NEUTRAL CITATION [2012] IEHC 166

THE HIGH COURT

[2008 No. 2550 S]

BETWEEN

ULSTER BANK IRELAND LIMITED

PLAINTIFF

AND

LOUIS ROCHE AND SORCHA BUTTIMER

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 29th day of March, 2012

1. Introduction

1.1 In early 2006, the first named defendant ("Mr. Roche") was running a business through a corporate entity called Louis Roche Motors Ltd. ("Roche Motors"). As the name implies, the business involved the motor trade. At that time, the second named defendant ("Ms. Buttimer") was his partner in the personal sense of that term, although she took no role in the business. She was, at all material times, employed as a hairdresser on a modest salary. It does, however, have to be noted that she had become a director of Roche Motors, although her case is that her involvement was limited in the extreme.

1.2 In any event, Mr. Roche was dissatisfied with his then current banking arrangements and entered into discussions with a Mr. Brendan Healy who was the manager of the Midleton branch of the plaintiff bank ("Ulster Bank"). As a result of those discussions, Mr. Roche agreed that the banking business of Roche Motors would be transferred to Ulster Bank at the Midleton branch.

1.3 The various banking formalities were entered into, but, of particular relevance to the issue which I now have to decide is the fact that one of the terms imposed by Ulster Bank was that a guarantee be put in place from the directors of Roche Motors. It is not disputed that a guarantee document was in fact signed by Ms. Buttimer. Moreover the circumstances in which that occurred are of some controversy. A guarantee was also executed by Mr. Roche. Ultimately, both the guarantees of Mr. Roche and of Ms. Buttimer were called in and proceedings against both, seeking to recover the monies said to be due arising out of those guarantees, were commenced by Ulster Bank by summary summons. I understand that judgment has been obtained against Mr. Roche but no sums have been paid by him on foot of that judgment. The case as against Ms. Buttimer was adjourned to plenary hearing and came on for hearing before me.

1.4 The guarantee concerned was for a maximum sum of €50,000 together with interest from the time when the guarantee was called in. That event occurred on 27th July, 2007, so that the claim is now for the sum of €50,000 together with interest from that date. There is no dispute between the parties as to the calculation of the amount due. The dispute which arises is as to whether Ms. Buttimer is liable on the guarantee at all. In that context, Ulster Bank's case is simple. Ulster Bank says that Ms. Buttimer guaranteed the liabilities of Roche Motors up to maximum of €50,000, that that guarantee has been validly called on and that the amount claimed is now due and owing. Against that background, it is appropriate to turn, first, to the defence put forward on behalf of Ms. Buttimer.

2. Ms. Buttimer's Defence

2.1 Counsel for Ms. Buttimer commendably confined himself at the hearing to making two points in defence of Ulster Bank's claim. I propose dealing with them separately.

2.2 The first point arises out of a factual dispute, to which brief reference has already been made, as to the circumstances in which Ms. Buttimer came to sign the relevant guarantee. It does need to be noted that Ms. Buttimer accepted in evidence that the signature on the guarantee is hers. The guarantee purports to be witnessed by an employee of Ulster Bank, a Ms. Sinead O'Connell. Ms. Buttimer says that she never attended at Ulster Bank in Midleton and never met Ms. O'Connell. On the other hand, Ms. O'Connell gave evidence that, while she had no direct recollection of the circumstances in which Ms. Buttimer came to sign the guarantee, it was her universal practice not to sign banking documents as witness unless the signatory was in her presence and signed the document in a way which she could verify.

2.3 On the assumption that I might favour the evidence of Ms. Buttimer on this point, counsel suggested that, in the event that the guarantee was not signed in the manner asserted on behalf of Ulster Bank, it could be said that Ulster Bank had failed in a duty to Ms. Buttimer which it is said that Ulster Bank had assumed. It is argued that by producing a standard form contract which, by its terms, required the document to be signed in the presence of a witness, Ulster Bank intended to afford Ms. Buttimer an opportunity to make enquiries and the like in relation to the substance of what she was doing. There is, under this heading, therefore, both a factual dispute and a legal question as to whether, even if Ms. Buttimer's evidence is accepted, same would afford any defence. Finally, under this heading, it should be noted that Ms. Buttimer's account is that she, on a number of occasions, signed documents that were given to her by Mr. Roche in connection with Roche Motors without reading the documents or considering their contents.

