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*Judgment: approved by the Court for handing down* | *Delivered:* **03/11/2015**
*(subject to editorial corrections)**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

**ON APPEAL FROM THE HIGH COURT OF JUSTICE (CHANCERY DIVISION)**

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**BETWEEN:**

**GERALDINE PATRICIA O'NEILL**

**Applicant/Respondent**

**-and-**

**ULSTER BANK LIMITED**

**Respondent/Appellant**

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**Before Morgan LCJ, Weatherup LJ and Weir LJ**

**Weir LJ** (**delivering the judgment of the Court**)

**The background to the Appeal**

[1] The respondent applicant, Ms O'Neill, entered into a business partnership with her husband Gerard O'Neill, who is a builder, and their two sons. This business partnership is known as Glenone Properties ("Glenone"). The appellant, Ulster Bank Ltd, ("the Bank") advanced Glenone a series of loans most of which were for the purpose of buying and developing land. The total amount still owing under these loans, including interest, is in excess of £1.3 million.

[2] The Bank issued a statutory demand, dated 13 January 2014, against Ms O'Neill, as a partner in Glenone, for the total amount owing on the debt on the ground that the sums were advanced for the joint benefit of all the partners of the business and not for the sole benefit of Ms O'Neill's husband. Ms O'Neill lodged an application dated 31 January 2014 to set aside the Statutory Demand on the grounds of undue influence exerted upon her by her husband, the failure of the Bank to take reasonable steps to alert her to the risks she was being exposed to and its failure to ensure she obtained independent legal advice. On 4 September 2014 the Bankruptcy

Master dismissed the application. Ms O'Neill's appeal from that decision was heard by Deeny J sitting in the Chancery Division of the High Court on 4 December 2014. In an *ex tempore* judgment, the learned judge allowed the appeal and granted the application to set aside the Statutory Demand. By Notice of Appeal lodged on 2 February 2015 the appellant Bank appeals that decision of the learned judge to this Court.

[3] In her affidavit sworn on 31 January 2014, Ms O'Neill avers that her husband became a self-employed builder on 1 May 1989; his work was mainly carrying out renovations for clients and occasionally one-off new builds. She believes that in order to carry out the work her husband formed a company and while she also believes she may have been named as a director of that company she avers that any services she provided were nominal and concerned administrative functions relating to VAT, invoicing and quotations. This work was subsequently taken over by her daughter and a nephew. She says that she acted throughout on the direction of her husband, that her husband made all the decisions relating to the business and did not consult her or ask for her consent; her primary role was at all material times that of a full-time mother, she believing in relation to his conduct of the business and management of the family home that her husband was acting in both of their best interests.

[4] On 6 April 2005 Ms O'Neill, along with her sons Patrick and Garrett, was introduced as a partner with her husband in the business known as Glenone. Ms O'Neill avers that at no point did she receive independent advice, either financial or legal, regarding the creation of a partnership or her introduction into it. She does not recall reading or signing the partnership agreement although she accepted before Deeny J that it bears her signature. She says that she did not understand what it entailed nor any risk or liability that it would expose her to. She avers that at the time she did not want to be a business partner but that she was told by her husband that she was preventing progress and that the decision to form a partnership was for the benefit of the family. Ms O'Neill further asserts that following the creation of Glenone she had no formal dealings with the business and was never in receipt of a wage from it, her only source of income being £200 per week housekeeping provided by her husband.

[5] Ms O'Neill asserts that it was her husband who negotiated and concluded any loans for the business. She avers that she was rarely informed of what it was she was signing; typically her husband would bring documents home that required her signature, point out where she needed to sign and she would sign without knowing the contents. She did not recall attending at the Bank's premises save for one occasion on an unknown date when she did attend a meeting at the Bank with her husband and on which occasion a copy of her driving licence was taken. However, at no point was the nature of the documentation she was signing explained to her, she was not advised independently of her husband either by a representative of the Bank nor by a solicitor, nor was she informed of any personal liability that she was

being exposed to and she was in the presence of her husband throughout the meeting.

