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The uncertain boundaries of undue influence

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This article focuses on the recent House of Lords decision of Royal Bank of Scotland v. Etridge (No. 2), *which refines and elaborates upon the principles laid down in its earlier decisions in* C.I.B.C. Mortgages Plc v. Pitt[1] *and* Barclays Bank Plc v. O'Brien.[2] Etridge *contains important pronouncements on the nature of undue influence and also elaborates upon the steps which banks ought to take in order to avoid being fixed with constructive notice of undue influence or some other vitiating factor. The article also considers briefly the viability of a broader doctrine of unconscionability which is at least hinted at in the case.*

A. INTRODUCTION

Long awaited, not least because of its potentially profound impact on the commercial (in particular, banking) community, the recent House of Lords' decision in *Royal Bank of Scotland* v. *Etridge (No. 2)*[3] is both long and complex. As we shall see, it is not always easy to ascertain what the judges concerned intended. The present article is therefore only an incipient as well as tentative attempt at unravelling the various themes and propositions. We will focus on general propositions rather than the merits of the actual decisions, which total eight in number in this consolidated appeal.[4] Our analysis is divided into three main parts: the first dealing with the House's pronouncements on the elements of undue influence itself; the second focusing on the steps which banks ought to take in order to avoid being fixed with constructive notice of undue influence or some other vitiating factor (such as misrepresentation); with the third part briefly considering the viability of the broader doctrine of unconscionability, which doctrine is alluded to throughout (especially in the speeches of Lord Nicholls of Birkenhead and Lord Hobhouse of Woodborough).

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1. [1994] 1 A.C. 200.
2. [1994] 1 A.C. 180.
3. [2001] U.K.H.L. 44; [2001] 3 W.L.R. 1021. References hereafter will be to paragraphs in the speeches.
4. They are: *Royal Bank of Scotland Plc* v. *Etridge (No. 2)*; *Barclays Bank Plc* v. *Harris*; *Midland Bank Plc* v. *Wallace*; *National Westminster Bank Plc* v. *Gill*; *UCB Home Loans Corp. Ltd* v. *Moore*; *Barclays Bank Plc* v. *Coleman*; *Bank of Scotland* v. *Bennett*; and *Kenyon-Brown* v. *Desmond Banks & Co.*

B. UNDUE INFLUENCE AND THE CATEGORIES OF UNDUE INFLUENCE

In the words of Lord Nicholls, it is essential to have recourse to "first principles".[5] Recourse to these principles has resulted in a realignment of the traditional categories of undue influence. However, this is not (with respect) altogether clear.

Very briefly put, the traditional categories comprise actual (or Class 1) undue influence and presumed (or Class 2) undue influence. The latter category is divided into two further sub-categories, *viz.*, Class 2A and 2B undue influence, respectively. In a situation of Class 2A undue influence, undue influence is presumed by virtue of established relationships (such as parent—child and solicitor—client), whereas in a situation of Class 2B undue influence, a presumption may arise, but only on proof by the claimant that there existed facts that justified such a presumption arising. Some views expressed in the present case suggest that different views ought to be taken, particularly with regard to Class 2 undue influence. As we shall see, such views would necessarily have an impact upon Class 1 undue influence as well.

Lord Nicholls emphasized the *evidential* nature of presumed (or Class 2) undue influence, which is dependent on proof both that the claimant had placed trust and confidence in the defendant and that the transaction concerned was one that called for an explanation. What was involved, in essence, was "a rebuttable evidential presumption of undue influence";[6] in other words, the legal or persuasive (as opposed to the evidential) burden remains with the claimant throughout.[7] However, the learned Law Lord took pains to point out that the claimant could nevertheless succeed despite the absence of such a presumption; presumably, in such a situation, the claimant would have succeeded because he had proven *actual* undue influence on the part of the defendant. It is submitted that such an approach in fact blurs the lines between Class 1 and Class 2 undue influence inasmuch as it is a distinction not of kind but rather of mode of proof; however, the claimant bears the burden of proof throughout, which burden might be alleviated by the rebuttable evidential presumption that may arise on the facts of the particular case itself. It is further submitted, however, that, where Class 2B undue influence is concerned, there may be no distinction even from an evidential perspective: the proof of facts that raise an evidential presumption would simultaneously constitute the proof of actual undue influence;[8] to put it another way, it may be plausibly argued that, where such proof is forthcoming, it would *necessarily* furnish the claimant with the advantage of the *evidential* presumption *in any event*, and that there would therefore be *no substantive distinction* as such between Class

5. [2001] U.K.H.L. 44; [2001] 3 W.L.R. 1021, para. 6.

6. See paras 16 and 17.

7. See also generally *Cross and Tapper on Evidence*, 9th edn (1999), 122. Insofar as some Law Lords had analogized this evidential presumption to the doctrine of *res ipsa loquitur* (see, e.g., at paras 16, 107 and 161, *per* Lord Nicholls, Lord Hobhouse and Lord Scott, respectively), this may not necessarily be the case: see generally F. Trindade and K.F. Tan, "*Res Ipsa Loquitur*: Some Recent Cases in Singapore and Its Future" [2000] S.J.L.S. 186.

8. See generally A. Phang, "Undue Influence–Methodology, Sources and Linkages" [1995] J.B.L. 552, 563–564; on the argument that this adopts a *substantive* approach, see *infra*, the main text accompanying fn. 26.

