Neutral Citation No: [2025] NICA 72 ***Judgment: approved by the court for handing down (subject to editorial corrections)****	***Ref:*** **McB12917** ***ICOS No:*** ***Delivered:*** **18/12/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

Between:

EXCEL-A-RATE BUSINESS SERVICES LTD

Plaintiff

and

EAMON BLANEY

First defendant

and

CARMEL BLANEY

Second Defendant

_____

Before: McCloskey LJ, McBride J and Huddleston J

_____

McBRIDE J (with whom Huddleston J agrees)

Introduction

[1] This is an appeal from a judgment of Horner LJ dated 13 December 2024 in respect of four actions, which were consolidated. The trial judge made determinations in respect of the following four matters:

(a) He held that Mrs Blaney (the wife) had a beneficial interest in the matrimonial home.

(b) He held that the wife's interest was 35%.

(c) He held that the wife's interest in the matrimonial home was not postponed to the plaintiff's interests.

(d) He held that the matrimonial home be sold in lieu of partition and granted an eight-week stay.

[2] The wife appeals against the findings of the trial judge that she had a 35% interest in the home and the eight-week stay.

[3] For the reasons set out by McCloskey LJ, I consider the wife's appeal should be dismissed. I consider the trial judge did not err in holding that she had a 35% interest in the matrimonial home for the reasons set out by McCloskey LJ. I also consider that the trial judge did not err in holding that the matrimonial home should be sold in lieu of partition and that the order for the eight-week stay was appropriate, for the reasons set out by McCloskey LJ.

[4] I further agree with the reasons set out by McCloskey LJ in respect of all the grounds of appeal of the wife.

[5] The plaintiff has also served a notice of appeal. Essentially, this notice appeals the trial judge's findings that the plaintiff's interests in the matrimonial home ranked behind the wife's interests and secondly, it submits that the trial judge failed to make any determination of its writ action which sought an order for a liquidated sum in respect of monies due and owing in respect of ten personal guarantees executed by the wife in respect of liabilities owed to the plaintiff by Ardcarmon Ltd (in liquidation) (the company).

[6] I agree with McCloskey LJ that the trial judge erred in finding the Deed of Consent and Postponement was not enforceable. I consider the Deed of Consent and Postponement was validly executed and enforceable for the reasons set out below, which differ in some respects to the reasoning of McCloskey LJ. I therefore consider that the plaintiff's interests in the matrimonial home rank in priority to the wife's interests.

[7] I agree that the trial judge failed to address the question relating to the enforcement of the personal guarantees. I agree with McCloskey LJ that this court is equipped to address this question.

[8] The enforceability of three of the wife's ten personal guarantees raises an interesting point of law upon which we are disagreed. I disagree with McCloskey LJ's reasoning and his findings in respect of the enforceability of these personal guarantees. For this reason, I now set out the basis upon which I find the Deed of Consent and Postponement and some of the personal guarantees are enforceable and why some of the other guarantees are unenforceable.

Background

[9] The first and second defendant are husband and wife; the husband and wife were directors of the company. The wife was not a shareholder in the company.

[10] During the period November 2017 to November 2018, the company took out several loans and entered into several finance agreements. These loans and finance agreements were secured by personal guarantees executed by the wife and the husband between the same dates. In addition, the matrimonial home, which was held

in the husband's sole legal name, was mortgaged in favour of the plaintiff as security for the company's debts. The wife signed a Deed of Consent and Postponement in relation to her interest in the matrimonial home on 6 December 2017.

[11] The wife challenges the validity of the personal guarantees and the Deed of Consent and Postponement on the ground that her consent to these transactions was vitiated by the undue influence of her husband.

Relevant legal principles

[12] The personal guarantees and the Deed of Consent and Postponement in this case are all surety transactions. They are tripartite transactions which involve a debtor, a creditor and a guarantor. The guarantor enters into the transaction at the request of the debtor, and the guarantor assumes obligations to the creditor for which the guarantor receives no demonstrable benefit in return. Accordingly, the guaranteed transaction is one-sided so far as the guarantor is concerned and the creditor knows this.

[13] In this case the wife executed the personal guarantees and the Deed of Consent and Postponement at the request of her husband, the debtor. She assumed obligations under the personal guarantees and agreed to defer any priority she had in relation to her interest in the matrimonial home to the plaintiff, the creditor, by reason of the deed of consent and postponement. On the face of the transactions the wife received no benefit.

[14] The legal principles governing suretyship transactions have been set out in *Barclay's Bank Plc v O'Brien* [1994] 1 AC 180, *Royal Bank of Scotland v Etridge* [2001] UKHL 44, and more recently in the Supreme Court decision in *Waller Edwards v One Savings Bank Plc* [2025] UKSC 22.

[15] As explained in *Etridge* at paras [35]-[37], surety transactions involve competing interests. On one side there is a need to allow homeowners the freedom to make economic use of their homes and for banks to have confidence that a wife's signature of the necessary guarantees and charges will be binding, otherwise banks will not lend money on the security of a jointly owned home. On the other side, it is recognised that a marriage relationship is characterised by a high degree of trust and confidence and emotional inter-dependence, and this can provide scope for abuse and there is therefore a need to protect a wife against a husband's undue influence.

