Independent Legal Advice in (Re)Mortgage Transactions 20 Years on from *RBS v Etridge* (No.2)

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Summary (50 words max)

Twenty years on from *RBS v Etridge* (No.2), this article draws on interviews with 28 solicitors who have experience acting for lenders and/or surety clients in secured lending transactions to show how, in practice, independent legal advice is not being delivered in accordance with Lord Nicholls' guidelines.

Keywords

Independent legal advice; legal profession; mortgages; suretyship; undue influence

Introduction

It has been just over 20 years since the House of Lords handed down its ruling on undue influence and the family home in *Royal Bank of Scotland v Etridge (No.2)*.[1] The main impact of this case was that, going forward, mortgagees would *have to* ensure that individuals contemplating providing suretyship for a loved one's lending received independent legal advice (ILA) from a solicitor.[2] Typically, in these types of cases, a wife stands surety by agreeing to a remortgage of the family home in order to secure the husband's business lending.[3] Where the husband defaults on the loan, and the security was called upon by the lender (i.e. they sought repossession of the home), the surety wife then claimed they only entered the transaction due to their husband's undue influence and/or misrepresentation.[4] It was hoped that, in making ILA compulsory in such situations, wives (and other types of sureties in a non-commercial relationship with the principal debtor) would be better informed and the risks entailed in doing this meaningfully considered before they decided whether to provide suretyship. This requirement - that sureties should receive ILA before providing security - was considered by the House of Lords to be a 'compromise' between the competing interests of lenders and those of sureties, as it provided some level of protection to both sureties and lenders.[5] Where banks provided for ILA in accordance with the *Etridge* guidelines, those banks could rely on a certificate of ILA from the surety's solicitor to refute any later claims of the husband's undue influence and/or misrepresentation.

Since *Etridge* there has been a reduction in the number of cases involving sureties trying to set aside their secured lending transactions with lenders on the basis of undue influence.[6] This has led Nelson Enonchong to remark that the reduction in case law indicates that 'banks have largely

followed the prescribed steps and the problems of the past have been avoided.'[7] Enonchong's inference - that a reduction in case law means that banks are performing their roles in accordance with *Etridge* – is, it is suggested, unsubstantiated. Furthermore, Enonchong's analysis is thin as he only focuses on lenders' interests and fails to question whether ILA is being delivered by solicitors competently and what effect incompetent ILA may have on sureties' decision-making. For the first time post-*Etridg*e, this article draws on interview data with 28 solicitors who have multiple experiences acting for lenders and/or surety clients in secured lending transactions to gain insights into whether and how the *Etridge* guidelines are being followed in practice. What this data demonstrates is that a number of ILA solicitors are preoccupied with delivering ILA in accordance with lenders' post-*Etridge* requirements over delivering ILA strictly in accordance with the requirements laid out by Lord Nicholls. As will be demonstrated below, lenders' and lawyers' approaches in coordinating and delivering ILA in practice post-*Etridge* are concerning as they are causing some solicitors to deliver ILA to non-commercial surety clients in a routinised and self-interested fashion (through, for example, the use of guidelines and checklists sent by lenders to ILA solicitors, which many solicitors say they see as 'instructions'; and due to lender referral practices that raise a number of questions). This is problematic because ILA is the only form of protection offered to sureties (typically women) who may still be being unduly influenced into (re)mortgaging their homes. The significance of women risking their interest in the family home to facilitate another individual's (possibly very risky) lending should not be minimised.

This article unfolds in four parts. First, the development of the common law in this area and academic criticisms of *Etridge* will be reviewed. Secondly, an explanation of the methods used to collect the empirical data discussed in this paper will be provided. Then, in the third and most substantive section, drawing on the interview data collected, it will be demonstrated how there is a gap between how lenders and lawyers are required to act in accordance with *Etridge* and how some are conducting themselves in practice. In drawing this article to a close the implications of these findings are discussed.

The Development of 'Independent Legal Advice'

In the late 1900s, wives who provided suretyship for their husbands' businesses increasingly brought actions against lenders (with whom they were contracted), to try and set their security transactions aside on the grounds of undue influence and/or misrepresentation. Sureties claimed that the lender had been aware of the risk that they would enter into the transaction under the undue influence (and/or misrepresentation) of their husband, and that the bank had not done enough to protect them before they entered into the transaction. These types of three-party cases

presented the courts in England and Wales with a quandary in the late 20th century. The courts had to decide whether banks should be held responsible for the undue influence/misrepresentation of the principal debtor/husband; namely, whether the security contract between surety and lender could be set aside where a presumption of undue influence between the principal debtor and surety could not be rebutted.

In *Barclays Bank v O'Brien*,[8] the second decision in the House of Lords on a case concerning undue influence and misrepresentation in secured lending transactions in a 10 year period,[9] Lord Browne-Wilkinson commented that whilst 'it is easy to allow sympathy for the wife who is threatened with the loss of her home… [there is a] need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile.'[10] Despite his concerns, Lord Browne-Wilkinson set out that banks *do* become tainted by the undue influence of the husband/principal debtor in suretyship transactions on the basis of constructive notice.[11] This meant that where the presumption of undue influence arises between the surety and debtor, a third-party creditor has a responsibility towards the surety.[12] Lord Browne-Wilkinson outlined how, in the future, an employee of the lender should have a private meeting with surety clients (in the absence of the principal debtor), before the security transaction is completed.[13] In that meeting the surety would be informed of the realities and consequences of the transaction.[14] Lord Browne-Wilkinson also remarked that he did not consider a personal interview between a lender representative and the surety as unworkable or too burdensome on lenders.[15]

It soon transpired post-*O'Brien* that most lenders required surety clients to receive 'legal advice' from a solicitor instead of conducting surety meetings in-house.[16] This was thought to be problematic as there were no common law guidelines on what solicitors should cover in their meetings with surety clients, and it became clear that ILA solicitors were typically just witnessing the surety's signature on the security documentation.[17] Other poor practices adopted by solicitors post-*O'Brien* also became apparent. For instance, sureties were often 'advised' by solicitors in the presence of the principal debtor;[18] and solicitors commonly failed to outline any contextual financial information pertaining to the extent of the surety's potential liability, or the principal debtor's current indebtedness (factors most people would consider relevant when providing security for someone's debts).[19]

