THE FAMILY HOME PROTECTION ACT: THE PRACTICAL IMPLICATIONS OF BANK OF IRELAND V SMYTH

PART ONE

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On the 19th of November 1995, the Supreme Court delivered its long-awaited judgment in *Bank of Ireland* v *Smyth*.[1] The case concerned the requirements for the validity of a consent under the Family Home Protection Act, 1976. The Supreme Court held that a consent would not be valid unless it could be shown to have been free and fully informed. This decision will create a number of problems for practitioners involved in lending transactions and in the conveyancing of residential property. These practical difficulties will be explored in this two-part article and an attempt will be made to suggest possible solutions.

Part One of the article will examine the judgment of the Supreme Court and will consider the implications of the Court's interpretation of the Family Home Protection Act, 1976 in the context of mortgages and charges over the family home. Part Two, which will appear in the next issue of this journal, will address the impact of *Smyth* on a variety of wider issues.

THE FACTS AND THE DECISION OF THE HIGH COURT

Mr Smyth was the registered owner of a property in Co Tipperary. With the prior written consent of Mrs Smyth, he gave a charge over the property to the plaintiff bank. When the lender sought to rely on its charge, it was argued *inter alia* that Mrs Smyth's consent was

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1 [1996] 1 ILRM 241.

not valid for the purposes of the Family Home Protection Act, 1976 because it was given without independent legal advice and without a proper understanding of the transaction. The family home was situated on a 124 acre farm but the bank official had not explained clearly to Mrs Smyth that the family home, as well as the farm, might be sold if the charge had to be enforced. In the High Court,[2] Geoghegan J relied on the judgment of the English Court of Appeal in *Barclays Bank* v *O'Brien*,[3] a case which dealt with the validity of a guarantee given by a wife to cover the business debts of her husband. The learned judge accepted on the basis of *O'Brien* that the bank had owed a duty to Mrs Smyth to ensure that she was giving a free and fully-informed consent. He upheld the defence based on Mrs Smyth's lack of understanding and refused the order for possession sought by the bank.

Not long after the decision of the High Court, the House of Lords rejected the Court of Appeal's approach in *O'Brien*.[4] Perhaps encouraged by the fact that the foundation of Geoghegan J's decision has thus been undermined, the Bank of Ireland appealed the *Smyth* case to the Supreme Court.

THE SUPREME COURT JUDGMENT

The Supreme Court[5] upheld the decision of Geoghegan J in the High Court. Blayney J gave the sole judgment, with Hamilton CJ and Egan J concurring. Somewhat surprisingly,

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2 [1993] 2 IR 102. For discussion, see Mee "Family Home - Consents, Guarantees and the 'Badge of Shame'" (1994) 16 Dublin University Law Journal 197.

3 [1993] QB 109.

4 [1994] 1 AC 180.

5 [1996] 1 ILRM 241.

the Supreme Court did not even mention the *O'Brien* case, which had been so influential in the High Court. Instead, the Court focused its judgment on the provisions of the Family Home Protection Act, 1976.

The central question to be decided was whether Mrs Smyth's consent was valid, notwithstanding the fact that she had not fully understood the transaction to which she was consenting. Blayney J believed that the onus of proof lay on the bank to establish the validity of the consent. He noted[6] that the Courts had not yet considered the requirements with which a consent must comply in order to be valid. He felt that the requirements had to be deduced from the object of the Family Home Protection Act, the dicta of the Court explaining that object and also from the authorities discussing the requirements laid down for consents in other legal contexts.

Blayney J began his analysis by looking at the object of the Family Home Protection Act, which was to protect the family home. He quoted from the judgments on the Act given by the Supreme Court in *Dunne* v *Hamilton*[7] and *Somers* v *W.*[8] From these judgments, Blayney J concluded that the Act's protection of the home was for the benefit of the family, not simply for the spouse.

