Undue Influence and Bank Guarantees

John Mee, *Law Department, University College Cork*

Given the experience of other common law jurisdictions, it is remarkable that there have been so few written decisions of the Irish courts in relation to the problem of the sexual (or emotional) transmission of debt.[1] In Ireland, as in other jurisdictions, lenders routinely seek guarantees from spouses, parents and other family members. When the lender subsequently seeks to enforce the guarantee, it is not uncommon for the surety to seek the assistance of equity on the basis that the principal debtor exercised undue influence (or committed some other equitable wrong) in inducing her or him to sign the guarantee. Yet the Irish case which is the subject of this note, *Ulster Bank* v. *Fitzgerald*[2] appears to be the first in modern times[3] in which the problem has squarely arisen (although the relevant legal issues were canvassed to some extent in two other recent cases, *Bank of Ireland* v. *Smyth*[4] and *Bank of Nova Scotia* v. *Hogan*[5]). While, with respect, the judgment of O'Donovan J in *Fitzgerald* is open to the criticism that it deals too briefly and too casually with complex legal problems, it does raise important issues concerning the relationship between Irish law and English law in this area. These questions are lent further interest by the fact that the House of Lords in *Royal Bank of Scotland* v. *Etridge*[6] (decided just a few weeks before *Fitzgerald* and not considered by O'Donovan J therein) has revisited in detail the ground charted in its earlier decision of *Barclays Bank* v. *O'Brien.*[7] This note considers the decision in *Fitzgerald* and ventures some reflections on the future of Irish law in the light of this decision and the recent developments in English law.

Ulster Bank v *Fitzgerald*

The second defendant in *Fitzgerald,* Ms Williams, had signed two guarantees in respect of the liabilities of a company called Fernhill Developments Ltd in which (one may infer from the judgment) Williams' husband, Mr Fitzgerald, had a controlling or important stake. When the plaintiff bank sought to enforce the guarantees, it was argued on behalf of Williams that she had entered into them as a result of the undue influence of Fitzgerald. She suggested that her marriage had been in difficulties and that she was convinced that a refusal to sign the guarantees would cause "further trouble between them and again threaten their marriage."[8] She also claimed *inter alia* that Fitzgerald had "insisted that he knew what he was doing and that she should trust him."[9] Her argument was that, as a result of this undue influence exercised by Fitzgerald, the bank should be precluded from enforcing the guarantees.

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[1] For a socio-legal overview, see Fehlberg *Sexually Transmitted Debt* (Oxford: Clarendon Press, 1997).
[2] High Court, November 9, 2001. The full text of this decision (and of many others referred to in this case note) is available at www.bailii.org.
[3] Note the older case of *Provincial Bank* v. *Keever* [1941] IR 471. *Cf. Northern Banking Co* v. *Carpenter* [1931] IR 268.
[4] [1993] 2 IR 102 (HC); [1995] 2 IR 459 (SC).
[5] [1996] 3 IR 239.
[6] [2001] 3 WLR 1021 (decided October 11, 2001). See Bigwood (2002) 65 MLR 435; Oldham (2002) 61 CLJ 29; Thompson [2002] Conv 174.
[7] [1994] 1 AC 180. For a recent survey of events since *O'Brien* see Draper "Undue Influence: A Review" [1999] Conv 176.
[8] Page 6 of the transcript.
[9] *Ibid*.

O'Donovan J believed that, while it "may well" have been the case that Williams had signed the guarantees as a result of undue influence from Fitzgerald, it was not necessary for him to reach a conclusion on this point because the bank would not have been affected by any undue influence which took place. He was satisfied that none of the representatives of the plaintiff bank had either actual or constructive notice of any undue influence which might have taken place. O'Donovan J gave no indication as to where he derived his assumption that the question of notice was central. Presumably, he was influenced in this respect by the leading Irish case of *Bank of Nova Scotia* v. *Hogan*[10] (which was not, however, one of the two authorities cited by O'Donovan J in the course of his relatively brief judgment).

