

## The Position Of A Bank For Security Obtained From A Non-Customer: Implications From O'Brien's Case

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### INTRODUCTION

A bank should be aware of its vulnerability when obtaining security from a non-customer, especially when such security is procured from a third party who is not a customer. When a bank loans money to its customer, the inclination is to find some ways of guaranteeing its repayment. Given that in today's condition, most people's greatest economic asset is their matrimonial home, it is common that banks seek a charge over that matrimonial home to guarantee the debt. Yet, the house is sometimes owned jointly by the debtor's spouse or partner and he or she will have to give consent to any charge or mortgage if the bank-creditor's security is to be affective. At this point it is interesting to note that the debtor, for example the husband may procure the consent of his wife, the joint-owner of the property by some undue influence or misrepresentation. As a result, the bank may be in trouble if it then seek to realize its security because there is a possibility that the bank will be affected by the inequitable conduct of its customer-debtor in obtaining the joint-owner's consent to the charge.

It is thus the aim of this article to discuss the position of the bank, its vulnerability when placed in such a situation. The decision of the House of Lords in *Barclays Bank v O'Brien*<sup>1</sup> is the main reference in this article. *O'Brien* has given an important ruling with regard to the basis, under English law, on which certain types of third party surety can challenge the validity of a security, arising out of the possibility of improper behaviour on the part of the debtor. Let us first set out the facts of *O'Brien*:

### THE FACTS AND ISSUES IN O'BRIEN

The husband and his wife agreed to execute a second mortgage of their matrimonial home as security for overdraft facilities extended by the bank to a company in which the husband had an interest. The bank manager instructed that the husband and wife should be advised of the sum of the overdraft granted and the effect of the documents they were signing. There were further instructions for them to seek independent advice if they had doubts. The instructions were not carried out and the wife signed the document without reading them, in reliance on her husband's explanation that the overdraft was limited to 60000 pound and would be operative for only three weeks. When the company's debts exceeded the agreed limit, the bank brought proceedings to enforce the legal charge on the matrimonial property and payment under the guarantee.

The trial judge had found that there was no evidence of undue influence on the part of the husband. Reversing the trial judge, the Court of Appeal held that

the wife was entitled to a special protection in equity, and the legal charge was not enforceable against her save to the extent of 60000 pound. However, the bank was not satisfied and appealed to the House of Lords. The House of Lords dismissed the bank's appeal but on different grounds. They held, inter alia, that where a wife had been induced to stand as surety for a her husband's debt by his undue influence, misrepresentation or some legal wrong, she had an equity as against him to set aside the transaction.

Thus, what are the cardinal principles arised from O'Brien, decided by the House of Lords? *First*, the House of Lords<sup>2</sup> appears to have actually said that there was no basis for providing special protection and equity to wives in relation to surety transactions, but such transactions could be set aside if the person taking the mortgage or guarantee had actual or constructive notice of the circumstances that the wife had been induced to stand as surety for the husband's debt by his undue influence.<sup>3</sup> The House thus, re-established a much wider principle of equitable interest and redefined the circumstances in which a creditor must answer to a surety or co-chargor for acts or omissions of the principal debtor in obtaining the surety or co-chargor's consent.

*Second*, at the same time, banks may justifiably argue that they are also entitled to consistent protection in the application of the laws of credit and security.<sup>4</sup> As Lord Browne-Wilkinson had stated in *O'Brien* where :

*" the right served to wives by the law renders vulnerable loans granted on the security matrimonial homes, institutions will be unwilling to accept such security, thereby reducing the flow of loan capital to business enterprises. It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions".<sup>5</sup>*

Thus, it is possible to say that, as the banks strive hard to adopt the watertight procedures for taking security, and thereby reduce the possibility that the security may later be set aside by the courts, they have welcomed the guidance given by the House of Lords as to the steps a lender should take when taking security from a wife who stands as surety for her husband's debts.<sup>6</sup>

There are several theories which can be drawn from the House of Lords' decision which reflects the judicial opinion on this matter. In the discussion that follows, the author will discuss the theories derived from O'Brien as well as from other cases.

