

UNDUE INFLUENCE: WHEN AND HOW IT MATTERS TO BANKS AND SOLICITORS

*Royal Bank of Scotland plc v Etridge (No. 2)*¹

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IN 1994, the House of Lords laid down an important principle in *Barclays Bank plc v O'Brien* in relation to the enforcement of sureties or charges provided by the debtors' spouses.² This principle allows a spouse who provided surety for the debts of her partner, as the result of the latter's undue influence or misrepresentation, to set it aside as against a creditor-bank, provided the bank had constructive notice of the presence of these vitiating factors.

The purpose of the *O'Brien* principle is to ensure that, while vulnerable sureties are protected, creditor-banks can enforce their securities without undue burden and transaction cost.³ Unfortunately, far from providing a conclusive solution, *O'Brien* has left the courts in the seven years that followed to grapple with the theoretical and practical difficulties it poses.

At the theoretical level, the 'notice' requirement in *O'Brien* is based on an erroneous analogy to the bona fide purchaser doctrine in property law.⁴ At the practical level, the requirement of a private meeting between the bank and the surety, and the need to ensure that the wife is free from undue influence, have proved to be unrealistic,⁵ and are often satisfied by a ritual reliance on formality.⁶

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¹ [2001] 3 WLR 1021.

² [1994] 1 AC 180 ("*O'Brien*").

³ *Ibid.*, at 188-9.

⁴ It has led the English Court of Appeal in *Barclays Bank plc v Boulter* [1998] 1 WLR 1, to misallocate the burden of proof, reversed by the House of Lords, [1999] 1 WLR 1919. See also Mindy Chen-Wishart, "The O'Brien Principle and Substantive Unfairness" [1997] CLJ 60 at 61.

⁵ Banks are reluctant to hold such a private meeting, lest it would open the door to allegations of misrepresentation about the loan facilities or assurances about their enforcement.

⁶ Sir Anthony Mason, "The Impact of Equitable Doctrine of the Law of Contract" (1998) 27 Anglo-American LR 1 at 6-16.

Accordingly, it became incumbent on the House of Lords to clarify and modify the *O'Brien* doctrine in the recent decision of *Etridge*, which concerned eight conjoined appeals to the House.⁷ This comment will examine the changes brought about by *Etridge*, and consider its practical impact on banks and solicitors. It will argue that although *Etridge* has removed most of the practical difficulties posed on banks and solicitors, some still remain.

Based on the approach postulated by Lord Hobhouse in *Etridge*, one might adopt the following line of enquiry to analyse a typical *O'Brien* scenario:⁸

- (1) Has the wife proved that the transaction was affected by the undue influence of the husband?
- (2) If so, was the lender put on inquiry?
- (3) If so, did the lender take reasonable steps to satisfy itself that the nature and practical implications of the transaction have been understood by the wife?⁹

An elaboration on each of these three questions is in order.

I. EXISTENCE OF UNDUE INFLUENCE

The first hurdle for a wife to establish her case against the bank is that she entered into the transaction upon the undue influence of her husband. According to *O'Brien*, this is established through either actual undue influence (Class 1) or presumed undue influence (Class 2). In relation to actual undue influence, the complainant needs to prove that the respondent had the ability to influence her, and did unduly influence her. While the influence usually takes the form of overt conduct, decisions subsequent to *O'Brien* have emphasised that neither coercion nor deliberate concealment is necessary.¹⁰ The complainant also needs to show that the influence had procured her to enter into the transaction in question,¹¹ but is dispensed from proving that the transaction was to her manifest disadvantage.¹²

⁷ Noted by Andrew Phang & Hans Tjio, "The Uncertain Boundaries of Undue Influence" [2002] LMCLQ 231; Dominic O'Sullivan, "Developing O'Brien" (2002) 118 LQR 337; Rick Bigwood, "Undue Influence in the House of Lords: Principles and Proof" (2002) 65 MLR 435.

⁸ *Supra*, note 1, at 1054B.

⁹ The third question posed by Lord Hobhouse was whether the lender could satisfy itself that there was no undue influence. In light of Lord Nicholls' emphasis that the steps expected of the lender is not to eliminate, but simply to minimize the risk, and Lord Hobhouse's agreement with Lord Nicholls' judgment, it is submitted that the third question formulated in this note might be a more appropriate line of enquiry.

¹⁰ *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876, 883.

