Garcia v National Australia Bank Limited – Ensuring Equity in Surety Transactions: A Legal Debt-End?

1. Introduction

The issue of a 'special equity' for married women acting as sureties in commercial transactions is historically contentious. The specific body of law which has evolved in this area has been expressed in courts of equity as a judicial sympathy for a wife who guarantees the debt of her husband, or an entity controlled by him.[1] In Australia, the clearest exposition of the law's exceptional treatment of women in this position was made by Dixon J in *Yerkey v Jones,*[2] where the court held that in certain circumstances a wife had a prima facie right which entitled her to have a security provided for her husband's debt set aside. In the ensuing sixty years, the authority of *Yerkey v Jones* has been the subject of intense judicial and academic scrutiny. Courts and commentators have derided the rule as 'anachronistic' and 'discriminatory', arguing that it patronises married women, and is out of step with modern social circumstances by failing to provide equal protection to both sexes.[3] More recently, in *Barclays Bank PLC v O'Brien,*[4] the House of Lords rejected the rule outright, claiming it was fundamentally flawed as a matter of law.[5]

It is therefore suprising that the Australian High Court in *Garcia v National Australia Bank Limited*[6] unanimously upheld an appeal by a surety wife to be relieved from liability in respect of a guarantee which she had signed, with five of the six judges unequivocally endorsing the authority of *Yerkey v Jones.* The majority was able to resurrect *Yerkey* by expanding the doctrine of unconscionability to include as a 'special disability' the disadvantage suffered by a wife who acted as guarantor in a transaction from which she had received no benefit, without adequate explanation as to its nature and effect. In the view of the court, although Mrs Garcia had not been subject to actual undue influence, and the

1 Prior to this judgment, there was some dispute as to whether *Yerkey v Jones* acts to relieve a wife from liability where the debt relates to a company in which both the husband and the wife have an interest: see *European Asian of Aust Ltd v Kurland* (1985) 8 NSWLR 192 at 200 (Rogers J); and *European Asian of Australia Ltd v Lazich* (1987) ASC 55564 at 57291 (Clarke J).

2 (1939) 63 CLR 649.

3 For a representative selection of judicial views on this stance see *Kurland,* n1; *Lazich,* n1; *Warburton v Whitely* (1989) 5 BPR 97–388; *Broadlands International Finance Ltd v Sly* (1987) ANZ ConvR 328; *Commonwealth Bank of Australia v McGlynn* (1995) ANZ ConvR 81; *Geelong Building Society (in liq) v Thomas* (1996) V ConvR 54–545: see also Aitken L, 'Equity, Third Party Guarantees and Wife as Guarantor: Recent English Developments' (1992) 3 *J of Finance Law and Practice* at 264 –267; Cretney SM, 'The Little Woman and the Big Bad Bank' (1992) 109 *LQR* 534; Williams G, 'Equitable Principles for the Protection of Vulnerable Guarantors: Is the Principle in *Yerkey v Jones* Still Needed?' (1994) 8 *J Contract Law* at 67–83; Collier B, 'Confusion Now Hath Made This Masterpiece!'(1997) 25 *ABLR* at 190–202.

4 [1994] 1 AC 180.

5 Lord Browne Wilkinson considered that '... law founded on obscure and possibly mistaken foundations... develops in an artificial way, giving rise to artificial distinctions and conflicting decisions' – an apt description of the judicial history of *Yerkey v Jones;* see also Aitken, n3 at 261.

6 (1998) 72 *ALJR* 1243.

bank was unaware that Mr Garcia had misrepresented the facts to his wife, the transaction was held to be unconscionable in hindsight. It is contended that whilst several aspects of this judgment are to be applauded – principally, the proposition that a married woman's particular vulnerability may be extended to other relationships of 'trust and confidence' – the decision fails to adequately resolve the many uncertainties which dominate this contentious area of law.

2. *Facts*

Mrs Garcia was a qualified physiotherapist who had acquired a block of land as sole proprietor following her marriage to Mr Fabio Garcia. The property was transferred into both names when the Bank insisted on having a 'breadwinner' on title prior to approving a building loan.[7] Subsequently this property became the marital home. In 1979 Mr and Mrs Garcia executed a mortgage over their home to secure 'all moneys' which might be owing under future guarantees by either mortgagor. Mr Garcia, a foreign exchange dealer, conducted a number of businesses, among which was Citizens Gold, a company in which Mrs Garcia was a shareholder and a director. Over the years, Mrs Garcia signed a number of guarantees in favour of Mr Garcia and his companies. The one at issue, dated 25 November 1987 was for $237,000, plus interest, costs and charges.

Mr Garcia told Mrs Garcia that the guarantee was for the purchase of gold bullion on behalf of Citizens Gold, and that she need not anticipate any risk because the company would have either the money or the gold. Mrs Garcia believed her husband's assurances, and signed the guarantees. The signing took place at a different branch from where Citizens Gold conducted business, and was over in less than a minute. Although Bank officers explained the general effect of the documentation to Mrs Garcia, they did not explain that the guarantees were secured by, and linked to the mortgages in the Sydney property. The bank officer who witnessed the signing gave evidence that she would have explained the provisions of the guarantee, but Mrs Garcia gave a different account.