O'Donovan J had been referred to a number of cases which, it was argued by counsel for Williams, demonstrated that in the circumstances there was an obligation on the part of the bank to warn Williams that "she and her matrimonial home" were potentially liable for the debts of the company and that it was essential that she obtain independent legal advice before signing the guarantees. The learned judge distinguished two authorities: the decision of the Supreme Court in *Bank of Ireland* v. *Smyth*[11] and that of the House of Lords in *Barclays Bank* v. *O'Brien.*[12] According to O'Donovan J, "both of these cases were concerned with a direct threat to a family home."[13] He argued that *O'Brien* had involved a transaction in which the wife had had no financial stake, while *Smyth* concerned an attempt to recover possession of a family home in respect of which the wife was alleged to have executed a consent under the Family Home Protection Act 1976. According to O'Donovan J, neither of these cases assisted Williams' case, since no threat to her family home resulted from her signing the guarantees and "in any event, she had a financial stake in both of those guarantees."[14] O'Donovan J rejected the proposition that the bank was obliged to take any special steps to ensure that Williams obtained independent advice before signing the guarantees, stressing that "the courts are not required to intervene to protect a contracting party from ill-advised action." O'Donovan J's ultimate conclusion was that the two guarantees were enforceable against Williams and accordingly he gave judgment against her for approximately £130,000.

The Legal Context

In order to assess the impact on Irish law of *Fitzgerald,* it is necessary first to consider the earlier decision of the Supreme Court in *Bank of Nova Scotia* v. *Hogan.*[15] There was actually no claim of third party undue influence in *Hogan,* the defendant instead arguing unsuccessfully that the bank itself had exercised undue influence over her. Nonetheless, Murphy J (with whom the other members of the Supreme Court agreed) made some general observations on the applicable law. In this context, Murphy J felt that *O'Brien* was "both relevant and helpful." He adopted[16] the following comments from the speech of Lord Browne-Wilkinson (with whom the other Lords agreed) in *O'Brien:*

> A wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong has an equity against him to set aside that transaction. Under the ordinary principles of equity, her right to

[10] [1996] 3 IR 239. This case is discussed further at text accompanying nn. 15-33.
[11] [1995] 2 IR 459.
[12] [1994] 1 AC 180.
[13] Page 9 of the transcript.
[14] Page 10 of the transcript.
[15] [1996] 3 IR 239.
[16] *Ibid*., p.248.

> set aside that transaction will be enforceable against third parties (e.g. against a creditor) if either the husband was acting as the third party's agent or the third party had actual or constructive notice of the facts giving rise to her equity.[17]

Thus, one sees the acceptance by the Supreme Court, at a general level, of the notice-based approach of Lord Browne-Wilkinson in *O'Brien.* It will be argued at a later point in this note that there are serious problems with a reliance on the doctrine of notice in this context (as has been demonstrated by the development of English case law following *O'Brien*). For the moment, however, these reservations will be left to one side and the focus will be on the treatment of the notice-based approach in the Irish courts.

Although Murphy J approved in general terms of Lord Browne-Wilkinson's approach in *O'Brien*, he did express (in rather cryptic terms) some reservations concerning aspects of that approach. Murphy J noted that Lord Browne-Wilkinson had accepted the principle that "the relationship of husband and wife did not as a matter of law raise a presumption of undue influence by a husband over his wife."[18] Murphy J went on to comment that, notwithstanding that principle, it had been suggested in the old Australian case of *Yerkey* v. *Jones*[19] that there was an "invalidating tendency" in transactions between husband and wife and by Scott LJ in the Court of Appeal in *O'Brien*[20] that married women were treated by the law "more tenderly" than others. Murphy J then continued:

> The consequence appears to be that whilst the matrimonial relationship as such does not give rise to a presumption of undue influence it may be possible to identify circumstances in a particular case which would more readily raise that presumption in favour of a wife than any outside party. I confess that I do not find the conclusion of the House of Lords in this regard satisfying as a matter of legal logic or fully acceptable as an analysis of the rights or capabilities of women generally and married women in particular.[21]

Murphy J did not identify precisely where in *O'Brien* "the conclusion of the House of Lords" which he is criticising is to be found (having referred, in the sentences preceding the above passage, only to *dicta* in other judgments).[22] Upon reflection, one can be reasonably satisfied that what Murphy J objected to was the passage in Lord Browne-Wilkinson's speech where he comments that "in any particular case a wife may well be able to demonstrate that de facto she did leave decisions on financial affairs to her husband thereby bringing herself within Class 2(B)."[23] Under the classification of undue influence favoured by Lord Browne-Wilkinson,[24] a Class 2(B) presumption of undue influence would arise where evidence had been adduced establishing that the relationship in question was *de facto* one of influence

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[17] [1994] 1 AC 180, 195.
[18] [1996] 3 IR 239, 247.
[19] (1939) 63 CLR 649.
[20] [1993] QB 109.
[21] [1996] 3 IR 239, 248.
[22] In general, in his discussion of the decision of the Lords in *O'Brien*, Murphy J seems to overstate the role of what he describes as "the "invalidating tendency' and "tender treatment' principles". These principles were at the heart of the so-called "special equity" doctrine propounded by the Court of Appeal in *O'Brien* [1993] QB 109. However, this doctrine was decisively rejected on appeal in *O'Brien* and the principles which Murphy J emphasises play a far more peripheral role in Lord Browne-Wilkinson's analysis (and in a moderated form).
[23] [1994] 1 AC 180, 190.
[24] This categorisation was not regarded as helpful by the Lords in *Etridge* (see [2001] 3 WLR 1021, 1056 per Lord Hobhouse; 1077 per Lord Scott).

