THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 119

Finlay Geoghegan J.
Hogan J.
Hanna J.

No. 2016/32

A.C.C LOAN MANAGEMENT LIMITED

PLAINTIFF/RESPONDENT

AND

JOHN CONNOLLY AND MAURICE CONNOLLY

DEFENDANTS/APPELLANTS

JUDGMENT delivered by Ms. Justice Finlay Geoghegan on the 4th day of April

2017

1. This appeal primarily concerns the question as to whether a guarantor who does not contend that he entered into a guarantee under the undue influence or by reason of some other wrong of the principal debtor, such as misrepresentation, nevertheless has an arguable defence against a claim made by the creditor pursuant to the guarantee upon the grounds that the creditor, being on notice of a family relationship between the guarantor and the principal debtor, was obliged to take steps to ensure that the guarantor understood the nature of the guarantee and/or freely consented to the giving of the guarantee.

2. The respondent raises a preliminary objection to the appeal upon the grounds that it was out of time and the appellant has brought a motion seeking, if necessary, an order extending the time within which to bring the appeal.

3. There is also a subsidiary question in relation to the execution of the guarantee purporting to have been "signed, sealed and delivered" but without evidence that a seal was affixed.

Background facts
4. The appellant is the father of the first named defendant ("the son"). By a facility letter dated the 28th October, 2005, the plaintiff ("the bank") offered credit facilities in the sum of €680,000 to the son. The purpose of the loan was to fund the purchase of a 1.7 hectare site with outline planning permission for five properties at Fethard-on-Sea, Co. Wexford. The loan was accepted by the son.

5. By a second facility letter dated the 30th November, 2007, the bank offered further facilities in the sum of €613,000 to the son for the purpose of building the first of the five houses and associated costs. That loan was also accepted by the son.

6. The security to be given for each loan pursuant to the facility letters included a guarantee and indemnity from the appellant supported by a first legal mortgage in charge on the 35 hectares of agricultural lands in Co. Wexford.

7. The bank contends that the appellant granted to it a first guarantee and indemnity dated the 4th November, 2005 and a second guarantee and indemnity dated the 23rd November, 2008.

8. There was default in repayment of the loans, and letters of demand were sent to the son and the appellant. The bank issued a summons on the 24th May, 2013, seeking judgment against the son as principal debtor and the appellant as guarantor pursuant to the first and second guarantee.

9. The bank in due course issued a motion seeking liberty to enter final judgment against both defendants. Affidavits were exchanged to which I will refer further below, and following the hearing of the application for summary judgment in the High Court (Fullam J.), that court, for the reasons set out in a written judgment delivered on the 12th February, 2015, granted judgment against the appellant in favour of the plaintiff pursuant to the first guarantee dated the 4th November, 2005 and remitted to plenary hearing the issue of the appellant's liability under the second guarantee. Judgment was also given against the son for the full amount claimed, from which there is no appeal.

10. Pursuant to that judgment an order was drawn by the High Court dated the 12th February, 2015, and perfected on the 4th June, 2015. It provided, insofar as the appellant is concerned, that "the plaintiff do recover against the defendants jointly and severally in the sum of €1,185,255.55 in respect of the first loan and guarantee" and remitted the claim against the appellant in respect of the second guarantee to plenary hearing.

11. No step was taken by the appellant within the ten day period permitted for an expedited appeal following the perfection of the said order.

12. It appears that the bank subsequently ascertained that the figure of €1,185,255.55 was incorrect and it made an ex parte application to the High Court under O. 28, r. 11 and the order was amended by a further order made on the 16th November, 2015, which in accordance with its terms insofar as relevant, ordered that the order of the 12th February, be amended by "the deletion of the figure €1,185,255.55 where same appears in the said order and replacing same with the figure €1,061,357.98". That order was perfected on the 14th January, 2016. The appellant issued a notice of expedited appeal on the 22nd January, 2016, i.e. within ten days of the perfection of the second High Court order. The respondent, in its notice, took as a preliminary point the fact that the appeal was out of time. The appellant issued a motion seeking an extension of time grounded on an affidavit of the appellant sworn on the 28th June, and it was agreed that the motion be heard with the substantive appeal.

