Commerce over Care:
Surety Client Protections 20 Years on from *RBS v Etridge (No.2)*

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Abstract

It has been 20 years since the House of Lords handed down its judgment in the *Royal Bank of Scotland v Etridge (No.2)*. In this case, it was held that solicitors should deliver independent legal advice (ILA) to those who provide security for a loved one's lending (the common situation being a wife remortgaging the family home for her husband's business). This thesis, for the first time, empirically explores how solicitors deliver ILA to surety clients post-*Etridge.* It does so through interviews with 28 solicitors who have experience delivering ILA and/or solicitors who have experience defending possession proceedings for past surety clients post-*Etridge*. My interview data shows that there is a significant and concerning gap between how Lord Nicholls (who provided the leading speech for the House of Lords in *Etridge*) intended ILA to be delivered by solicitors and how ILA is, in fact, being delivered. Drawing on a web of theories that I have drawn together, which relate to Carol Gilligan's Ethic of Care and Lawrence Kohlberg's Ethic of Justice, I suggest that ILA solicitors are required to deliver ILA (in part) relationally. While my close analysis of *Etridge* and the SRA Code of Conduct brings me to the view that ILA solicitors are required to lawyer relationally (prioritising Dana Remus' relational lawyering dynamics of trust, judgement, loyalty, service, and empowerment), my empirical insights make clear that most of my interviewees instead appear to deliver ILA in accordance with a market-exchange model of lawyering (in which they prioritise the means-ends of the secured lending transaction and provide tick-box and objective ILA). I suggest that the reasons why most of my interviewees deliver ILA in accordance with a market-exchange model of lawyering are complex and multi-faceted. For instance, I suggest that some interviewees deliver ILA in accordance with a market-exchange model because this is their usual lawyering approach with commercial clients (maybe because they deliver ILA infrequently), and that some interviewees deliver ILA as a market-exchange because they are loyal to their own interests over the surety client's interests. In addition, my data also shows how difficult it is for past surety clients to defend possession proceedings or to bring actions against solicitors for deficient ILA. Taken together, my work suggests that the House of Lords' judgment in *Etridge* has done more to protect lenders' interests than surety client interests. What we see is complacency over compliance, commerce over care, and (solicitor) self over surety.

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Barclays Bank Plc v O'Brien [1994] 1 AC 180 (HL)

Barclays Bank Plc v Rivett [1999] 1 FLR 730 (CA)

Barclays Bank v Thomson [1997] 4 All ER 816 (CA)

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CIBC v Pitt [1994] 1 AC 200 (HL)

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TSB Bank Plc v Camfield [1995] 1 All ER 951 (CA)

Williams & Glyn's Bank v Boland [1981] AC 487 (HL)

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Yorkshire Bank plc v Pamela Tinsley [2004] EWCA Civ 816 (CA)

List of Legislation

Legal Aid, Sentencing and Punishment of Offenders Act 2012

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List of Abbreviations

ILA – Independent legal advice

LSA – Legal Services Act 2007

LSCP – Legal Services Consumer Panel

SRA – Solicitors Regulation Authority

Glossary

Some of the terms in this thesis have particular, technical meanings. The below sets out those meanings in advance of the substantive chapters for ease of reference.

Commercial guarantor

A commercial guarantor is someone who is in a commercial relationship with the principal debtor (e.g., a director of a company), or, alternatively, the commercial guarantor could be the principal debtor directly benefiting from the lending (a sole trader who needs money for new machinery to carry out their business). It is important to distinguish non-commercial sureties from commercial guarantors because non-commercial sureties are required to receive independent legal advice in accordance with the common law (discussed below), but commercial guarantors are not.

Independent Legal Advice

In accordance with the common law, a solicitor is required to deliver independent legal advice (ILA) to individuals contemplating entering into a surety transaction for the benefit of a loved one, before the lender proceeds with granting the secured lending transaction. This thesis empirically explores how ILA is delivered in practice to these sorts of sureties.

ILA solicitor

When I am referring to solicitors who deliver ILA or interviewees who have experience delivering ILA, I may refer to them as an ILA solicitor. It is important to point out from the outset that there is (to my knowledge) no solicitor who is solely delivering ILA and not performing any other roles as a solicitor. When I refer to ILA solicitors, I mean that they are solicitors who deliver ILA as part of their practice; not that ILA is their exclusive (or the majority of) practice.

Lender

Throughout this thesis the words lender(s) and bank(s) are used interchangeably. In addition, some judges refer to the lender or bank as the creditor in case law that will be discussed in

this thesis. The lender is involved in the secured lending transaction because they are advancing the money to the principal debtor and are using the surety's security as collateral for that loan. It is the lender's responsibility, in such circumstances, in accordance with the common law, to ensure that an individual who is in a non-commercial relationship with the principal debtor receives ILA before entering into a secured lending transaction. The lender must also provide the surety's solicitor with information that should be outlined to the surety client in accordance with the common law.

Principal debtor

The principal debtor is the party who requires the loan monies from the lender (usually for their business), and (for the purposes of this thesis) the surety client is contemplating securing that transaction for the benefit of the principal debtor.

Surety

A surety is an individual who secures the debts of another. The word surety is a synonym for the word guarantor. In this thesis, I use the term surety to refer to individuals who have entered into a surety transaction for the benefit of a principal debtor with whom they are in a non-commercial relationship (i.e., wife and husband). That is, throughout this thesis I distinguish a surety from a commercial guarantor who enters into a guarantee for their own commercial benefit (see above).

Surety client

In case law discussed in this thesis, judges adopt the language of 'wife' when discussing the individual contemplating suretyship who is in a non-commercial relationship with the principal debtor. When discussing how solicitors should deliver ILA, judges refer to the solicitor as 'the wife's solicitor.'[i] Instead, I shall describe the ILA solicitor as the 'surety client's solicitor'. The term 'surety client' may be confusing – because the client is not yet a surety when they receive ILA. However, I have chosen to use the term 'surety client' instead of 'wife' because I wanted to be open to discovering whether solicitors who deliver ILA have experience delivering ILA to other types of individuals contemplating suretyship (i.e. people

[i] For instance: *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44, [2002] 2 AC 733 [179] (Lord Scott)

other than “wives”). For this reason, I used the term ‘contemplating surety’ during my interviews. This is not to say that I am in any way denying the gendered aspects of ILA. Instead, I did not want to lead interviewees or limit the conversations I had with ILA solicitors. I chose to stick with this (admittedly) rather bland descriptor of ‘surety client’ in my findings chapters. This is because, although most interviewees used the terminology ‘wife’ (and discussed how surety clients were mainly wives of the principal debtor in their own experiences), some interviewees did also discuss delivering ILA to individuals who were not female and or married to the principal debtor.

Undue Influence

It is generally accepted that undue influence is difficult to define (and prove) in the abstract. In addition, because the operation of undue influence is difficult to prove by one party, there are two categories of undue influence:

> (i) Actual undue influence - where it can be demonstrated that undue influence actually occurred and;
>
> (ii) Presumed undue influence - where there is a presumption that undue influence is in operation due to the relationship of trust and confidence between the parties.

The scenario discussed in this thesis is where it is presumed that A unduly influences B to contract with C. If C has notice of the relationship of trust and confidence between A and B (and therefore of the potential wrongdoing by one party influencing the other) and C does not ensure B enters into the contract after receiving independent legal advice, the transaction can be set aside against C.

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Chapter 1

Introduction

The family home is the largest asset of most homeowners. As a result, it has long been used as security for loans to assist in accessing funds for a new business venture, or 'to assist in the alleviation of financial difficulties.'[1] However, before 1981, banks were not legally required to obtain a wife's consent to mortgage (or remortgage) the family home where the husband was the sole legal owner of the property. Only since the landmark decision in *Williams & Glyn's Bank v Boland*[2] have lenders had to obtain a wife's consent before delivering a secured loan on the family home so that her husband can raise capital for his business. The House of Lords' decision in *Boland* meant that a wife's equitable interest in the family home should have been better protected.[3] Case law post-*Boland,* however, demonstrated that, in the years that followed, wives were often unduly influenced and/or deceived by their husbands into remortgaging their family home. Whilst lenders were obtaining consent signatures from wives before granting secured lending on the family home, wives' signatures were being procured through their husbands' inequitable means. Lenders were turning a 'blind eye' to this reality as their commercial interests were legally protected. The flood of cases that reached the appeal courts of England and Wales in the 1990s to the early 2000s mainly involved wives

[1] Lisa Whitehouse, 'A Longitudinal Analysis of the Mortgage Repossession Process 1995-2010: Stability, Regulation and Reform' in Susan Bright (ed), *Modern Studies in Property Law*, vol 6 (Hart Publishing 2010) 151, 155

[2] [1981] AC 487 (HL)

[3] For more on *Williams & Glyn's Bank v Boland* see: Rosemary Auchmuty, 'Williams & Glyn's Bank v Boland (1980).' in Erika Rackley and Rosemary Auchmuty (eds), *Women's Legal Landmarks: Celebrating the history of women and law in the UK and Ireland* (Hart Publishing 2019) 357-362

who had entered into surety transactions bringing undue influence or misrepresentation claims against lenders.[4] In simple terms, these wives claimed that lenders had not done enough to protect them from the undue influence and (sometimes) misrepresentation of their husbands. Accordingly, those wives argued that their surety transactions with the lenders should be set aside. This thesis concerns these sorts of transactions and the actors involved in them, focusing on the lawyers and the legal advice they give to surety clients.

Before we come to the lawyers, let me say something about terminology. Some readers may feel uncomfortable that I have discussed 'wives' being unduly influenced by their 'husbands'. However, as Rosemary Auchmuty (the leading scholar in this area) rightly points out, even in those minority of cases that did not involve a husband and wife couple,[5] men were overwhelmingly accused of unduly influencing women to enter surety transactions.[6] In fact, during the 1990s there was only one reported case of a husband claiming that their wife had unduly influenced them into entering into a secured lending transaction: *Barclays Bank Plc v Rivett*.[7] Auchmuty notes that 'the role reversals' in *Rivett* 'seem almost comical (though probably not to the parties concerned)…'[8] Mrs Rivett 'dealt with all financial aspects of [Mr

[4] For instance see: *Banco Exterior Internacional SA v Mann* [1995] 1 All ER 396 (CA); *TSB Bank Plc v Camfield* [1995] 1 All ER 951 (CA); *Bank of Baroda v Rayarel and Others* [1995] 2 FLR 276 (CA); *Bank Melli Iran v Samadi-Rad* [1995] 3 FCR 735 (CA); *Halifax Mortgage Services Ltd (formerly BNP Mortgages Ltd) v Stepsky* [1996] 2 All ER 277 (CA); *Barclays Bank v Thomson* [1997] 4 All ER 816 (CA); *Barclays Bank v Goff* [2001] EWCA Civ 635; [2001] 2 All ER Comm 847 (CA).

[5] For instance, see *Avon Finance Co Ltd v Bridger* [1995] 2 All ER 281 (CA) which involved elderly parents entering a surety transaction for their son; *Banco Exterior Internacional SA v Thomas* [1997] 1 All ER 46 (CA) which involved a widow entering a surety transaction for a close male friend; and *Credit Lyonnaise Bank Nederland NV v Burch* [1997] 1 All ER 144 (CA) which involved a female employee entering a surety transaction to benefit her male boss.

[6] Rosemary Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' (2002) 11 Social & Legal Studies 257, 259; Rosemary Auchmuty, 'When Equality Is not Equity: Homosexual Inclusion in Undue Influence Law' (2003) 11 Feminist Legal Studies 163, 174; Rosemary Auchmuty, 'The Rhetoric of Equality and the Problem of Heterosexuality' in Linda Mulcahy and Sally Wheeler (eds), *Feminist Perspectives on Contract Law* (Routledge-Cavendish 2005) 51, 57-56

[7] [1999] 1 FLR 730 (CA)

[8] Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' 259

and Mrs Rivett's] lives together'[9] and Mr Rivett was unaware of what he signed (executing a charge on the family home) because Mrs Rivett had intercepted post from her solicitor which outlined the realities of the transaction.[10] Therefore, the case of *Rivett* 'is an important corrective to any essentialist notion of gendered behaviour.'[11] However, Auchmuty goes on to write that whilst the problem in undue influence cases is the exploitation of the vulnerable, 'that vulnerability, whether it be due to emotional or economic or other causes, is in the present stage of social development more likely to be experienced by a woman than a man.'[12]

Between 1985 and 2001, four cases relating to undue influence and/or misrepresentation in the secured lending context reached the House of Lords: *National Westminster Bank Plc v Morgan,*[13] *Barclays Bank Plc v O'Brien,*[14] *CIBC v Pitt,*[15] and *Royal Bank of Scotland v Etridge (No.2)*.[16] It is the most recent House of Lords case - *Etridge* - which sits at the heart of this thesis. In *Etridge,* the House of Lords outlined how lenders *and solicitors* should better protect sureties before they enter into surety transactions. However, we only have a limited understanding about how the House of Lords' guidelines have been implemented in practice. This thesis does two things. First, it clarifies what is required of solicitors at common law to 'protect' surety clients by reviewing the House of Lords' decision in *Etridge* and post-*Etridge* case law before, second, empirically exploring the extent to which solicitors are or are not

[9] *Rivett* 734 (Buckley J)
[10] Ibid 732 (Buckley J)
[11] Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' 259
[12] Ibid. Also see Auchmuty's discussion on how the 'rhetoric of equality' can work to women's disadvantage 'when the reality fails to match the rhetoric' in R Auchmuty, 'Unfair shares for women: the rhetoric of equality and the reality of inequality' in Hilary Lim and Anne Bottomley (eds), *Feminist Perspectives on Land Law* (Routledge-Cavendish 2007) 171, 174-180
[13] [1985] AC 686 (HL)
[14] [1994] 1 AC 180 (HL)
[15] [1994] 1 AC 200 (HL)
[16] [2001] UKHL 44, [2002] 2 AC 733 (HL)

protecting surety clients in accordance with House of Lords' guidelines in *Etridge* (and in accordance with their wider professional obligations).

In what remains of this introductory chapter I offer some important context and background, set out my research questions, give a brief precis of my methodology, and account for the theoretical frames I deploy in depth in later chapters. I also make clear what I see as the distinctive contributions of this thesis before offering the reader a guide for the chapters to come. What follows provides, as the first chapter in this thesis, various forms of framing and introduction without necessarily much by way of substance, as that substance comes from the following six chapters. The first background matter, to which we now turn, concerns the roles that lenders and solicitors are required play in protecting surety clients.

1.1. *Further context*

At the turn of the millennium, despite the House of Lords' previous attempts to ensure that lenders better informed contemplating sureties before they entered into a surety transaction, the level of protection surety clients were afforded was, to be blunt, next to useless.[17] So, for example, in the 1994 House of Lords' decision of *O'Brien*, Lord Browne-Wilkinson outlined that banks had to have a private meeting with the surety client to outline the realities of the proposed transaction. In response, banks required surety clients to receive legal advice from a solicitor before they would proceed with the transaction (which corresponded with the Banking Code of Practice at the time).[18] As solicitors had no guidelines on what should be

[17] See: Peter J Millett, 'Equity's Place in the Law of Commerce' (1998) 114 Law Quarterly Review 214, 220 and Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' 262-264

[18] For more information on why banks took this approach, see: Sarah J Greer and Mark Pawlowski, 'Constructive notice and independent legal advice: a study of lending institution practice' (2001) Conveyancer and Property Lawyer 229. Greer and Pawlowski empirically explored lenders' practices post-*O'Brien* by sending questionnaires to residential mortgage lenders. Note that although their study was published in 2001 it was written before the House of Lords handed down their judgment in *Etridge*.

covered in that meeting with surety clients, solicitors were merely telling sureties that they could lose their homes and/or simply witnessing the signatures of sureties, often in the presence of the husband.[19] These meetings offered little protection to sureties. However, the lack of protection afforded to sureties was not the House of Lords' only focus in *Etridge*. Their Lordships were also acutely aware that lenders required more commercial certainty in being able to enforce surety transactions. As Auchmuty has put it:

> The stream of cases concerning undue influence or misrepresentation in mortgage transactions represents the fiercest of struggles between equity's much-vaunted defence of the vulnerable and the 'needs' of commerce.[20]

It was proposed by the House of Lords in *Etridge*, a mere seven years after the House of Lords decision in *O'Brien*, that a balance could be found between protecting lenders and sureties' interests through a series of protective measures. This balance and those interests were chiefly outlined in Lord Nicholls' speech in that case. The House of Lords' 'resolution' in *Etridge* was that wives should receive independent legal advice (ILA) from solicitors before providing security for their husband's debts in order for the lender to rely on their security. As part of his speech, Lord Nicholls set out what steps lenders should take: 1) ensuring that sureties nominated a solicitor to provide ILA; and 2) sending relevant information about the secured lending agreement to the nominated solicitor, so that the surety was properly and fully informed about the realities of the transaction.[21] In addition, in order to deal with the issue that legal advice was perfunctory in nature post-*O'Brien*, Lord Nicholls set out guidelines

[19] For a review of these cases see Chapter 3 section 3.2 of this thesis.
[20] Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' 257
[21] *Etridge* [79]

on what should be covered by a ILA solicitor with the surety client.[22] Importantly, Lord Nicholls made clear that whilst his guidelines provided solicitors with a 'core minimum' of what was required during ILA, what would be required in each case would depend on the surety client's individual circumstances.[23] He further set out that if the lender performed their duties in accordance with his guidance and received a certificate of ILA from the surety's nominated solicitor, then the lender could rely on the certificate of ILA and enforce the transaction against the wife.[24] If the solicitor has performed his duty negligently, but the lender had no notice or played no part in the advice being negligent (i.e. by the lender failing to send financial information about the transaction to the solicitor), the security could still be enforced against the surety client by the lender. In those circumstance, the surety client may have a separate action in negligence against the solicitor.[25]

1.2. *This project and its place in the field*

The House of Lords' decision in *Etridge* has been subject to extensive feminist critique over the last twenty years. Whilst I provide only a summary here – to demonstrate how my interest in the literature in this area led me to empirically explore how solicitors deliver ILA to surety clients – a more thorough review of the literature in this space is provided in Chapter 3 of this thesis.

It has been argued by Auchmuty and by others that Lord Nicholls' guidelines in *Etridge* do not go far enough in protecting sureties, and that the House of Lords' guidelines instead do more

[22] Ibid [65]
[23] Ibid
[24] Ibid [78]
[25] Ibid [75] (Lord Nicholls)

to ensure lenders have commercial certainty when taking a wife's security.[26] One of the main arguments Auchmuty makes is that, despite receiving ILA, a wife may still feel pressure to enter the surety transaction. She writes that:

> A woman might consent to mortgage her home for many reasons: because she trusts her husband, because she does not understand what she is doing, because her mind is on other things, to keep him happy, or because he will make her life hell if she doesn't.[27]

Belinda Fehlberg's study 'Sexually Transmitted Debt: Surety Experience and English Law' empirically attests to the fact that sureties often enter surety transactions for reasons *other* than their own self-interest.[28] As part of her study, and now almost 30 years ago, Fehlberg interviewed: 22 people who had acted as surety (20 women; two men); five debtors; nine representatives of lending institutions; and 13 lawyers (three barristers and 10 solicitors).[29] Whilst she interviewed lawyers and lenders, Fehlberg's main focus was to uncover 'the circumstances in which sureties in England provide security.'[30] Fehlberg's findings showed that surety wife interviewees often felt they had no choice but to enter the surety agreement

[26]Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' 270; Alison Diduck, 'Commentary on Royal Bank of Scotland plc v Etridge (No2)' in Rosemary; Hunter, Clare; McGlynn and Erika; Rackley (eds), *Feminist Judgments* (Hart Publishing 2010) 149; James P Devenney, Lorna Fox and Mel Kenny, 'Standing surety in England and Wales: the sphinx of procedural protection' (2008) Lloyd's Maritime and Commercial Law Quarterly 513, 535; Ambreena Manji, 'Land Law' in Rosemary Auchmuty (ed), *Great Debates in Gender and Law* (Macmillan International Higher Education 2018) 49, 55-57; Edwin C. Mujih, 'Over ten years after Royal Bank of Scotland Plc v Etridge (No.2): is the law on undue influence cases any clearer?' (2013) 24 International Company and Commercial Review 57, 67; Joan Wadsley, 'Bank Lending and the Family Home: Prudence and Protection' (2003) 3 Lloyds Maritime and Commercial Law Quarterly 341, 349

[27] Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' 267

[28] Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Clarendon Press 1997) 172-173 and 181-185

[29] Ibid 113. The lawyers interviewed either had experience witnessing the execution of security transactions and/or providing legal advice or litigating for lenders or sureties.

[30] Ibid 2

so that their husband could receive loans for their businesses.[31] As a result, Fehlberg argues that, in cases such as *O'Brien,* 'judges oversimplify to a large degree the emotional and economic reasons why women provide security.'[32] That is, whilst judges assume that wives will consider their own individual interests if they are properly informed about the realities of the transaction, Fehlberg's study tells us that quite often wives will be more concerned about preserving their relationship with their husband (the principal debtor).[33] As such, the House of Lords' balanced resolution in *Etridge* that non-commercial sureties should receive ILA seems, to feminist scholars (myself included), to completely miss the point.

It is worth mentioning at this juncture that in his leading speech in *Etridge* Lord Nicholls did acknowledge that ILA cannot completely eliminate the chances of surety clients entering transactions under the undue influence of the principal debtor.[34] Instead, the measures Lord Nicholls outlined were designed to make sure that ILA was more meaningful than the 'legal advice' that was being provided to surety clients post-*O'Brien*. After 20 years of *Etridge* being good law, there is no immediate reason to believe that the law surrounding surety protections is going to change. Therefore, as ILA is the only level of protection being afforded to surety clients, it struck me as important, on various fronts, to know whether ILA is being delivered in line with the *Etridge* guidelines and in accordance with the Solicitors Regulation Authority (SRA) Handbook and Code of Conduct.[35] On solicitors' conduct and competencies, Auchmuty

[31] Ibid 172-173 and 181-185
[32] Ibid 149
[33] John Stannard also discusses how emotional attachments are a breeding ground for undue influence in: John Stannard, 'The Emotional Dynamics of Undue Influence'' in Heather Conway and John Stannard (eds), *The Emotional Dynamics of Law and Legal Discourse* (Bloomsbury Publishing 2016)
[34] *Etridge* [54]
[35] When I conducted interviews for this thesis in 2018, interviewees were required to comply with the Solicitors Regulation Authority *Handbook and Code of Conduct 2011*, Version 19 (amended 1st October 2017). Available at: https://www.sra.org.uk/solicitors/handbook/v19/code/ (last accessed 8th June 2020). It should be noted that this code has since been replaced by the SRA Standards and Regulations 2019)

and Fehlberg each raised important points that acted as prompts for my study. For instance, Auchmuty - after reviewing the case law between the House of Lords' decisions in *O'Brien* and then in *Etridge* - has argued that: '…the judges' fulsome expressions of confidence in the legal profession seem misplaced.'[36] Similarly, Fehlberg's study revealed other issues about solicitors' competencies. When interviewing past-sureties, Fehlberg discovered that two sureties had been 'obviously upset about signing [the surety transaction]'[37] in the presence of a solicitor. According to the two interviewees, despite their distress, their solicitors were unconcerned and continued to witness their signatures. In both cases the surety transactions went ahead. Fehlberg states:

> The above descriptions [from the two surety interviewees who discussed being upset during their meeting with the solicitor] suggests the inability or unwillingness of professionals operating in the 'public' commercial arena to deal with private emotions of sureties.[38]

Fehlberg's work also shows how solicitor interviewees corroborated that they would avoid the private emotions of sureties. One solicitor said: 'You're talking about an English solicitor who would pretend not to notice [that the wife was upset].'[39] What the existing literature in this space suggested to me was that: (a) there is a gap in our understanding about how solicitors deliver ILA post-*Etridge*; and (b) that the delivery of ILA was likely to be an interesting, complex, and messy area of empirical study.

[36] Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' 271
[37] Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* 180
[38] Ibid
[39] Ibid

Other, doctrinal, scholarship on undue influence has also acted as a driver for, and helped shape, this doctoral project. For example, Nelson Enonchong has inferred that because there have been fewer reported cases post-*Etridge* (as compared with case law post-*O'Brien*) 'banks have largely followed the prescribed steps and the problems of the past have been avoided.'[40] This struck me as a rather limited conclusion based on a paucity of relevant data. It is, I would suggest, simply too positivistic to state that banks have largely followed the prescribed steps and that the problems of the past have been avoided when there has been no empirical study into lender conduct post-*Etridge*. The fact is that the decline in undue influence and misrepresentation case law post-*Etridge* could be explained in other ways. For instance, The Civil Procedure Rules 1998 (the Woolf Reforms), which encouraged mediation and out of court settlement over litigation, may have had an impact on banks settling cases outside of court. It is also possible that banks want to avoid cases being reported which demonstrate that those lenders failed to follow the correct *Etridge* procedures (as this might impact on their reputation and possibly also cause other sureties to make claims). The impacts of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which see civil defendants being less effectively represented, may further be relevant. It struck me that there were a series of questions that could be usefully explored in this space which had either not been explored before, or where I felt I could add something useful to that exploration. The questions I asked, and how I came to them, are set out in the following section.

[40] Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell 2018) 414

1.3. *Research questions and methodology overview*

In realising that I wanted to go some way to fill a lacuna in the literature on undue influence in bank lending transactions post-*Etridge*, I came to the view that the main research question I wanted to answer in this project was: *How are solicitors delivering ILA to surety clients post-Etridge and why is ILA being delivered in this way?*

I then thought carefully about my subsidiary research questions.[41] As Patrick White states:

> Subsidiary questions (or 'sub-questions') derive from the main question and answering them can help to answer the main question. Dividing up questions in this way can help you think about the relationship between your questions. It also allows you to see how well your research questions fit together or whether they are pulling in different directions.[42]

After multiple drafts, the finalised sub-questions that I thought needed to be answered to answer the main research question in this thesis, are as follows:

(a) How are solicitors directed to deliver ILA to a surety client in accordance with Lord Nicholls' guidelines in *Etridge*?

(b) Who, in practice, are the solicitors delivering ILA to surety clients?

(c) To what extent are solicitors delivering ILA in accordance with Lord Nicholls' guidelines in *Etridge*; and how have lenders changed their practices post-*Etridge*?

(d) To what extent are solicitors delivering ILA in accordance with their wider professional regulatory obligations?

[41] Patrick White, *Developing Research Questions* (Macmillan International Higher Education 2017) 70
[42] Ibid

(e) Whose best interests are being prioritised, and why and how, when solicitors deliver ILA?

(f) What factors are influencing (and to what extent) how solicitors deliver ILA in the way/ways discovered; and how do those factors interact with each other?

In order to answer these questions, I set out to interview solicitors who have experience delivering ILA and solicitors who have experience defending possession proceedings/debt claims for past sureties. In speaking with solicitors who have defended possession proceedings for past sureties I hoped that I would gain insight into how ILA (as outlined in *Etridge)* has impacted the defences advanced by sureties post-*Etridge*. In speaking with solicitors who have delivered ILA post-*Etridge,* I wanted to explore their practices and the advice they gave to their surety clients, what their attitudes were towards providing this kind of advice, and to understand better what communications and information they received from the lender.

However, as will be discussed in more detail in the next chapter, I faced an immediate methodological challenge because the identity of 'ILA solicitors' had not previously been discussed in the literature. That is, there was no explicit indication as to whether certain types of solicitors (specialising in certain practice areas) delivered ILA – 'ILA lawyers' are not a homogenous group (at a high level) like 'family lawyers' or 'environmental lawyers' or 'corporate finance lawyers'. This meant that I had to be creative, flexible, and responsive in trying to identify solicitors who delivered ILA. On a practical level, I had to invest significant energy in working out who might be in my sample population. In the end, for reasons that will be explained comprehensively in the next chapter, I interviewed 28 solicitors who had experience performing one or more of the following roles relating to surety transactions and

ILA: (i) those providing ILA to surety clients; (ii) those arranging secured lending transactions for lenders; (iii) those enforcing security agreements for lenders; (iv) those arranging commercial lending for principal debtors; and/or, (v) those defending possession proceedings or debt claims for individuals who previously acted as surety. As a result, I unintentionally gained access to solicitors who had various experiences working for a mix of lenders, surety clients, and principal debtors in secured lending transactions.

1.4. *Theory*

Scholars draw on theory in their work because it 'helps explain what is going on in the situation… [they] are investigating.'[43] It also helps scholars make connections with prior knowledge which can assure the researcher and their readership that their claims to knowledge are reliable. Similarly, using theory can help inform other areas of work, or demonstrate how further research could be framed.[44] In this explorative study I draw on multiple frameworks/lenses which are linked with Carol Gilligan's 'Ethic of Care'[45] and Lawrence Kohlberg's 'Ethic of Justice'[46] in an attempt to explain why ILA is being delivered in the manner that interviewees discussed during interview. I also draw on behavioural ethics and social psychology literature to explain some interviewees' self-reported - ethically compromised - behaviour.[47] My combination of these frames and approaches both seemed

[43] Colin Robson and Kieran McCartan, *Real World Research: A Resource for Users of Social Research Methods in Applied Settings* (John Wiley & Sons 2016) 66
[44] Ibid
[45] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1993)
[46] Lawrence Kohlberg, *Stages in the development of moral thought and action* (Holt, Rinehart & Winston 1969); Lawrence Kohlberg, 'Moral stages and moralization: the cognitive-developmental approach.' in Thomas Lickona (ed), *Moral Development and Behavior: Theory, Research, and Social Issues* (Holt, Rinehart & Winston 1976); and Lawrence Kohlberg, *Psychology of Moral Development* (Essays in Moral Development, Harper & Row 1984) demonstrate the development of Kohlberg's theory of moral development.
[47] For example: Max H Bazerman and Mahzarin R Banaji, 'The social psychology of ordinary ethical failures' (2004) 17 Social Justice Research 111; Max H Bazerman and Ann E Tenbrunsel, *Blind spots: Why We Fail to Do What's*

to best fit my data and also, as will become clear later, form part of the original contribution this thesis makes.

It is important at this point to note that I took an inductive analysis approach to my data because there had been no previous study which explored how ILA was being delivered post-*Etridge* (that is, no previous literature theoretically explored how and why ILA was being delivered as it was in practice). This means that I analysed my data, which in turn led me to relevant literature and theory, as opposed to taking a deductive approach and coding my data in accordance with previously applied theoretical frameworks in similar work.[48]

1.4.1. *Theory linked with an Ethic of Care/Ethic of Justice*

Gilligan's catalogue of work on an Ethic of Care is built upon her criticisms of Kohlberg's moral development theory.[49] As Joan Tronto explains: 'Kohlberg's goal was to explain the nature of moral reasoning',[50] and after publishing the 'first formulation of the famous cognitive development theory of moral development'[51] in 1958, Kohlberg started to design hypothetical scenarios (including the Heinz dilemma) to put to children in order to further determine the different stages of moral reasoning.[52] As Gilligan observes:

> Kohlberg's six stages that describe the development of moral judgment from childhood to adulthood are based empirically on a study of eighty-four boys whose development Kohlberg has followed for a period of twenty years.[53]

Right and What to Do About It (Princeton University Press 2011); Ann E Tenbrunsel and David M Messick, 'Ethical fading: The role of self-deception in unethical behavior' (2004) 17 Social Justice Research 223

[48] Alan Bryman, *Social Research Methods* (5th edn, Oxford, OUP 2016) 21

[49] Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 5-64

[50] Joan C Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Psychology Press 1993) 64

[51] Ibid

[52] Ibid

[53] Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 18

As a result, the hierarchal six-staged moral development theory that Kohlberg's empirical research informed was largely based on boys' responses to moral problems. Kohlberg argues the that 'principled basis for resolving claims [moral problems], [is] justice'.[54] That is, an individual achieves moral maturity - an Ethic of Justice - at stage six of his moral development theory.[55] Gilligan realised, after working with Kohlberg, that 'those groups not included in [Kohlberg's] original sample rarely reached his higher stages [of his moral development theory].'[56]

> Prominent among those who thus appear to be deficient in moral development when measured by Kohlberg's scale are women, whose judgements seem to exemplify the third stage of his six-stage sequence. At this stage morality is conceived in interpersonal terms and goodness is equated with helping and pleasing others… This conception of morality concerned with the activity of care centres moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rules. This different construction of the moral problem by women may be seen as the critical reason for their failure to develop within the constraints of Kohlberg's system.[57]

[54] Lawrence Kohlberg, *The Philosophy of Moral Development: Moral Stages and the Idea of Development*, vol 1 (Essays on Moral Development, Harper and Row 1981) 39

[55] A full explanation of the stages of development are not necessary here because I later explain how 'Stage 3' an 'Ethic of Care' is demonstrated by Amy's response to the Heinz Dilemma (as part of Kohlberg's study) and how Stage 6 an 'Ethic of Justice' by Jake's answer to the Heinz dilemma in the same study. For a more comprehensive understanding of Kohlberg's six stages see: ibid 1-40 and Tronto's condensed explanation of each stage of Lawrence Kohlberg's moral development theory in *Moral Boundaries: A Political Argument for an Ethic of Care* 64-65

[56] Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 18

[57] Ibid 18-19

This point about there being different moral voices is best exemplified through the responses of school children Jake and Amy, as discussed by Gilligan.[58] These two children, interviewed as part of Kohlberg's studies on moral development, were asked if a man (Heinz) should steal a drug from a pharmacist as it is the only drug that can save his wife's life. The children were told that Heinz could not afford the drug and that the pharmacist had already refused to lower the price. Jake's response is said to exemplify mature moral reasoning (Stage 6) of Kohlberg's moral development theory. Jake responds by saying that Heinz should steal the drug; that morally he is permitted to so because saving his wife's life is more important than not paying for a drug.[59] Jake even goes as far to state that stealing the drug was permitted despite the fact that Heinz would be breaking the law.[60]

Unlike Jake, Amy considered alternative methods of retrieving the required drug for Heinz's wife, such as taking out a loan or negotiating with the pharmacist – appealing to the pharmacist's sense of humanity.[61] Amy even considered how stealing the drug would be counterintuitive for Heinz because stealing the drug might mean he would end up in jail 'and then his wife might get sicker again, and he couldn't get more of the drug…'[62] Amy concludes: 'So, they [Heinz, Heinz's wife, and the pharmacist] should really just talk it out and find some other way to make the money.'[63] Amy also considers the position of the pharmacist and explains why stealing the drug from him would be bad. Amy's response exemplifies Stage 3 of Kohlberg's hierarchal moral development theory – 'interpersonal concordance'.[64] This

[58] Ibid 26-31
[59] Ibid 26
[60] Ibid
[61] Ibid 29
[62] Ibid 28
[63] Ibid
[64] Lawrence Kohlberg, *The Philosophy of Moral Development: Moral Stages and the Idea of Development*, vol 1 (Essays on Moral Development, Harper and Row 1981) 18

insinuates that Amy's response is inferior to Jake's; that Amy has not reached moral maturity. Critical of this finding, Gilligan argues that Amy's response, where Amy considers the dilemma contextually and relationally and not in terms of one answer, is not inferior. Gilligan discusses how Amy's different moral reasoning appreciates the complexity of the situation and considers the impacts and interests of each party, whilst also considering the relationships of the parties involved.

Fehlberg engages with Gilligan's Ethic of Care when discussing how surety interviewees' decisions to enter surety transactions had been based on preserving their relationships with their husbands:

> Gilligan's research does lend support to the proposition that a woman requested by her husband to execute a security would be likely to view her decision less in terms of law, economic considerations, or property, than in terms of the negative impact that her refusal to act as surety would have on their relationship.[65]

In this thesis, I also draw on theory and work associated with an Ethic of Care, not to explain how surety clients approach decisions on whether to enter surety transactions for their loved ones, but instead to explore how solicitors *should approach* delivering ILA to a surety client (based on the guidelines in *Etridge* and their wider professional obligations). When I read my interview data in full, I was reminded of Jake's and Amy's answers to the Heinz dilemma.[66] Their responses came to mind because some of my interviewees discussed remaining objective, not getting to know the surety's circumstances, but rather being set on performing ILA in a formalistic fashion in order to meet the means-ends of their client; to secure the

[65] Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* 86
[66] Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 25-31

lending. On the other hand, a small number of interviewees seemed to want to get to know the individual surety, to discuss their client's possible options and to pass judgement on whether the surety client should proceed or not with providing security based on their particular circumstances.

The path I took on theory for this thesis was not linear. After rereading Gilligan's *In a Different Voice* I realised that, in isolation, Gilligan's work did not help me fully understand my data. I then went on to read Tronto's *Moral Boundaries* and from there went on to engage with a large volume of legal literature that discussed Gilligan's theory. This included Margaret Thornton's article, 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the New Corporatism'.[67] In this piece, Thornton powerfully outlines 'imagined masculine' values and 'fictive feminine' values and I started to reflect on how most of my interviewees seemed to prioritise Thornton's 'imagined masculine' values in their work.[68] I then read a wealth of work on lawyers and approaches to lawyering (a mix of empirical and theoretical studies, including those concerned with lawyer regulation). This reading and reflection also included bodies of work on relational lawyering models which are linked with ideals of more relational decision-making and therefore an Ethic of Care.[69] This, in turn, led me to Dana Remus' relational lawyering model, and Remus' work helped me come to the view that *Etridge*

[67] Margaret Thornton, 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the New Corporatism' (1999) 23 Melb UL Rev 749
[68] Ibid 765
[69] Francesca Bartlett and Lyn Aitken, 'Competence in caring in legal practice' (2009) 16 International Journal of the Legal Profession 241; Susan L Brooks, 'Mindful Engagement and Relational Lawyering' (2019) 48 Sw L Rev 267; Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press 2018) 43; Reid Mortensen, 'The Lawyer as Parent: Sympathy, Care and Character in Lawyers' Ethics' (2009) 12 Legal Ethics 1, 15; Dana A Remus, 'Reconstructing Professionalism' (2017) 51 Ga L Rev 807 811;Eli Wald and Russell G Pearce, 'Being good lawyers: A relational approach to law practice' (2016) 29 Geo J Legal Ethics 601, 614

required ILA solicitors (in part) to lawyer relationally, which I suggest requires solicitors to prioritise Thornton's conceptualisation of 'fictive feminine' values.[70]

I also engaged with literature on market-exchange lawyering. As a result, and as will become clear as the rest of this thesis unfolds, I make the claim that lawyers who prioritise Thornton's 'imagined masculine' values,[71] are more likely to lawyer in accordance with a market-exchange model of lawyering. Similarly, individuals who prioritise 'imagined masculine' values in moral decision making are more likely to make decisions based on Kohlberg's Ethic of Justice.[72] I therefore retrospectively (after collecting and initially analysing my data) used a combination of theories (see Figure 1.1. below) to come to the view that ILA lawyers, acting in accordance with the House of Lords' guidelines in *Etridge,* are required to deliver ILA, in part, relationally.[73]

To save repeating the same explanations later in this thesis, I explain each theory/approach/idea used in this thesis (Remus' relational lawyering model and relational dynamics; market-exchange lawyering; Thornton's 'imagined masculine' values and 'fictive feminine' values; and Tronto's Ethic of Care), and how I suggest they are all linked, in more detail in Chapter 5. This way there is a better flow to the story I am trying to tell across the

[70] Remus, 'Reconstructing Professionalism' 807

[71] For instance: Russell G Pearce, 'The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve The Conduct And Reputation Of The Bar' (1995) 70 NYUL Rev 1229; Russell G Pearce and Eli Wald, 'Rethinking Lawyer Regulation: How A Relational Approach Would Improve Professional Rules and Roles' (2012) 513

[72] This will all be explained in more detail in Chapter 5 section 5.2.

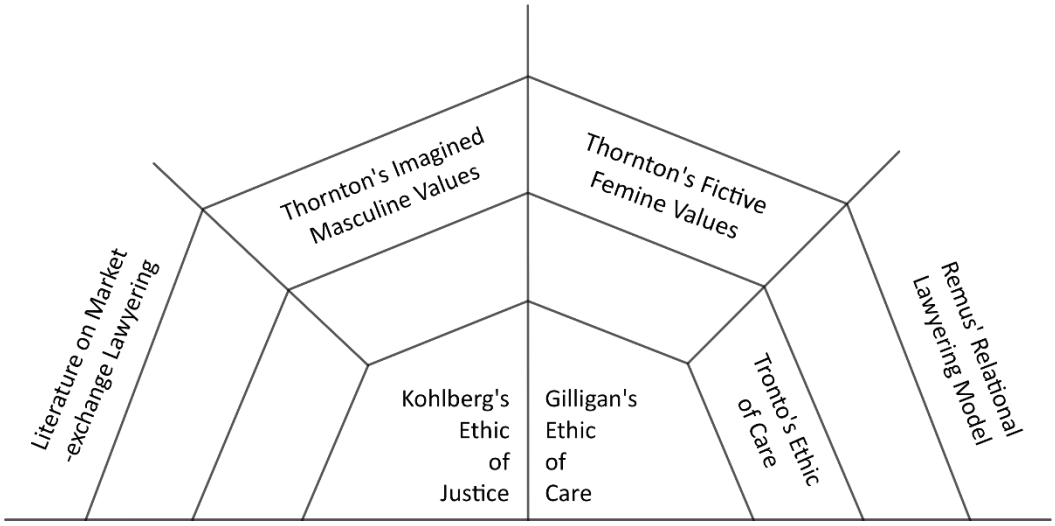
[73] This analysis is outlined in Chapter 5 and is therefore in keeping with the fact that I determined that the House of Lords' guidelines required ILA lawyers to follow a relational lawyering model *after* I collected data from my interviewees, by returning to the judgment and analysing *Etridge* in comparison with Dana Remus' relational lawyering model and Margaret Thornton's fictive feminine values.

chapters of this thesis, and the chapters are ordered in accordance with how my thoughts and analysis developed.

By drawing on various theories that are linked with Gilligan's Ethic of Care, such as Thornton's 'fictive feminine' and 'imagined masculine' values and also Tronto's Ethic of Care, I was able to gain a deeper understanding of what is required of lawyers when scholars suggest that solicitors should/must lawyer relationally. This enabled me to look at my data through multiple lenses to analyse how interviewees – according to their own accounts – delivered ILA. By engaging with Tronto's Ethic of Care, which builds on Gilligan's ideas,[74] I came to understand that 'care-giving' can be disrupted where the 'care-giver' and 'care-receiver' have conflicting needs.[75] Conflict is a theme in both Chapters 5 and 6. In Chapter 5, I suggest that ILA lawyering in accordance with the relational lawyering model conflicts with most interviewees' usual lawyering approaches that they adopt in their more frequent work (ILA work being only a tiny part of almost all interviewees' practices). In Chapter 6, I suggest that lawyering relationally conflicts with most interviewees' desires to impress the lenders who are involved in the secured lending transaction, and interviewees' perceived ideas about how best to protect themselves against professional negligence claims.

[74] Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* 61-97
[75] Ibid 133-147

Figure 1.1: The 'web' of linked theory drawn on in this thesis



1.4.2. *Behavioural ethics literature*

As will be made clear in later chapters, some interviewees not only demonstrated that they did not follow Lord Nicholls' guidelines in *Etridge*, but also demonstrated that they act unethically or would act unethically if moral dilemmas occurred in their ILA work. What is interesting is that interviewees were often unaware that what they were telling me during interview was unethical (for instance prioritising their connections with introducers by completing ILA quickly and formalistically). This phenomenon – individuals (including professionals) behaving unethically in accordance with their own self-interests without conscious awareness - is a 'core finding of behavioural ethics.'[76] Max Bazerman and Ann Tenbrunsel are leading scholars in this field and suggest, in *Blind Spots: Why We Fail to Do What's Right and What to Do about It*, that 'many ethical infractions are rooted in the

[76] Bazerman and Tenbrunsel, *Blind spots: Why We Fail to Do What's Right and What to Do About It*, 81

intricacies of human psychology rather than integrity.'[77] Bazerman and Tenbrunsel go on to state that:

> To design wise interventions, leaders [regulators, law firm partners etc.,] need to consider the ways in which their current environment could prompt unethical action without the decision maker's conscious awareness.[78]

By drawing on social psychology research as well as behavioural ethics research (in addition to the theories, approaches, and ideas just discussed in the previous section) I suggest how ethical sinkholes are present in ILA lawyering.

1.5. *My findings and how this thesis unfolds*

In the next chapter of this thesis, I discuss the methodology adopted in this project to answer the research questions outlined above. In that chapter, I speak to how difficult it was to identify my research population (i.e. solicitors who deliver ILA), and how I had to adopt a flexible and reactive research design in order to gain access to those lawyers I wished to interview. It will also be shown how I mainly recruited interviewees who worked in commercial specialisms who had experience in delivering ILA. Chapter 2 also sets out how I came to interview solicitors who arrange secured lending transactions for lenders or principal debtors, as well as solicitors who enforce security for lenders, which provided further insights into the workings of ILA. In Chapter 3, I present the doctrinal analysis element of this project. In this chapter, I review the *Etridge* requirements in more detail and analyse relevant and interesting post-*Etridge* case law. I also review academic responses/critiques to the House of

[77] Ibid 21
[78] Ibid

Lords' judgement in *Etridge*. Ultimately, I suggest that a doctrinal analysis of *Etridge* and post-*Etridge* case law only provides a partial insight into how lenders and solicitors conduct themselves in organising and providing ILA.

Across Chapters 4-6 I present my findings. In Chapter 4 I provide a high-level summary of my data by comparing what is required from lenders and ILA solicitors in non-commercial surety transactions as per the House of Lords in *Etridge*, and what I found was happening in practice in accordance with interviewees' accounts. In the following two chapters, Chapters 5 and 6, I use the multiple theoretical lenses, ideas, and approaches discussed earlier in this chapter to explain why ILA is being delivered (by most interviewees) in a different manner than that required by the House of Lords in *Etridge*. That is, I show how most interviewees prioritised commerce over care (Chapter 5) and their own interests over their surety client's best interests (Chapter 6) when delivering ILA. In these two chapters I draw heavily on theory linked with Gilligan's Ethic of Care and Kohlberg's Ethic of Justice. I also draw on elements of behavioural ethics research to demonstrate how interviewees were not consciously aware of the unethicality of their actions that they described during interview.

In Chapter 5 I argue that the House of Lords required ILA solicitors to deliver ILA (in part) relationally (drawing on Remus' relational lawyering model and Thornton's fictive feminine values, after explaining in more detail how they are linked with Gilligan's Ethic of Care). I then draw on my data to suggest that most interviewees demonstrated that they prioritise the surety client's means-ends; lawyering in accordance with a market-exchange model and so prioritising Thornton's imagined masculine values. I also suggest reasons why interviewees may be prioritising surety clients' means-ends by drawing on existing studies on commercial lawyering. In Chapter 6, I engage with literature on loyalty and independence, and with

Tronto's ideas on how care-givers inadequately dealing with conflict can lead to inadequate care-giving. I argue that most interviewees were preoccupied with their own interests over the interests of surety clients. That is, interviewees were having to navigate their own interest conflicts in accordance with the SRA Code of Conduct 2011 when delivering ILA. I suggest that in response to feeling conflicted, interviewees prioritised imagined masculine values; prioritising the client's ends rather than getting to know the surety client's situation contextually. I will demonstrate how this approach was viewed by some interviewees as the best way in which to prioritise their own self-interests and self-protection.

Chapter 7 is the final and concluding chapter of this thesis. In this chapter I present the answers to my research questions and take stock of those responses. I will discuss how, drawn together, this thesis demonstrates that an ILA lawyer's ability to lawyer relationally and prioritise care giving is impacted by their wider work, their lawyering values, the relationships they have with introducers, and how they respond to feeling at risk of professional negligence claims from past surety clients. I suggest that the House of Lords should have thought more carefully about the challenges ILA would present solicitors, particularly those who practice in commercial fields. I then end this thesis with some reflections on future directions for scholarship on ILA lawyering and relational lawyering.

1.6. *An introduction to the distinctive contributions made in this thesis*

As I hope is in some ways apparent from the above, this study makes a series of important methodological, empirical, and theoretical contributions. These will, naturally, become clearer as the reader engages with the chapters that follow. In summary, I would suggest that this work is distinctive in three main ways. First, this project provides an original empirical contribution by offering a significant and rigorous insight into how the House of Lords'

judgment in *Etridge* has affected lenders' conduct and lawyers' conduct in providing (or not providing) protections to sureties. I do this by interviewing legal professionals who have performed different roles (for different types of clients) relating to the arrangement and enforcement of secured lending transactions. As such, my data provides a form of holistic insight into the impact *Etridge* has had on lenders, lawyers, and sureties (which is important both for the routine way in which family homes are put at risk through secured lending transactions, and for our understanding of lawyers' practices in this space 'on the ground'). This leads me to my methodological contribution. As noted above and discussed more fully in the next chapter, identifying the types of solicitors who deliver ILA to surety clients was a difficult undertaking. This issue is highly unusual in scholarship on the legal profession because scholars interested in the legal profession typically investigate an area of lawyering (corporate lawyers, family lawyers, criminal defence lawyers, and so on) as opposed to lawyers who offer a singular one-off legal service like ILA. This thesis therefore acts as a tool for future researchers interested in underexplored and less-well known lawyering roles, as it provides guidance on how to go about identifying solicitor participants. What is also interesting here is the universality of my findings across solicitors working in *very different* law firms and practice specialisms (even if it could be broadly said that most interviewees practiced in commercial law). Finally, I make a theoretical contribution in this thesis by drawing on Remus' relational lawyering model to help explain how solicitors in England and Wales are required to lawyer relationally when delivering ILA (as well as other legal services). By connecting Remus' relational dynamics and Thornton's fictive feminine values, I not only explain in-depth how solicitors are required to lawyer relationally in accordance with SRA regulation (a claim that has not been previously advanced by legal profession scholars), but I also set out how lawyers can achieve a relational approach to their work. This insight, I hope,

will be of use to future legal profession scholars in exploring legal services in other settings, and help legal professionals (and legal services regulators) interpret the SRA Code of Conduct. I also offer a view in this thesis on how lawyers' loyalty should be framed and discuss how a client's best interests should be defined holistically and not in terms of simply performing the client's means-ends. My work further highlights to regulators that codes of conduct and guidelines do not always guard against unethical behaviour in lawyering. This project therefore contributes to a larger conversation about how lawyers' conduct should be regulated.

We move now to Chapter 2, and methodology.

Chapter 2

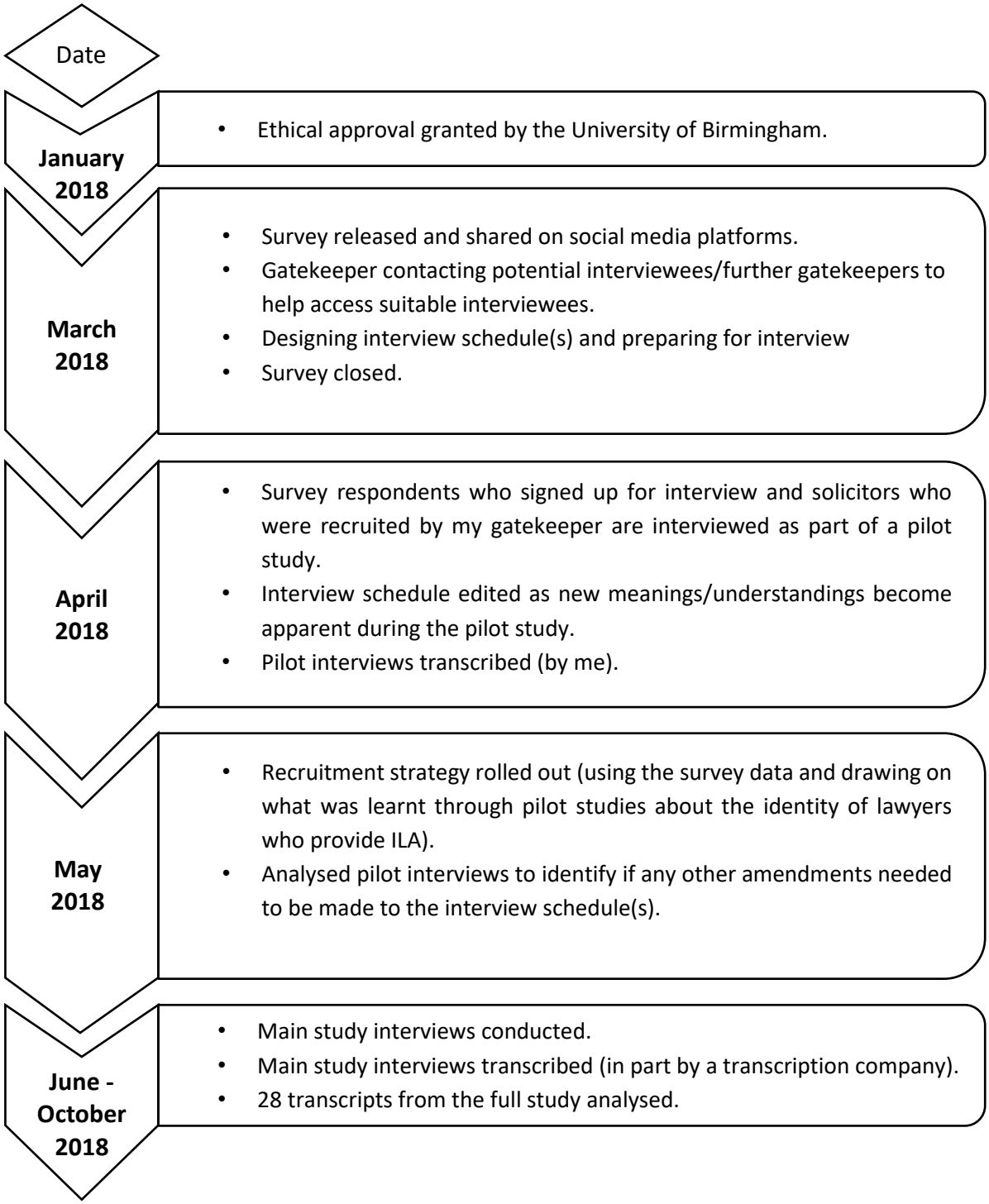
Methodology

In this chapter I outline the methods I used in this study to answer my main research question: 'How are solicitors delivering ILA to surety clients and why is ILA being delivered in this way?' I will explain in this chapter why I needed to obtain primarily qualitative data and how I identified my research population (as set out in Chapter 1, an unusually significant challenge for this particular project). I will also discuss how I thought carefully about my interview technique, assessed what was learnt from pilot interviews, and discuss the ethical implications of my study. I am also reflexive in this chapter about the role I played in influencing the production of knowledge in this study. Overall, this methodology chapter serves the important function of scaffolding what is to come (and why) in later chapters, and acts as a sort of initial line of defence to the claims made later in this thesis. What I do here is to offer up a detailed narrative of my methodological challenges and choices.

To give a 30 second summary of what follows, I spent a lot of time and effort (reading case law, talking with gatekeeper solicitor-colleagues at Birmingham and their contacts, using an online survey, and undertaking a pilot set of interviews) to better understand the likely practice areas of the solicitors who provide ILA, given this was not clear in any way at the outset. I then sent 237 letters and emails to solicitors working in five different practice areas asking for their participation in this project (using a random number generator and lists of specialisms through The Law Society's 'Find A Solicitor' function). In total, this thesis is based on 28 interviews with solicitors who provide ILA and/or defend ILA proceedings and/or arrange/enforce secured lending. This summary is neat and hides the messiness of what is to

come in the remainder of this chapter. Below in Figure 2.1. I provide a timeline of my methodological activities as I appreciate the following discussion may come across as somewhat convoluted and complex. This figure, and the discussion across this chapter, demonstrate how my research path was non-linear – how I had to capitalise on opportunities as they arose to interview lawyers who had knowledge about how ILA was being delivered in practice.

Figure 2.1: Non-linear research path



2.1. *Methodological approach*

This project, investigating how ILA is delivered by solicitors to surety clients 20 years on since the House of Lords' judgment in *Etridge*, is best described as an exploratory study. It is exploratory – research that involves discovery; gaining knowledge and generating ideas and theoretical explanations about under-explored phenomena which can be reviewed in further research[1] - because there had been no prior empirical research that investigated how solicitors delivered ILA to surety clients post-*Etridge* in England and Wales. What we knew instead came from limited case law reports and as will be discussed in the next chapter, case law reports (obviously) do not provide a full and accurate picture about whether *Etridge* is being followed in practice by lenders and/or lawyers.

Linda Kalof and others set out that, 'qualitative methods are particularly well-suited for studying a substantive area about which little is known in order to describe phenomena in detail.'[2] There are three main reasons why a qualitative methodology is commonly (but not exclusively)[3] the most appropriate design for exploratory research. First, exploratory research normally seeks to answer 'how' and 'why' research questions; and such questions often call for thick, descriptive, and non-numerical data.[4] This usually means that scholars undertaking exploratory research want explanations and theory to emerge from the data. This inductive approach can be compared with confirmatory studies which 'allow for a clear formulation of

[1] W. Paul Vogt, *Dictionary for Statistics & Methodology: A Nontechnical Guide for the Social Sciences* (2nd edn, Sage 1999) 105. For a sociolegal example of an exploratory small-scale research study see: Andrew Francis and Hilary Sommerlad, 'Access to legal work experience and its role in the (re) production of legal professional identity' (2009) 16 International Journal of the Legal Profession 63. Their justification for their methodological approach can be read on page 65.
[2] Linda Kalof, Amy Dan and Thomas Dietz, *Essentials of Social Research* (McGraw-Hill Education (UK) 2008) 83
[3] Pamela Atieno Ochieng, 'An analysis of the strengths and limitations of qualitative and quantitative research paradigms' (2009) 13 Problems of Education in the 21st Century 13, 14
[4] Joseph A Maxwell, 'Designing a Qualitative Study' (2008) 2 The SAGE Handbook of Applied Social Research Methods 214, 244

a theory to be tested in its application, commonly formulated as a hypothesis.'[5] Secondly, exploratory researchers normally adopt qualitative methodologies because they are flexible in design. Patrik Aspers and Ugo Corte note that 'qualitative researchers routinely make several adjustments of focus and research design as their studies progress.'[6] This means that 'qualitative research… is not usually set up and then allowed to run along a predetermined course. Instead, the research may be redesigned to meet changing conditions, perceptions and findings.'[7]

The flexibility a qualitative research design affords can be particularly useful when the research population are difficult to identify or where there is 'no formal list… from which to draw a sample.'[8] This is because of a view that qualitative researchers do not necessarily have to outline who the research population is, or outline the methods that will be used, at the beginning of their project.[9] Thus the researcher can decide upon the methods to be used once more information is elicited about the research population. The final, third reason why a qualitative methodology is usually adopted for exploratory research studies is because of the epistemological and ontological positions underpinning qualitative research. Qualitative researchers are normally interpretivists,[10] whereby they reject 'the very idea of foundational, mind-independent and permanently fixed reality that could be grasped or even sensibly

[5] Bernd Reiter, 'The Epistemology and Methodology of Exploratory Social Science Research: Crossing Popper with Marcuse' in Bernd Reiter (ed), *The Dialectics of Citizenship: Exploring Privilege, Exclusion, and Radicalization* (Michigan State University Press 2013) 2

[6] Patrik Aspers and Ugo Corte, 'What is Qualitative in Qualitative Research' (2019) 42 Qualitative sociology 139, 148

[7] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 926, 932

[8] Kalof, Dan and Dietz, *Essentials of Social Research* 83

[9] Gary Thomas, *How to Do Your Research Project* (3rd edn, Sage 2017) 114

[10] Norman K Denzin, 'The elephant in the living room: or extending the conversation about the politics of evidence' (2009) 9 Qualitative Research 139, 152

thought of without the mediation of human structuring.'[11] This is in direct opposition with the positivist epistemological and ontological underpinning of quantitative confirmatory research: 'For positivists, knowledge about the social world can be obtained objectively: what we see and hear is straightforwardly perceived and recorded without too many problems.'[12] As a result, positivists might be said to believe that 'researchers should attempt to distance themselves from any influences that might corrupt their analytical capacity;'[13] that knowledge should be obtained in a value-free way.[14] As a result, the research design is fixed, and scientific methods are used to create physical distance between the researcher(s) and the research population.[15]

I decided on a qualitative research design for this exploratory research project for all three reasons outlined above. First, whilst there were many unknowns at the start of my project, I always intended to gain access to solicitors who had delivered ILA and to learn about their 'lived experiences;'[16] to discover how those solicitors had delivered and are delivering ILA and why (as this seemed the most obvious route into exploring how the *Etridge* guidelines were operationalised in practice). I wanted to understand how ILA solicitors have experienced the phenomena under study, from 'the interior.'[17] This all pointed towards the need for a qualitative inquiry.[18] I decided on in-depth interviews as the main qualitative method in this

[11] Richard Shusterman, 'Beneath Interpretation' in David R. Hiley, James F. Bohman and Richard Shusterman (eds), *The Interpretive Turn: Philosophy, Science, Culture* (Cornell University Press 1991) 103
[12] Thomas, *How to Do Your Research Project* 108
[13] Rachel Ormston and others, 'The Foundations of Qualitative Research' in Jane Ritchie and others (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (3rd edn, Sage 2014) 1, 8
[14] Alan Bryman, *Social Research Methods* (5th edn, Oxford, OUP 2016) 24
[15] Aliyu Ahmad Aliyu and others, 'Positivist and Non-Positivist Paradigm in Social Science Research: Conflicting Paradigms or Perfect Partners' (2014) 4 Journal of Management and Sustainability 79
[16] Ormston and others, 'The Foundations of Qualitative Research' 11
[17] Uwe Flick, *An Introduction to Qualitative Research* (6th edn, Sage 2018) 93
[18] Karin Hammarberg, Maggie Kirkman and Sheryl de Lacey, 'Qualitative research methods: when to use them and how to judge them' (2016) 31 Human Reproduction 498, 499

project because '[i]n-depth interviews are a powerful method for generating description and interpretation of people's social worlds.'[19] That said, if I found that ILA lawyers were reluctant to be interviewed, or if the interviews were not eliciting enough information about how ILA is being delivered post-*Etridge* and why, I knew that I could be flexible and change the methods or go as far as altering the research population/focus of my study.

I also realised – when trying to fix on my (sample) population – that I needed a sufficiently flexible research design so that I could react and make decisions about which types of solicitors to interview as I learnt more about which types of solicitors deliver ILA. As discussed in the previous introductory chapter, before this project it was not known which types of solicitors deliver ILA (what practice area they tended to work in; what sort of law firm they worked for etc), in part because it was not explicitly stated in *Etridge* that solicitors of a certain specialism (or specialisms) were required to provide the service. This meant that my research population was initially broadly defined as 'solicitors in England & Wales'. This was an obvious challenge from the outset. So that I could effectively recruit participants for interview (and so I could use the limited time of my doctoral studies to best effect) I realised that I needed to better identify my research population and narrow it down from the 150,000 solicitors in England & Wales. I come back to this later on.

Finally, my epistemological and ontological views are compatible with the epistemological and ontological paradigms underpinning most qualitative enquiry. I believe 'there can be no objective or neutral social science because the researcher is always and automatically

[19] Alice Yeo and others, 'In-depth Interviews' in Jane Ritchie and others (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (3rd edn, Sage 2014) 177

involved and implicated with the object and the subjects of his or her enquiry.'[20] As such my aim is 'not to uncover the objective truth,'[21] and I do not propose that my research findings presented later in this thesis fully explain the phenomenon under study. Instead, I 'hope to unveil previously hidden facets of reality.'[22] I also recognise that my findings are tentative because the knowledge I have acquired about the 'facet of reality' discussed 'is a product of the specific interactions and relationships' I had with participants, and because I am an 'active creator of the research.'[23] Importantly, throughout this chapter I will be open and reflexive about the role I played in the production of knowledge so that I can demonstrate to stakeholders (my examiners, other readers, research participants, and so on) that this study 'should be taken seriously.'[24] I will also discuss issues regarding reliability and validity - or to adopt less positivistic language - 'the dependability and integrity'[25] of my research when discussing my interview method in more detail in Section 2.4. of this chapter. In the end, I ultimately accept that:

> Exploratory research is over once the empirical reality referred to by a concept or theory is explained so that "it makes sense" to the researcher. Such an explanation is

[20] Reiter, 'The Epistemology and Methodology of Exploratory Social Science Research: Crossing Popper with Marcuse' 19. Please note that this does not mean I refute the value of quantitative data in research. In this sense, it could be argued that I have a more pragmatic philosophical approach as opposed to an interpretivist approach, see: Gert Biesta, 'Pragmatism and the philosophical foundations of mixed methods research' (2010) 2 Sage Handbook of Mixed Methods in Social and Behavioral Research 95 for an explanation of pragmatism as an epistemological position.

[21] Sabrina Pultz, 'Flexibility in Research Design: How Unexpected Events Can Improve Learning and Research', *SAGE Research Methods Cases Part 2* (2018) 4 Available at: https://methods.sagepub.com/case/flexibility-in-research-design-unexpected-events-improve-learning-research (Last accessed: 13th February 2020)

[22] Reiter, 'The Epistemology and Methodology of Exploratory Social Science Research: Crossing Popper with Marcuse' 3

[23] Stacy M Carter and Miles Little, 'Justifying Knowledge, Justifying Method, Taking Action: Epistemologies, Methodologies, and Methods in Qualitative Research' (2007) 17 Qualitative Health Research 1316, 1319

[24] Michael Crotty, *The Foundations of Social Research* (Sage 1998) 13

[25] Webley, 'Qualitative Approaches to Empirical Legal Research' 935

> successful if others find this individual sense-making effort fruitful, helpful, or insightful, so that his or her sense-making overlap with theirs.[26]

In the sections that follow I discuss how the methodology adopted in this project had been contingent on what I discovered about the nature of ILA in the early stages of my research. The first step I took to explore how ILA is delivered in practice was to thoroughly analyse relevant case law and literature to see what had already been written about the House of Lords' decision in *Etridge* and ILA in secured lending transactions. This is sometimes called a 'law in the books analysis'[27] or 'documentary analysis'.[28] I completed this analysis for multiple reasons. First, to answer my subsidiary research question (a): 'How are solicitors meant to deliver ILA to surety clients in accordance with Lord Nicholls' guidelines in *Etridge*?'[29] This analysis (set out in Chapter 3) in turn helped me to think about what questions I wanted to ask ILA solicitors through in-depth interviews to answer subsidiary research question (c): 'Are solicitors delivering ILA in accordance with Lord Nicholls' guidelines in *Etridge*?'.

2.2. *Working out who might deliver ILA*

In socio-legal research studies it is important to comprehensively assess what the law is surrounding the legal phenomena to be investigated. This may sound trite, but it is nevertheless true. This typically involves an analysis of 'primary sources such as case law and

[26] Reiter, 'The Epistemology and Methodology of Exploratory Social Science Research: Crossing Popper with Marcuse' 17

[27] Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 13 Utrecht L Rev 95, 107

[28] Jane Ritchie and Rachel Ormston, 'The Applications of Qualitative Methods to Social Research' in Jane Ritchie and others (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (3rd edn, SAGE 2014) 27, 44

[29] To re-read the main research question and contributory sub-research questions this project looks to answer, please see Chapter 1 section 1.2.

statutes.'[30] It is then important to conduct a literature review – considering previous research findings in an area of legal scholarship.[31] First, I completed an in-depth analysis of the common law on suretyship in secured lending transactions to understand how the law has developed in terms of judicial reasoning.

When reviewing the case law and literature in this area I started to think about what questions I would want to ask solicitors who have experience delivering ILA. Stacy Jacob and Susan Ferguson state that 'using research to guide your [interview] questions' is important in order to 'create meaningful data.'[32] Looking back at this first draft of potential interview questions it is clear that I had designed them with sub-research question (c) firmly in mind: 'Are solicitors delivering ILA in accordance with Lord Nicholls' guidelines in *Etridge*?'. As such, they were test-like and, if left as they were, would have demonstrated to the interviewee that I was looking for specific answers. That is, the questions were too focused on finding out *if* solicitors deliver ILA in accordance with *Etridge* as opposed to being open to discovering new and interesting information about the interviewee's life world; and about the life of ILA in practice. However, drafting interview questions as I reviewed case law and literature in this area did serve to be useful when it came to designing my semi-structured interview schedule later in the life-cycle of my project. This early draft of questions reminded me that I wanted to explore how ILA solicitors interact with lenders involved in the secured lending transaction; how they come to be retained by a surety client to deliver ILA; and how they feel about delivering ILA to surety clients.

