

Undue influence – on the side of caution

Mark Pawlowski looks at the duties of a solicitor advising a wife who may be at risk of being influenced by her husband into charging her interest in the family home as security for her husband's indebtedness

The need for independent legal advice

In *Barclays Bank plc v O'Brien* [1994] 1 AC 180, Lord Browne-Wilkinson intimated that a bank was obliged to warn the wife at a private meeting (not attended by the husband) of the extent of her potential liability and of the risks involved in standing surety or charging her interest in the family home for her husband's indebtedness, and to urge her to take independent legal advice. The requirement of a private meeting, however, was considered by the subsequent House of Lords' decision in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 as not being prescriptive and the practice of lending institutions generally has been not to have a private meeting with the wife. The reason for this is that banks are reluctant to assume the responsibility of advising the wife at such a meeting. Instead, banking practice, in line with the House of Lords' guidance, has been to require the wife to obtain legal advice and to seek confirmation from a solicitor that he has explained the nature and effect of the documents to the wife.

If, however, the bank knows that the solicitor has not duly advised the wife, or if the bank knows facts from which it ought to have realised that the wife has not received appropriate advice, it will proceed at its own risk. Moreover, if the certificate is not forthcoming from the solicitor, the bank will not normally have reasonable grounds for being satisfied that the wife's agreement had been properly obtained. In that case, it will be subject to any equity in favour of the wife arising from her husband's impropriety.

The content of the legal advice

In *Royal Bank of Scotland plc v Etridge (No 2)* [1998] 4 All ER 705, the Court of Appeal set out its views of the duties of a solicitor advising a wife who may be under the influence of her husband. It was suggested that his duty was not merely to explain the documentation and ensure that his client understands the nature of the transaction and wishes to carry it out. It went further in ensuring that the transaction was one which she could sensibly be advised to enter into if free from undue influence. If the solicitor was not satisfied that this was the case, according to the Court of Appeal, he was obliged to advise her not to enter into it and to refuse to act further for her in the implementation of the transaction if she persisted.

According to the House of Lords, however, this went too far. It was not for the solicitor to veto the transaction. If he considers the transaction is not in the wife's best interests, he should give her reasoned advice to her to that effect. At the end of the day, however, the decision whether to proceed or not is that of his client. According to Lord Nicholls, "a wife is not precluded from

entering into a financially unwise transaction if, for her own reasons, she wishes to do so”: at [61]. This mirrors the approach taken by Fletcher Moulton LJ in *Re Coomber* [1911] 1 Ch. 723, 730, cited with approval by Lord Nicholls, who stated:

“All that is necessary is that some independent person, free from any taint of the relationship . . . should put clearly before the person what are the nature and consequences of the act. It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing”.

Lord Nicholls did, however, recognise that there may be exceptional circumstances where “it is glaringly obvious” that the wife is being “grievously wronged”: at [62]. In those circumstances, the solicitor should clearly decline to act further. Ultimately, the responsibilities of the solicitor who is advising the wife stem from his retainer. In this connection, the bank’s concern is to receive confirmation from the solicitor that he has brought home to the wife the risks involved in the transaction. The content of the advice required from a solicitor before giving such confirmation sought by the bank will depend on the circumstances of the case. The following matters were regarded by his Lordship as “the core minimum”:

- The solicitor will need to explain to the wife the purpose for which he has become involved. He should explain that the bank may rely upon his involvement to counter any suggestion that the wife did not properly understand the implications of the transaction. He must also explain that he will need to obtain confirmation from the wife that she wishes him to act for her in the matter and to advise her on the legal and practical implications of the transaction.
- He will need to explain the nature of the documents and the practical consequences these will have for the wife if she signs them (e.g., she could lose her home or be made bankrupt if her husband’s business does not prosper).
- He will need to point out the seriousness of the risks involved.
- He must state clearly that the wife has a choice as to whether or not to proceed with the transaction. The decision is hers and hers alone.
- He should check whether the wife wishes to proceed. She should be asked whether she is content that the solicitor should write to the bank confirming he has explained to her the nature of the documents and the practical implications they may have for her, or whether, for example, she would prefer him to negotiate with the bank on the terms of the transaction. The solicitor should not give any confirmation to the bank without the wife’s authority.

