Neutral Citation Number: [2024] EWCA Civ 302

Appeal No: CA-2023-001936
Case No: H00BH712

IN THE COURT OF APPEAL OF ENGLAND AND WALES (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
Mr Justice Edwin Johnson
HH Judge Mitchell (County Court at Bournemouth & Poole)

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 28 March 2024

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE JACKSON
and
LADY JUSTICE FALK

- -

Between:

ONE SAVINGS BANK PLC

Claimant/Respondent

- and –

CATHERINE WALLER-EDWARDS

Defendant/Appellant

Marc Beaumont (direct access) for the **Appellant/second Defendant** (Mrs Waller-Edwards)

Antonia Halker and **John Ditchburn** (instructed by **Equivo Limited**) for the **Respondent/Claimant** (the bank)

Hearing date: 29 February 2024

- -

JUDGMENT

This judgment was handed down remotely at 10:00am on 28 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

SIR GEOFFREY VOS, MASTER OF THE ROLLS:

Introduction

1. This is a second appeal, which raises a single question of law concerning the application of the principles laid down by the House of Lords in three well-known cases: *Barclays Bank plc v. O'Brien* [1994] 1 AC 180 (*O'Brien*), *C.I.B.C. Mortgages plc v. Pitt* [1994] 1 AC 200 (*Pitt*) and *Royal Bank of Scotland v. Etridge (No 2)* [2002] 2 AC 773 (*Etridge*). I shall refer to these three cases together as "the authorities".

2. HH Judge Mitchell (the trial judge) and Mr Justice Edwin Johnson (the appeal judge) decided, as a matter of fact and degree, that the bank was **not** put on inquiry of the undue influence that, as it has now been established, had been exerted over Ms Waller-Edwards by her then partner, Nicholas Bishop (Mr Bishop). That undue influence had in fact led to Ms Waller-Edwards remortgaging to the bank the property at Spectrum, 32B Beaucroft Lane, Wimborne, Dorset BH21 2PA (the property) that she jointly owned with Mr Bishop.

3. The property was, in fact, held in joint names subject to a declaration of trust providing that 1% was held for Mr Bishop and 99% for Ms Waller-Edwards. So far as the bank knew at the time of mortgage transaction on 24 October 2013, the mortgage advance of £384,000 was being used: (a) as to some £200,000 to pay off the previous mortgage, (b) as to some £40,000 (to pay off a £24,000 debt on Mr Bishop's car and £16,000 on his credit card), and (c) as to some £142,000 to purchase another property. These figures are not exact, but are taken from the trial judge's findings at [47]-[52]. The actual completion figures are somewhat different, but the differences are not material to what we have to decide.

4. It is common ground between the parties that the authorities provide for two different categories of case relating to secured borrowing by two persons in a relationship.

5. First, there is the category of case described, perhaps only partly accurately, as a "surety case". A surety case covers non-commercial situations where, for example, (a) one borrower guarantees the debts of the other or of a company, or (b) of more relevance to our case, the borrowers take secured borrowing on jointly owned property to pay off the debts of only one of them. In such circumstances, the lender will normally have constructive notice of the possibility of one borrower being unduly influenced by the other, and will be put "on inquiry". In current terms, if a lender is put on inquiry, it is normally required to follow what the parties before us called the "*Etridge* protocol". The *Etridge* protocol involves the series of steps described by Lord Nicholls at [79] in *Etridge*.

6. Secondly, there are cases, epitomised by *Pitt*, where a loan is taken for the joint non-commercial purposes of two borrowers in a relationship (whether husband and wife or not). In *Pitt*, the bank was told that the purpose was to remortgage previous debts and to release capital for a jointly owned holiday home. In such circumstances, the lender will not normally have constructive notice of the possibility of one borrower being unduly influenced by the other, and will not be put on inquiry. I shall refer to these two clear cut categories of case as the "surety case" and the "joint borrowing case".

7. The case before us raises an issue that has not seemingly been addressed (at least head on) before. That is the situation in which the borrowers seek a loan partly for their joint non-commercial purposes and partly for the benefit of one borrower only (described before us as a "hybrid case"). As already explained, from the bank's viewpoint, the £40,000 used to discharge Mr Bishop's car debt and credit card debt was for his sole benefit, whilst the remaining 90% of the loan was for joint purposes.

