THIRD PARTY SECURITIES AND GUARANTEES

Commentary

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In his interesting and thought-provoking paper, the Honourable Justice de Jersey referred principally to three decisions, *Barclays Bank v O'Brien*,[2] *Northside Developments v Registrar-General*[3] and *Commercial Bank of Australia v Amadio*,[4] describing the first of these decisions as "the modern exposition of 'its' rule"[5] despite the fact that *Yerkey v Jones*[6] continues to constitute the authority which in this respect is binding in Australia. A foreign visitor, and particularly one from the jurisdiction where the decision in question was handed down, could not possibly dispute the view of a judge of the Supreme Court of Queensland that "one may usefully dwell on *O'Brien*" and that "doing so amply demonstrates that the lender's **modern** position is really no less 'vague and indefinite' than it was in 1939".[7] However, if *Barclays Bank v O'Brien* is likely to be a significant authority in Australia, it is appropriate for a visitor from that jurisdiction to draw attention to two further matters: first, the English law context in which the decision was handed down and, secondly, the series of subsequent cases in which the principle enunciated by Lord Browne-Wilkinson has been worked out and, in some respects, extended. This is what I propose to discuss in my commentary this afternoon.

THE CONTEXT OF THE DECISION IN BARCLAYS BANK v O'BRIEN

English law has no general doctrine similar to that established by the High Court in *Blomley v Ryan*[8] and applied and extended in *Commercial Bank of Australia v Amadio*[9] and *Louth v Diprose*.[10] Justice de Jersey is of course absolutely correct to say[11] that "the equitable jurisdiction

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2 [1994] 1 AC 180, [1993] 3 WLR 786.

3 (1990) 170 CLR 146.

4 (1983) 151 CLR 447.

5 At p 6.

6 (1939) 63 CLR 649.

7 At p 6.

8 (1956) 99 CLR 362.

9 (1983) 151 CLR 447, 46 ALR 402.

10 (1992) 175 CLR 621.

to set aside a transaction as being unconscionable whenever, as it was put, 'a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage'[12] ... is not a creature of Australian law, but has very old English origins". However, those old English origins have not been the subject of any subsequent development by the English courts. Indeed, the authors of Goff & Jones: *The Law of Restitution*,[13] when listing the grounds which form the basis of restitutionary claims, include under the heading of "Unconscionability" only deviation in contracts for the carriage of goods by sea, payments of money under *ultra vires* agreements and void loans made to infants, stating that "[a] defendant who received, in these circumstances, the benefit of the delivery of the goods or the payment of money and then refused to make restitution may be said to have behaved unconscionably"; they then go on to say that, "[s]imilarly, *unconscionability* may be the happiest rationalisation of the equitable doctrine of proprietary estoppel". It may well be that the principle of unconscionability enunciated by the High Court will one day be adopted in England. In a recently reported appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda), *Boustany v Pigott*,[14] the Privy Council, composed entirely of existing Lords of Appeal in Ordinary,[15] stated[16] that they were "in general agreement" with the proposition that "[i]n situations of this kind[17] it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling conduct or circumstances", citing *Commercial Bank of Australia v Amadio*.[18] This decision may be the basis of the recent announcement by the English Law Society and the English Council of Legal Education concerning the required content of compulsory courses in English Law Schools including in the Equity course what is described as "the developing principle of unconscionability". However, even if that principle is now developing, it has certainly not as yet developed on anything like the Australian scale. Nor is it particularly likely to do so; the present impetus of any developments in this and indeed in many other areas of law in England is the repeated enunciation of the existence of a Law of Restitution, something which has proceeded apace since Lord Goff began to sit on the Appeals Committee of the House of Lords. In fact, the very existence of the principle of unconscionability in Australia may well be one of the principal reasons why the Law of Restitution has yet to take root to any significant extent here. Consequently, when the possible application in Australia of the principles enunciated by Lord Browne-Wilkinson in *Barclays Bank v O'Brien* is being considered, the fact that his speech was handed down in the context of a system which has no general principle of unconscionability must always be borne in mind.