The couple separated on 1 September 1988. On December 20 Mrs Garcia met with a bank officer to inform the bank of the separation, and requested that the account be kept within limits.[8] There were indications that Mrs Garcia would get back to the bank after speaking to her husband, but it does not appear that she ever did so. During December 1988 the Citizens Gold overdraft came into credit, but in April 1989, despite showing a loss for the previous year of $418,000, the facility was renewed and the bank advanced further monies. In the following year the couple divorced and Mr Garcia's company was placed in liquidation. As part of the matrimonial settlement the Family Court ordered the husband to transfer his interest in the property to the wife, subject to the mortgage in favour of the bank. The bank then sought to enforce the guarantee in a demand for $327,189.69 over the property.[9]

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7 Id at 1252 (Kirby J).

8 *Garcia v National Australia Bank* (1993) 5 *BPR* 11996 at 11998–9.

9 Id at 11996.

3. *At Trial*

Mrs Garcia sought equitable relief on the basis that at the time of her signing them, she did not understand the nature and effect of the guarantees. Young J found that Mrs Garcia would have presented to the bank as an articulate intelligent woman who appeared to be voluntarily signing in respect of an account of which she was a director and shareholder. But although she understood at the time that she was executing a guarantee of Citizens Gold overdraft, she did not understand that the guarantee was secured by the 1979 'all moneys mortgage.' Whilst the court did not accept Mrs Garcia's evidence that she was subject to pressure from her husband in the period surrounding the transaction, Young J found that she signed thinking that the transaction was 'risk-proof', because of her husband's claim that there would be 'either gold or money'.[10] In light of this finding, and the bank's failure to discharge the onus of showing that she had obtained any benefit from the transaction, the court at first instance found that it was unconscionable for Mrs Garcia to be held to the guarantee.

Mrs Garcia was unable to seek relief under the principles of unconscionability developed in *Commercial Bank of Australia v Amadio*[11] because the bank had no notice of the conduct of Fabio Garcia in procuring the guarantee.[12] She was also unable to seek relief under the *Contracts Review Act 1980* (NSW) because the improper conduct of Mr Garcia occurred after the original contracts of guarantee had been executed in 1979.[13] Accordingly, Young J considered that the case fell within the parameters of the principle developed by Dixon J in *Yerkey v Jones:*

> If a married woman's consent to become a surety for her husband's debt is procured by her husband, and without understanding its effect in essential respects she executes an instrument of suretyship which the creditor accepts without dealing with her personally, she has a prima facie right to have it set aside.[14]

In developing this principle the High Court applied the combined authority of *Turnbull & Co v Duval,*[15] (where the wife had been deceived by her husband) and *Chaplin & Co v Brammall*[16] and *Bank of Victoria v Mueller,*[17] (where no

10 '... he assured me several times that it was really just an overdraft facility and it was never going to entail any problem for me and it was just money in and out that – he always said, "if the gold isn't there, the money is"': transcript of trial, per Mrs Garcia, cited n8 at 12 011, 12 010.

11 (1983) 151 CLR 447.

12 Without adverting to the 'invalidating tendency' of a presumption of undue influence of a husband over his wife which was recognised in *Yerkey v Jones*, the principles of unconscionable dealing recognised in *Amadio* require the disability of the weaker party to be sufficiently evident to the creditor to make it prima facie unfair or unconscionable that the guarantee be accepted: n11 at 474.

13 Unless there is some substantive injustice, the existence of procedural injustice will not generally render a contract unjust: *West v AGC (Advances Ltd)* (1986) 5 NSWLR 610 at 620; see n8 at 12000.

14 Note 2 at 683.

15 [1902] AC 429.

16 [1908] 1 KB 233.

17 [1925] VLR 642.

explanation had been provided to the wife).[18] Adverting to the basis of trust and confidence between marriage partners which had been recognised in *Mueller*, the court in *Yerkey v Jones* held that although the relation of 'a husband to wife is not one of influence ...' it encompassed a presumption of an 'invalidating tendency' of influence which may, at the discretion of the court, relieve the wife from liability. To the court, the opportunities that the marriage relation gives rise to are such that a creditor who accepts a wife's suretyship is 'treated as taking it subject to any invalidating conduct on the part of her husband.' This is so 'even if the creditor be not actually privy to such conduct'.[19] Where the husband has exercised undue influence over the wife in order to procure her consent to a transaction for his benefit, it is voidable at the instance of the wife in the absence of 'independent advice or relief from the ascendancy of the husband over her judgment and will'.[20] Moreover, the court considered that 'misrepresentation as well as undue influence is a means of abusing the confidence that may be expected to arise out of the [marriage] relation.'[21] In such cases, the bank must take reasonable steps to ensure that the wife knows 'to what she is committing herself,' by making a full disclosure, or ensuring that she has received 'competent, independent and disinterested' advice from a third party.[22] The sufficiency of both the explanation and advice will depend on the circumstances. There is no further requirement that the creditor had knowledge of this abuse of confidence.[23]

On this authority, given that Mr Garcia misrepresented the nature and purpose of the guarantee to his wife, Young J found the 'onus is on [the bank], because of the special tenderness equity shows to wives, to show that the transaction was not unconscionable'.[24] Because the bank failed to satisfy this requirement, the court at first instance relieved Mrs Garcia from her liability under the guarantee.

4. *New South Wales Court of Appeal*

On appeal,[25] the bank argued that *Yerkey v Jones* had been overtaken by, or subsumed into the principles of unconscionability laid down in *Commercial Bank of Australia v Amadio*.[26] In that case, Gibbs CJ said:

> A transaction will be unconscientious within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken

18 Taken together, these judgments place the burden on the lender to show that the wife acted independently, and was not subject to the undue influence of her husband: n2 at 675–6; see also Howell N, 'Sexually Transmitted Debt' (1994) 4 *Australian Feminist LJ* 93 at 98.

