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Legal Advice for Vulnerable Sureties: The Problem with Giving Independent Advice

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Introduction

The House of Lords decision in *Barclays Bank v. O'Brien*ⁱ established clear authority that a surety transaction may be set aside on the grounds that the creditor has either actual or constructive notice of the transaction having been procured through some wrongdoing such as undue influence on the part of the debtor.ⁱⁱ One of the key “reasonable steps” that the creditor is expected to take so as to avoid being fixed with constructive notice is to urge the surety to seek independent legal advice. Cases post-*O'Brien* reveal not only how problematic the independent legal advice requirement may be in practice but also the emergence of two conflicting lines of authority.ⁱⁱⁱ The first line of authority illustrates how the requirement has whittled down to a minimal one where the creditor may successfully avoid being fixed with notice of the surety’s equity to set aside through the formal gesture of informing the surety to seek independent legal advice.^{iv}

The second line of authority may be found in the dissenting judgment of Hobhouse L.J. in *Banco Exterior Internacional v. Mann*,^v and cases like *Credit Lyonnais Bank Nederland v. Burch*^{vi} and *Royal Bank of Scotland v. Etridge (No. 1)*.^{vii} This line supports the view of a higher standard of advice being required where the courts will scrutinise not only the actual advice given but also whether the advice is competent and if not, whether the deficient advice should be attributed to the creditor. Given these conflicting views of the independent legal advice requirement, the Court of Appeal attempted to provide some clarity and consistency in *Royal Bank of Scotland v. Etridge (No. 2)*.^{viii} *Etridge (No. 2)* served the useful purpose of highlighting the significance of providing sufficiently detailed advice as so to enable the surety to give her informed consent.

The shift in focus to the surety’s informed consent will, however, require greater disclosure of information about the debtor’s financial position to the surety and her solicitor. This may, in turn, raise further issues which have not been adequately considered by the courts. In particular, a higher standard of advice will raise issues of confidentiality and conflicts of interest, as well as the extent of the solicitor’s independence and his ability to satisfy this higher standard of advice. The purpose of this article is to consider the extent to which the guidance given in *Etridge (No. 2)* on what is to be expected of solicitors when giving independent legal advice will be practicable in surety transactions.

***Etridge* (No. 2) - Clarity after the confusion?**

In *Etridge* (No. 2), Lord Stuart-Smith L.J. reiterated that one of the principal purposes of the “reasonable steps” requirement laid down by Lord Browne-Wilkinson in *O’Brien* was to provide a practical solution which enabled the matrimonial home to be used as security for raising credit and at the same time offer vulnerable sureties proper protection against advantage-taking. In situations where the surety alleges some wrongdoing, for example undue influence, one obvious way to rebut the presumption of undue influence is to provide evidence that the surety had entered the transaction after having received advice from some independent and qualified person who is fully informed of the material facts. However, cases since *O’Brien* have demonstrated that the protection of sureties through the provision of independent legal advice has in many cases proved “illusory”.^{ix} The advice given has often been “perfunctory, limited to an explanation of the documents and inadequate to dispel [the surety’s] understanding of the real extent of the liability which she was undertaking.”^x

In an attempt to clarify the confusion that has arisen in this area, the Court of Appeal provided an extensive analysis of the law and clearer guidelines on the steps necessary for satisfying the independent legal advice requirement. To some extent, *Etridge* (No.2) forms a compromise between the two earlier lines of authority. It maintains the earlier position taken in cases like *Mann, Midland Bank v. Souter*^{xi} and *Massey v. Midland Bank*^{xii} that the bank is entitled to assume that the solicitor, when giving advice to the surety, will regard himself as owing a duty to the surety and will carry out this duty regardless of who introduced the solicitor to the surety or asked him to advise her. There is also continuing support for the position that the bank is entitled to rely on the fact that, in taking on the task of advising the surety, the solicitor has considered himself to be sufficiently independent.^{xiii}

Etridge (No.2) attempts to reconcile the conflict between these two lines of authority by stressing that perfunctory advice will clearly be inadequate to prevent a bank from being fixed with notice of the surety’s equity. The role of independent legal advice requires more and, in giving advice, the solicitor must be fully informed of all material facts. Although the bank is entitled to assume the independence and sufficiency of the solicitor’s advice to the surety, the court stated that the bank will not be entitled to make such an assumption if it knows or ought to know that it is false. This is particularly pertinent to situations where the bank is in possession of material information which it knows is not available to the solicitor, or where the transaction is so manifestly disadvantageous to the surety that it cannot be one which a solicitor could properly advise his client to enter.

This approach reflects that taken by the Court of Appeal in *Burch* where the transaction was set aside on the grounds that the bank had failed to take the necessary reasonable steps to avoid being fixed with notice of the surety’s equity. In that case, although the bank’s solicitors had informed the surety that her liability was unlimited and that she should seek independent legal advice, no information was provided to her by the bank on the extent of the debtor’s current borrowings. Given the transaction was so manifestly disadvantageous to the surety, the court concluded that the bank’s failure to provide the necessary information to the surety and to insist on her taking independent legal advice fell short of the reasonable steps requirement.

At first glance, *Etridge (No. 2)* appears to have resolved two key issues that had emerged from the cases decided since *O'Brien*. The first relates to the constituents of independent legal advice, the other to the solicitor's independence. Clearer guidelines are provided on how the independent legal advice requirement is to be applied and what steps are required of both banks and solicitors in fulfilling that requirement. *Etridge (No. 2)* further purports to clarify the position on conflicts of interest and legal advice by reaffirming the position that solicitors are *prima facie* the parties best placed to judge their own independence and the extent of the advice to be given. Notwithstanding the welcomed clarity of *Etridge (No. 2)*, there remain questions about the efficacy of the independent legal advice requirement. Despite the emphasis on the importance of disclosure of material information and provision of more detailed advice, the treatment of the conflicts issue in *Etridge (No. 2)* has been relatively superficial. The approach further fails to shed light on how related issues on confidentiality and disclosure are to be dealt with.

