

Group Briefing

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Guarantors: Independent Legal Advice?

The Court of Appeal's position is now very clear on the question of guarantors needing independent advice - unless an individual guarantor has an arguable defence that he/she has been the subject of undue influence or misrepresentation by the debtor, the Courts will not find that the lender was under a positive duty to ensure that the guarantor received independent legal advice.

ACC LOAN MANAGEMENT LIMITED V CONNOLLY¹

The judgment of the Court of Appeal was delivered on 4 April 2017.

» **Facts:** A father guaranteed the debts of his son to ACC. The son borrowed from ACC in 2005 and 2007, and his father provided guarantees in 2005 and 2008. The son defaulted in repayment of his loans, and ACC began legal proceedings in 2013. In February 2015, ACC successfully obtained summary judgment in the High Court against the son, and against the father in respect of the 2005 guarantee.²

1. [2017] IECA 119.

2. ACC's claim in respect of the second (2008) guarantee was remitted to plenary hearing, and was not the subject of the Court of Appeal's April 2017 decision.

» **High Court:** The guarantor had signed a confirmation that he had been given the opportunity to take independent legal advice in relation to the 2005 guarantee, and that he had taken that advice. His son gave evidence that the advice was in fact given by the son's solicitor, and not by a separate solicitor acting for the father, and could not be said to be "independent". At no stage in the High Court did the father claim that he had provided the guarantee as a result of undue influence exerted by, or misrepresentations made by, his son.

The High Court granted judgment in favour of ACC. Notably, on the question of independent legal advice, Fullam J held that while undue influence had not been alleged, the father-son relationship put ACC on inquiry (i.e. on notice of a possible non-commercial aspect to the guarantee) and under an obligation to take reasonable steps to ensure that the father had freely entered into the guarantee. Fullam J found that, in obtaining the confirmation from the father that he had received independent legal advice, ACC had taken "a sufficiently reasonable step".

» **Court of Appeal:** The father appealed. The Court of Appeal (in a judgment delivered by Finlay Geoghegan J) found in favour of ACC, holding that:

- no evidence had been presented by the guarantor to the High Court to support an argument that he had been subjected to undue influence; and
- as the guarantor did not have an arguable defence that he was the subject of undue influence, he did not have an arguable defence that the bank (because it knew of the father-son relationship) should have ensured that he obtained independent legal advice or otherwise ensured that he freely entered into the guarantee.

JUDGMENTS CONSIDERED

The judgment considered key Irish decisions, and one English decision, in this area. Notably, Hogan J in the Court of Appeal delivered a separate judgment in which, while he ultimately supported the judgment of Finlay Geoghegan J, he disagreed with her on the relevance of the decisions in *Roche* and *Etridge* (each referred to in further detail on the next page).