[16] In deciding where the balance lay in respect of these two competing interests Lord Browne-Wilkinson in *O'Brien* determined that if undue influence was used by the husband to procure the wife's consent to the transactions then the creditor would be imputed with constructive knowledge of this undue influence in situations where the bank "was put on inquiry" and once put on inquiry the creditor would have to take reasonable steps to ensure the wife understood the nature and implications of the transaction otherwise its security would be unenforceable. The structured scheme set

out by Lord Browne Wilkinson in *O'Brien* for deciding cases which raised an issue of enforceability between a lender and a wife, was usefully distilled into three questions by Lord Hobhouse in *Etridge* at page 198 as follows:

> "(1) Has the wife proved what is necessary for the court to be satisfied that the transaction was affected by the undue influence of the husband?
>
> (2) Was the lender put on enquiry?
>
> (3) If so, did the lender take reasonable steps to satisfy itself that there was no undue influence?"

Question 1 – Was the transaction vitiated by undue influence?

[17] If a wife does not establish undue influence the transaction is enforceable as a creditor cannot be fixed with constructive knowledge of undue influence when the transaction was not procured by undue influence and in such circumstances the court does not need to proceed to answer questions 2 and 3.

What is undue influence?

[18] In *Nature Resorts v First Citizens Bank* [2022] UKPC 10, in a joint judgment by Lords Briggs and Burrows, the Privy Council helpfully summarised the nature of undue influence at para [10] emphasising that it was a single concept:

> "10 Putting to one side illegitimate threats (which are nowadays better viewed as falling within the doctrine of duress) … undue influence is concerned with a situation where, by reason of the relationship between them, one party B has such influence over the other A that A does not exercise a free judgment, independent of B, in relation to the making of a transaction between A and B (or, in a three-party situation, between A and a third party, C)."

[19] Actual undue influence refers to a situation where the person alleging undue influence (B) relies on direct proof of (A's) conduct, within a relationship with (B), which led to (B) not exercising a free and independent judgment.

[20] In contrast presumed undue influence arises where the person alleging undue influence relies on an evidential presumption. If a person proves that:

(i) they reposed trust and confidence in the other party (in certain types of relationships this is presumed without proof. The relationship of husband and wife however is not one of the types of relationships where there is such a presumption); and

(ii) the transaction calls for an explanation,

then the evidential burden shifts to the other party to produce evidence to counter the inference which should otherwise be drawn.

Proof of undue influence

[21] In all cases the burden of proving undue influence rests upon the person who claims to have been wronged. It can however be proved in different ways. It can be proved by direct evidence or a wife, in cases such as the instant one, can rely on an evidential presumption, namely if she establishes that she reposed trust and confidence in her husband and the transaction is not one which is readily explicable by the relationship of the parties then a presumption of undue influence arises and the evidential burden shifts to the husband to counter the inference of undue influence which will otherwise be drawn. Even when relying on this evidential presumption, however, as noted by Lord Hobhouse at para [106] any conclusion that the wife's consent was procured by undue influence will only be reached after receiving evidence and the legal burden of proving some wrongdoing rests on the wife.

Evidence required to raise evidential presumption of undue influence in the case of husband and wife

[22] The wife must prove both limbs set out above, before an evidential presumption arises. She must establish there is a relationship of trust and confidence and secondly must establish the transaction calls for an explanation. If both are proved, then the evidential burden shifts to the husband to counter the presumption of undue influence. If there is no such counter evidence, then undue influence will be established.

[23] Although no presumption of trust and confidence arises in the relationship of husband and wife, Lord Nicholls in *Etridge* at para [19], noted that:

> "…, the court will nevertheless note, as a matter of fact, the opportunities for abuse which flow from a wife's confidence in her husband. The court will take this into account with all the other evidence in the case. Where there is evidence that a husband has taken unfair advantage of his influence over his wife, or her confidence in him, 'it is not difficult for the wife to establish her title to relief.'"

[24] By way of example at paras [32]–[33] he sets out some conduct by a husband which would not amount to undue influence.

[25] In respect of the second limb, which relates to whether the transaction calls for an explanation, Lord Scarman in *National Westminster Bank v Morgan* [1985] AC 686 at 703-707, said that there must be evidence that the transaction itself is wrongful in that it "… constituted an advantage taken of the person subjected to the influence which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it."

[26] Similarly, in *Nature Resorts*, the Privy Council held at para [12]:

> "The underlying idea behind the test is that the nature and/or contents of the transaction must make one conclude, in the context of the relationship of influence, that, absent evidence to the contrary, undue influence has been exercised. A contract between A and B which is substantively very unfair to A stands on one side of the line: a Christmas present by A to B stands on the other side of the line."

[27] In *Etridge*, Lord Nicholls at para [30] addressing the question whether a wife guaranteeing her husband's debt together with a charge on her share in the matrimonial home was always a transaction which called for an explanation, opined that "*in the ordinary course*" such a transaction would not be regarded as a transaction which calls for an explanation. He noted, however, that each case is fact specific and the question whether a surety transaction has been brought about by the exercise of a husband's undue influence is always a question of fact to be decided having regard to all the evidence in the case and in some cases a wife's signature of a guarantee or a charge of her share in the matrimonial home does call for an explanation.

