Overcoming the Law's Marriage to the Past

A Re-Assessment of the Meaning of 'Reasonable Steps' in Non-Commercial Guarantees following Royal Bank of Scotland Plc v Etridge (No.2)

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Abstract—This article considers the law surrounding non-commercial guarantees and the steps that must be met in order to ensure that a third party's wrongdoing does not affect the validity of the guarantor's contract. Non-commercial guarantees often arise in mortgage and security relationships entered into by married couples, where the husband unduly influences the wife to sign a guarantee for his debt. It is suggested here that in order for the law to realign itself with contemporary societal standards, more stringent requirements need to be imposed on lenders and solicitors. It will be argued that this includes (a) private meetings with the guarantor/wife, (b) independent legal advice from

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different solicitors, and (c) a lower threshold for what is required in order for a solicitor to veto a guarantor transaction.

Introduction

In cases of non-commercial guarantees, where the relationship between the guarantor and debtor is personal and thus open to influence, there is grave scope for abuse. *Royal Bank of Scotland Plc v Etridge (No.2)*[1] (*Etridge*), while taking a substantial step in the right direction—holding that a guarantee is unenforceable if the lender has not taken reasonable steps to ensure that the guarantor was properly advised—still has a long way to go; we must ask ourselves: is *Etridge* the most desirable solution to resolving the three-party problems of relationship influence? The optimal solution might very well be contingent on contemporary morality. As Lord Bingham noted in *Etridge*, equity 'is not past the age of child-bearing'.[2] In His Lordship's opinion, 'the existence of this obligation in all non-commercial cases does not go beyond the reasonable requirements of the *present times*'.[3] This article will argue that as twenty years have passed since *Etridge*, the reasonable requirements of equity have changed in this time. The law has gradually become more protective of the interests of the weaker party—a development which has been described as one of the cornerstones of the evolution of contract law[4]—and lenders have also begun to incorporate principles of socially responsible lending into their practises. Because of society's shifting views, the law now falls short of equity's 'reasonable requirements', and certain reforms are necessary.

This article will take the following approach. First, the societal and practical background surrounding non-commercial

[1] [2001] UKHL 44.
[2] ibid [89].
[3] ibid (my emphasis).
[4] Hondius, 'The Protection of the Weak Part in a Harmonised European Contract Law: A Synthesis' (2004) 27 Journal of Consumer Policy 245.

guarantees will be considered in order to contextualise the applicable law and propositions for reform. Next, *Etridge*'s three-stage approach will be explained. Then, the following argument will be made: (1) There is currently a divergence between the law and societal norms. (2) The law ought to accord with contemporary morality and societal norms. (3) If the lender fails to adhere to these moral and social norms, they are not 'innocent'. (4) If the lender is not innocent, they do not merit the protection of the law and the contract should be voided. (5) In order to bridge the law-morality divide and thereby ensure that banks adhere to the moral standard, certain reforms are necessary, including more stringent steps for banks to follow prior to granting a loan, such as the provision of private meetings, as well as a requirement of independent legal advice. Lastly, and by analogy with unconscionable bargains, it will be argued that the solicitor's role in the process should also be reformed.

1. A Moving Picture

A. Context

The most common scenario where guarantor problems arise is in a relationship between husband and wife, as was the case in *Etridge*. In such a scenario, the husband needs a loan for personal or business purposes, and due to his own indebtedness or low credit score, the bank is unwilling to lend to the husband without some kind of guarantee on repayment. To this end, the wife is asked by her husband to serve as a guarantor and if successful, the bank will normally charge the land owned by the borrower.

This can include the guarantor entering a mortgage.[5] Consequently, if the husband is later unable to repay the loan, it is the guarantor (the wife) and their family who are forced into debt and homelessness, because the bank will likely take possession and sell the property with vacant possession, forcing its occupants to leave the home.[6] Other non-commercial guarantee relationships exist, such as agreements between employees[7] and friends,[8] but they are less common. The nature of the relationship matters because the husband-and-wife cases have the widest scope for abuse; they are the most obvious examples of relationships of influence: married couples will rely on each other for advice and try to accommodate each other's needs. However, the commonality that links all such relationships is that the guarantor's only reason for signing the contract and agreeing to act in such capacity is personal: by definition (a 'non-commercial' guarantee), the guarantor cannot have any involvement in the business activity of the debtor (the husband).