¹¹ A recent English Court of Appeal decision – post *Etridge* – held that the complainant does not need to prove 'but for' causation between the influence and her entry into the

In contrast, in relation to presumed undue influence, the complainant proves the presence of certain confidential relationships which raise the presumption, not the actual conduct of exerting undue influence, as well as the fact that the transaction in question was to her manifest disadvantage.¹³ Such a relationship can be established in two ways: first, through showing that the parties' relationship falls within those that would, as a matter of law, raise the presumption (Class 2A), or through proving that the complainant has, as a matter of fact, generally reposed trust and confidence on the other party (Class 2B). *Etridge* reformulated this criterion in several respects.

A. Classification of undue influence

Doubts were raised by the Law Lords in *Etridge* as to the classification of undue influence into actual and presumed undue influence, and into subdivisions within the latter.¹⁴ Concerns were expressed of the risk of pigeon-holing the infinitely various ways in which influence may be exerted, and thus exaggerating the differences or commonalities in the substance and the process of proof in undue influence cases.

The key message for future courts is that equity intervenes if the means of persuading a party to enter into a transaction is unacceptable.¹⁵ Whether such means take the form of overt coercion or covert abuses of influence, the general rule remains that it is the complainant's legal burden to prove that she entered into the transaction upon undue influence.¹⁶ The court's role is to draw 'appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff'.¹⁷ Thus, while rebuttable evidential presumptions may be invoked, nothing departs from the fundamental flexibility in equity to take into account the individual circumstances of each case; the classification exercise risks overlooking these 'first principles'.¹⁸

Accordingly, the current position may be summarised in the following propositions:

transaction: See *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555. Contrast *Bank of Credit and Commerce International v Aboody* [1990] 1 QB 923 at 967.

¹² *CIBC Mortgages plc v Pitt* [1994] 1 AC 200.

¹³ The requirement of manifest disadvantage was left open in *CIBC Mortgages plc v Pitt*, *ibid*, but its necessity was affirmed by the English Court of Appeal in *Dunbar Bank plc v Nadeem*, *supra*, note 10.

¹⁴ *Supra*, note 1, at 1050, per Lord Clyde; 1056E-G, per Lord Hobhouse; 1077B-C, per Lord Scott; and (perhaps implicitly) 1029C-D, per Lord Nicholls.

¹⁵ *Ibid*, 1029-30, per Lord Nicholls.

¹⁶ *Ibid*, 1030E.

¹⁷ *Ibid*, 1031C.

¹⁸ *Ibid*, 1029A.

- (1) It is the legal burden of a complainant of undue influence to attribute evidence to prove that she entered into the transaction upon the undue influence of the respondent.
- (2) Such influence may take two forms: the first comprises overt acts of improper pressure or coercion (this form of unlawful threats overlaps with the conduct prohibited by the doctrine of duress); the second involves the existence of a relationship of ascendancy whereby one party has acquired a measure of influence over another, and takes unfair advantage of his influence or ascendancy over the other.¹⁹
- (3) Where the second form of influence is concerned, the complainant may rely on the rebuttable evidential presumption of undue influence. If the complainant proves that the transaction was one that ‘calls for explanation’,²⁰ and that:
 - (a) her relationship with the respondent falls within one of the established categories of ‘relationships of influence’;²¹ or
 - (b) she placed trust and confidence in the respondent, for example, in relation to the management of the complainant’s financial affairs, or that the respondent acquired ascendancy over her;²² then,

the respondent would be rebuttably presumed to have unduly influenced her.²³

For their Lordships, the presumption operates in the same way as the doctrine of *res ipsa loquitur* does in actions in negligence, that is, it shifts the evidential burden of proof to the alleged wrongdoer to show that the complainant entered into the transaction upon the exercise of her free will.²⁴

¹⁹ *Ibid*, 1029E, per Lord Nicholls.

²⁰ This requirement will be discussed in Section IB, *infra*.

²¹ *Supra*, note 1, 1031G-H, per Lord Nicholls. His Lordship gave examples of such relationships as guardian and ward, trustee and beneficiary, solicitor and client, medical advisor and patient, and parent and child. The husband-and-wife relationship was specifically ruled out.

²² *Ibid*, 1030G & 1032F, per Lord Nicholls.