13. In his affidavit, the appellant has sworn that it was always his intention to appeal the order of the 12th February, 2015, insofar as it related to the summary judgment granted against him, but that as the order was not perfected until the 4th June, 2015, neither he nor his solicitor became aware of the order having been perfected until after the period of time for filing the notice of appeal. He seeks to contend that as his appeal is against both orders, the second of which was perfected on the 14th January, 2016, that his

appeal was in time. In the alternative he seeks an extension of time.

14. I do not consider that the appeal against the order granting summary judgment was lodged in time. The substantive order is the order of the 12th February, 2015. The amendment properly sought and obtained on behalf of the bank was to the benefit of the appellant as it reduced the amount for which judgment was ordered against him. The second order provides for an amendment to the substantive order.

15. I recognise that where there is significant delay in the perfection of an order, it may give rise to its perfection being overlooked by a client or his solicitor.

16. In accordance with the well known principles in *Eire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] I.R. 170, by reason of the averment of the appellant that he always intended to appeal the decision granting the summary judgment against him, it appears that the primary matter for consideration by the court is whether or not the appellant has arguable grounds of appeal. In circumstances where the full appeal has been argued before the court and raises an important point, it appears preferable in the interests of justice that the court enlarges the time for bringing the appeal up to the 22nd January, 2016 and determines the appeal.

17. The bank, by an amended respondent's notice, has sought to advance additional grounds upon which the judgment of the High Court should be upheld. It has not, however, cross appealed against the remittal of the claim on the second guarantee to plenary hearing.

Evidence relating to the first guarantee
18. Mr. Scanlon, the deponent for the bank in the High Court, exhibited a copy of what he described as "guarantee and indemnity dated 4 November 2005". The copy exhibited is not dated on the first page where a date ought to have been inserted. The guarantee on p. 11 opposite the printed words "signed, sealed and delivered" appears to have been signed by the appellant.

19. The final page, however, of the copy document exhibited contains the following printed words:-

> "I, Maurice Connolly, hereby confirm that I have been afforded an opportunity of obtaining independent legal advice as to giving my guarantee for a Loan Facility of €686,000 which has been sanctioned by ACC Bank plc to John Connolly, under the terms set out in the Letter of Sanction by ACC Bank plc dated the 28th October, 2005 and that I have ~~declined to avail of this opportunity or have~~ been afforded with such independent legal advise (sic)."

Below it is dated the 4th November, 2005, signed "Maurice Connolly" and then witnessed by Carol Sinnott of Cathal O'Neill and Co., Solicitors, 10 Church Avenue, Rathmines, Dublin 6.

20. The appellant did not make any affidavit in response to the plaintiff's application for summary judgment in the High Court notwithstanding being given the opportunity to do so and being legally represented. His son, the first named defendant, swore one affidavit in which he draws attention to the fact that the first guarantee is not dated; that it was signed by the appellant and also refers to the fact that the appellant "has signed an endorsement dated the 4th November, 2005, stating that he has been afforded independent legal advice in relation to the Guarantee". The son deposed that the advice was given by Cathal O'Neill and Co. Solicitors, who were the solicitors representing him in the transaction and that his father did not receive independent legal advice in respect of the guarantee and indemnity. The affidavit of John Connolly makes no reference to his having exerted any pressure or undue influence on his father to give the guarantees. The appellant swore no affidavit and did not adduce any evidence to ground any arguable defence that he entered into the guarantee by reason of pressure, undue influence or any other wrongful act by his son or adduced any evidence in relation to the circumstances in which he executed the first guarantee or received the legal advice referred to.

High Court submissions and judgment
21. The trial judge helpfully records the submissions relevant to the issues on appeal made on behalf of the appellant at para. 9 of his judgment to the effect that:-

> "(a) The second defendant had no independent legal advice and that there was nothing before the court as to the circumstances of the signing of the documents, and
>
> (b) The transaction was an improvident one for the second defendant who was a vulnerable person in his late sixties who had had a heart operation."