[6] In relation to the debts of Glenone, Ms O'Neill avers:

> "Having obtained copies of accounts prepared for Glenone Properties, I now know that the business' liabilities increased dramatically in 2006/2007. The accounts for the year ended 30 April 2006 show that bank loans and overdrafts totalled £107,310. This level of indebtedness accords with my understanding of my husband's business as being concerned with small renovations that involved a low level of risk. The accounts for the year ended 30 April 2007 show that bank loans and overdrafts totalled £1,259,700. I was not consulted on the decision to extend the scope of the business' borrowings. I did not receive any advice indicating how this borrowing was to be repaid. Had the risks been explained to me I would not have consented."

Furthermore, Ms O'Neill avers that she does not recall consenting to a second charge on the family home; she does not recall signing any documentation relating to it nor meeting with representatives of the Bank to discuss the creation of a second charge nor did she recall obtaining any independent advice, legal or otherwise, regarding its creation. She says that she did not know that the family home had been used to secure business debts until "sometime after the recession really started to bite which would have been in 2008 or 2009."

[7] Ms Caryn Murphy, an employee of the Bank with day to day management of Glenone's accounts, has sworn an affidavit on behalf of the Bank. Glenone opened partnership accounts with the appellant on 13 September 2004, copies of which she exhibits. From time to time thereafter Glenone applied to the Bank for further loan facilities on the account. A facility letter dated 15 February 2011 had subsequently been signed by all partners of Glenone which set out the various facilities at that date as:

> (i) "OVERDRAFT FACILITY A … Overdraft on the Borrower's current account at the Ballymena branch of the Bank up to the sum of £15,000."
>
> (ii) "DEMAND LOAN B … Demand Loan of £425,300 … The facility will be made available to the Borrower for the sole purpose of landbank and development costs on the site at Halfgayne Road, Maghera."

(iii) "DEMAND LOAN C … Demand Loan of £260,000 … The facility will be made available to the Borrower for the sole purpose of purchasing site at Innisrush, Portglenone."

(iv) "DEMAND LOAN D … Demand Loan of £838,280 … The facility will be made available to the Borrower for the sole purpose of purchasing site at Mullaghadun Lane, Dungannon."

(v) "DEMAND LOAN E … Demand Loan of £30,000 … The facility will be made available to the Borrower for the sole purpose of interest provision."

The facility letter goes on to set out the terms of security for the above loans:

"The facility together with interest and all other liabilities connected with the facility shall be secured by way of:

(a) the existing security, held by the Bank for the Borrower's liabilities (the "Existing Security") which includes, without limitation:

- Freehold 2nd Legal Charge over the Borrower's [home address], Portglenone pledged by Gerard O'Neill;
- Freehold 1st Legal Charge over 1 acre of land at Eden Road, Portglenone;
- Freehold 1st Legal Charge over 2 houses at Halfgayne Road, Magera;
- Freehold 1st Legal Charge over 1.5 acres site at Innisrush, Portglenone;
- Freehold 1st Legal Charge over development land at Mullaghdun Lane, Dungannon;
- Freehold 1st Legal Charge over house and 25 acre farm at 11 Ballymacpeake Road, Clady pledged by Gerard O'Neill;
- Assignment by way of security of the benefit of [Life Policy] for Gerard Patrick O'Neill pledged by Gerard O'Neill.

and such other Security which the Bank shall have taken at any time past or present
(b) such further security as the Bank may at any time hereafter hold in respect of the Borrower's liabilities to the Bank of any kind."

Ms Murphy further points out that the properties at Halfgayne Road, Innisrush, Mullaghadun Lane and the land at Eden Road were all purchased in the joint names of the four partners in Glenone.

