Neutral Citation Number: [2020] CA (Bda) Civ 10

Case No: Civ/2019/11

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON. CHIEF JUSTICE HARGUN
CASE NUMBER 2017: No. 007

Sessions House
Hamilton, Bermuda HM 12

Date: 19/06/2020

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

\- -

Between:

KEIMON LAVAN LAWRENCE **Appellant**

- and -

HSBC BANK BERMUDA LTD. **Respondent**

Mr. Marc G. Daniels (Marc Geoffrey Barristers & Attorneys Ltd.) for the Appellant

Ms. Jennifer Haworth (MJM Ltd.) for the Respondent

Hearing dates: 2 June 2020

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APPROVED JUDGMENT

CLARKE P

INTRODUCTION

1. This is an appeal by Keimon Lavan Lawrence ("Mr Lawrence") from a decision of the Chief Justice by which he declined to set aside two default judgments entered against Mr Lawrence and his father, Keith Percival James ("Mr James"), together "the Defendants", whereby it was adjudged that the two of them should pay to the Plaintiff, HSBC Bank Bermuda Ltd ("the Bank") $ 3,609,666 together with interest to be assessed and costs. The Chief Justice also declined to grant the defendants an injunction restraining the Bank from selling a property jointly owned by the Defendants and known as "Before Dawn", No 2 Tribe Road No 6 in Warwick Parish ("the Property"). Mr James does not appeal.

2. The procedural history of the action is set out in the judgment below in terms which I gratefully adopt:

> "*2. These proceedings were commenced by HSBC Bank Bermuda Limited ("the Bank" or "the Plaintiff") by Specially Endorsed Writ Of Summons dated 12 January 2017 claiming against Keith Percival James ("Mr James") and Keimon Lavan Lawrence ("Mr Lawrence") (collectively "the Defendants"), seeking judgement in the sum of $ 3,609,666 claimed under a guarantee given by the Defendants to the Bank dated 13 June 2008 ("the Guarantee"), and the sale of the underlying security represented by the Property owned jointly by the Defendants.*
>
> *3. On 17 February 2017, Judgement in default of appearance was entered against the Defendants in the amount of $3,609,666 and all interest and charges continuing from 17 February 2017 (being $692.26) together with all costs and costs of execution.*
>
> *4. On 4 May 2017, the Registrar made an Order that the Defendants deliver possession of the Property pursuant to Order 45 rule 3(2) of RSC 1985 and that the Bank was granted an Order for the sale of the Property pursuant to the Judgement.*
>
> *5. On 17 May 2018, the Defendants filed an ex parte Summons seeking an order that the Bank "be restrained, whether by itself, or howsoever otherwise until judgement herein or further order, from selling the property of [the Defendants]"*
>
> *6. On 17 May 2018, Hellman J. gave directions in relation to the filing of the evidence and the hearing of the ex parte Summons dated 17 May 2018 seeking to enjoin the Bank from selling the Property.*
>
> *7. On 25 October 2019, at the commencement of the hearing of the Summons dated 17 May 2018, I gave leave to the Defendants to apply to seek to set aside*

the default Judgement dated 17 February 2017 and that that application be heard [at the] same time as the application seeking to restrain the Bank from selling the Property. I also ordered that the affidavit evidence filed in support of the injunction proceedings also stand as evidence in relation to the application seeking to set aside the default Judgement.

THE PROCEEDINGS BELOW

3. As is apparent the application before the Court below was to set aside a default judgment (and impose an injunction). In ordinary course the question on such an application is whether the applicant has shown that he has a realistic defence, in which case, the judgment will be set aside, unless there is some good reason (such as inordinate delay in applying or undue prejudice to the judgment holder) not to do so. Such applications are usually determined on affidavit evidence alone. In the present case the judge heard oral evidence and the deponents were cross examined. This gives rise to a question as to the status of the judge's findings and, in particular whether they are to be regarded as final.

THE FACTUAL BACKGROUND

4. The factual background of the application is set out in the judgment of the Chief Justice and I do not find it necessary to repeat all of what he has found. In essence the position is as follows. Mr James and Mr Lawrence are father and son. Mr James was, and had been for many years, the Head Bellman at the Fairmont Southampton Princess. At the time of the transaction he was 53. Mr Lawrence was in 2008 an employee of the Bank, engaged as a computer operator. He was then 33. He was made redundant in 2012.

5. Mr James had a friend called Alexander "Jerry" Ming ("Mr Ming"), whom he had met in the early 2000s because Mr Ming was employed by the Fairmont Southampton Princess. In early 2008 Mr Ming asked Mr James if he would guarantee a loan that Mr Ming was seeking to obtain from the Bank. Mr Ming explained that he was intending to buy a business and that he had approached Mr James as he knew that Mr James owned a sizeable property. Initially Mr James was completely against the idea and rebuffed Mr Ming's sales pitch and business venture. In the end the persistent Mr Ming persuaded Mr Janes to provide the necessary guarantee to the Bank; and, as part of that persuasion he offered Mr James $ 50,000 a year "*as a return on any investment by way of guarantee*". The business venture was the purchase of 80% of a company called GSC Ltd which, according to Mr Ming had secured a contract to install and maintain the air conditioning, heating and ventilation units in the new Acute Care wing at the King Edward Memorial Hospital. That, at any rate, was the evidence of Mr Lawrence who says that what Mr Ming said was false.

