THE FAMILY HOME PROTECTION ACT AND PRIORITIES IN LAND LAW

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A number of recent High Court decisions have examined the interplay between the requirement of consent under the Family Home Protection Act, 1976 and the rules governing priorities in registered land. This article analyses these cases and also addresses the broadly similar questions which arise in relation to unregistered land.

The Issue

Under s.72 (1)(j) of the Registration of Title Act, 1964, the burdens which can affect land without registration include: "the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where, upon enquiry made of such person, the rights are not disclosed." The rights envisaged by this part of the subsection include those of a wife who, through contributions to the acquisition of a family home which is registered in her husband's sole name, has earned an equitable interest under a resulting trust.[1] In the normal case where she is "in actual occupation"[2] of the land, her rights will take priority over

[1] For the unsatisfactory Irish resolution of the problem of the beneficial ownership of the family home in terms of the old purchase-money resulting trust doctrine, see *e.g. C.* v. *C.* [1976] I.R. 254; *McC.* v. *McC.* [1986] I.L.R.M. 1; *L.* v. *L.* [1992] I.L.R.M. 115 and *N.* v. *N.* [1992] I.L.R.M. 127. The English "common intention" trust analysis has led to a rather different approach to the sort of issues discussed in this article. See *e.g. Bristol and West Building Society* v. *Henning* [1985] 1 W.L.R. 778; *Equity and Law Home Loans Ltd* v. *Prestidge* [1992] 1 W.L.R. 137 and Thompson, "Co-owners and Mortgagees" [1992] Conv. 206.

[2] According the modern view, exemplified by the English case of *Williams and Glynn's Bank Ltd* v. *Boland* [1981] A.C. 487, these words must be taken at face value. Older decisions which dismissed a wife's presence in the home as "the mere shadow of her husband's occupation" (see *Bird* v. *Syme-Thomson* [1979] 1 W.L.R. 440, 444 per

those of a lending institution in whose favour the husband subsequently charges the land, unless she has been asked about those rights and has failed to assert them. However, in order to satisfy the provisions of the Family Home Protection Act, 1976, the husband will have obtained his wife's consent to the creation of the registered charge. Does this consent operate, by way of estoppel, to prevent the wife from subsequently asserting her equitable right against the bank?

A Decision of Hamilton P.

In a case decided on December 4, 1990, and recorded briefly in the Irish Times,[3] Hamilton P. encountered the legal issue under consideration. In 1977 a husband executed a deed of charge in favour of the Bank of Ireland over land and premises in County Meath. His wife signed a document stating that she "as spouse of the within named chargeant ... do hereby consent to the granting of a charge in the within form to affect our family home ... and to the registration of same as a burden on the folio." Three years later the husband was declared a bankrupt, at which time he owed the bank in excess of £125,000. In 1986, the court ordered a sale of the property in question and at this stage the wife objected. In 1989 she was held to be entitled to a 50 per cent share in the beneficial interest in the family home. Hamilton P. held that, notwithstanding the consent which had allowed the husband to create a valid charge over the home, the bank could recover what it was owed only from the

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Templeman J.) now appear to have been discredited. In general, see Pearce, "Joint Occupation and the Doctrine of Notice" (1980) 15 *Ir. Jur.(n.s.)* 211 and Conlon, "Beneficial Interests, Conveyancers and the Occupational Hazard," (1985) 79 *Gaz. I.L.S.I.* 60.

[3] See *Irish Times* Dec. 5th, 1990 at p.7.

husband's share in the beneficial ownership.

In the view of Hamilton P., the wife had consented merely to comply with legal requirements. Her consent prevented her husband's charge from being deemed void, but it did not mean the creation of a charge over her interest in the property. It was a consent by the wife as "spouse of her husband" and not in any other capacity such as "beneficial owner". The brief report concludes with Hamilton P.'s view that if the bank had wished the wife to agree to the creation of a charge over her interests in the lands, it should have been made clear that such was its intention.