1 and Class 2B undue influence.[9] This argument is further buttressed by the related argument (made in the next Part of this article) to the effect that the requirement of manifest disadvantage for Class 2 undue influence underscores the similarity (even coincidence) between Class 1 and Class 2 undue influence. Unfortunately, matters are rendered more complex by Lord Nicholls's reference to relationships within the purview of Class 2A undue influence: in particular, to his classification of the presumption in *that* category as being *irrebuttable*. However, a close reading of the relevant text[10] suggests that the irrebuttable presumption is concerned only with the influence exercised by the defendant over the claimant. This is, with respect, somewhat unhelpful because the presumption of influence is not difficult to prove and does not, in and of itself, establish the claimant's case by any means. There is of course also the question as to *how* this irrebuttable presumption arose in the first instance. It is suggested that, albeit based in the final analysis on reasons of public policy, the *source* for each category under Class 2A undue influence arises, in the first instance, from *specific* instances that are the stuff of Class 1 and Class 2B undue influence.

Lord Nicholls's approach from the evidential perspective was endorsed by Lord Hobhouse, who also thought that the presumption was one pertaining to that of influence only, and not that the abuse of the relationship (i.e., undue influence) had occurred.[11] However, he also thought that the category of Class 2B undue influence should not be adopted, observing that "[i]t was not a useful forensic tool".[12] This is consistent with the argument proffered in the preceding paragraph to the effect that there is, in substance, no real distinction between Class 1 and Class 2B undue influence.

Lord Scott of Foscote also adopted Lord Nicholls's view that the Class 2 presumption was evidential in nature and added that the *weight* of the presumption would "vary from case to case and [would] depend both on the particular nature of the relationship and on the particular nature of the impugned transaction".[13] This is, again, consistent with the argument made above to the effect that the presumptions are part of a holistic process that tends to blur the distinction between Class 1 and Class 2B undue influence. Not surprisingly, therefore, the learned Law Lord doubted the utility of Class 2B undue influence, which he saw as "doing no more than recognising that evidence of the relationship between the dominant and subservient parties, coupled with whatever other evidence is for the time being available, may be sufficient to justify a finding of undue influence on the balance of probabilities", with the onus shifting to the defendant.[14] Once again, however, the evidence adduced to raise the presumption is part and parcel of the process of proof *vis-à-vis* Class 1 undue influence in any event.

Lord Clyde was even more explicit and thought that the division between actual and presumed undue influence appeared "illogical"; he further disputed the distinction

9. Such proof may fall short of actually establishing actual undue influence but is certainly an integral part of the overall successful invocation of the doctrine itself. *Cf.* also the reference to acquisition of ascendancy by the defendant over the claimant: see *infra*, fn. 18.

10. See para. 18.

11. See para. 104.

12. See para. 107.

13. See para. 153. See also para. 158. It should be noted that these two factors were also endorsed by Lord Nicholls.

14. See para. 161.

between Class 2A and Class 2B undue influence—in his words, "[a]ll these classifications to my mind add mystery rather than illumination".[15]

It would appear that the death knell has been sounded for the category of Class 2B undue influence, although it is unfortunate that the House did not articulate the justification for this approach by explicit reference to the relationship between Class 2B and Class 1 undue influence. It is unfortunate, too, that Class 2A undue influence continues, on balance, to be endorsed. Even accepting its endorsement, its practical utility may be doubted.

C. UNDUE INFLUENCE AND MANIFEST DISADVANTAGE

Given the difficulties engendered amongst the various categories of undue influence, the requirement of manifest disadvantage may provide some possible illumination. In the present case, the House refused to abolish this much maligned concept.[16] On the contrary, it sought to clarify its function in the context of presumed undue influence, bearing in mind that the House had already abolished this requirement for actual (or Class 1) undue influence in *C.I.B.C. Mortgages Plc* v. *Pitt*.[17] It would, however, appear that the concept of manifest disadvantage has now a much reduced (and merely evidential) role to play.

The House, in essence, viewed manifest disadvantage as performing a *sifting* function; in particular, it viewed manifest disadvantage as being the catalyst for the operation of the presumption of undue influence. As we have already seen, both Lord Nicholls and Lord Scott thought that there were two prerequisites to the evidential shift of the burden of proof from the claimant to the defendant: first, that "the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant"[18] and, secondly, "that the transaction is not readily explicable by the relationship of the parties".[19] Lord Nicholls equated the second prerequisite with the requirement of manifest disadvantage and (more importantly) viewed it as "a necessary limitation upon the width of the first prerequisite";[20] in other words, the presence of manifest disadvantage would enable the courts to ascertain whether the given relationship should trigger the evidential presumption of undue influence. A similar approach was adopted by Lord Hobhouse and Lord Scott.[21]

With respect, this continued retention of the requirement of manifest disadvantage is unfortunate. First, the role that is allocated to manifest disadvantage (as a catalyst for the evidential presumption) is even more limited than appears at first blush.[22] As we have argued above, the evidential presumption itself is of limited application and, in any event, serves only to blur the lines between Class 1 and Class 2B undue influence. Secondly, and

15. See para. 92.
16. See, e.g., D. Tiplady, "The Limits of Undue Influence" (1985) 48 M.L.R. 579 and M. Cope, "Undue Influence and Alleged Manifestly Disadvantageous Transactions: *National Westminster Bank Plc* v. *Morgan*" (1986) 60 A.L.J. 87.
17. [1994] 1 A.C. 200.
18. See para. 21, *per* Lord Nicholls.
19. See *ibid.* See also paras 153 and 158, *per* Lord Scott.
20. See para. 24.
21. See paras 104 and 156, respectively.
22. It certainly would not be substantive: see at para. 155, *per* Lord Scott.

as already alluded to above, the establishment of manifest disadvantage would serve to blur the lines between Class 1 and Class 2B undue influence even *further*. If the claimant proves facts establishing manifest disadvantage to him or her, does this not simultaneously aid in establishing actual (or Class 1) undue influence in any event?[23] Perhaps more to the point, given the views of the House on the operation of the presumption under Class 2B undue influence, one might not even have to go as far: the establishment of manifest disadvantage aids in triggering the presumptions that, in turn, aid in establishing undue influence. Looked at in this light, the entire process of proof is *coincident* with that which is adopted *vis-à-vis* the establishment of *Class 1* undue influence. If so, wherein lies the difference between Class 1 and Class 2B undue influence? It is true that manifest disadvantage would also perform a sifting function with regard to Class 2A undue influence. It is, however, submitted that the points just made would apply with equal force to this particular category as well and hence support the argument (already made) that there is only, in effect, one category of undue influence, in the final analysis.