Despite solicitors' 'advice' being perfunctory in most cases post-*O'Brien*, ultimately, if banks advised the individual contemplating providing suretyship to receive legal advice from a solicitor, the courts found that banks had done enough and that those banks could enforce the suretyship transaction.[20] Rosemary Auchmuty explains that post-*O'Brien* '[o]nce responsibility for giving

advice was shifted to solicitors, lenders could afford to be as careless as they like,'[21] and identified that due to these practices it was primarily women who suffered from 'systemic disadvantage.'[22] Extra-judicially Lord Justice Millet similarly wrote that 'allowing the bank to assume the surety has received adequate legal advice, an assumption which the bank almost always knows to be false' was 'failing to give adequate protection… to the vulnerable.'[23] Perhaps unsurprisingly, lenders' and solicitors' poor practices post-*O'Brien* led to another House of Lords' decision on undue influence in secured lending transactions just seven years after *O'Brien* in *Royal Bank of Scotland v Etridge* (No.2).

In a move away from the guidelines in *O'Brien,* Lord Nicholls' stated in his leading speech in *Etridge* that 'it was not unreasonable for the banks to prefer that this task (providing legal advice) was undertaken by an independent legal advisor.'[24] This response was seen by some academics as a concession to lenders' demands.[25] However, Lord Nicholls provided supplementary protections and required lenders to play a more active part in making ILA more meaningful post-*Etridge*.[26] Lord Nicholls stipulated that first the lender should contact the surety, explain why ILA is required, and ask them for the name of their nominated solicitor.[27] Once the lender has the solicitor's details, the lender then must send the necessary financial information to the surety's nominated solicitor. As a minimum, the information that should be sent by the bank includes: the principal debtor's current indebtedness; if applicable, the amount of the principal debtor's current overdraft; and the terms of the proposed new facility.[28] Lord Nicholls went on to say that, importantly, the lender 'does not have, and is not intended to have, any knowledge or control over the advice the solicitor gives the wife.'[29] Lord Nicholls also specified that if the lender does not provide the required financial information to the surety's solicitor then they cannot rely on any subsequent ILA certificate from the surety's solicitor.

Lord Nicholls also provided core-minimum guidelines on how solicitors should deliver ILA.[30] Whilst he detailed that certain information should be discussed, like the principal debtor's current indebtedness and the extent of the surety's liability if they should choose to sign, Lord Nicholls was clear that ultimately what needed to be covered during ILA depended on the surety's individual circumstances.[31] In other words, solicitors had a responsibility to learn about the individual surety's situation and tailor their advice. In addition, Lord Nicholls made it clear that solicitors must advise the surety not to proceed if they consider it was not in the surety's best interests do so.[32] He clearly stipulated that the ILA solicitor 'is acting for the [surety] wife alone. He is concerned only with her interests...'[33] Lord Nicholls stressed that the solicitor 'must consider carefully whether there is any

conflict of duty or interest' and refuse to act where they consider their independence has been compromised.[34]

Lord Nicholls' guidelines on ILA solicitor independence have been criticised because he did not go a step further and say that the surety must be advised by a different solicitor to the solicitors acting for the principal debtor and/or the lender. In fact, Lord Nicholls said that surety clients should have the option to be advised by the 'family solicitor' (i.e. the same solicitor acting for the principal debtor) if a surety should feel more comfortable with such an arrangement.[35] Whilst there have been seven reported cases in the Court of Appeal and House of Lords on undue influence post-*Etridge*, those cases have not fundamentally altered what is required when it comes to the delivery of ILA.[36]

There have been fewer reported cases where sureties have tried to set aside transactions on the basis of undue influence in the 20 years since *Etridge*, as compared with the number of relevant cases that reached the appeal courts in the 20-year period prior to *Etridge*. But it is important not to assume that a reduction in case law in this area clearly demonstrates that banks and solicitors are coordinating and delivering ILA as Lord Nicholls required.[37] Correlation is not causation, and there are many potential reasons why there is less case law in this area. For instance, the Civil Procedure Rules 1998 (the Woolf Reforms), which encouraged mediation and out of court settlement over litigation, may have had an impact on banks settling cases outside of court. Here, it is also possible that banks would have wanted to avoid cases being reported post-*Etridge* where they failed to follow the correct *Etridge* guidelines (as this could have impacted their reputation and possibly led to further claims).[38] Ultimately, to understand more comprehensively if the 'problems of the past' have been avoided, it needs to be empirically explored how banks and solicitors conduct themselves post-*Etridge*. That was the main aim of the present study.

Methodology

This section offers some detail on the methodology carried out in order to empirically explore how ILA is delivered post-*Etridge*. It explains the choices that were made to create the data at the heart of this paper, and the ways in which that data has been used to reach the assessments/claims being presented in this paper.

To provide rounded insights into how lenders and lawyers conduct their roles post-*Etridge*, lawyers with various experiences were interviewed: solicitors who have delivered ILA to surety clients; solicitors who have secured lending for mortgagees; and/or solicitors who have defended

possession proceedings for surety clients. It was also decided that interviews would be conducted in a semi-structured style so as to concentrate on 'specific research question[s] whilst also leaving space for study participants to offer new meanings to the topic of study.'[39]

As it was not specified in *Etridge* that only solicitors working in certain practice areas or firms could deliver ILA,[40] the types of solicitors who were delivering ILA in practice first had to be better identified in order to improve the effectiveness of participant recruitment efforts. This was a practical but significant initial methodological challenge. To identify the types of solicitors who delivered ILA in practice, a multifaceted approach was taken: a gatekeeper kindly provided inside knowledge on the types of solicitors they had known to deliver ILA,[41] an online survey was launched that could be completed by any type of solicitor,[42] and relevant post-*Etridge* case law was examined to determine the specialisms of ILA lawyers who had been named in those judgments.[43] Through these methods, it became clear that ILA solicitors often specialised in (drawing on The Law Society of England and Wales' practice area categories): 'commercial property', 'family – general', 'insolvency and restructuring – businesses' and 'litigation'. Solicitors who specialised in 'dispute resolution' and 'litigation' were also contacted to recruit interviewees who had experience defending possession proceedings, and those in 'banking' to recruit solicitors with experience working for mortgagees in arranging secured lending transactions.

