FOCUS

NON-COMMERCIAL LOANS

Navigating the risk of undue influence

Undue influence is an equitable doctrine that applies where a person appears to consent to a transaction but that consent is brought about by improper pressure from another person who abuses a relationship of trust and confidence. In these circumstances, the courts have deemed that the transaction is voidable even if a third party entered into the transaction in good faith and without knowing of the undue influence. The doctrine of undue influence is complex and includes situations where the act of undue influence, such as unlawful threats, can be proved (actual undue influence) and situations where a rebuttable presumption of undue influence arises (presumed undue influence).

In *Royal Bank of Scotland plc v Etridge (No 2)*, the House of Lords clarified the doctrine of presumed undue influence in the context of non-commercial loans and set out the practical steps that lenders should take when they are put on inquiry of the risk of undue influence (the *Etridge* protocol) (*[2001] UKHL 44; www.practicallaw.com/6-101-5979*). The Supreme Court's recent decision in *Waller-Edwards v One Savings Bank Plc* marks the most significant development in the law of undue influence since *Etridge*, having extended the *Etridge* protocol to so-called "hybrid" transactions that have both a joint borrowing and a guarantee or surety element (*[2025] UKSC 22*).

The key legal principles

For presumed undue influence to arise, there must be a pre-existing relationship of influence between the parties and the transaction must be of a nature that calls for explanation in the context of that relationship. Many financial arrangements are tripartite; that is, they involve three parties such as a lender and two borrowers. Where, for example, A and B jointly borrow funds and B provides security over their property but the loan benefits A alone, B may be a victim of undue influence.

Etridge established that, in a non-commercial tripartite secured lending transaction, the lender is placed on inquiry where:

- One borrower induces another borrower into entering a guarantee or surety agreement for the first borrower's sole debts.
- The transaction is not to the guarantor's or the surety's financial advantage.

Once a lender is put on inquiry, it must take certain practical steps to minimise the risk of undue influence and ensure that it can enforce the security that was entered into as part of the transaction (*see box "The Etridge protocol"*). If the lender does not comply with the *Etridge* protocol, this may result in the security being unenforceable.

Lenders are not put on inquiry where they lend to joint borrowers; that is, where two or more borrowers equally benefit from the transaction with no obvious disadvantage (*CIBC Mortgages plc v Pitt [1993] UKHL 7; www.practicallaw.com/7-100-4391*). This is the case even if only one borrower is a guarantor or is otherwise providing security to the lender. However, the lender will be put on inquiry if it is aware that the joint borrowing is taking place for the benefit of only one of the borrowers (*Davies v AIB Group (UK) plc [2012] EWHC 2178*).

Waller-Edwards extended the application of *Etridge* to transactions where there is both a joint borrowing and a guarantee or surety element (hybrid transactions) (*see box "Waller-Edwards and hybrid transactions"*). It established that, in hybrid transactions, the lender is placed on inquiry unless the personal debts in question are a trivial or de minimis part of the whole transaction.

Advising lenders

Over 20 years on from *Etridge*, lenders today are likely to understand that pure guarantee or surety transactions require them to comply with the *Etridge* protocol. That said, even sophisticated institutional lenders may not be aware of the change brought about by *Waller-Edwards*. Appropriate advice should be given to ensure that lenders are aware that hybrid transactions will now place them on inquiry and that they must comply with the *Etridge* protocol.

The *Etridge* protocol provides a clear, practical series of steps, which has not changed since the judgment of 2001. While this is the best source of guidance, the following additional practical tips may be helpful when advising lenders.

Identify the risks early. Having been advised that hybrid transactions will, following *Waller-Edwards*, place the lender on inquiry, most competent lenders should be capable of identifying the transactions that require them to comply with the *Etridge* protocol. Identifying these transactions as soon as possible can reduce the risk of sunk costs and time if the lender cannot proceed with the transaction.

Err on the side of caution. While legal practitioners will be familiar with the well-used legal terms "non-trivial" or "de minimis", lenders may not be. Given the risks involved, lenders should be advised that any transaction with a guarantee or surety element should be treated as reaching the threshold to put them on inquiry and require them to comply with the *Etridge* protocol.

Insist on written confirmation. The *Etridge* protocol requires the guarantor or surety to obtain independent legal advice. If they refuse to do so, lenders should be advised to refuse to proceed with the transaction. In any event, to fully comply with the *Etridge* protocol, the lender must receive written confirmation from an independent legal adviser and cannot safely proceed without this, even if it is the guarantor or surety that is refusing to obtain the very advice that is intended to afford them protection.