8. Ms Waller-Edwards ultimately submitted that, in a hybrid non-commercial loan situation, the lender is put on inquiry unless the element of the transaction that is for the sole benefit of one of the borrowers is trivial. She contended that the judges below had been wrong to say, as in effect they had, that: (a) the court's task was to look at the transaction as a whole so as to determine whether it was, in substance from the lender's point of view, a surety case or a joint borrowing case, and (b) the question of whether an element of a transaction that was for the sole benefit of one of the borrowers put the lender on inquiry was one of fact and degree. In effect, Ms Waller-Edwards contended for a third category of hybrid case and submitted that, in every such case where the sole benefit element was non-trivial, the lender was put on inquiry. This, she said, was clear from the authorities, and provided a bright line rule, giving certainty and clarity to lenders and borrowers alike as to how they had to proceed. Compliance with the *Etridge* protocol was not onerous.

9. The bank submitted in response that the judges below had been right. There was not a third category for hybrid cases. The authorities demonstrated that the lender was entitled to look at the transaction holistically. If it was essentially a joint borrowing transaction, the lender was not put on inquiry. If it was essentially a surety transaction, the lender was put on inquiry. The question was ultimately one of fact and degree as the judges below had said.

10. Lewison LJ granted Ms Waller-Edwards permission to 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. He said that: "If (as both judges [below] held) the legal test is a question of fact and degree, then permission to challenge the judges' evaluation of that question is refused". Accordingly, neither party sought to persuade us that, if a "fact and degree" evaluation had to be undertaken, the judges below had reached the wrong conclusion.

11. Before turning to the legal question we have to determine, I will (a) set out some of the essential background (taken largely from the judgments below), and (b) summarise the main points to be drawn from the authorities.

Essential background

12. In 2011, Ms Waller-Edwards, when she was at a vulnerable period in her life, began a relationship with Mr Bishop, who was a builder then constructing three houses including the property. She lived at that time in her own mortgage-free property at 60 Pilford Heath Road, Wimborne (the Wimborne property) and had savings of some £150,000 and a small income. On 25 May 2012, Ms Waller-Edwards exchanged her Wimborne Property (then worth some £585,000) plus £150,000 for the property (expected to be worth some £750,000 when complete). By the time of the completion of that transaction, Ms Waller-Edwards had been persuaded to accept two charges on the property, namely an existing one to a Mr Higgins for some £78,000, and a second charge in her favour for the £150,000 she had handed over to Mr Bishop. Pending

completion of the building of the property, Ms Waller-Edwards and Mr Bishop began living together in the Wimborne property with her two children and his one child. Later in 2012, the loan from Mr Higgins was increased and eventually replaced by another loan and charge in favour of Mr Higgins' company. The couple moved into the property before it was complete in September 2012. The declaration of trust that I have mentioned was also executed at some stage. In these transactions, a Mr Clake of Ellis Jones Solicitors, instructed originally for Mr Bishop alone, acted for him and for Ms Waller-Edwards.

13. In mid-2013, the bank was approached for a loan of £440,000 secured on the property, but agreed to loan only the £384,000 already mentioned. Mr Clake acted for all three parties.

14. [31]-[33] of the appeal judge's judgment sets out what the trial judge had found as to the bank's knowledge at the time of the transaction. I summarise the salient points as follows:

    i) The head of the bank's underwriting department said that the bank's understanding was that the couple wanted to remortgage the jointly owned property in order to pay off an existing mortgage debt and purchase another property. The remortgage was a buy to let mortgage, in the sense that the payments due to the bank would be funded by letting out the property.

    ii) The bank did not know that Ms Waller-Edwards owned 99% of the equity in the property or that £142,000 was intended by Mr Bishop to be going to Mr Bishop's wife in respect of her divorce settlement.

    iii) The bank did know that the loan would pay off £20,000 in car finance and £19,000 for Mr Bishop's credit card. That was a condition of the mortgage offer.

    iv) Mr Richardson told the trial judge that it was not uncommon for a joint application to be made to consolidate debts and for debts to be in one party's name, or greater debt to be attributable to one party than the other. In this case, Mr Bishop was the major wage earner, so it was not unusual that debts were in his name. The bank thought that Ms Waller-Edwards and Mr Bishop were in a relationship and had joint expenditure.

    v) Box 42 of the mortgage application referred to an existing mortgage in the sum of £200,000, Mr Bishop's credit cards of £16,000 and Mr Bishop's unsecured bank loan of £24,000. We were shown that document after the hearing. It is notable that the boxes indicating which of those debts would be repaid by the remortgage transactions were not ticked for any of these three items.