This husband-wife scenario is more common than one might think.[9] In *Barclay's Bank plc v O'Brien*[10] (*O'Brien*), Lord Browne-Wilkinson noted that there had been eleven reported cases in the Court of Appeal in the last eight years, and in *Etridge*

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[5] This was the case in *Etridge*, where the eight joint appeals concerned land mortgaged to lenders.

[6] Power to sell is given under the Law of Property Act 1925, s 101(1)(i), exercisable after three months if the whole sum is due (s 103(i)), after two months if the interest is due (s 103(ii)), or if there is a breach of the mortgage agreement (s 103(iii)). The right to possession always exists following *Four Maids Ltd v Dudley Marshall* [1957] 1 Ch 317, 320.

[7] *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, [185]-[186].

[8] *Banco Exterior Internacionale SA v Thomas* [1997] 1 WLR 221.

[9] Jack Beatson, *Anson's Law of Contract* (31st edn, OUP 2016).

[10] [1994] 1 AC 180.

it was noted that the House of Lords had heard appeals in eight separate cases on the topic.[11]

B. The Current Law

The current law was set out in *Etridge*, restating the *O'Brien*[12] principle (the bank's constructive notice of wrongdoing) and extending it to all guarantees entered into by guarantors and principal debtors who do not have a commercial relationship.

Etridge held that 'reasonable steps' are required of the lender if they desire to enforce a guarantee affected by vitiating factors. A guarantee is unenforceable if: (a) there is a vitiating factor (undue influence, misrepresentation etc.) which affects the dealing and communication between the guarantor and the debtor, (b) the bank knows that the guarantor is acting in a non-commercial manner and that the transaction is for the benefit of the primary debtor, and (c) the bank has not taken 'reasonable steps' to ensure that the guarantor was properly advised. In detail, this means:

(a) The first 'stage' necessary for a lender to enforce a guarantee is the absence of vitiating factors against the primary debtor—if no vitiating factor or 'misconduct of a third party'[13] exists, the bank can *always* enforce the guarantee. However, the existence of any such factors between the debtor and guarantor lays the foundation for the unenforceability of the contract between guarantor and

[11] ibid 185.
[12] For discussion of the principle, see Mindy Chen-Wishart, 'The O'Brien Principle and Substantive Unfairness' (1997) 56 CLJ 60.
[13] *Etridge* (n 2) [30].

debtor. Vitiating factors include undue influence as well as misrepresentation.[14]

(b) The next stage is the lender's notice of the vitiating factors. The law had already undergone development before *Etridge*. The initial position required the lender's *knowledge* of the vitiating factor(s) in order to render the guarantee unenforceable.[15] The *O'Brien* principle then extended this doctrine to include constructive knowledge, or as Lord Browne-Wilkinson put it, the lender's 'constructive notice' of the debtor's wrongdoing.[16] Constructive knowledge was said to be present where there was (i) a transaction with no financial advantage to the wife, and (ii) 'a substantial risk in transactions of that kind that the husband had committed legal or equitable wrongs, such as unduly influencing his wife.'[17] Lord Browne-Wilkinson's constructive notice test has been stripped from the law by *Etridge*, on the basis that the law must avoid arbitrary distinctions between, for example, people in sexual relationships and those in platonic relationships,[18] and also must avoid banks being forced to investigate the kind of relationship that existed between debtor and guarantor.[19] The *O'Brien* principle was replaced with the simple test that the bank must take 'reasonable

[14] *Annulment Funding Co Ltd v Cowey* [2010] EWCA Civ 711 [64].
[15] *O'Brien* (n 10).
[16] ibid 195-196. This use of the term was itself found to be an extension, see *Etridge* (n 2) [42]: 'Lord Browne-Wilkinson acknowledged he might be extending the law'.
[17] *O'Brien* (n 10) 196.
[18] *Etridge* (n 2) [86].
[19] ibid [87].

steps' in every case where the relationship between the guarantor and the debtor is non-commercial.[20]

(c) The final stage is the completion of 'reasonable steps' in order to make the agreement enforceable.

(i) The burden on the banks is relatively simple, requiring the guarantor to seek legal advice. The bank must then seek written confirmation from the guarantor's solicitor that they have explained the nature and effect of the lending documents to the wife.[21] The court expressly rejected requirements of private meetings between the bank and the guarantor,[22] requiring the bank to attempt to discover undue influence itself or obtaining confirmation that the wife was not unduly influenced[23] into signing the contract (in contrast to confirmation that the wife was instructed). These rules are displaced if the bank knows that the guarantor was not duly advised or 'if the bank knows facts from which it ought to have realised that the wife has not received the appropriate advice'.[24]

(ii) Independent advice for the guarantor is not necessary.[25] It is for the guarantor to choose whether they want to be represented by the same solicitor as the debtor, and given that solicitors are often shared in the common husband-wife cases, it is unlikely that the guarantor will go out of their way to find a new solicitor.