6. Mr James informed Mr Lawrence of Mr Ming's proposal. Mr Lawrence objected to it and said that he considered it a bad idea. He felt that Bermuda was headed towards a recession and that, as a result, the proposed business was unlikely to do well. However, as the judge observed:

> *"11 Mr James's evidence is that he explained to Mr Lawrence that Mr Ming was a businessman and that Mr Ming had showed Mr James that it was a sound business venture. Mr Lawrence explained that his father expressed the view to him that Mr Ming was "flush with cash and appeared to be a good person to invest in". As a result of Mr Lawrence's view and expressions of concern regarding the loan, Mr James arranged a meeting with Mr Lawrence and Mr Ming. Eventually Mr Lawrence agreed to act as a surety and sign the necessary guarantee to the Bank".*

7. Mr James and Mr Lawrence had a meeting with the Bank. The sequence of events is described in the judgment as follows:

> *"13. In his affidavit Mr James confirms that upon meeting the officers from the Bank, they advised that Mr James and Mr Lawrence "should seek legal advice about the responsibilities of being a Guarantor for the loan". Mr Lawrence in his second affidavit accepts "that the bank representative, on behalf of HSBC, encouraged my father and I to obtain legal advice'. He states that the Bank advised them that "as guarantor, [the Bank] needed a letter stating that we were given legal advice"*
>
> *14. Both Mr James and Mr Lawrence accepted in cross examination that they were advised by the Bank to obtain independent legal representation before deciding whether to provide the guarantee to the Bank.*
>
> *15. According to the affidavit evidence of Susan Tessitore, filed on behalf of the Bank, she questioned Mr James as to why he was putting up the Property as security when he was not an owner in the business and did not appear to have any commercial interest in the transaction. Mr James advised Mrs Tessitore that he and Mr Ming were close friends and that he was assisting a friend. Mrs Tessitore, in accordance with standard Banking procedure, advised that both Mr James and Mr Lawrence need to obtain independent legal advice. In this case, she gave evidence, that the Bank went a step further and inserted a condition precedent in the Loan Facility dated 29 May 2008, that the Bank must receive a letter of opinion from a reputable attorney confirming that the terms of the Guarantee have been explained to Mr James and Mr Lawrence and that they professed to understand the same.*
>
> *16. Mrs Tessitore also suggested to Mr James that he should obtain all the information from Mr Ming regarding business financials, business plans and financial projections to review these with an accountant. She recalls emphasising that he should ensure that he is fully informed and seek guidance from an accountant in reviewing the business financial (sic) of the proposed venture, the company being purchased, as well as legal advice.*

17. *Mr James and Mr Lawrence gave evidence that the Bank did not recommend any lawyer or law firm they should consult for the purposes of obtaining independent legal advice. Mrs Tessitore accepted that this was the case and explained that this was in accordance with the Bank's policy. She explained that the Defendants seem to have misunderstood the meaning of independent legal advice. One of the important aspects of independent advice, she explained, is not just independent from the borrowers and the guarantors, but also between the Bank and the guarantors. This is why neither she nor her colleagues would have recommended a specific attorney or made arrangements for the meeting to take place because to do such would not be independent of the Bank. Instead, it would be for the guarantors, in this case the Defendants, to see an attorney of their choosing.*

18. *In his second affidavit, Mr Lawrence states that his father, Mr James, explained to him that Mr Ming had promised to pay him $50,000 per annum, during the duration of the terms of the Facility Letters. Mr Lawrence says that he was not to receive the benefit of any money but explains that he believes that the length of the Facility Letters was to be about eight years and therefore, "my father had hoped to receive some $400,000 over that period in exchange for serving as an additional guarantor on the commercial business loan".*

19. *Mr James and Mr Lawrence accepted that they made no mention to any representative of the Bank that as part of the arrangement to give the guarantee to the Bank, Mr James had agreed with Mr Ming that he would be paid $50,000 per annum and that for the duration of the Facility Letters Mr James expected to receive a sum in the region of $400,000. Mrs Tessitore confirmed that Mr James made no mention of this arrangement and that she had assumed, as she was told by Mr James, that the guarantee was being given by Mr James because of his friendship with Mr Ming.*

20. *Mr Lawrence's position is that he had concern about the wisdom of entering into this guarantee to the Bank. However, it is to be noted that no such concern was expressed either by Mr James or by Mr Lawrence to the representatives of the Bank at any of their meetings. In cross-examination, Mr James accepted that his son, Mr Lawrence, did not raise any concerns with the Bank in relation to the signing of the guarantee. Mr Lawrence himself accepted in cross examination that any concerns he had in relation to the entering into of the guarantee were not expressed in front of the Bank's representatives. Mrs Tessitore confirms this to be the case on behalf of the Bank.*

21. *Mr Lawrence did not assert that he advised any of the representatives of the Bank that his father was exerting undue influence or that he was in any way*

> *[being] pressured to sign the Guarantee. It was [the] clear evidence of Mrs Tessitore that at no time, did Mr Lawrence ever say, suggest or hint to her or was it apparent in her presence, that he was being pressured into acting as a guarantor in this transaction by his father. Her evidence is that had Mr Lawrence come to her and said that his father was pressuring him into the transaction, she would have notified her appropriate superiors right away and the Bank would have refused to accept the Defendants as guarantors.*
>
> *22. Mrs Tessitore also states that, given that Mr Lawrence was an employee of the Bank at that time, he had access to ask questions or raise concern of herself and/or any of her colleagues on the lending team if he had any concerns in relation to undue influence in executing the guarantee. She confirms that at no time did Mr Lawrence or any of her colleagues on his behalf, raise any such concerns with her. "*

DISCUSSION

8. The essential features, for present purposes, of that narrative are the following:

   (i) Both father and son were advised by the Bank to obtain independent legal advice before deciding to provide a guarantee. It is not suggested however, that they were told that as between them they may wish to get separate advice. The Bank did not recommend any particular law firm;

   (ii) So far as the Bank was aware, Mr James was agreeing to act as guarantor and put up the Property as security in order to assist Mr Ming, his friend. There was, so far as the Bank was aware, no commercial benefit to either father or son;

   (iii) The Bank suggested to Mr James that he should obtain all the relevant financial information and review it with an accountant;

   (iv) Mr Lawrence did not raise with the Bank any concerns about the wisdom of entering into the guarantee; nor did he say to the Bank that his father was exerting undue influence or that he was in any way being put under pressure to enter into the guarantee by his father.

