



LegalMortgage Information Sheet

Undue Influence

What is Undue Influence?

Undue influence in the context of mortgage litigation is an equitable doctrine (a rule or principle of fairness) which may be relied upon as a defence to the enforcement of a mortgage. Similar principles apply in respect of other vitiating circumstances, such as misrepresentation. The problem with it is that it has become extraordinarily complicated and has given rise to a substantial amount of caselaw.

It typically arises where a wife is asked to put up her share of the family home as security for her husband's business borrowings. If the husband resorts to unacceptable force or coercion in order to procure the wife's entry into the transaction, or abuses the trust and confidence she may have placed in him to look after their financial affairs, the court may relieve the wife of liability and set the transaction aside.

The cases draw a distinction between two types of undue influence:

- (1) Actual undue influence – which involves the actual use of oppression or domination; and
- (2) Presumed undue influence – where the law will presume that a particular transaction between parties standing in a particular relationship is the result of undue influence. There are two categories:
 - (a) A relationship which is recognised in the law as giving rise to a presumption of undue influence (e.g. parent and child, solicitor and client, but not husband and wife); and
 - (b) A relationship which on its particular facts gives rise to a presumption of undue influence (where it is shown that one person reposed trust and confidence in the other).

The categories were identified in *BCCI v Aboody* [1990] 1 QB 923 at 953 per Slade LJ and were followed by the House of Lords in *Barclays Bank plc v O'Brien* [1994] 1 AC 180. In *Royal Bank of Scotland Plc v Etridge (No.2)* [2002] 2 AC 773 the House of Lords preferred to move away from rigid adherence to the distinct categories of undue influence and recognised that undue influence of whatever type was ultimately a matter of proof on the particular facts of each case, and that the presumptions were merely an evidential tool. In practice, they are still referred to and relied upon.

It is important to recognise that the categories of undue influence are not closed. The principles are evolving and adapting to changing circumstances, and some of the traditional elements of undue influence are being subsumed into others.

How does it work?

Many of the cases involve three parties: (1) a lender as mortgagee, (2) a husband (typically) as borrower and joint mortgagor, and (3) his wife (typically), as joint mortgagor and surety, with the undue influence invariably being exercised by the husband over the wife. In these cases, the law has to find some basis on which the mortgage may be susceptible to being set aside as against a lender, whose knowledge of the circumstances in which the wife is being asked to enter to the mortgage may vary considerably. So, when will a lender be put on notice?

Notice

A lender may be affected by actual, imputed or constructive notice. Most of the cases involve constructive notice (where the lender is deemed to be put on notice of particular facts), with cases typically giving rise to three different situations:

(1) Cases in which the lender is put on constructive notice – where a wife enters into the mortgage simply to provide security over jointly owned property (i.e. stand surety) for her husband's borrowings (it applies also where a husband stands surety for his wife's borrowings, and in the case of unmarried couples, whether in a heterosexual or homosexual relationship) (see *Royal Bank of Scotland Plc v Etridge* (No 2) [\[2002\] 2 AC 773](#)).

(2) Cases in which the lender is not put on constructive notice – where a wife enters into a joint loan as a joint borrower (see *CIBC Mortgages Plc v Pitt* [\[1994\] 1 AC 200](#)).

(3) Hybrid cases in which the lender is put on constructive notice to the extent that there is more than a *de minimis* element of borrowing which serves to discharge the debts of the husband (as well as other, joint borrowing) (see *Waller-Edwards v One Savings Bank Plc* [\[2025\] UKSC 22](#)). For a review of the Waller-Edwards case see the [Special Case Note in the 2025 Update](#).

There may also be other, borderline cases for e.g. where the wife stands surety for company borrowings in which she has an office and/or shareholding, in which case it has been held that the office or shareholding is not necessarily a reliable guide to the identity of the persons who actually have the conduct of the company's business (see for e.g. *Mahon v FBN Bank (UK) Ltd* [\[2011\] EWHC 1432 \(Ch\)](#) in which the wife was a 100% shareholder /secretary of the company but to the bank's knowledge played no part in negotiating the finance).