[30] Webley, 'Qualitative Approaches to Empirical Legal Research' 938
[31] Arlene Fink, *Conducting Research Literature Reviews: From the Internet to Paper* (5th edn edn, Sage publications 2019) 6
[32] Stacy A Jacob and Susan Paige Furgerson, 'Writing Interview Protocols and Conducting Interviews: Tips for Students New to the Field of Qualitative Research' (2012) 17 The Qualitative Report 1, 2-3

I was also aware, when conducting my case law and literature review, that progressing my project was largely dependent on acquiring knowledge about which types of lawyers deliver ILA in practice. Jonathan Eltredge and others state that '[d]efining the study population in a research project involves inductive reasoning, critical thinking, and pragmatic project management skills.'[33] This became apparent at the early stages of my study when, reviewing post-*Etridge* case law and literature, there was no explicit reference to, or mention of, certain types of solicitors of a particular specialism (or various specialisms) tending to deliver ILA to surety clients. Were they all family lawyers?; or high street lawyers? did they tend to work in small or large practices? (and so on). This predicament – not knowing what type of solicitors provided the type of legal work/service under scrutiny – was, I think, rather novel. The main reason for this is that most scholars who have conducted research on lawyers and other legal service providers explore an area of lawyering as opposed to a particular service,[34] or it is already well-known which types of solicitors provide the service that is central to their research.[35] As such, I faced a significant methodological challenge early on that is uncommon to others researching lawyers: who should I even be contacting to interview? What follows is a detailed account of how I approached that methodological challenge. There is a lot of content in these sections (and the reader may feel I start to belabour the point), but this reflects the volume of work and energy involved at this early stage of my thesis. I feel it is important to be open about this early (and oftentimes frustrating) challenge to my thesis. At

[33] Jonathan D Eldredge, Edward F Weagel and Philip J Kroth, 'Defining and identifying members of a research study population: CTSA-affiliated faculty members' (2014) 26 Hypothesis: the newsletter of the Research Section of MLA 5

[34] For instance, see: Michael McConville and others, *Standing Accused: The organisation and practices of criminal defence lawyers in Britain* (Oxford University Press 1994); Daniel Newman, 'Still standing accused: addressing the gap between work and talk in firms of criminal defence lawyers' (2012) 19 International Journal of the Legal Profession 3.

[35] For instance, see: John Eekelaar, Mavis Maclean and Sarah Beinart, *Family lawyers: the divorce work of solicitors* (Hart Pub Limited 2000)

the same time, the data from the people I interviewed forms the core of this thesis and so I want to take time to explain carefully how I came to interview the solicitors I interviewed. Those less interested in the blow-by-blow account of the construction of my population may wish to skip ahead to Section 2.4.

Whilst it did not qualify as post-*Etridge* literature, Belinda Fehlberg's study almost thirty years ago[36] - discussed in the previous chapter -[37] did shed some light on which types of solicitors deliver ILA (even if this related to a type of ILA lawyering before *Etridge* and not the ILA lawyering that was outlined by Lord Nicholls in *Etridge*). Fehlberg's research population included ten solicitors who had experience delivering pre-*Etridge* ILA or litigating for sureties or lenders.[38] Fehlberg provided the following description of these ten solicitors:

> ...the solicitors interviewed had a range of experience, including partners, assistant solicitors, and trainees from large firms (3), medium firms (2) and small firms (4), and one sole practitioner. Most were specialists in banking law, family law, or litigation.[39]

Whilst this provided some insight into the types of solicitors who had advised contemplating sureties on secured lending transactions, Fehlberg's description in the above excerpt was unhelpfully vague for framing my own study. Fehlberg does not discuss, for example, which solicitors (belonging to which specialism) had experience advising surety clients, and which solicitors (belonging to which specialism) had litigated for surety clients or lenders. Moreover, it is not clear how Fehlberg measured how a firm was 'large', 'medium' or 'small'. As Lee Epstein and Gary King comment, 'If researchers cannot replicate a measure, it is probably

[36] Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Clarendon Press 1997)
[37] See section 1.3.
[38] Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* 94
[39] Ibid 113

because the original study did not adequately describe it.'[40] Fehlberg also provides that *most* lawyers were specialists in banking law, family law or litigation, which may mean that other specialisms were mentioned and not recorded. Fehlberg further states: 'The solicitors interviewed included those who had acted mainly for lenders (3), mainly for sureties (1), and for both sureties and lenders on a regular basis (6).' In what capacity these solicitors worked for lenders and sureties were unclear.

These limitations put to one side, what Fehlberg's study did indicate, however, (and albeit from a very small sample of 10 solicitors) is that solicitors from various sized law firms and across different specialisms areas deliver (a pre-*Etridge* version of) ILA. Fehlberg also showed that lawyers across seniority levels deliver ILA (as she set out that the sample of lawyers included partners, assistant solicitors, and trainees). From her study, I made note of the practice areas 'banking law', 'family law' or 'litigation' as part of my thinking on population, and then looked for other ways to identify which types of solicitors deliver post-*Etridge ILA*.

The next opportunity to discover which types of solicitors deliver ILA presented itself when I closely analysed post-*Etridge* case law. I soon realised that the ILA lawyer who had delivered ILA to the surety client involved in the case was sometimes (but not always) named in the judgment, (and that the details of their employer law firm had sometimes been included too - even where the action did not involve the law firm as a party in those proceedings). I rigorously read all post-*Etridge* judgments a second time to ensure that I had not missed a reference to any named ILA lawyer and then created a table which included the name of the case, the name of the ILA lawyer mentioned, and (if included in the judgment) the name of

[40] Lee Epstein and Gary King, 'The Rules of Inference' (2002) The University of Chicago Law Review 1, 83

the solicitor's employer law firm. Ten cases out of the 14 post-*Etridge* cases I examined named solicitors who had delivered ILA to a surety client.

I next ran an internet search of each solicitor's name and their law firm's name mentioned in the judgment. I wanted to see if the firm had a website which included solicitor profiles which outlined that specific solicitor's practice areas and current position in the firm. If the solicitor's firm was not specified in the judgment, or the firm did not have a website, or there was no record of the solicitor still being at that firm, I would search for the solicitor's name in a separate internet search alongside the term 'solicitor'. However, most of the time (as Table 2.1. below demonstrates) these types of searches were unsuccessful. This shows how empirical work like this project can often take you down frustrating rabbit holes. If I had been successful in gathering information on a case-law-named solicitor through my internet search, I would then corroborate this information with the solicitor's official profile on The Law Society of England and Wales' website via its 'Find a Solicitor' function.[41] Here, you are able to search for a solicitor by name and location to discover the solicitor's most recent law firm employer and the solicitor's main practice areas. Table 2.1. below demonstrates what I learnt about the identity of ILA solicitors mentioned in case law post-*Etridge* through this method.[42]

[41] http://solicitors.lawsociety.org.uk/ [Last accessed: 19th October 2019]

[42] This research was conducted in the early months of 2018, so I decided not to look at case law reports before *Etridge* to search for solicitors' names as I reasoned that such solicitors were less likely to still be practising in the firms stated in judgments in 2018 (if at all).

Table 2.1: Details of solicitors who were mentioned in post-*Etridge* case law who have provided ILA to surety clients

Case Name	Solicitor's name and firm (as provided in the case)	Further information provided about the solicitor in the judgment	Firm and position (at the time of search)	Practice area(s) (as stated on their online law firm profile)	Practice areas(s) as stated on the Law Society website
Adshead v Royal Bank of Scotland Plc [2002] EWHC 192 (Ch)	Stephen Pocock Kingsford Flower & Pain	'…a partner in the firm of Kingsford Flower & Pain of Ashford in Kent' [43] (Ferris J)	Non-practicing Last known position: Solicitor at Pocock's Solicitors of Whitstable	'Specialised in civil litigation and employment law.'	Employment; Landlord and tenant – residential; Litigation – general; Private client – Probate; Private client – Wills; Professional negligence
National Westminster Bank Plc v Amin [2002] UKHL 9 (HL)	Mr Eyre Messrs Christopher Miles	'...who was then an assistant solicitor with the firm.' [7] (Lord Scott)	Unknown – no record	Unknown – no record	Unknown – no record
Bank of Scotland v Hill [2002] EWCA Civ 1081 (CA)	Mr Michael Clarke Stallard & Co.	'Stallard & Co. of Worcester.' [11] (Robert Walker J)	Unknown – no record	Unknown – no record	Unknown – no record
First National Bank Plc v Achampong [2003] EWCA Civ 487 (CA)	Mr Howard Pallis Howard Pallis & Co	'Mr H Pallis of Howard Pallis & Co of Upper Clapton Road, London E5' [7] (Blackburne J)	Clinton Davis Pallis - Partner	'a Duty solicitor... representing criminal clients'	Commercial property; Conveyancing – residential; Crime – general; Landlord and tenant – residential; Litigation – general; Private client – Probate; Private client - Wills
Yorkshire Bank plc v Pamela Tinsley [2004] EWCA Civ 816 (CA)	Mr Jordon of Riley & Co.	None	Unknown – no record identified	Unknown – no record identified	Unknown – no record identified
The Royal Bank of Scotland Plc v Chandra [2011] EWCA Civ 192 (CA)	Mr Stephen Lopeman Brook North	'...a partner' [21] (Patten LJ)	Kuit Steinart Levy LLP Partner	Commercial Property	Commercial Property; Company and Commercial
Kapoor v National Westminster Bank [2010] EWHC 2986 (Ch)	Mr Gordon of Gordons	None	Gordons Partnership LLP Partner	'...corporate and banking lawyer'	Company and commercial; Employment; Energy and natural resources; Information Technology; Media, entertainment, and sport; Mergers and acquisitions
Davies v AIB Group [2012] EWHC (Ch) 2178	Mr John Downing of Davenport Lyons London	'...the conveyancing solicitor' [37] (Norris J)	Goodman Derrick LLP Partner	Real Estate; Residential Property	Commercial Property; Conveyancing – residential; Landlord and tenant - residential
Padden v Bevan Ashford (A Firm) [2013] EWCA Civ 824 (CA)	Ms Rebecca Shinner Bevan Ashford Solicitors	'a young, recently qualified solicitor' [15] (McCombe J)	Unknown – no record found	Unknown – no record	Unknown – no record found
HSBC v Brown [2015] EWHC 359 (Ch)	Mr Alun Jones Harrisons Solicitors LLP	'...a partner in Harrisons Solicitors LLP' [8] (HHJ Simon Barker QC)	Non-practicing	Unknown – no record	Agriculture; Conveyancing – residential; Landlord and tenant – residential; Private client – Probate; Private client – trusts; Private client – Wills; Tax

Table 2.1. demonstrates that there were only five (out of 10) successful searches for solicitors named in the case law as having provided ILA. Using the Law Society's 'Find a Solicitor' application, I identified that these five solicitors had fourteen different practice areas between them. This breadth was not the result I had hoped for. The following practice areas, presented below in Table 2.2., were detailed twice or more on the five identified solicitors' Law Society profiles:

Table 2.2: Practice areas of ILA solicitors named in post-*Etridge* case law

Practice Area	**Frequency**
Commercial property	3
Company and commercial	2
Conveyancing - residential	2
Employment	2
Landlord and tenant - residential	3
Litigation	2
Private client - probate	2
Private client - wills	2

Whilst this exercise started to indicate that there were some themes about the types of solicitors who deliver ILA, I decided that I needed a more rigorous evidence base before trying to recruit solicitors for interview. I was keen to make sure, as best as I could, that I was contacting the right sorts of solicitors for the project I had designed.

2.3. *Further work on identifying the relevant research population*

I decided that my next step in trying to identify my research population was to create a simple online survey. The main purpose of this survey was to identify the required research population (lawyers who deliver ILA) more rigorously. The questions in this survey only

related to identifying which types of solicitors deliver ILA and did not ask any other questions to help ascertain how ILA is being delivered in practice. This survey was therefore not used as a method to answer the main research question in this study. [122] It was instead designed simply to give focus to my research population.

After my 'law in books analysis' (set out in Chapter 3) I also started to think about speaking with other types of solicitors who might be able to provide a different perspective on how ILA is delivered. I decided that it might be beneficial to also talk to solicitors who defended possession proceedings or debt claims for past surety clients (i.e. individuals who provided security and their security has been called upon).[123] After reading literature from academics such as Nelson Enonchong, who has argued that the lack of reported case law post-*Etridge* demonstrates that 'the problems of the past have been avoided'[124], I felt that solicitors who have worked for past surety clients whose security has been called upon might have stories about ILA not being delivered in accordance with *Etridge* (and who might be able to offer explanations as to why those cases did not reach court). I therefore decided to include a question in the survey about these types of lawyers too. I also decided that I could use this survey to ask potential interviewees (both ILA lawyers and lawyers who have defended possession proceedings for past sureties) if they would be interested in being interviewed for my project. Whilst this would generate a convenience sample, and I hoped to recruit from a more random sample of lawyers for other interviews, I thought this would be a good way to recruit interviewees for my pilot study.[125] Therefore, this survey was also used as a recruitment tool. If a survey respondent said they had provided ILA or defended possession

[122] The research design of this methodology can therefore not be called a mixed methodology study.
[123] The rationale for this is explained in section 2.5. below.
[124] Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell 2018) 414
[125] Note that this pilot study data was combined with the 'main study' data to comprise the 'full study' data.

proceedings/debt claims for surety clients, a pop-up window at the end of the survey asked if they would consider being interviewed for the purposes of my project. Within this window, I asked for contact details. Those who agreed to be interviewed after completing the survey were eventually interviewed as part of the pilot study.

My simple online survey was designed using Bristol Online Surveys and included 4 questions:

1. Have you ever provided independent legal advice to a client who is contemplating securing the debts of another (i.e. entering a suretyship transaction), resulting in you providing a certificate of independent legal advice to a lending institution?

2. If yes, in your own words, what would you say is your legal specialism? (For example, 'residential conveyancing', 'small business advice' etc.,)

3. Have you ever provided defence work for a client who had acted as a surety and since faced possession of personal assets by a lending institution?

4. If yes, in your own words, what would you say is your legal specialism?

These questions were drafted with the help of my supervisor (who has previously practiced as a solicitor), and other colleagues within the University of Birmingham's 'Centre for Professional Legal Education and Research' (CEPLER) who had also previously worked as solicitors. The reason I asked for their advice on the questions drafted was to check whether the language I used in the survey would make sense to the solicitors who completed the survey. My connections with CEPLER in this regard then led to a colleague within CEPLER using their contacts to spread the word that I wanted to interview solicitors who had either delivered ILA or defended possession proceedings for past sureties. CEPLER is a centre created

by the University of Birmingham Law School to 'enhance the legal practice skills, commercial awareness and employability of Law School students, [and] to create opportunities for and facilitate world class research on the legal profession, law in practice, and legal education.' [126] As a result, CEPLER has access to a range of legal professional contacts within Birmingham and beyond. This meant that if my survey were not successful in providing insights into which types of solicitors deliver ILA, I could use the specialisms of those solicitors identified by my colleague in CEPLER to help guide further recruitment. As Clive Seale and others state: 'Recruitment routinely happens on an ad hoc and chance basis… when accessing potential interviewees, you have to follow many trails, often relying initially on friends and colleagues.'[127] As what has been set out so far and what is to come will show, there were indeed "many trails" involved in this project.

At the same time that my CEPLER colleague kindly got in contact with numerous solicitors across England and Wales, I tweeted my survey in early March 2018 on my professional Twitter page (where my affiliation as a PhD researcher at the University of Birmingham was clearly stated) and asked for solicitors of any specialism to complete the survey and to consider - if they were eligible - signing up for an interview. I tweeted about the survey in three separate tweets over the span of two weeks, and collectively these three tweets were retweeted 92 times by other Twitter users. I also shared the survey on LinkedIn, and it was shared five times. A few weeks before tweeting the link to my survey, I also contacted the following solicitor organisations by email and asked if they would be willing to share my survey through their social medial accounts or newsletters: The Law Society of England and Wales; the Society of Trust and Estate Practitioners (STEP); Birmingham Law Society; the

[126] https://www.birmingham.ac.uk/facilities/CEPLER/index.aspx
[127] Clive Seale and others, *Qualitative research practice* (Sage 2004) 17

Junior Lawyers Association; the Property Litigation Association; the Association of Muslim Lawyers; the Resolution Family Law Association; and the Association of Women Solicitors. The majority of these organisations did not respond. Ultimately, only two organisations shared the survey to their followers on Twitter: The Family Law Panel; and Birmingham Law Society.

2.3.1. *Survey Results*

After two weeks, 74 solicitors in England and Wales completed my survey. Of those 74, only 19 respondents had delivered ILA, and only ten respondents had experience defending possession proceedings or debt claims for past surety clients. Of the ten solicitors who said they had experience defending possession proceedings or debt claims for surety clients, each detailed their area of specialism as 'Litigation' or 'Dispute Resolution'.[128] On the other hand, those solicitors who had experience delivering ILA provided 16 different specialisms in answer to the survey question about their practice area. Table 2.3. below lists the broad range of answers given, and the frequencies of those responses. In Table 2.3. I have written the specialisms stated by respondents exactly as they wrote them. If more than one survey respondent provided the same specialism – meaning they used the exact same terminology to describe their main practice area(s) - I have increased the frequency of that answer. Whilst there are variations of what may be considered the same specialism more broadly construed in Table 2.3., I chose not to initially combine results where there was a slight difference in the use of words/language.

[128] 4 respondents wrote 'Litigation', and 6 respondents wrote 'Dispute resolution' (or in one case 'Dispute resolution (commercial)').

Table 2.3: Survey results - solicitors who have provided ILA and their specialisms (in their own words)

Specialism	Frequency
Banking and Finance	1
Commercial Property	2
Debt Recovery	1
Dispute Resolution	2
Dispute Resolution (Commercial)	1
Family Law	2
Family Law (Children)	1
Finance and Funding Structures	1
General	1
General (now crime)	1
Insolvency law	1
Personal and corporate insolvency	1
Real Estate	1
Real Estate Finance (commercial)	1
Residential Conveyancing	1
Small business advice	1

The widespread nature of these answers was problematic. I had thought that once I had identified my research population via this survey (i.e. I had identified specific specialisms that seemed to be linked with providing ILA from my survey responses), I would then use the 'Find a Solicitor' function (and its ability to search by practice area) to find individual solicitors from those specialisms. In 'Find a Solicitor' there are 99 different areas of practice specified in a drop-down menu.[129] Whilst my survey and case law analysis narrowed down the areas from 99 different areas to 18, there was a disparity between the phrasing/description of the

[129] This involves a 'Pro search' see: https://solicitors.lawsociety.org.uk/?Pro=True (Last accessed 10th November 2020)

practice areas I uncovered through my case law analysis and survey and the practice areas listed on the Law Society website. For instance, the 'Find a Solicitor' application on the Law Society website does not have a 'Real estate' option when choosing a practice area.

In order to reconcile the differences between survey respondents' phrasing to explain practice areas and The Law Society's phrasing of practice areas, I trawled through law firm websites and looked at the services that law firms provide.[130] Where a law firm claimed to specialise in 'Real estate' on their website and provided a link to their solicitors who specialised in this area, I recorded those solicitors' names. Once I had recorded twenty individual names across ten different firms, I searched for each individual solicitor using the 'Find a Solicitor' application of the Law Society's website. I did this so that I could cross reference what the Law Society website set out as their practice area (or as one of their practice areas) with the practice area(s) as set out on their law firm's website. Through this exercise, I found that 19 out of the 20 individuals I looked up on the Law Society website had 'Commercial property' listed as one of their areas of practice. This suggested to me (someone not legally qualified) that 'Commercial property' was an alternative phrasing to describe the practice area 'Real estate'. As a result, I combined the results of 'Real estate' and 'Commercial Property' from the survey. Other practice areas which were more straightforward to combine (and label in accordance with practice area categories detailed on the Law Society website if such a category existed) included:

- 'Family Law' + 'Family Law (Children)' = Family - general

[130] I simply looked at the West Midlands law firm directory available on the Legal 500 website: https://www.legal500.com/c/west-midlands/directory/ to look for law firm names and then randomly chose law firms to see if those firms had websites. I then looked to see if any solicitors specialised in 'Real Estate.' I used the West Midlands directory (as opposed to the directory of other regions in England or Wales) because I was going to be contacting solicitors in this region through my recruitment strategy.

- ‘General (now crime)’ and ‘General’ = General
- ‘Insolvency law’ + ‘Personal and corporate insolvency’ = Insolvency and restructuring - business

Putting some of the preceding together, the frequency of practice areas mentioned across the literature analysis, the case law analysis, and the survey results are detailed in Table 2.4. below.

Table 2.4: Practice areas of ILA lawyers

Practice area	**Literature review frequency[131]**	**'Case law' frequency**	**Survey frequency**	**Total frequency**
Banking and finance	1	0	1	1
Commercial property	**0**	**3**	**4**	**7**
Company and commercial		2	0	0
Conveyancing - residential	0	2	1	3
Debt recovery	0	0	1	1
Dispute resolution	0	0	3	3
Employment	0	2	0	2
Family - general	**1**	**0**	**3**	**4**
Finance and Funding Structures	0	0	1	1
General	0	0	2	2
Insolvency	0	0	2	2
Landlord and tenant – residential	0	3	0	3
Litigation	**1**	**2**	**2**	**5**
Private client - probate	0	2	0	2
Private client – wills	0	2	0	2
Small business advice	0	0	1	1

Given what Table 2.4 suggested, I therefore decided that I would use the 'Find a Solicitor' function to generate lists of solicitors who specialised in 'Commercial Property', 'Litigation' and 'Family' to use as a sampling framework. Once these lists were created through the

[131] i.e. those specialisms that were detailed by Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* 113

website, I created a random number generator system to choose individual solicitors to email/send a letter. This sampling method will be discussed in more detail in section 2.5. What I hope this section has shown, through its detailed account, is the careful thought and work that has gone into scoping out the relevant lawyer population for this project; and the challenges I faced in this framing exercise which are not common to many other published studies of lawyers.

2.3.2. *Recruitment through my gatekeeper and survey*

Whilst my survey was open for responses and being shared on Twitter, seven solicitors were contacted by my colleague in CEPLER. The initial emails sent by my colleague in March 2018 provided a brief description of my study and mentioned the types of solicitors I was looking to interview. The email also provided a link to my survey and asked recipients to share the survey with their colleagues across their firm and/or if they knew of any solicitors eligible for my study to forward on the details of the study. My colleague also, very kindly, emailed the Head of Operations at Birmingham Law Society to ask whether they would publicise my survey to their members.[132]

Using this 'gatekeeper method'[133] to recruit interviewees worked relatively well. All seven contacts replied to my colleague (and I was copied in). On occasion, the responses were not fruitful because the solicitor was merely letting us know that nobody within their firm provided ILA to surety clients. Unfortunately, no explanation was given in these responses as to why no one within their firm delivered ILA. Looking back, this was a missed opportunity for

[132] It was this communication that likely led to the Birmingham Law Society retweeting my survey on their Twitter and sharing it with their many followers/members.
[133] For a discussion of the gatekeeper sampling method see: Johnny Andoh-Arthur, *Gatekeepers in Qualitative Research* (SAGE 2019) Available at: http://methods.sagepub.com/foundations/gatekeepers-in-qualitative-research (Last accessed: 1st March 2020)

further information. However, of the four firms that said that they could not identify anyone who could help within their own firm, three did pass on details of other solicitors they thought may be able to help and/or contacted other solicitors separately to ask whether they would be willing to assist. In the end, with the help of my colleague, one interview was secured with an original recipient of my colleague's email, and one other recipient identified a colleague in another part of the country and passed on that colleague's details because they had agreed to be interviewed.[134] The recruitment part of my survey also resulted in five solicitors providing their contact information so that I could arrange an interview with them. So that the potential interviewees recruited through my gatekeeper and survey did not change their minds or forget their offer to be interviewed, I decided to arrange these interviews as quickly as possible. This meant that I rolled out my sampling method and recruitment method (using the Law Society 'Find a Solicitor' application as a sample framework – intending to look at solicitors who specialised in 'Commercial Property', 'Litigation' and 'Family') after I conducted seven pilot interviews. I decided not to carry out my recruitment strategy until after my pilot interviews so that I could learn further or better from the first seven interviewees about which types of solicitors deliver ILA and which types of solicitors were defending possession proceedings. This proved to be a sensible decision as what I learned from interviewees during my pilot study led me to target solicitors specialising in one further practice area ('insolvency and restructuring – business') as well as the practice areas identified through my literature and case law data and survey data. Having conducted the pilot interviews before sending recruitment emails and letters to a more randomised sample of solicitors, I was also able to

[134] One further interview was also secured with an original recipient of my colleague's email. However, this solicitor later pulled out.

develop my vocabulary so that my initial contact made sense to other solicitors who had provided ILA or defended possession proceedings.

2.4. *In-depth interviews*

During the time that my survey was live, and my colleague in CEPLER was acting as a gatekeeper contacting various solicitors, I prepared for my both my pilot and main interviews. This preparation involved designing a research schedule which included vignettes (hypothetical scenarios), thinking-through and practising my interview technique, and preparing for interviewing elites.

2.4.1. *Research credibility and the use of vignettes*

I decided on a semi-structured interview schedule because 'the semi-structured interview is sufficiently structured to address specific dimensions of your research question whilst also leaving space for study participants to offer new meanings to the topic of study.'[135] However, before I designed my semi-structured interview schedule, I reflected on how credible/reliable my future research findings would be as a consequence of my interview-only methodology. As Herbert Rubin and Irene Rubin state:

> The credibility of your findings is enhanced if you make sure you have interviewed individuals who reflect a variety of perspectives. The philosophy of responsive interviewing suggests that reality is complex; to accurately portray that complexity,

[135] Anne Galletta, *Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication*, vol 18 (NYU Press 2013) 1-2

> you need to gather contradictory or overlapping perceptions and nuanced understandings that different individuals hold.[136]

I was very aware that I was depending 'on a self-report methodology rather than observing lawyers actually carrying out their work,'[137] and that interviewees who deliver ILA might not accurately reflect during interview on how they *actually* deliver ILA to surety clients in practice.[138] Such responses are not necessarily caused by interviewees' purposeful deceit.[139] Instead, interviewees' responses can be affected by 'memory and selective recall'[140] or social-desirability response bias.[141] On this point, and with a particular focus on lawyers' ethics, Richard Moorhead and others have said that:

> Interview approaches indicate what a practitioner says they do rather than what they do; although when done carefully… the approach is still revealing. Conscious and deliberate breaching of ethical principles or rules is more likely to be concealed with this method than with observation, but it is much less costly. Response biases are not all deliberate: an interviewee is likely to overestimate their own ethicality (the 'halo effect'). Nevertheless, they [interviews] can reveal important insights into ethical behaviour both because they can reveal descriptive information which helps build up a picture of ethical practice and because interviews can also reveal ethical problems where the interviewee does not appreciate or accept the problematic nature of their

[136] Herbert J Rubin and Irene S Rubin, *Qualitative interviewing: The art of hearing data* (Sage 2011) 67
[137] Ronit Dinovitzer, Hugh Gunz and Sally Gunz, 'Unpacking client capture: evidence from corporate law firms' (2014) 1 Journal of Professions and Organization 99, 114
[138] This issue with participants providing socially desirable views and accounts during an in interview that contrast with how they actually behave, feel, and think in action is demonstrated by Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Bloomsbury Publishing 2013). For a sample of the differences between what his participants said in interview with what he witnessed read pages 38-48
[139] Zoë Slote Morris, 'The truth about interviewing elites' (2009) 29 Politics 209, 211
[140] Webley, 'Qualitative Approaches to Empirical Legal Research' 237
[141] Bryman, *Social Research Methods* 217

> own (self-described) behaviour…. Good interviewing can also reveal the rationalisations and justifications that interviewees use to convince themselves that they are doing the right thing. Handled sensitively, it can be helpful in seeing how respondents might be deceiving themselves and susceptible to unethical behaviours.[142]

As I was concerned that some interviewees recruited for this study may be preoccupied with presenting 'themselves in a favourable light,'[143] I decided to include vignettes in my semi-structured interview schedule. Vignettes are 'hypothetical scenarios concocted by the researcher in advance of the interview,'[144] and are commonly used:

> …to elicit information through inviting responses, encouraging discussions, and probing for understandings to gain insights to participants' beliefs, emotions, judgments, attitudes, and values about the particular phenomenon that lies at the heart of the research.[145]

Rhidian Hughes and Meg Huby suggest that using vignettes in interviews can reduce the effect of social desirability response because of the 'distancing effect… between the participant's real lives and vignettes.'[146] The idea behind this is that when interviewees are talking

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[142] Richard Moorhead and others, 'Designing Ethics Indicators for Legal Services Provision' (2012) Available at: http://www.legalservicesboard.org.uk/wp-content/media/designing_ethics_indicators_for_legal_services_provision_lsb_report_sep_2012.pdf (Last accessed 1st January 2020) 28-29

[143] Melinda Collins, Mona Shattell and Sandra P Thomas, 'Problematic interviewee behaviors in qualitative research' (2005) 27 Western Journal of Nursing Research 188, 189

[144] Jennifer Mason, 'Qualitative Interviewing: Asking, Listening and Interpreting' in Tim May (ed), *Qualitative Research in Action* (Sage 2002) 204

[145] Karen Skilling and Gabriel J Stylianides, 'Using vignettes in educational research: a framework for vignette construction' (2020) 43 International Journal of Research & Method in Education 541, 542

[146] Rhidian Hughes and Meg Huby, 'The application of vignettes in social and nursing research' (2002) 37 Journal of advanced nursing 382, 384

hypothetically, they may feel more comfortable revealing their attitudes, feelings, and beliefs. Similarly, Moorhead and Victoria Hinchly have stated:

> Error, omission, and memory lapse are potential problems, as are response biases designed to show the interviewee in a good light. One way of mitigating these risks is by asking the participant to report on an experience in the immediate moment, rather than whilst recalling previous conduct.[147]

For this reason, many scholars investigating professional/legal ethics have adopted the vignette technique in their research.[148] In my study, I wanted to use vignettes to explore interviewees' attitudes and practices and explore whether they were preoccupied with complying with Lord Nicholls guidelines in *Etridge* in practice; whilst simultaneously trying to avoid social-desirability bias and memory lapse issues. As an example, rather than asking specific questions that indicate to the interviewee that there is a socially-desirable/*Etridge*-compliant answer, I wanted to pose a hypothetical situation and ask interviewees how they would most likely respond if they were the solicitor in that hypothetical situation. For instance, if I asked: 'Would you refuse to provide ILA to the surety client if you had not received information from the lender about the husband's current indebtedness?', this closed question would likely indicate to the interviewee that there was a right and wrong answer. I could instead pose an open question - such as: 'What information do you receive from the lender financing the secured lending?' - but the interviewees' answers could be impacted by

[147] Richard Moorhead and Victoria Hinchly, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers' (2015) 42 Journal of Law and Society 387, 395

[148] For example, see: Hugh Gunz and Sally Gunz, 'Hired professional to hired gun: An identity theory approach to understanding the ethical behaviour of professionals in non-professional organizations' (2007) 60 Human Relations 851; Richard Moorhead, Steven Vaughan and C Godhino, *In-House Lawyers' Ethics: Institutional Logics, Legal Risk and the Tournament of Influence* (Hart Publishing 2018); Steven Vaughan and Emma Oakley, ''Gorilla exceptions' and the ethically apathetic corporate lawyer' (2016) 19 Legal Ethics 50

memory or selective recall. I therefore decided that I would ask the open question but also pose a 'financial information' vignette later in the interview. I was hopeful that interviewees who had experience delivering ILA would talk about how they would likely proceed in a scenario and, whilst doing so, might demonstrate what factors are important to them when 'signing off' on a certificate of ILA and maybe also comment on whether it is usual to receive information about the current husband's indebtedness. If not, I could prompt the interviewee to talk about these matters once they had initially responded to the vignette.

Caroline Bradbury-Jones and others suggest that, 'vignettes can be constructed from a number of sources… [including] previous research findings, literature reviews or real-life experiences.'[149] The three vignettes designed for this study were constructed from various sources and are set out below in full in Table 2.5. Whilst the 'financial information' vignette discussed above was informed by Lord Nicholls' guidance in *Etridge*, I also used a 'vulnerable client' vignette which was based on the post-*Etridge* case *Burbank Securities Ltd v Wong*,[150] and a 'crying client' vignette which was adapted from a story told by a survivor of economic abuse at an event organised by the charity Surviving Economic Abuse.[151] I felt it important that each vignette be as realistic as possible.

[149] Caroline Bradbury-Jones, Julie Taylor and OR Herber, 'Vignette development and administration: a framework for protecting research participants' (2014) 17 International Journal of Social Research Methodology 427, 431

[150] *Burbank Securities Ltd v Wong* [2008] EWHC 552 (Ch)

[151] For more information about this charity, see: https://survivingeconomicabuse.org/ (Last accessed: 15th November 2020)

Table 2.5: Three vignettes used in interviews with ILA solicitors

FINANCIAL INFORMATION VIGNETTE: Before a meeting with a new client who requires independent legal advice before providing a guarantee for the lending of a loved one, you do not receive any financial information from the lending institution about the nature of the agreement, or any financial information regarding the principal debtor's current indebtedness. When you meet with the client, they summarise the details of the transaction and provide some insight into the borrower's current financial situation as they know it. How would you most likely proceed?
CRYING CLIENT VIGNETTE: Your client has left the room after a meeting where you felt satisfied that you relayed all important information and that they understood their risks. That same client is seen to be visibly upset as they left the building by one of your colleagues. Your colleague tells you what they had seen. This client already signed the documentation necessary to confirm the lending transaction with the bank. The principal debtor, your client's loved one, was sat outside the room throughout your meeting. How would you most likely proceed?
VULNERABLE CLIENT VIGNETTE: You are about to deliver independent legal advice to a new client who is considering securing the debts of a loved one. Upon your client's arrival you notice that they are physically disabled. During the meeting, the client is very unresponsive, and you are concerned that they do not understand what you are telling them. After your advice, the client does not ask any questions and just states that they would like to sign. When you hand over a pen to the client - to sign the relevant documentation - you notice that they are struggling to sign their signature. How would you most likely proceed?

The similarities between the 'vulnerable client' vignette and the facts of *Wong* will become more apparent when I set out the case in depth in the next chapter.[152] To summarise here, Sue Wong was a clearly vulnerable and disabled client who displayed little understanding about the nature of the secured lending transaction during a meeting with the mortgage broker. Sue also struggled to sign her signature on security documents because of her disability.[153] In this case, Sue did not receive ILA from a solicitor because the bank (and their agent – the mortgage broker) had been led to believe that Sue was directly benefitting from the lending (as opposed to providing security for the lending of a loved one - which in fact was the case). When reading this case during the doctrinal analysis stage of this project, I started to think: what if Sue Wong did receive ILA? How should a solicitor proceed if a physically disabled surety client is passive, lacks understanding, and struggles to sign her signature to provide security? As I hoped, and as will be discussed later in this thesis in Chapter 5, this vignette was a very important tool in discovering some interviewees' attitudes and priorities when delivering ILA.[154]

The 'crying client' dilemma is both based on Belinda Fehlberg's findings that two of her surety interviewees were physically upset during their meeting with a solicitor before providing security,[155] and on a story I heard at an event organised by the charity Surviving Economic Abuse.[156] The story that inspired this vignette was told by a survivor of economic abuse. In

[152] See Chapter 3 section 3.5.1

[153] Again, this vignette is also presented in full in Appendix 1. The vignette is also repeated in full where I talk about interviewees' responses to this vignette in Chapter 5 section 5.4.2.1.2.

[154] Surviving Economic Abuse, Banking on Change Inaugural Conference December 2017

[155] This study completed by Belinda Fehlberg was briefly discussed in Chapter 1 section 1.5.

[156] Surviving Economic Abuse is a charity which has 'four strategic priorities': They 'work with the media and develop awareness-raising campaigns to increase public understanding of economic abuse… deliver training, develop tools and resources, provide expert advice and disseminate best practice to professionals who work with victim-survivors… advocate for and support the development of new approaches to economic abuse, working with organisations to review existing systems, policies, and procedures… [and] highlight the issue of economic abuse through responding to national policy consultations and working with individuals in local and

her talk, this 'expert through experience' spoke of how her ex-partner had forced her to go to the bank and empty her bank account as soon as she got paid at the end of every month. She talked of how visibly upset she would be whilst all her earnings were withdrawn by a bank clerk. She even recalled that, on one occasion, members of staff could hear her partner threatening her harm if she did not stop crying whilst her money was being withdrawn. She spoke poignantly about how she felt staff at the bank were reluctant to interfere and help her, despite there being something very obviously wrong about the situation they were witnessing. This element of her story led me to question: how obvious must pressure/duress/abuse be before bank representatives intervene, or raise a concern on their client's account?; how obvious and significant must an abusive situation be before someone in a position of power responds with care? From here, I went on to consider: how should (and would) an ILA solicitor respond if something similar occurred in a law firm foyer after the surety client had received ILA to secure the borrowing of a 'loved one'? What if a surety, after agreeing and executing a suretyship transaction with her solicitor minutes earlier, was seen to be crying as they left the law firm offices? I then started to think about Lord Nicholls' guidance in *Etridge* that states that solicitors should only refuse to provide ILA if 'it is glaringly obvious that the wife [surety client] is being grievously wronged.'[157] Does this threshold (as it applies to solicitors) help pressured/abused parties or does it merely excuse inaction? What does the Solicitors Regulation Authority Code of Conduct say about such issues? Eventually,

national government.' See: https://survivingeconomicabuse.org/about-us/our-strategy-and-impact/ [Last accessed: 11th January 2021] The Experts by Experience Group attached to the charity 'is made up of victim-survivors of economic abuse… [and] their voices are at the heart of everything [they] do.' For more information see: Surviving Economic Abuse Impact Report 2019–2020 available through the link above.

[157] *Royal Bank of Scotland v Etridge* [2001] UKHL 44, [2002] 2 AC 773 [62]

this survivor's story - and my many questions - led to the drafting of the 'crying client dilemma' vignette.[158]

The next issue I needed to consider was how these vignettes would be presented to interviewees and when I intended to put the vignettes to my interviewees during the interview.[159] This was all considered when designing my interview schedule.

2.4.2. *Interview Schedule*

After thinking more carefully about the types of questions to ask potential interviewees, I consulted literature on how best to design an interview schedule,[160] and was made aware that I needed to think carefully about how I ordered my questions. For instance, Jacob and Ferguson suggest that interviews 'begin with easy to answer questions and move towards ones that are more difficult or controversial.' They go on to argue that if interviewees 'start with a big, probing, "high stakes" question… [c]hances are [the] interviewee will withdraw.'[161] I therefore planned that at the start of my interviews I would gain some insight into the interviewee's background which would 'help give my interview direction and depth.'[162] I also planned to ask easy open-ended questions at the start to allow the interviewee to 'generate a narrative'[163] about their role in delivering ILA/defending possession proceedings, such as: 'How did you get involved in this sort of work?' After establishing some degree of rapport and

[158] Please see Appendix 1 for the full vignette. Also see section 5.4.2.1.1 for the discussion on some interviewees' responses to this ethical dilemma.
[159] Rhidian Hughes and Meg Huby, 'The construction and interpretation of vignettes in social research' (2004) 11 Social work and social sciences review 36, 40
[160] Galletta, *Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication*; Jacob and Furgerson, 'Writing Interview Protocols and Conducting Interviews: Tips for Students New to the Field of Qualitative Research' 4; Beth Leech, 'Asking questions: Techniques for Semi-structured Interviews' (2002) 35 Political Science and Politics 665
[161] Ibid 4
[162] Galletta, *Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication* 46-47
[163] Ibid 48

trust with my interviewee, I then wanted to gain insight into their experiences and to ask more specific questions that ensured that my research topic was 'adequately explored.'[164] In this middle segment of my schedule, I drafted questions such as: 'What do you usually receive from the lender before delivering ILA to a surety client?' And in the schedule designed for interviewees who had experience defending possession proceedings I posed questions such as: 'Have you ever brought a claim against a solicitor for negligent ILA for a past surety?' Whilst this last question was a closed question, I would prompt further discussion through more open questions - depending on the interviewee's answer. Anna Galletta states:

> In the final segment of your interview protocol… you have an opportunity to engage the participant in clarification, meaning making, and critical reflection particularly as it relates to more abstract and theoretically driven questions.[165]

I decided to pose my vignettes (to interviewees who had experience of delivering ILA only) towards the end of the interview, because those vignettes provided a clarification/exploration of more theoretically-driven questions. I also did this because I did not want to influence interviewees' earlier answers by revealing 'my biases and motivations for conducting the study'[166] (i.e. that I was principally concerned about sureties being adequately advised about whether or not to provide security). I was mindful that I should not ask questions in a way that 'excludes the possibility of diverse responses… [or seek] confirmation of previously held notions, [otherwise] knowledge will not be advanced.'[167] In other words, I wanted to collect data that was meaningful to interviewees before I made it

[164] Ibid 49
[165] Ibid 51
[166] Joseph A Conti and Moira O'Neil, 'Studying power: qualitative methods and the global elite' (2007) 7 Qualitative Research 63, 74
[167] Gary Partington, 'Qualitative research interviews: Identifying problems in technique' (2001) 11 Issues in Educational Research 32, 34

clear what I was interested about in relation to ILA lawyering.[168] For this reason, I also raised questions about professional liability risk later in the interview (and even then, non-explicitly),[169] so that interviewees had time and space to raise this issue independently without being prompted - if they wanted to - earlier in the interview. I had decided to ask a question on risk as my literature review (set out in Chapter 3) indicated that lawyers were concerned about negligence risk as a consequence of delivering ILA. I also detailed in my schedule that I should ask interviewees if they had anything else to add to their interview at the end of the schedule in order to 'wrap up' the interview.[170]

2.4.3. *Interviewing elites*

Prior to my pilot study I thought about what significant challenges I might face as a researcher interviewing lawyer elites.[171] In order to mitigate challenges/issues associated with interviewing elites, I planned how I would 'pitch myself' to interviewees to ensure I was both sufficiently respected and viewed as unthreatening. I also decided to inform interviewees in an email before our scheduled interview (and in emails/letters in the recruitment strategy for the 'main study') that interviews would take no longer than 1 hour, and that interviewees' requests for shorter interviews could be agreed. The main reason for this was that I wanted to deter interviewees already signed up for interview from 'dropping out', and I wanted to clearly signal to potential interviewees in my recruitment emails/letters that taking part in the study would not be too demanding on their time. I planned for this because '[e]lites tend

[168] Neil Stephens, 'Collecting data from elites and ultra elites: telephone and face-to-face interviews with macroeconomists' (2007) 7 Qualitative Research 203, 205

[169] I asked all interviewees: 'In what ways do you think the law balances risk between lenders, debtors, and sureties?' See Appendix 1 for the full interview schedule.

[170] Galletta, *Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication* 52

[171] Steven Vaughan, 'Elite and Elite-lite Interviewing: Managing Our Industrial Legacy' in Alex Franklin and Paul Blyton (eds), *Researching Sustainability* (2013) 105, 106

to be time poor.'[172] That is, '[l]awyers tend to view time as money because it is standard practice to bill by the hour.'[173] Therefore, I thought it would be helpful to provide interviewees with this information so that they could be put at ease that I would not take up too much of their time.

I offered interviewees the option to be interviewed over the telephone. This might be an attractive method of interviewing for elites because it is more flexible and allows the interviewer to change the date/time of the interview depending on what is happening at work. William Harvey has also suggested that telephone interviewing helped him gain access to elites who 'would not have been able or willing to speak to [him] in person.'[174] Telephone interviewing also saved costs because I did not have to travel.[175]

Literature on elite interviewing also discusses 'how the authoritative position of interviewees may affect the power relations within the interview.'[176] However, Gareth Rice states that, 'power relations can be both a constraint and an enabler for academic researchers.'[177] Whilst I wanted to deter interviewees from having too much power over the direction and content of the interview - so that I could ensure that I asked the necessary questions to help produce useful data - I also wanted my elite interviewees to be sufficiently relaxed so that they felt they were able to talk openly and honestly. Steven Vaughan states that '[s]olicitors are, by

[172] Ibid 111
[173] Conti and O'Neil, 'Studying power: qualitative methods and the global elite' 71
[174]William S Harvey, 'Strategies for conducting elite interviews' (2011) 11 Qualitative Research 431, 436
[175] Vicente M Lechuga, 'Exploring culture from a distance: The utility of telephone interviews in qualitative research' (2012) 25 International Journal of Qualitative Studies in Education 251; Judith E Sturges and Kathleen J Hanrahan, 'Comparing telephone and face-to-face qualitative interviewing: a research note' (2004) 4 Qualitative research 107, 109
[176] Katherine E Smith, 'Problematising power relations in 'elite' interviews' (2006) 37 Geoforum 643, 646. Also see: Anna Boucher, *Power in elite interviewing: Lessons from feminist studies for political science* (Elsevier 2017); Teresa Odendahl and Aileen M Shaw, 'Interviewing Elites' in Jaber F. Gubrium and James A. Holstein (eds), *Handbook of Interview Research: Context and Method* (2002) 299, in particular see pages 309-313; Gareth Rice, 'Reflections on interviewing elites' (2010) 42 Area 70
[177] Rice, 'Reflections on interviewing elites' 71

their training and nature, cautious people constantly aware of risk.'[178] With this in mind I decided to present myself (in part) as naïve - in the hope that I would stop interviewees from being cautious and eliminate, as far as possible, the interviewee editing their responses and not providing accurate or authentic accounts. In preparation, I thought about how I would introduce myself at the beginning of the study and how I would react to new and interesting findings. At the start of the study, I decided that I would explain that I am a PhD researcher 'looking to explore how ILA is being delivered in the 'real world' because I have had my head in the books for too long and have no idea what is really going on'. Joseph Conti and Moira O'Neil endorse interviewers engaging in this sort of self-effacing humour because it helps to set interviewees at ease and instigate a rapport between interviewer and interviewee.[179] Balanced with this, to ensure that the interviewee did not control the interview, I demonstrated that I was professional by talking about the area of law with confidence in parts of the interview, and by dressing smartly at each face-to-face interview.[180] This 'balancing act' between two personas can be demonstrated through the following example. When it was revealed during interview that interviewees deliver ILA to commercial guarantors as well as to surety clients in non-commercial relationships with the principal debtor, I would reply to the interviewee by saying something like, 'Really? I had no idea' (naïve), and then go on to say something like: 'That's taken me by surprise because the common law does not require commercial guarantors to receive ILA' (thus demonstrating that I was sufficiently expert about this area of law).[181] Demonstrating that I was professional and unthreatening was also

[178] Vaughan, 'Elite and Elite-lite Interviewing: Managing Our Industrial Legacy' 113
[179] Conti and O'Neil, 'Studying power: qualitative methods and the global elite' 73
[180] Vaughan, 'Elite and Elite-lite Interviewing: Managing Our Industrial Legacy' 113
[181] This approach is closely associated with Linda McDowell's 'self-presentation [as] the whiz kid or naïve laywoman.' See: Linda McDowell, 'Elites in the City of London: some methodological considerations' (1998) 30 Environment and Planning A 2133, 2138

important because I was hoping interviewees would help recruit other interviewees by sharing my details with known contacts/colleagues. This is part of the 'snowball method' I put into place and is discussed in more detail in section 2.5.1.

2.4.4. *Pilot study*

Much was revealed by my interviewees interviewed in the 'pilot study' and this information proved invaluable in altering (in part) the direction of my main project recruitment strategy. Before conducting these pilot interviews, I communicated with all interviewees over email in order to determine what experience they had of delivering ILA and/or defending possession proceedings). Before heading to interview, I therefore thought that the following interviewees had experience conducting the following roles:

Table 2.6: Pilot interviewees' specialisms and roles

Identifier	Interviewees' specialisms (in their own words)	Role to be discussed during interview
P1	Commercial litigation	Defending possession proceedings
P2	Corporate restructuring and insolvency	Delivering ILA
P3	Defence regulatory work	Defending possession proceedings
P4	Real estate finance and Securities work	Delivering ILA
P5	Insolvency law	Delivering ILA
P6	Commercial litigation	Defending possession proceedings
P7	Banking and Finance	Delivering ILA

It seemed to me that these seven pilot interviews provided a good opportunity to test out my two interview schedules, as I thought I had recruited (according to interviewees' pre-

interview emails) three interviewees who defended possession proceedings and four who had experience delivering ILA. However, I soon discovered that interviewees P2, P4, P5 and P7 - who I set out to interview about their roles delivering ILA - had *other*, relevant experiences related to secured lending agreements. For instance, P4 mentioned that he also worked for lenders in arranging secured lending transactions (which involved putting together necessary documentation, ensuring that the surety received ILA, and sending required information and a checklist to the surety's ILA solicitor). P4 also mentioned that he had previously worked for a high street bank where he joined their 'senior [in-house legal] team' to write 'a checklist that goes to all lawyers' who deliver ILA to the surety/guarantor in individual cases. Similarly, P2 not only had experience delivering ILA, but he also had experience arranging secured lending transactions for principal debtors/companies that required the security of a loved one. He discussed 'chasing' the ILA solicitor advising the surety 'very aggressively' for the ILA certificate. P2 further had experience in challenging/defending lenders' enforcement of security on behalf of commercial guarantors ('80% of the time') and surety clients. P5 also had experience defending possession proceedings for commercial guarantors and sureties as well as providing ILA. In addition, P1 had experience enforcing security for lenders, as well as defending possession proceedings for past surety clients. After these interviews – which made clear to me that interviewees had performed multiple roles relating to the arrangement, enforcement, and defence of secured lending agreements – I designed questions in my interview schedule that I would want to ask future interviewees to clarify if they also had multiple experiences/roles. Without these pilot interviews, I would not have known that such varied work was relevant to the research questions I wanted to explore.

This pilot process was also useful because it enabled me to have discussions with interviewees about which types of solicitors deliver ILA. For instance, at the end of my interview with P2, I explained how it had been difficult to identify which types of solicitors are delivering ILA. In response, P2 told me that he thought it likely that every solicitor who has practised in insolvency law would have provided ILA at some time during their career. Even before I asked for help in trying to recruit other interviewees, P2 said that he knew 'just the man' I should speak to and said that he would email an ex-colleague to see if he would take part in my study. This ex-colleague (P2 told me) specialised in insolvency law, and a few weeks after my interview with P2 the ex-colleague emailed to say he would take part in my study. P5 – also an insolvency lawyer – commented too on how he suspected other insolvency solicitors would have delivered ILA. As a result of these conversations, I made the decision to contact 'insolvency and restructuring – business'[182] lawyers through my recruitment strategy using the Law Society 'Find a Solicitor' application, in addition to the other categories of lawyers decided upon (and discussed above). What I think this shows is that my population sampling frame was created through multiple lines of approach.

P5 remarked that 'no solicitor is making a living off of delivering ILA', and that this might explain why it is difficult to identify which solicitors deliver ILA, because many different lawyers are delivering it irregularly – 'as and when'. P5's reflections, coupled with the fact that all four pilot interviewees who had experience delivering ILA said they delivered ILA rarely and irregularly, helped shape the wording of my recruitment emails/letters. I made sure to state in those emails that I was looking for solicitors who had delivered ILA – *even if* they have only delivered ILA a handful of times or *even* as a one-off.

[182] The name of the category on the Law Society 'Find a Solicitor' function on their website.

I also felt that I had done well in creating rapport with pilot interviewees. As each of the pilot interviewees had agreed to 'spread the word' about my study, I was relatively happy that interviewees felt I was both unthreatening and professional. I felt that I played the naïve/professional role quite well, and to adequate effect. In fact, P2 stated during interview: 'So, you've taken legal training? You've practiced as a solicitor?' before I told him I had not, and P5 remarked at the end of the interview: 'I can't decide whether you are a student or a professional.' I tried to take this comment in the best possible light. As a result, my confidence about my ability to discuss the law in this area and interview solicitors had increased post-pilot interviews. This put me in a good 'head space' before contacting solicitors through my recruitment strategy.

2.5. *Recruiting further interviewees*

2.5.1. *Sampling method*

Up until this point, I had recruited interviewees through a convenience sampling method because my gatekeeper provided access to solicitors, and I took the opportunity to ask my survey respondents if they would take part.[183] Furthermore, as a consequence of asking pilot interviewees for help in recruiting other interviewees, I secured interviewees through a 'snowball method' which involves establishing 'new connections through existing contacts.'[184] The next stage of my recruitment method was to attempt to recruit interviewees more randomly. Whilst I was conducting qualitative research, and therefore was not intending on recruiting a representative sample, I wanted to recruit other interviewees

[183] Bryman, *Social Research Methods* 187
[184] Sharon Thompson, *Prenuptial Agreements and the Presumption of Free choice: Issues of Power in Theory and Practice* (Bloomsbury Publishing 2015) 78

through a more randomised and informed method other than just relying on my gatekeeper and snowballing method. This was to ensure that I got an array of insights from different types of solicitors, which would, I hoped, allow me to triangulate the data I captured. As discussed earlier on in this chapter, before I carried out my recruitment strategy, I had decided, through my literature analysis, case law analysis, and survey results, that I would contact solicitors who specialised in 'Commercial property', 'Family - general' and 'Litigation - general' to try to recruit interviewees who have experience delivering ILA. I also decided that I should contact solicitors who specialised in 'dispute resolution' and 'litigation' in order to recruit interviewees who had experience defending possession proceedings. Following my pilot interviews, I also added 'Insolvency and restructuring – business' into the mix as part of my recruitment strategy using the Law Society's 'Find a Solicitor' application.

In terms of geographical reach, I decided to recruit solicitors who practised in the above areas in the West Midlands. This was because I lived and studied in the West Midlands and because I had limited resources. By only recruiting solicitors who practiced in the West Midlands through my email and letter method, I was able to keep my travel costs and travelling distances to a minimum. Whilst Epstein and King argue that a large quantity and a wider spread of types of data is better, they do accept that personal and professional constraints 'quite reasonably affect research decisions.'[185] I was also not aware of any factor which might suggest that the location of the solicitor was a relevant factor in how they deliver ILA.

The process I used to randomly select solicitors to contact depended on the volume of results each search generated. In the 'Find a Solicitor' application I selected 'search for a person' (rather than firm), entered a main city within the West Midlands region, entered one of my

[185] Epstein and King, 'The Rules of Inference' 103

five decided practice areas, and pressed return. The Law Society processor then automatically looked for solicitors within that city and 25 miles beyond. The maximum amount of results the search processor provides is 500 solicitors, with 20 results/names per page. Results were ordered in relation to proximity to the main city entered. For reasons of time and convenience, I decided that I would try to email a sample of 50 solicitors from each of the five practice areas chosen. In order to eliminate risks of researcher bias, I used a random number generator to create random numbers which dictated which solicitors on which pages I contacted.

If the solicitor identified via the random number approach did not provide an email address on their Law Society profile, I searched for their online profile on their law firm's website. If the law firm in question did not have a website or no email address was not provided on the individual's law firm profile, I made a note of the solicitor's name and law firm address, so that I could later send a letter to that solicitor. If I could not find a solicitor's law firm address (which was very rare), I went to the next solicitor in the random number list and started the whole process again. During this process I was also careful not to contact solicitors who worked within the firms that I discovered did not provide ILA as a service through my gatekeeper's emails (discussed above). If my randomised strategy meant I landed on a solicitor from such a firm, I would - again - move on to the next solicitor in the list.

Initial emails to 237 possible interviewees were sent in batches over five days in May 2018, split by practice area and gender as set out in Table 2.7. below.

Table 2.7: Number of solicitors contacted through random recruitment method

Practice area	**Number of solicitors contacted by email or letter**	**Female**	**Male**
Commercial Property	50	19	31
Family – general	50	29	21
Insolvency and restructuring – business	44	14	30
Dispute resolution – commercial mediation	49	13	36
Litigation - general	44	13	31
Totals	**237**	**88**	**149**

The emails/letters sent to randomly selected solicitors outlined my study in brief. They also stated (because of what I learnt through my pilot interviews) that I was looking to talk to: solicitors who had experience of providing ILA to contemplating sureties; solicitors who worked for or advised lenders on arranging or enforcing secured lending; and solicitors who had provided defence work for sureties where their security has been called upon and they challenged/defended possession proceedings/debt claims.[186]

The email also outlined how I came to find their contact details, and which types of solicitors from which practice areas I was contacting. Importantly, the email informed the potential participants that I was funded by Economic and Social Research Council and that I had ethical approval from the University of Birmingham. The email finished by asking the recipient to email or call my mobile number if they were interested in taking part. It also asked those solicitors who were not eligible for interview to consider whether they had any colleagues

[186] Please see Appendix 2 for two example of the emails I sent to interviewees.

who may be eligible and to forward the email they had received or my details to the relevant persons if they could.

To my surprise, my hard copy letters worked better than I initially thought.[187] One interviewee who was recruited through a letter stated during interview that: 'In a world of instantaneous communications, and hundreds of emails a day, I think it is rather exciting to get a letter.'[188] This may in part explain why they were effective.

2.6. *Reflection on 'main study' interviews*

In the summer months of 2018, I conducted a further 21 interviews (on top of the seven 'pilot' interviews conducted earlier in the year) with solicitors who had various forms of experience working for lenders, surety clients, and principal debtors in relation to secured lending transactions. 27 out of 28 interviews were recorded using a voice recorder.[189] On average interviews lasted for 46 minutes. Before these audio files were transcribed, I attributed each interviewee an identifier from P1 to P28 (P = Participant). Table 2.8. below demonstrates how many interviewees performed each of the roles discussed in interviews.

[187] See Table 2.8. below for a breakdown on how each interviewee was recruited.
[188] P27
[189] Only P26 refused to be recorded, here I made notes and as soon I got back in my car after our interview, I recorded myself discussing the interview in as much detail as possible.

Table 2.8: Number of interviewees who have performed different roles relating to secured lending agreements[190]

Role	Number of interviewees
Interviewees who have delivered ILA	22/28
Interviewees who have defended possession proceedings	14/28
Interviewees who have arranged secured lending agreements for lenders	16/28
Interviewees who have enforced security for lenders	4/28
Interviewees who have arranged secured lending agreements for principal debtors	9/28

The roles each interviewee had experience conducting are further outlined in Table 2.9. below.

[190] To further demonstrate which interviewees did more than one role, please see Figures 2.2.-2.7. in Appendix 3.

Table 2.9: Interviewees' roles in relation to secured lending transactions

Identifier	Main practice area as stated in interview	Delivered ILA	Defended Debt Claims/Possession Proceedings for Past-Sureties	Enforced Security for Lenders	Arranged Secured Lending Transactions for Lenders	Arranged Secured Lending for Principal Debtors
P1	Commercial litigation		✓	✓		
P2	Corporate restructuring and insolvency	✓	✓			✓
P3	Defence regulatory work		✓			
P4	Real estate finance and Securities work	✓			✓	
P5	Insolvency law	✓	✓		✓	✓
P6	Commercial litigation		✓			
P7	Banking and Finance	✓			✓	✓
P8	Commercial disputes	✓	✓		✓	✓
P9	Litigation		✓	✓		
P10	Insolvency	✓	✓		✓	✓
P11	Corporate	✓			✓	✓
P12	Private client work	✓				
P13	Real estate finance	✓			✓	
P14	Insolvency and Restructuring	✓	✓		✓	✓
P15	Corporate finance	✓			✓	
P16	Real estate finance	✓			✓	
P17	Commercial property	✓	✓		✓	✓
P18	Residential property	✓				
P19	Dispute Resolution	✓	✓	✓		
P20	Restructuring and Insolvency				✓	
P21	Commercial litigation	✓		✓	✓	
P22	Insolvency restructuring	✓	✓		✓	
P23	Litigation department	✓	✓			
P24	Corporate/commercial	✓			✓	
P25	Corporate and commercial work	✓				
P26	Personal injury, litigation, and commercial disputes		✓			
P27	Commercial law	✓	✓			
P28	Dispute management	✓				✓

In the end, it was clear how important it was that my emails/letters had specified that interviewees did not have to deliver ILA regularly to be an eligible candidate for interview. 20 out of 22 interviewees who delivered ILA stated that they delivered ILA very infrequently. On the other hand, P24 said he delivered ILA at least once a week, and P25 said he delivered ILA for all surety clients across his firm (no other solicitor in his firm delivered ILA), and as a result he delivered ILA frequently. As it happens, P8 and P16, despite saying they delivered ILA infrequently, had in fact delivered ILA the day before their interviews:

> Advice to the guarantors would be maybe five a year, maybe give or take. As it happens, I did do one of these yesterday, but that's a complete coincidence. [P8]

> In fact, I did one yesterday but that's quite rare. [P16]

This point about frequency and research population is perhaps worthy of some reflection. Chapter 1 made clear how important ILA is to surety clients, but my interviews made it equally clear that ILA is a low volume area of practice. It makes me wonder what other areas of low volume; high risk legal advice also exist which might be worthy of future exploration.

I found that, overall, my 'main stage' interviewees were a lot more cautious and risk conscious than my pilot interviewees. For instance, I had phone calls with two interviewees before our scheduled interviews where they asked (despite receiving a participant information sheet that detailed all this information)[191] how their interview data would be used. Another interviewee rang before our interview to ask whether he really was a candidate for the

[191] See Appendix 4 for this participant information document that was sent 2 days prior to each participant's scheduled interview.

research. In the interview he recounted how he doubted he was a suitable interviewee because of how infrequently he delivered ILA:

> Personally, I do not deliver this advice very often. That's why I was hesitant to give myself to you as a research candidate, but you know, I've done it enough times to know the area we are talking about, and I would give it again. [P27]

2.6.1. *Interviewees' characteristics*

Table 2.10. below provides a comprehensive breakdown of all interviewees' characteristics that were relevant to this study. This table outlines the practice areas of each interviewee. It also outlines the geographical area and the size of the law firm in which each interviewee works.[192]

[192] The size of the law firm is defined in the following way. Sole practice: 1 solicitor & classified on the Law Society website as a 'sole practice law practice'; High Street: Location of office physically on a high street where potential clients can walk off the street into the practice without appointment; Small firm: 2-49 employed solicitors (including partners) and the office is not on the high street; Medium sized law firm: 50+ employed solicitors (including partners); and finally, Large law firm: 500+ lawyers but not a magic circle firm. All figures which were used to determine law firm size were correct at the time of classification (31st July 2018).

Table 2.10: Interviewees' characteristics

Identifier	Gender	Main practice area as stated in interview	Geographical area	Size of Law Firm	Years in practice	Position in firm
P1	M	Commercial litigation	South West	Small	10/11	Partner
P2	M	Corporate restructuring and insolvency	Greater London	Large	6	Senior Associate
P3	M	Defence regulatory work	Wales	Small	34	Partner/Director
P4	M	Real estate finance and Securities work	West Midlands	Medium	12	Partner
P5	M	Insolvency law	West Midlands	Medium	21	Partner
P6	M	Commercial litigation	West Midlands	Medium	3	Associate Solicitor
P7	M	Banking and Finance	East Anglia	Medium	17	Partner
P8	M	Commercial disputes	West Midlands	Medium	18	Partner
P9	M	Litigation	Greater London	Small	37	Consultant
P10	M	Insolvency	West Midlands	Medium	20	Partner
P11	M	Corporate	West Midlands	Medium	22	Director
P12	M	Private client work	West Midlands	Sole Practice	44	Sole practitioner
P13	M	Real estate finance	West Midlands	Medium	33	Director
P14	M	Insolvency and Restructuring	West Midlands	High Street	26	Director
P15	M	Corporate finance	West Midlands	Medium	20+	Director
P16	M	Real estate finance	West Midlands	Medium	43	Consultant
P17	M	Commercial property	West Midlands	Small	15	Associate Solicitor
P18	M	Residential property	West Midlands	Small	26	Associate Solicitor
P19	M	Dispute Resolution	West Midlands	Small	29	Director
P20	M	Restructuring and Insolvency	Greater London	Small	18	Partner
P21	F	Commercial litigation	North West	Medium	17	Senior Associate
P22	M	Insolvency restructuring	West Midlands	Small	10	Partner
P23	M	Litigation department	North West	Small	14	Partner
P24	M	Corporate/commercial	West Midlands	Small	1	Associate Solicitor
P25	M	Corporate and commercial work	West Midlands	Medium	30	Consultant
P26	F	Personal injury, litigation, and commercial disputes	West Midlands	High Street	31	Partner
P27	M	Commercial law	West Midlands	Small	35	Partner
P28	M	Dispute management	West Midlands	High Street	30	Consultant

2.7. *Analysis*

Once all interviews were transcribed,[193] I deleted all audio files and started to analyse my transcripts. As Liz Spencer and others make clear: 'Unlike quantitative analysis, there are no clearly agreed rules or procedures for analysing qualitative data, but many different possible approaches.'[194] I took an inductive approach/grounded theory approach to my analysis. I took this approach – as opposed to a deductive approach which involves analysing data using (one or multiple) theoretical frameworks[195] – because of the exploratory nature of my project (because there had previously been no empirical study looking at how ILA is delivered post-*Etridge* and therefore no prior theoretical explanations).[196] As previously discussed, inductive analysis is where 'the researcher begins with an area of study and allows the theory to emerge from the data.'[197] This approach is 'concerned with capturing and interpreting meanings in the data, focusing on what the text says. Data… [is] treated as [a] window on the participants' social world.'[198] As set out in Chapter 1,[199] I wanted to eventually use theory to help explain why ILA is being delivered in the way interviewees discussed. This process began with reading all my interview schedules in full. After doing this, I was overwhelmed by the sheer amount of data I had collected and did not know where to start in analysing the transcripts. Carl

[193] I transcribed half of the audio recordings and the latter half were transcribed by Audiosec Limited. This is a company that was recommended by the University of Birmingham Ethics Committee and a confidentiality agreement was drawn up. This confidentiality agreement can be found at Appendix 5. Special thanks to Professor Robert Lee for approving funding for this transcription through the Law School budget.
[194] Liz Spencer and others, 'Analysis: Principles and Processes' in Jane Ritchie and others (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (3rd edn, SAGE 2014) 269, 270
[195] Jennifer Fereday and Eimear Muir-Cochrane, 'Demonstrating rigor using thematic analysis: A hybrid approach of inductive and deductive coding and theme development' (2006) 5 International Journal of Qualitative Methods 80, 81
[196] Alan Bryman, *Social Research Methods* (3rd edn, Oxford University Press 2008) 539
[197] Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Ground* (Citeseer 1998)
[198] Spencer and others, 'Analysis: Principles and Processes' 272
[199] Section 1.5.

Auerbach and Louise Silverstein refer to researchers feeling a sort of 'paralysis' after reading interview scripts for the first-time post-transcription.[200] They suggest that 'one way in which researchers can work through this paralysis is to remember that your interpretation of the data will be one of several "right ways" in which the data can be interpreted.'[201] This is something I have remained mindful of throughout this study. As Moorhead states: 'What lawyers do, and who they are… plainly matters but the complexities of understanding and evaluating them are enormous.'[202]

Auerbach and Silverstein write that the next stage of analysis is coding. They suggest that researchers should focus on coding one small step at a time – not to get 'bogged down' in finding theoretical explanations and big answers straight away.[203] To code my interview scripts, I used NVivo – a specialist software 'designed to aid the analysis of qualitative data.'[204] Alan Bryman states that coding 'entails reviewing transcripts and giving labels to component parts that seem to be of theoretical significance and/or that appear to be particularly salient within the social worlds of those being studied.'[205] Coding is often a long and multi-layered process. On this point, Johnny Saldana writes that 'rarely will anyone get coding right the first time.'[206] He goes on to explain that this is because '[q]ualitative inquiry demands meticulous attention to language and deep reflection on the emergent patterns and meanings of human experience.'[207] Salanda argues that, eventually, codes should form categories and that then

[200] Carl Auerbach and Louise B Silverstein, *Qualitative Data: An Introduction to Coding and Analysis*, vol 21 (NYU press 2003) 36
[201] Ibid 36
[202] Richard Moorhead, 'Lawyers and Other Legal Service Providers' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 785, 801
[203] Auerbach and Silverstein, *Qualitative Data: An Introduction to Coding and Analysis* 38
[204] Tehmina Basit, 'Manual or electronic? The role of coding in qualitative data analysis' (2003) 45 Educational Research 143, 148
[205] Bryman, *Social Research Methods* 573
[206] Johnny Saldana, *The Coding Manual for Qualitative Researchers* (SAGE Publications Ltd 2008) 10
[207] Ibid 10

categories should lead to theory.[208] After much re-reading and re-coding, I reached the stage at which my codes could be grouped or categorised. I then started to explore literature which related to my categories. This then led me to re-read Carol Gilligan's 'Ethic of Care'[209] - which I had first encountered in the first year of my PhD studies -[210] and then subsequently to engage with literature on relational lawyering. After reading a volume of literature in this area, I came to the view that Lord Nicholls' guidelines in *Etridge* requires (in part) that ILA solicitors' lawyer relationally. I discuss this further in Chapter 5. From here, I then returned to my data and used my codes and categories to come to the view that most (though not all) of my interviewees delivered ILA in accordance with a market-exchange model of lawyering and not a relational lawyering model. This process will be explained in more detail in Chapter 5. The preceding few paragraphs may have given you, the reader, the view that my data analysis was a linear and straightforward process, when in fact this analysis was a long (and at times painful) process. As Patricia Ewick and Susan Silbey stated in an interview with Simon Halliday and Patrick Schmidt: 'Doing research with human beings is messy. There's always a fear that whatever you are doing is not going to turn out to be anything.'[211] The wealth of my data meant that it would have been possible to explore it using multiple lenses; different ways of shaping theory to the interview accounts I was reading. Part of the challenge in my analysis was in finding what I thought was the best fit for the narratives I had drawn out.