9. Mr James and Mr Lawrence did seek legal advice from the law firm of Peniston & Associates. Mr James told Mr Ming of the meeting with the Bank officials and Mr Ming arranged for them to "*see the lawyer at Llewellyn Peniston's law firm*". There appear to have been two meetings with the Peniston law firm, although Mr Lawrence may have only been at one of them. Mr Ming attended both meetings (although the Bank never learnt that he did). Both Mr James and Mr Lawrence accept that at the relevant meeting at the Peniston law firm they were advised that in the event that there was a default on the loan they could lose the Property. In his second affidavit Mr Lawrence said:

> *"I accept that during our only meeting with Mr Peniston, Mr Peniston did explain that there was a risk, in the event that Mr Ming et al failed to make payments to HSBC, that our house could be seized as collateral. At no point, however, did Mr Peniston ever explained [sic] to us that not only could our house be taken, but that we would likely be held personally liable [for] the balance of any debts that remain payable pursuant to the Guarantee that we signed as referenced in the various Facility Letters".*

10. Peniston & Associates sent to the Bank two letters. The first, dated 4 June 2008, did not reflect the provision of the condition precedent in the loan facility letter of 29 May 2008 (the "First Facility Letter"). The second, dated 13 June 2008 did. It was signed by Mr Graveney Bannister and said:

> *"I hereby confirm that on the 11th day of June, 2008 I advised Mr Keimon Lawrence Mr Keith James of the terms of the Additional Guarantee and the Additional Guarantors' liabilities under the Additional Guarantee, Further Charge and Facility Letter dated May 29, 2008 from the Bank of Bermuda Limited to The Fitz Group Ltd and they profess to understand the same and accepted the opinion given to them".*

11. Both Mr James and Mr Lawrence executed the First Facility Letter in their capacities as Additional Guarantors, on 11 June 2008. The Borrower was to be The Fitz Group Ltd, a Bermuda company. The loan was to be an on-demand term loan of $3,666,666 and was to be made available for 8 years from drawdown. Repayments were to be debited to the Borrower's Current Account on a standing order basis on the 30th of June in each year (or the next working day). Mr James and Mr Lawrence signed the Guarantee on 13 June 2008. The First Facility Letter stated that the Purpose of the Loan was to assist with the purchase of the 80% of the share capital of GSC Ltd, a Bermudian company.

12. By an amendment to the First Facility Letter, dated 5 October 2010, and signed on behalf of the Borrower and by, *inter alios*, Mr Ming and the Defendants as guarantors, certain amendments were made to the loan. These included a provision that the facility was to be paid by monthly instalments which represented an amortisation schedule of 20 years; and an increase in the interest rate from 2% per annum above the Bank's Base Rate for Bermuda dollars to 2.5%. The amended Facility Letter contained this provision:

> *"The Borrower and/or the Guarantors (as applicable and appropriate) covenant with the Bank to comply with all existing covenants stated in the First Facility Letter, with the addition of the below stated covenant:*
>
> *1. Not to make any advances or transfers to any related entity operating outside of the jurisdiction of Bermuda, except in the normal day to day operation of the Borrower or GSC Limited operating a Bermuda based company and only with the Bank's prior written consent"*

13. There was a further amendment to the facility, dated 30 October 2012, signed in like manner as the amendment dated 5 October 2010.

14. Thereafter, as the Chief Justice recorded, the Bank sought to enforce the Guarantee as follows:

> *"31. In March 2016, Mr James and Mr Lawrence received a letter from the attorneys for the Bank dated 4 March 2016, which demanded full payment of the debt on behalf of HSBC. Mr James and Mr Lawrence were advised by the Bank that the borrower was not making payments and that as guarantors, they were now liable [for the] outstanding balance.*
>
> *32. In May 2016, Mr James and Mr Lawrence agreed to pay $4000 per month towards the debt and made those payments in May and June 2016. At the end of June 2016 they asked the Bank to increase the payments to $7000 which was to be deducted directly from Mr James' account. In total, Mr James and Mr Lawrence paid $134,000 towards satisfying their obligation under the Guarantee.*
>
> *33. Subsequently in 2017 the Bank informed Mr James and Mr Lawrence that the Bank was seeking possession of the Property."*

THE COMMON LAW ON UNDUE INFLUENCE

15. Mr Lawrence contends that he was unduly influenced by his father to enter into the guarantee. Mr Daniels, on his behalf, contended that the Bank did not take sufficient steps to protect Mr Lawrence's position and to ensure that he received adequate advice; and that the Bank should have insisted that Mr Lawrence obtain separate advice from Mr James.

16. The question as to what steps a Bank needs to take in order to protect itself against claims of undue influence by a surety has been the subject of much consideration by Courts at the highest Level, in particular in the cases of *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180 and *Royal Bank of Scotland Plc v Etridge (No 2*) [2002] 2 A.C. 773.

17. The classic case in which the question arises is where a debtor husband arranges for his wife to stand as surety for his debts, or that of his business. The Courts have sought to lay down a procedure by which, if it is followed, the Bank may obtain protection from any such claims whist the surety will (or should) obtain adequate advice from an independent lawyer, so that he or she is protected.