Where a lender is put on notice, the law has then had to develop workable procedures for lenders to adopt in order to decide whether or not it is safe to lend, and to protect themselves again the risk of being saddled with constructive notice of any wrongdoing, in other words to be able to rebut any presumption of undue influence that may arise. This is best considered in three distinct stages: (1) communication, (2) provision of information, and (3) independent legal advice.

Rebutting undue influence

(1) Communication

The lender should communicate directly with the wife. It should explain that for its own protection it requires a written confirmation from a solicitor acting for her to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. The lender should check directly with the wife the name of the solicitor she wishes to act for her (which can be the same solicitor as is acting for her husband). The lender should not proceed with the transaction until it has received an appropriate response directly from the wife. See *Royal Bank of Scotland Plc v Etridge* (No 2) [\[2002\] 2 AC 773](#) per Lord Nicholls at [79].

(2) Provision of information

Unless the lender is willing to undertake the task of explaining the husband's financial affairs, it must provide the solicitor with the financial information. What is required depends on the facts of the case. Ordinarily it will include information on the purpose for which the proposed new facility has been requested, the current amount of the husband's indebtedness, the amount of his current overdraft facility, and the amount and terms of any new facility. If the lender's request for security arose from a written application by the husband for a new facility, a copy of the application should be sent to the solicitor (subject to the lender obtaining consent from the customer). If the lender believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will the lender must inform the wife's solicitors of the facts giving rise to its belief or suspicion. The lender should in every case obtain from the wife's solicitor (or legal executive) a written confirmation to the effect that he has advised her. See *Royal Bank of Scotland Plc v Etridge* (No 2) [\[2002\] 2 AC 773](#) per Lord Nicholls at [79].

(3) Independent legal advice

The starting point is the solicitor's retainer. The solicitor will need to explain to the wife the purpose for which he has become involved and will need to obtain confirmation that she wishes him to act for her. The content of the advice will depend on the circumstances of the case but will typically cover the following matters as a core minimum:

(a) he will need to explain the nature of the documents and the practical consequences these will have for the wife if she signs them – that she could lose or her home or be made bankrupt;

(b) he will need to point out the seriousness of the risks involved. The wife should be told the purpose of the new facility, the amount and principal terms, that it may be changed or increased without reference to her. The solicitor should discuss the wife's financial means including her understanding of the value of the property being charged and whether they have other assets out of which payment could be made;

(c) the solicitor will need to state clearly that the wife has a choice and the decision is hers and hers alone, this will call for some discussion of the present financial position; and

(d) the solicitor should check whether the wife wishes to proceed and whether she is content that the solicitor should write to the lender confirming he has explained the nature of the documents and the practical implications they may have for her, or whether for instance she would prefer him to negotiate with the lender on the terms of the transaction.

The solicitor's discussion with the wife should take place at a face-to-face meeting in the absence of the husband, using non-technical language and the solicitor should obtain from the lender any information he needs. It is not strictly necessary that the solicitor should act for the wife alone, but in advising the wife, the solicitor will owe her a duty of care alone. It is a matter for him whether, in all the circumstances, to act for her or whether there may be a conflict of interest in which case he may decline to act. See *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 AC 773 per Lord Nicholls at [64] etc.

The 'Etridge Certificate'

The significance of an Etridge certificate of independent legal advice is that it will substantially rebut any presumption of undue influence and will usually prevent the lender from being saddled with constructive notice of undue influence.

Ordinarily a lender will be able to rely on an Etridge certificate and is not normally required, or indeed entitled, to enquire into the adequacy of the advice given: *Royal Bank of Scotland Plc v Etridge (No.2)* [2002] 2 AC 773 per Lord Nicholls at [77]-[78]; *Bank of Baroda v Rayarel* [1995] 2 FLR 376; *Bank of Scotland v Hill* [2002] EWCA Civ 1081. However, this will not necessarily be the case if the lender is aware of defects in the authority of the solicitor to advise, or the manner in which he has purported to discharge his duty of care, for example where the lender is aware that the advice has not been confirmed in the borrower's own language: *National Westminster Bank Plc v Amin* [2002] UKHL 9 (a decision on a strike-out application); *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555; *HSBC Bank Plc v Brown* [2015] EWHC 359 (Ch). Equally, it will not normally be sufficient for the lender to be aware that the wife has solicitors acting for her, without obtaining a certificate from them, at least if it is unaware what advice was actually given: *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555; *First National Bank Plc v Achampong* [2003] EWCA Civ 487. Nor is it sufficient for the lender to rely on the fact that a solicitor was engaged in an 'execution-only' role, since this is not necessarily to be equated with an advisory role: *Lloyd's Bank Plc v Holdgate* [2002] EWCA Civ 1543.