[208] Ibid 11

[209] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1993)

[210] I read Gilligan's *In a Different Voice* during the first year of my PhD studies after reading Rosemary Auchmuty, 'The Fiction of Equity' in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish Publishing 2001) 78-125

[211] Simon Halliday and Patrick Schmidt, 'Patricia Ewick and Susan Silbey and The Common Place of Law' in Simon Halliday and Patrick Schmidt (eds), *Conducting Law and Society Research: Reflections on Methods and Practice* (Cambridge University Press 2009) 214, 226

When presenting my data in the chapters that follow, I have made sure that I '[d]on't rip... [interviewees'] words out of context.'[212] I am careful to show how interviewees came to make statements (in response to what questions and dialogue), in order to be as transparent as possible about how I might have influenced the data produced, and as a matter of good academic practice. This also shows how I have not ripped the data out of context to fit my theoretical explanations, and how my conclusions and the arguments I make are therefore reliable and valid.

2.8. *Ethical considerations*

Some ethical considerations have already been discussed in the course of this chapter and I have already made the reader aware of the ethical approval I received for this project from the University of Birmingham.[213] Earlier, I mentioned how interviewees were sent a participant information sheet before interview (see Appendix 4). This participant information sheet mentioned how transcripts would be anonymised, how interviewees could make a complaint to the university about my conduct or any other issues relating to my research, and how interviewees could withdraw up to 12 weeks after their interviews. I have also discussed how I destroyed all audio files once transcripts were transcribed. What I have failed to mention so far is that I made sure all interviewees signed a consent form before I started interviews (see a copy of this form in Appendix 6). I have also not discussed so far how some interviewees knew subsequent interviewees whom they recommended or contacted on my behalf. This meant that full anonymity could not always be guaranteed, although this was a small circle of disclosure (i.e. solicitor A knowing that solicitor B, whom they had

[212] Seale and others, *Qualitative research practice* 16
[213] See Figure 2.1 above.

recommended, might take part in the project) and is part of the 'snowballing' process. I have also failed to mention until now that I defined the terminology I would use during the interview at the start of each interview. For instance, I explained to interviewees that I would use the term surety when referring to non-commercial guarantors and that I would use the term 'commercial guarantor' when discussing guarantors that are commercially involved or benefiting from the lending. I also explained that I would refer to ILA clients as 'potential sureties' to demonstrate that we are discussing clients that have not yet signed the secured lending transaction agreement.

2.9. *Concluding remarks*

This chapter demonstrates how fluid and reactionary my qualitative research design was in order to generate meaningful data on such an unknown and under-explored phenomenon. It also shows how I was an active creator of the research (facing a series of methodological hurdles in generating the contours of my research population) and briefly discusses my analysis process and how I came to apply the theory that helped explain my data and which is naturally more fully explored in the chapters that follow. This chapter has also demonstrated how this research could not have been conducted without the help of others. Most obviously, this research could not have been undertaken if it were not for the generosity and kindness of 28 solicitors across England and Wales agreeing to be interviewed. Whilst my research data has limitations, as there are issues with response biases and memory lapses in interviews, I believe this exploratory project has innovative and reliable methodological foundations. We come now in the following chapter to a deep dive of the law of undue influence.

Chapter 3

Case Law and Literature Review

As discussed in the previous chapter, I completed a doctrinal analysis on the modern developments of the law of undue influence in preparation for my empirical research. This was an important preparatory step because I needed to understand, in detail, what the common law rules were on the protections that must afforded to surety clients by lenders and solicitors post-*Etridge*. In addition, I wanted to explore what case law post-*Etridge* tells us (and does not tell us) about how well banks and solicitors are following these rules. The findings of this doctrinal research influenced the content and parameters of my interviews with solicitors in that I uncovered various matters which were still unknown about how sureties were being protected in practice. This chapter presents the doctrinal research element of my thesis. In this chapter, I focus on a modern case law and literature review and do not provide a complete historical overview of the origins and development of the legal doctrine of undue influence. Such historical analysis has been completed elsewhere,[1] and for the purposes of the socio-legal investigation presented in this thesis - looking at how modern rules on ILA have been integrated into practice after *Etridge* - such analysis is unnecessary.

This chapter is presented in four parts. First, I will provide an overview on the leading case prior to *Etridge* – *O'Brien*. I will then provide a brief review of the case law that surfaced in

[1] For a more historical analysis of the doctrine of undue influence, see: Peter Birks and Nyuk Yin Chin, 'On the nature of undue influence' in Jack Beatson and Daniel Friendman (eds), *Good faith and fault in contract law* (Clarendon Press 1995); Mark Pawlowski and James P Brown, *Undue influence and the family home* (Routledge-Cavendish 2002); Robyn Honey, 'Deconstructing the Doctrine of Undue Influence' (Society of Legal Scholars 108th Annual Conference: The Diverse Unities of Law); James Devenney and Adrian Chandler, 'Unconscionability and the taxonomy of undue influence' (2007) 8 Journal of Business Law 541; Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell 2018)

the years between *O'Brien* and *Etridge* (1994 to 2001), and in the third part of this chapter I will provide a comprehensive analysis of the House of Lords' judgment in *Etridge*. After this, I will offer up an account of the literature that has critically analysed *Etridge.* This literature review will look at commentary which analysed the House of Lords' decisions pertaining to the rules banks and solicitors must follow in 'protecting' surety clients. In the final part of this chapter, I will then examine noteworthy cases post-*Etridge*, analysing how the lower courts have interpreted – and sometimes extended – the law as promulgated in *Etridge*. In doing so, I both show my command of the relevant doctrine critical to my thesis (which helped to scaffold and support the interviews I conducted) and will demonstrate how case law gives us only a limited insight into how ILA is being delivered by solicitors post-*Etridge*.

3.1. *O'Brien*

The case of *O'Brien* concerned Mr and Mrs O'Brien remortgaging their family home for the purposes of securing the business debts of Mr O'Brien. Mrs O'Brien signed the suretyship documentation without that documentation being properly explained to her by a bank representative. The bank also failed to advise Mrs O'Brien to receive ILA. Later that same year Mr O'Brien's business had financial problems and the bank called upon Mrs O'Brien's security. In defence to the bank's claim, Mrs O'Brien argued that she only entered the transaction because of her husband's misrepresentation and undue influence.

At first instance, the trial judge dismissed Mrs O'Brien's first argument that she had been unduly influenced by her husband because the security transaction was not to Mrs O'Brien's manifest disadvantage.[2] The trial judge did find that Mr O'Brien had misrepresented the true

[2] The first instance decision is unreported; however, Scott LJ refers to the trial judge's reasons for dismissing Mrs O'Brien's undue influence argument in the Court of Appeal judgment. At the time of the trial judge's decision,

nature of the charge to his wife but that the bank could not be held responsible for Mr O'Brien's actions because he was not an agent of the bank.[3]

The Court of Appeal reversed the first instance decision. The Court of Appeal outlined that based on a 'special equity theory',[4] special protection was afforded to surety wives based on their reliance on, and their relationship with, the principal debtor. As a result, the Court of Appeal held that creditors could therefore be responsible for a non-agent's undue influence or misrepresentation. The Court of Appeal held that lenders therefore must take steps to ensure that the surety's consent is fully informed where the surety falls within equity's special category.[5] Barclays then appealed, and the House of Lords, whilst not agreeing with the Court of Appeal's rationale, upheld the overall decision in favour of Mrs O'Brien.[6]

After reviewing the law underpinning the doctrine of undue influence, Lord Browne-Wilkinson (providing the leading speech) set out that claims of undue influence against third party creditors cannot be justified in application of the 'special equity theory' presented by the Court of Appeal.[7] Instead, Lord Browne-Wilkinson provided that, in his view, 'it is the proper application of the doctrine of notice which provides the key to finding a principled basis for the law.'[8] He further provided that the law should be restated 'in a form which is principled, reflects the current requirements of society and provides as much certainty as

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the leading authority *National Westminster Bank Plc v Morgan* [1985] 1 AC 686 on undue influence and secured lending transactions outlined that the security transaction had to be to the guarantor's manifest disadvantage for a presumption of undue influence to arise.

[3] *Barclays Bank Plc v O'Brien* [1992] QB 109, 141 (CA) (Scott LJ)

[4] Ibid 130-139 (Scott LJ)

[5] Ibid 139 (Scott LJ)

[6] *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 (HL)

[7] Ibid 195

[8] Ibid 194

possible.'[9] To provide commercial certainty Lord Browne-Wilkinson outlined that creditors will be put on inquiry

> …when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.[10]

Lord Browne-Wilkinson then went on to outline that lenders can avoid being fixed with constructive notice of undue influence where they insist on having a private meeting with the wife - in the absence of the husband - to explain the risk she is running.[11] He further provided that the bank's representative should explain to the potential surety the extent of her liability, warn her of the risk she is running, and urge her to take independent legal advice.[12] Lord Browne-Wilkinson clearly emphasised that responsibility was placed on the lender to ensure that the surety understood the extent of her liability before entering into the agreement. Whilst he recommended that the lender should urge the wife to receive ILA, ILA from a solicitor was not required for the lender to avoid constructive notice. Importantly, Lord Browne-Wilkinson noted in his speech: 'It does not seem to me that the requirement of a personal interview imposes such an additional administrative burden as to render the bank's position unworkable.'[13]

[9] Ibid 195
[10] Ibid 196
[11] Ibid
[12] Ibid
[13] Ibid 198

3.2. *Cases after O'Brien*

It soon transpired after *O'Brien* that lenders were not holding personal meetings with sureties.[14] Instead, lenders were requesting that the surety received legal advice from a solicitor before entering into the agreement.[15] It may seem that, in requiring legal advice to be delivered by solicitors, banks had extended the rules as per *O'Brien* and were heightening the protection offered to sureties. However, as the reported case law post-*O'Brien* demonstrates, it soon became clear that because there were no guidelines on what constituted meaningful legal advice, the 'advice' provided to sureties was sorely lacking.

Let me illustrate this by discussing *Massey v Midland Bank Plc*.[16] Miss Massey agreed to remortgage the family home so that her long-term partner could be granted a secured business loan. The bank arranged for Miss Massey to receive legal advice from a solicitor called Mr Jones. When Mr Jones delivered legal advice to Miss Massey her partner was present throughout, and Mr Jones merely explained to Miss Massey that she could lose her home if her security was called upon. Mr Jones also failed to ask Miss Massey any questions; failed to provide any advice considering her best interests; and failed to relay the true financial position of her partner's business. Clearly Miss Massey was not provided with adequate protection. Nevertheless, whilst the Court of Appeal found that the legal advice delivered by Mr Jones was 'not good practice',[17] they also held that 'fortunately… [Miss

[14] Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Clarendon Press 1997) 213
[15] This was in accordance with the Code of Banking Practice at the time. See: Sarah J Greer and Mark Pawlowski, 'Constructive notice and independent legal advice: a study of lending institution practice' (2001) Conveyancer and Property Lawyer 229, 238 for a discussion on why this practice may have started.
[16] [1995] 1 All ER 929 (CA)
[17] Ibid 934 (Steyn LJ)

Massey] did receive advice… [and therefore] the bank complied with the substance of the guidance [in *O'Brien*].'[18]

Similarly, in other cases during this period, an array of poor practices adopted by solicitors became clear: other sureties like Miss Massey were 'advised' by solicitors in the presence of the principal debtor;[19] solicitors did not inform the surety of any contextual financial information pertaining to the extent of the potential liability, or the principal debtor's current indebtedness (factors most people would consider relevant when providing security for someone's debts);[20] the lending banks appointed the surety's solicitor;[21] sureties were 'advised' by solicitors who were also acting for the principal debtor and/or the lender; [22] and in one case 'advice' was delivered over the telephone and not in person.[23]

Ultimately, post-*O'Brien*, if the bank advised the individual contemplating providing suretyship to receive legal advice from a solicitor, and the solicitor notified the bank that they had advised the individual who afterward entered the surety transaction, the courts held that the relevant bank could rely on the certificate. That is, banks were allowed to enforce the security despite the perfunctory nature of the legal advice.[24] Auchmuty frames the case law

[18] Ibid

[19] See: *Banco Exterior Internacional SA v Mann* [1995] 1 All ER 396 (CA); *TSB Bank Plc v Camfield* [1995] 1 All ER 951 (CA); *Bank of Baroda v Rayarel and Others* [1995] 2 FLR 276 (CA); *Bank Melli Iran v Samadi-Rad* [1995] 3 FCR 735 (CA); *Barclays Bank v Goff* [2001] EWCA Civ 635; [2001] 2 All ER Comm 847 (CA)

[20] See: *TSB Bank Plc v Camfield*; *Lloyds Bank Plc v Wright-Bailey* [1995] Unreported, 3rd May 1995 (Lexis Citation 2660) (CA); *Barclays Bank v Thomson* [1997] 4 All ER 816 (CA); *Barclays Bank v Goff*

[21] See: *TSB Bank Plc v Camfield*; *Lloyds Bank Plc v Wright-Bailey*; *Barclays Bank v Thomson*

[22] *Banco Exterior Internacional SA v Mann*; *Bank of Baroda v Rayarel and Others*; *Bank Melli Iran v Samadi-Rad*; *Halifax Mortgage Services Ltd (formerly BNP Mortgages Ltd) v Stepsky* [1996] 2 All ER 277 (CA); *Barclays Bank Plc v Caplan* [1998] 1 FLR 532 (CA); *National Westminster Bank Plc* v Breeds [2001] Lloyd's Rep. Bank. 98 (QB)

[23] *Midland Bank Plc v Serter* [1995] 1 FLR 1034 (CA)

[24] For instance, see: *Bank Melli Iran v Samadi-Rad* (n1); *Barclays Bank Plc v Caplan* (n26); *Scottish Equitable Life Plc v Virdee* [1999] 1 FLR 863 (CA). The case of *Allied Irish Bank Plc v Byrne* [1994] 2 FLR 325 (CA) is one example where the Court of Appeal held that the bank could not rely on the solicitor being present during a meeting because the solicitor was retained by the bank, was not independent, did not have the necessary information about the secured lending transaction, and the bank had not advised the surety to receive legal advice.

after *O'Brien* in this way: 'Once responsibility for giving advice was shifted to solicitors, lenders could afford to be as careless as they like.'[25] Lord Justice Millett wrote extra-judicially in 1998 that he had 'serious misgivings about the position... reached in this country following *Barclays Bank v O'Brien*.'[26] He continued:

> What Sir Anthony Mason has described as "ritual reliance on the provision of legal advice" is foreign to the traditional approach of a court of equity and is manifestly failing to give adequate protection to the… surety. We have substituted an inappropriate bright line rule for a proper investigation of the facts and have failed the vulnerable in the process… allowing the bank to assume that the surety has received adequate legal advice, an assumption which the bank almost always knows to be false.[27]

Unsurprisingly, the poor practices of lenders and solicitors that came to light post-*O'Brien* led to another House of Lords decision on undue influence in bank lending transactions a mere seven years after *O'Brien* – in *Royal Bank of Scotland v Etridge*.[28] I will consider this case, which is central to this thesis, next.

[25] Rosemary Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' (2002) 11 Social & Legal Studies 257, 263
[26] Peter J Millett, 'Equity's Place in the Law of Commerce' (1998) 114 Law Quarterly Review 214, 220
[27] Ibid
[28] [2001] UKHL 44, [2002] 2 AC 773

3.3. *Etridge*

Now 20 years old, *Etridge* remains the leading authority on undue influence. The case involved eight conjoined appeals,[29] and in all the cases wives sought action against lenders and/or solicitors because they were, they claimed, unduly influenced by their husbands to enter into a secured lending transaction. In seven of these cases, wives claimed that lenders had constructive notice of presumed undue influence and that, as the banks failed to discharge such notice, the repossession orders set against their homes should be set aside.

In *Etridge*, the House of Lords identified that the law of undue influence, especially in relation to bank lending transactions,[30] had '...problem areas [that needed] to be resolved as far as possible.'[31] The words 'as far as possible' demonstrate their Lordships' restricted view on how much protection could be offered to sureties when entering into an onerous mortgage transaction against their own free will. Lord Nicholls expressed that a balance had to be conducted between the competing economic interests of banks and wider society, and social welfare concerns about sureties.[32]

In what follows, I will discuss the important guidelines outlined by the House of Lords in *Etridge* which set out to improve the protections afforded to sureties. To do this, their Lordships amended and clarified the law regarding: (i) when a lender will be put on inquiry; (ii) what measures a bank must implement once put on inquiry; and (iii) the independence of the solicitor and the scope of the solicitor's role in providing ILA. This section will therefore

[29] *Royal Bank of Scotland plc v Etridge (No. 2)*; *Barclays Bank v Harris*; *Midland Bank plc v Wallace*; *National Westminster Bank v Gill*; *UCB Home Loans Corporation Lt v Moore*; *Barclays Bank plc v Coleman*; *Bank of Scotland v Bennett*; *Kenyon-Brown v Desmond Banks & Co*
[30] *Etridge* [99] (Lord Clyde)
[31] Ibid
[32] Ibid [34]-[36]

not provide an exhaustive evaluation of all the issues addressed by their Lordships in *Etridge*.[33]

3.3.1. *When a lender will be put on inquiry*

In interpreting Lord Browne-Wilkinson's words about when a lender will be put on inquiry, Lord Nicholls in *Etridge* determined '...that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts.'[34] However, Lord Nicholls outlined that the doctrine does not strictly apply to only wives:

> The position is likewise if the husband stands surety for his wife's debts. Similarly, in the case of unmarried couples, whether heterosexual or homosexual, where the bank is aware of the relationship... Cohabitation is not essential.[35]

Lord Nicholls further noted in *Etridge* that a bank is not put on inquiry where monies are advanced to the husband and wife jointly, 'unless the bank is aware that the loan is being made for the husband's purposes [only].'[36] However, Lord Nicholls stressed that where a wife is a shareholder or a director of the business a lender will still be placed on inquiry. This is because a surety's involvement in the company could be superficial; the wife could be a shareholder or director on paper only.[37] Again, to ensure commercial certainty, Lord Nicholls goes on to write that: '...the only practical way forward is to regard banks as "put on inquiry" in every case where the relationship between the surety and the debtor is non-commercial.'[38] He provides that this distinction is important because: 'Those engaged in business can be

[33] Ibid [3] (Lord Cornhill)
[34] Ibid [44]
[35] Ibid [47]
[36] Ibid [48]
[37] This is, of course, contrary to ideas from company law which say that it is impossible to be a 'sleeping' director.
[38] *Etridge* [87]

regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees.'[39]

3.3.2. *The steps lenders must take*

In response to the conduct of lenders post-*O'Brien*, Lord Nicholls decided that 'it was not unreasonable for the banks to prefer that this task (providing legal advice) was undertaken by an independent legal advisor.'[40] However, Lord Nicholls went on to provide that supplementary protections were necessary to improve ILA in the future. First, he outlined that the bank should contact the surety directly, asking her to name a solicitor who she wants to represent her. Secondly, he asserted that 'the bank must provide the solicitor with the financial information he needs [to provide meaningful advice].'[41]

Lord Nicholls then went on to outline the type of financial information that had to be sent by the lender to the surety client's nominated solicitor.[42] This included: the current amount of the husband's indebtedness; the amount of his current overdraft; and the terms of the new facility.[43] Their Lordships clearly wanted to avoid the situations of the past where no factual information about the transaction had been provided to sureties by banks or solicitors.[44] In addition, Lord Nicholls stressed that certain situations may call for further financial and non-financial information to be sent to the surety's solicitor.[45] For instance, Lord Nicholls refers to bank staff being attuned to their beliefs and suspicions:

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[39] Ibid [88]
[40] Ibid [54]
[41] Ibid [79]
[42] Ibid
[43] Ibid
[44] As in the cases of *Barclays Bank Plc v Thompson* and Mrs Etridge and Mrs Gill which were involved in the conjoined appeal.
[45] *Etridge* [79]

> Exceptionally there may be a case where the bank believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will. If such a case occurs the bank must inform the wife's solicitor of the facts giving rise to its belief or suspicion.[46]

Lord Nicholls set out that if the bank failed to provide the necessary financial and non-financial information to the surety's solicitor, then the creditor could not rely on the certificate of ILA to discharge constructive notice of wrongdoing.[47] In addition, where the bank ought to have known that meaningful ILA could not have been delivered by a solicitor because the legal advisor was not independent, the bank cannot rely on the certificate of ILA. Moreover, where the solicitor is not in fact acting for the wife but is determined to be the lender's agent, any inadequate advice will be imputed to the lender. On this, Lord Nicholls noted: 'The mere fact that, for its own purposes, the bank asked the solicitor to advise the wife does not make the solicitor the bank's agent in giving advice.'[48] Within the closing statements of his speech, Lord Nicholls set out that the bank's role in trying to provide the potential surety with some protection '...is a most modest burden.'[49]

3.3.3. *The independence of the solicitor and the scope of the solicitor's role*

Lord Nicholls also discussed 'the much-vexed question whether the solicitor advising the wife must act for the wife alone.'[50] As outlined in section 3.2. above, in the years between *O'Brien* and *Etridge* there had been cases where the same solicitor who worked for the principal debtor or lender had also 'advised' the wife. Despite these concerning cases post-*O'Brien*,

[46] Ibid [79]
[47] Ibid [67]
[48] Ibid [77]
[49] Ibid [87]
[50] Ibid [69]

Lord Nicholls held that the solicitor acting for the husband or the lender *could* provide ILA to the surety wife in the same transaction. He determined that in this scenario it is down to the solicitor to assess whether they were able to provide independent advice:

> In advising the wife the solicitor is acting for the wife alone. He is concerned only with her interests… in every case the solicitor must consider carefully whether there is any conflict of duty or interest, and more widely, whether it would be in the best interests of the wife for him to accept instructions for her.[51]

Lord Nicholls then stated that if the solicitor thinks they may not be able to advise the surety in her best interests alone, then they must cease to act for her.[52]

Lord Nicholls also turned his attention to what advice a nominated solicitor should provide to a surety client.[53] He first outlined that it was not the role of the solicitor to confirm to the lender that the surety was not subjected to undue influence.[54] He also communicated that whilst he would detail what solicitors can expect to cover 'as a core minimum,' ultimately what was 'required from a solicitor before giving the confirmation sought by the bank will, inevitably, depend on the circumstances of the case.'[55] First, he outlined that the solicitor should 'explain the nature of the documents and the practical consequences these will have for the wife if she signs them.'[56] This includes informing the wife that she could lose her home and potentially be made bankrupt if her husband did not meet loan repayments in the future. He added that the wife should be told about the purpose of the transaction; the amount being

[51] Ibid [74]
[52] Ibid [96]
[53] Ibid [64]-[65]
[54] Ibid [53]
[55] Ibid [65]
[56] Ibid

lent to the husband's business; and, where necessary, a solicitor should explain what is meant by an 'all monies' charge. Lord Nicholls also provided that the 'solicitor should discuss the wife's financial means, including her understanding of the value of the property being charged.'[57] In addition, the surety's solicitor should review the wife's other assets as a part of their advice, and the solicitor must point out that these assets may be lost too if the husband fails to meet loan repayments. Thirdly, Lord Nicholls asserts that the solicitor should clearly say to the wife that she has a choice – that the decision 'is hers and hers alone.'[58] In explaining to the wife that it is her choice, a discussion should be conducted between solicitor and wife about the husband's present financial position. The solicitor should disclose the husband's present indebtedness which may include a discussion about his current overdraft facility. It was further outlined that, if the bank fails to provide the necessary information required to deliver the advice in accordance with the 'core minimum' guidelines, the solicitor 'should decline to provide the confirmation sought by the bank.'[59] Finally, the solicitor should check whether his client wants to proceed. If the wife does want to proceed, the solicitor should ask if the client wants the solicitor to negotiate the terms of the agreement with the lender.[60] When a solicitor is satisfied that they have met their duty to the surety client in accordance with the *Etridge* guidelines, they can then provide a certificate of independent legal advice to the lender. Lord Nicholls also set out that ILA should be delivered by a solicitor in a face-to-face meeting with the surety without the husband and that 'the solicitor's explanations

[57] Ibid
[58] Ibid
[59] Ibid [67]
[60] Ibid [65]

should be couched in suitably non-technical language.'[61] Towards the end of his core minimum guidelines Lord Nicholls said in no uncertain terms that ILA 'is not a formality.'[62]

As can be seen from the preceding discussion, the steps solicitors must take to deliver ILA competently predominantly involve providing information on the practical and legal implications of the proposed transaction to the surety client. In Fehlberg's study prior to *Etridge,* she found that most solicitors interviewed thought ILA involved merely explaining the *legal effect* of the document, and that 'advice' was a misnomer.[63] On the point about providing advice (i.e., passing judgement), Lord Nicholls made clear that: 'If the solicitor considers the transaction is not in the wife's best interests, he will give reasoned advice to the wife to that effect.'[64] However, within his speech in *Etridge*, Lord Nicholls follows his statement about solicitors advising a wife against entering a transaction, with:

> But at the end of the day the decision on whether to proceed is the decision of the client, not the solicitor. A wife is not to be precluded from entering into a financially unwise transaction if, for her own reasons, she wishes to do so.[65]

Lord Nicholls also asserted that 'where it is glaringly obvious that the wife is being grievously wronged… the solicitor should decline to act further.'[66]

If the bank has performed their reasonable steps in requiring the surety to receive ILA and providing necessary information to the surety's solicitor, Lord Nicholls set out that any

[61] Ibid [66]
[62] Ibid
[63] Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law*, 171
[64] *Etridge* [61]
[65] Ibid
[66] Ibid [62]

deficiencies with the advice is then a matter between the solicitor and surety.[67] In this scenario, where the quality of the ILA is in dispute, the surety can raise a claim in professional negligence against the solicitor, not the bank.

3.4. *Literature on Etridge*

In this section I review the literature that has critically discussed the provisions that were set out in *Etridge* on how banks and solicitors should provide protections to sureties. This section will be divided into two parts. First, I will look at the scholarship that criticises the House of Lords for failing to adequately provide meaningful protection for sureties. Secondly, I will discuss literature which (instead) criticises the judgment for not providing enough commercial certainty for lenders, and for placing too much risk on to solicitors. It is perhaps worth noting at this point that some of the literature in the following sections comes from practitioner texts and journals and not just from more academic sources.

3.4.1. *Scholarship critical of Etridge*

Those commentators who criticise *Etridge* for failing to provide enough protection for sureties make arguments that principally fall within three main categories: i) that the steps required by lenders to avoid being fixed with constructive notice are not onerous enough and that the judgment weighs heavily in the favour of lenders; ii) that their Lordships in *Etridge* should have been critical of use of the family home as security for business lending in England and Wales; and iii) that their Lordships were wrong to make it legally permissible for the same solicitor acting for the debtor or lender to also act for the surety.

[67] Ibid [78]

i) The judgment favours commercial certainty

Auchmuty provides extensive feminist critique on the judicial responses to issues of undue influence and suretyship,[68] and writes forcefully about the House of Lords in *Etridge* oiling 'the wheels of capitalism' in several ways.[69] First, she labels the balance between protecting sureties and lenders a 'myth.' In her hypothetical/revised judgment of *Etridge* presented in *Feminist Judgments: From Theory to Practice*,[70] Auchmuty sets out that 'the law courts have been zealous to ensure that equity's role of protecting the weak and vulnerable is subordinate to the requirements of business.'[71] Moreover, Auchmuty argues that despite there being no evidence that legal rules requiring creditors to lend more responsibly discourages lending to small businesses,[72] the courts 'are excessively careful not to tread on lenders' toes.'[73] For instance, Auchmuty argues that the House of Lords did not go far enough in requiring banks to get in touch with sureties directly; that they could have gone further and required lenders to meet sureties face-to-face.[74] She observes that in not heightening the bank's responsibilities towards the surety, the House of Lords demonstrate that really there is no 'balance' and that they are actively reinforcing and reproducing capitalism and patriarchy; supporting the bank's position.[75] Other scholars also recognise that *Etridge* provides the most protection for lenders.[76] James Devenney and others, for example, criticised *Etridge* for failing

[68] Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases'; Rosemary Auchmuty, 'When Equality Is not Equity: Homosexual Inclusion in Undue Influence Law' (2003) 11 Feminist Legal Studies 163; Rosemary Auchmuty, 'Judgment: Royal Bank of Scotland Plc v Etridge (No 2).' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (1 edn, Hart Publishing 2010)
[69] Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' 270
[70] Auchmuty, 'Judgment: Royal Bank of Scotland Plc v Etridge (No 2).' 155
[71] Ibid 158
[72] Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' 269
[73] Auchmuty, 'Judgment: Royal Bank of Scotland Plc v Etridge (No 2).' 158
[74] Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' 270
[75] Ibid 271
[76] Joan Wadsley, 'Bank Lending and the Family Home: Prudence and Protection' (2003) 3 Lloyds Maritime and Commercial Law Quarterly 341, 349; Alison Diduck, 'Commentary on Royal Bank of Scotland plc v Etridge (No2)' in Rosemary; Hunter, Clare; McGlynn and Erika; Rackley (eds), *Feminist Judgments* (Hart Publishing 2010); James

to heighten the steps lenders must take to avoid being fixed with constructive notice. They state: 'Although more time is required to assess the impact of *Etridge*… the level of protection afforded to sureties in England and Wales seems much reduced.'[77] Debra Morris predicted that the *Etridge* guidelines will merely lead banks to 'amend their procedures,'[78] which will most likely include producing proforma documentation such as standard letters which can be sent to husbands, wives, and solicitors. We come back to the proceduralisation of ILA in Chapter 5. Morris also writes that the banks' protective procedures will most likely become 'formulaic', as a way to manage their own risk.[79] In other words, Morris predicts that lenders will care less about protecting surety clients and more about protecting themselves post-*Etridge*.

Auchmuty also criticises the House of Lords for ruling that in every case where the surety is in a non-commercial relationship with the debtor, the bank is put on inquiry.[80] She states:

> Non-commercial certainly covers all the situations in the case law – and a great many more besides. However, in choosing such a bland, cover-all description Lord Nicholls lost sight of (or deflected attention away from) the important features which most of these cases have in common: the fact that the vast majority of influencers are men,

P Devenney, Lorna Fox and Mel Kenny, 'Standing surety in England and Wales: the sphinx of procedural protection' (2008) Lloyd's Maritime and Commercial Law Quarterly 513, 535; Edwin C. Mujih, 'Over ten years after Royal Bank of Scotland Plc v Etridge (No.2): is the law on undue influence cases any clearer?' (2013) 24 International Company and Commercial Review 57, 67

[77] Devenney, Fox and Kenny, 'Standing surety in England and Wales: the sphinx of procedural protection', 534

[78] Debra Morris, 'Surety Wives in the House of Lords: Time for Solicitors to Get Real'?' (2003) 11 Feminist Legal Studies 57, 64

[79] Ibid

[80] Rosemary Auchmuty, 'The Rhetoric of Equality and the Problem of Heterosexuality' in Linda Mulcahy and Sally Wheeler (eds), *Feminist Perspectives on Contract Law* (Routledge-Cavendish 2005) 51

> that the victims are almost always women… The problem that lies at the heart of undue influence is the problem of male power.[81]

Auchmuty argues that in failing to address the problem of male power, the House of Lords have set out inadequate protections for women who provide security. For instance, in outlining ILA as the only form of protection, the courts have failed to recognise that power can easily dominate in this context too; between solicitor and surety.[82] We come back to this point later in the thesis. Auchmuty also asserts that ILA is deficient in providing protection because many judges and lawyers 'lack empathy for women.'[83] She argues that Lord Nicholls' guidelines are predominantly protecting the lender instead of the surety client, demonstrating the courts' reluctance to recognise the pain of women. By way of example, Auchmuty discusses how – in undue influence cases involving third party creditors - courts do not assess 'whether the woman's consent was not real,'[84] but rather, asks whether the bank knew it was not. Auchmuty writes:

> This kind of refocusing away from the actuality of the woman's suffering to whether men should bear the responsibility for it is very common in law. It is a reflection of legal men's primary concern for their own interests, born of centuries of masculine domination of law... Women's pain is less recognizable because it is so much a part of the very fabric of patriarchy.[85]

Auchmuty further argues that a solicitor's advice will make no difference to the woman's position in this context. She reiterates Fehlberg's arguments presented in 1997 - that women,

[81] Ibid 56-57
[82] Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' 273
[83] Ibid 274
[84] Ibid 275
[85] Ibid

'even if [solicitors] do their job properly… may still feel that they have no option but to consent to the mortgaging of their home.'[86] Ambreena Manji agrees with Auchmuty and writes that:

> Because of the way that unequal gender relations work in everyday life, woman may have all the facts in their possession but still find themselves unable to speak up against a decision even when they are fully aware of what is taking place. Here we see women's subordination working in the interests of both men and lenders.[87]

Morris suggests that to make a difference, solicitors need 'to 'get real' and provide some real advice in the wife's best interest, which may well be – don't do it.'[88]

ii) The family home should not be used as security for business loans

In her work in this area Auchmuty also questions why 'the family home must remain available for use as security for business loans.'[89] She argues that *Etridge* could have redressed the balance of risk between consumers and banks by requiring banks to do more due diligence before borrowing money to individuals: not allowing banks to rely so heavily on lending against the security of the family home.[90] Similarly, scholars such as Imtiaz Hafiz[91] and Morris[92] have argued that the family home should not be made available as security for business loans in England and Wales. In a similar vein, Joan Wadsley proposes that the start of the problem in undue influence cases is not the principal debtor applying the pressure on

[86] Ibid 278
[87] Ambreena Manji, 'Land Law' in Rosemary Auchmuty (ed), *Great Debates in Gender and Law* (Macmillan International Higher Education 2018) 56
[88] Morris, 'Surety Wives in the House of Lords: Time for Solicitors to Get Real'?' 68
[89] Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' 272
[90] Ibid 277
[91] Imtiaz B. Hafiz, 'Using Family Homes as Security for Business Lending in England and Wales: High Time for Change?' (2012) 9 International Corporate Rescue 310
[92] Morris, 'Surety Wives in the House of Lords: Time for Solicitors to Get Real'?' 66

the wife, but 'with the risky nature of the project'.[93] She argues that the banks have an overenthusiastic reliance on securing loans against the family home.[94] Wadsley therefore calls for banks to owe a duty of care towards borrowers. She argues that it should be down to the bank to duly investigate business plans and accounts and make reasoned decisions about whether to borrow based on the borrower's capability to pay back the loan - rather than rely on the family home as security: actions which she states are not too dissimilar to that of a pawnbroker.[95]

iii) It should not be permissible for the same solicitor to act for lender, debtor, and surety

Other scholars have been critical of that part of Lord Nicholls' guidelines which outline that the same solicitor acting for the principal debtor or lender can also provide ILA to the surety client.[96] John Phillips, for example, has been unconvinced with Lord Nicholls' reasoning that it should be permissible because the surety may be more comfortable with the family solicitor. He states:

> Do we willingly choose a medical practitioner who has a comforting 'bed side manner', even though there is a possibility that he or she is not the best person to make a correct diagnosis? Indeed, the solicitor's knowledge of the husband's 'history',

[93] Wadsley, 'Bank Lending and the Family Home: Prudence and Protection' 347
[94] Ibid
[95] Ibid 345
[96] Simone Wong, 'No man can serve two masters: Independent Legal Advice and Solicitor's Duty of Confidentiality' (1998) 62 Conveyancer and Property Lawyer 457; Devenney, Fox and Kenny, 'Standing surety in England and Wales: the sphinx of procedural protection' 535; Morris, 'Surety Wives in the House of Lords: Time for Solicitors to Get Real'?' 67; John Phillips, 'Setting Aside Guarantees: Another Approach' (2002) 2 Oxford University Commonwealth Law Journal 47

especially if it is littered with ill-considered business decisions, may make that solicitor the least suitable person to advise.[97]

Moreover, Phillips states that: 'It is simply unrealistic to expect that a solicitor acting for a number of parties with differing interests can give truly independent advice to all those parties.'[98]

3.4.2. *Scholarship critical of Etridge for not providing enough commercial certainty for lenders and placing too much risk on to solicitors*

i) Not enough commercial certainty for lenders

Phillips argues that the House of Lords' decision in *Etridge* - in determining that lenders will be put on inquiry in every case where the guarantors are non-commercial - is not sufficiently clear for lenders. He predicted (in 2002) that, in the future, 'lenders are likely to adopt procedures in respect of all guarantees, illegitimately increasing the burden upon lenders and the cost of borrowing.'[99] David Capper also suggests that *Etridge* has not done enough to provide banks with enough certainty:

> From the lenders point of view the conclusion reached by the House of Lords is unsatisfactory because… there is no guarantee of freedom from notice of wrongdoing where the lender is aware that the adviser lacked full independence or gave unsatisfactory advice. A better rule, maintaining a better balance between protecting sureties and protecting banks, would have been one which insisted on an adviser not

[97] Phillips, 'Setting Aside Guarantees: Another Approach', 57-58. My data suggests that this prediction was accurate (see Chapter 4 section 4.1.2.).
[98] Ibid 58
[99] Ibid 49

linked to any other party and where a certificate of explanation would have protected the bank in all cases. [100]

Capper also went on to predict that because of the uncertainty around independence, lenders will most likely 'insist on a fully independent solicitor anyway.'[101] He goes on to write that he does not believe this would 'unreasonably shift the risk to solicitors because they can refuse to act in cases where their independence is in question.'[102] Here, Capper is assuming that solicitors are able to identify when their independence is compromised. As we will come to see in Chapter 6 of this thesis, this is not always the case.

ii) Too much risk placed on solicitors

Some commentators post-*Etridge* have argued that the *Etridge* guidelines placed an excessive burden on solicitors,[103] and that ILA lawyers are more likely to be faced with professional negligence claims post-*Etridge*.[104] This has led to some observers predicting and advising solicitors on how to deal with this new perceived heightened level of risk. For instance, Morris had said that, because of the (then) new guidelines on how to deliver ILA, some solicitor firms would refuse to provide ILA. Of those firms that were still prepared to provide ILA, Morris predicted that they would at least heighten the fee attributed to the service.[105] Similarly, David Dabbs predicted that for 'a proper job' to be completed by a solicitor, individuals who

[100] David Capper, 'Banks, Borrowers, Sureties and Undue Influence-A Half Baked Solution to a Thoroughly Cooked Problem' (2002) 10 Restitution Law Review 100, 105-106
[101] Ibid 106
[102] Ibid
[103] Phillips, 'Setting Aside Guarantees: Another Approach' 63; Morris, 'Surety Wives in the House of Lords: Time for Solicitors to Get Real'?' 65; Alistair Sim, 'Risks in advising spouses - the Etridge effect' (2001) 46 The Journal of Law Society of Scotland 42
[104] Ibid
[105] Morris, 'Surety Wives in the House of Lords: Time for Solicitors to Get Real'?' 65

require ILA should expect to be charged higher solicitor fees.[106] He states that 'only the incompetent solicitor need review his professional indemnity cover.'[107] Alistair Sim also considers how solicitors should manage professional negligence risk in ILA post-*Etridge*. Interestingly, he states that:

> Each subsequent case will turn on its own facts – the risk management must be proportionate to the facts. *Etridge* does not provide a tick box checklist.[108]

He further stresses that solicitors must ensure that they have satisfactory paperwork completed to evidence that they provided ILA competently.[109]

3.5. *Cases Post-Etridge*

In this section, I will analyse some lower-court decisions post-*Etridge* where a party who provided suretyship has claimed that they were unduly influenced. In doing so, I will discuss how the lower courts are still trying to impose judgments flexibly according to the novel facts presented in individual cases. As will be shown, there have been cases where the procedures as laid out in *Etridge* have not been adequately followed by lenders and/or solicitors where a suretyship transaction was entered after October 2001.[110] Some cases post-*Etridge* have even widened the circumstances in which a lender will be said to be put on inquiry to potential wrongdoing. I turn to two interesting cases that do this, next. As set out above and in the previous chapter, it was important that I was familiar with the doctrine on undue influence

[106] David Dabbs, 'Banking on a proper job' (2003) 153 New Law Journal 831, 832
[107] Ibid 832
[108] Sim, 'Risks in advising spouses - the Etridge effect' 43
[109] Ibid
[110] This was the month that the House of Lords' judgment in *Etridge* was handed down – only transactions entered into after 31st October 2001 had to meet *Etridge* requirements.

both so that I could ask useful and appropriate interview questions and so that I presented as 'credible' to my interviewees.

3.5.1. *Cases concerning when a bank is 'put on inquiry'*

Achampong

Only nineteen months after *Etridge* a new situation was determined to place lenders on constructive notice of wrongdoing by the Court of Appeal in *First National Bank Plc v Achampong*.[111] Mrs Achampong claimed that her husband, as co-surety and not the principal debtor, had unduly influenced her to sign over her home in 1989 as security for a loan which was advanced to their cousin Mr Owusu-Ansah.[112] Both the primary broker and the bank failed to meet the debtors or co-sureties in person:[113] all communications between the bank, the principal debtor and the co-sureties were sent via post.[114] As a result of the bank sending a formal letter addressed to all three parties, Mr Achampong provided the name and address of Mr Pallis as their solicitor.[115] Mr Pallis duly completed the execution of the legal charge signed by Mr and Mrs Achampong.[116] The judge at first instance determined that the bank and their agents knew that the money was to be advanced to Mr Owusu-Ansah, and for that reason were put on inquiry.[117] Blackburne J upon appeal upheld the first instance decision despite the fact that the claim of undue influence was against a co-surety:

[111] [2003] EWCA Civ 487
[112] Ibid [1]
[113] Ibid [5]-[7]
[114] Ibid [6]-[7]
[115] Ibid [7]
[116] Ibid [8]
[117] Ibid [9]

> The fact, that, as it happened, the undue influence which the judge found to have existed came not from Mr Owusu-Ansah (in effect the debtor) but from Mr Achampong (as one of the co-guarantors) did nonetheless put the bank on inquiry.[118]

It was upheld by the Court of Appeal that the judge at first instance was right to determine that the involvement of the solicitor was not known by the bank to extend to instructions to give Mrs Achampong ILA.[119] Therefore the bank had failed to take reasonable steps to discharge constructive notice.[120]

Wong

In *Burbank Securities Ltd v Wong,*[121] it was held that a mortgage broker was put on inquiry to potential undue influence because of the surety's 'passivity and lack of understanding.'[122] This is despite the fact that the mortgage broker had been told that the relationship between the debtor and guarantor was commercial. As set out in Chapter 2, this case provided the factual basis for one of the vignettes I used in my interviews.

The surety concerned was Sue Wong who was born with cerebral palsy. A medical expert at trial said that as a consequence of her condition Sue had 'intellectual limitations.'[123] Sue also had a limited education and was unemployed. Sue did, however, have two children, worked as a volunteer at a hospital, and, with the help of a friend who worked for a building society, had managed to purchase her own home. The trial judge, Hodge J, inferred from evidence at trial that all Sue ever wanted in life was to have a nice home for herself and her children.

[118] Ibid [23] Blackburne J
[119] Ibid [42]
[120] Ibid [43]
[121] *Burbank Securities Ltd v Wong* [2008] EWHC 552 (Ch)
[122] Ibid [24]
[123] Ibid [9]

Hodge J also detailed that home ownership was made possible for Sue by using part of her state benefit and disability living allowance to pay off her mortgage in monthly instalments.

In 2004, Sue became romantically involved with Gary Aldridge. Gary was found by the trial judge to have unduly influenced Sue to secure her property for advancements of capital in excess of £100,000, principally for the benefits of his newly created business Aldridge, Wong & Co Import Export Ltd. In order to raise capital, Gary approached the mortgage broker Mr Harvey from the Mortgage and Loan Business (MLB). Gary took Sue along to the meeting with Mr Harvey in April 2005 and said that she was the director of the company, earning £24,000 a year.[124] Hodge J noted in his judgment that:

> Anyone who met her [Sue] and was told that Sue was a director of a company, earning £24,000 a year, would immediately ask himself how this could be the case; what contribution could she possibly be making to the company?[125]

The broker and subsequent lender made no checks about the validity of Gary's claims that Sue earned £24,000,[126] even though Mr Harvey accepted during evidence at trial that he was probably concerned about the proclamation that Sue earned £24,000 a year as a director. In his judgment, Hodge J noted Mr Harvey's words relating to his recollection of Sue's condition. Mr Harvey had said: 'You notice she was physically disabled. What are you supposed to do?'[127] It was determined by Hodge J that Mr Harvey in his evidence was purposely trying to

[124] Ibid [11]
[125] Ibid [11] It should, of course, go without saying that people with disabilities can be directors of companies and contribute to those companies. Here Hodge J was referring to the extent of Sue's disability and how she would likely be perceived.
[126] Ibid [13]
[127] Ibid [18]

understate his perception of Sue's disability, by stating that he had *only* noticed that she was *physically* disabled.

The point in this case is that no checks were made as to Sue's commercial involvement with the business, and Mr Harvey did not just have notice of Sue's physical disability but also of her 'passivity and lack of understanding.'[128] As no reasonable steps were taken by Mr Harvey as the bank's agent, Sue succeeded in having the charge against her home set aside.

Both the cases of *Achampong* and *Wong* serve as reminders to lenders that they must reflect on whether they have been put on inquiry to potential wrongdoing even where they are not aware of a non-commercial relationship between surety and debtor. I now turn to discuss cases that were decided post-*Etridge* which further highlight what a bank is required to do when put on inquiry. As will be shown, a solicitor's confirmation of independent legal advice is not always satisfactory.

3.5.2. *Cases concerning the measures a bank should take once 'put on inquiry'*

Amin

National Westminster Bank plc v Amin[129] reached the House of Lords shortly after its decision in *Etridge*. The court had to consider if the bank had done enough to discharge their constructive notice of wrongdoing. Ultimately, the House of Lords determined that the case should go to trial despite the fact that a solicitor had confirmed to the bank that they explained the transaction to Mrs Amin before she signed. It was determined by the court that Mrs Amin's son had unduly influenced her into providing her home as security for his business

[128] Ibid [24]
[129] [2002] UKHL 9; [2002] 1 FLR 735

debts and, as Mrs Amin was a non-English speaker, she was particularly vulnerable to undue influence.[130] It was further submitted by counsel for Mrs Amin that the bank was aware of the large Asian community within Birmingham - where the bank branch was based - and that whilst parents in that area would normally not be English speakers, their children normally would be.[131] It was therefore known to the bank that English speaking children within the Asian community in Birmingham were highly relied upon by their parents. Given this, the House of Lords held that this could be an exceptional case where more was required by the lender as per Lord Nicholls in *Etridge*.[132] It was also held that it was not unequivocally clear whether the solicitor was acting for Mrs Amin or the bank.[133] Therefore, the case had to go to trial to determine whether the bank had met the minimal requirements that were needed to discharge constructive notice of undue influence, in transactions which pre-dated the judgment of *Etridge*.[134] This cases demonstrates that banks have to think contextually and ensure that the surety is protected adequately. In cases going forward, where the surety's first language is not English, banks would be mindful to check that the surety has been independently advised in her first language.

Hewett

The case of *First Plus Financial Group v Hewett*[135] is concerning because despite Mrs Hewett remortgaging the family home in June 2002 - after the House of Lords handed down their judgment in *Etridge* – the lender failed to ensure the wife received ILA.[136] Mr Hewett was in

[130] Ibid [10] (Lord Scott)
[131] Ibid
[132] Ibid [24] (Lord Scott)
[133] Ibid [22] (Lord Scott)
[134] Ibid [24] (Lord Scott) There is no record of this re-trial and it is not known if this case was settled out of court.
[135] [2010] EWCA Civ 312
[136] Ibid [15]

the throes of an extra-marital relationship when Mrs Hewett entered a secured loan to pay off his mounting credit card debts. The Court of Appeal held that Mr Hewett's affair was a material fact which should have been disclosed by Mr Hewett to allow Mrs Hewett to make an informed choice. On this, Briggs J writes:

> The issue may be addressed by asking whether a solicitor, consulted by Mrs Hewett for advice about the wisdom of the transaction would have thought it relevant to know that her husband was, while asking for her unqualified trust, at the same time conducting a clandestine affair. There can in my view only be an affirmative answer to that question.[137]

As detailed above, Lord Nicholls in *Etridge* was insistent that it is neither the duty of the lender nor the solicitor to 'discover for themselves whether a wife's consent is being procured by the undue influence of her husband.'[138] Lord Nicholls further stated that 'wives would be understandably outraged by having to respond to the sort of questioning which would be appropriate before a responsible solicitor could give such a confirmation.'[139] However, after facts such as those in *Hewett*, I think an important question is raised: should a prudent lender and/or solicitor make inquiries into the health of the surety's relationship with the principal debtor to make sure the surety is adequately protected? That is, should the lender and/or solicitor ensure the surety has considered all factors that might impact her decision to enter into the agreement? As can be inferred from Briggs J's leading judgment, where a surety is being mistreated in their relationship - as Mrs Hewett was because she did not know about her husband's affair - this may have an impact on the surety's choice about whether to enter

[137] Ibid [35]
[138] *Etridge* [53]
[139] *Etridge* [53]

into such an onerous transaction. This case suggests that solicitors should/might be required to ask about the health of the surety client's relationship when providing ILA. Furthermore, if the lender is made aware that the principal debtor is having an affair, they must notify the surety client's solicitor. We come back to the contextual role of solicitors in providing ILA in Chapter 5.

Brown

In *HSBC Bank Plc v Brown,*[140] HSBC failed to satisfy the steps of contacting Mrs Brown directly and providing financial information to the nominated solicitor. Mrs Brown provided security in 2002 through a charge on her property 'Myddle Farm' as security for the debts of her son, Allen. Allen ran and occupied Myddle Farm with his family whilst Mrs Brown lived with her other son Graham at a separate address. In 2012, the bank sought possession of Myddle Farm after Allen failed to meet repayments. Mrs Brown defended the possession claim arguing that the charge was unenforceable on grounds of undue influence.

The case hinged on whether the bank could rely on a certificate of ILA provided by a solicitor named Mr Jones when the bank had not contacted Mrs Brown directly, after sending a letter to Myddle Farm and *not* her residential address. Whilst HSBC must have been provided with the name of Mr Jones it was implied that this information was likely provided by Allen. Even though Mr Jones negligently provided confirmation of ILA to HSBC the court held that because HSBC had not contacted Mrs Brown directly, or sent financial information to Mr Jones, they had failed to meet their required steps in ensuring Mrs Brown was adequately protected.

[140] [2015] EWHC 359 (Ch)

Hewett and *Brown* are concerning because the lenders in both these cases had failed to meet their obligations towards the surety client post-*Etridge*. However, noticeably both surety transactions in these cases were completed in 2002. This may just demonstrate that First Plus Financial Group and HSBC merely had 'teething problems' with rolling out their *Etridge* compliant procedures. That said, *Amin* and *Hewett* demonstrate that the lender may have to do more than just ensure the surety receives ILA where the surety is not a native speaker or where the principal debtor is having an extra-marital affair. In that regard, we see the shape of what is needed for sufficient ILA being pushed and altered (slightly) post-*Etridge*.

3.5.3. *The independence of the solicitor and the scope of the solicitor's role*

Chandra

In *Royal Bank of Scotland v Chandra*,[141] Mrs Chandra ultimately failed in her appeal to have the charge against her home set aside because of her husband's alleged undue influence and misrepresentation. The court had to consider whether her husband disclosing that a £700,000 loan would be enough to complete a hotel development project – when it turned out it was not - amounted to undue influence and misrepresentation.[142] The Court of Appeal dismissed Mrs Chandra's appeal because they determined that Mr Chandra gave an honest estimate at that time. However, despite this, it is worth considering the ILA that Mrs Chandra received in relation to her guarantee.

Mrs Chandra was advised by a solicitor, Mr Lopeman. Mr Lopeman had previously acted for both her and her husband and also acted for the company which was run solely by Mr

[141] [2011] EWCA Civ 192 (CA)

[142] In the first instance decision the case concerned two guarantor agreements. Mrs Chandra succeeded in one claim of undue influence at first instance but failed on the other. The Court of Appeal case was considering the claim which failed at first instance.

Chandra, although Mrs Chandra was a shareholder and co-director of that company on paper. There was no evidence to suggest that Mrs Chandra received ILA from Mr Lopeman alone without her husband also being present. Moreover, what is most striking about the facts relayed in the Court of Appeal judgment is that Mr Lopeman had said to Mrs Chandra during ILA that Mr Chandra 'has never let you down so far.'[143]

The ILA Mrs Chandra received with regards to the security transaction was not addressed as part of the failed appeal (likely because Mrs Chandra was not bringing an action against the solicitor). However, Mr Lopeman stating to Mrs Chandra that Mr Chandra 'has never let you down so far' raises questions about Mr Lopeman's incentives and whether he was principally concerned with Mrs Chandra's best interests when delivering ILA. It is arguable - interpreting the statement he made to Mrs Chandra - that Mr Lopeman's loyalty remained with Mr Chandra and his company, and that this ultimately may have affected his independence when providing ILA to Mrs Chandra. In line with Auchmuty's arguments (presented in section 3.4.1 above), I would argue that such statements are entrenched with heteronormative ideals that a wife should do as the husband requires. If other solicitors make similar statements during the course of ILA, sureties are potentially being pressured by heteronormative ideals in the solicitor's meeting room, *even if* the principal debtor is absent.

Davies

The case of *Davies v AIB Group (UK) Plc*[144] concerned a very complicated and 'intricate'[145] secured lending transaction, whereby Mrs Davies guaranteed her husband's lending. In

[143] Ibid [21]
[144] [2012] EWHC (Ch) 2178
[145] Ibid [38] (Norris J)

evidence, Mrs Davies claimed that her solicitor - Mr Downing - had failed to provide an adequate explanation of the transaction and that 'she could have done with better advice from a financial expert.'[146] By extension, she claimed that the lender, aware of the complicated nature of the transaction, failed to avoid constructive notice of undue influence. Norris J determined on the evidence that he thought Mrs Davies' claims were 'unfair on Mr Downing.'[147] He said Mr Downing was a 'conscientious man,'[148] and that he believed that 'he took care to put himself in a position to give effective advice.'[149] This raises legitimate questions (admittedly somewhat outside the scope of this thesis, although briefly discussed in Chapter 7) about whether solicitors are the best professionals to provide ILA – or whether accountants or financial advisors would be better suited to the role.

Padden

Padden v Bevan Ashford (A Firm)[150] is the only reported case post-Etridge where a surety has succeeded in a professional negligence claim against the solicitor that delivered ILA. The facts surrounding Mrs Padden's case against Bevan Ashford Solicitors are unique. Mr Padden was a financial advisor and in 2003, a client (Mrs Partridge) discovered that he had misappropriated £800,000 of her money. It also transpired that he had stolen money from other clients. Overall, he had stolen up to £2 million. However, Mrs Partridge agreed to a deal struck up by Mr Padden's solicitor Mr Lawson. She agreed that if Mr Padden reimbursed her £860,000 and covered her legal costs, she would not bring criminal proceedings against him.

[146] Ibid [44]
[147] Ibid
[148] Ibid [52] (Norris J)
[149] Ibid
[150] [2013] EWCA Civ 824 (CA)

The first Mrs Padden heard anything of her husband's criminality was when Mr Lawson randomly visited her at her home. Mr Lawson outlined that if Mrs Padden agreed to the sale of the family home and other assets, the proceeds could be paid to Mrs Partridge and Mrs Padden's husband could avoid prison. Mrs Padden agreed to help her husband 'for the sake of the children.'[151] Mr Lawson told her that she must go and see a solicitor and ignore any advice she was given not to sign over the rights in the family home if she wished to keep her husband out of jail. She was not told by Mr Lawson that, in paying back Mr Padden's client, Mr Padden only had a *chance* of avoiding criminal prosecution. That is, Mrs Padden believed that in securing the family home her husband would escape criminal proceedings all together.

Mrs Padden did as Mr Lawson instructed and turned up at the Tiverton branch of Bevan Ashford Solicitors without an appointment. Ms Shiner – a young and newly qualified solicitor - agreed to see her. After Mrs Padden informed Ms Shiner of the circumstances surrounding her husband's criminality, detailing how she had been told that the only way to keep him out of prison was to sell her home and other assets, Ms Shiner advised the claimant not to sign the documents. In the end Mrs Padden asked Ms Shiner to write a letter to Mr Lawson to confirm that she received ILA and that she wanted to proceed. Ms Shiner complied with her request. Mrs Padden did not pay for Ms Shiner's services as the firm offered 30 minutes free legal advice to new customers. Later the same month Mrs Padden revisited the same branch of Bevan Ashford Solicitors and her signature was witnessed by a solicitor, Mr MacKay. The sale was executed, and Mrs Partridge was remunerated. However, Mr Padden was still criminally prosecuted and subsequently imprisoned for his crimes.

[151] Ibid [10] (McCombe LJ)

The Court of Appeal overruled the first instance decision that, because the services provided by Ms Shiner were free, the firm did not owe a duty of care to Mrs Padden. They further determined that if Ms Shiner had advised Mrs Padden that selling her home and other assets would not necessarily mean that her husband would not face criminal charges, Ms Shiner would have met her duty to Mrs Padden. The Court of Appeal remitted the case back to trial. At re-trial, Norris J believed Mrs Padden's account that she would not have proceeded if she had been informed that signing over the rights in her home and other assets did not mean that her husband would definitely avoid imprisonment. The Court of Appeal upheld Norris J's decision.

The decision in *Padden* indicates that a full explanation of the risks involved in entering a financially disadvantageous transaction for the benefit of another must be disclosed to a client by their solicitor. Perhaps unsurprisingly, *Padden* sparked a lot of discussion and case analysis by those in the solicitor's profession.[152] Commentators - often solicitors themselves – writing for the *Solicitor's Journal* or other periodicals typically read by solicitors, made remarks such as that solicitors need to 'tread carefully'[153] when providing ILA. Francesca Kaye and Ricky Cellar - both solicitors – wrote in 2017:

[152] Rupert Allen, 'Free independent legal advice: the scope of the duty to advise' (2012) Professional Negligence 141; Allyson Colby, 'Walking the duty of care tightrope' (2012) Estates Gazette 83; Unspecified author, 'Bevan Ashford can be sued by wife of fraudster' (2012) Solicitors Journal 2; Janet Armstrong-Fox, 'Residential property update' (2012) Solicitors Journal 23; Unspecified author, 'Equity: undue influence' (2012) Property Law Bulletin (S&M) 76; Ruth Craig, '"Don't" is not enough' (2012) Northern Ireland Conveyancing and Land Law Journal 13; David Turner and Italo Cerullo, 'Retainers with professionals' (2012) Corporate Briefing 9; Katie Papworth and Sophie Davies, 'Professional negligence update' (2012) Solicitors Journal 23; Rachel Rothwell, 'Free advice "negligence" case for retrial' (2012) Law Society's Gazette 6; Sarah Witchell, 'A solicitor's duty of care' (2012) Writ 4; Julian Bremner, 'A cautionary tale' (2014) Family Law Journal 18; Julian Bremner, 'Tread Carefully' (2015) 143 Family Law Journal 22; Alison Padfield and Sophie Belgrove, 'Unbundling unshackled?' (2016) New Law Journal 18; Francesca Kaye and Ricky Cella, 'Limited appeal of limited retainers' (2017) 161 Solicitors Journal 29; Unspecified author, 'Equity: undue influence' (2012) Property Law Bulletin (S&M) (S&M) 7

[153] Bremner, 'Tread Carefully' 22

> Solicitors should approach limited retainers [such as ILA] with caution. Even if care is taken to construct clear limits to a retainer, these limits may not withstand intense judicial scrutiny, particularly if the client has suffered loss and the solicitor is seen as the party with deepest pockets.[154]

It seems that *Padden* has done more to heighten ILA solicitors' risk perceptions. It raises the question: is there a chance that solicitors who deliver ILA, because of the judgments of *Etridge* and *Padden*, will be more concerned with their risk in advising the client, as opposed to the client's risk if the client enters into the proposed agreement? This question will be addressed directly in Chapter 6.

3.6. *Conclusion*

In this chapter I have outlined the modern developments in the law of undue influence pertaining to the protections lenders and solicitors must implement in order help protect sureties from entering security transactions under the principal debtor's undue influence or misrepresentation. I have also reviewed the overwhelmingly doctrinal commentary on *Etridge,* and the case law reported post-*Etridge*. The case law and literature review exercise undertaken has (as set out above and in the previous chapter) given me a level of expertise that was useful for the interviews I conducted (in terms of my relationships with ILA solicitors) and helped me to frame and focus my interview schedule (to ask useful and appropriate questions to explore the research question I set myself).

Whilst post-*Etridge* case law provides some insight into how lenders and solicitors conduct themselves post-*Etridge*, I have demonstrated that case law raises more questions than it

[154] Kaye and Cella, 'Limited appeal of limited retainers' 29

answers. For instance: Are solicitors asking about the health of the surety client's and principal debtor's relationship? Are solicitors considering the surety client's best interests above all else when delivering ILA? Are solicitors feeling at risk of professional negligence claims and how is this affecting their delivery of ILA? My empirical research presented over the next four chapters provides further insight into the workings of ILA in practice and goes to some way to answer these lingering questions (and others). In the next chapter I will draw on my interview data to look at whether interviewees who have experience providing ILA to surety clients adhere to the *Etridge* guidelines.

Chapter 4

ILA after *Etridge*: Complacency over Compliance

In the previous chapter, I examined the House of Lords' guidelines in *Etridge* which outlined how ILA should be delivered by solicitors to surety clients. In this chapter, drawing on the interview data I collected from 28 solicitors across England and Wales, I shall explore when and how ILA is delivered in practice. As Chapter 3 outlined, the House of Lords in *Etridge* clarified the following legal rules on ILA: (i) when a lender will be put on inquiry; (ii) what measures a bank must implement once put on inquiry; and (iii) what advice ILA solicitors must provide. This chapter is presented in line with each of these items. In each section, I will draw on my data to demonstrate what I learnt about the workings of ILA in practice as compared with the legal guidelines in *Etridge*. In the final section of this chapter, I will present findings from those interviewees who have defended possession proceedings, and/or enforced possession proceedings for lender clients. I asked these interviewees about the defences they have advanced, or the defences they witnessed being advanced for sureties post-*Etridge.* I also asked if any of these defences have been successful. This provided one form of insight into the extent to which ILA was successful in protecting lenders' interests.

In what follows, I will make some initial observations about why there may be a 'gap' between the legal rules as specified in *Etridge* and ILA in practice. However, for the most part, this chapter provides a very descriptive overview of my empirical data. I will not draw substantively on theory or other literature to help explain why there is difference between what Lord Nicholls expected to happen and what is happening in practice. These are intentional choices. This chapter has been designed as a simple, framing, preparatory chapter

for the chapters that follow which take aspects of what is set out below and explore them in greater depth. Think of this as a holistic summary of *Etridge* in practice – a 30,000-foot view - which sets up the reader for the more substantive discussions of Chapters 5 and 6. Put another way, this chapter is a short 'what is going on' chapter; those that follow engage with 'why are these things interesting?' and 'so what?' questions.

4.1. *When a lender will be 'put on inquiry'*

4.1.1. *Common law requirements*

Lord Nicholls provided that the test outlining when a lender will be put on inquiry should be 'simple and clear and easy to apply in a wide range of circumstances.'[1] He went on to state that '...the only practical way forward is to regard banks as "put on inquiry" in every case where the relationship between the surety and the debtor is non-commercial.'[2] The Court of Appeal then extended this rule further post-*Etridge* in *First National Bank Plc v Achampong*,[3] holding that a lender is also put on inquiry where there is a non-commercial relationship between co-sureties. The test was also extended in *Burbank Securities Ltd v Wong*.[4] Despite the bank's agents in *Wong* only having knowledge of the commercial relationship between debtor and surety, it was held that the mortgage broker was put on notice of the risk of wrongdoing/undue influence due to the obviousness of Mrs Wong's 'passivity and lack of understanding.'[5] Therefore, post-*Etridge*, lenders and their agents must be vigilant; they cannot be wilfully ignorant to situations that are suspicious. In such situations, where lenders or their agents should have taken reasonable steps to satisfy themselves that the surety's or

[1] *Royal Bank of Scotland v Etridge* [2001] UKHL 44, [2002] 2 AC 773 [46]
[2] Ibid [87] (Lord Nicholls)
[3] [2003] EWCA Civ 487
[4] [2008] EWHC 552 (Ch)
[5] Ibid [24] (Hodge J)

co-surety's 'agreement to stand surety had been properly obtained',[6] they cannot assert that they only had knowledge of a commercial relationship between the surety and the principal debtor. Therefore, post-*Etridge* case-law developments demonstrate that lenders must consider each secured lending transaction on its own facts to decide whether ILA is required.

4.1.2. *In practice: ILA for all*

I asked all 22 interviewees who have experience delivering ILA about the types of surety clients they have encountered. Admittedly, I asked this question because I wanted to know if the surety role, in their experience, was predominantly gendered and usually provided within heterosexual relationships (as reported case law has tended to suggest).[7] Instead, interviewees' answers exposed something else that I had not considered: that the distinction between non-commercial and commercial guarantors – where only sureties in a non-commercial relationship with the principal debtor are *required* by the common law to receive ILA – did not exist in practice. Here, 20 out of 22 interviewees disclosed that they have delivered ILA to a commercial guarantor who was providing security for their own business, i.e., where the guarantor was clearly commercially involved and commercially benefiting from the lending.[8]

It was not clear to me why solicitors would be giving ILA to both surety clients and commercial guarantors and so I explored this further. Of the 14 interviewees with whom I explored this issue in more depth, all 14 told me that ILA was being delivered to every type of guarantor

[6] *Etridge* [38] (Lord Nicholls)

[7] For an overview of this case law, and a discussion of the gendered aspects of suretyship see: Rosemary Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' (2002) 11 Social & Legal Studies 257

[8] P2, P7, P8, P10, P11, P12, P13, P14, P15, P16, P17, P18, P19, P21, P22, P23, P24, P25, P27, P28

(commercial and non-commercial) because lenders required it as a precondition of lending.[9] Five of the 14 had not worked for lenders in arranging secured lending transactions. I asked these five interviewees why they thought banks were requiring ILA to be delivered to all guarantors.[10] As they had not worked for lenders, their answers were merely speculative. Each of the five, however, suggested that banks required ILA in every case out of concern for their own position. That is, banks were covering themselves; if they had to enforce the guarantee, the commercial guarantor who received ILA would not be able to claim undue influence or misrepresentation. P23 told me that he thought banks have become 'once bitten twice shy', and P25 commented that his perception was that banks were 'very risk averse now [post-*Etridge*].' The other nine interviewees I asked - who *did* have experience working for lenders in either arranging or enforcing security - also suggested that banks required ILA to be provided to all guarantors as a form of self-protection. P7 said it was easier for lenders to have a 'default' requirement that ILA be delivered in every instance, so that banks were not responsible for forming a judgement on when ILA is in fact legally required. Likewise, P11 said that this position on ILA was a 'fail-safe'; P20 calling it a 'belt and braces' provision. In addition, P21 commented:

> [I]n the years following the *RBS* [*Etridge*] judgment, banks have put into place a clear and strict policy and procedure as to how guarantees are taken, both from directors, shareholders and those people that are not connected to the day-to-day running of the business.

[9] P7, P8, P11, P12, P13, P14, P15, P20, P21, P22, P23, P25, P27, P28. This response by lenders was predicted by John Phillip's in his 2002 article which was reviewed in the previous chapter (in section 3.4.2.): John Phillips, 'Setting Aside Guarantees: Another Approach' (2002) 2 Oxford University Commonwealth Law Journal 47, 49

[10] P12, P23, P25, P27, P28

This ‘blanket’ approach to ILA means that lenders cannot later be caught out for failing to ensure that a guarantor received ILA - such as in the post-*Etridge* cases of *Achampong* and *Wong*. Rather than making contextual decisions about whether the guarantor requires ILA, banks have taken the view that their position is improved by making every guarantor receive ILA.

My data suggests that the solicitors who act for lenders in arranging secured lending transactions could have been the driving force behind lenders’ default ‘ILA for all’ position. Consider the following three insights:

> I’d prefer a director to be separately advised, separately represented… it’s better to make sure that everybody who could possibly need it [ILA] is given it. [P13]

> It is essential… there should always be independent legal advice. Any client that lends money should seek independent legal advice for a guarantor... If they are lending to a business and taking a charge over a property which is jointly owned, then the director personally is acting as a guarantor his wife could be acting as a guarantor. So, in an ideal world you’d want her to be separately advised as well. [P14]

> …if I was advising the bank, I would want both corporates and individuals to have independent legal advice. [P15]

P21 also discussed how, when she was working for lenders enforcing guarantees for lender clients, she had known guarantors who were directors or shareholders involved in the day-to-day running of businesses to defend possession proceedings/debt claims on the grounds of misrepresentation. Therefore, P21 thought it was reasonable for banks to respond by requiring all guarantors to receive ILA. This finding – that commercial clients often challenge

the legality of their guarantee - was corroborated by nine out of eleven interviewees who had experience defending possession proceedings for commercial guarantors. These nine interviewees spoke about how they have advanced misrepresentation arguments in the past for sophisticated business clients where the lender is trying to enforce their guarantee.[11] P1, P2, P17 and P19 talked about how such arguments were unlikely to succeed in court, but that they have known lenders to renegotiate the terms of repayment to avoid cases going to court. P19 even admitted that claiming misrepresentation is 'a smoke screen, a smoke game', all in aid of trying to get the lender to reduce the amount to be repaid by his commercial clients.

