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ENSURING THE PROTECTION ON MATRIMONIAL HOME: SHOULD THE PRINCIPLES ESTABLISHED UNDER ENGLISH LAW BE INTRODUCED INTO TURKISH LAW?

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Abstract

Article 194 of Turkish Civil Code establishes the mandatory rule that either of spouses shall not enter in any transaction considering matrimonial home unless the other spouses' express consent is obtained. This consent is required for the protection of matrimonial home as it is the property where spouses reside together. The same protection is also provided under English law by the equity based undue influence doctrine. In applying this, English courts considered the balance between the parties of the transaction and in Royal Bank of Scotland v Etridge the House of Lords established set of principles in order to strike the required balance and protect the spouse against the prospect of other spouse's undue influence. Considering these, this paper will seek an answer to the question: whether common law-like principles should be introduced into Turkish law for the purpose of ensuring the protection of the parties and the matrimonial home?

Key Words

Matrimonial home • Undue Influence • Art. 194 of TCC • Express Consent • Surety Spouses

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AİLE KONUTUNUN KORUNMASININ GÜÇLENDİRİLMESİ: İNGİLİZ HUKUKU'NDA DÜZENLENEN KURALLAR TÜRK HUKUKU'NDA UYGULANMALI MI?

Öz

Türk Medeni Kanunu'nun 194. Maddesinin emredici hükmü gereğince eşlerden herhangi biri aile konutunu ilgilendiren bir hukuki işlem yapmak istediğinde yapılacak bu işlemin geçerli olması için diğer eşin bu işleme ilişkin açık rızasının alınması gerekmektedir. Böyle bir rızanın şart koşulmasının sebebi eşlerin birlikte yaşadıkları aile konutunun korunmasıdır. İngiliz Hukuku'nda da aynı koruma equity (hakkaniyet) hukuku çıkışlı bir doktrin olan haksız etki doktrini yoluyla sağlanır. İngiliz mahkemeleri bu doktrini uygularken aile konutunu esas alan hukuki işlemlerin tarafı olan herkesi değerlendirmeye almış ve bunlar arasındaki dengeyi sağlama amacıyla tarafların uymasını ve takip etmesini istediği bir takım kurallar geliştirmiştir. Bu kurallar işlemin tarafı olmayan eşi, diğer eşin uygulayabileceği haksız etkiden korumayı amaçladığından eşten alınacak rızanın eşin kendi hür iradesinin sonucu olduğuna emin olmak için neler yapılması gerektiğini belirler ve taraflara bunlara uyulması yükümünü yükler. İşbu makale de madde 194 ile amaçlanan korumanın daha da pekiştirilmesi için İngiliz Hukuku'nda uygulanan kuralların Türk Hukuku'nda uygulanabilirliğini araştırmaktır.

Anahtar Kelimeler

Aile Konutu • Haksız Etki • Türk Medeni Kanunu Madde 194 • Açık Rıza • Eşlerin Korunması

I. INTRODUCTION

Matrimonial home, as a legal concept in family law can be defined as property or dwelling where spouses reside together as a family[1]. This concept was introduced into Turkish law via the new Turkish Civil Code (TCC) number 4721[2] which came into force in 2001. Although TCC does not define what 'matrimonial home' is, it provides remedies for issues that may arise relating to the matrimonial home in various arti-

1 DURAL Mustafa/ ÖĞÜZ Tufan/ GÜMÜŞ M. Alper, Türk Özel Hukuku Cilt III Aile Hukuku, 15th ed., İstanbul, 2020, p 168, 174. It is also defined as dwelling where all family activities has been centered in by Serozan in SEROZAN Rona, Aile Konutunun Şerhinde Değişik Bir Yaklaşım, Prof. Dr. Zahit İmre'ye Armağan, Der Yayınları, İstanbul, 2009, 261-278, p 281.

2 Official Gazette, 08.12.2001, No 24607.

cles[3]. However, it is worth noting at this early stage that only Art.194, which is provided as mandatory rule[4], will be the main focus of this work, as it imposes some duties onto spouses for the purpose of protection of the matrimonial home and the spouse who is not the party of the transaction concerning the matrimonial home[5]. The first paragraph of Art.194 stipulates that spouses shall not enter in any transaction that would transfer the ownership of the matrimonial home, terminate the tenancy agreement or limit the rights on the matrimonial home, unless an express consent is given by the other spouse. This is of quite importance, as matrimonial homes are usually the most valuable assets of spouses[6] and usually the preferred means to raise money for different purposes i.e. providing a capital for a small business that is owned by one of the spouse or simply for investment purposes. It is evident under Art.194 that such transactions cannot be completed without obtaining the express consent of the other spouse[7]. So that, the article ensures the protection of matrimonial home and family.

When compared to Turkish law, the matter has been developed rather differently in English law. Although the matter is dealt within the Acts specifically enacted on family law and matrimonial home[8], the core principles are set out by the judiciary on the common law based doctrine

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3 Such as articles 194, 240, 254, 255, 279 and 652.

4 So that it cannot be ruled out by any agreement that permits spouses to act otherwise. (Y.2.H.D., T. 26.02.2018, E. 2018/1075, K. 2018/2651. (www.kazanci.com) (The 2nd Civil Chamber of the Court of Cassation also held that neither of the spouses can waive their right to give consent nor they can rule out the requirement of an express consent for the transactions on their matrimonial home, since the Article is set out as a mandatory rule.)

5 It should here be stated that TCC does not only imposes obligations on spouses regarding their matrimonial home, it also provides certain rights to them. For instance Art.194/III *'The spouse who is not the owner of the matrimonial home may request matrimonial home to be registered as such in the Land Registry'*.

6 Royal Bank of Scotland v Etridge (No.2) [2001] UKHL 44; [2002] 2 A.C. 773 per Lord Nicholls para 34.

7 DURAL/ÖĞÜZ/GÜMÜŞ, p 179. KILIÇOĞLU Ahmet M, Aile Hukuku, 4th ed., Ankara, 2019; AKINTÜRK Turgut/ ATEŞ Derya, Aile Hukuku, 21st ed., İstanbul, 2019.