19 Note 2 at 675, 678 (Dixon J).

20 Id at 684 (Dixon J).

21 Id at 685 (Dixon J).

22 Ibid; see also 665 (Latham J); and *Amadio*, n11 at 454–455 (Gibbs CJ).

23 See Duggan T, 'Till Debt Us Do Part: A Note on *National Australia Bank Ltd v Garcia*' (1997) 19 *Syd LR* 220 at 227–229.

24 Note 8 at 12011.

25 *National Australia Bank v Garcia* (1996) 39 NSWLR 577.

26 Sheller J previously took a similar stance in *Akins v National Australia Bank* (1994) 34 NSWLR 155.

> unfair advantage of his own superior bargaining power, or of the position of disadvantage in which the other party was placed.[27]

This principle emphasises a 'special disability' or 'special disadvantage' requirement which is not confined to one particular class of guarantors. Although this requirement has been widely construed,[28] it has not been extended to surety wives as such. The bank's claim adverted to the wide body of judicial opinion in support of the view that *Amadio* encompasses the relief that *Yerkey* seeks to provide, without singling out a special class of claimant.[29] In *European Asian of Australia Ltd v Kurland,*[30] Rogers J rejected the submission that being a married woman is of itself sufficient to constitute a special disadvantage in any transaction involving her husband, which may give rise to equity's intervention. In his Honour's opinion, to do so would be to 'affix a badge of shame to this branch of the law.'[31] The Court of Appeal in this instance was of a similar view, holding that *Amadio* adequately described the 'jurisdiction of equity to relieve against unconscionable dealing'.[32]

Sheller J also considered the precise status of *Yerkey v Jones.*[33] Whilst conceding that lower courts must defer to the authority of High Court decisions, he contended that Dixon J's 'special equity' theory was not such a decision, but merely a 'a principle to which only one judge adhered,'[34] and therefore was not to be regarded as binding authority.[35] In the view of this court, a set of principles propounded by a lone High Court justice, who had relied on general assumptions about the capacity of married women prior to the passing of the *Married Women's Property Acts,*[36] was inconsistent with modern social conditions. Such a premise

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27 *Amadio,* n11 at 459 (Gibbs CJ), see also 461 and 474; this decision is now enshrined in sections 51AA and 51AB of the *Trade Practices Act* 1974 (Cth).

28 In *Amadio,* the court considered illiteracy or lack of education to be a 'special disability', n11 at 474; see also *Louth v Diprose* (1992) 175 CLR 621, where 'emotional dependence or vulnerability' were similarly recognised.

29 An alternate view sees *Yerkey* as standing independently of the considerations of unconscientious advantage: see Collier B, 'The Rule in *Yerkey v Jones*: Fundamental Principles and Fundamental Problems' (1996) 4 *Australian Property LJ* 181 at 208–209.

30 Kurland, n1.

31 Id at 200 (Rogers J); see also *Warburton,* n3 at 388, 397 (Kirby J).

32 Note 25 at 597 (Sheller J). Yet to Mason J in *Amadio,* '... it is impossible to describe definitively all the situations in which relief will be granted on the grounds of unconscionable conduct': n11 at 461.

33 Judicial response to *Yerkey* has been inconsistent in all jurisdictions: see n3; the Canadian court applied the rule in *E & R Distributors v Atlas Drywall Ltd* (1980) 118 DLR (3d) 339, yet failed to do so in a similar fact situation in *Toronto-Dominion Bank v San Ric Developments Ltd* (1987) 11 BCLR(2d) 260.

34 Note 25 at 598 (Sheller J).

35 Despite widespread dissatisfaction with the rule in *Yerkey v Jones,* judicial criticism had previously been restrained by the reality that a decision of the High Court of Australia, until overruled in that court, is the law of this country: *see Kurland,* n1; *Lazich,* n1; *Broadlands,* n3; *Commonwealth Bank of Australia v Cohen* (1988) ASC 55–681; *Re Halstead; Ex parte Westpac Banking* (1991) 31 FCR 337; *Peters v Commonwealth Bank of Australia* (1992) ASC 56–135.

36 *Married Women's Property Acts* 1870 (UK); 1870, 1884, 1890 (Vic); 1883 (SA); 1884 (Tas); 1886 (NSW); 1892 (WA); 1893 (Qld): (1939).

had no sure foundation in Australian law, and consequently no application in New South Wales courts.[37] Mahoney J agreed, further contending that it was inappropriate for courts to infer from the existence of the matrimonial relationship, that the free will of the wife has been over-borne by her husband when assessing factual findings.[38] Accordingly, the appeal by the bank was allowed.

5. *On Appeal to the High Court*

The High Court unanimously overturned the Court of Appeal's decision, and upheld Mrs Garcia's appeal – with only Kirby J rejecting the proposition that the basis of relief was to be found in an 'obsolete rule'. Gaudron, McHugh, Gummow and Hayne JJ delivered a joint judgment, affirming the authority of the rule in *Yerkey v Jones* as on the application of general principles, and focused on the unconscionability of the bank in its failure to explain the nature and purpose of the transaction to Mrs Garcia. Callinan J also affirmed *Yerkey*, in finding the facts of the case 'almost precisely within the language used by Dixon J'.[39] In contrast, whilst agreeing with the orders made, Kirby J soundly endorsed the Court of Appeal's view of *Yerkey* as a flawed judicial precedent, and based his judgment on an alternative principle aimed to protect sureties of either sex in situations where there is emotional dependence on the part of the surety towards the debtor.