[28] He further noted at para [20] that the fact that a wife had received independent legal advice may or may not be sufficient to have had an emancipating effect so that the transaction was not brought about by undue influence. Whether receipt of independent legal advice had or had not had this effect is a matter of fact to be decided having regard to all the evidence in the case. In making this assessment I consider the judge can look into the nature of the advice given to determine whether it ensured the wife's consent to the transaction was free and voluntary.

Did the evidential presumption apply in this case?

[29] The trial judge, having heard the witnesses in this case held that there was a relationship of trust and confidence between the husband and wife and further found on the basis of all the evidence, that the Deed of Consent and Postponement called for an explanation. Accordingly, he held that there was presumed undue influence in respect of the deed of consent and postponement. The husband did not call any evidence to counter this inference and, accordingly, the trial judge held the Deed of Consent and Postponement was vitiated by undue influence. The trial judge made no

findings in respect of whether the personal guarantees were procured by undue influence.

[30] I consider, having regard to the jurisprudence set out in detail by McCloskey LJ regarding the role of the appellate court, that there is no basis for this court to interfere with this finding of the lower court. Whether undue influence is established is a fact specific exercise and I consider the trial judge, was best placed to make this determination having heard the evidence and assessed the witnesses. Accordingly, I consider undue influence vitiated the Deed of Consent and Postponement.

[31] McCloskey LJ notes at para [154] the trial judge found "presumed undue influence" in respect of the Deed of Consent and Postponement. After setting out a number of legal principles he opines at para [164] that because there is no presumption of undue influence in the relationship of husband and wife, the wife could not pray in aid this evidential presumption. I respectfully disagree. As set out in the section headed: "Question 1 – Undue Influence", the evidential presumption applies when the two limbs, namely (i) reposing trust and confidence in her husband and (ii) the transaction "called for an explanation", are satisfied. The first limb requires the wife to prove that she reposed trust and confidence in her husband. Reposing trust and confidence is not presumed in the relationship of husband and wife and therefore must be proved by evidence. The trial judge found that the wife was "in thrall" to her husband and based on all the evidence was satisfied that she reposed trust and confidence in her husband. Accordingly, the first limb was established. The trial judge further found that based on the evidence the transaction called for an explanation. In these circumstances, I find the wife was entitled to rely on the evidential presumption of undue influence and accordingly undue influence would be proved in the absence of the husband providing counter evidence. The husband provided no such evidence. For the reasons already set out I consider there is no basis upon which this court can interfere with the factual findings of the trial judge that the wife reposed trust and confidence in her husband and that the transaction called for an explanation. In making such findings, as a matter of law the trial judge was correct to find that the evidential presumption applied and therefore properly concluded that her consent to the Deed of Consent and Postponement was vitiated by undue influence in circumstances where there was no counter evidence by the husband. Notwithstanding a finding of undue influence, for the reasons which appear below, I consider the Deed of Consent and Postponement can still be enforced by the plaintiff in circumstances where the plaintiff takes reasonable steps.

[32] Further for the reasons set out at para [17] above, if the court considers the wife's consent to the Deed of Consent and Postponement is not vitiated by undue influence then that is the end of the matter. The Deed of Consent and Postponement is valid and enforceable and the court does not need to go on to consider questions 2 and 3, namely whether the plaintiff was put on inquiry and whether the bank took reasonable steps.

Should the court consider the adequacy of legal advice when determining whether there is undue influence?

[33] Additionally, insofar as McCloskey LJ at para 166 states a trial judge cannot look into the adequacy of legal advice in respect of determining whether there was undue influence I respectfully disagree. I consider a judge can and must consider the nature of the legal advice given to determine the question whether the receipt of legal advice emancipated the wife and thereby enabled her to give free and voluntary consent to the transaction. Legal advice can this effect but not necessarily so in all cases. The trial judge must determine whether it had such an effect on the particular facts of each case. In contrast, when determining the question whether a bank (ie the third party) is to be fixed with constructive notice of the undue influence the courts at the highest level have held that if there is a solicitor's certificate filed in compliance with the *Etridge* protocol then the court cannot inquire into the adequacy of the legal advice in determining whether the bank took reasonable steps, unless there is evidence, for example that the bank had actual knowledge the solicitor had not advised the wife or knew the wife had not received appropriate advice. In the absence of such evidence, any concerns about the adequacy of the advice is a matter between the wife and the solicitor. In this case the trial judge did not go on to consider questions 2 and 3 (ie whether the plaintiff was put on inquiry and whether it took reasonable steps) and therefore I consider he must only have considered the adequacy of the legal advice in respect of the question whether the receipt of legal advice emancipated her from the effects of undue influence. I do not consider he erred in considering the adequacy of legal advice in respect of question 1 – namely whether her consent was vitiated by undue influence. Insofar as the trial judge looked at the adequacy of the legal advice in respect of question 3, namely, whether the plaintiff took reasonable steps, I find that he erred in so doing, for the reasons set out by McCloskey LJ.