It is clear to see how requiring ILA in every instance is the most effective risk management tool for lenders; and risk management is an important recurring theme for this thesis and discussed further in Chapter 6. However, Lord Nicholls clearly outlined that ILA *only* had to be delivered to guarantors in a tripartite scenario - where the surety is securing the debts of another with whom they are in a non-commercial relationship.[12] In Chapter 5, I discuss in more detail how the 'ILA for all approach' may be affecting the way in which interviewees deliver ILA. I argue that the consequences of 'ILA for all' can mean that ILA is treated as a mere formality in every case; even where the ILA is being delivered to a non-commercial surety client. This is, of course, concerning. What the preceding paragraphs show, I would suggest, is that lenders and their solicitors are helping set the parameters of legal behaviour post-*Etridge* with no consideration given to how a practice of 'ILA for all' may impact on how ILA is delivered to non-commercial guarantors by solicitors.

[11] P1, P2, P6, P8, P10, P14, P17, P19, P23
[12] *Etridge* [53]

4.1.3. *Non-commercial guarantors are mainly wives*

All of my interviewees had provided ILA to wives who were securing their husband's lending (for business purposes or otherwise).[13] In Table 4.1 below, I outline what other relationships interviewees' surety clients have had with the principal debtor in separate cases.

Table 4.1: Types of relationships between non-commercial guarantors and principal debtors

Types of relationships between a non-comm. surety and principal debtor	**How many interviewees had experience in delivering ILA to this type of non-comm. surety**	**Identifiers of those interviewees who stated they have delivered ILA to this type of non-commercial surety**
Wife for husband's lending	22/22	P2, P4, P5, P7, P8, P10, P11, P12, P13, P14, P15, P16, P17, P18, P19, P21, P22, P23, P24, P25, P27, P28
Husband for wife's lending	3/22	P4, P5, P16
Wives/husbands or partner/partner joint lending	4/22	P10, P12, P13, P27
Parents for child's or childrens' lending	11/22	P5, P7, P8, P15, P16, P17, P18, P21, P23, P25, P27
Child(ren) for a parent's or parents' lending	1/22	P27
Friend for a friend's lending	1/22	P14
Sibling for a sibling's lending	1/22	P22

[13] Whilst the majority discussed wives providing security for their husband's business, P28 gave an account of advising a wife and husband where the wife provided security for her husband to purchase an expensive car.

As is shown in Table 4.1, the wife providing security for their husband was the most frequent situation referred to by interviewees. However, three interviewees – P4, P5 and P16 – did also mention advising a husband about securing lending for their wife, and 18 interviewees discussed delivering ILA to non-commercial guarantors who were not married to the principal debtor. For instance, 11 interviewees talked about providing advice to parents who secured lending for their children.[14] It is also worth mentioning that not one interviewee discussed providing ILA to a surety who was in a same-sex relationship with the principal debtor.[15]

The vast majority of interviewees (21 of 22) provided ILA to surety clients who were wives proposing to remortgage the family home so that lending could be advanced to their husbands:[16]

> The textbook case, certainly, three quarters of the time, would be the wife supporting the business of the husband. [P4]

> I've seen a husband guaranteeing a wife's business, or parents guaranteeing childrens' businesses. I would say probably 50% are wives guaranteeing husbands' businesses, and the other 50 could be a mishmash of all sorts. [P5]

[14] 19 out of 22 interviewees stated that typically surety clients remortgaged the family home to provide security P2, P4, P5, P7, P10, P11, P12, P13, P14, P15, P17, P18, P19, P22, P23, P24, P25, P27, P28. Three of these 19 interviewees also discussed instances where non-commercial surety clients have remortgaged holiday homes – P14, P15 and P24.

[15] On secured lending between surety and principal debtor in a homosexual relationship, see: Rosemary Auchmuty, 'When equality is not equity: Homosexual inclusion in undue influence law' (2003) 11 Feminist Legal Studies 163

[16] P4, P5, P7, P8, P10, P12, P13, P14, P15, P17, P18, P21, P22, P23, P24, P25, P27

> A few in business situations [where the wife is involved in the business], but most of them where a husband is trying to borrow on his business and his wife has to sign. [P12]

P16 was the only interviewee who said he usually advised parents about securing the lending of their children. However, despite telling me that his surety clients were not usually wives, when explaining what usually happened during an ILA meeting with a surety client, P16 went on to say that: 'Normally, if she comes in [to the meeting room] … I'm not sexist; we always use the example of the husband and the wife signing the guarantee for the husband's business.' A further eight interviewees also referred to 'wives' and 'husbands' as a type of shorthand for 'surety client' and 'principal debtor'.[17]

So as not to influence interviewees, I was careful to use the terminology of 'potential surety' and 'principal debtor' in my questions. In one instance where I used this terminology, P5 interrupted me halfway through a question to say: 'Really, if we use the language of wife and husband it's easiest...' It is unclear, in this instance, if P5 used the shorthand 'wife and husband' for 'surety and debtor' because this was the usual scenario, or if the gendered terminology had become commonplace when discussing surety cases. P19 was clearer when he said: 'Let's call it 'wife and husband', because that is the way it usually happens.' This is important because it provides insight into the characteristics of surety clients (which may be useful for further studies where I or others need to identify surety clients). It is also important because it demonstrates that despite interviewees saying that they delivered ILA to commercial guarantors, they *all* had experience delivering ILA to non-commercial surety

[17] P2, P5, P7, P10, P11, P18, P19, P24

clients. This is relevant when I discuss in Chapter 5 whether my data suggests that the delivery of ILA differs when advising surety clients as opposed to commercial guarantors.

4.2. *Lenders' steps when 'put on inquiry'*

4.2.1. *Common law requirements*

Lord Nicholls outlines that when a lender has identified that ILA is required, the lender must directly contact the surety and ask them for the name of their nominated ILA solicitor.[18] It was further stated by Lord Nicholls that the nominated solicitor could also be acting for the principal debtor (i.e., the husband), and that this was permissible as the wife may be more comfortable being advised by a family solicitor.[19] Once the lender has the solicitor's details, the lender must send the following financial information to the solicitor: the principal debtor's current indebtedness; if applicable, the amount of the principal debtor's current overdraft; and the terms of the proposed new facility. [20] Lord Nicholls also stated that lenders may be required - in certain situations - to provide further financial and non-financial information to the surety's nominated solicitor,[21] thus emphasizing that the surety's nominated solicitor must have all the important information from the lender to make sure they provide meaningful and contextual advice.

4.2.2. *In practice: the surety does not typically nominate their solicitor*

I asked all 22 interviewees who had experience delivering ILA how surety clients typically came to choose them as their ILA solicitor. I soon discovered that surety clients were often referred to interviewees directly from the lender, or from the lender's solicitor arranging the

[18] *Etridge* [79]
[19] Ibid [74]
[20] Ibid [79]
[21] Ibid

secured lending, or from the principal debtor's solicitor. 14 out of the 22 interviewees who had experience in delivering ILA thought that they had procured some work from surety clients who had chosen their services completely independently from a third-party referral.[22] However, a further 19 out of the 22 interviewees detailed that some surety clients had been referred to them for ILA by third parties. Overall: (i) seven interviewees detailed how they had experience of surety clients being directly referred to them from lenders;[23] (ii) ten interviewees discussed how solicitors from other law firms, external accountancy firms or insolvency practitioners (who were either working for the lender or for the principal debtor) referred surety clients their way;[24] and, (iii) eight interviewees talked about being referred ILA work from other solicitors within their own law firm who may be working for the principal debtor or the lender.[25] Only three interviewees told me that surety clients *always* chose them to deliver their ILA independent of a third-party referral.[26] Interviewees often mentioned that the referral involved direct contact with the introducer - rather than just the introducer passing on their details to the surety client. This is clearly at odds with Lord Nicholls' guidelines in *Etridge*. It is worrying that sureties are not nominating their own solicitor because the solicitor delivering ILA may be impacted by their alignment with those partiers referring the surety client. The impact of referrals on ILA solicitors' loyalty and independence will be discussed more in Chapter 6.

[22] P2, P4, P5, P8, P10, P11, P12, P13, P14, P15, P17, P18, P19, P21, P22, P23, P24, P25, P27
[23] P4, P5, P10, P19, P21, P25, P27
[24] P5, P11, P12, P14, P15, P17, P19, P22, P24, P27
[25] P2, P8, P13, P18, P21, P23, P25, P27
[26] P7, P16, P28

4.2.3. *Lenders' heightened requirements on independence*

As briefly outlined above, and discussed in more detail in Chapter 3,[27] Lord Nicholls stated that the solicitor advising the wife can be the same solicitor acting for the husband in instances where the wife would prefer to be advised by their family solicitor.[28] In addition, it was held that the same solicitor acting for the lender can also advise the surety.[29] Lord Nicholls stated that in every instance where a solicitor acted for a surety client providing ILA, 'the solicitor must consider carefully whether there is any conflict of duty or interest, or more widely, whether it would be in the best interests of the wife for him to accept instructions from her.'[30] Despite this permission from Lord Nicholls, my interview data makes clear that lenders now require *separate* solicitors to advise all three parties involved in the transaction (the lender, the principal debtor, and the surety).[31] Nine out of 22 interviewees told me that – despite Lord Nicholls' guidelines to the contrary – lenders *did not allow* the same solicitor working for the lender or principal debtor to provide ILA to the surety.[32] Collectively, all nine said that lenders did this for their own protection because they did not want sureties to later argue that their solicitor had not been sufficiently independent and that the lender had notice of their solicitor's lack of independence. Those nine interviewees also discussed how some lenders would not allow a colleague from the same firm that was acting for the principal debtor to provide ILA to the surety:

[27] Chapter 3 section 3.3.3.
[28] *Etridge* [69]-[74]
[29] Ibid [73]
[30] Ibid [74] (Lord Nicholls)
[31] This was predicted by David Capper, 'Banks, Borrowers, Sureties and Undue Influence-A Half Baked Solution to a Thoroughly Cooked Problem' (2002) 10 Restitution Law Review 100, 106 previously discussed in section 3.4.2. in Chapter 3.
[32] P11, P13, P14, P17, P18, P19, P21, P25, P27

> [When I have worked for the principal debtor on a secured lending transaction] what I do is I say to… [the lender], "What are your requirements?" because I know at the most it could be that they [the principal debtor] has to get another law firm to act for the guarantor. I will say, "Or are you happy that another colleague of mine within this firm will do it?" And they might say "Yeah, that's okay." So, as long as I've done what they've asked me to do, fine, but sometimes they might say, "No I want a different law firm to do it," so I'm really in the hands of the banks. [P17]

Of the 13 remaining interviewees, 11 did not say that they were aware of lenders having these heightened requirements of independence during their interviews. The remaining two - P7 and P12 - detailed opposite experiences. They both told me that the surety could pick any solicitor they wanted, and the lender had no control over the surety's solicitor selection. A further four interviewees – P2, P4, P5 and P16 – made clear that they would never work for the lender arranging the security transaction and then also provide advice to the debtor or guarantor. Three of these four interviewees (P4, P5 and P16) had experiences arranging secured lending transactions for lenders but did not say that they made this decision not to advise more than one party involved in the transaction because of what lenders required. Instead, they discussed how they would make this decision because they would be concerned about a potential conflict of interest. We come back to conflicts, and this mixed picture, in depth in Chapter 6.

The impact of some lenders' heightened requirements on independence ultimately means that the surety's choice of solicitor is reduced. A surety's choice is limited because the surety is not allowed to be advised by the same solicitor acting for the principal debtor, even if, as Lord Nicholls put it, the surety would 'be happier to be advised by a family solicitor known to

her than a complete stranger.'[33] The practices outlined above are concerning. It is hypocritical of lenders to take the position that every party involved in the secured lending transaction should be advised by a separate solicitor when they are the ones referring surety clients to known solicitors. Because of these (until now, hidden) referral practices, the solicitor acting for the surety may struggle to assert their professional independence if they have ongoing connections with the lender introducer (i.e. if the lender often or routinely sends surety clients their way). It would be worrying if solicitors accept without further reflection that they must be providing independent advice simply because they are not directly working for the lender in the same transaction; when in fact, they are receiving other work and ILA referrals from the lender involved. We come back to important this issue in Chapter 6.

4.2.4. *Lenders' instructions*

In the previous chapter, I discussed the unusual circumstances that give rise to the solicitor's ILA retainer. Whilst Lord Nicholls admitted that the retainer is a result of the bank's desire to certify that the surety has received ILA - so that they are suitably protected in the event that they have to call upon the security - Lord Nicholls dismissed arguments that the solicitor is therefore an agent of the bank.[34] Lord Nicholls was very clear that the surety is the ILA solicitor's client and that the lender 'does not have, and is not intended to have, any knowledge or control over the advice the solicitor gives the wife.'[35]

Despite this, my data shows that lenders do try to control how ILA is delivered by the solicitor to the surety client. 17 out of 22 interviewees talked about lenders sending guidelines or

[33] *Etridge* [73] (Lord Nicholls)
[34] Ibid [77]
[35] Ibid

checklists to them before their ILA meeting with the surety client. These 17 interviewees spoke of how these guidelines detail what should be discussed during an ILA meeting with a surety client.[36] Here P23 answers my question on what information a lender typically sends before an ILA meeting:

> Well at the moment [in preparation for an upcoming ILA meeting] I have got to download some letter from some portal which will have a document for them to sign and it will have a checklist of the issues they would like the client to be advised on…

It is even more troubling (for surety clients and in terms of professional obligations) that seven interviewees referred to these guidelines/checklists as 'instructions' on how to deliver ILA to the surety client.[37] P7, for example, told me that lenders send a certificate that he must sign, and which must be signed by the surety once ILA is delivered. He suggested to me that these certificates included instructions, going on to say that: '[the bank] sets out much more clearly what the bank thinks should be explained to the individual, instead of relying on the solicitor's judgement.' P10 also commented that 'the banks will quite often send you exactly what they want you to say to her'; with P28 saying that lenders 'send their own instructions with the 'dos and don'ts' of what you have to say to the [surety] client.'

Whilst Lord Nicholls outlined that lenders must provide financial and non-financial information to the surety's solicitor, he did not say that lenders should send 'checklists', 'guidelines' or 'instructions' to solicitors outlining how they should deliver ILA. This practice of lenders (or lenders' solicitors) sending what amounts to instructions to surety clients' ILA

[36] P2, P4, P5, P6, P7, P8, P11, P12, P17, P18, P19, P21, P22, P23, P24, P25, P27, P28 (Not P14 and I did not ask P10, P15 and P13)
[37] P7, P8, P10, P16, P17, P24, P28

solicitors has clearly been normalised post-*Etridge*. In discussing arranging secured lending transactions for their lender clients, P4, P5, P11 and P16 spoke of how they have written and sent 'checklists' and 'strict guides' to a surety's solicitor. P4 put it this way:

> I went to [A high street bank's head-quarters] with their senior [in-house legal] team to help them redesign various processes, including *Etridge*. So, I put in place a checklist that goes to the lawyers, so that it's almost a bit of an idiot's guide… because we're [ILA solicitors] often under extreme time pressure with everything else we've got on our desks and it's easier to run downstairs and have a half hour meeting and not think about it ever again. So, I just give them a process to go through.

This idea that ILA is just 'a process to go through' because lenders send checklists to be completed is naturally concerning. My data suggests that some lenders have not only changed the parameters around when ILA is required, and which solicitors can deliver ILA to surety clients, but that they are also are trying to control how ILA is delivered by solicitors as well. This matter is also explored further in Chapter 6.

4.2.5. *Financial Information*

To investigate whether banks are providing the financial information that is required to be sent to the surety client's ILA solicitor as set out in *Etridge*, I asked 18 out of 22 interviewees what information they typically received from the lender.[38] Only four interviewees disclosed that, in every instance where they have delivered ILA, lenders have *always* sent the required financial information outlined in *Etridge*.[39] P4 told me that lenders sent comprehensive

[38] I failed to ask P10, P13, P16, P21 directly about what information they receive from the lender.
[39] P4, P5, P7 and P12

financial information including an outline of the health of the principal debtor's business and its current indebtedness. On the other hand, a further four interviewees - P15, P18, P24 and P25 - suggested that they only *sometimes* received required financial information. For example, P18 outlined that, in the past, he has 'sometimes' received the necessary financial information from lenders as required in *Etridge*, and that it can 'depend on who the lender is.' P18 suggested that well-known high street lenders always sent the required information including the principal debtor's current indebtedness, whereas smaller and less well-known lenders were less consistent.

The remaining ten interviewees failed to mention that they received information from the lender that detailed the principal debtor's current indebtedness.[40] Whilst this may reveal that lenders are not providing this information, equally, interviewees may have just struggled to recall what information lenders send/are required to send. As discussed in Chapter 2, most interviewees involved in this project delivered ILA only occasionally. [41] Therefore, recalling exactly what information is received from the lender may have been difficult.[42] P11 for example commented on this issue as follows: 'There's a couple of other documents as well, which we always get, which I'm struggling to remember now.' This begs the question: what does it mean to deliver ILA competently when it is a piece of legal work that takes place, for almost all solicitors, so infrequently?

To further investigate, I directly asked eight of these ten interviewees if they received information from the lender which outlined the principal debtor's current indebtedness

[40] P2, P8, P11, P14, P17, P19, P22, P23, P27, P28
[41] See sections 2.4.4. and 2.6.
[42] I also discuss issues with recall bias in interviews in Chapter 2 section 2.4.1.

before providing ILA to a surety client. All eight answered that they *did not* receive such information.[43]

> Yep - now, that's a really interesting point. I don't remember receiving anything about the status of the businesses themselves. In other words, I don't think you'll get [something]… from the bank saying: 'By the way we reckon the business is in good shape as things stand.' There is no document like that and even if they sent me a set of accounts - I am not an accountant! But do you, do I get a lot of information put on a plate for me regarding the health of the business, that is the subject matter of the loan? No - I think that is probably right to say no. [P27]

Like P27, P4 and P5 – both of whom detailed that they *did* receive necessary 'financial information' from the lender – stated that they thought it was beyond the scope of their role to provide advice on whether the surety should proceed based on the financial position of the principal debtor.

The data I have summarised above suggests that banks may be breaching the guidelines set out in *Etridge*. First, the surety client is sometimes referred to an ILA solicitor by the lender, the lender's solicitor, or the principal debtor's solicitor. Nowhere in *Etridge* was it stated that it was permissible for lenders to make direct referrals. Instead, Lord Nicholls stated that the surety client should nominate their own solicitor. My data also makes clear that lenders sometimes do not allow sureties to choose their own solicitor where the solicitor was already acting for the debtor or lender. This demonstrates that lenders have heightened the *Etridge* requirements for their own protection and as a result are restricting surety client choices. In *Etridge* there is no mention of lenders needing to send guidelines or checklists on how to

[43] P2, P11, P14, P17, P19, P23, P27, P28

deliver ILA to the surety's solicitor. This is, however, what in fact happens. And, worryingly, some interviewees referred to these guidelines as 'instructions'. This is troubling because Lord Nicholls stated that lenders should not have 'any knowledge or any control over the advice the solicitor gives the wife.'[44] Finally, where lenders are meant to provide information about the principal debtor's current indebtedness, a healthy minority (eight out of 22) of my interviewees did not typically receive such information. Four interviewees said that they only *sometimes* receive this information – often depending on who the lender was in that transaction. Next, I will discuss how interviewees had inconsistent views about what was required of them when delivering ILA.

4.3. *The parameters of ILA*

4.3.1. *Common law requirements*

The preceding chapter set out how advice delivered to surety clients post-*O'Brien* was perfunctory and meaningless,[45] discussing how solicitors post-*O'Brien* were failing to advise the surety client in her best interests because they did not provide contextual information about the extent of the surety's potential liability, and any information about the principal debtor's current indebtedness. The House of Lords in *Etridge* tried to remedy this by requiring solicitors to deliver ILA that included contextual advice detailing the potential liability and the principal debtor's current indebtedness. Whilst Lord Nicholls outlined that ILA solicitors must detail 'the legal and practical implications of the proposed transaction,'[46] he also detailed that 'the content of the advice required from a solicitor… will, inevitably, depend on the

[44] *Etridge* [77]
[45] Section 3.2.
[46] *Etridge* [64]

circumstances.'[47] He further set out that the solicitor should consider how the surety should proceed: 'If the solicitor considers the transaction is not in the wife's best interests, he will give reasoned advice to the wife to that effect.'[48]

4.3.2. *In practice: varied ideas about what is required when delivering ILA*

When discussing how they delivered ILA, 21 out of my 22 interviewees detailed that they always delivered ILA to the surety client face-to-face in the absence of the principal debtor,[49] and three interviewees discussed, unprompted, how they used non-technical language during ILA.[50] These are examples of compliance with the *Etridge* 'core-minimum' guidelines. However, interviewees' answers on the purpose and content of ILA revealed other, more troubling issues. First interviewees demonstrated that they had different ideas about what was legally required when delivering ILA. Secondly, some interviewees demonstrated they were concerned with their own interests or the lender's interests above the surety client's interests.

In asking interviewees questions about the purpose and content of ILA, it became clear that most interviewees were not concerned *only* with the surety client's interests. For example, eight out of 22 interviewees worryingly stated that the purpose of ILA was for the lender's protection.[51] P22 told me that he delivers ILA: 'So that later on, if they [the lender] need to enforce it, the defences the guarantor may have are as slim as possible.' P10, by contrast, initially talked about how the House of Lords in *Etridge* explained that the purpose of ILA was

[47] Ibid [65]
[48] Ibid [61]
[49] P8 was the only interviewee who did not talk about delivering ILA face-to-face. In fact, P8 mentioned providing ILA over the phone to a non-commercial surety. This is discussed in more detail in Chapter 5, section 5.4.1.1.
[50] P7, P12, P16
[51] P4, P8, P10, P13, P14, P22, P24, P27

to protect *both* sureties and lenders. However, P10 went on to tell me that 'really it is about protecting the banks and enabling the banks to have an uncluttered ability to enforce security over assets…' He then said:

> But what the purpose of it is, is because *Etridge* says the woman needs advice, the advice has to be given, it transfers part of the risk away from the bank and their solicitors onto another solicitor who is saying I've told the wife the house could be lost and repossessed and that the bank's money will come out first. Then, if the wife says I didn't understand that, then she sues the solicitor who gave that advice. However, she's got no money by that point in time so you know; the whole thing is, what I would call, a complete con.

P10 was the only interviewee to reflect critically on the House of Lords' decision in *Etridge* in this manner – i.e., considering the judgment as plainly enabling lenders to have an uncluttered ability to enforce security against sureties who are costed out of a defence.

By contrast, the other 14 interviewees who were asked: 'What is the purpose of ILA?', did not focus on how ILA was for the bank's protection only. Amongst these 14 interviewees, one interviewee - P19 - focused on the purpose of ILA 'from a solicitor's point of view', going on to say that the purpose of ILA is 'earning a fee.' The remaining 13 interviewees said that the purpose of ILA was making the client aware of the practical and legal implications of the transaction.[52] The following response from P17 was typical of this group: 'I mean the main thing is always, do they understand the sort of worst-case scenario?' P4 phrased his answer slightly differently, stating that the purpose of ILA was to give the surety client an opportunity

[52] P2, P5, P7, P11, P12, P13, P14, P15, P17, P18, P21, P23, P25

to say, 'I really don't want to do this.' In addition, despite Lord Nicholls stating in unequivocal terms that it was not the solicitor's job to certify that the surety is not being unduly influenced, five interviewees said that it *was* part of their role.[53] When I asked these interviewees how they determined if a surety client was being unduly influenced, all interviewees told me that seeing the surety client on their own away from the principal debtor helped with this process. This is undoubtedly naïve, as speaking with the surety client alone does not mean that a surety client who is feeling unduly pressured to enter the secured lending agreement will tell their ILA solicitor.[54] P7 gave a more expansive reply than some of the others, and said that to determine if the client were being unduly influenced, he would engage with the surety client on a 'human level':

> …It can be no more scientific than looking into the whites of people's eyes and seeing if you think they do understand or you know, want to be doing this, or if you get a sense that they are being coerced into doing it. And, actually, I will expressly say 'you don't have to do this if you don't want to.

However, according to P7, there is a distinction between saying to the surety client 'you don't have to do this if you don't want to' and advising the surety client against entering the transaction. As will be discussed in more detail in the next chapter, only four interviewees told me that they would advise a surety client against entering the transaction if they thought it was not in their client's best interests. Despite Lord Nicholls' guidelines, all other

[53] P7, P11, P24, P25, P27

[54] A similar point is made by Hilary Astor, 'The weight of silence: Talking about violence in family mediation' in Margaret Thornton (ed), *Public and Private: Feminist legal debates* (Oxford University Press 1995) 175, in her research on the breakdown of violent marriages. Astor writes that it is misguided to think that women who have been subject to violence in their marriage will disclose to 'referring agencies, intake officers at mediation schemes, or the mediators, that they have been the target of violence in order for mediators to take appropriate action.'

interviewees discussed how passing judgement on whether the client should proceed was not part of their role.

4.3.2.1. *The Etridge effect*

I asked ten interviewees who had experience providing ILA for 17 years or more how ILA has changed since 2001. I only asked those interviewees who had 17 years or more experience because I wanted to gain insight into how interviewees thought *Etridge* had impacted the provision of ILA.[55] The responses to my question were concerning: each of the ten discussed how *Etridge* has impacted them as solicitors and/or how it has impacted lenders and their practices. None mentioned impacts on (wives as) sureties. For instance, P16 emphasised that he found lenders' precise guidelines post-*Etridge* beneficial: 'The benefit is that banks are now setting out more clearly and precisely what they require you to do whereas before *Etridge* it was: "Well, here's a guarantee, can you get your client to see it."' Unlike P16, P19 stated that advice had not changed too much post-*Etridge*: 'Well, the advice hasn't changed very much.' P5 also stated that he did not thing advice had changed: 'So it's just the same old advice you trot out… I don't really think it's changed over the last 20 years.'

The above analysis suggests that ILA is not always being delivered in the surety client's best interests. Instead, most interviewees demonstrated concern about their own interests and/or lenders' interests. The inconsistencies in interviewees' responses about what should be covered during ILA (and whether a solicitor should pass judgement) will be discussed in more detail in the next chapter. Next in this chapter, I briefly review insights from interviewees who had experience defending possession proceedings for persons who provided security and

[55] I failed to ask 5 relevant interviewees this question because of time constraints: P10, P11, P15, P27, P28

those interviewees with experience enforcing security for lenders. As I set out in Chapter 2, gaining these sorts of insights helps to round out my understanding of ILA 'in practice' and the extent to which sureties are, post *Etridge*, better protected.

4.4. *Defending possession proceedings/enforcing security*

I wanted to speak to solicitors who had defended possession proceedings for past sureties because I wanted to explore if, post-*Etridge,* those solicitors had advanced successful defences of undue influence by constructive notice against a lender. Likewise, in speaking to solicitors who have enforced security for lenders, I learned whether those interviewees had seen successful claims of undue influence post-*Etridge*. In speaking with those who have had experience in defending possession proceedings or debt claims, I could also ask if they had ever advanced a negligence claim against a solicitor for negligent ILA. Insights such as these are important because although there has been less reported case law post-*Etridge* - as compared with the amount of appeal cases post-*O'Brien* - reported case law does not effectively measure if ILA is being delivered in line with *Etridge*.

In this chapter, I have started to demonstrate the gap between ILA as Lord Nicholls set out it should be delivered compared with how ILA is being delivered in practice. I have also discussed how surety clients may be being inadequately advised because of lenders and solicitors' practices. For instance, my data has shown that some lenders are not providing the correct financial information to the ILA solicitor, and ILA is still being delivered. In this section, I will discuss how, because of the use of standard ILA certificates sent by lenders and signed by solicitors, it may not be clear *ex post* that important steps have not been met by both the bank and solicitor. In speaking with solicitors who have defended possession proceedings I discovered that ILA certificates were rarely challenged.

4.4.1. *Negotiation*

All 14 interviewees who had defended possession proceedings for individuals who provided suretyship discussed how banks' 'ritual reliance'[56] on ILA had shut down the opportunity for most equitable and economic defences being raised in court.[57] Instead, all interviewees with experience in defending possession proceedings told me that the most that can typically be done for their clients is to negotiate the terms of repayment with the lender. P3's response was typical: 'Well, err those cases would involve a negotiation - negotiate the terms on repayment rather than defending on legal principles in court.' P10 put it in these terms:

> Now you can negotiate with the bank, but it is more along the lines of what was the real borrowing? What amount are you trying to recover from this property? How underwater the equity is. If the bank is saying we are going to take all the equity and we're £100,000 down, there is very little you can do. If there is a tiny bit of equity left for the two people, then you know, then I would say if we help you [the lender] sell for a bit of a good price can we take the upside that we get? If we walk away and let you repossess it, you won't get all your money back. I will try and use those sorts of things, but they are all practical they are not legal; they are just how do you get the best out of this very difficult situation.

When I asked P3 why he thinks he has not been involved in defending a possession proceeding in court, he replied that this was: '… because of the accuracy of the security documentation and the fact that they had taken independent legal advice… you would rarely see it [enforcement] defended in practice to be frank with you.' Similarly, all four interviewees who

[56] Peter J Millett, 'Equity's Place in the Law of Commerce' (1998) 114 Law Quarterly Review 214, 220
[57] P1, P2, P3, P4, P5, P6, P8, P9, P10, P14, P17, P19, P22, P23, P26

have enforced security for lenders said they have not known a case post-*Etridge* where a surety succeeded in advancing an equitable or economic defence in court.[58]

Instead, P1, P2, P9 and P10 told me that they raised the equitable doctrine of undue influence just so that a 'deal' can be made between their client and the lender. For instance, P2 suggested: 'I see it as a more a rod to beat people with - to try and get them round a table.' In the context of advancing an argument of undue influence to get lenders to negotiate, P1 – who also has experience enforcing security for lenders – said the following:

> I've certainly used the [undue influence] argument successfully in the sense of bringing about a settlement. I've certainly ran it and that's been a factor in whatever deal we've got at the end of it… I think you're on easier ground acting against a bank, particularly as I've acted on both sides; I know what their weaknesses are. I know they have difficulty finding witnesses. I know they have difficulty keeping records correctly. I know that reputationally they don't want to take a case forward. There are lots of buttons to press in terms of how you might cut a deal with the bank.

Like P1, P5 discussed how banks prefer out of court settlements to protect their reputation and to avoid costly cases which can impact other secured lending agreements.[59] P5 told me: '…banks don't like getting precedents in court cases that will affect their other 1,000 cases they've got that year… If you've got any case against a bank, they normally settle.'

P21 mentioned that, when working for a lender enforcing secured lending transactions, she has had concerns about her lender client's reputation. P21 discussed how undue influence

[58] P1, P9, P19, P21

[59] This is discussed by Marc Galanter, 'Why the" Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95, 99. He states that repeat players (large corporations) often have long-term strategies beyond immediate cases – that repeat players (such as banks) often settle cases because they do not want adverse precedent and litigation impacting their future long-term interests.

defences are fewer since *Etridge* and the House of Lords' rules and guidance on ILA. However, she also told me that even where a surety wife had received ILA but 'there was clear evidence that he [the husband] was a particularly domineering character,' she had ultimately decided on behalf of the lender client: 'that's not going to look great for us.' In such instances, she discussed negotiating a deal or even abandoning enforcing the security transaction all together. Whilst P21 did not refer directly to the *Etridge* guidelines, Lord Nicholls had stated that if the bank suspected that the client was being domineered/unduly influenced into entering the transaction - but had failed to inform the surety's solicitor about their concerns - the court could set aside the transaction.[60] On this basis, it is not surprising that P21 has abandoned enforcing security for lender clients in such circumstances.

Five interviewees also discussed how clients who faced possession proceedings or debt claims (because of providing suretyship) often did not have the financial means to defend possession proceedings in court:[61]

> The trouble is again though, if they've got to the stage where a personal guarantee's being called in, house is threatened to be repossessed, probably all the money that anyone has got available has been sunk into the business and has disappeared, and they probably can't afford to run a proper case like this. [P5]

This is concerning because even where the bank or solicitor has failed to follow the *Etridge* guidelines, the surety client may not have the financial means to bring an action.

[60] *Etridge* [80]
[61] P2, P5, P10, P19, P23

4.4.2. *Negligence claims against the ILA solicitor*

I asked ten out of the 14 interviewees who had experience working for clients who faced possession proceedings after providing non-commercial suretyship whether they have ever brought a claim in negligence against a solicitor who delivered the surety client's ILA.[62] Only one interviewee - P5 - stated that he had. In explaining the case where he had 'sued a solicitor for a 'Mrs Bloggs'', P5 outlined what his client's argument had been:

> ['Mrs Bloggs' said] "I went in there, I was in there for 10 minutes at most, he didn't seem to have the documents with him, and he just said you're getting the loan, right, and you need to sign this, and that was pretty much it." So that was her side of the story anyway. The lawyer had a slightly different side of the story. But there was no attendance note which is fatal for a lawyer because the judge says if there is no attendance note there it didn't happen basically if you're a lawyer. So again, we did a deal with the lawyer's insurers and it didn't reach court.

In response I asked P5: 'So the problem there was that there was no way the solicitor could have provided adequate ILA in such a short meeting?' P5 replied: 'No', and repeated that it was the lack of an attendance note that was fatal for the lawyer who advised 'Mrs Bloggs'. P5 noted that he suspected that solicitors who deliver ILA regularly would have a 'pro-forma attendance note' to help avoid negligence claims. In other words, in the 'Mrs Bloggs' scenario, had the solicitor written a comprehensive attendance note which outlined he had provided ILA competently - even if he had not - then, in accordance with P5's account, his client would most likely not have succeeded in her claim. The impact of completed documentation was

[62] P1, P3, P5, P6, P9, P10, P19, P22, P23, P26

addressed by P23 in his answer to my question about advancing a negligence claim for a client against the solicitor who provided ILA:

> No - I mean I, it is definitely a question I would ask myself - but the documents are in such standard form and are written in a such a way that make it very difficult to argue [undue influence], nowadays. You can imagine them [the client trying to argue that legal advice was negligent] getting cross examined and the first question would be: "Is that your signature at the end of that document? Can you read it out to me?" And they'll be saying, "I have confirmed everything in this document" ((laughs)).' [P23]

The remaining seven interviewees said that it was unlikely that they would 'look behind'/challenge the 'standard form' attendance note and certificate of ILA. This is despite the fact that attendance notes could provide an inaccurate account of the meeting. For instance, in 2019, in the case of *SRA v Hayre,*[63] the Solicitors Dispute Tribunal struck off a solicitor for fabricating an attendance note to avoid a professional negligence claim. In that professional negligence case, the claimant argued that the solicitor discharged his retainer negligently in respect of a sub-sale and provided negligent advice regarding stamp duty and land tax which ultimately cost the claimant an inappropriate amount.[64] Whilst I am not suggesting that ILA solicitors are fabricating attendance notes (although of course this is possible), I am instead suggesting that how ILA is *actually* delivered in practice in relation to each and every surety client seeking advice – as opposed to how it is meant to be delivered - may not be being recorded in attendance notes by ILA solicitors. As mentioned above, P5 discussed how he suspected that lawyers who provided ILA frequently would create standard

[63] Case No.: 11834 / 2018
[64] *Mansion Estates Ltd v Hayre & Co. (A Firm)* [2016] EWHC 96 (Ch)

attendance notes to be put on file every time they deliver ILA. P17 – an interviewee who had earlier in his interview told me that he does not receive information from lenders outlining the principal debtor's current indebtedness - later went on to say:

> I mean actually I had put in here [in the letter he typically sends to client after they have received ILA], "When assessing the seriousness of these risks," this is to the guarantor, "you need to consider matters such as the borrower's ability to repay the bank, including the borrower's financial position, and whether the borrower's business is likely to make money." And then I've said, "You also need to consider your own financial position and the amounts and your own personal assets.

P17 therefore unwittingly admitted that whilst he does not discuss the principal debtor's current indebtedness during ILA, he details in the letter to the surety client after the ILA meeting that the surety client should consider the 'borrower's financial position.' This gives the impression that the principal debtor's indebtedness has been detailed during ILA. It is therefore not implausible to think that other ILA solicitors detail providing advice/providing information during ILA in their attendance notes that was not in fact actually discussed explicitly. This will be discussed in more detail in Chapter 6 when I discuss how interviewees were preoccupied with their self-protection over protecting surety clients through the provision of ILA.

In asking P10 if he had ever questioned the quality of the ILA that a surety client had received before they provided suretyship, he responded with: 'No I don't think I have actually.' I then asked P10 why he thought he had not challenged the advice delivered by the solicitor. Here P10 raised the issue of cost once more:

It is a good point really, I suppose it is because… there isn't enough money to do all this extra stuff and everyone, in this situation, the spouse and their husband has ran out of money so they are not, they don't have the money to fight it and all you're trying to do is get the best out of a difficult situation. And the problem with running up costs which you know are going to be paid at the end of the day from either their business or their home, you've got to look at that all in the balance… This kind of theoretical idea that you can run all these arguments, is like I say, theoretical. In practice it is just not going to happen.

A further three interviewees said they would consider a professional negligence claim against a solicitor for a surety client.[65] On the other hand, P26 stated that she has never thought about questioning the quality of ILA delivered by the solicitor. P19 also said he would be reluctant to bring a claim of negligence against a solicitor for a client - even if the necessary documents and attendance notes were not completed:

P19 No, I haven't done that, but I see how it's possible. I've sued solicitors for other things, reluctantly actually; I'm quite reluctant to do that.

I Why are you reluctant?

P19 Well, being a solicitor is hard enough. We live in a big bad world where everybody is on our back. And in the 30 years that I've been a solicitor it's become harder and harder and harder and harder just to make a living. Everybody I know, they do different jobs, virtually everybody I know in my circle of mates they earn more than me, and virtually all of them have a job

[65] P1, P3, P22

> which is easier than my job to do. So, being a solicitor is a really, really hard way to make money these days… solicitors are really only ever trying to do their best, to do it right for the client within the timescale, and clients are very demanding. There is still now a reluctance with doctors for example giving expert evidence in cases against other doctors. And I think solicitors have done themselves no favours since I've been a lawyer for sticking up for themselves and saying, hang on a minute, this is a hard job… they are [solicitors generally] too willing, far too willing to sue other solicitors for perceived mistakes… [we should] actually say no, we're not doing that, this is a hard job, and the guy was doing his best.

If P19 did fail to pursue a negligence claim against a solicitor for a client because he aimed to protect a solicitor from a negligence claim - rather than trying to assist his client who may have received negligent advice leading to the loss of property or other assets - then P19 would most likely be in breach of his professional responsibilities as a solicitor and likely also tortiously negligent. The SRA Code of Conduct 2011 Principles state that solicitors must uphold the rule of law and the proper administration of justice (Principle 1); act with integrity (Principle 2); not allow their independence to be compromised (Principle 3); and, act in the best interests of each *client* (Principle 4). These principles, amongst other principles outlined in the SRA Code of Conduct 2011,[66] would be breached by P19 if he actively avoided bringing a negligence claim against a solicitor for the reasons he stated above. It is particularly

[66] If P19 acted in the way presented above, he could also be in breach of principles: 5) provide a proper standard of service to your *clients*; 6) behave in a way that maintains the trust the public places in you and in the provision of legal services; 8) run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles; 9) run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity; and 10. protect *client* money and *assets*.

worrying that P19 demonstrated more sympathy for his fellow solicitor's position than he did for a client who could be losing their family home or other assets. In the next chapter, I ask if solicitors who typically work for commercial clients are best suited to deliver ILA to surety clients; and then come back to this question in the final chapter of this thesis. It is interesting to note that when explaining his role with regards to enforcement/defence work at the beginning of our interview, P19 said to me: 'I act for banks and I've acted for individuals who have been trying to get away with it.' This negative view that surety clients are just 'trying to get away with it' could ultimately cause access to justice issues.

I also asked all interviewees with experience of providing ILA if a past surety client had ever advanced a professional negligence claim against them. Whilst none had faced a professional negligence claim, P12 revealed that he once received a letter from the lender forewarning him that there had been an accusation that he had delivered negligent ILA from one of his previous clients. P12 went on to explain the scenario:

> Mrs X was alleging that her husband when he came in had Parkinson's and didn't understand anything that was going on. I got rather worried at that because I thought, 'Gosh, this doesn't look good'. So, I got my notes out and whatever, and I think at the time I advised my indemnity insurers because I didn't know where it was going to go. I had my notes, and I was quite satisfied that they were just trying to wriggle out of it. They started proceedings against the wife and sort of tried to join me in, but they dropped the case before it got to court and it didn't go any further.

As I will explore in more detail in Chapter 6, despite P12's experience of having a past client accuse him of negligent ILA, P12 was one of only a few interviewees who seemed

unconcerned about professional liability risk. As P12 states above, the case against P12 was not taken to court. P12 did not know if the bank had settled in that case.

My data suggests that claims of undue influence advanced to try and stop lenders enforcing their security have been reduced because of the provision of ILA. My interviews also suggest that, in the experience of my interviewees at least, claims against solicitors for negligent ILA are very rare. This is interesting because it shows that solicitors acting for clients who face possession proceedings/debt claims because of providing suretyship are not challenging the quality of the ILA where the required documentation is completed by the lender and solicitor. This insight demonstrates that even where ILA is not being delivered in accordance with the *Etridge* guidelines, it is unlikely – for a combination of reasons – that the secured lending transaction will be set aside, or that solicitors will face professional negligence claims.

4.5. *Conclusion*

In this chapter I have provided an intentionally basic and simplistic overview of my empirical data (as a holistic scaffold for upcoming, more substantive analysis). This data suggests that there are a series of gaps between ILA as framed by Lord Nicholls in *Etridge* and how ILA is delivered in practice by solicitors. What also struck me, quite vividly, was how interviewees' accounts about how they delivered ILA varied. Some interviewees said they would contextualise the advice considering the surety's situation, and some said they would never advise the surety client against entering the transaction; that abstract and generic advice only was necessary: i.e. 'you could lose the family home/assets if the principal debtor fails to meet repayments.' These are concerning findings (in addition to those discussed above in this chapter), as some surety clients may be receiving 'better' advice and protection compared with others. This creates a picture of there being an ILA lawyer lottery post-*Etridge*. Whilst

the insights I have offered up in the chapter are an important starting point, and scaffold that which is to come, it is necessary to consider the following question across the next three chapters: what factors are influencing interviewees to deliver ILA formulaically? We turn now to Chapter 5 and issues of commercialisation and values.

Chapter 5

Commerce over Care

In the previous chapter, I provided an overview of my initial findings and started to demonstrate the gap between how solicitors were intended to deliver ILA, in accordance with the House of Lords' guidelines in *Etridge*, and how ILA is being delivered 'in practice' - as per my interviewees' accounts. This chapter builds on an observation considered in the latter part of the previous chapter;[1] that most interviewees discussed delivering ILA in a way that was formalistic, tantamount to an 'arm's length market-exchange.'[2] This chapter has three main functions. First, it demonstrates how the House of Lords in *Etridge* - and the broader professional regulatory regimes in England and Wales - require solicitors to deliver ILA in accordance with values that influence their moral approach to lawyering. Here, I argue, in line with Margaret Thornton's work,[3] that these values can be labelled either 'imagined masculine' or 'fictive feminine' (namely, delivering ILA prioritising the client's ends in relation to the former, yet delivering ILA with more care and ethical awareness regarding the latter). Second, I draw on my data to show that most interviewees prioritised delivering ILA in accordance with imagined masculine as opposed to fictive feminine values. Third, I suggest that most interviewees prioritise delivering ILA in accordance with imagined masculine values because it is as aspect of their professional identity as commercial lawyers.

[1] See Chapter 4 section 4.3.
[2] Dana A Remus, 'Reconstructing Professionalism' (2017) 51 Ga L Rev 807, 822
[3] Margaret Thornton, 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the New Corporatism' (1999) 23 Melb UL Rev 749, 765

In the first section of this chapter, I will discuss the moral psychology frameworks of Lawrence Kohlberg's 'Ethic of Justice', Carol Gilligan's 'Ethic of Care' (mentioned in brief in Chapter 1),[4] discuss Joan Tronto's four-phase model of an Ethic of Care and engage with Thornton's conceptualisations of the fictive feminine and imagined masculine. I will also draw on a Dana Remus' relational lawyering model.[5] I argue, I think for the first time, that the conceptualisations of an Ethic of Care, fictive feminine values, and the relational lawyering model are conceptually linked. I also argue, again I think for the first time, that there is a conceptual link between an Ethic of Justice, imagined masculine values, and the market-exchange model of lawyering. In discussing these conceptualisations of imagined masculine and fictive feminine lawyering, I provide an important insight into understanding why ILA is being delivered as per my interviewees' accounts. This analysis therefore may act as a prompt for future work on modes of lawyering.

In the second part of this chapter, I will then draw on these linked concepts to demonstrate how the *Etridge* guidelines, and the SRA Handbook and Code of Conduct 2011 (since replaced by the SRA Standards and Regulations 2019),[6] require lawyers to provide ILA in accordance with both fictive feminine values and also imagined masculine values. What I am doing here is exploring regulatory requirements, through the various lenses of work by Gilligan and

[4] For an overview of these moral psychology theories, see Chapter 1, section 4

[5] Susan L Brooks, 'Mindful Engagement and Relational Lawyering' (2019) 48 Sw L Rev 267; Jill Howieson and Shane L Rogers, 'Rethinking the Lawyer-Client Interview: Taking a Relational Approach' (2019) 26 Psychiatry, Psychology and Law 659; Michael McGinniss, 'Advice in the Lawyer-Client Relationship' in Erina L. MacGeorge and Lyn M. Van Swol (eds), *The Oxford Handbook of Advice* (Oxford University Press 2018); Russell G Pearce and Eli Wald, 'Rethinking Lawyer Regulation: How A Relational Approach Would Improve Professional Rules and Roles' (2012) 513; Remus, 'Reconstructing Professionalism'; Thomas L Shaffer, 'Legal Ethics of Radical Individualism' (1986) 65 Tex L Rev 963; Norman W Spaulding, 'Reinterpreting Professional Identity' (2003) 74 U Colo L Rev 1; Robert K Vischer, *Martin Luther King Jr. and the Morality of Legal Practice: Lessons in Love and Justice* (Cambridge University Press 2012); Eli Wald and Russell G Pearce, 'Being good lawyers: A relational approach to law practice' (2016) 29 Geo J Legal Ethics 601.

[6] Interviews for this study took place before the SRA moved to its Standards and Regulations (StaRs) framework in November 2019.

Thornton, to argue that ILA lawyers (and lawyers more generally) are required to lawyer *relationally*. Briefly, I will also review literature that looks at how gendered values are inculcated through legal regulation and legal practice. This discussion is useful because it explains how commercial lawyers typically inhabit imagined masculine values which I argue are linked with lawyering as a market exchange.

In the third part of this chapter, I will draw on my data to show how interviewees discussed delivering ILA prioritising imagined masculine values. I argue that most interviewees resisted prioritising fictive feminine values such as consultation, compassion, consideration, and care when delivering ILA to the surety client. That is, most interviewees demonstrated that they resisted a more relational form of lawyering when talking about delivering ILA. In this section I will draw substantively on interviewees' answers to my three vignettes (outlined in Chapter 2, section 2.4). Interviewees' answers to these vignettes showed that most prioritised masculine values of noninterference and objectivity, keeping the surety client at an arm's length, and viewing ILA as a means-to-an-end (where the priority was to facilitate the secured lending transaction). In other words, interviewees talked about providing ILA that was in line with their other work for commercial clients: meeting the client's objectives without lawyering relationally to understand their client's decisions in context.[7]

In this third section, I will draw on recent literature on commercial lawyering to argue that it is not surprising that the commercial solicitors interviewed for this study discussed delivering ILA prioritising imagined masculine values. Approaching ILA in such a manner absolves interviewees of the responsibility of shared decision-making, allows them to accept a surety client's decision as autonomous at face value, and allows for the lawyer to resist making value

[7] Wald and Pearce, 'Being good lawyers: A relational approach to law practice', 616.

judgements about the transaction. Such practices have been shown to operate in the commercial lawyering context, time and time again, in the existing empirical literature on commercial lawyers' ethics. What is different here of course is that, with ILA, the client is the surety (often the wife) and not a commercial entity. What seems to be happening is that my interviewees' usual practices and approaches to commercial lawyering are bleeding into how they approach ILA with surety clients. In this context, I also discuss behavioural ethics research, to suggest that there may be psychological explanations for interviewees' self-reported behaviour. Ultimately, I am critical of the House of Lords in *Etridge* for failing to consider how the context of lawyers' wider work may affect how they deliver ILA when they held that any type/specialism of solicitor can provide ILA to a surety client.[8]

5.1. *Gendered values: law and lawyering*

Earlier in this thesis in Chapter 1 (Section 1.4.), I outlined Gilligan's moral psychology theory - an 'Ethic of Care'.[9] In describing the development of the Ethic of Care, I set out how Gilligan argued (and evidenced) that Kohlberg's psychological theory for moral development (an 'Ethic of Justice') was gendered; that it constrained a woman's moral voice. Gilligan sought to demonstrate how women involved in her studies approached moral problems differently and not in accordance with Kohlberg's psychological hierarchal theory of moral development. Since the conception of an Ethic of Care '[i]n every field of academic thought touched by feminist thought… from business and law to nursing and veterinary medicine, Gilligan's work has been suggestive and important.'[10] Hilary Sommerlad also writes that: 'Gilligan's counter-

[8] David B Wilkins, 'Legal realism for lawyers' (1990) Harvard Law Review 468
[9] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1993)
[10] Joan C Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Psychology Press 1993) 77

posing of the Ethic of Care to the Ethic of Justice made it especially relevant to critiques of the law.'[11] In the literature, the Ethic of Care is often referred to as a feminine ethic, and an Ethic of Justice is often referred to as a masculine ethic. As a result, Gilligan's *In a Different Voice* has been widely criticised for being essentialist.[12] However, Gilligan clearly asserted that:

> The different voice… is characterized not by gender but theme. Its association with women is an empirical observation, and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex.[13]

That said, even academics who have built upon Gilligan's Ethic of Care are critical of Gilligan's methods in extrapolating that there is a different voice in moral decision making. For instance, Tronto writes: 'Interestingly, Gilligan's first criticism of Kohlberg was the basis of his work is almost exclusively with young boys. Now, Gilligan's own work is almost exclusively young girls.'[14] It is for this reason – because Gilligan mainly interacted with young girls on how they made moral decisions – that legal academics talk about how a 'feminine ethic' can influence the law when drawing on Gilligan's work.

Naomi Cahn suggests that lawyering prioritising a more 'feminine ethic' (in accordance with an Ethic of Care) would involve:

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[11] Hilary Sommerlad, 'The Ethics of Relational Jurisprudence' (2014) 17 Legal Ethics 281
[12] See Chapter 1 section 6 for a discussion on the critiques of Gilligan's work
[13] Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 2
[14] Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care*81

> More negotiation, mediation, and other alternatives to traditional adversarial dispute resolution… more appreciation for the other party's perspective – more understanding and recognition of the party's interests… more appreciation for the relational context in which the client's problem arises, more understanding of the totality of the client's experience and more listening to her… and more altruistic reasons for choosing to become lawyers – more public interest work.[15]

Despite negotiation, mediation, and public interest work featuring in the architecture of legal practice, Linda Mulcahy has written that 'patriarchal societies, such as our own, privilege male values over female ones, whatever they happen to be…'[16] For instance, Peter Goodrich has argued that 'doctrinal writers and judges alike have tended historically to ignore the emotive and relational dimensions of contracts...'[17] He further suggests that '…male professional identity may involve an endeavour to deny or negate the private, emotional, sexual, or subjective states of personal being.'[18] Tronto has also argued that where persons – whom she describes as white heterosexual men – adjudicate and make decisions prioritising Ethic of Justice values in action, feminine morality will always be undermined.[19] Lisa Webley too has explored that, in the legal profession context, through the architecture of legal practice (education, regulation, and practice), lawyers are 'subconsciously or consciously [influenced to] inculcate certain [gendered] values in relation to acceptable approaches to the

[15] Naomi R Cahn, 'Styles of lawyering' (1991) 43 Hastings LJ 1039, 1048-1049
[16] Linda Mulcahy, 'Bargaining in the Shadow of the Flaws? The Feminisation of Dispute Resolution' in Linda Mulcahy and Sally Wheeler (eds), *Feminist Perspectives on Contract Law* (Glasshouse Press 2005) 141
[17] See: Peter Goodrich, 'Gender and Contracts' in Anne Bottomley (ed), *Feminist Perspectives on The Foundational Subjects of Law* (Routledge-Cavendish 1996) 20
[18] Ibid 29
[19] Joan C Tronto, 'Beyond Gender Difference to a Theory of Care' (1987) 12 Signs: Journal of Women in Culture and Society 644, 655-656

professional project.'[20] These arguments support the wider feminist scholarship claim that 'the law protects the interests of men in our society.'[21] Ngaire Naffine suggests that, under a system where the law remains objective and neutral 'the man of law… [is] the individual who flourishes, and dominates…'[22] Ngaire goes on to write:

> This person [man] is preferred in the sense that the law reflects his priorities and concerns and conducts itself in a manner which is considered, by him, to be both desirable and natural... he is assertive… independent, calculating, competitive and competent. And these are precisely the qualities valued in the sort of society law has in mind: a society which is fiercely competitive and composed on similarly self-interested and able individuals; a society which looks very much like the free market.[23]

In this chapter I will draw on my data to demonstrate how most interviewees discussed prioritising 'masculine' values when delivering ILA. However, to understand this conceptualisation better, I first need to set out in more detail what is meant by feminine and masculine values and why this conceptualisation is important to help explain my data. This will be considered next.

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[20] Lisa C Webley, *Adversarialism and Consensus?: The Professions' Construction of Solicitor and Family Mediator Identity and Role* (Quid Pro Books 2013) 9

[21] Ngaire Naffine, *Law and the sexes: Explorations in feminist jurisprudence* (Allen & Unwin 1990) 22. See also: Rosemary Auchmuty, 'The Fiction of Equity' in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish Publishing 2001); Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Taylor & Francis Group 1998)Reg Graycar and Jenny Morgan, 'Feminist Legal Theory and Understanding of Equity: One Step Forward or Two Steps Back' (2005) 28 T Jefferson L Rev 399; Renata Grossi, 'The wife as legal subject in equity and commercial law' (2002) 27 Alternative Law Journal 171;Isabel Marcus and others, 'Feminist Discourse, Moral Values, and the Law - A Conversation' (1985) 34 Buff L Rev 11; Mulcahy, 'The Limitations of Love and Altruism - Feminist Perspectives on Contract Law'; Carole Pateman, *The Sexual contract* (Polity Press 1988); Janet Rifkin, 'Toward a theory of law and patriarchy' (1980) 3 Harv Women's LJ 83

[22] Naffine, *Law and the sexes: Explorations in feminist jurisprudence* 22

[23] Ibid

5.1.1. *Linked concepts on lawyering values and approaches*

Recall that earlier in Chapter 1 (Section 1.4.), I discussed Amy and Jake's separate answers to Kohlberg's 'Heinz dilemma', as presented in Gilligan's *In a Different Voice*.[24] As discussed, Jake's answer to the 'Heinz dilemma' demonstrates moral reasoning that can be explained in terms of Kohlberg's Ethic of Justice. Jake said that the husband should steal the drug, even though this meant breaking the law, as 'laws have mistakes, and you can't go writing up a law for everything that you imagine.'[25] Gilligan writes that: 'Fascinated by the power of logic, this eleven-year-old boy locates truth in math, which, he says, is "the only thing that is totally logical."'[26] Jake believes that a human life has more value than money, and that therefore Heinz is morally permitted to steal the drug. In this situation, where hurt will be caused either way to the parties involved, Jake answered the question: whose rights took precedence? - Heinz's wife or the pharmacist? The fact that eleven-year-old Jake could differentiate between morality and the law, commenting that the law can be mistaken, 'points toward the principled conception of justice that Kohlberg equates with moral maturity.'[27]

On the other hand, as you will recall, Amy's response was completely different. Amy did not give a definitive answer like Jake, and instead - in the words of Gilligan – was 'evasive and unsure.'[28] Amy discussed alternative ways for Heinz to appropriate the required drug for his wife; she discussed how he could 'borrow the money or make a loan.'[29] She concluded that

[24] Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 25. In short, the Heinz dilemma is a fictitious scenario designed by Kohlberg. The interviewer asked Amy and Jake if a man (Heinz) should steal a drug from a pharmacist as it is the only drug which can save his wife's life. The children were also told that Heinz could not afford the drug and that the pharmacist had already refused to lower the price.
[25] Ibid 26
[26] Ibid
[27] Ibid 27
[28] Ibid 28
[29] Ibid 28

'[Heinz] really shouldn't steal the drug--but his wife shouldn't die either.'[30] Unlike Jake, Amy thought about the repercussions of Heinz stealing the drug not in abstract ways (law vs. morality), but in terms of how his actions could affect his relationship with his wife.[31] Amy reflected that if Heinz stole the drug and he was imprisoned, he would not be able to care for his wife, and as a result his wife could 'get sicker'; rendering Heinz's act of stealing the drug pointless. Amy thought that Heinz should further negotiate with the pharmacist or appeal for help in raising the funds for the drug. Gilligan provides the following analysis:

> Failing to see the dilemma as a self-contained problem in moral logic, [Amy] does not discern the internal structure of its resolution; as she constructs the problem differently herself, Kohlberg's conception completely evades her.[32]

It is broadly accepted in the literature, where Ethic of Care and Ethic of Justice approaches are discussed, that those who take an Ethic of Care approach to moral reasoning prioritise: 'care, involvement, empathy and maintaining harmonious relations…'[33] Reasoning in terms of an Ethic of Care is 'holistic, contextual…need-centred… [and involves an] extended communicative rationality.'[34] Those that take an Ethic of Justice approach to moral reasoning are said to prioritise 'fairness and equality, [and make decisions in accordance with a] positivistic rationality.'[35]

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[30] Ibid

[31] It is for this reason that Fehlberg cited Gilligan's Ethic of Care in her study on surety experience and English law published in 1997 (previously discussed in Chapter 1 Section 1.3. this thesis): Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Clarendon Press 1997) 86. Fehlberg writes: 'Gilligan's research does lend support to the proposition that a woman requested by her husband to execute a security would be likely to view her decision less in terms of law, economic considerations, or property, than in terms of the negative impact that her refusal to act as a surety would have on their relationship.'

[32] Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 29

[33] Annatjie Botes, 'A comparison between the ethics of justice and the ethics of care' (2000) 32 Journal of Advanced Nursing 1071, 1072

[34] Ibid

[35] Ibid

Tronto - who builds on Gilligan's theory – sets out that there are four phases of care that are required to be exercised in order to achieve an Ethic of Care.[36] Tronto argues that caring involves recognising need (caring about);[37] taking responsibility and responding to need (taking care of);[38] meeting the needs of the care-receiver' (care-giving);[39] and the care-receiver's response to the care process (care-receiving).[40] Tronto also suggests that 'from these four elements of care arise four ethical elements of care: 'attentiveness, responsibility, competence, and responsiveness.'[41] Giovanna Maio presents the following table which demonstrates Tronto's four-phase model 'with the corresponding ethical elements':[42]

Table 5.1: Maio's table of Tronto's four-phase model of care and ethical elements

Phases of care	Ethical elements
1. Recognition of need (caring about)	1. Attentiveness
2. Willingness to respond to (take care of) a need	2. Responsibility
3. Direct action (care-giving)	3. Competence
4. Reaction to the care process (of the care-receiver)	4. Responsiveness

On the importance of the care-giver being attentive to the care-receiver, Tronto suggests that to achieve care individuals must recognise the need for care and not 'shut others out, and… focus our concerns solely upon ourselves,' even where this 'seem[s] almost irresistible.'[43] She further says the care-giver must recognise that they have a responsibility to care as a result of something they 'did or not do.'[44] For instance, Tronto gives the example of parents. She

[36] Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* 105-108
[37] Ibid 106
[38] Ibid 106
[39] Ibid 107
[40] Ibid
[41] Ibid 127
[42] Giovanni Maio, 'Fundamentals of an Ethics of Care' in Franziska Krause and Joachim Boldt (eds), *Care in healthcare* (Palgrave Macmillan, Cham 2018) 52
[43] Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* 127
[44] Ibid 132

writes that 'having become parents entails the responsibility of caring for these particular children.'[45] On the ethical element 'competence', Tronto says that 'making certain that the caring work is done competently must be a moral aspect of care.'[46] And on 'responsiveness', Tronto writes: 'The fourth moral moment that arises out of care is responsiveness of the care-receiver to the care.'[47] That the care-giver must be 'alert' to the possibility that they can abuse the care-receiver's position of 'vulnerability.'[48] Here, there needs to be a 'balance between the needs of care-receivers and care-givers.'[49] She goes on to say that in ensuring the ethical element of 'responsiveness', the care-giver needs to be attentive 'which shows the way in which these moral elements of care are intertwined.'[50] In the end, Tronto asserts that: 'Good care requires that the four phases of the care process must fit together into a whole.'[51] Tronto's four elements of care further demonstrate that an Ethic of Care morality approach is contextual and holistic, as actors need to pay attention to how care is needed in the circumstances and be conscious and reflective about how their approach/conduct could be serving their needs as opposed to those of care-receivers.

Also influenced by Gilligan's work (and thus linked – if indirectly – with Tronto's four elements of care), Margaret Thornton uses the conceptualisations of 'fictive feminine' and 'imagined masculine' to argue that: 'An ethical feminist consciousness can contribute to a new vision of justice, by incorporating the perspective of the 'other', which involves effecting a dialogue between the universal and the particular.'[52] The word 'fictive' was purposefully used by

[45] Ibid
[46] Ibid 133
[47] Ibid 134
[48] Ibid 135
[49] Ibid 136
[50] Ibid
[51] Ibid
[52] Thornton, 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the New Corporatism' 749

Thornton '[t]o stress the constructivist meaning of the feminine and to avoid its conflation with biological women, which all too often occurs within legal and other discourses…'[53] Likewise the term 'imagined masculine' is used by Thornton to 'explain 'a cluster of characteristics likely to be ascribed to (benchmark) men.'[54]

Thornton outlines that values which can be described as fictive feminine are: '…consultation, conciliation, compassion, consideration and care.'[55] It is clear to see how the value of consultation is linked with Tronto's element of attentiveness, and how consideration is linked with Tronto's element of responsiveness. By contrast, the imagined masculine approach is explained as a '[c]ommitment to a cold and uncompromising vision of justice that extols means-ends rationality.'[56] Thornton provides that the imagined masculine approach to morality carries 'more positive connotations – such as rationality, objectivity, independence, and strength.'[57] The different values associated with 'fictive feminine' and 'imagined masculine' are listed in Table 5.2. below.

Table 5.2: Thornton's conceptualisations of 'fictive feminine' and 'imagined masculine'

'Fictive feminine' values	**'Imagined masculine' values**
Consultation	Means-end rationality
Conciliation	Rationality
Compassion	Objectivity
Consideration	Independence
Care	Strength

[53] Ibid 765
[54] Ibid
[55] Ibid 766
[56] Ibid
[57] Ibid 765

To further locate her conceptualisations within legal practice, Thornton writes:

> …legal discourses have extolled the public realm qua *polis* as a masculinised and superior space… [s]o powerful has the trope of the disembodied 'Man of Reason' become in resisting the corrupting influence of the 'other' and safeguarding the pure rationality of the public sphere, that women have struggled, first, to be admitted and, secondly, to be accepted as agents of legality. Within a conservative politics, the public sector has become more and more impoverished and its status has declined, causing its character of certain aspects to become feminized. In contrast, the masculinised high status of the private sphere is extolled, particularly those aspects associated with the market and the 'new corporatism'. Legal practice cannot be strictly characterized as a market activity itself, although it evinces market elements, such as the pursuit of profits, and shares an intimate relationship with business and corporate clients.[58]

Thornton's point, that imagined masculine values are being prioritised 'as a result of a new corporatism,' is a significant one within the context of my study, as most interviewees (21 out of 22) practiced in commercial law specialisms. It is important to highlight that Thornton's conceptualisations have not been widely drawn upon to discuss approaches to lawyering, with the exception - to my knowledge - of Webley's work on solicitors as imagined masculine, family mediators as fictive feminine, and family solicitors as a hybridisation of both the imagined masculine and the fictive feminine.[59]

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[58] Ibid

[59] Webley, *Adversarialism and Consensus?: The Professions' Construction of Solicitor and Family Mediator Identity and Role*; Lisa Webley, 'Solicitors as imagined masculine, family mediators as fictive feminine and the hybridization of divorce solicitors' in Francesca Bartlett, Reid Mortensen and Kieran Tranter (eds), *Alternative Perspectives on Lawyers and Legal Ethics* (Routledge 2010) 142-160. I checked all work citing or incorporating Thornton's conceptualisations of fictive feminine and imagined masculine values through Google Scholar. I

However, in recent years, eminent American scholars in the field of legal professionalism and ethics - such as Thomas Shaffer, Dana Remus, Robert Vischer, Eli Wald and Russel Pearce - have advocated that relational lawyering (as opposed to lawyering which is defined as a market activity) is a functional way in which lawyers can meet their public duty and uphold the rule of law.[60] Relational lawyers 'advise and assist clients, colleagues, and themselves to take into account the well-being of others when contemplating and pursuing their own interests.'[61] Relational lawyers do not assume that economic benefit is the most important criterion for clients and do not see their legal services as a means to their client's individual ends.[62] As Wald and Pearce put it, '…a dialogue resulting in a well-informed client decision-making is the objective of the relational approach.'[63] Like other legal scholars have observed (admittedly sometimes only very briefly), I suggest that relational lawyering is linked with Gilligan's Ethic of Care.[64] Amy's Ethic of Care reasoning in the Heinz dilemma is an example of a more relational approach to moral dilemmas. As discussed above, Amy considered the effect of the act of stealing on all involved, as opposed to prioritising the rights of the individual - Heinz's dying wife.

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also spent time thoroughly checking other work that was referred to by Lisa Webley in both her publications on solicitors as imagined masculine and family mediators as fictive feminine.

[60] Remus, 'Reconstructing Professionalism' 864; Shaffer, 'Legal Ethics of Radical Individualism' 974; Vischer, *Martin Luther King Jr. and the Morality of Legal Practice: Lessons in Love and Justice*; Wald and Pearce, 'Being good lawyers: A relational approach to law practice' 606

[61] Wald and Pearce, 'Being good lawyers: A relational approach to law practice' 601

[62] Ibid 618

[63] Ibid 622

[64] See: Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press 2018) 43; Reid Mortensen, 'The Lawyer as Parent: Sympathy, Care and Character in Lawyers' Ethics' (2009) 12 Legal Ethics 1, 15; Remus, 'Reconstructing Professionalism' 811; Wald and Pearce, 'Being good lawyers: A relational approach to law practice' 614. It is worth noting though that when Wald and Pearce do mention an Ethic of Care, they do so only in passing. It is not clear why this is the case. In Remus' article 'Reconstructing Professionalism' which outlines her relational lawyering model (which is a focal component of this chapter), Remus only cites Gilligan's work amongst many other works in footnote 16, after stating at the beginning of the footnote: 'A rich literature, which spans many disciplines, recognises the importance of relational, as opposed to atomistic and individual, perspectives on society.'

In discussing the history of the relational lawyering model, Pearce and Wald have observed that:

> Until the 1960s, the assumption underlying legal regulation was relational self-interest' – "the view that all actors are interconnected … [and] cannot maximise [their] own good in isolation. Rather, maximising the good of the individual or [group] requires consideration of the good of the neighbor, the [constituent, community], and of the public." … [This approach] led lawyers to view themselves as "civic teachers" who served as intermediaries between the people and both the law and the public good.[65]

Since the 1960s 'lawyers, like others in elite culture, came to view individuals as atomistic actors [who] seek to maximise their own good.'[66] This view, Pearce and Wald argue, marked the decline of professionalism; where lawyers' commitment to community and the public good dwindled.[67] Pearce and Wald also observed that lawyers' regulation also became shaped by atomistic individualism:

> Indeed, contemporary ethics rules… promote the notion that lawyers are neutral partisans, also known as hired guns – Holmesian bad men (and women) who seek to get away with what they can, and to encourage clients to do the same, within the bounds of the technical requirements of the law and regulations.[68]

[65] Pearce and Wald, 'Rethinking Lawyer Regulation: How A Relational Approach Would Improve Professional Rules and Roles' 514
[66] Ibid 514-515
[67] See: Rebecca Roiphe, 'Redefining Professionalism' (2015) 26 U Fla JL & Pub Pol'y 193
[68] Pearce and Wald, 'Rethinking Lawyer Regulation: How A Relational Approach Would Improve Professional Rules and Roles' 515

Remus suggests that all is not yet lost. Whilst she recognises the 'decline in professionalism', she argues that lawyering has not been completely reformed 'pursuant to market logic.'[69] She presents that some lawyers still do practice relational lawyering by employing what she characterises as the '"relational dynamics"… which include, trust, judgment, loyalty, empowerment and service.'[70] As will be discussed throughout this chapter, I argue that these relational dynamics require Thornton's fictive feminine values and Tronto's four elements of care to be prioritised. For instance, Remus discusses how the relational dynamic of trust is often a necessary requirement in the lawyer-client relationship.[71] She argues that the relationship can involve the sharing of 'uniquely personal… and sensitive information about personal, legal, and financial matters.'[72] That clients want to be able to trust in their legal advisor and that the benefits of a personal relationship can 'extend far beyond legal and financial outcomes… [and that it can lead to] empowerment in other areas.'[73] I suggest that to encourage clients to reveal uniquely personal and sensitive information, the lawyer must prioritise the fictive feminine values of 'consultation', 'consideration' and perhaps also 'compassion' when lawyering. In a similar vein, lawyers must be attentive to their clients' circumstances to encourage them to reveal personal information in accordance with Tronto's elements of care. In relation to Remus' other relational dynamics, Thornton's fictive feminine

[69] Remus, 'Reconstructing Professionalism' 811

[70] Ibid 847-848. Similarly, Vischer in 'Martin Luther King Jr. and the Morality of Legal Practice' writes how qualities - advocated by Martin Luther King Jr. - need to be prioritised by lawyers to become more relational. These qualities are trust, agape, personalism, humility and self-restraint in the exercise of power. Brooks in 'Mindful Engagement and Relational Lawyering' states that the qualities of relational lawyering are kindness, curiosity, humility, and transparency. By extension, I argue that these qualities are also linked with Thornton's 'fictive feminine' values.

