Equity's Intervention in the Enforceability of Third Party Security Transactions

by

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Abstract

The main purpose of this thesis is to examine the way in which equitable principles come into play so as to affect the enforceability of the security provided to a bank by a woman who has agreed to stand surety for her husband's or partner's debts. In particular, the focus is on situations involving mortgages over the family home. In such cases, the female surety wishing to set aside the transaction will have to establish either an interest in the property which ranks in priority to the bank's interest or the existence of an equity to set aside the transaction which is binding on the bank.

In doing so, the thesis sets out to argue that the present formulation as well as judicial interpretation of the equitable principles governing the equitable ownership of the family home and the acquisition of an equity to set aside the transaction are gender biased and continue to discriminate against women. Despite the appearance of neutrality of these principles, the thesis sets out to establish the gender bias of the principles by their maintaining a clear dichotomy between the private and public spheres and ignoring the effect of sexual division of labour in domestic relationships and the continued economic disparity of men and women.

The gender bias of the law results in the equitable principles being ineffective in terms of offering the desired level of protection to vulnerable sureties as envisaged by the ***O'Brien*** test. The further aim of the thesis is to consider possible measures, particularly extra-judicial measures, which may be taken in improving the protection of women sureties against advantage-taking in the process of providing security.

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Preface

The main purpose of this thesis is to examine the way in which equitable principles come into play so as to affect the enforceability of the security provided to a bank by a woman who has agreed to stand surety for her husband's or partner's debts. In particular, the focus is on situations involving mortgages over the family home. In such cases, the female surety wishing to set aside the transaction will have to establish either an interest in the property which ranks in priority to the bank's interest or the existence of an equity to set aside the transaction which is binding on the bank.

The thesis, which considers the legal position up to July 1998, sets out to argue that the present formulation and judicial interpretation of the equitable principles governing the equitable ownership of the family home and the acquisition of an equity to set aside the transaction are gender biased and continue to discriminate against women. Despite the appearance of neutrality of these principles, the thesis sets out to establish the gender bias of the principles by their maintaining a clear dichotomy between the private and public spheres and ignoring the effect of sexual division of labour in domestic relationships and the continued economic disparity of men and women.

The gender bias of the law results in the equitable principles being ineffective in terms of offering the desired level of protection to vulnerable sureties as envisaged by the ***O'Brien*** test. Further, the thesis will consider other possible measures, particularly extra-judicial measures, which may be taken in improving the protection of women sureties against advantage-taking in the process of providing security.

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CHAPTER 1

Equity's Intervention in the Enforceability of Third Party Security Transactions

Introduction

Whenever a credit facility is made available to a customer by a bank, whether by way of an overdraft, a loan or any other form, the common practice of most banks is to require the provision of some form of security to be given by the customer and/or a third party for the repayment of the facility. The nature of the security may differ, depending on factors such as the type of facility being granted, the credit standing of the debtor, the purpose of the facility and the risk of non-payment of the facility by the debtor. In that respect, a common form of security taken by banks is mortgages over landed properties. As a mortgagee, the main advantage which the bank enjoys is that of being a secured creditor in the event of default by the debtor.[1] Given the high numbers of owner-occupied properties in England[2], the family home generally forms the major asset of most families against which capital may be raised for business purposes.

When granting credit facilities to small businesses, banks have, in the past, commonly taken the approach of granting overdraft facilities, rather than term loans, and relying on property-based security. Although it is clear that the provision of security will reduce the risk to banks, it has been noted that, in terms of prudential management and supervision of loans, banks should shift from relying on the provision of security to focusing on the cash flow and performance of the business.[3]

It is in this context of granting credit facilities and the provision of security that this thesis will explore the role which equity plays in third party security

transactions. In particular, the focus is on the instances where the security is property-based, involving the family home, and is provided by the wife or female cohabitant as security for facilities granted to the husband or male partner. In that respect, the decision of the House of Lords in ***Barclays Bank v O'Brien***[4] is of particular significance, as the case sets out the criteria for upholding a bank's security given by a third party who may be described as being a 'vulnerable' surety.

The thesis sets out to examine the role of equity in formulating its principles relating to two particular areas: firstly, the establishment of an equitable interest in the family home which is the subject matter of the mortgage, and secondly, the establishment of an equity to set aside the security transaction by the surety which is binding against the bank. There is a close relationship between the two, especially in cases where the surety is not a legal co-owner of the subject property and the unenforceability of the security transaction is dependent on her establishing either an equitable interest in the property which ranks in priority over the bank's interest or an equity to set aside the said transaction.

The purpose of the thesis is to highlight how the formulation of apparently neutral equitable principles effectively masks the practical inequality between men and women. The rhetoric of equity is equality, fairness and justice, which is reflected in the adoption of neutral concepts like common intention and detrimental reliance in constructive trust cases[5] as well as the doctrine of notice and independent legal advice in third party security transactions.[6] In doing so, the neutrality of the equitable principles is reaffirmed in its applicability to all parties, regardless of gender. Yet, these equitable principles remain gender biased in that they render almost invisible the sexual division of labour in domestic relationships and the impact it has on the economic disparity between men and women. In the context of women's standing

surety for their male partners, the consequence of the inherent gender bias of the equitable principles means that they are placed at a disadvantage in terms of their establishing either an equitable share in the family home which may rank in priority to the bank's interest or an equity to set aside the transaction as against the debtor which may be binding on the bank. Thus, failure to take into consideration gender-related issues in the legal discourse means that these equitable principles offer women equity but not equality. In other words, these principles theoretically offer women equity in the form of some level of protection and conferment of rights which are otherwise absent under the common law. However, in practice, the principles fail to give women the desired equality as they fail to consider whether women are placed in a position to enjoy the same legal as well as economic equality as men do.

In that respect, the earlier chapters highlight the major developments which have taken place in relation to the property rights of women in the past century. Chapter 2 traces the history of married women's property rights[7] and the effect coverture had on such rights.[8] The purpose is to highlight the tendency of the common law rules to discriminate against women. This is reflected in concepts like coverture which effectively deprived women of control and ownership of their property on marriage. The discriminatory nature of the common law rules gradually led to the vehement call for the legal reform of married women's property rights by feminists in the nineteenth century. In addition, the chapter highlights how equity had taken a view of the husband which was diametrically opposite to that taken by the common law. Whilst the common law rules alleviated the husband to the role of protector of the wife and all her property, the equitable rules assisted in offering protection to a married woman and her property against her husband by recognising her limited rights over property which had been settled on her.

The chapter further traces how the rising tension between common law rules and equitable rules relating to married women's property eventually culminated in the passage of the Married Women's Property Acts 1870 and 1882. The 1870 and 1882 Acts saw the eventual conferment of certain property rights on married women, albeit limited to property which might be classified as their separate property. One of the main criticisms of the 1870 and 1882 Acts was that married women were still being treated differently from other property owners, namely, men and unmarried women. This stemmed from the fact that the retention of the concept of separate property meant that the equitable rules continued to apply to such property and married women were not subject to the full responsibility of property ownership.[9]

More importantly, the continued distinction between full legal ownership and a married woman's separate property effectively masked the crucial matter of married women's participation in the power play inherent in property ownership.[10] The chapter seeks to establish that, despite the appearance of altruistic motives on the part of equity in conferring certain property rights on married women, gender bias remained an aspect of the equitable rules relating to women's separate property. The rules were formulated in a manner which maintained male hegemony through coverture and primogeniture. Equitable ownership limited the access of women to property and hence to the power of property ownership which effectively maintained their position of inequality in relation to men.

Although the law now recognises the formal equality of men and women in owning property independently of each other, Chapter 3 highlights how the choice of marriage or cohabitation has a direct effect on the way in which property rights over the family home may be determined. The chapter illustrates the various ways in which the law has responded to marriage and cohabitation[11] and, in particular, the

resolution of family property disputes between the parties in each type of relationship. Current figures indicate that cohabitation rates have increased in the United Kingdom over the past three decades.[12] The debate remains as to whether marriage and cohabitation should be given equivalent or differential treatment.[13] Aspects of both may be found in the law and the way the law has responded to cohabitation has been both piecemeal and hesitant.

One area in which the law has retained a clear differential treatment of marriage and cohabitation is in relation to the ownership of property. Whilst spouses may rely on the adjustive powers conferred on the courts in dealing with disputes over property ownership on the breakdown of the marriage[14], these adjustive provisions are not applicable to cohabitants. In such cases and in the absence of legal co-ownership, cohabitants will usually have to rely on contract, property law or trusts principles to determine the issue of ownership. However, a consequence of the differential treatment of marriage and cohabitation by the law is that, in terms of interpretation of the equitable rules, the nature of the cohabitants' relationship may be subject to greater judicial scrutiny and value judgment as to whether or not it is sufficiently spousal-like to warrant the courts' intervention. Here again the gender bias of the law manifests itself in terms of stereotyping the role of women in domestic relationships. This adds a further dimension to the discrimination faced by a female (cohabitant) claimant who is attempting to establish a share in the family home under the equitable principles. In order to succeed in her claim for an equitable share in the property, the female claimant would have to satisfy the judge of her role as a good 'wife' and homemaker in addition to meeting the conditions for establishing an equitable share in the property, which are considered in greater detail in Chapter 4.

In contrast, Chapter 4 attempts to illustrate the workings of the equitable principles in the resolution of such family property disputes. The chapter examines how, in the absence of legal co-ownership, any beneficial interest which a cohabitant may have in the family home hinges very much on whether she has satisfied the conditions set down by the equitable principles, justifying the acquisition of an equitable share in the property. This is equally true of spouses where the marriage has not broken down and the adjustive powers of the courts do not come into play. The chapter concentrates particularly on the cases where the female claimant is attempting to establish an equitable share in the family home under a 'common intention' constructive trust.[15]

The analysis revisits an area which has been well debated.[16] As with earlier materials, the focus of the analysis is on the disadvantages suffered by women under the common intention constructive trust approach. The manner in which the common intention approach is formulated places certain obstacles in women's path, in terms of successfully invoking the help of equity in establishing a beneficial interest in the family home. The test for successfully pleading a share in the family home depends on the establishment of two elements by the claimant: a common intention to share the property and acts of detriment in reliance on that common intention. Both conditions take on the appearance of neutrality.

However, the courts' emphasis on direct financial contributions towards the acquisition of the property to get the claim off the ground, especially in the case of an inferred common intention, masks the gender bias in the equitable rules. In that respect, unlike earlier materials, the analysis relies on empirical evidence to support the arguments raised about the weaker economic position of women. Even though more women are economically active and form a substantial proportion of the labour

force, the chapter attempts to show that sexual division of labour, albeit less rigid than before, remains the dominant pattern for most families. This renders the domestic responsibilities being borne mainly by the female spouse or cohabitant, with the male partner still being generally seen as the main 'breadwinner'. The general tendency is to use his income for capital expenditure, whereas the female partner's income is usually used for the family's everyday costs of living.[17]

The equitable principles ignore the reality of domestic relationships and how sexual division of labour remains an integral part of such relationships. Sexual division of labour will impact on the economic activity of most women[18] and the resources they will have in terms of financially contributing towards the acquisition of assets. More importantly, the principles fail to take into account the correlation between economic independence and the exercise of marital power between the parties in the relationship.[19] Hence, the chapter sets out to unmask how the economic disparity between women and men, together with the necessary requirements of common intention and detrimental reliance, which emphasise direct financial contributions, effectively limits the chances of women successfully establishing a beneficial interest in the family home under that doctrine. Notwithstanding the neutrality of the language used in framing these equitable principles, the practical effect of these rules is to maintain the discrimination of women, especially where they have taken on a domestic role in the relationship. Given the obstacles which a female claimant faces in establishing an equitable share in the family home, it is harder for her to contest successfully a claim made by a mortgagee bank over the family home on the basis of an equitable interest which takes priority over the bank's interest.

Further, the chapter comprises an analysis of the approaches taken by other Commonwealth jurisdictions, namely, Australia, Canada and New Zealand, in the

resolution of family property disputes.[20] The purpose of the study is twofold. Firstly, it serves to explore whether the alternative equitable doctrines applied by these Commonwealth jurisdictions are equally susceptible to gender bias.[21] Secondly, the analysis considers the extent to which these approaches may or may not fare better than the common intention approach, in terms of alleviating the discrimination faced by female claimants and offering protection of their proprietary interests in the family home.[22]

Chapter 5 sets out to examine the interventionist role of equity in the commercial realm and, more particularly, in relation to third party security transactions, where the surety may be described as vulnerable. In ***O'Brien***, the House of Lords described a surety as being vulnerable, where there is a *de facto* relationship of trust and confidence between the debtor and the surety and there is a possibility of that relationship of trust being abused by the debtor.[23] In these cases, equity intervenes to protect the interests of such 'vulnerable' persons who have agreed to stand surety for the credit facilities granted by the bank to the debtor, and where it appears that the surety's consent to the giving of security may have been procured as a result of undue influence, misrepresentation or possibly the commission of some legal or equitable wrong by the debtor on the surety.

The chapter further focuses on third party security transactions involving female sureties, where they have agreed to provide security in the form of a mortgage over the family home. Here, equity has framed the applicable principles along the lines of the doctrine of notice and the independent legal advice requirement. Concepts such as 'notice', 'reasonable steps', 'on its face', 'independent legal advice' and 'manifest disadvantage' appear to incorporate a certain element of objectivity. This, in turn,

reinforces the appearance of neutrality in the principles in that they are aimed at impartial applicability to all vulnerable sureties.

However, as the chapter reveals, the formulation of the test for determining whether or not the security transaction should stand as against the surety indicates that there are effective ways in which a bank may limit its responsibility.[24] At present, the judicial treatment of the ***O'Brien*** test assumes that the performance of 'reasonable steps' by the bank and, more particularly, the formal gesture of urging a vulnerable surety to seek independent legal advice will effectively counteract any form of advantage-taking, which the surety has been subjected to. This will relieve the bank from being fixed with constructive notice of the surety's equity to set aside the transaction. Given the evidence that women generally play a less dominant decision-making role in domestic relationships, it raises the question of whether concepts like notice and independent legal advice are adequate measures to ensure that the decision of a female surety to provide security has indeed been made as a result of her free independent will.

In Chapter 6, an attempt is made to elaborate on certain key issues relating to the role played by equity in formulating its present principles in the context of third party security transactions. The aim of equity in these cases is to prevent the occurrence of certain types of conduct, in particular, advantage-taking of the surety by the debtor and/or the bank. The purpose of the chapter is to consider how the judiciary has utilised the independent legal advice requirement as a device for managing risk in third party security transactions. The application of a risk management perspective to the law in relation to third party security transactions is helpful in considering whether the currently employed devices of the doctrine of undue influence and the independent legal advice requirement are adequate in managing risk.

In that respect, it will be argued that an analysis of the case law post-***O'Brien*** reveals the inadequacy of the independent legal advice requirement as a risk management tool and that alternative devices have to be considered to improve risk management in these transactions. The chapter will further expose the limitations of the present application of the doctrine of notice in third party security transactions and the use of the independent legal advice requirement. These limitations relate not only to the banks' responsibility for the moral hazards in the private relationship between the debtor and the surety, but also to the use of independent legal advice as a mechanism for managing risk in such transactions.

It will be further argued that these limitations stem from the formulation of the 'reasonable steps' test itself, which ignores the economic disparity between men and women and how such disparity may impact on the surety's decision-making role in both her personal relationship with the debtor as well as in relation to the debtor's business. The analysis will reveal that the present judicial treatment of the independent legal advice requirement indicates an approach which is clearly more sympathetic to the banks and other creditors.[25] This has been justified on the grounds of maintaining the security of loan transactions. Banks should, therefore, only be held responsible for matters which are obvious to them, failing which, banks and other financial institutions would be reluctant to grant credit facilities on security of the family home which would, in turn, 'reduce the flow of loan capital to business enterprises'.[26] This, however, raises the question of whether banks should continue to place such heavy reliance of property-based security as a means of managing risk, rather than other prudential measures, such as concentrating on the cash flow and performance of the debtor's business.[27]

In response to the observations made in the preceding chapter regarding the inadequacy of the independent legal advice requirement as a risk management device in third party security transactions, Chapter 7 seeks to explore the viability of two regularly made proposals for reform for the increase of surety protection. Given the existing gender bias in the equitable principles and the inadequacy of the present judicial interpretation of the independent legal advice requirement as a risk management device, the aim of the analysis is to highlight how other alternatives will have to be considered by both the judiciary and the banking industry in order to maintain better risk management strategies in third party security transactions.

One suggested proposal calls for banks to make greater disclosure to the surety and/or her solicitor about the debtor's financial position, prior to the execution of the security document, so as to enable the solicitor to offer advice on the financial wisdom of the transaction. Another is the implementation by banks of better procedures for supervising the granting of loans which may be effected through either legislation or self-regulation by the industry.

The purpose of the chapter is to consider whether such reforms will be effective in alleviating the existing discrimination of the equitable principles against women who agree to stand surety for their partners' debts. This calls into question both the viability, as well as the practicability, of these two particular proposals which raises in itself three central issues: the extent of the disclosure of information by the bank; the extent of the advice to be given by the solicitor to the surety and whether that advice should include advice on the financial wisdom of the transaction; and lastly, whether the present self-regulatory system set up by the banking industry should be maintained to ensure prudential practices by banks in cases of loans to be secured by third parties, especially where security is in the form of a mortgage over the family home.

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[2] Murphy and Clarke, *The Family Home* (1983) Sweet & Maxwell, London. The figure of owner-occupied homes in the early 1980s stood in the region of about 50 per cent. Cutler, *The housing market and the economy* (1995) Bank of England Quarterly Bulletin 260, states that the figure has risen in the 1990s and stands closer to about 68 per cent. Current figures indicate that about 42 per cent of private dwellings are owned with the aid of mortgages, whereas nearly 24 per cent of houses are owned outright (Social Trends 28, 1998).

[3] George, *The financing of small firms* (1994) Bank of England Quarterly Bulletin 67; Davies, *Finance for small firms* (1996) Bank of England Quarterly Bulletin 97. To some extent, more banks have now moved towards the latter approach as a result of the depressed property market.

[4] [1993] 4 All ER 417.

[5] *Lloyds Bank v Rosset* [1991] 1 AC 107

[6] *Barclays Bank v O'Brien*; *CIBC Mortgages v Pitt* [1993] 4 All ER 433.

[7] See Holcombe, *Wives and Property: Reform of Married Women's Property Law in Nineteenth-Century England* (1983) University of Toronto Press, Toronto; Staves, *Married Women's Separate Property in England 1600-1833* (1990) Harvard University Press, Cambridge, Mass., London; Shanley, *Feminism, Marriage and the Law of Victorian England, 1850-1895* (1989) Tauris, London; Erickson, *Women and Property in Early Modern England* (1993) Routledge, London.

[8] See also Stone, *The Family, Sex and Marriage in England 1600-1800* (1979) Weidenfeld & Nicolson, London; *Uncertain Unions: Marriage in England 1660-1753* (1992) Oxford University Press, London

[9] Holcombe, *op. cit.*; Staves, *op. cit.*; Shanley, *op. cit.*

[10] Cotterrell, *Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship* (1987) 14(1) Journal of Law and Society 77.

[11] For a discussion on marriage and cohabitation in early modern England, see Freeman and Lyon, *Cohabitation without Marriage* (1983) Gower Publishing, London and Stone (1992), *op. cit.* See also Parker, *Informal Marriage, Cohabitation and the Law, 1750-1989* (1990) MacMillan Press, London.

[12] In the period of 1996 to 1997, the proportion of non-married women who were cohabiting was nearly 25 per cent, whilst the proportion of men was nearly 22 per cent: Social Trends 28 (1998). For a general discussion of the increasing trend of cohabitation, see Prinz, *Cohabiting, Married or Single* (1995) Avebury Ashgate, England.

[13] Cretney, *The Law relating to Unmarried Partners from the Perspective of a Law Reform Agency* in Eekelaar and Katz (eds.), *Marriage and Cohabitation in Contemporary Societies* (1980) Butterworths, London; Deech, *The Case Against Legal Recognition of Cohabitation* in Eekelaar and Katz (eds.), *Marriage and Cohabitation in Contemporary Societies* (1980) Butterworths, London; Freeman and Lyon, *Towards a Justification of Rights of Cohabitees* (1980) 130 NLJ 228; Parry, *Law relating to Cohabitation* (1988) Sweet & Maxwell, London; Zuckerman, *Formality and the Family - Reform and Status Quo* (1980) 96 LQR 248; Blake, *To Marry or Not to Marry?* (1980) Fam Law 29.

[14] See, for example, Matrimonial Causes Act 1973, s 24; Matrimonial Proceedings and Property Act 1970, s 37.

[15] See *Lloyds Bank v Rosset* for the House of Lords' formulation of the 'common intention' approach. For a general discussion on proprietary rights and constructive trusts, see Burn, *Cheshire and Burn's Modern Law of Real Property* (1994) Butterworths, London; Oakley, *Constructive Trusts* (1987) Sweet & Maxwell, London; Moffat, *Trusts Law* (1994) Butterworths, London.

[16] Delphy, *Close to Home: A Materialist Analysis of Women's Oppression* (1984) Hutchinson, London; Land, *Parity Begins at Home* (EOC/SSRC1981); Miller, *Family Property and Financial Provisions* (3rd ed.) (1993) Tolley, Croydon; Clarke, *The Family Home: Intention and Agreement* (1992) 22 Fam Law 72; Eekelaar, *A Woman's Place - A Conflict between Law and Social Values* (1987) Conv 93; Flynn and Lawson, *Gender, Sexuality and the Doctrine of Detrimental Reliance* (1995) Feminist Legal Studies 105; Gardner, *Rethinking Family Property* (1993) 109 LQR 263; Lawson, *Acquiring a Beneficial Interest in the Family Home* (1992) Conv 218.

[17] See also Pahl, *Money and Marriage* (1989) MacMillan Education, Basingstoke; Delphy, *op. cit.*; Edgell, *Middle Class Couples* (1980) Allen & Unwin, London; Pahl, *The Allocation of Money within the Household* in Freeman (ed.), *The State, the Law and the Family: Critical Perspectives* (1984) Tavistock, London; Pahl, *Household Spending, Personal Spending and the Control of Money in Marriage* (1990) 24(1) J Br Sociological Assoc 119; Pahl and Vogler, *Money, power and inequality within marriage* (1994) 42(2) Sociological Rev 263.

[18] Equal Opportunities Commission, *Women and Men in Britain* (1995) HMSO, London.

Current figures indicate that more women are out of the labour market as a result of their domestic responsibilities and that, even where they are economically active, their average earnings are generally lower than the earnings of men.

[19] Pahl (1984), (1989) and (1990), *op. cit.*; Pahl and Vogler, *op. cit.*

[20] Australia, Canada and New Zealand have adopted the approaches of unconscionability, unjust enrichment and 'reasonable expectations' respectively.

[21] In contrast to the common intention approach, the Commonwealth approaches appear to evince a greater willingness to accept indirect contributions as qualifying contributions. Notwithstanding this, it raises a similar question of whether the formulation of these alternative approaches continues to mask the gender bias inherent in the equitable principles.

[22] See Neave, *Living together - Legal Effects of the Sexual Division of Labour in Four Common Law Countries* (1991) 17 Monash University Law Review 14; *The new unconscionability principle - property disputes between de facto partners* (1991) 5 Aust J Fam Law 185; Otto, *A barren future? Equity's conscience and women's inequality* (1992) 18 Melbourne University Law Review 808; Bryan, *Constructive trusts and unconscionability in Australia: on the endless road to unattainable perfection* (1994) 8(3) Trusts Law International 74; Farquhar, *Unjust Enrichment - Special Relationship - Domestic Services - Remedial Constructive Trust: Peter v Beblow* (1993) 72 Can Bar Rev 538; Scane, *Relationships "Tantamount to Spousal", Unjust Enrichment and Constructive Trusts* (1991) 70 Can Bar Rev 260.

[23] at 431.

[24] See also Fehlberg, *Sexually Transmitted Debt* (1997) Clarendon, Oxford; *The Husband, the Bank, the Wife and her Signature* (1994) 57 MLR 467; *The Husband, the Bank, the Wife and her Signature - the Sequel* (1996) 59 MLR 675; Berg, *Equitable Protection of Certain Sureties* (1993) LMCLQ 101; *Wives' guarantees: constructive knowledge and undue influence* (1994) LMCLQ 34; Mackenzie, *Vulnerable Security Providers, Risk Management and Moral Hazard: Independent Legal Advice After Barclays Bank v O'Brien, Massey v Midland Bank and Clark Boyce v Mouat*, unpublished paper presented at the WG Hart Legal Workshop, 1995; *Beauty and the Beastly Bank: What should Equity's fairy wand do?* in Bottomley (ed.), *Feminist Perspectives on Foundational Subjects in Law* (1996) Clarendon, Oxford.

[25] *Massey v Midland Bank* [1995] 1 All ER 929; *Banco Exterior Internacional v Mann* [1995] 1 All ER 46; *Bank of Baroda v Shah* [1988] 3 All ER 24; *Bank of Baroda v Rayarel* [1995] 1 FLR 376; *Barclays Bank v Thomson* [1996] 1 FLR 156; *Banco Exterior*

Internacional v Thomas [1997] 1 All ER 46. Cf. *Credit Lyonnais Bank Nederland v Burch* [1997] 1 All ER 144.

[26] per Lord Browne-Wilkinson in *O'Brien*, at 441.

[27] *Supra*, at n 3.

CHAPTER 2

Developments in Married Women's Law of Property

2.1 Introduction

The battle for equivalent treatment of married women in respect of property ownership was a long and hard one. Whilst it is conceded that the legal status of married women, as well as their rights to property ownership have changed dramatically in the past century, the debate as to the extent of protection given by the law to married women's property rights continues. Given that men and women are now given the formal legal equality to own property, the argument goes that women are no longer discriminated against. This however raises the question of the meaning of equality. Formal equality means that women are in theory given the same equality as men to own property. However, the concept of equality encompasses the practical aspect as well, which focuses on the economic equality of men and women to own property. In the absence of economic equality, it is argued that women are still placed in a position of disadvantage in terms of property ownership.

In dealing with this issue, this chapter aims to illustrate how the common law had historically discriminated against women in terms of property ownership by its adoption of concepts such as coverture, which effectively deprived a woman of her property on marriage. The first section will trace the type of property rights that married women were entitled to prior to the passage of the Married Women's Property Act of 1870, which was the first piece of legislation ever passed to deal directly with the property rights of married women. This will enable us to see the growing tensions between common law rules and equitable rules governing married women's property rights at that time, which instigated feminists in the nineteenth century to call for the

legal reform of married women's property law.

The recognition of a married woman's equitable rights in property which might be classified as her separate property mitigated the harshness of the common law rules. Notwithstanding this limited recognition of a married woman's property rights, the second section of this chapter will look at the feminist movement during the nineteenth century calling for legal reform which culminated in the passage of the 1870 Act and, more importantly, the Married Women's Property Act of 1882. The feminists' arguments for legal reform were grounded on the discriminatory element of the common law and that married women should be given similar rights to that of men and unmarried women. The intention of this section is to consider the merits of the arguments raised by the feminists and in particular, their argument that attainment of formal legal equality to own property would effectively eradicate the discriminatory element of the law.

The third section will proceed to look at the legal implications which the 1882 Act had on the property rights of married women. The 1882 Act was hailed as a major breakthrough for feminists in their struggle for reform of married women's property law. It finally recognised the legal status of married women as property owners by adopting a much broader definition of what constituted their separate property, thereby conferring on them more extensive rights of property ownership than ever before. The section will consider whether the passage of the 1882 Act achieved the desired result of eliminating the discrimination faced by married women and granting them comparable rights of property ownership as enjoyed by men and unmarried women.

Commentators like Holcombe[1] and Shanley[2] have quite correctly pointed out that the 1882 Act gave married women protection only of property which could be classified as their separate property and not absolute ownership. As a result, the 1882

Act did not give married women complete economic independence. Shanley further argues that the 1882 Act gave married women equity but not equality.[3] She suggests that married women were given 'equity' in the form of extended recognition of their property rights, which flowed from the adoption of a broader definition of property which could be classified as their separate property. However, the 1882 Act did not give the desired equality since a married woman's property rights were still limited to her separate property and she was not given the same legal status of a property owner as that of a man or an unmarried woman.

Furthermore, little consideration had been given by the legislators, whether intentionally or not, to the issue of economic equality and the crucial connection between the economic independence to gain property ownership and equality. Although rights of property ownership are now no longer governed by the marital status of a woman, there still exist reservations about the extent of protection given to married women's property rights. With changing social attitudes towards other alternative lifestyles to marriage, for example cohabitation, the issue becomes even more complex and has created greater tensions in the law when dealing with disputes over such property rights on the breakdown of the relationship between the parties.

It is suggested that the position of women, whether married or cohabiting, has not changed or improved dramatically over the past century since the passage of the 1882 Act. The inequality of the formal kind which Shanley speaks of may no longer exist. However, the inequality of the economic kind continues to exist and have an important bearing of the efficacy of formal equality. It is argued that this is so, primarily for two reasons; firstly, the unequal earning capacities of women and men, which directly affect the economic independence of the parties[4], and secondly, the continuance of sexual division of labour within these relationships.[5] These arguments

will be considered in greater detail in Chapter 4 below.

2.2 Historical Developments: Pre-Married Women's Property Act 1882

"*In law husband and wife are one person, and the husband is that person*"

....Blackstone

Tracing women's property rights in English legal history reveals the complexity of that area of property law. Historically, the property rights of women were primarily determined by their marital status. Unmarried women had full control of all property which they owned and had exactly the same rights of property ownership as men. However, a woman's legal status changed completely upon her marriage. Marriage was seen as a union between a man and a woman which, in the eyes of God, was indissoluble and the common law reinforced this ideology by treating husband and wife as one, with the husband being the legally recognised entity. A woman ceased to have a separate legal identity at marriage, which identity became assimilated with that of her husband. More importantly, the ideology that husband and wife were one was fully reinforced by the law in passing full control of her property to her husband at marriage.

Even then, the question of whether, at law, there was an effective property transmission from the wife to the husband was not one which could always be easily answered in the affirmative. This was due to the exceedingly complex nature of the marriage laws at that time.[6] The whole issue of whether there would be an effective transfer of property would depend on whether the marriage was one which the common law, as opposed to ecclesiastical laws, recognised as being valid. Between the sixteenth century and the mid-eighteenth century, there was a variety of ways by which one could enter into a valid marriage[7], that is, by: (i) a written contract made between the parents of the bride and the groom concerning the financial arrangements of the parties; (ii) the

exchange of spousals which was a formal exchange of oral promises made usually in front of witnesses[8]; (iii) the public proclamation of banns in church which had to be done three times for the purposes of enabling claims of pre-contracts to be heard[9]; (iv) the wedding in church in which the mutual consent of the bride and groom was publicly verified and the union received the blessing of the Church; and (v) the sexual consummation of the union. As a result, it was not easy at times to decide whether a marriage was indeed a legally valid one.

The confusion was further compounded by the fact that the ecclesiastical courts and the common law courts applied different rules in determining whether or not a union was a valid marriage. This is illustrated by, for example, the ecclesiastical courts being prepared to accept the exchange of spousals *per verba de praesenti*, made before witnesses, as being a valid and binding marriage. On the other hand, the common law only recognised the church wedding and regarded the exchange of spousals as being merely a conditional contract which, without the formality of a church ceremony, was not a valid marriage and, thus, ineffective in terms of property transmission. In addition, many from the poorer classes could not afford the services of a clergyman and the expense of having their marriage performed in church. They then opted to live in a form of concubinage, which received the community's acceptance, but was not recognised as a valid marriage by either the law or the Church.[10]

The increasing desire for clarity in the law relating to the validity of marriages eventually led to the passage of Lord Hardwicke's Marriage Act of 1753. The 1753 Act brought the much needed coherence and clarity to marriage laws and further provided that only the church wedding, and not the exchange of spousals, was legally binding. All church weddings had to be entered into the parish register and signed by both parties. The 1753 Act maintained the invalidity of marriages performed at times or in

places defined as being illegal under the 1604 canons.[11] It further rendered the marriage of any persons under the age of twenty-one, without the consent of their parents or guardians, to be invalid. Enforcement of the law was, thus, transferred from the ecclesiastical courts to the secular courts, which were empowered to punish clergymen who disobeyed the law.

Whilst the Marriage Act 1753 had resolved the ambiguity surrounding the validity of marriages by calling for the open registration of marriages, it did not necessarily mean that this was always carried out. The procedure was expensive and those especially hard hit were the poorer classes, who were either unwilling or unable to comply by going through a church ceremony. This meant that they were still obliged to live in concubinage.[12] This may have been of little significance to them in respect of the effective transfer of property from the bride to the groom, since they had either little or no property to speak of. However, with the middle and upper classes, wealth consolidation and property arrangements which a marriage would bring were highly relevant considerations in the choice of a marriage partner. Property arrangements were important to ensure the preservation of the family wealth and that the land be passed down from male to male. Any rights to be given to women would have to be limited to that which was sufficient for their subsistence and would commensurate with their particular social rank.[13]

What was the legal rationale for making a distinction between a married and an unmarried woman in terms of property rights? Why did the law see the need to deprive a married woman of her property rights, by transferring control of her property to her husband at marriage, whilst leaving the property rights of an unmarried woman intact? Should the marital status of a woman have any bearing on her capacity to own property and, more importantly, her ability to control her own property? One plausible

explanation may have been the prevalence of the patriarchal concept of the family during that period and that the law was a reflection of ideological response.[14] Having entered coverture, women were seen to be in need of protection and support and the person whom the law saw as being the appropriate protector was the husband. The ideology was supported by both the state and the Church.

Religious support was given to the ideology by viewing marriage as an holy and indissoluble union. Absolute marital happiness could only be maintained by the wife's absolute obedience and subordination to the husband's authority.[15] The state's support was exemplified by the total assimilation of a married woman's identity with that of her husband and for the husband's identity to be the only one recognised in law thereafter. The result of such assimilation was for the control of married women's property to pass over to their husbands at marriage and the consequent deprivation of their property rights.[16] After all, the logical choice of the person best suited to protect a married woman's property should be none other than the one person whom the law saw as her protector, her husband. Thus, just as the wife was subjected to the husband's protection, control of her property should also pass to him for his protection.

Although full control of a married woman's property passed to her husband at marriage, there were certain property rights which she could be said to enjoy during coverture as well as during her widowhood. A distinction has to be made between the situation where the woman was in the state of coverture and when she was a widow. In the latter case, she was treated by the law as being an unmarried woman and would enjoy corresponding property rights. A distinction also has to be made between real and personal property. In the case of real property, although control of a woman's real property passed to her husband at marriage, the wife retained the legal title to such property. The husband was merely the custodian of the wife's property and could not

dispose of her real property without first obtaining her consent through a legal device called a fine[17] or devise it by will. Control of the wife's real property would revert to her upon her husband's death. In contrast, a married woman's personal property belonged to the husband at marriage and he was entitled to deal with it in any manner whatsoever without her consent. One fact which stood out quite clearly at that time was that, at common law, husbands assumed ownership or, at least, control of their wives' property. Married women had little or no property at their disposal during coverture and were completely dependent on their husbands for financial support.

In medieval times, certain common law rules were established to compensate married women for the loss of control of their own property, notably the dower and free-bench rights.[18] Although these compensatory rules dealt with a married woman's property rights during widowhood, their study is necessary for understanding the effect they had in general on married women's property rights. These rules were aimed at giving a widow some source of income for her maintenance during her widowhood, rather than actually conferring rights of property ownership.

Dower gave a widow a life interest of a one-third share in all the freehold lands which her husband had stood possessed at any time during their marriage. A widow's free-bench right, on the other hand, was a lesser interest which was determined by the customs of the manor but would generally attach a one-third life interest to all the copyhold lands[19] of which her husband stood possessed at the time of his death. These rights were, however, not indefeasible and a widow could lose her right to dower or free-bench if, for example, her husband became a convicted felon and his estate was subject to forfeit or the married woman had committed adultery or eloped with another man, or, in the case of copyhold land, the husband had alienated the land during his lifetime.[20]

Dower gave married women very limited property rights since it attached only to a husband's freehold lands and would not attach to settled lands or any other lands in which he was merely entitled to a beneficial interest.[21] By the early nineteenth century, a widow's claim to dower, although existing in theory, was rarely ever claimed for in practice. One factor which might have contributed to the erosion of dower claims was the substitution of dowers by jointures.[22] The Statute of Uses 1535[23] provided that a jointure might bar a widow's dower on a qualitative basis, in that it should give her a life interest in a freehold estate which was as great as the life estate that she could acquire in dower upon the death of her husband. Whilst the law was concerned with ensuring that the quality of the jointure was comparable to that of the dower, it was less concerned with the quantitative aspect of the jointure. This effectively meant that a husband could settle an estate on his wife by way of a jointure which was of a lesser value in terms of cash income than what she could have been entitled to in dower.

Several reasons were relied on by the courts to justify the erosion of dower by the substitution of jointures, notwithstanding that such jointures might quantitatively have been of lesser value.[24] Firstly, dower interfered with the alienability and marketability of land, as it would attach even though the husband might have disposed of the freehold land during his lifetime.[25] Further, dower did not maximise the highest economic use of land resources. The erosion of dower meant that a widow's wealth could be increased, as such wealth could then be transferred to other forms of property, for example, stocks and bonds, bank deposits. Jointures, on the other hand, increased the alienability of land and women would have greater freedom from the customary status constraints on dower claims.[26]

The unequal treatment of men and married women was also well illustrated by the anomaly in the rules relating to curtesy[27] and dower. Curtesy would attach to the

property which the wife was beneficially entitled to but dower, on the other hand, would not attach to the lands which the husband was beneficially entitled to. It was not until the passage of the Dower Act 1833, that this anomaly was finally rectified by permitting a dower claim to attach to property which a widow's husband was beneficially entitled to at the time of his death. By rectifying this anomaly, it was argued that the Dower Act would offer a fair exchange to married women[28], thereby improving the rights of married women.

Staves, on the other, states that this argument was flawed in two major aspects. Firstly, husbands were entitled to bar their wives' dower and substitute such claims with jointures of lower value. Thus, the Act could not be said to actually improve the rights of married women since their husbands could quite easily defeat their dower by settling jointures on them. [29] Secondly, it ignored the fact that, by the time the Dower Act came into force, most women were not expecting dower, which had already been gradually replaced by jointures. Thus, the Dower Act made little practical difference. Notwithstanding the Dower Act, most husbands were settling jointures on their wives in lieu of dower and married women became entitled to only that which their husbands chose to give them and no more.[30]

The above analysis highlights a married woman's overall lack of access to property ownership during marriage and that, even in widowhood, the amount of property which she was entitled to enjoy through her dower was capable of being reduced through the manipulation of the common law rules relating to jointures. The closest a married woman could come to some form of property ownership during coverture was through her separate property. This would usually be property settled on her in a pre-nuptial marriage agreement for her own separate use. The purposes of such marriage settlements had usually been to protect the woman's property from her

husband and to ensure that the property was preserved and passed on to any issue born to the marriage or that, in the absence of children, the property would revert back to the wife's family.

However, a married woman's separate property was governed, not by the rules of common law, but by the rules of equity and did not accord to the married woman the full rights of property ownership enjoyed by men and other unmarried women. Equity did not recognise married women as having the same proprietary rights as these other citizens but only gave them special rights over certain property which could be classified as their separate property. Whilst married women enjoyed these special property rights in equity, they did not bear the responsibilities attached to property ownership generally imposed by the common law. This enjoyment of special rights was not a privilege enjoyed by majority of married women but only those from well-to-do families with the financial means to settle property on their daughters prior to marriage.[31] For others from families with limited or no means of creating such separate property, there would be virtually no enjoyment of any sort of property rights during coverture.

On the other hand, Erickson's study[32] shows that this might have been the case in theory but, in practice, wives at all social levels, did manage finances on their own behalf and jointly with their husbands. More interestingly, her study reveals that, even at ordinary levels, women were more attune to the obstacles of property ownership at coverture and that they generally sought to protect what little property they owned through simpler forms of trusts settlements. Erickson's findings raise two interesting points. The first suggests a conflict between theory and practice and that, notwithstanding coverture, married women did enjoy direct access to the household income through their involvement in the management of the household income. The

second is that, if married women at all levels were creating settlements for themselves and had direct involvement in the management of the household income, the lack of formal equality to own property might have been of little significance to them since they already had access to economic resources.

It is, however, suggested that the conflict between theory and practice may be explained on the basis that these simpler forms of trusts settlements and the direct involvement in the management of the household finances gave married women at ordinary levels only limited economic security but not full economic independence. The value of the trust settlements would have been proportionate to the value of the available resources of these women prior to marriage. Although marriage settlements were not limited to the wealthier classes, the ability of women from the lower classes to enjoy any substantial economic independence through their separate property would have been limited.

Further, involvement in the management of household finances might not be indicative of any direct enjoyment of the household finances. Recent studies by Pahl indicate that lower income families generally adopt a female-managed/controlled system, whereas high income families would adopt a male-controlled management system.[33] Despite the fact that the woman may be involved with the management of the household finances, the absence of control means that she does not partake in marital power. This is so even for women in low income families who have control as well as management of the household income. In such instances, control is so closely associated with management that there is an absence of any perception of control and hence participation in marital power. A more detailed discussion of Pahl's work may be found in Chapter 4 below. In the context of Erickson's findings, it is therefore suggested that direct involvement in the management of the household finances did not

necessarily give married women *de facto* economic independence unless they had the necessary perception of control which was directly linked to marital power.

2.3 Developments in the Nineteenth century

(a) The Feminist Movement in the Nineteenth century

In Victorian England, the patriarchal family was the dominant family structure, which received both religious as well as legal reinforcement. The latter was illustrated by the passing of control of all the wife's property over to the husband at marriage, including any property which she might acquire during the marriage. Dower and jointures were not technically property rights which married women could be said to enjoy during coverture, such entitlements becoming effective only during their widowhood. In addition, the ability of husbands to manipulate the jointures provisions to replace their wives' entitlements to dower with jointures of lesser value represented a further element of the discriminatory nature of the common law rules. This meant that, during their widowhood, married women were only entitled to such property as their husbands deemed fit to let them have.

The deprivation of the wife of any property rights independent of her husband secured her subordination by the husband, since she was totally dependent on the husband for financial support.[34] Both Erickson[35] and Stone[36] have argued that the domination of the husband over the wife was further reinforced by the unequal standards of education which men and women received during that period. The majority of women, even those belonging to the middle and upper classes, were given a comparatively low standard of education and there were limited opportunities available to women to receive a good education. This, in turn, materially impaired the earning capacity of women and their ability to gain financial independence. In addition, women

were hampered by social conventions and were instead encouraged to cultivate feminine accomplishments like cooking, singing, dancing, and needlework. All these accomplishments did little to add to their financial independence but merely groomed women to become more attractive in the 'social' market of wives.[37]

Equity, on the other, enabled married women to enjoy greater independence through its recognition of the equitable rights of a beneficiary of a trust. Through the trust mechanism, married women could be said in a limited sense to enjoy some rights of property ownership in respect of their separate property. Holcombe noted that equity, unlike the common law, saw the husband as the villain against whom the wife needed protection. This raises the question as to why equity's assumption of the husband was diametrically opposite to the one held by the common law. Holcombe accounts for the difference in attitude as being a response by both the common law and equity to the social and economic changes which were taking place.[38] There was an increased right of alienability and the law encouraged the freedom of disposition of property.

The landed classes were concerned that the family wealth would be dissipated by the younger generation. In addition, there was also a new class emerging, which derived its wealth from commerce rather than land ownership, who were equally concerned with the family wealth being squandered by the improvident younger generation. The common law response of depriving a woman of her property rights at marriage made the choice of a marriage partner, as well as the protection of her property from falling into the hands of an unscrupulous husband, of paramount concern for these wealthier classes. The deprivation of property rights made the subordination of a married woman by her husband complete because, as a non-property owner, she lacked any power which was inherent in property ownership and rendered her financial

dependence on her husband complete.[39]

The development of trusts law in equitable jurisprudence offered the necessary protection to the wife by isolating her property under a trust settlement. Such settlements served a twofold purpose. They allowed a married woman to have some property for her own use and at the same time, enabled her family to prevent the property from falling into the control of her husband under the common law rules. A trust settlement not only effectively prevented a married woman's property from falling into the hands of the husband but also ensured that the property remained within her family if there were no issue. The establishment of a trust settlement further gave a married woman some measure of independence from her husband. Thus, the harshness of the common law rules were, therefore, somewhat alleviated by the legal recognition of these trust settlements.

This analysis appears to suggest that equity's intervention was for the altruistic motive of improving the rights of married women by giving them limited property ownership in equity. On the contrary, it is argued that equity's motives, being in line with the dominant family structure which was based on patriarchy, were clearly to favour men in terms of promoting preservation of family wealth and male lineage; to ensure that a wife's property would be preserved for her children and more particularly, her male children, or that, in the absence of any issue, her property would revert back to other male members of her family. Any conferment of property rights by equity on married women, however limited, was purely incidental and was not the sole purpose of its intervention.

The equitable recognition of a married woman's separate property was far from being a satisfactory solution. These equitable rules were accused by feminists in the nineteenth century of being discriminatory, as they favoured the rich, since the poor did

not have the means to create settlements for a wife's separate property. In addition, the changing economic conditions which took place during the mid-nineteenth century also meant a change in the economic conditions of married women. More married women, especially among the lower classes, were finding employment outside of the home. As more women became gainfully employed, it became harder to see the role of married women as one needing support and protection from their husbands.

The iniquities and hardship caused to married women by the common law rules were clearly illustrated by the case of Caroline Norton.[40] Caroline Norton's failed marriage brought her face to face with the harshness of the common law rules. The common law rules not only denied her access to her children, since the father was recognised in law as the legal guardian, but did little to alleviate the financial hardships she faced throughout her separation from her husband, due to his lack of financial support and the inadequate property rights conferred on married women during that period. Through her machinations, a bill was introduced to Parliament by Thomas Talfourd, a serjeant-at-law and Member of Parliament, to give rights to mothers to appeal to the Court of Chancery for custody of their children under the age of seven. This led to the passage of the Infant Custody Act of 1839, which allowed the Court of Chancery to award custody of any children under the age of seven to the mother and to give the mother access in respect of children under the age of sixteen.

Caroline Norton's case clearly exemplified not only the failings of divorce laws but also the property rights of married women. The common law rules provided for the husband to be the protector of his wife's property and further imposed on the husband the duty of supporting her. Where the husband had failed to carry out this duty, the wife had no property of her own to fall back on for her support. Because of the generally low level of education most women received, they had limited means of supporting

themselves. Even where they were capable of earning, their income, being personal property, was legally the property of their husbands and not their own. Thus, a husband could come along and lay a legal claim over all of the earnings of his wife and any property acquired therefrom, even though the parties might no longer be living together, and the wife could have no legal recourse against him.

Caroline Norton did not see herself as a feminist. She had conformed to the social convention that men and women belonged to separate spheres. Her fight was not one for equal rights for married women but for the abolition of the common law classification of husband and wife as a single unit and for the recognition of the wife as a separate legal identity where the husband had failed in his duty to protect and support her, so as to enable her to seek recourse against him for such failure. Notwithstanding this purportedly non-feminist stand, her case had inspired feminists of that century and more particularly, Barbara Leigh-Smith.[41]

There was general consensus among feminists during that period that major legal reform was required to provide married women with rights equivalent to those of other citizens, namely, men and unmarried women. Barbara Leigh-Smith set up a committee for the purposes of advocating reform of laws affecting women and for the conferment of property rights on married women, which recognised the fundamental and equal rights for both men and women to own property, regardless of their marital status. Even then, that achievement was not attained by Barbara Leigh-Smith and her committee, which did not survive the failure of winning the desired legal reform for married women in the 1850s. This task was achieved instead by another feminist group based in Manchester in the 1860s, which organised the Married Women's Property Committee. The Married Women's Property Committee turned out to be one which was much larger and more impressive than the one founded in the 1850s by Barbara

Leigh-Smith.[42]

The delay in achieving the desired legal reform was partly owing to the passage of two pieces of legislation between the mid-1850s and the late 1870s. Firstly, in 1857, the Divorce Act was passed, providing for a civil procedure for the dissolution of marriage. More importantly, the Divorce Act also permitted a wife who was separated from her husband to be treated as a *femme sole* in respect of property acquired by her after the separation. The said Act was hailed as being a major breakthrough for married women, giving them property rights equivalent to their unmarried sisters. Opponents of legal reform, thus, argued that there was no need for further reform as the Divorce Act would effectively grant relief to married women of their grievances by returning to them the right of property ownership upon separation from their husbands. The Divorce Act had in that respect 'taken the wind out of the sails' for further legal reform in respect of married women's property rights.[43]

Notwithstanding the slow progress of legal reform, the Married Women's Property Committee had the added advantage of having men support their cause by way of membership. The feminist movement of the 1850s had generated increasing support and interest among women as well as men. In consequence, legal reform being canvassed in the 1860s extended to other areas such as equality in employment, in education and in giving women the right to vote.[44] The efforts of the Committee eventually came to partial fruition with the passage of the Married Women's Property Act 1870. However, the 1870 Act far from achieved the objectives which the Committee sought.

The 1870 Act failed to give any legal recognition to a married woman's own property and retained the equitable concept of her separate property, which was classified into three categories. Further, the definition of a married woman's separate

property adopted in the 1870 Act had created certain anomalous results.[45] The first category related to the wages and earnings acquired or gained by a married woman after the passing of the Act. This meant that any earnings which she had saved prior to the Act coming into force would still be treated as her husband's property and did not form part of her separate property.

The second was in respect of her savings or investments registered as being her separate property. The 1870 Act failed to make this an automatic provision. As such, the provision had little practical value since most banks and investors would not have been prepared to accept a married woman's money for the purposes of investment without first obtaining her husband's consent. This was to avoid any future disputes between the parties as to the identity of the actual owner. The final category of separate property related to any property which a married woman had inherited. If the inheritance was by way of a testamentary gift, it would form part of her separate property, provided that it did not exceed the value of £200. Any legacy worth more than £200 would still be caught by the old equitable rules, which provided that the property had to be divided equally between the husband and the wife.

With married women being given certain rights over their property, the 1870 Act had, correspondingly, placed certain responsibilities on them. This included, *inter alia*, placing the same liability on married women for the support of their husbands and children in the event that the husband was unable to support the family. This point was widely objected to by feminists who argued that women should not be required to support their husbands and children since that responsibility should be rightly borne by a husband in exchange for the services rendered by the wife in performing her wifely duties of maintaining and managing his household.[46] The 1870 Act further made married women with separate property responsible for their ante-nuptial debts and

abolished the common law rule which made husbands responsible for such debts.[47] The said Act, however, did not seek to make married women personally liable for their debts but merely made their liability a proprietary one which was limited to the value of their separate property.