15. When the transaction was completed, £233,801.76 was used to pay off the existing charge and most of the balance was in fact used to pay Mr Bishop's wife. The latter was another transaction to which Ms Waller-Edwards consented under Mr Bishops' undue influence. The mortgage was also subject to a condition that Ms Waller-Edwards and Mr Bishop would let the property within 30 days of completion, but this did not occur.

16. Subsequently, the relationship between Ms Waller-Edwards and Mr Bishop terminated. Mr Bishop moved out of the property towards the end of 2014, and ultimately ceased paying the mortgage instalments. On 4 November 2021, the bank initiated these proceedings seeking possession of the property and the arrears.

17. The appeal judge noted that the facts of this case were particularly sad, because, when Ms Waller-Edwards met Mr Bishop, she was the sole owner of her own unencumbered home, and had personal savings. By the time the relationship ended, the series of transactions engineered by Mr Bishop left her in a heavily mortgaged home, which she was not supposed to be occupying, with no personal savings and lacking the means to maintain the payments due. I entirely endorse the appeal judge's view of the sadness of this case.

18. As I have said, the trial judge decided that the mortgage had been entered into as a result of Mr Bishop's undue influence, but that the bank did not have notice of it. He gave judgment for £451,638.87 with costs to be added to the security. The trial judge dealt with the question of whether the bank was put on inquiry at [113]-[146]. He held that it had not. He said at [119] that the case was not, on the face of it "what would be called a surety-type case". At [121], he said that "whilst to a limited extent the instant situation could be described as hybrid, overall, the pattern of borrowing is much more consonant with what was being considered in *Pitt* than the straightforward surety case in *Etridge*". Having gone through all the alleged red flags raised against the bank by Ms Waller-Edwards, he held at [136] that the only arguable one was Mr Bishop's car debt and credit card debt. At [137] he concluded:

> 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[s] this case into one akin to a surety case.

19. The appeal judge dealt with what he called the "inquiry issue" at [62]-[112]. He upheld the trial judge as to both the facts and the law. Having referred to the authorities, the appeal judge said at [82] that the fact that, to the knowledge of the lender, the transaction was not, on its face, to the financial advantage of one of the borrowers put the lender on inquiry, where the relevant relationship was a non-commercial one. He thought that principle encompassed what he referred to as the partial surety case. At [89]-[90], he held that the identification of partial surety cases to which the *O'Brien* principles could legitimately be applied was necessarily a fact sensitive one. At [94], he held that it was "not simply a numbers exercise" and that it was "necessary to look at the transaction constituted by the [r]emortgage as a whole" as Judge Rich QC had done in *Midland Bank plc v. Greene* [1994] 2 FLR 827 at 833. He thought that the overriding consideration was whether the transaction was or should have been perceived by the Respondent as a transaction which was not to the financial advantage of Ms Waller-Edwards. Peter Jackson LJ suggested in argument, and I agree, that this formulation might be more accurate if it referred to a transaction that "might not be" to Ms Waller-Edwards' advantage. Ultimately at [111], the appeal judge concluded that the trial judge had correctly identified the question which he had to answer as one of fact and degree, and reached an answer to that question which was justified on the facts of the case, as he had found them.

The authorities

20. The authorities are well known. I do not intend to provide a comprehensive treatise on each of them. They need to be read. That said, the parts of them upon which the parties have relied are relatively short and bear recitation here, as I shall be following the principles adumbrated in them.

21. In *O'Brien*, Lord Browne-Wilkinson (with whom the other judges agreed) described the key to the problem as being "to identify the circumstances in which the creditor will be taken to have had notice of the wife's [now a party to any relationship] equity to set aside the transaction". He continued in a classic passage at pages 195-6:

> The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it.
>
> Therefore where a wife has agreed to stand surety for her husband's debts as a result of undue influence or misrepresentation, the creditor will take subject to the wife's equity to set aside the transaction if the circumstances are such as to put the creditor on inquiry as to the circumstances in which she agreed to stand surety. …
>
> 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. 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.