A second factor which must be borne in mind when considering the possible application in Australia of the decision is the content of the English law of undue influence prior to *Barclays Bank v O'Brien*. In *National Westminster Bank v Morgan*[19] the House of Lords had held that the doctrine of undue influence will only apply where two distinct elements can be established: first, the transaction must have been procured by undue influence and, secondly, the transaction must have been wrongful in that an unfair advantage has been taken of the person seeking to avoid it. In

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11 At p 20.

12 *Commonwealth Bank of Australia v Amadio* (1983) 151 CLR 447 at p 481.

13 (4th ed, 1993) pp 43-44.

14 (1993) 69 P & CR 298.

15 The Privy Council has often included retired Lords of Appeal in Ordinary (although this is no longer possible due to the new regulations governing the maximum age at which judges can sit) and/or a judge from the legal system whose decision is the subject matter of the appeal in question.

16 (1993) 69 P & CR 298 at pp 302 & 303.

17 The case concerned a successful attempt to set aside a lease on the grounds of unconscionable conduct by the grantee, who had taken advantage of the absence from Antigua of the administrator of the grantor's property to persuade her to agree to and execute before a lawyer retained specifically for the purpose a new lease on manifestly unfavourable terms.

18 (1983) 46 ALR 402 *per* Mason J at p 413.

19 [1985] AC 686, [1985] 2 WLR 588.

Barclays Bank v O'Brien the House of Lords held that the second of these requirements only applies to cases of presumed undue influence and not to cases of actual undue influence. Where a person alleging undue influence can "prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which has been impugned",[20] the wrongdoer will be unable to retain the benefit of the transaction in question whether or not it was to the manifest disadvantage of the claimant.[21] On the other hand, in cases of presumed undue influence,[22] the person who exerted the undue influence will nevertheless be able to retain the benefit of the transaction unless it can be shown to have constituted "a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the relationship between the parties it was procured by the exercise of undue influence".[23] Because of the need to clarify the law and restrict the scope of the earlier decision in *National Westminster Bank v Morgan*, Lord Browne-Wilkinson's speech consequently had to contain a substantial discussion of this question, one which would not otherwise have been necessary on the facts since it was of course inevitable that the charge entered into by the wife constituted a serious disadvantage to her. This particular part of his speech will obviously not be of any great significance when the possible application in Australia of the remainder of it is being considered.

THE SUBSEQUENT WORKING OUT OF THE SCOPE OF THE PRINCIPLE ENUNCIATED IN *BARCLAYS BANK v O'BRIEN*

The principle enunciated by Lord Browne-Wilkinson in *Barclays Bank v O'Brien* with which we are here concerned has already been set out by Justice de Jersey. For ease of reference, I repeat the most important paragraphs[24] here:

> "Therefore in my judgment a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction."
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> "It follow[s] that unless the creditor who has been put on inquiry takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained the creditor will have constructive notice of the wife's rights."
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> "What, then are the reasonable steps which the creditor should take to ensure that it does not have constructive notice of the wife's rights, if any? Normally the reasonable steps necessary to avoid being fixed with constructive notice consist of making inquiry of the person who may have the earlier right (ie the wife) to see whether such right is asserted. It is

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20 [1993] 3 WLR 786 at p 791. Lord Browne-Wilkinson, adopting a classification first laid down by the Court of Appeal in *Bank of Credit and Commerce International v Aboody* [1990] 1 QB 923 at p 953, classified this type of undue influence as falling into Class A.

21 This was held specifically by the House of Lords in *CIBC Mortgages v Pitt* [1993] 3 WLR 802, a case decided at the same time as and reported immediately after *Barclays Bank v O'Brien.*

22 Classified by Lord Browne-Wilkinson as falling into Class 2, consisting of Class 2 (A) where the relationship between the parties is such that it is presumed as a matter of law that undue influence has been exercised and Class 2 (B) where, despite the absence of a relationship of this type, the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer ([1993] 3 WLR 786 at p 792). The cases of third party securities and guarantees at present under discussion will almost invariably fall into Class 2 (B).

23 *National Westminster Bank v Morgan* [1985] 2 WLR 588 at p 597. In the case of a gift, this requirement will be satisfied "if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motives on which ordinary men act" (*Allcard v Skinner* (1887) 36 ChD 145 at p 185). In the case of a bilateral transaction, this requirement will be satisfied by any inadequacy of consideration in favour of the person who has exerted the undue influence. The cases of third party securities and guarantees at present under discussion inevitably satisfy this requirement.