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[20] ibid [44], [87].
[21] ibid [51].
[22] *Etridge* (n 2) [55], [94].
[23] ibid [53].
[24] ibid [57].
[25] ibid.

As an addendum, in situations where the creditor knew or had reasons to believe that the guarantor already knew of the risks associated with the situation, there is no obligation to follow these steps to begin with.[26]

C. Law and Societal Norms

When thinking about the divergence of law on the one hand, and societal standards and norms on the other, we are reminded of Lord Bingham's reference to equity not being past the age of child-bearing and its contingence upon current societal norms. The importance of responsible lending is increasingly being recognised in legislation. In 2014, the Financial Conduct Authority introduced the Consumer Credit sourcebook (CONC).[27] The sourcebook includes provisions such as CONC 5.2A.31 and CONC 5.2A.32, which discuss the factors to be taken into account in the debtor's creditworthiness assessment by the lender where there is a guarantor. CONC 5.2A.32 (5) says that the lender must have regard to information such as the total potential liability of the guarantor under the guarantee and any other potential adverse consequences for the guarantor arising under the guarantee from a failure to make a payment by the due date, when making the assessment. Secondly, and again in 2014, the European Union introduced the EU Market Directive 2014/17/EU, laying down a more regulated framework for the sphere of consumer mortgage credit agreements and residential immovable properties. These provisions are built on the foundations of responsible lending principles. They aim to prevent the bankruptcy of the borrower by ensuring that the

[26] ibid.

[27] Karen Fairweather, 'The development of responsible lending in the UK consumer credit regime' in James Devenney & Mel Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (CUP 2012) 84.

lender's terms are fully understood, that the loan is affordable, and that alternative arrangements can be made for unforeseen circumstances. This type of legislation is clear evidence of a shift in lending culture.

Moreover, the importance of promoting socially responsible lending has been recognised by the banks themselves. So far, lenders have taken a more substantive and less procedural approach to incorporating responsibility principles, paying more attention to environmental, social and governance (ESG) criteria that are traditionally used by investors to examine and evaluate potential investments.[28] The importance of ESG factors can be seen in a 2019 survey of 194 credit risk experts working in banking and finance: 86% of the participants believed that ESG factors were becoming more important thanks to increased investor demand, and 83% found that ESG factors were playing an increasingly crucial role in credit risk areas.[29] It is thus evident that the banking sector is becoming increasingly aware of their social responsibility to their customers.

There has also been international recognition of the importance of corporations examining their internal practices and following recognised guidelines for social governance, and although not binding on UK lenders, lessons can nevertheless be learnt. The 2011 Organisation for Economic Co-operation and Development (OECD) guidelines for responsible business

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[28] There are some differences between equity capital and corporate lending. Ralph De Haas and Alexander Popov, 'Finance and carbon emissions' (2019) ECB Working Paper Series 2318 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3459987> accessed 21 January 2021.

[29] S&P Global Market Intelligence, '2019 ESG Survey', https://pages.marketintelligence.spglobal.com/ESG-Survey.html> accessed 15 February 2021.

conduct (the Guidelines) ask businesses to (i) make a positive contribution to economic, environmental, and social progress with a view to achieving sustainable development; and to (ii) avoid and address adverse impacts through their own activities and seek to prevent or mitigate adverse impacts directly linked to their operations, products, or services by a business relationship.[30] Both principles can be applied to banks, and more specifically, to non-commercial guarantees. Interestingly, if a lender were to fail to prevent undue influence in a non-commercial guarantee, it would not meet part (ii) of the Guidelines. The Guidelines therefore provide a strong contextual framework for what we can ask of lenders and what their duties are in order to be 'innocent' in the transaction. This has in some forms already been recognised by individual banks, such as Lloyds Bank's introduction of a Domestic and Economic Abuse Team.[31]

Observing these changes in legislation, ESG criteria and international guidelines together, there is an undeniable trend towards more socially conscious lending practices, aimed at protecting the weaker party even when this might come at a cost or inconvenience to the bank. Such an evolution in principles should be reflected by a higher threshold for the 'reasonable steps' that lenders must follow.

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[30] OECD (2011), 'OECD Guidelines for Multinational Enterprises', <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 29 December 2020.