²³ Lord Nicholls held that in cases where the parties’ relationship falls within the established categories, ‘the law presumes, *irrebuttably*, that one party had influence over the other’ (emphasis added), *supra*, note 1 at 1031G. However, despite this confusing wording, his Lordship probably only meant that the existence of the *relationship of influence* (as opposed to the *undue influence* itself) was irrebuttably presumed. His Lordship went on to say that ‘[t]he complainant need not prove he actually reposed trust and confidence in the other party’: *ibid*. (This interpretation was suggested by Recorder Ma in a decision of the Court of First Instance, Hong Kong, in *Bank of China (Hong Kong) Ltd v Wong King Sing & Anor* [2002] 1 HKLRD 358 at para 369H.) It is submitted that it remains open for an alleged wrongdoer whose relationship with the complainant falls within the established categories to rebut the evidential presumption of undue influence.

²⁴ *Supra*, note 1, at 1031C, 1056E-G, 1077B, per Lord Nicholls, Lord Hobhouse and Lord Scott.

If the wrongdoer fails to do so, the court will infer that the transaction was procured by undue influence.²⁵

In so far as the Law Lords made reference to two different forms of unacceptable influence, the first requiring proof of overt pressure, and the second merely requiring proof of the existence of certain relationships, and went further to retain the distinction between presumptions that arise from the fact of reposing confidence on another, and the existence of established categories of relationships, the abolition of classification may be more apparent than real. The substantive message is rather in highlighting equity's flexibility to take into account individual circumstances in the infinitely various ways in which influence can be unduly exercised, which message could have just been as effectively delivered by warning against rigid adherence to categorisation.

A good illustration of how flexibility can be achieved within the former approach can be found in the approach of the High Court of Singapore in relation to the (Class 2A) presumption of undue influence between parent and children. In *Rajabali Jumabhoy & Ors v Ameerli R Jumabhoy & Ors*, Prakash J held that the presumption is inapplicable between an elderly father and his adult sons who have 'for decades conducted their lives as independent adults'.²⁶ The same approach was adopted in *Malayan Banking Berhad v Hwang Rose & Ors*.²⁷

B. Transactions that 'call for explanation'

Under the *O'Brien* doctrine, the proof of manifest disadvantage is not necessary for actual undue influence, but is needed for presumed undue influence. *Etridge* substituted manifest disadvantage by the requirement that the transaction is one which 'calls for explanation'.²⁸ Lord Nicholls relied on a statement of Lindley LJ in *Allcard v Skinner*²⁹ to explain what this involves, namely when 'the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act'. As his Lordship added, the greater the disadvantage to the vulnerable party, the more cogent the explanation would need to be to rebut the presumption.³⁰

²⁵ *Ibid*, 1030D, per Lord Nicholls.

²⁶ [1997] 3 SLR 802 at 854H-855A.

²⁷ [1997] 2 SLR 1 at 25A-C. See also *Overseas-Chinese Banking Corporation Ltd v Chng Sock Lee & Anor* [2001] 4 SLR 370, where a son who signed a joint guarantee with his parents in favour of facilities extended to a company owned by the son himself and his mother sought to rescind the transaction on the basis that the creditor-bank has notice of the father's undue influence on him. Lai J held that there was no undue influence on the facts.

²⁸ *Supra*, note 1, paras 1030G, 1032-4.

²⁹ (1887) 36 Ch D 145 at 185. See also *Goldsworthy v Brickell* [1987] Ch 378, 401F-H.

³⁰ *Supra*, note 1, 1033B-D.

The new terminology of ‘calling for an explanation’ was to replace the ‘ambiguous’³¹ label of manifest disadvantage. The latter was said to have caused difficulties in cases where a wife provides surety or charges her share of the matrimonial home for her husband’s debts, in that while such a transaction is to the disadvantage of the wife, she may derive benefit from the success of her husband’s business. According to Lord Nicholls, *in the ordinary course*, such transactions do not call for explanation; there are good reasons why wives frequently enter into them.³²

While it is encouraging to see the affirmation of the necessity of substantive unfairness,³³ it is difficult to see how the change of label has eliminated the alleged difficulties in the test of ‘manifest disadvantage’. As Lord Nicholls himself demonstrated, in applying the new criterion, one still cannot avoid comparing the financial disadvantage that the complainant suffered, with the nature of the relationship between the parties, in order to decide whether it was so one-sided as not to be explicable by reasons other than the exertion of undue influence. To put the point more strongly, the new label of ‘calling for an explanation’ simply restates the conclusion of the analysis, whereas the old one of ‘manifest disadvantage’ focuses attention on the essential criterion that leads to the conclusion.

