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KEY POINTS

- In *Waller-Edwards v One Savings Bank* [2025] UKSC 22, the Supreme Court agreed to a bright line test in holding that a lender is put “on inquiry” (requiring it to take the “reasonable steps” outlined in the *Etridge* protocol) where a person (often a woman) in a non-commercial relationship agrees to take on legal liability to discharge the personal debts of her partner, so long as those personal debts are more than *de minimis*.
- The Supreme Court held that this bright line test is likely to be less onerous than a “fact and degree” test (which would require lenders to assess the extent of the joint purpose as against the “husband”-centric purpose) for lenders dealing with large volumes of loan applications at any one time.
- The decision is compatible with social policy and FCA guidance.

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The Supreme Court tweaks *Etridge*

English property law periodically produces epoch-making decisions of the highest court. In years to come, *Waller-Edwards v One Savings Bank plc* [2025] UKSC 22 may well become such a decision. It enjoys the respectable jurisprudential lineage of three famous House of Lords’ decisions: (i) *Barclays Bank v O’Brien* [1994] 1 AC 180; (ii) *CIBC Mortgages v Pitt* [1994] 1 AC 200; and (iii) *Royal Bank of Scotland v Etridge No 2* [2002] 2 AC 773, but it also applies established principles in a novel way. In this article, Marc Beaumont considers why the Supreme Court reached the decision that it did including a look at the social policy considerations that influenced it.

Etridge, decided in 2002, was truly seminal. Lord Nicholls, in particular, expounded a modern variant of the traditional concept of constructive notice, adapting it in order to balance the rights of mortgage lenders against those (usually women) whose property is abused to support the exploitative behaviour of (usually) men in domestic relationships.

In *Etridge*, the House distilled the relevant test for the bank being “on inquiry” into two propositions. Lord Nicholls at [87] held that: “... the only practical way forward is to regard banks as ‘put on inquiry’ in every case where the relationship between the surety and the debtor is non-commercial”. Thus: (a) a non-commercial relationship plus; (b) a “surety” transaction, places a mortgage lender “on inquiry” of the risk of possible undue influence.

Ms Waller-Edwards (W) succeeded at trial in the County Court in 2022 in establishing that her property had been heavily mortgaged as a consequence of her partner’s (B) presumed undue influence. However, she failed to establish that, applying the *Etridge* criteria, the Bank was “on inquiry” of the risk of the possible commission of such undue influence.

A bank placed “on inquiry” must comply with the steps in the *Etridge* protocol and recommend that a wife takes independent legal advice. If it does not do that, the undue influence will taint the whole transaction,

which becomes unenforceable against a wife in W’s position.

W took the issue of constructive notice on appeal to the High Court in 2023 and to the Court of Appeal in 2024. Both of her appeals were dismissed. The two appeal courts upheld the decision of the trial judge, that, applying *Etridge*, whilst the Bank had: (a) known of the non-commercial relationship between Ms Waller-Edwards and her partner, it had not known; (b) that she was a “surety” for her partner’s debts.

Whether X is a “surety” of Y’s debts may sound like a straightforward binary question, but on the facts of *Waller-Edwards*, it was not. The mortgage application presented itself to the Bank as a hybrid of elements that appeared to be for joint purposes and a smaller element (about 10%) that ostensibly appeared to be for B’s benefit alone (to discharge his personal credit debts).

Whilst that is how the Bank *saw* the application, in reality B was defrauding the Bank by planning to raise some £142,000 of £384,000 to discharge a liability owed to his former wife and by pressurising Ms Waller-Edwards to agree to that. The focus of the courts on the 10% element required to discharge B’s personal debts, was itself caused by B’s deceit, as no part of the advance of some £384,000 ultimately went to discharge a penny of B’s declared debts.

The trial judge and the two appeal courts, the latter presided over by the Master of the Rolls, carried out a “balance sheet” approach to the “on inquiry” test. Balancing the declared joint purposes of the mortgage advance (as to 90%) against the declared Mr B-centric purposes (10%), the Bank was held not to be “on inquiry”. In other words, it was held that overall and thus as a matter of “fact and degree”, a ratio of 90 (joint purposes) to 10 (“husband”-centric), did not put the Bank “on inquiry”.

The immediate problem with that approach was that *Etridge* provides that knowledge that a “wife” is “a” surety, activates the trigger test, placing the Bank on inquiry. Yet *Etridge* did not say *how much* of a surety a wife needs to be to be a surety in the requisite sense. Why was 10% not enough?

BRIGHT LINE RULE AND THE DE MINIMIS PRINCIPLE

Before the Supreme Court, W submitted that a “surety” in a hybrid mortgage transaction, includes a woman: (a) in a non-commercial, emotional relationship; who (b) agrees to proffer her beneficial interest in her home to discharge the personal debts of her male partner, *so long as those personal debts are not trivial*; *ergo* such facts put a bank “on inquiry”, so it has to take the “reasonable steps” outlined in the *Etridge* protocol.