Next, using the 'Find a Solicitor' function ('Pro Search') on The Law Society website, solicitors who practiced in the areas identified in the West Midlands were found.[44] This provided a form of convenience sample population from which to randomly contact solicitors who may perform the roles that were of interest. In the end 237 letters and emails were sent in 2018 to solicitors asking for their participation in this project.[45] Letters/emails outlined the project, informed recipients that it was funded by the Economic and Social Research Council, and detailed that the study had ethical approval.

In total, 28 solicitors across England and Wales were interviewed in late 2018/early 2019. The majority of interviews took place in person in a private professional setting,[46] and two interviews were conducted over the telephone.[47] 27 out of 28 interviews were recorded using a voice recorder and, on average, interviews lasted for 56 minutes.[48] Before each audio file was transcribed, each interviewee was ascribed an identifier (P1 through P28) so as to offer some anonymity. 18 out of 28 interviewees had performed two or more of the three roles (delivering ILA (n=22); advising lenders (n=15); defending possession proceedings (n=15)). Interviews were professionally transcribed, and the data analysed using NVivo and an iterative approach to coding and theme generation.[49]

ILA in Action

In this section, key findings on the following aspects of ILA will be discussed: (i) when *lenders* require ILA to be delivered by solicitors in practice and to whom lenders require ILA to be delivered; (ii) how ILA solicitors are typically appointed in practice; (iii) what ILA solicitors usually cover during their meeting with the surety client; and (iv) what information lenders are sending to the surety's solicitor before ILA is delivered.

The Extension of *Etridge*: 'ILA for all'

As discussed above, Lord Nicholls outlined that the lender must require sureties in a *non-commercial* relationship with the principal debtor to receive ILA from a solicitor before the suretyship transaction was completed in order to be certain that the lender could enforce the transaction at a later date. What actually happens in practice post-*Etridge* is that most lenders require *all types* of sureties to receive ILA, including *commercial* guarantors who directly benefit from the secured lending transaction. 20 out of the 22 interviewees who had experience delivering ILA discussed that they had experiences delivering ILA to commercial guarantors. As P21 put it:

> [I]n the years following the *RBS* [*Etridge*] judgment, banks have put into place a clear and strict policy and procedure as to how guarantees are taken, both from directors, shareholders and those people that are not connected to the day-to-day running of the business.

14 interviewees were asked why they thought lenders were requiring commercial guarantors to receive ILA. Of those 14 interviewees, five did not have experience arranging secured lending transactions for lenders, and so their answers were merely speculative. These five interviewees suggested that lenders required commercial guarantors to receive ILA out of concern for their own position (i.e. lenders being able to have an uncluttered ability to enforce against security in all scenarios). The other nine interviewees, who each had experiences arranging secured lending transactions for lenders, also suggested that most lenders required all types of guarantors to receive ILA as a form of self-protection. P11 said that 'ILA for all' was a 'fail-safe' and P20 called it a 'belt and braces' provision.

In discussing this 'blanket' approach to ILA, and how interviewees interchangeably delivered ILA to non-commercial sureties and commercial guarantors, no interviewee voluntarily commented on how this practice may be problematic. In fact, many, especially those who also arranged secured lending transactions for lenders as well as occasionally delivering ILA to surety clients, thought

that this response from lenders was sensible and understandable. For instance, P13, an interviewee who mostly acted for lenders in arranging secured lending transactions, even remarked that he thought solicitors - such as him - were the driving force behind lenders' 'default ILA-for-all position'.

This change in ambit, around when ILA is required, may explain why some interviewees said that when they delivered ILA they viewed the purpose of ILA as a way to protect the banks interests. In response to the question: 'When you deliver ILA to a surety client how do you view the purpose of it? What is the value of delivering ILA to a surety client?', eight interviewees - in all seriousness - said that the *only* purpose of ILA was to protect the lenders' interests and did not discuss how they delivered ILA to protect surety clients. P22, for example, said that he delivers ILA '…so that later on, if they [the lender] needed to enforce it, the defences the guarantor may have are as slim as possible.' The problem here is that if the very solicitors who deliver ILA consider they are delivering it to protect the lender's interests, they may not be delivering ILA competently or independently and in the interests of their actual client – the surety. This also shows a lack of understanding of how Lord Nicholls viewed the competing interests balancing exercise (between lenders and sureties) that ILA was designed to reflect.

P10, by contrast, was the only interviewee who was critical of the *Etridge* guidelines and said that whilst the House of Lords said the intervention of ILA was to protect sureties as well as lenders' interests 'really it is about protecting the banks and enabling the banks to have an uncluttered ability to enforce security over assets…' Here, unlike eight of his contemporaries, P10 was not saying that he thought the purpose of ILA was only about protecting lenders, but instead suggested that in practice that was all it had become.

Whilst it is clear to see that requiring ILA in every instance is the most effective risk management tool for lenders, Lord Nicholls in *Etridge* was very clear that only non-commercial sureties were required to receive ILA because commercial guarantors are 'capable of looking after themselves…'[50] (i.e. Lord Nicholls had obviously considered and rejected setting out in *Etridge* that commercial sureties should also receive ILA). What this means is that post-*Etridge* lenders have stretched the application of the *Etridge* guidelines to further protect their position. In the following sections it will be demonstrated how lenders' requirements and actions - such as requiring ILA to be delivered to all types of guarantors - has transformed how ILA is viewed, valued, and delivered by ILA solicitors. It is argued that lenders (and their solicitors) have not given any thought on how their post-*Etridge* 'strict policies and procedures' (as P21 put it) may affect how solicitors deliver ILA. This finding – that ILA is delivered to *all types* of guarantors - was the first insight into how

lenders are influencing how ILA is delivered in practice in ways that do not fully reflect Lord Nicholls' guidelines in *Etridge*. Another key finding was that some lenders may be influencing how ILA is delivered by sureties' solicitors post-*Etridg*e as a result of lender referral practices.