24 [1993] 3 WLR 786 at pp 798-799.

> 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. But in my judgment the creditor, in order to avoid being fixed with constructive notice, can reasonably be expected to take steps to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice. As to past transactions, it will depend on the facts of each case whether the steps taken by the creditor satisfy this test. However for the future in my judgment a creditor will have satisfied these requirements if it insists 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. If these steps are taken in my judgment the creditor will have taken such reasonable steps as are necessary to preclude a subsequent claim that it had constructive notice of the wife's rights. I should make it clear that I have been considering the ordinary case where the creditor knows only that the wife is to stand surety for her husband's debts. I would not exclude exceptional cases where a creditor has knowledge of further facts which render the presence of undue influence not only possible but probable. In such cases, the creditor to be safe will have to insist that the wife is separately advised."

In the eighteen months since the decision of the House of Lords was handed down, this principle has had to be considered in a surprisingly large number of cases: on no fewer than four occasions by the Court of Appeal[25] and on at least four further occasions at first instance.[26] These authorities have interpreted and, in some cases, extended the scope of Lord Browne-Wilkinson's principle.

Does the principle extend beyond cohabitees?

In *Barclays Bank v O'Brien* Lord Browne-Wilkinson said this:[27]

> "I have hitherto dealt only with the position where a wife stands surety for her husband's debts. But in my judgment the same principles are applicable to all other cases where there is an emotional relationship between cohabitees. The 'tenderness' shown by the law to married women is not based on the marriage ceremony but reflects the underlying risk of one cohabitee exploiting the emotional involvement and trust of the other. Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this. Legal wives are not the only group which are now exposed to the emotional pressure of cohabitation. Therefore if, but only if, the creditor is aware that the surety is cohabitating with the principal debtor, in my judgment the same principles should apply to them as apply to husband and wife."

In *Massey v Midland Bank*[28] the Court of Appeal had to consider the case of a couple who, at the time of the execution by the woman of a charge over her dwelling house to secure an overdraft facility for the man's business, had maintained an emotional and sexual relationship for some fourteen years in the course of which they had had two children. However, they had never lived together because her parents objected to the relationship. On the face of things, this situation fell outside the principle enunciated by Lord Browne-Wilkinson. However, Steyn LJ, with whose

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25 *Massey v Midland Bank* [1995] 1 All ER 929, *Banco Exterior Internacional v Mann* [1995] 1 All ER 936, *TSB Bank v Camfield* [1995] 1 WLR 430.

26 *Midland Bank v Greene* [1994] 2 FLR 827, *Allied Irish Bank v Byrne* (1 February 1994) unreported but available on Lexis, *Bank Melli Iran v Samadi-Rad* (9 February 1994) unreported, *Midland Bank v Serter* [1994] EGCS 45.

27 Ibid at p 800.

28 [1995] 1 All ER 929.

judgment Neill and Peter Gibson LJJ agreed, had no hesitation in extending that principle to cover this situation. He held:[29]

> "[The woman] never cohabited with [the man]. But she had a stable sexual and emotional relationship with him over many years, and they had two children. While it is an extension of the approach enunciated by Lord Browne-Wilkinson, I have no doubt that in terms of impairment of [the woman's] judgmental capacity this case should be approached as if she was a wife or cohabitee of [the man]."[30]

This is clearly a sensible extension of Lord Browne-Wilkinson's principle. However, where the parties are neither married nor live at the same address, it is obviously less likely that the other party to the transaction will actually be aware of their relationship. This raises the question of whether that party is now required in every case in which a guarantor or surety does not have any particularly obvious commercial reason for acting as such to enquire whether he or she actually has any emotional or sexual relationship with the beneficiary of the guarantee or surety on pain of being held to have constructive notice of that relationship if no enquiry is made.[31] It is very much to be hoped that the courts do not take this further step to be a necessary consequence of extending Lord Browne-Wilkinson's principle beyond cohabitees. If they do, the acceptance of a guarantee will then involve the same duty to make enquiries as that which arises on the purchase of immoveable property, something which seems wholly inappropriate. Such a result would certainly extend the scope of constructive notice far beyond the obligation envisaged by Lord Browne-Wilkinson himself to investigate any suspicious facts of which the beneficiary is put on enquiry, something which should in itself constitute a sufficient argument against the extension being made.