18. The judge summarised what he described as the relevant legal landscape in the following terms:

> *"40. Lord Nicholls* [in Etridge] *recognised that in the ordinary course a bank which takes a guarantee security from the wife of its customer will be entirely ignorant of any undue influence the customer may have exercised in order to secure the wife's consent. However, there are circumstances when the bank is put on enquiry:*

"44. In O'Brien the House considered the circumstances in which a bank, or other creditor, is 'put on inquiry.' 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. The House set a low level for the threshold which must be crossed before a bank is put on inquiry. For practical reasons the level is set much lower than is required to satisfy a court that, failing contrary evidence, the court may infer that the transaction was procured by undue influence. Lord Browne-Wilkinson said ([1994] 1 AC 180, 196):

'Therefore in my judgment a creditor in (sic) put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (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 entitles the wife to set aside the transaction.' In my view, this passage, read in context, is to be taken to mean, quite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts."

41. Lord Nicholls recognised at [51] that the banks are unwilling to assume the responsibility of advising the wife at a private meeting with the banks representatives:

> *"Instead, the banking practice remains, as before, that in general the bank requires a wife to seek legal advice. The bank seeks written confirmation from a solicitor that he has explained the nature and effect of the document to the wife".*

42. Lord Scott also appeared to be of the view that the bank's requirement that the wife take independent legal advice was sufficient to insulate the bank from the effects of any undue influence:

"191. 3. If the wife's consent has in fact been procured by undue influence or misrepresentation, the bank may not rely on her apparent consent unless it has good reason to believe that she understands the nature and effect of the transaction.

4. Unless the case has some special feature, the bank's knowledge that a solicitor is acting for the wife and has advised her about the nature and effect of the transaction will provide a good reason for the purposes of 3 above. That will also be so if the bank has a reasonable belief that a solicitor is acting for her and has so advised her. Written confirmation

> *by a solicitor acting for the wife that he has so advised her will entitle the bank to hold that reasonable belief."*

19. The judge found that, in the present case, the Bank had taken reasonable precautions on the following basis. First, it advised Mr James and Mr Lawrence to seek independent legal advice. Second, it introduced a special condition precedent in the First Facility Letter which required that before the Bank would make the loan, the Bank would have to be provided with "*a letter of opinion from a, reputable attorney confirming that the terms of the Additional Guarantee and the Additional Guarantors' liabilities under the Additional Guarantee, this Letter and the Further Charge had been explained to [Mr James and Mr Lawrence] and that they professed to understand the same*". Third, Mr James and Mr Lawrence sought legal advice and were advised that in the event of default there was a risk that both of them could lose the Property. Fourth, the Bank received the latter of 13 June 2008 from Peniston & Associates who appeared to be independent attorneys in the sense that they did not act for the Borrower, which was represented by Trott & Duncan.

20. In all the circumstances, the judge found, the Bank had done enough to insulate itself from the consequences of any undue influence on Mr James and Mr Lawrence by the borrower, Mr Ming. The fact that Mr Ming had introduced Mr James and Mr Lawrence to Peniston & Associates and attended the meeting with them; and that Mr James and Mr Lawrence allegedly did not receive adequate advice from the firm could not affect the rights of the Bank under the Guarantee because the Bank was unaware of these matters. The judge accepted the evidence of Ms Tessitore as to the advice she had given to Mr James to obtain the requisite financial information and seek guidance from an accountant. In short, he held that the Bank had taken all reasonable steps which it could be expected to take and that none of the complaints made about lack of competent legal advice could affect the rights of the Bank under the Guarantee,

21. Up to this point in his judgment the judge had been considering potential undue influence by the debtor. He then turned to the issue of undue influence by Mr James over Mr Lawrence, and the contention that the Bank was on notice that Mr Lawrence might be under such influence. As to that he said this:

> *"57. The assertion that the Bank should have had constructive notice that one joint guarantor may be exercising undue influence over the other joint guarantor is conceptually different from the tripartite relationship envisaged in Barclays Bank PLC v O'Brien [1994] 1 AC 180 and in Etridge. As Lord Nicholls makes clear in Etridge, it is the disadvantageous nature of the transaction* ***between the borrower and the surety*** *which gives rise to constructive notice on part of the bank:*
>
> > *"43. The route selected in O'Brien ought not to have an unsettling effect on established principles of contract. O'Brien concerned suretyship transactions. These are tripartite transactions. They involve the debtor as well as the creditor and the guarantor. The guarantor enters into the*

transaction at the request of the debtor. The guarantor assumes obligations. On the face of the transaction the guarantor usually receives no benefit in return, unless the guarantee is being given on a commercial basis. Leaving aside cases where the relationship between the surety and the debtor is commercial, a guarantee transaction is one-sided so far as the guarantor is concerned. The creditor knows this. Thus the decision in O'Brien is directed at a class of contracts which has special features of its own. That said, I must at a later stage in this speech return to the question of the wider implications of the O'Brien decision.

The threshold: when the bank is put on inquiry

44. In O'Brien the House considered the circumstances in which a bank, or other creditor, is 'put on inquiry.' 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. The House set a low level for the threshold which must be crossed before a bank is put on inquiry. For practical reasons the level is set much lower than is required to satisfy a court that, failing contrary evidence, the court may infer that the transaction was procured by undue influence. Lord Browne-Wilkinson said ([1994] 1 AC 180, 196):

'Therefore in my judgment a creditor in (sic) put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (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 entitles the wife to set aside the transaction.'

In my view, this passage, read in context, is to be taken to mean, quite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts."

58. Here of course there is no disadvantageous transaction between Mr James and Mr Lawrence. They are both on the same side of the transaction, both being joint sureties. In the circumstances it is not clear how, if at all, the reasoning of cases such as O'Brien and Etridge applies to the relationship between Mr James and Mr Lawrence.