[34] Whilst I do not find the trial judge erred in finding undue influence was established in respect of the Deed of Consent and Postponement, I consider he erred in finding that because undue influence was established the plaintiff could not enforce its security. In so doing, he failed to answer questions 2 and 3 which need to be addressed before a court can find a third party is unable to enforce its security. Given the finding of undue influence there is no dispute that as between the husband and wife the Deed of Consent and Postponement is unenforceable as it is vitiated by undue influence. The question which arises in this case however is whether the plaintiff, who is a third-party creditor, can enforce the Deed of Consent and Postponement and the personal guarantees notwithstanding the undue influence exerted on the wife by the husband. As I have set out above *O'Brien* establishes that in these surety type transactions a creditor is only unable to enforce a surety transaction which was procured by undue influence, if it is put on inquiry and *it fails to take reasonable steps* to ensure the wife is made aware of the nature and implications of the transaction. In respect of the Deed of Consent and Postponement I consider the trial judge erred in not determining Questions 2 and 3 before he concluded the plaintiff could not rely on

the Deed of Consent and Postponement to give it priority in respect of the wife's interest in the matrimonial home.

Question 2 – Was the lender put on inquiry?

[35] In relation to question 2, Lord Browne-Wilkinson stated at page 196:

> "A creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors:
>
> (a) the transaction is on its face not to the financial advantage of the wife; and
>
> (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction."

[36] Lord Nicholls in *Etridge* at para [44] after quoting this passage held as follows:

> "In my view, this passage, read in context, is to be taken to mean, quite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts."

[37] At paras [48] and [49], Lord Nicholls then set out the types of transactions where a bank is put on inquiry. He noted that a straightforward case was where a wife becomes surety for her husband's debts. On the other side of the line, where on the face of the transaction the lending is advanced to husband and wife jointly, the bank is not put on inquiry.

[38] In respect of debts of a company, he stated that this is a less clear-cut case. He noted that *neither the shareholding interests nor the identity of the directors* was a reliable guide to the identity of the persons who actually had conduct of the company's business.

[39] Accordingly as he noted at para [53]:

> "…the circumstances in which banks are put on inquiry are extremely wide. They embrace every case where a wife is entering into a suretyship transaction in respect of her husband's debts."

[40] Lord Nicholls at para [84] similarly said:

> "A bank is put on inquiry whenever a wife stands as surety for her husband's debts. It is sufficient that the bank knows of the husband-wife relationship. That bare fact is enough."

[41] Similarly, Lord Hobhouse at para [110] stated:

> "110. The position therefore is that in relation to any guarantee by a wife of her husband's debts (or those of his company) the bank is put on inquiry."

[42] In *Waller,* the Supreme Court had to consider the slightly different question whether banks would be put on inquiry when the transaction was of a hybrid nature, ie the transaction is partly for their joint benefit, partly for the sole benefit of the wife and partly for the sole benefit of the husband. The Supreme Court held at para [5] that the correct legal test for deciding when a lender is put on inquiry in a non-commercial hybrid transaction is a bright line test, namely where the relationship is non-commercial and it appears on the face of the transaction that one party to the relationship is offering or has offered to stand surety to any extent more than a de minimis extent for the other. At para [2] the Supreme Court also confirmed that following a series of cases since *O'Brien* the law regards banks and other lenders as put on inquiry whenever on the face of a three-way transaction the wife is offering to stand surety for her husband's debts.

[43] In the present case, the wife became surety for the debts of the husband's company. Although she was a director of the company she had no shareholding in the company. In such circumstances, I am satisfied she was standing as surety for her husband's debts and the plaintiff was put on inquiry in respect of all 10 personal guarantees and the Deed of Consent and Postponement.

Question 3 – Did the lender take reasonable steps to satisfy itself that there was no undue influence?

[44] Lord Browne-Wilkinson identified at page 196, that once a creditor is put on inquiry, in order to avoid being fixed with constructive notice a creditor, "can reasonably be expected to take steps to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice."

[45] Lord Nicholls confirmed in *Etridge*, at para [54] the nature of the duty placed upon lending institutions, once they were put on inquiry, was as follows:

> "The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction."

[46] How this duty is to be discharged is the area of controversy which arises in this appeal. The principal area of controversy concerns whether the plaintiff's duty can ***only*** be discharged by obtaining a solicitor's certificate. I respectfully disagree with Lord Justice McCloskey, insofar as he holds that a solicitor's certificate is the only means by which the plaintiff can demonstrate that it has discharged its duty, to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. I consider that the duty placed on lending institutions can be discharged in several different ways and it is a fact specific exercise whether, on the facts of any given case the bank has discharged its duty.

[47] I accept that this understanding of the existing jurisprudence and in particular *Etridge,* may seem at first sight to be at odds with what the Supreme Court said in *Waller*. In *Waller* at para [55] and [56] Lady Simler said as follows:

> "Discharge of the onus is not difficult. It involves recommending that the wife (or other vulnerable party) should obtain independent advice. That onus can be discharged simply and inexpensively in accordance with the Etridge protocol…This bright line approach should encourage banks to prevent future litigation by taking modest, reasonable step of issuing Etridge Protocol letters…"

[48] I consider the Supreme Court in these paragraphs was not saying that the onus on the bank to take reasonable steps can ***only*** be discharged in this way. Rather, I consider it was setting out one way the bank's duty *can* be discharged. It did not state this was the only way the duty could be discharged. It was simply saying the onus "can" be discharged in this way. It is unarguable that this is one way in which the onus can be discharged.

[49] In this paragraph, the Supreme Court was considering the question, "In what circumstances are lenders put on inquiry?" It was not addressing the question, " how can a bank discharge its duty to take reasonable steps?" and more specifically it was not addressing the question which arises in this case namely whether a bank, when dealing with a series of commercial transactions, ***must*** follow the *Etridge* protocol in respect of each individual transaction to render its securities enforceable.