How is the principle applied to transactions entered into prior to *Barclays Bank v O'Brien*?

Lord Browne-Wilkinson said:[32] "As to the past transactions, it will depend on the facts of each case whether the steps taken by the creditor satisfy this test". All the transactions which have so far come before the courts have inevitably been transactions entered into prior to the decision of the House of Lords in *Barclays Bank v O'Brien*. In *Massey v Midland Bank*[33] Steyn LJ said this:[34]

> "The guidance offered by Lord Browne-Wilkinson in *Barclays Bank v O'Brien* postdates the transaction. Lord Browne-Wilkinson made clear in giving the guidance that it was to operate prospectively. On the other hand, since the pre-existing principles offered, if anything, a lesser protection to wives (and others) circumstanced as Miss Massey was, it will be convenient to examine her case in the light of that guidance."

He then concluded that the claim to set aside the guarantee failed according to Lord Browne-Wilkinson's more generous approach and so would necessarily also fail according to the lesser protection given by the pre-existing principles. It was therefore not necessary for him to consider the nature of these pre-existing principles and he did not do so.

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29 At p 933.

30 A similar conclusion had been reached a few weeks earlier by Ferris J in *Allied Irish Bank v Byrne* (1 February 1994) unreported but available on Lexis. The parties were divorced but had become reconciled and were believed by the bank to be still married.

31 This point is made by J Mee in [1995] Conv 148, whose conclusion to the question posed has been adopted in the text.

32 [1993] 3 WLR 786 at p 798.

33 [1995] 1 All ER 929.

34 At p 934.

It has been argued[35] that these remarks do not constitute a correct understanding of Lord Browne-Wilkinson's view. In the passage cited above, Lord Browne-Wilkinson stated that it would depend on the facts of each past transaction whether the steps taken satisfied "this test". This reference back to the test which he had already set out clearly indicates that he intended the same test to apply to both past and future transactions - the only difference being that he clearly assumed that in the future all prudent lenders would invariably follow his guidelines, something which could not possibly be expected of past lenders. This argument seems convincing, even though it is tolerably clear that in practice Lord Browne-Wilkinson's test will not and should not be applied too rigidly (this point will be considered in the next section).[36] Given that it has been held in several of the cases decided since *Barclays Bank v O'Brien* that Lord Browne-Wilkinson's test had not been satisfied,[37] if indeed the pre-existing principles provided a lesser protection then, according to the view expressed by Steyn LJ, those principles ought to have been considered. The fact that they were not is a further argument in support of the view that Lord Browne-Wilkinson intended the same test to apply to both past and future transactions. However, this question clearly cannot be resolved until the view of Steyn LJ is cited and considered in a case where Lord Browne-Wilkinson's test is held not to have been satisfied.

What conduct will comply with Lord Browne-Wilkinson's test?

In *Massey v Midland Bank*[38] Steyn LJ had this to say about the guidance offered by Lord Browne-Wilkinson:[39]

> "First, the guidance was clearly not intended to be exhaustive, as indeed the facts of the present case demonstrate. Secondly, the guidance was intended to strike a fair balance between the need to protect wives (and others in a like position) whose judgmental capacity was impaired and the need to avoid unnecessary impediments to using the matrimonial home as security. The guidance ought therefore not to be mechanically applied. The relief is after all equitable relief. It is the substance that matters. If, as far as the creditor is concerned, the objective of independent advice for the wife (or somebody in a like position) is realised, the fact that there was not an interview between a representative of the creditor and the surety, unattended by the debtor, ought not by itself to be fatal to the creditor's case."

This view is to be supported. However, given that all the transactions which have so far had to be considered by the courts had been entered into prior to the decision in *Barclays Bank v O'Brien*, they are only relevant as indicators of what conduct will satisfy Lord Browne-Wilkinson's test if, contrary to what Steyn LJ had already stated and in accordance with what has already been submitted,[40] that test does indeed apply to past transactions as well as to future transactions. On this assumption, what conduct has been the subject of rulings by the courts?