**Deeny J's Decision**

[8] In his judgment the learned judge summarised and made observations upon the factual background and in that context considered the applicability of the provisions of Rule 6.005(4)(b) of the Insolvency Rules (NI) 1991 namely that the Court may grant an application to set aside a statutory demand "if the debt is disputed on grounds which appear to the Court to be substantial" and reviewed the authorities in relation to that provision. He observed that the one occasion Ms O'Neill apparently did attend at the bank with her husband was circa 2004-2005 during the early stages of the partnership accounts and not at a later date when very substantial loans were being made. Indeed, the initial overdraft of £15,000 was, in the learned judge's view, commensurate with the modest working capital of a small builder doing the type of work Ms O'Neill said her husband carried out, namely, renovations and the occasional one-off build rather than the purposes for which the later substantial loans had been obtained including "land bank" and development. The judge considered that an issue in the case was whether this change of character in the activities being undertaken by the business was such as ought to have placed the Bank upon enquiry, the leading case on the subject being Royal Bank of Scotland Plc v Etridge (No.2) [2002] 2 AC 773. Whilst recognising the legal distinction between a partnership and a company, the judge opined that a court might find that a loan to a partnership which included a wife is analogous to a loan to a company in the Etridge decision. The judge further noted that it had been suggested by Ms O'Neill that it may have been the Bank itself which had insisted on the partnership and that, if this had indeed been the case, it could be considered that the Bank was attempting to circumvent the decision in Etridge by inviting borrowing husbands to form partnerships, rather than to borrow money in their own name and merely ask their wives to act as surety for the loan. The judge considered that the substantial loans were "anything other than a normal advance" and were converting a small builder into a putative developer. In those circumstances, the change of character of the lending together with the marked change in the scale of it may have put the Bank on notice that Ms O'Neill was at risk of acting to her manifest disadvantage by virtue of the influence of her husband when in reality the loans were to her husband for his own ambition to become a property developer. He accordingly concluded that those circumstances created a genuine and substantial defence and granted the application to set aside the statutory demand.

**Grounds of Appeal**

[9] By its Notice of Appeal dated 29 January 2015 and lodged on 2 February 2015 the Bank appeals on the following grounds:

(i) That the learned judge erred in law in concluding that an allegation of undue influence amounted to a potentially viable defence to a claim for repayment of a loan advanced to Ms O'Neill to purchase property.

(ii) That the learned judge erred in law in concluding that it was arguable that the appellant Bank was placed on inquiry as to the possibility of undue influence between Ms O'Neill and her husband in circumstances where the appellant Bank advanced monies to Ms O'Neill and her husband and others to purchase property.

(iii) That the learned judge erred in law in concluding that loans advanced to Ms O'Neill and her husband and sons to purchase property in their four names were loans for Ms O'Neill's husband's real benefit.

(iv) That the learned judge erred in law in concluding that loans advanced to Ms O'Neill and her husband and sons to purchase property in their four names were to the manifest disadvantage of Ms O'Neill.

(v) That there was no evidence that the appellant Bank attempted to circumvent the decision of the House of Lords in Royal Bank of Scotland plc v Etridge (No.2) [2002] 2 AC 773 by causing the loan to be advanced to Ms O'Neill and her husband and sons rather than to Ms O'Neill's husband alone.