6. *Joint Judgment of Gaudron, McHugh, Gummow and Hayne JJ*[40]

A. *The Authority of Yerkey v Jones*

The majority rejected Sheller J's finding that the 'so-called Yerkey principle' should be discarded, holding instead that the reasons given in the judgment of Dixon J were 'not significantly different' from the reasons of the other members of the court.[41] In emphasising that it was for the High Court alone to determine whether one of its previous decisions should be overruled, the majority considered that given the 'significant number of women in relationships ... marked by disparities of economic and other power between the parties,' the authority of *Yerkey v Jones* should be considered as of continuing legal utility.[42] They adverted to Dixon J's distinction between those cases arising from the actual undue influence by a husband over a wife, and those where the inequity is limited to a

37 Note 25 at 598 (Sheller J); this echoes similar views expressed by Clarke J in *Akins*, n26.

38 Note 25 at 578–579 (Mahoney J).

39 Note 6 at 1269 (Callinan J).

40 I will refer to this judgment as the 'majority judgment'.

41 Note 6 at 1246; to the majority the findings of the other judges as to pressure and misrepresentation were 'almost precisely within the language used by Dixon J in *Yerkey*'. Callinan J also 'did not read the judgments of the other members of the court ... as dissenting from the views and statements of principle of Dixon J' at 1267, 1269.

42 Id at 1246: the majority clearly refer to 'women' not 'married women', and 'parties' not 'married partners'.

failure to explain the transaction 'adequately and accurately.'[43] The case at issue fell into the second category, and was 'not so much concerned with imbalances of power, as with lack of proper information about the purport and effect of the transaction.' Mrs Garcia was entitled to relief on the basis that, given the lack of benefit she had received from the transaction, she was a 'mistaken volunteer' who had entered into an improvident bargain.[44] Her lack of understanding attracted equity's special protection because the creditor, 'being taken to have appreciated ... the trust and confidence between surety and debtor,' failed to sufficiently explain the purport and effect of the transaction.[45] Whilst the majority held that Dixon J's 'particular applications of accepted equitable principles ... have as much application today as they did then,' they confined the rationale for these principles '... save to the extent that the case was concerned with actual undue influence,' to the particular vulnerability which arises from the trust and confidence between marriage partners.[46]

B. Undue Influence or Unconscionable Dealing?

The majority rejected the assertion that *Yerkey v Jones* had been overruled by, or subsumed into the broader principle enunciated in *Amadio*, or that *Amadio* was intended to mark out the boundaries of the field of unconscionability.[47] This assessment recognises the significant number of cases in which practical problems faced by surety wives have left them unable to illustrate a 'special disability' that is sufficiently evident to the creditor – thus frequently leaving relief under the *Yerkey* principle as the only judicial option.[48] The expansion of the doctrine of unconscionable dealings in the case at issue suggests that the court in this instance was implicitly addressing this situation. In light of the bank's awareness of the relationship of trust and confidence between the principal debtor and the surety, the majority recognised the disparity between the information available to the wife, and the information available to the lender as a 'special disability' giving rise to an inequality of bargaining power that made it unconscionable to enforce the

43 Id at 1247; Dixon J found it '... necessary to distinguish between, on the one hand, cases in which the wife, alive to the nature and effect of the obligation she is undertaking, is procured to become her husband's surety by the exertion by him upon her of undue influence, affirmatively established, and on the other hand, cases where she does not understand the effect of the document, or the nature of the transaction of suretyship': n2 at 684; for an opposing view see Fehlberg B, 'Women in Family Companies' (1997) 15 *Syd LR* 345 at 354, where it is argued that the principle expounded by Dixon J operates as one composite rule.

44 Note 6 at 1247, 1251.

45 Id at 1249.

46 Id at 1246–1247.

47 Id at 1249. In contrast to *Yerkey*, the unconscionable conduct considered in *Amadio* concerned actual misconduct which effected the entry of the surety into the transaction, compounded by the fact that the bank's employee 'had shut his eyes to the vulnerability of the respondents and the misconduct of their son, see *Amadio*, n11 at 467–8 (Mason J) and 477–479 (Deane J).

48 See Fehlberg B, 'The Husband, the Bank, the Wife and her Signature – the Sequel': (1996) 59 *Modern LR* 675; see *Warburton* n3 (Kirby J); see also Williams, n3 at 72–3, where it is suggested that many recent decisions in this area have been founded on an often unexpressed reluctance to apply *Yerkey*.

transaction.[49] This proposition is in line with recent comments of Sir Anthony Mason, (author of one of the most authoritative judgments in *Amadio*), that there is a considerable degree of overlap between undue influence and unconscionable conduct.[50]

C. *Principal Elements of Majority Decision:*

The principal elements of the decision of the majority are as follows:

- The surety did not understand the purport and effect of the transaction
- The transaction was voluntary – the wife made no gain
- The lender is taken to understand that (a) the wife may repose trust and confidence in her husband in business matters, and (b) the husband may not fully and accurately explain the purport of the transaction to his wife
- The lender did not itself take steps to explain the transaction to the wife, or to ensure that she received independent advice.

These will be considered in turn.

