

A TALE OF TWO JUDGMENTS: THIRD-PARTY UNDUE INFLUENCE AND THE PATH TO REFORM IN IRELAND

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In this article the author undertakes a detailed and critical analysis of two major cases in the area of Undue Influence and examines their effect. Furthermore, the predicted implications of these decisions in the Irish context are considered and reasoned recommendations with regards to possible judicial approaches are forwarded. Including a concise synopsis of relevant academic commentary this piece is up to date and invaluable to students of equity grappling with the issue of undue influence.

A INTRODUCTION

In its decisions in *Barclays Bank v O'Brien*¹ and *Royal Bank of Scotland v Etridge (No.2)*² the House of Lords attempted to balance the competing interests of lending institutions and non-commercial persons offering to stand surety for the debts of another. This paper will attempt to assess the protections created for the surety by these decisions, and will consider whether the approach in *O'Brien* and *Etridge* should be followed by the Irish courts.

The typical situation which falls to be dealt with may be summarised as follows. One party to a close personal relationship³ approaches a financial institution⁴ seeking an advance often for the business purposes. The creditor seeks additional security, usually in the form of a charge over the family home which requires the other party to the relationship⁵ to agree to stand surety for the debts of the debtor. When the bank seeks to enforce the security, the surety will claim that it cannot be enforced against her since her consent was procured as a result of undue influence, misrepresentation or some other equitable or legal wrong.

1 Policy Considerations

Such situations give rise to a clear conflict of rights. On the one hand it has been stated that:

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¹ [1994] 1 AC 180, hereinafter *O'Brien*.

² [2001] UKHL 44, hereinafter *Etridge*.

³ The relationship in question is almost invariably marriage. However for the sake of convenience this party will be referred to throughout this paper as "the debtor" unless the context requires otherwise. It should be noted however that the case law in this area does cover relationships other than marriage e.g. parent and child as in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

⁴ Hereinafter "the creditor" unless the context requires otherwise.

⁵ Hereinafter "the surety" unless the context requires otherwise.

[protecting] people from being forced, tricked or misled in any way into parting with their property is ... the most legitimate object of all laws⁶

and that in line with this principle the surety must not be burdened with debts which she did not freely contract. On the other hand the creditor often has no knowledge of the misconduct of the debtor and can therefore legitimately look to the courts to ensure that it is not expected to bear the blame for the debtor's actions.

In resolving this conflict the courts must be mindful of importance of legal certainty. As Lord Browne-Wilkinson noted in *O'Brien*⁷ the family home is an important source of finance for small businesses. There is a danger that in seeking to do justice to the surety the courts may create uncertainty in the law, and as a result banks will be unwilling to lend for business purposes on the security of the family home.

The case law clearly demonstrates that the courts are mindful of the need for certainty as is clear from the following passage of the judgment of Hobhouse LJ in *Banco Exterior Internacional v Mann*:⁸

It is in the interests both of lenders and borrowers that there should be this certainty. [It] should not be undermined by deciding individual cases in a way that is believed not to cause injustice as between the parties to the transaction but which departs from the clear structure of the law as laid down in authority.⁹

B BARCLAYS V O'BRIEN

The facts of *O'Brien* can be summarised as follows. Mr and Mrs O'Brien executed a charge over their jointly-held family home to guarantee the debts of Mr O'Brien's company. Mrs O'Brien signed the documents in the presence of her husband at the bank. No explanation of the documents was given, nor was it suggested to her at any stage that she should seek legal advice. When the bank later sought to enforce the charge she claimed her consent to the charge had been procured by the undue influence of her husband and that he had misrepresented the effect of the charge, saying that it was limited in the amount and duration when in fact it was unlimited in both respects. The trial judge found as a fact that no actual undue influence had occurred but that the nature and effect of the transaction had been misrepresented to the defendant.

1 The Court of Appeal

In the Court of Appeal the leading judgment was given by Scott LJ, who conducted an extensive review of the English and Australian authorities on the question of undue influence and concluded that the law was at a

⁶ Lindley LJ giving judgment in *Allcard v Skinner* (1887) 36 Ch D 145, at 187.

⁷ *loc cit*, n.1 at p. 188, see also Kirby J in *Garcia v National Australia Bank* (1998) 194 CLR 395 at 426.

⁸ [1995] 1 All ER 936.