Blayney J then examined the requirements for a valid consent in other legal contexts. Quoting from *N (otherwise K)* v *K*[9] (on nullity of marriage) and *G* v *An Bord Uchtala*[10] (adoption), Blayney J concluded that consents in these other areas had to be "informed" and

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6 *Ibid*, 246.

7 [1982] IR 466.

8 [1979] IR 94.

9 [1986] ILRM 75.

10 [1980] IR 32.

"based on adequate knowledge". While Blayney J accepted that the consequences of a consent under the Family Home Protection Act were not as far-reaching as the consequences of a consent to marry or place a child for adoption, he felt that the requirement of an informed consent under the Family Home Protection Act also needed to be "a fully informed consent".

Blayney J's conclusion was therefore that Mrs Smyth's consent, because it was not fully informed, was invalid. The bank could not enforce its charge because it had constructive notice of Mrs Smyth's lack of knowledge. The bank was fixed with this constructive notice because its representative had failed to inquire of Mrs Smyth as to her understanding of the transaction to which she was consenting. Such an inquiry would, in the opinion of Blayney J, have been reasonable in the circumstances of the case.

Finally, Blayney J declined to consider an argument raised by the bank for the first time before the Supreme Court, to the effect that the charge could be severed and treated as void in relation to the family home only. Counsel for the bank had supported this argument by reference to the unreported decision of Johnson J in *Bank of Ireland* v *Slevin*.[11] However, since the argument had not been considered by the High Court, Blayney J felt that it would not be proper for the Supreme Court to address the matter. He indicated that his inclination would be to reject the severance argument, although he preferred to reserve the point for decision in a case where the matter was fully argued.[12]

IMPLICATIONS OF THE JUDGMENT IN RELATION TO MORTGAGES AND CHARGES OVER THE FAMILY HOME

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[11] High Court, 16th February, 1989.

[12] Note that in her recent reserved judgment in *AIB* v *O'Neill* unreported, December 13 1995, Laffoy J took a different view to the one provisionally expressed by Blayney J. She held that severance was possible, so that the bank's charge was void only in relation to the family home.

The *Smyth* case will have serious implications for practitioners who carry out conveyancing. Blayney J made it clear that a consent would be invalid unless it is free and "fully informed". The burden of proof lies on the person seeking to rely on the consent.[13] A consent can be invalid notwithstanding the absence of undue influence, misrepresentation or other equitable wrong. Nor is it strictly speaking necessary that person relying on the consent was at fault in relation to the inadequate understanding of the person giving the consent: as Blayney J stated, "the validity of the consent depends solely on whether [the spouse] had full knowledge of what she was doing."[14]

(i) Protection for the Purchaser for Full Value without Notice

At first glance, the Supreme Court's decision in *Smyth* leaves a person taking a mortgage or charge over the family home in an extremely perilous position. However, an important protection is provided by s 3(1)(a) of the Family Home Protection Act, which states that a conveyance to a purchaser for full value without notice[15] will not be void

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13 This point was recently confirmed by the Supreme Court in *Allied Irish Banks plc* v *Finnegan and Finnegan* unreported, February 16 1996. The case concerned a family home which was held in the sole name of Mr Finnegan. The house had been acquired with the help of a £100,000 mortgage. Although Mrs Finnegan had signed a document consenting to the creation of the mortgage, she claimed in her affidavit that she had believed the document to be a formality connected with putting the home into the joint names of herself and her husband. In his affidavit, her husband's solicitor strenuously denied her account of events. In the High Court (unreported, July 11 1995), Carroll J granted an order for possession to the bank. On appeal, Blayney J (speaking for the Supreme Court) emphasised that the burden of proof lay on the bank to establish the validity of Mrs Finnegan's consent. Blayney J held that it was necessary to resolve the conflict of evidence between Mrs Finnegan and the solicitor. He therefore remitted the case to be determined by the High Court at a plenary hearing on oral evidence.

14 [1996] 1 ILRM 241, 249.

