

Crown. To a great extent, however, it was a case of making whatever one wished of the job, since there were few formal guidelines.¹²⁶

Canadian governments sought to emphasise national independence by emphasising the position of the Governor-General at the expense of that of the Sovereign. New Zealand, treading a path less determined by conscious choice, found itself almost as it were by accident, with a Governor-General empowered to exercise all the powers and responsibilities of a Head of State.

The office of Governor-General has not been the means by which New Zealand has achieved independence. But the increasing division of the Crown meant that the Governor-General assumed more of the identity of a Head of State. With the delegation of the royal prerogative, the Governor-General became *de facto* Viceroy, but not a *de facto* president, for he/she continued to represent, not simply the Sovereign, but the concept of the Crown. But, unlike in Canada, not enough has been done to clearly establish the Governor-General as a symbol of national identity. The clearer this identification the lesser the prospects for rejection of the system which the Crown represents.

Noel Cox
Lecturer in Law
Auckland University of Technology

¹²⁶ Interview with Dame Catherine Tizard, 19 May 1998.

Reducing the Solicitor's Burden?

Georgina Andrews

Introduction

The obligations of solicitors who advise wives who have been asked to agree to charge their homes to secure their husband's business debts came under scrutiny in the House of Lords in the recent landmark case of *Royal Bank of Scotland PLC v Etridge (No 2) and others*¹. The House of Lords also clarified the obligations of banks and other lending institutions involved in such transactions. An invitation to dispense with the requirement for proof of manifest disadvantage in cases of presumed undue influence was rejected by the House. Instead, the restriction of the scope of the doctrine of presumed undue influence occasioned by the introduction of the requirement for proof of manifest disadvantage was confirmed.

The House of Lord's decision in *Etridge* determined the outcome of eight appeals. Each appeal arose out of a transaction in which a wife entered into a charge of her home to secure her husband's business debts. In each case the wife claimed to have consented to the transaction as a result of her husband's undue influence. In seven of the cases the wife sought to defeat the bank's attempts to enforce the charge on the basis that the bank had notice that the transaction had been procured as a result of the husband's undue influence. The eighth appeal involved a claim brought by a wife against the solicitor who advised her at the time when she entered into the charge.

This article examines the decision of the House of Lords in *Etridge*² and considers the practical effects of the decision. In particular, this article will focus on the obligations of solicitors who advise wives who have been asked to agree to charge their homes to secure their husband's business debts, and will seek to assess whether the decision represents a genuine reduction in the onerous burdens which solicitors and other independent legal advisers have hitherto been called upon to discharge.

¹ [2001] UKHL 44.

² *Ibid.*

The background to the decision will first be briefly explained. The redirection of the requirements of presumed undue influence will then be outlined, and the obligations of banks will be explored. Finally, the duties of solicitors will be analysed. The writer will contend that although the decision does significantly reduce the obligations of solicitors, it continues to allow lenders to shield themselves from potential loss by shifting their obligations on to independent legal advisers.

Background

What is undue influence? In his judgement, Lord Clyde questioned the wisdom of attempting to define and still worse classify, something which is more easily recognised than described.³ However in order to assess the impact of the decision in *Etridge* it is necessary to briefly recall the state of the doctrine of undue influence prior to the decision.⁴

In *Bank of Credit and Commerce International SA v Aboody*⁵ the Court of Appeal classified undue influence as follows:-

Class 1: actual undue influence. This is where the claimant can prove that undue influence was in fact exerted on the claimant to induce him to enter into the contract.

Class 2: presumed undue influence. This is where the claimant can show that there was a relationship of trust and confidence between the parties of such a nature that it is fair to presume that the trust and confidence of the complainant was abused. Once the claimant can establish the existence of the relationship of trust and confidence, the burden of proof then shifts to the alleged wrongdoer to rebut the presumption of undue influence, and to prove that the transaction was entered into freely.

The Court of Appeal also identified two types of presumed undue influence⁶.

³ n 1 above at [92].

⁴ Lord Browne-Wilkinson provides a masterly exposition of the doctrine of undue influence in the leading case of *Barclays Bank plc v O'Brien and another* [1993] 4 All ER 417, at p 423, 424.

⁵ [1990] 1QB 923, at p 953.

⁶ *Ibid.*

Class 2A: recognised relationships of trust and confidence. The law recognises that certain types of relationships (for example the relationship between solicitor and client, or doctor and patient) are by definition relationships of trust and confidence. The presumption of undue influence is automatically raised in cases involving transactions between parties involved in these relationships, simply by virtue of the existence of the relationship.

