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CURRENT DEVELOPMENTS: CASE COMMENT

Economic abuse, the bank, and the devil in the detail: *One Savings Bank plc v Catherine Waller-Edwards* [2024] EWCA Civ 302

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Introduction

In *One Savings Bank plc v Catherine Waller-Edwards*,[1] the Court of Appeal considered – for the first time – whether banks are put on constructive notice to potential undue influence in joint benefit remortgage/suretyship hybrid transactions. At a time where there is an increasing awareness of economic abuse as a form of domestic abuse,[2] this appeal offered an important opportunity to reassess banks' responsibilities in assisting potential victim-survivors. Unfortunately, that opportunity was not seized. In this case comment, I set out the negative impacts the Court of Appeal judgment could have on victim-survivors of economic abuse going forward, and how these concerns could – since this case has now been given leave to appeal – be addressed by the Supreme Court.

1. Facts of the case

Within two years of forming a relationship with Mr Bishop, Ms Waller-Edwards went from having a mortgage-free home and £150,000 in savings, to having a shared interest in a remortgaged property that she was not meant to be occupying. Soon into their relationship, Bishop (a property developer) persuaded Waller-Edwards to exchange her mortgage free home (worth £570,000–£600,000) and £150,000 for a property he had partly built, called 'Spectrum' (expected to be worth £750,000). The transaction under dispute between Waller-Edwards and One Savings Bank (OSB) was a joint buy-to-let remortgage of £384,000 that was said (by Bishop) to be required to pay off an existing charge (£233,081). Bishop said the remaining monies would go towards buying another home for them (as a couple) to live in whilst 'Spectrum' was rented out. Waller-Edwards, at the time of the transaction with OSB, had nominal earnings of £7,000 per annum and a 99% beneficial interest in 'Spectrum' (Mr Bishop was on the legal title). Once lending was issued by OSB, and after paying off the existing charge, Bishop asked his solicitor – Mr Clake – who was also acting for Waller-Edwards on the OSB remortgage, to advance

*I would like to thank the anonymous reviewer for their helpful comments. Any errors remain my own.

[1][2024] EWCA Civ 302.

[2]Economic abuse is recognised in law in the statutory definition of domestic abuse in the Domestic Abuse Act 2021, s 1(3)(d) and is defined as 'any behaviour that has a substantial adverse effect on B's ability to— (a) acquire, use or maintain money or other property, or (b) obtain goods or services'.

monies from the OSB remortgage to his ex-wife as part of a divorce settlement (without Waller-Edwards' knowledge). Bishop never intended for monies to be used towards a second property. This contemptible 'divorce payment' is a demonstration of economic abuse through joint mortgage.[3] Once one mortgage was issued on 'Spectrum', Bishop exercised economic control because Waller-Edwards – with nominal earnings – would have lived in (rational) fear that the original mortgage would not be paid by Bishop (as the main earner) without her doing as he wished (in terms of taking out further borrowing), meaning she was at risk of losing the financial security she had prior to their relationship. In the end, this is what happened. After their relationship ended, Bishop stopped paying the repayments to OSB, which subsequently sought possession of 'Spectrum'.

An important fact in this case was that, as part of the remortgage transaction, OSB required nearly £40,000 of Bishop's sole debt (part credit card debt and part car finance) to be paid off using the secured loan. This meant that Waller-Edwards was providing suretyship for some £40,000. In accordance with *Royal Bank of Scotland v Etridge (No 2)*,[4] where an individual provides suretyship for their intimate partner's sole debts (as opposed to joint secured lending), the bank is required to ensure that they receive independent legal advice (ILA) before the transaction is actioned because the bank has constructive notice of potential undue influence. If a lender does not ensure that ILA has been provided in such circumstances and proceeds, the transaction could later be set aside. This appeal hinged on the fact that around 10% of the monies loaned by OSB were known to solely benefit Bishop. The question for the court was: was OSB put on constructive notice to the risk of Waller-Edwards being unduly influenced by Bishop?