Consider substance over form. Although joint borrowing transactions do not automatically put lenders on inquiry of the risk of undue influence, lenders should not rely only on the terms of the loan documents in order to ascertain whether it is a joint borrowing transaction. As clarified in *Davies*, if a lender is aware that one borrower intends to use the loan monies (or, after *Waller-Edwards*, any more than a trivial or de minimis part of it) for their own purposes despite the terms of the agreement, the transaction will not be a joint borrowing transaction and the *Etridge* protocol will apply.

Ensure legal advice is compliant. In *Lloyds TSB Bank plc v Holdgate*, Mr and Mrs Holdgate took out a joint mortgage over the matrimonial home, which guaranteed Mr Holdgate's business debts (*[2002] EWCA Civ 1543; www.practicallaw.com/2-101-8263*). While the bank was aware that Mrs Holdgate had been advised by a family solicitor, there was no written confirmation that the full effects of the legal charge had been explained to her. In fact, for all the bank knew, the solicitor had merely been present and witnessed Mrs Holdgate's signing of the legal charge. The Court of Appeal set aside the bank's possession order and held that Mrs Holdgate was entitled to have her allegations of undue influence examined at trial.

Holdgate illustrates that lenders cannot rely on the mere fact that the guarantor or surety has received legal advice. This would be a failure to comply with the *Etridge* protocol, although the factual matters in *Holdgate* long pre-dated its application. It is therefore essential for the lender to ensure that the independent solicitor confirms that their advice was comprehensive and fully compliant with the *Etridge* protocol. Solicitors tend to have and use precedent wording for the written confirmation that meets this requirement and online legal databases, such as Practical Law, contain similar standard form precedents in addition to helpful guidance.

Consider de facto control. It is not always easy to distinguish joint borrowing cases from surety cases. The key issue is whether the relationship between the person giving the surety and the other borrower(s) is non-commercial. In *Etridge*, the House of Lords used the example of a loan to a company whose shares are held by a husband and wife where the wife stands surety for the loan. Although this may, at first sight, appear to be a joint borrowing transaction, the House of Lords pointed out that it is important to consider who conducts the company's business. The wife may have a nominal, minority or an equal shareholding and, in such cases, the House of Lords suggested that the lender would be put on inquiry even if the wife is a director of the company. It emphasised that shareholding interests, and the identity of directors, are not a reliable guide to who actually has control of the company's business. Following *Waller-Edwards*, this could even extend to companies

The *Etridge* protocol

Once a lender is placed on inquiry of the risk of undue influence, it must comply with a series of steps as set out in *Royal Bank of Scotland plc v Etridge (No 2)* (*[2001] UKHL 44*). If the lender does not comply with the *Etridge* protocol, the guarantee or surety may be voidable and, if challenged, unenforceable. The *Etridge* protocol requires the lender to:

- Communicate directly with the party in question, informing them that, for the lenders' own protection, it will require written confirmation from a solicitor that is acting for the party that they have fully explained to the guarantor or surety the nature and practical implications of the documents.
- Tell the party the purpose of this requirement; that is, the prevention of any future dispute as to the enforceability of the guarantee or surety document.
- Ask the party to nominate a solicitor for this purpose. The solicitor may also act for the other party in the transaction provided that they are content to act separately for the guarantor or surety for the purposes of this advice and the party is aware that they may elect a different solicitor.
- Not proceed with the transaction unless it receives an appropriate response from the guarantor or surety.
- Assist the solicitor advising the party in question by providing the necessary information to allow the solicitor to properly advise the guarantor or surety. This will vary from case to case, but will usually involve:

- all information requested for the purpose of the new facility arrangements;
- information about the other party's indebtedness;
- the amount of any overdraft facility; and
- the amount and terms of any new facility.

- Not proceed with the transaction if consent to share this information is not forthcoming from the other party.
- Inform the solicitor of the facts giving rise to any suspicion that one party is unduly influencing the guarantor or surety to enter into the transaction and the decision to do so is not of their own free will.
- Obtain written confirmation to the above effect before proceeding with the transaction.

If the lender has complied with the *Etridge* protocol, the guarantee or surety will remain enforceable even if undue influence is later alleged.

in which the person giving surety has a majority shareholding as the de minimis test would, in all likelihood, still be met.

