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

PART TWO

By John Mee BCL, LLM (NUI); LLM (Osgoode Hall); Barrister; Lecturer in Law, University College Cork

Part One of this article, published in the August issue, discussed the implications of the judgment of the Supreme Court in *Bank of Ireland* v *Smyth*[1] in the context of mortgages of the family home. Part Two, published here, addresses the impact of *Smyth* on a variety of wider issues, including the sale of residential property, the status of consents to previous transactions on the title and the validity of bank guarantees outside the context of the Family Home Protection Act.

CONVEYANCES OUTSIDE THE COMMERCIAL CONTEXT

The discussion in Part One of this article concentrated on the problem of consents to mortgages or charges. However, it is necessary to consider whether the *Smyth* case has wider implications. Will the question of a potentially invalid consent now arise every time a house is conveyed to a private individual? There is no suggestion in the Supreme Court's judgment that the validity of a consent can only be challenged in the context of a mortgage or charge. Nonetheless, it is submitted that conveyances outside the commercial context are likely to be treated differently by the courts. This is because the possibility of an invalid consent to the sale of a family home seems to be much lower than in the context of a mortgage or charge. The main reason for this reduced level of risk is that, compared to a loan transaction, the sale

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1 [1996] 1 ILRM 241.

of a family home is a very straightforward transaction. It is highly unlikely that a spouse could argue that she failed to understand the nature and consequences of a simple sale, particularly since she will invariably have left the home in order to allow the sale to close with vacant possession.

Admittedly, although a failure to understand a sale transaction is unlikely, it is possible to imagine a spouse consenting as a result of undue influence, misrepresentation or duress by the owning spouse. For example, a husband might intimidate his wife into consenting through the threat of physical violence or he might persuade her to consent by a false representation that he plans to invest the proceeds in a new home. It appears that in such circumstances the consent would be invalid, since the Supreme Court required that a valid consent be both "fully informed" and "free". Nonetheless, although there is therefore some danger of an invalid consent to a sale, it seems that the lower level of risk makes it unreasonable to expect the purchaser to make inquiries as to the possibility of an invalid consent.

Thus, unless there were unusual circumstances which should have put the purchaser's solicitor on inquiry, it would appear (although one cannot be definite about the point) that the purchaser would not have constructive notice of any equitable wrong which caused the consent to be invalid. It should, however, be remembered that if the purchaser has not given "full" value then he will not be protected by the absence of notice.[2]

THE VALIDITY OF CONSENTS TO PREVIOUS TRANSACTIONS ON THE TITLE

[2] See s 3(1)(a) of the Family Home Protection Act, 1976 and the discussion in the paragraph of text accompanying note 16 to Part One of this article.

Another problem which arises for conveyancers is in relation to the validity of consents to *previous* transactions. So long as the decision of the High Court in *Guckian* v *Brennan*[3] remains good law, this problem will not affect conveyances of registered land, where the register may be treated as conclusive. In relation to unregistered land, however, some problems could be posed by the Supreme Court's decision. These flow from s 3(3) of the Family Home Protection Act, which deals with the effects of conveyances subsequent to a conveyance void for lack of consent. Although the subsection is badly drafted, its effect is that a purchaser of a family home may be affected by the absence of a valid consent to a previous transaction unless he can claim to be a purchaser for value without notice (see s 3(3)(b) of the Family Home Protection Act). It is possible, assuming that each successive purchaser had notice of the relevant facts, that the absence of a valid consent could invalidate a whole chain of future transactions (see also s 3(3)(c) of the Family Home Protection Act).

After *Smyth*, solicitors will have to decide what inquiries are reasonable in relation to the validity of previous consents on the title. Can a solicitor take a previous consent at its face value? In relation to consents to previous *sales* of the property, problems are unlikely to arise since, as was suggested above, the main implications of *Smyth* relate to commercial transactions. The problems in relation to consents to previous loans are reduced greatly by the fact that a mortgage on the title will normally have been discharged before the property is sold, thus eliminating any problems resulting from the possible invalidity of the mortgage. However, a problem would arise for a solicitor involved in a purchase from a mortgagee or where there is a sale by a mortgagee on the title.

