The marriage foundered, as did the husband's business. A decree absolute of divorce was granted in 1993, and in 1994 Mrs. Walker's petition for ancillary relief was heard. The court ordered that Mr. Walker transfer to his former

https://doi.org/10.1017/S0008197301690627 Published online by Cambridge University Press

wife his interest in the matrimonial home and in an endowment policy; an order for nominal periodical payments (of five pence per year) was also made. The transfer was completed in 1995. Mrs. Walker subsequently sought to defend possession proceedings brought by FNB on the ground, *inter alia*, that her execution of the charge had been procured by her husband's undue influence and that the bank had actual or constructive notice of the relevant facts.

The Court of Appeal, allowing FNB's appeal from a trial of the preliminary issue, held that a claim of undue influence against a bank mortgagee is secondary to and parasitic on the existence of such a claim by one debtor against the other. Mrs. Walker, in entering into the conveyance in the terms in which she did, abandoned any right to invoke her husband's undue influence against him, and in so doing she necessarily also abandoned any right to invoke undue influence against the bank. The issue was not *res inter alios acta* because of the parasitic nature of the claim.

It seems that almost any such transfer of mortgaged land from one co-owner to another will have the effect of affirming the validity of a disputed charge. Clause 4 of the conveyance, drawn up by Mrs. Walker's solicitors, read: "Nothing in this Deed shall affect or prejudice the continuing nature of the First Second and Third Mortgages which shall be a security for all liabilities present and future of the Wife and the Husband to the Bank which the Wife and the Husband hereby acknowledge". Sir Andrew Morritt V.-C. construed this clause as "specifically acknowledging the existence and validity of the second charge, as between her and the husband". In his view Clause 4 was crucial to the outcome: "if the conveyance had been silent about incumbrances then it would have taken effect subject to such of them as were valid and enforceable". But the judgments of Chadwick and Rix L.JJ. suggest that the general tenor of the conveyance, even without Clause 4, constituted an election by Mrs. Walker not to pursue any claim of undue influence. Mrs. Walker "was facing in two directions" and could not pursue inconsistent remedies. She had obtained relief in the matrimonial proceedings on the basis that the charge was a subsisting charge which bound her as well as her husband; she could not subsequently in the possession action seek to set the charge aside on the basis that it did not bind her but only her husband. Sir Andrew Morritt expressed the view that any reservation against the mortgagee would have no effect. It remains possible (but not certain) that affirmation might be avoided by express reservation in the conveyance of the claimant's rights against *both* the other debtor and the mortgagee.

https://doi.org/10.1017/S0008197301690627 Published online by Cambridge University Press

The decision follows a line of recent cases on undue influence (appeals against several of which are shortly to be heard by the House of Lords) in which wives fare badly when courts are called upon to balance commercial against family interests. Mrs. Walker acted unwisely, but the price she paid was high.

The bank: If the claim of undue influence had succeeded, the bank could not have enforced its security against the property as a whole and could have looked only to Mr. Walker for repayment. Nevertheless, as pointed out by Chadwick L.J., the bank would still have been able to enforce its charge over the interest Mr. Walker owned in the property at the time when the mortgage was executed, treating the equitable joint tenancy as severed at that time. The Court of Appeal was concerned that the family court might not have made the orders it did had it been aware of Mrs. Walker's intention to challenge the validity of the charge. It is likely that the court would still have ordered the transfer of the house, although less likely that it would also have ordered the transfer of the endowment policy. The outcome of *Walker* might be said to have created a windfall for the bank, which enjoyed greater security than it would have had, had it discharged its duty to ensure that Mrs. Walker received independent legal advice.

The husband: Mr. Walker received an even greater windfall. If undue influence had been established, he would have been solely rather than jointly and severally liable to repay the loan. And doubtless the bank will enforce the charge against the house before it sues on the personal covenant to repay. It is unfortunate that the real wrongdoer—the perpetrator of the undue influence—is the party who benefited most from the Court's decision.

The wife: Mrs. Walker could have avoided the result if she had disclosed to the divorce court her intention to claim undue influence in respect of the FNB mortgage; or if, once she knew of that possibility, she had gone back and informed the court of the change of position. In the result she and the children pay the entire price of the husband's wrongdoing and are likely to lose their home. If the house is repossessed and she shoulders more than half the debt, she will have a right of contribution and indemnity against Mr. Walker, but that must seem small consolation. If undue influence had been established, Mrs. Walker's interest in the equity of redemption would have risen from £5,000 to £16,000. The interest transferred to her would have been worth nothing in monetary terms—but it would not for that have been worthless to her, since it represented the security of a family home for herself and the children.

https://doi.org/10.1017/S0008197301690627 Published online by Cambridge University Press

A perhaps more equitable result would have been to permit the defence, subject to terms that required the transfer back of the endowment policy, thus improving the bank's chances of eventual recovery against the former husband. The lack of flexibility as regards remedies for undue influence has been problematic in the past (see, *e.g.*, *T.S.B.* v. *Camfield* [1995] 1 W.L.R. 430). Perhaps only legislation can provide a cure.

MIKA OLDHAM

COMMUNITY DIRECTIVES: EXPLAINING *CIA SECURITY*?

CASE C–443/98 *Unilever Italia* v. *Central Food* (judgment of 26 September 2000) concerned a dispute between two private undertakings over a contract for the supply of olive oil. Central Food refused to accept delivery because the oil did not comply with labelling requirements imposed by recent Italian legislation. Unilever claimed that the Italian rules were themselves governed by the provisions of Directive 83/189 [1983] O.J. L109/8. Under Article 8 of the Directive, member States must notify draft technical regulations to the Commission. In Case C–194/94 *CIA Security* [1996] ECR I–2201, the ECJ held that breach of this obligation rendered the relevant technical regulations inapplicable, and thus unenforceable before the national courts, even in a dispute between two private parties based on domestic rules prohibiting unfair trading. Italy had notified its draft labelling rules to the Commission as required by Article 8, but nevertheless continued to enact those proposals into law contrary to the standstill obligations contained in Article 9. Unilever argued that the principle in *CIA Security* should extend also to Article 9, obliging Central Food to accept delivery in accordance with its contractual duties.

On an Article 234 reference, the ECJ held that breach by a member State of either the duty to notify or the standstill provisions constituted a "substantial procedural defect" which rendered the relevant technical regulations inapplicable. Departing from the advice of Advocate General Jacobs, the Court further asserted that this legal sanction could be invoked in civil proceedings between private parties concerning their contractual rights, especially since application of the Italian labelling rules would hinder the marketing of olive oil by Unilever and thus frustrate the free movement aims of the Directive. How was this conclusion to be reconciled with the rule that directives cannot of themselves impose obligations upon, and cannot be relied on

https://doi.org/10.1017/S0008197301690627 Published online by Cambridge University Press