The Reaction of Lending Institutions

Naturally, this decision was greeted with concern by banks and building societies. The most popular antidote has been to bring into wider operation a device of which occasional use had already been made. Where the property to be mortgaged is in the sole name of one spouse, the other may be required to execute an "Indenture of Confirmation".[4] This normally begins by stating that it is apprehended that the spouse (referred to as "The Beneficiary") may have some beneficial interest in the property in question and that she has agreed, at the request of the borrower, to execute this deed to "confirm"[5] the mortgage. Then the spouse would, in the case of unregistered land, "grant, convey and confirm" to the

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[4] A less elaborate option favoured by one bank merely involves the addition of a clause to the normal F.H.P.A. consent to the effect that "Insofar as I have power to do so I hereby confirm and ratify the said Mortgage ...."

[5] The notion of "confirming" the husband's mortgage is a convenient one but difficult to classify in legal terms. Presumably the intention is to be able to rely, at worst, on an estoppel against the wife.

mortgagee all of her beneficial interest (if any) subject to the proviso for redemption contained in the mortgage; and in the case of registered land, would as to her beneficial interest (if any) "confirm" the charge created in favour of the mortgagee. Such deeds go on to state that "the Beneficiary" will have none of the rights of a mortgagor, that the powers of the mortgagee shall be exercisable without notice to her and that it will not be necessary for the lender to execute a release in her favour when the mortgage is discharged.[6] As a final complication, the legal owner is then required to consent under the Family Home Protection Act to the Indenture of Confirmation which his spouse has executed.

A quite separate way of avoiding the problem, suitable where the loan is intended to fund the purchase of a family home, is for the lender to insist that the house be placed in joint names and to take a joint mortgage of the property. Indeed, legislative intervention will soon accomplish this result in almost all cases, assuming that the Government will introduce the long-promised regime of "automatic" joint ownership of the family home. These trends may prevent difficulties in relation to recent and future mortgages, but the problem will continue to reach the courts in the context of mortgages executed in previous years.

The *Doherty* case: Estoppel by Representation

Next it is necessary to consider the more recent High Court case of *Friends Provident*

[6] In general this kind of deed merits closer consideration than it can be afforded in the present context. One question may be noted in passing. In relation to unregistered land, the wife "grants" as well as "confirms", yet care is taken not to describe the deed as a mortgage and it purports to deny the wife any of the rights of a mortgagor. If the wife is not creating a separate mortgage of her own, she must be adding her portion of the ownership to her husband's mortgage. Given that the wife has made a separate conveyance of her interest, why is a release by the mortgagee in favour of the husband alone sufficient to return her equitable interest to her? It would be a matter of grave concern if these deeds served to alter the ownership of the family home as between husband and wife.

Life Office v. *Doherty*[7] where Blayney J. took a rather different approach to the issue under discussion. In 1982, in order to finance the expansion of his potato business in County Donegal, Mr. Doherty borrowed £22,000 from the plaintiffs. The loan was secured by a mortgage of the family home which had been built on land registered in his sole name. His wife joined with him in a Statutory Declaration for the purposes of the Family Home Protection Act and she also signed a consent which was endorsed on the mortgage.

In 1988 the plaintiffs served notice on the Dohertys demanding vacant possession of the mortgaged premises and subsequently obtained an order for possession in the Circuit Court. Mr. Doherty appealed to the High Court against this order. Meanwhile his wife, shortly before the plaintiffs were granted the order for possession, took an action in the Circuit Court under s. 12 of The Married Women's Status Act, 1957 claiming that she was entitled to an interest in excess of 50 per cent in the family home. This claim failed and she also appealed to the High Court. Both appeals were heard together.

The wife's claim was based on the fact that, although the site was in the sole name of her husband, she had contributed the entire cost of constructing the family home on that site. Without mentioning contrary precedent,[8] Blayney J. concluded briefly that Mrs. Doherty had had an interest in the property at the time of the mortgage.[9] Leaving aside the problems with

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7 [1992] I.L.R.M. 372.

