CASE DIGEST

ALEXANDER HEYLIN
NO5 CHAMBERS

WALLER-EDWARDS V ONE SAVINGS BANK PLC

[2025] UKSC 22

KEY TAKEAWAYS:

1. In allowing the appeal brought by Waller-Edwards (the Appellant) against One Savings Bank Plc (the Respondent), the Supreme Court held that a bright line test is the correct legal test for deciding when a lender is put on inquiry in a non-commercial hybrid loan transaction.
2. The bright line approach in this context simply involves treating a non-commercial hybrid transaction as a surety transaction and not as a joint loan.
3. The test to be applied, as set out by Lady Simler, is as follows: "a creditor is put on inquiry in any non-commercial hybrid transaction where, on the face of the transaction, there is a more than de mínimis 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".
4. Adopting this approach achieves the same "workable simplicity" as established in Royal Bank of Scotland plc v Etridge (No 2) [2001] UKHL 44; [2002] 2 AC 773.
5. The Supreme Court found that this was not a radical departure from the established position, as it accorded with the principle in, and policy objectives of, the previous case law.

ISSUE

Identifying the correct legal test for deciding when a lender is put on inquiry in a non-commercial hybrid loan transaction.

FACTUAL BACKGROUND

The Appellant commenced a relationship with Mr Bishop at a point in her life when she was emotionally vulnerable and financially independent, as the sole owner of a mortgage-free home and with reasonably substantial personal savings. Mr Bishop was in the process of building a property and persuaded the Appellant to exchange her home and savings for the property in question.

The Appellant was given a charge over the property to secure her "investment" pending completion of the property. The Appellant moved into the incomplete property, and the legal title to the property was put into joint names with a declaration of trust stating that the beneficial interest in the property was held by the Appellant as to 99% and Mr Bishop as to 1% as tenants in common.

Mr Bishop sought to remortgage the property with the Respondent. As part of this, the Respondent required Mr Bishop to pay off his existing debts, amounting to £39,500, constituting the asserted suretyship part of the joint loan. Following completion of the remortgage, the relationship between the couple came to an end and Mr Bishop moved out of the property. The Appellant continued to live there but without savings, her limited pension was inadequate to service the re-mortgage payments. Ultimately, the Respondent commenced possession proceedings.

DRAWING DISTINCTIONS

The law regards banks and other lenders as put on inquiry whenever on the face of a three-way transaction the vulnerable partner in the relationship is offering to stand surety for their partner's debts. (Barclays Bank plc v O'Brien [1994] 1 AC 180; CIBC Mortgages plc v Pitt [1994] 1 AC 200; Royal Bank of Scotland plc v Etridge (No 2) [2001] UKHL 44; [2002] 2 AC 773)

By contrast, where on the face of the transaction the lending is advanced to the partners jointly, the bank is not put on inquiry unless aware that the loan is being made for one partner's purposes as distinct from their joint purposes.

However, it was common ground on this appeal that there may be less straightforward transactions involving non-commercial loans sought by a couple that are, on the face of it, partly for their joint benefit and partly for one's sole benefit and therefore to that extent apparently to the financial disadvantage of the other.

This sort of transaction is described as a "HYBRID" TRANSACTION, like the one in the case at hand.

FIRST INSTANCE - HHJ Mitchell

Found that:

- the Appellant had entered into all these financial transactions under the influence of Mr Bishop, a finding which was not challenged.
- the Respondent knew that the relationship between the Appellant and Mr Bishop was a non-commercial one.
- the Respondent also knew that £39,500 of the loan would be used to repay Mr BIshop's existing debts.

As a result:

- "The question in the end is whether the fact that the remortgage 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 this case into one akin to a surety case" (para 137).

FIRST APPEAL - Edwin Johnson J

Considered that the O'Brien principle encompassed a partial surety case:

- "Looked at in the round, I do not think that the Remortgage, as it was known to the Respondent, constituted a transaction in which the Appellant was properly viewed as being in a relationship of suretyship with Mr Bishop" (para 104).

COURT OF APPEAL

Dismissed the appeal.

Sir Geoffrey Vos MR

- Rejected the Appellant's argument that a hybrid case of this kind should be treated in the same way as a full surety case unless the surety element of which the lender is aware is trivial.
- Held that nothing in Etridge No 2 implies a third test for hybrid cases of this kind.
- Found that the Appellant's test would introduce uncertainty with arguments about what was non-trivial.
- Recognised that it is not always easy for banks to know whether certain debts are truly for the sole benefit of the person in whose name they stand.
- Concluded that a fact and degree approach was appropriate.

Peter Jackson LJ

- Rejected the test proposed by Appellant as unduly onerous to lenders and many borrowers.

THE TEST TO BE APPLIED TO HYBRID TRANSACTIONS

Lady Simler (with whom Lord Briggs, Lord Hamblen, Lord Stephens and Lady Rose agreed)

APPEAL ALLOWED

STARTING POINT

As none of the appeals dealt with in Etridge (No 2) or the earlier cases addressed the approach to partial surety transactions, it was necessary as a starting point to understand the underlying rationale for treating surety transactions differently from joint borrowing transactions.

Rationale = recognition that surety transactions are more likely than others to be tainted by undue influence or misrepresentation.

HYBRID TRANSACTIONS

Non-commercial hybrid transactions are less straightforward as:

- they come in different shapes and sizes; and
- the ratio of joint borrowing to surety may vary significantly from one transaction to another.

APPROACH TO BE TAKEN

Whilst it is true that the level of risk posed by a particular transaction will depend on its particular facts and that, as a matter of fact, there may be a spectrum of risk posed by different type of transaction, that is NOT the approach that was adopted by the House of Lords in O'Brien, Pitt and Etridge (No 2).

Instead, the approach adopted is a BINARY one.

Either the creditor is on notice of the risk of undue influence, or it is not.
if the creditor is on notice, then the Etridge protocol must be followed, if it is not there is nothing to be done.

Since there is no scope for a nuanced approach to the steps required to be taken once the creditor is on notice, there is no side for a nuanced (or fact-senstive) approach to whether the creditor is on notice or not.

This is a BINARY question: either there is, on the face of the transaction, a surety element giving rise to a heightened risk of undue influence or there is not.

BRIGHT LINE APPROACH

A bright line approach, as proposed by the Appellant, is therefore appropriate.

The approach simply involves treating a non-commercial hybrid transaction as a surety transaction and not as a joint loan.

Lady Simler held that "a creditor is put on inquiry in any non-commercial hybrid transaction where, on the face of the transaction, there is a more than de mínimis 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" (para 57).

REASONS FOR APPROACH

There is a need for the same "workable simplicity" as established in Etridge (No 2) to assist banks to put in place procederes which can be applied routinely and straightforwardly.

The bright line approach to non-commercial hybrid cases achieves just that.

It is clear, promotes certainty, and is easy to apply effectively in all such cases.

The bright line approach should encourage banks to prevent future litigation by taking the modest, reasonable step of issuing Etridge protocol letters, rather than encouraging underwriting staff to determine whether there is, or is not, an appearance of suretyship. In this way it is less onerous.

The Supreme Court found that this was NOT a radical departure from the established position, according with the principle in, and policy objectives of, the previous case law.

ALEXANDER'S PRACTICE ENCOMPASSES INSOLVENCY AND COMMERCIAL CHANCERY. THIS INCLUDES CONSIDERABLE CROSS-BORDER AND OFFSHORE EXPERIENCE.

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