Lord Scott also gave useful guidance as to what the solicitor’s duty should be towards the wife, at [169]:

- He should try to discover from the wife her understanding of the proposed transaction so as to remedy any possible misconceptions
- He should explain to the wife the steps the bank might take to enforce its security
- He should make sure the wife understands the extent of her liabilities
- He must explain the likely duration of the security
- He must ascertain whether the wife is aware of any existing indebtedness that will, if she grants the security, be secured under it
- He should explain to the wife that he may need to give the bank a written confirmation that he has advised her about the nature and effect of the proposed transaction and obtain her consent to his doing so.

The meeting with the wife should take place in the absence of the husband and his explanations should be couched in non-technical language. Above all, the solicitor's task should not be viewed as purely a formality or a charade. He should obtain any information he needs from the bank and, if the latter fails to provide it, he should decline to provide the confirmation sought by the bank. In this connection, Lord Nicholls considered that it should become "routine practice" for lenders to send to the solicitor the necessary financial information (i.e., regarding the purpose of the loan, the current amount of the husband's indebtedness, the amount of his current overdraft facility and the amount and terms of any new loan). The consent of the bank's customer (the husband) will be required for this purpose and, if this is not forthcoming, the transaction will not be able to proceed. If, exceptionally, 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), it must inform the wife's solicitor of the relevant facts.

Solicitor acting for other parties

In some cases, the solicitor will be acting for the wife alone. Normally, however, he will also be acting for the husband (debtor) and/or even the lender. The Court of Appeal in *Etridge (No 2)* stressed that, when giving advice to the wife, the solicitor is acting exclusively as her solicitor and that it made no difference that he was also the husband's solicitor or that he was acting as the bank's agent at completion of the transaction. Even if he accepts the bank's instructions to advise the wife, he will still be acting as her solicitor when he interviews her. However, where he is also instructed by the bank (other than in a purely ministerial capacity), there may be a real danger of a conflict of interest arising.

The House of Lords in *Etridge (No 2)* essentially approved much of this reasoning. Lord Nicholls, for example, accepted that, in advising the wife, a solicitor is acting for her alone. He is concerned only with her interests despite the fact that he may also be acting for the husband and also the lender. As a corollary to this, knowledge of what passes between the solicitor and the wife cannot be imputed to the bank, since the solicitor is not acting as the bank's agent when he

is advising the wife. Any knowledge the solicitor acquires from the wife will be confidential as between them. If the solicitor acts in breach of his professional obligation to the wife, her remedy will be against him and not against the bank. Clearly, however, where there is any real risk of a conflict of duty, the solicitor must decline to act for the wife.

Conclusion

At the forefront of the House of Lords' ruling in *Etridge (No 2)* was the need to provide simple, clear and practical guidance to both lenders and solicitors involved in residential mortgage transactions where a wife is being asked to stand surety for her husband's indebtedness. In particular, Lord Nicholls' scheme whereby a wife will be put into a proper relationship with a solicitor, who is acting for her and accepts appropriate duties towards her, was intended to do much to reduce the "fiction of free and informed consent" so apparent in many of the earlier pre-*Etridge* cases. At the same time, its aim was to draw a fair balance between giving appropriate protection to wives and, at the same time, ensuring that lenders are not unduly hampered in advancing money on the security of the matrimonial home.

Points for the practitioner

1. The bank's concern is to receive confirmation from the solicitor that he has brought home to the wife the risks involved in the transaction. The content of the advice required from a solicitor before giving such confirmation sought by the bank will depend on the circumstances of the case.
2. If the solicitor considers the transaction is not in the wife's best interests, he should give her reasoned advice to her to that effect. At the end of the day, however, the decision whether to proceed or not is that of his client.
3. The interview with the wife should take place in the absence of the husband and his explanations should be couched in non-technical language. Above all, the solicitor's task should not be viewed as purely a formality or a charade. He should obtain any information he needs from the bank and, if the latter fails to provide it, he should decline to provide the confirmation sought by the bank.
4. When giving advice to the wife, the solicitor is acting exclusively as her solicitor and it makes no difference that he is also the husband's solicitor or that he is acting as the bank's agent at completion of the transaction. Even if he accepts the bank's instructions to advise the wife, he will still be acting as her solicitor when he interviews her.

Mark Pawlowski is a barrister and professor emeritus of property law, School of Law, University of Greenwich.