2. Court of Appeal decision

The Court of Appeal dismissed the appeal on the basis that 'on the face of it' (language from Lord Nicholls' leading speech in *Etridge*) the transaction was deemed by the bank to be a joint benefit remortgage, and because OSB was not aware that the loan was 'being made for [Bishop's] … purposes, as distinct from their joint purposes'.[5] The Court of Appeal held that it was 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"'. On this, Sir Geoffrey Vos MR states:

> … 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 credit card?[6]

Here, Vos MR provides judicial recognition of the issue that one partner often runs up debt in their intimate partner's sole name. In a different context, this acknowledgement would be music to the ears of those of us who are staunch advocates for the rights of victim-survivors of economic abuse. Commonly, an abuser perpetrates economic abuse by spending money on their partner's credit card or coercing them into debt in their sole name.[7] In such instances, under the current state of the law, victim-survivors have no legal recourse; they are left solely liable for their abuser's debts. This debt typically has a detrimental effect on their ability to re-build their lives after abuse.[8] But here, this point – that often partners benefit from debt accrued in their partner's sole name – is being weaponised against a victim-survivor (Waller-Edwards).

[3] D Cartwright '"Locked into a mortgage, locked out of my home": how perpetrators use joint mortgages as a form of economic abuse and how to stop them' (Surviving Economic Abuse Report, September 2024), available at https://survivingeconomicabuse.org/wp-content/uploads/2024/09/SEA-Joint-Mortgages-Report-2024.pdf (last accessed 9 January 2025).

[4] [2002] 2 AC 733 (HL).

[5] *OSB v Waller-Edwards*, above n 1, at [33] per Vos MR.

[6] Ibid, at [35].

[7] A Littwin 'Coerced debt: the role of consumer credit in domestic violence' (2012) 100(4) *California Law Review* 951.

[8] E Butt *Know Economic Abuse* (Refuge Report, 2020), available at https://refuge.org.uk/wp-content/uploads/2020/10/Know-Economic-Abuse-Report-2020.pdf (last accessed 9 January 2025).

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There is an obvious way that OSB could have ascertained whether Waller-Edwards had accrued any benefit from the car or credit card – OSB could have asked Waller-Edwards.

This case has now been given leave to appeal, and the Supreme Court hearing will likely focus on whether a bank is only required to view secured lending transactions holistically (where a hybrid transaction may 'on the face of it' look to be a joint benefit remortgage), or whether they must consider component parts (where they may identify a surety element) to determine whether they have constructive notice. I am firmly of the belief that banks should be required to look at the component parts of a transaction to determine whether they have constructive notice (and would go further in suggesting that banks should be making inquiries to learn about the context and history of each client's situation in presumed joint benefit remortgages too) – after all, the devil is (and was in Waller-Edwards' case) in the detail.

Next, I discuss two negative impacts that I think the Court of Appeal's judgment will have on victim-survivors of economic abuse (which are capable of being addressed by the Supreme Court when the appeal is heard). These are:

(a) the current constructive notice test to determine whether a bank is put on inquiry encourages lenders to learn as little of their clients' situations as possible, particularly the potential presence of domestic abuse.
(b) the 'matter of fact and degree' standard in hybrid cases creates uncertainty and will likely result in banks requiring ILA in hybrid cases anyway.

(a) The current 'constructive notice' test is problematic in relation to (presumed) joint benefit remortgages

According to Lord Browne-Wilkinson in *Barclays Bank v O'Brien*,[9] affirmed by *Etridge* (which bound the Court of Appeal in Waller-Edwards' case), banks are only put on constructive notice to the possibility of undue influence where it is known that an individual is providing suretyship for the sole debts of another (with whom they are in a non-commercial relationship). In cases where the secured lending transaction of two parties (such as husband and wife) is said to be for their joint benefit (such as to pay off an existing charge and to purchase a holiday home as in *CIBC Mortgages plc v Pitt*)[10] the bank is not put on inquiry. This, I argue, is an arbitrary distinction that does not accurately reflect the known realities of coerced debt and undue pressure within intimate relationships. Perpetrators of economic abuse may not admit to banks that they want to remortgage a jointly-owned home to raise capital for their sole benefit – even if that is what they intend to do (as Bishop did in this case).