Class 2B: de facto relationships of trust and confidence. This is where the claimant can prove that on the facts of the particular case, there was a relationship of trust and confidence between the parties.

The relationship between a husband and wife no longer falls into *Class 2A*.⁷ However in individual cases a wife may be able to prove that on the facts of her relationship she left decisions on financial affairs to her husband (or *vice versa*⁸), thus bringing the particular relationship into *Class 2B*.⁹

The marital relationship is not unique in this respect. A relationship of trust and confidence can be found to exist on the facts of many other relationships, such as the relationship between an unmarried couple¹⁰, or between a banker and a customer¹¹, or an employer and an employee¹². The marital relationship is the main focus of this article because that is the relationship that arose in each of the eight appeals before the House in *Etridge*.¹³ However, the redirection of the requirements of presumed undue influence applies to all relationships falling into *Class 2*.

The effect of a successful plea of undue influence is that the transaction will be voidable. However, the right to rescission may be lost if third party rights have been acquired by a person who is without notice that the transaction was procured as a result of undue influence.¹⁴

⁷ *Bank of Montreal v Stuart* [1911] AC 120.

⁸ *Barclays Bank plc v Rivett* [1999] 1 FLR 730.

⁹ *Barclays Bank plc v O'Brien and another* [1993] 4 All ER 417.

¹⁰ *Massey v Midland Bank plc* [1995] 1 All ER 929.

¹¹ *Lloyds Bank Ltd v Bundy* [1975] QB 326.

¹² *Credit Lyonnaise Bank Nederland v Burch* [1997] 1 All ER 144.

¹³ *n 1* above.

¹⁴ *Barclays Bank plc v O'Brien and another* *n 9* above.

The Decision

1. The requirements of presumed undue influence

One of the most contentious issues concerning the doctrine of undue influence prior to the House of Lords decision in *Etridge*,¹⁵ was as follows. Should claimants seeking to invoke the presumption of undue influence be required to prove that they have suffered ‘manifest disadvantage’ as a prerequisite to shifting the burden of proof on to the defendant?

The nature of the requirement for manifest disadvantage is in itself controversial. The suggestion is that in cases involving presumed undue influence, in order to invoke a shift in the burden of proof, it is not enough simply to establish a relationship of trust and confidence. The claimant must also satisfy the court that she has suffered a disadvantage as a result of the transaction. Moreover, the degree of disadvantage occasioned to the claimant, and the advantage taken, must be sufficiently clear and obvious (‘manifest’) so as to raise the presumption that the transaction is explicable only on the basis that it has been procured by the exercise of undue influence.

Lord Nicholls traces the origins of the requirement for manifest disadvantage to the case of *Allcard v Skinner*.¹⁶ In *Allcard*, Lindley LJ stated that where a gift of a small amount is made, some proof of the exercise of undue influence is required which goes beyond merely establishing the existence of the influence. In other words, in cases involving minor, insubstantial gifts, the claimant must prove actual undue influence, and cannot simply rely on the presumption. This is because the doctrine of undue influence applies only to transactions ‘not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary men act.’¹⁷

The principle established in *Allcard*¹⁸ was developed by the House of Lords in *National Westminster Bank PLC v Morgan*.¹⁹ In *Morgan*, Lord Scarman stated that, pursuant to *Allcard*, in cases of presumed undue

¹⁵ n 1 above.

¹⁶ (1887) 36 ChD 145

¹⁷ *Ibid* at p 185.

¹⁸ *Ibid*.

¹⁹ [1985] AC 686.

influence the courts would require evidence that the transaction constituted ‘an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it’.²⁰

In the House of Lords decision in *Etridge*, Lord Nicholls was critical of the label (‘manifest disadvantage’), but he embraced the concept. Blaming an inappropriate label for giving rise to ambiguity, Lord Nicholls declared that the courts should abandon the label, and instead adhere more closely to the test outlined by Lindley LJ in *Allcard*,²¹ and adopted by Lord Scarman in *Morgan*.²² In short, Lord Nicholls pronounced that in cases of presumed undue influence, the claimant must show that ‘the transaction is not readily explicable by the relationship between the parties’.²³

Are the effects of this rejection of terminology and reaffirmation of *Allcard* and *Morgan* merely cosmetic? Or does this decision represent a genuine change of approach?