Besides, the problem of the old label was one of vagueness, that is, how far a transaction can be said to be manifestly disadvantageous to the wife if, despite its one-sided nature, she may derive some benefit from it. In so far as the precise extent of the requisite disadvantage suffered by the wife has not been identified, the problem of vagueness will remain. For example, under the new label of ‘calling for explanation’, it can be argued that on the one hand, a wife’s surety or charge of her matrimonial home for her husband’s sole debts cannot be explained by the marital bond; on the other hand, because of the benefit she may derive from the success of her husband’s business ventures, it can be so explained.

When Lord Nicholls ruled that such transactions did not, in the ordinary course, call for explanation, he resolved the vagueness by stipulating where the line should be drawn. The solution does not stem, however, from switching to the new label. It is likely, therefore, that future courts will have to confront such difficulties in exceptional cases, as the new label will not offer any guidance.

C. Rebutting the presumption of undue influence

Consistent with the central message of the House about the weighing of all the evidence in determining whether a transaction was procured by undue

³¹ *Ibid*, 1034C.

³² *Ibid*, 1034D-E.

³³ This requirement had been doubted in *Barclays Bank plc v Coleman*, [2001] QB 20 at 30-2.

influence, the Law Lords emphasised that proof of independent advice is not a legal requirement, but an evidential matter to be taken into account by the court in rebutting the presumption of undue influence. The weight of the advice depends on all the circumstances of the case.³⁴

It is submitted that this makes good sense. It is the only guidance that equity could and should realistically provide for, given the infinite possibilities in which undue influence may be exercised, and the inherent nature of the equitable jurisdiction to pay heed to individual circumstances of each case. In this light, the greatest step forward in *Etridge* lies not in the use of a new label or the abolition of classification of undue influence, but in the exhortation for departing from a mechanical application of doctrines, and in moving towards a common sense approach in assessing all the evidence, using evidential presumptions where appropriate.

II. WHY AND WHEN ARE BANKS AFFECTED?

The greatest theoretical advance brought about by *Etridge* is in making it clear that the wife's right to set aside the transaction as against the bank is not based on any doctrine of notice or priority borrowed from property law.³⁵ Unfortunately, the House of Lords stopped short of spelling out what the theoretical basis of the *Etridge* doctrine is. No indication was given as to which of the two competing bases of undue influence, viz. the wrongful conduct of the stronger party, or the defective consent of the weaker party leading to autonomous unjust enrichment of the other party, ought to be adopted.³⁶

It is beyond the scope of the present commentary to resolve this thorny issue, but one might consider a synthesis of the two approaches along the following lines. On the one hand, a transaction can be vitiated by the defective condition of the complainant's own mental state, such as his spontaneous mistakes, insanity or incapacity. On the other hand, the defective consent can be brought about by the conduct of the respondent, which can take the form of active persuasion, such as misrepresentation or unlawful threats (in duress and actual undue influence), or passive exploitation, such as taking unfair advantage of the complainant's dependence on the respondent (as in undue influence), or of his mental inadequacy (as in unconscionability). The common justification between these two approaches is that an individual should only be held responsible for a transaction that he has entered into upon his autonomous and fully

³⁴ *Ibid*, 1032D-E, per Lord Nicholls. See - post-*Etridge* - *Hammond v Osborn & Anor* [2002] EWCA Civ 885.

³⁵ The point was made, albeit implicitly, by Lord Nicholls in 1036B and 1036F, *ibid*.

³⁶ See Chin Nyuk Yin and Peter Birks, "On the Nature of Undue Influence", in Jack Beatson and Daniel Friedmann (eds) "-Good Faith and Fault in Contract Law-" (1995) Ch 3, but see too Rick Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?", (1996) 16 OJLS 503.

informed consent. Thus, where undue influence is concerned, the relevant transaction is set aside as a result of the combination of both the impaired consent of the complainant, and the passive exploitation of his trust and dependence by the respondent. Similarly, where banks are concerned, even though the underlying rationale of the *Etridge* doctrine might be the bank's unjust enrichment from the complainant's impaired consent, a necessary condition for rescinding the particular contract could be the unacceptable conduct of the bank.

In this connection, one might note that Lord Nicholls appeared to see the *Etridge* doctrine as involving the traditional jurisdiction of equity to set aside transactions entered into by wives 'if the other party to the transaction ... was privy to the conduct which led to the wife's entry into the transaction'.³⁷ Put another way, the bank is affected because of its unacceptable conduct in knowingly (whatever the test of knowledge might be) taking advantage of the wife's defective consent. Such a structure of analysis is very much in line with that adopted in relation to the doctrine of unconscionability.³⁸ In English law, this doctrine has been subject to a three-step analysis set forth by Megarry J in *Creswell v Potter*,³⁹ namely that: (a) the complainant must be 'poor and ignorant', or in the circumstances of a modern society 'less well-off and less highly-educated';⁴⁰ (b) the transaction must be at a considerable undervalue; and (c) there was no independent legal advice. One might note that the three-fold requirements in *Etridge* in analysing the position of the banks, viz: (a) the existence of undue influence; (b) the bank's being put on inquiry – where the transaction is one-sided; and (c) the taking of reasonable steps by the bank to minimise the risk of undue influence, correspond to the questions raised in *Creswell v Potter*.