There are merits in the arguments raised by feminists that the effect of the 1870 Act was to grant to married women special property rights in relation to what might be classified as their separate property. By retaining the equitable concept of separate property, the 1870 Act failed to recognise married women's own property, which meant that the common law rules giving husbands full control of their wives' property at marriage remained intact. Thus, the practical effect of the 1870 Act was that it failed to give to married women the legal equality to own property together with full responsibilities, which normally attached to such property ownership. Married women were still classified as a special class of property owners to whom only the equitable rules of property ownership applied. The 'equality' conferred on them was, therefore, contrary to the type of legal equality which the feminists were fighting for. The fundamental point was that married women should not be placed in any special class of property owners. Married women should be given the same rights as men and unmarried women to own property at law, and not just in equity, and to bear the full responsibilities of such legal ownership.

A further criticism levelled at the 1870 Act by feminists was that the retention of the concept of 'separate property' in the said Act maintained the discriminatory element of separate property, which favoured the wealthy, since only women wealthy enough to have settlements giving them separate property would actually benefit from the Act.[48] It is arguable that the intention of the 1870 Act was to ensure greater protection of the earnings of poor working women. This was intended to be achieved

by extending the definition of a married woman's separate property to include wages and income earned after marriage and the passage of the 1870 Act. The Act, however, excluded any money which a woman might have earned or saved before her marriage and between her marriage and the passage of the Act, unless such savings were invested in the manner prescribed by the Act. The practical effect was that, unless women made settlements before their marriage to ensure adequate protection of their property, the 1870 Act did not accord sufficient protection to their property.

The 1870 Act further created anomalies in what might or might not be classified as a married woman's separate property as well as her responsibilities. Where a married woman had no separate property, creditors could not sue her personally for her outstanding ante-nuptial debts. But they no longer had any recourse against her husband, since his common law liability had been abolished.[49] Thus, the 1870 Act was far from acceptable to the Married Women's Property Committee in terms of conferring the level of legal protection being sought in relation to married women's property rights. The only route open to by the Committee was to persevere with their efforts to seek more favourable reform of married women's property law.

(b) The Married Women's Property Act 1882

After the passage of the 1870 Act, the movement for further legal reform appeared to lose some momentum. Holcombe noted that this could be accounted for by several factors, one of which was the change in the political climate.[50] The Conservative government, which was not particularly supportive of the legal reform of married women's property law, remained in power longer than expected.[51] There were also changes within the constitution of the executive committee of the Married Women's Property Committee, which meant the time-consuming process of readjustment. The

struggle for further legal reform turned out to be a protracted twelve year struggle. During that time, the Married Women's Property Committee began to make a perceptible change in focus by looking in greater detail at the implications of legislation being enacted or considered by Parliament which could affect married women's property rights.

The shift in focus meant that the Committee began to look at legal reform, not as a singular objective, but a mass of connected issues which other legislations being passed or considered by Parliament might have an effect on their fight for further legal reform. In 1873, the Committee drew up a new bill for introduction to Parliament, which was intended to be a thoroughgoing reform and was very similar to the original bill drawn up by the Committee in 1868. The effect of this new bill would have been to repeal eleven of the seventeen clauses in the 1870 Act, replacing them with provisions which gave full legal recognition to a married woman's own property, as well as placing full responsibility of property ownership on her, which was similar to that of men and unmarried women. Unfortunately, passage of this new bill was to be fraught with delays and postponements.[52]

In the interim, a major piece of legislation had been passed in 1873. The Judicature Act of 1873 fused the jurisdiction and administration of the courts of law with the courts of equity. In addition, section 22 of the said Act provided that, in the event of any conflict between the rules of law and the rules of equity, the rules of equity would prevail. Holcombe suggests that the supremacy of equitable rules over common law rules might have had a major effect and facilitated the further reform of married women's property law.[53] With the passage of the 1873 Act, there was a greater desire to bridge the gap between common law rules and equitable rules relating to married women's property. Based on the Judicature Act, the common law rules, which gave

control of a wife's property to her husband, would now be superseded by the equitable rules, which recognised her separate property.

Holcombe further suggests that the passage of the Married Women's Property Act of 1882 was, therefore, an attempt at reconciling the conflict between common law rules and equitable rules in relation to a married woman's separate property, as envisaged by the Judicature Act.[54] Shanley[55], on the other hand, holds a different view and feels that this may be too simplistic an analysis of the effect of the Judicature Act and its role in bringing about further reform of married women's property law. There is lack of jurisprudential evidence to suggest this outcome. Even if there were evidence pointing to the influence of the Judicature Act over the passage of the 1882 Act, Shanley argues that it would have applied only to a married woman's separate property and nothing else.

In 1880, the Liberals won the general election which brought back into Parliament an increased number of the Committee's supporters. This gave the cause a new surge of life. The bill was introduced to Parliament again in May 1880 which eventually led to the passage of the 1882 Act. The 1882 Act provided that, for a woman who married after the date on which the Act came into force[56], her separate property would include all the property she possessed or was entitled to at the time of marriage and which she acquired or became entitled to after marriage. With respect to women who were married before the Act, their separate property would include such property which they already held as their separate property under the 1870 Act and all other property which they acquired or became entitled to after the 1882 Act came into force.

Section 17 of the 1882 Act further provided that, in the event of a dispute between a husband and a wife regarding the ownership of property, either party could apply to the courts for a summary decision to resolve the dispute. Married women were

also empowered to acquire, hold and dispose of their separate property by will or otherwise. The 1882 Act retained the responsibility of married women for all their ante-nuptial debts up to the extent of the value of their separate property as well as their husbands' common law liability for such debts to the extent of any property which they had acquired from their wives at marriage. The new Act further provided that married women could protect their separate property and had the right to sue in their own names against persons, including their husbands, for civil remedies and remedies by way of criminal proceedings.

However, this right to protect was subject to two qualifications. Firstly, a husband and a wife could not sue each other in tort except where the wife was suing to protect her separate property.[57] Secondly, a wife could not institute criminal proceedings against her husband while they were still living together or if living apart, her right to institute such proceedings would be limited to situations where the husband had taken her property 'when leaving or deserting, or about to leave or desert' her. Thus, the 1882 Act gave married women far greater property rights, albeit limited to their separate property, than ever before and the scope of separate property was extended further than as defined in the 1870 Act.

The 1882 Act was intended to embody the principles which the Committee had long sought since the 1850s, but regrettably the Act still retained the old terminology of a married woman's 'separate property', rather than her 'own property'. This may have been intentional as it would appear that Parliament was still not quite ready to give full legal recognition to a married woman's right to her own property. A clear distinction between legal and equitable ownership of property was to be maintained in relation to married women and the 1882 Act was not intended in any way to repeal the common law rules governing coverture. The 1882 Act merely reduced the original

discriminatory element of separate property by adopting a much wider definition for such property. In that way, more married women who did not have marriage settlements bestowed on them might have their separate property.[58]

It is argued that the continued dichotomy between a married woman's separate and own property was a significant factor in maintaining the subordination of women in a predominantly patriarchal society. It has been argued by Cotterrell[59] that the beneficiaries of a trust, being the owners in equity, are the ones who actually enjoy the power of property ownership. However, in the trust form, this power play remains invisible in the eyes of the law as a result of the further distancing of the property owner and the property and power.[60] Thus, in the context of married women's separate property, this would suggest that married women, being the equitable owners of their separate property, were able to partake in the property-power, even though the common law vested the legal title of such property in their husbands or trustees.

Cotterrell's arguments, however, appear to have omitted the gender issue involved in maintaining the concept of a married woman's separate property. It is submitted that, in the context of married women's separate property, this further separation of power and property ownership effectively reduced a married woman's participation in the power play involved in property ownership. Notwithstanding the fact some married women might have been directly involved in the management of the household finances, Pahl's work[61] indicates that women generally would have played a less dominant role in decision-making and thus have less marital power. Hence, the retention of a concept of separate property failed to give married women both equivalent treatment and the full power of property ownership as given to men by the common law. It is further argued that the fact that such power had to remain invisible reinforces the idea that married women were not to be treated equally to men.

Ironically, whilst the feminists of Victorian England had condemned the domination and subordination of women in marriage, they had never disputed the existence of sexual division of labour.[62] They had accepted the notion of sexual division of labour within marriage and conceded that it was the wife's duty to be responsible for the home and children and the husband's duty to provide the family income. They did not seek to challenge the patriarchal set-up of marriage but sought, instead, legal equality for women by the removal of their subordination, which they believed stemmed from the loss of control of their own property at marriage. They believed that legal equality could be achieved through restoring such control to them, even though sexual division of labour and inequality of earning capacity, and therefore income, between spouses remained intact within marriage.

This raises the question of whether domination in marriage and sexual division of labour are separate and distinct issues. If a woman had to stay at home to perform her 'wifely' duties of managing the household and taking care of the children, her opportunities for employment, especially full-time employment, outside the home would be greatly reduced. This would result in the wife remaining financially dependent on the husband for support, which, in turn, would leave her more vulnerable to domination by her husband. It is therefore very difficult to see how sexual division of labour can be isolated from the whole issue of women's domination in marriage and be disregarded since it is intrinsically linked to the wife's financial independence. Giving married women the legal equality to own their own property is a step towards the emancipation of women but it is quite different from saying that they have economic equality to own such property. Without the latter, married women will still lack the power attached to property ownership. They will be hindered from participating on an equal footing with their husbands in the property-power play and

thus removing the latter's power to dominate them and the relationship.[63]

2.4 Conclusion

The above analysis shows that, although the 1882 Act was a major breakthrough for married women in respect of their property rights, there were certain setbacks which survived the 1882 Act. By maintaining the dichotomy between what was or was not married women's separate property, the 1882 Act basically failed to grant to married women the same sort of property rights which were enjoyed by men and unmarried women. The 1882 Act continued to give married women a special status as property owners, to which only the privileges of ownership attached but not the responsibilities of such ownership. Reference to married women's 'separate property' meant that only the rules of equity were applicable to that form of property ownership and married women were not bound by the common law rules of property ownership.

Whereas men and unmarried women were personally liable for all their debts and could be sued for such outstanding debts regardless of the value of their property, married women escaped this liability. They could not be made subject to common law rules such as bankruptcy or even imprisonment for failure to satisfy a judgment, since their liability was purely proprietary and limited to the value of their separate property. In addition, they were not liable for their post-nuptial debts even though they possessed property since their husbands bore responsibility for such debts in law. Thus, the 1882 Act gave married women protection as a special class of property owners, which related to their separate property, but not the independence of full property ownership.

The distinction of married women as a special status of property owners effectively deprived them of the independence of full property ownership which other citizens enjoyed. By retaining the concept of separate property, the 1882 Act was

effectively maintaining a distinction between legal and equitable ownership of property. Married women were given only equitable ownership but not full legal ownership and control of their property. The concept of separate property gave married women limited power of property ownership and effectively deprived them of the independence of full property ownership at common law which men and unmarried women enjoyed. In the absence of such independence, married women remained in a position of inequality *vis-à-vis* men.

The feminists of Victorian England might have taken a rather formalistic and simple view of equality, that is, married women would enjoy equality once full rights of legal ownership were given to them. In that respect, the feminists had been content to omit the issue of sexual division of labour in the debate of legal reform of married women's property rights. In their view, the main obstacle to married women enjoying the same independence as men and unmarried women stemmed from their lack of legal equality to own property. Whilst feminists had recognised the significance of property ownership to independence, they had failed to appreciate the impact that sexual division of labour had on their ability to be economically independent. If married women were constrained by their domestic responsibilities to be economically active, they would lack the resources to acquire property. Hence, their failure to link married women's lack of economic independence and their subsequent subordination to sexual division of labour was a crucial oversight of the fact that formal equality, without economic equality, would still place women in a position of inequality to men.

Over the passage of time, some of the anomalies created by the 1882 Act were eradicated giving rise to the present state of law which gives married women exactly the same rights of property ownership as men and unmarried women. It was not until 1935 that married women's property law was finally brought in line with the principles

propounded by the Married Women's Property Committee. The Law Reform (Married Women and Tortfeasors) Act of that year finally repealed all sections of the 1882 Act which referred to a married woman's 'separate property' or 'separate estate' and replaced them with reference to 'married women's property'. The 1935 Act rendered a married woman responsible for all her torts and contracts, by releasing her husband from these responsibilities, unless they were post-nuptial contracts entered into by her as his agent. A married woman became, for the first time, subject to the bankruptcy laws and was, likewise, liable to imprisonment for failure to comply with judgments and orders made against her.

The appearance of neutrality in the present law is evidenced by its recognition of a married woman as a separate legal entity with *locus standi* to own property independently of her husband. Despite this appearance of neutrality, the present law may be criticised on the grounds that it continues to discriminate against married women in two major aspects. Firstly, the law ignores the economic disparity between men and women which is evidenced by the fact that women generally earn less than men. In the context of domestic relationships, the economic disparity between men and women will mean that women will have fewer economic resources to contribute to the family income and/or by which to acquire legal ownership to property than their husbands and partners.

Secondly, the law ignores the continued existence of sexual division of labour in the majority of households and the effect that this may have on a woman's economic resources. The law does not place any monetary value on the important but unpaid domestic services which women, more than men, contribute to the family. The reasons given for ignoring domestic services is twofold: firstly, because the value of such labour is not quantifiable in terms of money; and secondly, it has been seen as nothing

more than what is expected of a woman in performing her wifely duties. These issues will be looked at in greater detail in Chapter 4 below.

The Married Women's Property Act 1882 was indeed a major breakthrough for women in that it was the precursor to granting them equal rights of property ownership. The present law, however, fails to remedy a major flaw which continues to exist, that is, the impact of sexual division of labour on a woman's ability to gain property ownership. Sexual division of labour continues to affect the earning ability of women who are either married or cohabiting, which, in turn, affects their ability to gain equivalent financial independence to men. Notwithstanding that married women can now own property separate from their husbands, they as well as other female cohabitants are still economically disadvantaged in acquiring property because of the limitations placed on their financial independence.

References

[1] *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-century England* (1983) University of Toronto Press, Toronto.

[2] *Feminism, Marriage and the Law of Victorian England, 1850-1895* (1989) Tauris, London.

[3] *Op. cit.*, at 130.

[4] Pahl, *Money and Marriage* (1989) Macmillan Education, Basingstoke; Delphy, *Close to Home: A Materialist Analysis of Women's Oppression* (1984) Hutchinson, London; Edgell, *Middle Class Couples* (1980) Allen & Unwin, London; Land, *Parity Begins at Home* (EOC/SSCR 1981).

[5] O'Donovan, *Sexual Divisions in Law* (1985) Weidenfeld & Nicolson, London; Otto, *A barren future? Equity's conscience and women's inequality* (1992) 18 Melbourne University Law Review 808.

[6] For a detailed discussion on marriages in the middles ages through to the nineteenth century,

see Stone, *The Family, Sex and Marriage in England 1600-1800* (1979) Weidenfeld & Nicolson, London.

[7] Stone, *op. cit.*, at 51.

[8] There were primarily two forms of spousals. *Per verba de futuro* was an oral promise to marry in the future which, if followed by consummation later, would be legally binding for life. The other was the spousals *per verba de praesenti*, which was an exchange made by the parties before witnesses, using phrases in the present tense, e.g. 'I take thee as my husband' and 'I take thee as my wife', and was recognised by the ecclesiastical courts as being an irrevocable commitment, which would nullify any subsequent church wedding to another person by one of the parties.

[9] By the seventeenth century, nearly all the well-to-do evaded this requirement by using a licence.

[10] For a further discussion, see Stone, *op. cit.*, at 30-37.

[11] Under the 1604 canons, a church wedding must take place between the hours of 8.00 a.m. and noon in the church at the place of residence of one of the parties, after the banns had been read for three consecutive weeks.

[12] Stone, *op. cit.*, at 37.

[13] See also Erickson, *Women and Property in Early Modern England* (1993) Routledge, London. Erickson argues (at 29) that the subordination of women might have been linked to the inferiority of women's education rather than property and law. The disparity in education between men and women was a principal reason for women's economic subordination, as well as for women's economic dependence on their husbands. The common law, although appearing egalitarian, was effectively the product of the medieval landed classes to preserve dynastic hegemony through practices of primogeniture and coverture.

[14] Shanley, *op. cit.*; Holcombe, *op. cit.*; Stone, *op. cit.*

[15] Stone, *op. cit.*, at 135-142; 154-156. He argues that the Church's support for the ideology allowed the responsibility of supervising the moral and religious conduct of family members to be transferred from the Church to the head of the family, thereby reinforcing the authority of the husband and father in the family.

[16] Stone, *ibid.* at 156-157, 195-202, shows how the ideology provided by the state with a buttress to political order and support for an authoritarian state. In passing control over property to the husband and father, the law further reinforced the patriarchal authority of the husband and father by increasing his power of alienation. This, in turn, facilitated the power of the husband and father to punish or reward family members, thereby leading to greater

subordination of family members.

[17] Fines were abolished by the Law of Property Act 1925.

[18] For a more detailed study of dower and free-bench rights, refer to Staves, *Married Women's Separate Property in England 1660 - 1833* (1990) Harvard University Press , Cambridge, Mass., London.

[19] Copyhold lands were finally abolished when the Law of Property Act 1925 was passed, which provided for the conversion of copyholds into freeholds by mutual agreement between the landlords and the tenants.

[20] Staves, *op. cit.*, Chap 2.

[21] The rule of no dower of a trust was subsequently rectified by the Dower Act 1833.

[22] A jointure was normally a provision of a life interest in land or income made in a marriage settlement for the wife in the event that she survived her husband.

[23] 27 Hen. 8, c. 10.

[24] Staves, *op. cit.*, at 32-33.

[25] Land was not as easily disposable as potential purchasers might not be prepared to take the risk of the widow of a prior owner making a dower claim over the land in the future.

[26] for example, a wife could lose her right to dower because of her adultery but such conduct would not affect her jointure.

[27] A widower's right to a life interest in all of the lands which his wife had brought into the marriage, which right was contingent on the birth of a child to the marriage.

[28] The fair exchange arguably came in form of a wife being able to claim dower on her husband's equitable interests, in exchange for giving her husband greater power to defeat her dower claim by alienating the land either during his lifetime or by will.

[29] *Op. cit.*, Chap 4.

[30] *Ibid.* Staves points out in Chaps 2 and 3 how various conveyancing techniques were employed to defeat a wife's dower.

[31] Holcombe, *op. cit.*

[32] *Op. cit.*

[33] (1989) *op. cit.* See also Pahl, *Household Spending, Personal Spending and the Control of Money in Marriage* (1990) 24(1) The Journal of British Sociological Association; Pahl and Vogler, *Money, power and inequality within marriage* (1994) 42(2) Sociological Review 263.

[34] Cotterrell, *Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship* (1987) 14 JLS 77, suggests that the concept of property was introduced to mask

the inequality of individuals which was supposed to be guaranteed by the law. The concept of property permits property ownership to be separated from the property owner. As a result, the legal doctrine and ideology of equality before the law is not compromised even though the nature and amount of the assets owned by individuals may be unequal. In addition, property ownership gives the property owner power over others. Cotterrell, therefore, argues that the concept of property ownership effectively masks this power enjoyed by the property owner as well as offering it legitimation.

[35] *Op. cit.*, Chap 3.

[36] *Op. cit.*, at 202-206.

[37] *Ibid.*, at 348. In the early to mid-eighteenth century, there was an increase in the number of boarding schools for women. However, such educational facilities were costly and were, therefore, limited to those with the financial means for paying for such education for their daughters. In addition, education for women were still focused on trivial matters, e.g. needlework, singing, dancing and cultivating other social graces rather than actually encouraging any intellectual studies comparable to men's education.

[38] *Op. cit.*, at 37-38.

[39] Cotterrell, *op. cit.*

[40] Holcombe, *op. cit.*, at 55; Shanley, *op. cit.*, at 23-28; Forster, *Significant Sisters: The grassroots of active feminism 1839-1939* (1984) Secker & Warburg, London, at 15.

[41] Holcombe, *op. cit.*, at 57; Shanley, *op. cit.*, at 29-35.

[42] Shanley, *op. cit.*, at 50-67.

[43] Holcombe, *op. cit.*, at 108.

[44] Shanley, *op. cit.*, at 67-68.

[45] Holcombe, *op. cit.*, at 179-181. See also Shanley, *op. cit.*, at 74-75.

[46] Holcombe, *ibid.*, at 181.

[47] *Ibid.*, at 181-182.

[48] *Ibid.*, at 179; cf. Erickson, *op. cit.*

[49] *Ibid.*, at 182.

[50] *Ibid.*, Chap 9.

[51] In 1874, the Conservative party returned to government under Disraeli. Many of the members who had been the Committee's supporters were absent from Parliament whereas their opponents formed the majority.

[52] Holcombe, *op. cit.*, points to how the bill was postponed no less than fifteen times by reason of opponents of the bill invoking the 'half past twelve rule' and then a further six times

on other grounds.

[53] *Ibid.*, at 190-202.

[54] *Ibid.*, at 202.

[55] *Op. cit.*, at 107 at fn 11.

[56] The Married Women's Property Act 1882 came into force on 1 January 1883.

[57] A husband did not have a reciprocal right to sue his wife in tort for the purposes of protecting his property.

[58] Holcombe, *op. cit.*, at 202-204; Shanley, *op. cit.*, at 124-127.

[59] *Op. cit.*, at n 34.

[60] *Ibid.*

[61] *Op. cit.*, at n 33.

[62] Shanley, *op. cit.*, at 65-67.

[63] These arguments would apply equally to female cohabitants. A more detailed discussion of the effects of sexual division of labour and the economic disparity between men and women may be found in Chap 4 below.

CHAPTER 3

Marriage and Cohabitation

3.1 Introduction

The previous chapter explored the historical developments which led to the passage of the Married Women's Property Acts of 1870 and 1882. The 1882 Act was seen as a landmark for married women's property rights since it conferred on them the right to own property, albeit classified as their separate property, independently of their husbands. Although the 1882 Act did not confer absolute legal ownership on married women, the said Act effectively gave recognition to them to own property of their own through an extended meaning of what comprises their separate property. Nevertheless, the chapter also highlighted some of the weaknesses in the law which, as noted by Shanley, gave women equity but not equality.[1] This is illustrated by both the 1870 and 1882 Acts maintaining a dichotomy between separate and own property. The former conferred only limited rights of property ownership on married women, which was governed by the rules of equity.

As a result, it has been argued that, as a special class of property owners, married women enjoyed limited responsibilities as opposed to being given full responsibilities of property ownership as borne by other citizens, namely men and unmarried women, who have the enjoyment of the full rights of property ownership. Since 1935, this right to property ownership has been extended from equitable ownership to absolute legal ownership. Bearing this in mind, this raises the question of the extent of the equality which women have in general to own property. Reference to equality in this context is not, however, limited to the equality of women to acquire and own property which theoretically the law gives to them. It extends to the equality

which they may actually have in practice to acquire and own property and, thus, encompasses both the legal as well as economic equality that they may enjoy.

Thus, given the formal equality of men and women to own property, there are several issues to be considered. The first issue is whether there are any constraints which married women may face, at a practical level, which may affect this formal equality to own property. The second is whether these constraints are similarly experienced by other women who choose to cohabit. This is further complicated by the fact that the issue of the legal treatment of cohabitation is less than straightforward and remains controversial. Should cohabitation be treated in the same manner as marriage? If so, on what basis should such equivalent treatment be premised? Or should the law give differential treatment to cohabitation?

There are, surprisingly, still misconceptions amongst the general public about the legal implications of cohabitation. Before looking at the way the law has responded in granting proprietary rights to spouses and cohabitants over the family home, it is necessary to look at the legal treatment of cohabitation in comparison to marriage, in order to determine the extent to which the law is prepared to recognise the former. It would, then, enable us to look in greater detail in the next chapter at the circumstances, if any, in which proprietary rights over the family home may be conferred on spouses and cohabitants and, in particular, whether the present formulation of the equitable principles is satisfactory and capable of adequately dealing with such family property disputes.

3.2 Marriage compared with cohabitation

(a) Marriage

Marriage is described by Dewar[2] as a social practice which may have a variety of

meanings and functions. Its concept is used to regulate legitimate heterosexual familial relations within English law but its meaning in terms of social practice and legal definition may not necessarily always coincide. This can be seen by the fact that the concept of marriage has taken on different definitions at different stages of history in terms of its legitimacy. Prior to the passage of the Marriage Act 1753, marriage was less formalistic than it is today. It was seen by the community as a state of affairs between men and women, which the community accepted as being in a conjugal relationship. There were primarily two facets of marriage - unions which the law accepted as being valid in contrast to unions which, although lacking in such legal validation, were nevertheless socially accepted by the community and/or the Church as being a binding marriage.[3]

As noted in Chapter 2, the laxity of community practices in forming a formal union of marriage was reflected by the fact that a couple could contract a marriage in a variety of ways.[4] Marriage took a variety of forms, some of which were accepted by the community and/or ecclesiastical law as being binding marriages, but were not necessarily recognised by the common law as being valid and binding marriages. Where ecclesiastical law and/or common law conflicted with local customs, the community developed its own alternative practices of forming informal marriages, which would have had some reference to general practices.[5] An example of this was the betrothal which operated as an exchange of consents between the parties. The betrothal was almost like a trial marriage, which the parties could agree to end but, when consummated, would crystallise into a marriage accepted by the community.

There was little consensus as to how a legally binding marriage should be carried out during that period. These inconsistencies were well illustrated by, for example, the conflicting rules applied by the Church and the state in respect of the

validity of clandestine marriages.[6] Another good example was marriages effected through the exchange of spousals. The exchange of the spousals *per verba de praesenti* was treated by the common law, not as a binding marriage, but a conditional contract which, in the absence of the formality of a church wedding, would lack legal validity.[7] These inconsistencies were deemed undesirable especially by the wealthier classes in terms of advancing and protecting their economic interests.

In 1753, Lord Hardwicke's Marriage Act was passed which brought about not only the abolition of common law marriages, but also the legal recognition only of marriages conducted through an Anglican church ceremony. The said Act inevitably brought with it greater state regulation of the concept of marriage. It introduced a 'dual' framework of religious and civil formality for the regulation of marriage, as well as introducing for the first time a compulsory system for the registration of marriages. Every church wedding had to be entered into the parish register and signed by both parties, and parental consent was compulsory where any one of the parties was under the age of twenty-one.[8] In addition, the Marriage Act 1753 shifted the jurisdiction for enforcement of the new marriage laws from the ecclesiastical courts to the common law courts.[9] Marriage began to acquire a formalistic and legal meaning and, through legal regulation, the state was able to set definitions of not only the procedures for getting married but what marriage is.[10] Thus, the state has been able to impose its own view of what marriage is. To that extent, it is inevitable that the community's perception of marriage over time is a derivative of legal definition.[11]

Although the formalities required for entering into a valid marriage have been amended significantly since the 1753 Act[12], the dual framework of religious and civil formality remains part of the legal framework of modern family law. The rationale for the continuation of such formalities is to protect against the adverse effects of

clandestine marriages.[13] Dewar suggests that marriage serves the purpose of defining and attaching significance to certain types of legitimate heterosexual familial relations.[14] Thus, the result of entering into a valid marriage carries with it certain legal effects and attaches certain rights and obligations on spouses which the law will uphold and help protect.[15] Given the legal endorsement of marriage and recognition of the rights and obligations of spouses, this raises the question of why cohabitation rates have been on the increase in the past twenty years or so. More importantly, cohabitation poses a challenge for the law not only in terms of its definition, but also in terms of its legal treatment in comparison to marriage. As can be seen from the following discussion, no clear-cut policy has been adopted by the law and the legal response to cohabitation has varied between equivalent and differential treatment to marriage.

(b) Cohabitation

It is of interest to note that there is still a great deal of confusion among the general public about cohabitation and common law marriages. The misconception that modern-day cohabitation is equivalent to a 'common law' marriage and that the legal effects of 'marriage' will, therefore, attach to such a relationship, still exists. This may in part be due to the fact that, in most attempts to prescribe a definition for cohabitation, reference is usually made to a non-marital conjugal relationship. Therefore, any such relationship which is not a marital one automatically attracts the label of 'common law', even though cohabitation and common law marriages are technically quite different concepts. Common law marriages did not survive the passage of the Marriage Act 1753 which abolished legal recognition of marriages *per verba de praesenti* and *per verba de futuro*.[16]

One of the main problems about cohabitation is in formulating an accurate definition of the concept. Freeman and Lyon illustrate the difficulty of drawing up a specific definition for cohabitation by highlighting the variety of definitions given by various writers which include, for example, 'a man and a woman living together under marriage-like conditions', 'long-standing common-life', 'living together in a relatively permanent manner similar in many respects to marriage without legal or religious sanctions'.[17] Prinz describes cohabitation as the status of couples who are sexual partners, not married to each other and sharing a household.[18] In all instances, one element which clearly distinguishes cohabitation from marriage is the lack of formality, whether religious or civil, for entry into that relationship.

Recent studies have shown that cohabitation is on the increase in the United Kingdom. Prinz found that the proportion of never-married women who were cohabiting increased from 21.9 per cent in 1960 to 24 per cent in 1985; the proportion of never-married men rose from 25.6 per cent in 1960 to 31.4 per cent in 1985. The proportion of women and men who married decreased over the same period, whilst the divorce rate for both men and women increased between 1960 and 1985.[19] These figures show that, although marriage is still the norm for most couples, cohabitation has increased and, contrary to what some people may believe, it is not a passing fad which saw its heyday in the 1960s.

Between 1979 and 1989, the proportion of all non-married[20] women who were cohabiting increased from about 10 per cent in 1979 to 20 per cent in 1989.[21] Of these women, the proportion of spinsters who were cohabiting rose from about 17 per cent in 1987 to 19 per cent in 1989. In contrast, the proportion of bachelors who were cohabiting increased from 13 per cent in 1987 to 15 per cent in 1989. The overall proportion of non-married men who were cohabiting over the period of 1986 to 1989

was about 14.5 per cent, compared to 15.5 per cent for non-married women.[22] More current statistics indicate that, in 1996 to 1997, the proportion of non-married women who are cohabiting has increased to 25 per cent, whilst the overall proportion of men cohabiting is about 22 per cent. Among these, the proportions of spinsters and bachelors who are cohabiting are about 23 per cent and 20 per cent respectively.[23]

Prinz's study shows that cohabitation is statistically a normal pattern in Europe today and that the majority of marriages these days are preceded by cohabitation for some period of time.[24] The data further shows that cohabitation is, increasingly, no longer a deviant phenomenon. Prinz points out that the pattern emerging in Europe today appears to be one where there is an increasing decline in marriage rates and a rise in the divorce rates, coupled with an increasing rate of cohabitation. The common belief has been that cohabitation was a transitional phase or a prelude to marriage - a sort of trial marriage. However, the emerging marital patterns suggest that cohabitation can no longer be described as transitional or a pre-marital phase and is increasingly seen as an alternative to marriage.[25] But, what does any of this data actually tell us about cohabitation? Is it a phenomenon which has developed only in the twentieth century or does it have roots which go much further back in history? What are the reasons for couples choosing cohabitation over marriage?

With respect to the question of whether cohabitation is a recent phenomenon, history reveals that cohabitation existed long before the twentieth century. Stone noted that concubinage was not an uncommon phenomenon in England during the middle ages right up to the passage of the Marriage Act 1753. Men and women lived together as man and wife, which union, although illegal according to the laws of the Church and the state, was accepted and recognised by the community.[26] One of the material considerations for marriage was the preservation, accumulation and/or aggregation of

wealth among families. Property transmission on marriage was, therefore, a crucial issue, especially among the propertied classes.[27] Concubinage, therefore, usually occurred among either the lower classes as they had less or no property to form the material consideration against concubinage or the very wealthy who were indifferent to public opinion.

The Marriage Act 1753 was intended to resolve the ambiguity surrounding the question of the validity of marriages by calling for the open registration of marriages. Even after the passage of the 1753 Act, it did not necessarily mean that there was complete compliance to the new laws at all social levels. This was particularly at issue among the poorer classes who were either unwilling or unable to comply. Since the new regime required the compulsory registration and the signatures of both parties in the parish register, some in the poorer classes would have refused compliance because of their illiteracy. Others might have refused compliance because they could not afford the costs of a church wedding. In such cases, the parties had little choice but to continue to live in concubinage.[28] Obviously, these reasons have little application in the choice of cohabitation in this century but it still leaves open the question as to why this phenomenon has survived several centuries and is fast becoming an alternative to marriage in the past three decades.

So, why have marriage rates declined and cohabitation increased? Several reasons have been put forward in explaining the decline of marriage. One is that there has been an increased cultivation of the romantic ideal of marriage after the Second World War, which has meant higher expectations of marriage by the parties. When these expectations are not met, it leads to the breakdown of more marriages.[29] Another possible reason is the emancipation of women brought about by the women's movement. The women's movement has helped to encourage women to achieve social,

economic and sexual independence and to believe in their own separate identities. This has also helped women to realise that there are alternatives to marriage so that they need not treat marriage and family as the main focus of their attention.[30]

Prinz, on the other hand, feels that it would be too simplistic to attribute these changes in marital trends purely to women's emancipation.[31] The women's movement has played a major role in the changes which have taken place in the past three decades, but the movement comprises several components which are interdependent and important to the framework of cohabitation. The first component is the increased economic independence of women which has given them a greater degree of equality in household responsibilities, and has also enabled couples to divorce and lead independent lives. Secondly, social changes have resulted in changes in the traditional role of women which, in turn, have resulted in the increased participation of women in the labour force. He suggests that the increasing numbers of women who are economically active means a decrease in the influence of traditional values and the prevalence of sex ideologies of marriage behaviour and family life.[32] This, coupled with the biological independence of women through the increased availability and use of birth control methods nowadays, has given women an independence which they have not previously had. The combination of women's increased economic and biological independence has led to a convergence of the gender roles of modern society. Thus, Prinz argues that, once gender roles converge and become interchangeable, the traditional competitive advantages of marriage whereby the man is seen as the sole provider and the woman as responsible for the home and caring for the children loses its impetus.[33]

In contrast, what are the possible reasons for the rise in cohabitation? Here, Freeman and Lyon identify four possible reasons for the increase in cohabitation.[34] The

first reason is that it is an ideological response. The choice of cohabitation is a rejection of the traditional marriage contract and the assumption of the roles within that arrangement. Traditional marriage is seen as imposing inequality on the parties since traditional social attitudes inevitably create certain expectations of the roles to be played by the parties within marriage. Cohabitants are at liberty to reject these prescribed roles and the relationship is, therefore, one which is freer, more flexible and equal than marriage. Secondly, the choice may be a law-avoidance response where the parties choose cohabitation due to some religious or legal impediment which prevent them from marrying. The third reason is the financial response which is effectively a rejection of the financial responsibilities imposed by the state on spouses or alternatively, an acceptance of the financial advantages of cohabitation. The final reason is the postponement response. The choice of cohabitation stems from the desire to postpone marriage and the assumption of the incidents of marriage.

The ideological response has been the oft-quoted reason for cohabitation's increasing popularity. On the face of it, the argument is a very attractive one and it is indeed very tempting to accept that reason as flowing from the evidently changing socio-economic conditions of women as a result of their emancipation. Arguably, the traditional view of marriage tends to be highly patriarchal, with men and women playing specific roles. The sexual division of labour is highly defined with men being seen as the main income providers of the family and women as homemakers and responsible for child care. This, in turn, perpetuates the continued subordination of women within marriage. Ideological rejection is, therefore, inevitable with the increased economic independence of women during this century.[35] The emancipation of women, together with increased paid employment, has given women financial independence which does not accord with the traditional role of women in marriage.

This increased financial independence purportedly enables women to have greater equality in the household responsibilities and an increased say in the financial arrangements of the household income. But, the extent to which increased independence will actually give women the desired equality in practice may be debatable.

Pahl's study[36] shows that an increase in earning power gives a wife greater financial independence and may increase her role in decision-making but it may not necessarily follow that she will enjoy a corresponding increase in the management and control of the household finance. In addition, families with low incomes would usually opt for a system whereby women were more likely to be responsible for managing the household finances. Her study shows that, in such cases, management of the household finances was seen by the women as being more a chore rather than their actually being in control of the family's finances and thereby enjoying an increased power in decision-making. Pahl argues that there is a correlation between the choice of allocative system of managing the family's income and the partner who controls the household finances and holds the decision-making power in the family.[37] Even though a woman may, through an increase in earning capacity, play a bigger role in decision-making, this would not necessarily mean she has greater power in comparison with her spouse or partner if control of the family's income is still deemed as being within his domain. In addition, there is also insufficient statistical proof that women who choose to cohabit earn higher incomes than their counterparts who are married. Role-playing and sexual division of labour are not automatically eradicated by the choice of cohabitation.

It may be too simplistic to allocate any one reason for cohabitation's increase in popularity as a couple's choice of cohabitation may be based on a combination of reasons. In that respect, what is more crucial is to recognise the fact that cohabitation is

no longer a transitory phenomenon and has established itself as an alternative to marriage. Thus, the question we should be addressing is not why people choose cohabitation but how the law should proceed to deal with that relationship in the future. In England, there is at present no specific legal framework to regulate cohabitation. The absence of a statutory framework regulating cohabitation has left the law to respond on a piecemeal basis and the desirability of this approach in the long-term is questionable. The long-standing debate as to whether or not legal recognition should be extended to cohabitation continues but, in the meantime, the legal differences between marriage and cohabitation remain.

3.3 Differences between marriage and cohabitation

To a greater extent, the legal position taken in relation to cohabiting couples is governed by the prevailing policy of encouraging, rather than discouraging marriage and family life.[38] In determining whether any recognition should be given to cohabitation, the factors which the courts concentrate on include, *inter alia*, the duration and stability of the relationship, financial support, the sharing of accommodation, whether there are any children and the existence of a sexual relationship. On reviewing the instances in which legal recognition has been conferred on cohabitation, Pearl notes that the emphasis should be on the '*dependency*' of the parties so as to establish a mutually interdependent relationship between the parties, rather than the sexual relationship of the parties.[39] Despite the limited instances where the law recognises cohabitation, we have seen in recent years an increasing rate of cohabitation in England. The reasons for opting for cohabitation rather than marriage may vary from couple to couple and may range from ideological to financial. Whatever the reasons, it is evident that there still remain certain differences between marriage and

cohabitation. A general overview of these differences is helpful in elucidating, more particularly, the differences in respect of ownership of the family home.

As a starting point, marital laws are drafted in such a way so as to place restrictions on not only the way in which a legally binding marriage may be entered into, but also who may marry and who may marry whom. The Marriage Act 1949[40] lays down specific formalities which have to be complied with, failing which the marriage will be void. The Act further prescribes the minimum ages of parties wishing to marry[41] as well as adopting a complex system of defining who may marry whom. For example, marriages between persons of the same sex are void[42]; marriage between persons within certain core relations of blood, known as relations of consanguinity[43], as well as relations of marriage, known as relations of affinity[44], are also prohibited. Bigamous marriages are void but polygamous marriages may be valid in certain circumstances.[45] The formalities imposed by marital laws are, on the other hand, not applicable to cohabitation. There are no restrictions on those who choose to cohabit and with whom they may wish to cohabit. Thus, where the marital laws prohibit marriage between the parties, for example, those who are already married or within prohibited degrees, gay couples or transsexuals, cohabitation is the only available alternative.

Secondly, one significant aspect of the status of marriage is the duty to support which spouses can claim from each other either during marriage or on divorce. This right, however, does not extend to cohabitants who are under no obligation to support each other during or even after the breakdown of the relationship. The relationship is deemed as being consensual, with no such legal obligation of support being imposed on either party. Another significant difference between marriage and cohabitation is exemplified in the law's handling of disputes over property ownership on the

breakdown of the relationship. A spouse who has neither a legal or equitable interest in the matrimonial home, may enjoy various rights over the property during or even on the breakdown of the marriage, which rights a cohabitant does not similarly enjoy.[46]

England has not adopted a system of community of property with respect to matrimonial property as in countries like the United States and New Zealand. Thus, the general law of property will apply in determining the ownership of any property acquired by spouses, even if such acquisition is for their joint use. This property law regime is equally applicable to cohabitants in determining issues of property ownership. It is, however, on the breakdown of marriage or cohabitation, that the legal distinction between the two become significant. Whilst marital laws have devised provisions to deal with disputes over money and property between spouses upon the breakdown of marriage, these adjustive provisions are not applicable to cohabitants.[47] Thus, any claims over the family home will have to be supported by the principles of contract law, property law or the trusts mechanism. The problems raised by using these analyses for determining property claims will be explored and examined in greater detail in the next chapter when we look at how spouses and cohabitants may establish beneficial rights over the family home in situations where they are not the legal co-owners of the said property.

One other difference between spouses and cohabitants is in relation to intestacy. The rules of intestacy for the distribution of an intestate's estate to his or her surviving spouse will mean that a surviving spouse will be entitled to some share in the deceased spouse's estate. Once again, these rules of intestacy do not apply to cohabitants. Thus, express provision will have to be made in respect of any property which either party wishes the surviving partner to have, for example, by bequeathing the property to that party by way of a testamentary bequest. Although cohabitants are not entitled as of

right, they may now be eligible to make a claim for reasonable financial support from the deceased partner's estate under the provisions of the Inheritance (Provision for Family and Dependants) Act 1975 if (s)he can show that (s)he was a dependant of the deceased at the time of his or her death and was, immediately before the death of the deceased, maintained either wholly or partly by the deceased.[48]

3.4 Equivalent or differential treatment?

What we have seen from the above discussion is that marriage is given a certain 'status' with rights and obligations accruing thereto which the law will enforce and protect but such 'status' is not extended to cohabitation. Although only a brief general overview, the preceding section attempted to show some of the differences between marriage and cohabitation and how each may have different legal effects. This then raises the question of whether the present law adequately protects the interests of parties who opt for cohabitation. The preceding section illustrates how, in relation to property disputes, the present differential treatment of cohabitation may place cohabitants at a disadvantage when trying to establish a share in the family home on the breakdown of the relationship.

However, the extension of legal recognition to cohabitation will require further consideration of issues such as the basis of such recognition, the extent of the recognition to be given, as well as the legal framework in which to implement such recognition. Should legal recognition of cohabitation be premised on equivalent or differential treatment to marriage? In each case, the answers are not easily formulated. The debate pertaining to the legal recognition of cohabitation has been and still remains highly controversial. Yet, a possible advantage of introducing the legal recognition of cohabitation and setting up a statutory framework for its regulation, whether premised

on equivalent or differential treatment, is that it may pave the way for greater clarification of the property rights of cohabitants, which would be a step forward in removing some of the present discrimination faced by those who have chosen to cohabit.

A problem of conferring legal recognition on cohabitation may lie in the difficulty of determining the underlying principle on which such legal recognition is to be structured. Cretney highlights how the problem lies in identifying the juristic basis on which rights and obligations of cohabitants are to be imposed, as well as the conceptual difficulty of comparing marriage and cohabitation as the two concepts are fundamentally very different.[49] On the one hand, marriage is seen as an ascertainable legal status and does not require any investigation into the exact nature of the parties' personal relationship. Cohabitation, on the other hand, entails some form of value judgment on the part of the judiciary of the nature of the parties' relationship and whether it conforms with the incidents of a normal marriage, for example, the use of the same surname, the presence of children, joint account and so forth.

To some extent, there has been piecemeal recognition of cohabitation by the law. This can be seen, for example, in the adoption of the cohabitation rule in relation to social security benefits. Cohabitation is treated in the same way as marriage in determining entitlement for social security benefits where the couple is living together as husband and wife.[50] The rationale for implementing the cohabitation rule is that it would be unfair to allow a couple who are not married but cohabiting and sharing resources to be entitled to claim benefits as two separate individuals. That would then place a cohabiting couple in a more advantageous position than a married couple. As stated earlier[51], the rules of intestacy do not apply to *de facto* partners but once again, there is limited recognition of cohabitation by the law in the provisions laid down in

the Inheritance (Provision for Family and Dependants) Act 1975. The 1975 Act enables dependent partners to apply for reasonable financial support from the deceased partner's estate.

The recognition of cohabitation is also found in other areas of the law. Illustrations of this may be found in the legal provisions dealing with domestic violence which confer on the court powers to make certain orders to restrain the use of violence in the home[52] and to facilitate claims by cohabitants under the Fatal Accidents Act 1976.[53] It should be noted that, even though cohabitation is treated differently from marriage in that the marital legal framework does not extend to it, it does not necessarily mean that cohabitants have no legal recourse when disputes or problems arise. This is illustrated, for example, in cases when property disputes arise between cohabitants. Putting aside questions of efficacy of the legal principles for the present moment[54], the law does offer alternatives for the resolution of property disputes between cohabitants. It currently responds by relying on ordinary principles of property law and trusts law to resolve these disputes. However, as there has not been a general recognition of cohabitation in English law, the result has been piecemeal regulation, giving limited legal recognition and on an *ad hoc* basis. Thus, the question is whether more can be done by extending legal recognition to cohabitation, rather than this halting and hesitant approach currently being taken by the legislature. Should cohabitation be subjected to legal regulation in the same way as marriage?

It has been argued that the purpose of the legal regulation of marriage is to serve basically four state interests: firstly, the promotion of public morality; secondly, to ensure family stability; thirdly, to assure support obligations of the spouses as between themselves and in respect of any children in the family; and finally, to assign child care responsibilities.[55] In the premises, marriage enjoys a special position which

merits legal protection because its aim is to promote social stability and public morality. Will extending legal recognition to cohabitation threaten this stability and corrupt public morality?

This has been one of the main arguments for rejecting the equivalent treatment of cohabitation with marriage. The 'public morality' argument emphasises this special position of marriage and that cohabitation is nothing more than a form of advanced prostitution. Bearing in mind the breakdown in organised religion in society as well as society's heterogeneous character, Freeman and Lyon argue that using the 'special position' of marriage to advocate differential treatment of cohabitation is less persuasive.[56] On the other hand, it is arguable that the equivalent treatment of marriage and cohabitation may be thought of as devaluing the institution of marriage and, hence, unacceptable to public opinion.[57]

It has also been argued that the differential treatment of cohabitation and marriage should continue on the basis of private autonomy. Those who have chosen cohabitation over marriage should have their choice respected and the law should help preserve this autonomy, rather than impose the same legal consequences of marriage on them.[58] Deech points out that if cohabitants feel that the legal system provides insufficient protection of their rights and results in injustice for them, they can opt for marriage.[59] She further argues that, rather than assimilating cohabitation and marriage, marriage should be deregulated and that the incidents of marriage should be reduced so that marriage becomes more like cohabitation.[60] In other words, the legal treatment of both relationships should not be based on status but rather contract and other ordinary legal principles, such as trusts, tort and restitution.[61] It has been further argued by Parry that the assimilation of marriage and cohabitation will undermine the former.[62] He states that the difference between marriage and cohabitation should be maintained

and that once cohabitation is recognised as being an alternative to marriage, rather than a threat to marriage, it paves the way for the development of the legal basis for its recognition.[63]

On the other hand, evidence of the equivalent treatment of cohabitation and marriage can be found in certain areas of the law. Such assimilation may be motivated by financial reasons, namely, that cohabitants should not be placed in a better position than those who have chosen to marry. A good example of this is the introduction of the cohabitation rule in determining entitlement to social security benefits. Thus, a justification for legal reform in terms of equivalent treatment of both relationships is based on the desire to remove defects in the law or to eliminate anomalies.[64]

A move towards the equivalent treatment of marriage and cohabitation assumes that cohabitation performs exactly the same functions as marriage which may not necessarily be the case. The focus is then placed on the marriage-like characteristics of cohabitation before equivalent rights may be extended to the cohabitants. In order to establish this familial nexus, the courts are asked to make a value judgment on the quality of the relationship which is not required when dealing with marriage. This would involve looking for several factors, such as the presence of children, the length of the relationship and the behaviour of the parties. The presence of children is always a strong indicator of the familial character of the relationship and is important in encouraging the courts to make maintenance orders or interfere with the property rights of cohabitants.[65]

The relationship must also be sufficiently long-standing, as opposed to it being a transitory one, so that an inference of permanence may be made. This, however, raises further definitional problems as to the requisite duration of the relationship for it to qualify as being sufficiently stable and permanent to warrant legal recognition. This

argument is further augmented by the fact that most marriages nowadays are no longer for life and appear to last only for as long as the parties remain satisfied that their expectations are being fulfilled. Thus, should the duration of cohabitation be a relevant factor in deciding whether legal recognition should be extended to the relationship?

The cases suggest that longer periods of cohabitation appear to be required in order to prove the permanence of the relationship, especially in cases where there are no children.[66] Marriage-like behaviour such as living in the same household, the sharing of household expenses, the presence of children, joint bank accounts, even the use of the same surname, may be helpful in establishing the familial nexus. Similarly, any expression by the cohabitants of a future intention to marry would cast a more favourable light on the relationship than in cases where the parties have openly rejected marriage.[67]

Another argument commonly raised in favour of the equivalent treatment of cohabitation and marriage is the need to protect the interests of the weak, usually women and children. The underlying rationale is that women are usually reduced to a state of economic dependence on their male partners because they have to forego their career opportunities to take care of the family and home. Thus, female cohabitants will be placed at a disadvantage compared with their married counterparts and the law should, therefore, be extended to protect them by giving them similar rights as married women.

Deech, in arguing against equivalent treatment of marriage and cohabitation, disagrees that extension of marital laws to cohabitation is the answer to the problem. Her objection is basically twofold.[68] Firstly, family law has not kept up with the notions of equality of women and marital partnership. A clear example of this is reflected in the law's treatment of homemaker services as being exploitative of the

woman. This renders her position weaker, a situation against which the law is required to protect her. Secondly, career sacrifice is neither a pre-requisite of nor imposed in cohabitation. To treat career sacrifice as one deserving compensation is to equate it to a redundancy payment which, in turn, treats the whole relationship as one of master and servant. Once again, that seems to bring out the paternalistic nature in which family law operates.

Deech concludes that any extension of family law to cohabitation 'retards the emancipation of women; degrades the relationship and is too expensive for society in general and men in particular'.[69] Zuckerman similarly argues that the implementation of a separate code governing cohabitants' property rights is undesirable because social trends are not sufficiently determinable to enable the needs of cohabitants to be adequately met this way. His preference is instead for the continued use of judicial discretion in resolving such disputes because there is wider scope to give effect to the rights and duties created by the parties, whether through agreement or relevant conduct.[70]

Parker, on the other hand, provides a different view for the increased legal recognition of cohabitation in the law. This, he argues, is based on the emphasis of 'family' in the current family law which focuses more on the economic reality of the family as a unit rather than as a legal status.[71] The emphasis is shifted from 'marriage' to 'family' and from 'wife' to 'mother' in determining the rights and obligations of the parties. In this manner, the law will be equally applicable to informal relationships as well as married couples. Parker concludes that the shift from marriage to family has enabled the law to appear to prioritise women as mothers and homemakers rather than as women. In this manner, the law continues to legitimate a patriarchal family and is able to cloak this by removing obviously oppressive rules which attach to the status of

marriage and recognising the changing economic position of women.[72]

The above analysis highlights the controversy, as well as the academic disagreement, on the issue of whether there should be legal recognition of cohabitation and if so, the basis of such recognition. There are clearly merits in the arguments raised for maintaining the differential treatment of cohabitation, especially those in favour of maintaining autonomy and freedom of choice. In the context of property disputes, it is evident that the lack of legal recognition of cohabitation, or of the presence of any statutory framework for its regulation, has subjected the relationship to closer scrutiny by the courts than marriage has. A cohabitant wishing to establish a share in the family home would find that there is a greater need to satisfy the court with evidence of a relationship which is sufficiently marriage-like so as to warrant the courts' intervention.