[71] Ibid 848

[72] Ibid 849

[73] Ibid 850

values and Tronto's elements of care are also necessary, as I will discuss in the sections which follow.

Like Thornton, who argues that '[l]egal practice cannot be strictly characterised as a market activity itself,'[74] Remus argues that:

> The market exchange-model ignores… [the relational] interactive process through which lawyers use their judgment and expertise to connect clients with the legal system. Instead, it conceptualises the provision of legal expertise as entailing a one-way flow of information (from lawyer to client), with nothing but payment back.[75]

For Remus, effective lawyering involves the hybridisation of fictive feminine and imagined masculine values: '…tension between commercialism and professionalism cannot be resolved through an embrace of market forces any more than it can be hidden behind… commitment to the public good.'[76] Importantly, under the relational lawyering model:

> [C]lients are not means to lawyers' ends – paying the bills, working on challenging cases, attaining status and power – but rather partners in a mutual exchange. The goal of the relationship from the lawyers' perspective is both to earn a livelihood and to educate and assist clients in the pursuit of their goals on an informed basis. Empowering clients in a relational manner requires getting to know them and their objectives.[77]

[74] Thornton, 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the New Corporatism' 765
[75] Remus, 'Reconstructing Professionalism' 854
[76] Ibid 814
[77] Wald and Pearce, 'Being good lawyers: A relational approach to law practice' 616

On the other hand, 'imagined masculine' values are prioritised in the market-exchange model of lawyering. The market-exchange model 'views lawyering as a business, just like any other business.'[78] As Pearce discusses, those lawyers who lawyer in accordance with the market-exchange model 'extract the maximum advantage of the legal system for the interests of wealth…'[79] By performing their roles 'narrowly' - pursuing their client's atomistic self-interests - lawyers who lawyer in accordance with a market-exchange model fail to embrace a 'more expansive understanding of their duties to the public good.'[80] Under the market-exchange model, lawyers remain objective, not interfering, and prioritising the client's (assumed) independent choice/autonomy. Whilst they may facilitate their client's wishes within the technical bounds of the law, market-exchange lawyers may not consider the wider ethical implications of their client's actions.

Consequently, I would suggest that lawyers who lawyer in accordance with the market-exchange model prioritise the 'imagined masculine' values outlined by Thornton, such as objectivity and means-end rationality. Jake's Ethic of Justice moral reasoning discussed above - where Jake decides that Heinz should steal the drug - prioritises imagined masculine values.[81] Jake remains objective, does not think about the situation relationally (i.e. how the pharmacist may be affected or how the relationship between Heinz and his wife may be affected), and says that Heinz should steal the drug because the law is not always right – emphasising the right of the individual (Heinz's wife) above all else.

[78] Remus, 'Reconstructing Professionalism' 813
[79] Russell G Pearce, 'The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve The Conduct And Reputation Of The Bar' (1995) 70 NYUL Rev 1229, 1243
[80] Pearce and Wald, 'Rethinking Lawyer Regulation: How A Relational Approach Would Improve Professional Rules and Roles' 513
[81] Thornton, 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the New Corporatism' 28

The links I see between the conceptualisations discussed above are set out in Table 5.2 below. In this table, I do not suggest that, in a market-exchange model of lawyering, *only* Ethic of Justice moral approaches are demonstrated by lawyers, or that an Ethic of Justice moral approach is *always* present or fully embodied in market-exchange lawyering. Instead, I suggest that the conceptualisations are linked as the values emphasised in accordance with each approach are similar. To represent the nuance, instead of using arrows between the concepts, presented in Table 5.3. below, I use a link image between the conceptualisations outlined. These 'conceptual links' will be discussed in more detail throughout this chapter.

Table 5.3: Links between concepts discussed in this chapter

MODEL OF LAWYERING	VALUES PRIORITISED	MORAL REASONING APPROACH
Market-exchange	Thorton's 'Imagined masculine'	Kohlberg's Ethic of Justice
Relational	Thornton's 'Fictive feminine'	Gilligan's Ethic of Care and Tronto's Ethic of Care

In the next subsection I will consider how both fictive feminine and imagined masculine values are inculcated in the architecture of legal practice in England and Wales, through the regulation of lawyers and also through the socialisation of lawyers in practice.[82] As a part of

[82] It is also recognised that legal education influences lawyers to adopt/prioritise certain values which impacts how they provide legal services. For literature on this topic, see: Sylvie Delacroix and Catrina Denvir, 'Virtually Teaching Ethics' (2020) Modernizing Legal Education 204; Nigel Duncan, 'Addressing emotions in preparing ethical lawyers' in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Routledge 2011); Adrian Evans, 'The values priority in quality legal education: Developing a values/skills link through clinical experience' (1998) 32 The Law Teacher 274; Ian Gallacher, 'Thinking like non-lawyers: why empathy is a core lawyering skill and why legal education should change to reflect its importance' (2010) Journal of the Association of Legal Writing Directors 1; Theresa Glennon, 'Lawyers and Caring: Building an Ethic of Care into Professional Responsibility' (1991) 43 Hastings LJ 1175; Linda Haller, 'Reading reported cases through a legal ethics lens' in Michael Robertson and others (eds), *The Ethics Project in Legal Education* (Routledge 2010); Mary Heath and others, 'Learning to feel like a lawyer: law teachers, sessional teaching and emotional labour in legal education' (2017) 26 Griffith Law Review 430; Emma Jones, 'Making practice more affective: Emotional intelligence as a legal meta-competency' (2018) 24 European Journal of Current Legal Issues ; Insa Koch, ''Turning Human Beings into Lawyers': Why Anthropology Matters So Little to the Legal Curriculum' (2018) 2 Journal of Legal Anthropology 99; Nathalie Martin, 'Think like a (mindful) lawyer: Incorporating mindfulness, professional identity, and emotional intelligence into the first year law curriculum' (2013) 36 UALR

the discussion on how regulation influences solicitors to prioritise certain values, I will first discuss how the *Etridge* guidelines emphasise that ILA lawyers should deliver ILA in accordance with both imagined masculine and fictive feminine values. This is because lawyers delivering ILA are regulated both by their professional rulebook and by the guidelines in *Etridge*.

5.2. *The inculcation of gendered values through the architecture of legal practice*

5.2.1. *Etridge guidelines*

The *Etridge* guidelines arguably prioritise the 'ethics of autonomy (the ethics of aloneness)'[83] when setting out that ILA should be delivered by a solicitor to the surety client alone in the absence of the principal debtor. The act of ILA, upon first analysis, could be said to be the antithesis of relational/fictive feminine lawyering as solicitors are required to advise the surety client solely on their individual interests. In fact, it could be said that Lord Nicholls discouraged more relational lawyering when outlining that it was not the role of lenders or solicitors to discover for themselves if the surety client's consent had been procured by the principal debtor's undue influence:

> Many, if not most, wives would understandably be outraged by having to respond to the sort of questioning that would be appropriate before a responsible solicitor could

L Rev 413; Carrie J Menkel-Meadow, 'Can a Law Teacher Avoid Teaching Legal Ethics?' (1991) 41 Journal of Legal Education 3; Carrie Menkel-Meadow, 'Telling stories in school: Using case studies and stories to teach legal ethics' (2000) 69 Fordham L Rev 787; Binny Miller, 'Telling stories about cases and clients: the ethics of narrative' (2000) 14 Geo J Legal Ethics 1; Deborah L Rhode, 'Professional responsibility: ethics by the pervasive method' (1998) 42 Journal of Legal Education 31; Julian Webb, 'Taking values seriously: the democratic intellect and the place of values in the law school curriculum' in Michael Robertson and others (eds), *The Ethics Project in Legal Education* (Routledge 2010); Julian Webb, 'The Body in (E)motion: Thinking through Embodiment in Legal Education' in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Routledge 2011); Chalen Westaby and Emma Jones, 'Empathy: an essential element of legal practice or 'never the twain shall meet'?' (2017) International Journal of the Legal Profession 1.

[83] Shaffer, 'Legal Ethics of Radical Individualism', 970

> give such confirmation. To require such an intrusive, inconclusive and expansive exercise in every case would be an altogether disproportionate response to the need to protect those cases, presumably a small minority where a wife is being wronged.[84]

The 'sort of questioning' Lord Nicholls refers to would involve the solicitor asking about the context of the surety client's decision, which would likely involve a discussion about their relationship with the principal debtor. It may also result in the solicitor asking the surety client if they felt pressured by the principal debtor to enter the agreement. These are the sort of 'personal' moral issues which would be addressed in more relational, caring, and fictive feminine lawyering. Shaffer discusses how a lawyer often encounters moral issues which are 'uncomfortable…sticky and uncertain.'[85] Shaffer goes on to write: 'It is much easier for a lawyer to behave as if he were a clerk in a driver's-license office than to behave as someone who invites trust… and then charges by the hour for it.'[86]

Shaffer argues that modern ethics codes influence lawyers to engage clients strictly as individuals, despite the client's legal problem often being relational/familial in nature. Shaffer exemplified lawyers' propensity for radical individualism through the 'quandary' of the 'case of the unwanted will.'[87] Vischer succinctly explains Shaffer's quandary of the unwanted will as follows:

> If one spouse were to disagree with the other spouse's wishes on designating beneficiaries, the profession's reflexive recommendation is for the lawyer to withdraw and recommend that the couple each recommend their own counsel. In Shaffer's

[84] *Royal Bank of Scotland v Etridge* [2001] UKHL 44, [2002] 2 AC 773 [53]
[85] Shaffer, 'Legal Ethics of Radical Individualism' 984
[86] Ibid
[87] Ibid 968

> view, this mistakenly views the client as two individuals who happen to be married, rather than as a family. The lawyer should not abandon the family – much less encourage the individuals who compose the family to "lawyer up" – simply because the messy reality of family life may require messy conversations that go far beyond the technical boundaries of estate planning.[88]

The *Etridge* guidelines on ILA are the embodiment of this type of 'reflexive recommendation' to radical individualism in lawyering; requiring individuals contemplating entering a suretyship agreement for the benefit of another, who are often relationally motivated to enter the agreement, to 'lawyer up' and consider their own individual interests.

Importantly, their Lordships in *Etridge* required ILA solicitors to advise solely in the surety client's best interest, meaning that ILA solicitors should not be concerned with the principal debtor's - or the lender's - objectives (beyond providing the confirmation to the lender of the delivery of ILA). In fact, Lord Nicholls said that 'in every case the solicitor must consider carefully whether there is a conflict of duty or interest.'[89] In the case he went on to say that: 'If at any stage the solicitor becomes concerned that there is a real risk that other interests or interests inhibit his advice to the wife he must cease to act for her.'[90] Remus argues (generally, and not in the *Etridge* context) that such conflict of interests provisions are demonstrations of the relational dynamic of loyalty because 'loyalty ensures that a lawyer's judgment is not compromised by her own interests or by obligations to other clients…'[91] Remus goes on to write:

[88] Vischer, *Martin Luther King Jr. and the Morality of Legal Practice: Lessons in Love and Justice* 10
[89] *Etridge* [74]
[90] Etridge [74]
[91] Remus, 'Reconstructing Professionalism' 856

> Rules requiring lawyers to prioritise client and other interests above their own require them to acknowledge and appreciate, on a regular basis, that lawyering is about more than self-interest and profit maximisation.[92]

However, whilst the House of Lords made it (implicitly) clear that loyalty was an important relational dynamic in ILA lawyering, they did not require the solicitor delivering ILA to the surety to be different from the solicitor acting for the lender or principal debtor in the same transaction. As detailed in Chapter 3 (section 3.3.3.), Lord Nicholls debated whether a husband and wife should always have separate representation in the secured lending context. After reviewing the possible advantages of separate solicitors for both husband and wife, Lord Nicholls then reviews the advantages of the same solicitor acting for both:

> A requirement that a wife should receive advice from a solicitor acting solely for her will frequently add significantly to the legal costs. Sometimes a wife will be happier to be advised by a family solicitor known to her than by a complete stranger. Sometimes a solicitor who knows both husband and wife and their histories will be better placed to advise than a solicitor who is a complete stranger.[93]

Interestingly, one of Lord Nicholls' reasons for allowing the same solicitor to act for the wife as well as the husband, is that 'a solicitor who knows both husband wife and their histories will be better placed to advise...'[94] Here, Lord Nicholls is discussing relational/fictive feminine lawyering concerns (even if he may not have been aware that was what he was doing). As discussed, relational lawyering requires the lawyer to understand the context of the client's

[92] Ibid 857
[93] *Etridge* [73-74] (Lord Nicholls)
[94] *Etridge* [74] (Lord Nicholls)

decision. Lord Nicholls demonstrates that he thought it beneficial that a family solicitor would already understand the context of the decision and the client's history, putting the solicitor in a better position to advise.[95] Lord Nicholls' consideration that a surety client may be 'happier to be advised by the family solicitor…' also reveals that relational/fictive feminine values are important. Whilst Lord Nicholls does not indicate what he means by 'happier', the inference is that a surety client will be 'happier' to be advised by a known solicitor due to factors of trust and familiarity. As Remus makes clear, the relational dynamic of trust is important because it fosters an environment where the client feels able to be more forthcoming with their lawyer.[96]

The above analysis begins to demonstrate that there are some elements of ILA, if delivered in accordance with the *Etridge* guidelines, which require relational lawyering approaches (where fictive feminine values - such as care - are prioritised). Whilst their Lordships detailed core-minimum guidelines, which at first blush seemed objective and easy to follow, the content of ILA requires the solicitor to provide a thorough 'consultation' (a fictive feminine value) to the surety client. Lord Nicholls also made it clear that what is required during ILA depends on each client's circumstances.[97] Such a requirement involves solicitors showing 'consideration' (again, a fictive feminine value) and being 'attentive' (an element of care) to each client's circumstances. For instance, Lord Nicholls outlines that '[t]he solicitor should discuss the wife's financial means… [and] whether the wife or husband have other assets…'[98] A solicitor should also obtain from the bank any financial information required for a

[95] Remus, 'Reconstructing Professionalism' 849
[96] Ibid 850
[97] *Etridge* [65]
[98] Ibid [65]

meaningful consultation.[99] Arguably, in order for such discussions to take place during ILA, a solicitor should be trusting and should engage in a meaningful consultation with the surety client.

The emphasis on the relational elements of ILA means that their Lordships (in particular Lord Nicholls) did not want ILA lawyers to view their meeting with the client as a means to an end, which is an imagined masculine value according to Thornton's conceptualisation. Lord Nicholls was clear that the ILA role did not merely require a solicitor to run through an objective checklist with the aim of facilitating the transaction and providing the ILA certificate to the bank. Instead, Lord Nicholls unambiguously outlined that ILA should not be a formality,[100] and that what was required during ILA was dependent on the context of each client's situation. Therefore, ILA also requires the solicitor to empower the client. Empowerment, which is one of Remus' five relational dynamics in lawyering, 'is central to the lawyers' role in society,'[101] where 'they represent individuals and causes that might find no other support in society.'[102]

Lord Nicholls also made it clear that a solicitor should not prioritise objectivity when delivering ILA. In fact, he outlined that a solicitor will form a judgement (one of the 'relational dynamics' of lawyering cited by Remus) about whether it is in the surety client's best interest to enter the transaction: 'If the solicitor considers the transaction is not in the wife's best interests, he will give reasoned advice to that effect.'[103] Such an instruction, in line with Remus' reasoning, 'requires [ILA] lawyers to employ reasoned judgment in applying expertise to the particulars

[99] Ibid [67]
[100] Ibid [66]
[101] Remus, 'Reconstructing Professionalism' 858
[102] Ibid 858-859
[103] *Etridge* [61]

of a client's case.'[104] Tronto, when discussing how all four elements of care must be integrated as a whole to provide effective care (one of Thornton's fictive feminine values), also discusses the importance of judgement. She writes that 'those who engage in a care process must make judgments: judgments about needs, conflicting needs, strategies for achieving ends, the responsiveness of care-receivers, and so forth.'[105] This notion that ILA lawyers must pass judgement speaks to the long-held debate about whether providing legal information alone constitutes legal advice. As Leanne Smith and others write: 'The boundary between legal advice and information, or non-legal advice, is not a clear one.'[106] In response to this contentious subject, John Eekelaar and others have argued that passing judgement and forming a recommendation is a required element of legal advice:

> Our working definition included as information… straightforward statements… concerning dates, descriptions of procedures, or even descriptions of what the court are likely to do. Advice becomes the appropriate description when a course of action is under discussion, i.e. when the client puts forward a plan and the lawyer accepts or rejects the idea, or when a lawyer puts forward a plan or a modification of a plan, or when a number of ideas are on the table and the lawyer recommends one of these either in its entirety or in part. [107]

[104] Remus, 'Reconstructing Professionalism' 853
[105] Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* 137
[106] Leanne Smith, Emma Hitchings and Mark Sefton, *A study of fee-charging McKenzie Friends and their work in private family law cases* (University of Cardiff, University of Bristol 2017) Available at: http://orca.cf.ac.uk/101919/1/A%20study%20of%20fee-charging%20McKenzie%20Friends.pdf (last accessed: May 2019) 49
[107] John Eekelaar, Mavis Maclean and Sarah Beinart, *Family lawyers: the divorce work of solicitors* (Hart Pub Limited 2000) 74

However, the relational dynamic of judgement is diminished in *Etridge* when Lord Nicholls, immediately after writing that the solicitor should 'consider the transaction…in the wife's best interests… [and] give reasoned advice to that effect', goes on to say:

> But at the end of the day the decision on whether to proceed is the decision of the client not the solicitor. A wife is not precluded from entering into a financially unwise transaction if, for her own reasons, she wishes to do so.[108]

Here, Lord Nicholls demonstrates that the values of non-interference and autonomy are overriding; that fictive feminine values have their limitations. In fact, interference with the surety's choice is only warranted where the circumstances are exceptional:

> There may of course, be exceptional circumstances where it is glaringly obvious that the wife is being grievously wronged. In such a case the solicitor should decline to act further.[109]

The fact that solicitors must only decline to act in 'exceptional circumstances' demonstrates that the client's individual right to non-interference is prioritised in most circumstances. This lawyering approach – where non-interference is prioritised – is comparable with the Ethic of Justice moral reasoning approach. This can be demonstrated through Gilligan's discussion of Jake's answer to the following question when interviewed: 'When responsibility to oneself and responsibility to other's conflict, how should one choose?'[110] Jake answers the interviewer's question by stating: 'You go about one-fourth to the others and three-fourths to yourself.' When the interviewer asked, 'What does responsibility mean?', Jake gave the

[108] *Etridge* [61]
[109] Ibid [62]
[110] Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 35-38

following example in explaining how responsibility is not doing something to hurt others: '…like, if I want to throw a rock, not throwing it at a window, because I thought of the people who would have to pay for that window, not doing it just for yourself.'[111] Gilligan provides the following analysis:

> [Jake] seeks rules to limit interference and thus to minimize hurt. Responsibility in his construction pertains to limitation of action, a restraint of aggression, guided by the recognition that his actions can have effects on others, just as theirs can interfere with him. Thus rules, by limiting interference, make life in a community safe, protecting autonomy through reciprocity, extending the same consideration to others and self.[112]

By contrast, in response to the interviewer's question about whose interests would come first if responsibility to oneself and responsibility to other's conflicted, Amy stated that her response '…really depends on the situation.' When asked, 'What does responsibility mean?', Amy replied: 'That other people are counting on you to do something, and well you can't just decide, "Well, I'd rather do this or that."' Only in response to the interviewer's next question - 'Are there other kinds of responsibilities?' - did Amy discuss the responsibilities she owes to herself. For Amy, 'responsibility signifies response, an extension rather than a limitation of action. Thus, it connotes an act of care rather than the restraint of aggression [interference].'[113] Whilst independence and objectivity are prioritised in *Etridge*, the fact that solicitors must react to exceptional situations 'where it is glaring obvious the wife is being grievously wronged', demonstrates that interference is at least required in *some* circumstances. This interference is born out of a consideration of 'care' (a fictive feminine

[111] Ibid 37
[112] Ibid 37-38
[113] Ibid 38

value) for the surety client, so that the solicitor does not facilitate a transaction where their client is being grievously wronged (where their decision is not independent).

Lord Nicholls also set out in *Etridge* that the solicitor should offer 'to negotiate with the bank on the terms of the offer.'[114] Negotiation is a form of 'conciliation' (a fictive feminine value), can 'empower' the client (a relational dynamic), and extend communicative rationality in accordance with an Ethic of Care approach. An example of this approach (albeit in a non-lawyer context) is demonstrated through Amy's reasoning that Heinz and the pharmacist should enter further negotiations, 'making the wife's condition more salient to the druggist…'[115]

The above analysis of the *Etridge* guidelines clearly shows that conceptualised gendered values are mutually contingent when delivering ILA; fictive feminine and masculine values each have their role to play in ensuring that a solicitor delivers ILA competently in line with the common law rules. Next, I will consider how the SRA Handbook and Code of Conduct 2011 inculcates gendered values in regulatees.

5.2.2. *SRA Handbook and Code of Conduct 2011*

Whilst the *Etridge* guidelines provide detailed guidance on how ILA specifically should be delivered by solicitors to surety clients, all solicitors in England and Wales must also adhere to the SRA Handbook and Code of Conduct (herein Code of Conduct). It is therefore important to look at what gendered values the SRA encourages through the Code of Conduct 2011.[116] It

[114] *Etridge* [65] (Lord Nicholls)
[115] Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 29
[116] Solicitors Regulation Authority, *Handbook and Code of Conduct 2011*, Version 19 (amended 1st October 2017). Available at: https://www.sra.org.uk/solicitors/handbook/v19/code/ (last accessed 8th June 2020). While the current regulatory toolkit appears in the form of the SRA's Standards and Regulations (introduced in

has been previously argued by Webley, with reference to the now outdated Law Society of England and Wales Guide to the Professional Conduct of Solicitors 2003,[117] that:

> …the Law Society of England and Wales [the regulator preceding the SRA] transmits the message that a non-specialist accredited solicitor's identity is more closely associated with the 'imagined masculine' rather than 'fictive feminine' characteristics or traits.[118]

Webley suggests that the 'archetypal non specialist solicitor embodies mastery of a large body of knowledge and is emotionally controlled.'[119] She goes on to write that 'there is little emphasis on emotional intelligence or on active empathy; instead, the solicitor is to be distanced and impersonal.'[120]

When I conducted interviews for this thesis in 2018, interviewees were required to comply with Version 19 of the Code of Conduct 2011. The Code forms part of the overall Handbook and details ten principles which 'are all pervasive.'[121] Of the ten principles set out in the Code of Conduct, the first six (in order) state that solicitors must: 'Uphold the rule of law and proper administration of justice; act with integrity; not allow their independence to be compromised; act in the best interests of each client; provide a proper standard of service; and behave in a way that maintains the trust the public places in you and in the provision of legal services'.

late 2019), it was the 2011 Code of Conduct (as updated) which applied to my interviewees at the time of my data collection.

[117] Law Society of England and Wales, *Guide to the Professional Conduct of Solicitors*, (8th edn, Law Society 2003)

[118] Webley, 'Solicitors as imagined masculine, family mediators as fictive feminine and the hybridization of divorce solicitors' 141

[119] Ibid

[120] Ibid 142

[121] Solicitors Regulation Authority, *Handbook and Code of Conduct 2011*, Version 19 (amended 1st October 2017). Available at: https://www.sra.org.uk/solicitors/handbook/v19/code/ (last accessed 8th June 2020) The Principles

The broader principles, such as: upholding the rule of law and proper administration of justice and maintaining the trust of the public, are principles taken more seriously in the relational lawyering model, as compared with the market-exchange model. This is because:

> Relational [lawyering]… explains that attorneys should discard the dominant hired gun role that encourages clients to maximise their atomistic self-interests without regard to implications for their neighbours or their community.[122]

For instance, one of Remus' five 'relational dynamics of lawyering' is 'service'. Remus states that 'the profession's rhetoric to public service may have value and force even while it remains aspirational.'[123] This means that relational lawyers must pay 'consideration' (a fictive feminine value) to broader public interests to ensure their actions are compliant with the rule of law and the proper administration of justice. Importantly, relational lawyers are not just concerned with their client's atomistic self-interest. In this sense, it could be argued that the Code of Conduct 2011 (Version 19) does convey to solicitors that fictive feminine values/relational approaches of lawyering are required. However, Andrew Boon states that '[t]he [Code of Conduct] principles operating in favour of clients may be reinforced, or balanced, depending on [a solicitor's] perception…'[124] In other words, solicitors may prioritise the more 'imagined masculine' principles in their everyday practice. I come back to this below when I turn to consider empirical work on corporate lawyers.

The SRA Code of Conduct discourages lawyers from viewing their practices merely as a business where 'the provision of legal expertise entails only a one-way flow of information

[122] Wald and Pearce, 'Being good lawyers: A relational approach to law practice' 623
[123] Remus, 'Reconstructing Professionalism' 862
[124] Andrew Boon, *The Ethics and Conduct of Lawyers in England and Wales* (3rd edn, Bloomsbury Publishing 2014) 313

(from lawyer to client), with nothing but payment flowing back.'[125] Whilst imagined masculine values are sometimes required in lawyering, lawyers cannot only prioritise objectivity, rationality, the client's independence (autonomy), and means-end rationality in every case. To demonstrate this point further - that relational lawyering is required - the SRA Competency Statement (which sets out the standards expected of a 'day one' competent solicitor and is also used as a framework for continuing standards of competence) states that a solicitor must: 'Develop and advise on relevant options… [u]nderstanding and assessing a client's commercial and personal circumstances, their needs, objectives, priorities and constraints.'[126] To do this, the solicitor must adopt a relational/feminised approach to lawyering. To assess a client's commercial and personal circumstances, priorities and constraints, the solicitor must learn more about their client.

It is beyond the scope of this chapter to analyse the SRA Code of Conduct exhaustively in terms of the gendered values/relational dynamics it encourages lawyers to adopt. However, it is worth noting that, like *Etridge*, the Code of Conduct details how a solicitor should act if there are grounds for believing a client's instructions are affected by undue influence. However, the Code of Conduct asserts that the solicitor should interfere in less severe circumstances, that there is an act of interference that is less forceful than refusing to act. In the SRA Handbook, a series of outcomes and indicative behaviours (IB) are detailed. In the section entitled '*You and your client*', subsection *'Accepting and refusing instructions'*, IB (1.28) states:

[125] Remus, 'Reconstructing Professionalism' 854

[126] This is the wording in the 2019 competency statement – I have emailed about a copy of the competency statement as it stood in 2018, but I am yet to receive an email from the SRA.

> Acting in the following way(s) may tend to show that you have not achieved these outcomes and therefore not complied with the ***Principles***: …acting for a *client* when there are reasonable grounds for believing that the instructions are affected by duress or undue influence without satisfying yourself that they represent the *client's* wishes.

The lack of symmetry between the *Etridge* guidelines and the SRA Code of Conduct 2011 on when a lawyer should 'interfere' due to concerns of undue influence is confusing. Lord Nicholls was adamant that ILA solicitors should not be required to ask personal questions to ascertain if the wife is being unduly influenced, as '[m]any, if not most, wives would understandably be outraged by having to respond to [such questions].'[127] Lord Nicholls further set out that such intrusion is an 'altogether disproportionate response to the need to protect those cases, presumably a small minority, where a wife is being wronged.'[128] However, the SRA rulebook sets out that where there are 'reasonable grounds for believing the client's instructions are affected by undue influence' then the solicitor must satisfy themselves that the instructions represent the client's wishes.

The above analysis makes the claim that relational lawyering was required to be practised by every solicitor in England and Wales as per their regulatory Code of Conduct in 2018. In requiring lawyers to consider the broader implications of their client's self-interested instructions/legal goals, the SRA requires solicitors not to deliver legal services the same as any other business (and so to avoid prioritising market and monetary imperatives).

[127] *Etridge* [53]
[128] *Etridge* [53]

5.2.3. *Commercial legal practice*

Scholarship on commercial legal practice demonstrates that there is a culture of 'ethical apathy'[129]; that commercial lawyers conceive and perform their roles narrowly,[130] 'disinterested in any further 'public-regarding ethical dimension' to their practice.'[131] As Donald Langevoort highlights, in commercial lawyering, the typical trope is: 'Clients are in charge: full stop.'[132] As a result, the market-exchange model of lawyering becomes the norm in the commercial context:

> As a matter of simple economics, clients pay the bills and normally prefer that the professionals they retain facilitate – not frustrate – their chosen ends. Intense competition among skilled lawyers forces them into acquiescence. Absent countervailing regulatory or disciplinary pressures – which have never been all that strong – what is left is professional integrity, which too easily gives way to norms that are more conductive to competitive success.[133]

For the most part, scholars have highlighted that commercial lawyers are not concerned with the ethical implications of their commercial client's legal ends. For instance, Steven Vaughan and Emma Oakley interviewed 57 corporate finance lawyers working in elite law firms in London. In the interviews, the researchers posed a number of vignettes where the atomistic legal actions of the lawyer's fictitious commercial clients had ethical implications for the broader public. For example, the vignettes posed to interviewees included a 'ethical pollution

[129] Steven Vaughan and Emma Oakley, ''Gorilla exceptions' and the ethically apathetic corporate lawyer' (2016) 19 Legal Ethics 50, 68
[130] Joan Loughrey, *Corporate Lawyers and Corporate Governance* (Cambridge University Press 2011) 131
[131] Donald C Langevoort, 'Gatekeepers, Cultural Captives, Or Knaves: Corporate Lawyers through Different Lenses' (2019) 88 Fordham L Rev 1683, 1685
[132] Ibid 1685
[133] Ibid 1687

dilemma' and a 'job losses dilemma'. For the most part, Vaughan and Oakley discovered that commercial solicitor interviewees distanced themselves from their client's decision making, and that the lawyers viewed themselves as facilitators who did not question the ethical impact of their client's choices.

Richard Moorhead and Victoria Hinchly have also observed that commercial lawyers are prone to 'professional minimalism'.[134] Interviewing 21 commercial lawyers, they found that the interests of the market primarily influenced decision-making, and that 'ethical consciousness is not a strong part of professional identity.'[135] Whilst scholars such as Tim Dare and Stephen Pepper have endorsed the zealous lawyering approach where the client's legal atomistic interests are prioritised (particularly in certain contexts),[136] others have suggested (often quite forcefully) that pursuing a client's wishes is not a demonstration of self-sacrifice, but instead motivated by lawyers' self-interest.[137] On this point, Vaughan and Oakley drew on behavioural ethics research to argue that their interviewees' 'self-interest triggers self-deception, which decreases the likelihood that an ethical frame will be adopted.'[138]

The literature on lawyers also suggests that, more generally, lawyers are resistant to dealing with their own - or client's - emotions: that lawyers are desensitised to clients more relational

[134] Richard Moorhead and Victoria Hinchly, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers' (2015) 42 Journal of Law and Society 387
[135] Ibid 412
[136] See: Tim Dare, 'Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7 Legal Ethics 24; Stephen L Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities' (1986) 11 Law & Social Inquiry 613
[137] Richard Moorhead and Rachel Cahill-O'Callaghan, 'False friends? Testing commercial lawyers on the claim that zealous advocacy is founded in benevolence towards clients rather than lawyers' personal interest' (2016) 19 Legal Ethics 30; Spaulding, 'Reinterpreting Professional Identity'; James R Elkins, 'The Moral Labyrinth of Zealous Advocacy' (1992) 21 Cap UL Rev 735
[138] Vaughan and Oakley, ''Gorilla exceptions' and the ethically apathetic corporate lawyer' 62

problems.[139] Drawing on Andrew Abbott's concept of impurity,[140] Sida Liu argues that a client's 'non-professional issues' are a source of professional impurity.[141] Abbott defines 'impurities' as 'problems that fundamentally challenge professional categories' and that they can be 'professionally defiling.'[142] Suggesting that lawyers might be avoiding dealing with client's non-professional problems because it is an assault on their professional purity, Liu writes that 'the ability not to exclude but to handle dirty work is an inherent element of professional expertise.'[143]

Secured lending transactions, the subject of this thesis, are a unique situation where messy human problems may surface in the commercial lawyer's meeting room, as we know that surety clients often make their decisions based on relational factors, rather than their atomistic self-interest.[144] ILA lawyers must, therefore, be capable of dealing with messy human problems and not react simply by distancing themselves from the situation and narrowly performing their role. I would suggest that if a surety client is emotional during an ILA meeting, then the solicitor has a responsibility to react, learn more about why the client is emotional, and ultimately ask themselves whether they should advise the client against entering into the transaction based on what they learn. An ILA lawyer should also question whether their client's emotional responses could be a sign of undue influence. In other words,

[139] Joy Kadowaki, 'Maintaining professionalism: emotional labor among lawyers as client advisors' (2015) 22 International Journal of the Legal Profession 323; Kathryn J Lively, 'Reciprocal emotion management: Working together to maintain stratification in private law firms' (2000) 27 Work and occupations 32; Susan A Bandes, 'Feeling and Thinking Like a Lawyer: Cognition, Emotion, and the Practice and Progress of Law' (2021) 89 Fordham Law Review 1

[140] Andrew Abbott, 'Status and Status Strain in the Professions' (1981) 86 American Journal of Sociology 819

[141] Sida Liu, 'Professional Impurities' in Elizabeth Gorman and Steven P Vallas (eds), *Professional Work: Knowledge, Power and Social Inequalities* (Emerald Publishing Limited 2020) 147, 150-152. Liu categorises this form of impurity as an 'impurity of expertise'.

[142] Abbott, 'Status and Status Strain in the Professions' 824

[143] Liu, 'Professional Impurities' 151

[144] Dina D Bowman, 'The deal: Wives, entrepreneurial business and family life' (2009) 15 Journal of Family Studies 167; Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* 172-173 and 181-185; Mindy Chen-Wishart, 'Undue Influence: Vindicating Relationships of Influence' (2006) 59 Current Legal Problems 231

ILA solicitors must not be ethically apathetic and must prioritise the fictive feminine values of care, consideration, and compassion to provide more relational lawyering. One challenge here is that commercial lawyers do not typically encounter messy human problems as compared with, say, family lawyers who deal with divorce matters.[145] Therefore, commercial lawyers may be more prone to avoiding dealing with a surety client's emotions if they arise during ILA. This will be explored in more detail when I discuss some interviewees' responses to the vulnerable client dilemma vignette later in this chapter. I turn now to my data and discuss what values interviewees made clear they prioritised when delivering ILA.

5.3. *Values in ILA practice*

In this section I will draw on my data and review what values interviewees discussed prioritising when they deliver ILA. Earlier in this chapter, I set out that ILA can be described as radical individualist lawyering where the atomistic interests of the surety client are considered in the absence of the principal debtor by an independent solicitor. However, there are elements of ILA-giving - in accordance with the House of Lords' guidelines in *Etridge* - that can be characterised as embodying relational approaches to lawyering. I discussed above that, amongst other relational aspects, ILA lawyers are required to: i) provide a meaningful consultation between solicitor and client; ii) pass judgement and advise the client in their best interests; and iii) interfere where there are concerns that their client's wishes are being affected by undue influence. Each of these relational aspects will be considered in turn. Regarding the latter two requirements, I employed vignettes to gauge in more depth my

[145] Mather and McEwen, 'Client Grievances and Lawyer Conduct'Susan A Bandes, 'Feeling and Thinking Like a Lawyer: Cognition, Emotion, and the Practice and Progress of Law' (2021) 89 Fordham Law Review 63; John Eekelaar, Mavis Maclean and Sarah Beinart, *Family lawyers: the divorce work of solicitors* (Hart Pub Limited 2000) 184

interviewees' reactions and attitudes to dealing with 'messy human problems'.[146] As I will come to show, interviewees' responses to these vignettes were particularly interesting in demonstrating that some interviewees felt more comfortable delivering ILA in accordance with the market-exchange lawyering model, as opposed to delivering more relational ILA.

5.3.1. *Meaningful consultation and judgement*

5.3.1.1. *The imagined masculine approach*

When I asked interviewees what they normally covered during ILA, 17 (of 22) interviewees referred to going through the checklists sent by lenders and informing the client about the realities of a secured lending transaction and the potential risks.[147] Responses similar to the following were common:

> I go through all the steps in terms of the checklist of making sure that they understand what the document is, what it means, what the practical effect is, what is going to happen if the bank calls upon it, so that they fully understand. [P21]

Similarly, P15 said:

> What I usually do is, well obviously I give them a copy of the guarantee… I then go through my tick list in terms of explaining the risk and the nature of the document and the fact that they are primarily liable.

Whilst a discussion of the effect and risks of the transaction are required during ILA in accordance with *Etridge*, P21 and P15's responses indicated that they prioritise ticking an objective checklist as opposed to providing relational ILA. P8 went as far to say that ILA was

[146] Mather and McEwen, 'Client Grievances and Lawyer Conduct' 63
[147] P4, P5, P7, P8, P10, P13, P15, P17, P18, P19, P21, P22, P23, P24, P25, P27, P28

'money for old rope'. P19 similarly told me that he is 'just providing the final ticks in the final boxes [as an ILA solicitor].' None of the 17 interviewees who answered in a similar manner discussed asking the surety client questions or learning about the context of the surety client's decision. P7 answered slightly differently, but also emphasised that he provided objective advice. P7 mentioned that he would go through the checklist, but that 'out of an abundance of caution' he would go through the guarantee document 'pretty exhaustively.' P7 went on to say:

> So the certificate [which details a checklist], that you are issued by the bank, will pick up on the principal half dozen - or however many it may be - key points that the bank wants to be absolutely sure that you get across. But actually, I will tend to shine a light on every single clause of the document and summarize it in as plain and clear English as possible.

Whilst P7 described how he went through the document with precision, there was little emphasis on asking the surety questions, learning about their situation and decision in context, and providing contextual advice in accordance with fictive feminine/relational imperatives. There were similarities in P23's response. P23, however, straight away mentioned that it was not his role to pass judgement (a relational dynamic) on the commerciality of the deal:

> Well, it's never on the commerciality of the deal. Unless there was something extremely clear and obvious that someone was being taken advantage of from a commercial perspective. It is always that they understand the consequences of entering the guarantee - explaining what joint and several liability means and yeah, [what] the consequences [are] if the guarantee is called.

In outlining that he would only comment on the commerciality of the deal if 'there was something extremely clear and obvious that someone was being taken advantage of', P23 demonstrated that he prioritised remaining neutral - being apathetic to the potential repercussions of a surety client's decision, in most circumstances. This may not be surprising as P23 is a commercial lawyer and as discussed above, other work routinely suggests that commercial lawyers tend to remain apathetic about the consequences of their client's ends.[148] Like most interviewees, P23 discussed remaining objective; emphasising that he provided generic advice about the implications of a secured lending transaction. As a result, P23's response indicated that he delivered ILA in accordance with imagined masculine values – that his approach was more synonymous with the market-exchange lawyering model as opposed to a relational lawyering model. In a similar vein, P5 told me that:

> It's to make the wife aware of what she's letting herself in for, what could she be hung on the hook for. [That] it's not going to be her own personal debt, but could she lose the house as a result of the husband's business going under, or something of that nature. So, it's forewarned and it's forearmed and that kind of thing. You don't normally have enough information to advise, and I'm not a business adviser so I don't advise on the likelihood of success of the business or anything like that, but it's what happens if it goes tits up, for want of a better expression.

P5 was particularly trivial when stating that he advises to forewarn and forearm 'that kind of thing'. He also told me 'you don't normally have enough information to advise', which indicates that the ILA he delivers is generalised and non-contextual. Like P23, P5 also said that

[148] Langevoort, 'Gatekeepers, Cultural Captives, Or Knaves: Corporate Lawyers through Different Lenses' 1683; Moorhead and Hinchly, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers' 387; Vaughan and Oakley, ''Gorilla exceptions' and the ethically apathetic corporate lawyer' 50

he would not pass judgement on the commerciality of the deal. This point was raised by P10 as well:

> …so we say are you, do you understand what you're entering? Blah blah... Explaining the nature of what is being proposed. See what lawyers are not meant to do, is get into the commerciality of the deal. So, if someone is inventing uranium ice-cream we are not to say, that sounds like a really bad idea – we are not meant to look at the business…

Where it is obvious to the solicitor that the business' product – such as uranium ice cream – is absurd, or that the business is in a very poor financial position, then it would not be in the client's best interests to provide security for the business. Arguably, in such a situation, the solicitor is faced with an ethical dilemma: should they advise in accordance with their subjective judgement or not? P10 suggested above that lawyers are not meant to advise on the commerciality of the deal but goes on to say that he may 'raise an eyebrow' or 'pass comment' in a subtle manner:

> [I may] talk to them before and say: 'Gosh that's an interesting business is it going well? Is anyone actually buying that stuff?' Or something like: 'Wow yeah, what's the market for that?' just so that they, just so that they have a small chance to say, 'Oh don't you think it's good?', chocolate teapots or whatever.

David Luban has long argued that a lawyer's role morality – such as, in this particular context, providing ILA not directed to the commercial wisdom of the transaction – should not absolve him of his universal morality to provide such advice if it is ethically required.[149] 17

[149] David Luban, 'Reason and Passion in Legal Ethics' (1998) 51 Stan L Rev 873, 893

interviewees discussed how they believed that surety clients, despite the independent legal advice, would enter the transaction anyway.[150] This was offered up despite the fact that some of the same interviewees discussed surety clients *refusing to enter the transaction* after advice.[151] As such, the common trope 'she'll enter it anyway' acted as an excuse for not passing judgement on the transaction. As discussed above, Oakley and Vaughan have demonstrated that commercial lawyers are apathetic to the potential wider consequences of a commercial client's self-interested legal actions. If commercial solicitors are used to acting for clients who approach legal dilemmas with atomistic self-interest, those same solicitors may wrongly assume that the surety client (usually the wife) is considering her atomistic self-interests, and thus may not deliver ILA relationally (which would require trying to understand the client's objectives and the context of their legal problem). This may cause ILA solicitors to prioritise the means-ends (i.e. facilitating the transaction) as opposed to prioritising the process – delivering ILA in the best interests of the surety client.

P28 answered differently to the majority, framing his responses, as this exchange shows, in terms of pursuing the client's legal and business interests in accordance with market-exchange lawyering imperatives:

> I: And what do you normally cover with the potential surety during ILA?
>
> P28: Don't [enter the transaction]
>
> I: …So, you advise them not to enter into the guarantee every time?
>
> P28: Yeah, unless they really have to, unless there is no… [other choice.] Because when I say they shouldn't proceed, what I make sure is that they have looked at every

[150] P2, P4, P5, P10, P11, P14, P15, P16, P17, P18, P19, P22, P23, P24, P25, P27, P28
[151] P10, P14, P15, P19, P28

possible other option. Because there is always, in business – there is usually more than one way to achieve that result… because the people that I'm giving this advice to, they are not people who have just come off the street. They are people whom, you know, I've got an established relationship with professionally. I think that if you are a commercial lawyer, you're looking out for your *client's overall legal and business interest*.' [emphasis added]

P28, in stating that he was interested in the client's legal and business interests when delivering ILA, demonstrated that he prioritised a client's atomistic self-interests as opposed to more relational concerns. That he was 'looking out for' the legal and business interests of the client because he was a 'commercial lawyer', and because he would usually advise people that he knows, rather than 'off the street.' However, as demonstrated in Chapter 4 (section 4.2.3.), all interviewees had experience of advising wives who were providing security for their husband's debts.[152] In such a situation, the business interests should not be of importance to the ILA lawyer. Instead, the surety's individual legal interests are to be considered. If the emphasis is on achieving the businesses' ends by delivering ILA formalistically (in accordance with an imagined masculine approach), then the purpose of ILA is not achieved. Social psychologists suggest that where a decision maker frames an issue as being commercial, they are more likely to pursue unethical outcomes.[153] As the above exchange shows, I clearly asked P28 how he provided ILA to *sureties* as opposed to commercial guarantors, yet he still discussed considering the client's business and legal needs.

[152] See Table 4.3 in Chapter 4 section 4.2.3.

[153] Maryam Kouchaki and others, 'Seeing green: Mere exposure to money triggers a business decision frame and unethical outcomes' (2013) 121 Organizational Behavior and Human Decision Processes 53

P8 also demonstrated that he succumbed to the pressure of pre-existing clients' demands; that where a pre-existing commercial client wanted the ILA certificate completed swiftly - irrespective of whether the client was securing the lending commercially or providing suretyship for a loved one's debts – he would comply. When I asked P8 about what was usually covered during ILA with a surety client, he replied: 'It depends on the individual.' This, at first glance, seems like a relational response, as what advice will be delivered depends on the client's circumstances. However, he went on to explain that the client calls the shots on how ILA is delivered:

> I can think of one particular person who I've done a few for now. Our property team is doing some bank facility direct with a company, the company's borrowing money, director to the company is giving a guarantee. By the time I speak to him he knows exactly what the facility says, he knows exactly what the guarantee is. He used to work in commercial banking for 20 years. He sees my phone call giving him advice as a complete inconvenience, he can't get off the phone quick enough, and it's almost having to keep him on the phone long enough for me to then sign the letter saying that I have advised him this, this, this. Other people might want to be taken line-by-line through the deeds saying if you don't pay then this, this, this…. So, it really depends on the person. [P8]

In this example, P8 discussed delivering ILA over the phone to a commercial guarantor, where a company was borrowing money and the 'director to the company is giving the guarantee.' In such situations, it is clear that the *Etridge* requirements do not apply – that the lender is only requiring ILA as an extra layer of self-protection. However, P8 later told me that he delivered ILA the day before our interview to a pre-existing commercial client. ILA was

required in that situation because P8's client had agreed to stand as surety for his son's debts. P8 - in this clearly non-commercial situation – went on to explain that:

> In that case he was a very experienced businessmen, very senior person in quite a large organisation, knew exactly what was going on. The advice took a couple of minutes, and he just said yeah, I know all of that, very interesting, you don't need to explain it to me. And actually that kind of is a lot of the experience we have on the ones that I tend to get involved with, the commercial ones, where you're often dealing with people who are very experienced, know full well what's going on, know incredible detail about the bank facility and all the rest of it, and know full well what the guarantee involves. Essentially you say to do them do you know the risks, they say yes. The advice is often not much more detailed than that with some people because they know.

Later in the interview, P8 confirmed that this ILA had been delivered over the telephone. He suggested that that this was acceptable because he had been advising his client 'on a piece of litigation for about two years already.' I then asked: 'Are you required to meet surety clients face-to-face?' In response, P8 said:

> I can't think of a case where they've [the lender] said you have to meet them face-to-face. But that is in context of… more often than not that advice we're giving is connected to something else, either somebody else that we already know, or something else we're already doing. If somebody rang up and said hello, I've been asked to sign this document, I need to take independent legal advice, you don't know me, I don't know you and I'm happy to pay for it, I'd be more than likely to have them

in. [Pause] Actually, you could do it on the phone. You wouldn't necessarily get them in…

P8's unconcerned response about delivering ILA briefly over the telephone to clients who are providing suretyship in a non-commercial context is worrying. P8 was clearly influenced by the fact that his pre-existing client was commercially savvy and already understood the commercial implications of providing a guarantee. However, the ILA solicitor is required to do more than just detail objectively the realities of the transaction and the risks involved. As set out above, relational elements of ILA are required. The ILA solicitor needs to consult with the client to understand the context of their situation and the surety client should receive advice from a solicitor about whether it is in their best interests to provide suretyship based on their personal financial means and the principal debtor's financial means. P8 emphasised that the client who had decided to provide suretyship for his son was a pre-existing client – that he had been involved in a litigation case with the client for two years. Arguably, in deciding to deliver deficient ILA over the telephone with a surety client – meeting the client's ends swiftly – P8 was 'keeping his client sweet' in order to maintain their existing, and likely more lucrative, relationship. In acting in such a way, P8 demonstrates that he prioritised lawyering in accordance with a market-exchange model; even when delivering ILA in the non-commercial context. Of even greater concern, P8 later admitted that even if he did not know the client 'he wouldn't necessarily get them in' to deliver their ILA face-to-face.

What I think my work shows is that P28 and P8's attitudes towards ILA are an effect of the 'ILA for all' procedure lenders have created post-*Etridge*.[154] The purpose of ILA is diminished where ILA is delivered to commercial guarantors that are, as Lord Nicholls outlined, 'capable

[154] Discussed in Chapter 4 Subsection 4.2.2.

of looking after themselves and understanding the risks involved.'[155] ILA is merely a paper exercise for the lender's protection in the commercial guarantee context, and solicitors such as P8 and P28 discuss treating surety clients the same as commercial guarantors. They fail to recognise how their approach should differ because they are dealing with a suretyship transaction involving a non-commercial guarantee, as opposed to a commercial guarantee.

At the end of his interview, P8 talked about how he believed ILA should be automated in situations 'where ILA is only needed to allow a wider deal to be facilitated'. In the following excerpt, P8 discusses how ILA should be delivered electronically or 'over the web':

> Let's say it's a property support thing, we've got our property team who, if they can get this deal over the line, can deliver a fee of X number of thousands of pounds. They really want to make that happen. In order to make it happen this advice has to be given. So, it's almost like I'm doing it as a favour to them to then allow them to do a wider deal. Now that of course doesn't affect the advice and you give it as professionally detailed as you need to, but it is part of a bigger picture. Now what could you do about that? What would make this sort of thing easier is if there was some sort of system, and I don't know how you do this or what it would look like. If there was somebody out there who was doing independent legal advice, that's all they did, independent legal advice on guarantee documents, web based, over the phone, something like that, and that's all they did. And because it's all they do they can do it process orientated; they can do it really cheap.

Here, P8 is suggesting that ILA should be further routinised and automated, prioritising

[155] *Etridge* [88]

market-exchange imperatives of meeting the client's needs, and ignoring the benefits of solicitors using their 'judgment and expertise to connect clients with the legal system.'[156] In stating that ILA should be automated where there is a situation where ILA is needed merely to facilitate a transaction 'worth X number of thousands of pounds to the firm', P8 demonstrates that he does not value the more fictive feminine values in lawyering 'which require human interaction and emotional intelligence and cannot, at least for the time being, be automated.'[157] In claiming that ILA could be automated and 'web based', P8 is demonstrating that he thinks that the only objective in ILA is to provide information. Remus argues that:

> Proponents of unbundled, commoditized, and automated services contend that basic information is all that is needed in countless instances of unmet legal need. However, it is frequently impossible to know from the outset of a representation whether the required legal work will be routine or complex…[158]

As Lord Nicholls clearly outlined, exactly what is required by a solicitor when they deliver ILA cannot be foreseen. Therefore, ILA cannot be routinised and seen as a formality because the lawyer's advice must be tailored to each individual client's situation.

During the course of his interview, P8 explained how he delivered ILA in the same objective manner whether or not the client was faced with providing suretyship for a loved one or if they were a commercial guarantor. This led me to ask 12 interviewees (in subsequent interviews) if ILA was delivered differently to clients providing a guarantee in the commercial

[156] Remus, 'Reconstructing Professionalism' 854
[157] Dana Remus and Frank Levy, 'Can Robots be Lawyers: Computers, Lawyers, and the Practice of Law' (2017) 30 Geo J Legal Ethics 501, 526
[158] Remus, 'Reconstructing Professionalism' 856

context compared with ILA that is delivered to those providing suretyship. Nine interviewees told me that their advice was exactly the same. All nine of these interviewees discussed providing non-relational/objective advice to surety clients. The following responses were typical of the responses from these nine participants:

> …my approach is entirely standard across the board, to the point I'm probably annoying people by being so pedantic. [P17]

> I would still go through all the steps in terms of the checklist. [P21]

> I have to tell them the same thing… we tick the same boxes with regards to the type of information we tell them. [P24]

On the other hand, the three interviewees who stated that ILA was delivered differently to those clients who were commercially entering a guarantee, as opposed to sureties in the non-commercial context, were part of the five interviewees who had also discussed providing more relational ILA. It is to these minority of interviewees, and their more relational approach to ILA, that I now turn.

5.3.1.2. *The fictive feminine approach*

As previously discussed, 17 interviewees discussed delivering ILA where imagined masculine values and market imperatives were prioritised. However, five interviewees discussed providing more relational ILA during their interviews.[159] These interviewees talked about asking the surety client questions to learn more about the context of the transaction and the

[159] P2, P11, P12, P14, P16

context of their decision to provide suretyship. For instance, P12 said that he would ask personal questions about the surety client's financial means during ILA:

> First, I want to go through the background, the nature of the transaction, what they're trying to do, why they're borrowing, what their means are at the moment. I can't be too intrusive on that, but I need to know that if someone's coming in and they're on social security for example and they're trying to guarantee somebody, I realise that the whole thing's a bit of a sham… I like to get a bit of background knowledge just to make sure it's a genuine transaction - that what they're trying to do is sort of realistic.

Here, unlike the interviewees discussed above, P12 (the only non-commercial lawyer interviewed) discusses providing a consultation with the surety client when delivering ILA. P12 reveals that he is cautious and caring about the surety client's situation by making sure the transaction is 'realistic'; considering the context of the individual client's decision and their financial means - checking that is not 'a sham'. Consequently, P12 details providing ILA where the fictive feminine values of consultation, consideration, care, and compassion are prioritised, as opposed to providing objective advice prioritising the client's means-ends. Drawing on Remus' conceptualisation of relational dynamics, P12 demonstrates that he is prepared to make a judgement on whether the transaction is advisable or not depending on what the client tells him about their financial means. P12 also prioritises the relational dynamic of trust when asking 'intrusive' and personal questions about 'why they're borrowing [and] what their means are' at the time. As Thornton argues, taking a more fictive feminine

approach to lawyering, is a 'reflective movement [which] allows us to view justice as a process, not just a finite end in itself.'[160]

P16 also discussed providing more relational ILA. In answering my question about the usual content of ILA, P16 first said that he would explain to the surety client the legal and financial implications of the transaction. However, P16 continued by stating that, as a result of the *Etridge* guidelines, another layer of advice is required – more relational advice:

> If you go through that [explain the realities of the transaction and the inherent risks], you just need to, in view of *Etridge*, step back and say 'look, is this the right thing to do for you? You've got no control usually over the business that you're guaranteeing. In your heart of hearts is this a risk you're prepared to take, and we can't advise you to take that risk if you've got any doubts.' So there are two things here: the legal side, if you like, which is to just go through the clauses of the document, and then stepping back and saying 'are you happy about it, is it sensible? You're putting your own finances at risk.' So, two prongs to it really.

Here P16 demonstrates that ILA is not just about informing the surety client about the realities and the risks of the transaction; that there is a second 'prong' which requires him to enquire whether the surety client - in their circumstances - is prepared to take the risk. Like P12, P16 demonstrates that he conducts a consultation as opposed to going through an objective checklist sent by the lender.

Unlike P12 and P16 - but still demonstrating more relational lawyering approaches - P2 and P14 spoke with me about asking questions about the client's relationship with the principal

[160] Thornton, 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the New Corporatism' 771

debtor during ILA. For instance, P2 said that he consults with the surety client and asks them questions such as:

> What if the relationship breaks down? What if the business struggles? What if the value of your property decreases? What happens in all of these external situations, which you are not in control of? What is the worst-case scenario and are you prepared for that?

P14 told me that: 'Inevitably one of the things I also ask is about is the relationship [between the client and the principal debtor].' Moreover, in answer to my follow-up question: 'What questions do you ask about their relationship with the principal debtor?', P14 said:

> Well one of the questions I ask about the relationship is, "You're entering into a long-term liability here personally, which will affect your personal position if it goes wrong. Are you comfortable doing that? How long have you been married? Are you comfortable with the decisions that your husband makes in the business? Are you comfortable that the relationship is where you want it to be?" Because they are all relevant factors because actually if you just do it in the cold light as a commercial transaction, you're missing out on a whole swathe of factors, which arguably are just as important. I wouldn't, for instance, give a guarantee to a friend if I think he's a lovely chap and a rubbish businessman. You just wouldn't. So, the principle's no different. Why would the principle be different for anybody else?

One of the most interesting parts of the above interview excerpt is where P14 comments: '…if you just do it in the cold light as a commercial transaction, you're missing out on a whole swathe of factors.' Here, P14 demonstrates that he believes his duty is to get the client to

consider their own self-interests before entering the guarantee. P14 seemed to indicate that he wanted to learn more about the context of the client's decision and therefore took consultation with his client seriously. That said, P14 demonstrated that he did not identify with the position of some sureties when he said: 'I wouldn't, for instance, give a guarantee to a friend if I think he's a lovely chap and a rubbish businessman. You just wouldn't. So, the principle's no different. Why would the principle be different for anybody else?' In this excerpt, P14 demonstrates that he does not appreciate how some sureties may only enter the transaction out of loyalty to the principal debtor, or to preserve their relationship with the principal debtor.[161] That said, P14, unlike most interviewees discussed above, did not discuss providing ILA as if it were a mere formality – as a means to an end. In other words, he indicated that he did not take a market-exchange approach to delivering ILA. However, P14 also demonstrated that in asking personal questions about the surety client's relationship, he exceeded the requirements set out in *Etridge*. As I discussed above in subsection 5.3.1., Lord Nicholls seemed to discourage solicitors questioning the surety client about their relationship with the principal debtor, when discussing that it is not the role of the solicitor to ascertain if the client was being unduly influenced. As previously outlined, Lord Nicholls said that such questions would understandably outrage the surety client.[162] In light of Lord Nicholls' criticisms that such questions were 'intrusive', I asked P14 how clients tended to react to questions about their relationship with the principal debtor. In response P14 said that:

> …some of them will literally say, "Well I don't think that's relevant" and I'll say, "That's fine." And I have to explain, "I'm asking you because I want you to make a decision having regard to any factor you think is relevant." If a client says to me, "Well I'm not

[161] Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* 181-184
[162] *Etridge* [53] (Lord Nicholls)

> prepared to discuss that with you" that's fine because I've already done what I need to do, which is I've brought it to their attention and it should then be something that they're thinking about when we talk about, "Well are we going to sign up or aren't we going to sign up?" But remember that the vast majority of people who come here are coming here determined to sign, whatever happens, irrespective of the advice I've given because a lot of them will have already decided that "The money's got to be used by the business and I'm only filling this piece of paper in because the bank's asked me to." Which makes it an annoying process because you know that they're not really listening or they're listening, but you know they're not actually thinking about it in the way that you want them to think about it, which is for the long term.

P14 demonstrated that he felt - despite the subject matter sometimes being uncomfortable for the surety client - that it was his duty to raise a discussion about the health and stability of the client's relationship with the principal debtor. P14 believed that his duty was to ensure that surety clients are taking into consideration all factors that should be relevant to their decision; not to have easy/comfortable discussions appeasing the client and meeting their ends swiftly. In the second half of the excerpt above, P14 reveals his frustrations about how surety clients, in his experience, tend to proceed regardless of the advice given. P14's frustrations seem to be borne out of care and consideration for the surety client's position; stating that clients are not thinking about their positions in 'the long term.'

Later in the same response, P14 said:

> [A] question I always ask is, "Well if Bob [their husband] is that good, why does he need the money? What is the money coming in for? What are you using it for? Is it coming in for a specific, positive purpose, i.e. we need to extend the warehouse

> because the business is flying? Or is it coming in because, "Well, we've been let down by a few clients and we're struggling a bit financially"? Because if it's you're struggling a bit financially, my question would be, "Have you looked at the balance sheet? What does the bank account look like?... All the kind of hallmarks of, "This company's going to fall over whether you lend money to it or not. Therefore don't."

In this excerpt, P14 indirectly reveals that he does not receive information outlining the principal debtor's current indebtedness from the lender before delivering ILA. As discussed in Chapter 4 (subsection 4.2.5), a further seven interviewees told me they did not receive information about the principal debtor's current indebtedness before advising a surety client.[163] In addition, four interviewees said they only sometimes received the required financial information from the lender.[164] In failing to receive the required financial information, meaningful ILA complying with the *Etridge* guidelines cannot be delivered because: i) the solicitor is unable to explain contextually the realities of the transaction or the risks involved; and ii) the solicitor will not be able to form a judgement on whether - depending on the principal debtor's current indebtedness and other financial considerations - it is advisable that the surety enter the secured lending transaction. In such circumstances, where the surety client's solicitor has not received the correct financial information from the lender, the solicitor 'should decline to provide the confirmation sought by the bank.'[165] Some interviewees indicated, by admitting that they never received financial information from the lender, that they have provided ILA and signed off on certificates of ILA in circumstances where they should have refused. I wanted to further explore if other interviewees would likely

[163] P2, P11, P17, P19, P23, P27 and P28.
[164] P15, P18, P24 and P25
[165] *Etridge* [67] (Lord Nicholls)

proceed where they would not have fulfilled the more relational aspects of ILA in accordance with the *Etridge* guidelines, and what motivated them to proceed in such a situation. To do this, I deployed several vignettes.

5.3.1.3. *Meaningful consultation – a vignette*

5.3.1.3.1. *The financial information dilemma*

To further understand if and why interviewees would confirm with the lender that ILA was delivered in instances where the lender had not sent the required financial information set out in *Etridge* (so that the solicitor can provide more relational advice), I asked 12 interviewees to respond to a hypothetical vignette on this subject:[166]

> *Before a meeting with a new client who requires ILA before providing a guarantee for the lending of a loved one, you do not receive any financial information from the lending institution about the nature of the agreement, or any financial information regarding the principal debtor's current indebtedness. When you meet with the client, they summarise the details of the transaction and provide some insight into the borrower's current financial situation as they know it. How would you most likely proceed?*

As discussed in Chapter 2,[167] vignettes are a valuable research tool because they assess interviewees' ethical reasoning and decision making in 'real time'. This means that interviewees' attitudes, perceptions, and approaches to ILA are demonstrated as opposed to

[166] As discussed in Chapter 2 section 2.6, only 12 interviewees were asked to respond to the vignettes mainly because of interviewees' time constraints.
[167] Chapter 2 Section 2.4.1.

being discussed in the abstract. Therefore, vignettes minimise, but do not eliminate, 'response biases designed to show the interviewee in a good light.'[168]

Out of the 12 interviewees asked, five said they would likely proceed in signing off on the certificate of ILA where they had not received the required financial information. For instance, P23 seemed oblivious to this *Etridge* requirement and merely said that he would most likely proceed because it is not usual to receive such information from the lender. On the other hand, P5 was aware that he should refuse to provide ILA where he did not receive the correct financial information from the lender, yet still stated that there may be situations where he would most likely proceed. Note that, in the excerpt which follows, P5 referred to the surety client as the wife instinctively, despite the vignette not specifying that the surety client was wife to the principal debtor:

> I would like to think I would say to the wife: 'I'm sorry I can't advise you properly because I haven't got X, Y or Z. Please can you come back and see me in a couple of days when I've had that information?' I'd like to think I'd do that. If they were insistent – who knows? I might say well on what you've said, it will be [the client's liability] from X to Y and this is the risk, and in the worst-case scenario this is what could happen. Depends on how pressing the need was for the money probably, how insistent they were. [P5]

Here, P5 - a lawyer who typically works for 'tertiary lenders' in arranging secured lending transactions and arranging secured lending for businesses - knows that he should not confirm ILA to the lender in such circumstances, as he states: 'I would like to think I would say to the wife: 'I'm sorry I can't advise you properly…' However, he goes on to say that whether he

[168] Moorhead and Hinchly, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers' 395

would proceed to confirm the ILA with the bank would depend on how 'pressing the need was for the money' and 'how insistent they [the client] were' about completing the transaction. As demonstrated in social psychology research, commercial considerations – such as 'how pressing the need was for the money' – can trigger unethical behaviour.[169] P5 therefore claims that he would only provide confirmation for altruistic reasons; that he would choose to be unethical to benefit the client's needs to complete the transaction and get the money. He was trying to suggest to me that 'his unethical actions were motivated by the benefits that would accrue to others rather than by potential direct benefits to himself.'[170] Behavioural psychologists Francesca Gino and others demonstrate through a series of experiments that self-serving altruism makes 'people feel less guilty' about unethical decision making 'when others (in addition to themselves) can benefit from it.'[171]

Like P5, P25 also seemed preoccupied with performing ILA to meet the client's commercial ends. Rather than saying he would ask the lender for the information before advising, P25 said he might ask the solicitor acting for the principal debtor, 'as the only financial information you need is the loan to value [ratio].' He explained that speaking to the solicitor acting for the principal debtor was an option 'because in many cases' he provides ILA 'to clients of the firm [clients of a solicitor in another office/branch of his firm].' He went on to say: '…the solicitor acting in the different office will generally still be able to provide the financial information.' Arguably, contacting the principal debtor's solicitor who wants the transaction to be actioned for their client would be more time-effective and efficient rather than having to get back into contact with the lender. Whilst P25 does not say it explicitly, P25 discusses taking a course of

[169] Kouchaki and others, 'Seeing green: Mere exposure to money triggers a business decision frame and unethical outcomes' 53
[170] Francesca Gino, Shahar Ayal and Dan Ariely, 'Self-serving altruism? The lure of unethical actions that benefit others' (2013) 93 Journal of economic behavior & organization 285
[171] Ibid

action which would likely allow the ILA to proceed, and therefore confirmation of the ILA and the transaction would likely proceed too, without too much interruption.

P2 responded to the 'financial information vignette' in a similar vein by stating that he would likely proceed. In the below excerpt, P2 discusses how he does not think it is necessary to receive financial information from the lender because it is not his job to go through this contextual information. He thinks it is enough to explain in the abstract the realities and risks of a secured lending transaction without knowing the specifics of that client's transaction and situation:

> I wouldn't say it's my job [to go through the financial information such as the husband's current level of indebtedness]. I would suggest: 'Before you do anything you should know what the 'up-to-date' finances are, what the money is being used for, etc.' But, ultimately, if they want to sign it, and you've warned them, you've told them that in the event of difficulties someone could call upon your debt, then if they want to sign it anyway and I've got a written record that I've given advice, then… (shrugs shoulders). [P2]

Here, despite earlier stating that he asked the surety client questions – indicating that he delivered ILA relationally – P2 demonstrated that he prioritised delivering ILA objectively (an imagined masculine value). As such, P2 revealed inconsistencies in his approach (between what he says he does and how he responded to the vignette). Unlike P5, P2 does not overtly say he will prioritise the client's means-ends. However, P2's neutral position, stating that clients can 'sign it anyway' after abstract warnings about the inherent risks of entering a suretyship transaction, has the effect of prioritising the client's means-ends. P2 is not

concerned with providing a legal service where the solicitor is willing to pass judgement on the transaction considering the client's best interests.

P15 more directly demonstrated how he did not think it was his role to perform ILA relationally. P15 said that he would most likely proceed, in the absence of financial information from the lender, because:

> I start from the premise that I'm not advising in a commercial or legal capacity in terms of the actual terms of the loan… But, generally speaking, the amount borrowed, the term of the loan, the details of the loan, the percentage payable, the default percentage interest rate, all of that, that's a commercial issue. I'll explain that to you, but I can't put it in context of your business because I don't know enough about your business… I'm a lawyer. Well, I like to think of myself as having business knowledge, but I'm a lawyer, I'm not your business adviser. So, I can't really put it in context really. I can explain it, but I can't put a judgement on it really.

The last sentence 'I can't really put it in context really. I can explain it, but I can't put a judgement on it really', is particularly telling of the fact that P15 does not deliver ILA relationally, and thus, does not fully understand or comply with *Etridge*. Like many of the interviewees, P15 seemed preoccupied with explaining rather than contextually advising, which should involve the lawyer forming a judgement about whether the transaction is advisable, considering the client's best interests.

P7, P18, P21 and P22 each said they would only not proceed in the vignette hypothetical because they would not have the correct information to 'explain' the transaction as opposed to using that information to form a judgement on whether the transaction was in their client's

best interests. In other words, their emphasis was on providing information in exchange for money, which – according to Remus - embodies a market-exchange approach to lawyering.[172]

P22 and P24's responses were slightly different as they were principally concerned with needing to hear from the bank to ensure that they performed the role in accordance with the lender's requirements.[173] For instance, P22 stated:

> I'd say: 'look, I can't do this. I need the lending institution to tell me what they're wanting.' ...I need to know because the ILA is ultimately going to go to the lender the ILA that I provide… [needs to be] in line with the lender's requirements, and the lender will have certain documentation and details.