8 On very similar facts in *N.A.D.* v. *T.D.* [1985] I.L.R.M. 153, Barron J., following *W.* v. *W.* [1981] I.L.R.M. 202, had held that contributions to improvements, including the erection of a house on a site, could not generate a share in the beneficial interest under the doctrine of resulting trusts. It was only if the wife could establish some form of proprietary estoppel, defined in these cases in a very restrictive manner, that she could claim any recompense for her expenditure. This unpalatable conclusion was regarded as beyond discussion by the Supreme Court in *N.* v. *N.* [1992] I.L.R.M. 127, a decision delivered shortly after the *Doherty* case. The Irish courts are to be condemned, not for imposing this almost unavoidable limitation on the purchase-money resulting trust, but for ignoring the gradual development in other jurisdictions of new doctrines which are sufficiently broad to reach a more just result in the circumstances under discussion. See *e.g. Grant* v. *Edwards* [1986] Ch. 638 and *Sorochan* v. *Sorochan* (1986) 29 D.L.R. (4th) 1 (Supreme Court of Canada).

9 Although ultimately Blayney J. held that Mrs. Doherty's interest was postponed to the rights of the Friends

the granting of an interest to the wife in the circumstances, the main issue in the case was again whether the wife's rights could take priority over those of the plaintiffs under s. 72(1)(j).

Blayney J. was satisfied that no enquiry had been made of Mrs. Doherty sufficient to satisfy the terms of the subsection. However counsel for the plaintiffs submitted that Mrs. Doherty was precluded from asserting her rights against the plaintiffs, on the basis of the doctrine of estoppel by representation. Under that doctrine,[10] "where a person has by words or conduct made to another a clear and unequivocal representation of fact ... [and] the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be."[11]

It was argued that Mrs. Doherty had represented to the plaintiffs (1) that she was consenting to the mortgage of the full interest in the family home and (2) that her husband, as registered owner, was entitled to charge the full interest in the family home.[12] Having induced the plaintiffs to act to their detriment by lending the money to her husband on the basis of these representations, she would then be estopped from subsequently denying their

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Provident, he stressed that this did not mean that she ceased to have any interest in the property ([1992] I.L.R.M. 372, 376). He did not make any final order in relation to her application, stating that he would hear counsel as to the form his order should take (*ibid*, 377).

[10] This doctrine is merely one aspect of the larger principle of estoppel. In some recent English cases there has been a tendency to blur the traditional boundaries between the different types of estoppel (proprietary estoppel, promissory estoppel, estoppel by representation *etc.*) and simply to ask whether it would be unconscionable for the person against whom the estoppel is raised to assert their rights. See *Taylor Fashions* v. *Victoria* [1982] Q.B. 133 (Note) and *Amalgamated Investment and Property Co. Ltd.* v. *Texas Commerce International Bank Ltd.* [1982] Q.B. 84. The Irish Courts thus far have been rather conservative in relation to this whole area. A move away from the technical detailed requirements of each doctrine towards the unifying principle of unconscionability might not greatly alter the conclusions suggested in the discussion which follows. See also note 27 *infra*.

[11] Halsbury's Laws of England, 4th ed. (1976), at para. 1505.

[12] [1992] I.L.R.M. 372, 376.

truth. Blayney J. accepted this submission and held that the plaintiff's rights took precedence over the beneficial interest of the wife.

Harrison* v. *Harrison

In *Doherty*, Blayney J. found support for his conclusion in the *ex tempore* judgment of Barrington J. in *Harrison* v. *Harrison*.[13] In that case, the conveyance had been taken in the sole name of the husband but the wife was entitled to a one-half share in equity on the basis of her contributions. The wife had consented for the purposes of the Family Home Protection Act to two mortgages on the house. Blayney J. quoted Barrington J.'s conclusion on these facts:

> It appears to me that the lending institution was led to assume first that the husband was the sole owner or[14] the wife was consenting or alternatively if the wife was claiming any interest in the house by consenting to mortgaging the house she was, so far as the lending institution was concerned, waiving her interest in the house, at least to the extent that the rights of the financial institution, lending institution, would be fully protected.