What, then, of the proposition in *Pitt* (noted above) to the effect that manifest disadvantage is not an essential requirement of Class 1 undue influence? Lord Scott, for instance, saw no inconsistency between this proposition and that which required manifest disadvantage insofar as Class 2 undue influence is concerned.[24] If manifest disadvantage is viewed as a substantive requirement, its abolition with respect to Class 1 undue influence is wholly consistent with the approach adopted by the House in the instant case, which basically treats manifest disadvantage as an evidential trigger or catalyst. But this would mean that manifest disadvantage as an evidential presumption ought to be retained even with respect to Class 1 undue influence. If, however, manifest disadvantage is viewed as a merely evidential requirement, its abolition with regard to Class 1 undue influence would appear to suggest its abolition with regard to Class 2 undue influence as well: the more so as we have already argued that there is no real distinction between Class 1 and Class 2B undue influence and, perhaps, even with respect to Class 2A undue influence. One way to resolve this difficulty is to argue that the requirement of manifest disadvantage with regard to Class 1 undue influence is substantive and not evidential in character, particularly since the rationale is grounded (as stated in *Pitt*) in fraud. However, the House in the present case did not appear to distinguish between the substantive and evidential aspects of the concept of manifest disadvantage. If so, it is suggested, with respect, that there is a grave difficulty with the analysis of the House: if the requirement of manifest disadvantage is a mere *evidential* concept, then it should apply, with *equal* force, to the establishment of *Class 1* undue influence. Put colloquially, what is sauce for the goose is sauce for the gander. One could go further: if the establishment of manifest disadvantage aids the court in presumed undue influence cases in ascertaining whether or not the presumption should be raised, this would apply equally to the situation of actual undue influence. Admittedly, the argument in response would be that manifest disadvantage was clearly stated to be immaterial in *Pitt*. One could, however, argue that it is almost impossible in point of fact to establish actual undue influence without *simultaneously* proving manifest disadvantage.[25] To the possible counter-response that this is to adopt, in

23. See Phang [1995] J.B.L. 552.
24. See para. 156.
25. See Phang [1995] J.B.L. 552.

effect, a substantive view of manifest disadvantage, the simple answer is that the distinction between substance and procedure is rather artificial indeed.[26]

The situation with respect to manifest disadvantage has, with respect, been unnecessarily complicated and one hopes that the position could be further clarified in a future decision. Indeed, one might also usefully refer to the acknowledgement by the Court of Appeal in *Barclays Bank Plc* v. *Coleman*[27] to the effect that the reliance by the House in *National Westminster Bank Plc* v. *Morgan*[28] on the Indian Privy Council decision of *Poosathurai* v. *Kannapa Chettiar*[29] in formulating the requirement of manifest disadvantage may have been less than fortunate, as the latter decision was decided on the basis of the Indian Contract Act 1872, s. 16, where the requirement of manifest disadvantage was clearly spelt out.[30] Unfortunately, however, the House in the instant case did not examine this argument at all.

D. THE NATURE OF CONSTRUCTIVE NOTICE

Up to this juncture, the discussion has focused on the various elements of undue influence. Of interest in this Part of the article is the related issue of whether undue influence had been exercised by the principal debtor on the surety in procuring her signature or consent. In Lord Scott's opinion, this was an unlikely circumstance.[31] But, even if such undue influence (or more likely misrepresentation) were proven, it is through "the proper application of the doctrine of notice"[32] that the third party creditor is prevented from relying on the apparent consent of the surety. By unanimously supporting the use of constructive notice in *Etridge*, the House of Lords clearly reiterated the judicial desire to strike a balance between the need to protect the surety, and allow the wealth that inheres in the matrimonial home to be safely used as collateral. Their Lordships saw their duty as one of clarifying the remaining difficulties.[33] Even so, Lord Nicholls thought that this was "not a conventional use of the equitable concept of constructive notice".[34] His Lordship saw traditional notice more in terms of determining priorities in property rights, which comes closest to how Lord Browne-Wilkinson described its operation in *O'Brien*.[35] Here

26. See, e.g., P.S. Atiyah, "Contract and Fair Exchange" (1985) 35 Univ. Toronto L.J. 1 (Reprinted as Essay 11 in P.S. Atiyah, *Essays on Contract* (1986)).

27. [2001] Q.B. 20.

28. [1985] A.C. 686.

29. (1919) L.R. 47 Ind. App. 1.

30. This was in fact the thrust of one of the major themes in Phang, [1995] J.B.L. 552.

31. See para. 162. In the appeals in *Royal Bank of Scotland Plc* v. *Etridge* and *Barclays Bank Plc* v. *Harris*, Lord Scott found that there had been no exercise of undue influence. In *National Westminster Bank Plc* v. *Gill*, Lord Scott said (at para. 281) that "[o]n the evidence in the case a finding of undue influence would, in my opinion, have been unthinkable".