In such cases, what should a purchasing solicitor do about the possibility that the

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3 [1978] IR 478.

consent to the mortgage had been invalid because it was not voluntary and fully informed? It is not easy to suggest a reasonable procedure for solicitors to follow in this type of situation. Presumably, one could make inquiries of the mortgagee as to the obtaining of the consent. However, it is surely quite possible that they will have no convincing evidence to offer as to the state of mind of the spouse at the time the consent was given. The problems are compounded if the sale by a mortgagee occurred at an earlier point in the chain of title.

The origin of the difficulty is that the Supreme Court in *Smyth* did not expressly address the practical problems caused by its decision. If the requirement of full knowledge for a valid consent had been written into the Family Home Protection Act in the first case, there would presumably also have been provision for a certification procedure to show future purchasers that the requirements of the Act had been observed. Unfortunately, it was the Supreme Court rather than the legislature which introduced the preconditions for a valid consent in this jurisdiction. This means that, in relation to transactions which took place before the judgment in *Smyth*, there is very little possibility of discovering whether the Supreme Court's requirements were complied with.

The solution may be to take a sensible view in relation to past consents and to assume that there will not generally be sufficient evidence as to the state of mind of the consenting spouse. Along the lines of the Law Society's suggested pragmatic approach to transactions in the early years following the enactment of the Family Home Protection Act,[4] it might be possible to make allowances for the previous practices of solicitors. On this basis, it could be suggested that consents given before *Smyth* may be taken at face value unless there are other unusual circumstances which should put the purchaser's solicitor on inquiry. In relation to

[4] See (1981) 75 Gaz ILSI 115.

future consents, it is possible that a practice of certification will develop. This would ease the problems of purchasing solicitors, since each consent to a mortgage would be accompanied by a certificate (probably signed by a solicitor)[5] stating that the transaction had been fully explained and that independent legal advice had been suggested to the spouse in question.

In relation to the problem under discussion, there is the consolation that s 54(1)(b) of the Family Law Act, 1995 (when it comes into force)[6] will prevent a transaction being invalidated under the Family Home Protection Act unless it has been challenged within six years. A spouse will not, however, be affected by this limitation period if she "has been in actual occupation of the land concerned from immediately before the expiration of 6 years from the date of the conveyance concerned until the initiation of the proceedings [to challenge the conveyance]". Thus, s 54 will eliminate the need to consider the validity of consents which are more than six years old unless the spouse in question is still in occupation of the family home.

IMPLICATIONS OF *SMYTH* IN THE CONTEXT OF BANK GUARANTEES

The Supreme Court judgment sheds little light on the related area of the impact of third party undue influence or misrepresentation, or mere lack of understanding, on the

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[5] Some conveyancing precedents suggest that a statement be extracted from the consenting spouse to the effect that the transaction has been fully explained to her and that she is giving a fully informed consent. At best, this is only a partial solution. The problem is that it is the person who has given the explanation, rather than the person who has received it, who is in the best position to decide whether it has been a "full" explanation. For example, Mrs Smyth would have thought that she had received a full explanation of the transaction to which she consented and could truthfully (and reasonably) have signed a statement to that effect. Since she could not have known that the bank manager had failed to mention the vital fact that her house could be sold, any statement she had signed could not, it is submitted, have created any sort of estoppel against her.

[6] Pursuant to SI 46 of 1996, this will take place on August 1st, 1996.

validity of bank guarantees.[7]

At only one point did Blayney J refer (and then only indirectly) to the "special equity" theory which had been advanced by the Court of Appeal in *Barclays Bank* v *O'Brien*.[8] Towards the end of his judgment,[9] Blayney J rejected the argument (presumably based on *O'Brien*) that the bank had a duty to explain the charge to Mrs Smyth and to suggest that she take independent advice. However, he then went on to say that, despite the absence of a duty, the bank ought to have taken these steps in order to protect their own interests and ensure that the charge was enforceable. In other words, his insistence that there is no duty on a lender appears to have been something of a semantic quibble - obviously, a lender is primarily interested in obtaining a valid security and if certain steps must be taken to ensure this, then for practical purposes there is a duty on the lender to take the steps.