Confidentiality and Conflicts of Interest

Independent legal advice has always been seen as a classic way of rebutting the presumption of undue influence having been exerted on a party to a transaction. Examples of factors which the courts have generally considered as pertinent are the quality of the advice given and the independence of the adviser. This raises the question of the meaning to be attributed to the term "independent". The shift in focus to whether sufficient information has been provided to the surety to enable her to make an informed decision will necessarily call for the greater disclosure of financial information about the debtor.

The disclosure of such information will, however, be subject to duties of confidentiality by both the bank^{xiv} and the solicitor.^{xv} Given the respective duties of confidentiality of a bank and a solicitor, the increased provision of information to the surety will bring about greater potential for conflicts of interest. This may be particularly acute in situations where the solicitor acts for two or more parties in the transaction.

(1) The bank's duty of confidentiality

The contractual nature of the relationship between a bank and its customer imposes on the bank a duty of confidentiality with regard to the customer's accounts^{xvi}. Thus, all information relating to the customer's accounts may not be disclosed by the bank to third parties, except in the following circumstances: (i) disclosure is under compulsion of law; (ii) there is a duty to the public to disclose; (iii) the bank's interests require disclosure; and (iv) disclosure is made by the express or implied consent of the customer.^{xvii} More recently, the Jack Committee^{xviii} noted the limited impact that the Data Protection Act 1984 had in maintaining customers' confidentiality.^{xix} The Committee further observed that there were three basic reasons for the bank's duty of confidentiality being increasingly undermined.^{xx} Firstly, there has been an increasing statutory erosion of the bank's duty of confidentiality as a result of a corresponding need for crime prevention and detection.^{xxi} Further, the growing risk of debtor default has resulted in the increasing flow of customer information within the banks' own banking groups as well as to credit reference agencies.

In surety cases, any disclosure of information by the bank regarding the debtor's financial position will clearly be caught by the bank's duty of

confidentiality. Allegations of breach of duty may, however, be avoided in one of two ways: by obtaining the debtor's consent;^{xxii} or by providing statutorily for the disclosure of such information. Given the general reluctance for such legislative measures to be taken^{xxiii}, the more likely solution would be to obtain the debtor's consent to disclosure.^{xxiv} Whilst the debtor's consent will address the issue of confidentiality, it does not resolve the issues regarding the extent of the disclosure and/or advice required to satisfy a higher standard of advice.

(2) *The solicitor's duty of confidentiality*

The solicitor-client relationship is one of the status-based relationships that has been recognised by English law as being fiduciary in nature.^{xxv} In order to prevent abuse and to maintain the integrity of the trusting relationship, the fiduciary is subjected to certain duties, namely: (i) the "no conflict of interest" rule where the fiduciary is under a duty not to act where his own interest may conflict with that of his principal's; (ii) the "no profit" rule; (iii) the undivided loyalty rule where the fiduciary is under a duty not to act for parties having conflicting interests; and (iv) the duty of confidentiality.^{xxvi} Hence, as a fiduciary, the solicitor will owe a duty of confidentiality to his client.^{xxvii}

When giving advice, the solicitor's duties of undivided loyalty and confidentiality will clearly determine the parameters of two elements: his independence and the extent of the legal advice to be given to the surety. The solicitor's independence may be called into question when he acts for two or more parties in the transaction since this may affect his ability to act with undivided loyalty for each client. The second element may bring into conflict the duty of confidentiality that the solicitor owes to his other client when offering advice to the surety. Hence, the solicitor's independence, the duties of confidentiality and undivided loyalty which he owes to his respective clients, and the extent of the advice to be given to the surety are all inextricably linked.

(3) *Independence of the Adviser*

It is clear in *Etridge (No. 2)* that, in order to satisfy the independent legal advice requirement, mere technical advice to the surety will not suffice and that a higher standard of advice is required of the solicitor. In doing so, the ability of a solicitor to act for two or more parties in the transaction and still maintain the level of independence demanded by such higher standard advice becomes increasingly harder to sustain.^{xxviii} A higher standard of advice will require the solicitor to be fully informed of all material facts so as to enable him to advise the surety on the wisdom of the transaction and other prudent options available to her.^{xxix} This is aimed primarily at ensuring that the surety's consent is an informed one. At a practical level, the increased provision of information may, however, subject the solicitor to greater potential of a conflict of interest where he acts for two or more parties in the transaction. On the one hand, his duty of undivided loyalty imposes on him the duty to disclose all material facts to the surety so as to enable her to give her informed consent. On the other hand, the solicitor is subject to a corresponding duty to his other client to maintain the confidentiality of such information.

A review of the surety cases indicate that the courts are not likely to take an overly restrictive approach towards the issue of conflict of interests.^{xxx} A large majority of the cases support the view that, even where the solicitor acts for two or more parties in the transaction, the bank may still safely assume the solicitor's

independence when advising the surety. The weight of the authorities suggests that the party best placed to judge the independence and extent of the advice to be given is the solicitor and not the bank. Hence, it is a matter for the solicitor's professional judgment as to whether there exists a conflict of interest between his clients. Notwithstanding a possible conflict of interest, the independence of the solicitor is not necessarily jeopardised by his representing two or more parties to the transaction. There are methods of overcoming the conflicts issues, for example, by obtaining the clients' informed consent.^{xxxvi}

In *Clark Boyce v. Mouat*^{xxxvii}, the court stated that there is no general rule prohibiting a solicitor from acting for both parties in a transaction where their interests may conflict so long as the parties give their informed consent. This means consent given with full knowledge of the potential conflict of interest between the parties and that the solicitor may be constrained by his duties to the respective parties in terms of disclosure of information and the advice to be given to them respectively. In addition, the scope of the fiduciary relationship and the extent of the solicitor's duties will depend on his client's instructions. Hence, the solicitor will not be expected to go beyond his instructions to offer unsought for advice.