8 Family Law Act 1996, Matrimonial Homes Act 1983.

of 'undue influence'[9]. It was therefore by this doctrine established that not only the consent of the spouse is needed for matrimonial home to be an absolute security against the home for the money lent, but also this consent must be given freely meaning that it should not be given under any pressure and it should be the product of a free will of the spouse. Otherwise, the transaction could be set aside due to the undue influence exerted by the other party. The creditors therefore must be sure that the consent is a product of a free will of the spouse. However in practice, it would not be straightforward to ensure that the consent is given under the free will since the guarantee transaction involves different parties who have different obligations. Indeed, English courts have been challenged with the different aspects of the matter andtriedstriking a balance between parties while ensuring that the matrimonial home[10] remains acceptable as security for business loans. In doing so, the House of Lords[11] restated that area of law in *Royal Bank of Scotland v Etridge (No.2)*[12]and more importantly established a set of rules to be followed by the parties that involve in the transaction particularly financial institutions i.e. banks.

These further obligations are established for the purpose of ensuring that the spouse whose consent is required acts and gives its consent by knowing all the possible consequences of the transaction. This would also enhance the protection on the matrimonial home and protect third parties who are the party of the transaction regarding matrimonial home. In Turkish law however, Art. 194 of TCC only requires an express consent for the transaction regarding matrimonial home to be valid and does not impose English law-like duties on the parties of the transaction. It is evident that without an express consent, the transaction would be unenforceable. Yet, what would be the consequences of giving the con-

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9 For detailed analysis on the doctrine of undue influence *See* O' SULLIVAN Janet, O' Sullivan & Hillard's The Law of Contract, 8th ed., Oxford University Press, 2018, Ch 11.

10 *Royal Bank of Scotland v Etridge* (No.2) [2002] 2 A.C. 773, para 34.

11 From 1 October 2009, Supreme Court has replaced House of Lords as highest appeal court in England.

12 [2002] 2 A.C. 773.

sent without understanding the all possible consequences of the transaction? It can be said that if this is brought before the court, the transaction might be set aside. If not, it would be enforceable on the ground that there exists consent. Even that the acquisition of the matrimonial home by bona fide third party might be protected by virtue of Art. 1023 TCC[13]. This begs the question if further obligations should be required from the parties as to the consent for the purpose of ensuring the protection provided by Art. 194 and to prevent the prospects of setting aside the transaction. In examining this, aforementioned common law principles are to be taken as guidelines and the following question is to be answered: if common law-like principles-which requires more than express consent for the transaction to be valid- should be applied in Turkish law?

In answering this question, this paper scrutinizes three different dimensions. First, the application of Art.194 of TCC in practice and the approach taken by Turkish courts thereby are to be conducted. This examination would provide clear understanding on the current legal framework and be assistive to determine if the law requires more insight. Second, the same examination is undertaken from the perspective of English law and more particularly on the House of Lords' findings in *Royal Bank of Scotland v Etridge (No.2)*[14]. Finally, in light of the findings of these examinations, the main question of this paper is sought to be answered. Ultimately, it should be worth noting that by no means this paper seeks to promote direct introduction of the approach taken by com-

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13 It should here be stated that the issue of the enforceability of the transaction that considers the matrimonial home against bona fide third parties with regard to Art. 1023 of TCC has also been the subject before the courts in most cases. Even that there are divergent decisions given by different chambers of the Court of Cassation. For instance, one chamber held that the acquisition of the matrimonial home by bona fide third party would be protected by virtue of Art.1023 of TCC unless the matrimonial home is annotated in the Land Registry. Y.H.G.K. T 02.03.2016, E. 2016/2-1420, K. 2016/210 (www.kazanci.com). For a judgment suggesting otherwise *See* Y.H.G.K T 15.04.2015, E. 2013/2-2056, K. 2015/1201 (www.kazanci.com). However, it should be underlined that this issue is not within the scope of this work. Thus, it will not be discussed within. For detailed analysis and discussion *See* DURAL/ÖĞÜZ/GÜMÜŞ, p 169; ŞIPKA Şükran, Aile Konutu ile İlgili İşlemlerde Diğer Eşin Rızası (TMK md.194), İstanbul, 2004, p 150; GENÇCAN, Ömer U., Aile Konutu (Yargıtay Uygulaması), Ankara, 2017, p 263; AKINTÜRK/ATEŞ, p 122.

14 ibid.

mon law into Turkish law. Perhaps, if necessary it may usher a way to amend Art.194 by the advocated suggestions below.

II. PROTECTION OF MATRIMONIAL HOME UNDER TURKISH LAW

A. ART.194 OF TCC

As a general rule, Art.193 of TCC allows spouses to enter into any transaction with each other or third parties. However, being the exception of this general rule, TCC. Art.194 limits the freedom of spouses, when the matrimonial home is the subject of transaction. The Article, titled as matrimonial home, reads

'Either of spouses may not terminate the tenancy agreement regarding the matrimonial home, transfer of the ownership of matrimonial home or limit the rights on the matrimonial home unless an express consent is given by the other spouse.

If the consent is not given without justified reason, the spouse may request the Court's intervention.

The spouse who is not the owner of the matrimonial home may request matrimonial home to be registered as such in the Land Registry.

In case the matrimonial home is provided by rent by one of the spouses, the spouse who is not a party to the contract becomes subject to the tenancy agreement provided that the notification is to be made to the landlord and both become jointly and severally liable.'

The first paragraph restrains spouses from entering into certain transactions regarding matrimonial home, unless the express consent of other spouse is granted. In the preamble, it is underlined that the purpose of the enactment of this article is to ensure the protection of matrimonial home and in turn, the family[15]. Reading reverse, if the matrimonial home is not the subject of the transaction, the spouses may enter into any transaction without the consent of the other spouse[16]. Hence, in

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15 KILIÇOĞLU, p 198; ERDEM Mehmet, Aile Hukuku, 2nd ed., Ankara, 2019, fn 381.

16 ÖZTAN Bilge, Aile Hukuku, 6th ed., Ankara, 2015, p 301. Therefore, such transaction limits the owning spouse's freedom of entering into transaction. For the discussion on the legal nature of this limitation *See* DURAL/ÖĞÜZ/GÜMÜŞ, p 215; ŞIPKA, p 46; GENÇCAN,p 31. For a counter argument SEROZAN, 285-288 ff.

order to determine whether a transaction caught by the first paragraph, the very first thing that needs answering is what is the matrimonial home. Although TCC does not provide an answer to this question, in its preamble the matrimonial home is described as *'a dwelling filled with memories in which spouses reside together, give shape to their life, live through good and bad days in together'*[17]. Therefore, the dwelling where spouses reside and live through their life together would be their matrimonial home and the transactions relating to such property can be said to fall within the limitations stated in the Art.194[18]. It should be underlined that in principle it is accepted that there cannot be more than one matrimonial home[19].