P4 and P12, on the other hand, were concerned about ILA not being delivered properly to their clients without the information. For instance, P4 stated: 'I don't think you can really be giving proper independent legal advice without the background information.' For similar reasons, P12 – the only non-commercial solicitor interviewed – stated resolutely that he 'absolutely wouldn't proceed'.

The House of Lords assumed in *Etridge* that solicitors would appreciate that they have a fiduciary duty of loyalty towards the surety client, which required them to provide a proper standard of service when delivering ILA. However, interviewees' responses to the 'financial information vignette' made clear that five (out of 12) interviewees felt they would most likely proceed in situations where they had not received the correct financial information out of concern for their client's ends, rather than thinking about what would be best for their client's protection.

[172] Remus, 'Reconstructing Professionalism' 827
[173] This is a theme that will be looked at it in more detail in the next chapter - Chapter 6.

5.3.1.4. *Judgement: a closer look*

As discussed above, most interviewees discussed ILA in accordance with imagined masculine values; where they remained objective - not forming a judgement on whether the transaction was in the client's best interests – and where they prioritised the client's ends. To further explore if the other interviewees were willing to pass judgement and advise surety clients against entering the transaction, I asked my interviewees directly if they had ever advised a surety client not to enter the transaction because it was not in their best interests to do so. As discussed in Chapter 3,[174] Morris describes this type of advice – where a judgement is made about whether it is in the best interests of the surety to enter the transaction – as 'real advice' which may well involve the ILA solicitor saying to the surety client: '…don't do it.'[175]

In his interview, P2 spoke of how he felt that there was ambiguity about whether a solicitor was required to provide 'real advice' during ILA:

> Some people say, 'Your duty is just to tell them what a guarantee is,' and other people will say: 'No your duty is to advise them on the whole circumstances: is the guarantee right in their circumstances?'

Following this, I asked P2 'What do you think your duty is?' In response, he stated: 'What is the worst-case scenario and are your prepared for that? I suppose that's it [the duty].' Arguably this vague answer indicates that P2 does think more relational advice is required. However, P2 did not answer my question directly about whether he provides real advice such as 'don't enter the transaction.'

[174] See Chapter 3, section 3.4.1.
[175] Debra Morris, 'Surety Wives in the House of Lords: Time for Solicitors to Get Real'?' (2003) 11 Feminist Legal Studies 57

Most interviewees answered my question less ambiguously. In fact, 15 out of 20 interviewees asserted that it was not their job to pass judgement when delivering ILA, cementing my suspicions that most interviewees did not in fact pass judgement during ILA.[176] The following responses were typical:

> I don't see it as our job to tell them whether to proceed or not. If somebody wants to do a deal, to sign an agreement or whatever, that's their decision. [P8]

> No, it's their decision to make. [P18]

> No… it's never my place - doesn't matter what the situation is - to take commercial decisions for clients. [P19]

These 15 interviewees demonstrated that they prioritised the imagined masculine values of objectivity and the client's independence – that they believed clients should make their own decisions independent of their solicitor's judgement. Note also that P19 referred to it as a commercial decision. Similarly, P22 states that entering a suretyship transaction was a commercial decision for the client to take alone:

> A solicitor's job is effectively to provide the options; it's not necessarily to turn round and tell them to enter into it or not. Again, with independent legal advice the extent of the advice is just to tell them what it is… So… it's a bit of a red herring there. I haven't before and I don't think I could do, on the basis that my job is to say 'this is the documentation, these are the ramifications of it, you enter into it on your choice

[176] P4, P5, P7, P8, P10, P11, P13, P17, P18, P19, P21, P23, P22, P24, P25.

basically.' Effectively at the end of the day it's a commercial choice to enter a personal guarantee; it's not really for me to say whether they should, or they shouldn't.

On the other hand, five interviewees told me they would advise the client against entering the transaction.[177] Those taking a relational approach included the only non-commercial solicitor interviewed - P12: 'I might well say this is not in your interest to do it.' He also went on to say that he has, 'on a couple of occasions, told the client to go away and think about it and to come back and we'll have a second appointment just to make sure [they want to proceed].' Similarly, P14 stated: 'I don't have a problem with saying to someone I think you're mad.'

P16, however, was the only interviewee who discussed actually being involved in a situation where he advised a surety client not to sign. P16 spoke of a time where he and his colleague were both delivering ILA to a surety client. In the end, he said that he and his colleague both refused to sign off on ILA because they were not comfortable that the surety client fully understood the ramifications of the advice or that she wanted to proceed.

It is worth highlighting that P28, despite saying he had advised clients not to enter the transaction considering the client's business and legal needs (as discussed in the previous subsection), went on to state later in the interview that if the client wanted to proceed, he really could not think of a situation where he would not sign off on a certificate of ILA. He told me: 'I can't, I really, really can't think of a situation where I would have any doubts about signing off such a certificate and withholding the means by which they could get access to the money.' P28, like most other interviewees, again seemed to be prioritising the client's means-

[177] P12, P14, P16, P27, P28

ends rather than their protection against undue influence. He and others were preoccupied with facilitating the transaction so that the client – or the principal debtor – 'can get access to the money.'

For the most part, accounts from my interviewees demonstrated that they were not cautious when providing ILA. In line with their other commercial lawyering practices, most interviewees told me that the client's decision was paramount; that they felt it was not their role to interfere, even though this approach may bring about ends which are not in the surety client's best interests.

5.3.2. *Interference*

It has already been demonstrated throughout this chapter that my interviewees resisted interfering with the surety client's decision to enter the secured lending transaction by providing more relational advice. I have suggested that most interviewees define their ILA role narrowly because they are used to lawyering in accordance with imagined masculine values in their typical commercial lawyering roles, where market-exchange imperatives are prioritised. I have also discussed the effect that 'ILA for all' is having on diminishing the overall purpose and quality of ILA in the non-commercial context. In this subsection, I will discuss interviewees' other responses which demonstrated they felt uncomfortable dealing with the 'human complexities'[178] that cannot be removed from ILA.

In this section, I demonstrate that my interviewees resisted dealing with messy human problems and that this in part explains why interviewees delivered ILA as a 'narrow legal

[178] Abbott, 'Status and Status Strain in the Professions' 824

role.'[179] Although this data is but a small part of my interviews, I felt it warranted discussion because it demonstrates that the House of Lords were wrong to assume that every lawyer would be comfortable with dealing with surety clients relationally. So, for example, my interviewees demonstrated that they were principally concerned with how they were perceived by the principal debtor, and how they wanted to protect their reputation as 'facilitators' rather than being seen to be obstructing the completion of the secured lending deal.

During interview, six participants discussed, without being prompted, the 'awkward' situation where a wife and husband attended the ILA appointment together.[180] P4 actually said that he was now 'better at handling the personal side of things' when having 'the husband and wife in'. He went on to say that he would always reassure the husband that he was not going to 'talk the wife out of what she wants to do,' but that he will 'have to take her aside' without the husband being present. P4 seemed preoccupied with 'saving face' with the principal debtor. This is, of course, of concern. P4 also revealed that he normally consulted the husband and wife together in a room before taking the wife to an alternative consultation room. He recounted another experience where 'the wife was very keen in the meeting with her husband' but then when he 'got her in another room, she was asking lots of questions about what could go wrong, what's the worst-case scenario… showing a whole other side.' Rather than discussing being concerned about the complete change in his client in the absence of her husband, P4 said that because 'she wasn't saying she didn't want to do it' he signed off on the ILA certificate. He then went on to say that when they returned to the husband 'she

[179] Ibid
[180] P4, P10, P15, P19, P25 and P27

was almost making out that I had been keeping her, almost to try and save face with the husband.'

P17 also demonstrated that he tried to 'save face' with the principal debtor who accompanied the surety client. After saying that '…the balance of power may not be equal' between the principal debtor and surety client, he recalled the following encounter:

> …once where I was trying to give advice, the husband was sort of poking his head through the door… It was really awkward; I was just sort of thinking this has to be face-to-face [without the husband]. And how am I going to do that with you trying to go 'Well can I come in and sit and watch it?'

I then asked P17 what he did in that situation. He answered:

> I did get them [the husband] out of the room, but it was a bit embarrassing and very awkward. And you feel tremendously under pressure yourself because you're trying to facilitate something and they're probably thinking you're being overly formal and pedantic.

Contrary to *Etridge*, and his wider professional obligations, P17 revealed that he saw his role as facilitating the transaction rather than ensuring the wife was fully informed and advised in her best interests. P17 also demonstrated that he had concerns that his client and their husband would view him as 'being overly formal and pedantic.' This shows how the act of providing ILA – and dealing with messy human problems - can be an assault on a lawyer's professional purity and self-image. Similarly, P19 was concerned with how he would be perceived by the principal debtor if a surety client did not proceed with the transaction:

> It would take a feisty person, male or female, to come back [to their loved one] and say, 'sorry I haven't signed it'. [The loved one is likely to say] 'What, you haven't signed it? Who was that solicitor you saw? I'm going right round to see him now, bloody troublemaker.

This data demonstrates that interviewees were, in part, concerned about how principal debtors perceived them and their role when delivering ILA. Langevoort argues that a lawyer's egocentrism can affect their lawyering as egocentric concerns can prompt self-serving biases.[181] Take, for instance P4, who stated that he will normally say to the husband (before he advises the wife separately) that he will 'not talk the wife out of what she wants to do.' In such a situation, it is likely that P4's delivery of ILA is going to be tainted by egocentric bias. In other words, despite what the surety client tells him about the context of their decision, it is unlikely that he will independently and loyally advise the surety client in her interests only (especially where those interests might suggest that the surety client does not proceed with the transaction). As Langevoort states: 'Ego desensitizes the mind to information that might otherwise be disillusion and prompts self-serving inferences and decisions that protect and enhance the self-concept.'[182] It is unlikely that, after effectively saying to the husband he will 'not upset the applecart', P4 would advise the surety client against entering the transaction.

These findings also relate to Liu's argument (drawing on Abbott's concept of professional impurity) that dealing with a client's emotional and messy needs can be an assault on lawyer's professional purity.[183] Liu observes that 'clients are a major source of impurity in professional

[181] Donald C Langevoort, 'Ego, Human Behavior, and Law' (1995) Virginia Law Review 853
[182] Ibid 859
[183] Liu, 'Professional Impurities' 150

life as they constantly bring dirty work to professionals.'[184] Therefore, it could be said that interviewees (such as P4, P17 and P19) may resist dealing with a surety client's messy/human problems, and are mostly concerned with how they are perceived, because dealing with client's emotions or other human complexities challenges their professional purity.

5.3.2.1. *Interference – two vignettes*

Direct questions aside, I wanted to further explore if interviewees would interfere with the client's decision, or refuse to act, if they were faced with a situation where there were reasons for suspecting undue influence. In other words, I wanted to present vignettes to interviewees where messy human problems arose in the ILA context, to see how interviewees would most likely respond.

5.3.2.1.1. *The crying client dilemma*

As discussed in Chapter 2,[185] I designed the following 'crying client dilemma' vignette to measure how comfortable lawyers felt with interfering and taking action to protect the client where the client was visibly upset after a meeting:

> *Your client has left the room after a meeting where you felt satisfied that you relayed all important information and that they understood their risks. That same client is seen to be visibly upset as they left the building by one of your colleagues. Your colleague tells you what they had seen. This client already signed the documentation necessary to confirm the lending transaction with the bank. The principal debtor, your client's loved one, was sat outside the room throughout your meeting.*

[184] Ibid 154
[185] Section 2.4.1.

The varied answers to this vignette demonstrated that some interviewees prioritised non-interference, objectivity, and the client's independence/autonomy more than others. This is potentially concerning as those lawyers with a more relational/fictive feminine approach to ethical dilemmas may do more to protect surety clients from harm than those who prioritise masculine values and delivering ILA in accordance with a market-exchange model of lawyering. Out of the 12 interviewees who were asked to respond to this hypothetical, seven stated that they would most likely proceed with confirming ILA to the lender and without getting back in contact with the surety client.[186] P24, the most junior lawyer interviewed, said he would ask a partner of his firm about how to proceed.

Six interviewees seemed exasperated or flummoxed about having to respond to this vignette.[187] The following responses were typical of this group and demonstrated that most participants felt uncomfortable having to deal with messy human problems:

> [Sigh] Oh, that is a thorny one! [P7]
>
> I'd possibly give my colleague a smack round the face for telling me... what a tricky situation! [P22]
>
> Crying as they leave?! [P23]

To justify not interfering, and their decision to confirm the ILA with the lender without getting back into contact with the surety client, seven participants told me, in their responses, how they had completed their role in this hypothetical before the surety client left and therefore

[186] P2, P5, P12, P15, P18, P21, P22
[187] P2, P7, P18, P22, P23, P24

felt they could proceed. P15, for example, demonstrated little concern or compassion for the surety client in accordance with the fictive feminine approach to lawyering:

> I don't know, I've never had that situation. Can you re-open something? Again, on the basis of the checklist and on the basis of them signing it off and nobody else being in the room at the time or glaring at them through the window, I think I'd proceed really.

Similarly, P5 told me:

> As long as I think I have advised them properly and they understand what I've told them and they've signed up, I think that's the end of my involvement… none of my business, I think.

Amongst this group of seven interviewees, P21 said she would do nothing other than note that her colleague had seen the client crying as they left the building: 'I would note it. But that's all.' When I asked why this would likely be her response, P21 briskly repeated that the aim of her role was: 'to make sure that they understand the effect of what it is that they are being asked to sign.' From this, and other statements given by P21, such as how she would 'never ever advise a client against entering a secured lending transaction', it can be inferred that P21 viewed her role of delivering ILA narrowly and not in accordance with relational lawyering imperatives (or, indeed, in line with the guidelines in *Etridge* and her professional requirements in the SRA Code). Throughout her interview, P21's overall emphasis when discussing how she delivered ILA was on the giving of information to the surety client. Arguably, P21 saw her role when delivering ILA as a market-exchange where imagined masculine values such as objectivity and means-end rationality are prioritised. This was

further demonstrated when I asked P21 towards the end of the interview if she thought surety clients were adequately protected through ILA:

> Well, I think the law - to be fair - does its best, when you take into account that it is not there to stifle commercial enterprises, it's not there to stifle business, it is not there to create rules and regulations to just make things cost prohibitive. It has got to allow for free commercial enterprise but has to protect those who are likely to suffer some sort of abuse or to be called upon to enter into agreements that they might not necessarily understand. I think in fairness, it strikes about a fair balance. But that is looking at it from a practical point of view rather than a purely legal one. I can only say, in practice, it is about the best you can get in a free commercial world. [P21]

Here, in discussing the importance of maintaining a 'free commercial world', P21 demonstrates that she does not think the law should 'stifle business' – that lawyers, such as herself, should reduce interference as anything else would cause harm to 'free commercial enterprise'. The values she espouses here are demonstrative of more imagined masculine values and exemplifies Thornton's point that imagined masculine values are associated with the 'market and the 'new corporatism.''[188]

Coming back to the 'crying client' vignette, four interviewees stated that they would not feel comfortable proceeding and said they would most likely get back in contact with the client because of concerns about undue influence. For instance, P7 said to me: 'I think that it is a tell-tale sign [of undue influence] and I would be tempted to chase them up and get a further

[188] Thornton, 'Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the New Corporatism' 750

assurance that they still want to proceed.' Equally, P4 said that the client crying was a 'textbook sign of duress'. He then went on to state:

> I think I'd have to get her back in, or at least go and talk to her again outside without him there. And if she says, 'Look, I'm not crying because he's going to hit me when I get home, I'm crying because it's a shame it's got this far,' or, 'I didn't know things were this bad with the business,' or whatever, fine.

These four interviewees clearly believed that the emotional outburst of the client outside of their office was related to the transaction; that their client was reluctant to enter the transaction, and/or that the client was potentially being unduly influenced to enter the transaction. As a result, these interviewees wanted to satisfy themselves that the client's decision to enter the suretyship transaction was their own.

Six interviewees – three of whom said they would proceed with the transaction without talking again with the client (P5, P12, P22) – suggested to me that the client could be crying over something different other than the suretyship transaction.

> If somebody's got emotional outside, it could be for any number of reasons or whatever… [P5]

> I'd probably document it. I'm not sure I'd call them back and discuss it because they could be crying over anything. They could have hay fever! [P12]

> …because obviously they could be upset about anything. [P18]

> Oh God, you know, what was she crying about? It could be something completely different, couldn't it? …It could be completely unrelated. She could've just had some bad news from somebody. [P22]

> Because it could be completely innocent - it could be that their dog has died or something whilst they have been in there. [P24]

> I mean, it may be completely unrelated of course. [P25]

Such statements were arguably displays of psychologically motivated reasoning. As Ziva Kunda states, psychologically motivated reasoning allows people's directional goals to affect their reasoning which ultimately means that 'people are more likely to arrive at those conclusions they want to arrive at.'[189] More recently, behavioural ethics researchers have referred to 'the innate psychological tendency for individuals to engage in self-deception' as 'ethical fading'.[190] Ethical fading causes individuals not to '"see" the moral components of an ethical decision, not… because they are morally uneducated, but because psychological processes fade the "ethics" from the dilemma.'[191] In other words, it is possible that my interviewees dismissed the logical conclusion that the surety client's emotional state was linked with the secured lending transaction that was the subject of the meeting by creating their own narratives that allowed them to do what they wanted to do: to remain disinterested in the effects of the transaction and earn a fee for facilitating the transaction. Thus, by creating narratives such as the client may be crying because they have 'hay fever', because

[189] Ziva Kunda, 'The case for motivated reasoning' (1990) 108 Psychological bulletin 480, 495

[190] Ann E Tenbrunsel and David M Messick, 'Ethical fading: The role of self-deception in unethical behavior' (2004) 17 Social Justice Research 223 See also: Max H Bazerman and Mahzarin R Banaji, 'The social psychology of ordinary ethical failures' (2004) 17 Social Justice Research 111;Max H Bazerman and Ann E Tenbrunsel, *Blind spots: Why We Fail to Do What's Right and What to Do About It* (Princeton University Press 2011) 70-72; McKenzie R Rees, Ann E Tenbrunsel and Max H Bazerman, 'Bounded ethicality and ethical fading in negotiations: Understanding unintended unethical behavior' (2019) 33 Academy of Management Perspectives 26

[191] Tenbrunsel and Messick, 'Ethical fading: The role of self-deception in unethical behavior' 224

they 'have received bad news' immediately after walking out of the meeting, or that their 'dog has died' while being in the meeting, absolves solicitors of the responsibility to become involved. As a result, those solicitors feel do not have to respond in a caring manner, keeping their imagined masculine persona intact - avoiding being recognised as members of a 'more feminine helping profession.'[192] In line with Tronto's framework of care, the solicitors who did not want to interfere were conflicted. Those solicitors are faced with the following options: do they provide care to themselves – by not caring about the client's interests/interfering with the secured lending transaction because they feel uncomfortable doing so - or do they prioritise care towards the surety client in terms of their professional responsibilities? This idea of 'conflict' will be explored in more depth in the next chapter.

It is also worth noting that 11 interviewees who were asked to respond to this vignette made very quick decisions about how they would likely proceed if the surety had been seen crying as they left the building. P22 on the other hand, provided a more reflective account. At first, P22 said:

> I think possibly just tell the bank and just say 'look, these are the circumstances. I can't put any context into it whatsoever.' And I'd have to be really, really careful contacting the actual client as well to say 'somebody saw you crying walking out of our room, what was that all about?' because it could be completely irrelevant. I think best practice is to say… Up to you bank, or lender or whoever's requiring the ILA, what do you want to do?' And then the ball's back in the bank's court then.

[192] Joan C Tronto, 'Does Managing Professionals Affect Professional Ethics? Competence, Autonomy, and Care' in Peggy DesAutels and Joanne Waugh (eds), *Feminists Doing Ethics* (Rowman & Littlefield 2001) 201

P22 initially demonstrated that he was uncomfortable dealing with this messy human situation; that he would prefer to put 'the ball back in the bank's court'. However, this approach contravenes P22's loyalty obligations to his actual client - the surety. Some ten minutes later on in the interview, P22 said: 'I'm just going to row back slightly on some of the questions before about the circumstances actually while I'm thinking about it.' He went on to say:

> I'm just thinking who the clients are. There might be an issue… the more I think about it, for contacting the bank, if they are my clients and not joint clients with the bank because it'll depend on who my duty's to – is it to the bank or is it to the client? This is getting into ethics. If my duty's to the client, not to the bank… it might be that we can't contact the bank at all, in which case it puts us in a very difficult ethical position whereby we have to take a decision as to whether we send the documentation over or not. And it might be that if we're not comfortable with providing the documentation to the bank on that basis, and we can't give the information, that we get into a quagmire where we turn round and we say to the bank 'we're unable to continue to act in the circumstances' and if they say 'why?' we say 'we can't comment any further,' and that's it. [P22]

Recognising that this dilemma was more complicated than he first realised, P22 demonstrated that he was unsure about to whom he owes a duty: '… is it to the bank or is it to the [surety] client?' Whilst he seemed to realise that his duty was to the surety client, he confusingly went on to say:

> [I would have to] make a judgement call… 'is just crying sufficient to say there's an issue?' Probably not, so I might be able to send it [the certificate of ILA] over to the bank and you just say nothing at all.

Here, I suggest that P22, despite reflective discussion, decided on a course of action that was less complicated and allowed him to avoid having to deal with messy human problems. As a result, P22 was prioritising lawyering as a market-exchange and was not considering his role in terms of upholding the rule of law and the proper administration of justice. The six interviewees who said they would most likely proceed providing confirmation with the bank in the 'crying client dilemma' were also, I would suggest, not concerned with maintaining the trust the public places in the legal profession. Most interviewees demonstrated an inclination not to interfere even where the circumstances amounted to reasonable grounds for believing the surety client may have been unduly influenced.[193] Most worryingly of all, *Etridge* may be encouraging solicitors to be 'wilfully blind' as Lord Nicholls stated that solicitors only must refuse to act where it is 'glaringly obvious that the wife is being grievously wronged.' This is a very high threshold and can – I suggest - lead solicitors to deduce that conduct such as crying outside the meeting room is not enough to show that the wife is being grievously wronged. As P22 put it: 'Is crying sufficient to say there's an issue?'

Just like Jake's reasoning for not throwing a rock, which demonstrated Kohlberg's Ethic of Justice approach, most interviewees were more concerned with not interfering (remaining neutral/independent) in response to the 'crying client' dilemma, as opposed to taking a fictive feminine approach. A more compassionate, relational (and ethical) approach to this dilemma

[193] Solicitors Regulation Authority, *Handbook and Code of Conduct 2011*, Version 19 IB (1.28) (amended 1st October 2017). Available at: https://www.sra.org.uk/solicitors/handbook/v19/code/ (last accessed 8th June 2020)

would involve the lawyer further consulting with the client, satisfying themselves that the client still wanted to proceed with providing security.

5.3.2.1.2. *The clearly vulnerable client dilemma*

The following vignette which was also used in my interviews concerns the situation where a client was clearly vulnerable, and (as set out in Chapter 2) draws on the facts of the case *Burbank Securities Ltd v Wong*:[194]

> *You are about to deliver ILA to a new client who is considering securing the debts of a loved one. Upon your client's arrival you notice that they are physically disabled. During the meeting, the client is very unresponsive, and you are concerned that they do not understand what you are telling them. After your advice, the client does not ask any questions and just states that they would like to sign. When you hand over a pen to the client - to sign the relevant documentation - you notice that they are struggling to sign their signature. How would you most likely proceed?*

Ten interviewees responded to this vignette.[195] These interviewees again demonstrated that they felt uncomfortable with dealing with human problems. For instance, P23 sighed very heavily and paused for quite a while before responding. P21 also took a long pause before responding after whispering: 'Oh dear'. P15 also remarked that the vignette presented 'a very difficult situation'.

[194] [2008] EWHC 552 (Ch). The rationale for drawing on the facts of this case are outlined and discussed in detail in Chapter 2 (section 2.4.1).
[195] P4, P5, P12, P15, P18, P21, P22, P24, P23, P5. Time constraints meant it was not covered with other interviewees.

Five of the ten interviewees who responded to this vignette were preoccupied with the surety client being unable to sign and concentrated on what could be done to help the surety client sign the document physically and practically.[196] This, I would suggest, is another example of interviewees being preoccupied with the facilitating the transaction, as opposed to protecting and promoting the best interests of the client. The following responses were typical of this group of interviewees:

> Right, well struggling to sign a signature on its own is not a problem, because I do a lot of wills for people who may be incapacitated and can't sign. There is provision even to put a mark or to sign for them, as long as you put the right attestation clause. [P12]

> Again… there's ways to deal with that, with signing and executing documents where there's a physical issue. [P22]

> I would actually go, 'Well, we won't sign at the moment, I need to revert to the bank to see if they've got any specific requirements if somebody is struggling to sign, any specific wording that they would want.' [P18]

P18's response is particularly interesting because he does not go on to discuss any other elements of the vignette such as the client's unresponsiveness, lack of understanding, or physical disability. Facts which, as *Wong* demonstrates, should indicate to the lawyer that their client may be being wronged. Instead, P18 concentrates on ensuring that the bank is covered, that there is 'specific wording that they [the bank] would want' where someone is struggling to sign.

[196] P4, P12, P18, P22, P24

In fact, only four of the interviewees discussed the issue about the client being unresponsive and having a lack of understanding.[197] Whilst P12 did discuss the signature issue, he went on to say that the client's lack of responsiveness was more of a concern and raises issues about whether they have 'the capacity to sign.' P4 also discusses the point about the client being unresponsive: 'You need to explain to her a bit better. I think she would need to be able to explain back to you what the process is.'[198] In taking this approach, P4 is emphasising the need for a consultation during ILA – a fictive feminine value.

On the other hand, P21 and P5 discussed taking a 'break'. P21 said that she would want to 'slow down the process… take a little bit of break [from delivering ILA] …to allow me to understand what's going on.' She went on to say:

> I would need to know what the situation was before I could really decide whether to proceed or not, because if I felt that somebody was there, was going to sign it, but ultimately was under duress, then I think I might go back to the lender and say look, I am not comfortable about witnessing this because I don't think they're signing it freely.

Similarly, P15 discussed refusing to act for the client:

> I would start from a position of saying, "There's something wrong here. I don't like this one." I wouldn't like to do it, to be honest.

[197] P4, P12, P21, P25

[198] It is worth noting again that I did not mention the gender of the surety client in the vignette. Here, like in his answer to the crying client vignette, P5 referred to the surety client as 'she' automatically.

Unlike P21 and P15, P5 remarked that it would be unlikely that he would refuse to act in such a situation:

> It may be that you need to have a break or ask them to come back another time. But it would take probably something pretty severe for me to do that, to make somebody, especially physically disabled, to struggle their way back into the building again. So, I would probably proceed unless I saw that somebody was outside bullying them to come in and sign.

P5 talks here about how he would only not proceed to act for a surety client if he saw 'somebody… outside bullying them to come in and sign.' Whilst this meets the high threshold test in *Etridge* (that a solicitor only has to refuse to act if it were glaringly obvious the client was being grievously wronged) it does not, I would suggest, meet the SRA Code of Conduct threshold. As discussed earlier on in this Chapter, the Code of Conduct requires the solicitor to satisfy themselves that the client's instructions represent the client's wishes when there are reasonable grounds for believing that the instructions are affected by duress or undue influence.[199] Lord Nicholls' high threshold – that solicitors only have to refuse to act where it was glaringly obvious that the surety client was being grievously wronged – therefore encourages lawyers who feel uncomfortable dealing with messy human problems to keep their client at arm's length and prioritise imagined masculine values when delivering ILA. This is particularly attractive for lawyers who usually adopt a market-exchange approach to their work. P5 demonstrates in the above excerpt that he was more concerned about asking a 'physically disabled client [to] struggle their way back into the building again', than to protect

[199] Solicitors Regulation Authority, *Handbook and Code of Conduct 2011*, Version 19 IB (1.28) (amended 1st October 2017). Available at: https://www.sra.org.uk/solicitors/handbook/v19/code/ (last accessed 8th June 2020)

such a client from entering a transaction possibly under the undue influence of another. P5 therefore tries to demonstrate that he cares about the surety client, when in fact all he really wants is for the transaction to be completed and the ILA to be done.

P24, as with the 'crying client' dilemma, discussed referring judgement to the partner heading up his department: 'I think we get their signature on it and then - like I said, bearing in mind I am one year qualified, I would probably go back to the partner before I do anything - before I release any documentation.' Worryingly, P24 then went on to say:

> I don't know if it's the type of client that we get here… without sounding like we are blowing our own trumpet, we are quite commercial, so we don't... there is a jump in the type of work that comes through… we do tend to pick up businesspeople that have been doing it for a while and their spouses and partners understand it.

Here, P24 is claiming that because he only advises commercial high-calibre clientele, it is not necessary for him to know how to respond to this kind of scenario. P24 is naively, and egotistically, stating that messy human problems, vulnerability, incapacity, and undue influence issues, will not arise in the context of his work. In doing so, I suggest he is failing to understand what it means to be a competent solicitor.

5.4. Conclusion

In this chapter, drawing on my data and literature on commercial lawyering, I have demonstrated that most interviewees' usual lawyering approaches (within their commercial practices) clashes with the lawyering approach required in ILA as set out in *Etridge*. It has been shown that most interviewees discussed delivering ILA that was formulaic and representative of a market-exchange model of lawyering. In other words, most interviewees

were principally concerned with performing their client's ends and nothing more. Commercial lawyers' ethics literature predominantly discusses how the broader public interests of commercial clients' actions are not considered by their lawyers. In this chapter, I have been concerned with the unique situation where commercial lawyers' usual ethically apathetic approaches to lawyering (i.e. not considering the broader implications of client's ends) are also present when they deliver ILA to surety clients. What I am suggesting is that ethical apathy has the effect of minimising protections to surety clients who may be entering the suretyship transaction under the undue influence of the principal debtor.

Analysing *Etridge* and the SRA Code of Conduct 2011, I discussed how solicitors are required to lawyer in accordance with Thornton's fictive feminine values when delivering ILA to a surety client. I therefore suggest that fictive feminine values are linked with Gilligan's Ethic of Care and Remus' relational lawyering dynamics. How an Ethic of Care (which is linked with relational lawyering) can be achieved in practice is outlined by Tronto. She asserts that to prioritise care, care-givers (such as solicitors) must be attentive to the care-reciever's needs, take responsibility, and be competent. However, as Tronto recognises: 'Care involves conflict; to resolve this conflict will require more than an injunction to be attentive, responsible, competent and responsive.'[200] Significantly, Tronto goes on to immediately then write that:

> Care as a practice involves more than simply good intentions. It requires a deep and thoughful knowledge of the situation, and *of all the actors' situations*, needs and competencies. To use the care ethic requires a knowledge of the care process.[201]

[200] Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* 136
[201] Ibid 136-137 (my own emphasis)

On this basis, I am critical of the House of Lords and their judgment in *Etridge*. While the House of Lords required relational lawyering to be practised by solicitors when they delivered ILA to surety clients, their Lordships failed to assess or reflect on how a commercial solicitor's wider work and competencies would impact the ILA services they provide to surety clients. To draw on Rosemary Auchmuty's words, in not excluding commercial lawyers from being able to deliver ILA, the House of Lords have further demonstrated a 'desire to oil the wheels of capitalism.'[202] I have also been critical of lenders' practices post-*Etridge* in this chapter. As numerous interviewees disclosed, lenders now require ILA to be delivered in every instance where a guarantee is given - including in commercial contexts. I suggest that providing ILA to commercial clients and surety clients interchangeably may further influence commercial solicitors to deliver ILA instrumentally to surety clients in the non-commercial context too.

Although the arguments and observations presented in this chapter are important, they only explain in part why deficient and unethical ILA is being delivered by interviewees to surety clients in practice. In the following chapter, I concentrate specifically on Remus' relational lawyering dynamic of 'loyalty' and draw on my interview data to suggest that some interviewees were unable to deliver ILA relationally to surety clients because ILA procedures post-*Etridge* pose own interest conflict situations. That is, some interviewees demonstrated that they did not 'suspend one's own goals, ambitions, plans of life, and concerns, in order to recognize and to be attentive to [surety clients].'[203]

[202] Rosemary Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' (2002) 11 Social & Legal Studies 257, 270
[203] Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* 128

Chapter 6

Self over Surety

In the previous chapter, I claimed that ILA lawyers are required to lawyer relationally in accordance with the *Etridge* guidelines and the SRA Code of Conduct 2011. Moreover, drawing on Dana Remus' relational lawyering model, I suggested that, in line with *Etridge* and the SRA Code of Conduct, ILA lawyers should lawyer in accordance with Remus' relational dynamics of trust, judgement, loyalty, empowerment, and service. I also outlined that, to successfully implement Remus' relational dynamics in lawyering, lawyers must prioritise Margaret Thornton's fictive feminine values and Joan Tronto's ethical elements of care. When I came to explore my data, I found that interviewees prioritised Thornton's imagined masculine values such as objectivity and means-end rationality, thus delivering ILA in accordance with a market-exchange model of lawyering and contrary to both their professional regulations via the SRA and the guidelines provided in *Etridge*. I then suggested that interviewees may be delivering ILA in accordance with a market-exchange of lawyering because they are *commercial* lawyers. For this reason, I criticised the House of Lords for permitting any type or specialism of solicitor to deliver ILA to surety clients. In this chapter, I look specifically at whether interviewees achieved Remus' relational dynamic of loyalty and suggest that some interviewees are delivering ILA as a market-exchange because they are being more attentive, considerate, and caring towards their *own* interests (which are better aligned with lenders' interests and other introducers' interests as opposed to surety clients' interests). In other words, there are loyalty, independence, and conflict of interest problems

arising in the delivery of ILA post-*Etridge*. My argument in this chapter therefore relates to Tronto's idea that conflict can disrupt care-giving:

> …the fact that care can be a well-integrated process should not distract us from the fact that care involves conflict… Often care-givers will find that their needs to care for themselves come in conflict with the care that the must give to others, or that they are responsible to take care of a number of other persons or things whose needs are in conflict with each other. How a care-giver mediates these conflicts will obviously affect the quality of care.[1]

My data suggests that there are two main reasons why interviewees prioritised their own interests when delivering ILA. First, I will discuss how surety client referrals present conflict of interest problems because most interviewees demonstrated that their reputational and financial interests aligned with pleasing (repeat) introducers instead of the one-off surety client. Secondly, I suggest that interviewees demonstrated that they categorise ILA as a particularly risky activity: that interviewees are untrusting of surety clients after Lord Nicholls outlined that surety clients could bring professional liability claims against their ILA solicitors if they breached his guidelines in *Etridge*.[2] Consequently, I demonstrate that some interviewees were more concerned about protecting themselves than protecting the surety client.

This chapter unfolds over three sections. In the first section I will outline how lawyers are required to be loyal and independent, and how lawyers are required to avoid conflicts of interest in accordance with their regulatory guidelines in England and Wales. Analysing the

[1] Joan C Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Psychology Press 1993) 109
[2] *Royal Bank of Scotland v Etridge* [2001] UKHL 44, [2002] 2 AC 773, [75] (Lord Nicholls)

literature on loyalty and independence, I will demonstrate how legal scholars predominantly focus on how commercial lawyers fail to be independent in accordance with their professional obligations because they are 'over-loyal' to powerful commercial clients. For instance, Eli Wald argues that solicitors demonstrate over-loyalty when they demonstrate '"entire devotion" to clients in the sense of pushing the legal envelope on behalf of clients… at the expense of the legal system and rule of law.'[3] Discussing my findings, I set out how solicitors pursuing clients' means-ends should not be described as them being over-loyal towards the client when the motivation for lawyers' action is their own self-interest (i.e. where there is an 'own interest conflict' in accordance with the SRA Code of Conduct 2011). I also discuss how Lord Nicholls in *Etridge* concentrated solely on the issue of 'client conflicts' in ILA. In the second section of this chapter, I demonstrate how some interviewees' self-interests conflicted with surety clients' interests when providing ILA. My main argument in this second section is that conflict problems that have developed post-*Etridge* may be causing interviewees who deliver ILA to prioritise being considerate, attentive, and caring (fictive feminine values and ethical elements of care) towards their own interests instead of surety clients' best interests. Compared with the number of interviewees who demonstrated that they prioritised imagine masculine values when delivering ILA (as outlined in the previous chapter), only a small number of interviewees explicitly (and I suspect unwittingly) discussed prioritising their own interests when delivering ILA because of referral practices and professional liability concerns. That said, I argue in this chapter that the referral practices and professional liability concerns that were discussed by many other interviewees 'could prompt unethical action without the decision-maker's conscious awareness.'[4] That is, whilst only a

[3] Eli Wald, 'Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients' (2008) 40 St Mary's LJ 909, 951
[4] Max H Bazerman and Ann E Tenbrunsel, *Blind spots: Why We Fail to Do What's Right and What to Do About It* (Princeton University Press 2011) 21

small number of interviewees directly discussed prioritising their own interests when delivering ILA, I draw on compelling behavioural ethics research to suggest that other interviewees may *also* be prioritising their own interests because of normalised ILA practices post-*Etridge*. Furthermore, I argue that, while on the face of it, lenders seem to have improved conflict of interest problems by requiring all sureties to have ILA delivered by a lawyer who is not acting for them or the principal debtor, lenders' other non-transparent practices nevertheless pressure the surety's lawyer to deliver ILA in accordance with their own interests. Of most concern, I suggest in this chapter that the inconspicuous nature of own interest conflicts means that surety clients are unlikely to find an appropriate remedy if their lawyer had delivered conflicted ILA. In the third and final section of this chapter, I conclude that the House of Lords was naïve to think that ILA solicitors would be able to easily prioritise the best interests of the surety client over their own interests when delivering ILA. I am also critical of lenders who have contributed to an environment and culture surrounding ILA which is rife with conflict of interest problems.

6.1. *Loyalty and Independence*

Loyalty is repeatedly recognised as the foundation-stone of a lawyer-client relationship in much of the literature on lawyers' ethics and professionalism.[5] In addition, legal scholars assert that 'professional independence' is a 'core' requirement of competent lawyering.[6] In

[5] Andrew Boon, *The Ethics and Conduct of Lawyers in England and Wales* (3rd edn, Bloomsbury Publishing 2014) 295; Robert P Lawry, 'The Meaning of Loyalty' (1990) 19 Cap UL Rev 1089; Michael K McChrystal, 'Lawyers and Loyalty' (1991) 33 Wm & Mary L Rev 367; Ray Patterson, 'Legal Ethics and the Lawyer's Duty of Loyalty' (1980) 29 Emory LJ 909, 960; Wald, 'Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients', 911

[6] Peter Margulies, 'Lawyers' independence and collective illegality in government and corporate misconduct, terrorism, and organized crime' (2005) 58 Rutgers L Rev 939; Bruce A Green, 'Lawyers' Professional Independence: Overrated or Undervalued' (2013) 46 Akron L Rev 599, 601; Eleanor W Myers, 'Examining Independence and Loyalty' (1999) 72 Temp L Rev 857; Rebecca Roiphe, 'Redefining Professionalism' (2015) 26 U Fla JL & Pub Pol'y 193, 195; Robert W Gordon, 'The Independence of Lawyers' (1988) 68 BUL Rev 1

this section I will explore what is meant by the term 'loyalty' and discuss to whom lawyers must be loyal. I will also discuss the complexity surrounding a lawyer's obligations to achieve client loyalty whilst also being professionally independent.

6.1.1. *What it means to be professionally loyal and professionally independent*

A lawyer's duty to be loyal to their client is a fiduciary obligation in accordance with the common law and begins once they have accepted an individual/entity as their client.[7] That is, the solicitor's obligation to be loyal is born out of the fiduciary and contractual relationship between lawyer and client. George Fletcher, on this point, writes:

> We speak often of the professional loyalty owed by lawyers to their clients, physicians to their patients, and corporate managers to their firms. These professional loyalties derive solely from contract, from voluntary commitments… Professional loyalty is expressed in the intensity of care and attention to the client or patient.[8]

This idea, that lawyers enter relationships with clients 'voluntarily' i.e. autonomously, is what – according to Fletcher – sets apart 'professional loyalty' and 'core loyalty'. The creation of core loyalty in other relationships between family members and friends is not contractual, but nonetheless loyalty is demonstrated by care, compassion, and consideration (fictive feminine values) and attentiveness (an ethical element of care). Fletcher has argued that this type of 'core loyalty' is linked with an individual's identity – that their loyalty is a consequence of their 'historical self'. John Kleinig summarises Fletcher's argument about loyalty resulting from the 'historical self' succinctly in the following passage:

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[7] *Hilton v Baker Booth Eastwood* [2005] UKHL 8, [2005] 1 WLR 567 (HL) see paragraphs [28] – [30] (Lord Walker)

[8] George P Fletcher, *Loyalty: An Essay on the Morality of Relationships* (Oxford University Press 1995) 22-23

> Loyalty [in accordance with Fletcher's theory] involves a commitment to the constructive sources of our historical being, to those relationships and commitments that define us as the particular individuals we are – not just as *generic* persons, but as members of *particular* familial, ethnic, religious, and national groups.[9]

In distinguishing core loyalty and professional loyalty, Fletcher explicitly asserts that 'the historical self of the lawyer… is irrelevant.'[10] In this chapter, I suggest that Fletcher's view that lawyers can be professionally loyal easily and instinctively with any client - that their historical self is 'irrelevant' to how loyalty is expressed in their relationships with clients - is naive. For instance, James Connor argues that 'actors tend to be loyal to what is closest to them… [that] the stronger and tighter their immersion in a particular social milieu the more likely that loyalty will surface.'[11] Kleinig similarly asserts that the historical self can influence professional loyalty:

> Professional roles frequently become constitutive elements in a person's identity, and therefore the loyalties associated with them can qualify as elements within what Fletcher refers to as the historical self. Becoming a professional has various dimensions. It involves more than taking on a particular job. It includes membership in a community of fellow professionals and socialization into a set of values and practices – ways of looking at and doing things – that become significant to one's identity.[12]

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[9] John Kleinig, *On Loyalty and Loyalties: The Contours of a Problematic Virtue* (Oxford University Press 2014) 212 Author's own emphasis

[10] Fletcher, *Loyalty: An Essay on the Morality of Relationships* 23

[11] James Connor, *The Sociology of Loyalty* (Springer Science & Business Media 2007) 131

[12] Kleinig, *On Loyalty and Loyalties: The Contours of a Problematic Virtue* 117

Kleinig's point that 'socialization into a set of values and practices… become significant to one's identity' can be demonstrated through my data which was discussed in the previous chapter. As you will recall, I discussed how most interviewees were reluctant to interfere with the surety client's decision making (i.e. pass judgement), and that they were preoccupied with satisfying the client's means-ends (an imagined masculine value). I suggested that interviewees delivered ILA this way because they usually lawyer in accordance with this approach with their typical commercial clients. That is – their historical self – 'their socialization into a set of values', impacted how they delivered ILA to non-commercial surety clients, and therefore on their expression of loyalty. It could be argued that, in prioritising the client's means-ends, most interviewees were being sufficiently loyal. However, professional loyalty requires more than meeting the means-ends of clients. In fact, to achieve the relational dynamic of loyalty, Remus provides that:

> …lawyers' [must] focus up and out from their own self-interests to the interests of their clients, and from a narrow conception of their clients' interests to one that simultaneously accounts for the interests of the legal system and society at large.[13]

Remus argues that the relational lawyering model encourages multifaceted professional loyalty obligations compared with the market exchange model, because lawyers following the market-exchange model merely concentrate on the client's means-ends. The multiple loyalty obligations lawyers must satisfy are outlined in the SRA Code of Conduct 2011 within the 'all pervasive' principles.[14] As Chapter 5 set out, the Code specifies – amongst other principles – that regulatees must 'uphold the rule of law and the proper administration of justice'

[13] Dana A Remus, 'Reconstructing Professionalism' (2017) 51 Ga L Rev 807 857

[14] A more thorough explanation of the SRA Code of Conduct 2011 Principles please see Chapter 5, Section 5.3.2.

(Principle 1), must 'not allow their independence to be compromised' (Principle 3), must 'act in the best interests of the client' (Principle 4), and 'behave in a way that maintains the trust the public places… in the provision of legal services' (Principle 6). It is further detailed that: 'Where two or more principles come into conflict the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice.' In other words, as Robert Gordon explains:

> …duties of loyalty to client interests must be balanced against and sometimes overridden by broad, more amorphous obligations, such as the lawyer's duties as 'officer of the court', member of a public profession, and a citizen with a responsibility to uphold the rule of law.[15]

Therefore, Gordon explains how a lawyer is required to be both loyal to their client and independent from their client.[16] This is because if lawyers are overly attentive to a client's means-ends the lawyer may fail to be loyal to the client's other interests, and fail to be loyal towards the court, the public, and the profession. This means that, where my interviewees prioritised client's means-ends they were not necessarily acting with sufficient independence.[17] This is because, in prioritising imagined masculine values such as 'means-ends rationality' and 'objectivity', interviewees typically prioritised facilitating the secured lending transaction and failed to pay consideration to the client's other interests, the morality

[15] Gordon, 'The Independence of Lawyers' 12
[16] Ibid
[17] Independence as discussed in this chapter is therefore different to the imagined masculine value of 'independence' discussed in the previous chapter. The imagined masculine value of independence related to interviewees' self-reported neutrality in advising on how the client should proceed because the client's independence/'autonomy' should be respected when delivering ILA (thus prioritising the 'means-ends' of the transaction). In this chapter, a lawyer's 'independence' is required so that interviewees can exercise Remus' relational dynamics of 'loyalty', 'judgment' and 'service'.[17] That is, they are required not to prioritise their self-interests and the interests of other clients.

of their client's actions, and the rule of law and administration of justice. These issues were particularly demonstrated by some of those interviewees who responded to my vignettes; despite there being reason (in the hypothetical I set out) to believe that the surety's decision to enter the secured lending transaction may have been overborne by undue influence or duress, some interviewees were still preoccupied with completing the transaction. Wald conceptualises that a lawyer is 'over-loyal' and lacks independence when they are entirely devoted to performing their clients' ends – even if those ends are unethical and/or they are 'at the expense of the legal system and the rule of law.'[18]

There has been a host of papers which look at how commercial lawyers are over-loyal to their clients. That is, as Kleinig frames it, their roles with commercial clients 'become constitutive elements in [their] identity'.[1] For instance, Robert Nelson in *Partners with Power*, found that: '[Corporate] lawyers strongly identify with the objectives of their clients'[1] and that: '[The] corporate sector of the profession is more dependent on and constrained by clients than are congeries of lower status lawyers who represent personal clients.'[19] Furthermore, other legal scholars have discussed how commercial lawyers come to be 'captured' by their clients.[20] Ronit Dinovitzer and others outline that the phrase 'client capture' is used:

[18] Wald, 'Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients' 951
[19] Robert L Nelson, *Partners with power: The social transformation of the large law firm* (Univ of California Press 1988) 233
[20] Ronit Dinovitzer, Hugh Gunz and Sally Gunz, 'Unpacking client capture: evidence from corporate law firms' (2014) 1 Journal of Professions and Organization 99; Hugh P Gunz and Sally P Gunz, 'Client Capture and the Professional Service Firm' (2008) 45 Am Bus LJ 685 ; Stefanie Gustafsson, Juani Swart and Nick Kinnie, ''They are your testimony': Professionals, clients and the creation of client capture during professional career progression' (2018) 39 Organization studies 73; Kevin Leicht and Mary L Fennell, *Professional Work: A Sociological Approach* (Blackwell Publishers 2001) 105-106; Emma Oakley and Steven Vaughan, 'In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms' (2019) Journal of Law and Society 83, 102

> …to describe the propensity for a professional to be 'captured' by his or her client and render advice which has less to do with professional standards, but which is more closely related to the commercial interest of both the client and the professional. Professionals who are 'captured' by their clients cannot then be relied upon to provide the advice their profession requires of them. That is not to say that advice may necessarily encourage the client to break laws or otherwise behave unethically… Yet whenever a professional is not acting within the dictates of their profession the client is potentially put at risk.[21]

Scholars have also explored the factors that likely influence client capture in the commercial law setting. In interviewing 30 Canadian commercial lawyers, Hugh Gunz and Sally Gunz outline that the following factors likely influence lawyers to be captured by clients: '…the revenue clients generate, the potential for future work from them, the nature of the relationship they have, and the extent to which they provide "good work."'[22] In a follow-up study – alongside Dinovitzer – Gunz and Gunz interviewed 106 Canadian corporate lawyers and discovered that client capture was more nuanced than their first study demonstrated. They found that:

> …interviews tapped into considerable concern about the perceived changes to practice – primarily focused on commercialism – that have heightened the negative pressures felt by practitioners. Senior lawyers in particular were fearful of the impact on their more junior colleagues. Taken together, our results suggest that factors such as a firm's compensation system, lateral mobility, an individual's seniority and the

[21] Dinovitzer, Gunz and Gunz, 'Unpacking client capture: evidence from corporate law firms' 100
[22] Gunz and Gunz, 'Client Capture and the Professional Service Firm' 718

> qualities they value in their clients may have an influence on how professionals respond to CC [client capture].[23]

Similarly, Stefanie Gustafsson and others' empirical study (interviewing 50 lawyers practising in England) demonstrated 'that as professionals succumb to the desire to advance their career and strive to be promoted, they also become prone to client capture.'[24] In other words, scholars investigating how lawyers come to be captured by their clients have suggested that a lawyer becomes captured by client X because pursuing X's interests is beneficial to the lawyer's own self-interests. If commercial lawyers are captured by their clients and pursue their ends because it is in their own interests, how can we describe the action of pursing the client's ends as the lawyer being over-loyal to their client? Can a lawyer be over-loyal to Client X if they are primarily motivated to perform X's ends to advance their own self-interest? To examine this further, I need to draw on broader philosophical and sociological literature on how loyalty is expressed.

6.1.2. *Expressing loyalty*

Simon Keller writes that loyalty can be expressed in 'several broad ways.'[25] These are '''loyalty in concern,'' ''loyalty in advocacy,'' ''loyalty in ritual,'' ''loyalty in identification,'' and ''loyalty in belief.'''[26] I suggest that Keller's conceptualisation of 'loyalty in concern' is what is required to be achieved by ILA lawyers when they advise surety clients.[27] Keller explains that loyalty in concern means to:

[23] Dinovitzer, Gunz and Gunz, 'Unpacking client capture: evidence from corporate law firms' 115
[24] Gustafsson, Swart and Kinnie, ''They are your testimony': Professionals, clients and the creation of client capture during professional career progression' 87
[25] Simon Keller, *The Limits of Loyalty* (Cambridge University Press 2007) 3
[26] Ibid
[27] Ibid

> …express your loyalty to X by prioritising X's interests, or welfare, over the interests of comparable others. To prioritise X's interests is to care more about X's interests than about the interests of others, and to be motivated to do more to advance them.[28]

He goes on to write: 'If you prioritise X's interests, and if you do it out of loyalty to X, then you're displaying loyalty in concern.'[29] Therefore, '[w]hether or not you are loyal to something depends not only on what you do, but on how are motivated.'[30] Loyalty in concern - prioritising the surety client's best interests and welfare over the interests of others - is spoken about (in effect, if not verbatim) by Lord Nicholls in *Etridge*:

> When accepting instructions to advise the wife the solicitor assumes responsibilities directly to her, both at law and professionally. These duties, and this is central to reasoning on this point, are owned to the wife alone. In advising the wife the solicitor is acting for the wife alone. *He is concerned only with her interests*. I emphasise, therefore, that in every case the solicitor must consider carefully whether there is any conflict of duty or interest and, more widely, whether it would be in the best interests of the wife for him to accept instructions from her. If he decides to accept instructions, his assumption of legal and professional responsibilities to her ought, in the ordinary course of things, to provide sufficient assurance that he will give the requisite advice fully, carefully, and conscientiously.[31]

Furthermore, the SRA Code of Conduct outlines that lawyers must express loyalty in concern towards the client when providing legal services. First, as mentioned above, within the SRA's

[28] Ibid
[29] Ibid
[30] Ibid
[31] *Etridge* [74] (my own emphasis)

10 Principles, Principle 3 and Principle 4 make clear that solicitors must must 'not allow their independence to be compromised' and must 'act in the best interests of the client'. In addition, Chapter 3 of the Code details how lawyers should mediate conflicts of interests. Chapter 3 sets out that a solicitor will be unable to serve their client's best interest if they have an 'own interest conflict' or 'client conflict'. The SRA Code of Conduct then defines own interest conflict in the Code's glossary as 'any situation where your duty to act in the best interests of any *client* in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter.' Client conflict is then defined in the Code's glossary as 'any situation where you owe separate duties to act in the best interests of two or more *clients* in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict.' Whilst it is clear what is meant by 'two or more clients in relation to the same matter' it is unclear what qualifies as 'related matters' in accordance with the SRA Code of Conduct as there is no definition provided in the glossary. It is then outlined in Chapter 3 of the Code that:

> If there is a conflict, or a significant risk of a conflict, between two or more current *clients*, you must not act for all or both of them unless the matter falls within the scope of the limited exceptions set out at Outcomes 3.6 or 3.7. In deciding whether to act in these limited circumstances, the overriding consideration will be the best interests of each of the *clients* concerned and, in particular, whether the benefits to the *clients* of you acting for all or both of the *clients* outweigh the risks.

The very reason why conflicts of interests pose a problem is because there is a risk that solicitors will not express loyalty in concern towards the client (or both their clients) if their interests, or the interests of another client, motivate their behaviour. That is, if there is an

own interest conflict, the solicitor may prioritise their own interests out of loyalty to themselves. In serving or protecting their own interests, their ability to serve the client's best interests might be affected.

Where I think this takes us is that my interviewees may not be being over-loyal to surety clients by prioritising the client's mean-ends, but instead may be prioritising the client's means-ends out of loyalty to *themselves*. In fact, in the previous chapter, I discussed how some of my interviewees seemed preoccupied with surety client's means-ends, not solely because they wanted to prioritise surety client's interests in completing the transaction, but because they were trying to maintain their position/self-identity as non-interfering facilitators – avoiding emotional/impure work.[32] That is, they were prioritising their *own* interests. For instance, recall my discussion in the previous chapter about P4, P17 and P19's concerns about how principal debtors would perceive their actions if the surety client decided not to proceed with the secured lending transaction.[33] If some interviewees were motivated to pursue the surety client's means-ends to serve their own self-interests (to maintain their self-identity), it may be more appropriate to offer the view that some interviewees were *under*-loyal to surety clients rather than *over*-loyal.

Like over-loyalty, under-loyalty is also matter of interest to Wald. He explains that where the lawyer is serving the interests of others (including the lawyer's self-interests) '[t]he problem is one of conflict of interests: [where the lawyer] is being under-loyal to the client.'[34] That is, if lawyers are motivated by their own interests when prioritising their client's means-ends,

[32] Sida Liu, 'Professional Impurities' in Elizabeth Gorman and Steven P Vallas (eds), *Professional Work: Knowledge, Power and Social Inequalities* (Emerald Publishing Limited 2020) 147, 150-152
[33] Section 5.4.2.
[34] Wald, 'Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients' 915

there is arguably an 'own interest conflict' in accordance with Chapter 3 of the SRA Code of Conduct. Whilst I agree with Wald that under-loyalty to the client (caused by over-loyalty to other interests – including the lawyer's own interest) *can* cause conflicts of interests, there is a potential middle ground. Where lawyers and clients' interests align – i.e. it is in the client's best interests (broadly defined in accordance with Remus' conceptualisation of loyalty) to take some legal action, and it is in the lawyer's best interests to keep the client happy in the hope that they keep the lucrative client who will continue to bring steady and interesting work - then there is no conflict of interest. This is because, whilst the lawyer may be primarily motivated to perform the client's best interests out of their own interests, the fact is that the action performed is in the client's best interests as well. Whilst the lawyer may not have demonstrated loyalty in concern, the ends pursued - maybe more by luck than judgement – still aligned with the client's best interests. Alternatively, if the lawyer pursued the client's means-ends (without considering the client's interests other than the client's means-ends) there could be a clash between the lawyer's own interest and the client's best interests – because a client's best interests are broader than their means-ends. Arguably, the problem lies in part in 'clients' best interests' not being adequately defined within the Legal Services Act 2007 (LSA), the SRA Code of Conduct 2011, or in case law such as *Etridge* (or, indeed, anywhere in much substantive detail in other cases or in scholarship on lawyers). It needs to be clearly outlined to solicitors that clients' best interests are broader than their means-ends. However, positively defining what is meant by a 'client's best interests' is no mean feat. For this reason, defining 'best interests' is beyond the scope of this thesis. For the purposes of this current project, it is enough, I would suggest, to say that a surety client's best interests are wider than their means-ends. In the ILA context, the means-ends (the ILA certificate being sent off and the transaction being completed) does not equate automatically with the client's

best interests. The client's best interests are contextual and relational and need to be discovered by the lawyer through consultation, compassion, and care (fictive feminine values).

It is well accepted in philosophical and sociological literature that actors (not specifically lawyers) can have numerous loyalties towards different parties operating at one time. For instance, James Connor talks about 'loyalty layers.'[35] He suggests that: 'Layering raises awareness that there are multiple loyalty influences being placed on the actor… that the actor is embedded in multiple sites, structures and relationships, all of which impinge on his or her actions.'[36] Connor also writes that it is inevitable that there 'will be conflict between layers.'[37] He also argues that 'loyalty operates in a relatively set hierarchy… that people will choose one type of loyalty over another.'[38] Similarly, on lawyers' loyalty, Michael McChrystal argues that loyalty 'can be an organizing principle for moral decision making in the sense that many moral issues often require a choice between loyalties.'[39]

If – as I have suggested – interviewees may be motivated to prioritise the client's means-ends (and more broadly, deliver ILA as a market exchange) out of loyalty to themselves, and not out of loyalty to the surety client – then own interest conflicts may be occurring in ILA. Next, I am going to explore further how own interests are regulated in England and Wales. This will include a review of the situations in which the SRA has said own interests' conflicts may occur, followed by a discussion on how conflict issues are framed in the Houses of Lords' judgment in *Etridge*. After this, I come to explore my data.

[35] Connor, *The Sociology of Loyalty* 47
[36] Ibid
[37] Ibid 48
[38] Ibid 48-49
[39] McChrystal, 'Lawyers and Loyalty' 384-385

6.1.3. *Regulatory guidelines on of own interest conflicts*

The SRA Code of Conduct specifies in Chapter 3 that the 'systems and controls for identifying own interest conflicts are appropriate to the size and complexity of the firm and the nature of the work undertaken…'. Chapter 3 then goes on to say that solicitors 'should assess all the relevant circumstances, including whether [their] ability as an individual, or that of anyone within [their] *firm*, to act in the best interests of the *client(s)*, is impaired by:' (a) a financial interest; (b) a personal relationship; (c) their appointment or the appointment of a member of their *firm* or family to public office; (d) commercial relationships; or (e) their employment.[40]

The SRA Code of Conduct then provides detailed guidance on how a solicitor may prioritise their own self-interest (loyalty to the self) when they are referring clients to other solicitors, or when they are acting for clients that have been referred from another third party.[41] For instance, when providing a referral, the solicitor may be motivated to provide that referral merely because they are receiving a financial interest (through referral fees), and not because they are motivated to refer their client to a party considering the client's best interest. On the other hand, when delivering services to a client who has been referred by a third party, the solicitor may pay more consideration (a fictive feminine value) towards the introducer to maintain a commercial relationship with the introducer. In fact, the Legal Services Consumer

[40] Outcome (3.2)

[41] SRA Code of Conduct 2011 Chapter 9: Fee sharing and referrals. For literature on the effects of referral arrangements on professionalism, independence and loyalty in the legal profession in America, see: John S Dzienkowski and Robert J Peroni, 'Conflicts of Interest in Lawyer Referral Arrangements with Nonlawyer Professionals' (2008) 21 Geo J Legal Ethics 197; Heather M Field, 'Complicity by Referral' (2018) 31 Geo J Legal Ethics 77; Katherine Huneke and Nathan Mintz, 'Lawyer referral services and the model rules: Balancing legal accessibility with professional independence' (2001) 15 Geo J Legal Ethics 827. I do not draw on this literature because I am focused particularly on 'own interest conflicts' which is wording

Panel (LSCP) - a panel appointed by the Legal Services Board in accordance with the LSA 2007 - has published its own reports on referral arrangements and discusses how referrals can impact on lawyer independence (and therefore lawyer loyalty). In the 2010 report, the LSCP recognised that: '…[the] independence of lawyers… [can be] compromised because they do not wish to harm their commercial arrangements with introducers by providing advice to clients that might risk those arrangements.'[42]

For this reason, the SRA Code of Conduct 2011 details how a solicitor should conduct themselves in referral arrangements. Overall, it calls for lawyers to self-regulate their own independence; ensuring that the client's best interests always exceed the interests of the introducer. This is demonstrated through Outcomes (9.1) and (9.2) (and where 'outcomes' in the Code of Conduct are, effectively, rules to be followed and not simply best practice guidance). Outcome (9.1) says that solicitors must ensure that they are sufficiently independent and that their professional judgement is 'not prejudiced by virtue of any arrangement with another person'. Outcome (9.2) outlines that solicitors must ensure that their 'client's interests are protected regardless of the interests of an introducer or fee sharer or [their]… interest in receiving referrals.' And Outcome (9.3) requires solicitors to be transparent about the referral arrangement with the client so that the client can make an informed decision about how to proceed. Outcome (9.4) then provides that solicitors must inform a client if the introducer has been party to any financial or other interest based on the referral. It is interesting that the emphasis here is on ensuring that the client is aware that the solicitor who referred the client may be gaining an interest. There is no mention that a

[42] Legal Services Consumer Panel, *Referral Arrangements* (2010) Available at: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_ReferralArrangementsReport_Final.pdf (Last accessed: 1st January 2020) 3

referred client should be told how their solicitor (to whom they have been referred) could gain an interest from the introducer. For example, the solicitor who gained a client through the referral may know that the introducer has a vested interest in the outcome of the referred client's case, and therefore the solicitor may be more attentive to the interests of the introducer in the hope that they receive more work from them in the future. This wider point might, however, be captured by the broader professional principles to act with independence and integrity (though the answer to the hypothetical just discussed is not immediately clear).

Interestingly, even though own interest conflicts could arise in the ILA context – whether because of referrals or otherwise – their Lordships failed to discuss own interest conflicts in *Etridge*. It is to this issue that we now turn our attention.

6.1.4. *Conflicts in the ILA context: the guidance in Etridge*

In *Etridge*, Lord Nicholls discussed only how 'client conflict' may arise in the ILA context if a solicitor s acting for the surety client as well as the principal debtor or lender in the same matter. As I discussed in Chapter 3,[43] Lord Nicholls admitted that:

> …a solicitor whose main client is the husband may not, in practice, give the same single-minded attention to the wife's priorities as would a solicitor acting solely for the wife. Her interests may rank lower in the solicitor's scale of priorities, perhaps unconsciously, than the interests of her husband.[44]

Nevertheless, Lord Nicholls concluded that wives should be allowed to be advised by the same solicitor acting for their husband. So, even though Lord Nicholls admitted that a solicitor

[43] Section 3.3.3.
[44] *Etridge* [72]

acting for the husband as well as the wife could 'perhaps unconsciously' favour the interests of the husband (principal debtor), he still called on those solicitors to carefully consider if they were able to act in the wife's best interests. In other words, Lord Nicholls was asking solicitors - those he admits may be unconsciously biased (loyal to the husband's interests) - to consider if they could be sufficiently loyal and independent to advise the surety client (the wife). This is in line with the SRA Code of Conduct on how lawyers should self-regulate their conduct.

The above is the full extent of Lord Nicholls' comments on conflicts. Nothing else is said. What this arguably insinuates is that conflict can only arise in same matter situations – where the solicitor is acting for two or more parties involved in the transaction. No consideration is given to the idea that even if the solicitor is not acting for the husband or lender in that transaction – but they do have a long-term relationship with the principal debtor or lender – that bias and conflict can permeate different matter lines. Unlike Lord Nicholls, legal profession scholars have recognised how, despite not acting for a third party in a matter, lawyers may be influenced to do their job prioritising the third party's interests if the lawyer deems it in their own interests to do so. For instance, John Flood argues that lawyers in large law firms are always conscious about the impression they are making on powerful lenders when they are a third party in a transaction they are working on for another client.[45] Claire Coe and Steven Vaughan have also argued (again in the context of lawyers in the largest, global law firms) that third parties may mediate the lawyer-client relationship because they act as 'shadow clients'. They explain that the term 'shadow client' signifies 'the power these third parties (commonly borrowers) have to choose which law firms act for other parties on their deals,

[45] Claire Coe and Steven Vaughan, *Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms* (2015) 2 Report available at: https://www.birmingham.ac.uk/schools/law/research/spotlights/independence-risk.aspx (last accessed: 25th March 2021)

and to dictate their roles.'[46] Coe and Vaughan observed how third-party shadow client 'situations do not engage the conflicts rules as set out in the SRA Handbook because the borrower/sponsor is never, at least technically, a client of the firm on the matter.'[47]

Where we land, I would suggest, is that Lord Nicholls' discussions on how conflicts of interest can arise in the ILA context are far too narrow and simplistic. In only discussing same matter client conflict, Lord Nicholls fails to remind ILA solicitors that their self-interests may conflict with advising the surety client in her best interests. We might forgive him this lapse as scholarship on conflicts of interest also tends to focus on client conflicts.[48]

It is also unclear from Lord Nicholls' guidance exactly *how* solicitors - who Lord Nicholls admits might unconsciously favour one client's interests over another - can be expected to 'carefully consider' if they are independent enough to provide ILA in the client's best interests, in an unbiased way. As Christine Parker and Adrian Evans write: 'The ethically significant thing is how each lawyer responds to these conflict pressures and loyalties when they occur or *whether they notice them*.'[49] A wealth of behavioural ethics scholars have demonstrated that professionals (such as accountants and lawyers) often fail to notice that they are biased and have a conflict of interest when serving clients.[50] Sunita Sah explains this point by drawing on a 'moral compass' metaphor:

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[46] Ibid 2

[47] Ibid 61

[48] Richard A Epstein, 'The Legal Regulation of Lawyers' Conflicts of Interest' (1991) 60 Fordham Law Review 579; Janine Griffiths-Baker, *Serving two masters: conflicts of interests in the modern law firm* (Hart 2002) 46; Also see: Janine Griffiths-Baker and Nancy J Moore, 'Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time' (2011) 80 Fordham L Rev 2541. Griffiths-Baker and Moore also discuss other ways in which client conflicts can be divided – e.g., former client conflicts at 2550.

[49] Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press 2018) 219 (my own emphasis)

[50] Bazerman and Tenbrunsel, *Blind spots: Why We Fail to Do What's Right and What to Do About It*; Dolly Chugh, Max H Bazerman and Mahzarin R Banaji, 'Bounded ethicality as a psychological barrier to recognizing conflicts of interest' in Don A; Loewenstein Moore, George; McCain, Daylian M.; Max H. Bazerman (ed),

> Imagine that each of us has a literal 'moral compass' that guides our ethical behaviour. As with all working compasses, the needle always points north. If we go astray, it might be because we ignored our compass, or our compass malfunctioned… In the latter case, our compass may be broken without us knowing it. Situational factors can act as a magnet that sways the compass needle away from north. For example, incentives that create conflicts of interest act as a magnet that deviates the needle, which could deter someone from his or her primary professional goal… Because we may not even be aware of this magnetic deviation, we may remain convinced that the needle on our moral compass faces north and that we are behaving ethically. Due to the pervasive belief that succumbing to a conflict of interest is a matter of deliberate corruption, rather than unintentional bias, many professionals deny and remain unaware that they could be, and likely are, appropriately influenced by conflicts of interest.[51]

In this context, George Loewenstein and Don Moore explain that 'self-interest exerts a more automatic influence than do professional responsibilities… [and] [s]ince automatic processing occurs outside of conscious awareness, its influence on judgment and decision making is difficult to eliminate or completely correct.'[52] Because professionals often hold unconscious biases and fail to recognise their own conflicts of interests, Sah (and other behavioural ethicists)[53] are critical of professional regulators' codes of ethics and ethics education and

Conflicts of interest: Challenges and solutions in business, law, medicine, and public policy (Cambridge University Press 2010); Sunita Sah, 'Policy solutions to conflicts of interest: The value of professional norms' (2017) 1 Behavioural Public Policy 177

[51] Sah, 'Policy solutions to conflicts of interest: The value of professional norms', 178-179

[52] Don A Moore and George Loewenstein, 'Self-interest, automaticity, and the psychology of conflict of interest' (2004) 17 Social Justice Research 189 190

[53] Bazerman and Tenbrunsel, *Blind spots: Why We Fail to Do What's Right and What to Do About It* 100-127

training. Discussing 'ethical fading' (where psychological processes fade the ethics from the dilemma),[54] Sah writes that:

> Such fading means that ethics training or codes of conduct cannot protect professionals from succumbing to bias from conflicts of interest. The fact that Enron had a 64-page 'Code of Ethics' booklet serves as a powerful exemplar that culture has a strong impact on moral decision making than codes.