Kelly v. Cooper^{xxxviii} further illustrates how the use of clearly worded and unambiguous contractual terms such as duty-defining or exclusion clauses may limit the scope of the fiduciary duties owed by a fiduciary to his principal. In that case, the defendant was an estate agent engaged by the plaintiff to sell his property. Given the nature of the parties' contract as well as the trade custom of the industry, the court found that the agent's failure to disclose to the plaintiff that the owner of the adjacent property had also commissioned him to sell that property was not a breach of duty. Thus, cases like *Mouat* and *Cooper* illustrate that contractual arrangements and the disclosure of potential conflicts of interest for the purposes of obtaining the clients' informed consent are effective ways of overcoming the conflicts issue. In surety cases, the instructions given to the solicitor will set the boundaries of the solicitor's duties to his respective clients and the extent of the advice required of him.

Continued support for this approach can be found in cases like *National Westminster Bank v. Beaton*^{xxxix}, *Barclays Bank v. Thomson*^{xl}, *Banco Exterior Internacional v. Thomas*^{xli} and *Etridge (No. 2)*. In *Beaton*, the Court of Appeal reiterated the assumption of the solicitor's independence. Notwithstanding that the solicitor had been instructed by the bank to provide legal advice to the surety, the court stated that such instructions were no more than a reminder to the solicitor of his duties to his client and did not amount to the bank having appointed the solicitor as its agent for the purposes of giving advice. The solicitor was therefore deemed to be sufficiently independent when advising the surety and any deficiency in the advice given could not be attributed to the bank. In *Thomas*, Sir Richard Scott V.C. further stated that:

“[i]t is not the bank's business to ask itself why [the surety] was willing to do this. It was the bank's business to make sure that she knew what she was doing.”^{xlii}

Hence, the bank is not expected to enquire into the personal relationship of the debtor and the surety, or their personal motives for wanting to help one another. The bank is entitled to rely on the solicitor's certificate confirming that independent advice has been properly given.^{xliii}

This approach was affirmed by the Court of Appeal in *Etridge (No.2)* where it stated that the bank was entitled to assume that the solicitor, in undertaking the task of advising the surety, has considered himself to be sufficiently independent and will carry out his professional duty to his client. The court did, however, recognise that a distinction must be made between actual and potential conflicts of interest.^{xxix} In the former, the solicitor should decline to act if he is also acting (otherwise than in a purely ministerial capacity) for another party to the transaction. The court went further to state that, in surety cases, there may not necessarily be a conflict of interests between the husband and the wife, nor would the transaction always be one that is disadvantageous to the wife. If the parties' marriage is secure and the indebtedness is being incurred for the business which provides the husband's livelihood and on which the family's prosperity depends, the court's view was that there may not really be any conflict of interest. Thus, a solicitor is not necessarily disqualified from acting for the wife merely because he is also acting for the husband.^{xl} This would be a matter for the solicitor's professional judgment whether he can properly advise the surety or whether she should be advised to go to another solicitor.

Two clear strands in the treatment of the solicitor's independence and the conflicts issues emerge from *Etridge (No. 2)*. The first sees the benevolent treatment of the issues of independence and conflicts in favour of banks. Here, the court has clearly indicated continued support for the approach that, once the bank has advised the surety to seek independent legal advice, the bank will not be affected by any deficiency in the advice given or the solicitor's independence since these are matters for the solicitor's professional judgment. The second sees the shift of responsibility from the banks to the solicitors whereby solicitors are now faced with the more onerous task of investigating matters such as the stability of their clients' relationship, the commercial background of the transaction and the risks involved before giving advice. Given the greater burden placed on solicitors when advising sureties, one result is that solicitors will either advise sureties not to sign or increase the costs of giving advice since more care and work will have to be put into advising the surety and negotiating terms with the bank. Furthermore, the tension between the solicitor's duties of undivided loyalty and confidentiality will be most acute in cases where the solicitor is acting for two or more parties. Hence, it will be increasingly difficult for solicitors to continue to do so without there being a greater risk of potential conflicts of interest turning into actual ones.

Disclosure and Extent of Advice

In *Etridge (No. 2)*, the court observed how the provision of mere technical advice or the formal gesture of merely urging the surety to take independent legal advice, without ensuring that such advice is actually taken, may be of very little assistance to the surety. The court noted the significance of the solicitor being fully informed of all material information so as to enable him to offer adequate advice to the surety.^{xli} However, the disclosure of material information to the solicitor will necessarily involve the disclosure of information which the bank may not be at liberty to divulge without being in breach of its duty of confidentiality to the debtor. A similar conflict of duty will arise where the solicitor acts for two or more parties in the transaction. The solicitor may acquire confidential information regarding the debtor in the course of acting for him in a previous transaction,^{xlii} or whilst representing the parties in the present transaction.^{xliii} In both instances, there will be a potential

conflict between the solicitor maintaining the confidentiality of the debtor and making full disclosure to the surety of all relevant information regarding the transaction.

Whilst recognising the “illusory” nature of the requirement, the exposition by the Court of Appeal in *Etridge (No. 2)* continues to retain the practical difficulties raised in the earlier cases regarding the conflicts issue. The court maintains the position that the party best placed to judge the extent of the advice to be given is the solicitor and not the bank. It is therefore a matter for the solicitor’s judgment whether he should advise the wife on the wisdom of the transaction or invite her to seek other advice, for example from the accountant of the business. In order for the solicitor to exercise this judgment, the solicitor must inform himself of the circumstances of the proposed transaction, the amount of the existing indebtedness and of the new advance, of the reasons for the new advance and/or the bank’s request for additional security, and to probe the stability of the parties’ marriage.^{xliv}

The practical effect of these requirements on the solicitor is to place a greater burden on solicitors to investigate the background of the transaction before advising the surety. But this may prove difficult if not problematic. Solicitors will need to tread with extreme care and sensitivity when probing the nature and stability of their clients’ relationships. In addition, the solicitor must acquaint himself well with his clients and their affairs so as to enable him to exercise his professional judgment. In other words, independent legal advice is no longer limited to merely giving advice on the nature and effect of the transaction but will entail commercial knowledge of the proposed transaction as well as an analysis of the risks involved. The availability of such information is clearly significant if the advice is to transcend mere technical advice. It will place the solicitor in a better position to offer more detailed advice to the surety on viability of the transaction, the risk that she is taking on by providing security and the available alternatives, including renegotiating the terms of the transaction.