In *Barclays Bank v O'Brien* itself, the bank simply sent the mortgage documents and a side letter to the mortgagors' local branch asking them to explain the projected increase in the overdraft facility and to ensure that the mortgagors were "fully aware of the nature of the documentation to be signed and advising that if they are in any doubt they should contact their solicitors before signing". The documents were in fact signed without any explanation whatever being given and the wife did not even read the documents. This obviously did not comply with Lord Browne-Wilkinson's

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35 By J Mee in [1995] Conv 148 at p 153.

36 See *infra*, text to footnote 37 *et seq*.

37 *Midland Bank v Greene* [1994] FLR 827, *Allied Irish Bank v Byrne* (1 February 1994) unreported, *Bank Melli Iran v Samadi-Rad* (9 February 1994) unreported, *TSB Bank v Camfield* [1995] 1 WLR 430.

38 [1995] 1 WLR 430.

39 At p 934.

40 See *supra*, text to footnote 34.

test. In *Midland Bank v Greene*,[41] the bank took "no steps at all to satisfy themselves as to [the wife's] position, or whether she was freely entering into the transaction, or as to her knowledge"[42] and the judge held, inevitably, that Lord Browne-Wilkinson's test had not been complied with. The same conclusion was reached in the unreported decisions *Allied Irish Bank v Byrne*[43] and *Banco Melli Iran v Samadi-Rad*[44] because in both cases the same solicitor had advised both husband and wife.[45] In *TSB Bank v Camfield*,[46] the bank manager stipulated that the wife should be given independent legal advice and wrote to the mortgagors' solicitors asking that she should be given such advice by a separate person in the same firm; however, although this was done, the wife, contrary to the assurance given to the bank, was not advised separately from her husband. The first instance judge held that Lord Browne-Wilkinson's test had not been complied with and this was not disputed in the Court of Appeal.[47]

On the other hand, in *Massey v Midland Bank*[48] the bank required the mortgagor to be independently advised by a solicitor before it would agree to proceed with the transaction. Her lover arranged for his own solicitors to advise her and they did so in his presence. The solicitors confirmed to the bank that they had explained the nature of the charge to her and the Court of Appeal held that the bank was entitled to rely on that confirmation. The same conclusion has been reached by the same court on substantially similar facts in *Banco Exterior Internacional v Mann*[49] (although only by a majority)[50] and in *Bank of Baroda v Rayarel*[51] (unanimously). In the latter case the wife had additionally signed a certificate confirming that she had been advised of the effect of the mortgage and of her right to have independent legal advice but this was not the decisive factor. Hoffmann LJ said "the bank was entitled to assume that the solicitor had given appropriate advice and that if there were a conflict of interest the solicitor would have advised the client to take independent advice. The bank's legal department was not required to commit the professional discourtesy of doubting whether the solicitor had actually given the required advice nor was it required to inform the solicitor of his professional duties. That applied *a fortiori* where the surety had certified in writing that such advice had been given, although the bank was not obliged to issue such a certificate as part of the loan documentation".

These decisions do not present a particularly consistent approach and there can be little doubt that at some stage the House of Lords will be called upon to resolve the differences of interpretation which have surfaced. However, it is clearly significant that the three recent decisions[52] of the Court of Appeal discussed immediately above all reached the conclusion that a bank is entitled to rely on an undertaking from the mortgagors' solicitor that the potentially vulnerable mortgagor has been

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41 [1994] 2 FLR 827.

42 *Per* Judge Rich QC at p 835.

43 (1 February 1994) transcript available on Lexis.

44 (9 February 1994).

45 This fact did not, however, prove fatal in a number of other cases, including *Massey v Midland Bank* [1995] 1 All ER 929, *Midland Bank v Serter* [1994] EGCS 45, *Banco Exterior Internacional v Mann* [1995] 1 All ER 936 and *Bank of Baroda v Rayarel* (1995) *The Times* 17 January 1995.

46 [1995] 1 WLR 430.

47 In the light of the subsequent decisions of the Court of Appeal in *Massey v Midland Bank* [1995] 1 All ER 929 (of which the Court of Appeal in *TSB Bank v Camfield* were actually aware), *Banco Exterior Internacional v Mann* [1995] 1 All ER 936 and *Bank of Baroda v Rayarel* (1995) *The Times* 17 January 1995, the bank should have disputed this.

48 [1995] 1 All ER 929.

49 [1995] 1 All ER 936.

50 Leave to appeal to the House of Lords was refused.

51 (1995) *The Times* 17 January 1995.