The appointment of the surety's solicitor and the falsehood of guaranteed 'independence'

Lord Nicholls outlined in *Etridge* that once a lender has been put on inquiry it must directly contact the surety to explain why the surety needs ILA and to ask the surety to nominate a solicitor. Lord Nicholls further outlined that it is permissible for a wife to nominate a solicitor who is also acting for the husband where the wife is more comfortable being advised by a family solicitor. In such a situation, Lord Nicholls' set out, it is for the nominated solicitor to determine whether they are able to advise the wife solely in her best interests.

To determine whether the surety's solicitor is appointed in practice through the surety's independent nomination, as is assumed by Lord Nicholls' guidelines in *Etridge*, interviewees who had experiences delivering ILA to non-commercial sureties were directly asked how they typically came to deliver ILA to such clients. In so doing, what became clear is that surety clients were often referred to ILA solicitors through a third-party. While 14 out of 22 interviewees thought they had procured *some work* from surety clients who had chosen their services completely independently from a third-party referral, 19 out of the 22 interviewees detailed how, commonly, their past surety clients were referred to them by third parties.

At this point, it is worth noting that Lord Nicholls does not say anything about referrals specifically in *Etridge*. In fact, because Lord Nicholls calls on the potential ILA solicitor to determine if they are independent enough to act for the surety and says that the solicitor acting for the principal debtor can also act for the surety, it would be fair to suggest that the types of referrals discussed by these interviewees do not obviously contravene Lord Nicholls' guidelines. However, it is suggested that these referral practices might be problematic for two reasons: (i) interviewees often mentioned that the referral involved direct contact with the introducer (rather than the introducer simply passing on the recommended solicitor's details to the surety client); and (ii) interviewees made clear that most lenders *do not* allow the same solicitor to act for the principal debtor and surety client (as was outlined by Lord Nicholls) but do allow/partake in referral practices. That is, in relation to the second point, lenders seem to have heightened protections regarding lawyer independence in requiring the surety client to be advised by a separate solicitor to the one acting for the principal debtor, but 'behind the scenes' lenders engage in referring surety clients to known solicitors. As will be examined next, many interviewees discussed how they prioritised what lenders

require on ILA lawyer independence as opposed to what is required at common law and in accordance with their regulatory rulebook in the SRA Code of Conduct, i.e. the obligations on solicitors to assess for themselves whether they are independent enough to act for the surety client before delivering ILA.

i) Lenders' heightened requirements on solicitor independence

Despite Lord Nicholls stating that the surety wife can be represented by the same solicitor acting for the principal debtor, collected interview data makes it clear that some lenders now require the surety client to be advised by a different solicitor to the one acting for the principal debtor. Nine out of 22 interviewees said that all the lenders they had encountered *did not* permit the same solicitor working for the lender or principal debtor to provide ILA to the surety client; that it was a condition of the lending that the wife be advised by a 'completely independent' solicitor. All nine of these interviewees suggested that lenders' requirements here were about self-protection and not out of concern that the surety receive wholly independent advice; that is, lenders had heighted requirements of independence so that sureties could not argue later down the line that their solicitor had not been sufficiently independent, and the lender had notice of their solicitor's lack of independence. Here, there is a danger that the surety's nominated solicitor might look to the lender to decide whether they are 'independent' rather than reflecting on whether they can advise the surety independently and in the surety's best interests. For instance, P17 candidly remarked:

> [If I am being asked by the surety to act for them as well as the principal debtor on the transaction] what I do is I say to the lender, "What are your requirements?" … as long as I've done what they've asked me to do, fine, but sometimes they might say, "No we need a solicitor from a different law firm to do it," so I'm really in the hands of the banks.

That P17 sees himself 'really in the hands of the banks' is telling; suggesting that his decisions about whether to act for a surety client are dependent on banks' requirements and not upon his own self-assessment considering the surety's best interests.

Not all interviewees, however, discussed not acting for sureties where they were also acting for the principal debtor because of lenders' requirements. Four interviewees – P2, P4, P5 and P6 – made it clear that they would never act for the principal debtor or lender and then deliver ILA to the surety client in the same transaction; not because lenders required different solicitors to act for each party, but because they would be concerned about potential conflicts of interest. This is

somewhat reassuring, but it is concerning that nine interviewees seemed *completely* preoccupied with lenders' requirements rather than their professional duty towards the surety client.

Where we land is that while *Etridge* suggested that the same solicitor could act for both the principal debtor and the surety, that is often not the case in practice. And while it could be argued that lenders requiring the principal debtor and surety client to be advised by different solicitors is a positive step forward (a form of 'heightened independence'), what the data instead suggests is that lenders' requirements distract from ILA solicitors questioning and assessing whether they are in fact sufficiently independent to be able to deliver ILA in the surety client's best interests. In addition, and as will be demonstrated next, hidden referral practices demonstrate that some lenders are not *genuinely* concerned about the ILA solicitor delivering independent advice.

ii) Referrals and compromised independence

As outlined above, 19 out of 22 interviewees discussed receiving third-party referrals to deliver ILA to surety clients. In summary: (i) seven interviewees mentioned how they have had surety clients directly referred to them from lenders; (ii) ten interviewees discussed how solicitors from other law firms, external accountancy firms, or insolvency practitioners (who were working for the lender or for the principal debtor) have referred work to them; and (iii) eight interviewees talked about being referred ILA work from other solicitors within their own law firm who may be working for the principal debtor or the lender. Only three interviewees said that the surety clients they had acted for always chose them independently of a third-party referral.

In what follows, discussion is focused on how 17 interviewees discussed receiving surety client referrals directly from lenders or solicitors acting for lenders. As the Legal Services Consumer Panel have acknowledged: '…[the] independence of lawyers… [can be] compromised because they do not wish to harm their commercial arrangements with introducers by providing advice to clients that might risk those arrangements.'[51] P10 was the only interviewee who recognised how receiving a referral from the bank involved in the transaction (which has a vested interest in the transaction being completed) could compromise his independence:

> I mean that's another complete myth about this, that this is independent advice because you normally get this referral from either the bank or their solicitors… I am very rarely going to say to her [the surety client] "Jesus this chocolate covered ants business [run by the husband/principal debtor] is a complete disaster, don't whatever you do sign this piece of paper!" If I do say that I'll never get any work through the referral line again.

