

STAND BY YOUR MAN?: LEGAL PROTECTION FOR WIVES WHO CHARGE THE FAMILY HOME TO SECURE THEIR HUSBANDS' BUSINESS DEBTS

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1. INTRODUCTION

In England, heavy reliance on the family home as security for loans to small businesses has resulted in a socially complex, yet fairly common scenario involving wives, husbands and creditor banks ("creditors"). The scenario occurs when a wife, under some emotional pressure or misunderstanding caused by her husband, signs a charge over the family home in order to secure a loan to a business which, although conducted by the husband, often provides the family's income. A particular issue arising in these circumstances is the extent to which private pressures and misunderstandings should operate to invalidate such a transaction against a creditor. The uncertainty caused by different judicial approaches to answering this question was addressed recently by the House of Lords, in *Barclays Bank plc v. O'Brien*¹ and *CIBC Mortgages plc v. Pitt*.²

The central concern of this article is to consider the operation of the law of undue influence and misrepresentation (two of the main grounds on which wives have relied when attempting to avoid liability under a charge over the family home³), before and after *O'Brien* and *Pitt*. After outlining the social context, it will focus on judicial approaches for determining when a creditor should be held responsible for such behaviour by a husband. A recurring theme which emerges from consideration of both legal and social aspects is the limited protection offered by the law to wives at a practical level, a situation which results from the uneasy balance struck by the courts between "private" spousal relationships and "public" third party security transactions.

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¹ 4 All E.R. 983 (C.A. 1992).

² 4 All E.R. 433 (H.L. 1993).

³ Creditors' duties of disclosure or explanation of security documents are raised briefly in Part 4(b). Other grounds not raised in *O'Brien* and *Pitt*, and therefore not discussed here, are gery, duress, mistake and *non est factum*.

2. SOCIAL CONTEXT

(a) *Current Social Factors*

While there is nothing new about wives providing security for their husbands' debts, the last decade in England has seen an apparent increase in both the attempts of wives to avoid liability (no fewer than eleven Court of Appeal cases in the last eight years⁴), and in the efforts of bankers to establish procedures which will make such securities unimpeachable in the event of challenge.⁵

Although the immediate social background for both trends is economic recession and a corresponding rise in possession actions by creditors,⁶ other important social factors have given rise to the likelihood that the family home will be used as security for business borrowing and that both spouses will be required to sign the relevant documents. These factors include increased owner-occupation in England since the Second World War, government encouragement to small business in the 1980's,⁷ and the increasing trend for spouses to hold jointly the legal title to the family home.⁸ A wife who is not a legal owner is still likely to be requested to sign a form of consent⁹ or the actual charge,¹⁰ due to changes in banking practice after *Williams and Glyn's Bank Ltd. v. Boland*.¹¹

⁴ See, e.g., *Bank of Baroda v. Shah*, 3 All E.R. 24 (C.A. 1988); *BCCI v. Aboody*, 1 Q.B. 923 (C.A. 1990); *Barclays Bank plc v. Kennedy*, 56 P. & C.R. 221 (C.A. 1989); *Barclays Bank plc v. Khaira*, 1 W.L.R. 623 (C.A. 1992); *Barclays Bank plc v. O'Brien*, 4 All E.R. 983 (C.A. 1992); *Cornish v. Midland Bank plc*, 3 All E.R. 513 (C.A. 1985); *Kings North Trust Ltd. v. Bell*, 1 W.L.R. 119 (C.A. 1986); *Lloyds Bank plc v. Egremont*, 2 F.L.R. 351 (Austl. C.A. 1990); *Midland Bank plc v. Perry*, 56 P. & C.R. 202 (C.A. 1988); *Midland Bank plc v. Shephard*, 3 All E.R. 17 (C.A. 1988).

⁵ In particular, the introduction of GOOD BANKING - CODE OF PRACTICE, a voluntary code adopted by banks and building societies in March 1992, and followed up by a second edition in March 1994. ¶ 14.1 of the second edition provides that before a private individual gives a guarantee or other third party security, the bank or building society should: inform her that she could become liable as well as or instead of the principal debtor, advise her whether the security is unlimited or, in the case of a limited security, what the limit of the liability will be, and advise her to take independent advice. The potential effectiveness of ¶ 14.1 is, however, reduced by the fact that the Code only requires the information to be given in the form of a "health warning" stamped on security documents. Although banking procedures vary, the likelihood that the warning will not be read or acted upon is particularly high in cases where the wife is given this information just before being asked to sign.

⁶ See 20 HOUSING FINANCE 33 Nov. 1993 (reported 31,780 property possessions for the first half of 1993, compared to 15,810 for the whole of 1989).

⁷ E.g., the Business Expansion Scheme and the Loan Guarantee Scheme.

⁸ Law Commission, *Matrimonial Property*, Law Comm. No. 175, ¶ 4.3 (1988).

⁹ E.g., *Coldunell Ltd. v. Gallon*, 1 Q.B. 1184 (C.A. 1986) (elderly mother signed consent to son's loan, agreeing that her interest in the property would be postponed to the interests of the moneylenders).

¹⁰ E.g., *Kings North Trust Ltd. v. Bell*, 1 W.L.R. 119 (C.A. 1986); *Barclays Bank plc v. Kennedy*, 56 P. & C.R. 221 (C.A. 1989); *Barclays Bank plc v. Khaira*, 1 W.L.R. 623 (C.A. 1992).

¹¹ 2 All E.R. 408 (H.L. 1980).

Problems have occurred because, while a wife is now required to execute documents charging the family home, it does not necessarily follow that she will have an equal involvement with her husband in planning the transaction, or an equal voice when it comes to making the decision to sign. In *O'Brien*, the Lords recognised that in many families the wife follows her husband's advice on business matters without independent thought.¹² While such reliance by the wife may be the pattern of the spousal relationship over the years, the issue of whether a wife is bound by a charge is most likely to arise in troubled times, either as an aspect of property settlement during separation or divorce,¹³ or in a case of business failure.¹⁴ The reported cases indicate that these events often coincide.¹⁵

(b) *Why Wives and the Family Home?*

The issue of whether a charge over the family home should be enforceable by a lender can arise outside the context of marriage and outside the context of relationships between couples.¹⁶ Similarly, the type of security provided may be of another form, such as a personal guarantee. Indeed, although *O'Brien* was a case of a wife who had provided a charge over the family home, the Lords stated that their ruling applies to cohabittees, homosexuals, and other relationships where the security provider "reposes trust and confi-

¹² *Barclays Bank plc v. O'Brien*, 4 All E.R. 417, 422 (H.L. 1993).