**The submissions on Appeal**

[10] While acknowledging that the evidence of Ms O'Neill as contained in her affidavit raises an arguable case of undue influence exerted upon Ms O'Neill by her husband, the Bank submits that from its standpoint these transactions were joint loans to the four partners of Glenone for their joint purpose of purchasing property which was thereupon purchased and registered in their four names. The Bank is not alleged to have had actual notice of such undue influence and there was nothing to indicate to it that these loans were other than for the joint benefit of the partners. Therefore it had no constructive notice and so was not placed on any inquiry as to possible undue influence. The House of Lords' decision in Royal Bank of Scotland Ltd v Etridge (No2) , following from its decision in CIBC Mortgages PLC v Pitt, [1994] AC 200 seeks to give effect to the need for transactional security by creating a 'bright line' rule as to when a financial institution is placed on inquiry; that 'bright line' rule excludes from inquiry the scenario where a loan advance is made jointly for joint purposes, or a joint loan made for what are in fact sole purposes where the lender is not aware that the loan is for the husband's sole purposes. The appellant contends that the judge's decision is an infringement of the reassuring clarity found in Pitt and Etridge; is an infringement of the rule of law that all partners are jointly and severally liable for partnership debts; and had the potential to introduce 'a loophole of havoc', a phrase used by Gillen J in AIB Group (UK) plc v Aiken [2012] NIQB 51 at paragraph [16] in a case where a lender advanced funds to a partnership

involving a husband and wife. In those circumstances the Bank submits Ms O'Neill does not have a viable defence to the action.

[11] The appellant further argues that in any event where a transaction is obtained by undue influence it must be set aside *ab initio* which requires mutual accounting with mutual restitution by both parties; the eventual remedy, therefore, would be to set aside the contract of loan and require the borrower to account for the monies received with interest at a rate fixed by the court (National Commercial Bank of Jamaica v Hew [2003] UKPC 51). Thus, Ms O'Neill's case, at best, would merely result in an adjustment of the interest rate; she will still be under an obligation to repay the principal sum advanced. If this subsidiary argument was advanced before the judge, it is not considered by him in his judgment nor does it appear to feature in the grounds of appeal against his decision nor was it dealt with in the skeleton argument of the respondent to this appeal. In any event it would not fall to be considered unless the Bank were to fail in its primary submission.

[12] On behalf of the respondent, Ms O'Neill, it is emphasised that she has provided evidence that she derived no benefit whatsoever from the business; she had no knowledge of the nature of the transactions that were being entered into; she stood to gain no benefit from any profits derived from the business and she did not believe and was not made aware by or on behalf of the Bank that she would be exposed to any personal liability. Therefore the matter is not as straightforward as a conventional joint loan on its face obtained for a joint purpose and the mere fact that any application was in joint names is insufficient to discharge the Bank from its responsibility. She argues that there is clear evidence of the trust and confidence Ms O'Neill placed in her husband and, conversely, there is no evidence that the Bank discharged its duty to explain to her that she was entering into a personal liability. Furthermore, the marked alteration in the purposes and greatly enhanced scale of the borrowing were such as to place a requirement on the Bank to take reasonable steps to determine the nature and extent of her understanding of the implications of, and confirm her informed willingness to enter into, the later transactions. It is submitted on behalf of Ms O'Neill that these circumstances bring her within the exception postulated by the House of Lords in Etridge as considered in this jurisdiction by Master McCorry in IBRC v Dolan [2014] NI Master 12. Moreover, a full trial of the matter is required in order to ascertain all the relevant facts.

**The Law**

[13]

***(i) Statutory Demands***

In Moore v Commissioners of Inland Revenue [2002] NI 26, at 29d Girvan J summarised the statutory demand procedure as follows:

> "Under article 241(2)(a) of the Insolvency (Northern Ireland) Order 1989 ("the 1989 Order") a creditor's bankruptcy petition may be presented to the High Court in respect of a debt only if the debt is a debt which "the debtor appears to be unable to pay or to have no reasonable prospect of being able to pay". Under article 242(1) the debtor appears to be unable to pay a debt if but only if the debt is payable immediately and either the petitioning creditor to whom the debt is owed has served on the debtor a statutory demand in the prescribed form requiring him to pay the debt or compound for it to the satisfaction of the creditor and at least three weeks have elapsed since demand was served and the demand has not been complied with or set aside in accordance with rules of court or alternatively the creditor has obtained a certificate of unenforceability in respect of a judgment debt.
>
> Rules 6.001 to 6.006 of the Insolvency Rules (Northern Ireland) 1991 are the relevant rules relating to statutory demands and applications to set aside.
>
> [Rule 6.004 provides, *inter alia* that the debtor may apply to the Court to set aside the statutory demand.]
>
> Under rule 6.005(1) on receipt of an application under Rule 6.004, the court may, if satisfied that no sufficient cause is shown for it, dismiss it without giving notice to the creditor. Under 6.005(4) the court may grant the application if: …. (b) the debt is disputed on grounds which appear to the court to be substantial or…. (d) the court is satisfied on other grounds that the demand ought to be set aside."