P10 then went on to disclose that he now refuses to provide ILA because of 'massive concerns about conflict-of-interest issues.' All other interviewees failed to see how their 'relationships' with introducers were problematic. For instance, look at how P4 speaks about receiving referrals from a 'bank relationship manager':

> [ILA work is referred] normally through the bank relationship manager, who I work very closely with. I get a call from the bank, the bank guy in the morning, saying, "We're doing this deal, it's completing in two days. We need to get ILA for the wife. Can you do it?" And they'll (husband and wife) just pop in that same day.

Here, P4 talks very casually about working very closely with a bank relationship manager and fails to reflect on how his relationship/ongoing commercial relationship with the bank could affect his independence.

This data begins to show that it is important for ILA solicitors to realise that their independence can be compromised in situations *other* than where they act for the principal debtor and surety client in the same transaction (something not addressed head-on in *Etridge*). As independence is a professional principle in the SRA rulebook which applies to everything they do, solicitors should always reflect on whether they are sufficiently independent, particularly when receiving referrals from repeated channels. If that introducer has a vested interest in the transaction being completed, ILA solicitors may not be providing independent advice solely in the surety client's best interests. Solicitors should not assume that just because lenders are happy with them delivering ILA that they are meeting their professional duties towards the surety client and that they are sufficiently independent. The following example from the collected data shows how issues may arise. P25 was one of those interviewees who remarked on receiving referrals from lenders. When questioned whether such referrals could affect his independence, he replied by saying, 'I regard myself as completely independent. I mean the way I look at it when I perform this function is that I am really performing it in my capacity as a solicitor really…' Here, P25 seems to think that his independence cannot possibly be impeded simply because he is a solicitor. Robert Nelson suggests that assertions of independence, such as P25's above, are demonstrative of 'the resilience of the ideology of professionalism.'[52] That is, solicitors view themselves as invulnerable to outside influence merely because they are professionals. Behavioural ethicist George Lowenstein has also written about this phenomenon. He states: 'When professionals are confronted with charges of bias resulting from conflicts of interests, inevitably their first reaction is that they are not vulnerable to bias because of their professional training.'[53] Equally, in their work, Emma Oakley and Steven Vaughan found that while solicitors had some sense that professional independence was

important, those solicitors struggled to articulate what exactly independence meant or where it could be in danger.[54]

It was also discovered that most of the interviewees who received referrals from lenders or solicitors acting for lenders discussed speaking directly with a bank manager or other representative of the lender. For instance, P19 stated:

> My contact [the bank's solicitor] who I get work from will ring me up and say: "Can you help me out? It's a pain in the neck I know [delivering ILA], and I know it's only a couple of hundred quid, but can you do it because I want this transaction to proceed… so can you help me with that?"

The fact that P19 admitted that the solicitor acting for the bank often remarks that they want the transaction to proceed and that the bank effectively contacts P19 to 'get the job done' is concerning. This demonstrates very clearly how referrals of this nature can affect independence. P19 even went on to say that he completes ILA for two main reasons:

> Number one, you're doing it because you earn fees out of it. Number two, you are helping somebody from whom you get more lucrative and more important instructions.

In light of this admission, it seems very unlikely that P19 will be able provide completely independent advice in the surety's best interests where he knows the lender wants the transaction to be completed. P19's quotation also highlights the potential problems that arise where solicitors who typically serve lender clients (in other capacities – not just in relation to secured lending transactions) deliver ILA infrequently to surety clients. Working for banks is more lucrative than providing ILA (as P19 points out above), and therefore commercial lawyers who see lenders as the '*über*-client'[55] (as John Flood puts it) may never be able to deliver ILA completely independently where a lender has introduced them to the surety client. In this context, impressing the lender in hope for future work may meaning prioritising completing the transaction over providing meaningful and candid advice to the surety client. This is an important unforeseen outcome to ILA not covered by *Etridge*. It could be suggested that the House of Lords were naive about how solicitors operate in practice.

What the data seems to suggest is that lenders' heightened requirements on ILA solicitors' independence is a 'smoke screen'. Whilst it may seem on paper that all efforts were made by the lender to ensure the surety was independently advised (going above and beyond Lord Nicholls' guidelines in *Etridge*), hidden referral processes – in which lenders and their solicitors partake - may

be undermining the ILA solicitor's independence and loyalty towards the surety client. The data clearly shows that 16 out of 17 interviewees who had experienced receiving referrals from lenders and/or their solicitors were not reflecting on their role or prioritising surety clients' interests. This theme – that interviewees prioritised lenders' interests in practice – was further demonstrated when some interviewees disclosed that lenders send 'instructions' to the surety's solicitor on how advice should be delivered; a matter which will be discussed next.

Lenders' 'Instructions'

The circumstances surrounding an ILA solicitor's retainer are unquestionably unusual. Whilst Lord Nicholls admitted in *Etridge* that the retainer is a result of the bank's desire to certify that the surety has received ILA, he dismissed arguments that the solicitor is therefore an agent of the bank.[56] Lord Nicholls was very clear that the surety is the ILA solicitor's client and that the lender 'does not have, and is not intended to have, any knowledge or control over the advice the solicitor gives the wife.'[57]

Despite this, the data collected as part of this project shows that some lenders do actively try to control how ILA is delivered. 17 out of 22 interviewees talked about lenders sending guidelines or checklists to them before their ILA meeting with the surety client. These 17 interviewees said these guidelines detailed what should be discussed during an ILA meeting with a surety client. Here P23 answers the question: 'What information does a lender typically send before your ILA meeting?':

> Well at the moment [in preparation for an upcoming ILA meeting] I have got to download some letter from some portal which will have a document for them to sign and it will have a checklist of the issues they would like the client to be advised on…

It is even more troubling (in terms of professional obligations) that seven out of 17 interviewees referred in interview to these guidelines/checklists as 'instructions' on how to deliver ILA to the surety client.[58] P7, for example, said that lenders send a certificate that he must sign, and which must be signed by the surety once ILA is delivered. He said that these certificates included 'instructions', going on to say that: '[the bank] sets out much more clearly what the bank thinks should be explained to the individual, instead of relying on the solicitor's judgement.' P11 also commented that 'the banks will quite often send you exactly what they want you to say to her' and P28 said that lenders 'send their own instructions with the 'dos and don'ts' of what you have to say to the [surety] client.'