[50] Insofar as this paragraph is interpreted to mean a bank can *only* discharge its duty by following the *Etridge* protocol, I consider it is obiter dicta.

[51] In determining whether the bank has discharged its duty to take reasonable steps, I consider the court is carrying out a fact specific exercise. I have come to this conclusion for the following reasons.

[52] Firstly, in answer to the question, "what are the reasonable steps which the creditor should take?" Lord Browne-Wilkinson in *O'Brien* at page 196-197 set out how the duty could be discharged, by stating:

> "…in my judgment a creditor will have satisfied these requirements if it insists that the wife attend a private meeting (in the absence of the husband) with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running, and urged to take independent legal advice. If these steps are taken, in my judgment the creditor will have taken such reasonable steps as are necessary to preclude a subsequent claim that it had constructive notice of the wife's rights.
>
> I should make it clear that I have been considering the ordinary case where the creditor knows only that the wife is to stand surety for her husband's debts. I would not exclude exceptional cases where a creditor has knowledge of further facts which render the presence of undue influence not only possible but probable. In such cases, the creditor to be safe will have to insist that the wife is separately advised."

[53] I consider Lord Browne-Wilkinson was setting out one method by which banks could discharge their duty. This is because following *O'Brien,* banks in practice, generally did not seek to discharge their duty by holding a private meeting with the wife because they were apparently unwilling to assume the responsibility of advising the wife due to the risk of litigation. Rather, as noted in *Etridge,* at para [51] in practice, banks sought to discharge their duty by requiring a wife to seek legal advice and the banks then sought written confirmation from the solicitor that he had explained the nature and effect of the documents to the wife.

[54] The question addressed by Lord Nicholls in *Etridge,* at para [55], was whether a personal meeting was the only way by which a bank could discharge its obligation to bring home to the wife the risks she is undertaking. He stated that a personal meeting was not the only way a bank could discharge its duty when he stated:-

> "…it seems to me that, provided a ***suitable alternative*** is available, banks ought not to be compelled to take this course." (emphasis added)

[55] Lord Nicholls therefore confirmed that a bank could discharge its duty of advising the wife, as to the meaning of the documents and the practical implications of the proposed transaction, by an ***alternative means*** to that set out by Lord Browne-Wilkinson namely, by having this task undertaken by an independent legal

advisor. Unlike McCloskey LJ at para [89], I do not consider the House erased Lord Browne-Wilkinson's method of satisfying the reasonable steps test.

[56] At para [79], Lord Nicholls outlined, in detail, the steps the bank should take if it was looking for its protection to the fact that the wife had been advised independently by a solicitor. In particular, if the bank was seeking to rely on the fact that a solicitor had independently explained the nature of the transaction, the risks to the wife, the bank should obtain from the wife's solicitor a written confirmation to this effect. In the absence of such a solicitor's confirmation, then the bank could not rely on the advice of the solicitor to discharge the bank from its duty to take reasonable steps to satisfy itself that the wife had brought home to her in a meaningful way the practical implications of the proposed transaction.

[57] I consider this jurisprudence makes clear that once a bank is put on inquiry the duty on the bank is to take reasonable steps to satisfy itself a wife understands the nature of the transactions she is entering into and the risks inherent in it. This duty can be discharged in different ways and how this duty is discharged is a matter for the bank. Whether it has, in fact, been discharged is a question of fact to be determined by the court, depending on all the circumstances of the case. Whilst the highest courts have given guidance, namely in the cases of *Etridge* and *O'Brien*, the guidance does not amount to rigid or prescriptive rules. As set out in *O'Brien*, the bank can discharge its duty by way of a face-to-face meeting between the bank and the wife. Alternatively, as appears from *Etridge* the bank can rely on a solicitor to carry out this duty. If the bank relies on a solicitor to carry out this duty on its behalf, then to ensure its security is enforceable, the bank must receive a solicitor's certificate to the effect that the advice has complied with the requirements set out in para [79] of Lord Nicholls' judgment, the so called "*Etridge* Protocol".

[58] This however is not the only way in which the bank can discharge its duty as even Lord Hobhouse, who in many ways imposed a stricter regime on lending institutions than the other Law Lords, accepted at para [122] that in cases where the bank does not obtain a solicitor's certificate its security is not enforceable, "in the absence of other evidence"- a point made by counsel for the plaintiff. Accordingly, I consider he also accepted the duty placed on lending institutions can be discharged in different ways and that each case must be determined on its own facts.

[59] Secondly, further support for a fact specific exercise can be gleaned from Lord Scott's speech, whom Lord Bingham at para [3] identified along with Lord Nicholls as identifying the "minimum requirements." Accordingly, insofar as Lord Hobhouse's speech may be interpreted as requiring the *Etridge* protocol to be followed in all cases, his comments do not represent the views of the majority of the house.