2.4 Indeed, that latter point leads to the second issue in the case. It is asserted on behalf of Ms. Buttimer that she was subject to undue influence from Mr. Roche. Evidence was lead in favour of that proposition. However, even if that evidence is accepted, there is a difficult legal issue as to the circumstances in which a finding of undue influence by Mr. Roche gives Ms. Buttimer a defence to these proceedings. It is, of course, clearly the case that, where one contracting party induces the other to enter into the relevant contract by the exercise of undue influence, then the contract concerned can be set aside *inter partes*. However, the problem here is that the assertion of undue influence is not made against a contracting party, but rather against a person who, in the context of the guarantee, is a third party, albeit one who had an interest in the execution of the guarantee in question by Ms. Buttimer, as the guarantee was a necessary part of the banking arrangements which were put in place which favoured Roche Motors and through that company, Mr. Roche himself. In that context, it does need to be noted that Ms. Buttimer was not a shareholder in Roche Motors even though she was a director. I propose dealing with both of the issues, which I have identified, in turn.

3. The Signature Witness Question

3.1 It seems to me that it is appropriate to address the legal question first. There have been cases such as: *Tulsk Cooperative Livestock Mart Ltd. v. Ulster Bank Ltd.* (Unreported, High Court, Gannon J., 13th May, 1983); *Towey v. Ulster Bank Ltd*. [1987] ILRM 142; and *T.E. Potterton Ltd. v. Northern Bank Ltd*. [1993] 1 I.R. 413, where the courts have held that, while a bank does not ordinarily owe a duty of care (outside the context and terms of the relevant contracts) to a customer, a bank may assume, by giving advice to the customer, added obligations which may leave the bank liable in the event that the advice concerned is not competently given. I have no difficulty in accepting that general proposition.

3.2 However, the only way in which counsel was able to suggest that Ulster Bank, on the facts of this case, had accepted any additional advisory responsibility in relation to Ms. Buttimer was that it was said that, by producing a standard form which bears in print the statement "in the presence of" prior to leaving space for the witness, Ulster Bank undertook to advise Ms. Buttimer. It was suggested that by producing such a form, Ulster Bank was, in substance, intimating that it required that the document be signed in the presence of an official of the bank. It was then further suggested that part of the reason for such a requirement was to enable such a bank official to give advice, if necessary, to the person signing the guarantee, as to the consequences of the guarantor so doing. It was suggested that that in turn amounted to an acceptance by Ulster Bank of an obligation to advise.

3.3 I am afraid I cannot agree with that proposition. The principal reason why any party may wish to have a witness (and preferably a witness from within its own ranks) to a signed contract is to deal with the difficulty which might well arise in the event that it is contended that the document was not signed by the other contracting party at all. Only a very limited class of legally effective documents are required, as a matter of law, to be not only signed, but to have that signature witnessed. A will is a good example. There is no requirement that a guarantee be witnessed at all. It seems to me that the only inference to draw from the fact that the standard form used by Ulster Bank in this case contains provision for a witness is that Ulster Bank considered it prudent that it have a witnessed document to minimise the risk of there being a dispute as to whether the guarantee had actually been signed by the person purporting so to do.

3.4 Counsel for Ms. Buttimer placed some reliance on the fact that Mr. Healy, the bank manager, did indicate in evidence that the presence of a bank official as a witness might afford that bank official the opportunity to answer any questions which the proposed guarantor might wish to put. That may well be so, but it seems to me that that fact falls far short of bringing the bank within the circumstances, identified in the jurisprudence to which I have referred, where the bank has taken it on itself to offer advice and then gives that advice negligently.