(even though it fell outside the Class 2(A) list of relationships where undue influence is automatically presumed). It seems that Murphy J felt, from the tenor of the relevant portion of Lord Browne-Wilkinson's speech, that his Lordship would be willing to find undue influence too readily in the marital context. Interestingly, Murphy J's concerns about so doing have since been echoed by the House of Lords in *Etridge,*[25] a point to which the discussion will return.

Murphy J then went on to consider the issues arising as between the wife and the lender. He noted that Lord Browne-Wilkinson was of the view that, where a wife guarantees her husband's business debts, the lender will be put on notice as to the possibility of an equitable wrong having taken place. According to Murphy J, the effect of this approach was "that married women … may in certain circumstances enjoy as against their husbands a presumption that undue influence was exercised."[26] The learned judge's reference in this context to a *presumption* of undue influence[27] has, with respect, the potential to cause great confusion (and this is a possible explanation for certain aspects of O'Donovan J's judgment in *Fitzgerald*).[28] In this part of his judgment, Murphy J was discussing the question of whether or not a lender had notice of an equitable wrong which *ex hypothesi* has already been proven to have taken place. Lord Browne-Wilkinson's views in relation to when a lender will be put on notice carry no implication that, at the earlier stage of attempting to prove that an equitable wrong has taken place, a wife is assisted by a presumption of undue influence. At most, Lord Browne-Wilkinson's approach requires a prudent lender to take precautions as if there were such a presumption (or, in fact, as if there were a presumption that undue influence *or* misrepresentation[29] *or* some other wrong has taken place). Despite Murphy J's shorthand use of the term "presumption", it is clear from the context of his remarks that he understood this point.[30]

Murphy J did not express any conclusion as to whether or not a lender would be put on inquiry when taking a guarantee from a wife over her husband's debts. One obvious explanation for this is that there was, on the facts before him, no need to do so. One might wish to speculate that, since he believed that Lord Browne-Wilkinson had overestimated the dangers of undue influence as between husband and wife, Murphy J would have set a higher threshold than his Lordship as to when a lender would be put on notice. In this respect, however, it is interesting to note that (as mentioned previously) the House of Lords in *Etridge* shared Murphy J's concern that undue influence not be detected too readily in the marital context.[31] Notwithstanding this, the House of Lords accepted Lord Browne-Wilkinson's view expressed in *O'Brien* that the lender will be put on notice when a wife guarantees her husband's business debts.[32] Moreover, the Law Lords in *Etridge* went on to establish a "wider principle" than that originally propounded in *O'Brien.* While Lord Browne-Wilkinson had felt that a lender would be put on inquiry in the case of a guarantee given by a wife, cohabitee or elderly parent, in *Etridge* Lord Nicholls extended English law so that this would

[25] *Ibid*., 1034 para. 32 per Lord Nicholls; 1076 paras. 159-160 per Lord Scott.
[26] [1996] 3 IR 239, 249.
[27] This also occurs at a slightly earlier point in the judgment (*ibid.,* 248).
[28] See text following n. 43 *infra*.
[29] [1994] 1 AC 180, 196C-D (heightened risk of misrepresentation due to informality of dealings between spouses).
[30] For example, the sentence beginning with "Assuming, without deciding,…" ([1996] 3 IR 239, 249) makes little sense otherwise.
[31] [2001] 3 WLR 1021, 1034 para. 32 per Lord Nicholls; 1076 paras. 159-160 per Lord Scott.
[32] This was in part because of the additional danger of a wife's falling victim to a fraudulent misrepresentation by her husband.

occur in the case of *all* guarantees given outside the commercial context.[33] Given the extent to which the concerns of Murphy J in *Hogan* are echoed by the House of Lords in *Etridge*, there would seem to be nothing in *Hogan* which is inconsistent with an acceptance of the *O'Brien* approach as extended in that case.