59. Leaving aside the conceptual difficulty the factual basis for saying that the Bank should have been put on enquiry is the fact that Mr James had agreed to

> *become a surety in consideration of being paid $50,000 and whilst Mr Lawrence was not receiving any such payment. However, it is agreed by all concerned that the Bank was not apprised of the fact that Mr James was receiving such a payment from Mr Ming. Mr Lawrence told the Court that he did not advise the Bank that Mr James had agreed to become a surety in exchange for payment of $50,000 per annum. This accords with the evidence of Mrs Tessitore in relation to this issue. Indeed it was the evidence of Mr James that his son, Mr Lawrence, did not raise any issues with the representatives of the Bank in relation to the signing of the guarantee. Mr Lawrence himself accepted that he did not express any concerns with the representatives of the Bank in relation to entering into the guarantee. In the circumstances there was no reason for the Bank to be on notice or suspect that James was entering into the guarantee for commercial reasons whilst Mr Lawrence was doing so at the request of his father, Mr James."*

22. In effect the judge was finding that the Bank was not put on inquiry that Mr Lawrence had been unduly influenced by his father.

23. Unfortunately, the judge did not have drawn to his attention the decision of the English Court of Appeal in *First National Bank plc v Achampong and others* [2003] EWCA Civ 487. In that case Mr and Mrs Achampong charged their property by way of mortgage as security for a loan by a bank to Mr and Mrs Owasu-Ansah (or at least to Mr Owusu-Ansah). Mr Achampong said that she was induced to agree to the charge by the undue influence of her husband, as the first instance judge found to be the case. In other words, the undue influence relied on was by one surety upon another.

24. In the course of his judgment Blackburne, J, giving the judgment of the court, which consisted of himself and Arden LJ (as she then was), said this:

> *"The first ground of appeal*
>
> *21. It is to be noted that, although this was an issue in the court below, the bank does not assert as part of this ground of appeal that it was not "put on inquiry" (that Mrs Achampong's execution of the legal charge was procured by the undue influence or other wrong of her husband). In undue influence cases of this kind, the plea is typically raised where a wife offers to stand surety for her husband's debts (or the debts of her husband's business). The courts have recognised, however, that the O'Brien principle (Barclays Bank plc v O'Brien [1994] 1 AC 180) is not so limited but can extend to other relationships. Here, husband and wife were together agreeing to stand surety (by charging the property) for a third party (Mr Owusu-Ansah or, strictly, Mr Owusu-Ansah and his wife). Yet the complaint which is made by Mrs Achampong is of undue influence on her exerted by her husband, in effect, her co-surety. She does not*

complain of any undue influence or other wrongful conduct on the part of Mr Owusu-Ansah.

22. *But, as Lord Nicholls observed in Royal Bank of Scotland plc v Etridge No 2) [2002] 2AC 773 in a section of his opinion entitled "a wider principle" (paragraphs 82 to 89):*

"87. These considerations point forcibly to the conclusion that there is no rational cut-off point, with certain types of relationships being susceptible to the O'Brien principle and others not. Further, if a bank is not to be required to evaluate the extent to which its customer has influence over a proposed guarantor, ***the only practical way forward is to regard banks as "put on inquiry" in every case where the relationship between the surety and the debtor is non-commercial****. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing surety. As a measure of protection, this is valuable. But, in all conscience, it is a modest burden for banks and other lenders. It is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual. If the bank or other creditor does not take these steps, it is deemed to have notice of any claim the guarantor may have that the transaction was procured by undue influence or misrepresentation on the part of the debtor.*

88. Different considerations apply where the relationship between the debtor and guarantor is commercial, as where a guarantor is being paid a fee, or a company is guaranteeing the debts of another company in the same group. Those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees."

(Bold added in this as in other citations)

23. *Here, the relationship between debtor and guarantor was, on its face, non-commercial. The bank, as the judge held, was put on inquiry. The fact, that, as it happened, the undue influence which the judge found to have existed came not from Mr Owusu-Ansah (in effect the debtor) but from Mr Achampong (as one of the co-guarantors) did not the less put the bank on inquiry. Why Mr Achampong should have pressured his wife into executing the legal charge, as the judge held had happened and against which finding there is no appeal, is and must remain a matter of speculation. It may be no more than a coincidence that, shortly after the transaction was completed, Mr Achampong left this country for Ghana as did Mr Owusu-Ansah."*

25. It is apparent from that judgment, which builds on the observations of Lord Nichols in *Etridge* that the Bank is put on inquiry whenever the relationship between the surety and the debtor is non-commercial. That is the factual basis for putting the Bank in that position. In the present case, so far as the Bank was aware, the relationship between the debtor and both sureties was non-commercial. It was, therefore, put on inquiry as to whether there was any undue influence. Since (unbeknownst to the Bank) the relationship between Mr James and Mr Ming was, in fact, commercial, Mr James could not rely on the doctrine of undue influence. But Mr Lawrence could. Further, as *Achampong* shows, the bank is put on inquiry, where the relationship between debtor and surety is on its face non-commercial even if the undue influence relied on is by one surety against another.

26. I see no good reason why that principle should only apply if the co-sureties are spouses or partners. The principle is of particular importance in a case in which a father is poised to agree to guarantee a very large sum in order to help his friend and where the co-guarantor is to be his son, in respect of whom it is not apparent why he should subscribe to the guarantee and a charge of property of which he is joint owner, save to oblige his father, and when it is well recognised that the relationship between parent and child may give rise to undue influence of the one upon the other: see Lord Nicholls at [10] of *Etridge.*

WHAT DOES THE BANK HAVE TO DO?