In Moore at 31(c) Girvan J also considered the impact upon the Statutory Demand procedure of Article 6 ECHR:

> "To deprive an alleged debtor of an opportunity to litigate his dispute a fair statutory demand procedure requires that the creditor spells out clearly and accurately what his debt is, establishes that the debt is due and gives the debtor a full opportunity to show cause why in the interests of fairness and practice he should have the opportunity to defend the claim by litigation.

> In summary judgment applications the plaintiff must show that the defendant has no arguable case. In an application to set aside regularly obtained judgments the test appears to be whether the defendant in the interests of justice should be permitted to defend the action. In either set of proceedings it is clear that if a defendant has in reality no defence to the plaintiff's claim allowing the defendant to defend would be unjust to the plaintiff. Refusing leave to defend would not be unjust to the defendant since it would merely delay the enforcement of the plaintiff's indisputable right and send to trial an indefensible case.
>
> Although at first sight the wording of rule 6.005 and some decided cases may suggest that a debtor served with a statutory demand bears a heavier burden than is borne by a defendant in summary judgment applications or applications to set aside judgment and that an onus of proof is thrown on him, in reality the test applicable should be no different. This is particularly so in the light of article 6 and in the light of the severe consequences flowing from a decision not to set aside a statutory demand…"

***(ii) Undue Influence and a lender's obligation to inquire***

In Pitt the matrimonial home was owned jointly by the husband and wife with a small mortgage. They sought to take out a loan secured against the house for the purpose of buying shares on the stock market. The wife was reluctant to do so but, following pressure from her husband, eventually agreed. The husband and wife signed a new mortgage for a 20 year period stating that the purpose of the loan (£150,000) was to pay off the existing mortgage and buy a holiday home. No holiday home was in fact purchased but rather the funds from the loan were instead placed in a joint bank account and used by the husband to speculate on the stock market. Following a stock market crash, the husband and wife were unable to make the new mortgage repayments and the Bank sought possession of the matrimonial home to realise the security. The wife contested the application on the grounds, *inter alia*, that she had signed under duress and undue influence by her husband. Lord Browne-Wilkinson, with whom the other Law Lords concurred, gave the leading speech. Having found that undue influence was a form of fraud and, therefore, the wife was able to set aside the transaction as against her husband, his Lordship went on to consider what effect this had on the plaintiff Bank:

> "Even though, in my view, Mrs. Pitt is entitled to set aside the transaction as against Mr. Pitt, she has to establish that in some way the [lender] plaintiff is affected by the

> wrongdoing of Mr. Pitt so as to be entitled to set aside the legal charge as against the plaintiff.
>
> … Applying the decision of this House in *O'Brien*, Mrs. Pitt has established actual undue influence by Mr. Pitt. The plaintiff will not however be affected by such undue influence unless Mr. Pitt was, in a real sense, acting as agent of the plaintiff in procuring Mrs. Pitt's agreement or the plaintiff had actual *or constructive* notice of the undue influence. The judge has correctly held that Mr. Pitt was not acting as agent for the plaintiff. The plaintiff had *no actual notice* of the undue influence. *What, then, was known to the plaintiff that could put it on inquiry so as to fix it with constructive notice?*
>
> So far as the plaintiff was aware, the transaction consisted of a joint loan to husband and wife to finance the discharge of an existing mortgage on 26 Alexander Avenue, and as to the balance to be applied in buying a holiday home. The loan was advanced to both husband and wife jointly. *There was nothing to indicate to the plaintiff that this was anything other than a normal advance to husband and wife for their joint benefit.* (emphasis supplied)
>
> What distinguishes the case of the joint advance from the surety case is that, in the latter, there is not only the possibility of undue influence having been exercised but also the increased risk of it having in fact been exercised because, at least on its face, the guarantee by a wife of her husband's debts is not for her financial benefit. It is the combination of these two factors that puts the creditor on inquiry."