Analysis of the Decision in *Fitzgerald*

Having considered *Hogan* in some detail, it is now possible to move on to look more closely at the decision in *Fitzgerald* itself. It may be helpful at the outset to put to one side a rather baffling feature of the judgment in *Fitzgerald.* Counsel for Williams laid considerable emphasis in argument on the proposition that, in signing the guarantees, Ms Williams was placing her matrimonial home at risk. O'Donovan J responded to this contention by pointing out that, even if the guarantees were enforced against her, the plaintiff bank would only obtain a money judgment which would not necessarily affect the family home. There was therefore "absolutely no substance to the suggestion that … [she] was putting her family home at risk".[34]

This aspect of the case is perplexing on a number of levels. First, it is difficult to understand the legal significance which was felt by judge and counsel to attach to a "threat" to the family (or matrimonial) home. Since the guarantees were not secured by a mortgage on the family home (or any other property) there was no question of a requirement of a consent under the Family Home Protection Act 1976. It would be a new departure in Irish law if, beyond specific legislative provisions such as the Family Home Protection Act, some special significance attached to a transaction which carried with it an unfocussed "threat" to the family home. No doubt counsel hoped to draw succour from *Bank of Ireland* v. *Smyth,*[35] where the Supreme Court held that a consent under the Family Home Protection Act would be invalid unless it was "free and fully informed". However, as was made quite clear in *Bank of Nova Scotia* v. *Hogan,*[36] this more strict test for validity does not translate into a context where the Family Home Protection Act is not applicable. Thus, O'Donovan J was on firm ground in distinguishing *Smyth.*

However, this having been done, why then did the learned judge proceed to distinguish *O'Brien* on the basis that it, like *Smyth*, "concerned a direct threat to a family home"?[37] The decision of the House of Lords in *O'Brien* did not of course involve an interpretation of the provisions of the Family Home Protection Act or any similar legislation. Although *O'Brien* in fact concerned a guarantee which was secured on the matrimonial home, Lord Browne-Wilkinson's statements of principle were not restricted to secured guarantees (let alone to guarantees which are secured on a matrimonial home).[38] There would be no defensible basis for drawing any distinction along these lines, given that it would lead to an arbitrarily reduced level of protection for those entering into guarantees which are not secured (in one particular manner).[39] It must be concluded that O'Donovan J, in rightly rejecting counsel's

[33] [2001] 3 WLR 1021, 1048-1049.
[34] Page 8 of the transcript.
[35] [1995] 2 IR 459.
[36] [1996] 3 IR 239, 246.
[37] Page 9 of the transcript.
[38] See *O'Brien* [1994] 1 AC 180, 197D where Lord Browne-Wilkinson refers to "a secured or unsecured surety obligation"; Fehlberg n. 1 supra, p. 5 n. 18.
[39] At a practical level it may not make all that much difference to a vulnerable surety whether or not the guarantee is secured. If a bank does obtain a money judgment, it will ultimately be able if necessary to obtain a

submission on *Smyth*, was misled into accepting a false assumption underlying the rejected argument. This unfortunately led him to distinguish *O'Brien* on a mistaken basis in *Fitzgerald.*

From the above, one might be inclined to infer that, in a more typical case where a guarantee was in fact secured on the family home, O'Donovan J would have been willing to apply the *O'Brien* approach. On the other hand, as will be discussed later, at other points in his judgment O'Donovan J rejected arguments based in substance on *O'Brien* for reasons other than that the guarantee posed no threat to the family home. Thus, it is unclear whether O'Donovan J would have followed *O'Brien* in any circumstances.

Was The Bank Put on Notice?

Most of O'Donovan J's legal analysis was taken up with a consideration of whether the plaintiff bank had notice of any undue influence which might have taken place. The essence of Lord Browne-Wilkinson's scheme in *O'Brien* is that the lender would be put on notice if (a) the relationship was one carrying a heightened risk of undue influence or other equitable wrong and (b) the transaction was "on its face not to the financial advantage" of the weaker party.[40] The submissions of counsel in *Fitzgerald* were largely based on *O'Brien* and (as will emerge), in rejecting those submissions, O'Donovan J was led to discuss the above two factors in turn.