15 The requirement that the purchaser take without notice is found in s 3(6) of the Act, as interpreted by the Supreme Court in *Somers* v *W* [1979] IR 94.

notwithstanding the absence of a valid consent.

A serious preliminary problem is created by the fact that this protection is only available to a purchaser for "full value". "Full value" is defined in s 3(5) as "such value as amounts or approximates to the value of that for which it is given". It seems obvious that a purchaser who acquires a family home at substantially less than its market value does not give "full value". Unfortunately, as noted by Geoghegan J at High Court level in *Smyth*,[16] the meaning of "full value" in the context of mortgages remains obscure. However, if the statutory provisions are to make any sense in this context, there must be some cases where a mortgagee will be deemed to have given less than full value. It is arguable, although by no means clear, that full value is not given by someone who takes a mortgage to cover past and future advances, for example someone who lends £50,000 in return for a mortgage which also secures £50,000 which was previously lent. The rather alarming consequence of *Smyth* is that if "full value" has not been given, then the absence of a free and fully informed consent will render the transaction void *irrespective of whether the lender or purchaser had notice of the invalidity*.

(ii) Suggested Steps to Avoid Being Fixed with Notice

Assuming that the purchaser can show that full value has been given, the question of notice will then arise.[17] The lender in *Smyth* had constructive notice of the invalidity of the

[16] [1993] 2 IR 102, 108.

[17] In Ireland, it is common for the same solicitor to represent the lender, the husband and the wife. In such cases, it is vital to take account of s 3 (7) of the Family Home Protection Act, 1976. This subsection modifies the statutory definition of notice in s 3 of the Conveyancing Act, 1882 by deleting the words "as such" from the part of the definition concerning imputed notice. As McWilliam J explained in *H and L* v *S* [1979] ILRM 105, 108, the effect of s 3 (7) is that "it is immaterial in which capacity the solicitor who acted for both parties obtained or failed to

wife's consent and therefore could not rely on the protection provided by s 3(1)(a) of the Family Home Protection Act. The obvious problem is to decide what steps a lender must take in order to avoid being fixed with constructive notice. A possible solution would be to follow the "reasonable steps" put forward by Lord Browne-Wilkinson in the House of Lords in *O'Brien*[18] as a method of avoiding constructive notice of the potential invalidity of bank guarantees given by vulnerable sureties. Lord Browne-Wilkinson suggested that a representative of the lender should hold a separate interview with the person giving the guarantee (from which the principal debtor would be excluded), at which the transaction and its attendant risks would be explained to her and where she would be urged to obtain independent advice. In exceptional cases, where the lender knew that the risk of an equitable wrong was unusually high, the lender to be safe would have to insist on the surety taking independent advice.

In the context of the Family Home Protection Act, there could be a meeting with the non-owning spouse, from which the owning spouse would be excluded, at which the nature and consequences of the transaction and the consent would be explained and the taking of independent advice urged upon the non-owning spouse. Only in exceptional cases would independent advice have to be insisted upon. The purpose of the proposed interview with the consenting spouse is primarily to reduce the possibility of an invalid consent by ensuring that, to the best of the lender's knowledge, the consent of the non-owning spouse is free and fully informed. The only obvious alternative to this approach based on the decision of the House of

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obtain notice of the true position." One may consider a case where X, a solicitor, is acting for both the lender and the husband and wife in the course of the mortgage transaction. If, in his capacity as solicitor for the husband and wife, X acquires actual or constructive notice of the invalidity of the wife's consent, this notice will be imputed to the lender.

[18] [1994] 1 AC 180. For discussion, see Mee "Undue Influence, Misrepresentation and the Doctrine of Notice" (1995) 54 Cambridge Law Journal 536.

Lords in *O'Brien* would be to insist that every person giving a consent to a mortgage or charge must have taken independent advice. It is submitted that such a requirement, which would involve a great deal of expense and inconvenience, is not required by *Smyth*.