⁹ *ibid.* at p 945.

crossroads between two conflicting lines of authority.¹⁰ On the one hand stood cases such as *BCCI v Aboody*¹¹ which suggest that a surety may only set aside a transaction against the creditor for the misconduct of the debtor where that creditor was actually aware of the misconduct, or where the debtor was acting as the agent of the creditor. Any finding of agency would have to be supported by a genuine agency relationship, and courts could not stretch the concept of agency in an attempt to protect the surety.¹²

On the other hand there were also a number of cases where the courts have recognised a so-called “special equity”¹³ which exists for the protection of certain protected classes such as wives¹⁴ and elderly parents,¹⁵ who agree to stand surety for the debts of others. Lord Scott continued:

in this protected class, equity would hold the security ... unenforceable by the creditor if:

- (i) The relationship between the debtor and the surety and the consequent likelihood of influence and reliance was known to the creditor.
- (ii) The surety’s consent to the transaction was procured by undue influence or material misrepresentation on the part of the debtor or the surety lacked an adequate understanding of the nature and effect of the transaction.
- (iii) The creditor, whether by leaving it to the debtor to deal with the surety or otherwise, had failed to take reasonable steps to ... ensure that ... the surety’s consent to the transaction was a true and informed one.¹⁶

In Scott LJ’s view the second option was to be preferred, holding that public policy ought to grant special protection to married women since the traditional tendency for business decisions to be left to the husband still persists. Scott LJ also suggested that this special protected class should not merely be confined to the marriage relationship but that

the class ought ... to include all cases in which the relationship ... is one in which influence by the debtor over the surety and reliance by the surety on the debtor are natural and probable features of the relationship.¹⁷

Having adopted the above test, the Court of Appeal held that the charge could only be enforced to the amount which the surety believed she had guaranteed.

2 The House of Lords – Undue Influence

¹⁰ [1993] QB 109 at 137.

¹¹ [1990] 1 QB 923, other cases regarded by Scott LJ as falling within this line included *Coldunell Ltd v Gallon* [1986] QB 1184, *Perry v Midland Bank* [1987] FLR 37 and *Bank of Baroda v Shah* [1988] 3 All ER 24.

¹² See the judgment of Slade LJ in *BCCI v Aboody*, *ibid* at p. 972, for a particularly artificial example see *Kingsnorth Trust v Bell* [1986] 1 All ER 423.

¹³ This label was actually coined by Browne-Wilkinson LJ giving judgment in the House of Lords, see [1994] 1 AC 180 at 187.

¹⁴ *Yerkey v Jones* (1930) 63 CLR 649.

¹⁵ *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281.

¹⁶ *supra* fn 10 at p 138–139.

¹⁷ *ibid*.

The sole judgement in the House of Lords was that of Lord Browne–Wilkinson, who dismissed the appeal, but based his decision on very different grounds to the court below. Browne–Wilkinson LJ began by adopting the classification of undue influence laid out by the Court of Appeal in *BCCI v Aboody*.¹⁸ This splits cases of undue influence into two categories, the second of which is divided into two further sub–categories. The first category is concerned with actual undue influence and the burden of proof falls on the surety to show that actual undue influence was exercised. The second category is concerned with presumed undue influence. Here the plaintiff need not show actual undue influence, rather the transaction must take place between certain types of parties and the plaintiff must also show that the transaction was to their “manifest disadvantage.”¹⁹ The two sub categories in Class 2 are concerned with the relationship between the parties. Class 2A relationships are those which carry an irrebuttable presumption of trust and confidence.²⁰ Examples of such relationships include doctor/patient,²¹ and parent/child²² but not husband/wife.²³ Class 2B deals with relationships of *de facto* trust and confidence which are established by evidence but do not fall under Class 2A, thus in order for undue influence to be presumed in Class 2B relationships the person claiming undue influence must show that they reposed trust and confidence in the other party and that the transaction is to their manifest disadvantage.

Browne–Wilkinson LJ then examined the special equity on which Scott LJ had sought to rest the law. According to Browne–Wilkinson LJ the special equity theory had to be rejected for a number of reasons, the most important of which were as follows:²⁴

- (i) The creation of a special equity for a limited class has no basis in principle
- (ii) To require the creditor to prove knowledge and understanding of the wife in every case is to re–introduce the so–called Romilly²⁵ heresy or at very least to introduce a Class 2A presumption by the back door.

3 Browne–Wilkinson LJ’s Solution – The Doctrine of Notice

Having dismissed the special equity theory, Browne–Wilkinson LJ turned his attention to a proposal to use the doctrine of notice to provide a more certain and appropriate level of protection to sureties. The surety is able

¹⁸ *supra* fn 11 at p. 953.