In discussing arranging secured lending transactions for their *lender* clients, P4, P5, P11 and P16 said they have written and sent 'checklists' and 'strict guides' to a surety's solicitor. For instance, P4 explained how he was involved in writing the checklists sent nationwide to ILA solicitors from a well-known high street bank:

> I went to [A high street bank's head-quarters] with their senior [in-house legal] team to help them redesign various processes, including *Etridge*. So, I put in place a checklist that goes to the lawyers, so that it's almost a bit of an idiot's guide… because we're [ILA solicitors] often under extreme time pressure with everything else we've got on our desks and it's easier to run downstairs and have a half hour meeting and not think about it ever again. So, I just give them a process to go through.

This idea that ILA is just 'a process to go through' because lenders send checklists to ILA solicitors is disconcerting. Lord Nicholls was clear that ILA should not be seen as a formality and that ILA solicitors should use their own judgement to determine what should be covered during ILA.[59] Collected data suggests that some lenders have not only changed the parameters around when ILA is required to be delivered (to commercial and not just non-commercial sureties) and which solicitors can deliver ILA to surety clients (only those 'independent' of the principal debtor), but that lenders are also influencing *how* ILA is delivered by solicitors.

When interviewees were asked about how they delivered ILA and what they would typically cover with a surety client, 17 (out of 22) interviewees referred to simply going through the checklist sent by the lender. The view of the majority was that their role was about informing the surety client about the realities of the transaction. Responses such as the following were common:

> What I usually do is, well obviously I give them a copy of the guarantee… I then go through the tick list in terms of explaining the risk and nature of the document and the fact that they are primarily liable. [P15]

15 out of 20 interviewees also explicitly stated that it was not their job to advise/pass judgement on whether the surety should proceed. P8 put it as follows: 'I don't see it as my job to tell them whether to proceed or not. If somebody wants to do a deal, to sign an agreement or whatever, that's their decision.' He then went on to say that ILA was simply 'money for old rope.' This is very clearly against what *Etridge* requires, as Lord Nicholls clearly outlines that it is an ILA solicitor's job to pass judgement if he considers it is not in the surety's best interests to enter the agreement.[60] Like P8, P18 stated that he would never advise the surety client on whether to proceed

and said that he saw his role as one of mere facilitation 'just providing the final ticks in the final boxes.' This is clearly not what Lord Nicholls envisaged.

What was more encouraging was that five interviewees said that they delivered ILA differently to those clients who were commercially entering a guarantee, as opposed to sureties in the non-commercial context. These five interviewees also said they would be willing to pass judgement and that they typically go beyond the checklist/instructions sent by the lender. For instance, P14 said: 'Inevitably one of the things I also ask about is the relationship [between the surety client and the principal debtor].' In answer to the follow-up question: 'What questions do you ask about their relationship with the principal debtor?', P14 said:

> Well one of the questions I ask about the relationship is, "You're entering a long-term liability here personally, which will affect your personal position if it goes wrong. Are you comfortable doing that? How long have you been married? Are you comfortable with the decisions that you husband makes in business? Are you comfortable that the relationship is where you want it to be?" Because they are all relevant factors because actually if you just do it in the cold light as a commercial transaction, you're missing out on a whole swathe of factors, which arguably are just as important.

Here P14 discusses getting to know his client so that he is in a better position to advise them in their situation (which is the cumulative intended effect of *Etridge*). Unlike the majority of the other interviewees, he did not approach ILA as a 'commercial transaction' or just a 'process to go through' to facilitate the principal debtor's lending.

Financial information

Despite Lord Nicholls clearly outlining that the lender must send financial information about the principal debtor's current indebtedness to the ILA solicitor in order to be able to later rely on the solicitor's certificate of ILA, only four interviewees said that in *every instance* where they have delivered ILA they have been provided with the required financial information from the lender. A further five interviewees said they *sometimes* received the required financial information. However, ten interviewees failed to mention at all whether they received financial information from the lender before delivering ILA. Eight of these ten interviewees were directly asked if they had ever received information from the lender about the principal debtor's current indebtedness. All eight said that they had not received such information where they were advising a non-commercial surety.

> I don't remember receiving anything about the status of the husband's business… I don't think I get something from the bank saying: 'By the way we reckon the husband's business is in good financial shape as things stand. No, there is no document like that, and even if they sent me a set of accounts – I am not an accountant! So, do I get a lot of information put on a plate for me regarding the health of the business that is the subject matter of the loan? No… it is right to say no. [P27]

Interviews conducted with ILA lawyers have demonstrated that, for the most part, there is an emphasis in delivering ILA in accordance with lenders' requirements and not in accordance with *Etridge* and solicitors' professional regulations. As Flood has argued, banks and law firms are institutions which are 'deeply embedded in each other's lifeworld.'[61] He goes on to say that, because law firms are often out to impress third-party lenders in legal actions/transactions, the actual 'lawyer–client relationship has fault lines running through it that require careful examination.'[62] The problem is that, according to interviewees who act for surety clients in trying to defend possession proceedings and/or bring professional negligence actions against ILA solicitors, sureties have little opportunity or resources to be able to carefully examine if their solicitors had been conflicted and/or delivered inadequate ILA. This is part of why there are so few undue influence cases post-*Etridge* and not, as Enonchong has claimed and the data presented in this article has refuted, because there is widespread compliance with the *Etridge* requirements.

Conclusion

An audit of ILA might give the impression that all is working well in this space: surety clients meeting with 'independent' solicitors; solicitor attendance notes filed to say that ILA has been provided; and completed ILA certificates that lenders have as part of their security documentation. The empirical research presented in this article, has, however, made visible a number of practices in the provision of ILA which are either actively against what Lord Nicholls set out in *Etridge* or later (and concerning) reinterpretations to the *Etridge* requirements put in place by lenders. It is quite clear that solicitors' and lenders' post-*Etridge* practices have left surety clients in a disadvantageous situation. Most interviewees misdirected emphasis on ensuring ILA is compliant with lenders' requirements speaks to the fact that ILA is a viewed by the majority of actors in practice as a way to protect the lender rather than the surety client (when the case law makes clear that there is a balancing exercise of opposing interests at the heart of these issues). As this work has made clear, the trivialisation of ILA post-*Etridge* has been caused by a multitude of factors: lenders requiring ILA to be delivered to all types of guarantors (not just non-commercial surety clients); lenders sending guidelines to solicitors on how to deliver ILA (which are often perceived

by solicitors as 'instructions') rather than solicitors relying on their professional judgement; and lenders referring surety clients to known solicitors who they (potentially unconsciously) influence to 'get the job done'. These factors and these practices are concerning in that they show disregard for the clear requirements of *Etridge*, they show a lack of knowledge of or respect for solicitors' professional obligations, and they seem to view surety clients (often women in potentially very vulnerable situations) as secondary and unimportant players in security transactions involving the family home.