(iii) The Conduct of the Proposed Interview with the Consenting Spouse

It will be recalled that Blayney J held in *Smyth* that the lender should have inquired of Mrs Smyth as to her understanding of the transaction. In the light of this, it might be argued that the lender's representative should attempt to ascertain, at the end of the private interview suggested above, whether the person giving the consent has actually understood the full implications of the transaction. This might, however, lead to some difficulties, since it is clear that a spouse could (quite reasonably) regard it as patronising to be required to repeat back the terms of a simple explanation which she has just been given. This difficulty appears to have been avoided in the English authorities by a tacit assumption that the giving of an adequate explanation makes it unnecessary to make direct inquiries as to a person's understanding of a transaction. Although it is difficult to be categorical given the brevity of the treatment of this issue in the Supreme Court's judgment, one hopes that this sensible approach can be adopted here.

Another problem, which affects the question of how the lender should conduct the interview with the consenting spouse, is to decide what precisely constitutes a "fully informed" consent. The Supreme Court did not discuss this important matter in any detail. In the High Court, Geoghegan J had referred with apparent approval[19] to the argument made by

19 [1993] 2 IR 102, 109.

counsel for Mrs Smyth to the effect that a spouse could not normally be said to understand the nature and consequences of a transaction unless:

> (1) She is told of the amount of the loan involved, and if the security is to cover future advances, that she is informed of that.[20]
> (2) That (*sic*) she has explained to her the repayment terms.
> (3) She has explained to her the consequences of non-payment and in particular that possession of her family home may be recovered by the bank, and the home may be sold.
> (4) She is recommended to obtain independent legal advice.

These points were not mentioned in the judgment of the Supreme Court and therefore their status is unclear. Nonetheless, it would be sensible for lenders to take them into account.

The four points mentioned by Geoghegan J relate primarily to knowledge of the details of the transaction. However, it could be suggested that a fully informed consent may require an awareness of the state of the financial affairs of the owning spouse. In deciding whether to consent to a charge over the family home, knowledge of the imminent collapse of her husband's business would be of far more relevance to a wife than a lecture on the details of the repayment terms. Yet, can one expect a lender to take upon itself invariably to provide detailed information on one spouse's business affairs to the other spouse? Even leaving aside issues of confidentiality, there is surely a danger of taking paternalism too far here. It is submitted that it must generally be sufficient for the lender to explain the transaction to the non-owning spouse and warn him or her of the risks involved in the transaction. Having received adequate warning, and having been urged to take independent advice, it is up to the adult spouse in question to protect her own interests and to refuse to consent if necessary.

[20] In relation to this point, it is worth noting that since the decision of the Supreme Court in *Bank of Ireland* v *Purcell* [1988] ILRM 480 it is, in any case, necessary to obtain a separate consent in relation to any future advances which are to be covered by an existing mortgage. See also text accompanying note 25 *infra*.

However, as always when dealing with doctrines of equity, one would have to accept that there could be exceptional cases (eg if the lender knew that the possibility of misrepresentation by the owning spouse was high) where the lender would have to insist on independent advice being given to the consenting spouse.

(iv) Three Special Cases

This section will consider briefly the special problems arising in three particular situations.

(a) Joint Mortgages

The first situation involves a joint mortgage of the family home by the two spouses. As is well known, the Supreme Court's judgment in *Nestor* v *Murphy*[21] established that, because both spouses have joined in the conveyance, there is no need for either of them to consent under the Family Home Protection Act. It appears that, by joining in the conveyance, each spouse is regarded as giving an implied consent to that conveyance. However, it is quite possible to imagine one spouse entering into a joint mortgage as a result of undue influence, misrepresentation or without understanding the full implications of the transaction. Given this danger, it is arguable that the preconditions for validity laid down in *Smyth* should apply to the implied consent given by a spouse who is a party to a joint mortgage. In other words, the mortgage would be invalid unless the lender could prove that both spouses entered into the

[21] [1979] IR 326.

conveyance freely and with full knowledge. If the rule in *Smyth* were not applied to joint conveyances, then the level of protection afforded to non-owning spouses by the Supreme Court would seem arbitrarily to be denied to jointly-owning spouses.