¹³ *E.g.*, *Midland Bank v. Perry*, 56 P. & C.R. 202 (C.A. 1988). Under the Matrimonial Causes Act 1973, an application for property settlement may be made where a third party (for example, a lender) is also interested in the property, but before making the order, § 25(4) provides that the court must give the third party the opportunity to make representations, and must consider those representations. The court has no power under this provision to direct the payment of proceeds to third parties (for example, to order that the family home be sold and part of the proceeds be paid to the husbands's creditors). STEPHEN MICHAEL GREANEY & JUDITH M. MASSON, *PRINCIPLES OF FAMILY LAW* 379-80 (5th ed. 1990). As the court must consider the lender's interests, any issue regarding the wife's liability to the lender would also need to be determined. Where the parties agree that the husband should be solely liable under the security, the situation may be resolved by the husband agreeing to put up an alternative security. Where there is no alternative security, the house will probably have to be sold as part of the property settlement, unless the charge can be invalidated, at least against the wife. The wife's liability is therefore likely to have a significant impact on whether or not she is able to retain possession of the home.

¹⁴ *E.g.*, *Lloyds Bank plc v. Egrement*, 2 F.L.R. 351 (Austl. C.A. 1990); Stephen Greaney, 20 *FAM. L.* 474 (1990). Although a detailed discussion of the Insolvency Act 1986 is outside the ambit of this Article, *see, e.g.*, Sally Wheeler, *Protection for the Matrimonial Home*, *J. Soc. WELFARE L.* 101 (1989); L. Ayrton, *Preserving the Family Home in the Face of Bankruptcy*, 23 *FAM. L.* 180 (1993).

¹⁵ *E.g.*, *BCCI v. Aboody*, 1 Q.B. 923, 950 (C.A. 1990) (the Aboody's had separated; the trial judge found that the marriage was a happy one for both Mr. and Mrs. Aboody until the collapse of the family company in 1983, which "shattered the respect, trust and affection that Mrs. Aboody had developed for her husband").

¹⁶ *Coldunell Ltd. v. Gallon*, 1 Q.B. 1184 (C.A. 1986).

dence in the principal debtor in relation to his financial affairs"¹⁷ and to third party security transactions generally.¹⁸

While it is no surprise that the family home, as the major asset of most spouses, is usually the security provided by wives, more questions surround the disproportionate representation of wives in the reported cases. This raises further questions of who goes to law, and why.¹⁹

There is no reported English case in which a cohabitee (female or male), or a husband, has provided a security for a partner or spouse. Perhaps this may be partly explained by Helena Kennedy's claim that "[j]udges and juries alike have a soft spot for the good wife Because the image of the faithful, supportive, albeit misguided, wife is so powerful, lawyers always try to turn a female client into just such a one."²⁰ Further assistance is provided by sociological studies on money and marriage,²¹ which indicate that, particularly in middle and higher income earning households, wives are less likely to have financial control and responsibility if they do not earn an income.²² In English society, the income earning role of women is often disrupted and reduced, taking a secondary role to their roles as mothers and homemakers.²³ As a result, it would seem that in many families the husband, as the more constant income earner, would be likely to have the greater say regarding major financial decisions,²⁴ such as the execution of a guarantee or security to support borrowing for his business interests.

Lack of control over financial decisions within the family is likely to increase a wife's vulnerability to emotional pressure and misleading information concerning financial matters. Carol Gilligan's work suggests that this vulnerability may be compounded by the tendency of women to perceive and construe social reality differently than men.²⁵ Applying her observation that "the standard of moral judgement that informed [women's] assessment of self is a standard of relationship, an ethic of nurturance, responsibility

¹⁷ *O'Brien*, 4 All E.R. at 431 (H.L. 1993).

¹⁸ *Id.* at 430.

¹⁹ See William L. F. Felstiner, et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & Soc'y Rev. 631 (1980-81).

²⁰ HELENA KENNEDY, *EVE WAS FRAMED: WOMEN AND BRITISH JUSTICE* 67-68 (1992) (concentrating on, but not confining herself to, women and crime).

²¹ The financial arrangements between cohabitees has apparently received less attention.

²² See, e.g., STEPHEN EDGELL, *MIDDLE CLASS COUPLES* (1980); J. PAHL, *MONEY AND MARRIAGE* (1989); GAIL WILSON, *MONEY IN THE FAMILY* (1987).

²³ E.g., P. MANSFIELD AND J. COLLARD, *THE BEGINNING OF THE REST OF YOUR LIFE?* (1988) (a study of newlywed couples).

²⁴ EDGELL, *supra* note 22, at 68.

²⁵ CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

and care,"²⁶ it would seem that a wife requested by her husband to execute a charge over the family home would be likely to see the decision less in terms of law or property than in terms of the effect that her refusal would have on their relationship. This view may also make the wife less inclined to seek independent advice, or to accept such advice if it discouraged her from signing.²⁷

(c) *Special Treatment Versus Equal Treatment*

The recognition that wives are often disadvantaged in terms of financial decision making within the family, raises the issue of whether special or equal treatment is a solution. While detailed exploration of this issue is beyond the ambit of this Article, it is important to note its relevance to cases involving wives who charge the family home.

In *Warburton v. Whiteley*,²⁸ Kirby, P. of the New South Wales Court of Appeal, briefly canvassed two views on the issue.²⁹ One view is that the conferral of "special" rights upon women (or wives) enables them to exercise an "equal right" without which they will, effectively, be denied equal treatment by the law. The other view opposes any "special treatment" for women (including wives), contending that, although there are limits to the strict equality in the treatment of women and men, there are more dangers in special treatment, because special treatment undermines women's equality with men, and women's agency. Although historically, equity has treated married women who provide loan security for their

²⁶ *Id.* at 159.

²⁷ See, e.g., D. Gowler & K. Legge, HIDDEN AND OPEN CONTRACTS IN WORK AND MARRIAGE, IN *WORKING COUPLES* 47-61 (Rhonda Rapport, et al., eds. 1978). But see, JANET FINCH, FAMILY OBLIGATIONS, 240-43 (1989), urging caution in making assumptions about the "sense of obligation" said to mark the distinctive character of kin relationships, arguing this is much less reliable than a ready-made set of moral rules. See also JESSICA BERNARD, THE FUTURE OF MARRIAGE 134-39 (1972), asserting that men and women often experience marriage in different ways; as a result of learned cultural expectations of gender inequalities, Bernard argues, men tended to report having more power in relation to their wives than they had in reality, and wives tended to report that they had less power than they really did.

²⁸ 55 N.S.W. Conv. R., 453 (Austl. C.A. 1989).

