

**UYO JOURNAL
OF
MANAGEMENT SCIENCES
(UJMS)**

VOL. 1 OCTOBER 2000

A PUBLICATION OF THE DEPARTMENT OF BUSINESS
MANAGEMENT UNIVERSITY OF UYO NIGERIA

**SECURING BANK SECURITY: UNDUE INFLUENCE AND THE
O'BRIEN LEGACY IN NIGERIA***

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The typical Barclays Bank V. O'Brien¹ scenerio is probably too familiar to be forgotten: A lender seeking to recover possession of property jointly owned by two people (usually in a long-term emotional relationship), where one joint owner alleges that his/her consent to the mortgage, guarantee or other security was procured by the undue influence or misrepresentation of the other owner, and that this undue influence or misrepresentation is binding on the lender (creditor) through actual or constructive notice.

It is generally agreed that in Anglo- Nigerian Law a rebuttable presumption of undue influence exists in such instances as in contracts between husband and wife, parents and child, guardian and ward, religious leader and disciple, solicitor and client or doctor and patient, but can also be shown to exist in other situations. For instance, in *Messey V. Midland Bank Plc.*², the Court of Appeal saw a possibility of undue influence where a woman acted as guarantor for the debts of her lover of 14 years standing, even though she did not live with him because her parents objected to the relationship. Equally, in *Credit Lyonnais Bank Nederland V. Burch*³, undue influence was inferred between a junior employee and her employer: the court held that the "extravagantly improvident" unlimited guarantee by the Junior employee of all her employer's debts was in itself evidence of abuse of the relationship of trust and confidence⁴. In short, undue influence is automatically

presumed in cases where "there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction."⁵

In the O'Brien case a bank sought to enforce its security against a wife who executed a charge on the matrimonial home by way of security for her husband's liability to the bank. The wife claimed to have been induced by the undue influence or misrepresentation of her husband to execute the charge and maintained that the bank had knowledge of this lack of independent judgement. The court held that a lending institution would only be bound as a third party by the undue influence exercised by another if it has been put on inquiry by the fact that the transaction was not on its face⁶ to the financial advantage of the surety. However, the lending institution could rebut undue influence by showing that it has taken all reasonable steps to ensure that the surety's agreement had been properly procured. The effect of the judgement was that steps ought to be taken to ensure that the risk the wife (or other surety) was running were brought home to her and that she should be advised to take independent legal advice.

The ramifications of the O'Brien decision have been discussed without end⁷. Subsequent decisions have more or less followed O'Brien. In all the cases, the basic question is always whether there has been independent legal advice so as to displace the presumption of undue influence. Some of the cases include: *Barclays Bank V. Thompson*⁸, *Cheltenham and Gloucester Plc V. Krausz*⁹, *Nightingale Finance V. Scott and Scott*¹⁰, *Steeple V. Lea*¹¹, *Massey V. Midland Bank Plc*¹², *Banco*

*Exterior Internacional S. A. V. Thomas*¹³, *National Westminster Bank V. Beaton*¹⁴, and *Royal Bank of Scotland V. Etridge (No.2)*.

In all the cases the approach of the court has been to strike a fair balance between, on the one hand, the vulnerability of the wife who relies implicitly on her husband and, on the other hand, the practical problem of financial institutions asked to accept a secured or unsecured surety obligations from the wife for her husband's debts. However, while earlier decisions restrict the burden of the lender to only ensuring that the surety is instructed to take independent legal advice, it was held in *Royal Bank of Scotland V. Etridge (No. 1)*¹⁶ that where the independent legal advice had been given by a solicitor appointed by the lender to act on its behalf, it was arguable that the solicitor was retained as the lender liable if the solicitor's advice was inadequate. In fact it has been further suggested that even where independent legal advice was provided, it was not a general panacea but rather, should be taken as merely one of the considerations on the question of constructive notice¹⁷. These views are however minor deviations from the overwhelming and consistent trend¹⁸. In *Barclays Bank V. Thompson*¹⁹, the defendant owned a house, which she has mortgaged to the bank to secure an overdraft for her husband's business. The bank engaged the husband's solicitors to act for it and entrusted the same solicitor with the task of advising the wife. The solicitors explained the nature of the charge and its

consequences to the wife and certified this to the bank. However, they did not explain to the wife the charge was unlimited duration and amount. The bank sought to enforce its security, the wife claimed undue influence of her husband and that the bank was tainted by such undue influence.

The court held that the bank was entitled to rely on a solicitor's certificate that proper advice has been given, even if they had instructed such solicitors to give advice. Likewise, the solicitors could not be regarded as the bank's agents such as to disentitle them from relying on such a certificate. This decision effectively means that the bank (creditor) may rely on a solicitor's certificate that proper advice has been given to a guarantor, thereby averting the imputation of undue influence to a bank via constructive notice. Such a certificate is powerful evidence that the guarantor (e.g wife) has been independently advised under the O'Brien formula. Moreover, such a certificate remains valid even when the solicitors are appointed by the bank in an attempt to fulfil the O'Brien duties, provided that such appointment is made conscientiously.

All the earlier views and the state of the law since O'Brien were exhaustively considered and succinctly summarized by Stuart-Smith L. J. in *Royal Bank of Scotland V. Etridge (No. 2)*²⁰. The Law Lord emphasized that the only duty of the secured lender is to urge the surety to get independent legal advice²¹. Indeed, a lender, such as a bank, cannot normally be expected to do more since it is not capable of itself providing independent advice. It is not independent²².

