

## Undue Influence Briefing

The English law doctrine that a wife may, in certain circumstances, set aside an agreement to act as surety for her husband's debts or borrowings has arrived in Jersey. In its recent judgment in *Toothill -v- HSBC Bank plc* (where Mourant acted for HSBC), the Royal Court approved the English authority of *Royal Bank of Scotland plc -v- Etridge (No 2)* (2002) 2 AC 773 and stated that the position under Jersey law was the same.

First, the wife must show that she was unduly influenced by the husband to give the security or that there was a misrepresentation.

Secondly, the wife must show that the bank was put on inquiry. This usually happens where a transaction is not on its face value to the financial advantage of the wife. A bank will invariably be put on inquiry when the wife gives a guarantee for a loan to her husband or his business. However, where husband and wife are joint borrowers, the bank is not put on inquiry unless it is aware that the loan is being made for the husband's purposes only, as opposed to the husband and wife's joint purposes.

The position on loans, which are in part for joint purposes and in part for the husband's purposes, is unclear. However, in *Toothill*, where the borrowers did not set out any specific allocation of the proceeds of the loan in their application, the Royal Court said that the bank had arguably been placed on inquiry.

The Royal Court also held that the bank was entitled to rely on information given by the borrowers. It was not a detective agency, albeit that it could not shut its eyes to the obvious (approving existing English authority).

Thirdly, the wife must show that the bank did not take reasonable steps to ensure that the wife understood the implications of entering into the loan. The steps are:

1. the bank should contact the wife and ask her to nominate a lawyer to act for her. If the husband already has a lawyer, the wife should be told that the same lawyer can act for her but she should

also be asked if she would prefer a different lawyer.

The bank should say that it will require written confirmation from her lawyer that he has explained to her fully the nature of the documents and the practical implications of signing them and that the purpose of this is to prevent her from later disputing that she is bound by the documents;

2. the bank should ensure that the wife's lawyer has the necessary financial information about the husband's affairs. Ordinarily, this will include the husband's application for the facility, the purpose of the facility, the amount of his current indebtedness and the amount of any new facility. The bank will need the husband's consent for this. If it is not forthcoming, the transaction should not proceed;
3. if the bank believes that the wife has been misled by the husband or is not entering into the transaction of her own free will, it should inform her lawyer of its suspicions and consider carefully whether to proceed with the transaction; and
4. the bank should obtain from the wife's lawyer the written confirmation set out in point 1.

In *Etridge*, it was held that these requirements would apply to future transactions. For past transactions, it would be sufficient if the wife's lawyer confirmed that he had brought home to her the risks that she was running. It is not clear whether in Jersey the "cut-off date" will be the date of the *Toothill* judgment (17 March 2008) or the date of the *Etridge* judgment (11 October 2001).

The implications of this judgment are potentially far-reaching for Jersey lenders. There is no reason in principle why it could not extend to other relationships where one party owes duties to or is capable of exercising undue influence over the other. Lenders will need to pay careful attention to joint loans and ensure that they are aware of the purpose of the loans. Where loans are being sought in whole or in part for the purpose of one of the borrowers only, lenders will need to make sure that they follow the *Etridge* guidelines in order to avoid the risk of their security over jointly owned property subsequently being set aside.

This briefing can only provide a general review of this area. Legal advice should be taken with regard to individual circumstances.

If you have any queries regarding the information in this briefing or simply wish to discuss your specific needs please contact:

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