22. He records the submission made on behalf of the bank relevant to this issue at para. 11.1:-

> "Not having legal advice is not a defence in Irish Law. If there was evidence of undue influence exerted by the first defendant on the second defendant, and in this case there is no such evidence, it might afford a defence (*Ulster Bank v. Roche and Buttimer* [2012] IEHC 166 Clarke J). In this regard, the second defendant, having been given time by the court to swear a replying affidavit has failed to do so."

23. The trial judge then identified the applicable principles on an application for summary judgment in accordance with the judgments in *Air Rianta. v. Ryanair* [2001] 4 I.R. 607 and *Harrisgrange Limited v. Duncan* [2003] 4 I.R. 1. He then considered the judgments of Clarke J. in the High Court in *Ulster Bank v. Roche and Buttimer* [2012] 1 I.R. 765, O'Donovan J. in the High Court in *Ulster Bank (Ireland Limited) v. Fitzgerald and Williams* [2001] IEHC 159, the House of Lords in *Royal Bank of Scotland v. Etridge (No. 2) [*2002] 2 AC 773 and Birmingham J. in the High Court in *ACC Bank plc v. McEllin* [2013] IEHC 454. Having done so he then set out his own analysis and conclusion on the issue at paras. 22 and 23:-

> "22. While there is no specific allegation of undue influence, either by the first defendant on affidavit or the second defendant through his counsel's submissions, the relationship between the first and second defendant does place the plaintiff on inquiry and, therefore under an obligation to take some reasonable steps to ensure that the guarantees have been freely entered into by the second defendant. In this regard the plaintiffs obtained a declaration from the second defendant that he had been afforded independent legal advice in respect of the first guarantee. The second defendant's declaration dated 4th November, 2005 was witnessed by Mr. O'Neill, the solicitor, who is an officer of the court. If the second defendant wished to contradict the import of that declaration, he has had ample opportunity to do so by swearing a replying affidavit. He has chosen not to make such affidavit.

> 23. In the circumstances I am satisfied that the obtaining of the declaration was a sufficiently reasonable step on the part of the plaintiffs and the declaration has not been dislodged by the assertions of the first named plaintiff on affidavit or the submission of counsel for the second defendant."

Appeal

24. On the principal issue, counsel on behalf of the appellant submitted that the trial judge was correct and followed the judgments in *Ulster Bank v. Roche and Buttimer* and the House of Lords in *Etridge* in determining that even in the absence of any claim of undue influence, those judgments provide that where a bank is on notice of a familial relationship, between the borrower and the guarantor, such as between the father and son herein, that the bank is under an obligation to take some steps to ensure that the guarantees are being freely entered into by the guarantor. Alternatively it is put that the bank is under an obligation to ensure that the guarantor is given independent legal advice prior to executing the guarantee. Counsel submitted that on the facts herein, by reason of the fact that the same solicitor was acting both for the son and the appellant, that the appellant had an arguable defence that the bank was in breach of its obligation to him and that such constitutes an arguable defence against the bank enforcing the guarantee against him.

25. The bank submitted, as it had done in the High Court, that the appellant had not adduced any evidence or otherwise sought to ground a defence that he had entered into the guarantee under the undue influence of his son. They submitted that the trial judge erred in law in determining that the relationship between the appellant and his son as principal debtor placed the bank on inquiry and under an obligation to take some reasonable steps to ensure that the guarantees were freely entered into by the appellant. Counsel for the bank submitted that this does not follow from the judgments in *Ulster Bank v. Roche* and *Buttimer* nor the decision of the House of Lords in *Etridge.*

26. Counsel for the appellant at the oral hearing sought to make two slightly different submissions. When asked what was the proposed arguable defence which he contended gave the appellant a right to have the bank's claim on the first guarantee remitted to plenary, hearing he initially submitted that it was a defence of undue influence. By that I understood him to mean that the appellant contended that he entered into the guarantee under the undue influence of his son. However, on further questioning by members of the court he also submitted that the appellant was seeking to pursue a second defence, independent of any defence of undue influence, that by reason of the fact that the bank knew of the father/son relationship it was placed on inquiry and under an obligation to take steps to ensure that the appellant was given independent legal advice prior to entering into the guarantee. He submitted that it was an arguable defence to the enforcement of the guarantee against the appellant that the bank had failed on the facts to comply with that obligation. He made that second submission in reliance upon what he understood had been determined by Clarke J. in Ulster *Bank v. Roche and Buttimer* and the House of Lords in *Etridge.*

