Trinity Term
[2025] UKSC 22
On appeal from: [2024] EWCA Civ 302

JUDGMENT

Waller-Edwards (Appellant) *v* One Savings Bank Plc (Respondent)

before

Lord Briggs
Lord Hamblen
Lord Stephens
Lady Rose
Lady Simler

JUDGMENT GIVEN ON
4 June 2025

Heard on 27 February 2025

Appellant
Julian Malins KC
Marc Beaumont
(Instructed by Howard Kennedy LLP)

Respondent
Joanne Wicks KC
Antonia Halker
(Instructed by Equivo Ltd, Northampton)

LADY SIMLER (with whom Lord Briggs, Lord Hamblen, Lord Stephens and Lady Rose agree):

Introduction

1. The law recognises that there are certain (non-commercial) relationships where there is a heightened risk that one party has an undue influence over the other: the husband-and-wife relationship is an obvious example but there are others too. In certain circumstances the vulnerable party to such a relationship (say, a wife) who has been induced to enter into a financial transaction by the undue influence of her husband, is entitled to have it set aside as against the husband. The question that can then arise is whether the undue influence as between husband and wife affects the lender with whom the husband has been dealing, even where the lender has entered into the transaction in good faith and without actual knowledge of the undue influence.

2. Following a series of well-known cases discussed below (*Barclays Bank plc v O'Brien* [1994] 1 AC 180 ("*O'Brien*"), *CIBC Mortgages plc v Pitt* [1994] 1 AC 200 ("*Pitt*") and *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44; [2002] 2 AC 773 ("*Etridge No 2*"), the law regards banks and other lenders as put on inquiry (that one party's agreement to the transaction may have been obtained by undue influence) whenever on the face of a three-way transaction, the wife (or other vulnerable partner in the relationship) is offering to stand surety for her husband's debts (or vice versa). By contrast, where on the face of the transaction the lending is advanced to husband and wife jointly, the bank is not put on inquiry unless the bank is aware that the loan is being made for the husband's purposes as distinct from their joint purposes. The distinction between these two cases is straightforward and binary.

3. But it is common ground on this appeal that there may be less straightforward transactions involving non-commercial loans sought by a husband and wife that are, on the face of it, partly for their joint benefit and partly for either the husband or wife's sole benefit and therefore to that extent apparently to the financial disadvantage of the other. This sort of transaction is described below as a "hybrid" transaction. The issue for resolution on this appeal is to identify the correct legal test for deciding when a lender is put on inquiry in a non-commercial hybrid loan transaction.

4. The courts below held, and the Court of Appeal agreed, that the test is one of fact and degree. In other words, the Court of Appeal said that the court is required "to look at a non-commercial hybrid transaction as a whole and to decide, as a matter of fact and degree, whether the loan was being made for the purposes of the borrower with the debts, as distinct from their joint purposes" ([2024] Ch 279, para 38).

5. That conclusion is challenged by the appellant. She contends that the Court of Appeal's approach is wrong in law. The proper test is a bright line test: namely, where the relationship is non-commercial, if it appears on the face of the transaction that one party to the relationship is offering or has offered to stand surety to any extent more than a de minimis extent for the other (and therefore apparently to her financial disadvantage), the lender is "put on inquiry". As will become clear, I have concluded that the appellant's bright line test is the correct test.

6. I should make clear at this stage that, in the discussion below, I refer to the non-commercial relationship of husband and wife, and to the wife as the vulnerable party since that is the fact pattern in this appeal, and an all too common one. However, the same points apply equally to other non-commercial relationships open to abuse and men can also be abused or exploited by their intimate partners.

The facts and the decisions below

7. To put some flesh on the bones of the hybrid transaction in this case, it is necessary to set out the essential facts. They are taken from the careful and detailed findings of the trial judge.

8. The appellant, Catherine Waller-Edwards, commenced a relationship in late 2011 with Nicholas Bishop at a point in her life when she was emotionally vulnerable. She was financially independent at the time, owning her own home, which was mortgage free and valued at about £600,000. She had a modest pension income of £7000 per annum and savings of £150,000.

9. Mr Bishop, a builder and developer, was in the process of building a property (referred to as "Spectrum"), expected to be valued at about £750,000 on completion. He persuaded the appellant to exchange her home and savings for Spectrum (and an adjoining piece of land). Spectrum was already subject to a charge securing a debt of £78,000 owed by Mr Bishop to a Mr Higgins. The appellant was given a second charge over Spectrum to secure her "investment" (of £150,000) pending completion of Spectrum. The Higgins charge was increased thereafter on three occasions to £220,000. The appellant moved into Spectrum in September 2012, although the construction work was not complete. In December 2012 the legal title to Spectrum was put into joint names with a declaration of trust stating that the beneficial interest in Spectrum was held by the appellant as to 99% and Mr Bishop as to 1% as tenants in common.

10. In 2013, Mr Bishop sought to re-mortgage Spectrum for £440,000 with the respondent bank ("the Bank"). The same solicitor acted for all three parties to the transaction: Mr Bishop, the Bank and the appellant. From the Bank's perspective it understood that the loan was to pay off an existing mortgage debt and to purchase another

property. The Bank was given to understand that the re-mortgage would be a buy-to-let mortgage, and that Spectrum would be let out at a rent sufficient to repay the instalments on the re-mortgage (this became a condition of the loan). The Bank understood that £233,000 of the loan would be used to pay off the existing mortgage and £100,000 would be used to buy a home for the couple. The Bank required Mr Bishop to pay off his existing debts so that £25,000 would be used to pay off the loan for Mr Bishop's car, and £14,500 to pay off his credit card. These two payments (amounting to £39,500) constituted the asserted suretyship part of the joint loan.

11. In fact (but unknown to the Bank) £142,000 of the £384,000 advanced was used to make a divorce payment to Mr Bishop's ex-wife and £233,000 odd was used to pay off the Higgins charge. Moreover, whilst the mortgage was subject to a condition that Spectrum would be let out within 30 days of completion, this did not occur. The Bank also did not know about the declaration of trust in relation to Spectrum.