It is hence crucial to determine whether a property is the matrimonial home. In light of the above-mentioned conditions, first thing to conduct in determining if the dwelling is the matrimonial home, is the intentions of spouses as to residing together and living their everyday life in there as their matrimonial home. The ownership of dwelling is not taken into account when determining it is a matrimonial home or not. Spouses may have their dwelling registered as their matrimonial home, even if one of them is a sole owner. This is also the case if they are the tenants in this dwelling, or if one or both of them have the right of usufruct on the dwelling[20].

Furthermore, spouses benefit from the protection provided in Art.194, even if the dwelling is free of an annotation as a matrimonial home in the Land Registry[21]. As long as the dwelling could be identified

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17 ERDEM, fn 381.

18 As it is pointed out by Serozan the matrimonial home is a dwelling where the family activities has been centered and carried out in. SEROZAN, p 281.

19 Y.2.H.D, T. 02.02.2006, E. 2005/16473, K. 2006/799 (www.kazanci.com). However it should be stated that there is no such rule stated in TCC. It is well embraced among the scholars that the matrimonial home may be more than one in exceptional cases provided that both fulfill the conditions stated above. Yet, still only one of them would be benefitting from the protection provided in Art. 194. ŞIPKA, p 85; DURAL/ÖĞÜZ/GÜMÜŞ, p 175, GENÇCAN, p 66. For counter argument *See* ÖZTAN, p 301.

20 ŞIPKA, p 79; DURAL/ÖĞÜZ/GÜMÜŞ, p 176.

21 This is because, the protection is provided for matrimonial home as it qualifies the specifics of matrimonial home (where the spouses reside and live their life together)

as a place where spouses reside and live together -matrimonial home- Art.194 applies to the transactions concerning this dwelling that are made by one of the spouse[22]. Therefore, once a dwelling is identified as matrimonial home then the spouses' freedom of conducting legal transactions on the matrimonial home becomes subject to Art.194. This is the underlying reason why the article states *'[e]ither of spouses may not terminate the tenancy agreement regarding the matrimonial home, (…),or limit the rights on the matrimonial home unless an express consent is given by the other spouse'.* This would also mean that the spouses are bound to the limitations set out in the Art., even if they do not own the property[23]. Hence, for instance a spouse would not be able to sell the matrimonial home nor would it be able to have a lien granted on the matrimonial home[24] unless the express consent is granted by the other spouse.

It should be emphasised that if the dwelling cannot be characterised as a matrimonial home, which may happen for different reasons, then the other spouse's consent would not be required for the validity of the transaction regarding this dwelling and therefore actions may not fall under Art.194/I[25]. Indeed, there are several cases that have dealt with such matters. For instance, if the marriage is dissolved with divorce or death, the matrimonial home would no longer be considered the matri-

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not because the property has been put annotation of matrimonial home in the Land Registry. (Y.H.G.K, T. 24.5.2017, E. 2017/2-1604, K. 2017/967) (www.kazanci.com)

22 Y.H.G.K., T. 04.10.2006, E. 2006/2-591, K. 2006/624 (www.kazanci.com)

23 It should however be underlined that spouses cannot have the matrimonial home annotation put on the dwelling that is not owned by them individually or solely. It is because the property right of the owner of the dwelling is absolute and cannot be restricted by matrimonial annotation put in Land Registry. (Y.2.H.D., T. 16.09.2008, E. 2008/11885, K. 2008/11958) (www.kazanci.com)

24 Y.2.H.D, T. 26.02.2018, E. 2018/1075, K. 2018/2651 (www.kazanci.com). (The court stated that although the lien on the matrimonial home does not necessarily prevent the family's right of use and habitation, the spouse who is the owner of the matrimonial home should obtain the express consent by its' spouse in order to a lien that is granted to a third party on the matrimonial home be valid.)

25 GENÇCAN, p 35; ÇABRİ Sezer, 'Aile Konutu Şerhi', Prof. Dr. Ergon A. Çetingil ve Prof. Dr. Rayegan Kender'e 50. Birlikte Çalışma Yılı Armağanı, İstanbul, 2007, 401-414, p 402; BARLAS, Nami, Yeni Medeni Kanunu Hükümleri Çerçevesinde Eşler Arası Hukuki İşlemi Özgürlüğü Ve Sınırları, Prof. Dr. Necip Kocayusufpaşaoğlu için Armağan, Ankara, 2004, 115-143, p 121.

monial home[26]. Or if the matrimonial home is rented out to a third party, then it could not be a matrimonial home, since spouses do not reside and live in this rented out property anymore[27]. As this is not used as a matrimonial home, the spouse who is the owner of the dwelling may get into any transactions under its freedom of contract without procuring the other spouse's express consent.

Against this background, how the requirement of an express consent have been interpreted and applied by Turkish courts will be examined below, since it is the only requirement stated in the article for such transactions made by the spouse regarding matrimonial home to be enforceable.

B. APPLICATION OF ART.194 BY TURKISH COURTS

It is surprisingly not uncommon that Turkish courts have been challenged to decide on the matters relating to the application of Art.194. As underlined above, Art.194 protects the matrimonial home and the family. Yet, its functionality is not as bare as it might be thought it would be. These transactions do not involve only spouses. There might be often another party who actually is party to such transactions. In most cases, this party could be banks or other financial institutions. It is therefore evident that the imposition of a certain obligation (obtaining the express consent from the other spouse) on the spouses would also affect this party.

As a default conclusion of this inter-connected transactions, the issues revolving around whether the dwelling is a matrimonial home[28]or whether the legal transaction regarding matrimonial home made by one of the spouses is valid and enforceable against third parties have often become the main subject before the courts[29]. As the application of re-

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26 Y.2.H.D., T. 07.07.2014, E. 2014/12999, K. 2014/15762 (www.kazanci.com) Having said that if the spouses are not living together without ending their marriage or are granted a separation order by the court, transactions regarding their matrimonial home would still be subject to the limitations stated in Art. 194 as the marriage has not yet been dissolved. ÇABRİ, fn 11.