[31] Lloyds Bank, 'Lloyds Bank 2020 Annual Report' <https://www.lloydsbankinggroup.com/assets/pdfs/investors/annual-report/2020/2020-lbg-annual-report.pdf> accessed 29 December 2020.

D. 'Innocent' Lenders

The main argument as to why the guarantee contract ought not to be undermined is because the lender is 'innocent' in the transaction, as the lender does not participate in the wrongful undue influence that renders the contract voidable. It is a well-established rule in contract law that if a third party in good faith acquires an interest in property, a merely voidable transaction can no longer be voided.[32] This also applies to the rescission of contracts for undue influence. It is, however, questionable to what extent one can really say that law in relation to non-commercial guarantees requires the bank to act in 'good faith'. Good faith requires a party to be open, fair, and honest. According to *Etridge*, banks can comply with what is required of them by law (i.e. comply with the 'reasonable steps'), yet still fall far short of the moral standard for good faith. There might even be instances where calling the lender reckless, indifferent, or negligent is a more accurate description of their conduct.

Thus, in order to be a *fully 'innocent'* lender, the bank must incur no *moral* culpability by meeting their *moral* duties and responsibilities. The question of whether the moral duty is met should be the same as whether the legal duty is met, and if the answer is negative, the contract should be nullified.

The preferred reasoning is already set out in *O'Brien*: the issue is not the advantage-taking by the bank, but the notice.[33] A lender cannot be acting responsibly or innocently when ignoring the abuse of the contractual partner. Thus, it is contrary to the principles of contract law to maintain a contract[34] where the third party has notice of the undue influence. In *O'Brien*, Chen-Wishart

[32] *Phillips v Brooks Ltd* [1919] 2 KB 243.
[33] *O'Brien* (n 9) 195-196.
[34] ibid.

characterises the question to be asked as being 'whether the conduct of the creditor has fallen short in any respect which would amount to *unconscionable disregard* for the predictable vulnerability to the misfeasance or influence of the debtor'.[35] The 'language of the jurisdiction' is one of notice.[36]

2. 'Reasonable Steps'?

A. The Role of the Bank

The current requirements fail to acknowledge that in order to merit protection, the lender needs to be *fully innocent*. Several new steps and safeguards should be introduced to ensure that the law governing non-commercial guarantees is in line with principles of contractual fairness and, as seen above, heightened contemporary standards of lender responsibility.

I. A Plea for Private Meetings

Private meetings between the lender and the guarantor ought to be included as a 'reasonable step', rather than the joint meetings currently required. The procedure of the meetings should remain the same, but the guarantor and debtors should have to individually meet with employees of the bank. This suggestion was discussed and rejected in *Etridge* on the basis that the cost of private meetings precluded them from being made mandatory. On closer inspection, this objection does not hold water.

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[35] Mindy Chen-Wishart, 'The O'Brien Principle and Substantive Unfairness' (1997) 56 CLJ 60 (my emphasis).
[36] ibid.

On one hand, costs ought to be kept to a minimum; otherwise, the lender will pass on the costs to borrowers and the availability of credit will suffer. This would harm all borrowers as a group, demonstrating why it is wrong to portray such costs as a conflict merely between the interests of the lenders and of the wronged guarantor.[37] Opponents to the private meetings proposal might therefore argue that it is an expensive burden to train the lender's staff to facilitate these meetings. Staff costs make up a significant portion of the operating expenses of banks—for example, such costs made up 26% of expenditure at Lloyds Bank in 2020.[38] However, and at the end of the day, the suggested reform simply means that a meeting which would be conducted anyway will now be held twice: once for the guarantor, once for the debtor. The training that is currently offered entails, on average, 40 hours at 1200 pounds per head per year.[39] One extra hour of training for the staff dealing with the guarantor (costing only around an extra 30 pounds per head) could make a significant difference, in that they would then be likely to perform any additional tasks linked to the guarantor contract with greater care. Moreover, some firms may already have similar training in these areas—such as Lloyds Bank's domestic abuse awareness training—which would allow the training programme to be expanded upon at minimal extra cost.

Next, two evaluations can be made about the potential costs of litigation. First, as above, qualified staff can prevent or at least mitigate this issue. Second, the problem of litigation is present both on the side of the bank and on the side of the

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[37] See Antony Dnes, *Principle of Law and Economics* (3rd edn, Edward Elgar) 121.

[38] Lloyds Bank 2020 Annual Report (n 31).