²⁹ This issue has been of recurring concern for feminist legal theorists, e.g. M. FINEMAN, THE ILLUSION OF EQUALITY 3 (1991), arguing in the context of divorce reform, for the necessity of rules based on result-inequality, rather than "special treatment" rules (which can be used to disadvantage women as well as help them) or rule-equality (which, in assuming that those subjected to the rules are in fundamentally the same position, may perpetuate result-inequality). Cf. Catharine MacKinnon's "subordination analysis", which focuses on dominance rather than difference, viewing the equality question as being a question of the distribution of power and specifically of male supremacy and female subordination. E. Du Bois, et al., *Feminist Discourse, Moral Values and the Law - a Conversation*, 34 *BUFF. L. REV.* 11, 56 (1985).

husbands more tenderly than others,³⁰ courts have in recent times favoured an approach which opposes special treatment of wives (and women generally) who provide loan security for their husbands. *O'Brien* and *Pitt* provide examples of this.³¹

3. *O'BRIEN* AND *PITT*: THE FACTS

O'Brien and *Pitt* both involved wives who, induced by some "wrongful" conduct of their husbands (misrepresentation and undue influence respectively) charged the family home as security for their husbands' financial interests.

The essential facts of *O'Brien* were unexceptional amongst cases involving wives who charge the family home. Barclays Bank agreed to allow an increased overdraft for a company in which Mr. O'Brien (but not Mrs. O'Brien) was interested, if Mr. O'Brien guaranteed all the company's liabilities to the bank and his guarantee was secured by a legal charge over the family home. The Barclays main district branch forwarded the relevant security documents to a sub-branch for signing by Mr. and Mrs. O'Brien, with instructions to "[p]lease ensure that our customers are fully aware of the nature of the documentation to be signed and advise that if they are in any doubt they should contact their solicitors before signing."³² The clerk who supervised the signing of the documents did not follow these instructions. Mrs. O'Brien signed without reading the documentation and received no independent advice before signing. Unfortunately for the bank, Mr. O'Brien had misrepresented to his wife the effect of the legal charge. Mrs. O'Brien thought that it was limited to securing £60,000 and would continue in force only for a few weeks.

In *Pitt*, Mr. and Mrs. Pitt charged the family home to secure a loan of £150,000. The loan was made to them jointly by CIBC. Mr. Pitt had told Mrs. Pitt that he wanted to borrow money on the security of the house to buy shares. Mrs. Pitt was unhappy about his suggestion but agreed after her husband exercised pressure. The trial judge held that this amounted to actual undue influence.³³ In both the application for loan and offer of mortgage signed by Mr. and Mrs. Pitt, the stated purpose of the loan was the purchase of a

³⁰ *Yerkey v. Jones*, 63 C.L.R. 649, 683 (Austl. 1939) (Dixon, J.). See discussion part 4(b) and 5(b) (iii), *infra*.

³¹ See *infra* part 5(b) (iii); see also Australian cases, e.g., *Washburton v. Whitely*, N.S.W. Conv. 55 (Austl. C.A. 1989); *European Asian of Australia Ltd. v. Kurland*, 8 N.S.W.St.R. 192 (Austl. 1985); cf. *Re Halstead: ex parte Westpac Banking Corp.* 31 F.L.R. 337 (Austl. 1991).

³² 4 All E.R. at 988 (C.A. 1992).

³³ 4 All E.R. at 437.

holiday home, and the transaction was said to be a remortgage, the intention being to pay off the existing first mortgage over the family home. Mrs. Pitt did not read the offer of mortgage or the legal charge before signing. She did not know the amount that was being borrowed, and received no independent advice about the transaction. No one suggested that she seek independent advice, and CIBC's solicitors acted for both Mr. and Mrs. Pitt. Once the first mortgage was discharged, Mr. Pitt used the balance of the loan for share speculation.

While both *O'Brien* and *Pitt* involved wives who charged the family home for their husbands' business interests, the cases differed in one respect which proved crucial: Mrs. O'Brien charged the family home for overdraft facilities extended to a business in which her husband had an interest, but Mrs. O'Brien had none. In contrast, Mrs. Pitt charged the home to secure a loan made to Mr. and Mrs. Pitt jointly for the stated purposes of discharging a first mortgage over their home and buying a holiday home (although in fact used mainly for Mr. Pitt's share market speculation). Thus, the *O'Brien* transaction was not "on its face" to Mrs. O'Brien's financial advantage, while in *Pitt*, the transaction was "on its face" to Mrs. Pitt's advantage. As a result, the House of Lords held that Mrs. O'Brien should succeed (the appeal of Barclays Bank being dismissed), and Mrs. Pitt should fail (her appeal being dismissed). This was despite the fact that Mrs. Pitt was in an equally, if not more, invidious position than Mrs. O'Brien. Mrs. Pitt, as the victim of her husband's undue influence, had no control over how the transaction was structured or the capacity in which she was implicated (joint borrower or otherwise).

4. PRE-*O'BRIEN* AND *PITT*: MAIN LEGAL GROUNDS FOR AVOIDING LIABILITY UNDER A SECURITY

The English courts have always had some sympathy for a guarantor who voluntarily takes on responsibility for someone else's debts for little or no tangible benefit to him or herself. A security supported by some form of property, such as a charge over real property, may be similarly lacking in tangible benefits to the surety. The general rule, however, has always been that if an adult person of ordinary understanding executes a security document, she is bound by the agreement notwithstanding any lack of knowledge or misunderstanding about its terms or effect, unless that agreement has been brought about by mutual mistake, undue influence,

fraud, or in some cases by misrepresentation or non-disclosure of material facts.³⁴

(a) *Two Main Grounds for Avoiding Liability: Misrepresentation and Undue Influence*

O'Brien and *Pitt* demonstrate two important grounds, namely, misrepresentation and undue influence, which a wife can rely on to avoid liability under the charge that she has signed over the family home.

(i) Misrepresentation

Misrepresentation has often been claimed by wives as a second part of a claim based primarily on undue influence.³⁵ For this reason, and because establishing undue influence has proved more problematic for wives, misrepresentation is outlined only briefly here.

The general rule is that fraudulent misrepresentations, made knowingly or recklessly, and non-fraudulent misrepresentations, made negligently and innocently,³⁶ can give rise to a right to rescind in equity, subject to the court's discretion,³⁷ provided that the misrepresentation was material and was relied upon by the representee in entering the contract.³⁸ Thus if material facts as to

³⁴ See, e.g., *Yerkey*, 63 C.L.R. at 662 (Latham, C.J.). At common law, contracting parties are expected to exercise certain minimum standards of self-protection. They must read agreements and not merely sign them. See *L'Estrange v. F. Graucob Ltd.* 2 K.B. 394 (1934); and they must not leave blanks in a document to be filled by others. See *United Dominions Trust Ltd. v. Western*, 1 Q.B. 513 (C.A. 1976).