22. In *Pitt*, Lord Browne-Wilkinson (with whom the other judges agreed) found that a bank was not put on inquiry by a transaction in which equity in a property was released, as far as the claimant bank was aware, for the purposes of buying a holiday home. Lord Browne-Wilkinson said at page 211D that: "[s]o far as the [claimant bank] was aware, the transaction consisted of a joint loan to husband and wife to finance the discharge of an existing mortgage …, and as to the balance to be applied in buying a holiday home. The loan was advanced to both husband and wife jointly. There was nothing to indicate to the [claimant bank] that this was anything other than a normal advance to husband and wife for their joint benefit". Lord Browne-Wilkinson further explained at page 211G that: "[w]hat 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".

23. In *Etridge*, the House of Lords was dealing with 8 cases of alleged undue influence and constructive notice in the context of loans secured on matrimonial property. All 5 judges gave substantive judgments. Every member of the House agreed with Lord Nicholls, whose judgment is, therefore, the most authoritative. For our purposes, the most important section of Lord Nicholls' speech is at [40]-[49]. I am reciting that section extensively, because it was subjected to minute analysis in argument, and I do not think it can be fairly understood without seeing the passage as a whole:

> 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.
>
> 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.
>
> 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. That said, I must at a later stage in this speech return to the question of the wider implications of the *O'Brien* decision.

The threshold: when the bank is put on inquiry

44. In *O'Brien* the House considered the circumstances in which a bank, or other creditor, is 'put on inquiry.' Strictly this is a misnomer. As already noted, a bank is not required to make inquiries. But it will be convenient to use the terminology which has now become accepted in this context. The House set a low level for the threshold which must be crossed before a bank is put on inquiry. 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. Lord Browne-Wilkinson said ([1994] 1 AC 180, 196):

> 'Therefore in my judgment a creditor in 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.'

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.

45. The Court of Appeal, comprising Stuart-Smith, Millett and Morritt LJJ, interpreted this passage more restrictively. The threshold, the court said, is somewhat higher. Where condition (a) is satisfied, the bank is put on inquiry if, but only if, the bank is aware that the parties are cohabiting or that the particular surety places implicit trust and confidence in the principal debtor in relation to her financial affairs: see *Royal Bank of Scotland Plc v Etridge (No 2)* [1998] 4 All ER 705, 719.

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.

> 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.
>
> 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 [*Pitt*].
>
> 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.

24. Numerous passages in the speeches of Lords Bingham, Hobhouse and Scott were drawn to our attention. I do not think that, for our purposes, they add much to what I have cited already from Lord Nicholls' speech. The precise position in this case was not squarely addressed in *Etridge*, but the applicable principles can, I think, be properly drawn from Lord Nicholls' exposition.

<u>Is the lender put on inquiry unless the element of the transaction that is for the sole benefit of one of the borrowers is trivial?</u>

25. The question I have posed in the heading is the formulation on which Ms Waller-Edwards' counsel finally alighted in argument. He pointed out that such a test for the kind of transaction in this case would, as I have said, give certainty, and would reflect the low threshold of risk enunciated in the passages I have already cited from *O'Brien* and *Etridge*. The question is whether that is the right test for a case such as this which is to be drawn from the authorities. In my judgment it is not.

26. Before turning to the essential legal question, there are three important points to make by way of introduction as to the ambit of the case.

27. First, it is accepted that the question of whether a bank in surety cases, joint borrowing cases and hybrid cases is put on inquiry is to be ascertained through the lens of the lender.

28. Secondly, there are, of course, in some cases one or more red flags which ought to alert a lender to circumstances which require further inquiry. But this is not such a case. The trial judge rejected 10 of the 11 indicators raised by Ms Waller-Edwards on the facts, and there is no appeal on those matters (see [122]-[138] of the trial judge's

judgment). The trial judge and the appeal judge dealt with the case, as we must, on the basis that the only matter that might have put the bank on inquiry was the fact that the transaction entailed paying off some £40,000 of debts in the sole name of Mr Bishop. The evidence established that this was not an uncommon situation (see [14(iv)] above).