(i) Failure to Understand

Whilst this element of the majority judgment is essentially aimed at misrepresentations or legal wrongs, it also encompasses the notion that in many cases vulnerable sureties do not fit the classic liberal model of freely contracting individuals. Callinan J goes some way to acknowledging this fact in his assertion that women continue to require protection because changes in the 'enhancement of women's opportunities and relief from discrimination ... as extensive as they may be ... are perhaps more apparent than real.'[51] Clearly, many more women than in 1939 now participate actively in the public sphere – and thus adopt a legal persona in accordance with the law's perception of a freely contracting individual. The obvious result of this trend is that such women – whether married or not – will find it more difficult to satisfy a court that they have failed to understand the transaction, succumbed to pressure, or been misled.[52] These dealings take place in the public realm, and are conducted at a physical and emotional distance, based on presumptions that individuals secure their agreement through contract, not trust or affection.[53] Surety transactions do not fit this model. Although the law now treats

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49 Whilst it is a particular feature of equitable doctrines that they continue to develop within established principles so as to alleviate the rigidity of the common law, equitable relief requires more than mere unfairness: *Muschinski v Dodds* (1985) 160 CLR 583 (Deane J); see also O'Donovan J, 'The Retreat from *Yerkey v Jones*: From Status Back to Contract' (1996) 26 *UWLR* 309.

50 Sir Anthony Mason, 'The Impact of Equitable Doctrine on the Law of Contract'(1998) 27 *Anglo American LR* 1 at 9.

51 Note 6 at 1269 (Callinan J); Lord Browne-Wilkinson also recognised that in a substantial proportion of modern marriages, wives fail to bring a 'truly independent mind to bear on financial decisions' and thus remain subject to 'and yield to undue influence by their husbands': *O'Brien*, n4 at 188 at 190–191.

52 As a result, 'Very rarely will such findings as were made here, be open in the case of a wife with the qualifications, experience and other attributes possessed by this appellant': n6 at 1269–1270 (Callinan J); see also *Louth v Diprose:* n28.

53 Naffine, N, *Law and the Sexes: Exploration of Feminist Jurisprudence*, (1990), 23; see also Howell, n18 at 104–106.

women and men as equals – as equal legal subjects equally subject to the law – there has been little concomitant endeavour to rethink the defining characteristics of a legal subject beyond traditional culturally male notions.[54] Hence it is assumed that a surety is acting as a rational, autonomous and self-determining individual – despite the fact that the circumstances and behaviour effected by the parties in question frequently do not match the law's traditional conceptions.[55] Because the difficulties in accommodating the implications inherent in the very notion of emotional vulnerability continue to remain problematic, there may be two different realities in the circumstances surrounding guarantee transactions – two opposing understandings of an event which cannot be reconciled in a single version of the facts.[56]

(ii) The 'Benefit' Element

The majority found that Mrs Garcia was a 'mistaken volunteer' who had nothing to gain – whether directly or indirectly – from the transaction she guaranteed. They accepted the trial Judge's finding that despite Mrs Garcia's being a director and shareholder of Citizens Gold, she had no financial interest in the fortunes of the company, nor obtained any real benefit from entering the transaction. In the view of the court the company was solely a 'creature of Mr Garcia.'[57] This decision stands in contrast to lower court decisions where relief was denied to surety wives in similar positions on the basis of benefit received – especially where the transaction related to a company in which the wife held an interest.[58] This is an extremely contentious issue. Critics will argue that had Citizens Gold not become insolvent, there is a significant chance that Mrs Garcia would have benefited – even if only in respect of maintenance payments following the dissolution of her marriage. Thus she could not be considered a 'volunteer' in the true sense. Yet there is a valid argument which rejects the liberal assumption that either common law or contractual rights can be readily translated into practical benefits in such circumstances.[59] Many commentators will welcome this decision in its tacit

54 The various *Sex Discrimination Acts* make it illegal for women in Australian public life to be treated differently from men: see Australian Law Reform Commission, *Equality Before the Law: Women's Equality* ALRC 69, Part I, (1994), ss2.12 – 2.2.15.

55 Emotional dependence or vulnerability was recognised in *Louth v Diprose* as a 'special disability' which, when acted upon, may give rise to an unconscionable dealing: n28. However, it should be noted that the one judicial ruling on this principle was in relation to an emotionally vulnerable male – and one who was very much a legal 'insider'.

56 Davies and Joshi, 'Sex, Sharing and Distribution of Income' (1993) 23 *J of Social Policy* 301 at 310.

57 Note 6 at 1251.

58 See *Kurland,* n1 (Rogers J): see also *Carrington Confirmers Pty Ltd v Atkins* Unreported Supreme Court (NSW) 23 April 1991 where Giles J found against Mrs Atkins on the basis that the guarantees she had signed were in respect of a business from which the family income which she enjoyed was derived; and *Commonwealth Bank of Australia v Cohen,* n35, where Cole J refused to apply *Yerkey* because a guarantee given by a surety wife did not operate 'primarily' for her husband's advantage, in that it enabled the company to continue to provide support for the woman and her children. For an astute analysis of the complexities of this problem see Chin NY, 'Undue Influence and Third Parties' (1992) 5 *J of Corporate Law* 108 at 115.