³⁵ E.g., *O'Brien*, 4 All E.R. 983 (C.A. 1992).

³⁶ A negligent misrepresentation occurs where the misrepresenter honestly believes that his statement is true but has no reasonable grounds for that belief. An innocent misrepresentation occurs where the misrepresenter believes that his statement is true and has reasonable grounds for that belief. JOHN CARTWRIGHT, *UNEQUAL BARGAINING* 63 (1991).

³⁷ In *Egremont*, 2 F.L.R. at 358, Lord Justice Lloyd doubted, without further explanation, whether the equitable defence applied in respect to innocent misrepresentations. Certainly, an innocent misrepresentation was not recognised at common law unless it had become a term of the contract, and equity's jurisdiction depended on the plaintiff proving that he or she had relied on the statement, or its untruth. See HANBURY & MAUDSLEY, *MODERN EQUITY* 785-88 (13th ed. 1989).

³⁸ Damages for negligent misstatements are available under *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, 1964 App. Cas. 465 (H.L.), principles for negligent misstatements as an alternative to rescission in equity for negligent misrepresentation. See *Esso Petroleum Co. Ltd. v. Mardon*, 2 All E.R. 5, 14-16 (C.A. 1976) (Denning, L.J.). Further, pursuant to § 2(1) of the Misrepresentation Act 1967, damages may now be awarded for a non-fraudulent misrepresentation, unless the misrepresenter proves that he or she reasonably believed that the facts represented were true (that is, an innocent misrepresentation). Section 2(2) of the Act, however, gives the court discretionary power, in the case of an innocent misrepresentation inducing a contract, to award damages instead of ordering rescission where it considers that damages would be the more appropriate remedy. The measure of damages for misrepresentation will usually be the tort measure. See CARTWRIGHT, *supra* note 36, at 65. The importance of securing possession of the family home in

liability under the charge are misrepresented by the creditor to the wife, the security will be unenforceable, at least with respect to the part misrepresented.³⁹ However, it is more common for wives to claim that a misrepresentation made by the husband should be imputed to the creditor.⁴⁰ The main difficulty experienced by wives (including Mrs. O'Brien), and discussed in detail below, is establishing that the creditor should be held responsible for the husbands' misrepresentation.

(ii) Undue Influence

Undue influence involves "the improper use of the ascendancy acquired by one person over another for the benefit of himself or someone else, so that the acts of the person influenced are not, in the fullest sense of the word, his free and voluntary acts."⁴¹ The doctrine of undue influence is founded on the principle that it is right to save people from being victimised by other people.⁴² The aim of this being "to protect people from being forced, tricked or misled. . . into parting with their property," rather than to "save persons from the consequences of their own folly."⁴³ The advantage of establishing undue influence is that the unduly influenced party can rescind the contract. The transaction will be voidable and so, where a wife has acted under undue influence in charging the family home, the creditor's entitlement to possession will be subject to her share.

As it is usually the husband rather than the creditor who has exerted the undue influence against the wife,⁴⁴ determining whether the wife was unduly influenced is generally a preliminary issue to be determined before deciding the main issue of whether the creditor is responsible for that behaviour. Although the courts

many cases involving surety wives probably explains why equity's remedy of rescission for misrepresentation is usually claimed, rather than the Misrepresentation Act. *See, e.g., Egremont*, 2 F.L.R. at 359.

³⁹ *E.g., Egremont* 2 F.L.R. at 359 (dismissed the argument that there had been any misrepresentation by the bank).

⁴⁰ *E.g., Midland Bank plc v. Shephard*, 3 All E.R. 17 (C.A. 1988) (wife claimed that the bank was responsible for the undue influence exercised by her husband, and for his fraudulent misrepresentation made to her regarding her liability under a joint account opened by them.) *See also Barclays Bank plc v. O'Brien*, 4 All E.R. 983 (C.A. 1992).

⁴¹ *Union Bank of Australia v. Whitelaw* 1906 V.L.R. 711, 720 (Austl.) (Hodges, J.). Complete domination is probably unnecessary, *Goldsworthy v. Bricknell* 1 Ch. 378, 402-06 (C.A. 1987) (Nourse, L.J.) (with respect to the presumption of undue influence, it was enough to show that the party in whom the trust and confidence is reposed is in a position to exert influence); *cf.* suggestion in *National Westminster Bank plc v. Morgan*, 1 App. Cas. 686, 706-07 (H.L. 1985) (Scarman, L.J.) (citing *Poosathurai v. Kannappa Chettiar* (1919) L.R. 47 I.A. 1 (P.C.)) that domination is an essential element.

⁴² *Morgan*, 1985 App. Cas. at 705.

⁴³ *Allcard v. Skinner*, 36 Ch. D. 145, 182-83 (C.A. 1887) (Lindley, L.J.).

⁴⁴ Or misrepresented the effect of the security.

have maintained that equitable jurisdiction to relieve undue influence is broad and flexible,⁴⁵ before *O'Brien* and *Pitt* establishing an initial case of undue influence presented particular difficulties for wives for three main reasons.

First, while undue influence⁴⁶ is automatically presumed in some relationships,⁴⁷ this presumption does not apply to the relationship of husband and wife⁴⁸ (although there were indications of a judicial view that the relationship of husband and wife gave rise to a particular risk of undue influence).⁴⁹ The reason why the automatic presumption does not apply to the relationship of husband and wife, "which commonly gives rise to the greatest degree of trust and confidence,"⁵⁰ is that the courts consider there to be nothing unusual in a wife showing her affection for her husband in a tangible way, for example by guaranteeing repayment of his debts.⁵¹ In special circumstances of illness and dependency, or dependency coupled with mutual trust and confidence, a presumption of undue influence arising from the circumstances could arise between husband and wife, at least with respect to inter-spouse transactions.⁵² Yet, such cases were rare. As a result, cases involving wives

⁴⁵ *E.g.*, *Morgan*, 1985 1 App. Cas. at 709 (Scarman, L.J.) (holding that there is no need for a general principle of relief against inequality of bargaining power, rejecting the decision of Lord Denning M.R. in *Lloyds Bank Ltd. v. Bundy*, 1 Q.B. 326 (C.A. 1975)).

⁴⁶ For a general explanation of the categories of presumed and actual undue influence, see *O'Brien*, 4 All E.R. at 423 (H.L. 1993) (following *BCCI*, 1 Q.B. at 953).