[39] Training Magazine, '2019 Training Industry Report' <https://trainingmag.com/sites/default/files/2019_industry_report.pdf> accessed 06 January 2021.

claimants. If the guarantor is unduly influenced and ends up homeless, resultant litigation is likely. As the law is forced to choose between two innocent parties, it is only right that the bank should carry this burden of cost, for two reasons. Firstly, there is a significant difference in resources: banks usually have greater access to lawyers and funds than a non-commercial guarantor. Secondly, there is the difference in bargaining power: bank loans will often be 'take it or leave it' contracts; it is a business-consumer contract with a large power imbalance in favour of the bank. As McBride neatly summarises it, the bank is better equipped to take on the risk of litigation.[40] Even when choosing between two innocent parties, there are still different degrees of 'innocence'. The guarantor, by default, is completely innocent. However, the lender's innocence, as examined above, can vary. When deciding between a resourceful stronger party with some degree of non-innocence and a weaker, financially vulnerable counterparty, it is contrary to both morality and doctrine if the latter is not protected.[41] Thus, the chance of litigation, although a recognised cost, is justifiably shifted onto the lender.

It was also stated in *Etridge* that private meetings would be a 'disproportionate response to the need to protect those cases,

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[40] Nicholas McBride, 'Random Lines – Land Law' (*McBride's Guides*, 13 August 2013) <https://mcbridesguides.com/category/random-lines/land-law/> accessed 28 April 2021.

[41] Evident in cases surrounding unconscionable bargains such as *Fry v Lane* [1880] 40 Ch D 312, 322, where Kay J articulated that equity most commonly intervenes in cases of a party 'just of age, his youth being treated as an important circumstance', or where the vendor is 'a poor man with imperfect education'. These principles are also visible in *Cresswell v Potter* [1978] 1 WLR 255. For wider academic discussion, see Waddams, 'Protection of Weaker Parties in English Law' in Mel Kenny, James Devenney & Lorna Fox O'Mahony (eds), *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable* (Cambridge University Press 2010).

presumably a small minority, where a wife is being wronged.'[42] This shows a flawed prioritisation of the interests involved. This calculation of proportionality does not seem to take into account the severity of the resultant harm: even though the harm is not likely, its effects on the wronged individual are immense. As explained above, homelessness and insolvency of the guarantor are common results in cases where the debtor defaults. Given the obvious need to prevent such an outcome, calling a small increase in costs a 'disproportionate response' seems almost cynical.

There may be non-pecuniary feminist challenges to the argument for private meetings which may characterise greater and stronger intervention as a patriarchal assumption of women's inability to self-protect. However, this is not a question of patronising women and assuming they are unable to make wise decisions relating to marriage and their financial affairs; it is merely a recognition of the fact that there is scope for abuse. There are three further reasons why such a change would not be anti-feminist. Firstly, for women who are resilient, privileged, and capable enough to resist any influence, they suffer no harm, and the reforms do not present any great additional burden. Secondly, the reforms do not only apply to women: *Etridge* made clear that the 'reasonable steps' affect both heterosexual and homosexual relations, cohabitational or not.[43] Although the issue might be more prevalent in husband-wife situations, the need to rebalance the priority given to the interests of the banks over the interests of the weaker party is not gendered. Thirdly, for those women who are more likely to be influenced, greater protection can only be a benefit. Thus, the argument that such legislation is

[42] *Etridge* (n 2) [61].
[43] ibid [86].

antifeminist is flawed to the extent that the inverse seems more likely.

Evidently, the objections to private meetings fall down on closer inspection. We can now also consider the benefits of private meetings, further demonstrating their necessity. Firstly, private meetings would make the existing protective mechanisms more effective. If insufficient attention is paid to the debtor and guarantor by the bank in the meeting, the result is that the meetings will be treated as merely performative, thereby undermining the effectiveness of the other procedural safeguards. Later steps, such as the provision of independent advice, are less successful, as the wife may well not understand why that later step is desirable or necessary. Thus, by rejecting the status quo and introducing private meetings, there is a lower likelihood that insufficient attention will be paid to both the debtor and guarantor by the bank, decreasing the chance of performative meetings. Private meetings would also provide more room for staff to identify misunderstandings. The current law is that if it is clear that the guarantor is under a false impression as to the terms of the agreement due to misrepresentation or another vitiating factor, it is on the lender to clarify that misunderstanding. Private meetings give the lender the opportunity to rectify any issues before the process goes awry. Again, private meetings should be seen as laying the foundations for the success of subsequent safeguards. Private meetings would allow the guarantor to ask questions more freely. Without the imminent fear and intimidation caused by the presence of the potentially influential or abusive debtor, the guarantor is in a better place to make enquiries about the terms, express discomfort, or seek to renegotiate the contract. In most cases, this will not be possible if the partner that is exerting pressure on the guarantor is present in the room. Separation will also eliminate potential conflicts of interest in the eyes of the (potentially) abused party. This way, the

guarantor will know that it is their interest that is being guarded, and that the bank's employee is there for their benefit, rather than the benefit of their partner.

