Legal Mortgage Monthly Update
August 2025

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Case name Neutral citation	Victoria Capital Trust v Emmett [2025] EWHC 1972 (Comm)
Legal points	Application to set aside default judgment - personal guarantee – whether presumed undue influence – *Etridge* protocol
Facts	Lender agreed to lend £986,250 to a company borrower pursuant to a facility agreement with associated finance documents including a legal charge and debenture, and personal guarantees entered into by Mr & Mrs E (who were divorced). Mrs E's signature was witnessed by a solicitor who provided the lender with a 'Solicitor's Certificate' that he had advised Mrs E in relation to the finance documents. Lender later assigned the facility and finance documents to VCT. Following default by the company in repayment of the facility, VCT demanded payment from Mr & Mrs E and issued proceedings for payment. No acknowledgements of service or defences having been filed, VCT applied for and obtained judgment in default against them in the sum of £1,276,033.09. Mrs E applied to set aside the default judgment, contending there is some other good reason to set aside the judgment, namely that she only became aware of the claim form after judgment was entered against her, and that she has a real prospect of successfully defending the claim. She filed evidence in support in which she took a number of points, including (a) she was not involved with the company; (b) she placed trust and confidence in her husband in relation to their financial affairs; (c) although she signed the Guarantee in the presence of a solicitor, she did not receive any advice from him in respect of the Guarantee or an explanation of what the Guarantee meant; and (d) Mr E was present throughout the meeting. The thrust of her case was to rely on presumed undue influence by her former husband.

Held

(HHJ Baumgartner, sitting as a judge of the High Court, 30 July 2025): The court directed itself on the requirements in CPR 13 (setting aside default judgment) noting that the power to set aside in CPR 13.3(1) is discretionary (the court *may* set aside…) if (a) the defendant has a real prospect of successfully defending the claim; or (b) it appears to the court that there is some other good reason why judgment should be set aside. The court noted this is essentially the same test as applies on applications for summary judgment under CPR 24 although noting Potter LJ's comment in *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [9] that a defendant applying under CPR 13.3(1) may find the court less receptive in applying the test in his favour than if he were a defendant advancing a timely ground of resistance to summary judgment.

In evaluating whether a defendant has a real prospect of successfully defending the claim the presumption is that the facts relied upon by the defendant are true (*Royal Bank of Scotland Plc v Etridge (No.2)* [2002] 2 AC 773 per Lord Scott at [229]).

The requirement in CPR 13.3(1)(b) for some other good reason is a disjunctive alternative – it is capable of extending to a situation where the defendant has not received the claim form and particulars before judgment was entered against him. It is not an absolute right but does not have to depend on the defendant having a real prospect of successfully defending the claim.

The court also noted that under CPR 13.3(2) the court is required to consider whether the defendant has applied promptly.

The court then reviewed the law on undue influence in Etridge noting that the principles were re-affirmed in *Waller-Edwards v One Savings Bank Plc* [2025] UKSC 22 at [20]-[22], [29], [32]-[36], and referred to the steps that must be taken by a bank – the *Etridge* protocol.

The court noted that Mrs E was not relying on actual undue influence, but that in order to succeed on presumed undue influence, she must prove:

> (1) (a) the relationship of influence – that she placed trust and confidence in him in relation to the management of their financial affairs (noting that it is not sufficient to assert that the transaction itself evidences a 'relationship of undue influence': *Perwaz v Perwaz* [2018] UKUT 325 (TCC) per Judge Elizabeth Cook);
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> (b) that the transaction (the guarantee) is one that calls for an explanation on the basis it was 'immoderate or irrational' or 'cannot be reasonably accounted for on grounds of friendship, relationship, charity or other motives on which ordinary men act (*Etridge* at [21]-[30] per Lord Nicholls.
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> (2) that the lender had actual or constructive notice of the presumed undue influence i.e. notice of the circumstances from which the presumption of undue influence is alleged to give rise.

Where the burden of proof is discharged, this results in a rebuttable evidential presumption which allows the court to infer that the transaction can only have been procured by undue influence. It is then for the lender to produce evidence to the contrary to show that the transaction was not procured by undue influence.

On the facts, there was no real prospect of Mrs E successfully defending VCT's claim:

1. As to the application of the presumption of influence – Mr & Mrs E were divorced and had entered into a comprehensive financial settlement (involving significant disclosure of assets and control) before the finance agreements were entered into (unlike in *Syndicate Bank v Dansingani* [2019] EWHC 3439 (Ch) (on appeal at [2021] EWCA Civ 714) where they were still married at the date of the transaction) and which provided her with a continuing income and dividends from the company.

2. The evidence was inconsistent with her allegation that she continued to trust Mr E to deal with her and her children's financial affairs.

3. No complaint of undue influence was made to the lender or VCT even after the first letter of demand.

4. The evidence was consistent with Mrs E being willing, at the time, to enter the finance documents.

5. The allegation that the Guarantee was to her manifest disadvantage was not true and could be rejected for a number of reasons.

6. The lender took the precaution of ensuring that Mrs E received independent legal advice. Although the firm instructed also acted for the borrower company, the solicitor was willing to give advice and provide a 'Solicitor's Certificate'.