#### a . Special Equity Theory

Lord Browne Wilkinson in the House of Lords focused on the question of whether wives should be accorded special rights in relation to surety transactions by the recognition of special equity applicable only to persons engaged in such transactions? Or should they enjoy only the same protection as they would enjoy in relation to their other dealings?<sup>7</sup> His Lordship rejected the special equity theory

stating that he could find no basis in principle for affording special protection to a limited class in relation to one type of transaction only. The authorities which supported such a theory being *Yerkey v Jones*<sup>8</sup> and the judgement of the Court of Appeal in the *O'Brien* case. In his Lordship's view, in any event, it was not necessary to have recourse to a special equity theory for the protection of wife. He concluded that a wife who was induced to stand surety for her husband's debts by undue influence, misrepresentation or some other legal wrong has an equity against him to have the transaction set aside. The right to set aside the transaction will be enforceable against a creditor if either the husband was acting as the third party's agent or the third party had actual or constructive notice of the facts giving rise to her equity.

#### b. The tender treatment

It is important to note that Lord Browne Wilkinson did admit that the main problem is to identify the circumstances in which the creditor will be taken to have had notice of the wife's equity to set aside the transaction.<sup>9</sup> It is here that the Lords sought to retain the so called "tender treatment" in the law for wives. This "tenderness"<sup>10</sup> of the law towards married women is due to the fact that, even today, many wives repose confidence and trust in their husbands in relation to their financial affairs. Moreover, the informality of business dealings between spouses may raise substantial risk that the husband did not accurately state to the wife the nature of the liability she was undertaking.

However, the tenderness shown to sureties in *O'Brien* contrasts with the approach of the New Zealand Court of Appeal in *Contractors Bonding Ltd v Snee*.<sup>11</sup> The facts of *Snee* were similar to *O'Brien* except that the surety and creditor were mother and son rather than the wife and husband. The plaintiff bonding agency had left the debtor to obtain the guarantee in the form of a mortgage against his mother's home. Unknown to the agency, the mother was mentally impaired and entirely reliant on her son.<sup>12</sup> The Trial Judge held that, in obtaining the mortgage, the son had unduly influenced his mother. The Court of Appeal however held that the mortgage was enforceable. In reaching this decision,<sup>13</sup> Richardson, Gault and Mc Kay JJ held that the mortgage was enforceable unless the son was the agent of the creditor or the creditor had actual or constructive notice of the undue influence. Neither of these conditions was met.<sup>14</sup> On the issue of agency, it was held that the ordinary tests of agency should be strictly applied.<sup>15</sup> In particular, it was held that, contrary to certain authorities,<sup>16</sup> the mere fact that a creditor entrusted a debtor with the task of obtaining a guarantee did not make the debtor an agent of the creditor.

It is also interesting to note that in *Snee*, Richardson J had made it clear that the constructive notice might have succeeded if, as in *Avon Finance Co. Ltd v Bridger*,<sup>17</sup> the mother was elderly. We can see that the mother in *Snee* seems more deserving of sympathy than in *O'Brien*, who was an educated intelligent woman.<sup>18</sup> However, the New Zealand Court had made a different approach as to whether the general category of mother-son relationship should merit special treatment. Perhaps

mothers in New Zealand would be better protected if *O'Brien* is applied in the courts of New Zealand since the principles announced by Lord Browne Wilkinson also applies to other types of relationships where the surety reposes trust and confidence in the debtor.

### c. Putting a creditor on enquiry

It is also clear from the decision of the House of Lords in *O'Brien* that the same principles as when a wife stands surety for her husband's debts should also be applied to certain other relationships.<sup>19</sup> The creditor is to be put on enquiry whenever he is aware that a) the surety and the principal debtor are cohabitants or b) the surety reposes trust and confidence in the principal debtor in relation to his or her financial affairs.<sup>20</sup>

The English Court of Appeal has maintained a similarly flexible approach to this issue. Steyn L.J. in *Massey*<sup>21</sup> was prepared to extend *O'Brien* in order to provide a similar protection to a woman who has had a long-standing sexual and emotional relationship with the man who controlled the principal debtor company, as there was a clear risk that the judgemental capacity might have been impaired by the relationship.<sup>22</sup> It is submitted that the bank must be aware of the underlying relationship between the surety and the principal debtor, or at least believe there to be such relationship,<sup>23</sup> for it to be put on enquiry.

