Waller-Edwards v One Savings Bank Plc
[2025] UKSC 22

Waller-Edwards v One Savings Bank Plc [2025] UKSC 22
On appeal from [2024] EWCA Civ 302 and [2023] EWHC 2386 (Ch)

Summary
In allowing the appeal, the Supreme Court held that a creditor is put on inquiry in any non-commercial hybrid transaction where, on the fact 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.

Facts
Prior to the events giving rise to the dispute, Ms W owned her own property mortgage-free. When she was at a vulnerable period in her life, she formed a relationship with Mr B, a builder/developer and was persuaded by him to enter into a number of transactions, including swapping her property for an unbuilt property in joint names ('Spectrum') in which it was declared that she had a 99% beneficial interest, and agreeing to raise successive sums on mortgage secured on the property for various purposes, including latterly a re-mortgage from One Savings Bank for £384,000. A (single) solicitor acted for W, B and the bank.

As far as the bank was aware from the mortgage application form this was being used as to (approximately):
(a) £200,000 to pay off a previous mortgage;
(b) £40,000 to pay off a £24,000 debt on B's car and £16,000 on his credit card;
(c) £142,000 to purchase another property.

In fact, when the transaction completed, £233,801.76 was used to pay off the existing mortgage and most of the balance (£142,000) was used to pay off B's wife on divorce

Shortly after this, the relationship between W and B broke down and B moved out. Following default in repayment of the re-mortgage, OSB commenced possession proceedings. W defended the claim principally on the ground of undue influence by B.

Trial	HHJ Mitchell: After reviewing the history of the relationship, the trial judge held that there was a relationship of trust and confidence which B had abused, and that that part of the transaction which involved the divorce payment called for an explanation, so that W had succeeded in raising a presumption of undue influence. But as to whether the bank was put on inquiry, the bank's evidence was that it thought this was a joint loan on the security of a jointly owned property. The bank did not know that 99% of the beneficial interest was held by W or that £142,000 of the remortgage monies were going to B's wife (although B's solicitor, who had acted for him in the divorce proceedings was aware). However, the bank did know that £24,000 was needed to redeem B's car finance and £16,000 to pay off B's credit card. The judge concluded this was not a typical 'surety-type' case but only had an element of surety to the extent of the £40,000, which only represented about 10% of the total borrowing. Whether this should have put the bank on notice was a matter of fact and degree but in the end he decided it did not tip into a surety case. In other words, it fell on the *Pitt* side of the line, rather than the *O'Brien* side, so that the bank was not put on notice. W appealed on two grounds (1) that the judge was wrong to conclude that the bank was not put on inquiry; and (2) that the bank took with imputed notice pursuant to s 199(1)(ii) Law of Property Act 1925, being notice via the solicitor of the divorce payment. There was no appeal against the judge's finding of undue influence.
1st Appeal	[2023] EWHC 2386 Ch Edwin Johnson J: The court reviewed the basis upon which a lender is put on inquiry, in accordance with *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 and *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200, and latterly *Royal Bank of Scotland Plc v Etridge* [2002] 2 AC 773, and in particular, the court's approach to 'hybrid' or 'mixed purposes' cases i.e. where, to the lender's knowledge, there is a surety element. Ultimately the trial judge saw the answer to the question whether there was a sufficient surety element as one of fact and degree. The court accepted in principle that the House of Lords did not intend to confine the *O'Brien* principles to cases only where the entirety of the loan, or even the majority of the loan, was for the benefit of the husband – the principles were clearly more flexible than that and were capable of extending to 'partial surety cases'. The court held that what puts the lender on inquiry, where the relationship is a non-commercial one, is the fact that, to the knowledge of the lender, the relevant transaction is not, on its face, to the financial advantage of the wife or other person in an equivalent position. How one identifies partial surety cases to which the *O'Brien* principles can legitimately be applied must necessarily be a fact sensitive question which is essentially what the judge was saying. On the evidence, the judge was correct in the conclusion to which he came. The fact that the remortgage did not involve a loan for the sole benefit of B did not preclude the application of the *O'Brien* principles. Rather, it became necessary to look at the remortgage as a whole, as the transaction was or should have been known to the bank. That part of the remortgage which discharged the existing mortgage was financially neutral so far as the bank was concerned because it was a joint mortgage and there was no suggestion the bank was on notice of any undue influence in respect of it. Beyond this, it was difficult to see why the bank was put on notice to the extent of the £40,000. Looked at in the round, the remortgage, as it was known to the bank, did not constitute a transaction in which W was properly viewed as being in a relationship of suretyship with B.