As in Waller-Edwards' case, an application may objectively look like it is for her benefit (to pay off an existing charge and to buy another property), but the only way of knowing if it is *truly* beneficial to her is by speaking with her. Context, in cases such as Waller-Edwards', is key: arguably, in addressing the widespread problem of economic abuse, it is vitally important for lenders to engage with each party to a proposed remortgage transaction. However, Lord Nicholls firmly rejected the idea that banks must make inquiries to determine whether they are put on inquiry to the risk of undue influence:

> 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… 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.[11]

[9][1994] 1 AC 180 (HL).
[10][1994] AC 200 (HL).
[11]*Etridge*, above n 4, at [41].

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This position that banks are *not* required to make inquiries is, I suggest, outdated, and based on the prioritisation of family privacy at the expense of aiding victim-survivors of economic abuse. As Ellen Gordon-Bouvier puts it, 'illusions such as family privacy and state restraint create conditions in which coerced debt and economic abuse can flourish'.[12] Over twenty years on from *Etridge*, more is known about the nature and impacts of economic abuse,[13] and the Supreme Court has a unique opportunity – through a restatement of the law on constructive notice – to require banks to be more aware of the existence of economic abuse and to better examine transactions for economic abuse.

There are, as Vos MR highlights in the Court of Appeal's judgment, other ways a bank may be put on inquiry (other than where the transaction is a clear non-commercial suretyship case).[14] This is best exemplified by the case of *Burbank Securities v Wong*.[15] In this case, Sue Wong (a woman with cerebral palsy and – according to a medical expert – 'intellectual limitations') was romantically involved with Gary Aldridge. Aldridge unduly influenced Wong to secure her property for advancements of capital of more than £100,000, principally for his newly created business 'Aldridge, Wong & Co Import Export Ltd'. To raise capital, Gary approached a mortgage broker at the Mortgage and Loan Business (MLB). Because of the name of the business and Aldridge telling them that Wong was a director, MLB believed it was a commercial suretyship transaction (MLB did not know about their romantic relationship). In such instances, according to *Etridge*, commercial parties are not required to receive ILA as '[t]hose engaged in business can be regarded as being capable of looking after themselves…'[16] The bank would therefore remain untainted by any later claims of undue influence, because they were told the parties' relationship was strictly commercial. Here, however, because MLB (an agent of Burbank Securities, who subsequently provided the lending) met with Wong and learnt about her disability and 'passivity and misunderstanding', the judge held that MLB was put on inquiry. As Wong had not received ILA, the transaction was set aside.

In *Wong*, the bank having constructive notice was contingent on an agent of the bank having met Wong in person. This means that lenders, after *Wong*, are incentivised to know as little as possible by not meeting with potential customers applying for commercial or joint benefit remortgages. Where banks do not meet with persons applying for (what seem on the face of it to be) joint benefit remortgages (such as in Waller-Edwards' case) the opportunity to learn about possible 'red flags' is diminished. This approach is contrary to Nicola Sharp-Jeffs' call for banks (and other agencies) to recognise economic abuse and 'maximise spaces within which victim-survivors can speak out… [and] be supported'.[17] A restatement of the law on constructive notice could lead to more meaningful protections for victim-survivors in cases where there is no suretyship component at all. However, in relation to Waller-Edwards' case, there *was* a suretyship component. This leads us to the second negative impact the Court of Appeal judgment could have on victim-survivors' access to assistance.

(b) The 'matter of fact and degree' standard in hybrid cases invites uncertainty and continued inadequate ILA being delivered to surety clients

On the issue of whether OSB had been put on constructive notice because of the suretyship component of the transaction, Vos MR stated:

> Lord Nicholls [outlined that a bank is put on inquiry in]… 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 regards, however, the identification of a surety case, Lord Nicholls tells us that a

[12]E Gordon-Bouvier 'Analysing legal responses to coerced debt' (2024) 44 *Legal Studies* 537 at 538.

[13]An Opinium survey shows that one in five women in the UK experienced economic abuse in 2023, available at https://survivingeconomicabuse.org/news/5-5-million-uk-women-experiencing-economic-abuse/ (last accessed 9 January 2025).

[14]*OSB v Waller-Edwards*, above n 1, at [28].

[15][2008] EWHC 552 (Ch).

[16]*Etridge*, above n 4, at [88] per Lord Nicholls.

[17]N Sharp-Jeffs *Understanding and Responding to Economic Abuse* (Emerald Publishing, 2022) 16.