27 Y.2.H.D., T. 01.03.2012, E. 2011/9066, K. 2012/4360 (www.kazanci.com)

28 Y.H.G.K., T. 02.03.2016, E. 2015/2-53, K. 2016/211. (www.kazanci.com)

29 See fn.13

quirement of obtaining an express consent and its extent are the main concern of this article, cases consider these matters should be assessed below[30].

As the express consent is the only requirement set out in Art.194/I, the courts have applied it to the cases before them and examined whether the consent granted by other spouse was fulfilled this requirement. The General Assembly of Civil Chambers of the Court Of Cassation stated that even an oral consent given by the other spouse fulfils the requirement of the Art., since it remains silent on whether consent should be oral or written. What has been underlined that as long as consent is express with regard to the wording of the Art., it is immaterial whether it was given orally or written[31]. In supporting this, the 2nd Civil Chamber of the Court of Cassation decided that the express consent must be granted for a particular transaction meaning that the consent given must be unequivocal for that particular transaction done by the other spouse[32]. Although the Chamber did not put a word on this, it is thought that this decision would also follow that the spouse giving consent should undoubtedly possess the details of that transaction which may entail further results. If this is not the case, the requirement of an express consent would have a nominal impact on the protection of matrimonial home.

To sum up, when either of the spouses enters into transactions regarding matrimonial home, the other spouse's consent should be obtained and this consent must be given expressly for the certain transaction that requires consent in order to be valid and enforceable. Reading reverse, if the consent does not satisfy these requirements, the transaction would not be enforceable.

These requirements appear to be unambiguous and perhaps uncomplicated to follow for a spouse in order to enter into an enforceable transaction regarding the matrimonial home. However, it should not be

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30 For detailed assessment on matrimonial home *See* ŞIPKA.

31 Y.H.G.K., T. 15.04.2015, E. 2013/2-2056, K. 2015/1201. (www.kazanci.com); ŞIPKA, 142-143 ff.

32 Y.2.H.D., T. 08.11.2016, E. 2016/20910, K. 2016/14532. (www.kazanci.com); ŞIPKA, p 135; DURAL/ÖĞÜZ/GÜMÜŞ, p 178.

overlooked that there might be another party or parties who would like to involve in such transactions with one of the spouse. It is evident that not having an express consent from the other spouse would most likely have an effect on this party, as the transaction would be unenforceable without the required consent. Therefore, fulfilling the requirement of an express consent is of great importance for this party as much as it is for the spouse who enters into the transaction. Yet, the question at this point is how could this party make sure that the required consent is duly obtained, and given expressly for that particular transaction? More importantly, are there any rules to be followed or any obligations to be undertaken by this party to ensure the enforceability of the transaction? It is evident that Art.194 does not mention or impose any duties on this party. This however does not necessarily mean that the matter in question should be overlooked. Unlike Turkish law, English law imposes certain duties on this party in order to ensure that the consent is duly given and is the product of free will of the spouse. Bearing all these in mind, the question is: Has a similar approach been considered by Turkish courts in dealing with the cases that have arisen from the application of Art. 194?

It is opined by the author that the answer to this question must be affirmative, albeit the fact that the matter has not been considered by the courts to a great extent. In a case dated back to 2014[33], the General Assembly of Civil Chambers of the Court of Cassation held that the party of the transaction regarding matrimonial home (which was the bank in this case) must act with such diligence as a prudent owner would deemed to be necessary. In this case, the bank was the provider of the capital that the husband sought for and the dwelling that he and his family had been living together was the security against this money lent from the bank. A lien was granted on this dwelling for the bank. When the debt was not satisfied by the husband, the bank acted to enforce the security by selling the property that the lien was registered on. That was when the wife had started the proceeding against the bank by claiming that process of thesale should be ceased on the ground that the lien

[33] Y.H.G.K., T. 02.03.2016, E. 2014/2-1420, K.2016/210 (www.kazanci.com)

granted by his husband was not valid in the lack of her express consent. The first instance court decided that the lien granted on the concerned dwelling must be set aside, as it was identified as a matrimonial home - regardless of not being put an annotation as matrimonial home in Land Registry- and the consent of the wife was required for this transaction to be valid under Art.194. Yet, this decision was dismissed at the appeal[34]. The case then came before the General Assembly of Civil Chambers of the Court of Cassation which restated the fact that having put an annotation of matrimonial home in Land Registry is not the requirement for benefitting from the protection provided in Art.194. Accordingly, it was held that the bank must have investigated, if the concerned dwelling was used as a matrimonial home. Moreover, in the case it was evident that the property was identified as dwelling on the assessment report that the bank had issued. Against all these, the court held that the bank should have acted with such diligence as a prudent owner would deemed to be necessary and investigated if the wife's consent was obtained by the debtor husband for the lien. In another case that shares similar facts, the General Assembly reiterated the fact that when the bank or another financial institution is the party of the transaction regarding matrimonial home, it should act with the diligence as a prudent owner would deemed to be necessary[35]. This would require bank to investigate whether the dwelling, which is subject to the transaction, is a matrimonial home.

Such due diligence is not only required to take necessary measures to investigate whether the requisite consent is given but also requires investigating whether this consent fulfils the necessary elements stated in Art.194 i.e. being express. This is also the outcome of the General As-

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34 The 2nd Civil Chamber of the Court of Cassation grounded its decision on Art. 1023 of TCC that protects the third parties' ownership or real right when they act bona fide. It was held that the lien granted on the property which did not put annotation as matrimonial home must be valid unless the wife prove that the bank did not act bone fide meaning that it knew or should have known that the property was a matrimonial home. (Y.2.H.D., T. 12.12.2013, E. 2013/11321, K. 2013/29334) (www.kazanci.com) For detailed examination on the application of Art.1023 in these cases *See* DURAL/ÖĞÜZ/GÜMÜŞ, p 180.