In the end, therefore, it is difficult to know what conclusion to draw from Blayney J's judgment as to the present status (outside the context of the Family Home Protection Act) of the decision of the English Court of Appeal in *Barclays Bank* v *O'Brien*.[10] On the one hand, the requirement of an informed consent under the Family Home Protection Act might suggest that a similarly paternalistic approach would be taken to bank guarantees, leading to an adoption of the position of the Court of Appeal in *O'Brien*. On other hand, Blayney J's invocation of the doctrine of constructive notice might indicate a preference for the notice-

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7 For discussion of this matter in the context of the High Court judgment in *Smyth*, see Mee "Family Home - Consents, Guarantees and the 'Badge of Shame'" (1994) 16 Dublin University Law Journal 197.

8 [1993] QB 109.

9 [1996] 1 ILRM 241, 249.

10 Note 33 *supra*.

based approach of the House of Lords on appeal in *O'Brien*.[11]

Since the legal issue remains unresolved, common sense dictates a cautious approach. Therefore, it is submitted that lenders should follow the "reasonable steps" prescribed by Lord Browne-Wilkinson in the House of Lords in *O'Brien*.[12] It will be recalled that he suggested holding a private interview with the vulnerable surety at which the transaction (and its risks) would be explained and the taking of independent advice would be suggested. These steps are somewhat more comprehensive than those suggested by Scott LJ in the Court of Appeal in *O'Brien* and appear to represent best practice for lenders. In the Irish context, one might further suggest that, in conducting this interview, lenders should bear in mind the four points mentioned by Geoghegan J in the High Court in *Smyth* which were quoted in Part One of this article.[13]

V CONCLUSION

This article has attempted to tackle the difficulties created by *Smyth*. Although some of the problems will yield to common sense, it does seem likely that further litigation will be necessary to clarify the scope of the new requirements.[14] One might, with the very greatest of respect, raise the possibility that the Supreme Court did not fully appreciate the consequences of its decision. Blayney J relied in his judgment on the law relating to consents to marriage

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11 [1994] 1 AC 180.

12 See text following note 18 to Part One of this article.

13 See text accompanying footnotes 19-20 to Part One of this article.

14 The problem has already returned to the Supreme Court: see *Allied Irish Banks plc* v *Finnegan and Finnegan* unreported, February 16 1996 (discussed in note 13 to Part One of this article).

and to adoption. Yet, as the relevant cases stress, in these areas a person is giving up a *constitutional* right. The veto under the Family Home Protection Act, although doubtless supportive of the constitutionally-protected family, is merely a statutory right. The elevation of the veto in *Smyth* to quasi-constitutional status creates problems for practitioners since, unlike marriage or placing one's child for adoption, consenting to a disposition of a home is a routine occurrence.

The irony is that the protection provided by the Family Home Protection Act is now extremely uneven. While laying down stringent requirements in relation to consents to ordinary mortgages, it gives a spouse no right whatsoever to prevent the imposition of a judgment mortgage on her home (see *Murray* v *Diamond*[15] and *Containercare (Ire) Ltd* v *Wycherley*.)[16] Therefore, after its setback in *Smyth*, the Bank of Ireland could presumably convert its debt into a judgment mortgage and, if necessary, force a sale of Mrs Smyth's family home anyway.

In conclusion, it may be suggested that the time has come for an overhaul of the Family Home Protection Act, 1976. Although the Family Law Act, 1995 will bring a number of welcome improvements, more radical surgery appears to be necessary. The basic problem is that the text of the Act fails to consider obvious practical questions, so that it has been left to the Courts to fill in the gaps. However, as the *Smyth* case demonstrates, it is difficult for judicial law-reform to address the wider picture. A revised Family Home Protection Act (which eg linked the rule in *Smyth* to a well-considered statutory certification procedure) would make life much easier for conveyancers while still serving the vital social function of

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15 [1982] ILRM 113.

16 [1982] IR 143.

protecting family homes.