¹⁹ See *National Westminster Bank v Morgan* [1985] AC 686 at 706.

²⁰ See G.H. Treitel, *The Law of Contract* (London, Stevens, 11th ed) pp 410–411.

²¹ *Re CMG* [1970] Ch 574.

²² *Lancashire Loans v Black* [1934] 1 KB 380, see also *Bainbridge v Brown* (1881) 18 Ch D 188.

²³ *Bank of Montreal v Stuart* [1911] AC 120 (PC), adopted in Ireland by Murnaghan J in *Northern Banking v Carpenter* [1931] IR 268.

²⁴ *supra* f n.1 at p 195.

²⁵ Romilly LJ suggested in *Hoghton v Hoghton* (1852) 15 Beav 278 that all large voluntary gifts may be set aside if the donee cannot show that they were made fairly and in full understanding of the consequences. Following Browne–Wilkinson LJ’s disapproval of it in *O’Brien* it would appear to have been finally formally overruled in English law.

to set aside the security as against the creditor where the creditor had notice, actual or constructive of the debtor's wrong-doing. Since the bank will rarely be actually aware of any wrongdoing, the critical question will usually be: when is the bank fixed with constructive notice?

In *O'Brien* the House of Lords suggested that the bank will have constructive notice if, having been put on inquiry as to the possible existence of an equitable right of the wife, it fails to take reasonable steps to ensure that the wife's agreement to the transaction has been properly obtained.²⁶ It is in determining when a creditor is put on notice that the law attempts to take account of the fact that the marital relationship provides a ready weapon for undue influence, by placing the bank on notice whenever a wife offers to stand surety for her husband. Two reasons are given to justify this position:

- (i) the transaction is on its face not to the financial advantage of the wife; and
- (ii) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.²⁷

4 The steps to be taken by the bank

Having sought to clarify the basis of the law in this area, Browne–Wilkinson LJ attempts to satisfy the requirements of certainty by providing a series of steps which, if followed by the financial institutions would enable them to rely on their security regardless of whether the guarantee has been obtained by improper conduct. One difficulty with *O'Brien* is that the aim of the steps to be taken is unclear. In one paragraph “the creditor [must] satisfy himself that the wife's agreement to stand surety has been properly obtained.”²⁸ In the very next paragraph however, this is acknowledged to be impossible and the duty is restated in very different terms, i.e. to “bring home to the wife the risk she is running.”²⁹ In order to do this the bank is expected to hold a private meeting with the wife at which she should be told of the extent of the liability and the risk being undertaken. She should also be advised to take independent advice.

5 Difficulties with *O'Brien* – Notice

O'Brien is in many respects unsatisfactory in its out of hand rejection of the “special equity” theory propounded by the court below. The attraction of the special equity theory is that it achieves a similar result without the necessity to apply the doctrine of notice in an artificial way. It would appear that the House's major objection to the special equity theory is that it developed from equity's ‘tender treatment’ of women and thus sits uneasily with modern thinking. As Chen–Wishart³⁰ points out, Scott LJ set out a far broader principle than simply protecting married women. According to this view,

²⁶ *supra* fn 1 at p 196.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ Chen–Wishart ‘The *O'Brien* Principle and Substantive Unfairness’ (1997) 56 CLJ 60.

the class ought, logically, to include all cases in which the relationship between the surety and the debtor is one in which influence by the debtor over the surety and reliance by the surety on the debtor are natural and probable features of the relationship.³¹

The other major objection to the special equity theory seems to have been that it would require creditors to show that they had taken steps to ensure that all protected sureties understood the transaction. In the view of this author, the steps which a financial institution would have to take to ensure such understanding do not pose an undue burden on those institutions having regard to the profits realised in such transactions. As was later acknowledged in *Etridge*³² the creditor is best placed to detect possible wrong doing or irregularity and therefore it seems appropriate to place the risk for deciding not to urge independent advice on the shoulders of those best placed to make that judgment. In addition to the above, the author is of the view that the inclusion of the *prima facie* financial disadvantage of the surety in the test for when a bank is on inquiry in fact renders Browne–Wilkinson LJ’s approach considerably more uncertain than the special equity approach.