Here, an analogy can be drawn to medical practice. When a person seeks advice on the termination of pregnancies, such as by an abortion pill, the accompanying party is asked to wait outside so that the affected party can be advised separately.[44] The reason for this is to avoid reproductive coercion.[45] Although this example takes place in a different field, it should be acknowledged that separate and private consultation is already common practice in other areas, in order to avoid the same kind of manipulative pressure that a debtor may place on the guarantor.

It is therefore pressingly clear that the private meeting objections raised in *Etridge* are not watertight. When we also consider the potential benefits that such meetings could bring, it is surprising that the House of Lords did not consider the case for private meetings more closely. Their introduction, far from being a 'disproportionate response', would only act to catch potential victims of abuse slipping through the procedural net.

Finally, we must also note that the current standards for the procedure and content of meetings need to be enforced *in practice*. Time and time again there has been criticism that meetings are seen as purely performative, rather than being taken seriously and complying with all the standards required.[46] This includes communicating in comprehensible language, double checking

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[44] British Medical Association, 'The law and ethics of abortion – BMA views' <https://www.bma.org.uk/media/3307/bma-view-on-the-law-and-ethics-of-abortion-sept-2020.pdf> accessed 1 May 2021.
[45] Grace & Anderson, 'Reproductive Coercion: A Systematic Review' (2018) 19(4) Trauma Violence Abuse, 371.
[46] *Etridge* (n 2) [33].

whether the contracting parties truly understand the nature of the terms etc. If the standards continue to be only applied in a manner that reduces them to mere formalities, there may need to be further reforms, such as the introduction of an independent accountability mechanism, in order to force compliance.

B. Independent and Separate Legal Advice

As well as the need for private meetings between lender and guarantor, the advice the guarantor receives from their solicitor ought to be *independent*, and therefore *private* too. Currently, all the bank needs to do is obtain confirmation from the guarantor's solicitor that the guarantor has been advised about the nature and effect of the transaction,[47] and all the debtor and guarantor need to do to meet their obligation is to attend a meeting with their solicitor. The solicitor may act for the guarantor's husband, or even the lender itself, leaving the contractual door wide open for relationship abuse. Whereas under the current law the legal advice can be given in the presence of the spouse,[48] reform would allow for distance to the abuser and prevent further influence and intimidation during the meeting.

Similar to the separation argument for private meetings, meeting the solicitor without the debtor is advantageous in that the spouse has greater freedom (and will feel they have this greater freedom) to honestly discuss whether they want to enter the transaction at all, or on what terms. Receiving legal advice from different people will also ensure that the guidance given is independent and free from any conflicts of interest—any potential conflict is not just *reduced*, but *eliminated*. As former Lord Chief Justice Hewart famously exclaimed, 'justice should not only be done, but should manifestly and undoubtedly be seen to be

[47] *Etridge* (n 2).
[48] ibid [66].

done'.[49] In the context of advising abuse victims, this is particularly true; if it is not *abundantly clear* to the victim that there is confidentiality and separation, they will not be able to benefit from it—having professional standards of conduct that the victim knows nothing about is of no use. Justice must be seen to be done. This recommended change mirrors the reasons for private meetings with the lender's staff; the two safeguards complement each other and jointly provide for a more effective safety net.

Admittedly, requiring all guarantors to find separate counsel from their spouse will require greater effort on the guarantor's part. In most cases, married couples will have the same solicitor that they turn to for legal advice. Thus, it is an additional burden for them to find different solicitors. However—and in contrast to the earlier argument about costs being justifiably shifted onto the lender—in order to create a level playing field, it is only reasonable to put some additional burden of undue influence prevention onto the debtors and guarantors too. Moreover, hearing a second independent opinion will never actively disadvantage the guarantor. Lastly, such an inconvenience can be mitigated: the family solicitor is likely to be a member of a firm of solicitors, and it is not particularly troublesome to go to a different solicitor (in the same building).