35 Y.H.G.K., T. 02.03.2016, E 2015/2-53, K.2016/21. (www.kazanci.com)

sembly's judgment held in 2017[36]. In this case, similar to the cases aforementioned, the issue was revolving around the validity of the lien that was granted for the bank by the husband on the matrimonial home. Unlike the other cases, the bank knew that the dwelling was a matrimonial home; hence the consent of the wife was indeed sought and requested from the husband before entering into the transaction. In result of this, the husband provided a certificate of consent that was allegedly signed by his wife. However in the proceedings the wife claimed that she had not given the consent hence the signature on the certificate was not hers. This in fact was confirmed in the proceedings by the Institution of Forensic Evidence that the signature was not hers. Following this, the court held that although the bank sought for the consent and it was provided so by the husband, the lien that was granted on the matrimonial home was not valid and enforceable, as the consent given did not fulfill the requirement of being express. It was stated that the due diligence that the bank must perform in entering into a contract also involves investigating the validity of the consent as well as whether it is genuine.[37] On this ground, the lien was held to be invalid and not enforceable.

It is evident that these decisions provide further guidance on the application of Art.194 while reinforcing the purpose of the protection of matrimonial home. Yet, the last case mentioned above bears rather greater importance for the main purpose of this paper. It is the outcome of this case that the party of a transaction who is not the spouse must make sure that the consent is given by the other spouse and it is genuine and express for this transaction to be valid. This is the direct result of the due diligence principle that the parties of the contract are to be expected to perform before entering into an agreement. Art.194 does not expressly require such steps to be taken by the other party of the transaction regarding matrimonial home. Even though Art.194 does not mention such duty, in consistent with the case law it is thought that when the matrimonial home is subject to any transaction, the party other than the spouse is also required to take necessary steps to make sure that the ex-

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36 Y.H.G.K., T 24.05.2017, E. 2017/2-1604, K. 2017/967. (www.kazanci.com)

37 ibid.

press consent is obtained by the other spouse. This is also the necessary outcome of the fact that it is often the bank that is the other party to this transaction. By virtue of Art. 18/II of the Turkish Commercial Code, banks are under a duty to act with the diligence as a prudent owner would deemed to be necessary in engaging all trade activities and entering into transactions. In that respect the application of Art.194 in Turkish law approximates to English law which is to be examined next below.

III. PROTECTION OF MATRIMONIAL HOME UNDER ENGLISH LAW

A. AN OVERVIEW OF THE APPLICABLE RULES

Under English law it was accepted that the spouses would have been under the duty to live together while their marriage lasted.[38] Although it is no longer considered as a duty, where the spouses live in is determined as their matrimonial home and the protection is still provided by law for the purpose of protecting the spouses' interest in this dwelling that arises out of their consortium to each other. These rights are referred to as 'home rights' and laid down in the Part IV of the Family Law Act 1996[39]. Later, Section (S) 30 of this Act was substituted by Civil Partnership Act 2004[40] in order to provide the same rights to civil partners in civil partnership, as well[41]. These rights principally entitle the spouse -who does not own the dwelling identified as matrimonial (/civil partnership) home- to a right to occupy. This would mean that the spouse entitled to this right cannot be evicted or excluded from the matrimonial home by the other spouse while it retains the right[42]. As a result of this, if, for example the dwelling is sold by the owning spouse to a

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38 LOWE Nigelle V./ DOUGLAS Gillian, Bromley's Family Law, 11th edition, Oxford University Press, 2015, 152; HERRING Jonathan, Family Law, 7th Edition, Pearson, 2015, 193 ff.

39 See http://www.legislation.gov.uk/ukpga/1996/27/part/IV#commentary-c21001491

40 See http://www.legislation.gov.uk/ukpga/2004/33/section/101

41 With that respect, it should be reminded that this article keeps using the term spouse meaning both spouses and civil partners.

42 It should be noted that this protection does of course not last indefinitely. S. 33 of the Family Law Act 1996 sets out the principles and conditions when and how long a spouse may benefit from this right to occupy the matrimonial home. For instance: termination of a marriage or civil partnership by death.

third party, then the non-owning spouse who has the right to occupy cannot be evicted from this property, providing that its right to occupy is registered in the Land Registry[43].

With respect to the Family Law Act 1996, the protection of matrimonial home under English Law does not appear to be similar to what Art.194 of TCC provides under Turkish Law. Having said that, these are not the only rules that are applied to the matters relating to matrimonial home under English Law. As stated in Introduction, common law doctrine of undue influence is applied by equity courts to these issues and the law on matrimonial home has been developed more comprehensively. Before analysing the case law, it is worth mentioning the doctrine of undue influence in short, though.

Undue influence is basically categorised as one of the forms of an unacceptable conduct[44]. In equity, it is established that the transaction that is procured by undue influence exerted by one party on the other may be set aside[45]. It is because, the will of the party who is under influence exerted by other party cannot be considered as an expression of free will, accordingly the law does not protect such abuse[46]. It is evident that this influence must be undue in order for the transaction to be set aside. As Trietel formulates '*undue influence is exercised by A whenever, through his influence, the transaction was not entered into as a result of B's own freewill'*[47]. Yet, ascertaining undue influence is still, in Lord Clyde's own words, '*something which can be more easily recognised when found than exhaustively analysed in the abstract*'[48].

Undue influence is traditionally established in two categories; actual and presumed undue influence[49]. Actual undue influence refers that

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43 S. 31 of the Family Law Act 1996.

44 *Royal Bank of Scotland v Etridge (No.2* [2002] 2 A.C. 773 para. 6. Duress is another example for unacceptable persuasion.

45 Trietel on the Law of Contract, 14th edition, Ed. PEEL Edwin, Sweet & Maxwell, 2015, 10-013 ff; O' SULLIVAN Janet, O' Sullivan & Hillard's The Law of Contract, 8th ed., Oxford University Press, 2018, Ch 13.

46 *Royal Bank of Scotland v Etridge (No.2),* [2002] 2 A.C. 773, para. 7.

47 Trietel,10-014.

48 *Royal Bank of Scotland v Etridge (No.2),* [2002] 2 A.C. 773 para.92.