27. The decision in *Etridge* laid down some guidance as to what banks need to do in order to secure the necessary protection against claims of undue influence. In this respect it is material to note that the two major speeches – those of Lord Nicholls and Lord Scott – are not identical in content, although they are similar. At paragraphs 2-3 of his speech Lord Bingham said this:

> "*2 The transactions which give rise to these appeals are commonplace but of great social and economic importance. It is important that a wife (or anyone in a like position) should not charge her interest in the matrimonial home to secure the borrowing of her husband (or anyone in a like position) without fully understanding the nature and effect of the proposed transaction and that the decision is hers, to agree or not to agree. It is important that lenders should feel able to advance money, in run-of-the-mill cases with no abnormal features, on the security of the wife's interest in the matrimonial home in reasonable confidence that, if appropriate procedures have been followed in obtaining the security, it will be enforceable if the need for enforcement arises. The law must afford both parties a measure of protection. It cannot prescribe a code which will be proof against error, misunderstanding or mishap. But it can indicate minimum requirements which, if met, will reduce the risk of error, misunderstanding or mishap to an acceptable level. The paramount need in this important field is that these minimum requirements should be clear, simple and practically operable.*

3 *My Lords, in my respectful opinion these minimum requirements are clearly identified in the opinions of my noble and learned friends Lord Nicholls of Birkenhead and Lord Scott of Foscote. If 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. While the opinions of Lord Nicholls and Lord Scott show some difference of expression and approach, I do not myself discern any significant difference of legal principle applicable to these cases, and I agree with both opinions. But if I am wrong and such differences exist,* ***it is plain that the opinion of Lord Nicholls commands the unqualified support of all members of the House.***

In those circumstances it seems to me right to look at what Lord Nicholls said in this respect.

28. At paragraphs 79-80 Lord Nicholls said this:

"79 *I now return to the steps a bank should take when it has been put on inquiry and for its protection is looking to the fact that the wife has been advised independently by a solicitor.*

(1) One of the unsatisfactory features in some of the cases is the late stage at which the wife first became involved in the transaction. In practice she had no opportunity to express a view on the identity of the solicitor who advised her. She did not even know that the purpose for which the solicitor was giving her advice was to enable him to send, on her behalf, the protective confirmation sought by the bank. Usually the solicitor acted for both husband and wife.

Since the bank is looking for its protection to legal advice given to the wife by a solicitor who, in this respect, is acting solely for her, I consider the bank should take steps to check directly with the wife the name of the solicitor she wishes to act for her. ***To this end, in future the bank should communicate directly with the wife, informing her that for its own protection it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. She should be told that the purpose of this requirement is that thereafter she should not be able to dispute she is legally bound by the documents once she has signed them. She should be asked to nominate a solicitor whom she is willing to instruct to advise her, separately from her husband, and act for her in giving the necessary confirmation to the bank. She should be told that, if she wishes, the solicitor may be the same solicitor as is acting for her husband in the transaction. If a solicitor is already acting for the husband and the wife, she should be asked***

whether she would prefer that a different solicitor should act for her regarding the bank's requirement for confirmation from a solicitor.

The bank should not proceed with the transaction until it has received an appropriate response directly from the wife.

(2) Representatives of the bank are likely to have a much better picture of the husband's financial affairs than the solicitor. If the bank is not willing to undertake the task of explanation itself ***, the bank must provide the solicitor with the financial information he needs for this purpose****. Accordingly, it should become routine practice for banks, if relying on confirmation from a solicitor for their protection, to send to the solicitor* ***the necessary financial information****.* ***What is required must depend on the facts of the case.*** *Ordinarily this* **will include** *information on the purpose for which the proposed new facility has been requested, the current amount of the husband's indebtedness, the amount of his current overdraft facility, and the amount and terms of any new facility. If the bank's request for security arose from a written application by the husband for a facility, a copy of the application should be sent to the solicitor.* ***The bank will, of course, need first to obtain the consent of its customer to this circulation of confidential information. If this consent is not forthcoming the transaction will not be able to proceed.***

(3) Exceptionally there may be a case where the bank believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will. If such a case occurs the bank must inform the wife's solicitors of the facts giving rise to its belief or suspicion.

(4) ***The bank should in every case obtain from the wife's solicitor a written confirmation to the effect mentioned above.***

80 These steps will be applicable to future transactions. In respect of past transactions, the bank will ordinarily be regarded as having discharged its obligations if a solicitor who was acting for the wife in the transaction gave the bank confirmation to the effect that he had brought home to the wife the risks she was running by standing as surety.

29. These observations were written in the context of the undue influence being that of the debtor husband. But since the undue influence, on which the Bank is put on inquiry, can be that of a co-surety it seems to me that these provisions must apply, *mutatis mutandis*, to such a situation.

30. I accept that the words of Lord Nicholls are not to be treated as if they were the words of a statute. At the same time, he was laying down the steps (or, as Lord Bingham put it, the minimum requirements)

which a bank should take; and substantial compliance was, in my judgment necessary, if the Bank was to be enabled to insulate itself from any undue influence that may have been exerted.

31. I note, also that at [100] Lord Hobhouse said:

> "*To the end that lenders, those advising parties and, indeed, judges should have clear statements of the law on which to base themselves, I will state at the outset that in this speech I shall agree with my noble and learned friend Lord Nicholls and, specifically, the guidance which he gives concerning the role of the burden of proof, the duties of solicitors towards their clients (paragraphs 64-68, and paragraph 74)**, and the steps which a lender which has been put on enquiry should take (paragraph 79). I would stress that this guidance should not be treated as optional, to be watered down when it proves inconvenient (as may be thought to have been the fate of Lord Browne-Wilkinson's equally carefully crafted scheme)**. Nor should it be regarded as something which will only apply to future transactions; it has represented, and continues to represent, the reasonable response to being put on enquiry. The purpose of guidance is to provide certainty for those who rely upon and conform to the requirements of that guidance: it is not a licence to excuse unreasonable conduct on the ground that no judge had previously told them in express terms what was not an adequate response…."*

32. In his speech Lord Scott indicated that the bank need disclose to the co-surety no more than the amount of the existing indebtedness of the principal debtor to the bank and the amount of the proposed new loan or drawing facility – see 191 (9). But, as it seems to me the speech of Lord Nicholls went further than that.