12. Following completion of the re-mortgage in October 2013, the relationship between the couple came to an end. Mr Bishop moved out of Spectrum in mid-2014. The appellant remained living in Spectrum (which was now heavily mortgaged) but without savings her limited pension income was inadequate to service the re-mortgage payments. At some point the couple fell into arrears and ultimately the Bank commenced possession proceedings in November 2021. Possession was sought on the basis of the arrears and because the couple were in breach of the condition to use Spectrum as a buy-to-let and not to live in.

13. As the lower courts observed, cases of this kind often involve distressing circumstances. That cannot and does not dictate a particular result. Nonetheless, I note that when the appellant commenced her relationship with Mr Bishop, she was the sole owner of her mortgage-free home and had reasonably substantial personal savings. By the time the relationship ended, and as a result of the series of transactions just described, she was left in a heavily mortgaged home she was not permitted to occupy, her personal savings gone and without the means to maintain the payments due in respect of the loan secured by Spectrum.

14. After a contested trial (in which Mr Bishop played no part) the trial judge, HHJ Mitchell, found that the appellant had entered into all these financial transactions under the undue influence of Mr Bishop. That finding has not been challenged. The judge also found that the Bank knew that the relationship between the appellant and Mr Bishop was a non-commercial one, and that £39,500 of the loan would be used to repay his car and credit cards debts. The judge rejected the appellant's case that there were red flags that should have put the Bank on notice of undue influence in this case. So far as concerned the part of the loan (of £39,500) to repay car and credit card debts, the judge held (at para 137):

> "The question in the end is whether the fact that the re-mortgage was, to a minor extent, in part, to repay Mr Bishop's credit debts should have put the Bank on inquiry. This is a matter of fact and degree but in the end, I do not accept that the fact that just over 10% of the total borrowing was to go to Mr Bishop's credit debts, tip this case into one akin to a surety case."

15. On the first appeal, Edwin Johnson J [2023] EWHC 2386 (Ch) considered that the *O'Brien* principle encompassed a partial surety case. However, he said that the identification of partial surety cases that would put the creditor on notice was necessarily fact sensitive and not simply a numbers exercise. In his view, it was necessary to look at the transaction as a whole to determine whether it should have been perceived by the creditor as a transaction that was not to the financial advantage of the appellant (see paras 89-94). At para 104, in agreement with the trial judge, he said:

> "This left the sum of £39,500 which was, to the knowledge of the Respondent, to be used to pay off Mr Bishop's personal debts. In the overall context of the Remortgage I cannot see that the Judge was wrong to reject the argument that this feature of the Remortgage placed the Appellant into a position of surety in respect of Mr Bishop's borrowing such as would justify the application of the *O'Brien* principles. Looked at in the round, I do not think that the Remortgage, as it was known to the Respondent, constituted a transaction in which the Appellant was properly viewed as being in a relationship of suretyship with Mr Bishop."

16. The Court of Appeal dismissed the appeal. Giving the main judgment with which the other members of the court agreed, Sir Geoffrey Vos MR rejected the appellant's argument that a hybrid case of this kind should be treated in the same way as a full surety case unless the surety element of which the lender is aware is trivial. He held that nothing in *Etridge No 2* implies a third test for hybrid cases of this kind. The appellant's test would introduce uncertainty with arguments about what was non-trivial. Moreover, he observed that it is not always easy for a bank to know whether certain debts are truly for the sole benefit of the person in whose name they stand: "How was the bank to know, in this case for example, what benefit each party had derived from either the car or the credit card?" (para 35). He concluded that a fact and degree approach accorded with the substance of Lord Nicholls of Birkenhead's speech *Etridge No 2* (see paras 34 to 37) and the correct approach was as follows:

> "Instead, it requires the court to look at a non-commercial hybrid transaction as a whole and to decide, as a matter of fact

> and degree, whether the loan was being made for the purposes of the borrower with the debts, as distinct from their joint purposes. In this case, the judges below decided, and I would agree (though there is no appeal on the point), that the loan was, looked at as a whole and from the point of view of what the bank knew, a joint borrowing made for their joint purposes" (para 38).

17. In a short concurring judgment, Peter Jackson LJ rejected the test proposed by the appellant for a hybrid transaction, holding that it would be unduly onerous to lenders and to many borrowers. He continued at para 41:

> "Although the authorities were not concerned with 'hybrid' cases, I am persuaded that they require us to decide whether a case is a 'surety' case or a 'joint borrowing' case. Were it otherwise, I could see the attraction of identifying cases where a lender is on notice by asking a single question, namely whether there is any aspect of the transaction that should indicate to the lender that the transaction as a whole might not be to the financial advantage of one of the borrowers."

The trilogy of cases: *O'Brien, Pitt* and *Etridge No 2*

18. *O'Brien* and *Pitt* were decided at the same time. Both concerned the circumstances in which a bank, faced with a mortgage (or other lending) transaction involving two non-commercial parties, might be put on inquiry that there has been undue influence by one party to the transaction over the other.

19. In *O'Brien*, the husband-and-wife defendants had agreed to execute a second mortgage over their matrimonial home as security for overdraft facilities extended by the plaintiff bank to a company in which the husband, but not the wife, had an interest. The wife signed the mortgage deed, without reading it and without the benefit of legal advice, relying on her husband's false statements that the second mortgage was limited to £60,000 and would last only three weeks. When the company's overdraft exceeded £154,000 the bank sought to enforce the second mortgage to its full extent.

20. In the House of Lords, Lord Browne-Wilkinson referred to changes in society that meant that a high proportion of privately owned wealth was being invested in the matrimonial home, mostly in the joint names of both spouses, making them an attractive means of raising finance for the business enterprises of one or other of the spouses, but requiring the consent of both spouses to use the jointly owned home as security. Having acknowledged that the concept of the "ignorant wife" leaving all financial decisions to

her husband was outmoded, Lord Browne-Wilkinson referred to the number of recent cases in this field which showed that in practice "many wives are still subjected to, and yield to, undue influence by their husbands" and should therefore be able to look to the law for some protection where a transaction has been procured by his undue influence (p 188). As he explained, the real question (in a surety transaction) was whether, and if so, when the claimant wife could set aside the transaction, not against the wrongdoing husband, but against the lending bank:

> "A wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong has an equity as against him to set aside that transaction. Under the ordinary principles of equity, her right to set aside that transaction will be enforceable against third parties (eg against a creditor) if either the husband was acting as the third party's agent or the third party had actual or constructive notice of the facts giving rise to her equity. … The key to the problem is to identify the circumstances in which the creditor will be taken to have had notice of the wife's equity to set aside the transaction." (p 195F)

21. In identifying those circumstances, Lord Browne-Wilkinson recognised that some development in the law was necessary to give wives (and other vulnerable parties) some protection in this situation, given the risk of a husband exercising his influence improperly regarding the provision of security for his debts and the increased risk that his explanations of the transaction to her might be misleading or inaccurate. He described the necessary development as follows:

> "Therefore in my judgment a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.
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> It follows that unless the creditor who is put on inquiry takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained, the creditor will have constructive notice of the wife's rights." (p 196E)

22. The reasonable steps to be taken by the bank to ensure that it was not fixed with constructive notice of the wife's rights were not steps that involved making any actual inquiry. Rather, they were steps that would reduce or eliminate the risk of her entering into the transaction at all, by bringing home to her the risk she was running by providing a free legal guarantee of her husband's debts, including advising her to take independent advice. This approach would "hold the balance fairly between on the one hand the vulnerability of the wife who relies implicitly on her husband and, on the other hand, the practical problems of financial institutions asked to accept a secured or unsecured surety obligation from the wife for her husband's debts." (p 197D)

23. The result in *O'Brien* was that the bank was bound by the wife's rights arising out of the husband's misrepresentation, with the consequence that the second mortgage could only be enforced against her to the extent of £60,000 which was the limit of the second mortgage as represented by the husband.

24. By contrast, in *Pitt* the lender was not put on inquiry. Again, the defendants were husband and wife. The husband had persuaded the wife to re-mortgage their home as security for a loan for purchasing shares on the stock market. The plaintiff mortgage lender offered to make a loan on the security of the defendants' house, but on the understanding that the loan was to be used for the purchase of a second home. The wife signed the re-mortgage documents without reading them and was unaware that the stated purpose of the loan was the purchase of a second home. The re-mortgage loan was advanced and paid over to solicitors acting for all three parties to the transaction. The solicitors then paid the loan monies into the joint account of the husband and wife. The husband's share dealings were unsuccessful. He failed to make re-payments on the mortgage and the lender brought possession proceedings against the husband and wife. The wife established that her consent to the re-mortgage had been obtained by the husband's undue influence and as against her husband she was entitled to have the re-mortgage set aside. However, the plaintiff lender had no knowledge of the undue influence. On the face of the transaction, the loan was advanced to both husband and wife jointly to buy a second home and there was nothing else to put the plaintiff on inquiry. Lord Browne-Wilkinson explained the distinction between joint borrowing and surety cases as follows (at p 211G):

> "What distinguishes the case of the joint advance from the surety case is that, in the latter, there is not only the possibility of undue influence having been exercised but also the increased risk of it having in fact been exercised because, at least on its face, the guarantee by a wife of her husband's debts is not for her financial benefit. It is the combination of these two factors that puts the creditor on inquiry."

25. For some time after the decision in *O'Brien* the two factors identified by Lord Browne-Wilkinson as putting the creditor on inquiry in a surety case (see the passage at p 196E cited at para 21 above) appear to have been understood by some as requiring that the factual conditions in each factor had to be satisfied on the facts of the individual case. In other words, if factor (a) was satisfied, it was understood that the bank was only put on inquiry if the bank was aware that the relationship in question was one in which the husband had acquired influence over the wife because she placed trust and confidence in him in relation to her financial affairs, so that the risk arose. That approach was rejected in *Etridge No 2.*

26. *Etridge No 2* concerned eight appeals where there had been alleged undue influence and constructive notice in the context of loans secured on matrimonial homes. All members of the House of Lords agreed with Lord Nicholls of Birkenhead, whose judgment is therefore the most authoritative (though each wrote separate judgments). Lord Nicholls discussed the change in the law introduced by *O'Brien* at paras 40 to 43:

> "40. … The law imposes no obligation on one party to a transaction to check whether the other party's concurrence was obtained by undue influence. But *O'Brien* has introduced into the law the concept that, in certain circumstances, a party to a contract may lose the benefit of his contract, entered into in good faith, if he ought to have known that the other's concurrence had been procured by the misconduct of a third party.
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> 41. There is a further respect in which *O'Brien* departed from conventional concepts. Traditionally, a person is deemed to have notice (that is, he has 'constructive' notice) of a prior right when he does not actually know of it but would have learned of it had he made the requisite inquiries. A purchaser will be treated as having constructive notice of all that a reasonably prudent purchaser would have discovered. In the present type of case, the steps a bank is required to take, lest it have constructive notice that the wife's concurrence was procured improperly by her husband, do not consist of making inquiries. Rather, *O'Brien* envisages that the steps taken by the bank will reduce, or even eliminate, the risk of the wife entering into the transaction under any misapprehension or as a result of undue influence by her husband. The steps are not concerned to discover whether the wife has been wronged by her husband in this way. The steps are concerned to minimise the risk that such a wrong may be committed.

> 42. These novelties do not point to the conclusion that the decision of this House in *O'Brien* is leading the law astray. Lord Browne-Wilkinson acknowledged he might be extending the law: see [1994] 1 AC 180, 197. Some development was sorely needed. The law had to find a way of giving wives a reasonable measure of protection, without adding unreasonably to the expense involved in entering into guarantee transactions of the type under consideration. The protection had to extend also to any misrepresentations made by a husband to his wife. In a situation where there is a substantial risk the husband may exercise his influence improperly regarding the provision of security for his business debts, there is an increased risk that explanations of the transaction given by him to his wife may be misleadingly incomplete or even inaccurate.
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> 43. The route selected in *O'Brien* ought not to have an unsettling effect on established principles of contract. *O'Brien* concerned suretyship transactions. These are tripartite transactions. They involve the debtor as well as the creditor and the guarantor. The guarantor enters into the transaction at the request of the debtor. The guarantor assumes obligations. On the face of the transaction the guarantor usually receives no benefit in return, unless the guarantee is being given on a commercial basis. Leaving aside cases where the relationship between the surety and the debtor is commercial, a guarantee transaction is one-sided so far as the guarantor is concerned. The creditor knows this. Thus the decision in *O'Brien* is directed at a class of contracts which has special features of its own. …"

27. Lord Nicholls explained that the House of Lords in *O'Brien* had set a low level for the threshold which must be crossed before a bank is put on inquiry. He said that for practical reasons "the level is set much lower than is required to satisfy a court that, failing contrary evidence, the court may infer that the transaction was procured by undue influence. …" (para 44). Having referred to the combination of two factors described by Lord Brown-Wilkinson in *O'Brien* at p 196E, Lord Nicholls held, "In my view, this passage, read in context, is to be taken to mean, quite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts."