59 Empirical research has found that a similar view is also reflected in the self-perceptions of many women who act as sureties: Fehlberg, n48 at 678.

acknowledgment that, all too frequently, any benefit accruing to the guarantor is likely to be conditional on continuing good relations with the debtor, and subject to his/her largesse as the practical controller of the business.[60]

(iii) 'Trust and Confidence'

The majority left open the possibility that the vulnerability arising from the trust and confidence between marriage partners may apply equally to 'other relationships more common now than in 1939' – including where a husband acts as surety for a wife.[61] With respect, the inconsistency of this position with the historical basis of Dixon J's 'special equity' affirms the flawed foundation of that principle in law. If, as Dixon J contended, the law's special tenderness for surety wives finds its authority in the equitable protection of married women's property prior to the passing of the *Married Women's Property Acts*[62] – doctrines which were 'strengthened, rather than diminished by the passing of these Acts'[63] – then there would be no question that application of the relevant principles could ever extend beyond married women. On analogy with the decision of the court in *Calverly v Green,*[64] the 'express commitment contained in the marriage relationship' brings with it a certain presumption from the outset which cannot be extended to other relationships. In that case, Mason and Brennan JJ found that the 'presumption of advancement' [65] had no application in a de facto relationship, which was an association 'devoid of the legal character which arises from marriage'.[66] *Calverly v Green* provides further authority for the proposition that if the law recognises a 'special tenderness' towards women who act as surety for the debts of their husbands, it owes little to the institution of marriage.

Such was the finding of the House of Lords in the recent English case of *Barclays Bank v O'Brien.* In that instance Lord Browne Wilkinson considered the equitable principles at issue as based on the 'underlying risk of one cohabitee exploiting the emotional involvement and trust of the other.' Furthermore, this proposition applied equally to all cohabitees, whether of the same, or different sex.[67] With the court in *Garcia* appearing to have endorsed this principle (at least in theory), problems must surely arise for a lender, in determining whether the transaction at issue involves a relationship of trust and confidence which is open

60 Collier, n29 at 192–95.

61 Note 6 at 1246; Dixon J's 'special equity' has been historically accepted as resting on the subordinate status of married women in business dealings, which leaves them particularly vulnerable. Although the English Court of Appeal extended its protection in a case where a son had procured a charge on his parent's property in *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, this was viewed as a necessary means of allocating risk to creditors where (unlike Australia) no protection under the doctrine of unconscionability was available.

62 See n36.

63 Note 2 (Dixon J).

64 (1984) 155 CLR 242.

65 Where a man purchases a property in the name of his wife, it is a rebuttable presumption of law that the man has made a gift of the property for the advancement of the wife: Evans M, *Outline of Equity and Trusts* (3rd ed, 1996) at 306.

66 This presumption does not extend to property purchased by the wife in the husband's name: n64 at 268–9 (Deane J).

67 In the view of the House, in the absence of undue influence, the validity of guarantees given by surety wives was largely governed by the doctrines of notice and advantage: n4 at 196.

to exploitation – especially where the association is not 'publicly declared'.[68] In the interests of fairness, surely all guarantee transactions must be made subject to the same rigorous standards, in terms of explanations and advice.

(iv) 'Explanations'

Again, there are two opposing arguments. Several commentators argue convincingly that formal processes of explanation and advice may be more likely to protect creditors than female sureties.[69] Studies conducted in both England and Australia citing several recent cases have shown that it will not always be possible to overcome barriers which arise where a person with little business experience, whether male or female, feels, or is made to feel uncomfortable about taking time to read the documentation provided, or about asking questions about terms not clearly understood.[70] With research suggesting that even articulate intelligent women view themselves as having a passive role in family business negotiations, (despite actively participating in the daily running of these businesses), the potential for injustice is significant.[71] Notwithstanding the High Court's support for Mrs Garcia, the risk remains that formal processes of explanation may act only to heighten a vulnerable surety's sense of 'informed powerlessness.' This situation takes on an added dimension when one considers the recent observation of Sir Anthony Mason, that post *O'Brien* cases suggest that informing the surety of the need for independent advice may be sufficient to relieve the creditor of responsibility, even if the advice is ignored.[72] On the other hand, as Professor Cretney points out, making explanations compulsory could encourage borrowers to seek an escape from their obligations simply by questioning the adequacy of the explanation given.[73] In the case at issue, Mrs Garcia was relieved from liability because she did not understand the nature and purport of the guarantee *in fact* – thus setting a subjective standard that suggests a lender could never be sure that any explanation, no matter how comprehensive, was adequate.[74] Whilst provision of independent advice would provide greater security for all parties concerned, cost factors could well be prohibitive – especially when the disproportionate liability of the adviser is taken into account.

In summary, the effect of the majority judgment is to widen the basis of relief in those cases where a surety can be considered in terms of a mistaken volunteer, yet it offers no resolution to the problems faced by guarantors where the bank does ensure adequate explanation and/or advice is given, and the surety signs as a result

68 Note 6 at 1246.

69 Fehlberg, n48 at 682–685; see also Howell, n18 at 93–97, who argues convincingly that credit providers use female sureties as 'insurance policies.'

70 See *Lloyds Bank plc v Wright Bailey* Unreported, CA, Russell, Hirst and Rose LJJ, 3 May 1995, where it is reported that Mrs Wright-Bailey gave evidence at trial that she was castigated by the bank's solicitor for wasting time wanting to 'read all this lot' prior to signing – cited in Fehlberg, n48 at 684.