Thus, cohabitants will not fare better than their married counterparts in terms of acquiring any rights of occupation or ownership over the family home, whether during or after the breakdown of the relationship, unless they have the foresight to make express arrangements regarding such property rights, prior to commencing the relationship. The courts' search for the marriage-like qualities in the cohabitants' relationship so as to render the relationship comparable to marriage, and hence attract judicial intervention, highlights the discrimination which cohabitants face under the present law when trying to establish an equitable share in the family home.

3.5 Conclusion

A couple's choice between marriage and cohabitation may be based on a variety of reasons. This may include the ideology underlying the two concepts, legal or even financial reasons. The discussion has highlighted how the law has been responding to cohabitation on an *ad hoc* basis in a variety of ways. There has been piecemeal

recognition of cohabitation in certain areas of the law, for example, in dealing with domestic violence, entitlements to social security benefits, claims for reasonable financial support under the Inheritance (Provision for Family and Dependants) Act 1975 and so forth. But, as noted by Parker, the process of assimilation of marriage and cohabitation so far evidenced in the legal system has been slow and halting.[73] The issue which remains undecided to-date is whether recognition should be further extended and if so, whether such recognition should be brought about by treating cohabitation in the same manner as marriage. This would mean extending the application of marital laws to cohabitation. The equivalent treatment of marriage and cohabitation has, however, met with strong arguments against it.[74]

In addition, total assimilation may not be desirable if both cohabitation as a viable alternative lifestyle to marriage and the private autonomy of choice between the two are to be maintained. As suggested by Parker, this may be reflected by the recent stance taken by the law in shifting its focus from 'marriage' to 'family' in determining the rights and obligations of the parties within a relationship, be it marriage or cohabitation. The shift in focus further means that the presence of children and parenthood become increasingly important determinants of what rights and duties the parties have, whether married or cohabiting.

The underlying problem here is not so much whether or not cohabitation should be treated in the same manner. In that respect, the arguments raised by Deech, Zuckerman, Freeman and Lyon for the differential treatment of cohabitation and marriage are persuasive. The choice between marriage and cohabitation should be maintained as one which individuals are free to make. Furthermore, those opting for cohabitation should not have the incidents of marriage imposed on them, which would necessarily be the case if marriage and cohabitation were to be given equivalent

treatment. The issue turns on the protection of the rights of cohabitants which appears to be lacking under the present legal system. The argument appears to be that the present law pertaining to cohabitation and more particularly, cohabitants' property rights, is inadequate and guilty of being unfair, uncertain and illogical. If this is to be used as a justification for equivalent treatment of marriage and cohabitation, the 'across the board' application of all existing marital laws to cohabitants will not necessarily resolve such deficiencies.

The arguments raised against the assimilation of cohabitation and marriage will still hold ground. That being the case, the issue revolves around the desired framework in which to protect the rights of cohabitants. In that respect, the majority consensus is for the continued application of the ordinary principles of contract, trusts and restitution. However, the application of these legal principles in dealing with the rights of cohabitants has been accused of being a major cause of the law's existing uncertainty which, in turn, may result in unfairness. Zuckerman shows certain optimism that any danger of uncertainty is hardly serious since there is little uncertainty in the legal principles being applied and that any such uncertainty would probably recede in time.[75] This in turn raises the question of whether the application of the present legal principles may in any way impair fairness and justice for cohabitants, especially in relation to their property rights. How should these principles be applied so as to avoid unfair results? These are, *inter alia*, some of the points which will be considered in greater detail in the following chapter when the way in which the law deals with the property rights of spouses and cohabitants over the family home is examined.

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[4] Chap 2 above, at 19; Stone, *op. cit.*, at 51.

[5] Parker, *Informal Marriage, Cohabitation and The Law, 1750-1989* (1990) MacMillan Press, London, at 27.

[6] For a more detailed discussion on the validity of clandestine marriages, refer to Stone, *Uncertain Unions: Marriage in England 1660 - 1753* (1992) Oxford University Press, London, Chap 8.

[7] Refer to Stone (1979), *op. cit.*, at 31-35 on the differences between canon law and common law on the validity of marriages.

[8] *Ibid.* , at 35.

[9] *Ibid.*, at 35.

[10] O'Donovan, *Legal Marriage - Who needs it*? (1984) 47 MLR 112, 113.

[11] *Ibid.*, at 114.

[12] Refer to the Marriage Acts of 1898 and 1949.

[13] Dewar, *op. cit.*, at 33.

[14] *Ibid.*, at 51-52.

[15] Cf. Clive, *Marriage: An Unnecessary Legal Concept?* in Eekelaar and Katz (eds.), *Marriage and Cohabitation in Contemporary Societies* (1980) Butterworths, London, who questions the legal concept of marriage and argues that marriage is not a necessary concept for attaching personal effects on couples living together.

[16] Stone (1979), *op. cit.*

[17] Freeman and Lyon (1983), *op. cit.*, at 2.

[18] *Cohabiting, Married or Single* (1995) Avebury Ashgate, England, at 72.

[19] *Ibid.*, Table 2.1 at 23; 24.

[20] For both men and women, this includes spinsters/bachelors, widows/widowers and those who were divorced and separated.

[21] Haskey and Kelly, *Population estimates by cohabitation and legal marital status - a trial set of new estimates*, Population Trends 66 (1989) HMSO, London. These figures are based

on the General Household Surveys between 1979 and 1989.

[22] These figures are based on the combined General Household Surveys of 1986 to 1989.

[23] Social Trends 28, 1998.

[24] *Op. cit.*, at 77.

[25] *Ibid.*, at 78.

[26] Stone (1992), *op. cit.*, at 16.

[27] Refer to Chap 2 above for a discussion of the effect of marriage on property transmission. Prior to the Married Women's Property Act 1882, and depending on the type of property in question, marriage would effectively pass ownership and control of a woman's property to her husband.

[28] Stone (1979), *op. cit.*, at 37; see also Parker, *op. cit.*, at 64-66 where there was clear evidence that unformalised cohabitation continued to survive beyond the eighteenth century especially in Wales, where, e.g., baptismal records in the parish of Celriog Valley showed that 60 per cent of all births between 1768 and 1805 were to parents whose relationships had not been solemnised in church and were therefore illegal according to the 1753 Act.

[29] Freeman and Lyon (1983), *op. cit.*, at 46.

[30] *Ibid.*, at 47.

[31] *Op. cit.*, at 81.

[32] Social Trends, 28 (1998) indicates that, in 1997, an estimated 11.4 million women make up the labour force, compared to 14.5 million men.

[33] *Ibid.*, at 83.

[34] Freeman and Lyon (1983), *op. cit.*, at 50-55.

[35] Social Trends 15, 1985. Between 1951 and 1983, the percentage of economically active married women rose from 35 per cent to 47.6 per cent. Between 1981 and 1983, 14 per cent of married women were in full-time employment and 35 per cent in part-time employment. The figures for unmarried mothers were 19 per cent and 23 per cent respectively. Since then, the proportion of women who are economically active has increased further. More current figures show that about two-thirds of women aged between sixteen and fifty-nine are in employment (37 per cent in full-time and 29 per cent in part-time): Social Trends 27, 1997.

[36] Pahl, *The allocation of money within the household* in Freeman (ed.), *The State, The Law and the Family* (1984) Tavistock, London. For more discussion on Pahl's work, see also *Household Spending, Personal Spending and the Control of Money in Marriage* (1990) 24(1) The Journal of British Sociological Association 119; *Money and Marriage* (1989)

Macmillan Education, Basingstoke.

[37] Pahl (1984), *ibid.*, at 45-46. A more detailed discussion of the impact of women's economic positions and their participation in marital power may be found in Chap 4 below.

[38] Pearl, *The legal implications of a relationship outside of marriage* (1978) CLJ 252.

[39] *Ibid.*

[40] ss 25, 49; see also Matrimonial Causes Act 1973, s 11(a)(iii).

[41] See Marriage Act 1949, s 2; Matrimonial Causes Act 1973, s 11(a)(ii).

[42] Matrimonial Causes Act 1973, s 11(c).

[43] Marriage Act 1949, s 1, and Part I, Sch 1.

[44] See Deceased Wife's Sister's Marriage Act 1907; Deceased Brother's Widow's Marriage Act 1921; Marriage (Prohibited Degrees of Relationship) Act 1931; Marriage (Enabling) Act 1960; Marriage (Prohibited Degrees of Relationship) Act 1986. There has been a certain relaxation of the restrictions on relations of affinity. The prohibited relations of affinity are now subject to s 1 of the Marriage Act 1949 (as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986).

[45] There has also been some relaxation on the recognition of polygamy and polygamous marriages may be valid under English law in certain circumstances: Matrimonial Causes Act 1973, s 11.

[46] A good example is the statutory rights of occupation given to a spouse in respect of the matrimonial home under s 1of the Matrimonial Homes Act 1983, which does not extend to cohabitants.

[47] See Matrimonial Causes Act 1973, s 24; Matrimonial Proceedings and Property Act 1970, s 37.

[48] Inheritance (Provision for Family and Dependants) Act 1975, s 1.

[49] *The Law Relating to Unmarried Partners from the Perspective of a Legal Reform Agency* in Eekelaar and Katz (eds.)., *Marriage and Cohabitation is Contemporary Societies* (1980) Butterworths, London.

[50] Income Support (General) Regulations 1987, reg 2(1), 17.

[51] See section 3.3 above.

[52] Domestic Violence and Matrimonial Proceedings Act 1976, s 1(2).

[53] s 1(3)(b) (as amended).

[54] The question of whether property disputes are efficiently dealt with by the application of property law and trusts law are dealt with in greater detail in Chap 4 below.

[55] Freeman and Lyon (1983), *op. cit.*, at 184.

[56] Freeman and Lyon, *Towards a Justification of Rights of Cohabitees* (1980) 130 NLJ 228.

[57] Cretney, *op. cit.*

[58] Freeman and Lyon, *op. cit.* See also Cretney, *op. cit.*; Deech, *The Case against Legal Recognition of Cohabitation* in Eekelaar and Katz (eds.)., *Marriage and Cohabitation in Contemporary Societies* (1980) Butterworths, Toronto; Blake, *To Marry or Not to Marry?* (1980) Fam Law 29.

[59] Deech, *op. cit.*, at 301.

[60] *Ibid.*, at 303.

[61] *Ibid.*; Freeman and Lyon (1980), *op. cit.*; Cretney, *op. cit.*

[62] *Law relating to Cohabitation* (1988) Sweet & Maxwell, London

[63] *Ibid.*, at 229-230.

[64] Cretney, *op. cit.*

[65] Refer to cases like *Eves v Eves* [1975] 1 WLR 1338; *Gammans v Ekins* [1950] 2 All ER 140; *Tanner v Tanner* [1975] 1 WLR 1346; *Chandler v Kerley* [1978] 1 WLR 693 where the presence of children may influence the courts to consider the cohabitants as a family.

[66] See *Gammans v Ekins* where a twelve year cohabitation was insufficient to infer that the cohabitants were members of a family; *Helby v Rafferty* [1978] 3 All ER 1016 where a five year relationship was also held not to be sufficiently long to show permanence; cf. *Dyson Holdings v Fox* [1975] 3 All ER 1030 (forty years) and *Watson v Lucas* [1980] 3 All ER 647 (nineteen years) where the duration of the relationships were held to be sufficiently long.

[67] E.g. *Cooke v Head* [1972] 2 All ER 38 and *Eves* where the future intention of the parties to get married were relevant considerations; cf. *Richards v Dove* [1974] 1 All ER 888 and *Helby v Rafferty* where rejection of marriage was fatal to both cases.

[68] Deech, *op. cit.*, at 303-305.

[69] *Ibid.*, at 310.

[70] *Formality and the Family - Reform and Status Quo* (1980) 96 LQR 248.

[71] Parker, *op. cit.*, at 97.

[72] *Ibid.*, at 157.

[73] *Ibid.*, at 150.

[74] Refer to Deech, *op. cit.*; Zuckerman, *op. cit.*; Freeman and Lyon, *op. cit.*

[75] Zuckerman, *op. cit.*, at 279.

CHAPTER 4

Property Rights over the Family Home[1]

> *"[T]o treat as equal that which is unequal may ..... be a very odious form of discrimination"*
>
> Sir Otto Kahn-Freund

4.1 Introduction

The ownership of the family home is usually not disputed until either the relationship between the spouses or cohabitants breaks down or there is a competing claim over the property by a third party. In such circumstances, it becomes imperative to determine who actually owns what in respect of the said property, especially when seen in the light that the family home forms the main asset for the family in most cases. This is reflected in the fact that the proportion of owner-occupied properties has risen from about one-third in the 1950s to more than two-thirds in the 1990s.[2] In the previous chapter, the ways in which the law manifests its differential treatment of marriage and cohabitation were highlighted. In particular, the law differentiates between marriage and cohabitation when dealing with disputes over property rights on the breakdown of the parties' relationship. Whilst the provisions of the Matrimonial Causes Act 1973 give the courts adjustive powers to deal with disputes between spouses on the breakdown of the marriage, these provisions are not applicable to cohabitants. In such circumstances, cohabitants, who are not legal co-owners of the family home, would have to rely on contract, property law or trusts principles to establish an equitable share in the property.

Notwithstanding the courts' adjustive powers under the marital laws, there is still a continuing relevance of determining property rights between spouses. There are

circumstances where it will be necessary or desirable, for example, where there is a competing claim by a creditor, or an application for property adjustment under the Matrimonial Causes Act 1973 may not be possible because a spouse has remarried after the dissolution of the marriage.[3] In such circumstances, the courts adopt a similar approach in dealing with disputes between spouses as in the cases of cohabitants. Cohabitants and spouses who are non-legal owners will find that the only available recourse is to invoke equity's help, by establishing an equitable share in the property by virtue of an implied trust, whether resulting or constructive, in his or her favour.

This chapter seeks to examine the various rights which a spouse or cohabitant may have in terms of occupation and/or ownership of the family home. This will involve an examination of the principles being applied by the courts in determining whether a spouse or cohabitant has an equitable share in the property where (s)he is not a legal co-owner and whether such family property disputes are adequately dealt with by these principles. The establishment of a proprietary claim over the disputed property is crucial especially if the spouse or cohabitant intends to challenge and claim a priority over the competing claims of a creditor, for example, a bank.

For the present, it suffices to note that, in situations where the claimant is not a legal co-owner of the family home, and where there is a competing claim over the family home by a third party such as the bank, there are two ways in which the claimant may successfully challenge the bank's claim. One way is for the claimant to establish the existence of an equity to set aside the transaction which is binding on the third party. This will be looked at in greater detail in the next chapter. The second is for the claimant to show that she has an equitable interest in the property which ranks in priority to that of the bank. In taking this line of argument, it is a pre-requisite that the claimant has an equitable interest in the property before the issue of priorities between

the claimant and the bank may be determined.

4.2 Rights over the family home of spouses and cohabitants who are not legal co-owners

(a) Rights of occupation

Ownership of the family home is one area where the differential treatment of marriage and cohabitation is clearly evident. One clear distinction between spouses and cohabitants is the rights of occupation conferred on the former, but not the latter, in respect of the family home. The right to occupy the family home is conferred on a spouse under the Matrimonial Homes Act 1983.[4] The statutory rights of occupation are conferred, by virtue of the marriage, on a spouse who is not entitled, whether under a contract or an interest in the property, to occupy it. This right will terminate upon either the termination of the marriage or the death of the owner-spouse. In addition, a spouse's rights of occupation have the same effect of an equitable charge on the property. Thus, the spouse is permitted to register his or her interest in the family home as a Class F land charge in the case of unregistered land, or by entry of a notice in the case of registered land.

Upon such registration, the owner-spouse would not be permitted to mortgage the family home unless the mortgage is created with the full knowledge and consent of the non-owner spouse, by joining him or her as a co-mortgagee. Failure to do so would mean that the latter's interest in the property would rank in priority to a bank's mortgage.[5] Cohabitation, on the other hand, is treated by the law as being a consensual relationship. In so far as rights of occupation are concerned, there are no comparable rights conferred on a non-owner cohabitant over the family home on the basis of the relationship. In the absence of such statutory rights of occupation, a cohabitant would

have to establish a right to occupy the family home on the basis, for example, that (s)he has an equitable interest in the property or a licence to occupy the said property. As such, the position of a non-owner cohabitant in relation to the occupation of the family home is more precarious than that of a non-owner spouse.

(b) Priorities in land

Although a spouse has a statutory right to occupy the family home, such rights of occupation do not confer on him or her any priority in the property, such as, an overriding interest if it were registered land. In order for there to be an overriding interest, the spouse has to have an equitable interest in the property, coupled with actual occupation of the property.[6] The principle was developed to protect the rights of a party who claims a beneficial interest in the property which would otherwise be defeated by reason of non-registration of that beneficial interest. Regardless of whether the property may be registered or unregistered land, cognisance has been given to the beneficial rights of such parties and that occupation of the property gives rise to a priority in their favour.

If the land is registered land, the rights of a spouse or cohabitant in occupation will constitute an overriding interest, regardless of whether a third party has notice of such actual occupation.[7] In determining whether the rights of the occupier are within section 70(1)(g) of the Law of Property Act 1925, it is the rights of the occupier which is crucial and not merely occupation of the property. Cases like ***Williams & Glynn's Bank v Boland***[8] illustrate that the actual occupation of the property need not be such as to give constructive notice to the bank. In ***Williams & Glynn's Bank v Boland***, Lord Wilberforce stated that 'actual occupation' was not intended to introduce any additional qualification or that occupation had to be adverse. It merely required

physical presence in the property.[9] This emphasises the importance for banks to carry out inspections of the property and to make inquiries of the possibility of any overriding interests, which will be binding on them, regardless of whether or not they know about such overriding interests and however extensive that enquiry may be.

In the case of unregistered land, a third party is deemed to have constructive notice of the interests of any occupiers of the property if inquiry or inspections had been made as ought reasonably to have been made by the third party.[10] As to what amounts to sufficient enquiry of who may be in actual occupation of the property, that will depend on the circumstances of each case.[11] In the cases of mortgages, the relevant time for ascertaining whether there are persons in occupation of the property should be as at the date of creation of the mortgage, that is, the time of completion rather than at the date of execution of the mortgage document where the execution of the document is prior to completion.[12]

4.3 Equitable rights over the family home

Although rights of occupation are capable of being registered as a Class F land charge or by entry of a notice, such rights give non-owner spouses only limited protection in respect of the family home. They subsist for as long as the marriage is subsisting. Priorities in the property, such as overriding interests, likewise give some protection to spouses and cohabitants only if two elements are present: firstly, that they have a beneficial interest in the property and secondly, that they are in actual occupation. In most cases of dispute, the first element of beneficial ownership will invariably be the main point of contention, especially where the title deeds are less than explicit as to the manner of holding the beneficial ownership between the parties. The crux of the matter is whether the claimant can establish that he or she has an equitable share in the family

home and very often, it will be the wife or the female cohabitant who is placed at a disadvantage in establishing such a claim.

The courts have fashioned rules whereby a wife or a female cohabitant may, in certain circumstances, claim a beneficial interest in the property. The analyses used are primarily based on property law and trusts principles and, more particularly, the principles of implied trusts and proprietary estoppel. It is, however, suggested that the present rules are wholly unsatisfactory in dealing with disputes over the beneficial ownership of the family home and are in need of review to adapt to social changes and needs. In order to establish this, the following sections will focus on the impact of the decision of ***Lloyds Bank v Rosset*** [13] and the position taken by the English courts in fashioning the 'common intention' constructive trust as a solution to such disputes.

Other Commonwealth jurisdictions have begun to move away from this analysis primarily because the requirement of a common intention to found a proprietary claim appears to be both illusory and inappropriate in dealing with family property matters. It will be argued that, whilst framed in neutral terms, the 'common intention' constructive trust approach effectively discriminates against female claimants, be they wives or cohabitants, in establishing an equitable share in the family home. The appearance of neutrality in the principles applied masks the continued economic disparity between men and women and the effect of sexual division of labour on the female claimant's economic resources. Thus, the equitable principles appear to offer equity to these female claimants, but not equality to share in the equitable ownership of the family home.

(a) Implied trusts

Under trusts principles, implied trusts are usually taken to refer to resulting and

constructive trusts. In the context of the family home and when dealing with disputes over ownership, the cases illustrate that the courts have a tendency to blur the distinction between these two types of trusts. Notwithstanding this, the historical origin of each type of trust has been distinctively different. Where title is vested in A but A has not provided the whole or any part of the consideration, then, unless a contrary intention is proved, the property will be held by A on resulting trust for the person who has provided the consideration to the extent of his or her contribution.[14] This causal connection between the financial contributions and the acquisition of an equitable interest in the property has been described as the 'solid tug of money'.[15] It becomes clearly evident from the discussion below that the 'solid tug of money' remains a central focus in determining beneficial rights over the family home.

The presumption of a resulting trust may be rebutted, for example, in a marriage where the husband provides the purchase price of the property which is transferred into the sole name of the wife. In such circumstances, the transfer of property from the husband to the wife would give rise to a rebuttable presumption of advancement[16] but a similar transfer from a male cohabitant to his female partner would not.[17] However, it would appear that the presumption of advancement may have less significance today.[18] As noted by Zuckerman, the presumption that the property is intended to be a gift to the wife is no longer automatically imputed to the husband.[19] He argues that the emphasis has now moved to the social phenomenon of the family as an integrated economic unit. Hence, the question raised is whether there is a common inference that the contributions made are for the family's benefit and that the contributor is intended to have a share in the property.

In any event, the presumption of advancement may be rebutted by evidence that the transfer was not intended to be a gift and that the beneficial interest was, instead,

intended to remain with the party who provided the consideration.[20] In ***McGrath v Wallis***[21], evidence of the fact that the father had instructed his solicitors to draw up a declaration of trust, which the father had never executed, was interpreted by the court as being sufficient evidence of the father's intention that the contribution towards the purchase price was not intended to be a gift to the son. Cases like ***McGrath v Wallis*** illustrate how the presumption of advancement may be rebutted by comparatively slight evidence.[22]

However, the presumption cannot be rebutted by adducing evidence to show that the reason for transferring the property into the sole name of the other spouse was for an illegal or fraudulent purpose.[23] This broad rule has since been qualified by the courts in ***Tribe v Tribe*** [24] where it was held that the rule was restricted to situations where the fraudulent or illegal purpose has been carried out. Even where the fraudulent or illegal purpose has been carried out, the transferor may still be able to adduce evidence to rebut the presumption of advancement. In ***Tinsley v Milligan*** [25], it was held that, if the claimant need not rely on the illegal or fraudulent purpose to support his or her claim of a beneficial interest in the property, then the claim might still succeed.

It will also be noted that the presumption of resulting trusts and advancement cannot be applied until it is clearly established who actually 'purchased' or 'contributed' to the purchase.[26] Ascertainment of contributions may not be problematic when referring to the original cash contributions made by the parties towards the purchase price. Miller, however, highlights that this may be less clear cut when referring to mortgage instalments, especially where the husband is the sole wage earner and the wife stays at home, providing homemaker services, and makes no further cash contribution. In such cases, except for her initial contribution, she will not acquire any interest in the property.

In contrast, constructive trusts have always been said to arise by way of operation of the law, rather than the intentions of the parties. The prominence of the constructive trust is evident in the commercial sphere and was based on the fiduciary relationship and that a constructive trust would be imposed to render a fiduciary accountable for any property or profit which he has gained through an abuse of his fiduciary position.[27] Oakley suggests that the English attitude generally is that the law would be prepared to impose a constructive trust where the conduct of the person on whom the trust is to be imposed amounts to a legal wrong.[28] Thus, a constructive trust arises in three established situations, namely: (i) where a person has obtained an advantage by acting fraudulently, unconscionably or inequitably; (ii) where a fiduciary has obtained an advantage as a result of a breach of his fiduciary duty; and (iii) where there has been a disposition of trust property in breach of trust.[29]

Despite the conciseness of the above analysis, the imposition of constructive trusts in the commercial as well as non-commercial spheres has in recent years drawn increasing debate as to both the principles underlying the courts' imposition of such trusts and the exact nature of the constructive trust imposed. The orthodox view of such trusts in English law is that the trust is institutional and, therefore, substantive in nature. In contrast, Commonwealth developments point to the imposition of constructive trusts which are increasingly remedial in nature.[30] It is arguable that the difference in English and Commonwealth attitudes towards the nature of the constructive trust may have an effect on the choice of doctrines applied in dealing with family property disputes. Notwithstanding these doctrinal differences, both the English and Commonwealth courts have evinced a willingness to prevent fraudulent or unconscionable conduct and to protect the interests of claimants over the family home by imposing a constructive trust. In the context of English law, it may be appropriate to

consider the way in which equity has responded to protect the proprietary rights of spouses and cohabitants by looking at the legal developments prior to and post ***Rosset***.

(b) Position prior to *Lloyds Bank v Rosset*

Prior to ***Rosset***, it was evident that two lines of authority emerged from the cases whereby implied trusts were relied on to justify a claim to a beneficial share in the family home. The first line of authority was primarily based on the 'solid tug of money' and followed closely the resulting trust analysis of granting an equitable share. This line of authority may be found in cases like ***Gissing v Gissing***[31] and ***Pettitt v Pettitt***.[32] In ***Gissing***, Lord Diplock had stated that, in the absence of evidence to the contrary, the *prima facie* inference is that it is the common intention of the parties that the contributing party should acquire a share in the same proportion as his or her financial contributions towards the total purchase price.[33] However, in subsequent cases like ***Re Sharpe***[34], ***Risch v McFee***[35] and ***Richards v Dove***[36], the contributions were construed by the courts as being loans, rather than for the purpose of acquiring a share in the property. The issue then revolves around the construction to be given to the contributions for the purposes of ascertaining whether or not a resulting trust arises.[37]

It is evident from these cases that a claimant may only be entitled to a share in the beneficial ownership of the family home if he or she can establish that there was an agreement or a common intention to share the property. The agreement may be informal or even inferred from the conduct of the parties but there must be actual common intention. Even then, conduct which normally suffices for such an inference to be drawn has to be in the form of financial contributions referable to the acquisition of the property. In other words, there has to be some causal connection between the financial contributions and the acquisition of the property. The size of the claimant's

share would then depend on the size of his or her contribution towards such acquisition.

The genesis of the second line of authority is Lord Diplock's statement in ***Gissing***[38] where he stated that:

> 'A resulting, implied or constructive trust - and it is unnecessary for the present purposes to distinguish between these three classes of trust - is created by a transaction between trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.'

The constructive trust is imposed by the courts on the grounds of 'fairness' or 'justice' in resolving disputes over ownership of the family home. The application of this line of authority is illustrated in cases like ***Eves v Eves*** [39] and ***Grant v Edwards*** .[40]

In ***Eves***, the plaintiff had cohabited with the defendant for four years. During that time, the family home was acquired and the defendant had told the plaintiff that the reason for vesting the legal title in his sole name was because she was under twenty-one years of age. The plaintiff brought up the parties' two children and performed the role of a housewife. In addition, she had carried out a great deal of work on the house and garden, including wielding the famous 'fourteen pound sledgehammer' to break up an area of concrete. On the breakdown of the relationship, the plaintiff moved out of the family home and subsequently made a claim for a share in the property.

Grant v Edwards was similarly a case involving cohabitants. In that case, the

explanation given by the defendant to the plaintiff for transferring the legal title into the joint names of the defendant and his brother was so as not to prejudice the plaintiff's financial claims against her ex-husband. The plaintiff had similarly performed the role of a housewife and looked after the parties' two children. She had made substantial contributions towards the household expenses, thereby enabling one of two mortgages over the family home to be discharged.

It is clear that the plaintiffs in both cases had made indirect contributions[41], rather than direct financial contributions towards the acquisition of the property. In both situations, the courts had, however, construed the fact that an excuse had to be given by the defendant to the plaintiff for not transferring the property into their joint names as evidence of some common intention to share the property. Thus, the cases suggest that the courts are willing to impose a constructive trust in circumstances where the claimant is able to establish that the defendant has either explicitly promised to share the property, or at least acknowledged in some way this intention to share, and the claimant has, in reliance on this promise, acted to his or her detriment.

(c) *Lloyds Bank v Rosset*

In ***Rosset***, the dispute was in relation to the matrimonial home. The property was acquired in the husband's sole name using funds from a family trust. The defendant had made no direct financial contributions towards the acquisition of the property. She had, however, carried out some renovations to the property and supervised the said renovation works. Without her knowledge or consent, the husband had subsequently mortgaged the property to the plaintiff bank as security for an overdraft facility. The parties' marriage eventually broke down and when the husband failed to repay his overdraft, the bank commenced proceedings for possession and the sale of the property.

The defendant sought to resist the bank's claim on the grounds that she had a beneficial interest in the property under a constructive trust. Following the decision of ***Williams & Glyn's Bank v Boland***, the bank was bound by her equitable interest since they had failed to obtain her consent to the mortgage.

However, on appeal to the House of Lords, the defendant's claim was dismissed. It is evident from the court's decision that a claimant may acquire a beneficial interest in the property under a constructive trust only if certain elements are established. The claimant has to show that there was an agreement, arrangement or understanding reached between the parties that the property was to be shared beneficially and that (s)he had acted to his or her detriment in reliance on such agreement. In the absence of an agreement or arrangement to share, there must be evidence of a common intention to share the property which may be inferred from the conduct of the parties. In that respect, Lord Bridge stated that direct financial contributions to the purchase price, whether initially or subsequently towards the payment of mortgage instalments, would readily justify the inference of a common intention.[42]

Whilst ***Rosset*** has served the useful purpose of clarifying the conditions necessary for imposing a constructive trust in family property disputes, it also reveals the inextricable 'solid tug of money' in founding a proprietary claim. ***Rosset*** illustrates how the courts look for some connection between the common intention to share and the claimant's acts of detrimental reliance, so as to justify the imposition of a constructive trust. In doing so, and in the absence of any express agreement between the parties, the emphasis has once again shifted back to whether financial contributions have been made by the claimant towards the acquisition of the property, so as to enable the claimant to get the claim off the ground.

4.4 The 'common intention' constructive trust: A satisfactory approach?

Under the common intention approach, a spouse or cohabitant who wishes to claim a proprietary right in the family home would have to establish two key elements: firstly, the common intention to share the property and secondly, detrimental reliance. Under the common intention heading, there are two alternative ways in which a claimant may establish an equitable share in the family home. The first requires the existence of an actual agreement, arrangement or understanding between the parties as to the sharing of the property. In the absence of such express agreement, the alternative method of acquiring a share is to infer such common intention from the parties' conduct. It is clear from ***Rosset*** that, in drawing such an inference, the emphasis is on the direct financial contributions made by the claimant towards the acquisition of the property.

The ***Rosset*** formulation does not appear to affect the ***Gissing*** type of resulting trust where the beneficial interest is dependent on the claimant having made direct financial contributions towards the acquisition of the property. Its impact is felt more within the second line of authority where constructive trusts are seen as remedial in essence. In such situations, 'fairness' and 'justice' alone do not appear to be sufficient grounds for the imposition of a constructive trust. Despite earlier authority wherein indirect financial and non-financial contributions were recognised by the courts, the ***Rosset*** formulation gives little recognition to such contributions. Indirect contributions are excluded, unless the claimant can show evidence of some notional common intention, that is, some express discussion or mention of the sharing of property. This may be so even where the indirect contributions are substantial in value.

Hence, indirect contributions are taken into account by the courts, not as 'contributions', but as acts of detrimental reliance when coupled with evidence of the requisite intention to share. In such cases, the courts may be prepared to take into

account indirect contributions if they are comparable to those in ***Eves*** and ***Grant v Edwards***. The factor which distinguishes those contributions from other forms of indirect contributions is that the courts perceive them as being contributions in money's worth and capable of valuation in economic terms. In all other circumstances, it may be difficult to link other forms of indirect contributions to the acquisition of the property which will justify the imposition of a constructive trust.

Criticisms have, however, been levelled at ***Rosset*** and the appropriateness of the common intention constructive trust in dealing with family property disputes. The first area of contention is the requirement of a common intention. To some extent, ***Rosset*** has created a certain confusion about the types of trusts which the courts are dealing with in these cases. Under both limbs of the common intention requirement, the courts have labelled the trusts as constructive trusts. However, the strong emphasis on direct financial contributions in the inferred common intention limb appears to blur the distinction between traditional resulting trusts and the constructive trusts being imposed in these cases. The addendum that detrimental reliance is required so as to bring the matter out of the scope of traditional resulting trusts is in itself problematic since it is unclear what the exact nexus is between common intention and detrimental reliance.[43]

As a result, ***Rosset*** is less than explicit as to the level of evidence required for finding the requisite intention to share. This has led the courts to fictionalise the sharing intent in some cases. Examples of such instances may be found in cases like ***Eves*** and ***Grant v Edwards***, where the courts had construed the fact that excuses had to be given to the claimants for not vesting the legal title in the parties' joint names as evidence of some sort of agreement between the parties to share. Such findings by the courts may seem contradictory. As stated by Clarke:

> 'The Court of Appeal found in both these cases that if there had not been a joint intention, there would have been no need for an excuse. But, with respect, is this necessarily so? I am about to move into a new house with my girl-friend. She wants to have a share in the property: I do not want her to have a share. I find some "excuse" which fobs her off. Surely this is not agreement: it is disagreement.'[44]

By making such findings, Clarke argues that the courts are converting the unilateral intention of one party (the claimant) into an agreement. Gardner similarly takes the view that the making of excuses is not in any way an acknowledgement of an intention to share the property but illustrates disagreement on the part of the legal owner.[45] He further argues that the willingness of the courts to stretch the facts, so as to enable them to make such findings of common intention, ends up being nothing more than an exercise by the courts in 'inventing' agreements. The 'invention' of such agreements adds little to the credibility of the common intention analysis and has led one judge to describing it as being a 'phantom intent'.[46]

The problems posed by the common intention requirement are also manifest in the second category of the ***Rosset*** formulation. In this case, the problems arise from the fact that only direct financial contributions are recognised as capable of giving rise to an inference of a common intention to share. The formulation of this condition effectively places little significance on indirect financial contributions (such as contributions towards the household expenses) and non-financial contributions (such as domestic and child care services), even where such contributions may be substantial. The focus here is not only on financial contributions but also contributions which are clearly referable to the acquisition of the property.[47] By ignoring indirect contributions, whether financial or non-financial, the main objection is that the equitable principles

effectively discriminate against women by making two basic assumptions.[48]

Firstly, by taking on the appearance of neutrality, the assumption is that the rules are to be applied impartially to spouses and cohabitants in such cases. In that respect, the parties are treated as if they are strangers, dealing with each other at arm's length and are, therefore, in a position to 'bargain' for their respective rights over the family home. It imposes a commercial gloss to a relationship which is, *prima facie*, a personal one and the 'bargain' is interpreted as the first condition of common intention. The second assumption made is that no value can be attached to the homemaker services provided by the female spouse or cohabitant. This is where the discriminatory effect of the law clearly manifests itself. By failing to take into account the effect of sexual division of labour in spousal and quasi-spousal relationships, the equitable principles ignore the fact that such division of labour may place unequal economic dependence on the parties in such relationships. These two basic assumptions work together in a way which renders the effect of sexual division of labour in a relationship mostly invisible. In other words, the focus of the courts is on the income-generating activities of the claimant. As such, her domestic duties are incapable of giving rise to a common intention.

Sexual division of labour is taken to refer to the system whereby the parties take on distinct roles of responsibility in which the female partner is usually the primary partner caring for the family and the male partner is the main wage-earner responsible for bringing home the family's income. The typical family setting of the husband (or the male cohabitant) being the only wage-earner and the wife (or the female cohabitant) being the full-time housewife and carer of the family is no doubt on the decline as increasing numbers of women join the labour market and are economically active. Nevertheless, it has been argued that this pattern, albeit less rigid

than before, remains the dominant pattern in most families.[49] Women are still primarily responsible for the domestic duties in the family.

In 1995, the Equal Opportunities Commission reported that the economic inequality of women and men was closely linked to women's domestic responsibilities.[50] For example, 23 per cent of women in their late 20s were outside the labour market because of domestic responsibilities, compared to virtually none (about less than 1 per cent) for men in the same age group. The proportions of women in their 30s and 40s, who were also unemployed because of domestic responsibilities, were 23 per cent and 12 per cent respectively, whereas the proportions of men in each of the same age groups were about half.[51] The figures further indicate that, for women with dependent children, the younger the dependent children are, the greater the constraint on employment for these women. Where the age of the youngest dependent child is under four, 45 per cent of women were economically inactive, whilst 33 per cent were in part-time employment and 18 per cent in full-time employment. In comparison, only 25 per cent of women with no dependent children (that is children under the age of sixteen) were economically inactive, with 24 per cent being in part-time employment and 48 per cent in full-time employment.[52]

The assumption of a homemaker role by women clearly has a major impact on their economic position. It affects their participation in the labour market, the type of work which they can take on, the hours, actual and potential, which they can work, the wages which they can earn and their entitlements to social security and pension benefits. The amount of a woman's financial contribution to the acquisition of the property will depend on her economic resources. As a result, women who take on a solely domestic role in the relationship will invariably have no or fewer economic resources of their own which, in turn, places them in a position of economic

dependence on their male partners. Even where women are gainfully employed, there is evidence to show that women are generally less well paid than men. Morris found that, in 1996, only about 55 per cent of women in the labour market worked in full-time employment.[53] In terms of earnings, there was a marked gap between the earnings of women compared to men. Morris argues that these findings reflect the overall weaker economic position of women and supports the contention that the only way to acquire greater equality is for women to acquire greater economic independence.

The current earning patterns of women indicate that this gap still remains. The average hourly wage of a female full-timer is about 81.1 per cent that of a male full-timer, whereas the average weekly wage of a female full-timer is about 72.9 per cent that of a male full-timer. The average weekly wage of a female part-timer is about 85.3 per cent that of a male part-timer, whilst the average hourly wage is about 85 per cent.[54] Thus, women's lack of economic resources effectively means that it is harder for them to compete on an equal footing to men in terms of the acquisition of assets. Women who are constrained in taking up employment because of their domestic responsibilities will find it harder to participate in the ownership of property, as many of them may not be able to meet the requisite direct financial contributions requirement. Eekelaar points out the very activity, which deprives a woman of her independence to earn her own income and acquire property, is excluded when deciding whether or not she should have a share in the property. He, therefore, observes that '[a] woman's place is often in the home, but if she stays there, she will acquire no interest in it.'[55]

In the context of family property disputes, the effect of sexual division of labour is clearly linked to the establishment of the common intention to share and the direct financial contributions requirement. This is where the heart of the problem lies,

which effectively discriminates against a woman who has devoted her life to the care of the family, as opposed to one who has (wisely) remained in either full-time or part-time employment, thereby enabling her to make the requisite financial contributions, whether direct or indirect, towards the acquisition of the family home. The need for financial contributions in itself raises two problems. Firstly, where the claimant is able to make financial contributions, she must ensure that her contributions are made directly towards the acquisition of the property, for example, towards the payment of mortgage instalments, in order successfully to establish an equitable share in the property. Secondly, where she has made indirect financial contributions, they must be substantial and necessary to relieve the husband's or partner's income for the payment of mortgage instalments. In certain exceptional cases, the courts have been prepared to stretch the principles to take into account indirect non-financial contributions.[56] However, these cases are few and far between and, in most cases of homemaker services, the courts have generally been reluctant to place any value on such services.

Neave argues that, although the financial contributions requirement appears gender neutral, its practical effect is to put men in a more favourable position in contrast to women. The homemaker services provided by the female spouse or cohabitant are generally disregarded by the law. This rejection is based on the fact that the courts refuse to see any connection between the provision of homemaker services and the acquisition of the property.[57] In its place, the 'solid tug of money' argument, as the preferred basis for justifying a proprietary interest, coupled with the arm's length dealing principle, helps to reinforce the discrimination of women in these cases. An argument often forwarded for rejecting homemaker services is that such services are provided by women out of natural love and affection for the other members of the family. As such, these matters should remain within the private sphere of family,

unregulated by the law.

O'Donovan suggests that the deliberate non-interventionist approach of the state is merely a mask for passing control to other informal mechanisms. In the context of the family, she makes the following observation:

> 'Who controls the family? It can be argued that non-intervention by law may result in the state leaving the power with the husband and father whose authority it legitimates indirectly through public law support for him as breadwinner and household head. A deliberate policy of non-intervention does not necessarily mean that an area of behaviour is uncontrolled.'[58]

By maintaining the dichotomy between private and public spheres, the homemaker services of women can be ignored because they have no economic value in the public sphere and are, therefore, given no recognition.[59] The law's refusal to recognise a connection between homemaker services and the acquisition of the property, as well as to place any value on such services, effectively reinforces the economic dominance of men.[60]

It is also intrinsic in the sexual division of labour argument that the law fails to recognise the reality of marital and quasi-marital relationships. By viewing the parties as strangers dealing with each other at arm's length, the legal perception runs diametrically opposite to the reality of such relationships. Gardner argues that any doctrine applied in such situations, which focuses on the parties' thinking, a corollary of the common intention, is inappropriate because the relationship is not one where the parties would deal with each other by organised thinking in relation to their respective shares.[61] Instead, the proper basis of such relationships is trust and collaboration and any doctrine applied should bear this in mind. Thus, the more appropriate approach would be to focus on the relationship rather than any specific reference to the parties'

thinking/common intention.[62]

Furthermore, there is incongruity between the judicial interpretation of the parties' thinking and the reality of such relationships. Bottomley suggests that the cases indicate that the common intention requirement looks for something a little more specific than just mere expectation to share.[63] This is where the need for specificity and the use of language in such relationships give rise to problems. She argues that this need for evidence to point specifically to the existence of a common intention reflects not only 'a requirement of jurisprudential approach but also a mode of reasoning and language use which is more conducive to men than women'.[64] The 'language use' in domestic relationships further reveals that women 'too often read silence as positive assent and lack of specificity as covering a number of issues with equal firmness rather than evading the particular issue'.[65] This suggests that the parties may actually have very different views about what it takes to make an agreement to share the property. It also illustrates the problems which women face unless they shift to a more 'male' way of thinking.

In addition, the law appears to assume that the equality of men and women in owning property independently equates to a similar equality in domestic relationships in terms of allocation and management of the household income. This assumes that both parties are on an equal footing in terms of decision making and are, therefore, able to 'bargain' for their respective shares in the property by way of allocation of the household income directly towards the acquisition of the property. Any other form of allocation of income, especially the income of the wife or female cohabitant, will draw a conclusion of a non-sharing intent. Is this necessarily a logical conclusion?

Pahl, in her study relating to the financial management patterns of families, noted the strong correlation between the control of household finances and marital

power.[66] The choice of management systems adopted by families is dependent on the level of the household income and who the main wage-earner is.[67] Historical evidence shows that the higher the level of income earned by the husband, the greater his overall control of the family and the larger the portion of the household income being managed by him. Further, the patriarchal ideology supporting male domination and female subordination is also central to the choice of management systems adopted by families. Her study shows that the management of household finances is not synonymous with the control of finances. The two are clearly distinct and it is the control of household finances which is directly linked to decision making and, therefore, marital power.

The partner viewed by the parties as being in control of the household finances normally plays a more dominant role in decision making, which is directly linked to marital power.[68] However, she noted that, for families at lower income levels, the preferred management system is usually the wife-management system, which invariably places not only the management of the household finances in the wife's hands but also control over such finances. In contrast, there is a tendency for families with higher incomes, especially where the male is the main wage-earner, to adopt a husband-controlled management system, even where the parties have opted for a pooling or an independent management system.[69] Thus, management and control of the household finances may lie in the same spouse or different spouses.

Although management and control may lie in the same spouse, management may be seen as a demanding chore rather than a source of power, especially where the income level is low and both control and management are in the hands of the wife. These wives rarely see themselves as being in control of the household finances. In the absence of such perception of control, they do not see themselves as participating in marital power. Pahl, therefore, concludes that the greater the wife's contributions

towards the household income, the greater her participation in decision making and the control of the household finances.[70] In a subsequent study, Pahl and Vogler found that the orthodox model of households as egalitarian decision-making units, where the household resources and decision making are shared equally by the couples, applied only to about one-fifth of households in the study.[71] These were predominantly couples who have opted for the joint pool system. The inequality between men and women in terms of control of the household income, having the final say in major financial decisions and access to the household resources for personal spending was the least in such households and the greatest in the low income and higher income households, where the finances were usually husband-controlled.

A further point noted by Pahl is the relationship between the earning and spending patterns of couples. The combination of the earning patterns of the parties and the choice of management system has a direct effect on the spending pattern of the family.[72] Even where the wife has her own income, there is a general tendency to utilise that income towards household expenses, such as food, clothing for herself and the children, presents and so forth. In comparison, the husband would usually be responsible for all other bills, such as his own clothing, cost of maintenance of the car, repair and maintenance costs of the family home and mortgage payments. Hence, the tendency is to use the wife's income for the day-to-day needs of the family, rather than for the acquisition of assets. Where her earnings are used towards household expenses, these contributions tend to be economically invisible since her earnings are ignored as pin money and are absorbed into the household pool for covering family expenses and non-essentials. Such contributions, being classified as indirect, will not suffice to ground a proprietary claim under the current principles, unless the wife is able to establish an existing agreement to share.

A further criticism of the common intention constructive trust lies in the need to link common intention to detrimental reliance. Although the cases make it clear that the basis for establishing a beneficial interest in the property is the common intention of the parties, that in itself is insufficient to make a claim successful. The courts may not necessarily be prepared to give effect to such intention in the absence of evidence that the claimant has acted on that intention in some way.[73] This then raises the question of the requisite nexus between the agreement or common intention to share and detrimental reliance in order for a claim to be successful. The answer is not easily discernible, as can be seen from the three contrasting approaches taken by the judges in ***Grant v Edwards***.

Nourse LJ adopted the 'but for' test, which focuses on whether the claimant would have embarked on a particular course of conduct 'but for' the agreement with the defendant. The test, therefore, requires a causal connection between the agreement to share and the acts of the claimant in establishing the requisite detrimental reliance. Mustill LJ, on the other hand, took a contractual approach in determining the issue. The claimant's acts must be referable in some way to the agreement reached between the parties in that the acts were carried out in exchange for a share in the property. It has, however, been argued that this may result in a situation where the courts are asked to reconstruct the terms of the parties' agreement in order to determine whether there is the requisite nexus.[74] The 'joint lives' approach taken by Browne-Wilkinson V-C appears to be the least stringent. Once the common intention to share is established, the test will treat any acts carried out by the claimant towards the 'joint lives' of the parties as evidencing the requisite connection between the intention to share and detrimental reliance. In view that the statements by the three judges are *obiter dicta*, it is difficult to state categorically which test is authoritative.

The question of the requisite link between common intention and detrimental reliance attracts a further ancillary point. This concentrates on the issue of what acts would suffice as detrimental reliance. Again, this will depend on the court's choice of the approach to be taken in determining the linkage question. The narrower the test adopted by the courts, the higher the evidentiary requirements for establishing the requisite nexus between common intention and detrimental reliance and the acts which would count as detrimental to justify the imposition of a constructive trust.[75] The choice of test can also lead to differences in judicial construction of acts tantamount to detriment. Moffat[76] illustrates this by pointing out how the 'but for' test is more susceptible to value judgments being made by the judiciary in relation to the type of activities which couples are reasonably expected to carry out in the course of a domestic relationship. In contrast, the contractual approach leaves greater autonomy to the parties to 'bargain' for which activities should be taken into account. On the other hand, the 'joint lives' approach appears to be the most flexible, allowing room for a wider range of activities to be taken into account as detriment.

It is arguable that homemaker services may be seen as sufficient acts of detriment under the 'joint lives' test but not the other two tests. However, given the judicial attitude towards homemaker services, it is unlikely that the courts will be prepared to recognise purely homemaker services as being sufficient acts of detrimental reliance under any of these tests.[77] Cases like ***Rosset*** and ***Hammond v Mitchell***[78] indicate the courts' unwillingness to be overly generous in accepting such services as being sufficient acts of detriment unless some monetary value can be placed on them. At first glance, ***Hammond v Mitchell*** may appear to be a case in point where the courts are manifesting a greater willingness to accept non-financial contributions as sufficient acts of detrimental reliance for a claim to succeed. However, on closer analysis, it

could be argued that the courts have evinced a certain willingness to accept indirect contributions as being sufficient acts of detrimental reliance only when some monetary value can be placed on them.

In that respect, indirect financial contributions, such as contributions towards the repair and maintenance of the property, will probably fare better in establishing detrimental reliance than domestic services. In ***Hammond v Mitchell***, the court appears to have found the requisite detrimental reliance in the form of the claimant's support for the defendant's highly speculative ventures and the risk of losing their family home. The court did not, however, proceed to consider whether her giving up employment to raise the parties' children and the extensive help she had provided in the defendant's business might constitute detriment as well. It could be argued that the former were accepted on the basis that they were, to some extent, capable of being valued in economic terms.[79] It is submitted that the case cannot be relied on as being authority for the proposition that the courts would be prepared to let a claim succeed purely on the basis of indirect contributions unless there is some notional agreement to share.

In the recent cases of ***Midland Bank v Cooke***[80] and ***Drake v Whipp***[81], the courts found that the claimants had met the direct financial contributions requirement in the form of their contributions towards the initial deposits for the purchase of the properties. In ***Midland Bank v Cooke***, the court stated that, in the absence of an express agreement to share and where the claimant has established an equitable share in the property through direct financial contributions towards the acquisition of the property, the whole course of conduct between the parties must be taken into account to determine the parties' respective shares in the property. In that respect, assessment of the claimant's share need not be limited to strict resulting trust principles and may be

based on constructive trust principles.

A similar approach was taken by the court in ***Drake v Whipp***. The upshot of these cases is that the courts' emphasis continues to lie in direct financial contributions being made by the claimant in order for her to acquire an equitable share in the family home. There is no suggestion in either case that the courts are prepared to infer a common intention to share based on purely indirect contributions. A sufficient direct financial contribution has to be made so as to enable the courts to draw an inference of an intention to share. Once the claim can get off the ground, there is wider discretion for the courts to take into account other forms of contributions, direct or indirect, as acts of detrimental reliance.