32. *Barclays Bank Plc* v. *O'Brien* [1994] 1 A.C. 180, 194, *per* Lord Browne-Wilkinson.

33. See, e.g., at para. 99, *per* Lord Hobhouse: "Doubt should not be cast upon the authority of *O'Brien*. There is a need for some clarification and for the problem areas to be resolved as far as possible. But the essential structure of *O'Brien* is in my view sound and Lord Browne-Wilkinson fully took into account the practical implications."

34. See para. 39. Cases such as *Bainbridge* v. *Browne* (1881) 18 Ch. D. 188, were, as noted by Stuart-Smith, L.J., in the Court of Appeal in *Etridge* [1998] 4 All E.R. 705, 717, about notice of a person who claimed under the principal debtor, and is not a true third party as such. This is supported by J. Cartwright, "Taking Stock of *O'Brien*" [1999] R.L.R. 1, 4.

35. See [1994] 1 A.C. 180, 195–196, and supported by Lehane (1994) 110 L.Q.R. 167.

by contrast, the creditor acquires its charge over the surety's rights to the matrimonial home from the surety, and there is nothing that questions her title to the underlying collateral. Thus, Lord Scott, who did not see the use of notice as entirely novel, accepts that, in reality, "[t]hey are contractual questions, not questions relating to competing property interests",[36] and "[i]t is notice of the husband's impropriety that the bank must have, not notice of any prior rights of the wife".[37]

There are related areas of law where constructive notice is used in a similar way. In cases of knowing receipt involving companies and not pre-existing trust funds, the third party recipient must have notice (in an evidential sense) of a prior breach of fiduciary duty by the directors.[38] *Rolled Steel Products (Holdings) Ltd* v. *British Steel Corp.*[39] illustrates this, and also the proposition that a transaction entered into by a company with a third party can be set aside if the latter had notice that the directors of the company were in breach of duties owed to the company or had abused their powers when they entered into the contract on its behalf. Yet, in both these situations, the third party is expected to make the necessary inquiries to absolve itself from liability once it is put on notice. Here, however, both Lord Nicholls and Lord Scott acknowledged that the response expected of banks is not to make inquiries in order to discover whether the surety had been wronged by the principal debtor, but to minimize the risk that such a wrong may have occurred. These reasonable steps are directed at ensuring that the surety understood the transaction she was entering into.[40]

Although it has been said that "[both] being put in inquiry and taking reasonable steps are part of constructive notice",[41] it is still slightly curious how ensuring that a surety understood the nature and effect of the transaction helps the creditor shed constructive notice of the principal debtor's impropriety. This is probably what troubled Lord Hobhouse,[42] and his Lordship would instead require the creditor to nullify the influence exercised by the principal debtor over the surety. But his Lordship was in a minority on

36. See para. 144.

37. See para. 146.

38. R.C. Nolan, "Dispositions involving fiduciaries: the equity to rescind and the resulting trust", Chap. 7 of P. Birks & F.D. Rose (eds), *Restitution and Equity* (1998), 119 distinguishes actions for knowing receipt founded on a pre-existing equitable interest, where notice is used in the traditional conveyancing sense, and the situation being considered here, where a new right as such is created when the third party has knowledge or notice of a prior breach of duty (see esp. at fn. 43).

39. [1986] Ch. 246 (C.A.). In the context of knowing assistance, the failure to make the enquiries expected of a reasonable man is evidence of want of probity or knowledge (under *Agip (Africa) Ltd* v. *Jackson* [1990] Ch. 265; *Eagle Trust Plc* v. *SBC Securities Ltd* [1993] 1 W.L.R. 484) or objective dishonesty (under *Royal Brunei Airlines Sdn Bhd* v. *Philip Tan* [1995] 2 A.C. 378) but see now *Twinsectra Ltd* v. *Yardley* [2002] U.K.H.L. 12; [2002] 2 W.L.R. 802. For knowing receipt, in *Bank of Credit and Commerce International (Overseas) Ltd* v. *Akindele* [2001] Ch. 437; noted R.C. Nolan [2000] C.L.J. 447; J. Stevens [2001] R.L.R. 99; H. Tjio [2001] J.B.L. 299, Nourse, L.J., preferred to see the test as one of unconscionability, which may be the best way to capture the shifting evidential burdens involved in the proof of knowing receipt. See also *infra*, Part F.

40. *Per* Lord Nicholls at para. 41, and *per* Lord Scott at para. 147.

41. *Barclays Bank Plc* v. *Boulter* [1998] 1 W.L.R. 1, 10, *per* Mummery, L.J., with whom both Leggatt, L.J., and Sir Brian Neill agreed.

42. See para. 111. See also *Banco Exterior International* v. *Mann* [1995] 1 All E.R. 936, 948 *per* Hobhouse, L.J., dissenting, observing that: "[i]t must be remembered that the starting point of this exercise is that the wife's will is being unduly and improperly influenced by the will of her husband. The steps taken have to be directed to freeing her of that influence or, at the least, providing some counterbalance."

this point.[43] In truth, however, what the majority of their Lordships in *Etridge* expected of the creditor is more directly relevant to minimizing the risk of the surety's failing to comprehend what she is signing, what is perhaps more apposite under the "special equity" approach of *Yerkey* v. *Jones*,[44] which does not require notice of the debtor's impropriety, or perhaps any notice at all,[45] or the application of unconscionability in *Commercial Bank of Australia* v. *Amadio*,[46] which requires constructive knowledge only of the surety's disadvantaged position.