O'Donovan J began his discussion by expressing the view that none of the representatives of the plaintiff bank "had even an inkling"[41] that there were difficulties in Williams' marriage to Fitzgerald or "that there was any other reason why [she] might not have been a free agent."[42] The learned judge then continued as follows:

> Moreover, as it is well settled that, where they are parties to the same contract, the relationship of husband and wife does not give rise to a presumption of undue influence and, accordingly, the burden of proving undue influence is on the party alleging it, I am not persuaded that the Plaintiffs had constructive notice that the Second Named Defendant executed the said guarantees as a result of undue influence exercised over her by her husband; if that be the case.[43]

O'Donovan J's reference (repeated later in his judgment)[44] to the absence of a presumption of undue influence as between husband and wife seems to betray a confusion between the question of whether an equitable wrong took place and the separate question of whether the lender had notice of this. The argument that the lender is put on notice in a situation like that in *Fitzgerald* effectively rests on the proposition that, although the relationship of husband

judgment mortgage over the surety's share in the family home (no consent being required under the FHPA for the creation of such a mortgage: *Containercare v. Wycherley* [1982] IR 143). Thus, a person against whom an unsecured guarantee is enforced will probably lose her home if she does not have other resources from which to discharge the debt (and, of course, if she had such other resources in circumstances where she had given a secured guarantee she could use them to pay off the debt and similarly avoid the sale of her home).

40 Cf. *CIBC v. Pitt* [1994] 1 AC 200.

41 Page 7 of the transcript.

42 *Ibid*.

43 *Ibid*.

44 Page 8 of the transcript.

and wife falls short of creating a presumption of undue influence, it creates a heightened risk of an equitable wrong which is sufficient to put the lender on inquiry. It is no answer to this argument to repeat what has already been conceded, *i.e.* that there is no automatic presumption of undue influence as between husband and wife.

Notwithstanding the foregoing, it is arguable that one should read into O'Donovan J's position an assumption that the level of risk of an equitable wrong in the marital context is lower than Lord Browne-Wilkinson assumed in *O'Brien*, so that a lender would only be put on notice if it was aware of facts about the marriage in question which further increased the risk.[45] The result of this position would be that (conveniently from the viewpoint of lenders) a defence based on third party undue influence would almost never succeed in the guarantee context. Since knowledge of the fact that the parties were married would not require the lender to inquire further, the approach under discussion would strongly encourage lenders not to acquire any further information beyond the fact that the parties are married. The result would be that, in Ireland, equity would provide a very modest level of protection for vulnerable sureties.

The second argument considered by O'Donovan J focused on the other aspect of Lord Browne-Wilkinson's analysis: the nature of the transaction in question. It was argued by counsel that, as Williams had no financial stake in the business of the company but her husband did, the bank were "on notice that there was a risk that she may have been unduly influenced by her husband to execute the said guarantees".[46] In responding to this argument,[47] O'Donovan J first addressed the proposition that Williams had no financial stake in the business. He noted that Williams had given sworn testimony to the effect that she was neither a director nor a shareholder in the company. She had stated that, while she may have signed documents in which she was described as the secretary of the company, she had not been aware that she was secretary thereof. O'Donovan commented that this evidence appeared to be inconsistent with an affidavit which she had previously sworn. In any case, the learned judge was persuaded that she and her family relied on the income generated by the company "for their day to day living" and accordingly he had no doubt but that she had "a financial stake in the business of the company."[48]

The problem with O'Donovan J's approach to this issue is that, since the question is whether the lender was put on notice rather than whether an equitable wrong had actually taken place, what matter are the facts as known to the lender. Therefore, unless the lender was somehow aware of the relevant facts, it is not pertinent that O'Donovan J was "persuaded by her evidence" that Williams relied on the income generated by the debtor company for her day to day living. Nor does it really matter whether Williams was or was not in reality secretary of the company (or whether she stated that she was in an affidavit sworn earlier in the proceedings). To determine whether the lender was put on inquiry, the relevant point is how the matter appeared to the lender and, unfortunately, O'Donovan J had little or nothing to say on this crucial matter.

Let us assume, for the purposes of discussion, that the bank knew that Williams depended on the company in question for her living. On Lord Browne-Wilkinson's approach, this would

[45] Cf. *O'Brien* [1994] 1 AC 180, 197B-D, an inconspicuous paragraph which is central to the entire project of Lord Browne-Wilkinson's speech.
[46] Page 8 of the transcript.
[47] Ibid.
[48] Ibid.