It is not stated in the *ex tempore* judgment in *Harrison* v. *Harrison* whether the property at issue had been registered or not.[15] If the case did concern unregistered land,

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[13] Judgment delivered on June 20, 1989. A true and accurate transcript of the stenographer's note was approved by Barrington J. on July 13, 1989. This judgment was also noteworthy for Barrington J.'s support for the now-discredited notion of a constitutionally-based trust in favour of a wife who works in the home. *Cf. L.* v. *L.* [1992] I.L.R.M. 115.

[14] The passage would make more sense if the word "or" in the transcript of Barrington J.'s decision were replaced with "and."

[15] The reference to "mortgages" on the property suggests that the land was unregistered, since strictly speaking one can create only a registered charge over registered land. However the usage on this point is often

somewhat different legal principles would have applied[16] and the case would not necessarily support Blayney J.'s approach. On the whole, given the brevity of the Barrington J.'s judgment, few conclusions may be drawn from *Harrison*.

Analysis

One circumstance relied on by Blayney J. in holding that an estoppel had been raised against the wife in *Doherty* will normally be present in cases of this nature. This was the fact that "Mrs. Doherty fully consented to the mortgage which was a charge by her husband as sole registered owner of the property."[17] Should this kind of consent be sufficient in itself to constitute a representation that a wife had no beneficial interest in the family home? The brief answer must be that it should not. The authorities clearly show that even if a statement is contained in a deed "there is no such thing as an estoppel by something implied" and that "a person is not bound by inferences which may be drawn from the statements in a deed".[18] It clearly requires a process of inference to treat a statutory consent to a disposition by her husband as a positive assertion by her that she has no interest in the home or that she is willing to waive any interest she might have. Consistent with the decision of Hamilton P. discussed above, a mere consent is not sufficient to establish an estoppel.

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slack.

[16] Discussed *infra*.

[17] [1992] I.L.R.M. 372, 376.

[18] See Halsbury's Laws of England, 4th Edition, 1976 at paragraphs 1572-1573. These statements are made in the context of statements in a deed but the rules where the document is not under seal can only be more favourable to the person making the statement.

Blayney J. also noted that in the affidavit upon which her claim to a beneficial interest against her husband was based, Mrs. Doherty had said: "While the site was in the name of my husband, I regarded myself as the primary beneficial owner of the house ...." She nonetheless kept silent as to "this very important fact."[19] Clearly the main strength of the plaintiffs' case lay not in what Mrs. Doherty said but in what she refrained from saying. Any positive assertions she made[20] were primarily of relevance when taken in conjunction with her silence on the question of her beneficial ownership.

Counsel for the plaintiffs had quoted Halsbury's Laws of England[21] to the effect that:

> To form the basis of an estoppel a representation may be either by statement or by conduct; and conduct includes negligence and silence.

What does not appear to have been drawn to the attention of the learned judge is that for silence or inaction to be relevant it is necessary that "a legal (not a mere moral or social) duty shall have been owed by the representor to the representee to make the disclosure, or take the steps, relied upon as creating the estoppel."[22] There is a clear necessity to show a legal duty to speak or act, and the burden of proof in this, as in all other pertinent matters, is on the person seeking to establish the estoppel.[23] With all due respect, it appears that in his

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19 [1992] I.L.R.M. 372, 376.

20 Another point relied on by Blayney J. was that "Mrs. Doherty swore a Statutory Declaration in which it is stated that the premises were in the sole name of Michael J. Doherty." ([1992] I.L.R.M. 372, 376). It is not easy to see the significance of this assertion, which in itself was entirely true and did not purport to comment upon the question of the beneficial ownership.

21 4th ed. (1976), paragraph 1592.