Advising individual borrowers

In *Etridge*, the House of Lords provided a useful and practical summary of solicitors' duties when advising individuals in loan transactions. The Court of Appeal repeated this guidance in *Padden v Bevan Ashford Solicitors* and also summarised the general duties of solicitors when advising clients (*[2011] EWCA Civ 1616*). In summary, solicitors should:

- Clearly explain the nature and consequences of the transaction to enable the client to make an informed decision. This includes outlining the documents, liabilities, risks and implications of default.
- Obtain full access to relevant documents and the background context in order to be able to give full and accurate advice. If the lender fails to provide these, the solicitor should not provide written confirmation that the *Etridge* protocol has been complied with.
- Insist on face-to-face meetings as remote or written communications risk unseen interference and do not meet the *Etridge* protocol.
- Explain the transaction clearly, including the documents, the risks and consequences of the transaction, and that the decision to proceed lies with the guarantor or surety. Many practitioners have access to template or precedent letters that can provide guidance as to the topics that their advice should cover.
- After giving advice, confirm the client's intention to proceed and obtain authority to notify the lender.
- Be prepared to assist in negotiating the terms of the transaction if the client is unsure or seeks changes. If the lender refuses, the solicitor should seek further instructions and withhold the written confirmation of *Etridge* protocol compliance unless the client agrees to proceed.
- Document all advice and make records of all meetings so that there is evidence of the advice given if this is later challenged. Many practitioners use precedent letters for this purpose.

Waller-Edwards and hybrid transactions

Waller-Edwards v One Savings Bank Plc concerned a relationship between Ms Waller-Edwards, whom the Supreme Court described as emotionally vulnerable but financially independent, and Mr Bishop (*[2025] UKSC 22*). Mr Bishop persuaded Ms Waller-Edwards to exchange her home and savings for land and a property that he was in the process of building (the property). The property was put into joint names, with Ms Waller-Edwards holding 99% of the beneficial interest. Mr Bishop later remortgaged the property with One Savings Bank Plc. Ms Waller-Edwards provided surety for just over 10% of the loan.

The relationship ended and the mortgage fell into arrears. The bank started proceedings to possess the property, but Ms Waller-Edwards claimed that it should have been put on inquiry of the risk of undue influence. The County Court held that although Ms Waller-Edwards had been subject to undue influence, the bank was not put on inquiry because the transaction should be categorised as a joint borrowing, rather than a surety, transaction (*Bournemouth & Poole County Court, 8 December 2022, claim no H00BH712*).

Both the High Court and the Court of Appeal dismissed Ms Waller-Edwards' appeals but took a different approach to the categorisation of the transaction (*[2023] EWHC 2386 (Ch); [2024] EWCA Civ 302, www.practicallaw.com/w-043-4082*). They classed the transaction as a hybrid transaction as the bank had understood that the loan was partly intended to be for the couple's joint purpose of paying off the mortgage on the property and partly to pay off Mr Bishop's personal debts. They then looked at whether, as a matter of fact and degree, the proportion of surety for the loan was sufficient to put the bank on inquiry and concluded that it was not.

The Supreme Court allowed Ms Waller-Edwards' further appeal, rejecting the lower court's "fact and degree" approach to whether a lender is put on inquiry and preferring a "bright line" approach. It concluded that where there is any exclusive benefit for one of the borrowers, which is not de minimis, the transaction moves out of the joint borrowing category and into the surety category so that the lender will be put on inquiry of the risk of undue influence.

Solicitors' liabilities

A lender may rely on a solicitor's written confirmation under the *Etridge* protocol without investigating the quality of the advice given. If the advice turns out to be inadequate, the guarantor's remedy lies against the solicitor in negligence, not the lender.

In *Padden*, Mrs Padden was under pressure from her husband and his solicitor to sign documents that relinquished her interests in family assets. She sought independent legal advice in order to comply with the *Etridge* protocol but received only brief, free of charge and insufficient advice from a newly qualified solicitor. Later, a partner at the firm provided the *Etridge* protocol written confirmation. The security was enforced despite Mrs Padden's claim of undue influence, as the *Etridge* protocol had been complied with. However, the law firm was found liable for professional negligence.

Padden is a useful example of the potential liabilities for solicitors who fail to effectively advise in this area, even in circumstances where the client walks in off the street and insists on a brief meeting. Solicitors advising a guarantor or surety in connection with the *Etridge* protocol must ensure that they do so properly before they provide written confirmation, even where the client is seeking to rush the task or seems determined to proceed with the transaction irrespective of the advice that they have received. If the client is unwilling to accept the advice given, a solicitor can, and should, refuse to act, and explain the reasons why in order to protect both themselves and the client.

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