3.5 The fact remains that Ms. Buttimer signed a guarantee in circumstances where it was likely that that guarantee would be given to Ulster Bank as representing her guarantee. It will be necessary to turn to the circumstances in which she signed the guarantee when dealing with the second issue to which brief reference has already been made. However, in the ordinary way (and as I pointed out in *ACC Bank PLC v. Kelly & Anor* [2011] IEHC 7, and as Kelly J. adopted in *Irish Bank Resolution Corporation Ltd v. Quinn & Anor* [2011] IEHC 470), a person who signs a document which may well have significant legal effect and does so, either without reading the document or without applying themselves to the content of the document, "must accept the consequences of having signed a commercially binding agreement in those circumstances" and will, *prima facie*, be bound by what they have signed. The fact is that Ms. Buttimer signed a document without making any attempt to ascertain what it was or what its consequences might be. In the ordinary way, she has to bear responsibility for her own actions in so doing. As I pointed out in *ACC v. Kelly*, the situation might be different where the bank concerned itself misrepresents the content of the document or otherwise acts in a way which would allow the party to have the transaction set aside. However, there does not seem to me to be any evidence to suggest that the bank in this case acted improperly. Even if, therefore, the way in which the guarantee came to be signed is as Ms. Buttimer asserts, I am not satisfied that that would afford her any defence. She signed banking documents on behalf of a company which was owned by her partner and of which she was a director. Any bank receiving those documents is entitled to assume that she has committed herself to guarantee the loan referred to in the documentation. Subject, therefore, to the undue influence question, it seems to me that Ms. Buttimer bound herself to the guarantee when she signed it. I, therefore, turn to the undue influence question.

3.6 However, lest I be wrong in that conclusion, it does seem to me that I need to make a finding of fact on the question of whether the signature was witnessed, even though, for the reasons which I have set out, it does not seem to me to be determinative of these proceedings. I found both Ms. Buttimer and Ms. O'Connell to be truthful witnesses who gave evidence in accordance with their current recollection. They cannot, of course, both be correct. Either Ms. Buttimer is now mistaken as to the circumstances in which she came to sign the guarantee, or Ms. O'Connell is mistaken in her assertion that she has never witnessed a banking document without the witness in question being in her presence. It does, of course, have to be noted that Ms. O'Connell does not, for entirely understandable reasons, have any direct recollection of the signing in this case. She was not directly involved in the lending transaction, save to the extent that it was her obligation to ensure that the formalities were dealt with so as to set up the account and to ensure that all necessary documentation (including the guarantees) was in place. There is no reason why she should recollect what would, on any view, have been a very brief event when a document was signed in her presence by someone who she did not know and where her only involvement would have been to witness the relevant signature. If her evidence was that she might on occasion depart from an otherwise normal practice (which was never to sign documents as a witness without the signatory being present), then it might easily be possible to conclude that this was one of those cases where she witnessed without the signatory being there. However, her clear evidence was that she never signed as a witness without the signatory being present. Having concluded that she was a truthful witness, I could only find the facts against her if I were satisfied that, while that is her universal practice, she did, on this occasion, depart from it in circumstances which she now does recollect.

3.7 Likewise, I could only find against Ms. Buttimer on this issue if I came to the view that, as a truthful witness, she now believes that she never attended Ulster Bank, but that she did, in fact, do so. In assessing that later possibility, a number of factors need to be taken into account. First, having regard to the fact that Ms. Buttimer has accepted that she dealt with formal banking documents on behalf of Mr. Roche without paying a great deal of attention to them, it is possible that she did not pay any attention to, and therefore does not recollect, going into Ulster Bank. The possibility of such an explanation is, in my view, heightened by the facts concerning her relationship with Mr. Roche at the time in question and the psychological difficulties which she was encountering at that time, which are addressed later in relation to the undue influence point. On balance, if forced to choose, I would conclude that it is more likely that Ms. Buttimer is mistaken and no longer recollects having attended Ulster Bank, rather than that Ms. O'Connell is mistaken by having, unusually and in circumstances which she no longer recollects, departed from her universal practice of never signing as a witness, save in the presence of the person whose signature she is to attest.

4. Undue Influence

4.1 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.

4.2 Having heard the evidence of Ms. Buttimer and the evidence of her clinical psychologist, I am satisfied that Ms. Buttimer was under the undue influence of Mr. Roche at the time in question. I am satisfied that she had no involvement in the business of Roche Motors of any material variety and that she was in a dependent and quite abusive relationship. Of particular assistance, on the evidence in this case, is the fact that the professional contact between Mr. Buttimer and her clinical psychologist was contemporaneous to the events with which this case is concerned. This is not one of those cases where a mental health professional is attempting to reconstruct a situation some time (often years) after the events which are crucial to the proceedings. Rather, this is a case where Ms. Buttimer was in receipt of counselling at the time in question and where her clinical psychologist is in a position to give a professional judgment as to her mental state and the relationship between that mental state and the actions of Mr. Roche, at the very time when the events which are at the heart of this case occurred. I fully accept the evidence of Ms. Buttimer's clinical psychologist and, on that basis, am satisfied that she was in the sort of dependent and abusive relationship with Mr. Roche at the relevant time where she would have done anything that he asked. That leg of the test is, therefore, in my view, met. Ms. Buttimer signed the guarantee in question while under the undue influence of Mr. Roche.