To begin with, as Fehlbeg³³ points out there is uncertainty as to what the ‘face’ of a transaction is. Therefore, when deciding whether they are on inquiry or not the creditor will have to decide the issue of financial disadvantage with reference to uncertain criteria. Any number of factors might be suggested for consideration, but a firm and definite rule about the types of transaction which will escape inquiry may cause considerable injustice to the surety. Joint advances to debtor and surety, or advances to a company of which the surety is a shareholder might be considered to the surety’s advantage but such a view misses

the fundamental problem that a wife who provides security as a result of pressure from her husband is also unlikely to have much, if any, control over how she appears in documentation.³⁴

6 Difficulties with *O’Brien* – Independent Advice

Firstly and perhaps most importantly, *O’Brien* has proceeded from the assumption that the provision of independent advice can effectively protect the wife. This must be the case since insistence on such advice provides absolute security for the creditor. No account is taken of the fact that while information “may reduce ... misrepresentations, it is unlikely to dispel ongoing private emotional pressure.”³⁵ To allow the creditor to proceed with the transactions where they have reason to suspect undue influence based on a step that is highly unlikely to protect the surety is unsatisfactory.

More unsatisfactory is the context in which the banks are to recommend such advice be taken. The difficulties with a private meeting

³¹ *ibid.*

³² *supra* fn 2 a para [105].

³³ Fehlbeg, “The Husband, the Bank, the Wife and her Signature” (1994) 57 MLR 467 at 473.

³⁴ *ibid.*

³⁵ *ibid* at p 473

between the surety and the bank will be discussed *infra*, but even where such a meeting takes place, the wife is likely to be advised to get independent advice literally at the last moment before signing the document. Not only is the advice itself likely to be ineffective against undue influence, the suggestion that it be taken may well amount to nothing more than a formality before the documents are produced for signature. Clearly further elaboration of the steps outlined by Browne–Wilkinson LJ is needed in order to provide any realistic level of protection for the surety.

The scheme is also open to the same criticism levelled by Browne–Wilkinson LJ at the special equity theory, i.e. that it creates a special protection for a limited class of persons in respect of a particular transaction. It should be noted that the bank is put on notice because of its knowledge of the relationship between the parties. The precise difference between Scott LJ’s special class and those falling within Lord Browne–Wilkinson’s notice test is not clear and it appears that in substance the special equity theory has been rejected simply because proving that the surety understood the transaction in every such case is too onerous a burden for lending institutions.³⁶

Finally, the steps suggested in *O’Brien* can be criticised as being unreasonable from the point of view of the banks. This criticism was acknowledged by Nicholls LJ in *Etridge*³⁷ where he notes that “banks consider they would stand to lose more than they would gain by holding a private meeting with the wife”³⁸ It is understandable that the banks did not follow the suggested procedure when taking such securities post *O’Brien*. Not only would such a meeting expose the bank to accusations that the bank manager had told the wife that the loan would not be enforced,³⁹ such a meeting might well give rise for an action for negligent misstatement against the bank under the *Hedley–Byrne*⁴⁰ doctrine or even give rise to allegations of undue influence on the part of the bank itself.⁴¹

C *ETRIDGE* – RECASTING *O’BRIEN*?

In the aftermath of *O’Brien* a series of cases came before the Court of Appeal seeking to clarify various difficulties⁴² in the application of the scheme laid down in *O’Brien*. In many of these cases, the point at issue was that banks had refused to follow Lord Browne–Wilkinson’s suggestion of having an independent meeting with the surety, but had instead sought to “run these

³⁶ *ibid* at p 471.

³⁷ *supra* fn 2.

³⁸ *ibid* at para 51.

³⁹ *ibid* at para 53.

⁴⁰ *Hedley Byrne v Heller* [1964] AC 465.

⁴¹ See Clark’s discussion of *Midland Bank v Cornish* [1985] 3 All ER 513, R. Clark, *Contract Law in Ireland* (Dublin, Round Hall Sweet and Maxwell, 4th Ed) p 290.

⁴² Dealing with the types of relationships which put a bank on inquiry: *Massey v Midland Bank* [1995] 1 All ER 929, *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 *et al.* Dealing with the details of independent advice: *Banco Exterior Internacional v Mann*, *loc cit*, fn 8, *Barclays Bank v Rivett* [1999] 1 FLR 730, *Bank of Baroda v Rayarel* [1996] ECC 157 *et al.*

two stages together thus creating confusion.”⁴³ In a lengthy decision in *Royal Bank of Scotland v Etridge (No.2)*⁴⁴ the House of Lords reviewed *O’Brien* in light of these developments and sought to issue further guidance on the issues of undue influence, notice and independent advice. Eight of the joined appeals concerned a situation where the banks had asked a solicitor to explain the nature and effect of the transaction to the surety. In the ninth appeal the surety sued a solicitor claiming that his advice in relation to the transaction had been negligent.