49 Class 1 and Class 2 are also used instead of terms actual and presumed.

actual undue influence exercised by one party to other while entering into the transaction and this is proved, on the other hand presumed undue influence means that there are some reasonable grounds to assume that there is an undue influence which is however yet to be proved[50]. A good illustration would be this: when someone is convinced by his friend to sell his car to himself, this transaction may be set aside when the influence of the friend is proved. In this example, the influence exercised on this party would be the actual one. In contrast, presumed undue influence, as its name suggests, refers that it is presumed that there is an undue influence exercised by one party and the presumption is grounded on the nature of the relationship between parties i.e. the one with trust and confidence. It can be said as to this example that the relationship between two friends does not necessarily require one party to repose the trust and confidence to other, as it would be expected in a relationship between parent and child. Indeed, it has been established – albeit not exhaustively- by equity courts that relationships between parent and child, doctor and patient, solicitor and client and trustee and beneficiary give rise to the presumption that the undue influence has been exercised[51]. In deciding which relationship gives rise to the presumption of undue influence, the test is whether the relationship between parties is the one where trust and confidence is reposed[52]. This type of presumed influence is categorised as Class 2A[53].

What is significant as to this paper is that the relationship between husband and wife is not considered as one of the relationships in Class 2A type, on the ground that in this relationship it is only to be expected that wife and husband would have an influence over one another to

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50 Trietel, 10-018; Chitty on Contracts, 33rd edition, Ed. BEALE Hugh, Sweet & Maxwell, 2019, para 45.031.

51 *Royal Bank of Scotland v Etridge (No.2)* [2002] 2 A.C. 773 paras 10, 18.

52 Trietel, para 10-020; ibid. para 18 per Lord Nicholls *'The law has adopted a sternly protective attitude towards certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where, moreover, substantial gifts by the influenced or vulnerable person are not normally to be expected.'*

53 Here it must be pointed out that *'that presumption arises only if it is also shown that the transaction is one which calls for explanation'*. Trietel, para 10.025; *Royal Bank of Scotland v Etridge (No.2)* [2002] 2 A.C. 773 para 14.

some extent, providing that they are loyally bonded with each other under a matrimonial union[54]. Though, this does not mean that husband or wife does not benefit from the relief provided under the doctrine of undue influence when the transaction is done under the influence of another. This would only follow that being in a relationship of husband and wife does not give a rise to presumption of undue influence. Following that either husband or wife may still set aside the transaction that is done under the influence of another, if there is an actual influence or if the concerned transaction falls into the Class 2B of presumed undue influence.

Unlike Class 2A presumed undue influence cases, under Class 2B, presumption of undue influence does not automatically arise as a matter of law. In Class 2B cases, there is a relationship in which trust and confidence are reposed and yet this is not accepted as a matter of law. Here, the party who claims that there is an undue influence shall prove that there is a relationship that trust and confidence reposed. As Treitel[55] explains in Class 2B cases *'there is proof that [B] has placed trust and confidence in [A]'* whereas in Class 2A cases *'[B] need not prove he actually reposed trust and confidence in [A] because their relationship is such that the law presumes irrebuttably that [A] had influence over [B], e.g. where their relationship is that of parent and child'*. In result of this, in Class 2B cases the presumption may be rebutted by showing that the party enters into the transaction as a result of its free will[56]. In Treitel's own words;*'the most usual way of doing this is to show that the other party (B) had independent advice before entering into transaction'*[57].

This can be of assistance to provide answers to the questions of this paper, since this is applied to the cases concerning surety spouses

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54 *Yerkey v Jones* (1939) 63 CLR 649, 675 cited from *Royal Bank of Scotland v Etridge (No.2)* [2002] 2 A.C. 773 para 19.

55 Treitel, para 10.025. Here, it must be underlined that there exists a discussion amongst academics and even in the Supreme Court that whether there should be different categories of presumed undue influence. For further discussion *See* Trietel, 10.025; Lord Scott and Lord Hobhouse's reasoning in *Royal Bank of Scotland v Etridge (No.2)* [2002] 2 A.C. 773.

56 *Royal Bank of Scotland v Etridge (No.2)* [2002] 2 A.C. 773 para 7.

57 Trietel, para 10-027.

where the spouse provides a security for the other spouse's business debts usually by ways of granting a charge on their matrimonial home that is either owned by itself or jointly with the spouse[58]. In a landmark case *Royal Bank of Scotland v Etridge (No.2)*[59], which considered group of spouse surety transactions, the House of Lords established set of principles for parties to follow in order to make sure that the transaction would not be in jeopardy to be set aside as a result of undue influence. This is where this matter appears to be closely analogous to the matters that arise out of the application of Art.194 of TCC which are examined above.

B. THE ETRIDGE CASE

In *Royal Bank of Scotland v Etridge (No.2)*[60] *–the Etridge case-*, (comprised eight conjoined appeals) which is stated above,theHouse of Lords dealt with the transactions where one of the spouses was the surety for the other spouses' business debt and agreed to grant a lien for the bank or other financial institution on the matrimonial home which was owned by either, individually or jointly with the other spouse. As those cases were examined under the doctrine of undue influence, the House of Lords considered the position of the financial institutions in these cases and established principles for them to follow to ensure that the surety enters into the transaction by exercising its free will.

First of all, it was stated that it is reasonable to expect from creditors -which are most likely the banks- to take some reasonable steps[61] '*to*

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58 For detailed analysis of such transactions See ibid, para 10.026; MUJIH, Edwin C., 'Over ten years after Royal Bank of Scotland Plc. v Etridge (No.2): is the law on undue influence in guarantee cases any clearer?', International Company and Commercial Law Review, 24(2), 2013, 57-67.

59 [2002] 2 A.C. 773.

60 ibid.

61 On that point Phillips reasonably pointed out that creating such special rule that is only applicable to guarantee cases may attract objections as it would mean the distortion from the contract law principles. Yet, he further asserts that *'a guarantee has always been recognised as a special type of contract as evidenced by a range of particular rules, including a (albeit limited) duty of disclosure, a different approach to construction, and the fact that the guarantor is discharged by events occurring subsequent to the execution of the guarantee. All these matters are a recognition that a guarantee is a peculiarly one-sided contract, imposing severe financial obligations with no direct financial benefits or*

minimise the risk that such a wrong (undue influence)[62] *may be committed'*[63]. With that regard, the principles established by the Court of Appeal in *Barclays Bank v O'Brien*[64]were reinstated by the House of Lords in the *Etridge* case. These principles in short established that once a bank[65] identifies that the relationship between the surety and debtor is one of the types giving rise to undue influence (i.e. non-commercial relationship such as wife and husband), the bank would then be under a duty tomake sure the spouse whose consent is required is aware of the all details of the transaction. This is often done by way of providing an independent advice to this spouse[66]. Nevertheless, as it was underlined in *Etridge*, in practice banks have not shown willingness to assume the responsibility of advising the spouse. Hence, they have usually made surety spouse to get the independent advice before entering into such transaction[67]. This however does not automatically lead to the conclusion that the consent given by this spouse would be the product of its free will. Banks should still make sure that the consent procured fulfils all required elements to be regarded complete so that the transaction would not be in jeopardy. This is why the House of Lords founded *core mini-*