52 These are the three most recent decisions in which the question has been discussed. It could also have been raised in *TSB Bank v Camfield* [1995] 1 WLR 430 (decided after the first two decisions but before the third one) but the bank chose not to do so (see *ante*, text to footnote 46 and footnote 47).

advised in the manner required by the bank. This may well mean that the spotlight of judicial criticism is about to be transferred from the banks to the solicitors of the mortgagors. If so, this may have interesting implications for such solicitors' professional indemnity insurance.

Where the test is not complied with, what remedies are available?

Where the test enunciated by Lord Browne-Wilkinson in *Barclays Bank v O'Brien* has not been complied with, the victim of the undue influence has the right to have the transaction set aside. Is this a right to have the transaction set aside *in toto* or only subject to such of the terms of the transaction as the victim was aware of at the time it was entered into?

In *Midland Bank v Greene*[53] a married couple, who owned a leasehold interest in their matrimonial home subject to a mortgage to the bank, purchased the freehold by means of a further mortgage into which the previous mortgage was rolled up. However, although the major part of the advance was for the purpose of purchasing the property, the mortgage also secured the husband's existing and future overdraft by means of an all-moneys clause. Subsequently, a further advance was obtained principally in order to improve the property but partially to discharge the husband's then overdraft. In accordance with its general practice at the time, the bank on neither occasion took any "steps at all to satisfy themselves as to [the wife's] position, or whether she was freely entering into the transaction, or as to her knowledge"[54] and the judge[55] held, inevitably, that Lord Browne-Wilkinson's test had not been complied with. However, he held[56] that the mortgage could only be set aside on terms that the wife paid to the bank all sums due in "the home loan account" with interest thereon.[57] On the other hand, in *Allied Irish Bank v Byrne*[58] the wife was induced to mortgage a house of which she was the sole owner as security for her husband's indebtedness by a false representation made by him that her liability, in reality unlimited. was limited to £35,000. She was held to be entitled to have the charge set aside because the same solicitor had advised both husband and wife. The bank nevertheless argued that its mortgage ought to be treated as good to the extent of £35,000 (it is not clear whether or not the then unreported decision in *Midland Bank v Greene* was cited). Ferris J held that the wife's claim was an all or nothing process and that she had to be put into the position in which she would have been if the misrepresentation had not been made. Consequently, the mortgage was set aside *in toto*. However, he conceded that the position might have been different if she had herself received the £35,000 beneficially. Eight days later, *Bank Melli Iran v Samadi-Rad*[59] a case with identical facts, save for the sum involved (£140,000),[60] had to be decided with the benefit of the decision in *Midland Bank v Greene* but without the benefit of the decision in *Allied Irish Bank v Byrne*. The judge[61] cited the decision in *Midland Bank v Greene* with approval and held[62] that "he who seeks equity must do equity".

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53 [1994] 2 FLR 827.

54 Ibid at p 835.

55 Judge Rich QC, sitting as a Deputy High Court judge.

56 Relying on the similar order made by Parker J in *Lodge v National Union Investment Co* [1907] 1 Ch 300, at p 312 (the debtor under an unlawful money-lending transaction was held entitled to recover his security only on repayment of the sum advanced).

57 It is not entirely clear whether the principal sum related only to the further advance or also to the original advance by means of which the property was purchased. The remarks of the judge suggest that it was the former (which seems rather strange) but since the matter was left to be determined by the Chancery Master it is impossible to be certain.

58 (1 February 1994) unreported but available on Lexis.

59 (9 February 1994) unreported.

60 On this occasion the bank accepted that the wife had made out an arguable case as to an alleged misrepresentation by her husband that the security was limited to £140,000. Again, the same solicitor had represented both husband and wife.