This approach, however, re-emphasises the point that the increased provision of information may place greater pressure on the solicitor to balance his duty of confidentiality with his duty of undivided loyalty to his clients with conflicting interests. On the one hand, the solicitor is bound by the former not to disclose information about the debtor’s financial matters to the surety. On the other hand, he is subject to a duty to disclose all material information to the surety. The solicitor faces the further problem of deciding whether the information in his possession is “material” and, thus, subject to a duty of disclosure. Cases like *Halifax Mortgage Services v. Stepsky*^{xlv} and *Mortgage Express v. Bowerman*^{xlvi} reveal the practical difficulties of determining whether the information is indeed material and that solicitors are not always “best placed” to determine where the fine dividing line lies between no-conflict and conflict situations.

Bowerman and *Stepsky* were both concerned with situations where the solicitor acted for two or more parties to the transaction and in the process of so acting, had come by material information that was subject to conflicting duties of disclosure and confidentiality. In both instances, the solicitor had failed to appreciate the materiality of the information or to make disclosure to the client to whom the duty was owed. *Bowerman* illustrates that, in such a situation, the solicitor would be in breach of his duty of disclosure if he fails to disclose the information to the relevant client, even though the other client has not consented to his doing so. *Stepsky* further illustrates that, where there is a conflict between

these two duties, the only appropriate course of action for the solicitor would be to inform the surety of the conflict and refuse the retainer, unless the parties give their informed consent.^{xlvii}

As can be seen from *Burch*, the availability of information pertaining to the debtor's existing borrowings and the current facility is crucial for the purposes of enabling the surety to assess the significance of the security, the extent of her potential liability and the risks that she takes on in providing security. The irony is that the solicitor is more likely to have in his possession the relevant financial information about the debtor than when he acts solely for the surety. In the absence of the debtor's consent to disclosure, the solicitor will, however, be constrained in his advice. The conflicting duties of confidentiality and disclosure ultimately result in the solicitor resolving the issue by offering mere technical legal advice to the surety rather than detailed advice on the viability of the transaction. Hence, the solicitor's duty of confidentiality will form an effective barrier to his giving such advice to the surety.

Even where the debtor's prior consent is obtained, several issues require consideration: firstly, the effect and validity of the debtor's consent; and secondly, the extent of the disclosure permitted by his consent. The effect and validity of a generalised advance consent to disclosure as a defence to an allegation of breach of fiduciary duty has been questioned by the Law Commission.^{xlviii} There was general opposition by both the Law Commission and the majority of respondents to the legitimisation of generalised advance consents.^{xlix} The main difficulty lies in distinguishing between acceptable and unacceptable practices by institutions when procuring the customer's consent, which is to operate as a blanket consent covering both present and future disclosure of information.ⁱ It may not be feasible for a bank to rely on the debtor's generalised advance consent since the validity of such consent may be open to challenge on the grounds of being too wide in its terms. Thus, it may be more practical for banks to rely on the *ad hoc* consent of the debtor to the disclosure of information that is pertinent to the current facility being granted.ⁱⁱ

Another aspect of the debtor's consent relates to the extent of the disclosure permitted by his consent. This further defines the scope of the waiver of the bank's duty of confidentiality. The scope of the debtor's consent should be such as not to undermine the purposive role of the independent legal advice requirement. Thus, an appropriate balance has to be struck between the debtor's right to confidentiality and the need for the disclosure of information so as to enable the surety to make an informed decision about providing security. In that respect, *Burch* suggests that a bank should, at the minimum, be permitted to release information about the debtor's existing borrowings and the details of the current facility, so as to enable the surety to gauge the extent of her potential liability and the risk that she is taking on in standing surety. A stronger position is taken in *Etridge (No. 2)* where Stuart-Smith L.J. observes that:

“[i]f the bank is in possession of material information which is not available to the solicitor ... the availability of legal advice is insufficient to avoid the bank being fixed with constructive notice.”ⁱⁱⁱ

Etridge (No.2) clearly indicates the court's support for a higher standard of advice but leaves the issue of confidentiality of information in a conundrum. It fails to provide an adequate answer as to how the practical difficulties relating to confidentiality and disclosure are to be dealt with when the solicitor is called upon

to fully inform himself of all material information relating to the transaction. The judicial view has inclined towards placing some responsibility on banks to provide sufficient information to the solicitor so that more than mere technical advice may be given to the surety.

It may, however, be argued that the approach taken in *Etridge (No. 2)* maintains a bank-sympathetic attitude by shifting the focus from the bank to the solicitor.^{liii} Thompson argues that this is illustrated by the observation in *Etridge (No. 2)* that it would actually be unwise for banks to follow Lord Browne-Wilkinson's suggestion of a private meeting with the surety, in the absence of the debtor.^{liv} Instead, banks are better advised to involve solicitors so as to avoid allegations of negligence.^{lv} Although the court had emphasised the importance of the solicitor being fully informed of all material information before advising the surety, the issues of confidentiality and the extent to which information is to be readily available was not fully addressed in *Etridge (No. 2)*. Given the clear need for the availability of material information and the practical problems relating to confidentiality, the debtor's consent should specify that the bank's duty of confidentiality is waived to the extent that it is permitted to disclose information about his accounts that is relevant to the current facility, which shall include, but not limited to, making available a copy each of the application form and the bank's letter of offer.

The former will at least provide information about the new advance being applied for by the debtor, the financial performance of his business, and the purpose of the facility. It will also reveal the extent of the debtor's existing indebtedness, thereby providing a helpful indication of his overall ability to repay the loan. The bank's letter of offer will provide the surety with information on the new advance agreed to, the extent of the debtor's borrowings from the bank and the various types of security required by the bank for granting the facility. This additional information will possibly help the surety to make a sounder assessment of the debtor's ability to finance the current facility and the risk of enforcement of the security to be provided by her to the bank.