Discussion and Decision

27. I cannot accept the submission made on behalf of the appellant that on the evidence before the High Court at the hearing of the application for summary judgment an arguable defence, as that term is used in the Supreme Court decision in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607, has been made out.

28. My conclusion is by reason first of the absence of any evidence by or on behalf of the appellant that he executed the first guarantee by reason of the undue influence or any other wrongful act of his son, the principal debtor. There was no evidence before the High Court upon which it could be concluded that an arguable defence of undue influence or other wrong by the son was made out. Further, I am not satisfied that, in the absence of the father making out an arguable defence that he gave the guarantee under the undue influence of his son (or because of any other alleged wrong such as misrepresentation), there is any arguable defence available in Irish law to him that the bank was under an obligation by reason of the known fact that he, the proposed guarantor, was the father of the principal debtor to take steps to ensure that he received independent legal advice or otherwise ensure that the guarantee was freely entered into such that the failure of the bank to take such steps is an arguable defence to the enforcement of the guarantee against him.

29. My reason for this latter conclusion is that I consider that the decision of the House of Lords in *Etridge* and the judgment of Clarke J. in *Ulster Bank v. Roche and Buttimer* are only concerned with the entitlement of a bank to enforce a guarantee where the guarantor has established, or in the case of an application for summary judgment has raised arguable grounds for contending, that the guarantee was entered into by reason of the undue influence or other wrongful act, in particular any misrepresentation, of the principal debtor. Those judgments are not in my view authority for an independent or distinct defence for a guarantor, albeit related to the principal debtor, seeking to vitiate a guarantee executed in favour of a bank by reason of a breach of an alleged duty owed by the bank to him to ensure that he has obtained independent legal advice or has taken some further steps to ensure that he fully understood the nature of the guarantee being given. Further, counsel has not referred to any other judgment as authority for such a proposition other than what I consider to be an obiter comment by Birmingham J. in the High Court in *ACC Bank plc v. McEllin* [2013] IEHC 454.

30. In *Ulster Bank v. Roche and Buttimer*, Ms. Buttimer was in a relationship with Mr. Roche and guaranteed his debt to Ulster Bank. Clarke J. at para. 16 of the judgment identified the issues arising in relation to the defence of undue influence raised by Ms. Buttimer in the following terms:-

> "As pointed out earlier, there are both factual and legal aspects to the argument under this heading. The first factual question is as to whether Ms. Buttimer was actually under the undue influence of Mr. Roche. The legal question (which involves, at least in one view, some further questions of fact) is as to whether there are sufficient circumstances that allow Ms. Buttimer to have the guarantee set aside on the basis of the undue influence of Mr. Roche where Ulster Bank was not, itself, guilty of any undue influence. I propose dealing with the first of those issues straight away."

31. On the first issue identified, Clarke J. concluded that Ms. Buttimer signed the guarantee in question while under the undue influence of Mr. Roche. He then concluded at para. 18 that the case came down to a question as to whether "that fact affords Ms. Buttimer a defence to Ulster Bank's claim in this case".

32. Clarke J. then identified the relevant question on that issue as being:-

> "The extent to which a bank may find itself unable to rely on a banking contract (including in this context a guarantee for a bank debt) where it can be shown that the relevant contract was entered into as a result of the exercise of undue influence by a third party not directly connected with the bank."