71 Fehlberg, n43 at 348–349 and 359–362.

72 Mason, n50 at 15.

73 Cretney, n3 at 538.

74 Note 6 at 1249.

of the undue influence of the principal debtor, which, given current evidential requirements, is difficult to show.[75] The judgment of Kirby J goes some way in addressing this deficiency.

7. *Judgment of Kirby J*

A. *Rejection of Yerkey v Jones*

Whilst agreeing with the orders made, Kirby J repeated his earlier condemnation of the *Yerkey* principle, on the basis that a rule which placed a wife in an 'advantageous position that she would not have enjoyed had she not been married to the principal debtor,'[76] was anachronistic. Seeking to derive the precise rule that was binding on the court, he then undertook an analysis of the separate judgments in *Yerkey v Jones*, and found that only the judgment of Latham CJ offered support for Dixon J's 'special equity' – and only where a lender had depended upon the wife's signature being obtained 'through the *agency* of the husband.' [77] Kirby J concluded from this analysis that the other judges neither expressly or by implication, agreed with the 'opinion' of Dixon J that the law had adopted a universal presumption to the effect that married women were entitled to legal protection not available to other classes of applicants.[78]

Subsequently, since 'rules governing binding precedent must be 'majoritarian and precise,' Dixon J's 'judicial statement', although 'worthy of the greatest respect', did not represent the rule of the majority, and thus did not command obedience as binding legal precedent.[79] Kirby J found that as a matter of authority, the court was not bound to apply the 'precedential strait-jacket' of *Yerkey v Jones*, and as a matter of legal principle, it should not do so.[80] He supported this stance in reference to judicial criticism of the *Yerkey* principle in other Australian decisions,[81] and in those of courts overseas.[82] Changes relevant to women, married women, and domestic relationships more generally, demanded that the courts cease classifying unnecessarily by gender, when more accurate and impartial principles could be stated.[83] Drawing on the reasoning of the House of

75 See *O'Brien*, n4 (Scott J).

76 Note 6 at 1257; see also judgment of Kirby J in *Warburton*, n3.

77 Note 2 at 664 (Latham J) (my emphasis).

78 Note 6 at 1254–5.

79 Id at 1255, 1256.

80 Id at 1255, 1261. Kirby J affirmed his earlier criticisms of *Yerkey* in *Warburton*, and adverted to various recent decisions where the High Court, in rejecting the 'unnecessary compartmentalisation of equitable principle', had departed from established precedent; see *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387 at 404, 420; *Foran v Wight* (1989) 168 CLR 385 at 435; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 410–411; see also Williams, n3 at 80.

81 *ANZ Banking Group v Dunosa Pty Ltd* [1995] ANZ ConvR 86; *Teachers Health Investments P/L v Wynne* [1995] ANZ ConvR 74 at 80; *Peters v Commonwealth Bank of Australia*, n35; *Geelong Building Society (in liq) v Thomas* [1996] *Aust Contract* R 90–068.

82 *E & R Distributors v Atlas Drywall Ltd*, n33.

83 Note 6 ay 1255–9; See also *Miller v Albright* (1998) 66 USLW 4266 (Ginsburg J).

Lords in *O'Brien* Kirby J then took this opportunity to restate the law in a 'principled and certain form.'

B. Re-stated Principle for Vulnerable Sureties

Notwithstanding special exceptional circumstances or where the risks are large, a lender will be on constructive notice of a surety's right to set aside a transaction procured by the undue influence, misrepresentation or legal wrong of the principal debtor, if it knows, or ought to know, that the surety and the debtor are in a relationship of emotional dependence, and the lender has not taken reasonable steps to warn the surety of the extent of the potential liability and risks involved to the surety's interests, and advises the surety, (at a meeting not attended by the principal debtor), to take independent legal advice.[84] Many of the elements of this test mirror those identified by the majority which were outlined above. Both tests place a similar onus on the lender to make itself aware of the relationship of emotional dependence – but neither offers any guidelines as to how this should be achieved. The transaction is not to be set aside because of any unconscionable behaviour by the creditor, but because the creditor, the party who seeks to benefit from the transaction, is taken to have actual or constructive knowledge of what has occurred, or is presumed to have occurred, between the principal debtor and the surety.

The common theme in all of these judgments is the limitation of existing legal mechanisms in dealing with the particular problems which arise in surety transactions. Empirical research indicates that the blurring of domestic and business boundaries which characterise surety transactions means that it is far from easy for courts to distinguish the subtle pressure and misleading behaviour which are likely to occur as a 'legal wrong.'[85] For example in *O'Brien*, Scott LJ did not consider the emotional scenes and insistence that Mrs O'Brien sign the guarantee as amounting to undue influence on the part of her husband, 'in the context of the normal husband and wife relationship and bearing in mind Mrs O'Brien's character and capabilities.'[86] This finding illustrates the difficulty of the courts, as outsiders to the contractual relationship, to decide whether particular conduct invalidates a transaction. As Dr Fehlberg has shown, sureties will not always be able to recount overt pressure or deception, simply because this pressure often lies in having to live with the consequences of denying a partner's request.[87] Tests which focus on commercial self interest and equality of bargaining power, and are based on assumptions of commonality of interests, can easily conceal and excuse more subtle relationship pressures and power imbalances that are highly relevant to why sureties place themselves in these positions in the first place, when it appears that they have little to gain and much to lose.

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84 Note 6 at 1262–3 (Kirby J).