It further appears that the courts have the discretion to avoid a strict resulting trust analysis in terms of determining the claimant's share in the property and to award to her a share which may be larger than her initial direct financial contribution, on the basis of the parties' common intention and under a constructive trust. Despite the appearance of the courts' willingness 'to do justice', the outcome in ***Midland Bank v Cooke*** and ***Drake v Whipp*** clearly illustrates the inextricable 'solid tug of money' in the common intention approach. It is argued that the position remains that more weight is given to financial contributions than purely non-financial contributions, such as domestic services, as sufficient acts of detrimental reliance.

The further problem of linking common intention with detrimental reliance is arguably that the courts have begun to treat the doctrines of constructive trusts and proprietary estoppel as being interchangeable. At first glance, there appears to be certain similarities between the two doctrines. The requirement of agreement, arrangement or some understanding between the parties to share, coupled with the need for detrimental reliance, is fairly similar to the requirement of assurance, reliance and

detriment in estoppel. There are, however, certain distinct theoretical differences. The first difference relates to the time of creation of the interest in the property and secondly, the type of interest created. In constructive trust cases, once the requisite elements have been established, there is little discretion in terms of awarding shares in the property. It is an 'all or nothing' approach whereby the claimant receives what the parties had agreed to or was promised or nothing. In contrast, the courts have a wider discretion in estoppel cases to award a remedy which is the 'minimum necessary to do justice'[82] and such remedy is not limited to a proprietary one.[83]

Furthermore, common intention is a requirement for the imposition of a constructive trust, whereas the unilateral conduct of the defendant, leading to an expectation of a share in the property by the claimant, is sufficient to ground an estoppel claim. Thus, the requirement of detriment in constructive trusts and proprietary estoppel serves a different purpose in each case. In trust cases, detriment gives the claimant an interest in the property which is enforceable against third parties. On the other hand, detriment in estoppel cases is merely a factor which the courts take into account in deciding whether it would be unconscionable for the owner to resile from his assurance or encouragement and if so, the appropriate remedy to be granted. Until the court's decision, the claimant has no interest in the property but only a mere equity.[84]

The approach of the courts in constructive trust cases has evidenced a blurring of the distinction between constructive trusts and proprietary estoppel. Firstly, the common intention requirement is less stringent than it first appears in that the courts have shown a willingness to impose a constructive trust in cases where there is no evidence of an actual agreement to share but merely some assurance or even an excuse being given to the claimant. Secondly, notwithstanding the purported 'all or nothing'

approach of constructive trusts, the quantification of the claimant's share in the property has become more discretionary as well.[85] The question then is whether this shift towards estoppel is desirable.

Eekelaar observes that, since common intention is not the sole criterion for determining beneficial interest in the family home, the common thread must be that the claimant has been led in some way by the defendant to hold a reasonable belief that she is to have a share in the property.[86] However, the present principles, with its requirement for common intention, are inadequate to deal with family property disputes because, firstly, homemaker services are precluded as evidence for establishing such common intention and secondly, the way the courts characterise the parties' intentions in such relationships are unrealistic. Eekelaar does not in fact deal with the issue of assimilation or argue for an assimilation of constructive trusts and proprietary estoppel. He, instead, proposes the use of the doctrine of estoppel as an alternative analysis in such disputes on the grounds that the doctrine allows greater flexibility wherein indirect non-financial contributions, such as domestic services, may be taken into account as acts of detrimental reliance.[87]

Hayton[88] has, on the other hand, argued in favour of the assimilation of constructive trusts with proprietary estoppel. His main reason for favouring assimilation is that the theoretical distinctions between common intention constructive trusts and proprietary estoppel are illusory and that:

> '[s]urely, it is time the courts and counsel moved beyond pigeon-holing circumstances into constructive trusts and proprietary estoppel and looked at this basic principle of unconscionability underlying both concepts.'[89]

The court's intervention is called upon in these cases to protect the claimant's detrimental reliance, rather than to compel the other party to give effect to the

expectation of a share. The focus is, therefore, on the parties' relationship and would entail assessing and analysing the relationship to ascertain whether the circumstances are such as to make it unconscionable for the husband or male cohabitant to assert his legal title absolutely.[90]

With unconscionability as the underlying principle for equity's intervention, Hayton argues that it would enable the courts to take into account a wider range of contributions, including domestic services.[91] The subsuming of constructive trust principles within estoppel principles means that the constructive trust imposed is purely remedial and should only have prospective effect. This will not adversely affect the existing rights of third parties as any order by the court will not be retrospective but only prospective in effect, and will be for the purposes of remedying the unconscionable conduct of the defendant. More importantly, Hayton argues that the assimilation of constructive trusts and estoppel will provide the courts with the flexibility of a wider range of remedies, both personal and proprietary.[92]

Whilst recognising the merits of Hayton's arguments, Halliwell[93] does not go as far as Hayton in advocating the complete assimilation of constructive trusts and proprietary estoppel, since questions relating to both the principles and policies underlying equity's intervention in these cases still remain unanswered. As with Moffat[94], Halliwell observes that the ability of estoppel to take into account a wider range of qualifying contributions, including homemaker services, will depend very much on the courts' willingness to re-conceptualise the underlying principle of estoppel as being unconscionability and unjust enrichment. This willingness does not, however, appear to be evident across the board.[95]

Halliwell further argues that the approach of the English courts has become too rule-oriented and '[c]oncentration on the rules may constitute as much a symptom as a

cause.'[96] The courts have moved away from analysing the remedial aspects of trusts and considering the principles underlying equitable intervention. This may be due in part to the fact that the common intention analysis involves only two conditions: common intention and detrimental reliance. These conditions have to be clearly identifiable, thereby making the analysis less flexible and with less scope for looking at the facts of each case to determine whether relief should be granted. Consequently, domestic services are considered as being insufficient acts of detrimental reliance.[97] The analysis acts as a filtering process for deserving cases and, therefore, calls for a higher evidentiary requirement than in estoppel cases.[98]

Furthermore, importing estoppel principles based on unconscionability into the constructive trusts analysis may not necessarily mean that it will increase the likelihood of success for a claimant who is relying solely on homemaker services. This is where the link between common intention and detrimental reliance becomes significant. Halliwell argues that disentangling proprietary estoppel from common intention constructive trusts may, in fact, pave the way for increased recognition of non-financial contributions.[99] As long as detrimental reliance remains linked to common intention, it remains necessary for the claimant to establish the requisite intention to share and a sufficient nexus between that intention and her conduct to qualify as detrimental reliance.

The discussion so far has attempted to highlight the existence of gender bias in this particular area of the law. This bias remains invisible because the law recognises formal equality between the parties to own property. This is reflected by seemingly neutral concepts in the common intention approach, such as intention to share and the referability rule which emphasises financial contributions. Yet, these neutral concepts work in an insidious way to discriminate against women because they fail to take into

account the effects of sexual division of labour on the earning capacity of women and how this will, in turn, limit their control and decision-making role in relation to the household income. The evidence reveals that women are generally in a less favourable economic position than men. Even where the parties have opted for a pooling or an independent management system, the trend seems to be towards a male-controlled system, especially when the husband's or male cohabitant's income level is much higher than that of the wife or female cohabitant. These factors place women at a disadvantage since they are in a weaker decision-making role in the relationship and may have little control over the way in which the household finances are allocated towards the acquisition of assets.

Given the unequal access of the parties to the family's income, women will generally find it harder than men to satisfy the requirements of the common intention approach. The significance of these arguments can also be seen in the discussion on the assimilation of constructive trusts and estoppel. The main argument for assimilation is the flexibility of the estoppel doctrine to take into account indirect contributions, especially non-financial contributions, as being sufficient acts of detrimental reliance. It is, however, submitted that an assimilation of constructive trusts and estoppel will not remove the gender bias in the common intention approach unless the analysis is prepared to take into account the economic disparity between men and women, especially when the woman's economic position is impaired by domestic responsibilities. The purported flexibility of the estoppel approach depends very much on two points. First, a general acceptance by the judiciary of unconscionability as the underlying principle in estoppel and second, a generous judicial treatment of non-financial contributions, particularly domestic services, as being sufficient acts of detrimental reliance.

4.5 Other Commonwealth jurisdictions compared

It has been argued so far that the common intention constructive trust approach taken by the English courts is far from satisfactory. This is evidenced by the fact that the current principles require the finding of a common intention to share and detrimental reliance. In addition, the common intention requirement remains linked to contributions which must be financial and direct. In doing so, these requirements place women at a disadvantage in establishing an interest in the family home as a result of the effect of sexual division of labour in domestic relationships. The effect of sexual division of labour is twofold. First, domestic responsibilities place constraints on women's earning capacities and generally reduces their economic resources in comparison to men. This affects the type of work, the aggregate earnings and hours of employment which women may take up. Second, the unequal economic position of women also affects how family financial arrangements are organised, which generally places women in a weaker position than their husbands and male partners in terms of access to and the allocation of household income towards the acquisition of assets.

This raises the question of what changes should be made in order to render the law less gender biased. Without resorting to legislative intervention, it would appear that equity is still the most appropriate instrument of law to deal with family property disputes. However, in view of the arguments raised against the common intention constructive trust, should the English courts abandon the common intention constructive trust and emulate other Commonwealth jurisdictions in adopting alternative doctrines in dealing with such disputes? In reviewing the various approaches taken by other Commonwealth jurisdictions, Gardner[100] noted that these alternative approaches were equally problematic. The common thread in the various doctrines applied is the parties' thinking which, Gardner argues, is inappropriate. This

is because parties in a domestic relationship normally deal with each other on the basis of trust and collaboration, rather than organised thinking. He suggests that the principles to be applied in family property disputes should be reformulated to incorporate these values, thereby enabling the courts to obtain the desired results without the need for manipulating facts and fabricating the common intention to share.

Gardner proposes two alternatives to the common intention constructive trust approach. The first is a form of modified unjust enrichment based on trust and collaboration, which will obviate the problems of subjective devaluation and voluntariness. The second is communality based on a form of mutually fiduciary relationship, where relief to the parties is by way of either a half share in, or adequate support from, each other's assets. More importantly, he argues that either approach will enable the removal of the referability rule from English law which discriminates against non-financial contributions. Whilst recognising the merits of his arguments, the gender issue has not been specifically addressed by Gardner in his analysis, which focused primarily of the broader principles underpinning each of the doctrines applied. It is submitted that trust and collaboration may be equally vacuous concepts and susceptible to value judgment by the judiciary. The discourse must take into account the issues of gender and its impact on the economic positions of the parties in order for less gender biased principles to be formulated. Based on the empirical evidence available pointing to the economic disparity between men and women and the continued existence of sexual division of labour in domestic relationships, the question raised is whether the Commonwealth approaches will offer any pointers on the direction which English law should take in formulating more gender neutral principles.

(a) Australian approach - unconscionability

The Australian courts have moved towards unconscionability whereby equity intervenes to prevent the legal owner of the property from unconscionably asserting full ownership and refusing to recognise the interest of the claimant who has made contributions for the purposes of the parties' joint relationship which has subsequently failed. The genesis of this line of authority is the case of ***Muschinski v Dodds***[101] in which Deane J had suggested that the rights of *de facto* partners on the failure of a relationship were analogous to those of partners or participants of a joint venture, upon failure of that partnership or joint venture, in the absence of blame being attributable to one party. The principle of unconscionability:

> '... operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specifically provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him to do so.'[102]

However, the facts of ***Muschinski v Dodds*** reveal both a domestic as well as a commercial element in the parties' relationship, which may have facilitated the finding of a joint endeavour by the parties.

Subsequently, in ***Baumgartner v Baumgartner***[103], the court extended the meaning of 'joint venture' to include arrangements which were purely domestic. There was evidence of the claimant making contributions which were both financial (in terms

of pooling earnings) and non-financial (in terms of domestic services). There was further evidence that the pooled funds had facilitated the purchase of the property. There was no evidence beyond this that the pooled funds had been used in any way directly towards the purchase of the property. On a strict 'common intention' analysis, there could not have been an imposition of a constructive trust since the requisite common intention was not manifest, nor could such an inference have been made since the contributions were indirect. However, the court found in favour of the claimant on the basis that the contributions were made for the parties' joint relationship which has failed, and that it would be unconscionable for the defendant to retain the benefit of those contributions.

At first glance, it would appear that this approach gives greater flexibility to the courts to grant equitable relief to claimants than the common intention constructive trust approach. It also appears to allow greater room for indirect financial and non-financial contributions to be taken into account in determining whether or not a constructive trust should be imposed. However, ***Baumgartner*** has raised certain questions which remain unanswered.[104] Is equitable intervention limited to situations which are analogous to ***Baumgartner*** where the parties have pooled their earnings or is it applicable to other forms of unconscionable conduct? The cases throw little light on the range of unconscionable conduct which will justify equity's intervention. More importantly, it remains unclear whether ***Baumgartner*** is equally applicable to situations where the contributions are purely domestic, which have enabled the other partner to earn income and increase his assets, since the unconscionability-based constructive trust has been imposed usually where the claimant has made substantial financial contributions to the other partner's resources.

Cases like ***Hibberson v George***[105], ***Tory v Jones***[106] and ***Public Trustee v***

Kukula[107] suggest that some sort of sharing of financial resources may be necessary for finding a joint endeavour. In ***Hibberson v George***, the court stated that, although there need not be a strict pooling of resources, there must be at least some evidence of financial contributions being made towards the parties' relationship. The failure to pool their earnings was, however, fatal to the plaintiffs' claims in ***Tory v Jones*** and ***Public Trustee v Kukula***. In ***Tory v Jones***, the parties had kept separate bank accounts throughout their twenty-one month relationship. Except for her contributions to some minor household items and $5,000 towards repayment of the building society loan, the plaintiff made no other contributions. In the circumstances, the court held that the ***Baumgartner*** principle did not apply since there was no evidence of any pooling of the parties' resources.

This further suggests that the courts may be reluctant to impose a constructive trust solely on the basis of non-financial contributions such as domestic services.[108] In ***Miller v Sutherland***[109], the claimant had made no financial contributions towards the acquisition of the property. However, she and her family had done substantial work in renovating the defendant's property. On that basis, the court was prepared to impose a constructive trust. Nevertheless, there is nothing in this decision to indicate conclusively that the unconscionability approach will allow purely domestic services to give rise to a similar result. It is suggested that, even though couched in terms of unconscionability, ***Miller v Sutherland*** is not very different from the court's reasoning in ***Eves*** where Janet Eves wielded a fourteen pound hammer.

Further, it has been argued that homemaker services have either been devalued or not been taken into account at all in later cases.[110] In determining whether there are grounds for intervention, there is an evident shift in emphasis in the valuation of contributions to what has been described as 'the materialist bias of Equity reassert[ing]

itself' and that '[t]he existence of financial contributions has sometimes constituted the litmus test as to whether it would be unconscionable for a defendant to assert sole legal title'.[111] The courts have vacillated between continuing its search for a common intention to share and unconscionable conduct as the appropriate basis for imposing a constructive trust.

Cases like ***Arthur v Public Trustee***[112] and ***Bryson v Bryant***[113] illustrate that, notwithstanding the purportedly more liberal approach, homemaker services fare no better under the unconscionability-based constructive trust, since such services are given either very little value or no value at all. There seems to be a shift back towards assessing claims on the basis of financial contributions to determine whether it would be unconscionable for the other partner to retain the benefit of such contributions.[114] Thus, the unconscionability approach appears to require some evidence of commercialism in the parties' relationship. Non-financial contributions, such as domestic contributions, will probably be insufficient to give rise to a finding of a joint endeavour and for the imposition of a constructive trust.

(b) The Canadian approach - unjust enrichment

In Canada, the courts have similarly moved away from the common intention approach. They have, instead, adopted unjust enrichment as the underlying basis for the grant of equitable relief. The landmark case is ***Pettkus v Becker***[115] where the parties had cohabited for about twenty years. During that time, the defendant had contributed towards the rent, the food, clothing and other living expenses of the parties, thereby enabling the plaintiff to save his earnings. The plaintiff had utilised his savings to purchase a farm, which was held in his sole name, and established a bee-keeping business, in which the defendant had contributed her labour, without any pay or

remuneration, for fourteen years. With the profits from the bee-keeping business, the plaintiff bought further properties, including the property which the plaintiff acquired as the parties' new family home. All the properties were held by the plaintiff in his sole name.

On the breakdown of the relationship, the defendant claimed a half share in all the properties held by the plaintiff. The court imposed a constructive trust on the grounds of unjust enrichment and identified three requirements which needed to be satisfied in order for unjust enrichment to apply. There has to be an enrichment of the defendant, a corresponding deprivation to the plaintiff and an absence of juristic reason for the enrichment. Once these elements are present, a constructive trust will be imposed, provided that there is a causal connection between the unjust enrichment and the property under dispute.

The fact that one party has benefited at the instance of the other party is not in itself sufficient to warrant the court's intervention. There must be evidence to indicate that the retention of the benefit will render such enrichment as 'unjust' in the circumstances of the case. In that respect, there will be an absence of juristic reason 'where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in the property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation'.[116] In such circumstances, it would be unjust to allow the recipient of the benefit to retain it.

In ***Pettkus v Becker***, the defendant had made both indirect financial contributions as well as non-financial contributions in the form of unpaid labour in the plaintiff's bee-keeping business. Subsequently, in ***Sorochan v Sorochan***[117], the court extended the principle to include the domestic services as well as the unpaid work

performed by the claimant on the farm which contributed to maintaining its value, rather than in its acquisition. The benefit which the defendant received included valuable savings from having essential domestic and farm work performed by the claimant without her being remunerated for the same. The court in ***Sorochan*** had, in fact, made no distinction between the claimant's domestic contributions and her farm labour and held that the defendant had benefited from both types of labour which had been performed by the claimant without remuneration. It was, therefore, recognised that domestic services could equally enrich the owner of the property.

Further support for this proposition was given in ***Peter v Beblow***[118] where the court stated that the provision of domestic services by one partner in the relationship could be treated as an incontrovertible benefit and was, therefore, capable of raising the presumption of an enrichment, which the claimant has been deprived of, in the absence of adequate compensation. As cohabitants are neither under any common law, nor equitable or statutory requirement, to provide such services, the presumption is that the services are not being given gratuitously. Accordingly, there is an absence of juristic reason for the enrichment and a corresponding deprivation.[119] The causal connection need not be in the form of the claimant's direct financial contributions towards the acquisition of the property. Thus, the causal test is a more general one and is satisfied so long as there is a clear link between the contributions and the disputed property. Furthermore, the approach does not appear to place greater significance on financial contributions, whether direct or indirect, over domestic contributions.

The unjust enrichment formulation further refers to the reasonable expectations of the claimant and the state of mind of the owner of the property. Thus, the owner must know or ought to have known that the contributions are not being made on the basis of a gift but with the reasonable expectation of a share in the property. The

reasonable expectation requirement has been criticised by Gardner[120] as a retreat by the courts to the parties' thinking and the manipulation of facts to find the relevant expectation and absence of juristic reason for the enrichment. Scane, on the other hand, argues that the reasonable expectation requirement appears to act in a purely evidentiary way to give rise to a presumption that the services are rendered by one partner in a relationship tantamount to spousal, for the benefit of the family or the business of the other partner, with an expectation of some form of economic compensation.[121]

Once the claimant establishes that the relationship is one tantamount to spousal and that she has made contributions (whether direct or indirect), the combination of these two factors raises the presumption and shifts the burden of proof to the defendant to show that he had no knowledge of the claimant's expectation. This is arguably very different from the common intention requirement which needs some form of meeting of minds of the parties. The reasonable expectation calls for no such meeting of minds and may be purely unilateral in its formation. This presumptive role does not differ substantially from Gardner's reference to trust and collaboration in domestic relationships which, likewise, raises the presumption of shared benefit.

A further problem raised is the nexus between the causal connection and the claimant's reasonable expectations. In ***LAC Minerals Ltd v International Corona Resources Ltd***[122], the court stated that, in deciding whether to impose a constructive trust, the issue is whether there is any reason to give the plaintiff additional rights over the property which necessarily flow from awarding a proprietary remedy. The choice of a proprietary remedy becomes significant when monetary compensation is inadequate but even then, there must be a proprietary link between the unjust enrichment and the property to justify such an award.

The basis of the unjust enrichment analysis appears to be twofold: firstly, the claimant's mistaken belief that, in supplying domestic services, she will acquire a share in the property and secondly, the defendant's acquiescence in 'freely accepting' the contributions made by the claimant.[123] This appears to exclude situations where the defendant has made his non-sharing intention clear to the claimant. It may, therefore, be argued that the claimant's continued provision of domestic services is done without the reasonable expectation of sharing the property.

This argument has been rejected on the grounds that, despite communication of the defendant's refusal to share, the very nature of these relationships is such that the claimant will probably continue to provide the services when faced with the risk of losing more from the deterioration of the relationship than what may be gained from withdrawing the services. Thus, the continued provision of the services cannot be seen as being 'voluntary' and should not be a bar to a restitutionary remedy.[124] This proposition appears to be supported by ***Sorochan*** where a constructive trust was imposed, despite the defendant having communicated his non-sharing intent to the plaintiff. This suggests that the reasonable expectation requirement is a minimal one and that a defendant may not be able to raise a defence to a proprietary claim by merely warning off the claimant.[125]

There remains a gap in the unjust enrichment analysis as to the necessary 'proprietary link' between the unjust enrichment and the property to justify a proprietary remedy. The necessary link between causal connection and reasonable expectation may, however, be easily satisfied by the presumptions raised in favour of the claimant and increasingly it will be harder for a defendant to resist a proprietary claim. Unlike commercial cases where the emphasis is on the causal connection and inadequacy of monetary compensation, the courts' treatment of family cases appears to

be more generous. They evince a greater willingness to impose a constructive trust, despite the absence of a clear proprietary link to any particular asset of the defendant.

Paciocco argues that the difference in treatment of domestic cases is justified on two grounds.[126] Firstly, because of the nature of the relationship, the causal connection requirement in domestic cases should be less stringent than in commercial cases. Secondly, while the parties in a commercial transaction assume a certain level of risk, the acceptance of risk in domestic relationships is generally absent. Thus, the courts' willingness to grant a proprietary remedy stems from the reasonable expectations of the parties that the contributions are being made towards the joint relationship, thereby entitling the claimant to a share in the property. This willingness may also be partially due to the fact that the courts recognise that the constructive trust in these cases is remedial in nature, unless the circumstances warrant the imposition of a substantive constructive trust. This will not, therefore, affect the prior claims of third parties.

By taking into account domestic contributions, it has been suggested that the unjust enrichment approach is a more realistic acknowledgement of familial relationships as a common enterprise.[127] Each member contributes to the relationship according to his or her abilities and the needs of the other members of the household. If the relationship subsequently breaks down, the property ought to be distributed according to these contributions whether they are direct or indirect, financial or non-financial. Criticisms of gender bias brought about by sexual division of labour and the weaker economic position of women in terms of making direct financial contributions and/or the allocation of the household income towards the acquisition of the property are markedly reduced if the doctrine provides greater scope for the recognition of indirect contributions, especially domestic services.

The reduced gender bias in the unjust enrichment approach is in part facilitated

by the presumptive role that reasonable expectations play. To some extent, an analogy may be drawn between this presumptive role and the values of trust and collaboration which Gardner speaks of. It is in recognising the effect of sexual division of labour on both the employment and earning patterns of women and their decision-making role in the family that true meaning can be given to concepts like trust and collaboration in domestic relationships.

Notwithstanding the merits of the unjust enrichment approach, there are still certain inherent problems with the approach which will require further judicial clarification. At present, the focus is on relationships which are 'tantamount to spousal'. This qualification raises two problems. The first relates to identifying relationships which qualify as being tantamount to spousal. This will necessarily entail the courts' evaluation of relationships and deciding whether they are sufficiently 'marriage-like' so as to come within the scope of the doctrine. This poses a factual difficulty for the courts and the tendency will be for the courts to look at long-standing relationships as being more worthy of the courts' protection than relationships of shorter duration. Factors such as the duration of the relationship, the presence or lack of presence of children, the usage of the same family name and having a joint account may influence the courts in deciding whether a particular relationship qualifies.[128] Thus, not all cohabiting couples will fall within the scope of the doctrine.

The second problem is whether the analysis will apply to other types of relationships. All the above cases involved heterosexual couples and the courts have consistently referred to relationships tantamount to spousal. Where the circumstances are such that the presumption of a reasonable expectation to a share in the property may be raised, the Canadian courts have evinced some willingness to extend the unjust enrichment doctrine to other non-spousal familial relationships. This is illustrated by

Clarkson v McGrossen Estate[129], which involved a successful claim by a stepdaughter against her stepfather's estate.

Yet, it remains to be seen whether the courts will be prepared to extend the principle to other relationships, for example, homosexual couples or couples who share a household but do not have a sexual relationship. The unjust enrichment approach will be of limited effect if the courts continue to make a distinction between relationships which they perceive as being spousal-like and those which they do not. In that respect, the common intention approach, despite its criticisms of gender bias, may be a more flexible approach with its ability to include a wider range of relationships.

(c) New Zealand - reasonable expectations

Gillies v Keogh[130] paved the way for the 'reasonable expectations' approach which the New Zealand courts have adopted in dealing with family property disputes. In ***Gillies v Keogh***, there was evidence that, throughout the relationship, the defendant had made it clear to the plaintiff that she viewed the properties as being her own. Consequently, the court found in favour of the defendant on the basis that there had been no reasonable expectations on the part of the plaintiff which justified the court's intervention. The court further observed that the common thread in these cases is the reasonable expectations of the parties.

In formulating these expectations, the courts will have to consider certain factors. The first is the 'degree of sacrifice made by the claimant', which may include 'opportunities foregone'. This is also used as a yardstick in assessing the unjust enrichment of the defendant. Secondly, the court will consider 'the value of broadly measurable contributions of the claimant by comparison with the broadly measurable value of the benefits received'. In that respect, the court recognised that contributions

towards the household expenses and food and other domestic services may have little significance and may at times be treated as being no more than a fair exchange for free board and lodging. It is also evident from ***Gillies v Keogh*** that the parties may expressly 'contract out' of the reasonable expectations approach.

The approach, therefore, appears to incorporate both a subjective and an objective component in determining the parties' reasonable expectations. The objective component centres on whether a reasonable person in the claimant's position would have expected an interest, while the subjective component involves the claimant formulating an expectation to share. In ***Phillips v Phillips***[131], the court recognised that a long-standing *de facto* relationship and the conduct of the parties are equally capable of giving rise to reasonable expectations of property sharing as in marriage. In ***Lankow v Rose***[132], the court reiterated that the imposition of a constructive trust would be justified only if the claimant has established four essential elements: that contributions, whether direct or indirect, have been made towards the acquisition, preservation or enhancement of the defendant's assets or property; that she expected an interest in the property; that the expectation was reasonable in the circumstances; and the defendant should reasonably be expected to give the claimant an interest.

The court further stated that there has to be a causal link between the claimant's contributions and the acquisition, preservation or improvement of the property. The contributions need not be financial but must fall into one of two categories. Firstly, the contribution of itself must assist the defendant in the acquisition, preservation or enhancement of the property or its value. Alternatively, the contribution by its provision must assist the defendant in acquiring, improving or maintaining the property or its value. In that respect, domestic contributions may qualify as contributions towards the acquisition of the home.

However, the contributions must manifestly exceed the benefits received. In other words, the claimant must show that she has suffered some detriment or that the contributions have resulted in the enrichment of the defendant which is unjust. This is where the New Zealand courts have reiterated the fundamental difference between *de facto* relationships and marriage. The presumptive half share adopted in legal marriage does not apply in *de facto* relationships. Therefore, the remedy of a constructive trust is based on a clear causative link being established between the claimant's contributions and the property in dispute and the appropriate share to be awarded is dependent on the balancing of contributions made and benefits received.

Although the cases illustrate that the courts do not intend to limit qualifying contributions to purely direct and financial contributions, they also reveal two major limitations. Firstly, the weighing up of contributions against benefits received may render the remedy ineffective at a practical level. The courts are faced with the difficult task of determining the point at which the contributions actually outweigh the benefits received so as to qualify. This is particularly problematic in cases of purely domestic contributions.[133] In the absence of any clear evidence of a sharing intent or contributions being in excess of benefits received, it will be difficult to assess whether the retention of the benefits by the legal owner is unconscionable or an unjust enrichment.

This is particularly so where the contributions are purely in the form of domestic services. If the courts are conservative in their valuation of such contributions, the net result of the balancing act will effectively reduce the share to be awarded to the claimant. Even where financial contributions are made, the balancing act is not necessarily an easier task. Given that women are generally in a weaker economic position, their contributions are constrained by their own economic

resources. Thus, a mathematical calculation of contributions versus benefits would render the approach equally as biased as the common intention approach.

The other more pressing problem is the ability of the parties to contract out of the reasonable expectations approach. In ***Cossey v Bach***[134], the court stated that the expressed intentions of the parties remain paramount. Once the defendant has made it clear to the claimant, as in ***Gillies v Keogh***, that she is not to acquire a share in the property, the claimant can no longer be said to continue to hold a reasonable expectation. The expressed intention has to be unequivocal, made by the party who has the power to dispose of the interest in question and pertinent to the circumstances of the case. The defendant's expressed intention will effectively override the claimant's reasonable expectation and allow the defendant to avoid having a constructive trust fixed on him. The ramifications of such an expressed intention are felt most in cases of domestic contributions. For the same reasons raised by Scane in relation to the unjust enrichment approach, it may be difficult for women in such relationships to withdraw their domestic contributions. At the same time, the defendant's ability to opt out will pose an effective bar to the claimant making a successful claim for a share in the property.

4.6 Conclusion

The above analysis shows how difficult it is for a claimant to establish an equitable share in the family home, especially where she is financially dependent on her husband or partner. The common intention approach raises problems which renders it inadequate to deal with family property disputes. The main objection is the need to find the relevant common intention to share, which is rarely found in the majority of marital and quasi-marital relationships. This has led some to argue that the process of awarding

a proprietary remedy depends on the willingness of the courts to manipulate the facts in order to find the relevant intent.

A further problem of the approach is its emphasis on the referability rule, which focuses on direct financial contributions, rather than all forms of contributions, whether direct or indirect, financial or non-financial. The principles clearly ignore the effects of sexual division of labour in such relationships which place women at a disadvantage. The approaches taken by various Commonwealth jurisdictions have, firstly, moved away from the common intention approach and, secondly, evinced greater willingness to take into account indirect contributions, in particular, non-financial contributions, such as domestic services, in deciding whether to grant a proprietary remedy.

The discussion on the Commonwealth approaches reveal that some approaches have evinced greater willingness than others in recognising indirect non-financial contributions in getting a proprietary claim off the ground. However, none of the approaches is completely problem-free. The unconscionability approach in Australia continues to manifest remnants of the 'solid tug of money'. Although not as rigid as the common intention approach, the joint endeavour requirement emphasises the need for the pooling of resources, which inevitably requires some form of financial contributions from the claimant. This may be difficult in cases of women who are constrained by their domestic responsibilities from taking up employment and making the requisite contributions.

In both Canada and New Zealand, the courts have stated that the contributions need not be solely financial, thereby allowing non-financial contributions to be taken into consideration. This is a marked departure from the conservatism shown by the English courts. The willingness of both the Canadian and New Zealand courts to recognise the significance of non-financial contributions, such as domestic services,

reveals the fallacy that no value can be placed on such services. It may be of interest to note that an independent study by Legal & General reveals that the average value of domestic services is about £16,265 per year.[135]

However, there are two caveats on the generosity of the reasonable expectations approach in the form of the contributions/benefits equation and opting out. Each may be an effective barrier to relief, especially in cases where women are providing purely domestic services. The Canadian approach appears to offer the greatest flexibility in terms of recognising indirect contributions, especially domestic contributions. Yet, the approach remains problematic if the courts place too rigid an interpretation of the types of relationships which fall within its scope. At present, the cases point to relationships which are tantamount to spousal. This exposes the assessment of deserving cases to value judgments by the courts and may limit the applicability of the doctrine to relationships which the courts view as being spousal-like and more deserving of protection. Thus, even where the claimant has made substantial indirect contributions, a short-lived relationship may be viewed as less deserving of protection than a long-standing one.

The Commonwealth approaches show how non-financial contributions need not be such a black box in terms of grounding a proprietary claim. They reveal how doctrines dealing with family property disputes may be better formulated to accord with the reality of domestic relationships and to take into account the continued existence of sexual division of labour and economic inequality between men and women in these relationships. Part of the problem of the common intention approach may be as stated by Halliwell. In searching for legal clarity, the English courts may have become too rule-oriented, as reflected by the rigid interpretation of ***Rosset***, and, in particular, the requirement for direct financial contributions.

Thus, the Commonwealth approaches reveal two important points. Firstly, they reveal the availability of other doctrines which are more receptive to the economic disparity of men and women in the resolution of family property disputes. The second point is that the contributions made by the female claimant need not be limited to only financial contributions and that the courts are competent in placing some value on non-financial contributions. It should, however, be noted that, even where the courts are prepared to recognise indirect contributions, it remains a difficult matter for the courts to determine the form and duration of such contributions which would suffice to justify a share in the property.

It is no doubt easier to argue that a claimant who has cared for the family over a twenty year period is obviously a more deserving case than one who has been in a relationship for six months. On the other hand, if the claimant in the latter relationship has made substantial indirect financial contributions, it becomes more difficult to define hard and fast rules for assessing eligibility and entitlement. However, this is where the open-texturedness of the equitable doctrines come into play. The principles should be flexible enough to allow room for each case to be assessed on its merits.

In determining whether the claimant should have a share in the property, one may need to reflect on Gardner's argument that the courts should assess the relationships on the basis of trust and collaboration, rather than the parties' thinking, in terms of formulating property rights. This allows the courts greater flexibility to take into account the true nature of the parties' relationship. Yet, concepts like trust and collaboration will require more thought as to their contents as, without such, they may be equally vacuous. The assessment should incorporate consideration of the whole course of conduct between the parties as well as the effect of sexual division of labour in the relationship and whether that may impact on the economic resources of the

claimant in terms of making financial contributions towards the acquisition of the property. By refocusing on these issues, it may pave the way for a more principled basis of deciding family property disputes which is less gender biased.

References

[1] A substantial part of this chapter formed the basis of a forthcoming article in Legal Studies titled '*Constructive Trusts over the Family Home: Lessons to be learned from other Commonwealth Jurisdictions?*'.

[2] See Murphy and Clarke, *The Family Home* (1983) Sweet & Maxwell, London. The figure of owner-occupied homes in the early 1980s stood in the region of about 50 per cent. Cf. Cutler, *The housing market and the economy* (1995) Bank of England Quarterly Bulletin 260, stating that the figure in the 1990s stand closer to about 68 per cent. In 1997, 42 per cent of dwelling houses were owner-occupied, owned with the aid of a mortgage, whilst 24 per cent were owned outright: Social Trends 28 (1998).

[3] See the Matrimonial Causes Act 1973, s 28(3).

[4] s 1(1) of the 1983 Act, which replaced the Act of 1967.

[5] *Bristol & West Building Society v Henning* [1985] 1 WLR 778, CA. See also Burn, *Cheshire & Burn's Modern Law of Real Property* (1994) Butterworths, London, at 241; Sparkes, *Purchasers and Rights of Occupation under the Matrimonial Homes Act 1983* (1989) 52 MLR 110.

[6] See the Land Registration Act 1925, s 70(1)(g). A cohabitant who has an equitable interest in the property and is in actual occupation will similarly have an overriding interest in the property.

[7] *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183. See also Burn, *op. cit.*, at 790-797

[8] [1981] AC 487.

[9] At 504-505.

[10] See the Law of Property Act 1925, s 199(1).

[11] For example, *Kingsnorth Finance v Tizard* [1986] 2 All ER 54. An appointment made by the bank with the husband for a Sunday afternoon was held as being insufficient enquiry about who else might be in occupation of the property.

[12] See *Abbey National Society v Cann* [1991] 1 AC 56; *Lloyds Bank v Rosset* [1990] 2 WLR 867; *City of London Building Society v Flegg* [1987] 2 WLR 1266.

[13] [1991] 1 AC 107.

[14] *Tinsley v Milligan* [1992] Ch 310 (CA), [1993] 3 WLR 126 (HL).

[15] *Hofman v Hofman* (1965) NZLR 795, per Woodhouse J at 800.

[16] *Silver v Silver* [1958] 1 WLR 257; *Dunbar v Dunbar* [1909] 2 Ch 639. See also *Moate v Moate* [1948] 2 All ER 486 where it was held that the presumption of advancement would also be applicable to a fiancée.

[17] *Crisp v Mullings* (1974) 233 EG 511; *Cantor v Fox* (1975) 239 EG 121.

[18] *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385; *Falconer v Falconer* [1970] 1 WLR 1333.

[19] *Ownership of the Matrimonial Home - Common Sense and Reformist Nonsense* (1978) 94 LQR 26, at 29.

[20] *Loades-Carter v Loades-Carter* (1966) 110 SJ 51; *Fennell v Fennell* (1966) 110 SJ 707.

[21] [1995] 2 FLR 114.

[22] See also Kenny, *Whose property is it anyway?* (1995) Solicitors Journal 926 who argues that *McGrath v Wallis* illustrates how the facts of a case may be open to conflicting interpretation and how the evidentiary requirement may be comparatively low for rebutting the presumption of advance.

[23] *Gascoigne v Gascoigne* [1918] 1 KB 233; *Tinker v Tinker* [1970] P 136.

[24] [1996] Ch 107.

[25] [1992] Ch 310 (CA); [1993] 3 WLR 126 (HL).

[26] Miller, *Family Property and Financial Provision* (3rd ed.)(1993) Tolley, Croydon.

[27] See cases like *Keech v Sanford* (1726) Sel Cas Ch 61; *Selangor United Rubber Estates v Craddock (No.3)* [1968] 1 WLR 1555; *Chase Manhattan Bank v Israeli-British Bank (London)* [1981] Ch 105; *Boardman v Phipps* [1967] 2 AC 46.

[28] *Constructive Trusts* (1987) Sweet & Maxwell, London.

[29] *Ibid.*, at 17.

[30] For example, in *LAC Minerals v International Corona Resources* (1989) 61 DLR (4^{th}) 14, where the Canadian Supreme Court imposed a constructive trust as a remedy for a breach of confidence.

[31] [1971] AC 886.

[32] [1970] AC 777.

[33] [1971] AC 886 at 907.

[34] [1980] 1 WLR 219.

[35] [1991] 1 FLR 105.

[36] [1974] 1 All ER 888.

[37] Oliver, *The Mistress in Law* (1978) CLP 81, observes that, because of the consensual nature of cohabitation, the tendency of the courts is to interpret financial contributions made by one cohabitant to the other as being a loan, rather than with the intention of acquiring a share in the property.

[38] at 905.

[39] [1975] 1 WLR 1338.

[40] [1986] Ch 638.

[41] In the case of *Eves*, the contributions were indirect and non-financial whereas in *Grant v Edwards*, the claimant had made indirect financial contributions. Cf. Oliver, *op. cit.*, who argues that the homemaker services were rightly rejected by the court in *Pettitt* and should only be taken into account if the case falls within Lord Diplock's formulation in *Gissing*. Oliver openly rejects the proposition that unremunerated homemaker services should give rise to compensation at the end of the relationship since such services are given freely and are probably rewarded by the husband or male partner's support. One weakness of this argument is that it assumes that most women have the freedom to choose whether or not to provide such homemaker services and, more importantly, it ignores the economic implications for women who lack this choice. More discussion of this point is found in section 4.4 below.

[42] at 132-133.

[43] See also Glover and Todd, *The myth of common intention* (1996) 16 LS 323 who posit an express trust explanation for the *Rosset* type constructive trust. They argue that, despite the similarities, the second category cannot be completely explained by the traditional resulting trust analysis. Further, the requirement of common intention is misguided since the intention to create a trust is premised solely on the intention of either one of the parties and that the role of the constructive trust is merely to overcome the formalities requirement.

[44] *The Family Home: Intention and Agreement* (1992) 22 Fam Law 72, at 74.

[45] *Rethinking Family Property* (1993) 109 LQR 263.

[46] *Pettkus v Becker* (1980) 117 DLR (3d) 257, per Dickson J at 270.

[47] Cf. Montgomery, *Question of Intention?* (1987) Conv 16, who highlights that the inferred common intention is premised on holding the defendant to the reasonable inferences which could be drawn from his conduct. Evidence of such intention will depend on the parties'

expectations and the question turns of whether there is any evidence pointing to the parties' state of mind and not to contributions made towards the purchase price. Thus, contributions may be taken as evidence of such intention but should not be seen as being the only type of evidence.

[48] Neave, *Living Together - The Legal Effects of the Sexual Division of Labour in Four Common law Countries* (1991) 17 Monash University Law Review 14.

[49] O'Donovan, *Sexual Divisions in Law* (1985) Weidenfeld & Nicolson, London, Chap 5; Land, *Parity begins at home* (EOC/SSRC 1981). See also Edgell, *Middle Class Couples* (1980) Allen & Unwin, London. Edgell argues (in Chap 3) that, because of the deeply institutionalised view of husband-breadwinner/wife-homemaker roles in society, it is unsurprising that, even in cases of dual-career couples and unemployed husbands, the wife remains primarily responsible for the home and children.

[50] *Women and Men in Britain 1995* (EOC) HMSO, London.

[51] Labour Force Survey, Spring Quarter, 1994.

[52] Social Trends 28, 1998.

[53] *Women and Labour* (a paper presented at the University of Kent, Canterbury on March 5, 1997). Morris found that the average hourly wage of women in full-time employment was generally about 79.9 per cent that of men in full-time employment, whereas the average weekly wage of female full-timers was about 72.3 per cent that of male full-timers (New Earnings Survey, 1996). In comparison, the average hourly wage of female part-timers was about 60 per cent that of male part-timers and 75 per cent that of female full-timers (New Earnings Survey, 1995).

[54] New Earnings Survey, 1997.

[55] *A Woman's Place - A Conflict between Law and Social Values* (1987) Conv 93, at 94.

[56] e.g. in *Eves* and *Grant v Edwards*.

[57] *Op. cit.*

[58] *Op. cit.*, at 7-8.

[59] *Ibid.*, at 118.

[60] Neave, *op. cit.*, at 26.

[61] *Op. cit.*

[62] Gardner looks at the doctrines of unjust enrichment and communality as being more appropriate alternatives in dealing with family property disputes. After reviewing the various approaches taken in other common law jurisdictions, he concludes that, regardless of the doctrine being applied by the courts in those jurisdictions, there is a gap between the

doctrines and the actual results of the cases. He suggests that the gap lies in the parties' thinking. If the parties' thinking is not the determinant of a successful claim, the determinant has to be the parties' relationship. Therefore, by focusing on the relationship rather than any specific notion of the parties' thinking, there is greater flexibility for the courts to grant remedies. The viability of his suggestions of a modified unjust enrichment and communality will be considered in greater detail below.

[63] *Self and Subjectivities: Languages of Claim in Property Law* (1993) 20 JLS, 56.

[64] *Ibid.*, at 64.

[65] *Ibid.*, at 62.

[66] Pahl, *Money and Marriage* (1989) Macmillan Education, Basingstoke.

[67] Pahl identifies four basic typologies of management systems, i.e. wife-management or whole wage system, the allowance system, the pooling or shared management system and the independent management system. For further details on the classification of each system, refer to 67-77.

[68] *Ibid.*, Chap 9.

[69] At 104-109. Pahl notes that husband-control is more common in families with relatively higher income levels and is usually associated with the allowance and independent management systems. Husband-control is also evident in a pooling system, especially in families with higher income levels or where the husband is the sole wage-earner.

[70] *Ibid.*, Chap 6.

[71] *Money, power and inequality within marriage* (1994) 42(2) Sociological Rev, 263.

[72] Pahl (1989), *op. cit.* , at 142-146. See also Pahl, *Household Spending, Personal Spending and the Control of Money in Marriage* (1990) 24(1) J Br Sociological Assoc, 119.

[73] *Midland Bank v Dobson* [1986] FLR 171.

[74] Moffat, *op. cit.*, at 454.

[75] Ferguson, *Constructive Trusts - A Note of Caution* (1993) 109 LQR 114.

[76] *Op. cit.*, at 454-455.

[77] See also Lawson, *The things we do for love: detrimental reliance in the family home* (1996) 16 LS 218; Flynn and Lawson, *Gender, Sexuality and the Doctrine of Detrimental Reliance* (1995) Feminist Legal Studies 105. They point to how the law maintains a separation of the domestic sphere from the public sphere and that the qualities of each are gendered, regardless of the increasing contributions by women in both spheres. In doing so, the law, through the doctrine of detrimental reliance may legitimate the exclusion of certain types of conduct, such as unpaid labour in the home, as being 'reasonably expected' of the

claimant and, hence, not tantamount to detriment.

[78] [1991] 1 WLR 1127. Although the court did take into account the claimant's domestic contributions, the crux of the matter seems to be that her overall contributions are capable of being valued in money terms e.g. postponing her interest in the property to the bank's mortgage as security for the loan granted to the defendant and supporting the defendant in some very speculative business ventures where the risk of losing everything including their home was very high.

[79] For criticisms, see O'Hagan, *Indirect Contributions to the Purchase of Property* (1993) 56 MLR 223; Lawson, *Acquiring a Beneficial Interest in the Family Home* (1992) Conv 218. See also Clarke and Edmunds, *H v M: Equity and the Essex Cohabitant* (1992) Fam Law 523.

[80] [1995] 4 All ER 562.

[81] [1996] 1 FLR 826.

[82] *Crabb v Arun* [1976] Ch 179, per Scarman LJ at 198.

[83] Moffat, *op. cit.*, at 459.

[84] Warburton, *Trusts, common intention, detriment and proprietary estoppel* (1991) 5 Trust Law International, 9.

[85] For example, the 'whole course of conduct' approach taken by the courts in both *Midland Bank v Cooke* and *Drake v Whipp.*

[86] *Op. cit.* at n 55, 99.

[87] *Ibid.*, at 101.

[88] *Equitable Rights of Cohabitees* (1990) Conv 370. See also Dewar, *Give and Take in the Family Home* (1993) Fam Law 231. Dewar points to how the shift to estoppel in family property disputes evinces a conceptual severance between of the issues of protecting the interests of family members and those of third parties. In doing so, it suggests that courts will in future be prepared to consider a wider range of contributions, besides direct financial contributions, in deciding whether a family member has an equitable share in the disputed property.

[89] *Op. cit.*, at 378.

[90] Cf. Ferguson, *op. cit.* at n 75, who provides a critical analysis of Hayton's comments. See also Hayton, *Constructive trusts of homes - A Bold Approach* (1993) 109 LQR 485, providing a reply thereto.

[91] Cf. Gardner, *op. cit.*, who argues that, despite the flexibility of estoppel principles, an estoppel claim cannot arise in the absence of reasonable belief. Thus, in order for the

assimilation of constructive trusts and estoppel to found claims based on indirect contributions, it would mean the abandonment of the referability rule, which will allow greater invention of facts by the courts.

[92] Cf. Warburton, *op. cit.*, who argues that any attempt to assimilate constructive trusts and proprietary estoppel appears to be an attempt to re-introduce by the backdoor Lord Denning's 'new model constructive trust' and will expose claimants and third parties to the same uncertainties which the new model constructive trust was criticised for.

[93] *Equity as Injustice: The Cohabitant's Case* (1991) 20 Anglo-Am LR, 500-522.

[94] *Op. cit.*, at 459-462.

[95] See *Greasley v Cooke* [1980] 1 WLR 1306 where the claimant was able to rely successfully on her homemaker services; cf. *Coombes v Smith* [1986] 1 WLR 808 and *Rosset* where such claims were rejected as being insufficient acts of detrimental reliance.

[96] *Op. cit.*, at 521.

[97] Warburton, *op. cit.*

[98] Ferguson, *op. cit.*

[99] *Op. cit.*, at 520.

[100] *Op. cit.*

[101] (1986) 160 CLR 583.

[102] at 620.

[103] (1987) 164 CLR 137.

[104] Neave, *The Unconscionability Principle - Property Disputes between De facto Partners* (1991) 5 Aust J Fam Law, 185; Kovacs, *A dozen ways (and more) to lose a de facto property case* (1994) 68 Law Institute Journal 723; Black, *Baumgartner v Baumgartner, The Constructive Trust and the Expanding Scope of Unconscionability* (1988) 11 The University of New South Wales Law Journal 117; Haines, *Unconscionability in Constructive Trusts and Remedies Therefor* (1991) 5 Aust J Fam Law 206.

[105] (1989) 12 Fam LR 725. There was no actual pooling of earnings in this case but the claimant had made indirect financial contributions towards renovations and improvements to the property, the purchase of furniture and expenditure on the children. There does not have to be a strict pooling of earnings. In the circumstances, the court felt that there was sufficient evidence of the contributions having been made by the claimant on the basis of a joint endeavour and that it would be unconscionable for the defendant to retain the benefit of such contributions.

[106] (1990) DFC #95-095.

[107] (1990) 14 Fam LR 97.

[108] Neave, *op. cit.*, at 201-202.

[109] (1991) 14 Fam LR 416.

[110] Bryan, *Constructive trusts and unconscionability in Australia: on the endless road to unattainable perfection* (1994) 8(3) Trusts Law International, 74.

[111] *Ibid.*, at 76.

[112] (1988) 90 FLR 203.

[113] (1992) 29 NSWLR 188. Bearing in mind that the deceased couple had been married for sixty years, the decision in this case may appear particularly hard. For a more detailed study of the case, refer to Riley, *The Property Rights of Home-makers under General law: Bryson v Bryant* (1994) 16 Sydney LR, 412.

[114] Cf. *Green v Green* (1989) 17 NSWLR 343 where the claimant succeeded in her claim, even though she had made no financial contributions. The court was prepared, in that instance, to make an inference of a common intention to share the property from the casual statements made by the deceased, as well as to give detrimental reliance a broad interpretation. Bryan, *op. cit.* (at 74) suggests that the case illustrates the fact that 'common intention' has still survived the introduction of the unconscionability-based constructive trust.

[115] (1980) 117 DLR (3d) 257.

[116] per Dickson J, at 274.

[117] (1986) 29 DLR (4^{th}) 1.

[118] (1993) 101 DLR (4^{th}) 621.

[119] Farquhar, *Unjust Enrichment, Special Relationship, Domestic Services, Remedial Constructive Trust: Peter v Beblow* (1993) 72 Can Bar Rev 538.

[120] *Op. cit.*, at 273-274.

[121] *Relationships 'Tantamount to spousal', Unjust enrichment and Constructive trusts* (1991) 70 Can Bar Rev 260, 278.

[122] (1989) 61 DLR (4^{th}) 14.