4.3 The case, therefore, comes down to the question of whether that fact affords Ms. Buttimer a defence to Ulster Bank's claim in this case. I therefore turn to that question.

5. Does Mr. Roche's Undue Influence Provide a Defence?
5.1 As pointed out earlier, there is a significant legal question which arises under this heading. That question is as to 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.

5.2 As pointed out in Donnelly *"The Law of Credit and Security"* (1st Ed. Round Hall 2011) at para. 19-141, the only occasion on which third party undue influence, in the context of contracts of guarantee, has come directly before the Irish courts to date is in *Ulster Bank Ireland Ltd. v. Fitzgerald & Anor* (Unreported, High Court, O'Donovan J., 9th November, 2001). In *Fitzgerald*, O'Donovan J. considered that it was not necessary for him to reach a conclusion as to whether undue influence actually existed on the facts of the case because he was satisfied that the bank in question had neither actual nor constructive notice of any undue influence. As O'Donovan J. put it, the bank did not have "even an inkling" of any reason why the guarantor might not have been a free agent. O'Donovan J. considered that a bank is not put on inquiry simply because a wife guarantees a loan to her husband's business and also accepted the proposition that the surety in the case in question had a stake in her husband's business (even though she was not a shareholder or a director) because she and her family relied on the income generated by the company, whose debts were to be guaranteed, for their day-to-day living. On the basis of those views, O'Donovan J. came to the conclusion that there was no obligation on the bank in question to seek to ensure that the surety should obtain independent legal advice.

5.3 There can be little doubt, therefore, that if I am to follow the views of O'Donovan J. in *Fitzgerald*, Ms. Buttimer must fail. There is no evidence on the facts of this case that Ulster Bank was in any way aware of any undue influence that Mr. Roche might have brought to bear on Ms. Buttimer. Indeed, I did not understand counsel for Ms. Buttimer to strongly press the argument that he could succeed in his defence if I am to follow *Fitzgerald.*

5.4 However, counsel for Ms. Buttimer places reliance on *Royal Bank of Scotland plc v. Etridge* (No. 2) [2002] 2 A.C. 773, in which the House of Lords clarified the law in respect of third party undue influence so far as the United Kingdom is concerned. It does need to be noted that the decision of O'Donovan J. in *Fitzgerald* came a few weeks after *Etridge* and, therefore, for understandable reasons, *Etridge* does not appear to have been referred to in argument and was certainly not referred to in the judgment. In substance, counsel for Ms. Buttimer suggests that I should now adopt the authority of *Etridge* as the law in this jurisdiction rather than the view of O'Donovan J. as set out in Fitzgerald. In that context, it is worth noting that Laffoy J. endorsed the approach of the House of Lords in *Etridge* in the context of a separate aspect of the judgment in that case which concerned a plaintiff's argument that she had not received adequate independent legal advice in signing a deed of confirmation in respect of a right of residence. The case in question was *Tynan v. County Registrar for Kilkenny & Anor* [2011] IEHC 250. It is also worthy of some note that the decision in *Fitzgerald* has been the subject of an amount of academic criticism. See para. 19-143 of *"The Law of Credit and Security"* by Donnelly; J. Mee *"Undue Influence on Bank Guarantees"* (2002) 27 Ir. Jur. 292; and Delaney, *"Equity and the Law of Trusts in Ireland"* (5th Ed. Round Hall 2011), p. 746.

5.5 The substance of that criticism is that the approach taken in Fitzgerald offers insufficient protection to potential vulnerable sureties and leaves a lender with no obligations arising from knowledge that the parties are married or otherwise closely connected unless it has some special reason to believe that a wrong has actually taken place.

5.6 In reality the issue with which I am concerned is one of constructive knowledge. In what circumstances is it appropriate to attribute to a bank knowledge of undue influence in circumstances where the bank is not actually aware of the exercise of the undue influence concerned? There is absolutely no evidence from which it could be inferred that Ulster Bank in this case was actually aware of the undue influence which I have found Ms. Buttimer to be under from Mr. Roche. If Ms. Buttimer is to succeed in her defence then it is necessary for her to establish that Ulster Bank has constructive knowledge of that undue influence.