Remedies

The usual form of relief sought is a declaration that the particular loan/security documents have been procured by undue influence and for an order that they be set aside or rescinded (usually in whole rather than in part, as for example where the court set aside a legal charge notwithstanding that the wife thought it was limited to a maximum liability of £15,000: *TSB Bank Plc v Camfield* [1995] 1 WLR 430).

Rescission is an equitable remedy and may be subject to the usual bars to relief, such as affirmation, estoppel or delay. These expressions are not uniformly used and there is considerable overlap. The essential ingredient is that it would be inequitable to allow the influenced party to set aside the transaction (*Goldsworthy v Brickell* [1987] Ch 378 per Parker LJ at 416H). It is not necessary that the influenced party who it is alleged has affirmed the particular transaction is aware of her rights. The real test is whether it is just in all the circumstances that the affirmation be held against her (*Habib Bank Ltd v Tufail* [2006] EWCA Civ 374 per Lloyds LJ at [22]; *Kanda v City & County Properties* [2006] EWHC 3689 (Ch)). Ordinarily, the influenced party will not be barred from relief so long as the influence continues (*Allcard v Skinner* (1887) 36 Ch D 145)).

Restitution

As a general rule, a party who has received a benefit under a contract must make restitution as a condition of rescission in order to restore the parties to their original positions (*Adam v Newbigging* (1888) 13 App Cas 308; *Cheese v Thomas* [1994] 1 WLR 129).

In most true surety cases, the influenced party will not have received any benefit so there will be nothing to restore. Where the influenced party has obtained a benefit, it may be inequitable to set aside the transaction without requiring her to account for the benefit received, for example to the extent of the value of an interest in property acquired by the advance (*Dunbar Bank Plc v Nadeem* [1998] 3 All ER 876), or to the extent of monies paid on home improvements (*Midland Bank Plc v Greene* [1995] 27 HLR 350). A court of equity will grant relief even if it is not possible to restore the parties precisely to the state they were in before the contract, whenever it can to do what is just (*Cheese v Thomas* [1994] 1 WLR 129; *Smith v Cooper* [2010] EWCA Civ 772). Subject to this, an influenced party is entitled to have the mortgage set aside in toto, and where, for example, she has been persuaded to enter into a legal charge thinking she will have a maximum liability of £15,000, she is not required, as a condition for setting it aside, to acknowledge that it is valid security for £15,000 (*TSB Bank Plc v Camfield* [1995] 1 WLR 430).

Alternative remedies available to the lender

In terms of alternative remedies for the lender, as in the case of forgery, where a mortgage is set aside for undue influence as between the wife and lender, the lender still retains an effective equitable charge over the husband's beneficial interest, and subject to consideration of the matters in [s 15\(1\) Trusts of Land and Appointment of Trustees Act 1996](#), including the interest of a secured lender under [s 15\(1\)\(d\)](#), the court may be minded to order sale (*First National Bank Plc v Achampong* [2003] EWCA Civ 487; *Thompson v Foy* [2009] EWHC 1076 (Ch) per Lewison J at [145]; *Santander UK Plc v Fletcher* [2018] EWHC 2788 (Ch)).

Alternatively, the lender may sue the husband for a money judgment which it can enforce by a charging order or bankruptcy (leaving it to the trustee in bankruptcy to seek a sale of the property under [s 335A Insolvency Act 1986](#)): *Zandfarid v BCCI* [1996] 1 WLR 2420; *Alliance & Leicester Plc v Slayford* [2001] 1 All ER (Comm) 1.