Together, the cases give us the opportunity to draw some conclusions about how undue influence is established and what a creditor must do to avoid being tainted. First, if the mortgagee has made it clear that independent advice should be sought and is in possession of a solicitor's

undertaking that such advice has been given, the mortgagee has discharged its responsibilities cannot be tainted by the undue influence. The exception is if the creditor has reason to suspect either that the advice has not in fact been given or is deficient. Secondly, if the mortgagee has made it clear that independent advice should be sought and has not checked whether the advice has been given, it runs the risk of being tainted by the undue influence but is only so tainted if it turns out that the advice has not in fact been given. Thirdly, if the mortgagee has not advised the claimant to seek independent advice, and has not otherwise ensured that her decision is made without undue influence, the mortgagee is very likely to be tainted by the undue influence. Fourthly, the claimant can succeed in case of presumed undue influence only if the transaction was to her manifest disadvantage and, even then, may have account for any benefits actually received.

Admittedly *Barclays Bank V. O'Brien* is in English case. The circumstances that led to the decision in the O'Brien case are virtually non-existent in Nigeria. For instance, joint ownership between husband and wife is not common. Even where it exists, the jointly owned property is often hardly used as security, and where it is so used, a spouse hardly raises the issue of undue influence in a bid to vitiate the security. However, though the problem of insecurity of security is mainly linked to joint ownership, Nigeria has a similar problem with regard to the requirement of consent to the creation of a mortgage. This may be the consent of principal members of the family or consent of the family head in the case of communally owned property and, in every case, the overriding consent of the State Governor. It is expected that when eventually the problem that led to the O'Brien decision crops up in Nigeria, the decision in the O'Brien case will provide the necessary illumination.

FOOTNOTE

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1. [1994] AC 180
2. [1995] All ER 929
3. [1997] 1 All ER 144
4. See also: *Steeple v. Lea* [1998] 1 FLR 138, C.A.
5. *Bank of Credit and Commerce International S. A. v. Aboody* [1990] 1 QB 923 at 953 as approved by Lord Brown-Wilkinson in
6. *Barclays Bank Plc. v. O'Brien* [1994] 1 AC 180 at 189-190. See also the classic case of *Allcard v. Skinner* [1887] 36 Ch.d 145, 190
7. *CIBC Mortgages v. J. Pitt* [1994] AC 200
8. Some of these are: J. O'Sullivan, "Undue Influence and Misrepresentation after O'Brien: Making security Secure" in F. D. Rose (ed): *Restitution and Banking*, Oxford, Mansfield Press, 1998 at P. 44; M. Haley, "Mortgagees and the O'Brien Defence: a Developing Jurisdiction?" [1998] *Journal of Business Law* 355; A. Lawson, "O'Brien and its Legacy: Principle, Equity and Certainty" (199)54 *Cambridge Law Journal* 280; B. Fehlberg, "The

9. *Husband, the Bank, the Wife and Her Signature*" (1994) 57 MLR 467 and 'The Husband, the Wife and Her Signature – the Sequel' (1996) 59 MLR 675; P. Giliker, "Maintaining the Balance between Victims of Undue Influence or Misrepresentation and
10. *Mortgagees*" (1995) 6KCLJ 108; P. Giliker, "Barclays Bank v. O'Brien Revisited: What a Difference Five Years Can Make", (1999) 62 MLR 609; Anthony Pugh-Thomas, "Barclays Bank v. O'Brien and independent advice" [1997]NLJ 726; Stuart Bridge, "The aftermath of O'Brien: Carte Blanche for banks, Cartes jaunes for solicitors?" [1999] vol. 58 CLJ. 28; [1994] Conv. 140,
11. 421; [1994] CLJ21; (1994) 110 LQR 167; [1994] *Restitution Law Rev.* 3; (1995) 15 *Legal Studies* 35; (1995) 15 *OJILS* 119.
12. (1996) NLJ 6 December C.A.
13. (1996) NLJ 13
14. [1997] NPC 161, H. C.
15. [1998] 1 FLR 138, C.A.
16. [1995] 1 All ER 929 CA
17. [1997] 1 All ER 46
18. [1998] 30 HLR 99

19. [1998] 4 All ER 705
20. [1997] 3 All ER 628
21. Millett L. J. in Credit Lyonnais Bank Nederland NV v. Burch [1997] 1 All ER 144
22. As shown in Midland Bank Plc. V. Sertter [1995] 1 FLR 1034 at 1046; Barclays
23. Bank v. Thompson [1997] 4 All ER 816; Halifax Mortgage Services Ltd. V. Stepsky [1996] ch. 207; National Westminster Bank Plc v. Beaton (1998) 30 HLR 99.
24. (1996) NLJ 6 December CA, [1997] 4 All ER 816
25. [1998] The Times, 17 August, CA., [1998] 4 All ER 705. See also: Dunbar Bank v. Nadeem [1998] 3 All ER 876, CA; Cooke v. National Westminster Bank Plc [1998] The Times, 27 July.
26. [1998] 4 All ER 705 at 721-722
27. Midland Bank Plc. V. Kidwai (1995) The Independent, June 5.