rights.' PHILLIPS John, Setting Aside Guarantees: Another Approach, Oxford University Commonwealth Law Journal, 2002 (2), 47-66, 56ff. This is also pointed out in Chitty on Contracts as follows; *'A contract of suretyship is formed, like any other contract, by offer and acceptance, supported by consideration. But difficulty has been encountered in applying the ordinary principles to contracts of this nature, particularly with regard to the revocation of guarantees. The difficulty stems largely from the fact that it is frequently hard to say whether the contract is intended to be unilateral or bilateral.'* Chitty on Contracts, para 45.019. For detailed analysis on guarantees *See* Chitty on Contracts, Ch 45 ff; ANDREWS Geraldine/ MILLETT Richard, Law of Guarantees, 7th ed., Sweet & Maxwell, 2015.

62 This is added.

63 ibid. para 41.

64 *Barclays Bank plc. v. O'Brien* [1994] 1 A.C. 180.

65 This party can also be any financial institution other than the banks. Yet, for the sake of simplicity the term of banks is used to describe these institutions in general.

66 [2002] 2 A.C. 773 para 50.

67 Ibid, para 51.

mum principles to be followed when the independent advice is provided by solicitors.[68] These are as follows[69];

- The nature and the effect of the transaction as well as the current state of debtor's accounts should be explained to the surety by the solicitor.
- The seriousness of the risk involved in transaction must be underlined and clearly explained.
- The surety must be reminded that it is only its own decision and its free will to enter into the concerned transaction.
- It must be checked if the surety would enter into the transaction exercising its free will and authorises the solicitor to provide the letter confirming the consent of the surety.
- All these must be done by using non-technical and plain language in face-to-face meeting.

As this paper's main aim is to examine the applicability of above-like principles into Turkish law, further analysis on the judgment of the House of Lords in *Etridge* would be beyond the subject of this paper and so would not be discussed here[70]. The focus should now turn onto the main question of the paper: whether common law-like principles should be applied under Turkish law for the purpose of ensuring the protection of parties as well as the matrimonial home.

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68 It was stated that these principles should not be considered as optional. Ibid, para 100.

69 ibid, paras 65-170.

70 However for detailed discussion and further examination on the issue under English law See PHANG Andrew /TIJO Hans, 'The Uncertain Boundaries of Undue Influence', Lloyd's Maritime and Commercial Law Quarterly, 2002(2), 231-245; MUJIH Edwin C., 'Over ten years after Royal Bank of Scotland Plc. v Etridge (No.2): is the law on undue influence in guarantee cases any clearer?', 57-67; MUJIH Edwin C., 'The Role of the Solicitor in Guarantee Cases 10 Years After Royal Bank of Scotland Plc. v Etridge (No.2)', Journal of International Banking Law and Regulation, 27(12), 2012, 520-528.

IV. COULD FURTHER OBLIGATIONS BE ADOPTED IN TURKISH LAW?

With respect to the examinations made above, the very first thing that should be pointed out is that even though the principles have been divergently developed, both Turkish and English law treat the matrimonial home different than as both laws would do with other properties. Accordingly the protection is provided by both laws. Under Turkish law, Art.194 of TCC ensures this protection with a mandatory rule that requires obtaining an express consent from the spouse when entering into the transaction. On the other hand, under English law, it is principally the application of common law doctrine of undue influence that ensures the protection on the matrimonial home. It is evident that in Turkish law the doctrine of undue influence is not directly applied to such cases. Having said that, the law on defects in consent[71] appears to be closely analogous to the common law based doctrine of undue influence and those rules may also apply. It indeed provides the same relief that is provided by the undue influence doctrine under English law. However, it should be emphasised at this point that it is not the undue influence and its applicability in Turkish law that this paper principally considers[72]. As stated before, this paper deals with the question whether further rules should be introduced in Turkish law for the transaction concerning matrimonial home in order to reinforce the protection provided by Art.194 of TCC.

Considering this question, firstly it is evident under Turkish case law that the Court of Cassation did actually take the creditors i.e. banks into the account in these cases despite the fact that Art.194 does not impose any obligation to them. With that respect, it was held that creditors

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71 This is regulated in Articles 36-39 of Turkish Obligations Code Numbered 6098, 11.01.2011. For detailed analysis on the law *See* EREN Fikret, Borclar Hukuku Genel Hukumler, 24th ed., Ankara, 2019.

72 For the discussion of the application of undue influence doctrine into Turkish law *See* SAĞLAM İpek, 'Haksız Etki', Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi Özel Sayısı Prof. Dr. Mehmet Somer'in Anısına Armağan, 2006, 12 (1-2) 687-700; BAŞOĞLU Başak, 'Miras Hukuku Özelinde Haksız Etkileme Kavramı ve Buna Bağlanabilecek Sonuçlar', Galatasaray Üniversitesi Hukuk Fakültesi, 2018 (1), 387-420.

are under a duty to take some reasonable steps as to the due diligence that is ascribed to them and by the virtue of Art. 18/II of Turkish Commercial Code. As such, in one case the General Assembly of the Court of Cassation required from the bank to investigate the validity of the consent letter, which was allegedly signed by the wife[73].

On the other hand, considering Turkish case law, it can be concluded that creditors cannot be said to be expected or required to investigate whether the spouse is provided all necessary information and whether the consent is given by this party in exercising its free will. Neither are they required to provide an independent advice to the spouse whose consent is required. The important thing is to make sure that the consent is given expressly. Nevertheless, it can be argued that if the consent is given without knowing the nature and character of the transaction, it would be hard to claim that the consent is express. In other words, the spouse could only give its unreserved, express consent, once it fully understands the transaction and its potential results. Considering the fact that it would most likely be the husband who would enter into the transaction with the creditors and it would be the wife who is required to give consent to transaction that she usually has limited information about, providing an independent advice to her would actually reinforce the protection provided by Art.194 of TCC. This follows that the application of common law-like principles, especially the requirement of providing face to face and independent advice to the spouse in those cases would prove to be effective for the purpose of further protection.