⁴⁷ *Huguenin v. Baseley*, 33 Eng. Rep. 26 (1807). Relationships where the presumption arises include parent and child (*e.g.*, *Powell v. Powell*, 1 Ch. 243 (1899); guardian and ward (*e.g.*, *Taylor v. Johnson*, 19 Ch. D. 603 (1882)); solicitor and client (*e.g.*, *Barron v. Willis*, 1902 App. Cas. 271); spiritual adviser and congregation member (*e.g.*, *Huguenin v. Baseley*, 33 Eng. Rep. 526 (1807)); nun and her sisterhood (*e.g.*, *Allcard v. Skinner*, 36 Ch. D. 145 (1887)); doctor and patient (*e.g.*, *Dent v. Bennett*, 41 Eng. Rep. 105 (1838)).

⁴⁸ *But see*, *Bischoff's Trustee v. Frank*, 89 L.T.R. 188 (1907) (the presumption was applied to the relationship of husband and wife). *Cf.* *Bank of Montreal v. Stuart* 1911 App. Cas. 120 (P.C. 1911). The Privy Council held otherwise on the basis of the earlier authority of *Nedby v. Nedby*, 64 All E.R. 1161 (1900). The presumption also applies to the relationship of banker and customer. See *Morgan*, 1 App. Cas. at 707 (Scarman, L.); *BCCI*, 1 Q.B. at 953 (Slade, L.J.). In contrast, the presumption has been held to apply to the relationship of a man and his fiancée. *E.g.*, *Cobbett v. Brock*, 52 All E.R. 706 (1855); *Bomze and Lederman v. Bomze*, 1 Ch. 289 (1931); *but see*, *Zamet v. Hyman*, 3 All E.R. 933 (C.A. 1961) Lord Evershed MR (Danckwerts L.J. concurs) thought that in modern social conditions the existence of influence should depend on the facts rather than being assumed in every case.

⁴⁹ *E.g.*, the "invalidating tendency" in respect of transactions between husbands and wives referred to by Judge Dixon in *Yerkey* and Lord Justice Scott's view in *O'Brien* that equity has in the past treated married women differently and more "tender[ly] than that which would have been applied to other third party sureties." *Yerkey*, 63 C.L.R. at 679 and *O'Brien*, 4 All E.R. at 988 (C.A. 1992).

⁵⁰ *Simpson v. Simpson*, 1 F.L.R. 601, 618 (1992) (Austl. Ch.) (Morritt, J.).

⁵¹ *Yerkey*, 63 C.L.R. at 675 (Dixon, J.).

⁵² *E.g.*, *Simpson*, 1 F.L.R. 601 (Morritt, J.) (citing *Howes v. Bishop*, 2 K.B. 390 (C.A. 1909) and *Stuart* 1911 App. Cas. 120 (P.C. 1911) considered that a presumption of undue influence arose from evidence, *inter alia*, of the testator's reducing mental capacity and his increasing dependence on his wife (at 621). See *Cretney's Comment*, 19 Fam. Law (1989).

(including *Pitt*) were usually argued as cases of *actual* undue influence,⁵³ with the wife having the burden of establishing the actual exercise of undue influence.

A second difficulty, in the court's view, is related to the fact that no automatic presumption applied between husband and wife, was that emotional pressure, although present, had (and still has) to be sufficiently overt to amount to "undue influence." In *O'Brien*, for example, it was held at trial and by the Court of Appeal, that Mr. O'Brien's behaviour (extreme insistence that Mrs. O'Brien sign, an emotional scene on the day she signed, and telling her that if she did not sign, the company would be bankrupt and their son would lose his home) was not pressure "in the context of a normal husband and wife relationship and bearing in mind Mrs. O'Brien's character and capabilities, sufficiently undue."⁵⁴ A wife viewed by the court to be "strong minded and independent," like Mrs. O'Brien, faced significant difficulties in establishing that she was unduly influenced by her husband.

A third difficulty for wives in establishing undue influence was the general requirement that a transaction would not be set aside for undue influence unless it was to her "manifest disadvantage."⁵⁵ This requirement was often difficult to establish in the context of marriage, as it tended to be assumed by the courts that wives would benefit from their husbands' business successes. Other important inquiries, such as whether a wife signed as a result of an independent will⁵⁶ or whether she would benefit in real terms from the transaction, were not made. For example,⁵⁷ Mrs. Pitt's claim of actual undue influence failed in the Court of Appeal on the basis that her husband's share speculation was not to her manifest disadvantage. Lord Justice Peter Gibson held that "Mr. Pitt was for a time highly successful with his investments . . . and, through him (the provider of virtually everything enjoyed by Mrs. Pitt since her marriage) Mrs. Pitt would have been substantially better off."⁵⁸ This finding ignored other realities, in particular the pressure brought to bear on Mrs. Pitt and the question of whether the investments made by her husband would necessarily have translated into more

⁵³ E.g., *BCCI*, 1 Q.B. 923 (C.A.1990).

⁵⁴ 4 All E.R. at 1011 (C.A.).

⁵⁵ *Morgan*, 1985 App. Cas. 686 (H.L.); *Aboody*, 1 Q.B. 923 (C.A. 1990).

⁵⁶ Particularly since a security is a contract, contract law theory would indicate that a security ought not be valid if a party's free will was overborne (e.g. economic duress). See also D. Tiplady, *The Limits of Undue Influence* 1984 M.L.R. 579.

⁵⁷ See also *BCCI*, 1 Q.B. 923 (C.A. 1990).

⁵⁸ March 31, 1993 (C.A.) (Neill and Peter Gibson LLJ), *THE TIMES* (London), April 7, 1993. (Citations are to the draft judgment of Peter Gibson, J.).

disposable income or personal benefits for Mrs. Pitt, particularly given her lack of financial control within the family:

Mr. Pitt paid most of the bills and gave Mrs. Pitt money for housekeeping and other expenditure such as a new coat. Mr. Pitt chose the furniture, fittings, wallpaper and holiday destinations [Mrs. Pitt's] evidence was that in relation to big items of expenditure, there was usually an argument, she would be shouted down and told it was in their best interests, and that she would also be told that she was stupid and she did not know what she was talking about.⁵⁹

(b) *Imputing the Conduct of the Husband to the Creditor*

While establishing a prima facie case of misrepresentation, and particularly undue influence, presented difficulties for wives, further difficulties arose in the usual situation where wrongful conduct is exercised by the husband rather than the creditor.⁶⁰ The established position, even before *Pitt* and *O'Brien*, was that the wife's claim would not succeed against the creditor unless the creditor either knew⁶¹ of the husband's wrongdoing⁶² or the husband's conduct could be imputed to the creditor. As the creditor often had no knowledge of the husband's misconduct, the emphasis in cases leading up to and including *O'Brien* and *Pitt* was on devising a feasible formula for determining the circumstances in which a creditor should be held responsible for such misconduct.