The Supreme Court agreed. First, the rationale in *Etridge* was identified at [46]. A surety transaction creates a heightened risk of the commission of undue influence behind the curtain “because on the face of the transaction, the wife assumes a legal liability that she would not otherwise have (whether under a guarantee or charge) for her husband’s debts but receives no apparent financial benefit in return”.

W submitted that the test of the meaning of “surety” in a hybrid case should be absolute,

not one of “fact and degree”, what the learned authors of *Emmet & Farrand on Title* referred to in their critique of the CA’s decision as a “bright line rule”. W argued that the conflict of approaches presented a contest between an absolutist and relativist approach: the former should prevail.

Whichever test was the correct one, it served two main functions: it governed the conduct of *the bank* at the inception of the transaction, and it also governed the response of *the court* when looking at that transaction in hindsight. So the test for hybrid cases had to be workable for banks and for trial courts *alike*. Further, the test for being “on inquiry” was supposed to be protective and benign. A *bank* that treated itself as “on inquiry” and took reasonable steps would be protected against future undue influence defences. A *wife* who received independent legal advice might be better protected against undue influence and the Machiavellian *husband* whose wife receives independent legal advice, would face a major obstacle.

W submitted that the “fact and degree” test did not assist the banks for three reasons: (a) it would lead to inconsistent outcomes in underwriting departments, with some banks being more cautious than others and engaging the *Etridge* protocol in hybrid transactions and others being more lax and not engaging the *Etridge* protocol at all; (b) it would require the banks to examine the file in every single hybrid case, to see where on a spectrum of risk the case fell. That was impracticable; (c) a “fact and degree” test would create more litigation, as the bank’s decision-making would be more open to subjective criticism.

The SC rejected the fact and degree test favoured by the lower courts and CA at [52]:

“... the approach adopted 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 spectrum of lesser or greater steps to be taken by a creditor put on inquiry that varies depending on a spectrum of differing

levels of risk. Since there is no scope for a nuanced approach to the steps required to be taken once the creditor is on notice, I see no scope for a nuanced (or fact-sensitive) approach to whether the creditor is on notice or not ... Moreover, 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.”

In the CA, Peter Jackson LJ had questioned in argument whether W was contending for two or three baskets: meaning loans for: (i) joint purposes; (ii) the sole purpose of H; (iii) joint purposes with an element of (non-trivial) sole purpose for H. In the SC, W argued that basket (iii) should be a sub-set of basket (ii). The SC agreed at [55]-[56]:

“55. There is nothing in the speeches in *Etridge No 2* 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 No 2* 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’ (para 108 per Lord Hobhouse). 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. Banks and other creditors have both the commercial incentive and the practical ability to arrange their procedures so that it is harder for mortgage transactions to be misused to facilitate domestic undue influence and fraud. Discharge

of the onus of inquiry is not difficult. It involves recommending that the wife (or other vulnerable party) should obtain independent legal advice. That onus can be discharged simply and inexpensively in accordance with the *Etridge* protocol, described by Lord Nicholls at para 87 as ‘a modest burden for banks and other lenders. It is no more than is reasonably to be expected of a creditor who is taking a guarantee from an individual’.

56. Contrary to the view of the Court of Appeal, this does not involve there being a third test for hybrid cases. This approach simply involves treating a non-commercial hybrid transaction as a surety transaction and not as a joint loan. The existence of any exclusive benefit for one borrower (not being *de minimis*) moves the case out of the joint loan category and into the surety category, engaging the need for a bank to take the simple steps identified in the *Etridge* protocol. It satisfies the need, identified in *Etridge No 2*, for simplicity of operation by the banks who are more likely to wish to play safe by issuing an *Etridge* protocol letter to remove possible risk, than to litigate about the need for one subsequently. This bright line approach should encourage banks to prevent future litigation by taking the modest, reasonable step of issuing *Etridge* protocol letters, rather than encouraging controversial or finely balanced judgments to be formed by underwriting staff about whether there is, or is not, an appearance of suretyship.”

HERESY OR NO HERESY?

The CA had treated W’s submissions as if they were radical, even heretical. She argued that her position flowed ineluctably from the judgments in *Etridge* itself. It was clear from *Etridge* that the threshold for being placed “on inquiry” was set intentionally low: see Lord Nicholls at [44] and Lord Hobhouse at [108]. The Supreme Court agreed with W at [58]:

“58. This is not a radical departure from the present position. Rather, it accords with the principle in, and policy objectives of, *O’Brien*, *Pitt* and *Etridge No 2* that

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favour certainty and afford a broad scope of protection by putting a bank “on inquiry” in every non-commercial case where a wife offers to stand surety for a loan used to pay off her husband’s debts to a more than *de minimis* extent. It recognises and applies, on the one hand, the low threshold for the bank being put on inquiry in such cases given the elevated risk of undue influence or misrepresentation because the transaction is on its face not to the financial advantage of the wife; and on the other, the modest steps which a bank must take to acquire protection in a case where the bank is put on inquiry.”