	As to the operation of s 199 Law of Property Act 1925, it was held in *Halifax Mortgage Services Ltd v Stepsky* [1996] Ch 207 that in addition to actual or constructive notice of the true purpose of the loan, a lender may be imputed with such knowledge as may have been acquired by its solicitor agents, pursuant to s 199(1)(ii)(b), but this only extends to knowledge of facts and matters which come to the solicitors as solicitors for the lender 'as such', and would not extend to facts and matters which come to the knowledge of the solicitors when acting for the [husband] or [wife]. Appeal dismissed. W appealed. Lewison LJ granted permission to appeal (a second appeal) limited to the question of the correct legal test in a hybrid case, where a loan is taken out for a variety of purposes, and if the legal test is a question of fact and degree, then permission to challenge the judge's evaluation of that question is refused.
Court of Appeal	[2024] EWCA Civ 302 Sir Geoffrey Vos MR, with whom Peter Jackson and Falk LJJ agreed: Referring extensively to *O'Brien*, *Pitt* and *Etridge* (of which the following are the main points): The law imposes no obligation on a 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 party's concurrence had been procured by the misconduct of a third party. In *O'Brien* the House of Lords considered the circumstances in which a bank or other creditor is 'put on inquiry'. Strictly this is a misnomer. A bank is not required to make inquiries, but it will be convenient to use this terminology. The House set a low level for the threshold which must be crossed before a bank 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 not on its face 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. This means simply that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts. The position is likewise if the husband stands surety for his wife's debts, and similarly in the case of unmarried couples, whether heterosexual or homosexual, where the bank is aware of the relationship. Cohabitation is not essential. In a straightforward *O'Brien* type case, the bank is put on inquiry where a wife becomes surety for her husband's debts, but on the other side of the line, in a *Pitt* case, where the money is being advanced to husband and wife jointly, 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. Is the lender put on inquiry unless the element of the transaction that is for the sole benefit of one of the borrowers trivial?

	The court made three introductory points: 1. The question of whether a bank is put on inquiry is to be ascertained through the lens of the lender. 2. In some cases there are one or more 'red flags'. In this case the only matter that might have put the bank on inquiry was the fact the transaction entailed paying off some £40,000 in debts in B's sole name. The evidence established this was not an uncommon situation. 3. If the test is as the judges below said (question of fact and degree) the fact that some 10% of the advance was used to pay B's debts did not, as a matter of fact and degree turn the transaction from a joint borrowing case (where the bank is not put on inquiry) to a surety case (where the bank is put on inquiry) (there being no appeal on this point). The judges below were right about the correct legal test. *Etridge* did not lower the threshold in *O'Brien*. The low threshold test – putting the bank on inquiry whenever a wife stands surety for her husband's debts was not addressing the question of whether a particular transaction was properly to be regarded as s surety case in the first place. As regards the identification of a surety case, Lord Nicholls (in *Etridge*) tells us that a joint borrowing case only puts the bank on inquiry "if the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes". It was from this 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". Nothing in *Etridge* implies a third test for hybrid cases, which may introduce some uncertainty – whether a particular percentage was or was not "non-trivial", or whether the bank knows the particular debts are truly for the sole benefit of one of them. The approach that requires the court to look at the transaction as a whole and to decide on the facts whether it was really being made for the purposes of the borrower with the debts as distinct from their joint purposes accords with the substance of the speech of Lord Nicholls in *Etridge* Applying *Etridge* to the facts as found by the trial judge does not demand that in a hybrid case, a lender is put on inquiry unless the element of the transaction that is for the sole benefit of one of the borrowers is trivial. 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. Looked at as a whole from the point of view of the bank, the loan was a joint borrowing made for joint purposes.
Supreme Court	[2025] UKSC 22 Lady Simler, with whom Lord Briggs, Lord Hamblen, Lord Stephens and Lady Rose agreed: Introduction The court reviewed the principles derived from the three leading cases: *Barclays Bank Plc 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)* [2002] 2 AC 773 – the law regarded 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) (*O'Brien*). By contrast, where on the face of the transaction the lending is advanced to the 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 (*Pitt*). The distinction between these two cases is straightforward and binary.

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 an extent apparently to the financial disadvantage of the other. This sort of transaction is described 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.

The courts below held that the test is one of 'fact and degree' in other words 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 distinction from their joint purposes.

Approach

It is 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. The rationale is that the wife assumes a legal liability that she would not otherwise have (whether under as guarantee or charge) for her husband's debts but receives no apparent financial 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.

The court acknowledged that non-commercial hybrid transactions come on 'different shapes and sizes' with the ratio of joint borrowing to surety varying significantly from one transaction to another but this did not justify a 'fact and degree' approach. The approach adopted in *O'Brien, Pitt* and *Etridge* 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 scope for a nuanced (or fact-sensitive) approach) to whether the creditor is on notice or not. 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. 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.

Conclusions

The Court of Appeal was wrong to focus on the purpose for which the loan is used. It is not a question of who benefits from the money loaned. 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 transaction. The fact that she expects to benefit from the money loaned may be what prompts her to agree to the transaction when the *Etridge* protocol is followed but it does not detract from the relevant point which is apparent on 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.

	There is nothing in the speeches in *Etridge* 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* 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". 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. Contrary to the view of the Court of Appeal, this does not involve there being a third test for hybrid cases. > [57] *I would therefore hold that a creditor is put on inquiry in any non-commercial hybrid transaction where, on the fact 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*
Comment	Common sense restored. We previously noted the practical difficulties caused by the courts below in applying a third 'fact and degree' test, and recognised the scope for a successful appeal. The Supreme Court has now confirmed that in all cases – the test is a binary one. Either there is an element of surety in which case the *Etridge* guidelines have to be followed, or there is not, and the Court particularly emphasised that it is how the transaction looks to the lender (not the court, on a later occasion). This will be welcome news both for lenders, whose underwriting departments need certainty, albeit there will now, inevitably be an increased number of referrals for independent legal advice in accordance with the *Etridge* guidelines, and for borrowers who, in any cases in which there is identified a surety element, will be given some measure of protection.

Nigel Clayton
Editor www.legalmortgage.co.uk Barrister www.kingschambers.com

Nigel Clayton appeared for CIBC Mortgages Plc in *CIBC Mortgages Plc v Pitt* [1994] AC 200