I INTRODUCTION
Property owners have signed guarantees and consequently lost their properties or faced some difficulties with court actions which seek to recover the debts and or by selling the property which was used to secure the loan which most guarantors fight but to no avail.

It is clear that these contracts of guarantee are watertight and favour creditors (banks) as against the interest of the guarantor(s). The very nature of contract of guarantees it is submitted favours banks and the various financial institutions advancing credits to the general public. In this piece the writer seeks to argue that having regard to the very nature of the contracts of guarantees, banks are over protected and it is time the courts took a second look at contracts of guarantee and safeguarded the interest of guarantors.

The writer recently had the opportunity to advise two different parties who have signed guarantee forms creating encumbrances on their properties, not for themselves, but in favour of third parties. This included an illiterate old lady who alleged that her own son deceived her and that an official of the financial institution supposedly misled her with regards to her

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1 They are standard form contracts prepared by the creditors
liability under the guarantee forms she thumb printed. This old lady came to see me after the transaction with the financial institution. The other party were a couple who were using their joint matrimonial home to secure a loan for the husband’s friend’s business. The couple approached me with a copy of the contract of guarantee to find out the extent of their liability if the document is signed by them.

The writer explained to the couple that, if the prospective borrower fails to pay, they will be called upon to pay the sum loaned together with interest. They were further told that where they are unable to pay the said sum their joint matrimonial home could be sold under a court order to defray the loan. The wife’s reaction was to the effect that she was not going to sign the contract because she was not comfortable with the consequences. Later she informed me that she has signed the contract not voluntarily, but by the husband’s ‘continuous talking’ which is seen by the writer as pressure on her.

This paper will attempt the discussion under the following headings:
1. The Legal Framework of guarantees
2. Enforcement of guarantee contracts
3. Lessons - conclusions
4. General Recommendations

II THE LEGAL FRAMEWORK OF GUARANTEES
The provision of credit is indispensable in the running of businesses by individuals, companies, corporations and groups of companies. Banks and financial houses generally lend on the security provided either by the borrower or a third party. The rational for taking securities is for the creditors to reduce the risk of losing the sum advanced and also to ensure that the money is recovered even if the borrower’s business collapses. Thus guarantees have become a very important aspect of lending and it plays a vital role in the banking world with regards to lending.

A guarantee as used in this article is a contract by which one party un-
dertakes to pay money if the principal debtor fails to pay the debt. This piece will restrict its discussion to situations where landed property has been used as a guarantee. It has also been defined as a contractual obligation undertaken by one person (known as the principal or principal debtor) to perform a contract or fulfil some obligation and that, if the principal does not do so, the surety will do it for the principal. It is thus seen as a secondary and an accessory transaction. It is important at this stage to distinguish between a guarantee, a surety and an indemnity. A contract of guarantee is a collateral contract to answer for the default of another person. In Campbell V. McIsaac, the court defined a contract of surety as an undertaking to pay the debt of another if the debtor fails and a contract of indemnity is a contract with the creditor that the creditor will be paid. It may thus be concluded that a guarantor is liable only when the debtor defaults.

Contracts of guarantee are governed by the rules of contract; there must be consideration provided by the guarantor that he promises to pay. Any party who also signs the guarantee must have the requisite capacity to contract and thus a guarantee provided by a minor is void. Guarantees are also governed by statute. In Ghana guarantees are governed by the Contracts Act (1960) Act 25. Section 14(1) of the Contracts Act states that all contracts of guarantee shall be evidenced in writing signed by the guarantor or his agent and subsection 2 adds that where there is no such writing the

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4 Campbell v. McIsaac [1873] 9 N.S.R. 287 (C.A.)
5 Roy Goode, op cit; 821. Secondary because the guarantor is liable to be sued only when the principal debtor defaults and it’s also accessory because both parties obligations are ‘coterminous’.
7 supra
8 Cited by Kevin J. Macdonald Clark & Wilson in Guarantees-Acting for lenders and borrowers, 1997
9 In Ghana Contracts of Guarantee are governed by the Contracts Act (1960) Act 25.
10 Boohene Foods V. National Savings and Credit Bank & Another [1992] G.L.R. 175, where it was held that the only requirement a guarantee should conform to in Ghana is that it must be signed by the guarantor or his agent. The law did not require any particular form that guarantees should take. See also Elluah v. Ankumah [1968] G.L.R. 795.
guarantee is void. Apart from this piece of legislation in Ghana, there is no other comprehensive legislation which seeks to govern lending and taking of securities let alone to protect guarantors when they enter into contracts of guarantee.