But it is arguable that the creditor does not need to do more even when it is afflicted with constructive notice of impropriety. The creditor is not the surety's keeper; and, once it takes reasonable steps to ensure that the surety is cognisant of the legal and financial risks of the guarantee or charge, it avoids constructive notice of any possible impropriety by the principal because there is now, on the face of the transaction, less likelihood of a wrong having been committed. An analogy can be drawn in this sense with the old principle that one only has constructive notice of matters that necessarily affect the subject matter in dispute and not of matters that may or may not.[47] Constructive notice, being a form of imputed knowledge, can be vacated by adherence to a set of prescribed steps, which entitles the creditor once again to rely on the apparent consent of the surety.

O'Brien balances the interests of the various parties through the use of procedural safeguards rather than a substantive determination of the state of mind of the creditor. In this regard, most of the Court of Appeal decisions after *O'Brien* had accepted that the bank only had to advise the surety to seek independent advice from a solicitor. Although Lord Browne-Wilkinson stated that, for transactions that followed after *O'Brien*, banks had to insist "that the wife attend a private meeting (in the absence of the husband) with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent advice",[48] the Court of Appeal in *Etridge* had doubted whether "banks have been willing to adopt the procedure even after *O'Brien's* case".[49]

E. LEGAL ADVICE AND CONSTRUCTIVE NOTICE

Consequently, the focus of a large number of decisions prior to *Etridge* was on whether the bank was entitled to believe that the solicitor had properly advised the surety, and a

43. Although Lord Scott, with whom Lord Hobhouse expressly disagreed, was most explicit (at para. 164), Lord Nicholls would also not require the bank or solicitor to negative any undue influence exercised by the principal debtor over the surety (at para. 41). Lord Bingham of Cornhill accepted the minimum requirements identified by Lord Nicholls and Lord Scott (at para. 3) and Lord Clyde agreed with Lord Nicholls's speech (at para. 91).

44. (1939) 63 C.L.R. 439, applied recently in *Garcia* v. *National Australia Bank Ltd* (1998) 194 C.L.R. 395.

45. *Cf.* A. Phang & H. Tjio, "From Mythical Equities to Substantive Doctrines–Yerkey in the Shadow of Notice and Unconscionability" (1999) 14 J.C.L. 72.

46. (1983) 151 C.L.R. 447; 46 A.L.R. 402.

47. *English and Scottish Mercantile Investment Co. Ltd* v. *Brunton* [1892] 2 Q.B. 700.

48. [1994] 1 A.C. 180, 196.

49. [1998] 4 All E.R. 705, 729.

certificate from a solicitor to that effect appeared to immunize the bank from liability.[50] The bank was not imputed with notice of what the solicitor learned in the course of advising the surety even if the solicitor also acted for the bank in the transaction, as the knowledge was acquired in his capacity as the surety's solicitor.[51] The Court of Appeal in *Etridge* reinforced this position by relying on the Law of Property Act 1925, s. 199(1)(ii)(b).[52] The court also held that a bank was not required to question the solicitor's independence, even if he had acted for the principal debtor in the transaction.

The House of Lords in *Etridge* endorses the approach taken by the Court of Appeal.[53] What matters is that the solicitor was acting for the surety in the relevant transaction; his professional responsibilities would ensure that he acts only in the surety's best interests. Lord Nicholls recast Lord Browne-Wilkinson's *O'Brien* guidelines in the following way.[54] First, the bank must check directly with the surety the name of the solicitor she wishes to act for her, and explain to the surety the conclusive effect of the solicitor's certificate. The concern of the bank here is with the quality of legal advice, including its independence, which she will receive. Secondly, recognizing that banks are often unwilling to warn the surety of the financial risks directly, Lord Nicholls requires banks to provide such information to the solicitor advising the surety. This would include information about the principal debtor's borrowings and current overdraft facility.[55] Thirdly, where a bank has cause to believe that the surety is labouring under some undue influence or misrepresentation exercised by the debtor, it has to inform the solicitor of its suspicions. And last, the bank has to obtain the solicitor's written confirmation, which is also the only prescribed requirement for transactions that pre-dated *Etridge*.

But what is the legal advice expected to contain? The duty that Lord Hobhouse thought is borne by the creditor, *viz.*, to negate the effects of the debtors' impropriety, was, in the Court of Appeal in *Etridge*, imposed on the solicitors,[56] and distinct guidelines were promulgated for solicitors.[57] These were followed in *Kenyon-Brown* v. *Desmond Banks &*

50. *Massey* v. *Midland Bank Plc* [1995] 1 All E.R. 929; *Bank of Baroda* v. *Rayarel* [1995] 2 F.L.R. 376; *Mann supra*, fn. 42. A certificate from a legal executive which is authorized by his principal solicitor would in normal circumstances be sufficient: *Barclays Bank Plc* v. *Coleman* [2001] Q.B. 20, which was one of three cases consolidated with five of those that were heard by the Court of Appeal in *Etridge*. The House of Lords upheld the decision, on this point specifically at para. 292.

51. *Royal Bank of Scotland* v. *Etridge (No. 1)* [1997] 3 All E.R. 628 was exceptional in this regard. According to Stuart-Smith, L.J., in *Etridge (No. 2)* [1998] 4 All E.R. 705, 722, it was decided "*per incuriam*".

52. This provides that a purchaser, including a mortgagee, is not affected by notice of matters which its solicitor discovers unless the solicitor was acting for the purchaser at the time he discovered it. The House of Lords relied on this provision in *Midland Bank Plc* v. *Wallace*, which was allowed to go to trial on the basis that there was evidence that the solicitor was not acting for Mrs Wallace, but for the bank.