### d. Independent Legal Advice

It follows that the question now is whether the bank has taken reasonable steps to ensure that the wife's agreement to grant the charge was properly obtained to avoid being fixed with constructive notice. Lord Browne Wilkinson in *O'Brien* has given an example of reasonable steps which the creditor should take to ensure that it does not have constructive notice of the wife's rights. His Lordship observed that:<sup>24</sup>

*"in my judgement the creditor, in order to avoid being fixed with constructive notice, can reasonably be expected to take steps to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice"*.

In *O'Brien*, Lord Browne Wilkinson referred to the two requirements that are necessary to be complied with by a creditor:<sup>25</sup>

*"One can see that, in a case where independent advice is not merely urged but is actually taken and the independent adviser performs his task properly, it ought to matter little, if at all, whether or not the creditor has itself pointed out the risk. But in the ordinary case these two elements of awareness of the desirability of obtaining legal advice must be both be present"*.

These two requirements were not complied with by the bank in *Allied Irish Bank V Byrne*.<sup>26</sup> In this case, even though the bank granting the loan advised the wife to take independent legal advice and also recommended a local firm of solicitors who also acted for the bank as well as for the husband, the bank had not taken steps to inform the wife of the risk she was running. The Judge also doubted the ability of the official dealing with the matter to give a clear explanation of banking transaction to someone not versed in banking procedure. From the facts of the case, the husband clearly prevented the solicitor from explaining the terms of the mortgage, assuring the solicitor that they understood the document. On this point, counsel for the bank cited the case of *Bank of Baroda v Shah*<sup>27</sup> in support of the proposition that the bank was entitled to assume that the solicitors would give proper advice to the wife. However, based on the two requirements above addressed by Lord Browne Wilkinson in *O'Brien*, the Judge rejected this proposition on the ground that the bank had not provided the solicitors with adequate information to ensure that the wife was properly advised.

The Judge further concluded that the bank had constructive notice of Mrs Byrne's equity to set aside the charge over her home as against Mr Byrne and was therefore bound by it. He noted that the solicitor advising Mrs Byrne was not in any relevant sense independent as he had also been retained by the bank. He said, "he was then the agent of the bank in addition to being the solicitor's knowledge that Mr Byrne had prevented him from carrying out his intention to explain the mortgage clause by clause is to be imputed to the bank."

However, a different approach was taken in *Midland Bank Plc V Massey*,<sup>28</sup> Steyn L.J. referred to the words of Lord Browne Wilkinson in *O'Brien* and continued "it is generally sufficient for the bank to avoid a finding of constructive notice if the bank urged the proposed surety to take independent legal advice from a solicitor. How far a solicitor should go in probing the matter, and in giving advice, is a matter for the solicitor's professional judgement and a matter between him and his client. The bank is not generally involved in the nature and extent of the solicitor's advice".

From the above statements of Steyn L.J., it can be understood that it does not appear to be necessary for the wife to have a private meeting with the bank's representative, so long as she takes independent advice. The creditor was entitled to believe that the wife had received independent legal advice from the reputable firm of solicitors to whom it had sent the charge and to assume that the solicitor carried out his duty honestly and gave proper advice. Furthermore, Steyn L.J.<sup>29</sup> stressed that the guidance in *O'Brien* was clearly not intended to be exhaustive in which he said;

*"the guidance was intended to strike a fair balance between the need to protect wives (and others in a like position) whose judgemental capacity was impaired and the need to avoid unnecessary impediments to using the matrimonial home as security.....The guidance ought therefore not to be mechanically applied"*.

The above statement means that, as long as the bank had taken reasonable steps to ensure that the wife's agreement to grant the charge had been properly obtained and had received confirmation from the solicitors, that they had explained the charge to the wife, it was not fixed with constructive notice of the husband's misrepresentation or undue influence.