A similar point is made by Emma Oakley and Steven Vaughan in their empirical study on commercial lawyers.[55] However, instead of drawing on behavioural ethics literature, they use Fineman's vulnerability thesis and show that interviewees were 'vulnerable to competition, client pressure, regulatory options, the demands of other stakeholders, [and] desires for profit making.'[56] They - like behavioural ethicists - also suggest that the conception of independence as promulgated by the SRA Code of Conduct, statute, and case law is 'an unrealizable myth of the hero-lawyer able to resist pressures from her firm, her colleagues, her clients, the lawyers on the other side, representative bodies, and the regulators themselves.'[57] Their work, the work of the behavioural ethicists, and my own, demonstrate that problems of independence, loyalty and conflicts of interest are more much complex than how regulators, legislators, and judges frame and explore them.

Next, I will draw on my data to demonstrate how many interviewees discussed facing conflicts of interest scenarios when delivering ILA.

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[54] This phenomenon of ethical fading is discussed in the previous chapter at section 5.4.2.1.1.
[55] Oakley and Vaughan, 'In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms' 83-111
[56] Ibid 84
[57] Ibid 109

6.2. *Conflicts in ILA practice*

6.2.1. *Same matter conflicts*

Despite Lord Nicholls concentrating solely on the risk of same matter client conflicts in ILA, the accounts of nine interviewees (out of the 22 who had experience delivering ILA) demonstrated that same matter client conflicts are unlikely to occur because they will not provide ILA to surety clients where they are *also* working for the lender or the principal debtor. As outlined in Chapter 4,[58] out of the nine interviewees who told me they would not deliver ILA to a surety client where they were also working for the lender or principal debtor in the same transaction, five said that the reason why they do not do this is because lenders do not permit it. The remaining four said they would not act for the surety client and the principal debtor and/or lender because they thought there was a conflict of interest risk. Out of the 13 remaining interviewees, 12 did not discuss a situation where they had advised a surety client where they had also been working for the lender or principal debtor in the same transaction. This meant only one solicitor - P28 - discussed delivering ILA to a surety client when they were *also* working for the principal debtor. When discussing this situation, P28 was unreflective about how there was a significant risk that his loyalties to both parties could conflict. This may demonstrate that solicitors may not be assessing how their loyalty duties may be compromised where they are acting for two or more clients in relation to the same matter (though we obviously must be cautious making grand claims from a single interview). P28 told me:

[58] Section 4.4.2.1

> …reasonably recently, one of my ongoing clients wanted to buy a new Tesla - a £80,000 car - and because he had not got the 'readies', he and his wife provided a personal guarantee for a charge over their company. So, I advised them on that… I did it with each of them in a separate room.

It is interesting to note that P28 referred to the 'husband' in this scenario – the client who was set to benefit from the guarantee so he could get a £80,000 car - as the 'ongoing client'. A conflict of interest issue could arise here because P28 would need to be sufficiently loyal to the wife and advise her solely in her best interests, and not let his advice be swayed by his other client's interests (i.e. having the means to buy the new expensive car). This 'client conflict' may be better described as an 'own conflict' though when considering that P28 may prioritise the husband's interests because it is in P28's own interests to maintain his relationship with the husband as the husband is the ongoing client. Coming back to the point about 'loyalty in concern', P28 may ultimately prioritise his interests, which, according to his 'ongoing client' comment, are better aligned with the husband's interests.

The SRA Code of Conduct also indicates that solicitors can be loyal to other ongoing clients even if they are not involved in the same matter, but a related matter (in Chapter 3 of the Code of Conduct). Even though many interviewees worked for lenders in arranging secured lending transactions,[59] no interviewee discussed how their work for specific lenders in related matters could come into conflict with providing ILA to surety clients. That is, no interviewee discussed providing ILA to surety clients where an ongoing lender client in a different matter was depending on the certificate of ILA. It is quite clear, however, that if a lawyer did advise a surety client who was contemplating providing a guarantee to a bank with whom the lawyer

[59] See Chapter 2 section 2.6. Table 2.8

had an ongoing relationship, then that lawyer might be preoccupied with the lender's interests as opposed to solely the surety client's interests. Returning to the discussion above, I would argue that this conflict could be more synonymous with an 'own interest conflict' – because the solicitor would be weighing up which client to prioritise depending on how it benefitted his - or his firm's - interests. However, as my data did not show that interviewees were in fact prioritising the interests of one client over another client in same or related matters, my focus is solely on how own interest conflict may be diminishing interviewees' loyalty and independence obligations in different ways when delivering ILA to surety clients.

6.2.2. *Heightened risk of own interest conflicts post-Etridge*

In this section I will present data from interviewees who demonstrated that there is significant risk of own interest conflicts surfacing when interviewees deliver ILA to surety clients post-*Etridge*. The first potential own interest conflict that may be leading interviewees to prioritise their own interests - instead of the surety client's best interests - is a consequence of normalised referral practices that operate post-*Etridge*.[60] I suggest that interviewees are at risk of prioritising the introducer's interests out of loyalty to their own interests because they want to maintain an ongoing commercial relationship with the introducer. The second own interest conflict that interviewees discussed is a consequence of interviewees' professional liability concerns. My point here is that some interviewees' concerns about their professional liability risk caused them to prioritise their own self-protection, and that this caused a conflict in care-giving because the surety client's best interests were not prioritised.

[60] There referral practices were briefly discussed in Chapter 4 when I discussed how interviewees revealed that most surety clients are not choosing their own solicitors for ILA – that is, they are referred to solicitors by the lender or by the lender's solicitor or the principal debtor's solicitor.

What we will see is how some interviewees explicitly demonstrated that they were motivated to deliver ILA in accordance with a market-exchange model of lawyering because this better facilitated or protected their own best interests. Consequently, I suggest (and building on the work done in the preceding chapter) that 'own interest conflicts' may be another reason why interviewees delivered ILA as a market-exchange instead of in accordance with the required relational lawyering model. Whilst other interviewees were not explicit about prioritising their own interests when delivering ILA, I will discuss how interviewees discussed situations and procedures surrounding ILA that can – according to behavioural ethicists – cause ethical fading and ethical blindness. I therefore suggest that the interviewees who were not explicit about having own interest conflicts may still be prioritising their own interests unconsciously, because of the difficult circumstances they find themselves in when delivering ILA.

6.2.2.1. *Referral practices*

In Chapter 4,[61] I briefly discussed how 19 interviewees were referred ILA work (to deliver ILA to surety clients) directly from lenders, from colleagues within their firm who were working for the principal debtor or the lender, and/or from solicitors from other firms, external accountants and/or from insolvency practitioners (who again, were either working for the principal debtor or the lender).[62] In talking about these referral practices, most interviewees demonstrated – contrary to the SRA Code of Conduct and *Etridge* – that they did not consider how receiving a referral may affect their ability to deliver ILA in the best interests of the surety client. In fact, only one solicitor - P10 - was explicit about how he thought referral practices negatively impacted his ability to be sufficiently loyal to the surety client, and sufficiently

[61] Subsection 4.4.2.
[62] P2, P4, P5, P8, P10, P11, P12, P13, P14, P15, P17, P18, P19, P21, P22, P23, P24, P25, P27

independent from the introducer, when delivering ILA. It is, I think, unsurprising that most interviewees did not admit to an own interest conflict due to referrals, because behavioural ethics research demonstrates that individuals are often unaware of how their actions are impacted by self-interested bias.[63] Alternatively, interviewees may have been careful not to reveal 'conscious and deliberate breaching of ethical principles or rules' during interview.[64] One reason why P10 may have felt, as an outlier, comfortable explicitly revealing an own interest conflict is because he no longer delivered ILA to surety clients. During the interview, P10 told me that he no longer provided ILA to surety clients because he was 'concerned about the massive conflict of interests and ethical issues' he felt were associated with delivering ILA. As such, P10 was reflecting on how his independence and loyalty may have been compromised when delivering ILA to surety clients in the past:

> It's a complete myth - that this is independent advice - because you normally get this referral from either the bank or the bank's solicitors. You very rarely get the woman ringing you up independently - in fact, this never happened to me… I mean, the only time that has happened is where the woman has said I've been told to get independent legal advice and your name has been given to me by the bank. So, the fact that I've got this referral from the bank in reality, or [from] their solicitors completely undermines any independence that is really there, because I am very rarely going to say to her 'Jesus this chocolate covered ants business is a complete

[63] Bazerman and Tenbrunsel, *Blind spots: Why We Fail to Do What's Right and What to Do About It* 73-74
[64] Richard Moorhead and others, 'Designing Ethics Indicators for Legal Services Provision' (2012) Available at: http://www.legalservicesboard.org.uk/wpcontent/media/designing_ethics_indicators_for_legal_services_provision_lsb_report_sep_2012.pdf (Last accessed 1st January 2020) 28

> disaster, don't whatever you do, sign this piece of paper!' Because if I do say that I'll never get any work through the referral line again.

Here, P10 demonstrates how acting for a surety client where the role was secured by a referral caused an 'own interest conflict'. P10 talks about prioritising his own interests (i.e. showing more care and consideration for his own interests) where he has received a referral. He also discusses how he is more likely to prioritise the referred surety client's means-ends in accordance with the market-exchange model of lawyering to prioritise his self-interests. This is demonstrated when P10 says that it is very unlikely that he will pass honest judgement (a relational lawyering dynamic) on whether the surety client should proceed to provide security for 'the chocolate covered ants business', where he knows that the introducer wants the transaction to be completed. As Tronto argues, to provide competent care-giving: 'One needs… to suspend one's own goals, ambitions, plans of life, and concerns, …to recognize and to be attentive to others.'[65] P10 demonstrates that, when receiving an ILA referral, it is difficult to suspend one's own goals. This is because he realises that to get future referral work from the introducer, he must meet the introducer's needs. P10 is aware that in being more considerate and caring towards the introducer's needs, he was prioritising his own needs, and therefore 'loyalty in concern' was not expressed to the surety client because his actions were motivated by self-interest.[66] To draw on the terminology used in the SRA Code of Conduct 2011, P10 is admitting that his ability to advise surety clients in their best interests may have been impaired by a 'commercial relationship' with the lender introducer.[67]

[65] Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* 128
[66] Keller, *The Limits of Loyalty* 3
[67] Outcome (3.2) (d)

Only two other interviewees mentioned the requirement to be professionally independent when discussing referrals, yet – unlike P10 – they were of the view that the referrals they received did not affect their independence. For instance, P15 first answered my question 'How do these clients come to choose you and your firm?', by stating that surety clients choose him 'independent of any third-party referral'. P15 even stressed that it was important that the surety client was not referred from the lender because 'that's how it should be so that it can be truly independent.' I then asked P15 if it was typical for a surety client (previously unknown to his firm) to call his firm and ask for an appointment. In response, P15 said:

> Sometimes. For example, our path very often crosses with [medium sized law firm] … and [this law firm] often sends clients here because they're arranging the transaction for the lender. So, they send them [the surety client] here to get independent legal advice because they wouldn't do it in house any more than we would. So, it can be other solicitors referring.

What we see here is that, despite his earlier comments, P15 demonstrated that he had an ongoing commercial relationship with a law firm that works for lenders in arranging transactions. Independence issues linked to referrals also arose in the interview with P25. After discussing receiving referrals from solicitors within his firm who were working for the principal debtor, P25 discussed how 'some banks are funny about solicitors within the same firm working for both the husband and the wife.' He then went on to tell me:

> I can understand why some banks do think that [that ILA should be delivered by a separate solicitor from a separate firm to the firm acting for the principal debtor] but my own view is that I regard myself as completely independent. I mean the way I look

> at it when I perform this function is that I am really performing it in my capacity as a solicitor really… I know that doing it [delivering the ILA and completing the transaction] means my law firm will get paid twice [for the ILA to the surety client and for the work completed for the debtor in arranging the transaction], but I do regard it as something which I'm… in that respect, completely independent. So, I don't have any qualms about it, but I can understand why some banks insist that it must be a solicitor from another firm [acting for the surety]. [P25]

Here, P25, recognises that he may be conflicted; that he could prioritise being loyal to his firm over being loyal to the surety client. However, P25 goes on to say that in performing the role in his 'capacity as a solicitor' he believes that his independence would be unimpeded. Nelson argues that assertions of independence, such as P25's above, are demonstrative of 'the resilience of this ideology of professionalism.'[68] Nelson writes that:

> …the legal elite will take positions on legal and social issues that maintain the legitimacy of the system as a whole. As has sometimes been observed, the one interest members of the elite have in common is their concern for preserving the system in which they are the elite.[69]

[68] Nelson, *Partners with power: The social transformation of the large law firm* 263
[69] Ibid 262

Behavioural ethics scholars such as Maryam Kouchaki,[70] Loewenstein,[71] Moore, [72] and Sah, have all discussed how professionals have a 'sense of invulnerability created by their belief of their own professionalism.'[73] George Loewenstein, drawing on Moore's work, explains:

> When professionals are confronted with charges of bias resulting from conflicts of interests, inevitably their first reaction is that they are not vulnerable to bias because of their professional training. Thus, for example, Don Moore… cites Gary Shamis, Chairman of the Management of an Accounting Practice Committee at the American Institute of Certified Public Accountants… [who said] "We are professionals that follow our code of ethics and practice by the highest moral standards. We would never be influenced by our own personal financial well-being."[74]

In asking commercial lawyers about their professional obligation to be independent, Oakley and Vaughan demonstrate that whilst most of the 53 commercial lawyers they interviewed 'believed that professional independence was important', they also had 'a limited understanding of the term and concept.'[75] Oakley and Vaughan commented on how most of their interviewees 'from their own subjective perspective… felt both individually and collectively appropriately 'independent' and 'resilient' in the face of client pressure.'[76] They then go on to quote a lawyer interviewee who told them that:

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[70] Maryam Kouchaki, 'Professionalism and Moral Behavior' (2015) 54 Business & Society 376
[71] George Loewenstein, 'Conflicts of Interest Begin Where Principal–Agent Problems End' in Don A Moore and others (eds), *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy* (Cambridge University Press 2005)
[72] Don A Moore, 'Conflicts of Interest in Accounting' in Don A Moore and others (eds), *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy* (Cambridge University Press 2005)
[73] Sah, 'Policy solutions to conflicts of interest: The value of professional norms' 177
[74] Loewenstein, 'Conflicts of Interest Begin Where Principal–Agent Problems End' 203
[75] Oakley and Vaughan, 'In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms' 97
[76] Ibid 102-103

> Most grown-up law firms behave in an appropriate way with their clients and I don't see even with [the firm], even our top ten global clients who are very important to our firm, I can't think of a single incident where the undue influence of one of those clients put the firm in a position where we were not complying with our general professional duties. [US COLP 1][77]

This lawyer's response – like P25's response above – are both typical responses from those who believe they are invulnerable to independence and conflict of interests problems because of their belief in their own professionalism.

Returning to my own data, whilst P15 and P25 seemed to reflect partially on loyalty and independence issues (even if their reflections were circumspect), most interviewees were completely unreflective about what impact referrals may be having on their loyalty and independence. In fact, 16 out of the 19 interviewees who discussed receiving referrals (from parties who had vested interests in the secured lending transaction being completed), discussed referrals trivially - unconcerned about how their loyalty and independence obligations may be compromised. The following excerpts are typical of the responses from these 16 interviewees:

> [ILA work is referred] normally through the bank relationship manager, who I work very closely with. I get a call from the bank, my bank guy in the morning, saying, 'We're doing this deal, it's completing in two days. We need to get ILA for the wife. Can you do it?' [P4]

[77] Ibid 103

> So sometimes a law firm contacts you and says, 'We're acting for the borrower, but we can't act on the guarantors, can you act?" So that's how we'll get it. And so yes, probably you have got law firms that are just going, "do I know a law firm? Can they do it quickly for me? Have we got a relationship with them? [P17]

> The way it works is that if it is referred from a solicitor or an accountant, they will say to me: 'Can you advise this client?' 'Yeah, I think I can do.' 'By tomorrow afternoon?' 'Fine, okay.' Then they'll tell their client… the bank – who is desperate to lend the money, it's burning a hole in their pocket. So, they will get the documents emailed to you from the bank's security centre. It's quite important that you have good relationships with the people who are doing the same job as you. You would think that they would be your opponent… but in fact I derive a lot of work from other solicitors who refer stuff to me. [P19]

In analysing these and other interviewees' responses about referrals, two matters stood out. First, it became clear that interviewees often had ongoing relationships with introducers and that ILA referrals would involve interviewees being in direct contact with the introducer. For instance, above, P19 talked about how relationships with other solicitors are 'quite important' because he derives 'quite a lot of work from other solicitors.' P19 even went on to discuss how introducers would call him to ask him to provide ILA:

> Your contact, either in a firm of accountants who you get on with and you get work from, or another firm of lawyers who you get on with and you get work from, [says] 'can you help me out, it's a pain in the neck I know, and I know it's only a couple of hundred quid, but can you do it because I want this transaction to proceed and I know

> that's necessary so can you help me with that?' So, that's the sort of situation you're looking at.

P19 also made the point that:

> Number one, you're doing it because you earn fees out of it. Number two, you are helping somebody from whom you get more lucrative and more important instructions. And you want to help their client [the principal debtor] because somewhere down the line if the client really likes you, then the client may fall out with their favourite lawyer, and they might think, well actually that guy was quite good, I'll go to him this time and see what he does with it.

P19 therefore explicitly told me that he was mindful that in 'helping' the introducer (prioritising the introducer's interests) he might 'get more lucrative and more important instructions' from that introducer in the future. He also discussed how providing ILA to the surety client may impress the principal debtor who may want to recruit him for other legal work. Likewise, P12 discussed how he 'might get spin-off work' from delivering ILA to surety clients. P14 also said that getting ILA work referred by other solicitors is a consequence of it being 'quite a small industry.' He then remarked that these connections and referrals 'tend to serve [him] quite well.'

Secondly, it became clear from interviewees' discussions on referrals that they were aware that the introducer (whoever they were) had a vested interest in the work being completed, and that introducers wanted the ILA completed as soon as possible. For example, P19 talked about how the introducer was often the bank's solicitor and that the bank was 'desperate to lend the money'. Similarly, P5 suggested that '...the lender [from whom P5 gets ILA referrals]

wants the deal [secured lending transaction] done as much as the borrower does.' P11 also remarked that the lender's solicitor – from whom he usually gets ILA work – makes it clear that he 'wants the process to be done.' What this shows is that interviewees understood how completing the transaction quickly aligned with introducer's interests. Each of these 19 interviewees discussed that, when receiving ILA referrals from lenders, or from solicitors or accountants that were acting for the lender or principal debtor, there was often pressure placed on them to complete the transaction as soon as possible.

> …one thing that does slightly annoy me is that it is very last minute... there is a transaction which is completing on the Friday and the bank suddenly realised that they haven't got ILA for the sureties and you know, on Wednesday we get a - and this has happened with HSBC about two months ago - we got instructions through on a Wednesday and you've got to see them tomorrow because it's completing the next day and so there is that sort of time pressure. [P5]

This is worrying because more relational ILA, involving a thorough consultation (a fictive feminine value) about the client's circumstances - so that the solicitor can reach a judgement (a relational dynamic) about whether it is in the client's best interests to proceed - is much more time consuming than providing objective ILA where the client's means-ends (an imagined masculine value) are prioritised. P18 said: 'There is time pressure, there always is… It's always like yesterday when it was required.' In a similar vein, P27 told me: 'That's another point by the way speed! Everybody wants things done yesterday.' P27 then went on to say:

> You ask where the undue influence is? It's from them [the bank] on the lawyer**.** To get on with it, without making a meal of it… it's all about satisfying the bank - they spell it out to you.

P27's comments clearly demonstrate how he felt pressured to perform ILA in the lender's interests where the lender had referred the client. P27 also told me that the banks 'spell it out' to ILA lawyers how they want ILA to be delivered to the surety client. Here, P27 was referring to the guidelines/instructions lenders were sending to surety clients' solicitors on how to deliver ILA. As discussed in Chapter 4, this practice could be a demonstration of lenders trying to control how ILA was delivered to surety clients.[78] This is despite Lord Nicholls stating in *Etridge* that the bank should not have any knowledge or control over the advice the solicitor gives to the surety client.[79] Arguably, lenders' actions in directly contacting and introducing surety clients to known solicitors may be another violation of Lord Nicholls guidelines that they are not allowed to have any knowledge or control over the advice a solicitor gives. As I have clearly demonstrated above, interviewees were *very aware* that referring lenders wanted the ILA (and therefore the transaction) completed as a priority, and it was often in interviewees' best interests to keep introducers 'on side' for future work opportunities. As P10 admitted, it is difficult to imagine that interviewees would prioritise the surety client's best interests through lawyering relationally, when such an approach could potentially frustrate the completion of the secured lending transaction and therefore thwart future referral work.

Behavioural ethicists have also demonstrated how time pressure can result in automatic and intuitive responses being triggered which are more likely to result in self-interested decision-making.[80] This relates to the point Moore and Loewenstein make (discussed earlier in this

[78] See Chapter 4 section 4.4.2.2.
[79] [77] (Lord Nicholls)
[80] Bazerman and Tenbrunsel, *Blind spots: Why We Fail to Do What's Right and What to Do About It* 165; Dolly Chugh, 'Why milliseconds matter: Societal and managerial implications of implicit social cognition' (2004) 17 Social Justice Research 203; Moore and Loewenstein, 'Self-interest, automaticity, and the psychology of conflict of interest'

chapter), about 'when professional responsibilities clash with self-interests… self-interests exerts more automatic influence than do professional responsibilities.'[81] This automatic response to decision-making is referred to as 'System 1' thinking by Max Bazerman and Ann Tenbrunsel.[82] They assert that:

> Time pressure… is another likely source of unethical behaviour. The busier and more rushed people are, the more they have on their minds, and the more likely they are to rely on System 1 thinking… Time pressure reduces the cognitive resources available to decision-makers and decreases their odds of making "should" choices.[83]

What this means is that where lawyers are under time pressure from introducers to complete the ILA as quickly possible, it is arguably less likely that they will deliver ILA in accordance with their professional responsibilities if they clash with their self-interests. Belinda Fehlberg, in *Sexually Transmitted Debt*,[84] called for cooling-off periods of 14-days 'to aid sureties who have signed but later have second thoughts.'[85] The behavioural ethics work just discussed demonstrates that cooling off periods may also benefit ILA lawyers' ethical decision-making because time pressure can cause individuals to instinctively prioritise their self-interests.

Interestingly, P2 remarked on how – when working for a principal debtor – he is often the solicitor pressuring the surety's solicitor to complete ILA:

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[81] Moore and Loewenstein, 'Self-interest, automaticity, and the psychology of conflict of interest', 190
[82] Bazerman and Tenbrunsel, *Blind spots: Why We Fail to Do What's Right and What to Do About It* 35. Bazerman and Tenbrunsel borrowed the terms System 1 and System 2 thinking from the work of Keith E Stanovich and Richard F West, 'Individual Differences in Reasoning: Implications for the Rationality Debate?' (2000) 23 Behavioral and Brain Sciences 645
[83] Bazerman and Tenbrunsel, *Blind spots: Why We Fail to Do What's Right and What to Do About It*, 164-165
[84] Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Clarendon Press 1997)
[85] Ibid 278

> We'll be saying, 'We need to complete this today because there might be a liability becoming due,' or something… And we'll be saying [to the surety], 'You need to go away and get this certificate signed and return it to us,' and then we'll chase their solicitor very aggressively for it sometimes because it needs to be done before it all falls over. Partially, maybe I'm part of the problem. Who knows? But they will return it very quickly… and I'm thinking: it seems like a very quick turnaround for a proper consultation.

Whilst most of my findings on referrals and the significant risk of own interest conflicts are concerning, two interviewees told me that they do not receive ILA surety clients from introducers. P7 – unlike 20 other interviewees – said that he would not receive a referral because banks would not make referrals. He said: 'I don't think banks feel they can [provide a referral], because they don't want to be seen promoting specific law firms in case there is some sort of undue influence argument to come out of that.' Here, P7 clearly thinks direct referrals 'promoting specific law firms' could result in surety clients arguing that there had been a lack of independence between lender and lawyer, and that lawyers may feel pressured to deliver ILA 'the way they want them to give it.' On the other hand, P16 discussed how referrals were commonplace but that he would never provide a direct referral when working for the lender or receive a referral direct from the lender or a solicitor within his firm (working for the lender or principal debtor), when acting for the surety client:

> If we're acting for the lender and we say to the guarantor 'you must get independent legal advice,' we far prefer it that they choose the lawyers. We wouldn't say 'here's a firm we suggest' because it's really got to be truly arms' length and truly independent legal advice. I mean if they come to us and say, 'we don't' know which firm,' we say

> ‘well, just ask around or go to the Law Society website’… [When delivering ILA] we are also a bit wary of Chinese walls [when receiving a referral from a solicitor within his firm]. Again, I think our view is that they should go to an entirely different firm.

P16 went on to explain why he does not provide or benefit from client referrals in this context:

> It’s just not worth the risk, it’s as simple as that, because if it all goes horribly wrong, we don’t want them [the surety] to be arguing about conflict and Chinese walls and everything. It’s the easiest thing in the world to say, ‘choose another firm’ and frankly the risk against the financial reward of actually advising someone with a guarantee is just not worth it. I mean you can’t really charge very much, to be brutal, for advising on a guarantee but the risk is very high so it’s just not worth taking the risk.

P16 demonstrates here how the risk of professional liability claims because of ‘conflict and Chinese walls’ are ‘not worth the risk’. This is a demonstration of how negligence concerns can direct a lawyer to make the right call about referrals and ensuring the surety client has a better chance of securing independent advice. However, as I will go on to discuss next, some interviewees discussed how their concerns about professional liability risk led to them to deliver inadequate ILA and – in some cases – act unethically. This is another gloss on the multiple, complex factors shaping the delivery of ILA post-*Etridge*.

6.2.2.2. *Professional liability concerns*

ILA solicitors’ concerns about professional liability risk became apparent at the very early stages of this project. In fact, when trying to recruit interviewees, I learnt that many law firms prohibit their solicitors from delivering ILA in the secured lending context because they

consider the professional liability risk too great. Eight solicitors replied to my recruitment emails (see Chapter 2) stating that they (and sometimes their firms as a whole) do not provide ILA to surety clients because of concerns about negligence risk. For example, one solicitor simply emailed: 'We don't do this kind of work. The fee is minimal or nil and the risk significant.' And another wrote:

> I'm afraid I don't fall into the categories of solicitors you are looking to talk to. I thought it might be useful to add that at a previous firm it was policy not to take instructions on giving advice on personal guarantees in the scenarios you identified… because the professional negligence risk was too high.

Moreover, of the four solicitors I interviewed who only had experience in defending possession proceedings for surety clients, two interviewees – P9 and P26 – discussed how their firms prohibited them and their colleagues from delivering ILA to surety clients. 17 out of 22 other interviewees who had experience delivering ILA discussed how many solicitors from other firms refuse to deliver ILA to surety clients because of the risks.[86]

Out of those interviewees who had experience delivering ILA, 14 interviewees noted that they were concerned about the professional liability risk associated with delivering ILA to surety clients. The fact that most interviewees were concerned about professional liability risk became apparent in response to this question that I posed: 'Has your delivery of ILA changed over the years you have delivered it?' I was particularly interested to hear from those solicitors who had delivered ILA before as well as after *Etridge*, to see if they would discuss how ILA had become more meaningful (for the surety client) and thorough because of the

[86] P5, P7, P8, P10, P12, P14, P15, P16, P17, P18, P19, P22, P23, P24, P25, P27, P28

guidelines in *Etridge*. 12 out of 14 interviewees responded to my question by stating that they felt more at risk post-*Etridge*.[87] Instead of discussing changes to ILA and how those changes impacted on surety clients, interviewees' responses demonstrated that they were principally concerned about their own risk as a consequence of Lord Nicholls' guidelines in *Etridge* (that specified that a surety client may have a remedy in damages against their ILA solicitor if the solicitor had delivered ILA negligently).[88] The following responses were common from this group of concerned interviewees:

> Yeah [it has changed], there is a higher risk of getting sued now. [P8]

> I think where my advice has changed is that I think solicitors have a far greater degree of accountability now than they used to have… the culture nowadays very much is, "Well if something's gone wrong, who can I blame?" [P14]

> There is definitely more paperwork and clients are trying to tie up the legal adviser far more on the hook now. [P18]

> I think it is more risky - I think there is a professional conduct point in terms of conflict of interest and there is a risk versus reward of somebody holding you responsible for not properly advising somebody, so you know, there has been a shift of risk towards the independent legal advisor. [P23]

The remaining two 'concerned interviewees' made clear that they worried about professional liability risk in other parts of their interviews. For instance, when talking about how he delivered ILA, P27 unexpectedly said: 'I have read with interest the case of *Padden v Bevan*

[87] P5, P7, P8, P15. P17, P18, P19, P23, P25
[88] *Etridge* [75] (Lord Nicholls)

Ashford – which you will be aware?' As discussed in Chapter 3,[89] *Padden v Bevan Ashford (A Firm)* was a case where a surety client successfully claimed damages because her solicitor (an employee of Bevan Ashford) had negligently delivered ILA. P27 went on to say that this case: 'sort of whistled all around the law firms about your PPI cover… so one is mindful of that kind of backlash. You have to be on the ball.' P28 also raised concerns about professional liability risk when he was discussing following lenders' instructions strictly. He set out that he delivers ILA in accordance with lenders' instructions 'because that's what they [lenders] require, and I don't want to find myself on the wrong end of a lawsuit!'

These 14 interviewees demonstrated that they categorised ILA as an 'activity of risk'. Susan Bandes argues that: '[P]lacing an event or activity in the category of "risk" is a categorization with consequences.'[90] This is because feeling at risk invokes an emotional response, and different emotional responses can affect 'how risks are assessed, prioritized, and ameliorated.'[91] P19 and P17's discussions about being concerned about professional liability risk demonstrate Bandes' point that 'feeling at risk invokes emotional responses.' For instance, P17 told me twice that he was 'fearful' and 'nervous' about professional liability risk post-*Etridge*. On the other hand, P19 demonstrated annoyance and frustration when discussing professional liability risk:

> Well [ILA] has not changed very much. Except I suppose… Unfortunately, I'm a little bit old-fashioned… and I don't really see why an inherent risk in a dispute or in a transaction should be transferred to the solicitor rather than remaining with the client… they're the ones who are borrowing the money; they're the ones who are not

[89] Section 3.5.3.
[90] Susan A Bandes, 'Emotions and risk regulation', *From Economy to Society? Perspectives on Transnational Risk Regulation* (Emerald Group Publishing Limited 2013) 219
[91] Ibid

> going to be able to pay it back if it all goes wrong in the future… So, why would a solicitor then become liable in that situation for advice given or not given when it's their problem? It's not our problem! …But why are the courts, who are lawyers themselves, then inventing a court of action for these people? The bank is unwise, the borrower is unwise, so what are the courts doing in the year 2000 [meaning the House of Lords in *Etridge* in 2001] inventing a course of action for those [surety clients] to have a go at the lawyers?' [P19]

Loewenstein and others explain why 'risks as feelings' can cause overly defensive and self-interested behaviour.[92] They propose that: 'People react to the prospect of risk at two levels: they evaluate the risk cognitively, and they react to it emotionally.'[93] They further outlined that whilst '[c]ognitive evaluations of risk are sensitive to the variables identified by decision theory, namely probabilities and outcome valences…' emotions can arise with minimal cognitive processing, and people can experience fear reactions when there is little to be afraid of (i.e. the probability and outcome of the risk is low).[94] Kouchaki and Sreedhari Desai 'suggest that people experiencing anxiety are likely to behave selfishly and possibly even engage in self-interested unethical acts in an effort to restore the threatened self.'[95] This means that there is a possibility that interviewees' reactions to feeling at risk could impact on their professional work, on their care-giving. This point is discussed by Landsman when he writes about cases where hospital 'risk managers [lawyers] exaggerate legal risks to provide

[92] George F Loewenstein and others, 'Risk as feelings' (2001) 127 Psychological bulletin 267
[93] Ibid 271
[94] Ibid 280
[95] Maryam Kouchaki and Sreedhari D Desai, 'Anxious, threatened, and also unethical: How anxiety makes individuals feel threatened and commit unethical acts' (2015) 100 Journal of Applied Psychology 360

misinformation about the operation of the legal system to frighten doctors.'[96] He goes on to write:

> Risk manager's advice in such circumstances, all too often, reflects a willingness to brush aside the patient's desires or interests in favor of what is perceived, rightly or wrongly, to be a course of action that will insulate caregivers and hospitals from any conceivable legal claim or adverse publicity.[97]

Landsman discusses how the desire to protect the hospitals' interests causes doctors to compromise care-giving and their client's best interests; that doctors' '[g]ood judgment and decency yield to fear.'[98] In arguing that care-giving can be diminished because of doctors' emotional reactions to risk, Landsman suggests that lawyers and law firms should be slow in embracing risk management at the expense of client care.[99] Tronto makes a similar point when she writes:

> …care-givers are often enraged about their own unmet needs. If they are unable to recognize this rage, care givers are likely to vent their anger on those for whom they care. Perhaps some rage is appropriate, but when it subverts the process of care itself, then it poses a serious problem.[100]

As I will show next, a small group of the 14 interviewees who were concerned about professional liability risk demonstrated that their responses to feeling at risk subverted the process of care in ILA. In other words, interviewees demonstrated that they prioritised their

[96] Stephan Landsman, 'The Risk of Risk Management' (2009) 78 Fordham L Rev 2315 2318
[97] Ibid 2318
[98] Ibid 2319
[99] Ibid 2326-2327
[100] Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* 143

own interests at the expense of the surety clients' interests when they delivered ILA because they felt at risk.

Six interviewees discussed not passing judgement on whether the surety client should proceed with the transaction to protect themselves.[101] Recall that, in Chapter 5,[102] I discussed how most interviewees were averse to exercising Remus' relational dynamic of judgement when delivering ILA. However, what was not discussed in Chapter 5 is that six out of the 14 interviewees who said they have not and would not pass judgement when delivering ILA went on to discuss how advising a surety client against signing a secured lending transaction put them at risk of a professional liability claim. In other words, at the expense of the surety client's best interests these interviewees discussed prioritising their own interests, i.e. not passing judgement. This, I suggest, is an own interest conflict, even though it is not outlined in Chapter 3 of the SRA Code of Conduct 2011 that a lawyer's actions in prioritising their own self-protection can be a factor which impairs their ability to act in the best interests of clients.[103]

The following quote from P7 demonstrates how, in prioritising his own self-protection, P7 would not pass judgement about whether the surety client should proceed with providing security. That is, to protect himself, P7 does not 'give reasoned advice' in his client's best interests as Lord Nicholls said he should in *Etridge*:[104]

> To my mind, unless you are being instructed to and you know all the details about the underlying transaction and you are therefore in a position to say I can't see how this

[101] P7, P8, P19, P24, P25, P28
[102] Section 5.4.1.3.
[103] As discussed in section 6.2.3. above
[104] *Etridge* [61]

> underlying transaction can ever work out well for [your client], I can't understand why you would personally be putting yourself at risk, you stand to lose more by doing this… you would be potentially negligent if you do that. [P7]

P19 also discussed how it was risky to pass judgement on whether the client should enter the transaction:

> Solicitors who do that [pass judgement] are unwise. The client will say: 'What would you do if it was you?'… That is not my role as a lawyer. And equally I am the first to be sued if I tell him what to do and then it goes wrong, because he will come straight back to me and say, you told me to do this. I am constantly, constantly aware of my own risk… a client can be your worst enemy in practice as a lawyer... And you've got to be aware of that all the time that you're dealing with clients, because if you get too close to the scenario, too close to the client, if you do end up loving the client more than your own parents, then that really can only end up in disaster actually. As an experienced lawyer I know that… And so you've got to be suspicious of everything. You've got to be very, very careful to cover yourself with a client. [P19]

P19 stresses that solicitors should keep their distance from all clients (not exclusively surety clients) to protect themselves; that lawyers should prioritise imagined masculine values (such as objectivity and independence/non-interference) which are linked with lawyering in accordance with a market-exchange model. In accordance with Landsman's observations about healthcare patients being viewed as adversaries by doctors and nurses due to legal risk concerns, we can see here that P19 views his clients as adversaries.[105] In fact, he openly

[105] Landsman, 'The Risk of Risk Management' 2319

suggested that ‘a client can be your worst enemy.’ This view – that the client is out “to get” the lawyer – clearly impacts P19’s lawyering approach and, I would suggest, almost certainly diminishes the care-giving provided to the surety client when he delivers ILA.

It is also interesting that P19 said, in the above excerpt, that ‘if you do end up loving the client more than your own parents’ then it can end in ‘disaster.’ This demonstrates that P19 thinks that there are two extremes in lawyering: you can ‘love’ the client, opening yourself up to negligence risk; or, alternatively, you can keep your distance from the client, lawyer instrumentally, and protect yourself. In his article, ‘What’s love got to do with it?’,[106] Robert Condlin is critical about Charles Fried’s argument (and Thomas Shaffer and Robert Cochran’s related argument),[107] that the lawyer-client relationship should be equal to friendship.[108] Condlin argues that ‘friendship is ultimately grounded in love’ and that ‘being a lawyer [to the client], even a wonderfully caring and humane lawyer, is not the same as a friend [to the client].’[109] Instead, Condlin claims that the lawyer-client relationship should involve a middle ground between the two extremes of ‘loving the client’ and ‘keeping distanced from the client’. As part of his discussion on this point, Condlin writes:

> This means that lawyers must be truthful with clients, and not hold back information secretively, or for self-interested or paternalistic reasons. They must be candid about

[106] Robert J Condlin, '"What's Love Got To Do with It" - "It's Not like They're Your Friends for Christ's Sake": The Complicated Relationship Between Lawyer and Client' (2003) 82 Neb L Rev 211
[107] Thomas L Shaffer and Robert F Cochran Jr, *Lawyers, Clients, and Moral Responsibility* (Thomson/West 1994) 42-65
[108] Charles Fried, 'The lawyer as friend: The moral foundations of the lawyer-client relation' (1975) 85 Yale LJ 1060
[109] Condlin, '"What's Love Got To Do with It" - "It's Not like They're Your Friends for Christ's Sake": The Complicated Relationship Between Lawyer and Client' 305

> where they own interests lie, and put the client's interests ahead of their own whenever the two… conflict.[110]

The issue demonstrated by some negligence-concerned interviewees, is that their '[g]enuine feeling'[111] when delivering ILA to a surety client is often anxiety, fear, or resentment, and that, in response to feeling at risk, there is a heightened risk of own interest conflict; that they fail to act dutifully to the surety client because they prioritise their own interests.

As a further example, P28 initially mentioned that he would pass judgement on whether the client should enter the agreement based on their 'legal and business' interests.[112] However, I then mentioned in the interview with him that some previous interviewees thought passing judgement was risky and exposed them to potential negligence claims. In response, P28 told me that he understood this position and rephrased that he would not explicitly pass judgement and advise a client against entering the transaction, but that he would just outline other options:

> I mean to say: 'Have you looked at this option?' does not expose the solicitor to any allegations of negligence. I am merely providing a prompt. You know, if I was to say 'don't enter it' then I am actually more exposed than if I say, this is really probably the least desirable option.

[110] Ibid 307-308
[111] Ibid 310
[112] Recall that P28 said he passed judgement, but this was not based on the surety client's individual interests but on whether it was a good business decision. Furthermore, he stated that he could not think of a reason why he would advise against the surety client entering the transaction if they needed access to the money. See Chapter 5 Section 5.4.1.1. for this discussion on how, despite P28 initially stating he passed judgement (which is a hallmark of relational lawyering), he in fact prioritised the client's ends in accordance with imagined masculine values which is linked with market-exchange lawyering.

As such, P28 discussed holding back from passing judgement for self-interested reasons. In a similar vein, P23 discussed how mentioning alternative options with the surety client would be acceptable, but that advising them against entering the suretyship transaction was 'inherently risky'.

This stance, that a lawyer's own protection comes first, is further demonstrated by P5. Although P5 did not discuss risk and self-protection when stating that he would not pass judgement about whether the surety client should provide with the suretyship, he instead discussed how he thought solicitors who advised sureties against entering a transaction did so only for their own protection. Talking about his role working for an insolvency practitioner in arranging and drafting a secured lending transaction agreement - a role which involved ensuring the surety in that case received ILA - P5 referred to the solicitor who was advising the wife in that case. As it happens, P5 had brought with him to our interview a letter written by the ILA solicitor who had advised the wife:

> No names obviously, but I brought one of these in actually just to show you what I did last year. I can't let you take it away obviously but acting for an insolvency practitioner here. He owed that much money – the husband – and she agreed to have the house charged [his wife], to pay off the other charges first, and pay us. Then we get a letter of independent legal advice there where the lawyer, as you can see at the end says 'I advised them not to sign up but they signed up anyway', because she's a big girl.

After taking time to read the letter, I realised that 'because she's a big girl' had not of course been written by the wife's solicitor but was ad-libbed by P5. This was not the first time P5 had made derogatory comments which indicated that he thought it was ridiculous that solicitors had to advise sureties (typically wives), and that solicitors could be sued if ILA had been

incompetent according to the *Etridge* guidelines and a solicitor's wider duties. For instance, he told me prior to this that undue influence was a 'convenient argument' for surety clients to make after their security was called upon. He even went on to talk about how it was unfair on lenders because 'she [the surety wife] benefits from that business in the same way her husband does because it provides the income for… [their] household.' [113] This demonstrates how P5 had a lack of empathy for wives who provided suretyship.[114]

After reading the letter P5 had brought to the interview, I commented that: 'It's interesting that he [the wife's solicitor in this scenario] felt it necessary to really detail that he told her that she shouldn't sign.' This led to the following exchange:

P5 Yeah, when there's no need for him to do that really, he was just making his point. But to be fair to him, I sent over this version of this document [the secured lending agreement the wife's solicitor would be advising on] that was in harsher terms, and he said you shouldn't sign because of that bit, that bit, and that bit. So I tweaked the agreement, which made the wife happier, but obviously not happy enough.

I So the wife's solicitor negotiated the terms of the agreement?

P5 Yes they negotiated the terms.

I Is that common?

[113] P5 made these comments even though he had experience bringing a successful professional negligence claim against another ILA solicitor.

[114] Rosemary Auchmuty discusses how research shows that lawyers often lack empathy for women in 'Men Behaving Badly: An Analysis of English Undue Influence Cases' (2002) 11 *Social & Legal Studies* 257, see pages 274-277. Other interviewees did not make such gendered remarks or demonstrate a lack of empathy explicitly, but they did not demonstrate that they had empathy for surety wives either.

P5 No it's not… he said I'm not happy with a couple of the clauses, and I was prepared to play with them enough to keep the wife happy enough to sign, but obviously not enough for the lawyer to advise her to sign. But yes, he's clearly gone to town making the point that I told her not to sign: 'She shouldn't have signed this, but she signed anyway.'

I Why do you think he's done that?

P5 I can only think it's covering his own back, because he thinks this deal is bad. And it could well be, because I've issued proceedings on this one for possession of the house.

I Oh you have?

P5 So it has gone wrong, yes. So I've got a court hearing later this month on it. It has gone wrong, and if she loses her house then she may well think 'who am I going to have a pop at now'? It's likely to be her solicitor, so he's probably covering his own back, and sensibly so.

P5's discussion is alarming because, if other solicitors are - as P5 suspects - passing judgement merely for their own protection, judgement is not being exercised as a relational dynamic where solicitors are prioritising care and consideration for the care-receiver (the surety client). There is also a broader point here about whether the solicitor in this example is really acting in accordance with the Code of Conduct 2011. As discussed earlier in this chapter, for solicitors to be properly loyal to surety clients they must demonstrate 'loyalty in concern.'[115] That is, interviewees need to be motivated to deliver ILA out of concern for the surety clients' 'interests or welfare,'[116] over the interests of others - including themselves. This point is made

[115] Keller, *The Limits of Loyalty* 3
[116] Ibid 3

by Tronto when she writes that a care-giver's action taken for self-protection is distinct from taking action to care for the care-receiver.[117] When a care-giver is motivated by their self-protection they are principally concerned about the self; '[w]hat is definitive above care, on the other hand, seems to be a perspective of taking the other's needs as the starting point for what must be done.'[118] This idea that solicitors may pass judgement for the sake of self-protection is different from the position taken by other interviewees who said they would not pass judgement as a form of self-protection. Either way, conflict in care could exist because the motivation behind both sets of actions is the lawyer's self-protection. Unlike P5, I did not interpret (from reading the letter P5 brought to interview) that the solicitor in that case was prioritising his own protection. Instead, it seemed as though that solicitor had deduced that the terms of the agreement were unacceptable and therefore passed judgement and advised the client against entering the agreement. Furthermore, this solicitor had negotiated the terms of the agreement to better protect his client. This approach is synonymous with a relational and fictive feminine approach to lawyering.

All of the interviewees who were concerned about professional liability risk stressed how important a comprehensive paper trail was after delivering ILA. This paper trail involved creating a file note and sending a follow-up letter to the client. As discussed in Chapter 4, [119] according to interviewees who have defended possession proceedings, file notes can be fatal to a surety client's claim that they had been delivered negligent ILA. I was therefore very concerned to learn that, in response to their concerns for self-protection, three interviewees admitted to unethical 'paper trail' practices. In discussing writing follow-up letters to clients

[117] Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* 105
[118] Ibid 105
[119] See Chapter 4 section 4.4.

or file notes about what was discussed and covered during ILA with their client, P7 and P25 told me that they have pro-forma (pre-written) file notes and follow-up letters that they copied and pasted after delivering ILA to different surety clients:

> So normally what we try and do is send a letter afterwards [to the client], you know, explaining all the things that *would have* been discussed. So, you know, what I have done for my own purposes… is come up with a pro-forma advice letter, which makes it quick and efficient to follow up a meeting. [P7]

> I do have my own precedent letters which I use. So, I have precedent letters set up on a system giving advice to a client, which I can cut and paste accordingly, but sometimes I'll use a bespoke letter, but in the main I have a template that I would use. [P25]

I am not suggesting, to be clear, that using or having a pro forma letter will *always* lead to ethically dubious outcomes. Instead, the point is that emphasis on self-protection through pro-forma letters deviates from the requirement that lawyers advise surety clients in ways that are catered to the needs of particular clients in particular situations. It also may mean that advice is detailed in the pro-forma letters that is not actually given in the meeting. For example, P15 said that he would hand over a pre-written advice letter to the surety client after advice was delivered in the meeting room. What this means is that the follow-up letters given/sent to the client that are also put on their client file may detail discussion and advice which was not, in fact, provided in the meeting with the surety client in that instance. That is, file notes and follow up letters are not contextualised. P5 also said that he suspected lawyers who delivered ILA frequently had proforma file notes that they simply 'copied and pasted' after advising every surety client. P16 also told me that he knows of a case where it was discovered that the ILA solicitor 'backdated' a file note to cover himself:

P16 …you also get sometimes solicitors doing attendance notes after the event. We've had evidence of that, where we proved that a solicitor actually his attendance note was only done when he'd got whiff of a potential claim, so he backdated it.

I That's so interesting. So how did you find out that actually it was backdated?

P16 There was forensic analysis of it [the file note]. I think it was something to do with the typescript, that it wasn't in use, something like that.

I So the actual text - the font that they used on the file note - actually wasn't around at the time the advice was given?

P16 That's right.

This is another example of the ethically questionable lengths to which solicitors will go to protect themselves from professional liability claims when they deliver ILA.

6.3. *Conclusion*

The SRA Code of Conduct 2011 clearly sets out that lawyers' self-interests should not be priortised over a client's best interests during legal representation. Yet my data suggests that interviewees are regularly influenced to priortise their own interests and concerns over surety clients' best interests when delivering ILA post-*Etridge*. In this chapter I have suggested that delivering ILA relationally conflicts with interviewees' interests in getting ILA completed quickly and efficiently for introducers. I have also shown how some interviewees prioritised a market-exchange model of lawyering – keeping clients at arm's length – because they throught this best protected them from professional liability claims. Whilst only a small

number of interviewees explicitly discussed prioritising their interests over surety clients' interests during interview, I have demonstrated how the circumstances surrounding ILA post-*Etridge* could mean that other ILA lawyers are unconsciously prioritising their own interests (and protections) ahead of surety clients' best interests. As such, own interests conflicts may be another reason why ILA is delivered by interviewees in accordance with a market-exchange model of lawyering and not a relational lawyering model.

Arguably, the House of Lords did not do enough to highlight own interest conflict issues. Lord Nicholls only discussed client conflicts (and not own interest conflicts) as part of his guidelines in *Etridge*. In response, I have suggested that lenders have broadly dealt with clients conflicts by requiring surety clients to be advised by a solicitor separate to the one acting for the principal debtor or lender. However, my data makes clear that lenders' referral practices and actions in providing guidelines/instructions may be causing interviewees to breach their loyalty and indepedence obligations towards surety clients. I have also highlighted how the SRA Code of Conduct is silent on the issue of self-protection being a factor that can cause solicitors to prioritise their own interests ahead of a client's best interests. That being said, behavioural ethics research demonstrates that codes of ethics do not prevent professionals from pursuing their own interests when serving clients. Therefore, possible guidelines in *Etridge* discussing the relationship between own interest conflicts and ineffective ILA, or a better, more specific SRA Code of Conduct, may not have had any real impact on lenders' conduct and ILA lawyers' delivery of ILA. As Bazerman and Tenbrunsel argue 'many ethical infractions are rooted in the intricacies of human psychology rather than integrity.'[120] Judges, regulators, and lawyers themselves may need to reflect on how a lawyer's 'historical self' can

[120] Bazerman and Tenbrunsel, *Blind spots: Why We Fail to Do What's Right and What to Do About It* 21

impact their ability to serve certain clients with sufficient loyalty and care. Such reflection may also lead to a reevaluation of the value of referrals; whether the benefits of referrals in ILA outweigh the risks of own interest conflicts.

Chapter 7

Conclusion

Shortly after the House of Lords handed down their judgment in *Etridge*, Rosemary Auchmuty speculated that the judges in that case had misplaced confidence in solicitors being able to deliver ILA in accordance with Lord Nicholls' guidelines.[1] The explorative empirical research presented in this thesis has gone some way to substantiate Auchmuty's concerns. What I have shown in this thesis is that most of the solicitors I interviewed, who mainly practised in commercial law specialisms, discussed delivering ILA that did not fully adhere to Lord Nicholls' guidelines and the SRA Code of Conduct 2011. That is, most of my interviewees discussed delivering ILA as a market-exchange as opposed to delivering ILA relationally. I have also offered various explanations across the previous two findings chapters on the reasons why most interviewees delivered ILA in accordance with a market-exchange model.

That said, I do not pretend to have fully identified why ILA is being delivered in the manner interviewees discussed. As I outlined in Chapter 2, due to my methodological and analytical approach, there are limitations in my research findings. For instance, I have only unveiled 'previously hidden facets of reality'[2] as opposed to an 'objective reality' of ILA lawyering on the whole. How solicitors from across different corners of the profession (for instance, family lawyers) deliver ILA is not explored in this thesis, and inevitably research on how ILA is

[1] Rosemary Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' (2002) 11 Social & Legal Studies 257, 271

[2] Bernd Reiter, 'The Epistemology and Methodology of Exploratory Social Science Research: Crossing Popper with Marcuse' in Bernd Reiter (ed), *The Dialectics of Citizenship: Exploring Privilege, Exclusion, and Radicalization* (Michigan State University Press 2013) 3

delivered by multiple types of solicitors would present a messier and more complicated reality. As a result of the limitations of my data, I am therefore cautious to provide radical and clear-cut recommendations for reform within this concluding chapter. For instance, I think it would be unjustified, in response to this small empirical study, to suggest that *all* commercial lawyers should not deliver ILA to non-commercial surety clients. Whilst most of my interviewees discussed delivering ILA in accordance with a market-exchange model, not all did, and my sample (22 ILA solicitors) is too small on which to base such a recommendation. Furthermore, it would be counterintuitive to suggest that commercial lawyers should not deliver ILA. As discussed in Chapter 5, other research suggests (in addition to this study) that commercial lawyers habitually deliver legal services as a market-exchange; prioritising the client's means-ends (which better align with the lawyer's ends too) as opposed to the client's contextual and holistic interests and as opposed to lawyering in the public interest. However, just because empirical research suggests that commercial lawyers do not lawyer relationally in practice does not mean that we (scholars, regulators, the public) should accept market-exchange lawyering as an unchangeable given. The SRA Code of Conduct, as I have made clear in this thesis, requires solicitors - no matter their specialism - to lawyer relationally. If I were to suggest that commercial lawyers should not deliver ILA because they do not lawyer relationally in practice, I would be accepting that commercial lawyers can and should only deliver legal services in accordance with a market exchange model. This would be an acceptance of a minimisation of professionalism in the commercial legal sector and a form of exemption for commercial lawyers from the duties in the Code to which they are so clearly subject.

It is fair to come to the view then that the findings presented in this thesis raise more questions than answers. These include: Is the SRA Code of Conduct fit for purpose? Should all solicitors (from across very different fields completing very different work) follow the same Code of Conduct? Do other types of solicitors in England and Wales lawyer relationally in their day-to-day practices? What motivates/encourages solicitors to lawyer relationally? What can be learnt from those solicitors who lawyer relationally in their day-to-day practices? How can we encourage all types of solicitors to lawyer relationally? Unfortunately, not all of these questions can be answered comprehensively in this concluding chapter because of the need for further empirical research on whether relational lawyering is accomplished in other corners of the profession. That said, what I can and will offer up in this chapter is a provisional discussion about how ILA lawyers could be encouraged to lawyer more relationally and how law firms and the SRA could better support regulatory and ethical change more broadly.

Before exploring some of the broader questions outlined above, I do three main things in this chapter (a form of stock taking of where this thesis has brought me to): I am reflective about the intentions and shortcomings of the House of Lords' judgment in *Etridge*; I discuss what surprised me about my findings and suggest how lenders and ILA lawyers could make simple changes to their working practices to better comply with *Etridge*; and I provide practical guidelines for solicitors on how they can deliver ILA relationally in practice. To be clear, the practical guidelines I provide for solicitors are not alternative guidelines to Lord Nicholls' guidelines (although I do deviate from Lord Nicholls' statement that the solicitor does not have to ask personal questions on account that it would 'outrage the client'). Instead, the aim is that my practical guidelines (for the most part) will supplement and clarify Lord Nicholls' guidelines; that I will provide a more comprehensive and explicit explanation about how ILA

lawyers can perform their roles relationally. Importantly, in my practical guidelines on how solicitors should deliver ILA, I draw on my web of theories that are linked with Carol Gilligan's Ethic of Care,[3] to better explain and frame how solicitors are required to deliver ILA relationally. In this way, and unlike the House of Lords in *Etridge* and the SRA in the Code of Conduct, I am explicit about what relational dynamics are (drawing on Dana Remus' conceptualisation), and how they can be achieved in ILA, instead of assuming that solicitors know how to lawyer relationally (when my data suggests they do not).

7.1. *A reflection on the intentions and shortfalls of the House of Lords' judgment in Etridge*

The House of Lords in *Etridge* outlined - like Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* - that a balance had to be conducted by way of response to trying to resolve problems of undue influence in secured lending transactions. That is, the House of Lords suggested that they wanted to protect the 'interests of the commercial community and… vulnerable members of society from expression or exploitation.'[4] However, the preceding chapters of this thesis have demonstrated that the House of Lords' judgment in *Etridge* has led to a place in which lenders are far better protected than surety clients.[5] Not only did the ILA solicitors interviewed as part of this project tell me that they typically deliver ILA as a market-exchange, prioritising their own and lenders interests, but most of the solicitors who have experience defending possession proceedings/or enforcing security told me that, where relevant documentation such as ILA certificates and solicitors' file notes are completed, it would be rare to bring an action against banks or solicitors for inadequate protections/incompetent ILA. It was also made clear to me by interviewees who have experience delivering ILA that file

[3] See Figure 1.1. in Chapter 1
[4] *Etridge* [98] Lord Hobhouse
[5] See Chapter 4 section 4.4.

notes and certificates of ILA were sometimes pro forma (and prepared in advance of the ILA being delivered) as opposed to being contextually written after delivering ILA to individual surety clients. Not one interviewee who had experience defending possession proceedings discussed challenging or 'looking behind' the file notes and other documentation completed by lenders and solicitors to interrogate what actually happened in their client's meeting. This documentation can therefore hide a multitude of deficiencies – including, as I learned, the fact that some solicitors are not receiving any contextual information about the secured lending transaction from the lenders providing the secured loan to the principal debtor.[6] These insights from my empirical work do not correspond with the claim that Nelson Enonchong put forward that the decline in reported case law post-*Etridge* demonstrates that the 'problems of the past have been avoided.'[7] In fact, for the most part, my empirical data provides a poor view of the effectiveness and impacts of surety client protections post-*Etridge*. In this section I reflect on what has led to this position. At least two explanations are possible. First, it could be suggested that, at worst, Lord Nicholls, with the support of the rest of the House of Lords, actually only intended to provide protection to lenders as opposed to lenders and surety clients as they proclaimed. In the alternative, and second, a less critical analysis could be that the House of Lords were simply naïve in thinking that lenders and lawyers would follow Lord Nicholls' guidelines without deviation. I consider both these perspectives in turn.

Auchmuty has been forceful in her critique of the judicial response to undue influence cases in secured lending transactions. In her hypothetical/revised judgment of *Etridge* presented in

[6] See Chapter 4 section 4.2.5. and Chapter 5 section 5.3.1.3.1.
[7] Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell 2018) 414

Feminist Judgments: From Theory to Practice,[8] Auchmuty states that the House of Lords' in *Etridge*, and other judges in case law post-*O'Brien*, 'bow[ed] to pressure from commercial interests.'[9] In her view, the House of Lords had protecting banks' commercial interests at the forefront of their minds and that the safeguarding of non-commercial surety client's interests (typically wives) was not taken seriously. Auchmuty suggests that two main responses demonstrate the House of Lords' real intentions. First, she argues that the House of Lords demonstrated their over-willingness to protect lenders interests by being too accepting of lenders' practices post-*O'Brien* whereby they shifted 'the entire burden' of advising surety clients before they enter into suretyship transactions onto solicitors.[10] Second, Auchmuty states that the House of Lords were far too accepting of businesses raising capital so 'freely and casually' against the family home.[11] She argues:

> It ill behoves the judiciary to bow to pressure from commercial interests as I believe it has done. The law should by all means try to facilitate the smooth and safe transfer of loan moneys into worthy projects. But let us not absolve the lender of every element of risk. Some of the burden must fall on those who seek to gain the most. Likewise, some of the court's protection must be reserved for those who need it most: the wives, who have so much to lose. Otherwise the "balance" of which so many judges have spoken, echoing Lord Browne-Wilkinson in *O'Brien*, is an empty term, for it is so heavily weighted in favour of the lenders and against the surety wives.[12]

[8] Ibid 155
[9] Rosemary Auchmuty, 'Judgment: Royal Bank of Scotland Plc v Etridge (No 2).' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (1 edn, Hart Publishing 2010) 158
[10] Ibid 157
[11] Ibid 158
[12] Ibid

In the alternative, a more positive and generous take is that Lord Nicholls (and the rest of their Lordships) had intended to provide some protection to surety clients but that he was naïve to, or simply failed to consider, how lenders and lawyers may respond to his guidelines in practice. For instance, as I discussed in Chapter 5, Lord Nicholls clearly failed to consider that commercial lawyers would deliver ILA to surety clients, and how they are particularly predisposed to delivering legal services as a market-exchange. If he had, he may have warned commercial lawyers directly against delivering ILA as market-exchange or been more explicit about what constituted poor ILA practice. I have also suggested that Lord Nicholls was naïve to think that solicitors would unquestionably be loyal to surety clients, and able to distance themselves from other inappropriate pressures, especially where referral practices were allowed to continue in accordance with his judgement. It may be that as Lord Nicholls' had a particular construction of professional independence and integrity that would, in practice, have operated in favour of ILA clients. Certainly, this is a form of independence valorised by professional regulation if not often seen in practice. [13]

I also think that Lord Nicholls' guidelines fell short because he demonstrated, in part, that he was resistant to lawyers having to deal with the 'messier' more emotional elements of the surety client's situation.[14] We can but speculate. Whatever the reason for the shortcomings of the House of Lords' judgement in *Etridge*, the empirical research in this thesis has demonstrated that the problems of the past have not been resolved. Whether Lord Nicholls' aspiration to provide a fair measure of protection to surety clients as well as lenders was insincere or ill-conceived, *Etridge* has been somewhat of a failure, and it is clear that in order

[13] See Emma Oakley's and Steven Vaughan's discussion on this in their article ''In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms' (2019) Journal of Law and Society 83

[14] See Chapter 5 section 5.2.1.

to improve the situation there has to be stronger messaging twenty years on to lenders and lawyers about how to improve compliance.

7.2. *Surprising findings and suggestions for lenders and lawyers on how to improve Etridge compliance*

John Phillips and Debra Morris predicted that, in response to *Etridge,* lenders would likely require every type of guarantor (not just surety clients) to receive ILA,[15] and that lenders would make their procedures 'formulaic' in order to mitigate their own risks.[16] However, despite reading Phillips' and Morris' work in preparation for my empirical study, I was still surprised to discover from interviewees that Lord Nicholls' guidelines had been co-opted and subverted by lending institutions and commercial lawyers in order to protect *only* their interests.[17] Arguably, I was naïve to be surprised by these findings - it is a common enough phenomenon that lenders and commercial lawyers subvert laws and processes to work best for their own interests.[18] However, as I thought, especially after reading Auchmuty's critique of *Etridge*, that the requirements that lenders and lawyers had to meet post-*Etridg*e really were not too onerous, I had not given much thought to how lenders and lawyers could perform their roles in a more perfunctory manner. Whilst I started this project thinking that lender and lawyer compliance may not be perfect, I was hopeful that I would find demonstrations of good caring practice: that some lawyers would be sensitive to providing adequate ILA to surety clients, not least because those clients were often vulnerable women

[15] John Phillips, 'Setting Aside Guarantees: Another Approach' (2002) 2 Oxford University Commonwealth Law Journal 47, 49

[16] Debra Morris, 'Surety Wives in the House of Lords: Time for Solicitors to Get Real'?' (2003) 11 Feminist Legal Studies 57, 64

[17] I am grateful to Professor Rosemary Auchmuty and Dr Emma Oakley for this useful phrasing.

[18] John Flood, 'Corporate lawyer–client relationships: bankers, lawyers, clients and enduring connections' (2016) 19 Legal Ethics 76

looking to, and relying on, their lawyers for multiple forms of counsel. In part, I did find demonstrations of good practice, but those lawyers who did lawyer in accordance with more fictive feminine values, as discussed in Chapter 5, really were in the minority.[19] On reflection, I do think that my being surprised by some of my findings is a good thing: It demonstrates that I did not set out to be critical of lawyers and lenders practices (and so went into the empirical phase of my thesis with an openness). In this section I discuss what findings in particular surprised me, and how lenders and lawyers can make simple changes in relation to those matters so that they properly adhere with the fundamentals of Lord Nicholls' guidelines in *Etridge*.

One of the main findings that really surprised me was that lenders typically send proforma checklists to ILA solicitors before they deliver ILA. Most interviewees discussed how lenders' checklists outline what should be covered by the solicitor and, more worryingly, some solicitors referred to these checklists as 'instructions'. Of more concern, I discovered that most interviewees discussed delivering ILA that strictly adhered with the checklists sent by lenders, and that most interviewees delivered ILA to surety clients in the same manner as they did with commercial guarantors. That is, very few interviewees had an appreciation for Lord Nicholls' stipulation that the ILA solicitor's advice should be shaped by their individual client's circumstances. In fact, very few interviewees talked about asking surety clients questions in order to learn more about their individual circumstances. Instead, interviewees over-emphasised performing tick-box ILA that protected the lender, and themselves, from potential future claims in the event that the surety client's security was called upon. I also was not expecting to learn that most interviewees regularly received referrals directly from

[19] Section 5.3.1.2.

bank personnel. This initially struck me as an obvious conflict (whether or not it was also a legal conflict for SRA purposes). Some interviewees talked about how they worked closely with banks and bank personnel in relation to other matters, and that they would often receive phone calls from bank managers or other personnel, asking for immediate assistance with getting a secured lending transaction completed by providing ILA to a surety client. According to most interviewees' accounts, lenders (and other types of referrers such as principal debtors' solicitors and accountants) played a large role in the appointment of the surety's solicitor and that lenders, through sending checklists, also had some element of control over how ILA was then delivered by the ILA solicitor. The majority of the interviewees who told me about these practices failed to recognise how their independence could be compromised as a result. This is worrying when the risks to independence are so obvious. In fact, only one interviewee - P10 - could and did recognise that referrals and checklists could undermine lawyer independence. He went as far to say that 'independence was a complete myth' where the powerful lender had so much of a say in who should act for the surety client and how ILA solicitors should deliver ILA. The idea that solicitors could independently advise the surety client when they had a vested interest in pleasing the lender referrer - who wants the deal done quickly - is very clearly a myth. As discussed in the Chapter 6, behavioural ethics scholars have long argued that individuals find it very difficult to assess when there is a conflict of interest.[20] The SRA in the Code of Conduct, and the House of Lords' in *Etridge*, presume that it should be easy for solicitors identify when conflict of interest arise in their daily work. My

[20]Max H Bazerman and Ann E Tenbrunsel, *Blind spots: Why We Fail to Do What's Right and What to Do About It* (Princeton University Press 2011); Dolly Chugh, Max H Bazerman and Mahzarin R Banaji, 'Bounded ethicality as a psychological barrier to recognizing conflicts of interest' in Don A; Loewenstein Moore, George; McCain, Daylian M.; Max H. Bazerman (ed), *Conflicts of interest: Challenges and solutions in business, law, medicine, and public policy* (Cambridge University Press 2010); Sunita Sah, 'Policy solutions to conflicts of interest: The value of professional norms' (2017) 1 Behavioural Public Policy 177

findings clearly demonstrate that, in the ILA context, solicitors do not find it easy to identify how their independence could be compromised by referral and checklist practices (and/or chose not to engage in the sort of reflective thinking that might take them to a place where they could assess whether a conflict might occur). A broader way in which the SRA could better regulate lawyer independence and client loyalty is by revising their current rules on referrals. As discussed in Chapter 6,[21] the SRA Code of Conduct 2011 calls on solicitors to self-regulate their own independence and ensure that their 'client's interests are protected regardless of the interests of an introducer or fee sharer or [their]… interest in receiving referrals.' Arguably further empirical research is needed on how referrals operate in other areas of practice - outside of ILA - but my research indicates that current regulations are far too idealistic – that they fail to consider how compromised independence as a result of receiving third party referrals can be an ethical blind spot for lawyers.

Whilst there are wider issues here – about how independence/loyalty issues in lawyering are regulated and how the SRA enforces these rules – I think there are some clear ways in which lenders and solicitors can change their behaviour/systems of working to ensure solicitor independence and surety-client loyalty is taken more seriously in the ILA context (loyalty being one of Remus' relational lawyering dynamics). First, lenders (and principal debtors' solicitors/accountants) should not refer surety clients to solicitors for ILA. This should be the case regardless of whether the lender (or principal debtor's solicitor/accountant) has worked with/referred work to that solicitor before or not. The powerful influence that can be exerted by lender introducers should not be underestimated. A solicitor may not even be aware of how their delivery of ILA could be impacted by the referral they received from the lender.

[21] Section 6.1.3.

Many interviewees also told me that referrers can put them under pressure to complete ILA as quickly as possible in order to complete the secured lending transaction with the principal debtor. If such referrals ceased to exist, it may be easier (although likely not perfectly possible) for solicitors to resist time pressure. This is important because, as analysed in Chapter 6, time pressures are known to contribute towards ethical fading.[22]

Secondly, lenders should not send checklists to ILA solicitors (and lenders' in-house solicitors should know that such practices are professionally problematic). Lord Nicholls' clearly stated that the lender should not have 'any knowledge or control over the advice the solicitor gives the wife.'[23] Lending institutions may, in their own defence, try to argue that their checklists are very similar to the guidelines Lord Nicholls' provides – that they are suitably vague and only mean to make it clear to solicitors that they must comply with the guidelines provided in *Etridge*. My interview data shows that, in fact, some lenders' ILA checklists are very specific. For instance, as discussed in Chapter 4,[24] P7 stated that lenders' checklists 'very clearly' outlined what the lender wanted the solicitor to cover with the surety client. P7 even went as far to remark that he thought lenders sent checklists because they did not want to rely 'on the solicitor's judgement.'[25] This is striking. Even if lenders' checklists were vague (or were to become more vague), what this project has clearly demonstrated is that lenders' referrals and checklists can skew the lawyer's loyalty and their understanding of their role just because of the lender's dominant presence in the ILA process. The fact is, if lawyers are more concerned

[22] Max H Bazerman and Ann E Tenbrunsel, *Blind spots: Why We Fail to Do What's Right and What to Do About It* (Princeton University Press 2011) 164-165
[23] *Etridge* [77] (Lord Nicholls)
[24] Section 4.2.4.
[25] Ibid

about the lender's needs they are not prioritising the needs of their *actual client* – the potential surety.