53. Lord Scott approved the decision of the Deputy Judge, who had been reversed by the Court of Appeal in *Bank of Scotland* v. *Bennett* [1999] 1 F.L.R. 1145, and stated (at para. 339) that the fact that the solicitor "had been acting not only for Mrs Bennett but also for Mr Bennett and for the bank itself did not detract from the reasonableness of the bank's expectation that the solicitors would have given Mrs Bennett adequate advice about the legal charge."

54. See para. 79.

55. The House of Lords acknowledged that these were not unusual or unexpected facts justifying disclosure under *Hamilton* v. *Watson* (1845) 12 C. & F. 109.

56. Stuart-Smith, L.J., said that "[h]is duty is to satisfy himself that his client is free from undue influence", [1998] 4 All E.R. 705, 715. The guidelines laid down by the Court of Appeal are discussed by Cartwright [1999] R.L.R. 1, 8–11.

57. [1998] 4 All E.R. 705, 715–717.

Co.,[58] the only conjoined appeal that involved an action by a surety against the solicitor. The House of Lords unanimously reversed and found for the solicitor. Lord Hobhouse accepted that the reasonable steps suggested by Lord Nicholls for banks to follow was the best way of ensuring that the surety received independent advice and provided real consent to the transaction. But logically, this should mean that the duty to ensure that the surety was free of any overreaching conduct falls on the solicitor. It is here that there is some difficulty with Lord Hobhouse's speech, for his Lordship also accepts Lord Nicholls's statement of the duty imposed on solicitors when advising the surety.[59]

Indeed, Lord Nicholls quite clearly refused to accept that solicitors were under such an onerous duty in normal cases.[60] Instead, solicitors had only to cover the following as the "core minimum"[61] when advising the surety. First, the nature of the documents and the practical consequences for the surety should she sign them. Secondly, the seriousness of the legal and financial risks involved. Thirdly, the fact that the surety had a choice in the matter, and here the state of debtor's accounts should be disclosed to her. Lastly, to confirm that the surety still wished to proceed, and whether she was content to authorize the solicitor to write to the bank confirming that he had advised her on the nature and effect of the transaction. Although the advice should be given at an *inter partes* meeting, without the debtor's presence, these guidelines are clearly only directed at ensuring that the surety understands the risks she is running, and not emancipating her from any influence exercised upon her by the principal debtor.[62]

Etridge does not provide a perfect, or even an elegant solution, but lays out workable procedures, which Lord Clyde saw as: "not matters of ritual, the blind performance of which will secure the avoidance of doom, but sensible steps which seek to secure that the personal and commercial interests of the parties involved are secured with certainty and fairness."[63]

Though the individual steps required of the bank and solicitor are not burdensome; taken together, their actions should, in *most* cases, ensure that the surety both understands the nature and effect of the transaction *and* gives her consent freely and without external interference.[64]

The difficulty remains with those cases where it is specifically pleaded[65] that the bank or solicitor has had something drawn to its attention that arouses suspicion that the surety's will has been overborne. Here, the burden, which Lord Hobhouse would impose

58. [2000] P.N.L.R. 266, where the Court of Appeal distinguished Lord Jauncey's statement in *Clark Boyce* v. *Mouat* [1994] 1 A.C. 428, 437, that a solicitor did not have to proffer "unsought advice on the wisdom of the transaction" on the basis that it did not concern a case of undue influence.

59. See para. 124.

60. Relying on *Re Coomber, Coomber* v. *Coomber* [1911] 1 Ch. 723, 730.

61. See para. 65.

62. Lord Scott set out five similar steps at para. 169 that a solicitor had to follow in order to satisfy himself that the surety understood the nature and effect of the transaction and her willingness to enter into it, and saw both the judgments of Stuart-Smith, L.J., in *Etridge* and Mance, L.J., in *Kenyon-Brown* as directed at the situation where the "solicitor has had something or other drawn to his attention which arouses suspicion that the wife may be the victim of undue influence" (see para. 182).

63. See para. 95.

64. Lord Bingham at para. 3 observed that, "[i]f these requirements are met the risk that a wife has been misled by her husband as to the facts of a proposed transaction should be eliminated or virtually so. The risk that a wife has been overborne or coerced by her husband will not be eliminated but will be reduced to a level which makes it proper for the lender to proceed."

65. Lord Scott required this, at para. 373, when discussing the *Kenyon-Brown* appeal.

generally, is on banks and solicitors to ensure that the surety is exercising her own free will. An extreme example of this was *Credit Lyonnais Bank Nederland NV* v. *Burch*,[66] where the terms of the unlimited personal guarantee were so disadvantageous to the surety (a junior employee of the principal debtor) that the Court of Appeal felt that no competent solicitor could have advised her to enter into it. Given this, the bank could not avoid notice of the debtor's impropriety despite taking the standard step of advising the surety to seek independent advice. The Court of Appeal in *Etridge* had relied on the judgment of Millett, L.J. (as he then was) in *Credit Lyonnais* in setting out the duties of the solicitor, which included discharging himself and declining to act for the surety even if the surety insisted on entering into the transaction. As we have seen, however, Lord Nicholls disagreed that such a high standard of care should be expected of solicitors except in extremely egregious circumstances. But the need for an inherently flexible doctrine prevented Lord Nicholls from overruling *Credit Lyonnais*; and, indeed, it prompted his Lordship to suggest that, along with *O'Brien*, it could lead the way in developing a wider general principle.[67]