Moreover, the Banking Ombudsman has recommended that the debtor's consent should be obtained as a pre-condition to the availability of the facility granted and extend to include the periodic disclosure of information relating to his accounts and other securities given in respect of the current facility for the duration of the surety's security.^{lvi} Even then, it should be noted that the debtor's consent will not necessarily eradicate the existing conflict between the parties' respective interests or the solicitor's need to balance those interests when giving advice to each client. In an attempt to balance these parties' conflicting interests, the solicitor may not be able to provide detailed or partisan advice so as to satisfy the purposive role of the independent legal advice requirement. Thus, it would be increasingly necessary for separate law firms to act for the parties in a surety transaction so as to reduce mistakes, conflicts of interest, as well as to improve standards of conveyancing practice.

Solicitor's Capacity to Advise

It has been observed that, in most instances, the solicitor's advice is limited to technical legal advice, covering the nature and effect of the transaction.^{lvii} Although *Etridge (No. 2)* lends support to the need for a higher standard of advice, it has been questioned whether solicitors have the necessary expertise to meet

this higher standard of advice and offer sureties not only an explanation of the legal effect of the security document but also advice on the financial wisdom of the transaction.^{lviii} The issues raised are twofold. The first is concerned with the solicitor's role in the solicitor-client relationship. The second focuses on whether solicitors have the necessary technical expertise to assess the financial viability of a transaction so as to offer such advice to the surety.

In *Burch*, Millett L.J. suggests that, not only will the solicitor's advice be subject to scrutiny by the courts but the solicitor should also ensure that his advice is followed by his client, failing which he should refuse to act further for that client.^{lix} To some extent, Millett's reasoning is captured in the Law Society's guidelines on professional conduct^{lx} which provides that the solicitor's capacity to provide impartial and frank advice must not be impaired by allowing the client to override the solicitor's professional judgment.^{lxi} Millett's statement has, however, been criticised for making too many assumptions about the solicitor-client relationship.^{lxii}

Firstly, the statement assumes that solicitors generally control the solicitor-client relationship and that clients will always follow their solicitors' advice. In contrast, Cain found that it is clients who usually determine their own desired outcomes rather than their lawyers, and that most clients are the ones who announce their needs and set the objectives for their solicitors.^{lxiii} She observes that the role of a lawyer is that of a translator. The client's issues, which are framed in everyday terms, are translated and reconstituted in terms of legal discourse which have trans-situational applicability.^{lxiv} Cain recognises that there may be countervailing pressure on the lawyer's choice of translation that results in his either transforming the client's chosen objective into a "reasonable one" or refusing to translate altogether.^{lxv} There may even be instances where the client is not seeking advice but merely legitimisation of her decision through independent legal advice.^{lxvi} Given that clients are the ones who generally determine their desired outcomes, Cain concludes that lawyers are not the controllers of the relationship.^{lxvii}

Moreover, it has been argued that solicitors are not always motivated by altruistic motives when advising clients. Drawing on the example of the duty solicitor scheme, Mungham and Thomas^{lxviii} found that, despite the image of altruism projected by the legal profession, the self-interest of the profession is actually placed in priority to any sense of community or client interest. Further, Genn^{lxix}, following Galanter's one-shotter/repeat player analysis^{lxx}, notes that the strategy adopted by parties in the negotiation process will often depend on whether one is a one-shotter or a repeat player. A one-shotter will usually choose a strategy that will minimise the risk of maximum loss, while a repeat player will adopt one that which will maximise long-term gains, even if short-term maximum losses result in individual cases.^{lxxi}

Genn further observes the structural imbalance between the one-shotter and the repeat-player. This causes not only a disparity between the parties in terms of access to legal advice but also serves to exacerbate the parties' inequalities.^{lxxii} Genn argues that one-shotters have little control over the conduct of their claims and, hence, the strategy adopted by their solicitors is crucial. Solicitors can take one of two negotiating strategies: cooperative or competitive.^{lxxiii} Following Galanter, Genn finds that a solicitor is more likely to adopt a cooperative strategy where, for example, he is professionally integrated and has a financial interest in maintaining a good working relationship with the defendant and/or other members of his profession.

In surety cases, a professionally integrated solicitor will attempt to balance this interest with his duty to provide impartial and frank advice by offering no more than mere technical legal advice to the surety. These observations make it increasingly harder to support the view that solicitors may act for two or more parties in a surety transaction and yet give legal advice that is truly independent to the surety. The countervailing pressures of acting in the best interests of each client, coupled with the solicitor's own self-interest in the process, may pose an effective barrier to the solicitor's independence and his ability to give detailed, or partisan, advice to the surety that a higher standard of advice will require. In addition, a solicitor who is professionally integrated will adopt a cooperative rather than competitive strategy in negotiating the terms of the security document for the surety.

The second issue is whether solicitors have the expertise to offer advice which will touch on the viability of the transaction. Genn observes that there is a direct relationship between a solicitor's advice and the extent of the information made available to him. The lack of or limited access to information will affect both his ability to make a sound assessment of his client's case and to offer reliable advice.^{lxxiv} In surety cases, this suggests that the bank should, at the very least, make available to the surety copies of the debtor's application form and its letter of offer since these will provide the necessary information about the debtor's existing borrowings and details of the new advance.

The Law Society has laid down guidelines for solicitors regarding the acceptance of a retainer and duties of the solicitor in fulfilling that retainer. A solicitor must not act where the client cannot be represented with competence or diligence.^{lxxv} The guidelines further provide that the solicitor must carry out his client's instructions with care and skill.^{lxxvi} This suggests that a solicitor is, to some extent, capable and competent to judge whether the scope of his retainer and the advice required of him by the client is within his expertise or whether he should advise the client to seek advice from another adviser. Most solicitors will have the competence to assess the information provided in these documents relating to matters such as the debtor's existing borrowings, the extent to which this is being extended by the current facility, the other types of security being requested from the debtor and whether there is any great disparity between the value of the security being requested for from the surety and the amount of the current facility. Thus, they are capable of offering advice on the viability of the transaction in terms of the short-term risks involved in giving security.