What this paper provides is a warning to lenders and their lawyers that their routinised versions of ILA rolled out post-*Etridge* are open to scrutiny. This article should also act as a reminder to ILA solicitors that they have a professional duty to surety clients and *not* to lenders. ILA solicitors should be reflective and self-critical about how their professional independence – a mandatory and pervasive Principle in the SRA's Code of Conduct - may be compromised as a result of their unquestioning acceptance of lender practices post-*Etridge*. Such compromise could lead to professional misconduct proceedings and/or negligence claims. If ILA solicitors resist providing contextualised and candid advice to surety clients they may be failing their client in not providing that client with a real opportunity to say 'No' to entering an onerous liability that could ultimately lead to them losing their home. It is also hoped that this explorative empirical investigation will act as a prompt for lawyers defending possession proceedings for past surety clients to look beyond the standardised forms and to call into question whether contextualised advice - meeting *Etridge* requirements - was in fact delivered to their client prior to providing security.

This paper also reminds academic and student readers that doctrinal investigation has its limitations; a reduction in case law in this area does not mean that a better balance between surety and lender protections has been achieved. A reduction in case law post-*Etridge* may well instead mean, as the data discussed in this article indicates, that the stories of vulnerable and pressured surety clients (most often women) could be lost behind a wall of paperwork and pretence. This leaves some surety clients in the same (difficult and unprotected) position they would have been prior to *Etridge*.

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[1] [2001] UKHL 44, [2002] 2 AC 733 (HL)
[2] Ibid [79] (Lord Nicholls)
[3] For earlier work in this space, see: Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Clarendon Press 1997)
[4] For instance see: *Banco Exterior Internacional SA v Mann* [1995] 1 All ER 396 (CA); *TSB Bank Plc v Camfield* [1995] 1 All ER 951 (CA); *Bank of Baroda v Rayarel and Others* [1995] 2 FLR 276 (CA); *Bank Melli Iran v Samadi-Rad* [1995] 3 FCR 735 (CA); *Halifax Mortgage Services Ltd (formerly BNP Mortgages Ltd) v Stepsky* [1996] 2 All ER 277 (CA); *Barclays Bank v Thomson* [1997] 4 All ER 816 (CA); *Barclays Bank v Goff* [2001] EWCA Civ 635; [2001] 2 All ER Comm 847 (CA). In addition, all the eight conjoined appeals considered by the House of Lords in *Etridge* involved wives claiming their husbands had unduly influenced them into entering a security transaction. There has only been one reported case where a husband claimed his wife unduly influenced him to secure her business lending: *Barclays Bank Plc v Rivett* [1999] 1 FLR 730 (CA). For a discussion on this case, and how principally men have been accused of undue influence in secured lending transactions in the appeal courts in England and Wales, see: Rosemary Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' (2002) 11 Social & Legal Studies 257, 259.
[5] *Etridge* (n1) [37] (Lord Nicholls)
[6] There have been cases where sureties have successfully set aside their secured lending transactions with lenders post-*Etridge*, such as: *Burbank Securities Ltd v Wong* [2008] EWHC 552 (Ch) and *HSBC Bank Plc v Brown* [2015] EWHC 359 (Ch). However, predominantly, these cases concerned secured lending transactions entered into shortly after the House of Lords handed down their judgment in *Etridge* (No.2). This may indicate that primarily the lenders in question were having 'teething' problems with how to arrange ILA post-*Etridge*.
[7] Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell 2018) 414
[8] [1994] 1 AC 180 (HL)
[9] The first being: *National Westminster Bank Plc v Morgan* [1985] AC 686 (HL)
[10] *O'Brien* (n6) 188
[11] Ibid 194
[12] Ibid 196
[13] Ibid
[14] Ibid
[15] Ibid 198
[16] For more information on why banks took this approach, see: Sarah J Greer and Mark Pawlowski, 'Constructive notice and independent legal advice: a study of lending institution practice' (2001) Conveyancer and Property Lawyer 229. Greer and Pawlowski empirically explored lenders' practices post-*O'Brien* by sending questionnaires to residential mortgage lenders. Note that their study was published in 2001 and that it was therefore written before the House of Lords handed down their judgment in *Etridge*.
[17] *Massey v Midland Bank Plc* 1995] 1 All ER 929 (CA)
[18] See: *Banco Exterior Internacional SA v Mann* [1995] 1 All ER 396 (CA); *TSB Bank Plc v Camfield* [1995] 1 All ER 951 (CA); *Bank of Baroda v Rayarel and Others* [1995] 2 FLR 276 (CA); *Bank Melli Iran v Samadi-Rad* [1995] 3 FCR 735 (CA); *Barclays Bank v Goff* [2001] EWCA Civ 635; [2001] 2 All ER Comm 847 (CA)
20 See: *TSB Bank Plc v Camfield*; *Lloyds Bank Plc v Wright-Bailey* [1995] Unreported, 3rd May 1995 (Lexis Citation 2660) (CA); *Barclays Bank v Thomson* [1997] 4 All ER 816 (CA)
[19] See: *TSB Bank Plc v Camfield*; *Lloyds Bank Plc v Wright-Bailey* [1995] Unreported, 3rd May 1995 (Lexis Citation 2660) (CA); *Barclays Bank v Thomson* (n16); *Barclays Bank v Goff* [2001] EWCA Civ 635;
[20] See: *Bank Melli Iran v Samadi-Rad* (n6); *Barclays Bank Plc v Caplan* [1998] 1 FLR 532 (CA); *Scottish Equitable Life Plc v Virdee* [1999] 1 FLR 863 (CA). The case of *Allied Irish Bank Plc v Byrne* [1994] 2 FLR 325 (CA) is one example where the Court of Appeal held that the bank could not rely on the solicitor being present during a meeting because the solicitor was retained by the bank, was not independent, did not have the necessary information about the secured lending transaction, and the bank had not advised the surety to receive legal advice.
[21] Rosemary Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' (2002) 11 Social & Legal Studies 257, 263
[22] Ibid
[23] Peter J Millett, 'Equity's Place in the Law of Commerce' (1998) 114 Law Quarterly Review 214, 220
[24] *Etridge* (n1) [54]