28. Lord Nicholls observed that the Court of Appeal had interpreted this passage more restrictively, setting the threshold somewhat higher. He disagreed with that approach:

> "46. I respectfully disagree. I do not read (a) and (b) as factual conditions which must be proved in each case before a bank is put on inquiry. I do not understand Lord Browne-Wilkinson to have been saying that, in husband and wife cases, whether the bank is put on inquiry depends on its state of knowledge of the parties' marriage, or of the degree of trust and confidence the particular wife places in her husband in relation to her financial affairs. That would leave banks in a state of considerable uncertainty in a situation where it is important they should know clearly where they stand. The test should be simple and clear and easy to apply in a wide range of circumstances. I read (a) and (b) as Lord Browne-Wilkinson's broad explanation of the reason why a creditor is put on inquiry when a wife offers to stand surety for her husband's debts. These are the two factors which, taken together, constitute the underlying rationale.
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> 47. The position is likewise if the husband stands surety for his wife's debts. Similarly, in the case of unmarried couples, whether heterosexual or homosexual, where the bank is aware of the relationship: see Lord Browne-Wilkinson in *O'Brien's* case, at p 198. Cohabitation is not essential. The Court of Appeal rightly so decided in *Massey v Midland Bank Plc* [1995] 1 All ER 929: see Steyn LJ, at p 933."

29. At paras 48 and 49 Lord Nicholls discussed the clear dividing line between surety cases on the one side, and joint borrowing cases on the other:

> "48. As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on inquiry. On the other side of the line is the case where money is being advanced, or has been advanced, to husband and wife jointly. In such a case the bank is not put on inquiry, unless the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes. That was decided in *CIBC Mortgages plc v Pitt* [1994] 1 AC 200."

30. Lord Nicholls made no reference to mixed or hybrid transactions but his approach to differentiating between the two different types of transaction in issue was explicitly a binary one, with a clear dividing line between them and a binary outcome dependent on which side of the line the transaction falls. Likewise, his discussion of "less clear cut"

cases involving a wife who becomes surety for the debts of a company whose shares are held by her and her husband follows the same binary approach:

> "49. Less clear cut is the case where the wife becomes surety for the debts of a company whose shares are held by her and her husband. Her shareholding may be nominal, or she may have a minority shareholding or an equal shareholding with her husband. In my view the bank is put on inquiry in such cases, even when the wife is a director or secretary of the company. Such cases cannot be equated with joint loans. The shareholding interests, and the identity of the directors, are not a reliable guide to the identity of the persons who actually have the conduct of the company's business."

31. Later in his speech Lord Nicholls made clear that the principle established by these cases could not sensibly be confined to undue influence arising in the context of sexual relationships:

> "87. These considerations point forcibly to the conclusion that there is no rational cut-off point, with certain types of relationship being susceptible to the *O'Brien* principle and others not. Further, if a bank is not to be required to evaluate the extent to which its customer has influence over a proposed guarantor, the only practical way forward is to regard banks as 'put on inquiry' in every case where the relationship between the surety and the debtor is non-commercial. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety. As a measure of protection, this is valuable. But, in all conscience, it is a modest burden for banks and other lenders. It is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual. If the bank or other creditor does not take these steps, it is deemed to have notice of any claim the guarantor may have that the transaction was procured by undue influence or misrepresentation on the part of the debtor.
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> 88. Different considerations apply where the relationship between the debtor and guarantor is commercial, as where a guarantor is being paid a fee, or a company is guaranteeing the debts of another company in the same group. Those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of guarantees."

32. The test formulated in *O'Brien* and *Etridge No 2* for situations involving non-commercial sureties was new. It moved away from a test of actual or constructive notice in fixing the bank with knowledge, and introduced a low threshold for putting the bank on inquiry unless further steps were taken to bring home to the surety the risks she was running. *Etridge No 2* was an extension of *O'Brien* and to the extent that the threshold had been misunderstood, *Etridge No 2* confirmed that the low-level set for triggering a requirement on the bank was much lower than required to satisfy a court that the transaction was in fact procured by undue influence. No factual inquiry or assessment of any kind was required of the bank. Rather, the "on inquiry" threshold is triggered *whenever* a wife offers to stand surety for her husband's debts; in other words, in every case where the relationship between the surety and the debtor is "non-commercial" because the surety is gratuitously taking on a liability to pay a debt on behalf of her husband for which she is not otherwise legally liable. However, the quid pro quo for that low threshold was the correspondingly modest requirement imposed on a bank "put on inquiry" as to the steps it must take to avoid being affected by the rights of the wife whose consent may have been procured by her husband's wrongdoing. As Lord Hobhouse of Woodborough explained at para 108 of *Etridge No 2*:

> "…the advantage of this low threshold is that it assists banks to put in place procedures which do not require an exercise of judgment by their officials and I accept Lord Nicholls's affirmation of the low threshold. This, however, is not to say that banks are at liberty to close their eyes to evidence of higher levels of risk or fail to respond appropriately to higher risks of which they have notice."

33. The steps that must be taken by a bank in these circumstances have been described as "the Etridge protocol". Lord Nicholls set them out at para 79. They can be summarised as follows:

> (a) The bank must communicate directly with the wife, informing her that for her own protection it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the transaction and its practical implications for her; and that the purpose of this requirement is that she will not be able to dispute that she is legally bound by the transaction once the surety documents are signed.
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> (b) The bank must ask the wife to nominate a solicitor she is willing to instruct to advise her, separately from her husband, and act for her in giving the necessary confirmation to the bank; that solicitor may be the same solicitor who is acting for the husband but if a solicitor is already acting, she should be asked whether she would prefer a different solicitor.