61 Robert Walker QC, sitting as a Deputy High Court judge (he is now Robert Walker J).

62 Referring to *O'Sullivan v Management Agency and Music* [1985] QB 428, a case in which an exclusive management agreement entered into by the well known singer Gilbert O'Sullivan was set aside on the grounds of

Consequently, the wife "must acknowledge that there is a valid security on the house for £140,000, with interest on that sum and costs as from the date of the formal demand on her, and the summary claim for possession must be dealt with on that footing". While the first two of these decisions are reconcilable on the grounds that the wife had received a personal benefit in the first case and not in the second, it is quite impossible to reconcile the second decision with the third one. This conflict of authority had to be resolved by the Court of Appeal in *TSB Bank v Camfield*.[63]

In this case, a husband and wife mortgaged their matrimonial home to secure loan facilities extended by the bank to finance a business venture into which the husband had entered as a partner on the strength of an innocent misrepresentation to the wife by the husband that their maximum liability was £15,000. As has already been seen,[64] the bank manager stipulated that the wife should be given independent legal advice and wrote to the mortgagor's solicitors asking that she should be given such legal advice by a separate person in the same firm; however, although this was done, the wife, contrary to the assurance given to the bank, was not advised separately from her husband. The first instance judge held that Lord Browne-Wilkinson's test had not been complied with and this was not disputed in the Court of Appeal.[65] The bank contended that the wife was only entitled to have the mortgage set aside on terms that she acknowledged that it was a valid security for £15,000.[66] Nourse LJ referred to *Barclays Bank v O'Brien*, in which the facts had also been very similar, in that the husband had falsely represented to the wife that the charge was to secure only £60,000. The Court of Appeal[67] had held that the legal charge was not enforceable by the bank against the wife save to the extent of the £60,000 which she had thought that she was agreeing to secure and which the bank had in fact already recovered as a result of the proceedings at first instance. However, in the House of Lords Lord Browne-Wilkinson did not specifically address this point, merely holding that the wife was "entitled as against the bank to set aside the legal charge on the matrimonial home securing her husband's liability to the bank".[68] Because the basis of the decisions of the Court of Appeal and the House of Lords had been different, Nourse LJ held that neither of them had decided this particular point ("or, at all events, that it would be speculative to hold that [either] of them did").[69] He considered the three authorities discussed immediately above and upheld the decision of Ferris J in *Allied Irish Bank v Byrne*[70] that the wife was entitled to have the transaction set aside *in toto*.[71] Leave to appeal against this decision to the House of Lords was sought and refused.

This decision of the Court of Appeal clearly represents English law at present, particularly in the light of the refusal of leave to appeal. Nevertheless, in view of the differences of opinion which have been expressed, it is unlikely to constitute the last word on the subject and it is probable that at some stage the House of Lords will be called upon to decide this point. It also remains to be

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undue influence and restraint of trade and the managers were ordered to account for their profits subject to the payment of reasonable remuneration for their skill and labour.

63 [1995] 1 WLR 430.

64 See *ante*, text to footnote 46.

65 The bank should in fact have disputed this; see *ante*, footnote 47.

66 Of which the wife's beneficial interest would have had to bear the appropriate percentage (see [1995] 1 WLR 430 at p 433).

67 [1993] QB 109.

68 [1993] 3 WLR 786 at p 801.

69 [1995] 1 WLR 430 at p 433. See also *per* Roch LJ at p 438.

70 (1 February 1994) unreported but available on Lexis.

71 [1995] 1 WLR 430 at p 437. Roch LJ, who agreed with this conclusion, went on to consider a further argument that, because in this case the misrepresentation was innocent rather than (as in the previous decisions) fraudulent, it was possible for the court to exercise its discretion under *Misrepresentation Act* 1967 section 2(2) to award damages in lieu of rescission *ab initio* and by this means enable the bank to recover the appropriate proportion of the £15,000 from the wife. However, because only the husband and not the bank was entitled to rely on this provision, he held (at p 439) that this was not an appropriate case for the award of damages in lieu of rescission *ab initio* since any such award against the husband would clearly be futile.

seen whether the decision will also be applied in situations where the victim of the undue influence has, as in *Midland Bank v Greene,* received some personal benefit from the transaction; presumably not, since in *Allied Irish Bank v Byrne*, the decision which the Court of Appeal applied, Ferris J conceded that the position might well have been different if the wife had received the funds beneficially. This is certainly the view which should be adopted if the occasion arises.

CONCLUSION

If and when, as Justice de Jersey has predicted, *Barclays Bank v O'Brien* becomes a significant authority in Australia, it is hoped that the observations in this paper as to the English law context of the decision may assist in its interpretation and that the analysis of the authorities in which the principle enunciated by Lord Browne-Wilkinson have been worked out and extended may assist the Australian courts in their deliberations.