Case	Details
Ulster Bank Ireland Ltd v Fitzgerald ³	O'Donovan J held that a wife who claimed that she had signed a guarantee of the debts of her husband's company under his undue influence in fact had a financial stake in that company. Ulster Bank was found not to have been under an obligation to take special steps to ensure that the wife obtained independent legal advice, because Ulster Bank had no actual or constructive notice of possible undue influence.
Ulster Bank Ireland Limited v Roche & Anor ⁴	Ms Buttimer successfully claimed that she had guaranteed the debts of one of Mr Roche's companies under his undue influence. Clarke J considered Royal Bank of Scotland v Etridge ⁵ (in preference to considering <i>Fitzgerald</i> , as O'Donovan J in <i>Fitzgerald</i> had not considered <i>Etridge</i>). In <i>Etridge</i> , the Court considered whether, in various cases where wives argued that they had signed security documents under their husbands' undue influence, the bank was on notice of this (and therefore unable to enforce the security). Clarke J in <i>Roche</i> was satisfied that <i>Etridge</i> was authority for the proposition that a bank is put on inquiry where it is aware of facts that indicate to it, or ought to indicate to it, that there is a non-commercial aspect to a guarantee. Clarke J found that because Ms Buttimer had limited legal rights in respect of the transaction in question, and no involvement in the company whose debts she guaranteed, this was enough to place the Ulster Bank on inquiry and oblige it to take some steps to ensure that she had freely agreed to give the guarantee. Ulster Bank had not taken any such steps (i.e. it had not asked that Ms Buttimer obtain independent advice), so its claim against Ms Buttimer under the guarantee failed.
ACC Bank Plc v McEllin & ors ⁶	Birmingham J made an <i>obiter</i> comment that, if the case had involved an elderly parent guaranteeing the debts of a child's business, the decisions in <i>Etridge</i> and <i>Roche</i> would have been relevant in considering whether independent legal advice was needed.
The Governor and Company of the Bank of Ireland v Curran ⁷	The Court of Appeal agreed that no credible evidence had been produced that the guarantor (the borrower's mother) had been the subject of undue influence and that, as a result, there was no evidence to suggest that the bank needed to check whether she fully understood the nature of the guarantee she had provided (the guarantee had highlighted that independent advice should be obtained, and Mrs Curran had signed a statement that she understood the nature of the liability she was undertaking, and did not wish to take independent advice).
Ulster Bank Ireland Ltd v de Kretser ⁸	Birmingham J found that there was no evidence to support the wife's claim that she had executed a guarantee under the undue influence of her husband: she was an experienced businesswoman who had dealt with Ulster Bank regularly. Notably, in <i>de Kretser</i> , Hogan J (in the minority) disagreed with Birmingham J, and was of the view that the guarantor had made an arguable case that the bank had a positive duty to ensure that she received independent legal advice before she signed the guarantee.

KEY FINDINGS OF THE COURT OF APPEAL

- » Both *Etridge* and *Roche* dealt with situations where a finding of undue influence had been made, and the principles set out in both cases regarding further steps that a bank must take were set out only in the context of a prior finding of undue influence.
- » Neither *Etridge* nor *Roche* is authority for the proposition that, where there is no arguable defence of undue influence, there is a separate defence available to the guarantor if the bank did not ensure that the guarantor fully and freely understood what he was agreeing to.

- » There is no stand-alone obligation on a bank to ensure that a guarantor fully and freely understands what he is agreeing to.
- » If the guarantor in this case had raised an arguable defence of undue influence, the judgment in *Roche* may have been relevant.
- » As mentioned above, Hogan J also delivered a judgment in this case in which he disagreed with Finlay Geoghegan J as to the applicability of *Etridge* and *Roche*. However, having regard to the decisions of the Court of Appeal in *de Kretser* and *Curran*, he felt that it was clear that the Court of Appeal's "*settled view is that...absent an express claim of undue*

influence or...misrepresentation, a bank is under no affirmative duty to ensure that a surety receives independent legal advice." He also noted that, unless special circumstances exist, a judge of the Court of Appeal should yield to the prevailing view set out in prior decisions. As a result, he agreed with the judgment of Finlay Geoghegan J.

NOTE IN RELATION TO CONDITIONS PRECEDENT

It is important to note that Finlay Geoghegan J distinguished the facts of this case from those in [ACC Loan Management Ltd v Sheehan](#)⁹ in which ACC had listed a confirmation that the guarantor had received independent legal advice as a condition precedent

3. [2001] IEHC 159.

4. [2012] IEHC 166.

5. [2001] UKHL 44.

6. [2013] IEHC 454.

7. [2016] IECA 399.

8. [2016] IECA 371.

9. [2016] IECA 343.

to the loan being advanced. In that case, both the High Court and Court of Appeal agreed that, as the borrower's solicitor had confirmed to ACC that the guarantor had waived his right to seek independent legal advice, the guarantor had an arguable defence that the condition that ACC had imposed (which was arguably for the benefit for both parties) had been (and should not have been) unilaterally waived by ACC.

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