34. Lord Nicholls made clear that the bank should not proceed with the transaction until it has received an appropriate response directly from the wife. The bank should provide information to the wife about the husband's financial affairs, either directly or through solicitors, and if consent from the husband to do so is not forthcoming, the transaction cannot proceed. In an exceptional case where the bank suspects the wife has been misled (or is not acting of her own free will), the bank must inform the wife's solicitor of the facts giving rise to the suspicion. The bank should obtain written confirmation from the wife's solicitor that the information and necessary advice have been given.

35. Plainly, the risk that the wife's consent has been procured by undue influence or misrepresentation will not be eliminated by compliance with the Etridge protocol. But those steps are liable to reduce it to a level which makes it appropriate for a lender to proceed: see paras 3, 37 and 148.

36. Finally, Lord Nicholls described the development of the principle in *O'Brien* in the following way:

> "89. … It is a workable principle. It is also simple, coherent and eminently desirable. I venture to think this is the way the law is moving, and should continue to move. Equity, it is said, is not past the age of child-bearing. In the present context the equitable concept of being 'put on inquiry' is the parent of a principle of general application, a principle which imposes no more than a modest obligation on banks and other creditors. The existence of this obligation in all non-commercial cases does not go beyond the reasonable requirements of the present times. In future, banks and other creditors should regulate their affairs accordingly."

Three preliminary points

37. There are three preliminary points to make before coming to the question of hybrid transactions.

38. First, it might have been thought that the increased participation of women in the labour market over the decades since *O'Brien* coupled with an increase in their levels of financial and other independence would mean that the prevalence of economic abuse between women and their spouses or intimate partners has reduced. But the evidence shown to the court in the form of reports and regulatory activity suggests that is wrong. Indeed, a report published by the Financial Conduct Authority suggests that as many as one in six women in the UK has experienced financial abuse by a current or former

intimate partner: see "The hidden cost of domestic financial abuse: working together to improve outcomes" by Joanna Legg, 17 May 2024. Legislation and greater regulation in this area suggest an increasing awareness and understanding of economic abuse as a form of domestic abuse (see for example section 1(3) of the Domestic Abuse Act 2021) and its damaging effects.

39. Secondly, in all cases, whether of surety or joint borrowing, the proposed transaction must always be considered from the bank's perspective. It is the bank's perception of the nature of the transaction that is critical.

40. Thirdly, as Lord Nicholls emphasised in *Etridge No 2*, although the trigger for action by a bank is described as being "put on inquiry", this is not an inquiry in the traditional constructive notice sense. The bank does not have to carry out any investigation or to ask any questions about the reasons why the wife was agreeing to the transaction or about her relationship with her husband. The bank is not expected to try to find out whether or not undue influence or misrepresentation is taking place, or indeed whether it is being misled as to the purposes of the loan. The bank is simply on notice of a risk of undue influence or similar impropriety. The most the bank is then expected to do is to take reasonable steps to minimise the risk that such a wrong may be committed by satisfying itself that the wife (or vulnerable partner) has had brought home to her, in a meaningful way, the implications of the proposed transaction, so that if she continues with it, she does so with her eyes wide open.

41. Even in surety or joint borrowing cases, there may be indicators of concern, often described as "red flags". These are different. They may indicate in a particular case that the wife's consent has or may have been procured by undue influence or misrepresentation and further inquiry is required. The existence or adoption of the Etridge protocol does not mean that banks can simply close their eyes to evidence indicating that there is a higher level of risk in a particular case: see *Etridge No 2* at para 108 per Lord Hobhouse. As the House of Lords recognised, even in apparently straightforward surety or joint borrowing transactions, there may be features which should put the bank on alert. The development of bright line rules for the straightforward cases does not absolve the banks of the need to exercise their judgment as to any increased risk of undue influence where red flags exist.

The test to be applied to hybrid transactions

42. Against that background I come to the question to be resolved on this appeal. It is common ground that there may be circumstances where a bank is treated as being put on notice in a case involving a non-commercial transaction with features of both surety and joint borrowing. The question is what test should be applied to decide whether the bank (or other creditor) is put on inquiry by such a hybrid transaction so as to trigger the

requirement to take the steps in the Etridge protocol to avoid the risk of the transaction being set aside in the future for undue influence by one of the borrowers over the other.

43. None of the appeals dealt with in *Etridge No 2* or the earlier cases addresses the approach to partial surety transactions. *O'Brien*, *Pitt* and most of the individual appeals heard in *Etridge No 2* were concerned either with straightforward surety or with straightforward joint borrowing transactions. The only possible exception is *UCB Home Loans Corpn Ltd v Moore* (one of the cases on appeal in *Etridge No 2*). This case was recognised by Lord Hobhouse at para 127 as "not wholly straightforward" because it involved both the refinancing of existing debt secured on the matrimonial home (about 60% of the loan) as well as an additional advance (about 40%) to a company under the husband's control and direction but in which the wife was a director. As Lord Scott of Foscote made clear at para 306, the lender ("UCB") knew that Mrs Moore was offering her share in the matrimonial home as security for the loan to the company. The company was unsuccessful and went into liquidation and UCB brought possession proceedings. The case came to the House of Lords on an appeal by Mrs Moore against an order striking out her defence to UCB's claim for possession of the matrimonial home on the basis that her consent to the grant of the legal charge had been obtained by undue influence. The House of Lords allowed the appeal, plainly considering it arguable that UCB was put on inquiry in relation to this mixed borrowing transaction. But none of the speeches addressed this aspect of the case in terms of identifying the approach to be adopted in a hybrid case involving mixed borrowing of this kind.

44. Similarly, I have not found *Davies v AIB Group (UK) plc* [2012] EWHC 2178 (Ch); [2012] 2 P&CR 19 of any real assistance. The judge, Norris J, rejected the wife's claim of undue influence in that case. Nonetheless at para 117, he expressed the view (obiter) that had he found undue influence by the husband, he would have held that AIB was put on inquiry because "it was aware the loan [was] being made (as regards a significant part, namely the replacement of the Barclays' stocking facility in the sum of £420,000) for the purposes of [the husband's] company, as distinct from their joint purposes". In other words, although there was joint borrowing, the bank was aware that a significant part of the loan was made for the benefit of the husband's company as distinct from their joint benefit. There is, however, no discussion of the underlying basis for this obiter view.