Lord Nicholls contemplated the application of the redefined prerequisite to transactions where a wife guarantees her husband’s business debts. This was in essence the character of the transactions in each of the eight appeals under consideration. Lord Nicholls rejected what he described as the narrow interpretation of the term ‘manifest’. He identified, but dismissed the argument that in ordinary circumstances a wife’s guarantee of her husband’s business overdraft was manifestly (plainly) disadvantageous to the wife since she was undertaking a serious financial obligation, and receiving no direct personal benefit.

Lord Nicholls declared that in most cases the fortunes of husbands and wives were inextricably linked.²⁴ His Lordship concluded that, in the ordinary course of events, a guarantee entered into by a wife in respect of her husband’s business debts should *not* be regarded as a transaction which ‘failing proof to the contrary, is explicable only on the basis that it has

²⁰ *Ibid* at p 704.

²¹ n 19 above.

²² n 21 above.

²³ n 1 above at [21].

²⁴ This point was accepted in the recent Court of Appeal decision in *Leggatt v National Westminster Bank* (2000) WL 1544615. However the special facts of *Leggatt* (which involved the replacement of a valid unlimited, all monies charge with a limited charge) rendered the case distinguishable. Interestingly in *Leggatt* the wife was unable to satisfy even the less demanding test of showing that the transaction was not on its face to her financial advantage for the purposes of invoking the doctrine of constructive notice.

been procured by the exercise of undue influence by the husband'.²⁵ The implications of this line of reasoning are potentially catastrophic for wives.

How, in the ordinary course of events, can a wife obtain relief on the grounds of presumed undue influence in these circumstances? In the ordinary course of events, it appears she cannot.²⁶ Even if a wife can establish that on the facts of her particular circumstances, she placed trust and confidence in her husband in respect of the management of her affairs, this will not in itself be enough to invoke a shift in the burden of proof. She must also satisfy the court that the transaction is one that is explicable only on the basis that it has been procured by the exercise of undue influence by her husband. In ordinary cases involving a guarantee by a wife of her husband's business debts secured on the matrimonial home, the wife will not be able to fulfil this requirement.

2. What is 'the ordinary course'?

The absence of direction in *Etridge* as to what constitutes 'the ordinary course' is likely to lead to considerable uncertainty. Somewhat ironically, adopting a narrow interpretation of what constitutes 'the ordinary course' may represent an opportunity for the courts to ameliorate the effects of *Etridge* in this regard.

3. Representations made by husbands

Having placed an often-insurmountable obstacle in the path of wives seeking to obtain relief on the grounds of presumed undue influence, Lord Nicholls was anxious to protect husbands from unwarranted connotations of impropriety. His Lordship explained that 'when a husband is forecasting the future of his business, and expressing his hopes or fears, a degree of hyperbole may be only natural'.²⁷

Provided the husbands' statements or conduct do not pass beyond what should be expected from a reasonable husband in the circumstances, Lord Nicholls did not feel such exaggerations should be classed as

²⁵ n 1 at [30].

²⁶ Lord Nicholls made it clear that his comments applied in 'the ordinary course', but he recognised that there will be exceptional cases where explanation is called for.

²⁷ n 1 at [32].

misstatements. Thus the ability of wives to adduce evidence of misrepresentation, which might provide an alternative path to relief was also effectively inhibited.

4. Third party lenders

Like many undue influence cases that appear before the courts, the eight appeals under consideration in *Etridge* did not simply involve allegations of undue influence raised by the claimant against the person whom they claimed had exerted the undue influence. Rather the claims were precipitated by the attempts of third party lenders to enforce securities. In each case the guarantors claimed that they had been induced to provide the security as a result of undue influence or misrepresentations perpetrated by their husbands. In addition to ascertaining the existence or otherwise of the undue influence, the House was therefore also concerned with the effects of the undue influence on such third parties.

In the leading case of *Barclays Bank plc v O'Brien*,²⁸ Lord Browne-Wilkinson invoked the doctrine of constructive notice in determining the enforceability of securities by third party creditors in situations such as these. Lord Browne-Wilkinson outlined circumstances in which a third party creditor will be 'put on enquiry'. When these circumstances arise, the creditor will be fixed with constructive notice of the undue influence unless it takes reasonable steps to satisfy itself that the security has been properly obtained. Only those creditors who are deemed to have constructive notice of the undue influence will be affected by it.

In *Etridge*, Lord Nicholls examined the circumstances in which the third party creditor will be 'put on enquiry'. His Lordship also clarified the steps which the creditor should reasonably be expected to take in satisfying itself that the security has been properly obtained.