Of course, whether the *Etridge* doctrine should be subsumed under the doctrine of unconscionability, and whether it is justifiable at all, is a different matter.⁴¹ All that the present commentary argues is that, after *Etridge*, the process of analysis in relation to equity's intervention in wife's surety cases is similar to that applicable for unconscionability, that is, a

³⁷ Lord Nicholls cited as authority *Cobbett v Brock* (1855) 20 Beav 524 and *Kempson v Ashbee* (1874) LR 10 Ch App 15.

³⁸ See the approach adopted by the High Court of Australia in *Garcia v National Australia Bank Ltd*, (1998) 194 CLR 395, noted Andrew Phang & Hans Tjio, "From Mythical Equities to Substantive Doctrines - Yerkey in the Shadow of Notice and Unconscionability" (1999) 4 JCL 72. See in particular Andrew Phang & Hans Tjio, *supra*, note 7 at 241-3 and Mindy Chen-Wishart, *supra*, note 4.

³⁹ [1978] 1 WLR 255 at 275, applied in *Rajabali Jumabhoy & Ors v Ameerli R Jumabhoy & Ors*, *supra*, note 26 at 857F.

⁴⁰ *Commercial Bank of Australia Ltd v Amadio*, (1983) 151 CLR 447 at 474, per Deane J.

⁴¹ This raises questions similar to those in the debate in the law of negligence about whether a unified law of negligence, as opposed to one based on discreet pockets of liabilities, is to be preferred. The High Court of Singapore has rejected the broad, Australian approach to unconscionability in preference for the English approach: *Rajabali Jumabhoy & Ors v Ameerli R Jumabhoy & Ors*, *supra*, note 26, at 858B-D.

contractual party should not be allowed to knowingly take advantage of the other party's disability.

In this light, the greatest practical challenge of the *Etridge* doctrine lies in defining what counts as unacceptable conduct such that the bank is seen to have taken such unfair advantage. Given that the bank is not the person exerting the influence itself, one ought not expect it to fool-prove the wife from any defective consent. *Etridge* rightly recognised that the ultimate choice is with the wife, and that the bank should not be required – as it was under *O'Brien* – to ensure that she was indeed free from undue influence of her husband. It is adequate that the bank has brought to her the practical implications of the transaction. Thus, in the absence of any unacceptable conduct on the part of the bank, the mere fact that the wife did enter into the transaction upon impaired consent would not render it voidable. In this way, an appropriate balance can be drawn between protecting the vulnerable wives on the one hand, and not rendering it unduly cumbersome for banks to procure and enforce their securities on the other. *Etridge* sets out the relevant rules through laying down two conditions before setting aside the surety -against the bank: first, that the bank was put on inquiry; and, second, that it had failed to take reasonable steps to minimise the risk of undue influence upon the wife.

III. WAS THE BANK PUT ON INQUIRY?

Etridge abandoned the threshold requirement stipulated in *O'Brien*, namely that the transaction was to the wife's financial disadvantage, and that there was a substantial risk of undue influence arising from the couple's emotional ties; such a test unrealistically requires banks to pry into the couple's marital relationship.⁴²

Instead, *Etridge* set forth a lower, but also simpler and easier-to-apply threshold, that a bank is put on inquiry whenever a wife becomes surety for her husband's debts (or vice versa), or for the debts of a company owned jointly by the couple, even though the wife is involved in the management of the company; it will not be put on inquiry if the loan is for joint purposes.⁴³ Beyond husband-and-wife cases, the threshold would also be crossed if the surety's relationship with the debtor was non-commercial, such as that between parent and child, employer and employee, siblings, or parent- and child-in-law.⁴⁴

This straight-forward criterion is likely to dispose a large majority of cases. There will remain the unlikely, though not impossible ones where,

⁴² See *Royal Bank of Scotland plc v Etridge (No 2)*, [1998] 4 All ER 705, Court of Appeal (which laid down the unrealistic test). This was disapproved by the House of Lords, *supra*, note 1.