1 The Decision in *Etridge* – Undue Influence

In *Etridge* the House of Lords adopted a new approach to the question of when so-called “presumed” undue influence would arise. To begin with several judges were at pains to emphasise that presumption of undue influence would not arise merely by the existence of a relationship of trust and confidence,⁴⁵ rather presumed undue influence is an

evidential presumption which can only be established on proof of two facts:

- (i) The existence of a relationship between A and B, in which B reposed trust and confidence in A or is presumed in law to have done so.
- (ii) The transaction which was undertaken between A and B was “one which calls for explanation.”⁴⁶

The second fact need not be proved in a limited class of cases where the law has “adopted a sternly protective attitude”⁴⁷ toward the surety. The use of the classification system adopted from *Aboody*⁴⁸ has been discouraged⁴⁹ as has the use of the label manifest disadvantage.⁵⁰ In all cases the question of undue influence is now one of the evidence and all of the judgments delivered suggest that a comparison may be drawn with the doctrine of *res ipsa loquitur*. This aspect of the *Etridge* decision is to be welcomed. The abandonment of the classification system solves two problems at once. The first is the danger that the use of the word presumption could lead to undue influence being presumed in inappropriate situations where the facts underlying the presumption have not been adequately proved. Nicholls LJ’s statement that what rises here is a “rebuttable evidential presumption”⁵¹ only to be drawn on proper proof of certain facts is a welcome clarification of the law in this area.

⁴³ *Etridge*, *loc cit*, at para 116 per Hobhouse LJ.

⁴⁴ *supra* fn 2.

⁴⁵ Eg Nicholls LJ at para [13] – [16], Hobhouse LJ at para [104], Scott LJ at para [158].

⁴⁶ Per Nicholls LJ at para [14] with whom Bingham LJ and Clyde LJ agreed. Scott LJ at para [156], preferred the formulation “is not readily explicable by the relationship between the parties” but it is suggested that the two expressions are synonymous.

⁴⁷ Per Nicholls LJ at para [18].

⁴⁸ *supra* fn 11.

⁴⁹ The utility of Class 2B was doubted by Scott LJ at para [161]; Hobhouse LJ expressly rejected it at para [107] apparently because it confuses the necessity for the wife to prove her case at all stages.

⁵⁰ Nicholls LJ, *supra* fn 48

⁵¹ *supra* fn 2 at para [16].

The renewed focus on manifest disadvantage, or a transaction which calls for explanation is also welcome. The need for this to be done arose from one of the Court of Appeal decisions which was under appeal in *Etridge*⁵² where Nourse LJ suggested that there was “a serious question mark over the future of the requirement of manifest disadvantage in cases of presumed undue influence.”⁵³ This was based largely on the fact that manifest disadvantage is not required in cases of actual undue influence⁵⁴ and that Browne Wilkinson LJ seemed to suggest that it might not be needed in Class 2A cases in *CIBC Mortgages v Pitt*.⁵⁵

It should be recalled that actual and presumed undue influence are very different in nature. Transactions procured by actual undue influence can be set aside in equity because they are “a species of fraud.”⁵⁶ Presumed undue influence arises because the law recognises that a relationship of trust and confidence may influence the mind of the victim in a manner which is not as susceptible to judicial proof as actual undue influence. It may well be that there is no misconduct of any kind on the part of the dominant party but that the mere existence of the relationship will *per se* deprive the weaker party of a wholly free choice.⁵⁷ In granting that concession however it is important to remember that not all transactions between connected parties will be caused by such influence⁵⁸ and it is important that a line be drawn between preserving certainty and protecting potential victims. This line is drawn in *Etridge* by requiring the victim to show that the transaction is sufficiently unusual that it would not be ordinarily entered into. Since a free mind would not ordinarily enter into the transaction the burden of explaining the circumstance in which the victim did so falls on the beneficiary of the transaction.

2 The Decision in *Etridge* – When is a creditor put on inquiry?

In *Etridge* Nicholls LJ suggested that the two step test set out in *O'Brien* was in fact an explanation of why a creditor was put on notice and should not be understood as setting out requirements which the surety has to prove in order to establish that the creditor was on inquiry.⁵⁹ In *Etridge* it was made clear that the threshold for the bank to be put on inquiry is lower than that required for a finding of presumed undue influence.⁶⁰ The position post-*Etridge* appears to be that the creditor is put on notice by a combination of two factors, the nature of the transaction and the relationship between the

⁵² *Barclays Bank v Coleman* [2001] QB 20.