Predominantly contracts of guarantee are unilateral in character because they are usually executed on standard forms. The bank dictates the terms of the contract without any input whatsoever from the guarantor. A contract of guarantee contains numerous clauses which together increase the banks’ rights under the guarantee and reduce the guarantor’s rights. When the guarantor signs the guarantee, he tells the bank or the financial house that when the debtor defaults he will pay the sum involved. The only part played by the guarantor as argued by Sir Roy Goode is that the guarantor makes an offer to repay when the principal debtor defaults and when the bank advances the money it is deemed to have accepted the offer made by the guarantor. Once the contract is concluded the bank will exercise its rights under the guarantee if the principal debtor defaults by asking the guarantor to pay or praying the court for an order to sell the property which was used to secure the loan.

As has earlier been referred to in this article, the parties to the contract of guarantee do not operate on a level playing field. This is because, apart from the Contracts Act, there is no major legislation safeguarding the interest of the guarantor.

Serious issues arise from the lack of equal bargaining positions between the parties to the contract of guarantee. What happens to the guarantor when the terms of the contract of guarantee are harsh and unconscionable, the guarantor signs under duress and or undue influence, misrepresentation of the material facts of the transaction either by the prospective debtor or the creditor, and when fraud is perpetuated against the guarantor? Does the law provide adequate measures to cushion such vulnerable

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11 See Section 14 (1) and (2) of the Contracts Act for the full wording.
12 The English position is better because quite apart from the Statute of Frauds 1677 whose provision also requires guarantees to be in writing, there is also the Consumer Credit Act 1974 which governs lending and taking of securities. To be discussed in detail later in this article.
13 Roy Goode, op cit; 831
14 Vitiating factors to be looked at in detail when discussing enforcement of guarantees.
guarantors? For now guarantors may have to accept the little protection provided by the Contracts Act, Act 25\(^{15}\).

In England and Wales, to be specific, even if the terms of the guarantee are harsh and unconscionable there is consumer protections legislation\(^{16}\). This serves to protect consumers in general, including bank customers. However in Ghana, there is no consumer protection law. This is very unfortunate, having regard to the consumer\(^{17}\) in the country now. If the role of the financial sector in the economy in particular is considered, it is time for the passage of such legislation at this time of the development of the nation.

In a paper presented by Dr. Kwaku Addea on 30th November 1993, titled ‘Appraisal of the Law Protecting Bank Customers in Ghana’ to the Association of Financial Institutions the writer lamented the lack of consumer protection laws and advocated the promulgation of ‘Bank Customer Protection Law’\(^{18}\). Again the same writer in another lecture to the Ghana Bar Association on the topic ‘The state of the Law after Bank Restructuring’\(^{19}\), the writer repeated the need for the said law but to date nothing has been done about this very important piece of legislation. Perhaps it is time civil societies and organisations take up the issue.

If one takes a look through the Banking Code of Ethics issued by The Chartered Institute of Bankers, Ghana there is no mention or reference to lending in the 16 page booklet. One would have expected that at least some mention would have been made of lending which is one of the core businesses of banking in Ghana. Contrast the Banking Code issued jointly by

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\(^{15}\) It is woefully inadequate compared with what exists in other jurisdictions especially in England.

\(^{16}\) Consumer Credit Act 1974 at sections 137-139 controls ‘extortionate credit agreements and can be re-opened by the courts, Unfair Contract Terms Act 1977 and two statutory instruments i.e. Unfair Terms in Consumer Contracts Regulation of 1994 and 1999.

\(^{17}\) Consumers of banking services, telephone, electricity, water and other services. The lack of the legislation has given the service providers the opportunity to treat consumers with contempt.

\(^{18}\) Dr. Kwaku Addeah, A guide-book on the rights and duties of bank customers 1\(^{st}\) edition (2002); 11

\(^{19}\) Ibid; 11
the British Bankers Association\textsuperscript{20}, Association for Payment Clearing Services and The Building Societies Association, there is a chapter on lending and it really makes some great strides in favour of guarantors who give guarantees to secure other peoples debts\textsuperscript{21}. The provisions of this clause will be reproduced in detail:

"\textsuperscript{13(4) if you want us to accept a guarantee or other security from someone for your liabilities, we may ask you for your permission to give confidential information about your finances to the person giving the guarantee or other security, or to their legal adviser. We will also:

- Encourage them to take independent legal advice to make sure that they understand their commitment and the possible consequences of their decision (where appropriate the documents we ask them to sign will contain this recommendation as a clear and obvious notice);
- Tell them that by giving the guarantee or other security they may become liable instead of, or as well as, you; and
- Tell them what their liability will be. We will not take any unlimited guarantee."