[123] Birks defines free acceptance as one 'where a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to reject, elects to accept'(*Introduction to the Law of Restitution* (1985, repr. 1993) Clarendon, Oxford, at 265). For Birks, free acceptance not only establishes the enrichment but also the unjust factor. See also Birks, *Restitution - The Future* (1992) Federation Press, NSW. This argument has been challenged by both Burrows (*Free Acceptance and the Law of*

Restitution (1988) 104 LQR 576) and Mead (*Free Acceptance: Some Further Considerations* (1989) 105 LQR 460). Using Birks' example of the window-cleaner, Burrows, who is supported by Mead, contends that the window-cleaner, in offering his unrequested services, is assuming the role of risk-taker in expecting payment from the recipient. The law of restitution should not be expected to undertake the task of protecting that risk (at 578). However, Burrows agrees with Birks that there is an unjust enrichment in the situations where services are rendered, albeit unrequested, to the recipient under a mistake. See also Birks, *In Defence of Free Acceptance* in Burrows (ed.), *The Law of Restitution* (1993) Butterworths, London, in reply to the arguments raised by Burrows and Mead; Garner, *The Role of Subjective Benefit in the Law of Restitution* (1990) OJLS 42.

[124] Scane, *op. cit.*, 295.

[125] For a detailed discussion of the issue of proprietary link, refer to Scane, *op. cit.*, at 287-304. Cf. Gardner's argument that incorporating trust and collaboration within the unjust enrichment analysis will remove problems relating to voluntariness and subjective devaluation by the defendant. It would seem that trust and collaboration raises a similar presumption as that discussed by Scane.

[126] *The Remedial Constructive Trust: A Principled Basis for Priority over Creditors* (1989) 68 Can Bar Rev 315.

[127] Welstead, *Domestic Contributions and Constructive trusts: The Canadian Perspective* (1987) Denning LJ 151.

[128] Cases like *Pettkus* (twenty years), *Sorochan* (forty-two years), *Pirie v Leslie* (1988) 29 ETR 246 (Man QB) (nine years) and *Boucher v Koch* (1988) 14 RFL (3d) 443 (Alta CA) (twenty years) all illustrate how the length of the relationship may be an influential factor in determining whether equitable relief is to be granted.

[129] (1995) 122 DLR (4^{th}) 239.

[130] (1989) 2 NZLR 327.

[131] (1993) 3 NZLR 159 (CA).

[132] (1995) 1 NZLR 277 (CA).

[133] See Parkinson, *Intention, Contribution and Reliance in De facto Cases* (1991) 5 Aust J Fam Law 268, who highlights the problems of taking a contributions and mutual benefit conferral approach.

[134] (1992) 3 NZLR 612 (HC).

[135] Daily Mail, November 6, 1996.

CHAPTER 5

Third Party Security Transactions and Equity's Intervention[1]

5.1 Introduction

The preceding chapters have highlighted the major developments which have taken place in relation to the property rights of women in the past century. In Chapter 2, legal reform in the form of the Married Women's Property Acts 1870 and 1882 saw the eventual conferment of absolute property rights on married women. Although the law now recognises the formal equality of men and women to own property independently of each other, Chapter 3 highlighted the differential treatment of the law towards marriage and cohabitation in terms of ownership of the property which is used by the parties as the family home.[2] Whilst spouses may rely on the adjustive powers conferred on the courts in dealing with disputes over property ownership on the breakdown of the marriage, these adjustive provisions are not applicable to cohabitants. With the increase of cohabitation in recent decades, the issue of property rights has become more complex due to the lack of legislative intervention to regulate such relationships.

As seen in Chapter 4, in the absence of legal co-ownership, any beneficial interest which cohabitants may have hinges very much on whether there is an express agreement between the parties to regularise their rights over the family home and, in the absence of such agreement, their only ally is equity. This is equally true of spouses where the marriage has not broken down and the adjustive powers of the courts do not come into play. However, as can be seen in that chapter, the common intention constructive trust approach taken by the English courts in dealing with family property disputes places certain obstacles in women's path in successfully invoking the help of

equity to establish a beneficial interest in the property. The economic inequality of women and men and the necessary requirements of common intention and detrimental reliance, together with the emphasis on direct financial contributions, effectively limits the chances of success of women in establishing a beneficial interest in the family home under that doctrine.

In this chapter, the interventionist role of equity in the commercial realm and more particularly, in relation to third party security transactions will be examined.[3] In these cases, equity intervenes to protect the interests of persons who have agreed to stand surety for advances made by the bank to another party (the debtor) and where it appears that the surety's consent to the giving of security may have been procured as a result of undue influence, misrepresentation or possibly fraud having been exercised by the debtor (for example, the husband) on the surety (the wife). The courts have recognised a 'vulnerable class' of sureties[4] where the surety's vulnerability stems from there being a relationship with the debtor whereby the likelihood of trust and reliance exists. The class of vulnerable sureties is not limited to spouses and cohabitants but to any party standing surety for the debtor, whose relationship with the surety is one where there is a likelihood of influence and reliance. In consequence thereof, there is a possibility that the security given by the surety may have been procured by the exercise of undue influence or misrepresentation or the commission of some other legal wrong by the debtor.

In such situations, banks are now expected to take reasonable steps to ensure that the surety has independent legal advice. Failing this, the vulnerable surety may be able to establish an equity to set aside the transaction which is binding against the bank. This will allow the surety to circumvent the enforcement of the security given to the bank in certain circumstances. However, the extent to which the bank's security may be

effectively challenged will no doubt depend on, firstly, whether the surety has a proprietary interest in the property under dispute and, secondly, whether that interest has priority over the bank's interest. In relation to third party security transactions involving mortgages over the family home, a surety who is not a legal co-owner will have to establish an equitable interest in the property so as to have *locus standi* to challenge the bank's security. It was noted in Chapter 4 that, in the absence of clear legal or equitable ownership of the property, the establishment of a beneficial interest under the constructive trust regime is not necessarily all that clear-cut.

For the purposes of this chapter, the type of third party security transactions under consideration is limited to mortgages over the family home by women sureties for the purposes of securing the debts of their husbands or partners. However, it will be noted that the equitable principles developed in relation to the vulnerable sureties are not limited to that particular type of third party security transactions and will have general application to other forms of security given by such sureties. In the cases of mortgages over the family home, the significance of where the legal and beneficial ownership lie is manifest. Where the legal ownership is in the sole name of one party, usually the husband or male partner, the problems which may arise are twofold: firstly, where the husband or male partner creates a mortgage over the family home without the wife or female partner's knowledge or consent and to her detriment and secondly, where she is joined as a co-mortgagor, her consent may be tainted by the commission of some legal wrong, for example, undue influence and/or misrepresentation, on the part of the husband or male partner. To some extent, the consent forms which spouses and cohabitants are now expected to execute following the decision in ***Williams and Glyn's Bank v Boland***[5] have reduced the number of instances where the securities taken by banks are caught out by the former. It is the latter problem as well as the

direction which the equitable principles have taken since the case of ***Barclays Bank v O'Brien***[6] on which this chapter will focus.

In examining the role of equity in vulnerable third party security transactions, the purpose is to highlight the weaknesses in the present equitable principles and to demonstrate further that the current approach taken by the courts, which emphasises the independent legal advice requirement as a risk management device in such transactions, is unsatisfactory in dealing with the disputes which arise therein. The equitable principles governing such third party security transactions have been couched in neutral language, with equal applicability to the parties regardless of their gender. Yet, it will be argued that, in the context of women standing surety for their husbands or partners, these seemingly neutral principles tend to, once again, discriminate against them as a result of the disparity in the economic positions of men and women in domestic relationships. This will entail looking at, *inter alia*, the development of the equitable principles in this area of law, the rationale behind the development of these principles and how the economic disparity between men and women will affect the efficacy of these principles in protecting the interests of those who agree to stand surety.

5.2 Undue Influence and Misrepresentation

Undue influence and misrepresentation are commonly pleaded defences to actions against a surety. Equity will set aside a transaction on the ground that a party has acted unconscionably and has obtained an advantage as a result of such unconscionable behaviour.[7] For the purposes of this chapter, the focus is on third party security transactions involving female sureties who have agreed to provide security for their partners. In third party security transactions, allegations by the surety of the exercise of

undue influence will normally be of two kinds: first, where the surety claims that the bank itself has used undue influence over her in procuring her consent to the giving of the security and second, where the debtor is the party exercising undue influence over the surety and where the bank has notice of such undue influence and is, therefore, placed in a position to take responsibility for it or to have gained an advantage from it.

There are primarily two aspects of undue influence, namely, actual undue influence and presumed undue influence. Certain propositions are made in relation to this area of law by orthodox contractual principles.[8] Firstly, in certain relationships, there is a presumption that undue influence may be exerted by one party over another so that were the party presumed to exercise influence to acquire a contractual or other benefit from the party influenced, he would have to rebut this presumption in order for the transaction to stand.[9] However, neither the banker-customer[10] nor the husband-wife[11] relationship is one where the presumption of undue influence normally exists. A surety, regardless of whether or not she is a customer of the bank, will be released from her liability only if she establishes that the bank has exercised actual undue influence, or is guilty of misrepresentation[12], or has adopted, whether by notice or agency, the acts of the debtor who has exercised undue influence. Jeremie points out that the ability to postpone the security lies in the distinction between misfeasance and non-feasance on the part of the bank.[13] It is only the former which allows the transaction to be set aside. Any other conduct, even if irregular or prejudicial to the surety, would not suffice and offer any relief to the surety.[14]

In addition, the courts are not prepared to set aside the transaction unless it is shown that the transaction is manifestly disadvantageous to the surety.[15] If the relationship between the parties is one where the presumption of undue influence exists, the transaction is manifestly disadvantageous where an advantage has been

taken of the person subjected to the influence of the other party in the relationship which, unless rebutted, can only be explained by reason of the influence exercised to procure it.[16] In ***BCCI v Aboody***[17], the court further stated that, in order for the disadvantage to be manifest, it had to be obvious as such to an independent and reasonable person considering the transaction at that time and with knowledge of all relevant facts.

However, in establishing actual undue influence, there is no requirement to prove that there is domination over the party influenced.[18] The essential element is not that the surety has been intimidated into submission to the will of the debtor but that there has not been an exercise of her free independent will and that the person exercising undue influence was in a position to take advantage of the party influenced.[19] Thus, when would a surety be deemed to have given her consent to a security by the exercise of her free independent will? How should a bank guard against a surety acquiring an equity to set aside the transaction so that the security would be unimpeachable when challenged subsequently in court by the surety? The answers to these questions have been made more complex by the development of the class of 'vulnerable sureties' deserving the protection of equity.

In the cases of ***O'Brien*** and ***CIBC Mortgages v Pitt***[20], the House of Lords had to deal with the legal problems which arise in a scenario involving wives, husbands and banks. Prior to ***O'Brien***, a closer analysis of the defence of undue influence reveals that there are differing views on the application of the remedy, giving rise to two distinct lines of authority: one taking on the so-called 'agency' approach and the other, the 'non-agency' approach. As the terms suggest, the first of the two lines of authority requires proof of a relationship of agency between the bank, as principal, and the debtor, as agent, before the defence of undue influence can be successfully pleaded by

the surety. On the other hand, the second line of authority provides a contrary argument, where the success of the plea is not dependent on proof by the surety of the existence of any agency between the debtor and the bank. The following sections trace the development of these two lines of authority so as to throw light on the issue of which of the two lines of authority the courts view as being more appropriate in 'vulnerable' third party security transactions.

(a) The "Agency" Approach

The origin of the 'agency theory' is in the case of ***Turnbull v Duval***[21] which involved a married couple where the wife, Mrs. Duval, had given security over her property to secure her husband's debts to the bank company. The agent of the bank, Mr. Campbell, was incidentally also the trustee of the will of Mrs. Duval's father, so that there already existed a fiduciary relationship between him and Mrs.Duval. The agent and Mr.Duval had arranged between themselves that the agent would prepare the necessary security document for creating a charge over Mrs. Duval's property and that Mr. Duval would then obtain Mrs. Duval's signature to the said document. Mrs. Duval was given no legal advice over the nature and effect of the security document nor did she read the document before signing it. She contended that she had signed the document because she was pressed into doing so by her husband.

The court held that the charge, which was obtained through the bank's agent, who was also the executor and trustee of the estate of Mrs. Duval's father, was not enforceable by the bank. The reason for upholding the invalidity of the security was that the surety had been pressured by her husband into signing a document which was very different in nature from what she had thought it to be and without any independent legal advice. As stated by Lord Lindley, '[t]hey left everything to [the husband], and

must abide the consequences.'[22] Whilst ***Turnbull v Duval*** has been seen as laying the foundation stones for the agency theory, one should note that there was no reference throughout the decision to there being a relationship of agency between the husband and the bank. Further, there was no reference to the exercise of undue influence or misrepresentation by the husband on the surety. Yet, the agency theory was thus developed and applied in subsequent cases, thereby endorsing the theory and its application to third party security transactions.

In ***Avon Finance v Bridger***[23], the elderly parents of an adult child had, unbeknownst to them, given security for their child's debts by way of a second charge over their home. Under the terms of the loan agreement with the bank, the son agreed to procure the execution of a legal charge on the parents' property. The charge had been obtained through the son's misrepresentation that the mortgage documents, for which the parents' signatures were being sought, were in relation to an earlier loan granted to the parents by a building society for the purposes of the purchase of the property. The parents had no knowledge at all material times of the second loan which their son had obtained from the bank nor had they been independently advised on the nature and effect of the security document.

The court's decision that the charge was unenforceable by the bank turned on the following material findings. Firstly, the bank had chosen to appoint the son, who was the debtor, to obtain the security from his parents which was obviously to the benefit of the bank and the debtor. Secondly, in view of the disparity in age and the education standards between the son and the parents, the relationship was one where it should have been more obvious to the bank that the son could be expected to have some influence over the elderly parents. The third and final finding of the court which was pertinent to the unenforceability of the security was that there was no independent

advice given to the parents. As pointed out by Brandon LJ, the security was impeached as a result of the combination of three factors, namely, 'procurement of the security by the son, the relationship between the son and his elderly parents and the absence of independent advice.'[24]

The concept of agency was similarly applied in the subsequent case of ***Kingsnorth Trust v Bell***.[25] The facts of this case were not dissimilar to ***Turnbull v Duval*** where the wife had provided security for her husband's debts. Once again, the bank had left it to the husband to obtain the wife's signature to the security document and this the husband did by misrepresenting to the wife the actual purpose of the loan. As with Mrs. Duval, Mrs. Bell was not given any independent legal advice on the nature and effect of the document and the risks to her in entering the transaction. Dillon LJ stated the following reasons for the security being unenforceable:

> 'if a creditor or potential creditor, of a husband desires to obtain, by way of security for the husband's indebtedness, a guarantee from his wife or a charge on property of his wife, and if the creditor entrusts to the husband himself the task of obtaining the execution of the relevant document by the wife, then the creditor can be in no better position than the husband himself, and the creditor cannot enforce the guarantee or the security against the wife if it is established that the execution of the document by the wife was procured by undue influence of the husband and the wife had no independent advice.'

Dillon LJ went on further to say that it did not matter whether the execution of the security document by the wife was procured by the husband's influence, without his giving to her any explanation of the document or through his giving a false explanation. In either case the execution was still being procured through a fraudulent misrepresentation and:

> '[o]n the general law of principal and agent, the principal (the creditor), however personally innocent, who instructs an agent (the husband) to achieve a particular end (the signing of the document by the wife) is liable for any fraudulent misrepresentation made by the agent in achieving that end, including any continuing misrepresentation made earlier by the agent and not corrected.'[26]

Cases post-***Kingsnorth Trust v Bell*** such as ***Coldunell v Gallon***[27], ***Midland Bank v Perry***[28], ***Bank of Baroda v Shah***[29] and ***BCCI v Aboody*** clearly show that the approach taken by the courts in dealing with third party security transactions is that the security provided by the surety would not be impeached on the ground of undue influence, unless there exists a relationship of agency between the bank and the debtor, so that the bank would be vicariously responsible for the debtor/agent's wrongful acts.[30] The relationship of agency may be established, for example, by the bank leaving it to the debtor to obtain the surety's signature. In the absence of establishing such agency, the security would not be set aside even if there has been undue influence or misrepresentation on the part of the debtor.

In ***Coldunell v Gallon***, Oliver LJ stated that 'the authorities which demonstrate the voidability of such transaction against third parties are all based on the concept of the person exercising the influence having acted as agent of the third party procuring the transaction.'[31] Thus, there has to be proof of the existence of a relationship of agency between the debtor and the bank by either express or ostensible authority and without this, the transaction would not be set aside as 'to grant relief to the defendants in respect of the son's acts alone without [the plaintiff's] authority or knowledge, is to go further than any decided case has yet gone.'[32]

A rigid application of the principles of agency was also found in ***Midland Bank***

v Perry where the court held that, in the absence of proof of the existence of an agency, the surety/wife would not be able to set aside the transaction, even if she was unaware of what she was signing and the bank had not taken adequate steps to explain the nature and effect of the document to her.[33] In that case, the court found that there was negligence on the part of the bank in explaining the nature and effect of the security document to the wife. However, neither the undue influence exercised by the husband in procuring the wife's consent nor the bank's negligence in giving an inadequate explanation rendered the transaction voidable since the wife had failed to prove that the husband was acting as the bank's agent. Nothing short of the strict principles of agency based on actual or ostensible authority on the part of the bank would suffice to grant relief to the surety.

At the same time, there seems to be a shift in emphasis from the true agency approach to an extended form of agency whereby a distinction is made between the general law of agency and the principles of agency applicable in equity.[34] In ***Barclays Bank v Kennedy***[35], the court dealt with the issue of what the proper test was in deciding whether there was a relationship of agency between the bank and the debtor. Purchas LJ expressed that 'the concentration on actual or ostensible authority being "given to the husband to act on behalf of the bank" may not be a reliable way of applying the test now established by authority.....the real question is whether the bank were content to leave it to the husband to obtain the wife's signature upon the charge.'[36] The court held that the proper test in deciding whether the husband was acting as the bank's agent was not whether there was actual or ostensible authority given by the bank, but whether the bank had been content to leave it to the husband to procure the wife's consent.[37] Thus, the liability of the bank is premised on the failure of the bank to take appropriate precautions, rather than the conscious devolution of

responsibility by the bank on the debtor as agent.[38]

In contrast, cases like ***Kingsnorth Trust v Bell***, ***Coldunell v Gallon***, ***Bank of Baroda v Shah*** and ***BCCI v Aboody*** do not make any distinction between the ordinary law of agency, which relies upon authority being given by the principal to the agent, and agency for the purposes of undue influence, which appears to be dependent on the bank having 'left everything to the husband'. This non-distinction reached its strictest interpretation in ***Midland Bank v Perry*** where the debtor was deemed not to be the bank's agent unless there was actual or ostensible authority to that effect.

Thus, under the 'agency' approach, there are two separate grounds upon which the transaction may be set aside.[39] Firstly, there must exist a relationship of agency between the debtor and the bank. In that respect, the court's interpretation of whether a relationship of agency exists has varied from a broader definition of an 'equitable' agency which is not dependent on actual or ostensible authority being given by the bank to the debtor, but may be established where the bank 'leaves it all to the debtor' to obtain the surety's consent as in ***Barclays Bank v Kennedy***, to a strict application of the principles of agency as in ***Midland Bank v Perry***.

Secondly, there must be notice of such undue influence or misrepresentation on the part of the bank for it to be bound by the surety's equity to set aside the transaction. In the absence of either of the above features, even if undue influence or misrepresentation has been positively proven, the surety would not be able to set aside the transaction. The case law further shows that the lack of understanding on the part of the surety as to the nature and effect of the security being given is not *per se* a sufficient ground for equity's intervention to set aside the transaction or that a married woman, who agrees to stand surety for her husband's debts, is placed in any special category of sureties.

(b) The "Non-Agency" Approach

Notwithstanding that the genesis of the 'agency' approach was ***Turnbull v Duval***, there was in fact no reference in that case to the existence of a relationship of agency between the bank and the husband. There was further no evidence of the husband having made any misrepresentation or exercised undue influence or excessive pressure on the wife in procuring her consent to the charge. The decision in favour of the wife turned on the fact that the court found that no independent legal advice had been given to the wife on the nature and effect of the transaction, thereby resulting in the wife not having a full understanding of her liability and the risk to her in standing surety.

In the earlier case of ***Bainbrigge v Browne***[40], three adult children made a disposition in respect of their property in favour of the mortgagee as security for their father's debts. The court held that, as the children were not fully emancipated from the father's control at the time of giving the security, there was the possibility that the charge might have been obtained by the exercise of pressure and undue influence on the part of the father. Accordingly, the charge could not be enforced by the mortgagee. Fry J held that the inference of undue influence would operate not only against the father but also 'every person who claimed under him with notice of the equity thereby created, or notice of the circumstances from which the Court infers the equity.'[41] In such circumstances, the burden of proof would lie on the debtor or his mortgagee to show that the charge was created with the full knowledge and understanding of the surety, which burden might be discharged by showing that the surety had been given independent legal advice.

Similarly, in ***Chaplin v Brammall***[42], the bank had agreed to supply goods to the husband on condition that the wife would stand as guarantor for the payment of the goods. The guarantee document was sent to the husband and the matter was left

entirely to him as to how he would obtain the wife's signature thereto. The husband had made no explanation of the contents of the guarantee form to the wife prior to her execution. She neither read the document before signing it nor knew the nature and import of the document which she had signed. No legal advice had been given to her in respect of the nature and effect of the document. Following ***Turnbull v Duval***, the court held that the guarantee was unenforceable against the wife. In both ***Turnbull v Duval*** and ***Chaplin v Brammall***, there was no evidence of undue influence or misrepresentation.

It is evident that the common thread in both cases was the lack of full understanding on the part of the surety. The courts' intervention was justified on the basis that, firstly, the bank had not taken any steps to ensure that the wife had independent advice in the matter. Secondly, the bank was aware that the execution of the guarantee was to be procured through the husband, who was living with the wife at that time and would presumably have some influence over her, and the bank had failed to show that the document was properly explained to her.[43]

This rationale was taken a step further in ***Yerkey v Jones***[44] where Dixon J conceptualised the 'special equity' theory. In that case, the wife, Mrs. Jones, was asked to stand surety for her husband's debts. The debt was in respect of the payment of the purchase price of a property purchased by Mr. Jones from the plaintiffs. Unlike Mrs. Duval who had no legal advice given to her, Mrs. Jones did get an explanation of the nature and effect of the security document from the plaintiff's solicitors prior to her execution, which the court found was adequate enough to impress upon her the liability she was undertaking in giving the security.

Dixon J distinguished between the two cases in which a wife may act as her husband's surety, that is: (a) where the security is procured by the husband's

misrepresentation or undue influence but the obligations of which the wife has full understanding; and (b) where the wife does not understand the nature and effect of the security document but there may not necessarily have been any misrepresentation or undue influence on the part of the husband. In the first category, even if the bank has taken steps to explain the document to the wife, the security would still be impeachable. However, in the second category where no misrepresentation or undue influence has been made out against the husband, but there is the *possibility* that the wife's consent may have been procured by those means, the issue would be whether or not the bank had taken reasonable steps to ensure that the wife had full understanding of the nature and effect of the document. Dixon J stated that, in such circumstances, if the bank accepts the duly executed security document without dealing directly with the wife personally, she has a *prima facie* right to have the transaction set aside.[45] He further stated that:

> 'If the creditor takes adequate steps to inform her and reasonably supposes that she has an adequate understanding of the effect of the transaction, the fact that she has failed to grasp some material part of the document, or, indeed, the significance of what she is doing, cannot I think, in itself give her an equity to set aside, notwithstanding that at an earlier stage the creditor had relied upon her husband to obtain her consent to enter into the obligation of surety.'[46]

These cases illustrate that, in the 'non-agency' approach to third party security transactions, relief is not limited to cases where it has been proven affirmatively that there exists a relationship of agency between the bank and the debtor, or that actual undue influence has been exerted on the surety by the bank or the debtor which gives the surety an equity to set aside the transaction.

In certain circumstances and bearing in mind the relationship between the

debtor and the surety, the court may infer that there is a possibility of the debtor having influence over the surety, so that the surety's consent may not have been given as a result of the exercise of her free independent will but the debtor's influence. These relationships in which an inference of influence may be made appear to give rise to a 'protected class' of sureties, which includes a wife providing security for her husband's debts or an unemancipated adult child giving security for a parent.[47] The existence of an agency relationship is irrelevant to the issue of whether the transaction is voidable. The equity to set aside arises if (a) the bank is aware of the relationship between the debtor and the surety, (b) the surety lacked an adequate understanding of the nature and effect of the transaction and (c) the bank does not take reasonable steps to ensure that the surety has a full understanding of the transaction.

5.3 *Barclays Bank v O'Brien* and Equity's Intervention

Faced with a choice between two lines of authority, the question becomes which of the two one should apply in third party security transactions. A detailed analysis of the cases was made by the Court of Appeal, more particularly Scott LJ, in ***O'Brien***. Scott LJ expressed the view that the case law appeared 'if not at the cross-roads, at least at the junction of two diverging roads'.[48] The first road is the one supporting the 'agency' approach which did not treat married women who provided security for their husband's debts as being in any 'special protected class'. Cases like ***Coldunell v Gallon***, ***Midland Bank v Perry***, ***Bank of Baroda v Shah*** and ***BCCI v Aboody*** exemplify the first approach. A third party security will only be impeachable if it was obtained by undue influence or misrepresentation on the part of the debtor and the bank has knowledge of these facts, or if the debtor was acting as the agent of the bank. A true agency will have to be established in order for relief to be granted to the surety. Further, the bank does

not have to ensure that the surety has an adequate understanding of the transaction in order for the security to be enforceable.

The other road is the one giving support to the 'special equity' theory which recognises that there is a 'protected class' of sureties whom equity treats more tenderly than other third parties who provide security for the debts of others. Cases falling within the 'protected class' are those where the relationship between the surety and the debtor is one in which influence by the debtor over the surety and reliance by the surety on the debtor are natural and probable features of the relationship. Where the security is given by a person falling within the 'protected class', the security will be unenforceable in certain circumstances, regardless of whether the bank has knowledge of or is a party to any vitiating feature in the transaction, for example, undue influence, fraud or misrepresentation. The second approach is exemplified by cases like ***Turnbull v Duval***, ***Chaplain v Brammall***, ***Yerkey v Jones***, ***Avon Finance v Bridger*** and ***Barclays Bank v Kennedy***.

Scott LJ opined that the cases pre-***Avon Finance v Bridger*** which supported the 'special equity' theory have not been overruled by the cases post-***Kingsnorth Finance v Bell*** which gave support to the 'agency' approach. Both lines of authority were still good law and the choice between the two lines of authority was a matter of policy. Scott LJ further recognised that there is still a segregation of the responsibilities of the parties within the domestic framework. The tendency for the husband to make the business decisions is still prevalent in most households and the position appears to remain unaffected even where the wife is independent and has a separate job. He explained that, in a culturally and ethnically mixed community, the degree of emancipation of women was uneven. In consequence thereof, there is a likelihood of influence by the husband over the wife and reliance on the part of the wife on the

husband which justifies equity's intervention in protecting the interests of the wife who agrees to act as her husband's surety.[49]

The equitable protection is not limited only to married women but extends to others in an analogous situation, for example, as in ***Avon Finance v Bridger***, where elderly parents acted as sureties for an adult child. Cretney, on the other hand, criticises the Court of Appeal's decision on the basis that the effect of the decision provides protection to a class of sureties purely on the basis of marital status.[50] This raises two objections. Firstly, the solution propounded will not offer protection to parties who have opted for a domestic relationship outside of marriage.[51] Secondly, Cretney argues that the decision also ignores the changing nature of domestic relationships where the parties function on an equal footing.[52]

Having reached the conclusion that the 'special equity' theory was still good law, Scott LJ went on to explain that the security given by a surety within the 'protected class' would be unenforceable by the bank if:

> '(i) the relationship between the debtor and the surety and the consequent likelihood of influence and reliance was known to the creditor; and
>
> (ii) the surety's consent to the transaction was procured by undue influence or material misrepresentation on the part of the debtor or the surety lacked an adequate understanding of the nature and effect of the transaction; and
>
> (iii) the creditor, whether by leaving it to the debtor to deal with the surety or otherwise, had failed to take reasonable steps to try and ensure that the surety entered into the transaction with an adequate understanding of the nature and effect of the transaction and that the surety's consent to the transaction was a true and informed one.'[53]

Under this formulation, the right of the 'protected' surety to set aside the transaction is, therefore, not dependent on the bank's unconscionable behaviour or the debtor acting as its agent.

It is also interesting to note that the surety's lack of understanding of the nature and effect of the transaction forms a basis of relief for the surety. Berg observes that condition (ii) appears to have been formulated for the purposes of ensuring that the equitable remedy to set aside remains available, even in the absence of undue influence or misrepresentation.[54] The Court of Appeal appears to have placed a greater emphasis on the notion of 'informed consent' on the part of the surety which stems from the surety having an adequate understanding of the nature and effect of the transaction. The stand evidently taken is that the surety's lack of understanding, whether as a result of either an inadequate or no explanation being given to her of the nature and extent of the transaction, could suffice to set aside the transaction as opposed to merely giving the surety the right to claim damages.[55]

Hence, a 'protected' surety may set aside the transaction if she is able to show that her consent was procured through the debtor's undue influence or misrepresentation or some other actionable wrong. Under the normal principles of equity, the surety's equity to set aside the transaction will only be enforceable against third parties, such as the bank, if either the debtor was acting as the agent of the third party or the third party had notice, whether actual or constructive, of the facts giving rise to the surety's equity. In that respect, the 'agency' theory applied in the earlier authorities is still maintained and has not been overruled by Scott LJ's formulation of the principles applicable to third party security transactions where the surety falls within the 'protected class'.

Scott LJ, however, felt that the cases in which the bank would appoint the

debtor as its agent for the purposes of procuring the security would be rare. Banks may often stipulate that additional security is required for the availability of a facility and may even leave the matter of procuring such additional security to the debtor. However, even where the debtor is asked to procure additional security, such instances will not necessarily be construed as 'leaving it all to the debtor' so as to amount to an appointment of the debtor as the bank's agent.

Thus, it appears that, where the surety is not within the 'protected class', the 'agency' theory is still applicable and a transaction will not be set aside, even where there is affirmative proof of undue influence or misrepresentation, unless the debtor was acting as the bank's agent or the bank has knowledge of the vitiating factors. The question of whether an agency exists between the bank and the debtor will depend of the facts of each case. In order for the court to draw the inference of an agency, there has to be some proof of either actual or ostensible authority on the part of the bank or, as in ***Barclays Bank v Kennedy***, circumstances where the bank's actions were of such detachment to the point of being content to leave it to the debtor to obtain the security from the surety.

When ***O'Brien*** came up for appeal before the House of Lords, the 'special equity' theory as applied by Scott LJ and the majority of the Court of Appeal was rejected by the House of Lords.[56] In ***BCCI v Aboody***, the Court of Appeal stated that undue influence may be categorised as follows:-

(a) Class 1 in respect of actual undue influence where the complainant has to prove affirmatively that undue influence has been exerted; and

(b) Class 2 in respect of presumed undue influence where the complainant has to show the existence of a relationship of trust and confidence between himself and the wrongdoer whereby it is fair to presume that the wrongdoer has abused

> this relationship by exerting undue influence on the complainant in procuring his consent to enter into the impugned transaction. This category may in turn be further divided into two sub-categories, that is, Class 2A where certain relationships, as a matter of law, raises the presumption of undue influence[57] and Class 2B where, although there is no Class 2A relationship, the complainant shows the existence of a *de facto* relationship under which the complainant reposes trust and confidence in the wrongdoer so that the presumption arises.

As the husband-wife relationship is not one which falls within a Class 2A relationship[58], a surety/wife would then have to prove either actual undue influence or the existence of a Class 2B relationship. In order to acquire an equity to set aside the transaction as against the debtor/husband, she will have to show the existence of a *de facto* relationship, in which she has reposed trust and confidence in her husband in respect of financial matters, thereby raising the presumption of undue influence. Lord Browne-Wilkinson conceded that the earlier cases did show a special tenderness to married woman which was attributable to two factors. Firstly, many of the cases of wives acting as sureties would probably fall within the Class 2B category as the wife would, in most instances, be able to demonstrate that she has placed trust and confidence in her husband in financial matters. This would give rise to the presumption of the exercise of undue influence by the husband over her. Secondly, the sexual and emotional ties between the parties would render the wife more vulnerable to abuse of the trust and confidence which she places in her husband.

Whilst there is no problem of the wife establishing an equity against the husband upon her proving that she falls within the Class 2B category, the issue would be whether her equity is enforceable against a third party, like the bank. In determining

this issue, their Lordships disagreed with the approach taken by the Court of Appeal. Lord Browne-Wilkinson categorically rejected the proposition that the interests of the wife acting as surety were protected by the 'special equity' theory as he found no basis for affording special protection to a limited class in relation to one type of transaction only. In addition, an analysis of the cases showed that the 'special equity' theory propounded by Scott LJ was supported only by two cases, namely, ***Yerkey v Jones*** and the decision of the Court of Appeal in the instant case.

Their Lordships' main objection to the 'special equity' theory was the requirement of proof by the bank that the wife had an adequate understanding of the nature and effect of the transaction so as not to be bound by her equity. The result of requiring proof of such knowledge and understanding by the wife in these cases is tantamount to an attempt to reintroduce by the back door a presumption of Class 2A undue influence in a husband-wife relationship, which has been rejected, or alternatively, the approach adopted by Romilly J in ***Hoghton v Hoghton***[59] which, although not expressly overruled, their Lordships have held to be bad law.[60]

The House of Lords applied, instead, the doctrine of notice. Under the normal principles of equity, the wife's equity to set aside the transaction would only be enforceable against third parties if either the husband was acting as the agent of the third party or the third party has actual or constructive notice of the circumstances which gave rise to her equity. The matter would be resolved by, firstly, considering the actions of the debtor, that is, whether or not he has exercised undue influence or misrepresentation or committed any other legal wrong on the surety in obtaining her consent. If the debtor has committed these acts, the surety would then acquire an equity to set aside the transaction as against the debtor. The next question which arises is whether the surety's equity is enforceable against a third party, such as the bank, and

this would have to be determined by the doctrine of notice.

Lord Browne-Wilkinson was of the opinion that there was no necessity for the introduction of the 'special equity' theory to protect the interests of wives who act as sureties if the doctrine of notice is properly applied. He stated his reasons as follows:

> 'The key to the problem is to identify the circumstances in which the bank will be taken to have had notice of the wife's equity to set aside the transaction. The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party asserting that he takes free of earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or to take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it. Therefore where a wife has agreed to stand surety for her husband's debts as a result of undue influence or misrepresentation, the bank will take subject to the wife's equity to set aside the transaction if the circumstances are such as to put the bank on inquiry as to the circumstances in which she agreed to stand surety.'[61]

Thus, the question of whether the bank's rights in the security would prevail over the wife's equity to set aside the transaction depends on identifying the circumstances in which the bank could be fixed with notice of the wife's equity, rather than any notion of a 'special equity'.

The courts' 'tender treatment' of wives in such circumstances are attributable to two reasons. Firstly, most wives, even if they are independent and have separate jobs,

still repose trust and confidence in their husbands in respect of financial matters and are, therefore, more likely to be able to prove a Class 2B presumed undue influence than other third party sureties. Secondly, the sexual and emotional ties evident in such relationships render the wife more susceptible to her husband's undue influence.[62] Thus, the security provided by the wife for her husband's debts would be voidable if the bank had actual or constructive notice that her consent may have been procured as a result of undue influence or misrepresentation or some other legal wrong having been committed by the husband. The bank would be put on inquiry and deemed to have constructive notice by the combination of two factors. First, the transaction on the face of it is not to the financial advantage of the wife and second, there is substantial risk that in procuring the wife's consent to stand surety, the husband has committed a legal or equitable wrong.[63]

The House of Lords made it clear that these principles are not limited exclusively to the relationship of husband and wife but would be equally applicable to the following types of relationships, that is[64]:-

(a) where the surety is living with the debtor, that is, cohabitants whether heterosexual or homosexual;

(b) where the debtor was implicitly trusted by the surety in that the surety places trust and confidence in the debtor in relation to his or her financial affairs, for example, elderly parents and adult child, parent and unemancipated child.

Lord Browne-Wilkinson further suggested that the bank can avoid being fixed with constructive notice of the surety's equity to set aside the transaction by taking 'reasonable steps'.[65]

The purpose of the 'reasonable steps' is to bring home to the surety the risk that she is running in entering into the transaction and to advise the surety to seek

independent legal advice. Examples of 'reasonable steps' which a bank should take include, *inter alia*, insisting that the surety attends a private meeting with a representative of the bank, in the absence of the debtor, at which the extent of her liability as surety is explained to her, that the surety is warned of the risk that she is running by entering into the transaction and urged to take independent legal advice. In addition, where the circumstances are exceptional, for example, when the bank has knowledge of facts which makes the presence of undue influence or misrepresentation not only possible but probable, the bank should insist that the surety seek independent legal advice.

The decision of the House of Lords places less emphasis on the notion of 'informed consent' on the part of the surety as compared to the Court of Appeal's decision. The import of the decision is that, even though the 'protected class' propounded by Scott LJ was rejected, the House of Lords conceded equity's protection of sureties who may be classified as 'vulnerable'. In that respect, notice of the vulnerable surety's equity and the reasonable steps which the bank should take to avert such notice are central in the House of Lords' approach, rather than full understanding on the part of the surety so that her consent is an informed one. As long as the bank has taken reasonable steps and has urged the surety to seek independent legal advice, the bank will avoid being fixed with notice of the surety's equity to set aside the transaction. The bank is not under any additional burden of proving that the surety has full understanding of the nature and effect of the transaction and that her consent was an informed one.

5.4 Limitations of *O'Brien* - Bank's responsibility

The decision in ***O'Brien*** has seen the extension of equity's protection to a class of

sureties described as being vulnerable, which renders the security given by such a person voidable in the circumstances laid down by Lord Browne-Wilkinson. The approach taken by the House of Lords may appear to differ from that taken by the majority in the Court of Appeal in that the former has rejected the 'special equity' theory and accepted the doctrine of notice as being the appropriate basis for setting aside the security given. However, in both courts, there was consensus that equity has treated married women acting as sureties for their husbands' debts more tenderly than other sureties.

Despite the fact that the husband-wife relationship does not give rise to a presumption of Class 2A undue influence and that there may be an absence of affirmative proof of actual undue influence having been exerted by the husband over the wife, the wife may, under Scott LJ's analysis, still acquire an equity to set aside the transaction. Being a member of the 'protected class', the wife may acquire this equity if it is shown that she lacked an adequate understanding of the transaction and the bank has failed to take steps to ensure that her consent is a truly informed one. Whilst rejecting the 'special equity' theory, the House of Lords did recognise a class of 'vulnerable sureties' which includes spouses, cohabitants, whether heterosexual or homosexual, as well as others who repose trust and confidence in the debtor.

Equity's intervention is, however, formulated along the lines of notice, rather than any 'special equity' applicable to a 'protected class'. Following this approach, equity's intervention is not determined by whether there has been undue influence or misrepresentation on the part of the debtor over the surety, or a lack of understanding by the surety of the nature and effect of the transaction, so that the consent given is not an informed one. The issue is whether the bank has actual or constructive notice of any vitiating circumstances. This is, in turn, determined by whether the circumstances are

such that notice, whether actual or constructive, may be reasonably imputed to the bank, thereby shifting the burden of proof from the surety to the bank.

The emphasis of the notice approach is, thus, not on whether the surety has given an informed consent. The giving of security by a vulnerable surety appears to raise the presumption that the security may be voidable, unless it can be shown that the bank has taken reasonable steps to avoid being fixed with constructive notice, for example, by taking the measures suggested by Lord Browne-Wilkinson, such as drawing to the attention of the surety the nature and effect of the transaction, the inherent risk which she is taking on by acting as surety and urging the surety to take independent legal advice.

The notice approach taken by the House of Lords, however, raises two questions. The first relates to the issue of whether the doctrine of notice is appropriate in dealing with third party undue influence in surety transactions. The second deals with the exact boundaries of the bank's responsibility in such transactions. With respect to the first issue, the notice approach has been criticised as lacking in conceptual clarity. Mee argues that the doctrine of notice is inappropriate in cases of undue influence or misrepresentation by third parties.[66] He notes that, traditionally, the doctrine of notice has been designed to deal with competing priorities which arise from two separate transactions, whereas cases like ***O'Brien*** and ***Pitt*** actually deal with only one transaction. In third party security transactions, there cannot be said to be any vitiating factors affecting the transaction until the guarantee or mortgage is created. In the premises, Mee observes that there are no competing priorities to which the doctrine of notice may be applied. In order for the doctrine to apply, he argues that the courts have created the fiction of two transactions: first, the voluntary transaction between the husband and the wife whereby the husband acquires certain benefits and second, the

contract between the bank and the husband where those benefits pass on to the bank in exchange for the consideration which the bank passes on to the husband.

He, therefore, argues that the result of these cases is effectively to allow the surety to rescind the agreement which is better premised on the surety's capacity to consent being impaired by the debtor's undue influence or misrepresentation, than on the bank's state of knowledge of vitiating circumstances. In recognising the fact that the relief being sought is rescission, defences to such a claim, particularly the defence of reliance on the validity of the contract, should also be available to the bank. Such defences should only be denied to the bank if it has either actual or constructive notice of the vitiating factors.[67] Mee contends that this alternative approach focuses on the reasonableness of the bank's conduct, rather than whether it has notice, actual or constructive, of the vitiating factors. The approach will further encourage banks to take reasonable care to prevent undue influence or misrepresentation by third parties and at the same time, avoid the theoretical problems inherent in the approach taken in ***O'Brien***.

Rickett and McLauchlan, on the other hand, observe that reference to the doctrine of notice in Lord Browne-Wilkinson's judgment appears to serve the purpose of identifying a duty of care which banks owe to sureties.[68] The origin of this duty of care is, however, conceptually dubious. It is arguable that the duty of care may be premised on either tort or contract but in either event, the duty is a personal one. This is where the conceptual confusion arises. Rickett and McLauchlan note that, in focusing on notice of rights, ***O'Brien***, is effectively providing the surety with a proprietary remedy, whereas, conceptually, the proper remedial focus of a breach of duty of care is compensation for loss, for example, damages or possibly an account of profits. They, therefore, conclude that, in practical terms, the House of Lords' decision in ***O'Brien***

has the same effect as the 'special equity' theory. The test appears to be an extended version of the 'special equity' theory but is couched in terms of notice and, thus, leads to confusion.

Their suggested approach is to reformulate the test into one which recognises the equitable duty of care which banks owe to sureties in explaining or ensuring that the surety is told to get an explanation of the nature and effect of the transaction. This, they argue, will then allow the courts to move away from the conceptual problems of an extended notion of notice. The breach of the duty of care by the bank will be treated as an equitable wrong, which renders the bank primarily liable. They further suggest that the advantage of adopting a duty of care approach is to enable the courts to move away from the 'all or nothing' approach which the courts have taken post-***O'Brien*** in terms of the enforceability of the security.[69] Given that the courts have recognised that a bank is generally under no duty to explain the terms of the security document to a surety[70], except possibly the situations where the surety is a customer of the bank[71], framing the bank's responsibility to a surety in terms of an equitable duty raises certain difficulties. This approach still leaves unanswered the exact juristic basis upon which this equitable duty of care is to be premised. Is the duty of care limited to the bank's giving an adequate explanation to the surety of the nature and effect of the transaction or does it extend further? Furthermore, it does not offer an adequate explanation for justifying a distinction between vulnerable sureties and other sureties for the imposition of this duty of care.

The added problem of the notice approach is that it is unclear in ***O'Brien*** whether the test is equally applicable to registered land.[72] It is arguable that the doctrine of notice is only applicable to cases involving unregistered land.[73] It would seem that if the security involves registered land, the wife's equity would only be binding on the

bank if she were in actual occupation so as to have an overriding interest in the property which is binding on the bank. In other circumstances, the doctrine of notice will not be applicable. In response, Dixon and Harpum argue that the doctrine of notice, as applied in third party security transactions, is not limited to unregistered land.[74] This is illustrated by three examples.

The first relates to situations where the wife waives her rights in the property as a result of the husband's undue influence or misrepresentation. In such instances, if the bank is privy to the husband's impropriety, the bank will not be allowed to rely on the wife's waiver, whether the land is registered or unregistered. The issue in this case will be the validity of the waiver and not the mortgage itself. Although the subject matter of the dispute is real property, the nature of the wife's equity to set aside the transaction is personal and is binding on the bank by reason of its notice of the vitiating factors.

The second example refers to the 'reasonable steps' recommended in ***O'Brien***. Although a proprietary right will be binding on the bank if it fails to make reasonable enquiries as required by s.70(1)(g) of the Land Registration Act 1925, Dixon and Harpum argue that the 'reasonable steps' proposed by Lord Browne-Wilkinson in ***O'Brien*** to avoid being fixed with constructive notice of the wife's equity are not the same as those required of the bank to avoid being bound by the wife's overriding interest. In the latter case, the bank is seeking to avoid a wholly different liability.

The third and final example which Dixon and Harpum rely on is the situation where the third party security transaction involves a guarantee, as opposed to a mortgage. The relationship between the parties in the former is purely contractual and does not involve property law. In such circumstances, the transaction may be set aside where the bank has notice of the wife's equity. This reveals that the crucial factor is not whether property forms the subject matter of the mortgage or guarantee, but the nature

of the wife's rights generated by the undue influence or misrepresentation. Hence, they conclude that the issue relates to equities *inter partes* and revolves around the validity of the transaction, rather than whether the bank is bound by the wife's rights in the land. The doctrine of notice being applied in these third party security transactions renders the transaction voidable in the event that the bank is privy to the husband's impropriety. Reference to notice in ***O'Brien*** is, therefore, different from the orthodox doctrine of notice applied in property law.

Notwithstanding that the notice approach renders it possible for banks to be bound by the surety's equity, there are certain limits to the bank's responsibility for the private conduct between the debtor and the surety. Fehlberg succinctly points out that ***O'Brien*** limits the bank's responsibility in four main ways.[75] Firstly, undue influence, misrepresentation or some other legal wrong must have been committed by the debtor before the bank can be fixed with constructive notice. In the absence of undue influence or misrepresentation having been exercised by the debtor, Fehlberg argues that the need to establish the commission of some other legal wrong by the debtor in inducing the surety's consent to the transaction may poses an effective barrier to her being granted relief. The surety may find it harder to prove the commission of a legal wrong, especially in cases where the emotional pressure exerted by the debtor is more insidious and subtle. This will, in turn, pose a bar to relief being given to the surety.

Berg, on the other hand, takes the view that proof of undue influence appears to be a minimal condition. Whilst conceding that the surety will still need to prove undue influence, misrepresentation or the commission of some other legal wrong, he argues that two features in ***O'Brien*** tilt the scales in the surety's favour.[76] Berg suggests that there is no real requirement for the surety to prove that the bank has actual or constructive knowledge of her equity resulting from the debtor's wrongdoing.

Secondly, the bank is required to explain or take steps to ensure that the surety is urged to take independent legal advice so as to protect its security. He argues that the effect of ***O'Brien*** is to fix the bank with the requisite knowledge by virtue of the relationship between the debtor and the surety. This may be illustrated by the House of Lords removing the 'manifest disadvantage' requirement in cases of actual undue influence in ***Pitt***.

Prior to ***Pitt***, the court in ***BCCI v Aboody*** stated that there are two aspects to undue influence, proof of which is required in order for a transaction to be set aside. The first is undue influence either in fact (actual undue influence) or presumed and the second is the 'manifest disadvantage' of the transaction to the surety. Regardless of the surety's plea being based on actual or presumed undue influence, the surety must also prove that the transaction is manifestly disadvantageous to her before the transaction may be set aside. Slade LJ further stated that, for the purposes of undue influence, 'manifest disadvantage' has to be a disadvantage which is obvious as such to any independent and reasonable person, who considers the transaction at the time and with knowledge of all the relevant facts. The loss of the power of choice on the part of the surety, or the fact that there is a risk of the security being called in by the bank[77], is not in itself sufficient to establish that the transaction is manifestly disadvantageous to the surety. Thus, the test depends on balancing the seriousness of the risk of enforcement to the surety, in practical terms, against the benefits derived by the surety in giving the security.[78]

However, in ***Pitt***, Lord Browne-Wilkinson disagreed with the interpretation taken by the Court of Appeal in ***BCCI v Aboody***. His reading of Lord Scarman's speech in ***National Westminster Bank v Morgan***[79] was that the 'manifest disadvantage' requirement serves to raise a Class 2 presumption and is not in itself a

constituent element of undue influence. Lord Browne-Wilkinson opined that actual undue influence is a species of fraud which entitles a person, who has been induced by such actual undue influence, to set aside the transaction as of right.[80] Thus, a surety who proves actual undue influence is not under the further burden of proving that the transaction is manifestly disadvantageous to her. Berg, therefore, concludes that the dispensation of the 'manifest disadvantage' requirement in cases of actual undue influence and its presumptive role in presumed undue influence means that a surety may find it easier to prove undue influence, whether actual or presumed. Even though the husband-wife relationship is not one where the presumption of undue influence automatically arises, the presumption may easily arise where the surety shows that she has placed herself in a relationship of dependence on the debtor.[81]

Another limit to the bank's responsibility is the bank's ability to avoid being fixed with constructive notice of the surety's equity by taking the suggested 'reasonable steps', even where there is undue influence or misrepresentation on the part of the debtor.[82] In that respect, the action needed is twofold: firstly, to explain to the surety the risks involved in the transaction and secondly, to advise the surety to take independent legal advice before entering into the transaction. The 'reasonable steps' requirement presupposes that the surety's consent to the transaction is obtained properly. Berg, on the other hand, feels that this condition places sureties in the 'vulnerable class' in a more favourable position as it offers protection against the bank.[83]

One of the recommended 'reasonable steps' entails the bank holding a separate meeting with the surety, in the absence of the debtor, to explain the transaction to her. ***O'Brien*** appears to suggest that this personal explanation has to be given to the surety in every case and is not limited to those situations where the bank is aware or may

suspect that undue influence has been exerted. Berg, therefore, argues that there will be fewer cases of vulnerable sureties giving security without understanding the full extent of their liability and that the ***O'Brien*** test places the burden on banks to be alert to circumstances which may give rise a vulnerable surety's equity.[84]

Whilst the 'reasonable steps' suggested by Lord Browne-Wilkinson in ***O'Brien*** are not rules of law, it is evident that a prudent bank will not choose to ignore them if it wants to avoid being fixed with constructive notice. This is exemplified by the response of the banking industry to ***O'Brien*** in terms of increased provision of information to those who are providing third party securities. As protection of the security given is based on the doctrine of notice, banks have introduced measures to avoid being fixed with constructive notice. This can be seen from the 1992 edition of the Good Banking - Code of Practice (hereafter referred to as 'the Code of Practice') which laid down the recommended procedures to be adopted by banks when taking third party securities as follows[85]:-

> 'Banks and building societies will advise private individuals proposing to give them a guarantee or other security for another person's liabilities that (i) by giving the guarantee or third party security he or she might become liable instead of or as well as that other person; (ii) he or she should seek independent legal advice before entering into the guarantee or third party security. Guarantee and other third party security forms will contain a clear and prominent notice to the above effect.'