At the centre of the confusion was *Turnbull & Co. v. Duval*,⁶³ a 1902 decision of the Privy Council in which security granted by a wife for her husband's business debts was held by Lord Lindley to be unenforceable for the main reason that the creditor "left everything to Duval [the husband] and must abide by the consequences."⁶⁴ Unfortunately, the equitable principle applied to reach this conclusion was unclear. There was no finding of undue influence against the husband, and the transaction was also open

⁵⁹ *Id.*

⁶⁰ *But see* National Westminster Bank plc v. Morgan, 1 App. Cas. 686 (H.L. 1985) (wife failed to establish lender's undue influence).

⁶¹ Although the term "notice" was used in *BCCI*, 1 Q.B. 923 (C.A. 1990), the Court of Appeal seems to have meant knowledge. See J.D. Davis *The Re-awakening of Equity's Conscience: Achievements and Problems in EQUITY AND CONTEMPORARY LEGAL DEVELOPMENTS* 48, 62 (Goldstein ed., 1992).

⁶² *E.g.*, if the creditor's solicitor acted for all parties and had become aware of the acts constituting the husband's undue influence. *Lancashire Loans Ltd. v. Black*, 1 K.B. 380 (1934) (Since the moneylenders had notice of the mother's undue influence on her daughter the transaction had to be set aside so far as the daughter was concerned.).

⁶³ 1902 App. Cas. 429 (P.C.).

⁶⁴ *Id.* at 435.

to the objection of having been obtained by a trustee from his beneficiary.

From Lord Lindley's words in *Turnbull*, two judicial approaches evolved (although some cases did not clearly follow either approach).⁶⁵ The first approach was the "agency theory." In essence, the husband's wrongdoing was imputed to the creditor if the husband was regarded as the creditor's agent in procuring the wife's consent to the proposed security. The "agency theory" was applied with varying degrees of stringency and artificiality in several Court of Appeal decisions, beginning with the judgment of Lord Justice Dillon in *Kings North Trust Ltd. v. Bell*,⁶⁶ (who merely referred to the creditor as the principal and debtor as the agent),⁶⁷ and eventually resulting in the wholesale application of common law agency principles of actual and ostensible authority by Lord Justice Fox in *Midland Bank plc v. Perry*.⁶⁸ After *Bank of Credit and Commerce SA v. Aboody*,⁶⁹ it was clear that a true agency "in accord with the approach of the general law of principal and agent"⁷⁰ had to be established before the creditor would be held responsible for the husband's conduct.

The second approach was the "special equity theory," applied most obviously by Lord Justice Scott and the majority of the Court of Appeal in *Barclays Bank plc v. O'Brien*,⁷¹ and by Judge Dixon in the Australian High Court decision of *Yerkey v. Jones*.⁷² While Judge Dixon's earlier formulation of the "special equity theory" offered special protection to wives who provided security for their husbands' debts, Lord Justice Scott extended the application of the approach. Lord Justice Scott held that a surety⁷³ would be a member of a "protected class" if the relationship between debtor and

⁶⁵ *E.g.*, *Chaplin & Co. Ltd. v. Brammall*, 1 K.B. 233 (C.A. 1908); *Avon Finance Co. Ltd. v. Bridger*, 2 All E.R. 281 (1985); *Barclays Bank plc v. Kennedy*, 1 F.L.R. 356 (Austl. C.A.) (1989).

⁶⁶ 1 W.L.R. 119 (C.A. 1986).

⁶⁷ *Id.* at 124.

⁶⁸ 56 P.P. & C.R. 202 (C.A. 1988); *see also* *Coldunell Ltd. v. Gallon*, 1 Q.B. 1184 (C.A. 1986); *Bank of Baroda v. Shah*, 3 All E.R. 24 (C.A. 1988); *Egremont*, 2 F.L.R. 351 (Austl. C.A. 1990).

⁶⁹ 1 Q.B. 923 (C.A. 1990).

⁷⁰ *Id.* at 972.

⁷¹ 4 All E.R. at 983 (C.A. 1992).

⁷² 63 C.L.R. 649 (Austl. 1939). More equivocal support for this approach can be found in *Chaplin*, 1 K.B. 233 (C.A. 1908); *Avon*, 2 All E.R. 281 (C.A. 1985); *Kings North Trust Ltd.*, 1 W.L.R. 119 (C.A. 1986); *Barclays*, 1 F.L.R. 356 (Austl. C.A. 1989). *Cf.* Lord Justice Scott's view in *O'Brien* that the cases "provide support for this road." 4 All E.R. at 1008 (C.A. 1992).

⁷³ Lord Justice Scott doubted whether those providing a mere contractual undertaking (*e.g.* a personal guarantee) rather than a surety obligation (secured over their property) would be within the "protected class." 4 All E.R. at 1009-10 (C.A. 1992). *Cf.* the wider view taken by the House of Lords, *supra* n.18.

surety was such that influence over the debtor by the surety, and reliance by the surety, was a natural and probable feature of the relationship. The surety obligations of members of this protected class which included wives, would be unenforceable if (1) "the relationship between the debtor [husband] and the surety [wife] and the consequent likelihood of influence . . . was known to the creditor," (2) the surety's consent was obtained by the undue influence or misrepresentation of the debtor, or without "an adequate understanding of the nature and effect of the transaction," and (3) "the creditor . . . failed to take reasonable steps to try and ensure that the surety . . . [had given a true and informed] consent to the transaction."⁷⁴ A particularly notable feature of this approach was that a wife's failure to understand the transaction provided a basis for relief. This was in contrast to the general position not to recognise any legal duty of creditors to explain to third party security providers the effect of the proposed transaction or to advise the taking of independent advice,⁷⁵ (although where a creditor does proffer an explanation, a duty is owed not to misstate the position).⁷⁶

5. O'BRIEN AND *PITT*: TIDYING UP THE LAW

Given the complexity and uncertainty of the law in the area of third party security providers, it came as a relief when the House of Lords considered *O'Brien* and *Pitt*.

⁷⁴ *O'Brien*, 4 All E.R. at 1008 (C.A. 1992).

⁷⁵ *E.g.*, *Barclays Bank plc v. Khaira*, 1 W.L.R. 623 (C.A. 1992); *Cf.* GOOD BANKING - CODE OF PRACTICE, *supra* note 5.

