a new test had to be formulated. Arden L.J. was also keen to put the test on a principled basis. However the support that she derives from *T. Choithram International SA* v. *Pagarani* [2001] 1 W.L.R. 1, in formulating a trigger test of unconscionability, is not entirely analogous. The unconscionability discussed in that case resulted from a duty that the donor had because he was a trustee. He had already been construed as declaring himself to be a trustee. In *Pennington* unconscionability is being used to justify imposition of trusteeship.

Interestingly, in *Re Rose*, as in *Pennington*, the donor was not in fact trying to resile from his gift. The challenge came from third parties seeking to upset what the donor still intended, or had intended until death, to be a valid gift. The test is formulated therefore on a hypothetical basis, namely: if the donor had attempted to resile, would equity have permitted this? It is far easier to justify equity's aid when such aid is, in fact, simultaneously realising the intentions of the donor.

The donee in *Pennington* had agreed to become a director in the company, which required a share qualification, and the donor had expressly told the donee that he need not do anything further to secure the transfer of shares. These were the factors that justified a finding of unconscionability. Yet these do not constitute detriment to the donee. In *Banner Homes Group plc* v. *Luff Developments Ltd. (No. 2)* [2000] Ch. 372 two parties agreed that one would buy land and then both would own the land together, as part of a joint venture. The party making the acquisition gained from this agreement by not having the other party as a rival in the buying process. Thus it was unconscionable for this party to renege on the previous agreement, and a constructive trust arose to prevent this. Yet the donor in *Pennington* had not gained anything. So why was equity's preemptive strike, precluding a retraction which had not actually been attempted, justified in the name of unconscionability when the donee had not incurred any detriment in reliance upon the gift and the donor had not gained any benefit? On other facts disclosing genuine unconscionability the imposition of a constructive trust may be justified, but on the facts of *Pennington* and *Re Rose* the search for an explanation continues.

ABIGAIL DOGGETT

FINANCIAL ASSISTANCE: A RESTATEMENT

SECTION 151 of the Companies Act 1985 prohibits the giving by a company of financial assistance for the purpose of the acquisition

https://doi.org/10.1017/S0008197303306300 Published online by Cambridge University Press

of its shares or for the purpose of reducing any liability incurred for the purpose of the acquisition. This penal section is notoriously broad and uncertain in its application. Judges may therefore be tempted to accept constructions which narrow its application at the expense of straining the statutory words. The Court of Appeal's recent decision in *Chaston* v. *SWP Group plc* [2002] EWCA Civ 1999, [2003] B.C.C. 140 has reaffirmed the importance of adherence to the statutory wording.

SWP was negotiating to purchase DRCH's share capital. SWP wished to obtain an accountant's "due diligence" report, detailing the state of the target's finances. Chaston was a director of DRC, a subsidiary of DRCH. He procured DRC to pay the accountant's fees. The Court of Appeal, reversing Davis J., held unanimously that this constituted unlawful financial assistance by DRC for the acquisition of DRCH's shares by SWP, and hence a breach of duty by Chaston. The leading judgment was given by Arden L.J., an expert in this area, and amounts to a restatement of the law. Buxton and Ward L.JJ.'s short judgments agreed with her analysis.

Arden L.J. began by reiterating the mischief against which section 151 is directed: that "the resources of the target company and its subsidiaries should not be used ... to assist the purchaser financially to make its acquisition" (at [31]). On the one hand, the prohibition protects creditors from a sudden increase in default risk which may follow a leveraged acquisition. On the other, it protects shareholders who do not accept an offer made to sell their shares to such an acquiror, or those to whom the offer is not made.

To be prohibited, a transaction must not only constitute "financial assistance" within the general meaning of section 151, but must also fall within one of the four heads of subsection 152(1)(*a*). These restrict the breadth of "financial assistance" in two different ways. The first three heads (subsections 151(1)(*a*)(i)–(iii)) cover only specific *types* of transaction, and use definitional terms with recognised legal meanings (*British & Commonwealth Holdings plc* v. *Barclays Bank plc* [1996] 1 W.L.R. 1 at 13–14). The fourth (subsection 151(1)(*a*)(iv)) imports the general definition, covering "any other financial assistance". It restricts this by reference to the *effect* on the company: the transaction must materially reduce the company's net assets, or the company must have no net assets. On the facts, the payment of fees of circa £20,000 by a company with net assets of less than £100,000 was conceded to be a "material" reduction. Thus the arguments turned on the fourth head, allowing the Court to consider the general meaning of "financial assistance". Arden L.J. reaffirmed (at [32]) that in contrast to the terms used in subsections 151(1)(*a*)(i)–(iii), this is a commercial concept, rather

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than a term of legal art (*Charterhouse Investment Trust Ltd.* v. *Tempest Diesels Ltd.* [1986] B.C.L.C. 1 at 10, *per* Hoffmann J.). In determining whether a transaction constitutes prohibited financial assistance, what matters is its "commercial substance and reality". The Court of Appeal elucidated how this test is to be applied.