Subsequent to the House of Lords' decision in ***O'Brien***, two further editions of the code of banking practices have been drawn up. The second edition of the Code of Practice was adopted in March 1994, with the added recommendation for banks to advise a potential surety of the extent of his or her liability under the security to be

given.[86] This edition was followed up by a third edition, simply called the Banking Code, which came into effect on 1 July, 1997.[87] In all three editions of the banks' code of practice, there is no express recommendation that banks should hold a private interview with the surety, in the absence of the debtor, to explain the risks involved in the transaction. In fact, the cases post-***O'Brien*** indicate that banks appear to treat the private meeting requirement as an alternative to the surety seeking independent legal advice.[88]

Further, banks are advised to urge the surety to take independent legal advice since written warnings to the surety are often not read by the surety before entering into the transaction and may sometimes be intercepted by the debtor. Thus, a bank acting in accordance with the Banking Code and following the measures laid down in ***O'Brien*** would be able to effectively limit its responsibility, even if the surety proves affirmatively that there has been undue influence or misrepresentation on the part of the debtor. Notwithstanding the measures taken by the banking industry, Fehlberg's argument is persuasive, especially when seen in the light of developments subsequent to ***O'Brien*** in relation to the independent legal advice requirement, which will be discussed in greater detail in the following chapter.

The independent legal advice requirement is a further limitation of the banks' liability. Fehlberg describes this requirement as being the ultimate limit for the bank's responsibility for the simple reason that, once the bank has advised the surety to seek independent legal advice, the surety will not be able to escape liability even if the security was procured by the debtor's undue influence, unless the bank has knowledge of this vitiating factor prior to the security being executed. Where the bank has complied with this requirement, the surety will not be relieved of her liability under the security, however much she was pressured by the debtor into giving the security.[89]

This limitation of the bank's liability is probably the most effective barrier to a surety's claim of a binding equity since the focus of the courts is not on the actual legal advice given to the surety but the fact that the surety has been urged to seek independent legal advice. If the bank has highlighted to the surety the need to seek independent legal advice and receives in return the security document duly signed by the surety in the presence of a solicitor, this appears to raise the presumption that the surety has full understanding of the terms of the transaction and the actual risk she runs in giving the security. The emphasis is on the need to urge the surety to take independent legal advice, or in exceptional circumstances where the bank is aware that undue influence or misrepresentation is not only possible but probable, to insist that independent legal advice is sought, rather than the actual giving of independent legal advice.

Last but not least, the responsibility of banks may be further limited by the requirement that the transaction must not 'on its face' be to the financial disadvantage of the surety. This arguably is a different requirement to the 'manifest disadvantage' requirement. The limit to the bank's responsibility under the 'on its face' heading is clearly exemplified in ***Pitt***. In ***Pitt***, the loan was granted by the bank to the joint account of the Pitts. The purpose of the loan was stipulated as being for the discharge of the existing mortgage over the property and that the balance thereof was for the purchase of a holiday home. As far as the bank was aware, the transaction was a joint loan to the Pitts, the purpose of which was for their joint benefit. The loan was disbursed to the parties jointly and there was no indication to the bank that the actual borrower was Mr. Pitt and that Mrs. Pitt was merely acting as surety. Thus, even though there was a finding of undue influence having been exerted by the husband in procuring her consent to the security, the transaction was, on the face of it, not to her financial

disadvantage. Accordingly, the bank was not put on inquiry as to any equity that she might have acquired against the husband to set aside the transaction.

In contrast to ***O'Brien***, it was clearly evident in that case that the loan was being granted solely to the husband. It was evident on the face of the transaction that Mrs. O'Brien was acting as surety and that the transaction was not to her financial advantage. In the premises, the bank was put on inquiry and, in the absence of taking reasonable steps, would be fixed with constructive notice of her equity to set aside the transaction. As stated by Lord Browne-Wilkinson in ***Pitt***:-

> 'What distinguishes the case of a joint advance from the surety case is that, in the latter, there is not only the possibility of undue influence having been exercised but also the increased risk of it having in fact been exercised because, at least on its face, the guarantee by a wife of her husband's debts is not for her financial benefit. It is the combination of these two factors that puts the bank on inquiry.'[90]

The main distinction lies in the fact that a wife standing surety gains no financial benefit from giving the security whereas, in the case where she is a co-borrower, some benefit will be derived from her giving the security.

It has been observed that the 'on its face' requirement is intentionally a superficial one, the reason being that banks should only be expected to guard against matters which are obvious to them.[91] As conceded by Lord Browne-Wilkinson in ***Pitt***[92], if third parties were to be fixed with constructive notice in every transaction involving husbands and wives, such transactions would become impossible, as banks and financial institutions would be discouraged from making advances to these parties for fear that the security given would be later impeached. Thompson, however, notes that the requirement raises the issue as to when the courts will consider a transaction to

be sufficiently suspect so as to put a bank on inquiry.[93] Banks will incline towards the side of caution by ensuring that the vulnerable surety is urged to seek independent legal advice but at the same time, it does not effectively eradicate the undue influence which the surety is subjected to. The cases can range between two extremes where at one end, one is faced with cases like ***O'Brien*** where the loan is for the sole benefit of the husband, and at the other end, with cases like ***Pitt*** where the loan appears to be for the joint benefit of the parties. The cases, therefore, show that the less honest the debtor is in explaining the true purpose of the loan to the bank, as in ***Pitt***, the more likely the bank will be able to enforce the security against the surety, even where there is actual undue influence.

5.5 Outstanding issues after *O'Brien*

To a certain extent, the decision in ***O'Brien*** was a welcomed one for banks as it helped to clarify the confusion and ambiguity raised by the previous case law and laid down comprehensible principles in relation to equitable relief in third party security transactions. Banks now have a clearer picture of their legal position *vis-à-vis* the surety and the appropriate steps which they must take to ensure that the security given to them by a surety, especially one who falls within the 'vulnerable class', remains unimpeachable if subsequently challenged by the surety. However, as can be seen from the discussion in the preceding section, the protection accorded to 'vulnerable sureties' is not as far-reaching as ***O'Brien*** suggests and the decision has effectively placed certain limits on the banks' responsibility. In addition, ***O'Brien*** has left certain questions unanswered which will be the main focus of this section.

First, the requirement of the transaction being 'on its face' to the financial advantage of the surety is an element which is altogether separate from the 'manifest

disadvantage' requirement needed for establishing a Class 2 presumed undue influence. A surety claiming a Class 2 presumed undue influence will have to show initially that the transaction is to her 'manifest disadvantage' so as to give rise to the presumption of undue influence. Having established the manifest disadvantage and in order for her equity to be enforceable against the bank, the surety will then have to show that the transaction is not to her 'financial advantage'. This serves to put the bank on inquiry, thereby fixing the bank with constructive notice of her equity, in the event that the bank fails to take reasonable steps to rebut this presumption.

In ***Pitt***, the court had noted three points. First, there was actual undue influence on the part of the husband in inducing the wife to enter into the transaction. Second, the court stated that manifest disadvantage was not required where actual undue influence had been proven. Third, as the transaction was 'on its face' to the financial advantage of the wife, the bank was not put on inquiry of the existence of her equity and, accordingly, no constructive notice could be imputed to the bank. This leads to the question of whether 'financial advantage' is just the flip side of the coin for 'manifest disadvantage'. As there was evidence of actual undue influence in ***Pitt***, Mrs. Pitt was not required to prove that the transaction was 'manifestly disadvantageous' to her in order to acquire an equity against her husband. She was, however, required to show that the transaction was not to her financial advantage, in order for her equity to be enforceable against a third party like the bank. This may seem like a case of reintroducing by the back door the 'manifest disadvantage' requirement under the guise of 'financial advantage'.[94]

The 'financial advantage' requirement provides a yardstick to banks to take precautions so as to avoid being fixed with constructive notice of the surety's equity. The rationale for this condition appears to be for the practical purposes of facilitating

third party security transactions, especially between husbands and wives, which would otherwise be impossible.[95] However, from the surety's perspective, the approach may not be practicable since it does not accord with reality. The main objection here is that it fails to take into consideration the fact that, if the surety is subject to the influence of the debtor in entering into the transaction, she may have little control over how she will appear in the security documentation.[96] Clear examples of this are Mrs. Pitt in ***Pitt*** and Mrs. Aboody in ***BCCI v Aboody***, who appeared on the company's register as a substantial shareholder and company secretary but was very much under her husband's actual undue influence.

This point is further supported by the fact that the House of Lords has acknowledged that there is 'substantial risk' of abuse of trust and confidence in such emotional and sexual relationships.[97] Thus, the combination of these factors may prove the 'financial advantage' requirement to be an unreliable gauge for exposing the exercise of undue influence or misrepresentation. The law, as it stands, results in an approach being taken which, although fair to the bank, may be unfair to the surety as the surety may have little control over how she is to appear on the face of the transaction. Hence, this requirement may become an effective obstacle to relief being granted.

It becomes questionable whether the notice approach formulated by the House of Lords in ***O'Brien*** should be reformulated so that the bank should hold a private consultation in every instance, rather than be limited to situations where a person falling within the 'vulnerable class' offers security for advances to be made by the bank. In that respect, the ***O'Brien*** requirement for a private meeting to be held between the bank and the surety, in the absence of the debtor, should be the preferred practice for not only banks but all creditors. Further, this should be an across the board

requirement, regardless of the way in which the transaction may appear 'on its face', so that a more equitable balance is achieved, especially in view of the fact that there is 'substantial risk' of a legal wrong being committed by the debtor in procuring the security.

Another issue which has been left unanswered in ***O'Brien*** relates to independent legal advice. It is apparent from the decision that it is essential for a bank to ensure that the surety is encouraged to take independent legal advice before entering the transaction[98] so as to avoid being fixed with constructive notice. However, their Lordships have not laid down any guidelines as to the qualitative requirements of such legal advice. Neither the Lords' decision nor the Banking Code throws any light on the extent of the independent legal advice which a bank should stipulate that a surety is required to take, before it can be deemed to have taken the necessary 'reasonable steps'.

Cases post-***O'Brien*** such as ***Massey v Midland Bank***[99] and ***Banco Exterior Internacional v Mann***[100] illustrate how this requirement may be easily satisfied, once the security documents are duly executed by the surety, in the presence of a solicitor. The bank is not expected to stipulate and/or enquire about the extent of the independent legal advice given to the surety under this requirement. The independent legal advice requirement has generated a great deal of controversy and doubts have been raised as to its effectiveness, as well as appropriateness, in monitoring advantage-taking in third party security transactions. The issues raised in respect of this requirement will be discussed in greater detail in the following chapter.

The third issue left unanswered by ***O'Brien*** is whether a charge may be partially enforced. In ***O'Brien***, neither the Court of Appeal nor the House of Lords addressed this issue. Mrs. O'Brien had acknowledged that at all material times she was

under the mistaken impression that her liability under the charge was limited to £60,000. There was reference in the Court of Appeal's judgment, but as the sum of £60,000 had been paid and was not in dispute, Scott LJ's observation that the charge was not enforceable against Mrs. O'Brien, save to the extent of £60,000, can only be treated as *obiter* that the charge may be partially enforced. On appeal, the matter was not raised before the Lords. Lord Browne-Wilkinson reached the conclusion that Mrs. O'Brien was entitled to set aside the charge, whereas Purchas LJ stated that the bank could not recover more than £60,000 from Mrs. O'Brien, which it had already received. These statements throw little light on whether or not a charge which was procured by the debtor's undue influence or misrepresentation would be set aside in toto or could be partially enforced.

In ***Midland Bank v Greene***[101], both husband and wife mortgaged the jointly owned property to the bank as security for a loan to purchase the property as well as to cover all existing and future debts of the husband. The mortgage was later extended to cover a home improvement loan. The husband died leaving behind large debts. The bank sought possession of the property, which the wife resisted on the ground that undue influence had been exercised on the part of the husband. The court found that the home improvement loan was to the financial advantage of the wife and was, therefore, not voidable, even though she lacked independent advice. However, acting as surety for her husband's existing and future debts was manifestly to her disadvantage which gave her an equity to set aside. This equity was enforceable against the bank unless it had taken reasonable steps to avoid being fixed with constructive notice. The court conceded that there was no power to rewrite the terms of the mortgage but it could set aside the mortgage on terms as a condition of the wife obtaining equitable relief. On that premise, an order for possession was made subject to

the wife repaying all outstanding sums due under the home improvement loan.

The approach taken in ***Midland Bank v Greene***, supporting the proposition that a charge may be set aside on terms, was followed by the court in ***Bank Melli Iran v Samadi-Rad***.[102] However, this proposition was rejected in ***Allied Irish Bank v Byrne***.[103] The court held that a transaction has to be set aside entirely as it was 'an all or nothing process'. The basis for this proposition is that a person alleging misrepresentation as a ground for setting aside a transaction should be put in the position he would have been in except for the misrepresentation. This would entail ascertaining the position which the party would have been in if the transaction had not taken place and not modifying the terms of the transaction to accord with the misrepresentation.

In the subsequent case of ***TBS Bank v Camfield***[104], the Court of Appeal reviewed ***Midland Bank v Greene***, ***Bank Melli Iran v Samadi-Rad*** as well as ***Allied Irish Bank v Byrne*** and came to the conclusion that the approach taken in ***Allied Irish Bank v Byrne*** is to be preferred. Where it is shown that the surety's consent to the transaction was procured by the debtor's misrepresentation and the bank had failed to take the necessary reasonable steps, the charge would be set aside in its entirety and could not be partially set aside or set aside on terms. Thus, the present position appears to be that, if the bank has been put on inquiry and has not taken reasonable steps to avoid being fixed with constructive notice of the surety's equity to set aside the transaction, the bank would be bound by the surety's equity. The bank would not be able to enforce the security partially or have it set aside on terms, even if the surety had been under the mistaken belief that the security given was intended to secure a specified amount as opposed to 'all monies'.[105]

Finally, ***O'Brien*** appears to have established for a surety within the 'vulnerable

class' an alternative to the plea of *non est factum* which enables her to set aside the transaction. The *non est factum* plea is available to a person who has signed a document believing the document to have a particular character or effect, whereas, in fact, it has a very different character or effect. Thus, a surety's contention that she has not been given any independent legal advice and, therefore, lacked an understanding of the nature and effect of the document runs very closely to a plea of *non est factum.* However, a plea of *non est factum* is rarely successfully pleaded by a person of full capacity who can read and write. The claimant bears the burden of proving that she has acted with reasonable care to ascertain the nature and effect of the document before executing it. The plea will not stand if the party were content to sign the document without taking the trouble to read over the document, or to find out the general effect of the nature of the document.

In addition, the surety would also have to show that the document which she had executed is radically or fundamentally different from the document which it was believed to be. In the words of Lord Wilberforce in ***Saunders v Anglia Building Society***[106], 'a man cannot escape from the consequences, as regards innocent third parties, of signing a document if, being a man of ordinary education and competence, he chooses to sign it without informing himself of its purport and effect.' It is interesting to note that, when ***Norwich & Peterborough Building Society v Steed (No. 2)***[107] came before the Court of Appeal three months prior to ***O'Brien***, this view was supported by Scott LJ. In ***Avon Finance v Bridger***, the elderly parents had pleaded *non est factum* but the plea had been rejected by the Court of Appeal on the grounds that the parents had failed to show that they had exercised reasonable care in ascertaining the nature and effect of the transaction. However, this finding was not fatal to their case, as the court held that the parents still had a right in equity to set aside the transaction

which was entered into without independent advice and as a result of the son's undue influence.

It is obvious from ***Avon Finance v Bridger*** that, even if a plea of *non est factum* were to fail, it is still possible for a surety within the 'vulnerable class' to acquire an equity to set aside the transaction as against the debtor which is enforceable against a bank, which has failed to take the requisite reasonable steps. It does, however, seem contradictory that, in the very same scenario, a finding that the surety's lack of understanding of the transaction, as a result of her failure to take reasonable care to satisfy herself of the nature and effect of the document, would not assist her in a plea of *non est factum*. Yet, it would do so in a claim for equitable relief by virtue of her being a member of a special class of sureties. The way these cases have been decided seems to suggest that, in instances where the surety falls within the 'vulnerable class', the plea of *non est factum* would become redundant. A vulnerable surety would stand a better chance of successfully setting aside a transaction on the basis of her lack of independent legal advice and placing reliance on equitable relief rather than a plea of *non est factum*, since the burden of proof shifts from her to the bank. It would be for the bank to show that reasonable steps have been taken (for example, urging the surety to take independent legal advice) to bring home to the surety the risk involved in the transaction, rather than for the surety to show that she has acted with reasonable care.

5.6 Conclusion

It is clear from ***O'Brien*** that there are now two distinct lines of authority relating to third party security transactions. The first is cases where the surety (the vulnerable surety) stands in some close relationship with the debtor, where undue influence is a likelihood, and the bank is aware of such a relationship. The second is cases where no

such relationship exists and the cases pre-***O'Brien*** will still be applicable. The common theme running through these cases is the absence or lack of independent legal advice. For cases within the first category, the bank runs the risk of being fixed with constructive notice of the surety's equity against the debtor if it fails to ensure that the surety is given sufficient explanation or advice as to the nature of the transaction and the extent of her liability, as well as the risk she is running by giving such security.

To some extent, ***O'Brien*** has helped to remove some of the confusion created by conflicting decisions in relation to third party securities by stating clearly the appropriate steps which must taken by a bank to protect the security given and ensure its enforceability. The requirements placed on the bank are fairly stringent and failure to take reasonable steps, especially in relation to the seeking of independent legal advice, will render the security unenforceable. The usefulness of this clarity is reflected in the Banking Code, recommending that banks will advise all potential sureties of the need to seek independent legal advice. The Banking Code, however, only requires the information relating to the need to seek independent legal advice to be given as a warning to the surety. Its effectiveness may be rather limited, especially when the surety is not given sufficient opportunity to act upon the information, for example, when the information is given to her just before she is asked to sign the security document.

In addition, the effectiveness of the Banking Code will also depend on the banks adhering to correct and prudent procedures. All too often the cause of a security failing is due to the failure of some person within the bank to follow and adopt the procedures laid down by the bank. The Banking Code, for example, does not deal with the issue of whether a bank should take the third party security if it knows that the surety has chosen to ignore the recommendation to seek independent advice, or has no

grounds to believe that she understands the effect of the document. ***O'Brien*** suggests that, in such situations, the bank should not take the third party security as it would probably be unenforceable.

Furthermore, the ***O'Brien*** test which concentrates on the doctrine of notice places greater emphasis on the need to urge the surety to seek independent legal advice, rather than actually ascertaining whether the surety's consent is an informed one. However, the doctrine of notice, as formulated, has in itself conceptual problems. The doctrine has been criticised for being inconsistent with the orthodox doctrine of notice as applied in property law, which appears to suggest the development of a form of equitable doctrine of notice, which is peculiar to 'vulnerable' third party security transactions. The practical effects of the doctrine of notice further appears to be nothing more than an extended version of the 'special equity' theory which the House of Lords had purportedly rejected.

The reasonable step of urging the surety to seek independent legal advice plays a presumptive role in that, once the bank has taken that step, the presumption is that the security document which the surety has subsequently executed, reflects an exercise of her independent will, free of any possible undue influence which may or may not have been exerted by the debtor. The independent legal advice requirement merely requires the bank to stress to the surety the need to seek independent advice. The import of this requirement is not whether the surety actually has full understanding of the security being given and its potential consequences, but the fact that the surety has been told to go and seek independent legal advice. The reasonable step does not entail ensuring that the actual advice given is sufficiently independent to counteract the effects of undue influence or misrepresentation and that the consent given is, in fact, a true exercise of the surety's independent free will. Instead, the reasonable step merely facilitates the

raising of the presumption that, once the surety is told to seek independent legal advice and she is legally represented, the consent has been properly obtained and is an independent one. This is clearly illustrated in cases like ***Massey v Midland Bank*** and ***Banco-Exterior Internacional v Mann***.

Thus, the lack of qualitative emphasis in the independent legal advice requirement renders the requirement an ineffective measure for weeding out cases of undue influence and misrepresentation and actually counteracting their effects on the surety in giving her consent to the transaction. The shift in emphasis from the notion of 'informed consent' to the doctrine of notice and the need for banks to take 'reasonable steps' has not, however, rendered the state of knowledge and understanding of the nature and effect of the transaction on the part of the surety totally irrelevant. It is still pertinent since a bank must ensure that it urges the surety to take independent legal advice so as not to be fixed with constructive notice of the surety's equity. The time may have come when the practices of banks will have to change and that banks would have to seek greater external legal advice, at least for the purposes of ensuring that the surety has full understanding of the nature and extent of the transaction, thereby making its security unimpeachable.

More importantly, the doctrine of notice, coupled with the independent legal advice requirement, may, at first glance, appear to offer better protection to sureties, who may be described as vulnerable, against advantage-taking. However, a closer analysis of the cases, especially in relation to the courts' treatment of the independent legal advice requirement which will be discussed in the following chapter, reveal the superficiality of this protection. Based on current judicial interpretation of that requirement, all the courts have done is to merely shift the goal posts and that a bank is ultimately able to limit its responsibility to the surety by merely urging her to seek

independent legal advice. This is illustrated by the lack of qualitative requirement in the legal advice to be given to the surety. Thus, the 'reasonable steps' will not effectively offer protection to the vulnerable surety or counteract the effects of any undue influence or misrepresentation which may have been exercised on her by the debtor.

References

[1] Part of the material used in this chapter is extracted from the writer's LLM dissertation which was submitted in September 1995 to the University of Kent at Canterbury.

[2] In this context, family home will refer to dwelling houses used by spouses and/or cohabitants as the parties' family home.

[3] For a general discussion on the various forms of third party security transactions, see Lingard, *Banking Security Documents* (1993) (3rd ed.) Butterworths, London; Ellinger, *Modern Banking* (1994) Clarendon Press, Oxford; Penn et al., *The Law of Domestic Banking* (1987) Sweet & Maxwell, London.

[4] *Barclays Bank v O'Brien* [1992] 4 All ER 983 (CA); [1993] 4 All ER 417 (HL).

[5] [1981] AC 487.

[6] [1992] 4 All ER 983 (CA); [1993] 4 All ER 417 (HL).

[7] *Allcard v Skinner* (1887) 36 Ch D 145.

[8] See Penn et al. , *op. cit.*, Chap 19; Johnson, *Banks, Securities and Undue Influence: A Case of Confusion* (1993) 11(8) IBFL 94.

[9] Examples of relationships where there is a presumption of undue influence: solicitor and client (*Wright v Carter* [1903] 1 Ch 27); parent and unemancipated child (*Bullock v Lloyds Bank* [1955] Ch 317); elderly parent and adult child (*Avon Finance v Bridger* [1985] 2 All ER 281).

[10] However, in special circumstances, where the facts show that the bank takes on the role of adviser to its customer, the presumption may arise and the customer may acquire an equity to set aside the transaction. See *Lloyds Bank v Bundy* [1975] QB 326.

[11] *Howes v Bishop* [1909] 2 KB 390; *Bank of Montreal v Stuart* [1911] AC 120; *Mackenzie v Royal Bank of Canada* [1934] AC 468.

[12] The surety would be released from his liability even if the bank's misrepresentation was

innocent. See *Davies v London and Provincial Marine Insurance Co* (1878) 8 Ch D 469.

[13] *Creditors beware: a wife is not a surety* (1994) Co Law 137.

[14] *Bank of India v Trans Continental Commodity Merchants* [1982] 1 Lloyd's Rep 506.

[15] *National Westminster Bank v Morgan* [1985] 1 All ER 821.

[16] per Lord Scarman at 827.

[17] [1992] 4 All ER 955, per Slade LJ at 974.

[18] *Goldsworthy v Brickell* [1987] 1 All ER 853.

[19] *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 where the relationship was between an adviser and an elderly person. See also *Lloyds Bank v Bundy*.

[20] [1993] 4 All ER 433.

[21] [1902] AC 429.

[22] at 435.

[23] [1985] 2 All ER 281.

[24] at 287.

[25] [1986] 1 All ER 423.

[26] at 427.

[27] [1986] 1 QB 1184.

[28] [1988] 1 FLR 161.

[29][1988] 3 All ER 24.

[30] Clements, *"Informed Consent" and Acting as Surety: Barclays Bank plc v O'Brien - The Implications for Lenders* (1993) 8(2) BJIB&FL 68.

[31] at 1196.

[32] at 1201.

[33] per Lloyd LJ at 169.

[34] Jeremie, *op. cit.*, points to *Avon Finance Ltd v Bridger* as an illustration of this shift in emphasis. He argues that liability in such cases is based on the bank's failure to divest itself of the culpable acts of the person (usually the debtor) on whom reliance has been placed for procuring the surety's consent to the transaction, rather than there being a true agency.

[35] [1989] 1 FLR 356.

[36] at 363.

[37] See also the comments of Lloyd LJ in *Lloyds Bank v Egremont* [1990] 2 FLR 351, at 357.

[38] Jeremie, *op. cit.*, at 138.

[39] Clements, *op. cit.*, at 70-71. See also Jeremie, *op. cit.*, at 138.

[40] (1881) 18 Ch D 188.

[41] at 197.

[42] [1908] 1 KB 233.

[43] Clements, *op. cit.*, at 69.

[44] (1939) 63 CLR 649.

[45] at 683.

[46] at 685.

[47] *Avon Finance v Bridger* extends the 'protected class' to elderly parents who act as surety for their adult child.

[48] at 1007.

[49] at 1008-1009. In recognising a 'protected class' of sureties, it is arguable that the Court of Appeal is doubting the applicability of the agency theory in such cases. For a more detailed discussion, see Berg, *Equitable protection of certain sureties* (1993) 1 LMCLQ 101.

[50] *The Little Woman and the Big Bad Bank* (1992) 109 LQR 534.

[51] This objection may be of less significance in view of the fact that the House of Lords has recognised that the vulnerable sureties may include cohabitants and others, such as parents and adult children, where a relationship of trust and confidence exists between the parties.

[52] *Ibid.*, 536-537. Cf. Pahl, *Money and Marriage* (1989) Macmillan Education, Basingstoke; Pahl and Vogler, *Money, power and inequality within marriage* (1994) 42(2) Sociological Rev 268. Refer also to the discussion on Pahl's work in Chap 4 above, where the continued economic inequality of men and women was highlighted.

[53] at 1008.

[54] *Op. cit.* at n 49, at 107.

[55] Cf. *Lloyds Bank v Egremont*; *Midland Bank v Perry* [1988] 1 FLR 161

[56] For a general discussion on the decision of the House of Lords in *O'Brien* and *CIBC Mortgages v Pitt* [1993] 4 All ER 433, see Johnston, *Banking Contracts - The Influence of Spouses* (1993) 8(12) BJIB&FL 523; O'Hagan, *A Specially Protected Class?* (1994) 144 NLJ 765; Gibbons, *No 'Special Equity' for Married Women* ((1994) 28 Law Teacher 72; Lehane, *Undue Influence, Misrepresentation and Third Parties* (1994) LQR 167; Lawson, *O'Brien and Its Legacy: Principle, Equity and Certainty?* (1995) CLJ 280.

[57] for example, the relationships between solicitor and client and parent and unemancipated child.

[58] *Howes v Bishop*; *Bank of Montreal v Stuart.*

[59] (1852) 15 Beav 278, 51 ER 545. The approach taken by Romilly J in this case was that, when a person has made a large voluntary disposition, the burden of proof shifts to the

person benefiting from the disposition to show that the disposition was made fairly and honestly and in full understanding of the nature and effect of the gift.

[60] per Lord Browne-Wilkinson at 428.

[61] at 428-429.

[62] at 424.

[63] at 429.

[64] at 431.

[65] at 429.

[66] *An Alternative Approach to Third-Party Undue Influence and Misrepresentation* (1995) 46(2) NILQ 147. See also Mee, *Undue Influence, Misrepresentation and the Doctrine of Notice* (1995) 54(3) CLJ 537.

[67] Mee recognises that the defence of reliance on the validity of the contract is similar to the defence of change of position which was accepted in *Lipkin Gorman v Karpnale* [1991] 2 AC 548.

[68] *Undue Influence, Financiers and Third Parties: A Doctrine in Transition or the Emergence of a New Doctrine?* (1995) New Zealand Law Review 328.

[69] *TBS Bank v Camfield* [1995] 1 All ER 951.

[70] Per Scott LJ in *O'Brien*, at 1010. See also *O'Hara v Allied Irish Bank*, Unreported, February 4, 1985.

[71] *Cornish v Midland Bank* [1985] 3 All ER 513; *Midland Bank v Perry*.

[72] See ss 20(1), 59(6) and 70(1)(g) of the Land Registration Act 1925.

[73] See Mee, *op. cit.*; Thompson, *The Enforceability of Mortgages* (1994) Conv 140.

[74] *Fraud, Undue Influence and Mortgages of Registered Land* (1994) Conv 421. See also Lawson, *O'Brien and Its Legacy: Principle, Equity and Certainty?* (1995) 54(2) CLJ 280.

[75] *The Husband, the Bank, the Wife and her Signature* (1994) 57 MLR 467; *The Husband, the Bank, the Wife and her Signature - The Sequel* (1996) 59 MLR 675; *Sexually Transmitted Debt* (1997) Clarendon, Oxford..

[76] *Wives' guarantees: Constructive knowledge and Undue Influence* (1994) 1 LMCLQ 34.

[77] since the risk of any security being called in by the bank is inherent in the giving of such security.

[78] at 974.

[79] [1985] 1 All ER 821

[80] at 439.

[81] See *Langton v Langton* [1995] 3 FCR 521.

[82] Fehlberg (1994), *op. cit.*, at 472.

[83] *Op. cit.*, at 40.

[84] See also Stallworthy, *Third Party Sureties and the Extent of the Bank's Duties after Barclays Bank v O'Brien* (1994) 3 JIBL 118. Stallworthy argues that the requirement for a private consultation to explain the transaction to the surety may reduce the risk of the bank being fixed with constructive notice of the surety's equity to set aside. However, the hidden danger of this 'reasonable step' may be the increased exposure of banks to liability for misleading advice being given to the surety.

[85] at para 12.1. The Code of Practice was set up greatly due to the recommendations made in the Report of the Review Committee on *Banking Services: Law and Practice* (1989) Cm. 622, HMSO, London, more commonly referred to as the Jack Report. For more discussion, refer to Chap 7 below.

[86] The Code of Practice (1994), para 14.1(ii).

[87] A more detailed discussion of the Code of Practice and the Banking Code may be found in Chap 7 below.

[88] See Chap 6 for a more detailed discussion of this point.

[89] Fehlberg (1994), *op. cit.*, at 472. See also Lawson, *op. cit.*; 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*, unpublished paper presented at the WG Hart Legal Workshop, 1995.

[90] at 441.

[91] Fehlberg (1994), *op. cit.*, at 473.

[92] at 441.

[93] *Op. cit.*, at 144.

[94] Fehlberg (1994), *op. cit.*, at 473.

[95] per Lord Browne-Wilkinson in *Pitt*, at 441.

[96] Both Fehlberg and Thompson have made similar observations about the 'on its face' requirement. In *Pitt*, there was clear evidence that Mrs. Pitt had little control over the household finances. This also fits in neatly with the arguments raised by Pahl, which were referred to in Chap 4 above. Pahl's observations are that the general tendency in most households is still towards male-control.

[97] per Lord Browne-Wilkinson at 429

[98] the bank should insist on such independent legal advice being sought in exceptional circumstances where the exercise of undue influence or misrepresentation is not only

possible but probable.

[99] [1995] 1 All ER 929.

[100] [1995] 1 All ER 936.

[101] [1993] NPC 152.

[102] [1995] 1 FCR 465; reversed [1995] 3 FCR 735.

[103] [1995] 2 FLR 325.

[104] [1995] 1 All ER 951.

[105] See also *Castle Phillips Finance v Piddington* (1995) 70 P & CR 592 where the court followed *TBS Bank v Camfield* by holding that the impeached transaction has to be set aside in toto and not partially or on terms.

[106] [1970] 3 All ER 961, at 972.

[107] [1993] 1 All ER 330.

CHAPTER 6

Management of Risk and Independent Legal Advice in Third Party Security Transactions

6.1 Introduction

The preceding chapters have so far sought to highlight one common theme which is the increasing use of equitable principles in dealing with disputes over ownership of the family home, as well as the enforceability of third party security transactions involving mortgages over the family home. In the previous chapter, the type of third party security transactions under consideration were those provided by persons who may be described as vulnerable sureties and, more particularly, involving women sureties who have agreed to provide security by way of a mortgage over the family home. It was argued in that chapter that the basis for the enforceability of the bank's security is primarily twofold: first, whether the surety has an equitable interest in the subject property, which ranks in priority over the interest of the bank, and second, whether the circumstances are such that the surety has acquired an equity to set aside the security transaction which is binding on the bank.

These two issues are not necessarily complementary and may be mutually exclusive. Thus, even where the surety may not be able to set aside the transaction on the basis that her beneficial interest over the property ranks in priority to the bank's interest, she may still be able to succeed on the basis of the equity to set aside which she acquires as against the debtor. In ***O'Brien***[1], the House of Lords emphasised the need for banks to take reasonable steps so as to avoid being fixed with constructive notice of the surety's equity to set aside the transaction. The focus was on the doctrine of undue influence, notice and the requirement of independent legal advice. However,

cases post-***O'Brien*** have seen a whittling down of the independent legal advice requirement[2] which, in turn, have raised doubts about the appropriateness of the doctrine of undue influence and the independent legal advice requirement as devices for determining whether or not the bank's security should be upheld.

Mackenzie contends that the current developments reveal two important points.[3] The first is the imprudence of current lending practices of some banks and second, the inadequacy of their internal supervision of credit facilities. The increasing globalisation of the financial markets has led to the rapid expansion of banking. As has been noted[4], the total cross-border lending has increased from $360 billion in 1974 to $6,300 billion in 1990.[5] Financial deregulation in the 1980s has, in turn, facilitated and encouraged greater competition and innovation, leading to the extensive expansion of the range of financial products being marketed.[6] Consequently, the established risk management strategies of financial institutions are being constantly challenged.[7] It has been further observed that, since the Second World War, the incidence of bad and doubtful debts in the recent recession has increased to unprecedented levels in some countries. This strongly suggests that some banks have allowed the risk/reward ratio to get seriously out of control.[8] The second point to note is that, in terms of risk assessment, lenders are in a far better position to assess risk than the debtor, the surety and/or the legal adviser.[9]

Drawing on the work of Mary Douglas[10] on a cultural theory of risk management, Mackenzie offers an interesting analysis of how these current legal trends reflect credit risk management strategies. She argues that the current legal developments whereby equitable intervention has been invoked in the area of third party security transactions illustrate how risk may be managed in a way which accords with the culturally accepted values of different cultural institutions.[11] In this particular

area, the doctrine of undue influence has been given a new surge of life as the underlying principle for intervention in certain circumstances. The rationale for intervention appears to be not so much the protection of individuals against their own folly but from their being taken advantage of or victimised, and to prevent others from abusing certain types of relationships and profiting from their wrongdoings. However, even within a legal context, terms like influence, unconscionable behaviour, manifest disadvantage and actions of an ordinary person are imbued with social, cultural and historical connotations. Thus, Mackenzie's contention is that, based on the cultural ideal types as identified by Douglas, it is possible to demonstrate how the legal remedying of advantage-taking in third party security transactions may be used as a device for managing risk which accords with the values cherished by each way of life in terms of their respective perception of risk and allocation of loss and blame.[12]

It is not the intention of this chapter to take a cultural critique of legal risk management but to elaborate on certain key ideas of the role played by equity in formulating its present principles to prevent certain types of conduct in the context of third party security transactions, particularly, advantage-taking of the surety by the debtor and/or the bank. In particular, the aim is to consider how the judiciary has utilised the independent legal advice requirement as a device for managing risk in third party security transactions. The application of a risk management perspective to the law in relation to third party security transactions is helpful in considering whether the currently employed devices of the doctrine of undue influence and the independent legal advice requirement are adequate in managing risk. In that respect, it will be argued that an analysis of the case law post-***O'Brien*** reveals the inadequacy of the independent legal advice requirement as a risk management tool and that alternative devices have to be considered to improve risk management in these transactions.

6.2 Preliminary Observations

There are certain preliminary observations which should be noted about sureties and their experiences and how these experiences may be translated by judges and lawyers in terms of giving protection to their interests. These observations are useful in assessing how effective independent legal advice is as a device for managing credit risk and the way in which reforms should be carried out to ensure more effective protection of the interests of sureties. At present, there is a dearth of empirical research in the area of suretyship, particularly, of the circumstances in which individuals agree to stand surety, their motives for providing security and their experiences as sureties in the whole process of providing security. It has been argued that perception of the process of providing security is premised on the private/public dichotomy[13], where the personal experiences of the surety in giving security do not fall within the public domain, but remain unobserved within the private domain. Since the equitable rules are applied from a 'public' perspective, these personal experiences are ignored when deciding whether or not relief should be granted to the surety.[14]

In England, research on a limited scale has been carried out by Fehlberg[15], the results of which have been very helpful in elucidating the personal experiences of women who have agreed to stand surety for their husbands and partners. Fehlberg's study indicates that there is a common theme in the experiences of these sureties. She observes that 'while the rules create the impression of balancing the interests of sureties and creditors, their manner of application has tended to ensure that creditors are more likely than sureties to win in the end.'[16] Banks are, according to Galanter's analysis[17], 'repeat players' who generally enjoy certain advantages, such as advance knowledge, since they have 'done it before', which enables a bank to structure the next transaction and the terms of the contract. They have greater resources to enforce or defend claims

as well as better access to expert and legal services.[18] On the other hand, most sureties are what Galanter would describe as the 'one-shotters' who will only occasionally stand surety and be involved in the process of providing security.[19] This leaves the surety/one-shotter in a less strategically secure position to negotiate the terms of the transaction.

Galanter argues that the advantages enjoyed by repeat players may place them in a position of advantage *vis-à-vis* the one-shotter and that a legal system which is formally neutral may perpetuate and amplify the advantages of the former.[20] This is well illustrated by the treatment of the independent legal advice requirement. The requirement, on the face of it, appears to be an egalitarian one, intended to protect the interests of a surety by ensuring that her decision to provide security is based on informed choice. However, the formal gesture of urging the surety to seek independent legal advice, without assessing the actual independence and extent of the advice given, fails to address the practical problems faced by most vulnerable sureties.[21]

Fehlberg's study found that there was a common feeling of lack of choice among most of the sureties when asked to provide security. Most of the sureties consented to the giving of security, not because of any direct or indirect benefit which they expected to derive from standing surety but as a mark of moral support for their spouses' or partners' business. Thus, the motive for standing surety is usually non-financial, that is, without any expectation of financial gain.[22] Her findings further indicated that most of the sureties had little information about the debtor's business and that their access to information markedly declined when the business faced financial problems. This reflected the overall lack of power and involvement of most sureties in the debtor's business.[23] These findings are consistent with the observations made earlier in Chapter 4 above relating to the economic disparity between men and women

and women's general participation in decision making and, hence, marital power in domestic relationships.[24]

Fehlberg noted that, within her sample, the impact of that economic disparity meant that most of the sureties were usually unequal partners in the debtor's business. Just as most women fail to play a major decision-making role in the relationship and have limited access to the household income as a result of the economic disparity between themselves and their husbands or partners, they are similarly less likely to be involved in business decisions.[25] Thus, the judicial approach of assessing the merits of a surety's claim by weighing it against the extent of her involvement with or the benefit which she derives from the debtor's business[26] has been criticised as it ignores the fundamental fact that sureties usually lack power over the way the business is run and/or their access to benefits. The approach further ignores the sureties' motives for giving security, which is usually non-financial, but due to their self-sacrificing attitude in the domestic relationship.[27]

A further finding which is pertinent to the present discussion is the perception of sureties of the role of the lawyer and of lawyers themselves as advisers. Here, the findings indicate several points. First, most sureties had very little contact with the banks before the signing of the security and were rarely involved in the negotiation of the transaction. Thus, most sureties felt that, by the time they were informed of their need to provide security, the decision had already been made.[28] As a result, most sureties viewed the purpose of seeing a solicitor as being merely to witness the signing of the document, rather than to obtain advice. Under such a perception, most sureties are unlikely to avail themselves of the solicitor's expertise. For most sureties, this perception was further reinforced by the impression given by the solicitors themselves, as some solicitors gave only a brief explanation of the legal effect of the security but

not the wisdom of the transaction.[29] Most sureties took a literal meaning to independent legal advice and that the solicitor advising them should be acting solely for the surety, in her interests and offer advice on the wisdom of the transaction, or at least partisan advice, and not just technical legal advice of the salient terms in the document.[30]

The overall conclusion of Fehlberg's study indicates that the impact of the economic disparity between men and women in domestic relationships applies equally to the business relationship between the parties. Her findings further indicate how crucial economic dependency and emotional commitment are in the process of providing security and that the present rules, especially the independent legal advice requirement, may have little effect on the surety's decision to provide security. As noted earlier, there is presently very little empirical evidence besides Fehlberg's study in the specific area of female suretyship. Whilst there is a danger of placing too much weight on the accuracy of her findings, these observations, particularly in respect of women's economic dependency and lack of power and control in relationships, are consistent with earlier research. Thus, to that extent, these preliminary observations are useful pointers for the direction to be taken in the future development of the principles to be applied in this particular area of the law.

6.3 Risk and Independent Legal Advice

In terms of risk management, the role of the law is that of a means by which the levels of accountability and the consequences of risk exposure may be mediated and maintained. In ***O'Brien***, the focus clearly shifted to the doctrine of notice and reasonable steps.[31] One point which clearly emerges from the cases post-***O'Brien*** is that the onus on the bank to avoid being fixed with constructive notice of the surety's

equity to set aside the transaction is significantly reduced. Johnston argues that ***O'Brien*** reveals that it is not the actual independent advice which is important.[32] The requirement is merely a means by which the bank may raise the presumption that the surety has full understanding of the nature and effect of the transaction. Urging the surety to seek independent legal advice also serves the ancillary function of relieving the bank from undertaking the task of explaining the security document to the surety and exposing itself to a claim of misrepresentation or negligence.[33] As a result, the cases post-***O'Brien*** have reached inconsistent conclusions on the question of how independent the legal advice must be.

In ***Allied Irish Bank v Byrne***[34], the bank had advised the wife to take independent legal advice and recommended a local firm of solicitors who also acted for the bank, as well as the husband in a related matter. However, the court found that the solicitor in this case was not sufficiently independent as a result of a combination of several factors. Firstly, the solicitor was also retained by the bank. Secondly, the bank had withheld information from the solicitor thereby affecting the extent of his advice to the surety. Thirdly, as the solicitor had knowledge that the husband had prevented him from giving an explanation of the nature and effect of the document to the wife, this information was imputed to the bank since the solicitor was also the agent of the bank. The bank was, accordingly, bound by the wife's equity to set aside the transaction.

In ***Bank Melli Iran v Samadi-Rad***[35], the court took a similar approach to that in ***Allied Irish Bank v Byrne***. In that case, the solicitor acting for the surety/wife was also acting for the husband. In assessing the constituents of the independent legal advice requirement, the court stated that not only did the advice have to be 'disinterested and dispassionate' but two other distinct elements would, in addition, have to be present. Firstly, the advice must be independent of the potential source of

influence and secondly, the adviser must also be independent of any prior commitment to any other client, so that (s)he can act single-mindedly in the interest of the client and give independent advice to such a client. The decisions in ***Allied Irish Bank v Byrne*** and ***Bank Melli Iran v Samadi-Rad*** suggest that, where the same solicitor acts for both the surety and the bank and/or the debtor, the independent legal advice requirement may not be complied with as there is the potential for a conflict of interest, which will render it difficult for the solicitor to be sufficiently independent.

A different approach was, however, taken in the case of ***Midland Bank v Serter***.[36] In that case, the court upheld the test laid down in ***Bank of Baroda v Shah***[37], which stated that a bank is entitled to assume that the solicitor would act honestly and give proper advice to the surety, even though he might be acting for both the surety and the debtor and/or the bank. The bank is under no additional obligation to ensure that the legal advice given to the surety is entirely independent. In ***Massey v Midland Bank***[38], a similar stand was taken by the Court of Appeal. In that case, the debtor had arranged for his solicitors to advise the surety. The interview, in which the solicitor had explained the nature of the document to the surety, was also held in the presence of the debtor. The solicitor subsequently returned the charge document, duly signed by the surety, together with his confirmation that the document had been explained to the surety.

The court found that the circumstances were such that the bank was put on inquiry of the surety's equity. The issue was whether the bank had complied with the 'reasonable steps' test so as not to be fixed with constructive notice of the surety's equity. This would depend on whether the advice given by the solicitor was sufficiently independent. In response, Steyn LJ stated that:

'It is generally sufficient for the bank to avoid a finding of constructive notice if

the bank urged the proposed surety to take independent advice from a solicitor. How far a solicitor should go in probing the matter, and in giving advice, is a matter for the solicitor's professional judgment and a matter between him and his client. The bank is not generally involved in the nature and extent of the solicitor's advice. And in my judgment there is nothing in the circumstances of the present case which required the bank to do more than to urge or insist on independent advice.'[39]

Although the court expressed that it was not 'good practice' for the bank not to hold a meeting with the surety, in the absence of the debtor, this would not be fatal to the bank's case. Neither would the bank be affected by the fact that the debtor had chosen the firm of solicitors to advise the surety nor that the solicitor did not meet the surety, separately from the debtor, to explain the nature of the document. The court further held that the bank was entitled to assume that the solicitor would act honestly and carry out his professional duty by offering proper advice to the surety. The bank was under no duty to enquire into what had transpired at the interview between the solicitor and the surety, so as to ascertain whether the advice given had been adequate or proper.

In ***National Westminster Bank v Beaton***[40], the Court of Appeal reiterated the general assumption of the solicitor's independence. Even where the surety's solicitor were to act for the bank in the same transaction, instructions by the bank to the solicitor to explain the security document to the surety would not be treated as the bank's having appointed the solicitor as its agent for that particular purpose. The Court of Appeal held that such instructions were no more than a reminder to the solicitor of his duties to his client, the surety, and that the bank would not be fixed with constructive notice of any deficiency in the legal advice given. Thus, these cases indicate that the bank is under no

more than a normal duty to urge, or insist, that the surety seeks independent legal advice but is not concerned with stipulating the extent of that advice, which is primarily a matter for the solicitor's professional judgment.

The cases do not make clear what actually constitutes 'independent legal advice', thereby resulting in different conclusions. It is arguable that ***Allied Irish Bank v Byrne*** may be distinguished from ***Massey v Midland Bank*** on the ground that the bank had withheld important information in the former case. However, the same cannot be said about ***Bank Melli Iran v Samadi-Rad***, as there was no withholding of information by the bank in that case which might have affected the nature and extent of the legal advice being given to the surety. It has been argued that ***Bank Melli Iran v Samadi-Rad*** should be treated as a conflicting decision which should not be followed and that the approach taken in ***Massey v Midland Bank*** should be preferred.[41] The latter approach is fairer on banks as they should not be put in a position to 'second-guess' the advice given by a solicitor to the surety.

The further relaxation of the interpretation of the 'reasonable steps' test can be seen in ***Banco Exterior Internacional v Mann***.[42] In that case, the bank had agreed to grant a loan to a company owned and controlled by the husband, on condition that the nature and effect of the charge document be explained to the wife, as surety, by a solicitor and a declaration by the solicitor to that effect be incorporated in the charge document. The charge document was forwarded by the husband to the company's solicitor who had, in turn, written to the wife, explaining the nature and effect of the document. Both the husband and the wife subsequently attended a meeting with the solicitor, where an explanation was given by the solicitor, prior to the wife's execution of the charge document. Although the wife understood the solicitor's explanation of the security document, she had informed the solicitor that she felt that she had no choice in

the matter but to sign the charge. At all material times, the bank had not dealt or communicated directly with the wife. The Court of Appeal by a majority (with Hobhouse LJ dissenting) followed ***Massey v Midland Bank*** and took the stand that the test rests on how the transaction appears to the bank.[43] Thus, a bank is entitled to assume that the solicitor acting for the surety would act honestly and provide advice to the surety which would be entirely independent, even if he were acting for the bank and/or the debtor. Questions of conflict of interest and the extent of the advice to be given to the surety are all questions best dealt with by the solicitor, rather than the bank.[44]

In contrast, Hobhouse LJ in his dissenting judgment, stated that the 'reasonable steps' requirement is not aimed at trying to remedy the lack of intelligence or education of the surety. It is intended to remedy the surety's lack of independence and this end has to be achieved through realistic rules of law. A surety may have full understanding of the nature and effect of the security document but yet not be free from the undue influence exerted on her when executing the document. According to His Lordship, the 'reasonable steps' test sets out two elements which must be done by the bank in order to rebut the presumption of undue influence, namely, to bring home to the surety the risks involved in giving the security and to advise her to take independent legal advice. The steps taken by the bank in the instant case were felt by His Lordship to have been insufficient. The bank had failed to comply with the second element of advising the surety to obtain independent advice since it had never communicated with the surety, or taken any steps to ensure that she was advised by someone to take independent legal advice. In the premises, the case could be distinguished from ***Massey v Midland Bank*** and the bank was bound by the wife's equity.

Some support for Hobhouse LJ's approach may be found in the recent case of

Credit Lyonnais Bank Nederland v Burch[45], even though ***Massey v Midland Bank*** was not actually referred to their lordships in that case. Here, the Court of Appeal unanimously held that the charge over the surety's property could not stand as the bank had failed to take the necessary reasonable steps to avoid being fixed with constructive notice of the surety's equity. This was premised on the fact that the surety was given neither an explanation of the potential extent of her liability nor any independent legal advice. The reasons given by both Nourse and Swinton Thomas LJJ for finding that the bank had not taken reasonable steps are twofold. Firstly, the surety was not told the extent of the company's borrowings and its current facility limit. Despite the fact that the bank's solicitors had warned the surety that her liability was unlimited both in time and amount, the failure to provide such information for her meant that the surety was not in a position to assess the extent of her potential liability or the significance of the guarantee being unlimited in nature. Secondly, because the transaction was so manifestly disadvantageous to the surety, it was a case where the bank should have insisted on, and not merely urged, the surety to take independent legal advice.