When this provision is viewed alone it has made some important inputs in so far as guarantees are concerned to the extent that the prospective debtor's financial standing should be declared to the guarantor. He may also be advised to take independent legal advice so as to understand his or her commitment once the guarantee is signed. This is in addition to other legislation which seeks to ensure that there is fairness between the guarantor, the creditor and the prospective borrower.

The question is what happens when a party signs a guarantee without even knowing the financial standing of the prospective borrower and when the creditor fails to even ask the guarantor to seek an independent legal advice or offer any to the guarantor? These are some of the issues the present writer is worried about when viewed against the backdrop of the fact that majority of these people are illiterates or semi-illiterates\textsuperscript{22}.

\textsuperscript{20} The 2003 edition. Although it is voluntary it reflects the position of the law in England and Wales.
\textsuperscript{21} Clause 13(4) of the code
\textsuperscript{22} Even with literates, since guarantees are technical documents, there is the need for independent legal advice so as to know the effect of a guarantee.
Other issues\textsuperscript{23} are worth considering under the legal framework. First, can the creditor go ahead to enforce the guarantee when it is proved that undue influence was brought to bear on the guarantor? Secondly will the guarantor be successful when evidence is led to establish that, facts about the whole transaction were misrepresented to him or her? Thirdly can a guarantor who has signed a guarantee argue that ‘it is not my deed’\textsuperscript{24} because that party has been misled to sign a document which is ‘fundamentally’ different from what the party believed was signing. It is submitted that it is time guarantees are scrutinized along these lines to ensure that creditors do not have their way simply because a party’s signature appears on a guarantee.

In the light of the above it may be submitted that a person who signs a guarantee in Ghana may do so without knowing fully and understanding the consequences of their actions. Be that as it may, creditors do not consider this aspect and are more interested in enforcing the guarantee when there is a failure of payment of the loan by the principal debtor.

III ENFORCEMENT OF GUARANTEE CONTRACTS
All loan agreements contain conditions of repayments and the effect of default of repayment. Loan repayment depends upon the nature of the loan. Some loans are payable by equal instalments referred to as ‘amortized repayments’, or where repayment increases in amount over the period of the loan known as ‘balloon repayments’ and lastly where the debtor is given time to pay at a go referred to as ‘bullet payment’\textsuperscript{25}. So that where a party is given any of these options and the party fails and or defaults, the creditor will then invoke the default clause. Because the guarantor used landed property to secure the loan, both parties will be sued and the creditor will in the alternative ask for the judicial sale of the property used. In most cases the guarantors in a bid to save their property fight to save them. This to a greater extent frustrates creditors when guarantors in a bid to rescue their property put up defences\textsuperscript{26} to render the guarantee unenforceable.

\textsuperscript{23} See enforcement of guarantees for full discussion of these.
\textsuperscript{24} Non est factum.
\textsuperscript{25} E.P. Ellinger et al., Modern Banking Law, 3\textsuperscript{rd} Edition, 2002, Oxford; 654
\textsuperscript{26} Vitiating factors
The defences put up include undue influence\textsuperscript{27}. This doctrine "suggests improper use of ascendant acquire by one person over another for the benefit of himself or someone else, so that the acts of the person influenced are not, his free voluntary acts\textsuperscript{28}. Undue influence thus refers to a situation where a party to a transaction has abused a relationship of trust and confidence between the parties which consequently calls for the transaction to be set aside because no party is allowed, 'to retain the benefit of his own fraud or wrongful act\textsuperscript{29}. The germ of the doctrine of undue influence is whether or not a party has entered into a contract freely. If undue influence is successfully proved the security so taken cannot be enforced.

Another factor which may affect the enforcement of guarantees is misrepresentation. This is generally a false statement made at the time of the contract which induced the other party to enter into the contract. The creditor and or the prospective borrower may misrepresent facts about the loan to the guarantor and this will entitle the guarantor to set aside the guarantee. In this context the misrepresentation may relate to the extent of the guarantor's liability, the amount being loaned, and the financial position of the guarantor. One can put this generally under the heading 'suppression or concealment of truth' which eventually mislead the guarantor to sign to commit himself or herself.