Yet, a question remains to be answered; could such obligation be compatible with the Turkish law with respect to Art.194? As the law stands, the answer to this question appears to be negative. This is firstly because Art.194 does not mention such requirement. Thus, it would be impossible to enforce such obligations without making necessary amendments on it. Considering the fact that the courts have also taken the due diligence principle into account in dealing with such cases, the applicability of above-mentioned requirements should also be interpret-

73 Y.H.G.K., T. 24.5.2017, E. 2017/2-1604, K. 2017/967. (www.kazanci.com)

ed under the due diligence principle. The General Assembly of the Court of Cassation held that it would only be reasonable to expect from banks to take the necessary steps to make sure the consent given fulfils the requirements on the basis of their due diligence[74]. The General Assembly went on to say that the banks must act with such diligence as a prudent owner would deemed to be necessary. In layman terms due diligence means that the parties should act with reasonable care that would be expected from reasonable person before entering into transaction. In that respect, it would be difficult to conclude that the due diligence expected by banks would involve the act of providing the independent advice to the spouse whose consent is sought for. This would mean that imposing an obligation on them that requires much more than exercising the reasonable care by virtue of due diligence.

In the light of these, it is submitted that the obligations which would require further measures to be taken when entering into the transactions regarding matrimonial home would not be compatible with the *status quo* under Turkish law without amending Art. 194, despite the fact that such obligations would prove to be effective in reinforcing the protection provided for the parties and on the matrimonial home by Art.194 of TCC.

V. CONCLUDING REMARKS

As a general principle, Art.193 of TCC prescribes that spouses have their own freedom to contract meaning that they may individually enter into any transaction with third parties or even with each other. Having said that, Art.194 of TCC limits this freedom, only when the matrimonial home is the subject of a transaction that one of the spouses would like to enter into. Its first sentence stipulates '[e]*ither of spouses may not terminate the tenancy agreement regarding the matrimonial home, transfer of the ownership of matrimonial home or limit the rights on the matrimonial home unless an express consent is given by the other spouse'*. Hence, once a spouse is willing to enter into a transaction regarding the matrimonial home, it shall have the express consent of its spouse for this transaction to be valid. The purpose of bringing such limitation on the

74 ibid.

spouses' freedom of contract is explained as the protection of matrimonial home in the preamble of TCC.

On the other hand, under English law the same protection is rather differently ensured. Although Family Law Act 1996 provides so-called home rights to the spouse who is not the owner of the matrimonial home, the law on matrimonial home is established more comprehensively in common law by the application of undue influence doctrine. As is demonstrated above, this equity principle has been applied to the issues that had arisen from the spouse surety transactions in which the spouse provides a security for the other spouse's business debts usually by ways of granting a charge on their matrimonial home that is either owned by itself or jointly with the other spouse. As it is firmly grounded by the courts, this relationship falls into the Class 2B of presumed undue influence. Accordingly, in these cases it must be proved that the surety spouse enters into the transaction as a result of its free will for this transaction to be enforceable. However, since such transactions may involve in other party *i.e.* financial institutions who lend the money, the courts had to reassess this party's position in the transaction and the balance between all these parties. In the landmark case, *Royal Bank of Scotland v Etridge (No.2)*[75] *–the Etridge case-* the House of Lords set forth some principles for the purpose of protecting the surety spouses against its spouses potential undue influence as well as ensuring the enforceability of the transaction and the security granted to the bank. With that regard, it is established that the creditors are expected to take some reasonable steps '*to minimise the risk that such a wrong (undue influence)*[76] *may be committed*'.

In that sense, they are required to make sure that the surety spouse is provided all facts and prospects as to the transaction that is to be entered into and that the surety spouse becomes party to that transaction by exercising its free will. Against the fact that the creditors have been reluctant to assume the responsibility of advising the surety in practice and they have made the surety to receive the independent advice by solicitors, the House of Lords also established some core minimum prin-

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75 [2002] 2 A.C. 773.

76 This is added.

ciples to be followed when the independent advice is given to the surety. These principles are actually provided for creditors in order to make sure that the consent procured fulfils all requirements for surety transaction to be regarded valid. It was this paper's aim to examine whether these principles should be adopted into Turkish law with respect to Art.194 in order to reinforce the protection on matrimonial home as well as the spouse's rights who is not party to the transaction. This is because the further steps that are required by common law would prove to be effective under Turkish law –if they are to be introduced at all- in making sure that the surety spouse exercises its free will as the above assessments have concluded.

In the examination undertaken above, it is firstly diagnosed that Turkish courts actually analysed the matter and the application of Art.194 by taking all parties into the consideration. Indeed, in one case the General Assembly of the Court of Cassation[77] held that it is the duty of the bank to investigate whether the property subject to the transaction is matrimonial home and then to make sure that the other spouse's consent is procured for the transaction. This duty is grounded on the due diligence attained on the banks. In another case, it is accepted that the diligence that the banks are required to act with also involves investigating the genuineness of the consent allegedly given by the spouse[78]. These cases actually appear to be demonstrating that banks, as being party to the concerned transactions have some obligations imposed on. In that sense, one may argue that the principles established in *Etridge* by the House of Lords can be introduced into Turkish law. Yet, the important point is that under Turkish law, banks are expected to take reasonable steps by virtue of due diligence principle, not because of Art.194 requires them to act in that way. It is therefore submitted by the author that imposing further obligations on them as mandatory rules would unlikely be compatible with Art.194, unless Art.194 is amended by legislators, as the due diligence principle would not suffice alone to burden such further obligations on banks. It is hence eventually concluded that

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77 Y.H.G.K., T. 02.03.2016, E. 2014/2-1420, K. 2016/210. (www.kazanci.com)

78 Y.H.G.K., T. 24.05.2017, E. 2017/2-1604, K. 2017/967. (www.kazanci.com)

imposing further obligations on creditors would not be compatible with the *status quo* of Turkish law, although they would be desirable. As a final note, it should be underlined that this should not be understood as that parties could not be obliged to take further steps to make sure the enforceability of the transaction. It is evident from the above examination that such obligations may be regarded reasonable by virtue of the due diligence principle and these would not only be for banks but for all of the parties to the transaction.

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