33. Next, Clarke J. considered the judgment of O'Donovan J. in the High Court in *Ulster Bank Ireland Limited v. Fitzgerald* [2001] IEHC 159, where O'Donovan J. having been satisfied on the facts that the bank in question had neither actual or constructive notice of any undue influence, concluded that there was no obligation on the bank in question to seek to ensure that the surety should obtain independent legal advice. On the facts of *Ulster Bank v. Roche and Buttimer* it was accepted that the bank was not in any way aware of undue influence and that Ms. Buttimer's defence would have to fail if Clarke J. had followed *Ulster Bank v. Fitzgerald.*

34. However, Clarke J. then went on to consider the reliance placed by counsel for Ms. Buttimer on the *Etridge* judgment of the House of Lords where as stated by Clarke J. "the House of Lords clarified the law in respect of third party undue influence so far as the United Kingdom is concerned". Clarke J. at paras. 24 and 25 of his judgment identified the issue that he was then concerned with was one of constructive knowledge, and stated at para. 25:-

> "Constructive knowledge can often usefully be broken down into two separate questions. The first is as to what factors place a party on inquiry. The second is as to the nature of the inquiry or action that may then be required. If, in circumstances where a party is put on inquiry, that party does not carry out the inquiries necessary or take whatever other form of action may be mandated, then the party will be fixed with knowledge of matters which it would have discovered had it made the appropriate inquiries or, at least, may be faced with the situation where the court views the case on the basis that appropriate steps were not taken."

35. Having considered portions of the opinion of Lord Nicholls in Etridge, Clarke J. the concluded at para. 32:-

> ". . . While not necessarily accepting that the precise parameters, identified *in Royal Bank of Scotland plc v. Etridge (No. 2)* [2001] UKHL 44, [2002] 2 A.C. 773, are those which give rise to an obligation on the bank to inquire, and thus represent the law in this jurisdiction, I am satisfied that the general principle, which underlies *Royal Bank of Scotland plc v. Etridge (No. 2)* [2001] UKHL 44, is to the effect that a bank is placed on inquiry where it is aware of facts which suggest, or ought to suggest, that there may be a non-commercial element to a guarantee. That general principle, at a minimum, goes far enough to cover the facts of this case where the bank was, for reasons set out, aware of the personal relationship between Ms. Buttimer and Mr. Roche and was also aware that Ms. Buttimer had no direct interest in the company (other than being a director) and was, indeed, in those circumstances, in a less secure position than a spouse or, in the modern context, a civil partner who has at least certain potential legal rights in the assets or income of the other spouse or partner. The potential for undue influence against a partner, such as Ms. Buttimer, who has very limited legal rights indeed and who has no interest in the company whose debts it is sought that she should guarantee, seems to me to be well on the side of whatever threshold might ultimately be fixed for determining the point at which a bank is placed on inquiry.
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> 33. In those circumstances I am satisfied that the bank was on inquiry on the facts of this case.
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> 34. That leads to the second question which is as to what a bank must do when placed on inquiry. I have already cited the position in the United Kingdom as per *Royal Bank of Scotland plc v. Etridge (No. 2)* [2001] UKHL 44, [2002] 2 A.C. 773. Again, under this heading, nothing which I say should be taken as necessarily implying that the full rigours of the regime which applies in the United Kingdom represents the law in Ireland. However, I am satisfied that a bank which is placed on inquiry is obliged to take at least some measures to seek to ensure that the proposed surety is openly and freely agreeing to provide the requested security. As Ulster Bank, in this case, took no such steps it is, in my view, unnecessary to consider the precise level of steps which a bank must take.
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> 35. In those circumstances it seems to me that Ms. Buttimer is entitled to rely on the undoubted undue influence which Mr. Roche exercised over her by virtue of the failure of Ulster Bank to take any steps to seek to ensure that she was acting freely in circumstances where, for the reasons which I have sought to analyse, Ulster Bank was, in my view, placed on inquiry.
>
> 36. For those reasons it seems to me that Ulster Bank's claim must fail.
>
> 37. I leave it to another case to deal with any different set of circumstances either as to when a bank is put on inquiry or the steps which a bank must take when put on inquiry."

36. As appears from para. 35 of the judgment of Clarke J. above, his ultimate conclusion was that Ms. Buttimer was entitled to rely on the undue influence which Mr. Roche exercised over her as a defence to the bank's claim, in circumstances where the bank was placed on inquiry and failed to take any steps to seek to ensure that she was acting freely in the circumstances.