Moreover, as Fuller argues, formalities have a cautionary function.[50] Finding separate legal counsel gives the guarantor more time to reassess the situation and discuss their concerns with their confidantes. This additional consideration time helps prevent them from signing something they ought not to. This method will help all guarantors, including those considering

[49] *Rex v Sussex Justices* [1924] 1 KB 256 [259].
[50] Fuller, 'Consideration and Form' (1941) 41 Columbia Law Review 799.

signing something for less serious, but equally irrational reasons, such as mere lust or temporary endearment.

Nevertheless, though independent legal advice and private meetings with those advisers are necessary, they are not always sufficient. In relationships of pressure, fear and intimidation, the abusive and dominant partner will not need to be present in order to influence the wife's behaviour. Other steps can and should be taken to counteract the effect of undue influence. The next step that should be taken is raising the threshold for what counts as 'adequate advice', discussed below.

I. The Problematic Role of the Solicitor: Adequate Advice

One of the biggest issues the wronged guarantor will face is the fact that the lender can escape liability by passing on all responsibility to the solicitor.[51] If the solicitor's advice is inadequate, there is the possibility of a tort action for professional negligence against the solicitor, but there is no effect on the contract between the lender and the guarantor. A tort claim against the solicitor is not an effective alternative to voiding the contract: as McBride points out, because the bank is able to enforce the contract, the last thing the guarantor is able to do is sue,[52] as she ends up both homeless and penniless. The only way the solicitor can currently protect the guarantor from enforcement of the guarantee is by declining to act for the bank any further. The solicitor has access to a de facto 'veto', but it can only be used in cases 'where it is glaringly obvious that the wife is

[51] Morris, 'Wives are Told: Don't Blame the Bank, Sue Your Solicitor: Royal Bank of Scotland v Etridge (No. 2)' (1999) 7 Feminist Legal Studies 193.
[52] McBride (n 40).

being grievously wronged'.[53] This threshold is too high. It should be reduced in order to offer a more holistic protection of the guarantor.

II. Reducing the Threshold of the Solicitor's 'Veto'

There should be a lower threshold to allow a solicitor veto, as the bar is currently set so high that it effectively absolves the solicitor of any responsibility in preventing undue influence. Firstly, the wrong suffered must be 'grievous', indicating that the degree of undue influence present must be *really bad*. Secondly, the influence must be 'glaringly obvious', meaning that the undue influence not only needs to be glaringly obvious, but it must *also* be '*glaringly obvious'* that the undue influence is '*grievous'*. Unless the abuse quite literally jumps into the face of the solicitor, there is no further protection at this step.

Moreover, comparison with the undue influence case law suggests the threshold for the solicitor veto should be reduced. Particular reference should be made to *Crédit Lyonnais v Burch*[54] (*Crédit Lyonnais*), which embodies the principle that advice is inadequate if the guarantor enters into a transaction with no sensible solicitor could have recommended. In the context of non-commercial guarantees, no inference about the quality of advice can be drawn by the court from the outcome, no matter how grossly unfair the guarantor's ultimate position. This does not follow the line taken in undue influence cases. The relationship between the quality of advice and the outcome is the same in both scenarios, but the law concerning each area is divergent. There appears to be no reason in principle for such an inconsistent distinction and the law, in cases of non-commercial

[53] *Etridge* (n 2) [61]-[62].
[54] [1997] 1 All ER 144.

guarantees, ought to recognise this by following the protection given in undue influence cases.

C. A Comparison to Unconscionable Bargains

The law of unconscionable bargains has a similar doctrinal structure to non-commercial guarantees. An unconscionable bargain also defeats a contract based on the unfairness of the transaction. Following *Fry v Lane*,[55] three elements are necessary to cause contractual vitiation:[56] (a) the weaker party must be at a serious disadvantage, i.e. they must have a bargaining impairment; (b) the stronger party must exploit the disadvantage in a morally culpable manner; and, (c) the contract that is entered into must be oppressive, meaning the transaction 'must shock the conscience of the court', in that there is a *substantial* undervaluation of the consideration offered by the weaker party.[57] The similarities between these vitiating factors and those in non-commercial guarantees are striking: in both cases, the ability of the weaker party to negotiate or strike a good bargain is affected. In unconscionable bargains, this is often due to an intrinsic bargaining impairment,[58] while in non-commercial guarantees the bargaining difficulties are induced through undue influence or misrepresentation by the debtor. Another similarity is the immoral conduct of the stronger party, which in non-commercial guarantees includes the debtor and the lender. Lastly, the resulting

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[55] (1888) 40 Ch D 312.