⁵³ *ibid* at p 32.

⁵⁴ See *National Westminster Bank v Morgan* [1985] AC 686.

⁵⁵ [1994] 1 AC 200 at 209.

⁵⁶ *ibid*.

⁵⁷ For further analysis see Fehlberg ‘Securities and Guarantees: Another Perspective on Money and Marriage’ (1995) Unpublished DPhil thesis, University of Oxford p245, surety interview, Mrs Parkes, referenced at Fehlberg ‘The Husband, the Bank, the Wife and Her Signature – the Sequel’ (1996) 56 MLR 675 at 679 note 31.

⁵⁸ A number of the judges in *Etridge* made reference to several innocuous situations such as a Christmas present being given to a solicitor by a client.

⁵⁹ *supra* fn 2 at para [44] – [46].

⁶⁰ Nicholls LJ at para [44] – [45], Hobhouse LJ at para [108].

parties.⁶¹ In surety transactions involving a married couple, the creditor will always be on inquiry because the transaction is not to the advantage of the surety. The only exception to this was identified by Lord Nicholls who suggested that a joint advance should not place the bank on inquiry unless the bank was aware that it was to be used exclusively for the purposes of one spouse.⁶²

The exclusion of joint advances from notice in this author's view is both regrettable in itself and also inconsistent with the position taken in respect of advances to a company of which the wife is a shareholder. In deciding that creditors are on inquiry in the latter situation Nicholls stated: "The shareholding interests ... are not a reliable guide to the identity of the persons actually have the conduct of the company's business." This approach is to be commended in that it recognises the reality,⁶³ that a wife under the domination of her husband is unlikely to have control of business of which she is nominally a director. This means that creditors cannot save their securities merely by viewing the transaction in a superficial way and closing their eyes to the underlying risks. A similar approach is required with joint advances; logically there is no reason why a joint advance cannot be affected by undue influence in the same way as all transactions. It is suggested that were an undue influence case to arise with a similar set of facts to *CIBC Mortgages v Pitt*⁶⁴ it would be totally unjust for a court to excuse the bank simply on the basis that the advance was in the joint names of the spouses.

In line with the view that the threshold for inquiry should be lower than that of undue influence, *Etridge* confirms the view that the presence of a wide range of relationships should put the bank on inquiry. According to Nicholls LJ the protection of inquiry should be very broadly extended to encompass not only unmarried couples and in certain cases employer/employee relationships⁶⁵ but should in fact extend to all surety cases involving a non-commercial relationship.⁶⁶ While Browne-Wilkinson LJ clearly thought it was possible for relationships other than marriage to put a creditor on inquiry⁶⁷ the formulation provided in *Etridge* extends the scope of protection to cover every conceivable circumstance which might arise and removes the necessity for the courts to build up a catalogue of relationships which place a creditor on notice. This enhances both protection for the surety and certainty for the creditor.

3 The Decision in *Etridge* – Steps to be taken on inquiry

⁶¹ *supra* fn 20 at p 425.

⁶² Following *CIBC Mortgages v Pitt*, *supra* fn 58.

⁶³ See Fehlberg *supra* fn 57, *supra* fn 60.

⁶⁴ *supra* fn 58, there the advance was in the joint names of the parties and was allegedly for the purchase of a holiday home, in reality it was used to fund stock market speculation by the husband.

⁶⁵ *Massey v Midland Bank* *supra* fn 42 at p 933 approved at para [48], *Credit Lyonnais Bank Nederland NV v Burch* *supra* fn 42 approved at para [84].

⁶⁶ per Nicholls LJ, *supra* fn 2 at para [87].

⁶⁷ *supra* fn 1 p 198.

Perhaps the most significant development in *Etridge* was that the House of Lords attempted to clarify the role of the solicitor in such transactions by issuing detailed guidelines on how sureties should be advised. The focus of these guidelines is to ensure that the surety understands the transaction and they may be summarised as follows.⁶⁸

- (i) The creditor should inform the surety of the need for a solicitor and ask her to nominate a solicitor who will act for her. (This solicitor may also act for the debtor in the transaction if he does not perceive a conflict of interest.)
- (ii) The creditor should provide all the relevant information to the solicitor and inform him of any suspicions they may have about the transaction.
- (iii) The solicitor should meet privately with the surety and explain why he is involved and the role his certificate may play in future litigation.
- (iv) The solicitor should obtain the wife's consent for him to advise her.
- (v) The advice to be given will vary depending on the facts of the case but will usually include the nature of the security and the amount of debt which is being guaranteed.
- (vi) The solicitor should emphasise that the surety has a choice and should ask if they wish to proceed and should obtain her permission to certify that he has explained the transaction to her.
- (vii) The solicitor does not act as agent for the creditor.
- (viii) The solicitor and the creditor should bear in mind that this advice should not be a mere formality and should ensure that the creditor understands.