be irrelevant. He stated that the lender would be put on inquiry in cases where a wife guaranteed her husband's debts and explicitly added the clarification that this included "the debts of a company in which the husband (but not the wife) has a *direct* financial interest".[49] The implication is that the lender will still be put on notice even if it is aware that the wife has an indirect financial stake in the transaction. The opposite view would have greatly reduced the scope of the protection afforded to vulnerable sureties by Lord Browne-Wilkinson's analysis. In fact, in its more recent decision in *Etridge*, the House of Lords has taken the view that, even where the wife has a shareholding in the company in question (even an equal shareholding) and/or is a director or secretary of the company, the lender is nonetheless put on notice. Lord Nicholls justified this conclusion on the basis that "[t]he shareholding interests, and the identity of the directors, are not a reliable guide to the persons who actually have the conduct of the company's business."[50] Thus, it can be seen that the English courts have taken a very liberal approach to the issue under discussion. Although O'Donovan J approached the inquiry from the wrong angle, it does seem clear that he would favour a far more conservative view, whereby a lender would avoid being put on notice if it was aware that the surety had even an indirect financial stake in the success of the husband's business. Depending on one's policy preferences, one could put an argument in favour of this approach (which again holds considerable attractions from the viewpoint of lenders) but O'Donovan J makes no effort in this direction in *Fitzgerald.*

Did the Bank Take Adequate Steps if Put on Inquiry?

Given O'Donovan J's view that the bank had neither actual nor constructive notice of any equitable wrong, there was nothing surprising about his assertion that the bank was not under "any obligation to take any special steps to ensure that [Williams] obtained independent advice".[51] However, it is interesting to note the weight which O'Donovan J appeared to attach to the fact that "the actual forms of guarantee … contained a note at the top headed by the words "IMPORTANT' strongly recommended that any persons signing the guarantee should seek independent legal advice before doing so".[52] In light of this, O'Donovan J opined that "it was above and beyond the call of duty" for the bank official (as he had done) to raise the question of independent advice with Williams. This contrasts with the view taken in *O'Brien*, where Lord Browne-Wilkinson discounted the effectiveness of written warnings on the basis that they "are often not read".[53]

According to Lord Browne-Wilkinson, a lender who has been put on notice would normally have 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 legal advice."[54] While (by chance it appears) Williams' husband was absent when the bank official met Williams, it is unclear whether the official told her of the extent of her liability as surety or warned her of the risk she was running.[55] Furthermore, the bank official's telling Williams that "she could

[49] [1994] 1 AC 180, 199 (emphasis added).
[50] [2001] 3 WLR 1021, 1038, per Lord Nicholls (whose speech, according to Lord Bingham ibid, 1028 commanded "the unqualified support of all members of the House").
[51] Page 9 of the transcript.
[52] Ibid.
[53] [1994] 1 AC 180, 198.
[54] Ibid., p.196.
[55] He apparently "explained … the meaning of the guarantees and the reason why they were required by the Plaintiff bank": see p. 3 of the transcript.

obtain legal advice with regard to the guarantees"[56] seems to fall short of "urging" her to take this step (particularly when taken in conjunction with the apparent absence of any warning as to the risks involved in the transaction). Thus, if the bank in *Fitzgerald* had been deemed to have been put on notice, the steps taken by the lender would probably not have been sufficient to satisfy the requirements of *O'Brien.* It is unclear whether (had he reached a different conclusion on the notice question) O'Donovan J would have regarded the steps taken by the bank in *Fitzgerald* as sufficient to allow the guarantees to be enforced. It is arguable, in light of the comments which he did make on the matter, that he might have leaned towards that conclusion.

Broader Criticisms of the Notice-Based Approach

It is necessary now to return to a point adverted to in passing earlier in this note, *i.e.* the difficulties with an approach based on the doctrine of notice. Despite the superficial attractiveness of Lord Browne-Wilkinson's invocation of the doctrine of notice in *O'Brien*, the reality is that the approach his Lordship proposed really has little to do with that doctrine. Consider the following passage from *O'Brien* (which was quoted with approval by Murphy J in *Hogan*):[57]

> The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on enquiry as to the possible existence of the rights of that other and he fails to make such enquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it.[58]

Two points can be made. First,[59] in the context under discussion, it is not accurate to speak of "an earlier right" on the part of the surety to set aside the guarantee which is competing against "a later right" on the part of the lender. Both rights come into existence at the same time, the point in time at which the guarantee is signed. The doctrine of notice applies where there are two transactions giving rise to competing rights[60] and, in the guarantee context, there is only one transaction. In light of this, some justification (other than an appeal to "ordinary principles" which "lie at the heart of equity") is required for the choice of the negligence standard implicit in the doctrine of notice instead of, for example, a test whereby the lender would be able to enforce the guarantee unless it knew of the fact that an equitable wrong had taken place (or of facts establishing a presumption of undue influence).[61]