Etridge is the lead title of eight conjoined appeals before the House of Lords in relation to claims in which wives were alleging that their husbands had exerted undue influence upon them to enter into arrangements whereby their interests in their respective matrimonial homes were charged to secure the husbands' debts. The conjoined appeals gave the House of Lords an opportunity to provide guidance for such surety cases. A helpful summary is provided by the headnote which reads in part:

> "Where a wife sought to impugn a transaction into which she had entered on the ground of her husband's undue influence their relationship did not fall within a special category of case where an irrebuttable presumption of trust and confidence arose. If she was able on the facts of

> the particular case to establish that she had placed trust and confidence in her husband in the management of her financial affairs and that the impugned transaction was not explicable in the ordinary way she could rely on a presumption which, as an evidential forensic tool, shifted the burden of proof to her opponent and could be rebutted on appropriate evidence by that party. Since the fortunes of husband and wife were ordinarily bound up together, a guarantee given by the wife with a charge on her interest in the matrimonial home to secure her husband's debts was not plainly to her disadvantage so as to be explicable only on the basis that the transaction had been procured by his undue influence.
>
> Whenever a wife offered to stand *surety* for the indebtedness of her husband or his business, *or a company in which they both had some shareholding*, the lender was put on inquiry and was obliged to take reasonable steps to satisfy itself that she had understood and freely entered into the transaction…" (emphasis supplied)

In Irish Bank Resolution Corporation v Dolan [2014] NI Master 12 the debtor was a co-director in her husband's building company and had signed as a personal guarantor for the company's loans. When the Bank sought to call in the guarantee the wife claimed she had been placed under undue influence by her husband to become a personal guarantor. Master McCorry analysed the Etridge decision in considerable detail, observing, *inter alia*,

> "[23] The context of the present case, where it is not alleged that the plaintiff bank exercised undue influence itself, but rather was arguably on notice, actual or constructive that a relationship existed between others, which was capable of giving rise to a possibility of undue influence being exercised by one against another, is not at all unusual. Indeed, in one view, it arises out of the most common situation where undue influence is raised, namely between a husband and wife, and typically in a guarantor type of situation. That is the main thrust of the House of Lords' judgments in the Etridge cases, where it considered the approach adopted, and the principles established in the case of Barclays Bank Plc v O'Brien [1994] 1 A.C. 180 (HL). Essentially what O'Brien established is that whilst the law imposes no obligation on one party to a transaction to check whether the other party's concurrence was obtained by undue influence, in certain circumstances, a party to a contract may lose the

benefit of his contract, entered into in good faith, if he ought to have known that the other's concurrence had been procured by the misconduct of a third party. This gives rise to competing interests between the bank and those raising undue influence; and what O'Brien decided was where the balance of those competing interests lay. On the one side, there is the need to protect a wife against a husband's undue influence. On the other side, there is the need for the bank to be able to have reasonable confidence in the strength of its security. Otherwise it would not provide the required money. The problem was to find the course best designed to protect wives without unreasonably hampering the giving and taking of security. The solution was to set out the steps a bank should take to ensure it is not affected by any claim the wife may have that her signature of the documents was procured by the undue influence or other wrong of her husband. This solution involved *putting the bank on inquiry* (my emphasis). …