Millett LJ went on to state that the purpose of the legal advice is to protect the surety from the influence of the wrongdoer. In that respect, it is insufficient for a solicitor merely to satisfy himself that his client understands the transaction and intends to enter into it (technical advice) but he must also advise his client on the propriety of the transaction. This involves the solicitor being fully aware of all material facts when giving advice. Contrary to earlier authorities, Millett LJ further observed that the adequacy of the advice given by the solicitor to the surety will be subject to the court's scrutiny. In the premises, it is insufficient for the solicitor merely to satisfy himself that the surety has an understanding of the nature and effect of the transaction. This will only offer protection to the surety in cases of mistake or

misrepresentation but not undue influence.[46]

On the issue of conflict of interest and whether a solicitor, who acts for the bank and/or the debtor as well as the surety, is sufficiently independent, the court in ***Clark Boyce v Mouat***[47] held that there is no general rule of law that a solicitor should never act for both parties in a transaction where their interests may conflict. A solicitor is entitled to act for both parties, even where there is potential for a conflict of interest between the parties, so long as the solicitor obtains the informed consent of both parties to his so acting. This would mean consent being given with knowledge of the conflict of interest between the parties and that, accordingly, the solicitor might be disabled from disclosing to each party the full knowledge which he possesses in respect of the transaction or that he may not be able to give advice to one party which conflicts with the interests of the other.

In determining whether or not the parties have given their informed consent, the solicitor would have to determine the exact nature of the services required of him by the parties and proffer advice to the client in accordance with such services. The court held that it would place an onerous burden on solicitors if they were expected to give unsought advice to their clients on the wisdom of a particular transaction when the client is in full control of his faculties and is aware of his own actions. A similar approach was taken by the court in ***Bank of Baroda v Rayarel***[48] where it was held that the bank was entitled to assume that the solicitor acting for the surety had advised her properly and would have advised her to seek independent legal advice if there had been a risk of a conflict of interest. The bank was under no duty to take further steps to avoid being fixed with constructive notice of the husband's alleged undue influence.

The approach taken in these cases following ***O'Brien*** suggests that, unless the bank is aware of circumstances which may actually make undue influence or

misrepresentation probable, the requirement to urge the surety to obtain independent legal advice will not be interpreted too restrictively by the courts. The bank is not concerned with the nature and extent of the legal advice sought. The decision whether the legal advice is sufficiently independent is one which the solicitor, and not the bank, is in the best position to judge. Thus, as long as the bank indicates to the surety that independent legal advice has to be taken and where on record the surety is legally represented, the bank is entitled to assume that the advice given by the surety's solicitor will be independent. The bank will not be responsible for any defects in the legal advice given by the solicitor since the solicitor is expected to carry out his professional duty to his own client by giving proper and adequate advice.

Further, the solicitor would not be deemed to be the bank's agent, even if he were acting for both the bank and the surety, unless the bank had intentionally withheld information from the solicitor, as in ***Allied Irish Bank v Byrne***.[49] There is also no objection to the solicitor acting for both parties in a situation of conflict of interest so long as the parties give their informed consent. This would depend on the solicitor's perception of whether the clients are in full command of their faculties and are aware of what they are doing. It is also clear that the solicitor is under no duty to go beyond his instructions by giving unsought advice on the wisdom of the transaction. In that respect, the solicitor is under no duty to disclose to the surety the financial position of the debtor or that he is not in possession of material information.[50]

Mackenzie points out that, in so far as 'vulnerable' third party security transactions are concerned, the focus of risk management has shifted to the independent legal advice requirement. The cases post-***O'Brien*** have, however, shown a lack of consensus on whether independent advice is limited to merely giving an explanation of the nature and effect of the transaction or whether it entails a heavier

burden of covering an assessment of the viability of the transaction and that it is in the surety's interest to sign.[51] Earlier cases like ***Inche Noriah v Shaik Allie Bin Omar*** [52] suggest that the doctrine of undue influence support the latter proposition but the cases post-***O'Brien*** suggest the former. In the two-party presumed undue influence cases, the legal advice 'must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.'[53] This suggests that the legal advice in a two-party presumed undue influence case involves more than just technical advice but requires the advice to touch on the financial wisdom of the transaction, before the presumption of undue influence is rebutted.

It has, however, been argued that independent legal advice is an inadequate gauge in third party security transactions because, despite the label, banks are not expected to ensure that the advice given is actually independent.[54] Banks are further not expected to concern themselves with the exact nature and extent of advice being given to the surety. The limitations of the independent legal advice requirement is well illustrated in ***Banco Exterior Internacional v Mann***. It has been further observed that the ability of a solicitor to act for both the surety and the debtor and/or the bank is premised on the minimal standards of advice, which is evidenced by cases like ***Massey v Midland Bank***, ***Midland Bank v Serter*** and ***Banco Exterior Internacional v Mann***.[55] The cases post-***O'Brien*** indicate that a bank is generally relieved of responsibility once a surety has been informed, whether directly or indirectly, to take independent legal advice. This is so even if the surety fails to act on the bank's warning and where advice is sought, it is not in fact independent.[56]

Richardson, on the other hand, observes that the problem in these cases is not whether the surety lacks intelligence and/or education but that she has been pressured

into giving the security.[57] In cases like ***Pitt*** and ***Banco Exterior Internacional v Mann***, the sureties knew what they were doing but they felt that they had little choice. ***Massey v Midland Bank*** and ***Banco Exterior Internacional v Mann*** further reveal how the solicitor's advice may be of very little help to the surety in such instances. This has led some commentators to argue that the effect of ***O'Brien*** and the treatment of independent legal advice in subsequent cases give vulnerable sureties 'ostensible rather than actual protection' but, more importantly, these developments do not help to encourage sureties to take responsibility for deciding the best course of action for protecting their own interests.[58]

Thus, the independent legal advice requirement plays a minimalist role in actually protecting the interests of sureties and as argued by Fehlberg[59], the requirement serves as an effective limit of the bank's responsibility in these transactions. In that respect, commentators like O'Hagan[60], Mackenzie[61] and Richardson[62] argue that Hobhouse LJ's approach in ***Banco Exterior Internacional v Mann*** is to be preferred, the reason being that Lord Browne-Wilkinson's recommendation of independent legal advice was intended to protect the surety's interest. This can only be achieved if the surety is advised by a solicitor who is truly independent. Hobhouse LJ's approach accords with this purposive role of independent legal advice as it suggests a higher standard of advice is required in third party security transactions. This will allow the courts to focus in each case on whether the advice given provides the surety with not only a full understanding of the terms of the transaction and the risks she runs in giving the security but also that she has a choice, so that the surety may be said to be truly exercising her independent free will in giving the security.

As the law stands, the security will be unimpeachable so long as the bank stresses to the surety the need to seek independent legal advice and the solicitor

acknowledges that an explanation has been given to the surety. The bank need not concern itself as to the extent of the legal advice given and matters relating to conflict of interest and the content of the advice to be given are for the solicitor to determine. In the circumstances, the requirement imposes on a bank no more than a nominal duty of merely urging the surety to take independent legal advice. In addition, there is no objection to the same solicitor acting for both parties, provided that their consent is an informed one. The solicitor is not under any duty to disclose to the surety either the lack of knowledge of material information or the financial position of the debtor in order for the advice given to be deemed sufficiently independent. The cases post-***O'Brien*** further suggest that the bank can safely rely on certificates from solicitors confirming that the consequences of the charge have been duly explained to the surety primarily because solicitors are expected to fulfil their professional obligations to their clients in giving adequate and correct advice, regardless of who is responsible for payment of their legal fees. The catch, however, in the banks' requesting for solicitors' certificates is that, the more a solicitor is pressed by a bank into signing such a certificate, the less likely is the bank to be free of exerting pressure on the surety, through her agent, the solicitor, to execute the security document.[63]

The cases, however, do not shed any light on the position which the courts will take if the explanations were made by officers of the bank. When the bank leaves the explanations to their staff, there is always a danger on the part of the bank's executives of misstating or failing to explain the actual legal consequences of the security to the surety. Such misstatement or failure to explain will affect the quality of the surety's consent and render the security voidable. In the circumstances, it would be prudent for the bank to arrange for the surety to obtain independent advice from an independent and qualified person for two reasons. Firstly, the nature of the transaction and its

consequences may be fully explained to the surety so as to satisfy the court that the surety has acted on her own independent will and with a full understanding of the transaction. Secondly, the bank will avoid being held liable to a claim for misrepresentation.[64]

6.4 Conclusion

Equitable intervention has taken the foreground in third party security transactions. The courts have embraced the doctrine of undue influence and the independent legal advice requirement as being appropriate devices for controlling and remedying advantage-taking in this type of transaction. The above analysis highlights how the present law fails in two major ways. The first is the way in which the law allows the abdication of responsibility by banks. This is seen in the setting of low thresholds of merely requiring banks to take 'reasonable steps' by urging sureties to seek independent legal advice. Secondly, ambiguity on the extent to which solicitors may be seen as being sufficiently independent and the qualitative nature of the advice being given renders the independent legal advice requirement of little effect in actually managing risk in these transactions, especially when the nature of the undue influence being exerted is more insidious and subtle. The minimalist role relegated to the independent legal advice requirement, as evidenced in the cases post-***O'Brien***, indicate how a lower standard of legal advice to be given to a surety will be ineffective in counteracting the effects of advantage-taking.

Taking a risk management perspective not only enables us to consider the way in which legal devices may be better formulated to handle risk management but also to formulate possible reforms. The first points to the fact that the only way in which the independent legal advice requirement may function more efficiently as a means of

credit risk management in third party security transactions is through a re-formulation of the requirement into one which calls for a higher standard of legal advice to be given. This move will further require the increased provision of information by banks to solicitors, so as to furnish the latter with more information which will enable them to advise potential sureties on the financial wisdom of the transaction. Cases like ***Credit Lyonnais v Burch*** may perhaps pave the way for such changes in the judicial treatment of the independent legal advice requirement.

A re-formulation of the independent legal advice requirement, whilst helpful, may not in itself be sufficient as a means of controlling risk. The call for a higher standard of legal advice may bring about other issues, such as increased conflicts of interest for solicitors and the competence of solicitors to advise on the financial wisdom of the transactions, which may render a higher requirement impracticable. Further, extra-judicial measures, particularly by the banking industry itself, may probably be a more effective starting point of credit risk management. Controlling moral hazards in these third party security transactions may be better effected through more prudential lending practices by banks. Both of these issues will be looked at in greater detail in the next chapter.

References

[1] *Barclays Bank v O'Brien* [1993] 4 All ER 417.

[2] See cases like *Massey v Midland Bank* [1995] 1 All ER 929 and *Banco Exterior Internacional v Mann* [1995] 1 All ER 936.

[3] 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*, unpublished paper presented at the WG Hart Legal Workshop, 1995.

[4] George, *Recent banking difficulties* (1993) Bank of England Quarterly Bulletin 103.

[5] Quinn, *Derivatives - a central banker's view* (1994) Bank of England Quarterly Bulletin 277, has noted that, in the past twenty five years, the proportion of the world output traded internationally has doubled to about 18 per cent in 1993.

[6] Quinn, *supra* n 5. See also Quinn, *Recent developments in supervisory practice* (1994) Bank of England Quarterly Bulletin 365; Gower, *"Big Bang" and City Regulation* (1988) 51 MLR 1.

[7] Quinn, *supra* n 5.

[8] Quinn, *supra* n 6. Quinn highlights how an upswing in the economy tends to obscure bad credit and bad market decisions and a downswing, especially one which is protracted and severe, will reveal these errors in judgment and also create solvency problems for these financial institutions. This is illustrated by the downswing experience in the United Kingdom between 1990 and 1992. See also Pennant-Rea, *Credit and economic policy* (1994) Bank of England Quarterly Bulletin 169, who similarly highlights that, notwithstanding the diversity of the types of lending in the market, the common thread in most cases of bad loans is faulty credit judgments by financial institutions, the simplest error of which is the failure to gauge whether a debtor can service a loan and repay it.

[9] See also Quinn, *Derivatives - where next for supervisors?* (1993) Bank of England Quarterly Bulletin 535, where he points to the need for financial institutions themselves to focus on risk control, rather than taking a reactive stand and waiting for supervisory response.

[10] Douglas, *Risk and Blame: Essays in Cultural Theory* (1992, repr. 1994) Routledge, London, New York. Douglas adopts a group-grid typology to identify four basic ways of life, *viz.* hierarchists, individualists, egalitarians and fatalists. Her cultural theory of risk management is then premised on the fact that each way of life has its own particular bias which determines the manner in which risk, blame and loss is allocated between the parties. For further discussion by Douglas, see *Culture and Collective Action* in Freilich (ed.) *The Relevance of Culture* (1989) Bergin & Garvey, Berlin; *The Person in an Enterprise Culture* in Hargreaves Heap and Ross (eds.), *Understanding the Enterprise Culture: Themes in the Work of Mary Douglas* (1992) Edinburgh University Press, Edinburgh. See also Thompson, *The Dynamics of Cultural Theory and their implications for the Enterprise Culture* in Hargreaves Heap and Ross (eds.), *Understanding the Enterprise Culture: Themes in the Work of Mary Douglas* (1992) Edinburgh University Press, Edinburgh; Thompson et al., *Cultural Theory* (1990) Westview Publications, California.

[11] Mackenzie, *op. cit.*.

[12] Mackenzie focuses only on three of the four ideal types, namely the hierarchists, the individualists and the egalitarians. Fatalists have been excluded from the analysis since that it would be a contradiction in terms.

[13] See O'Donovan, *Sexual Divisions in Law* (1985) Weidenfeld & Nicolson, London; Fehlberg, , *Sexually Transmitted Debt* (1997) Clarendon, Oxford; Richardson, *Protecting women who provide security for a husband's, partner's or child's debts. The value and limits of an economic perspective* (1996) 16 LS 368. See also Otto, *A Barren Future? Equity's Conscience and Women's Inequality* (1992) 18 Melbourne University Law Review 808, who provides an interesting discussion of equity's construction of equality and women and how equity may face certain limitations in terms of responding to gender inequality.

[14] Fehlberg, *op. cit.* at 21.

[15] *Ibid.* Fehlberg's sample of forty-six comprised twenty-four sureties, of which nineteen were female sureties and five were male sureties, twelve debtors, five lenders and five lawyers.

[16] *Ibid.*, at 42.

[17] *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change* (1974) 9 Law & Society Review 95.

[18] *Ibid.*, at 97-104, 124-125.

[19] *Ibid.*, at 97-98.

[20] *Ibid.*, at 103.

[21] As can be seen by cases like *Midland Bank v Serter*, *Massey v Midland Bank* and *Banco Exterior Internacional v Mann*. Refer also to Fehlberg, *op. cit.*, at 66.

[22] *Ibid.*, at 132.

[23] *Ibid.*, at 145.

[24] Refer particularly to Pahl, *Money and Marriage* (1989) Macmillan Education, Basingstoke and Delphy, *Close to Home: A Materialist Analysis of Women's Oppression* (1984) Hutchinson, London.

[25] *Ibid.*, at 147.

[26] This approach is reflected in the 'manifest disadvantage' requirement whereby the creditor will only be put on notice of the possibility of undue influence having been exerted on the surety if the transaction is manifestly disadvantageous to her.

[27] Fehlberg, *op. cit.*, at 147. See also Richardson, *op. cit.*, who argues that reference to the 'rational self-interested man' without emotional connections in economic analysis is

inappropriate to many female sureties. In practice, because of their role in the family and their relationship with their husband, partner and/or children, most women are under strong pressures to subject their own individual preferences as subsidiary to the broader preference of maintaining the family relationships. She further argues that choice cannot be treated as 'rational' in the economic sense where it is the only possible outcome in the context of the relationship which is one of dependence.

[28] Fehlberg, *op. cit.*, at 162.

[29] *Ibid.*, at 170-171.

[30] *Ibid.*, at 174.

[31] Refer to Chap 5 for a detailed analysis of *O'Brien*.

[32] *Banking contracts: the influence of spouses* (1993) 8(12) BJIB&FL 523.

[33] See cases like *Lloyds Bank v Bundy* [1974] All ER 757 and *Cornish v Midland Bank* [1985] 3 All ER 513 in which the courts have held that, where the bank takes on the role of adviser to a customer in respect of the nature and effect of the security document, the bank is under a duty of care not to negligently misstate the effect of the proposed security.

[34] [1995] 2 FLR 325.

[35] [1995] 1 FCR 465; reversed [1995] 3 FCR 735, CA.

[36] [1995] 1 FLR 1034

[37] [1988] 3 All ER 24.

[38] [1995] 1 All ER 929.

[39] at 934-935.

[40] [1997] ECGS (3)53.

[41] Gross and Wolfson, *Enforcing security against the surety: Matters left unresolved by the House of Lords in Barclays Bank plc v O'Brien* (1994) 9(6) BJIB&FL 265.

[42] [1995] 1 All ER 936.

[43] Goo, *Enforceability of Securities and Guarantee after O'Brien* (1995) 15 OJLS 119 and Chandler, *Undue Influence and the Function of Independent Advice* (1995) 111 LQR 51 both observe that the *O'Brien* test makes minimal attempts to check the unconscionable conduct of the debtor so as not to hinder the provision of loan capital to business enterprise.

[44] See also *Halifax Building Society v Brown* [1996] 1 FLR 103. In that case, the wife had signed a letter in favour of the bank postponing her interest. The letter also acknowledged, contrary to the facts, that she had received legal advice independently from the husband. The court was, however, prepared to find that there was a triable issue on the basis that the bank had done much less than the bank in *Banco Exterior Internacional v Mann* and in

other cases in ensuring that the wife was actually warned of the consequences of the transaction.

[45] [1997] 1 All ER 144.

[46]at 156. Criticisms have, however, been levelled at *Credit Lyonnais v Burch* and particularly the judges' treatment of manifest disadvantage and the independent legal advice requirement: see Hooley and O'Sullivan, *Undue Influence and Unconscionable Bargains* (1997) LMCLQ 17. See also Tjio, *O'Brien and Unconscionability* (1997) 113 LQR 10.

[47] [1993] 4 All ER 268.

[48] [1995] 2 FLR 376.

[49] See also *Halifax Mortgage Services v Stepsky* [1995] 3 WLR 711 where the court held that as soon as the solicitor, who was acting for the bank, the debtor and the surety, acquired knowledge of the true purpose of the loan, a conflict of interest arose between his duty to communicate the information to the bank and his duty to the debtor and the surety not to disclose such information without their consent. In the premises, the solicitor's knowledge could not be imputed to the bank and the security was therefore enforceable.

[50] See *Clark Boyce v Mouat*.

[51] See also Hooley, *Taking security after O'Brien* (1995) LMCLQ 346. Hooley notes that, if the independent legal advice criterion were to involve a duty by the bank to pass on information about the debtor's financial affairs, this requirement would not only place a heavy burden on banks but would also raise two problems: first, the question of what information the bank should pass on and second, the issue of confidentiality owed by the bank to its customer. It has been noted that a guarantee is not *uberrimae fidei* requiring full disclosure of material facts. Hooley, therefore, concludes that the so-called relaxation of the independent advice requirement is a reflection of the fact that the courts are merely concerned with the way the transaction appears to the bank and not the surety and whether the bank can assume that the surety has received independent legal advice.

[52] [1929] AC 127.

[53] *Inche Noriah*, per Lord Hailsham LC at 135.

[54] Mackenzie, *op. cit.;* Lawson, *O'Brien and Its Legacy: Principle, Equity and Certainty?* (1995) CLJ 280 who highlights that the 'uncertainty' of the independent legal advice requirement is centred on the uncertainties which lie in interpreting what 'independent' means.

[55] O'Hagan, *Legal Advice and Undue Influence: Advice for Lawyers* (1996) 47(1) NILQ 74.

[56] Tjio, *Banking: New cases applying O'Brien* (1996) JBL 266.

[57] *Do Not Sign* (1996) New Zealand Law Journal 143.

[58] Mackenzie, *Beauty and the Beastly Bank: What should Equity's fairy wand do?* in Bottomley (ed.), *Feminist Perspectives on Foundational Subjects in Law* (1996) Clarendon, Oxford. See also Fehlberg (1997) *op. cit.*; *The Husband, The Bank, The Wife and Her Signature* (1994) 57 MLR 467 *and The Husband, The Bank, The Wife and Her Signature - The Sequel* (1996) 59 MLR 675.

[59] (1994) and (1996), *op. cit.* at n 58. Refer also Chap 4 above.

[60] *Op. cit.*, at n 57.

[61] *Op. cit.*

[62] *Op. cit.*

[63] Birman, *Provision of security by wives: What she doesn't know may hurt the lender* (1995) 69 Law Institute Journal 675. Birman notes that, in complying with the bank's wishes of providing certificates in the form required by the bank, the more a solicitor acts in accordance with the wishes of the bank, the greater the risk that the solicitor will not perform his duty to the surety by giving truly independent legal advice, as opposed to technical advice. In addition, the provision of solicitors' certificates do not, in any event, save a transaction which is an unconscionable one.

[64] In *O'Brien*, Scott LJ was of the opinion that a bank should not, in explaining the security to the surety, be taken to have assumed a tortious duty of care. However, if the surety is also a customer of the bank or if the bank assumes the role of adviser, the bank might be found to have owed a contractual or tortious duty of care to the surety. A similar view was expressed by Kerr LJ in *Cornish v. Midland Bank* [1985] 3 All ER 513; cf. *Downsview Nominees v First City Corp* [1993] 2 WLR 86.

CHAPTER 7

Third Party Security Transactions: Directions to be taken in the future[1]

7.1 Introduction

In the previous chapter, an attempt was made to explain the limitations of the present application of the doctrine of undue influence, together with the doctrine of notice and the independent legal advice requirement, in third party security transactions. These limitations relate not only to the banks' responsibility for the moral hazards in the private relationship between the debtor and the surety but also to use of independent legal advice as a mechanism for managing risk in such transactions. The whittling down of the independent legal advice requirement indicates an approach which is clearly more sympathetic to the banks and other creditors and has been justified on the grounds of maintaining the security of transactions.[2] Banks should only be held responsible for matters which are obvious to them. If not, banks and other financial institutions will be reluctant to grant credit facilities on security of the family home which will, in turn, 'reduce the flow of loan capital to business enterprises.'[3]

The central argument in Chapter 6 was that the reduced significance of the independent legal advice requirement consequently renders the present principles ineffective in counteracting the effects of undue influence which have been exerted on the surety when providing security. The evident shift is from advice which has to be actually independent[4] to mere technical legal advice on the nature and effect of the transaction.[5] The application of a risk management perspective in the legal discourse of suretyship law is helpful in considering whether the devices of undue influence and the independent legal advice requirement are adequate in managing risk.

It was further argued in that chapter that such an approach paves the way for considering strategies and alternative devices which are better suited to risk management. The analysis led to the observation that greater clarification of the independent legal advice requirement is required. The cases post-***O'Brien*** illustrate the inconsistency of the courts' interpretation of this particular requirement. This is exemplified in the different approaches taken by the courts in determining the extent of the legal advice required in order for the 'reasonable steps' test to be satisfied. In order for the independent legal advice requirement to act as a more effective device for counteracting the effects of advantage-taking of the surety, the analysis posits the need for increasing access to information for the surety and the adopting of a higher standard of advice as suggested by Hobhouse LJ in ***Banco Exterior Internacional v Mann***.[6]

In response to the inadequacy of the present principles in controlling moral hazards in surety cases, various proposals for reform have been made.[7] One of the recurring proposals made is that banks should make disclosure of the debtor's financial position to the surety's solicitor prior to the execution of the security document so as to enable the solicitor to offer advice on the financial wisdom of the transaction. Another possible solution for improving risk management is the implementation of better procedures for supervising the granting of loans. These may be implemented through legislation or self-regulation by the banking industry. The above proposals are not intended to form an exhaustive list but, for the purposes of this chapter, discussion is to be limited to these two proposals. The aim is to consider the viability, as well as practicability, of these two particular proposals. In that respect, the analysis revolves around three central issues: the extent of the disclosure of information; the extent of the advice to be given to the surety and whether that advice should include advice on the financial wisdom of the transaction; and lastly, whether the present self-regulatory

system set up by the banking industry should be maintained to ensure prudential practices by banks in cases of loans to be secured by third parties, especially where security is in the form of a mortgage over the family home.

7.2 Independent Legal Advice - Conflicts of Interest and Information

Hobhouse LJ in his dissenting judgment in ***Banco Exterior Internacional v Mann*** recognises that the independent legal advice requirement serves a purposive role, which is to protect the surety from advantage-taking. In order for the requirement to satisfy this role, the advice must be sufficiently independent, which necessarily draws attention to the quality of the advice given, the independence of the adviser and whether sufficient information has been made available to the surety to enable her to make an informed decision as to whether or not to proceed with the transaction. The upshot of this approach is the increased provision of information to the surety so that her consent is an informed one.

However, the provision of information to the surety is subject to duties of confidentiality at two levels. First, the disclosure of information about the debtor's financial position by the bank is subject to the bank's duty of confidentiality to the debtor.[8] Second, a solicitor who acts for two or more parties in the transaction is also bound by his duty of confidentiality to his other client (be it the bank and/or the debtor) not to disclose information, which is classified as confidential, to the surety.[9] Given the respective duties of confidentiality owed by a bank and a solicitor and the purposive role of the independent legal advice requirement, the increased provision of information to the surety which is called for by a higher standard of advice may in itself 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.

(a) Duty of confidentiality

(i) *The bank's duty of confidentiality*

One of the main principles of banking law is that banks are subject to a duty of confidentiality to their customers. In ***Tournier v National Provincial and Union Bank of England***[10], the court specifically stated that the duty of confidentiality owed by a bank to its customers stems not from a mere moral obligation but from the contract between the bank and its customer.[11] Thus, any information pertaining to the customer's accounts with the bank is classified as confidential and may not be disclosed by the bank to third parties. ***Tournier***, however, provides certain exceptions to this general duty of confidentiality, which are: (i) where disclosure is under compulsion of law; (ii) where there is a duty to the public to disclose; (iii) where the interests of the bank require disclosure; and (iv) where disclosure is made by the express or implied consent of the customer.[12]

Deviation from the bank's general duty of confidentiality is only permitted in any one of the above circumstances. However, as recognised by the Review Committee in 1989, there is a growing concern over the extent to which the bank's duty of confidentiality is being undermined.[13] Despite the passage of the Data Protection Act 1984, the Review Committee noted the limited impact of the 1984 Act in maintaining the confidentiality of information for customers.[14] In addition, the Review Committee observed that the increasing undermining of the bank's duty of confidentiality is based primarily on three reasons.[15] First, as a result of moves towards crime prevention and detection, there has been an increasing statutory erosion of this duty.[16] Second, banks are seeking a greater flow of confidential information about customers within their own banking group as a result of the growing risk of debtor default. Third, one repercussion of the growing risk of debtor default is the increasing pressure on banks to release

customer information to credit reference agencies.

In relation to third party security transactions, setting a higher standard for the independent legal advice requirement will undoubtedly call for greater disclosure by the bank of the debtor's financial matters, which are caught by the bank's duty of confidentiality. There are two possible solutions available to the bank so as to avoid any allegations of breach of duty. The first would be to obtain the consent of the debtor under ***Tournier*** rule (iv) to permit the bank to make disclosure of the necessary confidential information to the surety and/or her solicitor. The other solution is to legislate for the provision of such information. However, given the response of the previous Conservative Government in 1990 to the recommendations of the Review Committee,[17] the general preference lies against legislation.

Thus, the more probable and practical solution for a bank would be to obtain the prior consent of the debtor to make disclosure of information pertaining to the debtor's accounts, as may be necessary, to satisfy this higher requirement. However, reservations have 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.[18] This point will be considered in greater detail below, in conjunction with the issues of disclosure and the extent of the legal advice required.

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

The exact boundaries of a fiduciary relationship are less than clear. However, certain common characteristics assist in identifying whether a relationship may be fiduciary in nature. The relationship normally entails a person undertaking to 'act on behalf of or for the benefit of another, often as an intermediary with a discretion or power which affects the interests of the other who depends on the fiduciary for information or

advice'.[19] The characteristics of a fiduciary relationship have been described as follows[20]: (i) the fiduciary has scope for the exercise of some discretion or power; (ii) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (iii) the beneficiary is peculiarly vulnerable or at the mercy of the fiduciary holding the discretion or power.

The imposition of duties on the fiduciary appears to be concerned with the conduct of the party who is placed in a position of trust, and the policy behind imposing such a duty is to prevent abuse and to maintain the integrity of the trusting relationship.[21] As such, a fiduciary relationship will attract the following duties: (1) 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 client's; (2) the 'no profit' rule; (3) the undivided loyalty rule where a fiduciary is under a duty not to act for parties having conflicting interests; and (4) the confidentiality duty.[22]

The solicitor-client relationship, being fiduciary in nature[23], imposes the aforementioned duties on the solicitor in relation to his client. The independent legal advice requirement draws particular attention to duties (3) and (4) and how these two particular duties may set the parameters on two elements: the independence of the solicitor and the extent of the legal advice given to the surety. The first may call into question duty (3) when the solicitor acts for two or more parties in the transaction, whilst the second may challenge the solicitor's duty of confidentiality owed to his other client when offering advice to the surety. The workings of these two elements *vis-à-vis* duties (3) and (4) are not necessarily distinct and may have considerable overlap.

(b) Independence of the Adviser and Conflicts of interest

The less rigid treatment of the independent legal advice requirement evident in the

cases post-***O'Brien*** can only be supported on the basis that a difference is made between technical advice of the nature and effect of the transaction and advice on the financial wisdom of the transaction.[24] In two-party presumed undue influence cases, the legal advice 'must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor'.[25] This suggests that the legal advice in a two-party presumed undue influence case entails more than just technical advice but requires advice on the financial wisdom of the transaction, before the presumption of undue influence is rebutted. This appears to parallel the purposive role of legal advice in surety cases, as identified by Hobhouse LJ.

On moving away from technical advice, the contention that a solicitor may act for two or more parties in the transaction becomes harder to sustain.[26] The adviser in a third party security transaction should be fully informed of all material facts so as to be able to proffer advice on the wisdom of the transaction and other prudent options which may be available to the surety. All material facts should also be disclosed by the adviser to the surety to enable her to give her informed consent. This argument is attractive in the sense that it conforms with equity's view of informed choice and exercise of independent free will on the part of the surety. At a practical level, the increased provision of information may subject a solicitor to a greater potential of a conflict of interest where he acts for two or more parties in the transaction.

Earlier discussion indicates that cases post-***O'Brien*** like ***Clark Boyce v Mouat***[27] and ***Bank of Baroda v Rayarel***[28] support the view that a solicitor may act for two or more parties in a transaction, even where there is a possibility of a conflict of interest between the solicitor's clients.[29] The Privy Council in ***Clark Boyce v Mouat*** expressly stated that the scope of the fiduciary relationship and the extent of the

solicitor's duties to his client will depend on his client's instructions and that a solicitor is not expected to go beyond his instructions to proffer unsought for advice. Recognition by the courts of the effectiveness of contractual terms to delineate the scope of the fiduciary duties owed to clients can also be seen in ***Kelly v Cooper***.[30] The action in ***Kelly v Cooper*** revolved around the issue of whether the estate agent, who had been engaged by the plaintiff to sell his property, was in breach of duty when the agent failed to disclose to the plaintiff that the owner of the adjacent property had also commissioned the agent to sell that property. Taking into account the nature of the parties' contract as well as the trade custom of the industry, the court found that there was no duty on the part of the agent to disclose that particular information to the plaintiff. Hence, the agent's non-disclosure to the plaintiff was not a breach of duty.

In doing so, ***Kelly v Cooper*** clearly indicates that, where a fiduciary relationship arises out of a contract, a duty-defining or an exclusion clause, which is clearly worded and unambiguous, will effectively circumscribe the extent of the fiduciary duties owed by the fiduciary to the principal. Thus, ***Clark Boyce v Mouat*** and ***Kelly v Cooper*** illustrate that contractual arrangements and disclosures for the purposes of obtaining the clients' informed consent are effective measures in overcoming conflicts of interest. In the context of third party security cases, the instructions given to the solicitor will demarcate the extent of the solicitor's duties to his respective clients and the advice required of him.

Further, there is little guidance in the Law Society's Guide to the Professional Conduct of Solicitors (1993) (hereafter referred to as 'the Solicitors' Guide') to help mark out clearly the cases of conflict and when solicitors should not be acting for several parties in a transaction. Whilst the current rules expressly prohibit a solicitor from acting for both parties in a transaction where there is a possibility of their interests

being in conflict[31], there are no clear guidelines in the Solicitors' Guide to assist solicitors in determining where the boundaries lie. Notwithstanding the prohibition of acting for two or more parties in a possible conflict situation, the Solicitors' Guide generally accepts that a solicitor may continue to act in such a situation provided that the informed consent of the parties is obtained.[32]

Cases like ***Bank of Baroda v Rayarel***, ***Bank of Baroda v Shah***[33], ***Midland Bank v Serter***[34]and ***Massey v Midland Bank***[35] reaffirm the view that a bank may safely assume the independence of the solicitor in giving advice to the surety, even though the bank knows that the solicitor acts for more than one party in the transaction. In the third party security cases, the weight of the authorities suggests that, where the solicitor acts for two or more parties in the transaction, the solicitor is the party who is best placed to judge his independence and whether his duty to one client is in conflict with that owed to the other client. Even where there is a possible conflict of interest, his representing two or more parties to the transaction will not be seen to jeopardise his independence as adviser, provided that the parties give their informed consent.

Recent cases like ***National Westminster Bank v Beaton***[36], ***Barclays Bank v Thomson***[37] and ***Banco Exterior Internacional v Thomas***[38] indicate continued support for the approach taken in ***Bank of Baroda v Shah*** which *prima facie* assumes the independence of the solicitor when giving advice to the surety. In ***Banco Exterior Internacional v Thomas***, Sir Richard Scott V-C reiterated 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'.[39] To that extent, the 'classic rebutting evidence' of the presumption of undue influence is the evidence that advice has been given by an independent solicitor. A 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[40], and is entitled to rely on the solicitor's certificate confirming that independent advice has been properly given.[41]

As matters stand, the purposive role of the independent legal advice requirement in third party security transactions remains tenuous. If legal advice were effectively to counteract the undue influence exerted on the surety by the debtor, the advice should come from an adviser who is truly independent. In that respect, the legal profession needs to be more proactive in surety cases. Clearer guidelines than the present highly generalised rules are required from the Law Society in defining situations which may possibly be conflict situations and delineating when solicitors should not act for two or more parties in a transaction. This would be a positive step in the direction of checking the independence of the solicitor.

(c) Disclosure and Extent of Advice

The independent legal advice requirement further calls into question the extent of the advice required to be given to a surety. The cases post-***O'Brien*** show a lack of consensus on whether independent advice is limited to merely a technical legal explanation of the nature and effect of the transaction or entails a heavier burden of covering an assessment of the viability of the transaction.[42] Although the weight of the authorities indicate that legal advice need not extend to advice on the wisdom of the transaction, cases like ***Banco Exterior Internacional v Mann*** and ***Credit Lyonnais Bank Nederland v Burch*** [43] illustrate the limitations of a lower standard of legal advice. These cases show how mere technical legal 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 in such instances. On the other hand, a higher standard of advice will necessarily involve greater

disclosure of information to the solicitor, which information the bank may not be at liberty to divulge without being in breach of the duty of confidentiality owed to the debtor.

It is further inherent in the solicitor's fiduciary duties that all material information should be disclosed to the client. Where the solicitor acts for two or more parties in the transaction, this duty of disclosure may very easily bring about a conflict with the solicitor's duty of confidentiality to his other client. For the purposes of surety cases, a situation of conflict is likely to arise for a solicitor where he has confidential information regarding client A, which is relevant to a transaction between client A and client B in which he is acting. Knowledge of the confidential information regarding client A may have been acquired by the solicitor in the course of acting for that client in a previous transaction[44], or may have been acquired whilst representing the parties in the present transaction.[45] In both instances, the solicitor will find himself facing a conflict between maintaining the confidentiality of client A and making disclosure to client B of all information relevant to the transaction.

Thus, the increased provision of information places greater pressure on a solicitor to balance his duty of undivided loyalty with his duty of confidentiality to his clients with conflicting interests. If the solicitor were to act for the bank and/or the debtor, he would be bound by his duty of confidentiality to either or both of these parties not to disclose information about the debtor's financial matters. He would similarly be subject to a duty to disclose all material information to his other client, the surety, thereby giving rise to a conflict of interest. The cases indicate that the proper test for determining whether there is a conflict and whether there is a risk of improper disclosure of confidential information is premised on 'whether a reasonable man informed of the facts might reasonably anticipate' that the confidential information will

be communicated. At that juncture, the appropriate course of action for the solicitor should be to inform the second client of the conflict and refuse the retainer. The solicitor must refrain from acting for one of the parties unless the parties give their informed consent.[46]

Cases like ***Halifax Mortgage Services v Stepsky***[47] and ***Mortgage Express v Bowerman***[48] reveal how it may not always be easy for a solicitor to discern whether information in his possession is 'material', thereby subject to the duty of disclosure to his client. More importantly, both cases illustrate how, in reality, there is a fine line between a no-conflict and a conflict situation and that solicitors are not always able to discern where that line is and whether they have crossed it. Yet, as can be seen from ***Credit Lyonnais v Burch***, the availability of information pertaining to the debtor's existing borrowings and the current facility is crucial to the surety. In the absence of such information, the surety is unable to assess the significance of the security, the extent of her potential liability and the risks she is taking on in giving such security.

The irony is that a solicitor is more likely to have in his possession the relevant financial information about the debtor where he is acting for the bank and/or the debtor as well as, rather than solely, for the surety. However, such financial information is subject to the duty of confidentiality which the solicitor owes to his client, be it the bank and/or the debtor. Yet, the solicitor is under a contemporaneous duty to make full disclosure of all material information to the surety. Here again, in the absence of the debtor's consent to the disclosure of confidential financial information, the solicitor will be constrained in his advice and the advice given will probably not satisfy the purposive role of the independent legal advice requirement. 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 which will

touch on the viability of the transaction or partisan advice. The solicitor's duty of confidentiality will, thus, form an effective barrier to his giving such advice to the surety.

A possible solution to the confidentiality problem may be to obtain the debtor's prior consent to the disclosure of all material information relating to the transaction, including his financial standing, to the surety or to her solicitor so as to enable the surety's solicitor to proffer the requisite higher standard of advice. However, in obtaining the debtor's consent, several issues require consideration: first, the effect and validity of the debtor's consent and second, the extent of the disclosure permitted by his consent. The effect and validity of a generalised advance consent to the non-disclosure (or disclosure) of confidential information as a defence to an allegation of breach of fiduciary duty has been questioned by the Law Commission.[49] Both the Law Commission and the majority of respondents have opposed the legitimation of generalised advance consents.[50] The main difficulty with the legitimation of generalised advance consents lies in distinguishing between acceptable and unacceptable practices by institutions in procuring the customer's consent.[51]

It has been seen that contractual techniques and obtaining the informed consent of a client, after making full disclosure of material facts, are effective methods of dealing with conflicts of interests and circumscribing the bank's and the solicitor's duty of confidentiality to the debtor.[52] If a higher standard of advice is to prevail in third party security cases, it may not be feasible for a bank to rely on the generalised advance consent of the debtor to disclose confidential information about his accounts (as opposed to only the accounts and/or borrowings which are pertinent to the current facility being applied for) since the validity of such consent may be impeachable on the grounds of being too wide in its terms.

The other aspect of the debtor's consent relates to the extent of the disclosure permitted by his consent. This will further define the scope of the waiver of the bank's duty of confidentiality. In order for the validity of the debtor's consent to be unimpeachable, it has been argued that a generalised advance consent should be avoided. However, the scope of the consent should be such as not to undermine the purposive role of the independent legal advice requirement. Thus, an appropriate balance has to be maintained between the debtor's right to confidentiality and the need for the disclosure of information to the surety, so as to enable her to make an informed decision about whether or not to enter into the transaction.

In that respect, ***Credit Lyonnais v Burch*** suggests that a bank should, as a minimum, be permitted by the debtor to release information about the debtor's existing borrowings and the details of the current facility, so that the surety will have the relevant information to gauge the extent of her potential liability and the risk she is taking on in giving the security. The request for the debtor's consent should specify that the bank's duty of confidentiality is waived to the extent that the bank is permitted to disclose information to the surety about the debtor's credit standing, which is relevant to the current facility, and shall include, but not be limited to, making available to the surety a copy of the debtor's application form and a copy of the bank's letter of offer.

The former will provide relevant information to the surety about factors such as the type of credit facility which the debtor is requiring, the financial performance of the debtor's business and whether the business has the ability to make repayments of the facility. It will also reveal to the surety the existing borrowings of the debtor which may impinge on the debtor's ability to finance the current facility. The bank's letter of offer will provide the surety with information on the nature of the credit facility being granted, the extent of the debtor's borrowings from the bank and the various types of

security required by the bank for the granting current facility. This additional information will possibly help the surety to make a sounder assessment of the ability of the debtor to finance the current facility and the risk of enforcement of the security by the bank.

In addition, it has been recommended that the debtor's consent to the disclosure of confidential financial information should include periodic disclosure by the bank to the surety, of information relating to the debtor's accounts and other securities given in respect of the current facility for as long as the surety's security remains operative.[53] The debtor's consent may be stipulated as a pre-condition to the availability of the facility in the bank's letter of offer. This will overcome the objection to generalised advance consents which are too broad in their terms of reference and will clearly delineate the scope of the debtor's waiver of the bank's duty of confidentiality.

Even then, it should be noted that the debtor's consent to the disclosure of confidential financial information will not necessarily eradicate the existing conflict between the parties' respective interests and the solicitor's need to balance those interests in terms of his advice to each client. Despite the debtor's consent, the solicitor may still be constrained in his advice in an attempt to balance the interests of his clients and may, therefore, be unlikely to satisfy the purposive role of the independent legal advice requirement by effectively giving such advice to the surety. As recognised by the Law Society, it has become increasingly necessary for lenders and borrowers to be separately represented by solicitors, rather than for the same firm of solicitors to do the work for both in a conveyancing transaction.[54] This flows from the requirement of lenders for solicitors to do more than just check the title to the property, and to provide more financial information about the borrower which in itself can lead to greater conflicts of interest. In consequence thereof, the Law Society is finding it an increasing

necessity for separate law firms to act for the parties in a transaction so as to reduce mistakes, conflicts of interest, as well as to improve standards of conveyancing practice.

(d) The solicitor's capacity to give effective advice

It has been observed that, in most instances, the advice given by a solicitor is usually limited to technical legal advice, covering the terms and nature of the transaction.[55] Although the argument has so far been for the introduction of a higher standard of advice if the independent legal advice requirement is to satisfy its purposive role, it has been questioned whether this higher standard of advice is within the scope of expertise of some solicitors.[56] This raises the question of whether solicitors have the competence 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 viability of the transaction.

The question raises two issues, the first of which draws attention to the solicitor-client relationship and how solicitors behave in the course of representing their clients and the second highlights the matter of 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 ***Credit Lyonnais v Burch***, Millett LJ suggests that, not only will the advice given by a solicitor be subject to scrutiny by the courts but that the solicitor should ensure that his advice is followed by his client, failing which (s)he should refuse to act further for that client. This statement has been criticised for making too many assumptions about a solicitor's relationship with his client.[57]

Firstly, the assumption is that solicitors are the ones who are in control of the solicitor-client relationship and that clients are subordinated to their lawyers. Cain found that, contrary to this general proposition, it is clients who 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.[58] She observes that lawyers are translators. They merely translate their clients' issues which are framed in everyday terms, and reconstitute them in terms of legal discourse which have trans-situational applicability.[59] Cain recognises that there may be instances where there may be countervailing pressures on the lawyer's choice of translation and that the lawyer may either refuse to translate or transform the client's chosen objective into a 'reasonable one'.[60] There may even be some instances where the client is not seeking advice but merely legitimation from the solicitor through independent legal advice.[61] Despite these qualifications, Cain, nevertheless, concludes that lawyers are not controllers as clients will generally tell lawyers of their desired outcomes and that lawyers do not tell their clients what they want.[62]

Notwithstanding Cain's observations, it has been argued that it is far from true that solicitors are always motivated by altruistic motives when advising clients. Drawing on the example of the duty solicitor scheme, Mungham and Thomas[63] 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/client interest. Further, Genn[64], following Galanter's one-shotter/repeat player analysis[65], notes that the strategy adopted by parties in the negotiation process will depend on whether one is an one-shotter or a repeat player. The strategy taken by an one-shotter will be one which will minimise the risk of maximum loss, while a repeat player will adopt a strategy which will maximise long-term gains, even if it results in short-term maximum losses in individual cases.[66] Genn observes that the differential access to expert legal advice, which is in itself a consequence of the structural imbalance between the parties, serves to exacerbate the inequalities between the parties.[67]

Contrary to Cain's arguments, Genn, relying on survey results in personal injury cases, argues that plaintiffs/one-shotters have little control over the conduct of their claims and that the strategy adopted by their solicitors is, therefore, crucial. Here, solicitors can take one of two negotiating strategies: cooperative and competitive.[68] As with Galanter, Genn, finds that a solicitor is more likely to adopt a cooperative strategy in negotiation where, for example, the solicitor 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 terms of the third party security transaction, such a solicitor will, in offering legal advice to the surety, offer no more than mere technical legal advice to the surety and will not probe further to offer more detailed advice which will touch on the viability of the transaction, or at least partisan advice. In view of these observations, it makes it increasingly hard to sustain the argument that solicitors may act for two or more parties in a third party security transaction and yet give legal advice which 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, which a higher standard of advice will require.

The second issue is whether solicitors have the expertise to offer advice which will touch on the viability of the transaction. As noted by Genn, there is a direct relationship between a solicitor's advice and the information he is provided with. The lack of information will affect both the solicitor's ability to make a sound assessment of his client's case and to offer reliable advice.[69] As suggested by their lordships in ***Credit Lyonnais v Burch***, the bank should make available to the surety and/or her solicitor information pertaining to the debtor's existing borrowings and details of the

current facility, so that the surety may assess the extent of her potential liability, as well as the significance of the type of security which she is providing. At a practical level, the bank should provide the surety with, at the very least, a copy of the debtor's application form as well as a copy of its letter of offer.

It is submitted that it is within the competence of most solicitors 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, if any, being requested from the debtor to secure the current facility and whether there is any great disparity between the value of the security being requested from the surety and the amount of the current facility. Thus, most solicitors should be capable of offering advice on the viability of the transaction in terms of short-term risks involved in giving the security. It is, however, debatable whether solicitors, not being accountants or risk managers, are competent to offer more detailed financial advice on the projected performance of the debtor's business and the long-term risks involved to the surety. This may be an effective limit to the extent of the legal advice which a solicitor may be able to give to the surety. In such cases, it may be prudent for the solicitor either to advise the surety not to sign or to seek further financial advice, rather than expose himself to allegations of negligence and breach of professional conduct.[70]

Given that there are still certain limitations to the effective protection of all sureties by the introduction of a higher standard of advice, the question posed is whether the law is acting in a paternalistic way in providing differential treatment to vulnerable sureties, which requires a higher standard of advice. The answer lies in the fact that the experiences of vulnerable sureties are specific to their relationships with the debtors, which render them more vulnerable than other sureties to advantage-taking

in the process of providing security. The formal application of rules, such as the independent legal advice requirement, without really assessing whether the advice given is truly independent, will be of very little help to these sureties in ensuring that they are, as far as practicable, protected from such advantage-taking.

As observed by Sir Richard Scott V-C in ***Banco Exterior Internacional v Thomas***[71], 'the purpose of advisers is to advise. The recipient of the advice does not have to accept it. He or she can decide, fully informed by the advice that has been received, whether or not to proceed with the allegedly ill-advised and improvident transaction.' These observations should equally apply to a vulnerable surety. However, the emphasis is on the informed choice of the surety. It is one thing to say that a surety should take independent legal advice and quite another to ensure that the advice is truly independent. The difference lies in the fact that, in the former, the surety, who is not given sufficient information, is not in a position to assess objectively what the true extent of her potential liability is or the significance of the type of security she is being asked to provide. Thus, her decision to provide the security requested cannot truly be said to stem from an informed decision.

7.3 Regulation within the banking industry

Over and above the need to ensure that a surety receives legal advice which is truly independent and will extend to advice on the viability of the transaction, there is also the question of whether more can be done by the banking industry itself to improve credit risk management. One area of focus will be the implementation of more prudential practices by banks in terms of granting facilities and the type of securities to be taken for such facilities. Banks may find that improved banking practices are, in the long-term, better risk management strategies. In this context, two particular

developments in the banking industry are worthy of note, namely the Banking Ombudsman scheme and the Good Banking - Code of Practice, which first came into effect in March 1992 and has since then, seen two further editions: the second edition of the Good Banking - Code of Practice which came into effect on 28 March, 1994 (hereafter referred to as 'the Code of Practice') and the latest edition of which came into effect on 1 July, 1997 (hereafter referred to as 'the Banking Code').

(a) Banking Ombudsman Scheme

The Banking Ombudsman scheme, which is a scheme self-financed by the banking industry, became operational as from 1 January, 1986. The rationale behind the scheme was to offer complainants a less formal alternative dispute resolution forum other than the courts.[72] The idea was to shift away from court-imposed resolution of disputes between consumers and business enterprises to more flexible and informal modes of extra-judicial dispute settlement, focusing on consultation, complaints procedures, conciliation and arbitration.[73] The scheme has a tripartite structure made up as follows: the Board, which is a body comprised wholly of banking interests; the Council, which has a 5-3 division of lay persons and banking representatives; and the Banking Ombudsman himself, who is appointed by the Council.[74] The rationale is that the Council will act as a buffer between the Board and the Banking Ombudsman, so as to maintain the independence of the Banking Ombudsman.

The aim of the Banking Ombudsman scheme is encourage banks to resolve disputes themselves. This is to be achieved by promoting better 'in-house' complaints procedures and to encourage informal settlement of disputes.[75] The complaints process is a three-phase process. Firstly, when a complaint is made, the Ombudsman will have to determine whether the complaint is one relating to banking business and, therefore,

within his remit.[76] If so, the Ombudsman will next have to determine whether the complainant has exhausted all of the bank's internal complaints procedure without success and the complaint is one which has 'matured' in that the parties find that it has reached deadlock.