22 Spencer Bower and Turner, *Estoppel by Representation* (3rd ed., 1977) at pp. 48-49. "The courts have on the whole steadily repelled the invitations, again and again addressed to them, to pronounce that silence and inaction, in the absence of such duty, is other than justifiable in law, or subjects the party to any liability or disability whatsoever." (*Ibid* at p. 61).

23 *Ibid* at p. 29 (referring to the burden of proof in general) and at pp. 47-48 (in relation to the burden of

judgment Blayney J. failed to appreciate where the burden of proof lay.

So is there a duty on a spouse in Mrs. Doherty's position to speak up in relation to her beneficial interest? According to the leading textbook on the subject:

> Where a person, having a title, right, or claim to property of any kind, perceives that another person is innocently, and in ignorance, conducting himself with reference to the property in a manner inconsistent with such title, right or claim, it is the duty of the former to undeceive the other party forthwith ....[24]

On this basis there may be a duty on a spouse to assert their beneficial interest. There are however two important qualifications which must be considered.

The first is appended immediately to the textbook definition quoted above:

> It is of course essential that it is brought sufficiently to his [*i.e.* the person having the right] notice that his rights and property are those with which the other party is concerned.[25]

This means that if the spouse does not understand that the mortgage is capable of affecting her beneficial ownership she will be under no duty to assert her rights, thus precluding the establishment of an estoppel on the basis of her silence.

It had been argued for the Dohertys that the consequences of the mortgage had not been explained to Mrs. Doherty. Blayney J. felt the plaintiffs had had no duty in this respect, and that since the Dohertys were being advised by their own solicitor, "there was no reason to think that Mrs. Doherty would not have everything fully explained to her."[26] Whether or not

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proving that a representation was made).

[24] Spencer Bower and Turner, *op. cit*. at p.50.

[25] *Ibid* at p.50, n.3.

[26] [1992] I.L.R.M. 372, 377. An issue which lurks beneath the surface is the possibility of a consent under

there was a duty on the plaintiffs is beside the point. The issue was whether there was a duty on Mrs. Doherty to assert her rights, and a precondition for the existence of this duty was that she understood that her rights were to be affected by the plaintiffs' transaction with her husband. If the plaintiffs could not rely on having explained this to her at the time, then they had to discharge their burden of proof on the point by showing that she gained the necessary knowledge in some other way. It is quite possible that the solicitor for the Dohertys had omitted to explain matters fully to Mrs. Doherty.

It must not be forgotten that for a lay person, with no knowledge of the difference between legal and equitable ownership, it would not be obvious that her husband could purport to give the bank rights over her share in the ownership in the property as well as over his. She could, not unreasonably, suppose that he was merely dealing with his portion of the ownership, a transaction which would still have required her consent under the Family Home Protection Act. The point under discussion was clearly the decisive consideration in the decision of Hamilton P. discussed above. It is respectfully submitted that Blayney J. underestimated the importance of the issue, largely because he misplaced the burden of proof.

On the basis of the authorities, it seems clear that a spouse, who has made no positive statement that she has no interest, should be estopped from subsequently asserting her beneficial ownership only if she understood the nature of the transaction or was wilfully blind in relation to reaching that understanding. It would seem inconsistent with the clear wording of s. 72(1)(j) if the husband and the lender, without explaining to the wife the consequences of their dealings, could defeat her interest and channel ownership away from her over to the

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the Family Home Protection Act being deemed void if no independent legal advice was available to the wife. In most cases the potential problem is compounded by the fact that one solicitor acts for the lender, the husband and the wife. It is hard to deny that the interests of the bank and of the husband are at variance with those of the wife.

payment of his debts.

The second qualification established in the case-law is that for there to be a duty to speak, the person concerned must be aware of their rights.[27] Unfortunately for Mrs. Doherty, she had claimed in the course of establishing her beneficial interest against her husband that she had always regarded herself as "the primary beneficial owner"[28] and so could not have argued that she had been unaware of her rights.