[25] Auchmuty (n21) 270; Alison Diduck, 'Commentary on *Royal Bank of Scotland plc v Etridge (No.2)*' in Rosemary; Hunter, Clare; McGlynn and Erika; Rackley (eds), *Feminist Judgments* (Hart Publishing 2010) 149; James P Devenney, Lorna Fox and Mel Kenny, 'Standing surety in England and Wales: the sphinx of procedural protection' (2008) Lloyd's Maritime and Commercial Law Quarterly 513, 535
[26] *Etridge* (n1) [79]
[27] Ibid
[28] Ibid [79]
[29] Ibid [77]
[30] Ibid [64]-[65]
[31] Ibid [65]
[32] Ibid [61]
[33] Ibid [74]
[34] Ibid
[35] Ibid
[36] These seven cases are: *Annulment Funding Co Ltd v Cowey and another* [2010] EWCA 711 (CA); *First Plus Financial Group v Hewett* [2010] EWCA Civ 312 (CA); *Lloyds TSB Bank v Holdgate* [2002] EWCA Civ 1543 (CA); *National Westminster Bank Plc v Amin* [2002] UKHL 9 (HL); *Padden v Bevan Ashford (A Firm)* [2013] EWCA Civ 824 (CA); *Royal Bank of Scotland v Chandra* [2011] EWCA Civ 192 (CA); *Yorkshire Bank plc v Pamela Tinsley* [2004] EWCA Civ 816 (CA). Key lower court decisions where lenders (or a lender's agent) have been found not to comply with *Etrdige* requirements are *Burbank Securities Ltd v Wong* [2008] EWHC 552 (Ch) and *HSBC Bank Plc v Brown* [2015] EWHC 359 (Ch).
[37] As suggested by Enonchong (n7) 414
[38] This is why solicitors with experience in defending possession proceedings for past surety clients were interviewed as part of this study. If there is a culture of out of court settlements in these types of cases this is an important finding which may rebuke Nelson Enonchong's argument that the law in this area is settled and that the problems of the past have been avoided.
[39] Anne Galletta, *Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication*, vol 18 (NYU Press 2013) 1-2
[40] Lord Scott had stated within his speech in *Etridge* that '[a]n experienced legal executive in a firm with conveyancing practice is well able to give full and adequate advice as to the contents and effect of a straightforward legal charge.' Still, here, Lord Scott was not outlining that *only* solicitors with conveyancing practice are permitted to deliver ILA.
[41] A past colleague who worked within the University of Birmingham's Centre for Professional Legal Education and Research (CEPLER) kindly recruited a gatekeeper who helped identify the types of lawyers that were delivering ILA in practice. This gatekeeper also provided introductions to two solicitors who agreed to be interviewed as part of this project.
[42] Solicitors of all specialisms were invited to complete a short survey which asked if they had experience of delivering ILA in this context and, if yes, what was their main specialism. The survey was advertised on Twitter and retweeted by colleagues and lawyer organisations such as The Family Law Panel and Birmingham Law Society. A colleague in CEPLER (see n41) also kindly shared the survey via email to all the research centre's contacts.
[43] Data was collected on named solicitors' specialisms in post-*Etridge* case law by looking at their firms' websites and the Law Society Find a Solicitor Application which details the main specialisms of every qualified solicitor in England and Wales.
[44] See: https://solicitors.lawsociety.org.uk/?Pro=True [Last accessed 21st June 2022]. The search area was limited to the West Midlands because of time and money constraints. Eventually 8 other interviewees were recruited outside this geographical region through a gatekeeper and through a snowball method (where interviewees introduced other eligible participants).
[45] Whether an individual lawyer was sent a letter or email was dependent on what information was provided on their Law Society profile. If no email address was provided a letter was sent to their firm address.
[46] Typically meetings took place in the solicitor's private office at their firm or in a meeting room at the University of Birmingham Law School.
[47] Two participants were interviewed via the telephone due to the two interviewees in question repeatedly rescheduling meetings.
[48] P27 refused to be recorded. When asked why she would not be recorded she discussed how she was very concerned about data protection and a recording 'getting into the wrong hands.' Whilst P27 was reassured P27 that a strict protocol would be followed to keep data safe she said she would prefer it if only notes were made.
[49] See: Braun and Clarke, Thematic Analysis: a practical guide, Sage, 2022; and Saldana 'The Coding Manual for Qualitative Researchers', Sage, 4th Edition 2021
[50] *Etridge* (n1) [88] Lord Nicholls
[51] Legal Services Consumer Panel, *Referral Arrangements* (2010) Available at: http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_ReferralArrangementsReport_Final.pdf (Last accessed: 1st January 2022) 3
[52] Robert L Nelson, *Partners with power: The social transformation of the large law firm* (Univ of California Press 1988) 233

[53] George Loewenstein, 'Conflicts of Interest Begin Where Principal–Agent Problems End' in Don A Moore and others (eds), *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy* (Cambridge University Press 2005) 203
[54] Emma Oakley and Steven Vaughan. "In dependence: The paradox of professional independence and taking seriously the vulnerabilities of lawyers in large corporate law firms." Journal of Law and Society 46.1 (2019): 83-111.
[55] John Flood, 'Corporate lawyer–client relationships: bankers, lawyers, clients and enduring connections' (2016) 19 Legal Ethics 78
[56] *Etridge* (n1) [77]
[57] Ibid [77]
[58] P7, P8, P10, P16, P17, P24, P28
[59] *Etridge* (n1) [66]
[60] Ibid [61]
[61] Flood (n55) 78
[62] Ibid