It was also worrying that only four interviewees told me that they *always* receive the correct financial information from the lender detailing the principal debtors' current indebtedness. It seems therefore that whilst lenders are providing additional information – i.e., checklists - to lenders, they are falling short on providing the basics of what Lord Nicholls set out in *Etridge* (here, information about the principal debtor's current indebtedness). Without sending the correct information to the surety client's solicitor, that solicitor can then not provide contextual information to the surety client and, in turn, that solicitor will not be able to properly advise the surety client in their best interests because they have not considered all the required information. According to Lord Nicholls' guidelines, ILA solicitors also have a role to play where they do not receive the right information from the lender. Lord Nicholls' stated that solicitors must ask for the correct information before providing advice. He further states that if the lender does not provide that information upon being asked, the solicitor should refuse to act for the surety client. Most interviewees' responses to my direct questions about receiving financial information from the lender, and their responses to the financial information vignette, demonstrated that they do not refuse to act where they do not receive the correct financial information from the lender. My third suggestion then is that lenders and lawyers should better follow the law. That is, they should adhere to Lord Nicholls' guidelines on providing and detailing the principal debtor's current indebtedness to the surety client.

My fourth suggestion is that lenders should not require commercial guarantors to receive ILA before they enter a secured lending transactions for their own benefit. As I have suggested

previously, I think that this response from lenders has distorted how ILA is viewed and valued by ILA lawyers. Lord Nicholls clearly stipulated that ILA was required to be delivered to non-commercial sureties – i.e., those individuals who were offering to enter to suretyship transaction for the benefit of a loved-one.[26] In lenders requiring solicitors to deliver ILA interchangeably to commercial guarantors and surety clients, the importance of ILA (as a means of protection for those potentially very vulnerable) is lost in translation. Interviewees clearly discussed how ILA delivered to commercial guarantors is viewed, both by the client and themselves, as an extra hurdle to cross (at the commercial guarantor's expense) just to safeguard the lenders' interests. It is not difficult to see how this view – that ILA is designed to protect and benefit lenders – can then cross-over to instances where ILA is delivered, as it was originally intended to be, to surety clients. This can create an attitude that ILA is 'a clog in the wheels of capitalism'.[27] The danger is that where the ILA solicitor does not value the process for their client (seeing the process simply as a vehicle of protection for the lender), they are less likely to take seriously the requirement to learn more about the client's circumstances and cater the advice to their situation.

Admittedly, I think that it is unlikely that lenders will stop requiring commercial guarantors to receive ILA. As some of my interviewees who had experience defending possession proceedings/debt claims or enforcing security in the commercial guarantor context discussed, commercial guarantors often claimed misrepresentation when lenders tried to enforce security.[28] As such, ILA to commercial guarantors is a strategy promoted and developed by lenders to mitigate against such defenses arising. If, as I suspect, lenders do continue to

[26] *Etridge* [87]
[27] Auchmuty 'Judgment: Royal Bank of Scotland Plc v Etridge (No 2).' 158
[28] Chapter 4 Section 4.4.

require commercial guarantors to receive ILA, law firms and their lawyers should educate themselves on how ILA in the commercial context versus ILA in the surety client context should be viewed and delivered differently. Whilst the former is centered around protecting lenders, the latter – ILA delivered to surety clients – is about giving (potentially very vulnerable) surety clients the opportunity to be properly and fully briefed on the nature and implications of the proposed transaction and an opportunity for the surety to be advised in her best interests *only*. ILA solicitors should be very careful to treat the two different types of ILA differently. ILA as required by *Etridge* only applies in non-commercial suretyship situations, and ILA as required by *Etridge* should be taken more seriously than ILA delivered in cases of commercial suretyship. This form of reflection is, in fact, already required by the SRA's 'continuing competence' regime, but we have little evidence that solicitors engage in the necessary work to further their own education and continuing professional development.[29]

Let me turn now to the theme of routinisation of ILA. I was genuinely surprised to learn, from a small number of interviewees, that they copied and pasted the same file note for every surety client and that some used pro forma follow-up letters for each surety client outlining what had been covered (where those letters were subsequently uploaded on the client's account to demonstrate that the lawyer had even briefed the client on what had been discussed after their ILA meeting). This time-saving process was clearly carried out by interviewees to protect themselves from potential negligence claims from past surety clients, but such practices raise, quite obviously, significant ethical and potential access to justice issues. As discussed in the previous section, interviewees who have defended possession

[29] See: https://www.sra.org.uk/solicitors/resources/cpd/tool-kit/continuing-competence-toolkit/ (Last accessed: 3rd October 2021)

proceedings for past surety clients told me that in the event that a surety claimed they had not been adequately advised before the secured lending transaction had been completed, the surety's negligence claim against their solicitor would likely fail if the solicitor had a file note which detailed that that advice was delivered correctly. As P5 forcefully repeated in our interview, it was the lack of a file note that was fatal for an ILA lawyer's defence of such a claim – not whether that file note accurately reflected how ILA was *actually* delivered.[30] It is therefore clear to see how certain uses of pro forma file notes or follow-up letters to clients have the potential to cause access to justice issues. It is somewhat ridiculous that I feel the need to write in this chapter that solicitors must write reflective and personalised file-notes after delivering ILA to individual surety clients to ensure that ILA becomes less about protecting lenders and themselves, and to remind themselves that ILA is a process which, according to Lord Nicholls' discussion about balance, is designed to also protect surety clients. I also suggest that file notes are written (to provide a time for reflection) before the solicitor provides confirmation to the lender that ILA has been given and the surety client would like to proceed (if that is the decision that the surety client has made in that instance). Therefore, my fifth suggestion is that ILA solicitors should always write bespoke file notes for each individual surety client whereby they detail what was discussed, what was learnt about the client's circumstances, and how they advised the client. That last sentence feels like a sentence that should be so obvious that it should not need to be written, and yet my empirical work suggests it is very much needed. Pro formas can be used (and it would be quite a stretch to say they should never be used) but they should only be a starting point (for individualised notes) and not an end point.

[30] Chapter 4 Section 4.4.

Below is a quick reference table for lenders and solicitors on how their compliance can be improved which summarises my lengthier discussion above.

Table 7.1: Suggestions for lenders and lawyers on how to improve their compliance

Suggested changes to lenders' practices	**Suggested changes to ILA lawyers' practices**
Lenders should never make direct referrals to ILA solicitors. The surety client should appoint their own ILA solicitor without lender involvement.	ILA lawyers should refuse to provide ILA to surety clients where the referral has been received from a lender.
Lenders should not send checklists to the surety client's nominated solicitor about how ILA should be delivered. Instead, lenders should concentrate on providing *only* the information outlined by Lord Nicholls in *Etridge*. Lenders should make sure they *always* provide the details of the principal debtor's current indebtedness to the surety client's nominated solicitor.	ILA lawyers should refuse to act for a surety client where the lender has sent a checklist on how ILA should be delivered. If the lender does not send the correct financial information (including an outline of the principal debtor's current indebtedness) then they should ask for this information before providing ILA. If they do not receive this information, they must refuse to act.
Lenders should stop requiring commercial guarantors to receive ILA before the secured lending transaction is completed.	If lenders do not stop requiring commercial guarantors to receive ILA, solicitors who deliver ILA should make sure that they reflect on and then actually approach and deliver ILA in the non-commercial context very differently to how they approach and deliver ILA in the commercial context.
The lender should have no knowledge about what was covered during the ILA meeting	ILA lawyers should always write bespoke file notes after delivering ILA to each individual

between the surety client and their ILA solicitor.	surety client. File notes should be reflective and best practice would involve the solicitor recording how they practised Remus' five relational dynamics during their meeting with that individual client. The note should, as a minimum, detail what was learnt about the surety client's circumstances and detail what the solicitor told the surety client about the particular transaction (including the monetary specifics, the principal debtor's current indebtedness, and what would happen if security was called upon). The solicitor should also record whether or not they advised the surety client not to proceed and why they advised the surety client in this way. File notes should be completed before an ILA certificate is issued to the lender as it provides the solicitor with time to reflect on whether they delivered ILA in accordance with their relational lawyering obligations.

In combination, if lenders and lawyers adopted the changes discussed above (and outlined in Table 7.1.) their conduct would better align with Lord Nicholls' guidelines in *Etridge* (and, for the lawyers, with their obligations under the SRA's rules). These changes would also promote a better environment for lawyers to exercise their own judgement on how to deliver ILA (which is one of Remus' relational dynamics). That said, I would be myself naïve to think these changes alone would ensure that lawyers deliver ILA relationally (prioritising Remus' five

relational dynamics). Whilst I think lenders should step back and, as Lord Nicholls' stipulated, not have any control over who delivers ILA and how it is delivered, ultimately whether solicitors deliver ILA relationally depends on them and their willingness to adopt reflective and caring practices (and to accept that those practices are what is required of them). Lord Nicholls' guidelines were unambiguous when he stated that ultimately how ILA will be delivered is down to the solicitor's judgement and dependent on the individual client's circumstances and, as my data suggests, this message has been widely ignored by those ILA solicitors interviewed as part of this project. I have therefore had to think carefully about how my guidelines would supplement and better clarify what is required of ILA solicitors. Importantly, I am more explicit in my guidelines about what relational lawyering looks like in the ILA context and, as I began to discuss above, I ask ILA solicitors to use the file note as a medium for explicit moment of reflection – thinking about whether Remus' relational dynamics were embodied in the ILA meeting with the surety client.

7.3. *Relational ILA: Practical guidelines for ILA lawyers*

In principle, a relational lawyer prioritises being loyal to the client whilst also balancing their other duties to the public and the court. A relational lawyer would acknowledge that being loyal to the client does not always involve doing exactly what the client wants and that the client's best interests can be multiple and broader than their means-ends/financial interests. A relational lawyer would also never put their own interests (such as earning large fees or the hope of repeat work from a third party) above their client's multifaceted interests or the public interest. They would also be reflective about their practices and ethics. This framing is, to be clear, quite simply what the SRA rulebook requires (as set out in Chapter 5). The challenge is that relationally lawyering will take many different forms depending on individual

situations. To be clear from the outset, ILA lawyers cannot be provided with an easy-to-follow checklist about how to deliver ILA to surety clients in every instance. By its very nature, relational lawyering requires contextual responses to legal problems. As Stephen Ellman writes, 'guidelines derived from the ethic of care characteristically would leave room for debate and discretionary judgment.'[31] I predict that this would be uncomfortable for those lawyers who have relied for so long on delivering objective, tick-box ILA, where they prioritise keeping their distance from the client's circumstances and decision-making. As I demonstrated in Chapter 5 and 6, most interviewees take comfort in delivering ILA in the same way to *all* ILA clients (whether commercial guarantors or surety clients), strictly adhering to lenders' checklists; both to protect themselves against potential negligence claims and so as to not displease introducers (such as lenders) who they see as potential future clients. What I hope my guidance (below) will show is that, in fact, lawyering relationally is the most effective way for ILA lawyers to show they have complied with the various obligations to which they are subject (i.e. the most effect way to protect themselves and crucially, also their ILA clients). By drawing on Remus' relational dynamics, I provide guidance on how these dynamics can be satisfied in the ILA context and explain how and why some interviewees' self-reported behaviour was incompatible with the relational lawyering model. Hopefully these examples will help further clarify what is meant by relational lawyering in the ILA context, and what is bad practice in the ILA context.

[31] Stephen Ellmann 'The Ethic of Care as an Ethic for Lawyers' (1992) 81 Geo LJ 2665, 2711-2712

7.3.1. *Fostering trust, loyalty, judgement, service, and empowerment in ILA*

As I discussed in Chapter 5,[32] Remus discusses how *trust* is an essential relational dynamic in every lawyer-client relationship because it encourages clients to share 'sensitive information about personal, legal, and financial matters.'[33] This is vitally important in the ILA context because the lawyer needs to learn more about their client before passing *judgement* about what needs to be covered in their meeting, and ultimately in deciding whether to advise the client against entering into the transaction. In order to foster trust in the relationship, it is important from the beginning that ILA solicitors deliver ILA for the correct reasons. That is, they must ensure that they are being *loyal* only to the surety client. Importantly, ILA solicitors should learn that they are not delivering ILA only or primarily to serve their own interests (it is of course possible to deliver ILA relationally and also earn money from that work and to gain a reputation for good ILA work, which leads to recommendations and further work and so on). If ILA solicitors do think delivering ILA serves only or primarily their own interests they should cease to act for the surety client as their loyalty and independence is likely compromised. Instead, ILA lawyers should appreciate that whilst ILA does not solely or primarily benefit their own monetary (and egotistical) interests the 'societal interests'[34] in providing *service* to potentially vulnerable surety clients is an important one. It is for this reason that I suggest ILA lawyers should not receive referrals from lenders, or other introducers such as other solicitors and accountants (likely acting for the principal debtor). That is, in order to foster trust, lawyers must be set up to be as loyal as possible to the surety client (and be concerned with delivering ILA in the surety client's interests). Only where a

[32] Section 5.2.1.
[33] Remus, 'Reconstructing Professionalism' 849
[34] Ibid 862

surety client feels that the solicitor is concerned principally with their interests is it likely that that client will open up to the lawyer. Furthermore, in order to encourage trust the lawyer must prioritise the fictive feminine values of 'consultation', 'consideration' and perhaps also 'compassion'. In simple terms, this means asking the surety client questions, being conscious of the client's feelings, and being understanding and comforting if the surety is particularly concerned about something/reveals something personal. By actioning some of these suggestions, the lawyer is more likely going to *empower* his or her client.

Recall in Chapter 5 where I discussed P4 detailing in his interview how often the surety client will be in the foyer with her husband (the principal debtor).[35] He then went on to say that he typically takes the husband and wife into a meeting room (before he takes the wife into a separate room) to discuss the transaction in brief. He also mentioned that he commonly comforts the husband by telling him that he will 'not talk the wife out of what she wants to do.' This is an example of poor practice – where the relational dynamics of loyalty, trust and empowerment are not prioritised. In speaking with the husband, as well as the wife, P4 is signaling to the surety client (his actual client) that he is not wholly loyal to her and her interests alone. Secondly, he is disempowering his client – he is in effect saying to the principal debtor, 'If she leaves our meeting having decided not to proceed, that was her decision alone, and nothing to do with me'. This leaves the surety wife in an incredibly difficult position. She is unable to use her solicitor as a relevant part of her narrative; she cannot leave the meeting and say upon her lawyer's advice she is not entering the agreement. Here, as discussed in Chapter 6, P4 demonstrates that he prioritises his self-interests (not displeasing the principal debtor or lender who might be ongoing or potential future clients). He also demonstrates that

[35] Section 5.3.2.

he does not value the service of providing ILA to surety clients (because he is preoccupied with minimising his discomfort in being confronted with the principal debtor who clearly wants the transaction completed).

A better (more relational) way that a solicitor could respond to the situation where the husband is in the foyer with the wife is to ask the wife (who is contemplating acting as surety) to come into their office without engaging directly with the husband. If the husband does engage directly with the solicitor, the solicitor should clearly and politely state that they are acting solely for the wife and cannot engage with them. If the husband is annoyed, frustrated, or rude about this, this is something the solicitor may want to raise with the surety client. For instance, the solicitor may begin by saying something like:

> I need you to know that entering this guarantee – whereby you are putting your family home at risk of repossession - needs to be your decision and your decision alone. I am here to advise you alone and will only consider your best interests. Even if you feel like you are only doing this for your husband/out of loyalty for your husband, if you sign this agreement after our meeting today you will be considered, in law, to have entered into this agreement upon your own free will – even if you feel you have not. As a result the bank will be able to enforce security and take away any assets (including your home) that reach the required value and interest of the monies lent to your husband. My encounter with your husband just was a little fractious, and I am sorry to be so direct, but do you any feel pressure to enter into this agreement?

It is here that my guidelines do deviate slightly from Lord Nicholls' guidelines in *Etridge*. Lord Nicholls' stated that it is not the role of the solicitor to ascertain whether the client's 'consent

is being procured by the undue influence of the husband.'[36] He said that, 'wives would understandably be outraged by having to respond to the sort of questioning' that would result.[37] To be clear, I am not saying that it *is* the job of the ILA solicitor to ascertain whether the client is being unduly influenced into entering the transaction. I, like Lord Nicholls, think this is an unfeasible task. Instead, I think that personal questions can and should be asked if the solicitor, after consulting with and listening to the surety client, (or potentially witnessing the husband acting agitated/overly keen to complete the transaction in the foyer), believes that their client is feeling pressured. The exchange will be relational if the solicitor prioritises being loyal to the client and empowering the client, and if they extend care towards the surety client rather than minimising their own discomfort. P14 was one of very few interviewees who discussed asking personal questions in order to advise the surety client properly and relationally.[38] I even asked how surety clients responded to his personal questions – these included: 'Are you comfortable with the decisions that your husband makes in the business? Are you comfortable that the relationship is where you want it to be?' In response, P14 stated that sometimes surety clients do say they do not want to talk about their relationship, or that they say that they do not think that his questions are relevant. He went on to say that such responses were acceptable to him in that he felt he had done enough by bringing those considerations to the forefront of the surety client's mind before then asking: 'Would you like to proceed with providing security?'

[36] *Etridge* [53]
[37] Ibid
[38] Chapter 5 section 5.3.1.2.

As most of my interviewees communicated having a fondness for checklists and guides on how to deliver ILA, I have provided a quick reference table below to help explain what is meant by each of the relational dynamics, and how they can be embodied in ILA.

Table 7.2: Relational dynamics in ILA practice - a break down for solicitors

Relational dynamic	**An explanation of the relational dynamic and how it can be implemented in ILA practice**
Trust	Trust is essential in every lawyer-client relationship. It is particularly important in ILA because your client needs to disclose as much as possible about their situation in order for you to advise them in their best interests. Only if the surety client trusts you will they talk without reservation. A key means to foster trust is to clearly signal to the client that you are involved only to advise/help them. You can demonstrate this by not engaging directly with the principal debtor if they accompany the surety client to their meeting; not acting for the surety where you have received a referral from the lender, principal debtor, or other agent; and by directly telling the client why you are involved (i.e. they are your client, and you are working in their best interests). You should also ask questions, be inquisitive about the client's situation, and be compassionate.
Loyalty	You must be loyal to the surety client and not loyal to the lender's interests, and/or primarily loyal your own interests. Delivering ILA is not for your primary benefit; it is a service required to better protect surety clients (typically wives) who may feel pressured/ or being duped into entering secured lending transactions. If you ever consider that it is advantageous to you to deliver ILA to a client – because you may impress the lender or principal debtor or surety client in the case and may get further work – you should not deliver ILA. You need to demonstrate loyalty in concern principally for the surety client. This

	means you prioritise the surety client's interests, and you do ILA work out of loyalty to their interest. If you are primarily concerned about your interests, you do not satisfy this relational lawyering dynamic, and your professional independence and integrity are compromised.
Judgement	During ILA you should (be willing to) pass judgement in two ways. First, after getting to know the client and their situation (both through your consultation with the client and by reading the documentation about the suretyship transaction sent by the lender), you need to pass your professional judgement on what should be covered during your meeting with that individual client. You should not be following a checklist that has been sent by the lender or that you may have pre-designed. This is because ILA should not be formulaic - it should be discretionary and responsive to each individual client's circumstances. Secondly, if you consider that the surety client should not enter the suretyship transaction after all you have learned about their situation and the transaction, you should pass judgement and say so.
Empowerment	You can empower your client by educating them, properly consulting with them, passing judgement, and by demonstrating loyalty. If ILA is completed relationally, you will give the surety client the opportunity to be heard, considered, and advised in their best interests. Ultimately, you may empower the client to say 'No' to proceeding with the transaction, or you may empower the client by negotiating on the terms of the secured lending agreement with the lenders' legal representatives. You may also empower your client to say 'Yes' to the transaction in better knowledge of the risks it involves. Empowering clients in a relational manner requires getting to know the client and their objectives. That said, ultimately, empowerment will be satisfied if all relational dynamics are fostered where you are representing a client, in a difficult situation, where they would otherwise receive no support.

Service	This is the fifth and final dynamic and arches across all the dynamics. The relational dynamic 'service' means to remind you that your role as a solicitor is more than performing your client's ends: you always have a duty to both the public interest and the court. ILA is a non-lucrative service delivered by solicitors for the betterment of society.

In order to lawyer relationally it is vitally important that lawyers are reflective about their lawyering approach and whether they need to do more to foster relational dynamics (seen, for example, in my suggestion above about the completion of file notes). If the solicitor has any doubt about whether they have met their obligations to the surety client they should hold back from providing confirmation to the bank and reach out to the surety-client for a further consultation/meeting. However, it would be naïve to think that, as a result of my project alone, commercial lawyers are going to start to lawyer relationally both in delivering ILA and in their wider work. For lawyers to take seriously the requirement to lawyer relationally, it is clear that there is a lot of work to do and that there needs to be supporting regulatory change. It is to these points to which I turn next.

7.4. *How law firms and regulators can support, encourage, and enforce relational lawyering in ILA*

Getting lawyers such as those involved in this study to fully embrace relational lawyering, and my guidelines outlined in this conclusion, will not be easily achieved. This is because it involves undoing years of de-professionalisation in the legal sector. However, like Remus, I am hopeful that – with further work, reflection, and thought – more lawyers can lawyer relationally as opposed to in accordance with a market-exchange model. In part this is because, as Remus argues (and as the minority in my own work show), not all lawyers do currently deliver legal

services 'pursuant to market logic.'[39] For instance, other scholars have demonstrated that, in both America and England and Wales, family lawyers empower (a relational lawyering dynamic) clients to understand how the legal system works in divorce proceedings,[40] that they encourage conciliation (extended communication between parties; a fictive feminine value),[41] and that they learn all about 'the circumstances, needs and resources'[42] of the divorcing parties when trying to arrange a settlement. This combined body of work demonstrates, I would suggest, that family lawyers often take (and are able to take) a holistic/relational approach to their work. John Eekelaar and others also discuss how some of the divorce lawyers involved in their empirical study prioritised care and compassion (fictive feminine values); that they did not carry out their role narrowly, avoiding 'non-professional issues.'[43] They came to the view that their work shows, 'abundantly that the lawyer's role is not confined to merely giving legal advice. It extends to providing reassurance and practical support for many clients during a particularly stressful period.'[44] What we do not know, however, and what may be worth further exploring, is whether divorce lawyers' relational lawyering approaches are also adopted by the same broad group of lawyers when they deliver ILA. This is one area that requires future study.

[39] Remus, 'Reconstructing Professionalism' 811
[40] Gwynn Davis, Stephen Cretney and Jean Collins, Simple Quarrels: Negotiating Money and Property Disputes on Divorce (Clarendon Press 1994) 57; William LF Felstiner and Austin Sarat, 'Negotiation between lawyer and client in an American Divorce' in Robert Dingwall and John Eekelaar (eds), *Divorce Mediation and the Legal Process* (Oxford University Press 1998) 35
[41] Richard Ingelby, 'The Solicitor as Intermediary' in Robert Dingwall and John Eekelaar (eds), *Divorce Mediation and the Legal Process* (Oxford University Press 1998) 47
[42] Davis, Cretney and Collins, Simple Quarrels: Negotiating Money and Property Disputes on Divorce 53
[43] Sida Liu, 'Professional Impurities' in Elizabeth Gorman and Steven P Vallas (eds), *Professional Work: Knowledge, Power and Social Inequalities* (Emerald Publishing Limited 2020) 147
[44] John Eekelaar, Mavis Maclean and Sarah Beinart, *Family lawyers: the divorce work of solicitors* (Hart Pub Limited 2000) 184

If future projects demonstrate that other types of lawyers who deliver ILA are delivering and can deliver ILA relationally, or that lawyers performing completely different roles lawyer relationally, we – as scholars – may be able to garner further insight into why they lawyer relationally and thus how we can encourage other solicitors to do the same. As well as supporting this further research, the SRA and individual law firms could do more to encourage or enforce more relational practices in ILA, and beyond. For instance, law firms could encourage weekly meetings between their employed lawyers to encourage the sharing of ethical concerns or problems they have encountered in their work. I would also happily visit law firms to disseminate my research findings if law firms would find it beneficial.

Whilst behavioural ethicists Max Bazerman and Ann Tenbrunsel warn that Code of Conducts do not have much sway in ensuring professionals act ethically,[45] the SRA could adopt more relational language in their Codes of Conduct and solicitor communications. Let me be clear here. I am of the view, and Chapter 5 made this clear, that the SRA's rules already require relational lawyering. My point is not that the purpose or aims of the rules change; simply that they the SRA be more explicit about the fact that their rules require relational lawyering. It would also be useful if, prior to completion of this thesis, I could disseminate my research findings through SRA platforms (including their newsletters and website). The SRA also has a role to play in revising specific parts of their Code of Conduct in light of my findings. As I have discussed above, one way in which the Code of Conduct could clearly be amended is the rules on referrals. The SRA should stop relying solely on lawyers' self-regulation of their professional independence. This study, as well as others, clearly indicates that such an

[45] Max H Bazerman and Ann E Tenbrunsel, *Blind spots: Why We Fail to Do What's Right and What to Do About It* 100-127

approach does not work.[46] I also think that the SRA needs to be more explicit about what is meant by the term 'client's best interests' which is repeatedly deployed in the SRA Code of Conduct. Again, further research is needed into understanding how 'best interests' is interpreted by solicitors, and how it should be interpreted. To give one example, I think it should be clearly portrayed to solicitors that a client's best interests are not solely defined by how the client views their best interests (i.e., financial interests). The SRA could also play a better role in enforcing its own rules. For instance, like there is with money laundering compliance,[47] there could be thematic reviews of ILA solicitors file notes to ensure that they are not proforma – to check that they are bespoke, reflective, and that they detail important relational lawyering dynamics. Such a process, like money-laundering compliance checks, could involve enforcement officers completing random visits to law firms, without notifying said law firms, and completing a random controlled review of file notes. I would not be surprised if ILA lawyers disregarded my guidelines on how to deliver ILA relationally. If this were to be the case, the SRA's communication, promotion and enforcement of relational lawyering principles is vital. It may be that ILA lawyers' approaches to delivering ILA will only improve when they realise that market-exchange self-interested approaches to lawyering have no place within the profession.

7.5. *Further research*

To be clear, whilst I think more relational approaches in ILA would ensure better compliance with Lord Nicholls' guidelines and could have the effect of better protecting surety clients,

[46] Oakley and Vaughan, 'In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms' 83

[47] For a discussion on SRA thematic reviews of law firms money laundering practices, see: https://www.sra.org.uk/solicitors/handbook/v19/code/ https://www.sra.org.uk/sra/how-we-work/reports/aml-thematic-review/ (last accessed 8th September 2021)

even ILA delivered relationally has its limitations. As Rosemary Auchmuty highlights, the only way to fully and wholly guard against surety clients entering into suretyship transactions under the principal debtor's undue influence is if lenders were not permitted to secure lending against the family home and other shared assets.[48] Ultimately, the limited effect ILA can have in mitigating against surety clients entering into secured lending transactions under the undue influence of the principal debtor means that there has to be other strategies to ensure that surety clients – typically women – feel empowered to say 'No' to providing security for a loved one where they feel uncomfortable or unwilling to do so. Imagining what these strategies could or might be should be informed by past surety clients' experiences. Regrettably, the voices of past surety clients are missing from my analysis, but further research should address this shortfall. For instance, it would be interesting to discover how past surety clients remember and reflect on their meeting with an ILA solicitor, what they think of my findings and guidelines, and to learn if there has been change over time (are surety clients more empowered, twenty years on from *Etridge*, (for whatever reasons) to say 'No' to providing security for the principal debtor?) One way in which this might explored is to survey women who are petitioning for divorce (with access granted via divorce lawyers) to see if they have ever been asked to remortgage their family home for their husband's business borrowing, and to learn about their experiences. We might learn, from women who felt they could not say 'No' to their husbands' request to provide security but who wanted to, how they think they could have been better protected and empowered. Further research is also needed on how other types of lawyers deliver ILA to surety clients. As discussed above, whilst work on family lawyers (including divorce solicitors) indicates that they provide more

[48] Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' 272

holistic/relational advice, it is not known if this approach is adopted by family lawyers when they deliver ILA to surety clients.

Whilst it is clear that more research is needed (and that my data presents only part of a complex picture), I would suggest that this thesis demonstrates the importance and power of socio-legal property law research. Simply reading the case law pre- and post-*Etridge* gives a rather distorted view of what actually happens in practice with ILA. A black-letter analysis alone would have missed what has been shown so clearly in this empirical work: complacency over compliance; commerce over care; and self over surety.

APPENDIX 1: Interview Schedules (with amendments made after pilot interviews)

Interview Schedule: FOR SOLICITORS WHO PROVIDE INDEPENDENT LEGAL ADVICE

The following headings provide the themes/type of questions to be asked during an interview with a solicitor who provides advice to a surety before they decide whether to proceed with providing security for another person's borrowing. The questions below each topic/heading are not exhaustive but are examples of the types of questions to be asked.
Remember: Explain the use of language – surety client/sureties and principal debtor etc.,

ABOUT THE SOLICITOR

1. How long have you been practising as a solicitor?

2. What is your main area(s) of practice?

3. How long have you been providing advice to sureties, for the purpose of providing a certificate of independent legal advice to a lending institution for a secured loan?

4. How often do you give this sort of advice?

    4a. How much is this sort of advice part of your practice?

    4b. Do you have a sense how many other people in your firm do this sort of work?

    4c. How did you end up getting into this area of work?

5. Can you tell me a little bit about whether, if at all, the sort of advice you give to sureties has changed over time? [and if there have been changes, what has influenced these changes]

IDENTITY OF SURETY CLIENTS

6. How would you describe the backgrounds of the sureties you advise?

    PROMPT: Age; gender; class

7. What sorts of relationships do the sureties tend to be in with the principal debtor? Have you noticed those relationships change over time? [prompt: e.g., are more people coming to you for this advice who are not married to the debtor; people who do not live with the debtor]

8. Have you ever advised guarantors that are personally or commercially benefiting from the secured lending?

> **If yes:** Why do you advise commercial guarantors? [Did you know this is not required in accordance with common law] Who is requiring that commercial guarantors receive ILA?

8. Typically, how do these types of clients come to choose you and your firm, to receive independent legal advice? [prompts: are they referred to you? By someone inside the firm? Or outside? By a bank? Etc.]

CONTENT OF ADVICE

9. What do you think the purpose is of the advice you provide to a potential surety?

10. Do you think you do achieve this purpose?

11. How do you try to achieve this?

12. Please could you provide me with more detail on the usual content of your advice to a surety?

13. Does your approach to independent legal advice alter if your client is being asked to secure the debts of a loved-one's business which is already in arrears, as opposed to a business-start-up?

14. What type of questions do you usually ask the surety? How often does the surety ask you questions? What are these questions about?

15. Do you ever discover, during the course of your meeting with a client, whether they were asked to provide security by their loved one (the principal debtor), or if they volunteered?

16. To what extent do you think clients of this type understand why it is necessary to receive independent legal advice before the transaction can go ahead?

17. How do you record what is said during the course of the meeting?

18. How often have clients decided not to proceed with providing security on the basis of your advice? Why do you think this is?

19. Have you ever told a client that they should not proceed with the transaction? Did they proceed?

20. Have you ever refused to sign a certificate of independent legal advice?

21. How do you decide whether to sign the certificate of independent legal advice, what informs your decision about whether to sign or not?

INTERACTION WITH (AND THE ROLE OF) BANKS

23. OPEN: What information do you receive from the lender?

24. SPECIFICS: In your experience, how would you describe the quality of the information given to you by the lender in relation to the proposed transaction?

25. Are some lenders better than others in this regard? Has the quality of information changed over time? ***If yes:*** In what ways?

26. What information do you normally receive from a lending institution?

27. How long do you typically take to read and assess this information before advising your client?

VIGNETTES

I am now going to outline some hypothetical scenarios, could you please discuss what you may do if such a situation did arise? (It may be that you have experienced a scenario similar to the ones I outline! If so – please mention) *Maybe add: Please remember not to answer in accordance with how you think you should proceed, but instead answer how you have proceeded in the past or how you feel you may most likely proceed if this situation presented itself today, in a real-life situation. All these situations relate to a person offering to provide security for the debts of a loved-one (therefore a non-commercial relationship).*

a. **FINANCIAL INFORMATION VIGNETTE:** Before a meeting with a new client who requires independent legal advice before providing a guarantee for the lending of a loved one, you do not receive any financial information from the lending institution about the nature of the agreement, or any financial information regarding the principal debtor's current indebtedness. When you meet with the client, they summarise the details of the transaction and provide some insight into the borrower's current financial situation as they know it. How would you most likely proceed?
b. **CRYING CLIENT VIGNETTE:** Your client has left the room after a meeting where you felt satisfied that you relayed all important information and that they understood their risks. That same client is seen to be visibly upset as they left the building by one of your colleagues. Your colleague tells you what they had seen. This client already signed the documentation necessary to confirm the lending transaction with the bank. The principal debtor, your client's loved one, was sat outside the room throughout your meeting. How would you most likely proceed?
c. **VULNERABLE CLIENT VIGNETTE:** You are about to deliver independent legal advice to a new client who is considering securing the debts of a loved one. Upon your client's arrival you notice that they are physically disabled. During the meeting, the client is very unresponsive, and you are concerned that they do not understand what you are telling them. After your advice, the client does not ask any questions and just states that they would like to sign. When you hand over a pen to the client - to sign the relevant documentation - you notice that they are struggling to sign their signature. How would you most likely proceed?

GENERAL QUESTIONS ON THE LAW OF UNDUE INFLUENCE

28. In what ways do you think the law balances risk between lenders, debtors and sureties?

29. What is your opinion about how the law has developed in relation to affording sureties protection?

30. Do you wish to add something or discuss anything that I have not raised?

THANKS

RECRUITMENT

I am trying to find other solicitors who do this sort of work and who might be willing to interviewed. If I sent you a follow up email, do you think you might be able to pass it on to your contacts please and encourage them to participate?

Interview Schedule: FOR SOLICITORS WHO HAVE ADVISED SURETIES/GUARANTORS AFTER THE EVENT (WHEN THEIR SECURITY IS BEING CALLED UPON)

Introduce/summarise my research...

ABOUT THE LAWYER

1. How long have you been practising as a solicitor?

2. What is your main area(s) of practice?

3. How long have you been defending possession proceedings?

4. How often, roughly, do you provide advice to clients in relation to defending possession proceedings?

5. How much is this sort of advice part of your practice?

6. Do you have a sense how many other people in your firm do this sort of work?

7. How did you get into this area of work?

8. Can you recall any times where you have provided defence work for a person who acted as surety for another person's debts and the principal debtor failed to meet the demands of the debt repayments?

If yes: How did you come to defend them?

If no: What are the usual identifies of these clients (commercial clients involved in the business that defaulted on the lending)?

9. Can you tell me a little bit about whether, if at all, the sort of advice you give to sureties/commercial guarantors who wish to defend possession proceedings, has changed over time? [and if there have been changes, what has influenced these changes] ...

10. Have you ever advanced a defence of undue influence against a bank, for a surety or commercial guarantor who is facing possession proceedings?

If yes: *Can you tell me about these experiences. If easier, please recall the last client and their case.*

Who is usually advancing this defence (demographic or ethnicity)/what have been their circumstances?

Have you had a claim of undue influence succeed/why has it succeeded? When was this?

SURETIES: Did you believe that your client's choice to provide security had been overborne by the principal debtor's undue pressure?

Did you call into question the advice a surety received by another solicitor before prior to signing the security agreement with the lending institution?

Have any of your clients ever not received independent legal advice before entering a security transaction?

If yes: *Where do you think banks/solicitors are going wrong?*

If no: *Why do you think you have never advanced a defence of undue influence?*

11. What does adequate ILA look like to you?

IDENTITY OF A SURETY

12. Do the past surety clients you advise tend to be of a particular demographic or ethnicity?

13. What sorts of relationships do the sureties tend to be in with the principal debtor? Have you noticed those relationships change over time? [prompt: e.g., more people coming to you for advice who are not married to the debtor; people who do not live with the debtor]

GENERAL QUESTIONS ON THE LAW OF UNDUE INFLUENCE

14. In what ways do you think the law balances risk between lenders, debtors, and sureties?

16. What is your opinion about how the law has developed in relation to affording sureties protection?

17. Do you wish to add something or discuss anything that I have not raised?

THANKS

RECRUITMENT

ADDITIONAL QUESTIONS FOR THOSE SOLICITORS WHO HAVE DELIVERED ILA TO SURETY CLIENTS OR DEFENDED POSSESSION PROCEEDINGS FOR PAST SURETY CLIENTS <u>AND THEY ALSO HAVE EXPERIENCE ARRANGING SECURED LENDING FOR LENDERS AND/OR ENFORCING SECURITY FOR LENDERS.</u>

1. Have you ever arranged security for lenders?

<u>If yes</u>:

a. *How did you come to do this work? How long have you been providing this work? Do you have numerous clients or one in particular (would you feel comfortable disclosing the name of the client)?*

b. *Which types of lenders are you working for in arranging security? (High street lenders; tertiary lenders etc.,)*

c. *What does this role entail?*

d. *What contact do you have with the surety's solicitor on behalf of your lender client?*

e. *Have you ever referred surety clients to solicitors you have an ongoing relationship with for ILA?*

f. *Do the clients you work for in this regard have in-house lawyer teams?*

   <u>If yes</u>: Why do you think your lender client(s) – despite having in-house lawyers – outsource this work to you and your firm?

g. *Have you ever heard from a lender again querying whether the correct procedures for taking security were actioned? I.e., has a lender client ever faced a problem enforcing the security you arranged as part of your role arranging the secured lending transaction? Would you normally be made aware of this?*

h. *How quickly do ILA solicitors normally get the ILA certificate back to you where you are working for the lender arranging the secured lending transaction?*

i. *Do you prefer arranging security over providing ILA?*

j. *Have you ever arranged the security for the lender and also provided ILA to the surety client?*

2. Have you ever enforced security for lenders?

<u>If yes:</u>

a. *How did you come to get this work? How long have you been providing this work? Do you have numerous clients or one in particular (would you feel comfortable disclosing the name of the client)?*

b. *What does the role entail? Can you tell me about the most recent or memorable time you acted for a lender enforcing security?*

c. *Has a surety ever claimed they were unduly influenced into entering the transaction? If yes: Can you tell me more about what happened in that instance?*

d. *Have you ever settled a claim because the surety had a strong case? If yes: Why?*

e. *Have you ever had to go to court because the surety defended the enforcement of security?*

f. *What work do you prefer doing? Arranging/enforcing/defending/advising on secured lending agreements?*

APPENDIX 2: Examples of recruitment emails/letters

Example of recruitment email/letter directed at recruiting interviewees who have experience delivering ILA

Dear X

I am looking for solicitors to participate in my research study. This is a recruitment email[/letter] asking if you would please consider participating.

I am currently studying for my PhD at the University of Birmingham. My doctorate looks at the law in relation to security transactions; specifically, where the provider of security has to receive independent legal advice before they enter a security transaction with a bank or other lender. Case law tells us that this often involves a wife remortgaging the family home for the business debts of her husband. Of course, other scenarios are possible. I am interested in the instances where legal advice is provided to a person who is considering providing security for the lending of a 'loved-one' (i.e., not directly for their benefit). I want to speak to solicitors who advise these persons before the security transaction can go-ahead. I am also interested in speaking to litigators who may act for sureties and/or lenders after the principal debtor has defaulted on the loan and said surety faces possession proceedings.

Using the Law Society's 'Find a Solicitor' application on their website and searching for solicitors in the West Midlands who specialise in 'Commercial Property', I found your name and details. I am contacting solicitors who specialise in commercial property because a previous survey indicated that solicitors who specialise in commercial property often have experience delivering ILA.

If you have in the past (even only a handful of times or as a one-off), or do currently, provide independent legal advice to sureties/guarantors for the purposes of them providing personal guarantees/security for another person's debt, resulting in the providing of a certificate of independent legal advice to a bank, would you be willing to give up some of your time for an interview? Alternatively, if you have ever defended a client who acted as a surety and defended possession proceedings, I would also like to hear from you. I am also interested in speaking to lawyers who may work for lenders in relation to personal guarantees and security transactions (whether that is arranging secured lending transactions or enforcing secured lending transactions).

The interview can be arranged to take place face-to-face at a location of your choosing or over the telephone. The interview would take up to one-hour (max.) and can be shorter if requested. I will record the interview with your consent, and then the interviews will be transcribed. All interviewees will be anonymised in my thesis and any other published work.

At present, I have recruited 7 solicitors for my study. With a view to collect data from 25 solicitors, I am very much depending on solicitors' contributions and their generosity in giving up an hour of their time. My research is endorsed by the University of Birmingham's Research Ethics Committee and is sponsored by the Economic and Social Research Council. If you do

not qualify for my study but may know a colleague or other solicitor who does, I would very much appreciate your help in forwarding this email to appropriate persons.

If you would be willing to take part or need further information, please email or, if easier, ring on 077XXXXXXXX.

Thank you for taking time to read this email.

Kind regards,
Ellie Rowan

Eleanor Rowan
Doctoral Researcher and Visiting Lecturer
University of Birmingham
School of Law
Edgbaston, B15 2TT

Example of recruitment email/letter directed at recruiting interviewees who have experience defending possession proceedings:

Dear X

I am looking for solicitors to participate in my research study. This is a recruitment email[/letter] asking if you would please consider participating.

I am currently studying for my PhD at the University of Birmingham. My doctorate looks at the law in relation to security transactions; specifically, where the provider of security has to receive independent legal advice before they enter a security transaction with a bank or other lender. Case law tells us that this often involves a wife remortgaging the family home for the business debts of her husband. Of course, other scenarios are possible. I am interested in the instances where legal advice is provided to a person who is considering providing security for the lending of a 'loved-one' (i.e., not directly for their benefit). I want to speak to litigators who may act for sureties and/or lenders after the principal debtor has defaulted on the loan and said surety faces possession proceedings. I am also interested in speaking with solicitors who have any experience delivering independent legal advice to persons contemplating securing the debts of another (even if they have only delivered ILA a handful of times). I am also interested in speaking to lawyers who may work for lenders in relation to personal guarantees and security transactions (whether that is arranging secured lending transactions or enforcing secured lending transactions).

Using the Law Society's 'Find a Solicitor' application on their website and searching for solicitors in the West Midlands who specialise in 'Litigation – general', I found your name and details. I am contacting solicitors who specialise in litigation because a previous survey indicated that solicitors who specialise in litigation often have experience defending or enforcing secured lending transactions.

The interview can be arranged to take place face-to-face at a location of your choosing or over the telephone. The interview would take up to one-hour (max.) and can be shorter if requested. I will record the interview with your consent, and then the interviews will be transcribed. All interviewees will be anonymised in my thesis and any other published work.

At present, I have recruited 7 solicitors for my study. With a view to collect data from 25 solicitors, I am very much depending on solicitors' contributions and their generosity in giving up an hour of their time. My research is endorsed by the University of Birmingham's Research Ethics Committee and is sponsored by the Economic and Social Research Council. If you do not qualify for my study but may know a colleague or other solicitor who does, I would very much appreciate your help in forwarding this email to appropriate persons.

If you would be willing to take part or need further information, please email or, if easier, ring on 077XXXXXXXX.

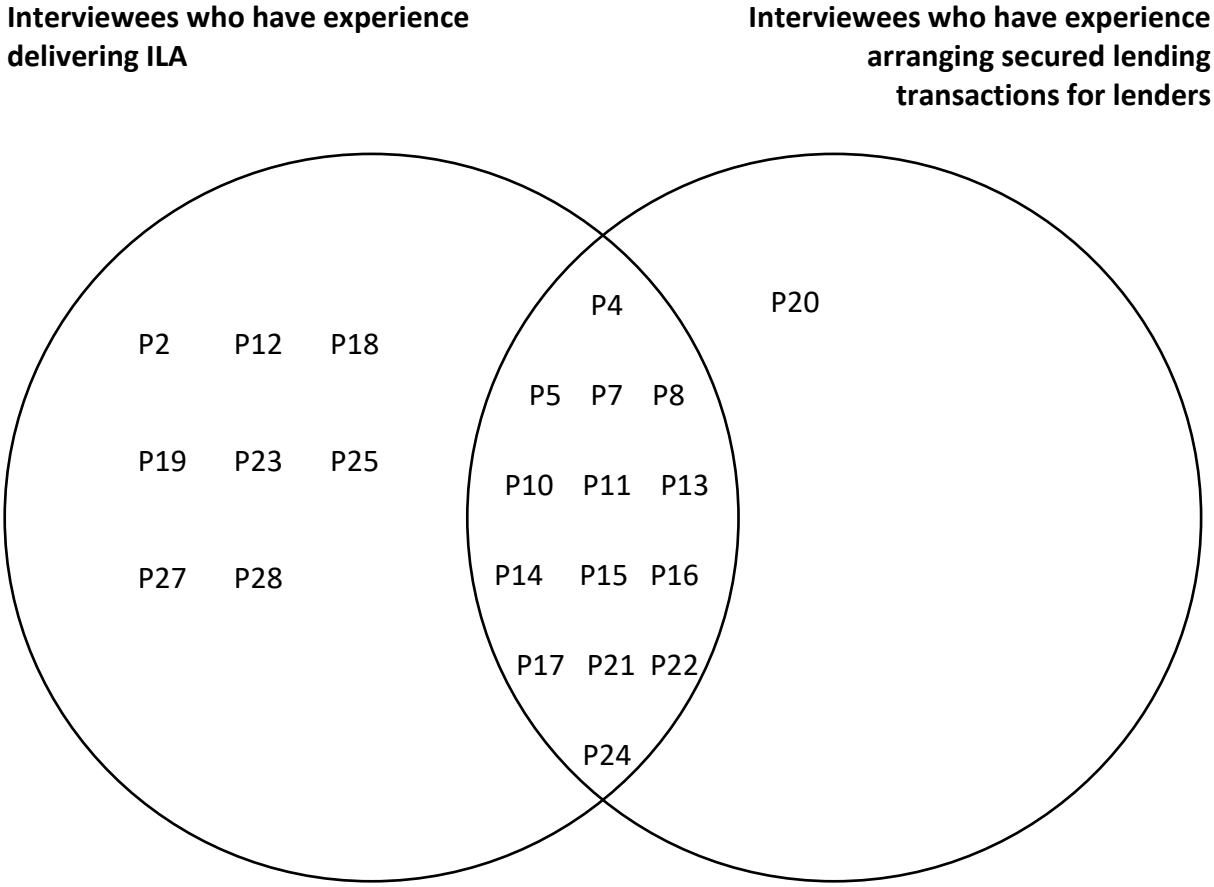
Thank you for taking time to read this email.

Kind regards,
Ellie Rowan

Eleanor Rowan
Doctoral Researcher and Visiting Lecturer
University of Birmingham
School of Law
Edgbaston, B15 2TT

APPENDIX 3: Interviewees' roles in relation to secured lending agreements [49]

Figure 2.2: Interviewees who have experience delivering ILA, interviewees who have experience arranging secured lending transactions for lenders, and those interviewees who have experience doing both.



[49] Thank you to Professor Amanda Perry-Kessaris (Kent University) for her suggestion that I should present this data through Venn diagrams after I first presented this PhD data at the SLSA Conference 2019 (Leeds University).

Figure 2.3: Interviewees who have experience delivering ILA, interviewees who have experience defending possession proceedings for past sureties, and those interviewees who have experience doing both.

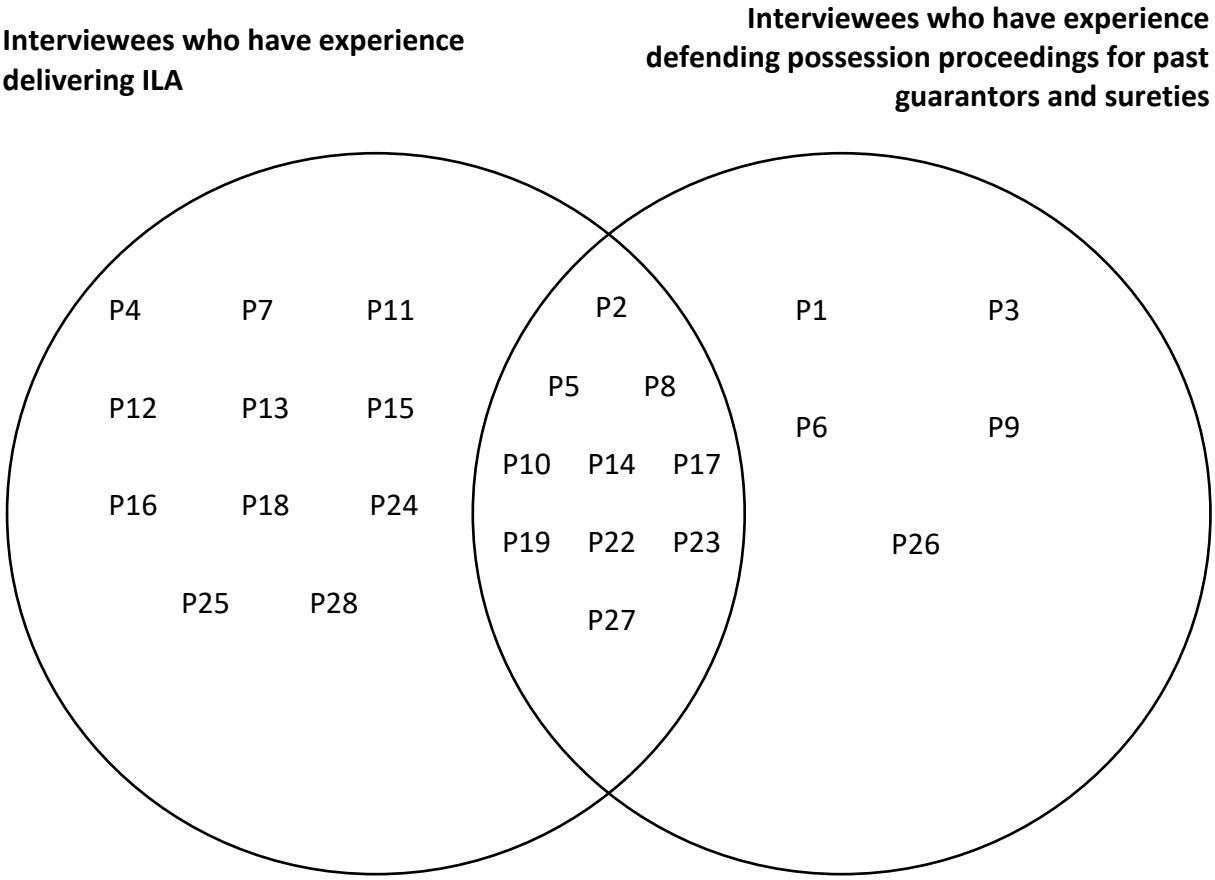


Figure 2.4: Interviewees who have experience arranging secured lending transactions for lenders, interviewees who have experience arranging defending possession proceedings for guarantors and sureties, and those interviewees who have experience doing both.

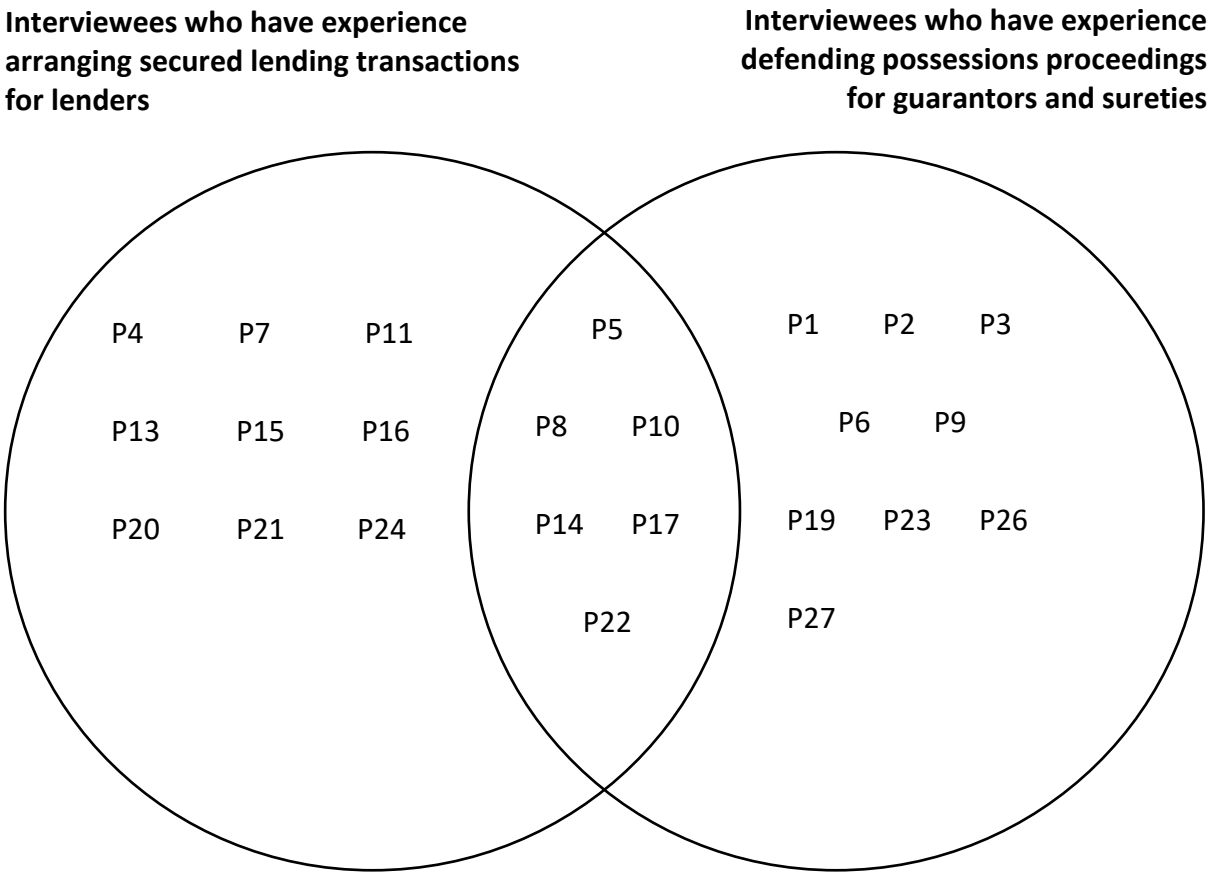


Figure 2.5: Interviewees who have experience arranging secured lending transactions for lenders, interviewees who have experience enforcing security for lenders, and those interviewees who have experience doing both.

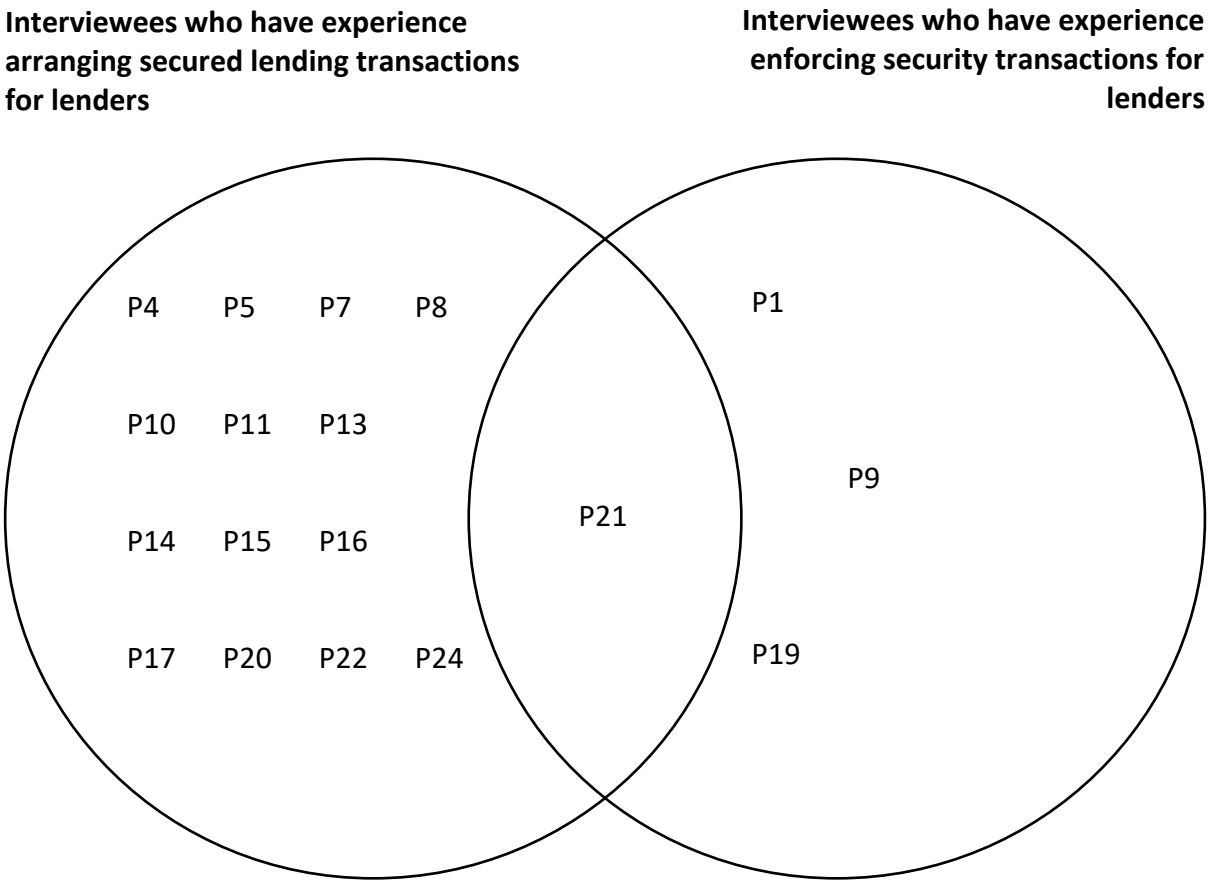
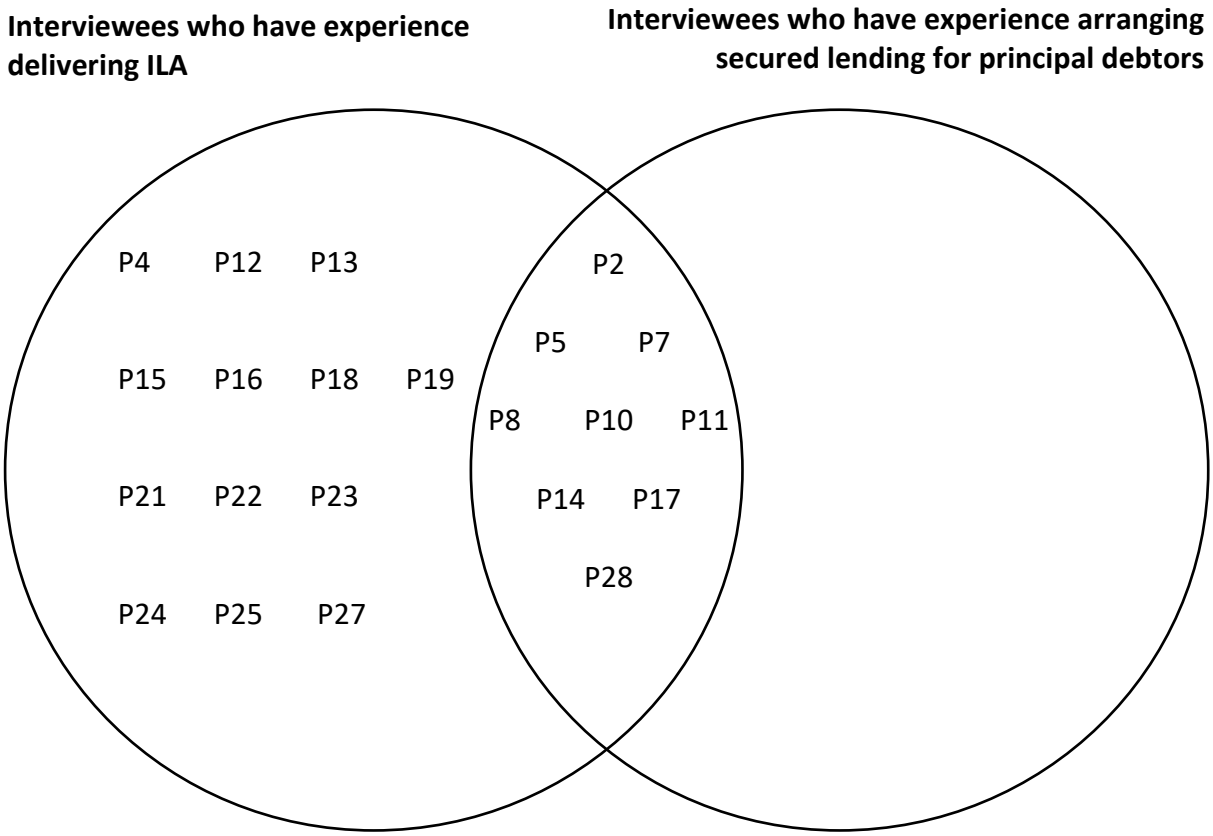


Figure 2.6: Interviewees who have experience delivering ILA, interviewees who have experience arranging secured lending for principal debtors, and those interviewees who have experience doing both.



APPENDIX 4: Participant information sheet

A study investigating how independent legal advice is delivered by solicitors to individuals that are contemplating securing the debts of another

I would like to invite you to take part in a research study. Before you decide, you need to understand why the research is being done and what it may involve– if you decide to proceed. Please take time to read the following information carefully and please ask any questions if anything is unclear or if you would like any more information. Please take time to decide whether or not to take part. Should any further questions arise after reading this information sheet, please email me - Eleanor Rowan – at [redacted]

Aspects of the study:
The purpose of this project is to explore how independent legal advice is provided to sureties and/or guarantors. This can be where a client is 'contemplating' providing security for the debts of another (typically a loved one) or for their own direct benefit – i.e. providing a personal guarantee for their own business or a business they have involvement in. There has not been a study exploring the practice of this type of advice since 1994. Since then, the common law has changed on how surety clients should be advised. One of the most significant changes is that lawyer's involvement is now obligatory if a bank wants to be protected from potential future litigation by a surety, which could result in the transaction being set aside due to the lender having constructive notice of presumed undue influence. Learning about the day-to-day operations of the procedures operated by banks and solicitors in providing sureties and guarantors with independent legal advice, will provide an insight into how the legal rules as imposed by the courts, have filtered down into practice. In order to gain a more holistic insight into advice of this nature, I hope to talk to litigators as well as solicitors who provide this advice. I want to talk to litigators who have defended possession proceedings for sureties at the end of the 'security lifecycle'. I am also interested in talking to any solicitors who have advised lending institutions on issues to do with security/guarantor transactions.

Do you have to take part?
It is up to you to decide. If you decide to proceed after reading all of this information, the researcher will ask you to sign a consent form prior to interview. You are free to withdraw at any time by email before the interview, or during the 12 weeks that follow the interview. You do not need to provide a reason for your withdrawal.

What will happen if you take part?
If you choose to take part in this study, then your commitment to the researcher will be a (max.) one-hour interview which will be recorded at a location of your choosing, or which could be conducted over the telephone. The research will form part of a PhD, and will run for approximately two years from the date of the interview; however, your commitments beyond the interview will be minimal. The researcher may subsequently contact you following the interview for the following reasons:

1. Clarification on anything said during the interview.
2. Further questions that have arisen from the research.

Any subsequent contact following the interview will take place by telephone or email. All data collected through either the interviews or any subsequent communication will be kept confidential and anonymous. Further detail on data management and security as part of this project is detailed below. The interview data will be transcribed, in part by the researcher and in part by a professional company with whom we will enter into a confidentiality agreement.

Possible risks of taking part:
The researcher has identified no serious risk to a person or organisation from taking part in this study. All data will be kept strictly confidential and all participants will remain anonymous in any write-up about the project.

Possible advantages of taking part:
The researcher cannot promise that the study will directly benefit you or your organisation personally. However, this research provides lawyers with an opportunity to have their say about the law of undue influence and the part they play.

Furthermore, the researcher is willing to share the final (anonymous) results with any participant of the study, up to and including a presentation of the study to their organisation – if they the relevant authorities of their organisation deem it worthwhile.

What if there is a problem during the study?

Should you feel unhappy at any point during the study then please contact the researcher by email [redacted] Should the researcher be the focus of any complaint - or if the researcher is unable to deal with the complaint - then contact Birmingham Law School and initiate the University's complaints procedure. You should feel free to contact the researcher's lead supervisor Professor Robert Lee at any time if you have concerns: [redacted]

Confidentiality:
The raw interview data will initially be transcribed. The transcription company will be required to sign a confidentiality agreement prior to them receiving the sound files. Once the data has been transcribed, the researcher will go through all of the data and redact any confidential information that could identify the participant. Once all the personal information has been redacted the original transcribed files will be permanently deleted. Only the redacted files will be retained for the rest of the study. For analysis, the participant will not be linked to any ID number or name.

The data will be encrypted and stored on a secure university network drive, which only the researcher has access to, and which will be password protected.
In extreme circumstances, if the participant provides information regarding criminal or illegal activity the researcher may need to breach confidentiality. Such extreme circumstances may include situations where the researcher is concerned about the safety of the participant or wider society. Before the researcher does report such information to the necessary authorities, the participant will be informed.

Withdrawal:
You are free to withdraw at any time before the interview and during the 12 weeks that follow the interview taking place. Any withdrawal should be done by email and sent to

[redacted] Upon withdrawal, any data (if withdrawal takes place following the interview) will be permanently deleted.

What will happen to the results of the study?
The results of the study will form the basis for a doctoral thesis, which will eventually be published.

Who is sponsoring the research?
Eleanor Rowan is this project's researcher and has been sponsored by the Economic and Social Research Council to conduct this study at the University of Birmingham.

APPENDIX 5: Confidentiality agreement with transcription company



CONFIDENTIALITY AGREEMENT

This confidentiality agreement has been prepared and is being distributed on behalf of Audiosec Limited ("The Service Provider") by Dee Briston (Project Management Officer), who acknowledges and accepts the terms and conditions of this Confidentiality Agreement.

The Service Provider agrees that they shall not during the course of the contract with ***"ELEANOR ROWAN"***, and at all times (without limit) after the termination thereof (howsoever the same is determined), directly or indirectly, make use of, or disclose (to a third person, company, firm, business entity or other organisation whatsoever) or exploit for their own purposes or for those of any other person, company, firm, business entity or other organisation whatsoever, any trade secrets or Confidential Information (as defined below) relating or belonging to ***"ELEANOR ROWAN"*** or any of its clients.

Confidential Information includes, but is not limited to, any information relating to clients (including clients with whom ***"ELEANOR ROWAN"*** is negotiating), client lists or requirements, charge out rates or charging structures, marketing information, intellectual property, business plans or dealings, precedents, technical data, financial information and plans, any document marked "confidential" or any information which the Service Provider has been told is confidential or which might reasonably be expected to be regarded as confidential, or any information which has been given to ***"ELEANOR ROWAN"*** in confidence by clients, suppliers or other persons.

The obligations contained in this provision shall not apply:

To any information or knowledge which may subsequently come into the public domain other than by way of unauthorised disclosure (whether by the Service Provider or by a third party);

To any act of The service Provider in the proper performance of their contractual duties;

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Where such use or disclosure has been properly authorised by ***"ELEANOR ROWAN"***;

To any information which the Service Provider is required to disclose in accordance with an order of a Court of competent jurisdiction.

In complying with these confidentiality obligations The Service Provider must refrain from discussing, reading or disclosing Confidential Information openly in public areas, such as, on trains, buses and airplanes, on mobile telephones, or in restaurants. If the Service Provider is in any doubt as to the extent and/or the ambit of these obligations they should, in the first instance address any queries to ***"ELEANOR ROWAN"***

Audiosec Limited acknowledges that the client reserves the right to terminate any contract should they become aware of any unauthorized use of the Confidential Information.

[redacted]

(Mrs. D A Briston Project Management Officer for Audiosec Limited)

Dated 1 August 2018

Please note all transcriptionists used by Audiosec Limited are UK based, professional transcriptionists who comply with our confidentiality agreement as per their freelancer agreement terms. *Registered in England & Wales, number 5866610*

APPENDIX 6: Research consent form

Name of Researcher
Eleanor Rowan
Title of study
A study exploring how independent legal advice is delivered to surety clients

Please read and complete this form carefully. If you are willing to participate in this study, ring the appropriate responses and sign and date the declaration at the end. If you do not understand anything and would like more information, please ask me.

- I have had the research satisfactorily explained to me in verbal or written form by the researcher. **YES / NO**
- I understand that the research will involve: *a recorded interview of approximately one hour* **YES / NO**
- I understand that I may withdraw from this study at any time without having to give an explanation. This should be done by email (to [redacted] within 12 weeks from the interview date. **YES / NO**
- I understand that all information about me will be treated in strict confidence and that I will not be named in any written work arising from this study. **YES / NO**
- I understand that any audiotape material of me will be used solely for research purposes and will be destroyed on completion of the research. **YES / NO**
- I understand that you will be discussing the progress of your research with others at the University of Birmingham, including your PhD supervisors, Dr Steven Vaughan and Professor Robert Lee. **YES / NO**

I freely give my consent to participate in this research study and have been given a copy of this form for my own information.

Signature: …….

Date: ……

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