Hence when a husband misrepresents facts about a loan he is taking and the wife is induced to sign the guarantee using the matrimonial home the guarantee will be set aside once the lender had notice of the debtor's

\textsuperscript{27} It may be actual undue influence, where there is no need to establish any special relationship between the parties but the party alleging it must prove that it existed at the time of the transaction. The other is presumed undue influence which exist where one party exploit a relationship of trust and confidence that exist between the parties at the time of the contract.

\textsuperscript{28} Union Bank of Australia Ltd. v. Whitelaw [1906] V.L.R. 711, 720. See also Alcard V. Skinner [1887] 36 Ch. D.145, 181, where the court said undue influence connotes "some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating and generally though not always, some personal advantage..." by the party influencing the other. In Royal Bank of Scotland v. Etridge (No 2) [2001] 4 All E.R. 449 at 458 it was held to include cases where a vulnerable person has been exploited.

\textsuperscript{29} Chitty on Contracts, 29th edition, vol. 1 2004; 535
When it becomes clear that the facts were misrepresented to the wife or any other party, that person will have the opportunity to rescind the guarantee. The misrepresentation may also be fraudulent where a guarantor may be told by the lender that by signing the guarantee it is a mere formality and does not carry with it any obligation. The lender may be liable in tort of deceit unless the maker believed in the truth of the statement at the time it was made. To that extent misrepresentation may protect guarantors as it can be raised to challenge the guarantee which has been given.

Having discussed these vitiating factors the writer will now proceed to look at the effect of these on enforcement of guarantees or securities taken by creditors.

Persons providing a guarantee to secure a party’s loan may be a spouse, a colleague, relative or a parent. When any of these parties alleges that the guarantee was signed as a result of misrepresentation, undue influence or the fact that what was explained, was different from what has been signed, that will hinder the enforcement of the guarantee. When there is non-payment of the loan and the lender seeks to enforce the guarantee the guarantor may challenge the whole transaction on any of these issues.

The undue influence or the misrepresentation may be exercised by the bank. The decision in Lloyds Bank V. Bundy is instructive for two reasons. First the court was concerned about the need for not allowing the guarantor to seek for an independent legal advice and secondly the bank concealing the fact that the father’s son business was facing difficult times financially.

In this case, the father used his farmhouse to secure the son’s overdraft. His business faced difficulties and the bank sought to increase their interest and asked for a further security in respect of the overdraft. The documents on this were sent to the father without being given the opportunity to seek for an independent legal advice before signing. The son defaulted and the bank sought to enforce the security. The Court of Appeal set aside the

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31 Vitiating factors, that is undue influence, misrepresentation and non est factum
32 Lloyds Bank V. Bundy [1975] Q.B. 326
33 Supra
guarantee on the grounds that, the bank failed to advise the guarantor by disclosing the full facts. The Court further said that it would be unjust to allow the bank to enforce the guarantee as it concealed the extent of the financial problems their client was facing which would have given the defendant the opportunity to sign or not to sign.

Do the banks and the numerous financial providers in Ghana perform these services when people appear before them as guarantors? Do the lenders advise the guarantors as to the financial position of the person whose loan that person is going to guarantee? If they even say something is it the truth or something that will let the guarantor sign? Won’t this amount to concealment of material facts which if it has been disclosed, would have influenced the guarantor either to sign or not to sign?

Secondly how many banks in Ghana will inform a guarantor to seek for an independent legal advice before signing a guarantee? In the case of the old lady whose case the writer is handling at the High Court, Kumasi, a request for a copy of the guarantee signed by the guarantor was not reacted to. Such is the attitude of the financial institutions in Ghana.

It is submitted that, for these reasons the courts should now take a second look at some of these guarantees by re-opening them as most of them were executed under some of these vitiating factors. Indeed this is a situation which should be checked and the banks should not be allowed by the courts to enforce guarantees simply because the guarantee has been executed. Much will also depend on solicitors who act for these guarantors. For if the solicitors do not challenge the guarantees the courts can do very little or nothing.

When one considers the case of the prospective debtors exercising undue influence or misrepresentation, in some cases\(^\text{34}\), the courts have held that undue influence and misrepresentation exercised by debtors will not affect the guarantee unless the bank was a party to what has transpired\(^\text{35}\).

In one case\(^\text{36}\) for example, a joint matrimonial home was used to secure an overdraft given to a company where only the husband had an interest.