⁴³ *Supra*, note 1, 1057E-58A, per Lord Hobhouse. Note that as between the husband and the wife, such a transaction does not call for explanation: see text to note 32.

⁴⁴ *Ibid*, 1048F-G.

say, a wife is unduly influenced by her husband to provide surety for the debts of her husband's friend,⁴⁵ who is a stranger to the wife and whose *prima facie* relationship with her is indistinguishable from that between commercial parties.⁴⁶

In Asian jurisdictions, the bifurcation between commercial and non-commercial relationships may also pose difficulties in the not uncommon situation where a business enterprise is run by family members. In this context, it is worthwhile noting an observation of Lai J in *Overseas-Chinese Banking Corp Ltd v Chng Sock Lee & Anor*.⁴⁷ In this case, an allegation was made that a father of ungovernable temper had by undue influence procured his wife and son to sign certain guarantees. The family was in the business of property development, and the father had been training his son in the family business. In deciding whether the father had unduly influenced the son, Lai J noted that a clear distinction ought to be made between familial relationships on the one hand and relationships in family businesses on the other. It is submitted that the same distinction ought to be borne in mind in applying the new criterion put forward by *Etridge*. Accordingly, where guarantees are provided by family members who are involved in a joint family enterprise, care must be taken not to adopt a mechanical classification of the relevant transaction.

Putting these difficult cases aside, banks can now rely on information readily available to them, namely about the type of transaction involved and the type of relationship of the relevant parties, to determine whether they should take reasonable steps. This is a step in the right direction. The lower threshold also expands the scope of situations where banks should take reasonable steps.

IV. REASONABLE STEPS BY BANKS

Etridge also took the realistic step of not insisting upon a private meeting between the bank and the wife: litigation post-*O'Brien* has shown that banks are reluctant to do this for fear of opening themselves to allegations of misrepresentation, undue influence, and assurances about the enforcement of the facility. The Law Lords only required a bank to 'satisfy itself that the wife has had brought to her the practical implications of the transaction'.⁴⁸

⁴⁵ See, for example, *Chekiang First Bank v Fong Siu Kin*, [1997] 2 HKC 302; *Well Kent Finance & Anor v Wulfgam & Anor* (4 June 2001)(unreported) Woolley J, Court of First Instance, Hong Kong.

⁴⁶ A practical step that banks may take to prevent such difficulties is to require the surety to declare her relationship with the debtor to the bank; in the absence of circumstances indicating otherwise, the bank should be allowed to rely on the surety's declaration.

⁴⁷ *Supra*, note 27.

⁴⁸ *Supra*, note 1, 1040A, per Lord Nicholls; 1077H-78A, per Lord Scott. Lord Hobhouse, however, opined that the bank should in all cases satisfy itself that the wife was free from undue influence: 1058B-H.

In elaboration, Lord Nicholls suggested that,⁴⁹ in the ordinary case, with respect to the wife, the bank should check directly the name of her solicitor, inform her why the solicitor is involved, and that the bank may rely on the confirmation against her. To the solicitor, the bank should provide not only information on the purpose, the amount, and the terms of the new facility, but also information on the debtor's indebtedness and, his current overdraft facility, in order that the solicitor can explain the practical effect of the transaction to the wife.⁵⁰ The bank should then obtain written confirmation from the solicitor that the nature and effect of the transaction has been explained and understood by the surety.

These rules were applied in *Greene King Plc v Stanley*,⁵¹ where parents charged their home – their only valuable assets which they planned to use in a few years' time to supplement their pension – to help finance their son's purchase of a public house. The solicitor did explain the terms of the transaction to them, and told them that they risked losing their home should the son default on the loan. Nonetheless, the English Court of Appeal held that the claimant had failed to take reasonable steps (or indeed any steps) because it did not urge the parents to take independent legal advice. In particular, the Court noted that the bank had failed to inform the solicitor about a pending action on specific performance for the sale and purchase agreement of the public house, the long-standing nature of the loan, and the poor financial situation of the son. All these factors were crucial in making the parents appreciate that the practical implications of the transaction differed significantly from what they had been told by their son.

If the relevant solicitor acted for the wife (or for both parties), the bank could rely on such confirmation after taking the above-mentioned steps, even though the legal advice itself was deficient,⁵² or that the bank had not specifically instructed the solicitor to give independent legal advice.⁵³ However, if the solicitor acted for the bank alone, the bank could not rely on such confirmation.⁵⁴ Moreover, as Lord Scott pointed out in *Etridge*, 'knowledge by a bank that a solicitor is acting for a surety wife does not, without more, justify the bank in assuming that the solicitor's instructions extend to advising her about the nature and effect of the transaction'.⁵⁵

⁴⁹ *Ibid*, 1045E-46E. See also 1076H-78A, per Lord Scott.