Lord Browne-Wilkinson stated in *O'Brien* that 'a creditor is put on enquiry when a wife offers to stand surety for her husband's debts by the combination of two factors (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk...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'.²⁹

²⁸ n 9 above.

²⁹ *Ibid* at p 429.

Lord Nicholls interpreted this passage as meaning that ‘quite simply, a bank is put on enquiry whenever a wife offers to stand surety for her husband’s debts’.³⁰ Indeed, his Lordship later extends this rule to all cases where the relationship between the parties is non-commercial.³¹

This interpretation clearly has the effect of putting banks on enquiry more readily than the Court of Appeal previously envisaged in this case. The Court of Appeal interpreted this passage as meaning that where condition (a) is satisfied the creditor is only put on enquiry where it is aware that the parties are cohabiting, or if it is aware that a relationship of trust and confidence exists on the facts.³²

In cases where monies are advanced to spouses jointly, Lord Nicholls found that the creditor will not be put on inquiry unless it is aware that the loan is being made for one party’s sole purposes, rather than for the couple’s joint purposes.³³

However, creditors should not be unduly alarmed by this development, since although they will be put on notice more readily, the steps which they are required to take, are clear and simple. As Lord Nicholls states, ‘in all conscience, it is a modest burden for banks and other lenders’.³⁴ Incorporating these steps into standard banking practices could easily discharge the creditor’s obligations without causing undue difficulties.

Namely, for future transactions,³⁵ a bank must *either*:

- (a) Insist that the wife attends a private meeting with a bank representative where the extent of her liability and the risks involved will be explained, and she will be urged (and in exceptional cases required) to take independent legal advice, *or*
- (b) Require the wife to seek independent legal advice.

³⁰ n 1 at [44].

³¹ n 1 at [87].

³² [1988] 4 All ER 705, at p 719.

³³ See also *Wright v Cherrytree Finance Ltd* [2001] EWCA CIV 449, where a creditor was found to have been put on inquiry despite the fact that the advance cheque was payable to joint names, since the cheque could be easily converted into a cheque payable to one party for his sole purpose.

³⁴ n 1 at [87].

³⁵ For past transactions, in ordinary cases the bank will be able to rely upon confirmation from a solicitor that he had brought home to the wife the risks that she was running.

If option (b) is selected, the creditor will have an obligation to provide any information required by the independent legal adviser, but it will ordinarily be entitled to rely upon confirmation³⁶ from a solicitor acting for the wife that he has provided appropriate advice.³⁷

In his speech to the House of Lords in *Etridge*, Lord Hobhouse described the widespread reluctance of banks to carry out personal interviews with wives themselves as opposed to entrusting such interviews to solicitors as 'sad'.³⁸ His Lordship also referred critically to the practice of allowing banks to treat a certificate provided by a solicitor as conclusive evidence that it has no notice of any undue influence that has occurred, particularly since the made information available to the solicitor by the bank was often incomplete. His Lordship stated that 'The law has, in order to accommodate the needs of commercial lenders, adopted a fiction which nullifies the equitable principle and deprives vulnerable members of the public of the protection which equity gives them'.³⁹

It is likely that most third party lenders will prefer to carry on their current normal practice of requiring wives to seek independent legal advice, since this enables them to shield themselves from potential loss by shifting their obligations on to independent legal advisers.⁴⁰ However, the procedural guidelines contained in *Etridge*, which require banks to provide the legal adviser with full details of the proposed transaction, should at least help to ensure that the advice is well founded.

5. The obligations of independent legal advisers

The obligations of independent legal advisers were also scrutinised by Lord Nicholls.⁴¹ His Lordship sensibly acknowledged that in some

³⁶ Detailed guidance is offered to banks concerning the steps it should take in obtaining the solicitor's confirmation, see n 1 at [79].

³⁷ Lord Nicholls rejected the argument that the solicitor should be regarded as the agent of the bank. Deficiencies in the legal advice provided will not therefore be attributed to the bank, and knowledge gained by the solicitor will not be imputed to the bank.

³⁸ n 1 at [113].

³⁹ n 1 at [116].

⁴⁰ See also Burrows D, [2001] *Law Gazette*, 23 November.