45. It seems to me that it is therefore necessary as a starting point for answering the question as to the court's approach to hybrid transactions, to understand the underlying rationale for treating surety transactions differently from joint borrowing transactions.

46. The rationale for the principle established in *O'Brien*, *Pitt* and *Etridge No 2* (that a bank is put on inquiry as to undue influence or misrepresentation in a surety transaction, but not a joint borrowing transaction), is the recognition that such transactions are more likely than others to be tainted by undue influence or misrepresentation. A tripartite non-

commercial surety transaction carries with it an increased risk of undue influence having been exercised because on the face of the transaction, the wife assumes a legal liability that she would not otherwise have (whether under a guarantee or charge) for her husband's debts but receives no apparent financial benefit in return. Put another way, she incurs the financial risk for no apparent personal gain and that is what gives rise to a greater risk that the wife's consent will have been procured by undue influence or misrepresentation by her husband. The transaction is one-sided as far as she is concerned, and this is apparent on the face of the transaction and so known to the lender.

47. Of course, the recognition of a higher risk of undue influence or misrepresentation in surety transactions does not mean that all surety transactions are procured by wrongdoing. There are many good reasons why a wife or husband may knowingly and willingly agree to be a surety for their spouse's borrowing, and it is likely to be only in a minority of cases that the wife is in fact being exploited or abused. On the other hand, a joint borrowing transaction is different. The risk in such cases is much lower because, on the face of it, wife and husband are both personally liable for the debt which is secured by the charge and so both stand to benefit from the giving of security, for example by a reduction in the interest rate compared to the rate for an unsecured loan.

48. In *O'Brien* and *Etridge No 2*, the risk of wrongdoing affecting the wife's agreement to enter into the surety transaction was viewed as sufficiently high to lead the courts to conclude that it is proportionate to place a requirement on banks faced with surety transactions to follow the Etridge protocol to avoid being fixed with notice of wrongdoing. All that is required is that the lender knew or ought to have known that the relationship between the wife and the husband (the borrower) was a non-commercial one and that the transaction involved the wife acting as surety for her husband's obligations to the lender. That is sufficient to put the lender on inquiry. Once that has occurred, an improperly procured surety transaction will be set aside as against the lender unless it can show that it took the modest steps described in the Etridge protocol.

49. On the other hand, in a joint borrowing transaction the risk of wrongdoing is sufficiently low to conclude that it would be unduly burdensome to borrowers and banks to require the bank to take any additional steps. In *Pitt* at 211E-F, Lord Browne-Wilkinson rejected "without hesitation" the submission that the risk of undue influence inherent in all transactions between husband and wife, including joint borrowing transactions, was itself sufficient to put a bank on inquiry. Lord Browne-Wilkinson recognised that the introduction of friction into ordinary borrowing transactions comes at a cost. He said that the "average" married couple enter into a joint borrowing transaction free of any taint of undue influence or misrepresentation and it is not to their benefit to require them to pay for additional steps designed to protect against the risk of such wrongdoing.

50. Non-commercial hybrid transactions are less straightforward. They come in different shapes and sizes. The ratio of joint borrowing to surety in a hybrid transaction

may vary significantly from one transaction to another. It is also the case, as Ms Wicks KC submitted on behalf of the Bank, that a husband's personal borrowing might be used for the benefit of both partners: the family car might be in his name but used by both, or joint household debts might be in his sole name. Hybrid transactions may arise where some of the borrowing is for joint purposes, some is to pay off debt in the sole name of the husband, and some to pay off debt in the sole name of the wife. In some circumstances the couple may seek to borrow, in part, to pay off one spouse's debts. In others, they may apply for a loan for a joint purpose, but the lender will make it a condition of lending that the husband's personal debts are paid (as happened here). The extent to which the wife will in fact benefit from the transaction will also vary and depend on the circumstances. But none of these features will necessarily be apparent to the lender on the face of the transaction.

51. Ms Wicks relied on the infinitely variable nature of such transactions to support the fact and degree approach adopted by the Court of Appeal. She submitted that the fact that certain transactions are more likely than others to be tainted by undue influence or misrepresentation indicates that there is a spectrum of risk, emphasising the observation of Lord Hobhouse in para 108 in *Etridge No 2* that situations "will differ across a spectrum from a very small risk to a serious risk verging on a probability" and that there "has to be a proportionality between the degree of risk and the requisite response to it." It follows in her submission that there is a spectrum of risk; and transactions must be considered on that spectrum and looked at as a whole from the perspective of the bank, to determine whether the transaction is one which presents a substantial risk that the wife's entry into it has been procured by the undue influence or misrepresentation of the husband because of the extent to which it is not for her benefit. Ms Wicks submitted that this approach maintains the policy balance between competing interests which underpins the decisions in *O'Brien*, *Pitt* and *Etridge No 2*. It applies the low threshold for the bank being put on inquiry to cases where there is an elevated risk of undue influence or misrepresentation because the transaction is substantially for the benefit of the husband. But equally, it avoids disproportionate and costly steps being required of banks, to the disadvantage of borrowers generally and the UK economy, where the risks of wrongdoing are low.

52. Persuasively as these submissions were advanced, I do not accept them. It is true of course that the level of risk posed by a particular transaction will depend on its particular facts and that, as a matter of fact, there may be a spectrum of risk posed by different types of transaction. However, that is not the approach that was adopted by the House of Lords in *O'Brien, Pitt* and *Etridge No 2*. Instead, the approach adopted is a binary one. Either the creditor is on notice of the risk of undue influence, or it is not; and if the creditor is on notice, then the Etridge protocol must be followed, whereas if it is not, there is nothing to be done, and no steps are required at all. There is no spectrum of lesser or greater steps to be taken by a creditor put on inquiry that varies depending on a spectrum of differing levels of risk. Since there is no scope for a nuanced approach to the steps required to be taken once the creditor is on notice, I see no scope for a nuanced (or fact-sensitive) approach to whether the creditor is on notice or not. In my view, this is a binary question: either there is, on the face of the non-commercial transaction, a surety

element giving rise to a heightened risk of undue influence or there is not. Moreover, as a matter of fact and logic, the level of risk presented by a surety transaction is the same whether it is accompanied by joint-borrowing or not. The hybrid element does not reduce that risk. In any event, the level of risk is infinitely variable, and not for the lender to judge on some fact-specific basis.