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> 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.' … 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' … I think the judges [below] were right.[18]

Vos MR's agreement that constructive notice in hybrid cases is a 'matter of fact and degree' considering whether the loan was being made for 'the purposes of the borrower with the debts, as distinct from their joint purposes', is problematic. Given what we know now about the prevalence of economic abuse in intimate partner relationships, it was irresponsible for OSB to assume that Waller-Edwards would be happy for some of the monies raised through the remortgage to be used to pay off Bishop's sole debt – no matter how small the amount is (and nearly £40,000 is not a small amount). In support of his judgment, Vos MR refers to what Mr Richardson (the head of the bank's underwriting department of OSB) 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 person's name… 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… had joint expenditure.[19]

The assumption that parties in a relationship have 'joint expenditure' is based on an ideal of each party in a relationship happily and devotedly looking after the interests of the other. This myth is dispelled by the accounts of victim-survivors of economic abuse.[20] Banks should never assume that an individual will secure the sole debts of their intimate partner because it is likely they helped to run up those debts. Without understanding Waller-Edwards' individual circumstances and wishes, it was neglectful to make such an assumption without at least making cursory inquiries. Waller-Edwards and Bishop had been together for less than two years before the OSB remortgage and during that time her financial security had been substantially exploited by Bishop. If banks assume – as Mr Richardson for OSB had – that individuals are happy to provide suretyship as part of a joint benefit remortgage, they are potentially enabling abusers and missing critical opportunities to identify and assist survivor-victims of economic abuse.

I would also argue that the 'fact and degree' component of the constructive notice test endorsed by the Court of Appeal is far too uncertain. The Court of Appeal does not outline how, practically, the 'fact and degree' standard should be assessed by banks in determining whether they have been put on inquiry in 'hybrid' cases. To add insult to injury for Waller-Edwards, after this decision, it is likely that banks will require ILA to be delivered to surety-borrowers in every instance where there is a suretyship component. This would provide banks with more certainty (as opposed to applying the 'fact and degree' threshold test endorsed by the Court of Appeal), as they will then have an uncluttered ability to enforce security in *all* cases if undue influence claims later arise. I suspect banks will respond to the Court of Appeal's judgment in this way, because research into lenders' conduct and solicitors' practices 20 years on from *Etridge* has shown that many banks now require solicitors to deliver ILA to commercial sureties as well as non-commercial sureties, despite Lord Nicholls' clearly stipulating that banks are not put on inquiry in commercial situations.[21] This response by banks was likely taken in a bid to avoid situations such as the one that arose in *Wong* (discussed above).

If, as I suspect, banks require ILA to be delivered to sureties in hybrid transactions after this case – no matter how small or indistinct the suretyship component is – not only would Ms Waller-Edwards' hard-fought action have resulted in no individual legal recourse (and the repossession of her home), but her

[18] *OSB v Waller-Edwards*, above n 1, at [33]–[34].

[19] Ibid, at [14].

[20] Cartwright, above n 3, and Butt, above n 8.

[21] E Rowan 'Independent legal advice in (re)mortgage transactions 20 years on from RBS v Etridge (No 2)' (2023) 2 *Conveyancer and Property Lawyer* 166 at 173.

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case would act as a catalyst for change for lenders' protection, rather than protection in the name of victim-survivors of economic abuse. This will have an ongoing detrimental impact, because, whilst more sureties like Waller-Edwards' will likely receive ILA in practice after this case, no attention has been given to clarifying and improving the *Etridge* guidelines on the roles banks and solicitors play in organising and delivering ILA. Recent empirical research has shown that ILA is treated as a mere box-ticking exercise by some solicitors.[22] What this means is that ILA is likely to continue to offer little meaningful assistance to victim-survivors of economic abuse going forward. Therefore, if the Supreme Court upholds the Court of Appeal's decision, it would be missing an important opportunity to reassess what is required of banks and solicitors considering what we know now about the quality of ILA after *Etridge*, and the pernicious and widespread effects of economic abuse.

[22]Ibid, at 179–181. See also E Rowan 'Commerce over care: exploring independent legal advice given in potential economic abuse cases' (2025) Legal Ethics 1.

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