[56] Beatson (n 9).

[57] *Alec Lobb (Garages) Ltd v Total Oil (Great Britain)* Ltd [1983] 1 WLR 87, 95.

[58] See *Creswell v Potter* [1978] 1 WLR 255, 'less highly educated.' It is however possible that it can also be external, as seen in *Backhouse v Backhouse* [1978] 1 WLR 243, 251, where a marriage break-up caused such emotional strain that an otherwise intelligent and competent person was impaired in their ability to bargain.

transaction will cause grave detriment to the weaker party in both cases. Although, unlike the law on unconscionable bargains, the resultant harm is not examined by the courts in non-commercial guarantee cases, in practice this discrepancy does not make a difference, as in both cases the weaker party is left with nothing without legal intervention.

Despite these similarities, the judicial treatments of the two situations differ. In unconscionable bargains, the role of adequate advice is more prominent and the requirements more stringent. Following *Bank of Montreal v Stuart*,[59] if the defendant recommended independent advice, but the complainant refused to obtain it, then such an action is interpreted as evidence of the seriousness of their bargaining impairment. No such requirement or 'safety net' exists within non-commercial guarantees. It has already been argued that independent legal advice should be required in all cases of non-commercial guarantees, and although one cannot expect that, every time the wife refuses to employ her own solicitor, it must be because she is being pressured and manipulated, downright refusal to comply is out of the ordinary, given that it is only a slight inconvenience, indicating that there might be ulterior pressures at play. If both the debtor and the guarantor had the best interest of the other party in mind and were acting in good faith, they would want the best possible counsel for their partner.

Moreover, in the context of unconscionable bargains, if the complainant has received advice, the court may still find that, because of the harshness of the transaction or for other reasons, the advice was inadequate.[60] Alternatively, the court may find that, because of the severity of the complainant's impairment, they

[59] *Bank of Montreal v Stuart* [1910] UKPC 53, [1911] AC 120.
[60] *Fry v Lane* (n 55).

were unable to benefit from the advice.[61] Again, no such safety net exists within non-commercial guarantees, other than *Credit Lyonnais*'s principle that a transaction might be so unbalanced that the willingness of the guarantor to proceed after independent legal advice is further evidence of undue influence.[62] This check alone is insufficient as it will only be evidence for stage one of the guarantee process (the underlying vitiating factor), and is consequently unrelated to the reasonable steps that are required of the lender. Proving satisfaction of step one will often not be helpful to the guarantor, as an underlying vitiating factor alone cannot vitiate a guarantee. While helpful in two-party situations where the difficulty is proving vitiating factors, the principle will not assist in a three-party cases.

By examining *Crédit Lyonnais* again, but this time more closely, we can see the relationship between grossly unfair outcomes and independent advice. The Court held that in unconscionable bargain cases the bank should have *insisted*, rather than merely *recommended*, that the claimant obtain independent legal advice. This is directly comparable to non-commercial guarantees, but the onus on the bank is much higher. Moreover, Millet LJ recognised the limited effect that independent advice—on its own—will have, supporting the position that the independence of the advice delivered is a necessary part of a number of protective mechanisms. 'It is not sufficient that the solicitor has satisfied himself that the complainant understands the legal effect of the transaction and intends to enter into it. That may be a protection against mistake or misrepresentation; it is no protection against undue influence'.[63] This position is one that is far more stringent than the current non-commercial guarantees

[61] *Boustany v Piggot* [1995] 69 P & CR 298.
[62] McBride (n 40).
[63] *Crédit Lyonnais* (n 53) 156.

regime, further demonstrating the need for law reform in order to harmonise these different, yet highly similar, areas of contract law.

Conclusion

This article has shown that the current law surrounding non-commercial guarantees does not provide sufficient protection for guarantors and is in need of reform. The current three-part structure of the law—composed of underlying vitiating factors, the need for notice of the lender, as well as the completion of reasonable steps—is coherent and serves as a good foundation. However, the 'reasonable steps' the lender must take are not adequate. Both the moral obligations and societal expectations of the banks exceed what the law prescribes to them. More—and indeed stronger—safety nets are required in order to effectively prevent undue influence and misrepresentation. 'Reasonable steps' should include the requirement of private meetings with the lender for the guarantor, as well as independent advice from the solicitor. Finally, the role of the solicitor must be reconsidered by reducing the threshold of what is required in order for the solicitor to 'veto' the transaction. These changes will provide the protection that guarantors so desperately need and deserve, while also realigning the law with contemporary societal and legal standards.