⁷⁶ An inadequate explanation may make a security unenforceable (probably as a misrepresentation of fact) but would not necessarily result in damages (the court has discretion whether or not to award damages in lieu of rescission and this may be an instance where the discretion would not be exercised). 4 All E.R. at 1010 (C.A. 1992) (Scott, L.J.). However, a tortious duty to take reasonable care and skill in advising a surety, giving rise to liability for damages, may arise when the surety is a customer of the creditor and the contract with the creditor extends to the giving of advice, or the creditor assumes the role of adviser to the prospective surety. *Id.* The problem for a wife who establishes the existence and breach of a tortious duty to explain or advise, owed by the creditor to her, is that although she will be entitled to damages, the charge will still be valid, and the creditor will still be entitled to possession. Yet, as *Perry* demonstrates, there may be tactical as well as financial advantages to establishing liability in negligence. *See* 56 P.P. & C.R. 202 (C.A. 1988). In *Perry*, Lord Justice Fox assumed that the negligence finding against the bank would mean that the bank would not be quick to seek to evict Mrs. Perry and her daughter. However, if possession of the property is the main concern, and it is arguable that the creditor has misstated the position when explaining the charge, misrepresentation is the better claim, as the elements are easier to establish and the remedies of rescission and damages are available.

(a) The Reasoning

In *O'Brien*, Lord Browne-Wilkinson⁷⁷ began from the position that a wife who has been induced to provide security for her husband's debts by his undue influence, misrepresentation, or some other "actionable wrong"⁷⁸ (possibly meaning duress) has an equity against him to set aside that transaction. Under ordinary principles of equity, her right to set aside the transaction would be enforceable against third parties (such as a creditor) if either her husband was acting as third party's agent, or the third party had notice (actual or constructive) of the facts giving rise to her equity. The "agency theory," as applied strictly in some earlier cases,⁷⁹ was therefore maintained, although the Lords considered that "such cases will be of very rare occurrence."⁸⁰ In contrast, the "special equity theory" applied by Lord Justice Scott and the majority of the Court of Appeal in *O'Brien* was rejected. The most significant objection was that creditors should not be required to prove that the wife understood the transaction.⁸¹

Instead, the Lords considered that a fair balance could be achieved by applying the doctrine of notice, adopting in broad terms the approach taken by Judge Peter Gibson in the Court of Appeal in *Pitt*. Thus, a security will be voidable if the creditor has actual or constructive notice that the wife's consent to providing the security may have been obtained as a result of a legal wrong committed by her husband. Creditors will be fixed with constructive notice if the transaction is not on its face to the financial advantage of the wife, and, as was recognised by the Lords in the case of husband and wife, the relationship between borrower and security provider is one where there is a substantial risk that in procuring the security provider's consent the borrower has committed a legal wrong. Creditors can, however, avoid being fixed with constructive notice by taking the "reasonable steps" set out in *O'Brien*, which require a creditor to "insist" that the wife attend a private meeting (in the absence of her husband) with a representative of the creditor, at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice."⁸² Only in "exceptional cases where a

⁷⁷ Lord Browne-Wilkinson delivered the Lords' unanimous rulings in both *O'Brien* and *Pitt*.

⁷⁸ 4 All E.R. at 430 (H.L. 1993).

⁷⁹ *E.g.*, *Aboody*, 1 Q.B. 923 (C.A. 1990).

⁸⁰ 4 All E.R. at 428 (H.L. 1993).

⁸¹ *Id.* at 428-29.

⁸² *Id.* at 429-30.

creditor has knowledge of further facts which render the presence of undue influence not only possible but probable" will the creditor, to be safe, have to insist that the wife be separately advised.⁸³

(b) *The Law Post-O'Brien and Pitt*

In *O'Brien and Pitt*, the Lords addressed some of the more obvious problems in the law affecting wives who charge the family home for their husbands' business debts, particularly the law of undue influence.

(i) Misrepresentation

In following the "reasonable steps"⁸⁴ required to avoid being fixed with constructive notice, a creditor is obliged to explain the charge to the wife. While *O'Brien* does not change the law of misrepresentation, the effect of the decision is that a misrepresentation made by a husband is now more likely to be corrected by the creditor in the course of explaining the wife's liability for the charge. Correspondingly, the possibility is increased that a creditor's representative may, in explaining the document, misrepresent a material fact, with the effect that the wife is induced to enter the contract. As discussed above, a negligent or innocent misrepresentation may make the transaction voidable in equity and may result in an award of damages.⁸⁵

(ii) Undue Influence

Undue influence may now be easier for wives to establish for two reasons. First, Lord Browne-Wilkinson, adopting the classifications of undue influence in *Aboddy*, emphasised that a presumption of undue influence arising from circumstances of a relationship could arise in favour of a wife who was "able to demonstrate that de facto she did leave decisions on financial affairs to her husband."⁸⁶ Before *O'Brien*, it seemed that this presumption would only arise between husband and wife in most unusual circumstances. The second reason why undue influence may be easier to establish is that in *Pitt*, the Lords overruled *Aboddy* to the extent that "manifest disadvantage" is not a requirement for actual undue influence.⁸⁷ The Lords also suggested in *Pitt* that the exact limits of the manifest disadvantage requirement for presumed undue influence as set out

⁸³ *Id.* at 430.

⁸⁴ *Id.* at 429-30.

⁸⁵ See *supra* part 4(a)(i).

⁸⁶ 4 All E.R. at 424 (H.L. 1993).

⁸⁷ 4 All E.R. at 439.

in *National Westminster Bank plc v. Morgan*⁸⁸ may have to be “considered in the future.”⁸⁹ This aspect of the decision should be welcomed. As Lord Browne-Wilkinson explained, undue influence is a species of [equitable] fraud, and like any other victim of [equitable] fraud, a person induced by undue influence to enter a transaction is entitled to have that transaction set aside as of right.⁹⁰

(iii) No Special Rules for Wives

A question arises whether the Lords’ approach actually changes the law of undue influence in relation to wives, or merely clarifies the position while consolidating a few stray rules. In particular, the Lords subsumed under the general head of undue influence arising from the circumstances both the “invalidating tendency” in respect to transactions between husbands and wives referred to by Judge Dixon in *Yerkey v. Jones*⁹¹ and Lord Justice Scott’s view in *O’Brien* that equity “has in the past treated married women differently and more tenderly” than other sureties.⁹²

The Lords’ approach in this respect is consistent with their view that wives should not be accorded special rights as sureties,⁹³ and their view that Lord Justice Scott’s “special equity theory” was objectionable partly because it offered special protection to a limited class in relation to a particular type of security transaction.⁹⁴ However, the Lords also recognised at the level of policy both “society’s recognition of the equality of the sexes” and the fact that in many families “the practice does not coincide with the ideal [of equality],”⁹⁵ the husband having the business experience and the wife following his advice. This complex reality was reflected in their ruling that, while no special rules apply to wives, the marital relationship, with its sexual and emotional ties, gives rise to a particularly high risk of wrongful conduct by the husband. Therefore, a presumption of undue influence was particularly likely to arise from these circumstances. This approach strikes a balance between “special treatment” versus “equal treatment” issues.⁹⁶

⁸⁸ 1 App. Cas. 686 (H.L. 1985).