[24] However, the application of the principles could arguably differ in this case where the wife is not just the spouse of the husband who allegedly has exercised undue influence over her in regard to persuading her to stand as a personal guarantor for his debts. She is also a commercial partner of his, in the sense of being a co-director in a company and it is the company's debts that she is guaranteeing rather than her husband's personal debts. The case then takes on more of the flavour of a commercial transaction. Is that situation covered by the Etridge principles? At paragraph [49] of his judgment in Etridge Lord Nicholls commented that the shareholding interests and the identity of the directors are not a reliable guide to the identity of the persons who actually have conduct of a company's business, which would appear to be consistent with the facts alleged by the defendant in the present case. This suggests that Etridge is wide enough, arguably, to cover the present situation.

[25] However, even if that is not the case, and the defendant had a more active role in the running of the company, that may not rule this defendant out entirely…

[26] I do not read [paragraphs [87, 88 and 89] of Lord Nicholls speech in Etridge] to mean that Lord Nicholls entirely rules out the application of the principles of

> undue influence, and the resultant placing of a bank on enquiry, in every commercial situation, but rather that the threshold at which an institution such as a bank would be required to make inquiry is higher, perhaps depending upon the circumstances of a particular case, much higher, than for example in a purely domestic situation, with arguably a case of a wife playing a subsidiary role in a company falling somewhere in between the purely domestic relationship as in the O'Brien cases, and the relationship between business partners active in a commercial venture. I must remind myself at this point that it is not the role of this court to try this issue but simply to ask whether, taking the facts in her favour, the defendant raises an arguable defence, that is, a defence with some prospect of success…."

**Consideration**

[14] The facts of the Pitt case are the closest in character to those of the present. There, unlike the purely surety-type cases dealt with in Etridge, there was a joint loan to husband and wife whose purpose was declared to be to release equity from the matrimonial home to finance the purchase of a holiday home. As Lord Browne-Wilkinson observed at page 211D:

> "There was nothing to indicate to the [lender] that this was anything other than a normal advance to husband and wife for their joint benefit."

The intended purchase of a holiday home is perhaps a quintessential example of a purchase for the joint purposes of husband and wife. It was, in the words of Lord Bingham in Etridge at page 739G: "a run-of-the-mill case with no abnormal features."

In the present case it is said on behalf of Ms O'Neill that the position is and was at all material times quite otherwise. Her evidence, to be taken at its height at this stage, is that her husband had since 1989 been a jobbing builder in a small way of going. He had a relatively modest overdraft facility commensurate with the modest financing needs of such a small business. Ms O'Neill has little or no knowledge of the day to day workings of the business, she having given up her limited secretarial involvement years previously. She had only been to the bank on one occasion in the company of her husband and had never negotiated any borrowings. She had signed forms presented to her by her husband and had no idea that in doing so she was placing her interest in the family home in jeopardy.

[15] It appears to be established that in the financial year 2006/2007 the borrowings of the partnership increased from £107,000 to £1,260.000. This increase

was attributable to the fact that the husband had during that period arranged to borrow sums totalling about £1.5m to purchase 3 significant parcels of land for a land bank and development and the costs of development. The nature and scale of this activity and of the borrowing associated with it appear to have been quite disproportionate to anything which the husband had undertaken previously in the more than 15 years that he had operated his hitherto modest business. These new loans were by no means normal for this business in either their scale or their purposes and it is argued therefore that the Bank was well aware that they marked a very significant change and escalation in the nature of the husband's business and its borrowings with the concomitant significant escalation in risk. It is further argued that, quite unlike the holiday home loan in Pitt, these were certainly not normal advances to husband and wife for their joint benefit and that, as the Bank knew, Ms O'Neill had theretofore always been at most minimally concerned in the business and that it was her husband who carried on the business and dealt with it in relation to any borrowings for business purposes, so that it was in all the circumstances firmly placed upon inquiry. This required it to ascertain Ms O'Neill's state of knowledge and confirm her free assent to what the husband proposed and to ensure that she had had brought home to her the practical implications of the proposed transactions so that, as Lord Nicholls put it in Etridge at paragraph [54]:

> "She entered into the transactions 'with her eyes open'."