It is, however, debatable whether solicitors, not being accountants or risk managers, are competent to offer detailed financial advice on the projected performance of the debtor's business and the long-term risks involved. This may pose an effective limit to the extent of the legal advice which a solicitor may be able to give to the surety. In such cases, the advice that the solicitor is likely to give to the surety is either do not sign or seek further financial advice, rather than expose himself to allegations of negligence and breach of professional conduct.^{lxxvii} Thus, there remains certain limitations to the effective protection of all sureties by the introduction of a higher standard of advice.

Conclusion

As matters stand, *Etridge (No. 2)* maintains the position that a surety transaction will be unimpeachable so long as the bank stresses to the surety the need to take

independent legal advice and the solicitor acknowledges that an explanation has been given to the surety. Cases like *Burch* and *Etridge (No. 2)* have indicated a shift away from the earlier post-*O'Brien* cases where the independent legal advice requirement had focused mainly on form, rather than substance. In order for the requirement to be satisfied, the Court of Appeal in *Etridge (No. 2)* has clearly recognised the significance of a solicitor being fully informed of material information so as to enable more detailed advice to be given to the surety. However, a higher standard of advice and the need for greater disclosure of confidential information may bring greater potential for conflicts of interest, particularly between the solicitor's duties of undivided loyalty and confidentiality.

The increased provision of information regarding the debtor's financial standing would place a surety in a better position to assess both the extent of her potential liability and the seriousness of risk of enforcement of the security. With material information being made more readily available to sureties and their solicitors, solicitors should be better placed to give more than mere technical legal advice and, to some extent, provide advice on the viability of the transaction. It is further hoped that advisers will pick up on the Banking Ombudsman's recommendation to ensure that a surety is advised of her continuing liability under the security and the method of termination of her liability.^{lxxviii}

However, a word of caution is still necessary in surety cases. This shift in emphasis from form to substance in the independent legal advice requirement does not necessarily mean that sureties come out faring any better. Instead, the approach has become even more bank-sympathetic where responsibility has clearly shifted away from the bank to the solicitor. In future, the surety is less likely to succeed in protecting her home on the basis of an *O'Brien* defence and her only remedy may be against her solicitor. In addition, independent legal advice should not be seen as a panacea for advantage-taking until further consideration is given to issues such as those involving disclosure and confidentiality. Even with the increased provision of information, it remains debatable whether solicitors do indeed have the expertise to offer detailed advice on the financial wisdom of a transaction beyond merely short-term risks. Given that more care and work will have to be put into advising sureties, the result will necessarily be increased costs for the surety.

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- * Lecturer in Law, Kent Law School, University of Kent, Canterbury, Kent. I would like to thank Indira Carr for her encouragement and invaluable comments on this paper.
- i [1993] 4 All E.R. 417.
- ii In *O'Brien*, the House of Lords refers to sureties who may be described as “vulnerable”, in that there exists a relationship of trust and confidence between the surety and the debtor. Those falling within the class will include, but is not limited to, spouses and cohabitants where such a relationship of trust and confidence may be easily established. For the purposes of this paper, the focus is on wives and female cohabitants who have agreed to stand surety for their husbands’ or male partners’ debts.
- iii M Draper, “Undue Influence: A Review” (1999) 63 *Conv.* 176.
- iv See *Banco Exterior Internacional v. Mann* [1995] 1 All E.R. 936; *Midland Bank v. Serter* [1995] 1 F.L.R. 1034; *Massey v. Midland Bank* [1995] 1 All E.R. 929; *Allied Irish Bank v. Byrne* [1995] 2 F.L.R. 325; *Bank Mellie Iran v. Samadi-Rad* [1995] 1 F.C.R. 465, [1995] 3 F.C.R. 735 (CA). For criticisms on this particular line of authority, see B Fehlberg, *Sexually Transmitted Debt* (Clarendon, Oxford: 1997); R Mackenzie “Vulnerable Providers of Security, Risk Management and Moral Hazard: Independent Legal Advice After *Barclays Bank v. O'Brien*, *Massey v. Midland Bank* and *Clark Boyce v. Mouat*” in R Baldwin and P Cane (eds.) *Legal Risk and Uncertainty* (Kluwer, London: 1997); P O’Hagan, “Legal Advice and Undue Influence: Advice for Lawyers” (1996) 47 N.I.L.Q. 74..
- v [1995] 1 All E.R. 936.
- vi [1997] 1 All E.R. 144.
- vii [1997] 3 All E.R. 628.
- viii [1998] 4 All E.R. 705. This is an appeal that was conjoined with seven other appeals.
- ix *per* Lord Stuart-Smith at 710-711.
- x At 711.
- xi [1995] 1 F.L.R. 367.
- xii [1995] 1 All E.R. 929. In *Massey*, the debtor arranged for his solicitors to advise the surety. The interview where the solicitor explained the documentation to the surety was conducted in the presence of the debtor it was subsequently held that the bank was entitled to assume the solicitor’s independence even though he was also acting for the debtor and to rely on the solicitor’s confirmation that the surety had been given an explanation.
- xiii *Bank of Baroda v. Shah* [1988] 3 All E.R. 24; *Bank of Baroda v. Rayarel* [1995] 2 F.L.R. 376.
- xiv The banker-customer relationship is generally not one which is fiduciary in nature but the law recognises that, by virtue of the contract between the bank and its customer, the bank owes a duty of confidentiality to its customer.
- xv This duty stems from the fiduciary nature of the solicitor-client relationship which will be discussed in greater detail below.
- xvi *Tournier v. National Provincial and Union Bank of England* [1924] 1 K.B. 461. The courts have recognised that, in some circumstances, the banker-customer relationship may attract the fiduciary label, for example, where the bank is aware that the customer places trust and confidence in the bank and is relying on its advice: *Lloyds Bank v. Bundy* [1975] Q.B. 326; *National Westminster Bank v. Morgan* [1985] 1 All E.R. 821. The fiduciary relationship will incidentally impose a similar duty of confidentiality on the fiduciary in relation to the principal’s matters.
- xvii *per* Bankes L.J. in *Tournier*, at 473.
- xviii Review Committee on Banking Services: Law and Practice, Cm 622 (1989).
- xix The 1984 Act is not generally concerned with the confidentiality of information but merely regulates the use of computerised data about individuals. The position remains the same with the new Data Protection Act 1998, notwithstanding that the definition of “data” (and hence “data subject”) is broader in the new Act.
- xx *Supra.*, chap. 5.
- xxi For example, ss. 23A(5) and 26B of the Drug Trafficking Offences Act 1986; s. 83 of the Banking Act 1987; ss. 52 and 53 of the Building Societies Act 1986.
- xxii See *Tournier* rule (iv).
- xxiii See the response of the previous Conservative Government in 1990 to the recommendations of the Jack Committee in Banking Services: Law and Practice, Cm 1026 (1990). The Jack Report had recommended for the codification of the *Tournier* rules on confidentiality. This recommendation was however rejected on the basis that the system appears to be working well without the need for codification. Any necessary clarification and modification of the *Tournier* rules may be done through a code of practice for the banking industry. This was taken up by the British Bankers Association when drafting the Code of Banking Practice, as can be seen from paras 8.1 to 8.4 of the Code of Practice (2nd ed) 1994, now contained in para 4.1 of the Banking Code (revised ed.) 1998. For criticisms on the effectiveness of the Code of Practice in self-regulation and clarifying the bank’s duty of confidentiality, see P Kent, “Banks and Customer Confidentiality” (1994) C.P.R. 80; G Roberts, “The British Pendant for Self-Regulation: The Case of the Code of Banking Practice” (1995) J.I.B.&F.L. 385.
- xxiv Reservations have, nevertheless, been voiced as to the effect and validity of generalised advance consents as a defence to an allegation of a breach of duty by the bank. See Law Commission Consultation