[60] Lord Scott stated at paras [147] and [148] as follows:

> "What Lord Browne-Wilkinson had in mind was that the bank should be expected to take reasonable steps to satisfy

> itself that she understood the transaction she was entering into…Lord Browne-Wilkinson thought that, in order to reach this point, the bank should itself give the wife an explanation of the nature and effect of the proposed transaction and should advise her to take independent legal advice. The function of these steps would be to try and ensure that the wife understood what she was doing in entering into the proposed transaction and that her consent to do so was an informed consent. But whether these steps would always be necessary, or would always be sufficient, would depend on the facts of the particular case. Lord Browne-Wilkinson was not legislating; he was suggesting steps that, if taken, would in the normal case entitle a bank to rely on the wife's apparent consent, evidenced by her signature to the document or documents in question." [emphasis added]

[61] Lord Scott's view was that Lord Browne-Wilkinson was not legislating as to what steps the bank must take but was rather setting out ways in which they could satisfy the duty which was and continues to remain a duty to take reasonable steps to satisfy itself that the wife understood the nature and effect of the transaction she was entering into and that her consent was an informed consent (see paras [163]–[165]).

[62] More specifically, at para [165] he opined:

> "165. Lord Browne-Wilkinson made clear, at [1994] 1 AC 180, 197, that it would only be in exceptional cases 'where a creditor has knowledge of further facts which render the presence of undue influence not only possible but probable' that a bank would, to be safe, have to insist that the wife be separately advised. In other cases, it would suffice if the bank took steps 'to bring home to the wife the risk she is running by standing as surety and to advise her to take separate advice.'

He added that, it would depend on the facts of each case whether the bank had satisfied the reasonable steps test.

[63] He further stated:

> "I would emphasise and repeat that the purpose of the steps, in the ordinary surety wife case, would be to satisfy the bank that the wife understood the nature and effect of the transaction she was entering into." [emphasis added]

[64] Similarly, Lord Clyde set out the fact specific nature of the duty when he said at para [95]:

> "Matters of banking practice are principally matters for the banks themselves in light of the rights and liabilities which the law may impose upon them. I would not wish to prescribe what those practices should be. One can only suggest some courses of action which should meet the requirements of the law. These are not matters of ritual, … Necessarily the precise course to be adopted will depend upon the circumstances. In the Scottish case of *Forsyth v Royal Bank of Scotland Plc* [2000] SLT 1295 it appeared to the creditor that the wife had already had the benefit of professional legal advice. In such a case, it may well be that no further steps need be taken by the creditor to safeguard his rights." [emphasis added]

[65] I am satisfied all these passages from the Law Lords' speeches show a uniformity in approach namely, that the duty placed on the bank is to take reasonable steps to satisfy itself that the wife understood the nature and effect of the transaction she was entering into. The courts have given guidance as to how this duty can be discharged and what would amount to taking reasonable steps in certain scenarios, but they have not legislated about this matter. They have not sought to dictate to the banks what banking practice should be. Rather, the test in every case remains whether the bank has taken reasonable steps and the answer to this question will depend on the facts of each case. This contrasts with the bright line rule which relates to the question whether a bank is put on inquiry. A test of "reasonable steps", in contrast, is I consider, by its nature, a fact specific exercise as reasonableness in any given situation will depend on all the circumstances.

[66] Although the obtaining of a solicitor's certificate is the most common and easiest method by which banks take reasonable steps to ensure their securities are enforceable, as I have already outlined, I do not consider that this is the only way a bank can discharge its duty to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. The duty on the bank, as stated in *O'Brien* and confirmed in *Etridge,* is to take reasonable steps. Whether a bank has taken reasonable steps to ensure that the wife has had brought home to her the nature of the transaction and the risks involved is, I consider, a fact specific question which is to be determined by having regard to all the circumstances of the case. Whether the duty is discharged or not depends upon a fact sensitive examination of all the circumstances and facts of the peculiar case.

[67] In deciding whether the steps taken by the bank are reasonable, it is necessary to consider the objective of the steps, namely, to ensure the wife knows and understands the nature of the transaction and its implication. In determining whether the steps taken by the bank are reasonable in terms of discharging this duty I consider

it is helpful to take into account what Lord Nicholls said at para [64] when he outlined the scope of the responsibilities of a solicitor who was undertaking this duty.

[68] He outlined that a solicitor would need to explain the nature of the documents and the practical consequences they would have for the wife if she signed them, namely that she could lose her home if her husband's business did not prosper. That her home may be her only substantial asset and may also be the family home and that she could be made bankrupt. Further, the solicitor would need to point out the seriousness of the risks involved and that the wife should be told the purpose of the proposed new facility, the amount and principal terms of the new facility, that the bank might increase the amount of this facility, or change its terms, or grant a new facility, without reference to her. She should also be told the amount of her liability under a guarantee. The solicitor should also discuss the wife's financial means and discuss whether there are other assets out of which repayment could be made if the husband's business should fail. The solicitor would also need to explain clearly to the wife that she had a choice and that the choice was hers and hers alone and the solicitor should check whether the wife wished to proceed. Lord Nicholls described these requirements as the "core minimum" but as he noted at para [68], the advice which a solicitor can be expected to give must depend on the particular facts of the case.

[69] Accordingly, I consider a bank would discharge its duty in respect of a personal guarantee if there is evidence the wife knew and understood the nature of a guarantee; knew the details of the facility and the terms of the guarantee; understood the risks involved including the fact her home was at risk if her husband's business did not prosper; knew she might be made bankrupt; knew she had a choice and the choice was hers and hers alone and the bank checked that she wished to proceed.

[70] In respect of the Deed of Consent and Postponement I consider the bank would discharge its duty if there was evidence the wife knew and understood the nature of a Deed of Consent and Postponement, namely that her interest in the matrimonial home would be postponed to the interests of the creditor in the event it called in its security, and that she might lose her home.