37. The judgment to Clarke J. in *Ulster Bank v. Roche and Buttimer* cannot in my view be considered as authority for a defence, independent of any allegation of undue influence or other wrong by the principal debtor, on the basis of a breach by a bank of a free standing obligation to take any measures to seek to ensure that a proposed surety is openly and freely agreeing to provide the requested guarantee or security. The entire analysis in Ulster *Bank v. Roche and Buttimer* is in the context of the prior finding of undue influence by Mr. Roche, and as identified by Clarke J. at para. 19 of his judgment set out above, the difficult question being whether a bank can rely on a contract where it can be shown by the defendant that the contract of guarantee or security was entered into as a result of the exercise of undue influence by a third party not directly connected with the bank. That was the issue being considered and decided in *Ulster Bank v. Roche and Buttimer.*

38. Similarly, in my view, in *Etridge*, the House of Lords speeches are given in a context where the appeals in question all concerned claims where the wife had raised a defence of undue influence by the husband in relation to the bank's claim to enforce a security given by the wife. The leading opinion of Lord Nicholls commences with an explanation of the appeals in eight cases in the following terms:-

> "Each case arises out of a transaction in which a wife charged her interest in her home in favour of a bank as security for her husband's indebtedness or the indebtedness of a company through which he carried on business. **The wife later asserted she signed the charge under the undue influence of her husband** [emphasis added]. In *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 your Lordships enunciated the principles applicable in this type of case. Since then, many cases have come before the courts, testing the implications of the *O'Brien* decision in a variety of different factual situations. Seven of the present appeals are of this character. In each case the bank sought to enforce the charge signed by the wife. The bank claimed an order for possession of the matrimonial home. **The wife raised a defence that the bank was on notice that her concurrence in the transaction had been procured by her husband's undue influence** [emphasis added]. The eighth appeal concerns a claim by a wife for damages from a solicitor who advised her before she entered

into a guarantee obligation of this character."

39. Whilst the opinions of Lord Nicholls and Lord Scott, as put by Lord Bingham, "show some difference of expression and approach", each makes clear that what was under consideration were the circumstances in which, where a wife asserts that she gave security to the bank for her husband's debt by reason of his undue influence, the bank is considered to have constructive notice of the undue influence, or as alternatively stated, is put on inquiry. Further, in those circumstances, what steps a bank must take if it is to avoid being fixed with constructive notice of the undue influence or other wrongdoing such as misrepresentation by the husband such that it may not enforce the security against the wife or the wife may assert as a valid defence against the bank the fact that she gave the security under the undue influence of the third party husband. The speeches of the Law Lords are not in my view authority for a defence for a wife, independent of undue influence, simply by reason of her position as a wife and the bank's knowledge of that fact based upon a free standing obligation on a bank to take steps to ensure that she obtained independent legal advice or otherwise that her consent to entering into the guarantee or security was freely given. It is clear there is no general presumption of undue influence between spouses.

40. The opinions in *Etridge* are primarily concerned with a consideration of the earlier decision of the House of Lords in *O'Brien's* case. In that case there was a single opinion given by Lord Browne-Wilkinson which sets out well the legal position. He identified the question on that appeal as being "whether a bank is entitled to enforce against a wife an obligation to secure a debt owed by her husband to the bank where the wife has been induced to stand as surety for her husband's debt by the undue influence or misrepresentation of the husband". In that opinion Lord Browne-Wilkinson summarised his views as follows:-

> "Where one co-habitee has entered into an obligation to stand as surety for the debts of the other co-habitee and the creditor is aware that they are co-habitees:-
>
> (1) the surety obligation will be valid and enforceable by the creditor unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor;
>
> (2) if there has been undue influence, misrepresentation or other legal wrong by the principal debtor, unless the creditor has taken reasonable steps to satisfy himself that the surety entered into the obligation freely and in knowledge of the true facts, the creditor will be unable to enforce the surety obligation because he will be fixed with constructive notice of the surety's right to set aside the transaction;
>
> (3) unless there are special exceptional circumstances, a creditor will have taken such reasonable steps to avoid being fixed with constructive notice if the creditor warns the surety (at a meeting not attended by the principal debtor) of the amount of her potential liability and of the risks involved and advises the surety to take independent legal advice."