Once a dispute has reached deadlock, the second stage entails an investigation, which is exploratory, by the Ombudsman as to whether there may be an acceptable compromise for the parties, either in terms of a settlement or the withdrawal of the complaint. At this stage, the role of the Ombudsman is that of a conciliator, where he acts to resolve the dispute by actively encouraging the parties to reach a mutually acceptable compromise.[77] In the event that no such compromise is reached by the parties, the complaints process enters its third and final stage in which the Ombudsman switches role from conciliator to arbitrator. The Ombudsman will then hold a full and formal investigation into the complaint, at the end of which a formal recommendation is put forward by the Ombudsman. In the event that a bank were to refuse compensation to the complainant, the Ombudsman may exercise his residual power of making a binding order up to the maximum sum of £100,000 in favour of the complainant.[78]

There are, however, three substantial exclusions to the jurisdiction of the Ombudsman. The first is that the Ombudsman is not permitted to deal with any complaint relating to the commercial decisions made by banks.[79] The second covers complaints dealing with the policies or practices of banks which do not by themselves give rise to any breach of duty or obligation owed by a bank to the complainant.[80] Notwithstanding these two exclusions, the Ombudsman has indicated willingness not to treat the terms of reference as equivalent to statutory provisions, but to allow flexibility in their interpretation. Thus, errors in procedure leading up to a commercial

decision being made or the overly rigid application of a policy may be treated as being within the Ombudsman's remit if the bank's actions are tantamount to maladministration.[81] The third exclusion involves cases which may be classified as 'test cases' wherein a bank may, by written notice, request that the matter be determined by the courts as the outcome will have 'important consequences for the bank or banks generally or an important or novel point of law'.[82]

In carrying out this remedial process, the terms of reference call for consideration by the Ombudsman of 'general principles of good banking practice' and any other relevant code of practice.[83] In the early days of the Banking Ombudsman scheme, pessimism was voiced at the ability of the Ombudsman to play an influential role in shaping the banking industry's codes of practice to provide better consumer protection. Such reservations about the efficacy of the scheme were shared by the Jack Report.[84] It was argued that the Ombudsman's role of monitoring and promoting compliance would be limited to the compliance of existing standards of good practice as formulated by the banking industry itself, rather than to promoting the establishment of higher standards in the interest of consumer protection.[85] As the scheme is self-financed, there were further arguments that the scheme would be weighted in favour of the banking industry and would not be sufficiently independent, thereby undermining the scheme's credibility and utility as an effective dispute settlement forum. The Review Committee proceeded to recommend that the banking industry should put into place a code of banking practice and that the Banking Ombudsman scheme be placed on a similar statutory footing to the Building Societies Ombudsman scheme so as to maintain the necessary independence of the Banking Ombudsman. The response of the previous Government was that both the Banking and the Building Societies Ombudsmen schemes were working well, despite the lack of statutory standing of the

former. The efficacy of the former scheme may be improved by encouraging more banks to join the scheme.[86] Since then, the number of banks subscribing to the Banking Ombudsman scheme has increased[87] and banks, who are not already members, will eventually do so in response to the requirement of the Banking Code that all banks subscribing to the said Code must subscribe to the scheme or some other recognised arbitration scheme.[88]

(b) Codes of practice

The emergence of the 1992 Code of Practice was largely owing to the recommendation made in the Jack Report that banks 'should promulgate a Code of Banking Practice'.[89] One of the objectives which the Jack Committee felt should be given priority is for greater transparency in the banker-customer relationship.[90] This might be achieved by banks drawing up a code of good banking practice to enable customers to have greater knowledge of the banking relationship.[91] A code of practice would further increase the standards of practice in the banking industry as well as customer confidence in the banking and card payment systems.[92] The previous Government's response to the Jack Report was to maintain the present flexibility of self-regulation and favour the Committee's recommendation that a code of practice be drawn up, which would provide for a minimum standard of services that customers could expect from banks.[93] Thus, the Code of Practice would become a yardstick for best practices against which the services provided by a bank could be assessed.[94]

Shortly after ***O'Brien***, a second edition of the Code of Practice was drawn up.[95] In the context of third party security transactions, the Code of Practice provided that banks *will advise* the potential surety that he or she may become liable instead of or as well as the debtor, whether the liability is limited or unlimited and that the surety

should seek independent legal advice before entering the transaction.[96] The Code of Practice, however, does not require such advice to be anything more than a 'health warning' stamped on the security documents.[97] Another revision made in the Code of Practice was for banks to ensure that both staff and customers were made aware of the banks' complaints procedures.[98] Yet, the Code of Practice appears to set lower standards than those expected by the reasonable steps suggested in ***O'Brien***. This is clearly illustrated by the absence of the ***O'Brien*** requirement that a bank should hold a private meeting with the surety, in the absence of the debtor, to explain such risks to her. By taking a 'health warning' approach, the Code of Practice has been criticised for not going far enough in terms of offering adequate protection to the surety, by ensuring that the surety has a reasonable understanding of the extent of her potential liability and the risks she is taking on in giving security.[99]

In addition, the Preface of the Code of Practice clearly states that the Code is purely voluntary. Thus, it does not form part of the contract between the bank and the customer. Non-compliance with the Code of Practice is not tantamount to a breach of contract and thereby not entitling the customer to claim damages. It is further not a mandatory requirement that banks subscribing to the Code must also be members of the Banking Ombudsman scheme or any other recognised arbitration scheme.[100] This will impact on the accessibility of the customer to the complaints procedure of the Banking Ombudsman scheme. Such banking practices were felt not to go far enough in terms of giving adequate protection to sureties in giving security.

The previous Ombudsman, Lawrence Shurman, was of the opinion that more protection was needed for sureties and suggested that advice to a surety should include, *inter alia*, warning her of her continuing liability until the termination of the guarantee, giving an explanation of the method of termination, warning her that, even after

termination, her liability continues for all liabilities guaranteed prior to the termination, and that a separate copy of the signed security document should be given to the surety as well as the debtor.[101] He further emphasised the significance of the ***O'Brien*** requirement for holding a private meeting with the surety to warn her of the risks in standing surety and to urge her to seek independent legal advice.[102] Even then, he felt that the ***O'Brien*** test did not go far enough.

Given that independent legal advice may be of little help to the surety if the person giving advice does not have relevant financial information, the Ombudsman felt that banks should require beforehand that a debtor make available such financial information to the surety and her independent adviser. Further, the debtor should be required to authorise the bank to supply information to the surety about his accounts and about other types of security being given for the same indebtedness for so long as the security remains operative.[103] The Ombudsman further noted that the Banking Ombudsman scheme was not widely known to the public as the Code of Practice was not generally on display in all bank branches but made available on request. In addition, banks subscribing to the Code of Practice were not required to subscribe to the Banking Ombudsman scheme.[104] Notwithstanding this, it was felt that the Banking Ombudsman scheme should remain a non-statutory one and that converting the scheme into a statutory scheme might result in the loss of flexibility and the power to make binding awards against banks which the present scheme enjoys.[105]

The Ombudsman further recognised that the efficacy of the scheme as an alternative dispute settlement forum will require, *inter alia*, that the scheme be free to consumers and readily accessible, that complaints should be resolved speedily by conciliation where possible[106], that the decisions be based on what is fair in the circumstances which should bind the business and not the consumer, and that the

scheme be clear and well publicised.[107] In 1997, the total number of telephone enquiries to the Office of the Banking Ombudsman increased from 22,793 in 1996 to 26,561 in 1997. The total number of written complaints increased from 7,264 in 1996 to 8,818 in 1997.[108] In terms of actual number of investigations undertaken by the Ombudsman, the number decreased from 736 in 1996 to 674 in 1997. It is arguable that the decline in complaints requiring full investigation may be due to the increasing effectiveness of the internal complaints procedures of banks and the greater willingness of banks to resolve complaints by agreement.[109] Alternatively, the low number of complaints may be due to the fact that consumers do not pursue their complaints or those who do, give up in frustration. The Ombudsman noted that research conducted by Consumer Associations suggests that one in five people do not bother to complain to the Ombudsman and that one in three people give up if the complaint is not resolved at the first attempt.[110] This suggests that, if the scheme were to retain its utility and credibility, more needs to be done to make the scheme more visible and user-friendly.

Since then, the banks have come up with the latest version of a code of practice, which is simply called the Banking Code. The noticeable changes in this latest version of the banks' code of practice is that it is more extensive and inclusive that its predecessors. Firstly, the language of the Banking Code, unlike the Code of Practice which was addressed to banks, is now addressed to customers. This change in emphasis suggests an important shift for the Banking Code, from being one which reflects an in-house set of rules for banks to one which is addressed to the public at large. The desired aim of banks is to make the Banking Code more accessible, visible and comprehensible to customers. Instead of making copies of the Banking Code available to customers on request, copies of the Banking Code are now required to be on display in bank branches.[111] Secondly, both the 1992 and 1994 versions of the Code

of Practice did not make it compulsory for banks who subscribe to the Code to be members of the Banking Ombudsman scheme.[112] In comparison, the Banking Code expressly states that all banks subscribing to the Banking Code 'must belong' to the Banking Ombudsman scheme.[113]

There are two further changes in the Banking Code which were absent in its predecessors and are of particular significance to sureties. Firstly, there is a clear rejection by banks to the taking of unlimited guarantees. This followed a strong recommendation made by the Ombudsman to that effect.[114] Secondly, if a debtor intends to ask the bank to take a guarantee or other security from a third party for the facility, the debtor *may be asked to consent* to the disclosure by the bank of confidential financial information to the surety and his or her legal adviser.[115] This change in practice will undoubtedly help to avoid future cases like ***Credit Lyonnais v Burch*** and is a welcomed move by banks in terms of prudential risk management practice.[116]

The Banking Code further states that banks will 'encourage' sureties to take independent legal advice to make sure that they understand their commitment and the extent of their potential liability in standing surety.[117] Once again, the Banking Code does not go as far as the ***O'Brien*** test by making it a requirement for banks to hold a private meeting with a surety to explain the risks to her in giving security, in addition to urging her to seek independent legal advice. The appearance of the word 'encourage' in the Banking Code suggests that banks may now be expected to do more than merely advise the surety to seek independent legal advice. However, it remains unclear how far 'encouragement' will go. Will 'encouragement' extend to such advice being insisted on in all cases and not just those which are so manifestly disadvantageous as in ***Credit Lyonnais v Burch***? Further, the Banking Code does not go as far as the recommendation made by the Ombudsman in that not only should financial

information be made available to the surety prior to her entering the transaction, but that periodic information about the debtor's accounts should also be made available to her during the life of the security.[118]

(c) A working combination - The Ombudsman Scheme and the Banking Code

As to the question whether the presence of the Banking Ombudsman scheme has made any impact on improving consumer protection and in shaping the setting up of higher standards of good practice, there appears to be conflicting evidence. Morris argues that fears of the Ombudsman being restricted to a standard reflecting, rather than a standard setting, role appears to have been unfounded.[119] The Ombudsman has consistently shown willingness to criticise and suggest changes to standard banking practices which have been exposed as being deficient. In contrast, Seneviratne argues that the Ombudsman scheme has had little impact on alleviating the grievances of customers. Although the Ombudsman is consulted by the banking industry on the working of the industry's code of practice, there appears to be no incentive at this juncture to extend the role of the Ombudsman by expanding his terms of reference, for example, in relation to matters which touch on the policies of banks.[120]

Whilst it is true that the Ombudsman's terms of reference have not been expanded to that extent, it is, however, arguable that developments since Seneviratne's study may point to the increasing efficacy of the Banking Ombudsman scheme as an alternative dispute settlement mechanism. Since that study, the third edition of the Banking Code has come into force, eliminating some of the weaknesses of the scheme as then identified by Seneviratne. The banking industry has shown greater willingness to take on board the Ombudsman's recommendations, as illustrated by some of changes found in the Banking Code. For example, both the 1992 and 1994 versions of

the Code of Practice did not make it compulsory for banks who subscribe to the Code to be members of the Banking Ombudsman scheme. In comparison, the Banking Code 1997 expressly states that all banks subscribing to the Banking Code 'must belong' to the Banking Ombudsman scheme.[121] This would ensure greater participation by banks in the scheme and consequently, increased accessibility to the scheme for customers. A further example can be seen in the Ombudsman's recommendation for the increased provision of financial information to the surety and his or her adviser being taken on board in the Banking Code.[122]

One of the main advantages of the Banking Ombudsman scheme is the fact that, by reason of the scheme being a self-funded one, a customer, who is aggrieved and who has exhausted the bank's internal complaints procedures, may proceed to bring his or her complaint to the Ombudsman in a relatively informal environment and at little or no cost to himself or herself. This may be a particularly attractive option for a surety, especially in cases where the surety lacks resources to protect her interests through the formal court process. Certain limitations, however, remain which still call into question the efficacy and utility of the scheme, some of which are linked to the Banking Code. Although the Banking Code makes it mandatory for all banks subscribing to the Banking Code to be members of the Banking Ombudsman scheme and for the Banking Code to be a guide to the Ombudsman in determining what is or is not good banking practice, the legal effect of the Banking Code remains in doubt.

As the Banking Code's key commitments start with the words 'We …promise', it has been argued that the Banking Code effectively elevates itself to a form of 'super-added' obligations to the general law.[123] The Banking Code, rather than being a code which sets the minimum standard of practice for banks, appears to go further than the minimum standard set by the general law. In other words, the general law sets the

minimum standard which is expanded by the Banking Code.[124] However, the absence of the elements of accord and consensus in voluntary codes of practice means that it is difficult to explain the effect and enforceability of such codes in contractual terms. It is, therefore, unclear whether, by the usage of words such as 'We...promise' in the Banking Code, banks are contractually bound to perform as provided therein. Further, although the Banking Ombudsman is required by his terms of reference to consider the Banking Code when dealing with a complaint, it is also unclear whether the courts should similarly be expected to take into account the provisions of the Banking Code if a dispute were to come before the courts instead of the Ombudsman. Whilst the Banking Code describes itself as being voluntary, new provisions in the Banking Code regarding matters such as the compulsory subscription to the Banking Ombudsman scheme, mean that the Banking Code is gradually taking on a more semi-voluntary stance. Coupled with the Ombudsman's role in monitoring compliance, the Banking Code may be more appropriately described as a form of 'quasi-self-regulation'.[125] Yet, these issues render the question of the exact legal effect of the Banking Code an unresolved one.

It is suggested that there are several key points which tilt the scales in favour of the Banking Ombudsman scheme and the Banking Code as an effective combination for the future development of better banking practices, which will provide better protection for sureties. The consultative role of the Ombudsman in the drawing up of the banks' code of practice may facilitate the introduction of better practices in relation to the provision of financial information and advice to sureties. Although not all recommendations made by the Ombudsman have to-date been taken up by the banking industry, the latest Banking Code reveals a cooperative relationship and the willingness of banks to take on board some of the Ombudsman's recommendations, thus shedding

light on the Ombudsman's increasing standard setting role. The periodic review of the Banking Code is to be further encouraged so that banking practices are subject to scrutiny on a regular basis to ensure that the practices are kept up to date. These factors, coupled with the move by the Ombudsman and banks to make the scheme more visible, comprehensible and accessible to consumers, gives the scheme great potential for developing into an efficient alternative to the formal court process for dispute resolution. The utility of the scheme as an alternative dispute settlement forum may be further enhanced if the financial jurisdiction of the Ombudsman is extended from the existing £100,000 to £150,000 as recommended by the Ombudsman in 1996.[126]

7.4 Conclusion

As the law stands, the security given by a surety 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. There are, however, strong arguments in favour of the contention that, in terms of policy objectives, there should be no difference in the treatment of independent legal advice in two-party presumed undue influence cases and third party security cases. A higher standard of advice should be introduced in the latter cases. However, such higher standard of advice may bring a greater potential for a conflict between the solicitor's duties of undivided loyalty and confidentiality were he to act for two or more parties in the transaction.

The effective performance of the solicitor's duty to advise will call for several changes. There should be an increased provision of information regarding the debtor's financial standing. This 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. Falling short of legislative intervention, this would entail introduction by banks of best practice procedures, which should not be oppressive, to obtain the debtor's consent to the disclosure of such information to the surety and her solicitor. It is hoped that, with the introduction of paragraph 3.14 in the Banking Code, more banks will move towards the general practice of obtaining a debtor's consent to the disclosure of confidential information to the surety and her adviser as a matter of course in all surety cases, rather than on a case to case basis. With such information being made available, lawyers should be better placed to give more than mere technical legal advice to the surety and to extend their advice to the viability of the transaction. It is further hoped that advisers will pick up on the 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. In addition, there should be clearer guidelines from the Law Society as to multiple representation in third party security transactions so as to minimise potential conflicts of interest.

More importantly, the time has come for banks to overhaul their banking practices and introduce better procedures for supervising the grant of credit facilities, especially in cases of loans to be secured by mortgages over the family home and to offer better protection to sureties. With the collaboration of the Banking Ombudsman, developments are taking place which generally point in that direction. As can be seen from the latest Banking Code, banks have now committed themselves to not taking unlimited guarantees. The Banking Code has also responded to the need of advisers to have greater access to financial information about the debtor, in order to proffer adequate advice to the surety on the extent of her liability and the risks to her in giving security. In the long-run, prudential banking practices will be a more efficient way of dealing with credit risk management than the independent legal advice requirement.

This is not to say that the Banking Code is all inclusive. The effectiveness of the Banking Code in giving better protection to sureties will no doubt depend on factors, such as how banks respond to the new Code in terms of the actual disclosure of information to sureties and their advisers, their procedures for assessing the creditworthiness of the debtor and his ability to repay before approving his loan application, how far banks will 'encourage' sureties to take independent legal advice and whether 'encouragement' will go as far as banks insisting on independent advice being taken in all cases as well as stipulating that the adviser must be one who is truly independent. It is hoped that banks will sooner, rather than later, take on the Ombudsman's recommendations relating to the advice to be given to the surety[127], which have not been expressly provided for in the Banking Code.

References

[1] Part of the discussion in this chapter relating to the solicitor's duty of confidentiality and the independent legal advice requirement as set out in *Barclays Bank v O'Brien* [1993] 4 All ER 417 formed the basis of a forthcoming article in The Conveyancer and Property Lawyer titled '*No man can serve two masters: Independent Legal Advice and the Solicitor's duty of confidentiality*'.

[2] Fehlberg, *Sexually Transmitted Debt* (1997) Clarendon, Oxford; *The Husband, The Bank, The Wife and Her Signature* (1994) 57 MLR 467 and *The Husband, The Bank, The Wife and Her Signature - The Sequel* (1996) 59 MLR 675; Berg, *Equitable Protection of certain Sureties* (1993) LMCLQ 101 and *Wives' guarantees: constructive knowledge and undue influence* (1994) LMCLQ 34; 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*, unpublished paper presented at the WG Hart Legal Workshop, 1995 and *Beauty and the Beastly Bank: What should Equity's fairy wand do?* in Bottomley (ed.) *Feminist Perspectives on Foundational Subjects in Law* (1996) Clarendon, Oxford.

[3] *Barclays Bank v O'Brien* [1993] 4 All ER 417, per Lord Browne-Wilkinson at 422.

[4] The argument is that the standard of advice required in two-party presumed undue influence cases as illustrated by cases like *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 should not be different from the standard of advice required in surety cases, since the objective of independent legal advice is the same in both instances.

[5] *Midland Bank v Serter* [1995] 1 FLR 1034; *Massey v Midland Bank* [1995] 1 All ER 929; *Banco Exterior Internacional v Mann* [1995] 1 All ER 936.

[6] [1995] 1 All ER 936.

[7] Fehlberg (1997), *op. cit.*; Mackenzie (1995), *op. cit.;* O'Hagan, *Legal Advice and Undue Influence: Advice for Lawyers* (1996) 47 NILQ 74.

[8] 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: *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461.

[9] This duty stems from the fiduciary nature of the solicitor-client relationship which will be discussed in greater detail below.

[10] [1924] 1 KB 461.

[11] The courts have recognised that, in some circumstances, the banker-customer relationship may attract the fiduciary label where, for example, the bank is aware that the customer has placed trust and confidence in the bank and is relying on its advice. See *Lloyds Bank v Bundy* [1975] QB 326; *National Westminster Bank v Morgan* [1985] 1 All ER 821. The fiduciary relationship will incidentally impose a similar duty of confidentiality on the fiduciary in relation to the principal's matters.

[12] per Bankes LJ, at 473.

[13] Report of the Review Committee on *Banking Services: Law and Practice* Cm 622 (1989) HMSO, London (hereafter referred to as 'the Jack Report').

[14] The 1984 Act is not generally concerned with the confidentiality of information but merely regulates the use of computerised data about individuals.

[15] *Op. cit.*, Chap 5.

[16] 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.

[17] *Banking Services: Law and Practice* Cm 1026 (1990) HMSO, London. The Jack Report had recommended the codification of the *Tournier* rules on confidentiality. However, the recommendation was rejected on the premise that the system appears to be working well

without the need for codification and that 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 (1994), now contained in para 4.1 of the Banking Code (1997). For criticisms on the effectiveness of the Code of Practice in self-regulation and clarifying the bank's duty of confidentiality, see Kent, *Banks and Customer Confidentiality* (1994) Consumer Policy Review 80; Roberts, *The British Penchant for Self-Regulation: The Case of the Code of Banking Practice* (1995) BJIB&FL 385.

[18] Law Commission Consultation Paper No. 124 on *Fiduciary Duties and Regulatory Rules* (1992) HMSO, London. 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, *Fiduciary Duties and Regulatory Rules* No. 236 (1995) HMSO, London.

[19] Law Commission No. 236, *supra* n 17, para 1.3.

[20] *Frame v Smith* (1988) 42 DLR (4th) 81, per Wilson J at 99.

[21] Waters, *The Fiduciary Relationship* (1988) 18 Western Australian Law Review 42; Flannigan, *The Fiduciary Obligation* (1989) 9 OJLS 285. See also McDougall, *The Relationship of Confidence* in Waters (ed.), *Equity, Fiduciaries and Trusts* (1993) Carswell, Scarborough, Ont., 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. In *LAC Minerals v International Corona* (1989) 61 DLR (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 Foster et al., *Disclosure and Confidentiality: A Practitioner's Guide* (1996) FT Law & Text, London.

[22] Law Commission No. 236, para 1.4.

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

[24] O'Hagan, *op. cit.*, argues that the finding of the court in *Clark Boyce v Mouat* [1993] 4 All ER 268 that a solicitor may act for two parties is premised on this distinction between technical advice and advice on the financial wisdom of the transaction.

[25] *Inche Noriah v Shaik Allie Bin Omar* , per Lord Hailsham LC at 135.

[26] O'Hagan, *op. cit.*; Mackenzie (1995) *op. cit.*

[27] [1993] 4 All ER 268.

[28] [1995] 2 FLR 376.

[29] Refer to Chap 6 above.

[30] [1993] AC 205.

[31] Rule 6 of the Solicitors' Practice Rules 1990. The rule expressly prohibits a solicitor from acting, for example, for both the lender and the borrower in a private mortgage, unless there is no conflict of interest.

[32] See Chaps 15, 16 and 24 of the Solicitors' Guide and, more particularly, commentary (1) to Principle 15.03.

[33] [1988] 3 All ER 24.

[34] [1995] 1 FLR 1034.

[35] [1995] 1 All ER 929.

[36] [1997] ECGS (3)53.

[37] [1996] 1 FLR 156.

[38] [1997] 1 All ER 46.

[39] *Ibid.*, at 54-55

[40] *Ibid.*, at 55.

[41] See 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.

[42] Refer to Chap 6 above.

[43] [1997] 1 All ER 144.

[44] *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 SJ 1063; *Lee (David) & Co (Lincoln) Ltd v Coward Chance* [1991] Ch 259 and *Re A Firm of Solicitors* [1992] 1 All ER 353.

[45] *Halifax Mortgage Services v Stepsky* [1995] 3 WLR 711; *Mortgage Express v Bowerman* [1996] 2 All ER 836.

[46] 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 (Law Commission Consultation Paper No. 124 and Law Commission No. 236), 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 Poser, *Chinese Wall or Emperor's New Clothes? Parts I, II and III* (1988) Co Law 119; 159 and 203; McKee, *The Law Commission Report on Fiduciary Duties* (1996) 4 JIBL 139; Bamford, *Banker/Customer Relationship Fiduciary Duties and Conflicts of Interest* (1997) IBL 74.

[47] [1995] 3 WLR 711.

[48] [1996] 2 All ER 836.

[49] Law Commission Consultation Paper No. 124.

[50] Law Commission No. 236, para 12.3.

[51] Law Commission Consultation Paper No. 124, para 6.24. See also Report of the Review Committee on *Banking Services: Law and Practice* Cm 622 (1989) where the Review 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.

[52] See section 7.2(b) above.

[53] The Banking Ombudsman Scheme Annual Report 1995-1996, para 11.5.

[54] The Mail on Sunday, February 8, 1998. The Law Society's observation will equally apply to surety cases where solicitors may represent the bank, the debtor and/or the surety in the transaction.

[55] Fehlberg (1997), *op. cit.*, 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.

[56] Fehlberg, (1996) *op. cit.*; Mackenzie (1995), *op. cit.*

[57] Hooley and O'Sullivan, *op. cit.*, at 21.

[58] *The General Practice Lawyer and the Client* in Dingall and Lewis (eds.) *The Sociology of Professions* (1983) Macmillan, London.

[59] *Ibid.*, at 111.

[60] *Ibid.*, at 120.

[61] *Ibid.*, at 126.

[62] *Ibid.*, at 129.

[63] *Solicitors and Clients: Altruism or Self-Interest?* in Dingall and Lewis (eds.), *The Sociology of Professions* (1983) Macmillan, London. See also Felstiner et al, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming....* (1981) 15 Law & Society Review 631.

[64] *Hard Bargaining* (1987) Clarendon, Oxford.

[65] *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change* (1974) 9 Law & Society Review 95.

[66] Genn, *op. cit.*, at 26.

[67] *Ibid.*, at 37.

[68] *Ibid.*, at 46.

[69] *Ibid.*, at 70.

[70] Richardson, *Do not sign* (1996) NZLJ 143; Anderson, *Duties of Care in Conveyancing* (1993) 31 LSJ 54.

[71] at 54.

[72] A similar scheme has been set up in relation to building societies under the provisions of the Building Societies Act 1986. That scheme, unlike the Banking Ombudsman scheme, is a statutory one which compels 100 per cent membership by all building societies, whereas the Banking Ombudsman scheme is wholly self-financed and voluntary. For a general discussion of the various Ombudsman schemes in the private sector, see Hodgin, *Ombudsmen and Other Complaints Procedures in the Financial Services Sector in the United Kingdom* (1992) 21 Anglo-Am LR 1.

[73] See Morris, *The Banking Ombudsman - I and II* (1987) JBL 131 and 199, for a general discussion of the Banking Ombudsman scheme during the early days of its inception.

[74] The scope of the Banking Ombudsman's jurisdiction is found in the Terms of Reference of the Office of the Banking Ombudsman (hereafter referred to as 'TR').

[75] TR para 19 (c). The Banking Ombudsman may only consider a complaint once the complaint has gone through the complaints procedure of the bank and a deadlock has been

reached.

[76] TR para 29 (c)(2) provides that a bank shall be treated as providing banking services to an individual by virtue of the individual providing a guarantee or other security for any facility granted by the bank to another individual. Thus, a complaint brought by a surety in relation to the third party security transaction will generally be within the remit of the Banking Ombudsman, even though the surety is not ordinarily a customer of that bank.

[77] TR para 1 which provides that one of the principal functions of the Ombudsman is 'to consider .... complaints and facilitate their satisfaction, settlement or withdrawal whether by agreement, by ...making recommendations or awards, or by such other means as seem expedient'. See also TR para 9.

[78] TR para 12.

[79] TR para 16.

[80] TR para 17.

[81] Morris, *op. cit.*

[82] TR paras 20(a)(i) and (ii).

[83] TR para 14(b).

[84] *Supra*, n 13.

[85] The Jack Report, para 15.11. See also Morris, *The Banking Ombudsman - Five years On* (1992) LMCQL 227.

[86] *Banking Services: Law and Practice* Cm 1026 (1990) HMSO, London.

[87] The Banking Ombudsman Scheme Annual Report 1996-1997 reveal that, as at 30 September 1997, a total of 111 banks have subscribed to the scheme, in comparison to 36 when the scheme first started in 1986.

[88] Banking Code, para 5.9.

[89] Recommendation 16(1) of the Jack Report.

[90] See paras 4.02-4.07.

[91] Wheatley, *The New Code of Banking Practice - Or Banking for Beginners* (1991) 6(4) BJIB&FL 155.

[92] Whitehead, *Banking Regulation - Code of Banking Practice* (1994) 9(6) JIBL N129.

[93] *Banking Services: Law and Practice* Cm 1026.

[94] Arora, *Banking law review since the Jack Committee report on banking services* (1991) Co. Law 182. For a general discussion, see also Morris, *Banking Practices Revised* (1992) LMCLQ 474; Lawson, *The legal aspects of the new Code* (1992) NLJ 346 and 353.

[95] For a general discussion of the second edition of the Code of Practice, see Campbell,

Banking: The Revised Code of Practice (1994) Consum LJ 171.

[96] Para 14.1.

[97] Para 14.2.

[98] Para 22.2.

[99] Fehlberg (1997), *op. cit.*

[100] Para 22.4 states that those subscribing to the Code of Practice 'will be expected to belong' which suggests subscription to the Banking Ombudsman scheme or any other recognised arbitration scheme is purely voluntary.

[101] Shurman, *A Fair Banking Code?* (1991) The Chartered Institute of Bankers, Ernest Sykes Memorial Lecture - The Banking Ombudsman Scheme Annual Report 1992-1993.

[102] The Banking Ombudsman Scheme Annual Report 1995-1996, para 11.4.

[103] *Ibid.*, para 11.5.

[104] *Ibid.*, paras 14.4 - 14.5. The same sentiments about publicity of and accessibility to the Banking Ombudsman scheme were voiced by the present Ombudsman, David Thomas, in the Banking Ombudsman Scheme Annual Report 1996-1997.

[105] The Banking Ombudsman Scheme Annual Report 1996-1997.

[106] The turn-around time of a complaint took about 193 days in 1996 compared to 173 days in 1995: The Banking Ombudsman Scheme Annual Report 1995-1996. The Ombudsman aims to improve the turn-around time of complaints so as to make the scheme more efficient.

[107] *Ibid.*

[108] The Banking Ombudsman Scheme Annual Report 1995-1996; 1996-1997.

[109] The Banking Ombudsman Scheme Annual Report 1995-1996.

[110] The Banking Ombudsman Scheme Annual Report 1996-1997.

[111] For a general discussion on the Banking Code, see Salt and Southern, *Black-Gold-Blue: Banking Regulation's New Banner* (1997) 12(7) BJIB&FL 303.

[112] *Supra*, at n 100.

[113] Para 5.9.

[114] The Banking Ombudsman Scheme Annual Report 1995-1996, para 11.3.

[115] The Banking Code, para 3.14.

[116] See also George, *The financing of small firms* (1994) Bank of England Quarterly Bulletin 67; Davies, *Finance for small firms* (1996) Bank of England Quarterly Bulletin 97 which both identify how, in terms of more prudential practices, banks should move away from overdraft facilities to term loans as preferred forms of credit facilities to small firms and that

the better risk management strategy is to focus on the cash flow and performance of the business in determining its ability to repay, rather than reliance on property-based security.

[117] Para 3.14. Cf. The Code of Practice, para 14.1(ii) which states that banks will advise sureties that he or she should seek independent legal advice.

[118] The Banking Ombudsman Scheme Annual report 1995-1996, para 11.5.

[119] Morris (1992), *op. cit.*

[120] Seneviratne, et al., *The Banks, The Ombudsman and Complaints Procedures* (1994) 13 CJQ 253.

[121] Para 5.9.

[122] Para 3.14.

[123] Salt and Southern, *op. cit.*

[124] *Ibid.*, at 307.

[125] *Ibid.*, at 308. Salt and Southern suggest that, as banking services had been excluded from the provisions of the Financial Services Act 1986 where a two-tiered form of regulation was introduced, the Banking Code was a proactive response by the banking industry to the fact that if the industry itself did not initiate some form of self-regulation, the said Act would eventually be extended to cover banking services as well. The Banking Code, in taking on a comparable role to regulatory rules under the 1986 Act, may as such be described as being 'quasi-self-regulatory'.

[126] The Banking Ombudsman Scheme Annual Report 1995-1996, para 15.11.

[127] *Supra*, nn 101 and 102.

CHAPTER 8

Equity's Protection of Vulnerable Sureties: Conclusion

Summary

The main aim of this thesis has been to establish how the present formulation of the equitable principles in two interrelated areas tend to discriminate against women. The first is where the woman is attempting to establish an equitable share in the family home under the common intention constructive trust approach, whilst the second is where she agrees to stand surety for her husband's or partner's debts. The analysis points to how a female surety, who is attempting to protect her proprietary interest in the family home and to avoid the successful enforcement of the security given to the bank, is disadvantaged on both counts by the way in which the equitable principles are both formulated and interpreted by the judiciary.

This is premised on the fact that the principles take on the appearance of neutrality which encompasses both elements of objectivity and impartiality in its application. However, the fundamental flaw of the present equitable principles lies in the formal treatment of women and men as being equal. This formal equality effectively masks the continuing inequality between them, which stems from the impact that sexual division of labour has in a domestic relationship, especially in relation to the parties' respective economic positions. In doing so, the law compounds the inequality experienced by most women.

In the context of property law, it has been shown in the discussion spanning Chapters 2 to 4 that the appearance of neutrality in the present law is evidenced by its recognition of the formal equality of men and women to own property. The discussion

in Chapter 2 pointed to the major developments which took place in the nineteenth century which had a great impact on the property rights of married women. It was evident that, prior to the passage of the Married Women's Property Acts of 1870 and 1882, the common law rules effectively deprived women of their property on marriage, by passing control of all real property and giving absolute ownership over all personal property to their husbands. Through a complex system of rights such as dower, free-bench and jointures, married women were given some form of income during their widowhood to secure their subsistence. The overall effect of the common law rules was to discriminate married women from men and unmarried women, leaving them in total economic dependence on their husbands.

In response, equity had recognised limited rights of women to property in the form of their separate property, which traditionally took the form of marriage settlements, securing the use of the trust property to the women during their marriage. By severing legal and beneficial ownership, married women were permitted by equity to enjoy some rights of property ownership. Calls for legal reform in the nineteenth century eventually culminated in the passage of the 1870 and 1882 Acts which provided for an extended definition of married women's separate property, so as to confer greater property rights on married women.

However, as argued in that chapter, the retention of all reference to married women's separate property in the 1882 Act basically meant that the same sort of property rights which were enjoyed by men and unmarried women were not conferred on married women. The 1882 Act continued to treat married women as a special class of property owners, where only the privileges of ownership attached but not the responsibilities of such ownership. It was further noted in that chapter that the distinction of married women as a special class of property owners effectively deprived

them of the independence of full property ownership and the ability to participate fully in the power relationship inherent in property ownership which other citizens enjoyed.

It was only with the passage of the Law Reform (Married Women and Tortfeasors) Act 1935 that the law finally granted full recognition to a married woman as a separate legal entity independent of her husband, with *locus standi* to hold the legal title to property. Even with the conferment of absolute rights of ownership, several criticisms may still be made against the present law which point to its continued discrimination of women in terms of property ownership. Firstly, where a female claimant wishes to claim an equitable share in the family home, the legal status of the domestic relationship becomes a pertinent point. Chapter 3 reveals that, although evidence indicates that the rate of cohabitation has increased in the past three decades, the law continues to maintain a clear dichotomy between marriage and cohabitation in the context of family property disputes.

Whilst there are traces of the law giving equivalent treatment to marriage and cohabitation in certain instances, the general tendency at present is to retain the differential treatment of cohabitation to marriage. One area where a clear line of separation is maintained between marriage and cohabitation is in the area of property law. In the event of the breakdown of a marriage, the parties may rely on the adjustive powers conferred on the courts under the present marital provisions to resolve all family property disputes. These provisions are, however, not applicable to cohabitants, in which case the claimant will have to resort to contract law, property law or trusts principles to establish a share in the family home. These principles are equally applicable to spouses where the adjustive powers of the courts do not come into play, for example, where the marriage has not broken down, or where one spouse has remarried since the dissolution of the marriage.

However, the discussion in Chapter 4 reveals the difficulties faced by a female claimant in establishing an equitable share in the family under the existing common intention constructive trust approach. The present formulation of the conditions of the common intention constructive trust approach indicates the hidden gender bias in the approach which tends generally to discriminate against women rather than men. This stems from the present judicial treatment of the two requisite elements of the common intention constructive trust approach, that is, common intention and detrimental reliance. In determining whether the requisite common intention to share is present, the 'solid tug of money' remains a dominant feature of the test and the emphasis of the courts is on the direct financial contributions of the claimant to ground a proprietary claim.

In doing so, the law continues to maintain a clear dichotomy between the domestic arrangements of the parties, which fall within the private domain and should be left unregulated by the law, and the free market/public domain. The assessment of property rights, clearly a matter within the public domain, is determined along principles operative in the public domain. Thus, Chapter 4 concludes that this approach facilitates the courts' ignoring the continued existence of sexual division of labour in domestic relationships and the direct effect it has on the economic resources of the parties in the relationship.

Empirical evidence reveals that, despite the increasing proportion of women who are economically active, the trend remains that women are primarily responsible for the domestic duties in the relationship and that more women than men are either economically inactive or constrained in their employment as a result of their domestic responsibilities. In addition, the evidence points to the fact that women who are economically active are generally less well paid than men. Thus, sexual division of

labour not only has an impact on the availability of a wife's or female cohabitant's economic resources towards the acquisition of assets but also the extent to which she may participate in decision making/marital power in the relationship. Given these factors and the emphasis on direct financial contributions in the common intention constructive trust approach, the conclusion is that the equitable principles effectively discriminate against women.

Further, the private/public dichotomy analysis enables the law to place little or no monetary value on the domestic services which women contribute to the family on the grounds that such labour, being provided solely in the context of the private domain, has no economic value in the public domain and is seen as nothing more than what is expected of a woman in performing her wifely duties. Thus, notwithstanding that married women are given formal recognition to own property independently of their husbands, they as well as other female cohabitants are still economically disadvantaged in acquiring property because of the limitations placed on their financial independence.

The analysis of the Commonwealth approaches have equally indicated that there are alternative equitable doctrines which may be less gender biased than the common intention constructive trust approach in terms of awarding an equitable share in the family home to the female claimant. However, this is not to say that all three jurisdictions which were looked at, namely Australia, New Zealand and Canada, have managed to eradicate completely the possibility of gender bias in the respective approaches taken. What they have managed to do is to reveal a greater willingness to take into account other forms of contributions, other than direct financial contributions, to ground a proprietary claim.

That means that indirect contributions may stand a better chance of awarding the female claimant a share in the family home than the common intention constructive trust approach. However, judicial acceptance of solely non-financial contributions, such as domestic services, to ground a proprietary claim is not applicable across the board. Notwithstanding the purportedly more generous attitude of these alternative doctrines towards indirect contributions, solely non-financial contributions may not fare any better in these jurisdictions than under the common intention constructive trust approach. Further consideration should also be given to the fact that the Commonwealth courts have clearly indicated that the nature of the constructive trust being imposed in those cases is purely remedial in nature. To that extent, the practical implications of this difference in treatment of the constructive trusts being imposed may mean that a claimant under the Commonwealth approaches may not be as well protected, especially against third party claims over the property, as one under the common intention constructive trust approach.

In the context of third party security transactions, the success of a wife or female cohabitant who wishes to challenge the existing claims of third parties over the family home, such as a mortgagee bank, will depend on her establishing either an equitable share in the family home which ranks in priority to the bank's interest or an equity to set aside the transaction which is binding on the bank. As revealed in the discussion in Chapter 5, the present equitable principles in relation to vulnerable third party security transactions have shifted to the use of the doctrine of notice and the independent legal advice requirement as a gauge to monitor the responsibility of banks for the moral hazards in the private relationship between the debtor and the vulnerable surety.

Notwithstanding the altruistic motives of equity in wishing to secure the better protection of vulnerable sureties against advantage-taking, the ***O'Brien*** test, as formulated by the House of Lords, reveals that there are effective limits to the bank's responsibility. Concepts like 'notice', 'reasonable steps' and 'independent legal advice' contain elements of objectivity, thereby securing the appearance of neutrality of the equitable principles. However, given the present judicial treatment of these concepts, the conclusion reached in that chapter was that the level of protection effectively given to vulnerable sureties, particularly female vulnerable sureties, by the ***O'Brien*** test remains in question.

As can be seen in Chapter 6, the reduced significance of the independent legal advice requirement consequently renders the present equitable principles ineffective in counteracting the effects of undue influence which have been exerted on the surety when providing security. This in part stems from the fact that, in applying the ***O'Brien*** test, the courts once again fail to take into account that, in the context of female sureties, the whole nature of the private relationship between the debtor and the surety has a direct impact on the process of providing security. Despite the altruistic motives of equity in formulating principles which are aimed at providing protection to a class of vulnerable sureties, the efficacy of these principles in offering such protection has been called into question.

Factors such as the continued existence of sexual division of labour in most domestic relationships, the economic disparity between men and women and the direct impact that has on the participation of most women in decision making, as well as the marital power in the relationship, are not taken into consideration in determining whether the surety has indeed exercised her free independent will in agreeing to stand surety. Moreover, empirical evidence points to the reduced decision-making role of

most women sureties in relation to their husbands' or partners' businesses. The evidence further suggests that the motives of most female sureties in standing surety are non-financial and have little to do with any benefits which may be derived from the success of the husband's or partner's business.

By failing to take into account these considerations and the effect they have on the parties' respective decision-making role and participation in marital control in the relationship, the equitable principles, even though framed in neutral language, effectively discriminate against women. Thus, an approach of deciding whether a transaction is 'manifestly disadvantageous' to the surety, by weighing the merits of her claim against the benefits which she may derive from standing surety so as to bring into play the equitable principles, will not deal effectively with the issues of undue influence and whether the surety's consent to provide security is indeed a product of her free independent will.

In order for the independent legal advice requirement to act more effectively as a risk management device in third party security transactions, the analysis in Chapter 6 led to the observation that greater clarification of the independent legal advice requirement is required. The inconsistency of the courts' interpretation of this requirement is illustrated by the different approaches taken in the cases post-***O'Brien***. The weight of the authorities suggests that the requirement is a minimal one, which will be easily satisfied by banks ensuring that they urge the sureties to seek such advice, without calling into question the actual independence of the adviser and the extent of the advice given.

Given the experiences of female sureties in the process of providing security, the conclusion reached in Chapter 6 was that a higher standard of advice is necessary in order for the independent legal advice requirement to counteract the effects of

advantage-taking on the surety. The chapter pointed to the need for increasing access for the surety and her solicitor to financial information about the debtor and the current facility being applied for and the need to adopt a higher standard of advice as suggested by Hobhouse LJ in ***Banco Exterior Internacional v Mann***. However, setting a higher standard of legal advice in third party security transactions may not in itself be sufficient to ensure the total protection of vulnerable sureties from the effects of advantage-taking.

A primary issue which needs to be considered in relation to the provision of advice is that of the independence of the solicitor. The introduction of a higher standard of advice will not only place greater emphasis on the issue of the solicitor's independence but will also in itself raise a series of questions relating to the extent of the disclosure of information required, the potential for greater conflicts of interest, and the competence of a solicitor to offer advice on the financial wisdom of the transaction in order to meet this higher standard of advice.

Here again, research has shown that, despite the purportedly altruistic motives of solicitors when advising clients, the self-interest of the legal profession is generally placed in priority over any sense of community or client interest. This is, however, not to say that solicitors are totally incapable of some level of independence when offering advice to their clients. Further, the issue of the solicitor's independence is closely related to the issue of conflicts of interest, especially in instances where the solicitor may act for two or more parties in the transaction.

Chapter 7 reveals that the weakness of the present approach is twofold. Firstly, there are, at present, very generalised rules provided by the Law Society prohibiting a solicitor from acting for two or more parties where there is a possibility

of their interests being in conflict. However, such possibility of conflict does not in itself bar a solicitor from acting for the parties, provided that their informed consent is obtained by the solicitor. This view is supported by the judiciary, as illustrated by ***Clark Boyce v Mouat***. Secondly, in permitting multiple representation, the greater disclosure of confidential financial information relating to the debtor which is called for by a higher standard of advice may bring about the increased potential for conflicts of interest.

There is a greater potential for conflict between the solicitor's duty of confidentiality and his corresponding duty to make full disclosure of all material information to his respective clients. The practical effect of a solicitor's attempt to reconcile his conflicting duties is to adopt an approach of offering mere technical legal advice to the surety, in lieu of detailed advice on the viability of the transaction or at least partisan advice. This approach is further supported in cases where solicitors are motivated by their own self-interest, rather than their client's best interests. A further issue noted in the analysis in Chapter 7 is that of the solicitor's competence to give detailed advice on the financial viability of the transaction.

Setting a higher standard for the independent legal advice requirement may serve the useful purpose of helping the surety to have a fuller understanding of the nature and effect of the transaction. Further, the solicitor's ability to meet this higher standard may be greatly improved by the suggested move towards the greater disclosure of financial information relating to the debtor and the current facility being granted. However, given that solicitors generally may not have the required expertise to make assessments of the long-term financial risks, the increased provision of information may not have the desired effect in practice of enabling solicitors to proffer such higher advice to sureties. Its effectiveness in counteracting

the effects of advantage-taking and, hence, its viability as a risk management device, remains debatable since the absolute independence and the competence of a solicitor to offer advice on long-term risks and the financial viability of the security transaction remain in doubt.

Thus, the conclusion reached in Chapter 7 was that, whilst the move towards the greater disclosure of information is desirable so as to enable solicitors to give more detailed advice to the surety, there may still be certain limitations on the effectiveness of a higher standard of advice as a risk management device in third party security transactions. It remains unlikely that total reliance on the independent legal advice requirement, albeit one which sets a higher standard, will offer adequate protection to the vulnerable surety, since the issue of the independence of the solicitor, as well as the extent to which he may be competent to give detailed advice on the financial wisdom of the transaction, remains a moot point. This suggests that other extra-judicial measures may be required to enhance the protection of vulnerable sureties against advantage-taking.

An investigation into the measures taken by the banking industry reveals that the industry has been increasingly proactive in its attempts to bring about greater transparency of the banker-customer relationship. Two particular measures were focused on in Chapter 7, namely the Banking Ombudsman scheme and the codes of good banking practice which the banking industry has periodically issued. Since the Jack Report, three editions of the banks' code of good banking practices have been issued, each edition being more extensive and inclusive than its predecessor. To some extent, the two earlier Codes of Practice and the latest Banking Code have taken on board some of the 'reasonable steps' suggested in ***O'Brien***, more notably the need to explain to the surety the extent of her liability as well as the need to seek

independent legal advice. However, all three codes of practice have been accused of not going as far as the ***O'Brien*** test. One noticeable omission in the previous Codes of Practice and the current Banking Code is the private meeting requirement whereby the risks of standing surety are to be explained to the surety in the absence of the debtor and she is told to seek independent legal advice. It has been argued by several commentators that the 'health warning' approach taken in the Banking Code falls short of meeting this requirement.

It would be interesting to see whether the change in language used in the Banking Code whereby key commitments have been made by all subscribing banks will point to a more conscious effort by banks to ensure improved services to customers. In the context of third party security transactions, it remains to be seen whether the shift in language from banks 'advising' to 'encouraging' sureties to seek independent legal advice will result in a move towards making legal advice a pre-requisite. Thus, banks would require all sureties, and not just vulnerable sureties, to take independent legal advice prior to their providing security, rather than the present practice of merely urging them to do so.

Yet, at the same time, the Banking Code has indicated that banks are moving towards ensuring better protection of sureties. This can be seen from the banks' move towards obtaining the consent of the debtor to the disclosure of confidential information to the surety and/or her adviser, as well as their clear rejection of accepting unlimited guarantees. However, ambiguity remains as to the legal effect of the Banking Code. Despite the language used under the banks' key commitments, it is arguable that the Banking Code remains merely a guideline, rather than a contractual obligation which is enforceable by a customer against the bank.

In addition, the conclusion reached in that chapter was the increasing standard setting role of the Banking Ombudsman. There are clear indications from the Banking Ombudsman that more measures are needed to ensure improved surety protection. Recommendations have been periodically made by the Banking Ombudsman, some of which have been taken on board by the banking industry in the Banking Code. Recommendations have not been limited solely to the banking industry but have also extended to the legal profession, such as the recommendation that the adviser of a surety should ensure that the surety is advised of her continuing liability under the security and the method of termination of her liability.

As the Banking Ombudsman scheme is financed by the banking industry itself, criticisms have been voiced about the independence of the Banking Ombudsman and the efficiency of the scheme as an alternative dispute resolution forum. Issues such as the credibility of the scheme, the objectivity of the Banking Ombudsman in investigating a complaint and accessibility of the public to the scheme have been raised. Yet, the indications are that the objectivity of the Banking Ombudsman is not prejudiced merely because the scheme is self-financed. The Banking Ombudsman has expressed a willingness to be critical of banking practices which are exposed as being deficient. This, coupled with the consultative role of the Banking Ombudsman in the drawing up of the banking industry's code of practice and the willingness of the industry itself to consider the recommendations of the Banking Ombudsman, points to a collaborative relationship which may be more effective in ensuring better practices in the provision of banking services, including third party security transactions.

Thus, the conclusion reached was that the working combination of the periodic review of the codes of practice by the banking industry and the Banking

Ombudsman scheme may serve to improve banking procedures in the context of third party security transactions in terms of the drawing up of improved guidelines for the handling of such transactions in the future. Some indications of this can already be seen, such as rejecting the acceptance of unlimited guarantees from sureties, and providing for the greater disclosure of confidential financial information about the debtor. The latter, it is hoped, will enable the surety's solicitor to provide more extensive legal advice to the surety.

This brings the matter back full circle to the point made earlier by some commentators that prudential banking practices ultimately are better risk management strategies.[1] Although reliance on the provision of security is no doubt a common feature of risk management, there are strong arguments favouring a shift from security reliance to other prudential practices such as focusing on the borrower's cash flow and performance to gauge whether the borrower will be in a position to repay the credit facility. In the context of third party security transactions, the combination of the Banking Ombudsman scheme and the Banking Code may pave the way for the more effective protection of the surety than reliance on the equitable doctrine of undue influence and the independent legal advice requirement.

The proactive role of the Banking Ombudsman may facilitate the increased awareness by both the banking industry as well as the legal profession of the existence of defective or deficient practices which may impinge on the ability of the vulnerable surety to give an informed consent to the provision of security. Not only should the banking industry continue to strive for increased transparency in the banker-customer relationship and to endeavour to provide better services to customers, the legal profession likewise needs careful reconsideration of the role they

play in the third party security transaction and in offering independent legal advice to sureties.

As noted by the Banking Ombudsman, the extent of legal advice should be more inclusive and, furthermore, solicitors should offer advice to sureties on not only the nature and effect of the transaction but also on ancillary matters, such as the methods of termination of liability, the effect of termination on the continuing liability of the surety and so forth. More importantly, the Law Society should move towards giving clearer guidelines to the legal profession regarding multiple representation of parties in a transaction and conflicts of interest situations.

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