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[56] Page 3 of the transcript. Somewhat confusingly, O'Donovan J later describes what occurred as the bank official's "advising" Williams to seek legal advice (see p.9 of the transcript).
[57] [1996] 3 IR 239, 248.
[58] [1994] 1 AC 180, 195-196.
[59] See Battersby "Equitable Fraud Committed by Third Parties" (1995) 15 *Legal Studies* 35; Harpum and Dixon "Fraud, Undue Influence and Mortgages of Registered Land" [1994] Conv 421; Mee "An Alternative Approach to Third Party Undue Influence and Misrepresentation" (1995) NILQ 147.
[60] For an example in the undue influence context, see *AIB* v. *Glynn* [1973] IR 188.
[61] This was the test applied in the 19th century English cases: see *Etridge* [2001] 3 WLR 1021, 1036 para 40 *per* Lord Nicholls. See also *Provincial Bank* v. *McKeever* [1941] IR 471.

The second point[62] is that, even if one accepts that it would be appropriate to apply the doctrine of notice, Lord Browne-Wilkinson's analysis does not actually do so. When someone is "put on inquiry", he or she is expected to make inquiries. Constructive notice is knowledge which a person would have acquired had he or she made such inquiries and inspections as are reasonable in the circumstances. However, Lord Browne-Wilkinson explicitly stated that "[i]t is plainly impossible to require of banks and other financial institutions that they should inquire of one spouse whether he or she has been unduly influenced or misled by the other."[63] What he envisaged instead was that the lender who was "put on inquiry" would be obliged to take "reasonable steps" to protect the position of the lender. The effective result of Lord Browne-Wilkinson's approach is the creation of a duty on the part of a lender to take reasonable care to protect the position of a vulnerable surety or take the consequences if an equitable wrong turns out to have occurred. The imposition of such a duty may or may not be justifiable but it should not be presented as a straightforward application of the doctrine of notice.

The House of Lords in *Etridge* essentially conceded the truth of these criticisms. Lord Nicholls claimed that "Lord Browne-Wilkinson would have been the first to recognise that this is not a conventional use of the equitable concept of constructive notice."[64] Similarly, Lord Scott warned that it was "important to recognise that constructive notice … is serving a different function from that served by constructive notice in its traditional role and is not necessarily subject to the same rules."[65] Both judges conceded that there was only one transaction at issue and that "the wife does not have any prior right or prior equity".[66] Both also recognised that "the steps a bank is required to take, lest it have constructive notice … do not consist of making inquiries". Rather, "the steps are concerned to minimise the risk that such a wrong may be committed."[67] All "these novelties"[68] conceded, however, their Lordships did not feel that the *O'Brien* analysis should be discarded or reformulated. As Lord Hobhouse put it, "[d]oubt should not be case upon the authority of *O'Brien*."[69]

The lessons for an Irish court are twofold. First, it should be recognised that there is nothing inevitable about a decision to follow the substance of *O'Brien* (given also that the brief comments of the Supreme Court in *Hogan*[70] were both *obiter* and unclear). The concessions of the House of Lords in *Etridge* reveal the bankruptcy of Lord Browne-Wilkinson's attempt to gain plausibility for his approach by appealing to the "ordinary principles" of equity. Lord Browne-Wilkinson's approach must stand or fall on its merits as a novel development of equity to respond to an important social problem. This leads on to the second lesson of *Etridge* in this respect. If the Irish courts do decide to follow the substance of *O'Brien*, they would do better to abandon the misleading reference to the doctrine of notice and instead explicitly recognise that they are imposing a duty on a lender to take reasonable steps to protect the position of vulnerable sureties (or face the consequences if it turns out that an equitable wrong took place).[71] While the Law Lords may have been embarrassed to follow

[62] See Mee "Undue Influence, Misrepresentation and the Doctrine of Notice" (1995) 54 CLJ 536.
[63] [1994] 1 AC 180, 196.
[64] [2001] 3 WLR 1021, 1036.
[65] *Ibid.,* 1072. *Cf.* his remarks concerning the burden of proof. See also *ibid,* 1057A *per* Lord Hobhouse.
[66] [2001] 3 WLR 1021, 1072G *per* Lord Scott. See also 1036 paras. 38-39 *per* Lord Nicholls.
[67] *Ibid.,* 1036-1037 *per* Lord Nicholls. See also 1073 *per* Lord Scott.
[68] *Ibid.,* 1037 *per* Lord Nicholls.
[69] *Ibid.,* 1053.
[70] [1996] 3 IR 239.
[71] It is not, of course, being contended that there is no analogy between the doctrine of notice and the *O'Brien* analysis. A key element in both contexts is the question of what, given the facts of which a person is aware, it is

through on the logic of the criticisms they accepted of Lord Browne-Wilkinson's speech, our courts are not obliged to carry this baggage for them.[72]