It is significant that in Ireland the claim of any spouse to a beneficial interest will usually have been founded on the doctrine of resulting trusts. This doctrine requires the claimant to have had at the time of her contribution an intention (the existence of which may be presumed in certain circumstances) to gain a share in the ownership. Therefore however carefully her words are chosen, it will be difficult for a spouse to argue that when making her contribution she had intended to gain a share, but that subsequently she was unaware of the share earned by her contribution. Admittedly, in the present climate a legal expert (let alone a normal person) could be forgiven for an inability to predict the extent of a particular wife's rights until our courts had muddled to a conclusion concerning them.[29]

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[27] See *Armstrong* v. *Sheppard and Short Ltd* [1959] 2 Q.B. 384, 396, per Evershed M.R. and *Deveney* v. *Crampsey* (1967) 62 D.L.R. (2d) 244 (Ont. C.A.) affirmed *sub. nom. Crampsey* v. *Deveney* (1968) 2 D.L.R. (3d) 161 (Supreme Court of Canada). In *Taylor Fashions Ltd.* v. *Liverpool Victoria Trustees Co. Ltd.* [1982] Q.B. 133 (Note), Oliver J., speaking in the context of proprietary estoppel, argued that whether or not the defendants were aware of their rights was not decisive and should be seen as only one of a number of relevant factors in the inquiry. However he did show some sympathy with the view that in cases involving silence or inaction "there must be shown a duty to speak, protest or interfere which cannot normally arise in the absence of knowledge or at least a suspicion of the true position." *Ibid*, 147.

[28] [1992] I.L.R.M. 372, 376.

[29] Another related requirement for a valid estoppel is that the representation relied upon must be clear and unambiguous. (See Spencer Bower and Turner, *op. cit*. at pp. 82-84). If the spouse, to the knowledge of the lending institution, may understand neither the extent of her rights nor the nature of the transaction undertaken by her husband, it may not be reasonable for them to understand from her silence that she is representing that she has no rights. It is also worth recalling the requirement that the plaintiff must have dealt with the property "innocently" and "in ignorance" of the defendant's ownership: see text to note 24 *infra*.

It is quite possible that the result reached by Blayney J. was appropriate on the particular facts of the *Doherty* case, but his handling of the legal issues was unsatisfactory. With respect, the learned judge was unnecessarily lax in relation to the essential preconditions of a valid estoppel, especially in relation to the need for the spouse to have understood the nature of the transaction between the plaintiffs and her husband.

Conclusions on Registered Land

It seems clear that it would be unconscionable for a wife, understanding her rights and the nature of the transaction between her husband and the lending institution, to stay silent and subsequently try to assert her rights against the lender. In such a case the doctrine of estoppel by representation will operate to postpone her rights to those of the lender. Despite the view which seems to have been taken in *Doherty*[30] (and possibly in *Harrison*),[31] the onus of proof is on the lender to show that it would indeed be unconscionable for her to assert her rights. This would seem to require proof that she was aware to some extent of the existence of her beneficial ownership and understood that the lender was dealing with her husband on the basis that she had no rights. This conclusion is supported by the decision of Hamilton P. and his statement that if a bank wishes to create a charge which will bind the wife's share in the ownership, they should make that clear to her. Insofar as there is any conflict between Hamilton P.'s approach and that in *Doherty*, it is submitted that the former is preferable. It is

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30 *Supra*.

31 *Supra*.

in line with the older authorities on estoppel and seems more just.

Finally one may invoke policy considerations to support the view that an estoppel should not lightly be raised in the circumstances under discussion. It should be remembered that s. 72(1)(j) of the Registration of Title Act constitutes a strong protection for the rights of someone in actual occupation of registered land. In effect, the statutory provision makes it incumbent upon a mortgagee to enquire as to the rights of such a person. It is difficult to have sympathy for a lending institution which does not trouble to take this simple precaution, particularly when there has already been sufficient contact with the spouse to enable the extraction from her of a statutory consent to the transaction. A second consideration is that the Family Home Protection Act is designed to protect the right of a spouse to occupy her family home. It would be unfortunate if lending institutions could invariably rely on this statutory protection as an indirect method of defeating a spouse's right to a share in the ownership of the home in the unduly limited cases in which our courts are willing to recognise its existence.