Thus, we can say that one of the advantages for the bank from the guidelines in *O'Brien* is that the bank's position is well protected once a surety goes to a solicitor for advice. If the solicitor had not given adequate advice, the wife must look to the solicitor and not to the bank for redress.<sup>30</sup> Where the bank merely urges that advice be taken, but the wife does not go on to take it, there is a strong case for arguing that the bank has not taken reasonable steps to satisfy itself that the wife's agreement to stand as surety has been properly obtained.<sup>31</sup> However, in most cases the wife is unlikely to take independent advice because she will probably regard it as an unnecessary extra expense and she may even see it as being in some way disloyal to her husband. It is here important for the bank to give a clear explanation to the wife about the nature of the transaction and the extent of the wife's liability as well as the risk she is running so that the wife may realize the importance of taking independent legal advice.<sup>32</sup>

#### e. Safeguarding the Bank's Position

It appears that the decision as to whether legal advice is or is not independent is one which a solicitor has to make, not a creditor. A creditor cannot be expected to know or assess the circumstances in which a firm of solicitors will have a conflict of interest.<sup>33</sup> A creditor should be entitled to rely on the assurance from the solicitors concerned that they will be able to provide independent legal advice.<sup>34</sup> Accordingly, if it transpires that this is not the case, then the surety should have a remedy against the solicitor and not the creditor.<sup>35</sup> To the extent that it conflicts with this view, the *Bank of Melli Iran* decision should not be followed. As Steyn L.J. in *Massey* said:

“ The bank did not know what happened between the solicitor and Miss Massey, or how the interview was conducted and it was under no duty to inquire. But the bank had every reason to believe ( as was the case on the Judge's findings ) that Miss Massey had received independent advice..... The bank was entitled to assume that the solicitors would act honestly and give proper advice to Miss Massey..... The law does not generally require the creditor to stipulate the nature and extent of the advice”.

This approach seems fair to banks. The creditor is under no duty to inquire how the meeting between the solicitor and the wife was conducted. It would be wrong in principle to assume that a surety has not been properly advised, simply because the advice has been given by a solicitor also acting for the creditor at the same time.<sup>36</sup> The solicitor is the right person to judge whether he is able to give advice to a surety or whether he is prevented from so doing because of a conflict of interest.<sup>37</sup>

#### f. The solicitor as the creditor's agent

Where the solicitor is acting both for the bank and the wife it could be argued that the knowledge of the solicitor that the husband had prevented him from carrying out his intention to explain to the wife the term of the mortgage is to be imputed to the bank. Moreover, if the solicitor had been retained by the bank, he could be regarded as the bank's agent and consequently his knowledge pertaining to the husband's conduct is to be imputed to the bank. There are at least two cases where the solicitor's knowledge was imputed to the bank. In *B.C.C.I. S.A. v Aboody*,<sup>38</sup> the bank arranged for a solicitor to advise Mrs. Aboody about a proposed charge, and to confirm in writing that she fully understood its implications, in return for a fee to be paid by the bank. During the course of the solicitor's interview with Mrs. Aboody, her husband burst into the room and exercised actual undue influence over her to induce her to sign the charge. The Court of Appeal held that, as the solicitor had been retained by the bank to advise Mrs. Aboody, the solicitor's knowledge of the influence brought to bear on Mrs. Aboody could be imputed to the bank.<sup>39</sup> The bank would have been liable to have Mrs. Aboody's charge set aside.<sup>40</sup> The solicitor's knowledge in *Aboody* was held to be imputed to the bank because he owed the bank a contractual duty to report to the bank any circumstance known to him which in his opinion made it unsafe for the bank to rely on the charge. It did not matter that disclosing these facts to the bank might have rendered the solicitor in breach of duty to his other client, Mrs. Aboody. It is interesting to note that the Court of Appeal's emphasis on the fact that the solicitor was under a duty to report to the bank reflects a general principle of agency law, namely, that a principal is deemed to be affected by his agent's knowledge because, "knowledge acquired by the agent in respect of a matter..... as to which he has a duty to inform the principal, is presumed to have been passed on".<sup>41</sup>