(b) Deeds of Confirmation[22]

Lenders who are taking a mortgage or charge over a family home which is in the sole name of one spouse must always concern themselves with the possibility that the other spouse might have a beneficial interest in the home under a resulting trust. One precaution which has been favoured by lenders has been to get the non-owning spouse to sign a "deed of confirmation". Although deeds of confirmation take a number of forms, their general effect is that any beneficial interest which the non-owning spouse might have is postponed to the security interest of the lender. This means that the lender's priority is protected and the lender need not concern itself about a subsequent claim by the non-owning spouse.

While deeds of confirmation are convenient from a lender's point of view, they are surrounded by certain dangers. By means of the deed of confirmation, the non-owning spouse may effectively relinquish a valuable property right in the form of her beneficial interest in the home. It is easy to imagine a spouse signing a deed of confirmation without, for example, fully appreciating the extent of the beneficial interest to which she is entitled.

Given the dangers inherent in deeds of confirmation, it seems likely that, by analogy with *Smyth*, the Irish courts would apply the requirement that they be entered into freely and with full knowledge. Although a consent under the Family Home Protection Act will

[22] See generally Mee "The Family Home Protection Act and Priorities in Land Law" (1992) 12 Irish Law Times 213.

normally also be taken in this situation, the deed of confirmation could raise different issues of knowledge and understanding to which lenders should be alert.[23]

(c) General Consents

The final problem relates to "general" consents, the validity of which will be confirmed when the Family Law Act, 1995 comes into force.[24] S 54(1)(b) of the 1995 Act will *inter alia* insert a new subsection (9) into s 3 of the Family Home Protection Act, 1976 in the following terms:

> If, whether before or after the passing of the Family Law Act, 1995, a spouse gives a general consent in writing to any future conveyance of any interest in a dwelling that is or was the family home of that spouse and the deed for any such conveyance is executed after the date of that consent, the consent shall be deemed, for the purposes of subsection (1), to be a prior consent in writing of the spouse to that conveyance.

One obvious application of this section would be in a separation context, where one spouse might consent to any possible disposition of the home.[25] After *Smyth*, it will be vital to ensure that any "general" consent is made freely and with full knowledge of the scope and special

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[23] The point is that the Family Home Protection Act consent relates only to the conveyance by the owning spouse of his interest in the home. The consequence of the deed of confirmation is that the non-owning spouse also effectively disposes of her own interest (if any) in the home. See the contrasting cases of *Re White* Irish Times, December 5th 1990 (Hamilton P, *ex tempore*) and *Friends Provident Life Office* v *Doherty* [1992] ILRM 372, discussed in Mee note 22 *supra*. *Cf Hibernian Life Association Ltd* v *Gibbs* unreported, High Court, July 23 1993 (Costello J).

[24] Pursuant to SI 46 of 1996, the Family Law Act (in its entirety) will come into force on August 1st, 1996.

[25] Another useful application would be in the context of a mortgage or charge intended to cover future advances. In order to avoid the need to have a consent to each individual advance (see *Bank of Ireland* v *Purcell* [1988] ILRM 480), the non-owning spouse could give a general consent to any future advances (perhaps up to a certain specified amount). Unfortunately, the wording of s 54 (1) (b) appears to cover only those dispositions which involve the execution of a deed, thus excluding *inter alia* the making of advances under a past mortgage. It is unclear whether, without the help of s 54 (1) (b), a general consent to future advances would be deemed valid.

nature of the consent. Given that they can have wider consequences than ordinary consents, it would seem that, if anything, the onus on the person attempting to prove validity would be higher in relation to general consents.

[TO BE CONTINUED]