\(^{35}\) Anu Arora, “The Doctrine of Undue Influence and the Protection of the Surety”, 1994, J.B.L. 242

The instructions which accompanied the execution of the guarantee was that the parties were to be made aware of the ‘nature and effect’ of the documents and where in doubt the couple should consult the solicitor of their choice before they sign. This was not complied with and the parties signed the document. The wife was actually induced to sign the guarantee by her husband’s misrepresentation with regards to the extent and duration of the charge. The wife resisted the claim for the possession of the matrimonial home on the grounds of the husband’s misrepresentation and undue influence and further contended that the bank was aware of the husband’s wrongdoing. The court of first instance held that the bank can enforce the guarantee. On appeal by the wife the transaction was set aside and the bank’s appeal to the House of Lord which was dismissed.

The House of Lords held that where a wife was induced by the husband’s undue influence and misrepresentation or other legal wrong to stand as a surety for the husband’s debt, the creditor will in circumstances which should have put him on enquiry, be fixed with constructive notice of the wife’s right to set aside the transaction, unless the creditor had warned the wife at a meeting not attended by the husband of the risks involved and advised her to seek independent legal advice.

The House further held that for creditors to avoid being fixed with constructive notice, they should insist that a wife attend a private meeting without the husband with an official of the bank. At this meeting the wife should be told her liability, the risk involved and the need to take independent legal advice and if the bank has any facts which make undue influence likely then it should insist that the wife take independent legal advice separate from that of the bank.

This decision also brings to the fore another instance which is, having regard to the person signing the guarantee, the bank will be put on notice that undue influence or misrepresentation has been exercised and the necessary steps to be taken by the bank. Certain issues arise from the fact that the bank should insist that under some circumstances the prospective guarantor should take independent legal advice. Who pays for the legal service? Again how independent will that advice be? These are issues which might increase the cost of the loan but it is worth it and if there is any extra cost, same should be borne by the prospective borrower and where possible the guarantor should do that to save his or her property.
In C.I.B.C. V. Pitt\textsuperscript{37}, the case involved a couple who took a loan jointly to discharge a first mortgage and to buy a holiday home. They used their joint matrimonial home to secure the loan. However the husband speculated on the stock market with the money and when it crashed they were unable to pay and the bank proceeded to enforce the charge. As usual the wife resisted the claim on the grounds that she signed the guarantee under undue influence and misrepresentation exercised by the husband. The trial court, the Court of Appeal and the House of Lords rejected this argument. The House of Lords held that if the transaction is a joint loan to a couple and the wife is not a surety the creditor will not be fixed with constructive notice. This decision may be justified on the ground that this was a loan to a couple for their joint benefit.

The House of Lords in these two cases\textsuperscript{38} 'made an attempt' to state the law for the banks when taking guarantees from individuals.

The courts have also held that in some cases, having regard to the person signing the guarantee the lender is immediately put on notice that undue influence has been exercised. In Credit Lyonnais Bank Nederland V. Burch\textsuperscript{39}, a junior employee signed a guarantee in respect of an overdraft granted to a company she was working for with her flat. This particular charge was unlimited: that is, it secured both the present and future debts of the employer. When the company failed and the bank sought to enforce the security, the Court of Appeal held that the bank cannot enforce same as the employee had committed herself beyond her means. The court further said that the transaction "shocked the conscience of the court" and that the presumption of undue influence on the part of the employer could not be ruled out.

Steeples V. Lea\textsuperscript{40} also concerned a junior employee who gave a guarantee for the employer but in the face of the exercise of undue influence which became evident in the course of conversation in the presence of a solicitor, the security could not be enforced.

Non est factum when proved will also affect the enforcement of securi-
ties. It operates when a party is misled to sign a document which is different from what the party intended to sign. In Saunders v. Anglia Building Society\textsuperscript{41} the House of Lords stated the conditions to be fulfilled before invoking the this defence. The party invoking it must show that:

a) that there was a disability
b) that the document signed was fundamentally or radically different from what was intended; and
c) that there was no carelessness but took precautions to ascertain the documents, contents and significance.

The defence failed in this case because the signor was not negligent, she knew what she was signing and the character of the document was not different.