⁵⁰ Lord Scott held that the debtor's loan application entailed an implied consent to the disclosure of such information, whereas Lord Nicholls suggested that if the debtor's consent is not available, the bank should not proceed with the transaction: *ibid*, 1045E-46E.

⁵¹ [2001] EWCA Civ 196.

⁵² See *Etridge*; *Barclays Bank plc v Coleman*, and *National Westminster Bank plc v Gill* of the eight conjoined appeals.

⁵³ *The Governor and Company of the Bank of Scotland v Hill* [2002] EWCA Civ 1081.

⁵⁴ *National Westminster Bank Plc v Amin* [2002] 1 FLR 735.

⁵⁵ *Ibid*, 1079B. This statement was applied in *UCB Corporate Services Ltd v Williams*, *supra*, note 11.

These steps are applicable in the ordinary cases. In exceptional cases, the steps expected are more extensive; the bank might need to satisfy itself that the wife was free from undue influence.⁵⁶ If, for example, the bank suspects that there was some wrongdoing, it should inform the solicitor of facts giving rise to such suspicion.⁵⁷ The House of Lords had, for example, little difficulty in seeing that an exceptional case arose in *National Westminster Bank plc v Amin*,⁵⁸ which involved immigrant parents who acted as surety for their son's business debts, but who did not speak English. In particular, their Lordships took issue with the fact that under the circumstances, the bank's instruction to the solicitor did not indicate the need for any special care. It was merely an instruction to attend formalities, and the solicitor only confirmed that the relevant terms of the transaction was explained, not that they were also understood.

No doubt, banks will welcome the *Etridge* decision with great relief. The fundamental improvement from *O'Brien* is that banks are now judged according to facts available to them. For example, a bank need not go behind the prima facie relationship of their customers to determine whether they are put on inquiry; nor does it need to go behind the apparent validity of the solicitor's confirmation.

V. REASONABLE STEPS BY SOLICITOR

In a similar vein, a solicitor acting in a surety transaction is, in the ordinary case, also relieved from having to satisfy himself that the wife is free from undue influence;⁵⁹ he only need satisfy himself that the wife understands the nature and effect of the transaction.⁶⁰ In the exceptional case where the solicitor has reason to suspect that the wife is the victim of undue influence, the higher standard may still be applicable.⁶¹

Nonetheless, even in the ordinary case, the Law Lords still require that there be a private meeting with the wife, in the absence of the husband, where the solicitor should advise her of the purpose of his involvement, and obtain confirmation from wife that she wishes to retain him.⁶²

⁵⁶ Lord Scott expressed agreement with Lord Hobhouse in these exceptional cases: *supra*, note 1, 1077H-1078A and 1058B-H respectively.

⁵⁷ *Ibid*, 1045E-46E, per Lord Nicholls.

⁵⁸ *Supra*, note 54.

⁵⁹ For criticism of the old approach, see Stuart Bridge, "The Aftermath of O'Brien: Carte Blanche for Banks, Cartes Jaunes for Solicitors?", [1999] CLJ 28; Richard Hooley & Janet O'Sullivan, "Undue Influence and Unconscionable Bargains" [1997] LMCLQ 17; Simone Wong, "No Man Can Serve Two Masters: Independent Legal Advice and Solicitor's Duty of Confidentiality" [1998] Conv 457.

⁶⁰ *Supra*, note 1, 1115B-16A, per Lord Scott on *Kenyon-Brown v Desmond Banks & Co (a firm)*, one of the eight conjoined appeals in *Etridge*; 1039F-40A, per Lord Nicholls.

⁶¹ *Ibid*, 1058B-H, per Lord Hobhouse.

⁶² *Ibid*, 1043B.

Lord Nicholls set out the core minimum of steps in such a meeting. The solicitor should:⁶³

- (1) explain to the wife the nature of document and the practical consequences of signing;
- (2) point out the seriousness of the risks involved;
- (3) tell the wife that the choice is hers, producing information on the husband's indebtedness; and
- (4) check whether the wife wishes to proceed.