In *Allied Irish Bank V Byrne*,<sup>42</sup> Ferris J. held that a solicitor who had been retained by the bank to prepare and complete a charge "was thus the bank's agent" and "in these circumstances [the solicitor's] knowledge that Mr. Byrne had prevented him from carrying out his intention to explain the mortgage clause by clause [to Mrs. Byrne] is to be imputed to the bank."<sup>43</sup>

However in *Midland Bank v Serter*,<sup>44</sup> where Mrs. Serter argued that the bank had appointed the solicitor as its agent not merely to secure registration of the charge, but also to take necessary steps as to bring home to her the risks she was running if she signed the charge and to advise her to take independent legal advice. She further alleged that, if the solicitor was the bank's agent for this purpose, his own knowledge that he had not taken such steps could be imputed to the bank. If the bank knew that the steps had not been taken, it should not be able to hide behind the solicitor's certificate that they had.

Glidewell, L.J. rejected this argument for two reasons: First, he held that the evidence established that the solicitor was the agent of the bank to register the security, but not for any other purpose. When the solicitor advised the wife, he did so either acting for her or, if acting for her husband, as part of his general professional duty. Secondly, he accepted the bank's general submission that it is

only knowledge acquired by the agent when carrying out that part of the transaction in which he is instructed to act as agent which is to be imputed to the party who for that purpose is his principal.<sup>45</sup> In other words, the bank had instructed the solicitor to register the charge and it was only knowledge acquired by the solicitor when carrying out these instructions, and not when advising the wife which could be imputed to it.

At this point it seems that it is necessary to know the terms of the bank's instructions to the solicitor and also whether he was entitled to look to the bank for payment of his fees. This is essential in order to determine whether the solicitor advising Mrs. Serter in *Serter's* case owed the bank a similar duty to report to the bank any circumstances known to him which might make it unsafe for the bank to rely on its charge.

#### **g. Bank's Letter of Instructions.**

In *Byrne*,<sup>46</sup> the solicitor gave evidence that from time to time the bank instructed him to advise prospective mortgagors and that he was paid by the bank for this service. Consequently, it was held that the solicitor was the bank's agent and that his knowledge could be imputed to the bank. Unfortunately, the bank's letter of instruction to the solicitor does not appear to have been adduced in evidence in *Serter*. It is therefore uncertain as to whether the bank asked the solicitor to advise Mrs. Serter, or whether the bank asked him to certify that he had done so and the most important question is to whom did the solicitor look for payment of his fees? However, it is clear that the solicitor himself drafted both the certificate signed by Mrs. Serter and his own certificate, verifying that she had been properly advised. He must have been aware of the purpose of the certificate and if the bank did instruct him to draft either or both of them, he would have been under a duty to inform the bank of any circumstances known to him which would have rendered the certificate useless.

From the above discussion, it seems clear that the solicitor's certification is very vital. However, it may not, after all, be decisive of the issue as to whether the bank has constructive notice of the wife's equity. Much will depend on whether the wife can establish that the solicitor acted as the bank's agent and was therefore under a duty to pass information to the bank. To rebut this allegation, banks would certainly be well advised not to retain a solicitor to advise the wife or to certify that he had done so.<sup>47</sup>

#### **h. A bank's duty of disclosure<sup>48</sup> - Duty to disclose terms of facility letter to surety**

*Levett V Barclays Bank Plc*<sup>49</sup> decided by Michael Burton Q.C., sitting as Deputy Judge of the High Court seems to be the only reported English case since 1946 in which a guarantee or a surety's mortgage supporting a bank loan has been challenged on the ground of non-disclosure by the bank.<sup>50</sup>



Even though this case is not concerned with the special consideration applying to a guarantee provided by a wife, co-habitee or an elderly parent of the principal debtor, it provides a further protection to a wife surety to challenge the validity of the transaction on the ground of non-disclosure by the bank. At the same time, creditors having arranged for the surety to be advised by an independent solicitor did not save the security because the bank did not inform the solicitor of a key term in the contract loan.