The guidelines issued raise a number of points. Firstly, the solicitor is not responsible for detecting and defeating any actual undue influence.⁶⁹ Nor is it the solicitor's role to veto the transaction if it is improvident.⁷⁰ Rather the solicitor's intervention should reduce the risk of undue influence to the point where the creditor can safely rely on the security. No advice will entirely remove the possibility of undue influence and in certain extreme cases even independent advice will not be enough to save the security.

The difficulty with this approach is that it may create injustice, by enforcing a guarantee against a surety who, despite having taken advice, is still acting under undue influence. This however is an acceptable balancing of the interests involved, since creditors cannot be expected to enquire in any real way whether there has been actual undue influence, and having carried out the steps in *Etridge* they have done everything that could reasonably be expected of them to protect the surety. It is worth noting that presumed undue influence is recognised without proof of any wrongdoing, it is recognised merely because of a risk that one party will feel obliged to consent to a transaction. Therefore it is appropriate that a creditor who only has notice of such a risk should only be expected to take steps to reduce it as far as possible.

⁶⁸ The following points are taken from the judgment of Lord Nicholls at para [52] – [81].

⁶⁹ *supra* fn 2 per Scott LJ at para [182].

⁷⁰ Although the solicitor may refuse to act in extraordinary cases where the surety is being grievously wronged, per Nicholls LJ in *Etridge* at para [62].

One possible note of criticism of the *Etridge* guidelines is that the solicitor need not be wholly independent. Nicholls LJ suggested that the advantage to be gained from insisting on such independence was not worth the cost,⁷¹ however in light of empirical evidence⁷² that surety wives being advised by their husband's solicitors do not always feel that such advice is truly independent, it might be better to insist on the additional precaution.

It should be pointed out that the security will not be affected by the failure of the solicitor to properly advise the surety. While this may seem unsatisfactory it must be borne in mind that the solicitor would be liable to the surety in negligence for such a failure.⁷³ It must also be recognised that it would be difficult if not impossible for the creditor to adequately discover and assess what if any advice the solicitor had given, and that therefore the bank must be able to rely on the certificate.

D THE CURRENT IRISH POSITION

Surprisingly, the Irish courts have never had to rule directly on a case involving an *O'Brien* or *Etridge* type scenario. In *Bank of Ireland v Smyth*,⁷⁴ a case concerning a charge on a family home, Geoghegan J in the High Court⁷⁵ suggested that the special equity theory set out by the Court of Appeal in *O'Brien* represented Irish law, since the bank was aware of the relationship of husband and wife they had a duty to take steps to ensure that the wife fully understood the transaction and to suggest taking independent advice. It should be noted that Geoghegan J made his decision before the House of Lords handed down judgment in *O'Brien*. On appeal the Supreme Court declined to clarify its position on undue influence in third party situations generally and confined itself to stating the law in relation to informed consent under S 3 of the Family Home Protection Act 1976. The bar for such consent to be valid is very high – the consent must be “a fully informed consent ... obviously a precondition is that one should have knowledge of what it is that one is approving of.”⁷⁶ Whether the bank is aware of the surety's state of knowledge is irrelevant since it has constructive knowledge of any lack of knowledge. Blayney J suggests that since it is the bank that is seeking the additional security, the bank should bear the burden of ensuring that the consent is valid.⁷⁷ While this does have the effect of making it clear what banks must do in order to create a valid charge, it also leaves a spouse in a better

⁷¹ *supra* fn 2 at para [72] – [74].

⁷² *supra* fn 60.

⁷³ Donnelly criticised this approach in ‘Undue Influence, Misrepresentation and Guarantees: What is a Bank to do?’ (1999) CLP (June) 167 at 175 for simply shifting the problem onto solicitors, however she did not propose a more satisfactory alternative and since the solicitor is best placed to ensure that the surety is properly advised it seems just that he should accept liability if he breaches his duty.

⁷⁴ [1995] 2 IR 459 (SC) [1993] 2 IR 102 (HC).

⁷⁵ *ibid*, High Court at p 111.