5.7 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.

5.8 The starting point has to be to note that it seems clear that O'Donovan J. in *Fitzgerald* did accept, at least at the level of principle, that it was possible that a bank might have constructive knowledge of third party undue influence. However, O'Donovan J. was not satisfied that constructive notice existed on the facts of the case before him.

5.9 I am mindful of the fact that if I am either to follow *Etridge* or go someway down the road towards the position adopted by the House of Lords in that case, I will necessarily be disagreeing with O'Donovan J.. The jurisprudence concerning the circumstances in which a judge of this Court should depart from the interpretation of the law as found by another judge of this Court is clear (see- *Irish Trust Bank v. The Central Bank of Ireland* [1976-7] ILRM 50; *Worldport Ireland Ltd. (In liquidation) v. Companies Acts* [2005] IEHC 189; *Brady v. D.P.P.* [2010] IEHC 231; and *I v. MJELR* [2011] IEHC 66). However, in circumstances where O'Donovan J. was not referred to *Etridge* and did not, therefore, have an opportunity to consider whether the views expressed by the House of Lords in *Etridge* should find favour in this jurisdiction, it seems to me that this is an appropriate case where I should at least consider whether the United Kingdom jurisprudence is persuasive.

5.10 On that basis, and returning to the two questions into which constructive knowledge can usefully be divided, it seems appropriate to turn first to the question as to when a bank may be placed on inquiry. In that context it is appropriate to consider the views on that question expressed by the House of Lords in *Etridge*. It must be recalled that the House of Lords was considering, in that case, appeals in some eight different cases raising, at least in general terms, the same types of issues. The head note to the judgment suggests that the finding of the court was as follows:-

> "Whenever a wife offered to stand surety for the indebtedness of her husband or his business, or a company in which they both had some shareholding, the lender was put on inquiry and was obliged to take reasonable steps to satisfy itself that she had understood and freely entered into the transaction. The steps reasonably to be expected of a lender in relation to past transactions were to bring home to the wife the risk she was running by standing surety, either at a private meeting with her or by requiring her to take independent advice from a solicitor on whose confirmation the lender might rely that she had understood the nature and effect of the transaction. In respect of future transactions the lender should contact the wife directly, checking the name of the solicitor she wished to act for her and explaining that for its protection it would require his confirmation as to her understanding of the documentation to prevent her from subsequently disputing the transaction. The lender should not proceed until it had received an appropriate response from the wife and should in every case receive the written confirmation from the nominated solicitor. Subject to the husband's consent to disclosure, without which the transaction could not in any event proceed, the lender should routinely furnish to the nominated solicitor financial information relating to the facility and the husband's existing indebtedness to enable a proper explanation to be given to the wife. The nominated solicitor should require confirmation that the wife wished him to act for her, and he might, so long as no conflict of duty or interest arose and he was satisfied that it was in her best interests to do so, also act for the husband or the lender. His advice should be given at a face-to-face meeting in the absence of the husband, and its contents need not be directed to the commercial wisdom of the transaction but should include, as a core minimum, an explanation of the documentation, its practical consequences and inherent risks based on the financial information provided by the lender; he should also state that the choice whether to proceed was to be exercised by her and should check that she wished to continue and, if so, he should obtain her consent to his giving the confirmation required by the lender. Since in so advising her the solicitor assumed professional responsibilities to the wife he did not act as agent for the lender, who was entitled to assume that he had acted properly, and, in consequence, knowledge of the contents of advice given to the wife, whether negligently or otherwise, was not to be imputed to the lender".

5.11 In his speech in *Etridge*, Lord Nicholls found that a bank was put on inquiry when faced with a transaction which called for explanation and thus is put on inquiry: where a wife stands surety for her husband's debts; where a husband stands surety for his wife's debts; and where unmarried couples, whether heterosexual or homosexual, stand surety for each other's debts in circumstances where the lender is aware of the relationship. Lord Nicholls went so far as to suggest that the only practical way of dealing with the matter was to regard the lender as on inquiry in every case where

"the relationship between the surety and the debtor is non-commercial". While Lord Nicholls distinguished between cases where the surety guaranteed the debts of a spouse or partner from a case where the monies were advanced to the spouses or partners jointly (the lender not being in inquiry in the latter case unless it was known to the bank that the loan was for the benefit of one person only), nonetheless Lord Nicholls took the view that a guarantee over the debts of a company in which the shares were held by both spouses or partners did place the lender on inquiry having regard to what was said to be the fact that, in many such cases, the shareholding did not reflect the true situation.

