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Etridge – If in doubt, do

by Anthony Pavlovich, 3 Verulam Buildings

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An Article examining when lenders must employ the 'Etridge protocol', an important safeguard to address the risk of undue influence in financial transactions. Anthony Pavlovich of 3VB analyses the recent Supreme Court decision in Waller-Edwards v One Savings Bank Plc [2025] UKSC 22; [2025] 2 W.L.R. 1263, a ruling that brings "workable simplicity" to this complex area but in doing so widens the range of transactions that require the protocol.

The Etridge protocol

Lenders are expected to mitigate the risk of borrowers entering certain transactions as a result of undue influence. They must take certain steps to ensure that the borrowers understand the implications of the transaction and are willing to proceed. This safeguard is referred to as the 'Etridge protocol' after the case that created it: *Royal Bank of Scotland plc v Etridge (No 2) [2002] 2 AC 773*.

The question for lenders is when to apply the protocol. The time and the cost involved make it impractical to apply routinely. But failing to apply the protocol when it is required has serious consequences: if undue influence is found, the lender will be taken to be on notice and may then be unable to enforce the loan against the borrower affected.

Fortunately, a recent decision of the Supreme Court sheds light on the relevant principles: *Waller-Edwards v One Savings Bank Plc [2025] UKSC 22; [2025] 2 W.L.R. 1263*. The Court stressed the need for "workable simplicity", not just in applying the protocol but also in knowing when to apply it. In an area beset by policy considerations, at the intersection of equity and banking law, such simplicity is a worthy goal.

As explained below, the Supreme Court has simplified the test for when the protocol is needed but its approach means that the protocol will be needed more often and some uncertainty remains.

When the protocol is needed

Even before the Etridge decision, the House of Lords had established a distinction between 'surety' cases and 'joint borrowing'. As now explained by the Supreme Court, the focus is on a borrower assuming another person's liability, as a guarantor does in respect of the principal debt. That is what is deemed to give rise to the risk of undue influence. By contrast, where two borrowers take a loan for their joint purposes, the risk is lower. One exception is where the lender knows that what is ostensibly joint borrowing is in fact for just one borrower's benefit.

Thus, in ordinary commercial transactions, the Etridge protocol would not apply. But around the fringes of such transactions, there may be non-commercial parts that do engage the protocol. For example, a couple may seek a loan to invest in a business, or they may guarantee a loan taken by the company that carries on the business. If it is their joint business—shown perhaps by their both being directors or shareholders—then the protocol would not generally apply. But if only one borrower is involved in the business, then the loan may be seen as being for that person's benefit.

The development in Waller-Edwards is that the whole loan, save only for *de minimis* elements, must be for joint purposes; otherwise, the protocol applies. It would be odd, after all, if a loan with two components, one for joint purposes and one not, required no safeguard, whereas separate loans representing the two components would require the protocol (at least in respect of one loan).

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The key is that the transaction is viewed from the lender's perspective. If there is an apparent risk of undue influence, it does not matter how that risk eventuated. The facts of Waller-Edwards illustrate this point. Ms Waller-Edwards and Mr Bishop received a loan advance of £384,000, of which £39,500 was found to be for Mr Bishop's purposes. That money was used to discharge car finance and a credit-card balance. It did not matter that Ms Waller-Edwards may have used the car, nor that she may have benefited from some of the credit-card spending, since she was assuming a liability that was otherwise not hers. More importantly, it did not matter that the real disadvantage to her was a separate sum of £142,000, which Mr Bishop used to make a divorce payment to his ex-wife, since this payment was unknown to the lender. All that mattered was that the lender knew enough to see a risk of undue influence.

Thus, in general, it should be clear that the Etridge protocol applies unless any 'surety' part of the transaction is *de minimis*. The Court, with solicitous concern for the bank officials who have to make that judgment, explained what is meant by *de minimis*: anything that is "trifling, insubstantial, inconsequential, immaterial, irrelevant or negligible". In practice, lenders may choose to err on the side of caution, and apply the protocol when in doubt, but the Court recognised that this point was open to debate.

When the protocol is erroneously not applied

If the lender decides not to apply to Etridge protocol, and a court later finds that it was required, then the lender will be fixed with notice of any undue influence. Accordingly, there is a related question of whether there was undue influence. This is seen from the borrowers' perspective. Assuming the borrowers are domestic partners (or there is some other relationship of trust and confidence between them), the transaction must be examined again to see if it has features that are not readily explicable other than by undue influence. Such features will often be the same as those giving rise to the protocol, namely one party assuming another's liability. If those features are found, undue influence is rebuttably presumed.

Workable simplicity

In striving for 'workable simplicity', the Supreme Court has increased the number of situations in which the protocol will be required. Parties will not be able to argue that the different components of a transaction mean that the transaction as a whole was for joint purposes. This 'fact and degree' approach had been adopted by all the courts below the Supreme Court and was rejected there. Now, any 'surety' part, other than one that is *de minimis*, will engage the protocol. But, ultimately, the Court has brought some clarity to the common situation in which businesspeople use their personal assets, and their domestic partner's assets, to fund their business borrowing. Given the consequences for lenders in making the wrong decision, such clarity is welcome.