Unregistered Land

The different rules governing the question of priorities in relation to unregistered land appear to be more favourable to a mortgagee in relation to the question under discussion. Given that the beneficial interest earned by a wife through contributions to the acquisition of a family home will not be capable of registration under the Registration of Deeds (Ireland) Act 1707, disputes as to priority will be governed by the doctrine of notice. A legal mortgagee will take free of a prior equitable interest if he is a bona fide purchaser for value

without notice ("equity's darling").[32]

The application of these principles may have been demonstrated in the *Harrison* case. Another example is provided by the Northern Irish case of *Ulster Bank Ltd.* v. *Shanks*.[33] The wife had acquired a one-third interest in the beneficial ownership of an unregistered home held in the sole name of her husband. She was present during discussions between the bank manager and her husband in relation to the creation of a mortgage over the home.[34] On the evidence Murray J. was satisfied that "she knew perfectly well" what arrangements her husband was making with the bank but gave no indication whatsoever that she had any legal or equitable interest in the home.[35] Murray J. noted that a mortgagee or other purchaser would normally have constructive notice of the rights of a joint occupier of whom they failed to make enquiries. However, in this case, given that to the knowledge of the bank manager the wife had been aware of the creation of the mortgage and had not mentioned having any beneficial interest, it would not be reasonable to have expected him to make explicit enquiries of her. Therefore the bank had no constructive notice and took free of the wife's interest.[36]

In that case it was possible to accommodate the impact of the wife's silence within the traditional examination of whether or not the bank had constructive notice.[37] However, the need to examine the matter purely from the view-point of the lenders may not mean that a

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32 See s. 3(1) of the Conveyancing Act, 1882.

33 [1982] N.I. 143.

34 In a case in the Republic of Ireland, a wife would invariably be aware of a transaction concerning the family home because of the need for her consent.

35 [1982] N.I. 143, 149.

36 *Ibid*, 150.

37 For discussion of the sort of inquiries necessary in relation to the possible interest of a wife, see *Northern Bank* v. *Henry* [1981] I.R. 1. Note also the view of Parke J. (*ibid*, 22) that this question had become "largely academic" since the Family Home Protection Act.

consent by a wife will automatically absolve them of constructive notice of her beneficial interest. It appears that unless it was reasonable for the bank to conclude that the wife had understood that the transaction would affect any beneficial interest she might have in the home,[38] it would not be reasonable for them to conclude from her consent that she had no such interest or that she was willing to waive any interest she might have. Thus, as against registered land, there seems to be the rather subtle difference that here it is not necessary to go on to inquire whether, despite the reasonableness of the bank's deductions from the conduct of the wife, she was in reality aware of her beneficial interest and of the fact that this interest would be affected by the mortgage transaction.

In a case involving unregistered land, one could still rely on the doctrine of estoppel by representation but this would not appear to have any advantage for a lending institution over the approach through the doctrine of notice favoured in *Ulster Bank* v. *Shanks*.[39] If estoppel were argued, presumably the same considerations would be relevant as in relation to registered land.

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[38] The argument concerning an awareness of her rights on the part of the wife may be weaker here than in relation to registered land. In any event, it has already been suggested that it will be almost impossible for a wife to argue that she was unaware of the beneficial interest which she had intended to earn by her contributions.

[39] *Ibid*. Murray J. in that case did make the interesting comment that "if a person in the wife's position were deliberately to stay silent about her own equitable interest with a view to asserting it later ... it would in my view ... be conduct which would leave the owner of the equitable interest open to the charge of coming to court with hands that were not clean." *Ibid*, 150.