⁷⁶ *supra* fn 78 Supreme Court at 468.

⁷⁷ *ibid* at p 469.

position if they have not taken “any steps ... to inform themselves of the consequences”⁷⁸ of their actions.

In *Bank of Nova Scotia v Hogan*⁷⁹ the Supreme Court appeared to adopt the reasoning of the House of Lords in *O’Brien* and in particular approved the statements therein that those claiming undue influence must prove their case. However the court was unimpressed with the suggestion that married women ought to be treated more favourably than others in this area and although the court did not expressly decide the point, it seems that the special equity theory has now been abandoned in Ireland.

The final Irish decision to be considered is *Ulster Bank v Fitzgerald*.⁸⁰ This decision is, as Delaney remarks, “unsatisfactory ... in terms of laying down general principles”⁸¹ The case concerned a guarantee in favour of the husband’s company, which did not charge the family home, and which the surety claimed she had signed for fear of further strife in an already troubled marriage if she refused. O’Donovan J suggested that undue presumed influence did not arise since the wife had a financial interest in the company’s fortunes in that it provided her income even though she was not a shareholder.⁸² If the concept of financial advantage were to be generally applied in this way, it is suggested that many sureties would find themselves unable to plead undue influence, the court gave no consideration to the degree of control which the surety was in a position to exercise over the application of the secured loan and it is suggested that not merely is this approach out of line with English authorities such as *Etridge*,⁸³ it is incorrect in principle since it suggests that financial dependants of a shareholder can be compelled to undertake commercial risks with their own property at the shareholders insistence. The rest of O’Donovan J’s analysis is concerned with whether the bank had notice of the undue influence. He suggests that this was not the case since the bank was unaware of the difficulties in the surety’s marriage. This view of the issue seems unconscionably narrow to this author, the surety will rarely be in a position *vis-à-vis* the bank that the latter could become aware through its agents of problems in the surety’s marriage. Indeed as Mee points out under this approach “a defence based on third party undue influence would almost never succeed”⁸⁴ and the bank would be entirely insulated from the misconduct of the husband in all but the most extraordinary cases.

E CONCLUSIONS AND RECOMMENDATIONS

⁷⁸ Sanfey, ‘Consenting Adults: The Implications of *Bank of Ireland v Smith*’ (1996) CLP (Feb.) 31 at 35.

⁷⁹ [1996] 3 IR 239. For a summary and full discussion of the decision see *Delaney, Equity and the Law of Trusts in Ireland* 3rd Ed, 2003 at pp 622–3.

⁸⁰ Unreported, High Court, O’Donovan J, 9th November 2001, BAILII Transcript at [2001] IEHC 159.

⁸¹ *loc cit*, n.83 at p 624.

⁸² *supra* fn 84 at para [9].

⁸³ *supra* fn 61 see also the discussion of the judgment of Nicholls LJ in light of *CIBC Mortgages v Pitt*, *supra* fn 62.

⁸⁴ J. Mee “Undue Influence and Bank Guarantees” (2002) 37 Ir Jur 292 at 299.

As can be seen from the above, the position in Ireland is far from clear. While the Family Home Protection Act 1976 provides a commendably high level of protection for surety wives, the protections afforded to sureties who charge property not covered by that legislation is very vague and, if *Fitzgerald* is to be followed, paltry.

A future Irish court faced with an *O'Brien* type case should take up Browne–Wilkinson LJ's challenge to "restate the law in a form which is principled, reflects the current requirements of society and provides as much certainty as possible."⁸⁵ The form that in this author's view would best serve Irish society would be as follows.

The notice doctrine should be rejected. As Mee points out, what Browne–Wilkinson LJ really proposed and the approach that was followed in *Etridge* has little to do with the concept of notice.⁸⁶ Rather an Irish court should take the direct and non-artificial approach and recognise that non-commercial sureties are a category at special risk and deserving of special protection. Once a creditor becomes aware that such a situation exists a duty should be imposed on him to reduce as far as reasonably possible the risk that the surety is being procured by undue influence or misrepresentation. The precise steps to be taken will vary from case to case, but the approach set out in *Etridge* for obtaining independent advice provides adequate protection for the vast majority of sureties and should therefore protect all but the most extraordinary transactions.

Such an approach would provide all the necessary protections while at the same time ensuring that the risks of lending on the security of a guarantee do not become too great for financial institutions to engage in this essential activity.

⁸⁵ *supra* fn 1 at p195.

⁸⁶ *supra* fn 87 at p300.