Paper No. 124, *Fiduciary Duties and Regulatory Rules* (1992). Although the focus of the consultation paper was on the provision of financial services covered by the Financial Services Act 1986, rather than regular deposit-taking banking business which is governed by the Banking Act 1987, the observations of the Law Commission relating to the common law and equitable duties of financial institutions to their customers, especially where conflicts of interest arise, are pertinent and useful. See also Law Commission No. 236, *Fiduciary Duties and Regulatory Rules* (1995).

xxv *Brown v. IRC* [1965] A.C. 244; *Oswald Hickson Collier & Co (A Firm) v. Carter-Ruck* [1984] 2 W.L.R. 847; *Islamic Republic of Iran Shipping Lines v. Denby* [1987] 1 Lloyd's Rep. 367.

xxvi Law Commission No. 236, *supra*. n. 24, para. 1.4.

xxvii D Waters, "The Fiduciary Relationship" (1988) 18 *Western Australian Law Review* 42; R Flannigan, "The Fiduciary Obligation" (1989) 9 O.J.L.S. 285. See also J McDougall, "The Relationship of Confidence" in D Waters (ed), *Equity, Fiduciaries and Trusts* (Carswell, Scarborough, Ont.: 1993), on how a relationship of confidence may be distinguished from other fiduciary relationships. It appears possible that the passing of confidential information may give rise to a fiduciary relationship. For example, in *LAC Minerals v. International Corona* (1989) 61 D.L.R. (4th) 14, both Wilson and La Forest JJ. found this to be the case but for different reasons. The solicitor's duty of confidentiality should also be distinguished from legal privilege, which relates to information which can be kept out of a court during the course of litigation but does not survive beyond the litigation. See C Foster et al., *Disclosure and Confidentiality: A Practitioner's Guide* (FT Law & Text, London: 1996).

xxviii O'Hagan, *supra*.; Mackenzie, *supra*.; S Wong, "No Man can Serve Two Masters: Independent Legal Advice and Solicitor's Duty of Confidentiality" (1998) 62 *Conv.* 457.

xxix In *Etridge (No. 2)*, the Court of Appeal took the view that the surety was in a stronger bargaining position in the negotiation process. This is emphasised by the fact that: (i) the surety is not obliged to provide security; (ii) any security is better than none to the bank; and (iii) the bank cannot afford the risk of taking security from the surety who has been advised by her solicitor not to give it. Hence, the surety is a strong position to negotiate terms that are more favourable to her.

xxx *Bank of Baroda v. Rayarel* [1995] 2 F.L.R. 376; *Bank of Baroda v. Shah* [1988] 3 All E.R. 24; *Midland Bank v. Sertey, Massey v. Midland Bank*.

xxxi The new rule 6(3) of the Solicitors' Practice Rules 1990 which came into effect on 1 October 1999 expressly prohibits a solicitor from acting, for example, for both the lender and the borrower on the grant of a mortgage of land if a conflict of interest exists or arises. See also chaps 15, 16 and 25 of the Law Society's *Guide to Professional Conduct of Solicitors* (8th ed., 1999) dealing with conflicts of interest and confidentiality. Whilst the guidelines generally restate the common law position that a solicitor should not act for two or more clients with conflicting interests, the issue of a conflict between the solicitor's duties of confidentiality and disclosure may be resolved by obtaining the clients' informed consent. See particularly comment 8 to Principle 16.06.

xxxii [1993] 4 All E.R. 268.

xxxiii [1993] A.C. 205.

xxxiv [1997] E.C.G.S. (3)53.

xxxv [1996] 1 F.L.R. 156.

xxxvi [1997] 1 All E.R. 46.

xxxvii *Ibid.*, 54-55.

xxxviii See P Birman, "Provision of security by wives: What she doesn't know may hurt the lender" (1995) 69 *Law Institute Journal* 675 for comments on the effectiveness of the solicitor's certificate in counteracting the undue influence exerted on the surety.

xxxix See also *Bristol and West Building Society v. Mothew* [1998] Ch. 1.

xl The court further took the view that it would be unwise for a solicitor who is already acting for the bank to also act for the surety unless acting purely in a ministerial capacity for the bank at completion.