41. The reason for which there is a reference to co-habitees is that whilst Lord Browne-Wilkinson had considered the position of husband and wife he also took the view that the same principles apply to co-habitees and indeed that other relationships including those between a son and elderly parents could give rise to a similar result.

42. In *Etridge*, Lord Nicholls had some difficulty with the use of the term "constructive notice" and also the phrase that the bank is "put on inquiry". As stated at para. 44 of his opinion in relation to the latter phrase he stated "Strictly this is a misnomer. As already noted a bank is not required to make inquiries. But it will be convenient to use the terminology which has now become accepted in this context". At para. 50 of his opinion, he identifies that the principal area of controversy in the *Etridge* appeal concerns "the steps a bank should take when it has been put on inquiry". All the subsequent views expressed by him are in the factual context of the defence raised by the wife that the security or charge was given by reason of the undue influence of the husband.

43. The approach of both Lord Nicholls and Lord Scott to the individual appeal of Mrs. Etridge appears to me to put beyond doubt that they were only considering the position of a bank where the wife successfully raises a defence of undue influence against her husband. At para. 90 of his opinion, Lord Nicholls agrees that the appeal of Mrs. Etridge should be dismissed. Lord Scott, who considered in some detail the facts relating to the appeal by Mrs. Etridge, concluded at para. 221 of his opinion, in relation to the defence of undue influence, "In my view, the judge's conclusion that there had been no undue influence was well justified on the evidence. That conclusion should have been an end of the case". However, he then continued to consider a submission made by counsel on her behalf before the House of Lords that there had been misrepresentation to Mrs. Etridge by her husband. On that issue at para. 223 he concluded "The misrepresentation contention is, in my opinion, for both these reasons a hopeless one". He then stated at para. 224:-

> "There was, therefore, nothing, no undue influence and no misrepresentation, to which constructive notice could attach."

44. Notwithstanding that conclusion he did go on to consider, at paras. 225 to 227 inclusive, the question of constructive notice and advice given to Mrs. Etridge by solicitors. However that appears to me to have been obiter given his earlier conclusion.

45. I am aware that my colleague Hogan J. in the judgment he is about to deliver takes a different view of what was decided in *Etridge*. With the greatest of respect I cannot agree, for the reasons set out that *Etridge* is authority for an arguable defence by a guarantor who is a spouse or, as in this instance father, of the principal debtor independently of any allegation of undue influence or other wrongdoing by the principal debtor.

46. Accordingly I have concluded that in this case the trial judge was in error in considering that in the absence of any evidence which could form the basis of arguable grounds for contending that the appellant entered into the guarantee under the undue influence of the principal debtor, his son, it is arguable that the bank failed in any duty to ensure the appellant received independent legal advice or take other reasonable steps to ensure that the guarantees have been freely entered into by the appellant. No submission was made correctly that in a father/son relationship there is a presumption of undue influence of by the son over the father.

47. If, however, an arguable defence of undue influence had been made out it may well be arguable, upon the authority of *Etridge*, that the approach in *Ulster Bank v. Roche and Buttimer* should also apply to a relationship between a son and an elderly father with no commercial interest in the transaction, which might include the situation of the appellant. However, in the absence of any evidential basis for an arguable defence that the appellant entered into the guarantee under the undue influence of his son, there is on the facts herein no arguable defence available to the appellant against the enforcement of the guarantee by the bank by reason of any alleged obligation on the bank to ensure or procure that he obtained independent legal advice. In those circumstances the question as to whether the advice given by a solicitor in the firm of solicitors acting also for the principal debtor and acknowledged by the appellant in the document signed was or was not sufficient does not arise.