53. In my view the Court of Appeal was also wrong at para 38 to focus on the purpose for which the loan is used. The court postulated that what may ostensibly be debt in the name of the husband could also have been enjoyed by the wife because she might have driven the husband's car or used his credit card. However, that is not the point. It is not a question of who benefits from the money loaned. That is a matter which will not usually be apparent to the lender. It is a question of whether the wife has, for no consideration, taken on a legal liability that is not hers and for which she is otherwise not responsible. That is the only relevant question and is fully apparent from the face of the proposed transaction. If on the face of the proposed transaction she is undertaking to provide a guarantee of her husband's debts for nothing in return, that legal liability should be explained to her under the Etridge protocol. The fact that she expects to benefit indirectly from the use of the money loaned solely to her husband may be what prompts her to agree to the transaction when the Etridge protocol is followed. It may be a factor militating against a finding of undue influence. But it does not detract from the relevant point which is that it is apparent from the face of the transaction that she has gratuitously taken on a liability for a debt which is being used to discharge her husband's indebtedness.

54. Nor do I find support for the fact and degree test adopted by the Court of Appeal from Lord Nicholls' speech at paras 48 and 49 in *Etridge No 2* as is suggested at paras 32-34 of the Court of Appeal judgment. At para 34 Sir Geoffrey Vos MR said it was from the passages at paras 48 and 49 that "the judges below drew the need to look at the transaction as a whole and to decide, as a matter of fact and degree whether the loan was being made for 'the [purposes of the borrower with the debts], as distinct from their joint purposes'". Lord Nicholls explained in those passages (see paras 29-30 above) that there is a clear dividing line between surety and joint borrowing transactions, and no question of fact or degree conceivably arises. However, in a case of joint borrowing (which is on the wrong side of the line for this purpose) the bank *is* put on inquiry if it is made aware that what purports on the face of a loan application to be joint borrowing for both spouses is really being made for the purposes of one of them (for example, as a loan advance for the husband's business). In other words, the bank is not put on inquiry in relation to security given for joint borrowing unless there are particular facts which if established, put the bank on inquiry that the transaction is not what it seems to be on the face of the documents. But that is different from a case such as this, where on the face of the transaction, part of the loan secured by the house was to discharge the husband's personal liability on his credit card and car loan and the bank is or should have been aware that this part of the loan was made for the husband's purposes as distinct from securing their joint liabilities, yet the wife is taking on a legal liability in relation to it for nothing in return. Nothing in what Lord Nicholls said about joint borrowing requires an evaluation in an

apparent partial surety case, to determine whether, as a matter of fact and degree, the loan was being made for the purposes of one spouse, as distinct from their joint purposes.

55. There is nothing in the speeches in *Etridge No 2* that envisaged a debate about fine distinctions as to the meaning of surety, or as to differing proportions of joint and sole borrowing or differing purposes for which borrowers borrow to pay off the debts of one partner or the other. It is difficult to see how such a debate could help underwriting departments faced with deciding whether to apply the Etridge protocol. There is a need for the same workable simplicity as established in *Etridge No 2* to assist banks to put in place procedures which can be applied in a routine, straightforward manner and which "do not require an exercise of judgment by their officials" (para 108 per Lord Hobhouse). The bright line approach to non-commercial hybrid cases achieves just that. It is clear, promotes certainty, and most significantly, it is easy to apply effectively in all non-commercial hybrid transactions. Banks and other creditors have both the commercial incentive and the practical ability to arrange their procedures so that it is harder for mortgage transactions to be misused to facilitate domestic undue influence and fraud. Discharge of the onus of inquiry is not difficult. It involves recommending that the wife (or other vulnerable party) should obtain independent legal advice. That onus can be discharged simply and inexpensively in accordance with the Etridge protocol, described by Lord Nicholls at para 87 as "a modest burden for banks and other lenders. It is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual."

56. Contrary to the view of the Court of Appeal, this does not involve there being a third test for hybrid cases. This approach simply involves treating a non-commercial hybrid transaction as a surety transaction and not as a joint loan. The existence of any exclusive benefit for one borrower (not being de minimis) moves the case out of the joint loan category and into the surety category, engaging the need for a bank to take the simple steps identified in the Etridge protocol. It satisfies the need, identified in *Etridge No 2*, for simplicity of operation by the banks who are more likely to wish to play safe by issuing an Etridge protocol letter to remove possible risk, than to litigate about the need for one subsequently. This bright line approach should encourage banks to prevent future litigation by taking the modest, reasonable step of issuing Etridge protocol letters, rather than encouraging controversial or finely balanced judgments to be formed by underwriting staff about whether there is, or is not, an appearance of suretyship.

57. I would therefore hold that a creditor is put on inquiry in any non-commercial hybrid transaction where, on the face of the transaction, there is a more than de minimis element of borrowing which serves to discharge the debts of one of the borrowers and so might not be to the financial advantage of the other. The transaction must be viewed from the bank's perspective. Such a transaction, if viewed in this way, should be regarded as a "surety" transaction and the creditor placed on inquiry of the possibility of undue influence. The steps set out in the Etridge protocol must then be taken.

58. This is not a radical departure from the present position. Rather, it accords with the principle in, and policy objectives of, *O'Brien, Pitt* and *Etridge No 2* that favour certainty and afford a broad scope of protection by putting a bank "on inquiry" in every non-commercial case where a wife offers to stand surety for a loan used to pay off her husband's debts to a more than de minimis extent. It recognises and applies, on the one hand, the low threshold for the bank being put on inquiry in such cases given the elevated risk of undue influence or misrepresentation because the transaction is on its face not to the financial advantage of the wife; and on the other, the modest steps which a bank must take to acquire protection in a case where the bank is put on inquiry.

59. It is also consistent with what Lord Bingham of Cornhill described as the paramount need in this important field that the requirements of the law should be clear, simple and practically operable (see para 2 in *Etridge No 2*).