In fact, following the guidelines in *O'Brien*, the bank in *Levett's* case did advise the sureties to seek independent advice when they entered into the transactions. Unfortunately, it was held that this made no difference since the bank officer concerned did not explain to the solicitor who was to advise the surety that the loan was repayable on the maturity date of the Treasury Stock with the Treasury Stock's proceeds<sup>51</sup> which was considered as "a material non-disclosure"; in the sense of being causative of loss.<sup>52</sup>

The essential facts in *Levetts* were as follows; Mr. Levett was a retired stockbroker. He was persuaded by Mr. Hole and Mr. Lewis, a solicitor, (the 'borrowers') to mortgage his Treasury Stock in 1990 to Barclays Bank to secure a loan which Barclays Bank were to make to borrowers. Each of the borrowers gave Mr. Levett written promises that his Treasury Stock would be returned to him, free of the mortgage, before the Treasury Stock's maturity date. However, the facility letter from Barclays to the Borrowers provided that the facility, the amount of which (plus anticipated interest) equalled the nominal amount of the Treasury Stock, was to be repaid on the Treasury Stock's maturity date by the sale of the Treasury Stock. The plaintiffs claimed that the bank had failed to comply with a duty to disclose material differences between the loan agreement with the bank and that which the Levetts as sureties were entitled to expect.

#### **I. Duty to disclose relevant information to solicitor.**

The Court of Appeal in the decisions of *Massey*, *Mann*, *Rayarel* and *Serter* as discussed above, emphasized that a bank is not generally involved in the nature and extent of the solicitor's advice. Unfortunately, no explanation has been given as to the extent of the bank's duty of disclosure of certain important information to the solicitor. We are left, therefore with a number of unanswered questions. What if the bank withholds important information from the solicitor, information which the solicitor is unlikely to obtain from any other source? Was there a conflict of duties between a duty of confidentiality which the bank owes to its customer and a duty to disclose important information to the solicitor. Is the wife surety entitled to ask any question pertaining to the principal-debtor?<sup>53</sup>

The point arose in *Allied Irish Bank V Byrne*<sup>54</sup> was not considered by the Court of Appeal in *Massey*, *Mann*, *Rayarel* and *Serter*. In this case, the assistant manager did not explain the nature of the transaction to Mrs. Byrne, nor did he advise her on the risks involved. As a result, Mrs. Byrne was not aware that what she was being asked (a) to open a joint account with Mr. Byrne, which was to be used for his sole benefit and (b) to execute 'all Monies' charge expressed to

secure only her own indebtedness but which because of her liability on the joint account, had the effect of securing her former husband's debts. The bank on the other hand was fully aware of the purpose and effect of these arrangements. Mrs. Byrne executed her mandate to open the joint account, but the assistant manager advised her to take independent advice before executing the charge. Mrs. Byrne, accompanied by her husband was interviewed by the solicitor who attempted to explain the terms of the charge to her, but was prevented from doing so by Mr. Byrne's intervention. Ferris J. held that the bank had not advised Mrs. Byrne of the risks involved in becoming a surety for Mr. Byrne's debts.<sup>55</sup> He further held that<sup>56</sup> the solicitor had not done so because he had not been told of the circumstances giving rise to the risk.

It is clear from the above case that the solicitor had not been given any information concerning the amount, purpose and terms of the facilities, accordingly, he could not advise her as to the risk she was running by executing, what was unknown to him, a suretyship obligation. Furthermore and most importantly, Ferris J. observed that, if the bank had thought about it, it would have realized that the solicitor was unlikely to acquire this information from the Byrnes or from any other source.<sup>57</sup> Consequently, the bank could not claim to be entitled to assume that the solicitor would give proper advice to Mrs. Byrne.

Thus, it is clear that the information which should have been disclosed was related to the nature of the transaction. The solicitor will not be able to advise the wife properly as to the risk she is running by standing surety for her husband's debts unless he is provided with information about the husband's financial affairs. Moreover, information as to the current state of her husband's indebtedness, and his credit history may be essential to the risk the wife is running by standing surety for him. It is here that only the information provided by the bank is reliable.

It could certainly be argued that the bank will breach its duty of confidentiality<sup>58</sup> as between the bank and its customer i.e. the principal debtor when the bank disclose all the current state of his indebtedness. It follows that, can the solicitor ask any question pertaining to the borrower's current state of indebtedness to the bank or can the wife herself ask the same question to the bank?

