

Advising the guarantor: Certificates of independent legal advice

Royal Bank of Scotland v Etridge [2001] UKHL 44

Practitioners in Australia should ensure that they are aware of recent developments in the United Kingdom regarding the provision of independent legal advice to guarantors. On 11 October 2001, the House of Lords handed down its long awaited decision in *Royal Bank of Scotland v Etridge*¹. This case involved eight co-joined appeals. Each appeal involved wives seeking to set aside guarantees they had given to secure the borrowings of their husband or their husband's business. The decision of the Court of Appeal strengthened the position of a wife against the solicitor who provided her with independent legal advice. This decision prompted so much concern among the legal profession that the Law Society was permitted to intervene in the House of Lords. Needless to say, the profession has awaited the decision of the House of Lords with great interest.

Lord Nicholls of Birkenhead has now offered the following list of matters which a solicitor should expect to address as a 'core minimum' when giving independent legal advice:

- [The solicitor] should explain the nature of the documents and the practical consequences these will have for the wife if she signs them. She could lose her home if her husband's business does not prosper. Her home may be her only substantial asset, as well as the family's home. She could be made bankrupt.
- [The solicitor] should point out the seriousness of the risks involved. The wife should be told the purpose of the proposed new facility, the amount and principal terms of the new facility, and that the bank might increase the amount of the facility, or change its terms, or grant a new facility, without reference to her. She should be told the amount of her liability under her guarantee. The solicitor should discuss the wife's financial means, including her understanding of the value of the property being charged. The solicitor should discuss whether the wife or her husband has any other assets out of which repayment could be made if the husband's business should fail.
- The solicitor will need to state clearly that the wife has a choice. The decision is hers and

hers alone. Explanation of the choice facing the wife will call for some discussion of the present financial position, including the amount of the husband's present indebtedness, and the amount of his current overdraft facility.

- The solicitor should check whether the wife wishes to proceed. She should be asked whether she is content that the solicitor should write to the bank confirming [that the solicitor] has explained to her the nature of the documents and the practical implications they may have for her, or whether, for instance, she would prefer [the solicitor] to negotiate with the bank on the terms of the transaction. Matters for negotiation could include the sequence in which the various securities will be called upon or a specific or lower limit to her liabilities. The solicitor should not give any confirmation to the bank without the wife's authority."² □

Anne Matthew is a Casual Academic and Postgraduate Student at the Faculty of Law, Queensland University of Technology
PHONE 07 3864 9175
EMAIL a.matthew@qut.edu.au

Footnotes:

¹ [2001] UKHL 44.

² Ibid at 65.