Significantly, his Lordship suggested that in the interest of savings on cost, the solicitor need not act solely for the wife. However, if he acts for both the bank and the wife, the solicitor owes the duty to advise both parties in their best interests, and must resolve any conflict of interest or duty himself.⁶⁴

Etridge has rightly relieved solicitors from the unrealistic task of freeing the wife from undue influence. It accepted that even where a wife truly understands the nature and implications of the surety transaction, she may still be acting under undue influence.⁶⁵ The proper role of a legal advisor is to provide full information to reduce, but not to eliminate, the risk of undue influence. The choice lies ultimately with the wife.

Nonetheless, *Etridge* may not have removed all the practical difficulties faced by the solicitor.⁶⁶ Lord Nicholls' endorsement of double representation is likely to be a mixed blessing. While it affirms the practice in a considerable number of transactions, it will also be more difficult for solicitors to resist invitations, if not pressure, from banks to act for both parties. Such pressure is not unrealistic, for confirmation from a solicitor who acted for both parties has been treated just as valid as that from one who acted solely for the wife.⁶⁷ Besides, the bank can be spared the extra effort of making direct and individual communication with the wife's solicitor, and providing relevant information to him, not to mention the additional saving on legal expenses.

Should a solicitor act for both parties (or perhaps also for the borrower), the risk of conflict of interest and duty is extreme. On the one hand, his duty to the wife requires the solicitor to obtain from the bank any information necessary to explain to her the practical implications of the transaction.⁶⁸ On the other hand, his duty to the bank (and the borrower if he also acts for

⁶³ *Ibid*, 1042B-43A. The points were also set out succinctly by Lord Scott at 1079D-E.

⁶⁴ *Ibid*, 1044D-F.

⁶⁵ See *Banco Exterior International v Mann*, [1995] 1 All ER 936 at 947, per Hobson LJ; *Etridge*, *supra*, note 1, at 1032D-E.

⁶⁶ See "Undue Influence – Solicitors' Duties" (2002) LSG, 30 May 2002, 41; Simone Wong "Revisiting Barclays Bank v O'Brien and Independent Legal Advice for Vulnerable Sureties" [2002] JBL 439.

⁶⁷ See *Barclays Bank plc v Coleman*, *supra*, note 33, and *Etridge*, *supra*, note 1.

⁶⁸ *Ibid*, para 1043B, per Lord Nicholls.

him) is to make the minimum disclosure required by *Etridge*, without running the undue risk of losing any potential business.

Besides, to ensure that the *Etridge* guidelines are not treated as a mere formality, and that the wife is given a genuine choice, it appears that it is not enough for the solicitor to give the advice, and obtain the wife's signature at a single meeting, as is usually the case. There must be a reasonable period of time between the meeting whereby the nature and practical implication of the transaction is explained to the wife, and another meeting whereby the wife's intention to proceed is confirmed, and her signature is obtained. This means that there would have to be at least more than one face-to-face meeting, and thus additional work on the part of the solicitor.

In the exceptional case where the solicitor suspects that the wife is a victim of undue influence, he might be expected to take further steps to protect her.⁶⁹ However, it is unclear what these additional steps are, and when exactly an exceptional case arises. Until these issues are clarified by future courts, any actions by a solicitor outside the routine cases will run the great risk of actions by either party for negligence and breach of fiduciary duty.

VI. CONCLUSION

After extensive experimentation, the English courts have now refined their protective rule on would-be sureties in two significant respects. First, the House of Lords has emphasised the importance of adopting a common sense approach to assessing the evidence in each type of case. It has laid down simple, easy-to-apply guidelines for the ordinary cases, while at the same time maintaining that each case, especially the exceptional ones, is to be considered on its own facts. Second, it has limited the protective role of the banks and solicitors to that of explaining the nature and practical implications of the transaction to the surety.

Both are great strides forward, though one should not expect the flurry of litigation in this area of law to subside immediately. *Etridge*'s emphasis on assessing each case on its own facts, and the preservation of a fluid class of exceptional cases are likely sources of future contention.

In common law jurisdictions in Asia, the recent collapses of the property markets will add further pressure on litigation. The different social settings in which small businesses in these jurisdictions operate, such as the prevalence of commercial enterprises that are run by family members,⁷⁰ will also give rise to new issues not explored in English case law.

⁶⁹ *Ibid*, para 1115B-16A, per Lord Scott.

⁷⁰ See *Overseas-Chinese Banking Corporation Ltd v Chng Sock Lee & Anor*, *supra*, note 27 and *Rajabali Jumabhoy & Ors v Ameerli R Jumabhoy & Ors*, *supra*, note 26.