The defence however succeeded in Lloyds Bank plc v. Waterhouse\textsuperscript{42}. In this case a party was made to sign an ‘all monies guarantee’ when he was made to understand that he was signing only a guarantee covering a single loan granted to his son. The Court of Appeal held that the difference between the two documents, that is, the intended and what was actually signed, is the liability each carried. Hence all monies guarantee is fundamentally different from signing a guarantee for a single loan. Indeed for non est factum to avail a party the document signed must be ‘fundamentally’ or ‘radically’ or ‘totally’ or ‘seriously’ or ‘very substantially’ different from what was intended.\textsuperscript{43} Thus where the plea succeeds any guarantee taken will be null and void and the security cannot be enforced. Be that as it may hardly will banks ask a guarantor to sign a document radically different from what was intended in view of their experiences.

It is abundantly clear that the English Courts scrutinise guarantees whenever there is a challenge before they can be enforced. The mere fact that a party has signed a guarantee does not make it automatic for same to be enforced. It is thus time for the Ghanaian Courts to start examining guarantee contracts so as to stop the ‘one way traffic’. This will go a long

\textsuperscript{41} 1971 A.C. 1004
\textsuperscript{42} 1993 2 F.L.R. 97
\textsuperscript{43} John Cartwright, A Guarantee signed by Mistake, 1990 L.M.C.LQ 338; 339
way to ensure that lenders in general do not benefit from their wrongs.

One can also argue that the courts will only act when cases appear before them and there are challenges; else there is very little the courts can do.

It is on this score that the present writer will implore barristers who represent such guarantors to go beyond the normal rhetoric question that did you sign or not? Barristers should not readily submit to applications for summary judgments. They should be prepared to listen to their clients to see whether or not some of these guarantees can be enforced automatically. The case law on guarantees in Ghana is not better as the reported cases discuss the form guarantees should take and so far detailed cases of challenging the enforcement of guarantee contracts are concerned they are nonexistent.

In Woodchester Equipment Leasing Co. V. Capital Belts the plaintiff company was stopped from enforcing a guarantee because as the court put it, it turned ‘a blind eye’ when a supplier quoted a higher price which was different from what was stated to a lessee which was known to the plaintiff company.

The law has been piecemeal. All the cases so far discussed give some guidelines to be followed when taking securities. There has been the need to streamline all these rules which are scattered in cases. The House of Lords decision in Royal Bank of Scotland V. Etridge (No. 2) is a landmark case so far as taking of guarantees are concerned in English law. It gives the steps to be taken by the banks to make their securities secure. The

44 Unreported (April 12, CAT NO. 335)
45 See also U.C.B. Corporate Services Ltd V. Williams [2002] E.W.C.A. Civ. 555 where the English Court of Appeal held that the fraud of a husband prevented the wife from making a ‘free and an informed choice’......which entitles the wife to set aside the transaction (guarantee).
46 Barclays Bank V. O’Brien, CIBC V. Pitt, Woodchester Equipment Leasing Ltd V. Capital Belts, UCB Corporate Services Ltd. V. Williams and a host of others.
47 [2001] 4 All E.R. 449
48 See also the British Columbia Court of Appeal decision in E & R Distributors V. Atlas Drywall Ltd., 25 B.C.L.R. 394, stated that, ‘The creditor must ... be in a position to prove that the spouse as surety received a proper explanation of the instrument before being asked to sign it. Some refer to this as the “spousal” rule in Kevin J. Macdonald. Clark, Wilson supra.

case comprised of eight appeals which were heard together. Seven of these cases involved appeals brought by wives who alleged that by their husbands undue influence and misrepresentation they have signed guarantees in favour of the banks on their matrimonial homes for monies advanced to companies in which only their husbands had interest. The monies were not paid and the wives opposed the repossessing the matrimonial homes.

The last appeal involved a wife who had sued a solicitor who advised her for breach of duty. The House of Lords among others held that where a wife stands as a surety for the husband’s debt using the matrimonial home the bank and the solicitor who advises the wife⁴⁹ should adhere to the following guidance:

Banks are put on enquiry when the transaction is not to the wife’s⁵⁰ advantage financially and there is a risk in the transaction. The reasonable steps to be taken by the creditor are;

a) The bank should meet the wife separately and tell her the need to get a solicitor who will explain the nature and the practical effect of the documents to be signed. The solicitor may be the bank’s own or one nominated by the wife. If the wife does not respond, the bank should not proceed.

b) If the bank receives a positive response, the solicitor should be furnished with all details of the prospective borrower’s financial details to enable the solicitor give an informed advice to the wife.

c) If the bank has any reasons to believe that the wife has been misled or was under some form of pressure the solicitor must be given these facts.

d) Lastly, the solicitor who advised the wife must write to inform the bank that the wife has been advised adequately and now understands and appreciates the implications of her actions.⁵¹

The House further held that in a situation where the relationship between the debtor and the surety is ‘non-commercial’, the creditor must en-

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⁴⁹ This includes any other person standing as a guarantor for anybody in a loan transaction emphasis mine.