Conclusion

Since *Fitzgerald,* and *Hogan* before it, contribute comparatively little to the establishment of a distinctively Irish doctrinal approach, the future path of Irish law remains to be determined. In terms of the direction in which Irish law should go in the future, one may offer the following reflections. Looking at the matter for a moment at a very general (and, therefore, over-simplified) level, one can identify two ends of one spectrum[73] of possible approaches. At one end of the spectrum, a lender would (notwithstanding knowledge that the parties were married or in some similar close relationship) be able to enforce the guarantee unless it had some special reason to suspect that an equitable wrong had taken place - essentially, the approach of O'Donovan J in *Fitzgerald.* The trouble with this approach is that it provides very little protection for the vulnerable surety. Unless it appears that the legislature would be in a better position to provide such protection, it is arguable that equity should intervene if this can plausibly be done through the incremental development of its doctrines in the case law. The second approach, representing the opposite end of the spectrum, would be for equity to refuse to enforce the guarantee unless the vulnerable surety had received independent legal advice. This second approach is open to the objection that it would carry unnecessary costs (which would be passed on to bank customers) and could also have the detrimental consequence of discouraging lenders from providing finance to small businesses on the security of residential property.[74]

What Lord Browne-Wilkinson attempted in *O'Brien* was to find a middle ground between the two extremes. In light of the subsequent case law, it can be seen that Lord Browne-Wilkinson's analysis has failed to achieve this difficult goal. From the lender's point of view, the steps which Lord Browne-Wilkinson stipulated (involving a bank official meeting privately with the surety) were in fact more onerous for lenders than insisting on independent legal advice and passing on the risk of being sued to the legal profession.[75] Therefore, Lord Browne-Wilkinson's approach has lost the middle ground and (as demonstrated by *Etridge)* has for practical purposes collapsed into a regime which requires the lender to insist on independent legal advice. Somewhat unkindly, one may contrast the *pre-O'Brien* decision of *Kings North* v. *Bell,*[76] where Dillon LJ took six pages to reach the conclusion that for its own protection a lender would have to insist on independent legal advice, with *Etridge* which added a further hundred pages to the reams of *post-O'Brien* case law and which was

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reasonable to expect of that person (in one case in terms of inquiries, in the other in terms of protective steps). However, the significance of this similarity should not be overstated, since the concept of reasonableness is central to many legal doctrines.

[72] *Cf. Wilkinson* v. *ASB Bank Ltd* [1998] 1 NZLR 674, 690 lines 3-5 *per* Blanchard J; 695 *per* Tipping J.

[73] One could, of course, approach the matter from a quite different angle and, for example, have recourse to the jurisdiction to relieve against unconscionable bargains. See the line of Australian case law beginning with *Commercial Bank of Australia* v. *Amadio* (1983) 151 CLR 447 *(cf. Credit Lyonnais* v. *Burch* [1997] 1 All ER 144; and the different approach in *Garcia* v. *National Australia Bank Ltd* (1998) 194 CLR 395). There is no discussion in *Fitzgerald* (or *Hogan)* of such other possibilities and it is beyond the scope of this case note to comment on their possible merits.

[74] *See O'Brien* [1994] 1 AC 180, 188G-H.

[75] See e.g. *Etridge* [2001] 3 WLR 1021, 1040 para. 55 *per* Lord Nicholls. Amongst the many interesting aspects of *Etridge* which cannot be discussed here are the views of the House of Lords on the issues surrounding independent legal advice.

[76] [1986] 1 WLR 119.

concerned with elaborating essentially the same conclusion as that of Dillon LJ fifteen years earlier.

However, in considering the future of Irish law, it is important not to focus too much on the knots into which the English courts have tied themselves in the past. While *O'Brien* did not achieve all that was hoped for it, it has been painstakingly patched up by the House of Lords in *Etridge.* In its current state, English law represents a not unreasonable basis for the development of Irish law.[77] One could learn from the *O'Brien* experience and state the theoretical foundations of the doctrine in a more consistent manner than in the English case law. It might well be that the Irish courts would differ from the House of Lords in *Etridge* on a number of significant points of principle. Nonetheless, at least in the view of the present writer, the current English law represents a more fruitful point of departure than the unconvincing approach of O'Donovan J in *Fitzgerald.*

[77] *Cf.* the reception of *O'Brien* in New Zealand: *Wilkinson* v. *ASB Bank Ltd* [1998] 1 NZLR 674.