Similarly, the lender may also have a claim based on subrogation (*Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291), and as to this the lender may need to be alert to the possibility that the wife may also seek to avoid liability to a subrogated charge also on the grounds of undue influence, leaving the lender to pursue sub-subrogation (*UCB Group Ltd v Hedworth* [2003] EWCA Civ 1717). Where a mortgage which is liable to be set aside for undue influence is replaced by a later mortgage to the same lender, in circumstances where the two mortgages could be regarded as inseparably connected, the lender will be fixed with constructive notice of the invalidity of the earlier mortgage, and notice of the comparable invalidity of the later mortgage (*Yorkshire Bank Plc v Tinsley* [2004] 1 WLR 2380).

HM Land Registry

Since the effect of a successful plea of undue influence is that the mortgage is voidable, not void, different considerations apply in respect of alteration/indemnity from HM Land Registry (*NRAM Ltd v Evans* [2018] 1 WLR 639 per Kitchin LJ at [59]; *Antoine v Barclays Bank Plc* [2019] 1 WLR 1958 per Asplin LJ at [25] etc, and see generally Ruoff & Roper's Registered Conveyancing, Volume 2, para 46.037 etc.). It may permit the court, or the registrar, to alter the register for the purposes of bringing the register up to date ([Land Registration Act 2002, Sched 4, paras 2\(1\)\(b\), 5\(b\)](#)), consequent upon a court order setting aside the mortgage, but this will not amount to the correction of a mistake and will not amount to rectification ([Land Registration Act 2002, Sched 4, para 1\(a\)](#)). While this will avoid the restrictions which apply in respect of alterations which amount to rectification ([Land Registration Act 2002, Sched 4, paras 3 and 6](#)), it will not give rise to a right to an indemnity ([Land Registration Act 2002, Sched 8, para 1](#)).

Practice and procedure

The burden of proving undue influence is upon a complainant. He or she may discharge the burden by proving sufficient facts giving rise to a plea of actual undue influence, or at least sufficient facts giving rise to a presumption of undue influence, which, in the usual husband and wife cases, requires proof of trust and confidence, and a transaction which calls for an explanation, in which case the burden shifts to the husband to rebut the presumption (*Royal Bank of Scotland Plc v Etridge (No.2)* [2002] 2 AC 773 per Lord Nicholls at [13]-[14]). The burden of proving a bar to relief is on the mortgagee and will need to be properly pleaded (*Habib Bank Ltd v Tufail* [2006] EWCA Civ 374 per Lloyd LJ at [21]; *Goldsworthy v Brickell* [1987] Ch 378 per Nourse LJ at p 411B).

A complainant who wishes to rely on undue influence by way of defence and counterclaim in enforcement proceedings (in practice, a plea of undue influence is usually only raised by way of defence and counterclaim to a mortgagee's claim for possession, although there is nothing to stop a complainant from commencing proceedings for declaratory and consequential relief) will need to plead sufficient facts and matters in support ([CPR PD 16, para 8.2](#)). As in the case of forgery, while it is open to a claimant mortgagee to file a reply to the defence and a defence to the counterclaim, if he wishes to seek alternative relief, he will need to apply for permission to amend the claim form and particulars of claim ([CPR 17.1](#)) (unless he obtains the written consent of all the other parties), and for consequential directions ([CPR 17.3](#)).

Checklist

It is important to bear in mind these key points:

1. A person who seeks to rely upon undue influence must prove it.
2. The starting point is always to establish impropriety (the fact that there may have been no independent legal advice does not, by itself, give rise to a cause of action and should not be the starting point).
3. Next, make sure the transaction is of the right type to put a lender on notice.
4. Check if independent legal advice has been properly given, and whether the lender has relied on an Etridge Certificate.
5. Anticipate if the lender is entitled to other remedies.
6. Proceed with caution and weigh cost/benefit carefully – the lender may be able to add some or all of the costs of defending the claim to its security.
7. Overall, do take legal advice before pursuing an undue influence defence. They are very difficult to run.