⁵⁰ Any person who is a guarantor.

⁵¹ Referred to as Solicitor’s Certificate.
sure that the guarantor is aware of the risks involved in standing as a surety. If these steps are complied with the bank can go ahead to enforce the guarantee without any inhibitions.

The case of Etridge now places a great deal of responsibility on the solicitors who may be called upon to advise a surety or a guarantor. The issue is: do the banks follow these guidelines in Ghana? If they do, who gives the advice? Do they issue solicitor’s certificate indicating that the guarantor has been advised? If they fail to ask the guarantor to look for solicitor for advice is the guarantee binding? The writer admits that these issues should be considered by the courts and when found proved in court may influence the enforcement of the guarantee. Before the content of advice to be given by the solicitor is considered the writer pauses to ask the following questions.

- Should the same solicitor advise the bank and the guarantor?
  - If the guarantor should seek an independent advice who pays for it?
  - Does it matter if the family solicitor advises the wife when she guarantees the husband’s debts?
  - What happens when the guarantor does not receive the appropriate advice?
  - What then should be the content of the legal advice?

Etridge places some obligations on solicitors advising those providing securities for a loan. The advice is two fold. It both protects the guarantor and also ensures that the security is enforceable. It is to be emphasised that these guidelines applies to both wives and all other sureties.

The essence of the advice is for the banks to be given a certificate that the party has been adequately advised so that the guarantor does not challenge the enforcement of the guarantee. Be that as it may, where a solicitor gives advice which is inadequate the surety can proceed against the solicitor.\textsuperscript{52} The advice to be given should contain the following:

a) Explain the nature of the document to be signed with its practical consequences and the fact that the party risks losing the home if the business of the borrower does not prosper.

b) The wife and for that matter all guarantors must be told the seriousness of the risk involved. The wife should be told the purpose of the loan.

\textsuperscript{52} James O’Donovan et al., op.cit 244
the total amount, the terms of the facility and wife's financial position including the value of the property being charged.

c) The wife should be told that she has a choice, the decision is hers and hers alone.

d) The solicitor should ask the wife whether she wishes to proceed. If she wants to proceed the solicitor should write to the bank confirming that the wife knows the nature of the documents and its implications. She might even ask the solicitor to negotiate with the bank on terms of the transaction. The solicitor should also not give any confirmation to the bank without the wife's authority.  

Where a solicitor gives a questionable advice and the guarantor therefore suffers, the solicitor will be liable to the guarantor for the breach of a professional duty. This position was tested in the case of McGregor V. Michael Taylor & Co, a firm of solicitors were found liable for breach of duty caused to the claimant for failing to advise her adequately that she had a claim against a bank to set aside a charge on matrimonial home when the solicitors were engaged for advice.

This should inform solicitors that they should be careful when advising so that they would not later be sued for failing in their professional duty.

IV LESSONS - CONCLUSIONS

The question is will a party be able to challenge the validity of a guarantee in the face of these guidelines provided under these cases? Obviously, it will depend on the circumstances of a particular case. One of the notable features in the development of the law of guarantees is the existence of myriads of rights of the creditors and defences that may be raised to challenge the enforcement of guarantees. The effect of the case law on the law of guarantees cannot be underestimated. Today it is possible for a guarantor to resile from a contract of guarantee because of the existence of a vitiating factor.

53 Etridge (H.L), Para. 65. The same advice should be given to all guarantors.  
54 Philip O'Donovan et al., 246  
55 [2002] 2Lloyd's rep 468
At best banks and creditors are required to be candid in their dealing with guarantors.

The guidelines given in the Etridge case with regards to the creditors’ duty and the role of the solicitor is very paramount. Though these guidelines are yet to be tested in Ghana it is hoped that very soon cases of this nature shall arise with the numerous financial institutions now springing up and the various facilities they are offering their customers.