7. While Lord Nicholls made clear in *Etridge* at [49] that shareholder interests and the identity of directors are not a reliable guide to the identity of the persons who actually have the conduct of a company's business, this was not a case of a wife standing surety for her husband's debts: this was a case of an ex-wife, who, having been involved in a business in which she and Mr E continued to participate in and were (to the lender's knowledge) directors of a holding company and the ultimate beneficial owners of the group.

8. Although Lady Simler pointed out in *Waller-Edwards* that in *Barclays Bank Plc v O'Brien* [1994] AC 180, the House of Lords set a low level for the threshold which must be crossed before a bank is put on inquiry, there were no grounds to put the lender on inquiry in this case.

9. If the court had to go on to consider whether Mrs E acted of her own free will, it would make that finding (by reference to the exchanges with the solicitors at the time).

10. The solicitors complied with the '*Etridge* protocol'. The court went through the 'Solicitor's Certificate' and noted it was a reliable contemporaneous document which contradicts Mrs E's account of what happened. On accepting instructions, the solicitor was not acting as the agent of the lender and the lender had no control over the advice given. The lender was entitled to proceed on the basis that the solicitor had "done his job properly" (*Etridge* per Lord Nicholls at [78]).

Mrs E therefore had no real prospect of successfully defending the claim (and the court would not have found there was some other good reason why the judgment should be set aside – she was sufficiently on notice of VCT's claim.

Application dismissed.

Comment	This is the first (detailed) decision on the application of the undue influence principles after *Waller-Edwards v One Savings Bank Plc* [2025] UKSC 22, and although it is not a hybrid case in which the court had to grapple with the new principles, it provides a really helpful review for practitioners of all the main ingredients of an undue influence claim in the context of mortgages and guarantees. All credit to the judge – he could have knocked this application out simply on the solicitor's *Etridge* certificate which, save for manifest error, can invariably be relied upon as a contemporaneous record both of the content of the advice, and the fact that advice was given (noting that it is for the solicitor to decide whether to undertake a duty of care to give advice, free of any conflict of interest and that the court will not generally go behind the advice or, as in this case, an allegation that the advice was inadequate – that is a matter for solicitor/client, not a lender). The judgment contains some useful comments on the role of the solicitor in acting for [in this case] a guarantor, and notes that while the solicitor did not communicate "directly with" the lender, it did so indirectly through the lender's solicitors, which the judge thought was sufficient. The case also provides a useful reminder of the principles to be applied on an application to set aside a default judgment for money under CPR 13 (note that default judgment is not available on a CPR 55 possession claim: CPR 55.7(4)).

Case name Neutral citation	Milltom Builders Ltd v Waterfield Developments Blackburn Ltd [2025] EWHC 2159 (Ch)
Legal points	Sale at an undervalue – sale by LPA receiver to appointing mortgagee
Casenote	This is a short case note of a point which arose in the administration of a company W. The company was incorporated as a special purpose vehicle to develop certain land by engaging builders M, whose fees were secured by mortgages granted by a director of the company over separate properties. A dispute about the amounts owed was resolved at arbitration with the High Court giving permission to enforce the award, which M secured by way of a charging order over the development land. Pursuant to the mortgages, M appointed LPA Receivers over the separate properties, and they sold one of the properties to M, the mortgagee who appointed them. An issue arose about the validity of the sale and whether it was at an undervalue, with the court noting: > 68. *Devon Commercial Property Ltd v Barrett* [2019] EWHC 700 (Ch) at [28] is authority for the proposition that the sale by an LPA receiver to the mortgagee is not, in itself, objectionable on the grounds of self-dealing. Further, prima facie, [the LPA receiver] acted as agent of the mortgagor [the director of the company], in respect of the sale, and thus any remedy in respect of a sale at an undervalue would, prima facie, be that of [the mortgagor] as against the [LPA receiver]. As to the duties of an LPA receiver to obtain a proper price, see *Silven Properties Ltd v Royal Bank of Scotland plc* [2004] 1 WLR 997.

	69. A claim as against [the mortgagee] in respect of a sale at an undervalue is only likely to lie if the latter acted in bad faith in relation to the sale and/or if the circumstances were such that [the LPA receiver] was, in fact, acting as agent of [the mortgagee]. Thus, again, prima facie, the claim would be that of [the mortgagor] not the company – see e.g. *Fisher & Lightwood's Law of Mortgage, 15th Edn at [30.34]*. The ability of [the administrator of the company] to rely upon any sale at an undervalue as providing a basis for reducing the outstanding liability of the company to M is thus limited. The case principally concerned a contest over who should be given conduct of the sale of the development property – M following the making of an order for sale in the charging order proceedings (for which M sought permission to continue pursuant to Para 43, Sched B1 Insolvency Act 1986) or whether the property should be sold by the administrator of the company after the court had made an order pursuant to Para 71, Sched B1, Insolvency Act 1986. Held: Permission given to the administrator to sell the property free of M's charging order, but on the basis that the priorities in the net proceeds of sale would be preserved pursuant to Para 71(4), subject to further directions.