Press Summary

4 June 2025

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

[2025] UKSC 22

On appeal from [2024] EWCA Civ 302

Justices: Lord Briggs, Lord Hamblen, Lord Stephens, Lady Rose and Lady Simler

Background to the Appeal

In 2011 the appellant commenced a relationship at a point in her life when she was emotionally vulnerable but financially independent as the sole owner of her mortgage-free home with substantial savings. Her partner, Mr Bishop, persuaded her to exchange her home and savings for a property he was building, which was already subject to an existing charge. In 2013, Mr Bishop re-mortgaged the property for £384,000 with the respondent ("the Bank"). The Bank understood from Mr Bishop that the re-mortgage would be to purchase another property for the couple to use as a buy-to-let and to pay off an existing mortgage debt. The Bank required Mr Bishop to use the loan to pay off his other 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. In fact (but unknown to the Bank), the loan was used by Mr Bishop to make a divorce payment to his ex-wife and pay off the first charge on the property.

Following completion of the re-mortgage in October 2013, the relationship between the couple ended. The appellant remained living in the property, now heavily mortgaged. The couple fell into arrears and ultimately the Bank commenced possession proceedings in November 2021.

At a contested trial (in which Mr Bishop played no part), the appellant alleged that she had acted under Mr Bishop's undue influence when entering the remortgage transaction with the Bank. The appellant relied on the principle established in a series of well-known cases (*Barclays Bank v O'Brien* [1994] 1 AC 180, *CIBC Mortgages plc v Pitt* [1994] AC 200 and *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 [2002] 2 AC 773 ("*Etridge No 2*")) to argue that she was a surety (i.e. a guarantor) for part of the loan made to pay off Mr Bishop's debts (which totalled £39,500) so that the Bank was "put on inquiry" that her agreement to the transaction may have been obtained by undue influence. Since the Bank failed to take steps to be satisfied that her agreement to stand surety had been obtained in full

knowledge of the liability she was taking on, the appellant argued that the remortgage transaction should be set aside as between her and the Bank.

The judge in the County Court found that the appellant had entered into the remortgage under the undue influence of Mr Bishop but the County Court, the High Court and the Court of Appeal all held that the Bank was not put on inquiry that the appellant's agreement to the transaction may have been obtained by undue influence because this was joint borrowing and not to be viewed as a surety transaction.

Judgment

The Supreme Court unanimously allows the appeal. Lady Simler gives the only judgment, with which the other justices agree.

She holds 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 (i.e. trivial) 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.

Reasons for the Judgment

Undue Influence and the principle confirmed in Etridge No 2

The principle confirmed by *Etridge No 2* is that banks and other lenders are "put on inquiry" (that one party's agreement to the transaction with the Bank may have been obtained by undue influence) whenever on the face of a three-way non-commercial 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 **[1], [2]**.

A relevant surety transaction is a non-commercial transaction where the vulnerable party offers to guarantee the other party's debt, taking on a legal liability for nothing in return. When a lender is "put on inquiry", it is required to follow the "Etridge protocol" **[33]**. This is a series of steps designed to reduce the risk of a vulnerable party being induced to enter into the transaction by bringing home to that party the risk in providing a legal guarantee of their partner's debts for nothing in return **[22]**. If a lender is put on inquiry and fails to follow the Etridge protocol the vulnerable party is entitled to set aside the transaction as against the bank.

A relevant joint borrowing transaction is a non-commercial transaction for which, on the face of it, both are jointly liable (for example, husband and wife take out a joint loan to purchase a car or a second home). In such circumstances, the bank is not ordinarily put on inquiry. Since the bank is not put on inquiry, it is not required to follow the Etridge protocol and there can be no question of the transaction being set aside on this basis.

This appeal involves a non-commercial hybrid loan. The loan was on the face of it partly joint borrowing and partly to discharge Mr Bishop's sole debt and to that latter extent to the financial disadvantage of the appellant. The question is what is the correct legal test for deciding when a lender is put on inquiry in a non-commercial hybrid loan transaction **[3]**.

The Court of Appeal adopted a fact and degree test. It held 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). It held that in this case, 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 **[4]**.

The appellant contends that a fact and degree test is wrong.

The correct test

Etridge No 2 confirmed that surety transactions are more likely than others to be tainted by undue influence because on the face of the transaction, the vulnerable party takes on a legal liability for the other's debt for no apparent personal gain. On the other hand, the risk in a joint borrowing transaction is much lower because, on the face of it, both parties are jointly liable for the debt and so both stand to benefit from it **[46]-[47]**. Because the risk of undue influence is sufficiently high in surety transactions, 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 the undue influence. On the other hand, in a joint borrowing transaction the risk of undue influence is sufficiently low to conclude that it would be unduly burdensome to borrowers to require the bank to take any additional steps **[48]-[49]**.

The approach adopted by the court in *Etridge No 2* is binary. Either a creditor is on notice of the risk of undue influence and must follow the Etridge protocol, or the creditor is not on notice and no steps are required. 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 risk **[52]**.

Nor is there scope for a nuanced or fact-sensitive approach. 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 of undue influence 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 **[52]**.

These considerations lead to the conclusion that the fact and degree test adopted by the Court of Appeal is wrong. The Court of Appeal was also wrong to focus on the purpose for which the loan is used. The relevant question is not about 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 one borrower has, for no personal gain, taken on a legal liability for which she is otherwise not responsible. That is the only relevant question and is fully apparent from the face of the proposed transaction **[53]**.

A bright line test reflects the approach of the court in *Etridge No 2* and the earlier cases. Accordingly, 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. This bright line test is clear, promotes certainty, and most significantly, it is easy to apply effectively in all non-commercial hybrid transactions. The onus of inquiry can be discharged simply and inexpensively in accordance with the Etridge protocol **[55]-[57]**.

Applying the correct test to this case, the appellant took on a legal liability for the loan to discharge Mr Bishop's debt of £39,500. She received nothing in return. The amount involved was not de minimis or trivial **[60]**.

References in square brackets are to paragraphs in the judgment.