W submitted in the CA and SC that only cases of a loan for joint benefit plus a *de minimis* husband-centric element, would not put a bank “on inquiry”. The CA had emphatically rejected that test, but the SC welcomed and adopted it at [60]:

“60. The Court of Appeal criticised this bright line test as likely to engender argument as to whether a particular percentage was or was not *de minimis* or ‘non-trivial’ (see para 35). That may be true, but I find it hard to see how any other test would engender as much argument as a ‘fact and degree’ test. I agree with the appellant that the *de minimis* principle is of such long standing that it is surprising to regard it as a source of unworkable uncertainty. Courts have little difficulty in identifying what is and is not caught by the principle ...”

POLICY ZEITGEIST

Doom-laden prognostications by the Bank about how allowing the appeal would damage UK domestic mortgage lending and make it more expensive, were rejected by the SC. As W submitted, her suggested test was supported by academic learning on the economic abuse of women in domestic relationships and by a protective regulatory ethos.

This is not clear from the judgment, but W outlined to the SC how the banking world had changed markedly since *Etridge* in 2001. Banks are regarded by their regulator, the FCA, as obliged to lend responsibly. The banking crisis of 2007 to 2009, was a sea change.

The FCA publishes the *Mortgages and Home Finance: Conduct of Business Sourcebook* (MCOB) in which checking affordability extends to guarantors. Mortgage lenders are now all subject to specific and very detailed guidance on “vulnerable” customers and they are expressly directed by the FCA to look out for domestic economic abuse.

In March 2024 the FCA wrote to all CEOs:

“Domestic Financial Abuse

We have been looking into how domestic financial abuse manifests in the use of financial services products, particularly noting heightened risks because of cost of living pressures. We want victim-survivors of financial abuse to receive fair and consistent treatment from firms, so that they can start rebuilding their financial wellbeing ...

Consumers who have been coerced into taking out unsecured loans, including credit cards and personal loans, by an abusive partner may feel they have limited choice about entering into such an agreement at the point of borrowing, or the loan may be taken out in their name without their knowledge or consent. We encourage firms to be alert to the possibility of coercion to reduce foreseeable harm ...”

W cited the FCA *Guidance on the fair treatment of vulnerable customers* (2021):

“Domestic abuse (including economic control): relevant staff should be aware that this is widespread, with both immediate and long-term impacts on victims and survivors across all drivers of vulnerability. It is important that relevant staff are aware of how perpetrators of abuse can use financial services in their abuse and recognise how to safely provide victims with the support they need.”

W explained that in May 2024 the FCA had published, “The hidden cost of domestic financial abuse: working together to improve outcomes”, stating that, “... we encourage firms to be alert to the possibility of coercion

and financial control to reduce foreseeable harm”.

Further, W explained how the concept of economic domestic abuse was now on a statutory footing: see s 1(3) of the Domestic Abuse Act 2021 and that domestic coercive control had since 2015 been a criminal offence.

She pointed out that the FCA had approved the *Financial Abuse Code of Practice* published by UK Finance, (a trading association for the banking and financial services sector), with some 300 banking members. Many banks had signed up to it.

It was submitted that in these circumstances extending the *Etridge* protocol to “hybrid” cases was fully compatible with the FCA’s modern regulatory regime, rather than some radical threat to the UK mortgage industry.

W submitted that nothing in the Bank’s written case had referred to these momentous changes. Its case that being placed too easily “on inquiry” about possible undue influence would be an unwarranted burden on the banks, was out of tune with the spirit of the times. Its case that W’s proposed test would somehow retard the UK economy was absurd.

W also submitted that the work of Dr Eleanor Rowan of Cardiff University equated this area of the law with the need more generally for the law to set its face against the economic abuse of women by men (an argument which the CA had ignored). But a “fact and degree” test for hybrid cases might well (as here) militate against independent legal advice being provided to victimised women – and that was wrong.

Dr Rowan had impugned the decision of the CA. She pointed to an increasing recognition of economic abuse as a form of domestic abuse. In her article about the CA’s decision in *Legal Studies*, she held that the facts of this case were an example of economic abuse through a joint mortgage. She cited an Opinion survey showing that one in five women in the UK experienced economic abuse in 2023. W submitted that her work pointed to another strong reason of policy why the banks should be required to play safe in this regard. Lady Simler agreed, citing W’s submission that in May 2024, the FCA released advice that:

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“One in six women in the UK has experienced financial abuse in a current or former relationship. Although it is not only women who are affected, over 9 million people, as many as the population of London, have been subject to control, exploitation or sabotage of their money and finances by an intimate partner.”