33. In the present case the Bank learnt the name of the lawyers who were, in the event, involved. But what the procedure outlined called for in the present case, as it seems to me, was, firstly, that the Bank should communicate directly with Mr Lawrence informing him that, for its own protection, the Bank would require confirmation from a solicitor acting for him to the effect that the solicitor had fully explained the nature of the documents and the practical implications they will have for him and that the purpose of that requirement is that he should not be able later to dispute that he is legally bound by the documentation. The Bank should not proceed with the transaction until it had received an appropriate response from Mr Lawrence directly. An appropriate response would, in my judgement be one which indicated that Mr Lawrence had understood what the Bank was seeking and why it was seeking it. Moreover, it seems to me that he should have been asked, or at least invited, to nominate an attorney who was completely separate from Mr Ming or his father; but told that the attorney could be the same attorney as was acting for either of them, if that is what he preferred.

34. I do not regard such requirements as formalities failure to comply with which is of no consequence. As was said in *HSBC Bank PLC v Catherine Mary Brown* [2015] EWHC 359 (Ch):

> "*62 Preliminary steps to be taken by HSBC*

> *I have not been referred to any evidence from which I can reasonably conclude on the balance of probabilities that HSBC informed Mrs Brown that (1) for its own protection it required her to nominate a solicitor who would, after advising her, provide HSBC with written confirmation that the nature of the 2002 Charge and its practical implications had been fully explained to her, and (2) the purpose of this requirement was to prevent Mrs Brown from subsequently disputing that 2002 Charge is legally binding. Quite apart from the absence of documentary evidence, I observe that Mr Warburton makes no reference to any such step being taken by HSBC; His evidence is*
>
> > *"... [HSBC] required Mrs Brown to obtain independent legal advice prior to entering into the [2002 Charge].*
> >
> > *[HSBC] asks the proposed security provider for details of their nominated firm of solicitors".*
>
> *63 Communication of the purpose underlying the requirement that a surety obtain legal advice is an essential preliminary step and HSBC ought not to have proceeded with the transaction until it had taken that step and received an appropriate response from Mrs Brown. Communication of the purpose is no mere technicality or formality; it puts the surety on notice of the seriousness of the transaction and drives home the reason for requirement that the surety is to obtain independent advice"*

35. The reason why communication of the purpose underlying the requirement and receipt of a direct response from the surety is important is, as stated, that it alerts the surety to the seriousness of the transaction and the need for him to consider his personal position, with advice that may appropriately be completely independent of the borrower or another guarantor. That itself may encourage the individual who is said to have been under the undue influence of someone else to take steps that extract him from such influence.

36. The Bank advised the Defendants to get legal advice and that it required a letter saying that they had been given legal advice, but, being from its perspective aware that the transaction was non-commercial in nature, it does not appear to have fulfilled any other of the requirements by way of (a) communicating directly with Mr Lawrence in the terms contemplated; (b) raising the question of separate representation as between Mr James and Mr Lawrence; or (c) receiving a response directly from Mr Lawrence.

37. Paragraph 79 (2) makes plain that the Bank needs to provide the necessary financial information to the solicitors. The Bank did not do this. *Etridge* indicates that what is required must depend on the facts of the case and will ordinarily include information on the purpose for which the proposed new facility had been requested and the current amount of the husband's indebtedness and of his current

overdraft facility and the amount and terms of any new facility. The attorneys in the present case must have been aware of the purpose of the new facility and its terms since they are specified in the First Facility Letter. But the Bank, which was proposing to lend over $ 3.6 million must have had, to use Lord Nicholls words "*a much better picture of the… financial affairs*" of the relevant persons. These would include the actual borrowers – The FITZ Group Ltd - and, probably, Mr Ming if the actual borrower is just an SPV and the *alter ego* of Mr Ming, who is a guarantor of the facility so that he was, in commercial reality, the Borrower.

38. That the Bank had relevant financial information is apparent from the evidence of Mrs Tessitore (see paragraph [16] of the judgment cited at [7] above). At paragraph 13 of her affidavit said that it was not appropriate for the Bank to disclose financial information regarding a borrower to third party guarantors because to do so would breach confidentiality. But what *Etridge* makes plain is that the relevant financial information is to be provided <u>to the solicitor</u> and that, if the customer does not give consent to the release of confidential information, the transaction is not to go ahead.

39. Given that the Bank provided no financial information at all, I do not think it profitable to consider the precise ambit of the financial information that should have been provided; but it would be likely to include any application for funds on the part of the Borrower, any cash flow projections for servicing the debt, any relevant accounts of the Borrower, and details of the overall borrowing of The Fitz Group Ltd and Mr Ming, together with at least some of the business financials to which Mrs Tessitore referred. The Bank was in the best position to judge what a solicitor would need to see.

40. Lastly the Bank needs to receive a written confirmation that the solicitor has fully explained the nature of the documents and the practical implications that they will have for the surety. In other passages in the speeches in *Etridge* it is said that what a bank needs is confirmation:

(i) that the solicitor has "*brought home to the wife the risks that she was running by standing as surety*": see Lord Nicholls at paragraph 80 in relation to past transactions (the test in relation to future transactions being stricter)*;*

(ii) *" that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction*" _ Lord Nicholls at paragraph 54;

(iii) that the solicitor has given an adequate explanation of the nature and effect of the transaction – Lord Bingham at [2] and Lord Scott at [167 (1)] and [168] and [171].