But any fluidity in the respective roles of the bank and solicitor would mean that it would be difficult summarily to dispose of a case once it is pleaded that the bank should have been aware that the surety's consent might be tainted by the debtor's undue influence or misrepresentation. This is borne out by the fact that all three of the interlocutory appeals heard by the House of Lords were permitted to go to trial. But, of the other four wife versus bank cases that had come to the House after a full trial, their Lordships found for the bank in three of them; and not in the fourth only because the bank failed to disclose the existence of unusual facts which affected the surety's liability, which is a separate ground altogether from *O'Brien*.[68] Sureties, it would appear, are destined to fail only at the last.[69]

F. A BROADER DOCTRINE OF UNCONSCIONABILITY?

What is the broader principle to which Lord Nicholls was alluding? It is instructive that his Lordship found support for such a wider doctrine in an article by Professor Birks,[70] which suggests a plaintiff-focused restitutionary framework. Lord Nicholls has also

66. [1997] 1 All E.R. 144; noted M. Chen-Wishart [1997] C.L.J. 60; R. Hooley and J. O'Sullivan [1997] LMCLQ 17; H. Tjio (1997) 113 L.Q.R. 10.

67. See para. 89.

68. See *supra*, fn. 55. The doctrine was applied by Lord Scott in *Bennett* to require the disclosure by the bank of a ranking document that reduced the amount of the company's assets available for the payment of the company's debts to the bank which correspondingly increased the likelihood that the surety would be called upon to discharge the principal debtor's borrowings (see paras 346–348).

69. See N.S. Price (1998) 114 L.Q.R. 8; (1999) 115 L.Q.R. 186.

70. "The Burden on the Bank", Chap. 11 of F.D. Rose (ed.), *Restitution and Banking Law* (1998), 195.

widened the circumstances in which the bank is put on notice.[71] What initiates the series of steps to be taken by the bank, and, in practice, by the solicitors, is the mere fact that the relationship between surety and debtor is "non-commercial":[72] one between father and daughter for example.[73] There are signs of strict liability here that trigger off the taking of reasonable steps. One difficulty with this approach is that the House of Lords' decision in *Barclays Bank Plc* v. *Boulter*[74] clearly imposes the burden of proving that the bank had the requisite notice on the surety. Another is that it fails to deal adequately with those cases where the bank and solicitor are expected to do more because their background knowledge and surrounding circumstances demand it.[75]

The present writers have suggested that the nuanced as well as reasoned development of the doctrine of unconscionability may well be the best way forward.[76] There is of course the uncertainty that naturally arises when a fledgling doctrine such as this is implemented; more importantly, perhaps, is the fear of opening the floodgates of discretion. Not surprisingly, then, the doctrine of unconscionability has (in England) been confined to very specific situations, for example, those involving expectant heirs. There is, however, no reason in principle or logic that compels such a narrow approach. One of the present writers has argued elsewhere that the doctrines of economic duress and undue influence ought to be merged under an umbrella doctrine of unconscionability.[77] Subsequent writings have acknowledged the linkages amongst these various doctrines but have refrained from arguing in favour of a complete merger.[78] Significantly, there are hints in the present case which suggest that a full-blown merger under a broader doctrine of unconscionability may not be too far away. This may well, in fact, be the first occasion when the House has even alluded to such a broader development.

Indeed, throughout Lord Nicholls's speech, although the primary reference is to undue influence, the language utilized is as (if not more) applicable to that of unconscionability.[79] This is not of course surprising as the concept of abuse (common to both doctrines on the level of *rationale*) is of especial *substantive* significance in the doctrine of unconscionability. Interestingly, Lord Nicholls also alluded to a possible overlap between duress

71. Whenever "a wife offers to stand surety for her husband's debts", whereas Lord Browne-Wilkinson in *O'Brien* [1994] A.C. 180, 196 proposed two requirements; that:
(a) the transaction is on its face not to the financial advantage of the wife; and
(b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitled the wife to set aside the transaction.
Under the new formulation, the bank is put on notice even if it is not aware that the surety and debtor are cohabiting or that the surety has placed implicit trust and confidence in the debtor. Lord Nicholls expressly disapproved of the decision of the Court of Appeal in *Etridge* [1998] 4 All E.R. 705, 719, in this regard (see para. 46).

72. See para. 87.

73. See para. 84.

74. [1999] 1 W.L.R. 1919.

75. *Cf.* Birks, *supra*, fn. 70, at pp. 194–195.

76. See generally Phang and Tjio (1999) 14 J.C.L. 72, discussing the decision of the High Court of Australia in *Garcia* v. *National Australia Bank Ltd* (1998) 194 C.L.R. 395, where the majority resurrected the "special equity" for wives as enunciated in the judgment of Dixon, J., in *Yerkey* v. *Jones* (1939) 63 C.L.R. 439. Nor has *O'Brien* found universal favour in New Zealand where the Court of Appeal stated that "the jurisprudential basis of *O'Brien* remains uncertain": see *Wilkinson* v. *A.S.P. Bank Ltd* [1998] 1 N.Z.L.R. 674, 698.