The SC’s decision fully reflects these issues by rendering *Etridge* compatible with social policy in 2025.

TOO ONEROUS?

W submitted that her proposed bright line test would *not* be too onerous for the banks. The Supreme Court agreed at [61]–[62], holding that a bright line test is likely to be less onerous than a “fact and degree” test for lenders dealing with large volumes of loan applications at any one time.

Lady Simler agreed with W that it was far simpler to have a bright line rule that applies in all (save *de minimis*) non-commercial partial surety cases. Examining every non-commercial loan application to decide whether a transaction, viewed as a whole, is being made for the purposes of suretyship, as distinct from the borrowers’ joint purposes, would not be easy or practicable.

The Bank submitted that if it were required to send out *Etridge* protocol letters to those like Ms Waller-Edwards, this would somehow stultify domestic mortgage lending. In *Etridge*, Lord Nicholls at [87] and [89] had dismissed similar concerns and stated that “in all conscience” the duties imposed on banks and other lenders in this context are “a modest burden”. That is the view of the SC too in the application of *Etridge* to partial surety cases.

W submitted that *Etridge* created a counter-measure for the risk of undue influence. It was designed to *reduce the risk* that undue influence may be the driver behind a mortgage application. The so-called reasonable steps that *Etridge* requires a bank to take once “on inquiry” were limited to sending a letter to the wife advising her to take independent legal advice. That counter-measure is proportionate, not onerous. Computer-generated *Etridge* letters are a simple panacea.

The SC agreed that extension of the *Etridge* protocol to hybrid cases is in the banks’ own interests. That must be right: the *more* often the *Etridge* protocol is implemented by lenders, the *less* often will their mortgages be capable of being set aside for undue influence.

Unlike the CA, the SC agreed that a test of “non-trivial” certainly satisfied the need, identified in *Etridge*, for simplicity of operation by the banks. And it agreed with W that there was no difficulty in case-law in working out what is *de minimis* and that 10% was not *de minimis*.

In the CA, the Master of the Rolls had questioned whether it would be possible to determine if a credit card or car under finance had also been enjoyed by the wife. W submitted that that was not the point, because in evaluating possible risk, it behoved a bank to assume that the discharge of debt in the name of H, plainly benefited *that* party, whoever may have shared his car or his credit card. If the *liable* debtor was H alone, the risk of possible undue influence exerted on W by H to proffer *her* beneficial interest as security for *his* liabilities, was heightened: that obvious risk should trigger an *Etridge* protocol letter.

The SC agreed with W’s focus on “liability” for the debt and disagreed with the MR at [53]:

“However, that is not the point. It is not a question of who benefits from the money loaned. That is a matter which will not usually be apparent to the lender. 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 proposed transaction. If on the face of the proposed transaction she is undertaking to provide a guarantee of her husband’s debts for nothing in return, that legal liability should be explained to her under the *Etridge* protocol. The fact that she expects to benefit indirectly from the use of the money loaned solely to her husband may be what prompts her to agree to the transaction when the *Etridge* protocol is followed. It may be a

factor militating against a finding of undue influence. But it does not detract from the relevant point which is that it is apparent from 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.”

W submitted that in a hybrid transaction, the banks are protected by the law in other ways. One protection for banks is counter-restitution: see for example *Dunbar Bank v Nadeem* [1998] 3 All ER 876. As a condition of relief, sureties can be ordered to return those loan elements that are for joint benefit as a condition of being granted rescission of the transaction. But in *Waller-Edwards*, the Bank did not plead that, nor argue for it in any of the courts below.

A second protection for the banks may lie in the law of subrogation: see for example, *Castle Phillips v Piddington*. [1994] 70 P&CR 592. In a case such as the present, a mortgage lender may be able to plead and contend that it should be subrogated to all the rights of a lender whose security it has redeemed. Again, that was not pleaded in *Waller-Edwards*.

The SC considered whether a large number of historic partial surety transactions may now fall to be challenged. That seems unlikely. But only time will tell. ■

- 1 Counsel for Ms Waller-Edwards in the Supreme Court (with Julian Malins KC) and in the Court of Appeal, High Court and County Court. Marc Beaumont’s two-hour submissions to the Supreme Court may be viewed at <https://www.supremecourt.uk/cases/uksc-2024-0066#watch-hearings>

Further Reading:

- Secured lending: when is the lender put on inquiry in a ‘hybrid’ transaction? (2025) 2 JIBFL 93.
- Is a lender’s security on a home enforceable against a spouse? (2002) 1 JIBFL 3.
- Lexis+® UK: News Analysis: Undue influence in a hybrid/partial surety case (*Waller-Edwards v One Savings Bank plc*).