[71] Turning then to the facts of this case.

Factual matrix

[72] Ten personal guarantees and one Deed of Consent and Postponement, were executed by the wife as follows:

(i) Personal guarantees 1, 2, 3 and 4 are dated 24 November 2017. In respect of each of these transactions the wife obtained independent legal advice and a solicitor's certificate to this effect was obtained by the plaintiff.

(ii) The deed of consent and postponement was signed on 6 December 2017 and the plaintiff received confirmation from the solicitor that the wife had obtained independent legal advice.

(iii) Personal guarantee 5 is dated 20 February 2018. The plaintiff wrote to the wife enclosing a copy of the guarantee and asked her to complete and sign only if she was prepared to be bound by the terms of the guarantee. The letter further stated, "we would advise you to take your own independent legal advice before signing the guarantee" (the warning letter). The wife confirmed that she had taken independent legal advice before signing the guarantee but no solicitor's certificate to this effect was received by the plaintiff to confirm that the wife had received independent legal advice.

(iv) Personal guarantee 6 is dated 22 March 2018, the plaintiff sent a warning letter to the wife. The wife confirmed that she had taken independent legal advice, but no solicitor's certificate was obtained by the plaintiff.

(v) Personal guarantee 7 is dated 29 April 2018. The plaintiff did not send the wife a warning letter.

(vi) Personal guarantee 8 is dated 29 April 2018. The plaintiff did not send a warning letter to the wife.

(vii) Personal guarantee 9 is dated 23 July 2018. The plaintiff sent a warning letter to the wife, and she confirmed that she had not taken independent legal advice.

(viii) Personal guarantee 10 is dated 1 November 2018. The plaintiff did not send a warning letter to the wife.

Consideration

Were the transactions affected by Undue Influence?

[73] The trial judge found that the husband exercised undue influence over the wife in respect of the Deed of Consent and Postponement. The trial judge made no finding about undue influence in respect of the ten personal guarantees. In light of the trial judge's finding that the relationship between the wife and husband was one of trust and confidence and his finding that the Deed of Consent and Postponement called for an explanation, in circumstances where it was entered into at a time when the wife was securing debts of the husband's company, I consider the evidential presumption of undue influence also arises in respect of the ten personal guarantees because they were similar transactions in that the wife was securing her husband's company debts and the personal guarantees were all executed sequentially over a period of one year to secure the husband's company debts. In the absence of any counter evidence by the husband I find undue influence was exercised by him in respect of all ten personal guarantees. Accordingly, I have determined that all the transactions were vitiated by

undue influence. I have further found that the plaintiff was placed on inquiry in respect of all the transactions for the reasons set out above.

Did the plaintiff take reasonable steps?

[74] Turning then to the question whether the plaintiff took reasonable steps to ensure its security, namely the 10 personal guarantees and Deed of Consent and Postponement were enforceable, I consider as follows.

Personal Guarantees 1-4 and the Deed of Consent and Postponement

[75] I am satisfied the plaintiff discharged its duty to take reasonable steps as it complied with the requirements of the *Etridge* protocol set out by Lord Nicholls at para [79]. The plaintiff advised the wife to seek independent legal advice and received confirmation from the solicitor that such advice had been given to the wife.

[76] When determining Question 1: "Was the transaction vitiated by undue influence?", the court is entitled to assess whether independent legal advice received by a wife had an emancipating effect. When it comes to question 3, authority at the highest level establishes that a bank is considered to have taken reasonable steps where a solicitor gives advice which complies with the *Etridge* protocol. Insofar as the trial judge considered the adequacy of the legal advice to ascertain whether the wife entered into the transactions of her own free will, I consider he was entitled to do so. Insofar as the trial judge inquired into the adequacy of the wife's legal advice in respect of question 3, I consider he erred, as it is not the duty of the bank to inquire into the adequacy of the legal advice and as Lord Nicholls noted in para [88], "…deficiencies in the advice given are a matter between the wife and her solicitor".

[77] In respect of the first four personal guarantees and the Deed of Consent and Postponement, I am therefore satisfied that the plaintiff through receipt of the solicitor's certificate has discharged its duty to bring home to the wife the risks involved in the proposed transaction. It has taken all the steps set out by Lord Nicholls at para [79] which are considered sufficient to discharge this duty. Accordingly, I consider the first four personal guarantees, and the Deed of Consent and Postponement are enforceable.

Personal guarantees 5 and 6

[78] Personal guarantee 5 was signed on 23 February 2018. Personal guarantee 6 was signed by the wife on 28 March 2018. In both cases, the plaintiff sent the wife a warning letter with the guarantee attached. She proceeded to sign the guarantees and advised Excel that she had taken legal advice. In neither case did Excel obtain a solicitor's certificate to this effect.

[79] In this case, the wife had already obtained independent legal advice on 24 November 2017 regarding four personal guarantees which were used to provide

security for her husband's business debts. At that time, the plaintiff received a solicitor's certificate and therefore could rely on it as evidence she had been fully advised about the nature of personal guarantees and the risks involved in signing a personal guarantee. Again, in December 2017, she signed a Deed of Consent and Postponement after having the benefit of independent legal advice and, again, the plaintiff could rely on the solicitor's certificate that the nature of that transaction and the risks inherent within it, particularly, the fact that the home could be sold in the event of enforcement procedures had been explained to her.