xli Stuart-Smith L.J. (at 722) stated that the availability of legal advice will be insufficient to avoid the bank being fixed with notice where the bank has failed to disclose material information to the solicitor.

xlvi *Rakusen v. Ellis* [1912] 1 Ch. 831 held that there is no general rule that a solicitor, who is in possession of confidential information of a client, may not act for another client in a subsequent matter against the former client, provided that the solicitor does not make improper use of such confidential information to further the interests of the new client. See also *Re a Solicitor* (1987) 131 S.J. 1063; *Lee (David) & Co (Lincoln) Ltd v. Coward Chance* [1991] Ch. 259 and *Re A Firm of Solicitors* [1992] 1 All E.R. 353.

xlvi *Halifax Mortgage Services v. Stepsky* [1995] 3 W.L.R. 711; *Mortgage Express v. Bowerman* [1996] 2 All E.R. 836.

xlvi *Etridge (No. 2)*, 717.

xlvi [1995] 3 W.L.R. 711.

xlvi [1996] 2 All E.R. 836.

xlvi This appears to be the only practicable solution for a solicitor acting in such a conflict situation. The Law Society's rules only permit the use of Chinese walls in the separation of confidential information as a means to manage conflicts of interest in one very limited case, that is, where there has been an amalgamation of two firms of solicitors: Commentary (3) and (4) to Principle 15.03. This technique may be used by other financial institutions to avoid the attribution of knowledge where the confidential information is known by one department in the company but not another. However, as noted by the Law Commission, above n. 24, the use

of Chinese walls may not always be totally effective to prevent the flow of confidential information. For further discussion on the use of Chinese walls, see S Posner, “Chinese Wall or Emperor’s New Clothes? Parts I, II and III” (1988) *Company Lawyer* 119; 159 and 203; M McKee, “The Law Commission Report on Fiduciary Duties” (1996) 4 J.I.B.L. 139; C Bamford, “Banker/Customer Relationship Fiduciary Duties and Conflicts of Interest” (1997) I.B.L. 74.

xlvi Law Commission Consultation Paper No. 124, *supra*. n. 24.

xlvii Law Commission No. 236, *supra*. n. 24, para. 12.3.

l Law Commission Consultation Paper No. 124, *supra*. n. 24, para. 6.24. See also the Jack Report (*supra*. n. 18) where the Jack Committee recommended that it would not be best practice for creditors to obtain the express consent of a customer in such a way as puts the customer under pressure to give it.

li To some extent, this step has been taken by the banking industry through para. 3.14 of the Banking Code 1998 which stipulates that, where security is to be taken from a third party, the bank may require the debtor’s consent to the disclosure of confidential financial information to the surety or their adviser. Given the wording of the paragraph, the Banking Code appears to limit the paragraph to a case by case basis rather than an across the board requirement for all surety cases.

lii *Ibid.*, 722.

liii M P Thomson, “Redefining O’Brien” (1999) 63 *Conv.* 126.

liv *Ibid.*, 132.

lv See also Draper, *supra*.

lvi The Banking Ombudsman Scheme Annual Report 1995-1996, para. 11.5.

lvii Fehlberg, *supra.*, at 224, found that most solicitors, even those who have knowledge in guarantees and legal charges, usually take a “broad brush” approach in giving advice. Most solicitors view the role of giving advice as drawing the consequences of signing to the attention of the surety, rather than actually giving a detailed explanation of all the clauses in the document. Thus, the solicitor’s advice will usually cover only the salient terms of the transaction, such as the possibility of the surety losing her home if the facility is unpaid, the extent of her liability and an explanation of technical terms in the document. The advice, however, will not cover the financial position of the debtor and/or the viability of giving the security.

lviii Fehlberg, “The Husband, the Bank, the Wife and Her Signature- the Sequel” (1996) 59 M.L.R. 675; Mackenzie, *supra.*; Wong, *supra.*

lix see also *Etridge (No. 2)* where the approach taken in *Burch* was applied. Stuart-Smith L.J. (at 715) stated that the solicitor is under a duty to ascertain whether the transaction is one which (s)he could properly advised the surety to enter into. If it is not, the solicitor must advise the surety not to do so and to refuse to act for her if she persists. In addition, the solicitor should also inform the other parties including the bank that, without actually divulging the contents of the advice given, certain advice had been given to the surety and consequently the solicitor has declined to act further.

lx The Guide to the Professional Conduct of Solicitors (8th ed., 1999).

lxi See comment 2 to Principle 11.01.

lxii R Hooley and J O’Sullivan, “Undue Influence and Unconscionable Bargains” (1997) L.M.C.L.Q. 17, 21.

lxiii “The General Practice Lawyer and the Client” in R Dingall and P Lewis (eds) *The Sociology of Professions* (Macmillan, London: 1983).

lxiv *Ibid.*, 111.

lxv *Ibid.*, 120.

lxvi *Ibid.*, 126.

lxvii *Ibid.*, 129.

lxviii “Solicitors and Clients: Altruism or Self-Interest?” in R Dingall and P Lewis (eds), *The Sociology of Professions* (Macmillan, London: 1983). See also W Felstiner et al, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming....” (1981) 15 L. & Soc. Rev. 631.

lix *Hard Bargaining* (Clarendon, Oxford: 1987).

lxx “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change” (1974) 9 L. & Soc. Rev. 95. Galanter describes a one-shotter as someone who only has occasional recourse to the courts whereas repeat players have engaged in similar litigations over time.

lxxi Genn, *supra.*, at 26.

lxxii *Ibid.*, 37.

lxxiii *Ibid.*, 46.

lxxiv *Ibid.*, 70.

lxxv The Law Society’s Guide, *supra*. n. 60, Principle 12.03.

lxxvi *Ibid.*, Principle 12.08.

lxxvii N Richardson, “Do not sign” (1996) N.Z.L.J. 143; J Anderson, “Duties of Care in Conveyancing” (1993) 31 L.S.J. 54.

lxxviii *Supra*. n. 56.