29. Thirdly, if this court were to accept that the judges below had applied the correct legal test, Ms Waller-Edwards has not been given permission to appeal the factual findings of the courts below. Accordingly we must accept that, if the test is as the judges below said, they were right to decide that looking at the transaction as a whole, the fact that some 10% of the advance was to be used to pay debts in Mr Bishop's sole name did not, as a matter of fact and degree, turn the transaction from a joint borrowing case (where the bank was not put on inquiry) to a surety case (where it would have been put on inquiry).

30. It is against that background that I shall try now to explain why I think the judges below were right as to the legal test.

31. It is true, as Ms Waller-Edwards's counsel submitted to us, that *Etridge* was an extension of *O'Brien*. But it was not the extension which he submitted it was. He argued that *Etridge* imposed a lower threshold for when a case was properly to be regarded as a surety case. In fact, the lower threshold that *Etridge* imposed, beyond *O'Brien*, was as to the inquiries that were necessary into the nature of the relationship between the borrowers. Lord Browne-Wilkinson said famously in *O'Brien* that "a creditor in 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". Subsequent cases had been confused as to how these factors, if regarded as tests, might be satisfied. Lord Nicholls put the matter to rest in *Etridge* by saying that "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" (my emphasis). In other words, there was a low threshold for the risk that was required, because in every case where a wife (or other borrower in a relationship) stood surety for the debts of a husband (or another borrower in a relationship), the bank was put on inquiry. Neither Lord Nicholls (in that passage in *Etridge*) nor Lord Browne-Wilkinson (in *O'Brien*) was addressing the question of whether a particular transaction was properly to be regarded as a surety case in the first place. That much is clear from [45]-[47] of Lord Nicholls in *Etridge*.

32. It is only at [48] to [49] that Lord Nicholls briefly addresses the nature of a surety transaction. There he makes clear that "the case where a wife becomes surety for her husband's debts is" straightforward, as is "the case where money is being advanced, or has been advanced, to husband and wife jointly". Lord Nicholls' following words are important in our context. He said that "[i]n 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 [*Pitt*]". He then makes clear at [49] that company cases are not joint borrowing cases even if the wife has an interest in the company.

33. In my view, therefore, Lord Nicholls was imposing a clear test for the low threshold for the risk that was required to put a bank on inquiry: every non-commercial case where a wife (or other borrower in a relationship) stood surety for the debts of a husband (or another borrower in a relationship). As to the non-commercial requirement, see [43] of Lord Nicholls. As regards, however, the identification of a surety case, Lord Nicholls tells us that a joint borrowing case only puts a bank on inquiry if "the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes".

34. In effect, it was from these passages 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". In a case where the transaction is on its face not to the financial disadvantage of the wife, and the court is looking only at a hybrid transaction, where part of the loan is being used for one party's purposes, I think the judges were right.

35. Nothing in *Etridge* implies a third test for hybrid cases of the kind that Ms Waller-Edwards advances. Even her proposed test would introduce some uncertainty. There would still be arguments as to whether a particular percentage was or was not "non-trivial". Moreover, it is not always easy for a bank to know whether particular 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?

36. More importantly, however, I think 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 Lord Nicholls' speech in *Etridge*.

37. This case does not require us to explore the outer limits of the non-straightforward cases considered in Chapter 24 of the 4th edition of Professor Nelson Enonchong's interesting treatise on Duress, Undue Influence and Unconscionable Dealing (2023). I have, however, found nothing either in what he says or in the various post-*Etridge* cases he refers to at [24-017]-[24-027] that casts doubt on the principles I have explained.

Conclusions

38. As I have said, this is a sad case. In my judgment, however, we must apply *Etridge* to the facts as found by the trial judge. *Etridge* 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. 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.

39. I would dismiss the appeal.

LORD JUSTICE PETER JACKSON:

40. I agree that the appeal should be dismissed for the reasons given by the Master of the Rolls. Like him, I would reject the test proposed by the appellant (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). That would be unduly onerous to lenders and to many borrowers.

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.

42. However, that approach, insofar as it differs from the approach taken by the judges, would lead to the same result in the present case. The trial judge was entitled to find after examination of the facts that the proposed redemption of personal loans of the principal earner was a relatively routine incident of a remortgage of this kind and that this element of the transaction did not put the bank on notice of the possibility of undue influence of the kind that Ms Waller-Edwards had in fact experienced.

LADY JUSTICE FALK:

43. I agree with both judgments.