41. The letter provided by Peniston & Associates was not in those terms. It said that the attorneys had advised the sureties of the terms of the Additional Guarantee and the Additional Guarantors' liabilities under the Additional Guarantee, Further Charge and Facility Letter and that they profess to understand the same and accepted the opinion given to them. I do not regard such a confirmation as going far enough. The whole point of requiring the solicitors to be given the requisite financial information must be so that they can give some advice as to the nature of what the surety is letting himself in for in commercial terms. To give such advice requires more than a consideration of the terms provided for

by the instrument and the liabilities arising from the terms. If that was all that was needed it is difficult to see what purpose is served by providing the financial information. The meaning of the terms and the liabilities to which they give rise does not depend on any financial information. The solicitor/attorney must be provided with this information in order to be able to give some advice as to the extent of the risks that the surety is taking if he enters into a guarantee. There is an obvious difference between the risks and practical implications of guaranteeing the debt of some person who has no other debts to the Bank and strong cash flow prospects and the debt of a person who does have such debts and for whom the cash flow prospects are dubious.,

42. I bear in mind when reaching this conclusion what Lord Hobhouse said in *Etridge* at [115]:

> "*Another consequence of using solicitors is the risk of confusion about what the solicitor's role is to be. The solicitor will normally have been instructed by the bank to act for it. The solicitor will often already be acting for the husband. The solicitor may not be acting for the wife at all, let alone separately and independently from the solicitor's other clients* ***. Similarly, the solicitor's instructions may simply be to explain to the signatories the character and legal effect of the documents. This is a low order of advice which can be given solely by reference to the formal documents to be signed."***

43. It seems to me apparent that Lord Nicholls, when he spoke of the need for the Bank to receive confirmation that the solicitor had fully explained both the nature of the documents and the practical implications, was not contemplating that the advice to be given (of which the Bank needed confirmation) was advice that could be given solely by reference to, or as to the nature of, the formal documents; but included advice in relation to which the financial documents, which he required to be provided, were relevant.

44. As I have said, Lord Nicholls' words are not to be read as a statute. Substantial compliance may be sufficient. But, in the present case, there was not, in my judgment, substantial compliance, not least because of the failure to raise with Mr Lawrence the prospect of representation separate from his father, and because of the failure to provide any financial information at all.

CONCLUSION

45. Accordingly, in my judgment the Bank had not done enough to insulate itself from the consequences of any undue influence on Mr Lawrence by his father. As a result, the default judgment should be set aside and the matter remitted to the Supreme Court to determine whether or not Mr Lawrence in fact entered into the transaction under the undue influence of his father. In the light of the manner in which the case was addressed below, without objection from either side, it does not seem to me open to the Bank hereafter to contend that it had in fact successfully insulated itself from the consequences of any undue influence there may have been, and whether, in this connection, the doctrine of laches has any application at all.

46. Subject to any further argument, it seems to me that the Bank should undertake not to sell, and, if it does not, we should order that the Bank be restrained from selling, the Property until further order of the Supreme Court. It may be that the Bank will seek to argue that there should be a sale of the Property so that the Bank can obtain the value of Mr James' interest in the Property. If the Court determines that that should take place, it will be open to the Court to amend the order or, if the matter has proceeded by way of undertaking, to release the Bank, in part, from that undertaking.

47. The Appellant suggests that it was incumbent on the Bank to ensure that Mr Lawrence was separately represented. I do not agree. *Etridge* makes plain that it is not, ordinarily speaking, incumbent on a bank to insist that the surety be represented separately from the debtor; and the same must apply in relation to a co-surety. The position would be different if there was some reason known to the Bank for suspecting undue influence by the co-surety: see Lord Scott at [174]. His observations related to undue influence by the debtor husband, but would seem to me to be equally applicable where the bank suspects that there has been undue influence by one surety on another.

48. The Appellant included in his skeleton argument, but not in his notice of appeal, as his ground 5, the contention that the Bank failed to inform Mr Lawrence of the failure of the borrower to make payment towards the principal and interest and the reason why it felt compelled to add a covenant in the 2010 Facility Letter which suggested that the Borrower was not meeting its obligations. Further the Bank had a duty to inform the Appellant as to the reason for the changes made in the 2010 Facility Letter and to encourage him to obtain further independent legal advice. If it had done so, and had the Appellant refused to sign the 2010 Facility Letter the consequence would be that the debt was payable by May/June 2016 so that, the Bank's claim would, at least in part, be time barred, since the proceedings were only commenced in January 2017.

49. I do not regard these points as having any arguable basis. Under the terms of the Guarantee the guarantors were due to pay the Bank upon demand "*all and every sum of money which now or shall at any time hereafter be owing by the Customer to the bank, including all interest.*" The demand was only made in March 2016. The 2017 action was not, therefore out of time. Further the obligation under the Guarantee was as stated and even if the Bank was not entitled, as against Mr Lawrence to rely on the terms of the 2010 and 2012 amendments, the terms of the Guarantee themselves obliged Mr Lawrence to pay the Bank, up to the amount of the guarantee any sum, which became due and owing by the Customer to the Bank. This would cover sums (such as the increased interest) which only became due under the 2010 and 2012 amended Facility Letters. I would not, therefore, give the appellant leave to add this ground to his appeal.

50. Insofar as the appeal is against the refusal of an injunction it could be said to be an appeal against an interlocutory matter which requires leave (from, in the first instance the Supreme Court, which has never been sought either within the 14 days stipulated (Order 2 Rules 3 (1) (a) or at all, or, after refusal by the Supreme Court, which has never occurred, by this Court).That could, also, be said to be the case in relation to the application to set aside the default judgment, if the relevant test is whether, whichever the way the Chief Justice had ruled, the case would have been finally determined. I do not

think it necessary to address these issues. I propose that we should grant any leave, and any extension of time that may be necessary, pursuant to Order1 Rule 5.

SMELLIE JA

51. I have had the benefit of reading my Lord President's judgment in draft, and I agree. The appeal should be allowed.

GLOSTER JA

52. I also agree.