60. The Court of Appeal criticised this bright line test as likely to engender argument as to whether a particular percentage was or was not de minimis or "non-trivial" (see para 35). That may be true, but I find it hard to see how any other test would engender as much argument as a "fact and degree" test. I agree with the appellant that the de minimis principle is of such long standing that it is surprising to regard it as a source of unworkable uncertainty. Courts have little difficulty in identifying what is and is not caught by the principle. Lord Briggs, giving the judgment of this court in *Brown v Ridley* [2025] UKSC 7; [2025] 2 WLR 371, stated, at para 30, that:

> "[The de minimis] principle is enshrined in the Latin tag de minimis non curat lex, which is often translated as meaning that the law is not concerned with trifles. Well-known authorities on the principle describe it as excluding matters which are trifling, insubstantial, inconsequential, immaterial, irrelevant or negligible: see eg *Chatterton v Cave* (1878) 3 App Cas 483, 490, 492, 499, and *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229, para 50."

Certainly, in this case, no-one could regard a surety component of £39,500 as de minimis or trivial.

61. Ms Wicks submitted that the appellant's proposed test would be onerous for lenders and for many borrowers. I do not accept that compliance with the Etridge protocol in non-commercial hybrid cases would be onerous. Lord Nicholls dismissed such concerns in *Etridge No 2* and Lord Hobhouse considered that the Etridge protocol would assist banks by requiring them to put in place procedures which do not require an exercise of judgment by their officials. Developments in information technology since 2001 have no doubt reduced that burden even further. It is true that there is a requirement for

independent legal advice (inevitably paid for by the borrowers), but that can sometimes be delivered by the same solicitor as is acting for the husband in a case where the wife is content that this should be so. In any event, I cannot see that such advice is likely to add materially to the cost of the borrowing in a case where undue influence is absent. The fact that more transactions will be affected is nothing to the point. Nor is there any basis for concluding that it will introduce unnecessary friction at significant cost into the lending system by requiring a wider category of borrowers to have independent legal advice or inhibit or unduly delay transactions which are important to the overall economy. Although this was asserted by Ms Wicks, there was no evidence adduced to support it.

62. In fact, it seems to me that a bright line test is likely to be less onerous for lenders dealing with large volumes of loan applications at any one time. Examining every non-commercial loan application to decide whether a transaction, viewed as a whole, is being made for the purposes of suretyship as distinct from the borrowers' joint purposes is unlikely to be easy or practicable. It is far simpler and clearer to have a bright line rule that applies in all (save de minimis) non-commercial partial surety cases. Indeed, for the reasons I have given, I consider that a bright line of this kind favours the banks.

63. Ms Wicks submitted that banks have been effectively operating the "fact and degree" test since *Etridge No 2* for over 20 years. When pressed, she accepted that the court has been provided with no evidence that this is the case. It is equally possible that banks have been operating the proposed bright line test in non-commercial partial surety transactions for many years. To have done so would have reduced their risk in a modest and cost-effective way. The absence of any authorities dealing with the treatment of such transactions is itself neutral as to the way in which banks have been managing the risk of undue influence in hybrid transactions, and I am satisfied that this decision will not disturb any settled understanding or practice in relation to non-commercial hybrid transactions. The mere fact that the evidence of the Bank's underwriter in this case, that, if the Bank had known that £142,000 from the re-mortgage was to go to discharge Mr Bishop's liability to pay his ex-wife, it would have required the appellant to obtain independent legal advice (see the judgment of HHJ Mitchell at paras 46 and 128) tells one nothing about standard operating practices. I note in this regard that there has been no application to intervene by other banks said to be affected by the outcome of this appeal, nor any attempt to rely on evidence of standard banking practices and procedures. While it is likely that adoption of a bright line test in partial surety cases may have the effect of opening up more historic transactions to legal challenge than a test based on fact and degree, there is no evidential foundation for Ms Wicks' assertion that it will have profound implications for the lending industry.

Academic analysis

64. Finally, I note that academic analysis of this question also supports a simple bright line test. In *Emmet & Farrand on Title*, looseleaf ed, at para 25.068 the authors say of the

suggested bright line rule rejected by the Court of Appeal, that it "would have had the attraction of preserving the simplicity and predictability of the *Etridge* approach: in the case of non-commercial joint borrowers the lender would be put on enquiry if it was aware that *any* non-trivial part of the loan was for the purposes of only one of the couple rather than for their joint purposes".

65. Hybrid cases are discussed in *Duress, Undue Influence and Unconscionable Dealing*, 4th ed (2023) by Professor Enonchong of the University of Birmingham at 24-017 onwards. Professor Enonchong suggests that in a case like the present case, where there is only one transaction, but the amount advanced by the bank to both parties jointly, is to be used partly for their joint purposes and partly for one party's own purpose, the creditor should be put on inquiry by knowledge that the loan is partly for the joint purpose of the parties and partly for the husband's sole purposes. In an article written more recently, "Secured Lending: When is the Lender Put on Inquiry in a 'Hybrid' Transaction?" (2025) JIBFL 93, Professor Enonchong argues that a bright line test is more in line with the principles and legal policy articulated by the House of Lords in *Etridge No 2*.

66. A similar conclusion is reached by Dr David Capper, School of Law, Queen's University Belfast in "Etridge in hybrid surety and joint borrowing cases" (2025) LMCLQ 34; and by Dr Eleanor Rowan, Cardiff University in "Economic Abuse, the Bank, and the Devil in the Detail: One Savings Bank Plc v Catherine Waller-Edwards [2024] EWCA Civ 302" (2025) 45 Legal Studies 149 at p 153. Dr Rowan expresses the view that following the Court of Appeal's decision in this case,

> "it is likely that banks will require ILA [independent legal advice] to be delivered to surety-borrowers in every instance where there is a suretyship component. This would provide banks with more certainty (as opposed to applying the 'fact and degree' threshold test endorsed by the Court of Appeal), as they will then have an uncluttered ability to enforce security in *all* cases if undue influence claims later arise. I suspect banks will respond to the Court of Appeal's judgment in this way, because research into lenders' conduct and solicitors' practices post-*Etridge* has shown that many banks now require solicitors to deliver ILA to commercial sureties as well as non-commercial sureties, despite Lord Nicholls' clearly stipulating that banks are not put on inquiry in commercial situations."

Conclusion

67. For all these reasons I would allow the appeal. It will be necessary for the parties to consider the consequences that should follow. In the absence of agreement about an appropriate order, it may be necessary for the case to be remitted to the county court for further consideration of the question of remedy.