85 See Sing S, *For Love or Money: Women, Information and the Family Business* (1995).

86 Note 4 (Scott LJ).

87 See Fehlberg, n43.

8. *Policy Issues*

There is little doubt that despite many well recognised limitations, surety transactions continue to be of considerable social utility. Guarantees by loved ones are the major source of funding for small business – and as such are a 'social good' which must be protected. In light of this reality, a policy objective of commercial certainty for lenders in family business dealings demands that securities be enforceable in order for creditors to transact in the first place.[88] With respect, the judgment of the High Court in *Garcia* fails to recognise that protection for those who stand to lose out in these transactions – ie, the surety and the lender – cannot be assured unless fundamental social assumptions, and the banking practices supported by those assumptions, move to accommodate the often hidden difficulties actually faced by vulnerable guarantors.[89] The common theme running through cases in this area is the need to increase consumer awareness of the nature and effect of surety transactions.[90] A range of possibilities may be considered to this effect: specific statutory provisions similar to those currently applicable to consumer credit contracts;[91] making the debtor's loan application and creditor's offer available to the guarantor; and even a mechanism by which the guarantor's liability is reviewed, or even terminated, on separation or divorce.[92] Other commercial safeguards such as a cooling off period, plain English drafting, and/or stand alone summaries of contracts, and provision of debtor's statements and accounts to the surety for the duration of the security could also be viable options.[93] Such mechanisms would have protected Mrs Garcia. The account secured by her guarantee was not in overdraft until some time after the couple had separated.[94] A contractual clause requiring credit providers to disclose all relevant information – including the extent of the principal debtor's current indebtedness – to a potential guarantor, (and amendments to the *Privacy Act*[95] to this effect), could not only assist the surety, but also create a further impetus to the lender to comprehensively assess the ability of the borrower to service the loan. The added transaction costs of such measures would be more than compensated by the potential benefits to the vulnerable parties.

9. *Conclusion*

The decision in *Garcia* is useful in several areas. Firstly, it provides High Court endorsement for the long accepted proposition that vulnerable sureties – and not just surety wives – frequently enter into transactions solely because of the

88 Note 6 at 1268–69 (Callinan J).

89 Ideally, the challenge for both the courts and the legislature is to set creditor obligations at a level that minimises both compliance costs for the parties involved, and the costs of contract failure: see Fehlberg n48 at 693–94, and Duggan, n23 at 222.

90 See Trade Practices Commission, *Guarantors: Problems and Perspectives Discussion Paper* (1992) at 14.

91 *Consumer Credit Code* (1984) s70(2).

92 Howell, n18 at 102–3.

93 Consumer Credit Legal Service, *Draft Submission to the Trade Practices Commission Review of Guarantees* (Victoria, 1992) at 5 and 18; see also Fehlberg, n48 at 694.

94 Note 8 at 12011 (Young J).

95 *Privacy Act* 1998 (Cth).

existence of a personal relationship, and with little appreciation of the legal relationship created. Taken in concert with the apparent inconsistency of the majority's broadening of the application of the rule in *Yerkey* with the historical foundation of that rule, one is left with the undeniable conclusion that, despite the endorsement of five out of the six justices of the High Court, the death knell for Dixon J's 'special equity' is imminent. There will of course be those who find a general rule inadequate in such circumstances – simply because the potential for injustice is so great.[96] Leaving aside the obvious limitations of Dixon J's 'special equity', its practical effect has been to provide a legal mechanism to accommodate the range of particular pressures which arise when a specific domestic relationship takes on a commercial character.[97] Rules of general application are not sensitive to such pressures. The strength of *Yerkey* is that it is able to accommodate a blurring of commercial and personal realities, by lessening a surety's burden of proving actual undue influence or unconscionable dealing. Its most cogent weakness is that it discriminates in favour of just one class of surety.[98]

In *Garcia*, the High Court has gone some way to addressing such deficiencies. The majority found a presumption of undue influence arising from, (but not limited to) the relationship of marriage, which leads to a risk that the surety will receive inadequate explanation – either intentional or otherwise. This makes the transaction unconscionable to enforce. All judgments use the language of undue influence in requiring a relationship of trust and confidence, but bring the transaction into the circumstances of an unconscionable dealing, by looking to the quality of the assent of the stronger party.[99] Whilst there is no clear recognition of the 'special disability'' as that notion has been understood since *Amadio*, the same consequences flow – allowing equity to intervene. Presumptions of undue influence and unconscionable dealings may be rebutted by factors such as the provision of independent advice, adequate explanation, or the lack of benefit resulting to the surety.[100] At the discretion of the court, the critical factor is to be the diligence of the credit provider – which may act simply to redirect the effect of the inequity that 'shocks the conscience' from one vulnerable party to the other.

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96 See Gilligan C, *In a Different Voice: Women's Conceptions of Self and of Morality* (1982); Feminist commentators argue for a rule of special application on the basis that women's childbearing role and consequent economic dependence on bread-winning males continues to compound the socialisation pressures placed on women to the detriment of their individual self interest: see also Fehlberg, n43 at 356.

97 See Fineman M, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991); and Fehlberg, n43 at 356–8.

98 See O'Donovan, n49.

99 This seems to follow the ruling of the court in *Louth v Diprose* (1992) 175 CLR 621, where Brennan J watered down the distinction between undue influence and an unconscionable dealing in those transactions where a relationship of trust and confidence exists and the gift is substantial: n28.

100 There is no requirement in Australian law (as exists in England) that the transaction must be to the 'manifest disadvantage' of the surety in order to be set aside: see *O'Brien*, n4.

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