It must be stressed that the law in this area in Ghana is now evolving and the courts will thus need some guidelines from the practitioners in trying to shape the law to suit the Ghanaian circumstances. With regards to advice, it is submitted that solicitors should beware of conflict of interest. They should refrain from acting for the guarantor and the bank at the same time. There is now a burden on them once they accept to advise guarantors because the advice and the consequent certification play an important role in lending. This means that the quality and the content of the advice are very crucial and solicitors can now be sued for not advising adequately. It is thus submitted that solicitors who strongly believe that the transaction is not in the interest of the guarantor may proceed with caution by advising the guarantor not to sign.

Again in Ghana solicitors at banks and other creditor institutions may also proceed with caution and refrain from advising prospective guarantors. This point is based on the conflict of interest where the same solicitor acts for the creditor and the guarantor. The situation may also be true of a family solicitor advising the wife when the husband needs the loan. The prudence of this caveat is to ensure that one party does not act for more than one party in the same transaction.

Where the same solicitor does the advice in the face of this provision to the parties to the contract, it is submitted that the advice so given is a myth and the guarantor should be given the benefit of the doubt.

56 See note 52 supra.
58 Legal Profession (Professional Conduct & Etiquette) Rules, 1969, L.I. 613, Regulation 5(10) states that 'a lawyer shall at the time of retainer disclose to the client all the circumstances of his relationship to the parties and his interest in or connection with the controversy, if any, which might influence the client in selection of counsel. He shall avoid representing conflicting interest'.
The stage is now set for all stakeholders to play their respective roles to ensure that there is a level playing field for all the parties to a contract of guarantee.

V RECOMMENDATIONS
It is the wish of the writer that all the stakeholders will help the law of guarantees to grow and ensure that borrowers and creditors do not unfairly prejudice the predicament of guarantors. The following are thus recommended to guide all\textsuperscript{59} in the area.

For creditors, it is crucial for them to ensure that whatever security taken by them is secure and this means they should ensure that the minimum guidelines given in the Etridge case is obeyed to the letter. It is submitted that following the guidelines only reduces the risk of challenging the enforcement but does not eliminate it. The creditors should ensure that all the needed information is also given to the solicitor to be able to give an informed legal advice to the guarantor. This ensures that the guarantor is not given any opportunity to challenge the contract of guarantee.

The beneficiaries of loans should also ensure that they have been candid to the guarantor as much as possible. Borrowers should not use all possible means to ensure that guarantors sign the guarantee. For if the guarantor successfully sets it aside, the burden will still be on the borrower to pay the loan. Borrowers should also start thinking seriously about insuring loans they take from banks. A time may come when people will be reluctant to surrender their leases to secure money advanced to others when they know that the businesses may fail with its attendant consequences. Taking an insurance policy simply means adding to the loan, but in the likely event of not being able to pay, the insurance company will pay because the party has paid the premium.

Guarantors should also know and understand the effect and consequences of signing a guarantee. The guarantors should know that it is possible for them to lose their property where the borrower fails to pay the loan. Guarantors should thus be prepared to even pay for the legal advice to truly satisfy themselves whether they should sign or not, having regard to

\textsuperscript{59} Creditors, Borrowers, Guarantors, Courts, and Solicitors.
all the circumstances of the case. Indeed the guarantee may be set aside on a stated ground but guarantors should think about the time, money and energy that may be spent to achieve this.

On the part of the solicitors they should know that whether advising at the time of the loan or representing the guarantor in court they should act in the uttermost interest of their client. This means that they cannot act for two parties in the same transaction as this sin against the Legal Profession (Professional Conduct & Etiquette) Rules, 1969, L.I. 613. It is recommended that solicitors should now know their role in lending transaction and the fact that they can now be sued for not giving proper legal advice and it is an indication that solicitors should now proceed with caution. Solicitors should also be prepared to fight for their clients when they plead any of the vitiating factors and pray for the courts to re-open some of these guarantees to satisfy themselves that the guarantors entered into the agreement on their own free accord or not.

The courts are also called upon with the greatest respect, not to be too quick to enter judgments on applications for summary judgments and should be prepared where possible to re-open some of the guarantee contracts. This is so when viewed against the backdrop that the contract of guarantee is a very technical document and having regard to the level of illiteracy in Ghana it will be appreciated if the courts will be slow to enter judgments and take time to examine the circumstances under which these guarantees were given. It will be appreciated if one day one of the people who allege they have interpreted the terms in the guarantees to prospective guarantors to mount the witness box and be asked to explain some of the terms to the court. Their response may influence the courts thinking about contracts of guarantee.

It is respectfully submitted that when these are done the courts would have acted to safeguard the interest of all the parties to the contract of guarantee.