[16] The Bank in response founds itself upon Etridge and in particular the observations of Lord Nicholls at paragraphs [48] and [49]:

> "As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on inquiry. On the other side of the line is the case where money is being advanced, or has been advanced, to husband and wife jointly. In such a case the bank is not put on inquiry, unless the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes. That was decided in Pitt.
>
> Less clear cut is the case where the wife becomes surety for the debts of a company whose shares are held by her and her husband. Her shareholding may be nominal, where she may have a minority shareholding or an equal shareholding with her husband. In my view the bank is put on inquiry in such cases, even when the wife is a director or secretary of the company. Such cases cannot be equated with joint loans. The shareholding interests, and the identity of the directors, are not a reliable guide to the identity of the persons who actually have the conduct of the company's business."

[17] We do not read these passages as necessarily excluding transactions such as the present from the obligation to inquire. True it is that in exchange for agreeing to the charge on the matrimonial home Ms O'Neill became a joint owner of the parcels of land purchased with the loans. We consider it to be arguable that such a joint loan to purchase lands which, regardless of their legal ownership, were in reality to be used by the husband for what were effectively his own purposes in a business controlled and operated by him are not necessarily on the "wrong side of the line". It is arguable that the partnership arrangement into which Ms O'Neill was introduced shortly before the lending pattern radically altered was in substance no different from the provision of surety for a company's loans by a wife who also had some shareholding in the company but where the activities of the company were in reality conducted by and for the husband alone. We consider that there is an arguable case that the Bank had been put upon inquiry as to whether these loans were in fact for the husband's sole purposes. The identified matters that might support that case include the modest nature and extent of the husband's previous jobbing builder business over many years, the historic low level of bank borrowings over those years consistent with the modest needs of that business, the minimal personal relationship between Ms O'Neill and the Bank, consisting of only one visit over the period of many years and that visit in the company of her husband, and the very significant alteration in the scale and intended purposes of the unprecedentedly large loans negotiated by the husband and all advanced during the period of one year. We emphasise that none of these are matters upon which we have reached any conclusion. We remind ourselves, as did Master McCorry in Dolan, that it is not the role of the court in statutory demand proceedings to decide the issue but rather simply to ask itself whether an arguable defence, that is a defence with some prospect of success, has been raised.

[18] We bear in mind also the fact that the evidential issues have not, by reason of the statutory demand procedure, been examined by a court. The importance of this was made clear by Lord Hobhouse in Etridge at paragraph 123 D:

> "… There is an important distinction to be drawn between cases which have been tried where the parties have been able to test the opposing case and the trial judge was able to make findings of fact having seen the critical witnesses and evaluated the evidence. By contrast, in those cases where the lender is applying for an immediate possession order without a trial or to have the defence struck out, the court is being asked to hold that, even if the wife's allegations of fact be accepted, the wife's case is hopeless and bound to fail and that there is no reason why the case should go to trial. This conclusion is not to be arrived at lightly nor should such an order be made simply on the basis that the lender is more likely to succeed. Once it is accepted that the wife

> has raised an arguable case that she was in fact the victim of undue influence and that the bank had been put on inquiry, it will have to be a very clear case before one can say that the bank should not have to justify its conduct at a trial."

[19] Undoubtedly, as Master McCorry observed in Dolan at paragraph [26], the threshold at which a lender is placed upon enquiry will vary according to the particular facts on a continuum between the absence of any such obligation, as in the holiday home example of Pitt, and the obligation that will almost certainly arise in a normal surety case. This court does not feel able to say that the authorities oblige it to preclude Ms O'Neill from making her case at a trial that the Bank was, in the particular circumstances upon which she relies, placed upon inquiry. Accordingly we dismiss this appeal.