This may not be so as the wife does not want to show her disloyalty towards her husband. As regards to the bank's duty of confidentiality to its customer, it can be rebutted by the fact that when the husband ( principal debtor ) brings together his wife to the bank impliedly had consented to any information to be disclosed to his wife.

Nevertheless, a duty to pass on information about the principal debtor's financial affairs imposes too high a burden on a bank and this goes too far than what is required by *O'Brien*.<sup>59</sup>

## CONCLUSION

It is clear that the House of Lords in *O'Brien* has given an authoritative determination on the question of how far special protection may be afforded to the wife surety, in the event of enforcement proceedings by the bank. Even though

there is no special equity in favour of a wife who acts as surety for her husband's debts and there is no presumption of undue influence which can exist in the husband and wife relationship, the law will be more 'tender' in its treatment of the wife or co-habitee, than a third party surety. The bank is, or should be put on enquiry when the wife offers to stand surety for the husband's debts mainly because the transaction is prima facie not to the advantage of the wife and there is a substantial risk that the husband did exercise undue influence in order to obtain the consent from the wife to act as a surety.

## NOTES

- \* Lecturer, Faculty Of Law, Universiti Kebangsaan Malaysia
1. [1993] 4 ALL ER 417
  2. Ibid
  3. Ibid, at 440 to 441
  4. See also Mark Stallworthy, "*Third party Sureties and the Extent of the Creditor's Duties after Barclays Bank v O'Brien.*" [1994] 3 JIBL 118
  5. [1993] 4 ALL ER 417 at 422
  6. Similar principle applies to certain other sureties; e.g. where there is an emotional relationship of cohabitation between the surety and the principle debtor or the surety reposes trust & confidence in the principal debtor in relation to his/her financial affairs. See also Mark Stallworthy, "*The Party Sureties and the Extent of the Creditor's Duties after Barclays Bank v O'Brien.*," [1994] 3 JIBL 118
  7. [1993] 3 W.L.R. 786
  8. (1940) 63 C.L.R. 649
  9. See Richard Hooley "*Taking Security After O'Brien*", LMCLQ 1995 349
  10. Lord Brown Wilkinson held in *O'Brien* that the 'tenderness' shown by the law to the married women is not based on the marriage ceremony but reflects the underlying risk of one co-habitee exploiting the emotional involvement and trust of the other.
  11. [1992] 2 NZLR 157 —
  12. See also Stephen A. Smith, "*Undue Influence*," Current Legal Problems, 1994, Part, Annual Review, at p. 37
  13. Ibid
  14. See also Stephen A. Smith, "*Undue Influence*," Current Legal Problems, 1994, Vol. 47, Part 1, Annual Review, at p. 37
  15. Ibid., See also [1992] 2 NZLR 157, Gault J.
  16. Ibid., See also *Avon Finance Co. Ltd Bridger* [1985] 2 ALL E.R. 281., *Kings North Trust Ltd v Bell* [1986] 1 W.L.R. 119
  17. [1982] 2 ALL ER 281
  18. See Stephen A. Smith, "*Undue Influence*", Current Legal Problems, 1994, Vol. 47, Part 1, Annual Review at p. 37
  19. Where there is an emotional relationship for example the cohabitation between the surety and the principal debtor, or the surety reposes trust and confidence in the principal debtor in relation to his or her financial affairs.
  20. [1994] 1 A.C. 180, 198D-F
  21. [1995] 1 ALL ER 929 at 933D
  22. [1995] 1 ALL E.R. 929, at 933D
  23. At this point, see also *Allied Irish Bank v Byrne* [1995] 1 F.C.R. 430, 458C – 459C, Ferris J held that the bank was put on enquiry because the assistant manager mistakenly believed that Mr. and Mrs. Byrne were married and cohabiting at the relevant time.
  24. [1993] 3 W.L.R. 799