The transaction must *assist* the acquisition, whether directly or indirectly. The payments alleged to be financial assistance were in respect of work done on account of the DRC Group. Nevertheless, Arden L.J. considered that "[a]s a matter of commercial reality, the fee payments smoothed the path to the acquisition of shares" (at [38]), or, as Ward L.J. saw it, the target paid for services for which the acquiror would otherwise have paid (at [54]).

Moreover, the assistance must be *financial*. In this respect, it did not matter that the DRC Group's payments had no impact upon the price paid by SWP for the shares. This suggests that the "financial" aspect of the transaction is assessed from the point of view of the target company. As Arden L.J. explained during argument, creditors and minority shareholders might be prejudiced by any use of corporate assets to assist an acquiror (at [63]).

Perhaps the most troublesome point concerns timing. Counsel for Chaston argued that because DRCH's assistance preceded the actual acquisition, it fell outside the prohibition, being "pre-transactional". Arden L.J. rejected this, reasoning that "pre-transactional" assistance was capable of constituting assistance given "indirectly", and moreover that section 151(1) expressly extends not only to actual, but also to *proposed* acquisitions of shares. Whilst the result in *Chaston* seems undoubtedly correct, the temporal scope of section 151 now merits further consideration. For example, at what point does an acquisition become "proposed": when the vendor decides to solicit tenders, or when an offer is made?

The Court of Appeal also clarified what is *not* relevant to the application of section 151. First, they rejected a distinction, based on Australian authorities considered by Aldous L.J. in *British & Commonwealth* (above at 16–17) and relied upon by Laddie J. in *MT Realisations Ltd.* v. *Digital Equipment Co. Ltd.* [2002] EWHC 1628 (Ch) at [30], between "assistance" and a "mere inducement" to enter into a transaction.

Secondly, Arden L.J. affirmed that the application of section 151 is not conditioned upon showing objective detriment to the target company. For example, financial assistance given by way of loan could be objectively beneficial to the company—if the borrower is a good credit risk and the interest rate favourable—but would still be prohibited.

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Thirdly, they rejected Davis J.'s finding that although DRCH's purpose in paying the accountants was to facilitate the due diligence exercise, the acquisition of its shares was merely a *reason* for forming this purpose. This attempt to reverse the logic of Lord Oliver's well-known distinction in *Brady* v. *Brady* [1989] A.C. 755 at 779–780 by applying it to the primary prohibition rather than the section 153 exception would, as Arden L.J. put it, "turn *Brady*, and the section, on its head" (at [49]). DRCH's sole purpose was to facilitate the acquisition of its shares by SWP. Moreover, the fact that the directors had acted in good faith in the interests of the company did not negative this purpose, being relevant only to their motive in forming it.

The Court of Appeal's approach, by focusing attention on the "commercial substance" of the transaction, brings increased certainty to the formulation of the law. Doubtless, however, much scope will remain for differences over the application of this test.

JOHN ARMOUR

CONDEMNED TO LIFELONG IGNORANCE

A DICKENSIAN law dating back to the dire days where women were driven, by poverty and stigmatization of single motherhood, to give birth in secret and abandon their newborn children outside nursing homes, allows women in France to give birth anonymously, which means that the child will never know the identity of its natural mother, nor—in practice—that of its father or any siblings, who in turn will never learn of the existence of the child. This legislative regime, originally introduced to encourage women to give birth to unwanted children in the safety of a hospital, is still invoked by roughly 600 women every year. Its compatibility with the European Convention of Human Rights was challenged unsuccessfully in a recent case before the European Court of Human Rights: *Odièvre* v. *France*, judgment of 13 February 2003 (Grand Chamber).

The applicant had been born anonymously in the 1960s and grown up with adoptive parents. Upon her request for information regarding her origins, the French authorities had furnished her with a non-identifying description of her biological family (which, incidentially, revealed the existence of siblings), but refused to disclose the identity of her birth mother or any other blood relative to her. The applicant argued that the non-disclosure of this (fortuitously available) information contained in her file amounted to a violation of her right to private and/or family life protected by

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