48. It is important to distinguish the position in this appeal from that in *ACC Loan Management Ltd -v- Sheehan* [2016] IECA 343 where the bank had made a condition of drawdown of the loan receipt of a "letter from Guarantor Solicitor confirming Guarantor received independent legal advice prior to execution of Guarantee & Indemnity document" and only a letter from the borrower's solicitor was received. The defendant had sworn that he had not received independent advice nor been advised (by the borrower's solicitor) of the effect of the guarantee in question. On those facts, this court upheld a decision to remit to plenary hearing as it considered the High Court was entitled to conclude that it was arguable that the bank was not entitled to unilaterally waive a condition it had imposed but which arguably was for the benefit of both parties. No such condition was included herein and no submission was made (correctly) in reliance on either the certificate or note on the guarantee advising to take independent advice.

49. The appellant's unfortunate position is that as a person of full age he has signed a guarantee in favour of the bank. Whilst he was referred to in submission as a "vulnerable" person there was no evidence of any particular vulnerability. He has not put any evidence before the court upon which it could be argued that he did not freely enter into the commitments under the guarantee he signed and permitted to be delivered to the bank in connection with the loans being given to his son. In the absence of evidence which would support an arguable duty imposed on the bank and arguable breach thereof there is no arguable defence.

50. I have also considered the line of authority referred to in the judgment about to be delivered by Hogan J in relation to the equitable jurisdiction to set aside unconscionable bargains or improvident transactions. However, again, in the absence of any evidence from the appellant there is no factual basis for consideration of any arguable defence in reliance on what would, in effect, be a counterclaim to set aside the guarantee upon which the appellant is sued.

51. I am aware that since the hearing of this appeal two judgments have been delivered by this Court in which the majority take a similar view to the conclusion I have reached above: *Bank of Ireland -v- Curran & Anor.* [2016] IECA 399 and *Ulster Bank (Ireland) Ltd -v- De Kretser & Anor.* [2016] IECA 371. As I have independently reached a similar view I did not consider it necessary to reconvene the parties.

No seal on guarantee

52. The copy guarantee exhibited by the bank indicates that it is "Signed, Sealed and Delivered". It is only signed by the appellant, and it does not appear to have had a seal affixed. The trial judge rejected any arguable defence by reason of the absence of the seal upon the basis that the obligation to have a guarantee by an individual executed under seal was abolished by s. 64 of the Land and Conveyancing Law Reform Act, 2009. Counsel for the appellant submits that this provision only came into operation on 1st December, 2009 and is not retrospective. The guarantees were signed in November, 2005 and January, 2008, respectively.

53. The bank does not dispute that the trial judge incorrectly decided this issue by reference to s. 64 of the 2009 Act. However, it submits that even prior to that Act there was no requirement that a guarantee be executed under seal to be valid. It refers to *Anglo Irish Bank p.l.c. v. McKenna & Ors.* [2014] IEHC 122 in which Birmingham J. found that the guarantee in question was not executed under seal, but held that there was no such requirement where the bank had provided consideration for the guarantee by way of loan and overdraft facilities to the principal debtor. It submits that there was on the facts herein consideration for the guarantee in the form of the loan facility advanced to the first named defendant.

54. Reliance was also placed upon the judgment of this Court in *McDonnell v. Ring & Ors.* [2016] IECA 16 where Mahon J. giving the judgment of the Court stated at para. 30:

> "Even if there had been an absence of consideration, the guarantee was "Signed Sealed and Delivered" by the appellant. Where a contract is executed "under seal" it is not necessary to establish the existence of consideration. In this case, although the guarantee is said to be "under seal" there is no evidence that the document was in fact sealed. However, the absence of a seal is not necessarily fatal to the respondent's claim. In Halsbury's Laws of England (Vol. 32/2012) the following is stated:-
>
> > 'Where a person executes a deed by stating that it has been "Signed, Sealed and Delivered" but without in fact sealing it, and another person relies on the deed to his detriment, the person executing the deed is estopped from denying that it was sealed.'"

55. Whilst the trial judge rejected any arguable defence by reason of the absence of a seal for an incorrect reason, the decision reached was correct for the reasons advanced in the above submissions on behalf of the bank.

56. Accordingly the appeal must, in accordance with law on the evidence adduced, be dismissed.