5.12 It seems to me that this issue raises very difficult questions. It is not, in my view, necessary to fully explore the precise parameters of the circumstances in which a bank may be placed on inquiry for the purposes of determining the issues in this case. It seems, for example, to follow from the adoption of the test from *Etridge* that a bank would be placed on inquiry when faced with a request for guarantees from two business partners who were the principals and shareholders in a business whose debts were to be guaranteed and who were also, to the knowledge of the bank, same sex partners in the relationship sense of that term. There would be no particular reason why either one of the partners might not be said to be the one who might exercise undue influence and the other be the one who might be influenced. It follows that it would be necessary to ensure that both had independent legal advice. Again, given the recognition that the principle applies equally between husband and wife as it does between wife and husband, it is difficult to see how there could be any logic in requiring a wife to demonstrate independent legal advice but not a husband in circumstances where they were both shareholders in the business whose debts were to be guaranteed and where there were no facts known to the bank concerned which would suggest that the business was, in truth, operated by only one of them. Nothing in this judgment should be taken as, therefore, necessarily implying that the law in Ireland goes as far as the position in the United Kingdom as identified in *Etridge* in placing a bank on inquiry.

5.13 However, and in any event, on the facts of this case it is not necessary to go that far. First, it is clear that Ms. Buttimer was not a shareholder in Roche Motors even though she was a director. That is a factor which suggests at least a significant possibility of a non-commercial aspect to the case. Second, the bank had some knowledge of the fact that Mr. Roche and Ms. Buttimer were engaged in a personal relationship. Admittedly that knowledge was somewhat limited and indirect in that it seems that another official in the same bank who had a tangential involvement in the transaction (being the official who was required to verify compliance with the various formal requirements, as a second set of eyes, after they had initially been confirmed as being in order by Ms. O'Connell) also happened to know of the relationship between Mr. Roche and Ms. Buttimer. Third, there is some evidence which suggests that Ulster Bank may have been aware that both Mr. Roche and Ms. Buttimer operated from the same address. The address ultimately placed on the relevant banking documents for Ms. Buttimer was a different address to that of Mr. Roche. However, the address initially placed on the documents seems to have been tippexed and printed over in circumstances where the verifying documentation, for the purposes of the money laundering legislation, seems to have given a different address to that initially tendered by Ms. Buttimer. In the circumstances I am satisfied that Ulster Bank was, in fact, aware that Mr. Roche and Ms. Buttimer were in a relationship. Furthermore, it is clear that all of the discussions between Roche Motors and the bank were conducted by Mr. Roche. That fact, of itself, would not, in my view, be sufficient. It is, as Mr. Healy pointed out, frequently the case that one of a number of partners in business ventures (whether carried out as a partnership or through a corporate vehicle) will have primary responsibility for dealing with financial matters including relations with the venture's banks. That fact of itself should not necessarily place a bank on inquiry as to whether others involved in the venture, who are asked to put up security by way of guarantee, might not be the subject of undue influence. However, in circumstances where a person who is required to offer security is not a shareholder and where there is no evidence to suggest that the bank was aware of any active involvement of that party in the business, then it seems to me that the personal relationship between the parties emerges as a much more significant factor.

5.14 It seems to me that the academic criticism of *Fitzgerald* is well founded. A regime which places no obligation on a bank to take any steps to ascertain whether, in the presence of circumstances suggesting a non-commercial aspect to a guarantee, the party offering the guarantee may not be fully and freely entering into same, gives insufficient protection to potentially vulnerable sureties.

While not necessarily accepting that the precise parameters, identified in *Etridge*, 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 *Etridge*, 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.

5.15 In those circumstances I am satisfied that the bank was on inquiry on the facts of this case.

5.16 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 *Etridge*. 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.

5.17 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.

6. Conclusions
6.1 For those reasons it seems to me that Ulster Bank's claim must fail.

6.2 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