77. See Phang [1995] J.B.L. 552, 565–574.

78. See, e.g., D. Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 L.Q.R. 479.

79. See, e.g., at paras 6 and 11.

and undue influence.[80] One should also bear in mind that Lord Nicholls's speech was acquiesced in by all the Law Lords.[81]

References to unconscionability are also made throughout Lord Hobhouse's speech, although perhaps more as part of general equitable doctrine.[82] Significantly, however, his Lordship finds support for the imposition of stricter duties on banks (and solicitors) by referring to a passage in an article by Lord Millett, exploring the possibility of using the substantive doctrine of unconscionability in order to provide vulnerable sureties greater protection.[83] But the concerns of Lord Millett on the way the *O'Brien* principles have been applied should be contrasted with his earlier writings, where his Lordship perceived *O'Brien* as restoring constructive notice to its rightful place in equity, as a flexible concept to be applied in commercial transactions.[84] It is a misgiving borne from experience. Unfortunately, the reference to a broader principle in *Etridge* appears to be to *procedural* unfairness only.[85] This is an unfortunate distinction which is artificial as procedural and substantive fairness often impact on, as well as interact with, each other.[86]

Nobody today seriously argues against the concept of unconscionability as a *fairness rationale* underlying many equitable doctrines. We would, however, go further and suggest that there already exists a *structure* upon which unconscionability can be developed as a *doctrine*.[87] Indeed, in this instance at least, one ought to adopt an holistic view that integrates both rationale and doctrine. Many of the factors already enunciated with respect to economic duress and undue influence would be excellent points of departure for the concrete development of an umbrella doctrine of unconscionability, particularly from the perspective of relevant factors which would guide the courts. Given the substantial overlaps (if not, coincidences) amongst these various doctrines,[88] the argument for integration is compelling. As the courts integrate the best in doctrine and reason from the existing law, the charge of excessive discretion and uncertainty as well as unprincipled development is an exercise in needless anxiety. The more difficult issue is whether or not the courts will go further and abandon the rather artificial distinction between procedural and substantive unfairness.[89]

80. See para. 8. *Cf.* also at para. 3, *per* Lord Bingham. See also generally Phang [1995] J.B.L. 552, 565–566.

81. See, e.g., at para. 3, *per* Lord Bingham.

82. See paras 101, 103 and 108. His Lordship ultimately still favours the use of constructive notice; see also A.J. Duggan, "Till Debt Us Do Part: A Note on *National Australia Bank Ltd* v. *Garcia*" (1997) 19 Sydney L. Rev. 220.

83. See para. 115. Lord Millett in "Equity's Place in the Law of Commerce" (1998) 114 L.Q.R. 214, 220, referred, in turn, to an article by Sir Anthony Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 L.Q.R. 238.

84. (1995) 9 T.L.I. 35, 40, though the duty to make inquiry is less onerous than in transactions involving land and estates due to their pressing nature: *Macmillan Inc.* v. *Bishopsgate Trust Plc (No. 3)* [1995] 1 W.L.R. 978, 1000–1001 (Millett, J.).

85. See, e.g., at para. 7, *per* Lord Nicholls.

86. See Atiyah, *supra*, fn. 26.

87. See, e.g., the oft-cited Australian High Court decision of *Commercial Bank of Australia* v. *Amadio* (1983) 151 C.L.R. 447; 46 A.L.R. 402.

88. See generally Phang [1995] J.B.L. 552, 565–574.

89. See generally the main text accompanying *supra*, fn. 86.

G. CONCLUSION

The House's attempt at tackling many fundamental issues in the law relating to undue influence has had mixed results. The situation with regard to the elements of the doctrine is somewhat (albeit not wholly) rationalized. However, its clarification of the precise nature of constructive notice as well as the practical steps to be taken pursuant therewith are, on balance, to be welcomed, as are the allusions to a broader umbrella doctrine. Given the complexity of the decision, we hesitate to attempt a more specific summary. But given the importance of the decision, we would tentatively list what we believe to be the main points (and points for departure), as follows:

1. The presumption under Class 2 undue influence is only *evidential* in nature, the legal or persuasive burden remaining with the claimant throughout. This sounds the death knell for Class 2B undue influence (a unanimous view of the House, in fact). This is something in our view that should be welcomed given (as we have argued) that there is now, in substance, no real distinction between Class 2B and Class 1 (actual) undue influence.

2. Class 2A undue influence continues to hold its ground (though *cf.* Lord Nicholls's view that the presumption there is irrebuttable, but only (it appears) with regard to the influence exercised by the defendant over the claimant). However, there continue to be difficulties with respect to the precise source of this particular category of undue influence.

3. The requirement of manifest disadvantage continues to be retained, but now performs a *sifting* function *vis-à-vis* Class 2 undue influence by constituting a catalyst for the invocation of the evidential presumption referred to above. The role of manifest disadvantage has been greatly reduced and, in our view, its present role supports the argument that there is only, in effect, one category of undue influence, in the final analysis. However, the argument in favour of the abolition of the requirement of manifest disadvantage nevertheless remains an open issue for future cases.[90]

4. The nature of constructive notice in this particular situation is, arguably, somewhat idiosyncratic (particularly when compared with traditional conceptions of constructive notice and the application thereof) but nevertheless fulfils an important pragmatic function of striking a balance between the need to protect the surety whilst allowing the wealth that inheres in the matrimonial home to be safely used as collateral.

5. The House laid down a number of reasonable steps to be followed by banks as well as a "core minimum" (*per* Lord Nicholls) that had to be contained within the legal advice given to the surety. Insofar as the actual actions by the solicitor are concerned, the central guiding principle is that the solicitor must act for the *surety* in the relevant transaction. Whilst not providing a perfect or even elegant solution, we argue that the individual steps required of the bank and solicitor are not burdensome and should adequately protect the surety in *most* transactions, although difficulties remain where it is specifically pleaded that the bank or solicitor has had something drawn to its attention that arouses suspicion

90. See the main text accompanying *supra*, fns 27–30.

that the surety's will has been overborne (and this is particularly so with regard to interlocutory appeals).

6. Finally, the references by the House to a broader doctrine constitute the boldest attempt yet in heralding a significant change in the law and raise, as we have suggested, the distinct possibility (dare we say, probability) of the development of a broader umbrella doctrine of unconscionability.