[80] Personal guarantees 5 and 6 were signed some two to three months after she had received this independent legal advice. The guarantees were given in respect of further loans and finance agreements relating to the husband's business. Documentation about the new loans and guarantees were provided to her by the plaintiff together with a warning that she should seek independent legal advice before signing the guarantees. She signed the declaration that she had received independent legal advice. The plaintiff did not receive a solicitor's certificate to this effect.

[81] In these circumstances, has the plaintiff discharged its duty to take reasonable steps to ensure that she knew and understood the nature of the transaction and the risks involved? Personal guarantees 5 and 6 were given in the context of a course of ongoing loans being provided to the company. The wife had already received independent legal advice some months earlier and I consider the plaintiff could rely on the solicitor's certificate that the wife had been fully advised at that time and knew and understood the nature of personal guarantees and the risks inherent in signing personal guarantees, particularly the risk to her home and the risk of bankruptcy. Personal guarantees 5 and 6 were of a similar nature to the earlier personal guarantees and the wife was provided with details of the loans and guarantees by the plaintiff and therefore she knew their terms. In addition, due to the warning letter she knew it was her choice whether to sign or not; she was advised she could seek independent advice, and she in signing the declaration advised the plaintiff that she had taken legal advice in respect of personal guarantees 5 and 6.

[82] In all the circumstances, I consider the plaintiff has taken reasonable steps to discharge its duty. I consider that the wife was aware of the nature of the transactions and the risks inherent in signing personal guarantees 5 and 6. Whilst guarantees 5 and 6 increased the amount of the debt she was securing, the nature of the personal guarantees was the same as the first four guarantees and the risks inherent in signing guarantees, namely the risk of sale of the home and the risk of bankruptcy, were all explained to her when she signed the first four personal guarantees, some months earlier. In these circumstances, I do not consider the plaintiff was required to do more, and that by advising her of the terms of the loans and guarantees and by advising her to seek independent advice they had taken reasonable steps.

[83] In *Etridge*, the House noted the importance of having an appropriate balance between the competing interests at play in surety transactions. The balance struck in *Etridge* was to require the bank/creditor to take reasonable steps. I consider that it

would place an unreasonable burden on lending institutions to require then to obtain a solicitor's certificate in every case irrespective of the circumstances. Further, it may frustrate lending if security is not enforced in circumstances where a wife having received independent legal advice in respect of an earlier guarantee, enters into a further personal guarantee or guarantees a short time later indicating that she either has received legal advice or does wish to obtain further legal advice.

[84] The objective of the test set out in *Etridge* and *O'Brien* is to ensure that a wife has brought home to her by the bank in simple terms the nature of the transaction and the risks involved. I am satisfied that in respect of personal guarantees 5 and 6 this objective was achieved by the steps that the plaintiff took and, therefore, I find, personal guarantees 5 and 6 are enforceable on the facts of this case.

Personal guarantee 9

[85] The factual matrix in respect of personal guarantee 9 is different. It was signed on 25 July 2018. The wife was sent a warning letter by the plaintiff, and she signed the guarantee. This time she declared that she had not taken legal advice.

[86] In all the circumstances, I find that the plaintiff for the reasons outlined above, in respect of personal guarantees 5 and 6 had taken reasonable steps in this case to enable its security to be enforceable. The wife had already entered into a series of personal guarantees. She had received independent legal advice on two occasions. She had indicated she had taken legal advice in respect of personal guarantees 5 and 6. The plaintiff had provided her with details of the loan and guarantee terms and advised her to seek independent legal advice which she declined. I consider in all the circumstances the steps taken by the plaintiff to provide her with details of the loan and guarantee terms and to warn her to seek legal advice were reasonable and I, therefore, consider for these reasons that personal guarantee 9 was enforceable.

Personal guarantees 7, 8 and 10

[87] Personal guarantees 7, 8 and 10, have yet again a different factual matrix. These were entered into on 29 April 2018, 1 May 2018 and 1 November 2018 respectively. In respect of each of these personal guarantees, from the evidence before us, the plaintiff did not send a warning letter to the wife asking her to seek independent legal advice.

[88] I consider on the facts that these guarantees are not enforceable. In the earlier personal guarantees, the plaintiff had taken the step of proving it had sent her details of the terms of the facility and the guarantee and had asked the wife to seek independent legal advice thereby ensuring she knew she had a choice whether to sign. In personal guarantees 5, 6 and 9 she either declared she had received legal advice or that she did not want independent legal advice. In those circumstances, I consider the plaintiff had taken reasonable steps to discharge its duty. In respect of guarantees 7, 8 and 10, however, even though the wife had knowledge of the nature of a personal guarantee and the risks inherent in signing it, and even though these guarantees were

also sequential, I still consider the plaintiff needed to take steps to ensure she knew the terms of the facility and the guarantee and that she had a choice whether to sign or not. On the evidence, the plaintiff took no such steps. The plaintiff did nothing and for that reason, I consider these personal guarantees are not enforceable.

Conclusion

[89] For the reasons set out, I consider personal guarantees 1-4, 5, 6, 9 and the Deed of Consent and Postponement are enforceable. I consider personal guarantees 7, 8 and 10 are not enforceable.