⁸⁹ 4 All E.R. at 439.

⁹⁰ *Id.*

⁹¹ 63 C.L.R. at 679.

⁹² 4 All E.R. at 1008 (C.A. 1992).

⁹³ 4 All E.R. at 428 (H.L. 1993).

⁹⁴ *Id.* at 428.

⁹⁵ *Id.* at 422.

⁹⁶ *See supra* part 2(c).

6. THE FUTURE: FAIRER OUTCOMES OR ONGOING PROBLEMS?

While *O'Brien* and *Pitt* have resolved some of the difficulties in this area of the law, on closer inspection it becomes apparent that while the rulings acknowledge the problem of emotional and thus financial vulnerability, at a practical level, significant aspects of this problem are left unresolved.

It is particularly important to note the Lords' concern with balancing the need to protect the vulnerable with the "important public interest"⁹⁷ of not rendering the family home "economically sterile"⁹⁸ as security for business loans. As a result, the protection offered to wives under *O'Brien* and *Pitt* is necessarily limited. This limitation is achieved in four ways, only three of which seem justifiable in the interests of maintaining a fair balance.

The first way in which protection for wives under *Pitt* and *O'Brien* is limited is that before constructive notice can be fixed upon a creditor, 'undue influence, misrepresentation or some other legal wrong must have been committed by the husband. The requirement of a legal wrong will continue to act as a significant bar to relief for wives (such as Mrs. *O'Brien*) who provide security as a result of more subtle and insidious emotional pressure which, although very real to them, falls short of what the law considers to be undue influence. Second, even if a pressure or misunderstanding amounts to a legal wrong, a creditor will not be fixed with constructive notice if it has taken "reasonable steps" to satisfy itself that the wife's agreement to charge the family home has been properly obtained, subject to the need to insist on independent advice in "exceptional circumstances."⁹⁹ Although fulfilling the reasonable steps requirement is likely to cause problems for creditors in respect to pre-*O'Brien* transactions, the adequacy of the steps taken will be decided on their particular facts.¹⁰⁰ Third, independent advice remains the ultimate limit for creditor responsibility; if a creditor insists on a wife receiving independent advice, there is no scope for the wife to avoid liability, however pressured she was.¹⁰¹ The fourth, and most problematic, boundary of creditor responsibility is that for constructive notice to apply, the Lords stipulated that the transaction must not on its face be to the financial advantage of the

⁹⁷ 4 All E.R. at 422 (H.L. 1993).

⁹⁸ *Id.*

⁹⁹ *Id.* at 429-30.

¹⁰⁰ *Id.* at 429.

¹⁰¹ *Egremont*, 1990 F.L.R. 357 (Lloyd, L.J.) ("the one thing that runs like a golden thread through all the cases . . . is that the safest course for the bank to take, and perhaps the only safe course, is to ensure, if it can, that the wife receives independent advice").

wife. This requirement is the most troubling aspect of the Lords' rulings because it ironically resurrects the "manifest disadvantage" requirement, overruled so convincingly in *Pitt* in relation to actual undue influence.

Although there is some uncertainty as to the elements which comprise the "face" of a transaction, it does seem clear that the "on its face" requirement is intentionally superficial, and stems from the attitude that a creditor should only be required to guard against matters which are obvious to it. This approach, while fair to creditors, ignores the fundamental problem that a wife who provides security as a result of pressure by her husband is also unlikely to have much, if any, control over how she appears in the documentation. Thus, in *Pitt*, the reality was that Mrs. Pitt acted under her husband's actual undue influence, and as a result appeared as a joint borrower for a holiday home on "the face of the transaction." In actuality, she had no control over family expenditure (let alone Mr. Pitt's business investments).¹⁰² It is unfair, and somewhat ironic, that the "face of the transaction," being a matter beyond Mrs. Pitt's control, should form the basis for denying her relief.

Further injustice seems likely to result from the "financial advantage" requirement. How appropriate is it to apply what is essentially a commercial assessment of the likely benefits and risks to a wife who is very unlikely to have made her decision on that basis?¹⁰³ At least in the case of Mrs. Pitt, a peaceful life (and possibly the sense of stability inherent in an almost unencumbered property) appears to have been more important than the gamble involved in charging that property in the interests of a business venture over which she had no control. Moreover, even if Mrs. Pitt is judged on the commercial assessment of a likely gain to her, on the facts, any gain would more likely have been translated into further share investments by Mr. Pitt, rather than more disposable income or a better lifestyle for Mrs. Pitt, who could not buy a new coat without first asking for the money from her husband. The public perception of possible gain assumes a private sharing between spouses which is not supported on the facts of *Pitt*.

In *Pitt*, the Lords insisted that it was crucial for the requirement that a transaction be on its face disadvantageous to the wife. Without it, "such transactions would become almost impossible."¹⁰⁴

¹⁰² See *supra* part 4(a)(ii).

¹⁰³ See *supra* part 2(b).

¹⁰⁴ 4 All E.R. at 441.

This reasoning is not convincing, particularly given the Lords' acknowledgement of the "substantial risk" of the abuse of trust and confidence in emotional relationships.¹⁰⁵ Given the high risk and the fact that the manifestation of this risk may well affect the structure of the transaction, as well as the uncertainty concerning which factors the court in any given case will consider constitute the "face" of the transaction, why not require creditors to meet every borrower or security provider, regardless of the transaction? From the cases, it seems that creditors will often meet the husband, who arranges the borrowing, several times during the loan negotiations. A short meeting with a wife seems a fair price to pay for an unimpeachable transaction when the consequences (loss of her home) are so significant.

7. CONCLUSION

In *O'Brien* and *Pitt*, the Lords attempted to balance the interests of both creditors, and wives who provide security for their husbands' debts. In this article, I have tried to show how, as a result of the need to balance public interests and private pressures, familiar limitations on relief, particularly the continuing relevance of manifest disadvantage, play an important role in the Lords' reformulated notice approach.

Given the Lords' view that the heavy reliance in England on the family home as loan security is an "important public interest," an important question is whether any more can be done to protect the vulnerable. Increasing public awareness about the potentially non-beneficial aspects of providing security remains a potentially powerful supplement to the limited protection offered by the law. To a certain extent, the public awareness issue is already being addressed by community groups in England, such as Bank Action Group, and by increased media attention throughout the *O'Brien* case. A media campaign conducted by a public body (for example, the Citizen's Advice Bureau) which is specifically directed at addressing the interaction between emotional and financial vulnerability, may prove even more effective. In the absence of legislation restricting the freedom of spouses to use the family home as security for business loans, discouraging people from making financial decisions on the basis of emotional involvement presents a formidable challenge.

¹⁰⁵ *Id.*