25. [1993] 4 ALL E.R. 417
26. [1993] 1 F.C.R. 430
27. [1998] 3 ALL E.R. 24 at 29
28. [1995] 1 ALL ER 929
29. [1995] 1 ALL E.R. 929 at 934
30. See Richard Hooley "*Taking Security After O'Brien*", LMCLQ 1995, p. 349
31. *Ibid* at p. 349
32. *Ibid* at p. 349
33. See also some useful guidance contained in *Mortgage Express Ltd v Bowerman* [1995] 4 E.G. 126. For detail, see also M.P. Thomson, "*Conflicts of Interest*", May/June 1996, 60 Conveyancer 24. See also C.I. Howells, "*Mortgagees and Purchasers : Separate Solicitors*" 1995, New Law Journal 193.
34. See Richard Hooley "*Taking Security After O'Brien*", LMCLQ 1995, p. 349.
35. *Ibid*.
36. In *Clark Boyce v Mouatt* [1994] 1 A.C. 428 the Privy Council held that, when a client is in full command of his faculties and apparently aware of what he is doing, the solicitor is under no duty to go beyond his instructions by proffering unsought advice on the wisdom of the transaction. As Lord Jouncey said at 437D "To hold otherwise could impose intolerable burdens on solicitors." See also *Halifax Mortgages Services Ltd (formerly BNP Mortgage Ltd) v Stepsky and anor.* [1996] 2 ALL. E.R. 277.
37. Richard Hooley "*Taking Security After O'Brien*", LMCLQ 1995, p. 349. —
38. [1990] 1 Q.B. 923
39. *Ibid.*, 975C
40. At this point, it is important to note that the House of Lords in *C.I.B.C. Mortgages Plc v Pitt* [1994] 1 A.C. 200 held that the victim of actual undue influence does not have to prove manifest disadvantage.
41. See F.M.B. Reynolds (ed.), *Bowstead on Agency*, 15th. edn. (London), 1985, 413.
42. [1995] 1 F.C.R. 430
43. *Ibid.*, 416C-D
44. [1995] *The Independent*, 8 March. See also *Current Law March Digest* 1995, p. 101.
45. See also *Saffron Walden Second Benefit Building Society v Rayner* (1880) 14 Ch.D 406 and *Blackburn Law & Co v Vigors* (1887) 12 A.C. 531.
46. [1995] 1 F.C.R. 430
47. The bank could still argue that the solicitor owed it a tortious duty of care when certifying that he had advise the wife; See *Caparo Industries Plc v Dickman* [1990] 2 AC 605
48. One of the most cited formulations was that proffered by Barwick CJ in *Goodwin v National Bank of Australasia Ltd* (1968) 117 CLR 173 at 175, who stated that there is a duty to disclose "anything which has taken place between the bank and the principal debtor which was not naturally to be

expected in the transaction”, see also Gibbs CJ in *Commercial Bank of Australia Ltd v Amadio* where Gibbs CJ held that the matter to be disclosed must be in respect of “the transaction” between the creditor and the debtor (1983) 151 CLR 447 at 457, See also, Duncan Murdoch “*Creditor’s Duty of Disclosure in Contract of Guarantee*”, 1995 Journal of Contract Law 286. See also, Ellinger and Hans Tjio, “*New cases applying O’Brien*” 1996 (May) Journal of Business Law 266.

49. [1995] 2 ALL E.R. 615.
50. Alan Berg, “*Guarantees-Creditor’s Duty of Disclosure to Surety*”, 1994, Lloyd’s Maritime and Commercial Law Quarterly, p. 331.
51. *Ibid.*, at 622
52. After considering *Hamilton v Watson* (1845) 12 Cz & Fin 107 and *Cooper v National Provincial Bank Ltd* [1946] K.B., his lordship concluded that the principal appeared to be that there was imposed upon a creditor a duty to disclose unusual terms unknown to the surety.
53. Richard Hooley “*Taking Security After O’Brien*”, LMCLQ 1995 349.
54. [1995] 1 F.C.R. 430
55. *Ibid.*, at 460F
56. *Ibid.*, at 460G
57. *Ibid.*, at 461B
58. *Tournier v National Provincial & Union Banks of England* [1924] 1 K.B. 461
59. See *The Banking Ombudsman Scheme*, Annual Report 1993-1994, para 8.6, that the proposed guarantor be given relevant up – to – date financial information about the principal debtor.