⁴¹ Lord Nicholls left solicitors to determine on a case-by-case basis whether there is any conflict of interests between a husband and wife, or whether it would be in the best interests of the wife for her to be separately represented. If instructions are accepted from the wife the solicitor will assume legal and professional responsibilities directly to her, and advice should be offered at a face-to-face meeting, in the absence of the husband.

respects the burdens placed on solicitors by the Court of Appeal went much too far. Lord Nicholls found that, contrary to the findings of the Court of Appeal, there is in fact no obligation in the ordinary course of events for the solicitor to satisfy himself that the wife is free from undue influence. 'To require such an intrusive, inconclusive and expensive exercise in every case would be an altogether disproportionate response'.⁴² Instead Lord Nicholls declared that the solicitor's duty is confined to bringing home to his client the risks involved in the proposed arrangement.

The solicitors' profession has not surprisingly, welcomed the reduction of the obligations placed on solicitors. Jeremy Scott of the Solicitors Indemnity Fund is reported to have said: "A solicitor specialising in conveyancing and mortgages cannot also be expected to be an expert in company finance and psychology. If this decision had not been overturned by the Lords, many solicitors would have had to refuse to handle routine transactions."⁴³

The precise steps that the solicitor will have to undertake to discharge this obligation are set out clearly, and in detail, in Lord Nicholls' judgment.⁴⁴ In summary, Lord Nicholls stated that the solicitor should cover the following matters as a core minimum:-

1. Explain the nature and content of the documents, including the consequences that could ensue in the event of default by the husband.
2. Explain the serious nature of the risks involved, including the purpose, amount and main terms of the new facility and the risk that the credit might be extended.
3. Explain that the wife has a choice, including a discussion of the present financial position, and a discussion of any matters that might be negotiable, such as the sequence in which the various securities might be called upon, or a specific lower limit to the wife's liabilities.⁴⁵

⁴² n 1 at [53].

⁴³ MacCallum V, 'Lords Reduce the Duty to Wives.' [2001] *Law Gazette*, 19 October .

⁴⁴ n 1 at [64] to [68].

⁴⁵ For a further discussion of the steps which independent legal advisers are required to take see also Pines Richman H, 'The Etridge Mortgage Cases: A Review.' [2001] *NLJ* 1541.

The duties of independent legal advisers are therefore clearly significant, and should not be underestimated. However, Lord Nicholls is realistic about what should be expected from independent legal advisers, and the extent of their duties is more clearly defined and contained.

6. The requirement for the solicitors' certificate

Solicitors will no doubt be concerned that banks may seek to suggest that the requirement that banks should obtain a written confirmation from the solicitor that he has brought home to the wife the risks that she was running creates a duty of care between the solicitor and the bank.

However, they will take comfort from Lord Nicholls' finding that 'When accepting instructions to advise the wife the solicitor assumes responsibilities directly to her... these duties...are owed to the wife alone.'⁴⁶ Lord Nicholls also specifically rejects the argument that the solicitor can be regarded as the agent of the bank,⁴⁷ and states further, 'The solicitor is not accountable to the bank for the advice he gives to the wife' and 'deficiencies in the advice are a matter between the wife and the solicitor'.⁴⁸

Conclusions

What are the practical implications of the decision of the House of Lords in *Etridge*? Has the decision in fact succeeded in improving protection for wives without deterring lenders from extending credit to businesses on the security of jointly owned property?

It would be naïve to suppose that it would ever be possible to provide absolute protection against abuse of influence, especially in the circumstances of the type of cases under appeal before the House. No amount of explanation, investigation or probing by creditors or independent legal advisers will ever guarantee the absence of abuse of influence exerted subtly and in private, within the contexts of relationships as complex and intimate as matrimony.

Etridge at least ensures that the limited safeguards that equity can provide will be triggered more easily and more frequently than hitherto. It also provides models of good practice for creditors and independent legal advisers that are reasonably clear, workable and considerably more realistic. The burdens placed upon solicitors involved in cases of this kind

⁴⁶ n1 at [74].

⁴⁷ n37.

⁴⁸ n1 at [77].

have undoubtedly been reduced by this decision. However, their obligations remain considerable, and banks continue to enjoy the ability to minimise their risk of potential loss at the expense of independent legal advisers.

In his speech to the House of Lords, Lord Hobhouse stated that if the procedures spelled out by Lord Nicholls are adhered to (by both the solicitor and the bank), there is a greater likelihood that ‘the fiction of independent advice and consent’⁴⁹ should be replaced by true independent advice and real consent’.⁵⁰ If this is indeed the outcome of the case then the decision will have succeeded, in practical terms, in restoring to vulnerable members of the public some of the protection which equity aims to provide.

Georgina Andrews
Senior Lecturer in Law
Southampton Institute

⁴⁹ referred to at n 31 above.

⁵⁰ n 1 at [121].