

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

JEAN BALHARRY GARCIA

APPELLANT

AND

NATIONAL AUSTRALIA BANK LIMITED

RESPONDENT

Garcia v National Australia Bank Limited (S18/1997) [1998] HCA 48
6 August 1998

ORDER

1. *Appeal allowed with costs.*
2. *Set aside paragraphs 1 to 8 of the orders made on 3 July 1996 by the Court of Appeal of New South Wales and in lieu thereof dismiss the appeal to that Court with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

D F Jackson QC with L J W Aitken for the appellant (instructed by Minter Ellison)

B C Oslington QC with D L Williams for the respondent (instructed by Dibbs Crowther & Osborne)

Amicus Curiae:

D M J Bennett QC with J Stoljar amicus curiae on behalf of the Consumer Credit Legal Centre (NSW) Incorporated (instructed by J Hutchinson, Principal Solicitor, Consumer Credit Legal Centre (NSW) Inc.)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Garcia v National Australia Bank Limited

Equity – Wife guaranteed debts of husband's company as a volunteer – Wife did not fully understand effect of guarantees – Whether guarantees liable to be set aside – Bank did not explain document to wife – Bank not on notice of unconscionable dealing between husband and wife – Principle in *Yerkey v Jones* explained.

Precedent – Binding effect of previous decisions of High Court – Ascertainment of binding rule.

Yerkey v Jones (1939) 63 CLR 649, explained and followed.

Barclays Bank Plc v O'Brien [1994] 1 AC 180, not followed.

1 GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. In August 1979, the appellant and her then husband, Fabio Garcia, executed a mortgage over their home in favour of the Commercial Banking Company of Sydney Ltd (a bank with which the respondent later merged and to the rights of which the respondent succeeded). The mortgage secured all moneys which the mortgagors might owe the mortgagee, including moneys owing under future guarantees given by either of them to the mortgagee. It was given to secure a loan of \$5,000 made to the husband for use in his business and was later used as security for a personal loan made to the appellant and her husband.

2 The appellant's husband conducted a number of businesses of which we need to refer only to one - a business of buying and selling gold conducted through a company called Citizens Gold Bullion Exchange Pty Ltd ("Citizens Gold").

3 Between 1985 and 1987 the appellant signed four guarantees in favour of the respondent. Three of the guarantees guaranteed repayment to the bank of debts owed by Citizens Gold; the fourth guaranteed debts owed by another company but the details of that transaction do not now matter. Of the three guarantees which related to debts of Citizens Gold, one dated 25 November 1987 was limited to \$270,000 plus interest, costs and charges. It is convenient to refer to this guarantee as the November 1987 guarantee.

4 On 1 September 1988, the appellant and her husband separated. The appellant told the bank of this and asked that "the bank account" (presumably of Citizens Gold) be kept within limits. After this, the balance of the Citizens Gold account fluctuated: in December 1988 and January 1989 it was in credit but by May 1989 it was again in debit. On 13 October 1989, an order was made for the winding up of Citizens Gold. On 30 November 1989, the appellant obtained a decree nisi for dissolution of her marriage; that decree became absolute on 1 January 1990.

5 In June 1990, the appellant commenced proceedings in the Supreme Court of New South Wales seeking declarations that the mortgage which we have mentioned and the guarantees she had given of the indebtedness of Citizens Gold are of no force or effect and are void. In August 1990, the respondent demanded payment under the November 1987 guarantee and under the mortgage of amounts owing to it by Citizens Gold. It then made a cross-claim in the proceedings commenced by the appellant to claim possession of the mortgaged property and the sum which it had demanded (together with interest). No demand was made under the other guarantees.

6 The trial judge, Young J, granted the declaration that none of the guarantees which the appellant had given bound her. A further declaration was made that

there were no moneys owing by the appellant to the respondent under the mortgage in respect of that interest which the appellant had in the mortgage property immediately prior to the making of an order in the Family Court of Australia. The Family Court had ordered that, subject to the mortgage in favour of the respondent, the appellant's husband transfer to her his interest in that property.

7 He found that although the appellant was a director of Citizens Gold and was recorded as being a shareholder of the company he was not satisfied, on the whole of the evidence, that the companies were "anything more than Mr Garcia's creation and that he was in complete control of them" and he accepted the appellant's evidence that she was not directly involved in Citizens Gold (or the other companies associated with her husband).

8 The trial judge found that the appellant signed the November 1987 guarantee following requests by her husband to do so in order that (as he told her) he might deal in larger amounts of gold than he had been. There was, so the appellant's husband told her, no danger because "if the money isn't there the gold is there". The appellant agreed to sign the guarantee and she did this at a different branch of the bank from the branch at which Citizens Gold conducted its account.

9 Although the bank officer who witnessed the appellant's signing of the November 1987 guarantee gave evidence that she would have explained the provisions of the guarantee to the appellant, the appellant gave a different account. She described signing the document, at the places to which the bank officer pointed, in a process which took less than a minute and included no explanation of the transaction. The trial judge accepted the appellant's account in preference to the evidence of the bank officer.

10 From 1975 to 1979 the appellant worked part-time as a physiotherapist; in 1979 she set up practice as a physiotherapist at Hornsby on her own account and was still conducting that practice at the time of the trial. In the words of the trial judge she "presented herself [at trial] as a capable and presentable professional". He found that she understood at the time she signed the November 1987 guarantee that she was executing a guarantee and that she believed it was a guarantee of Citizens Gold's overdraft. He also found, however, that she did not understand that the guarantee was secured by the all moneys mortgage which she had signed in 1979 and that she signed the guarantee thinking that it was quite safe to do so or was "risk proof" because there would either be money there or gold.

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- 11 The trial judge granted relief to the appellant on the basis of the principles referred to in *Yerkey v Jones*¹. He held that the appellant's alternative case founded on *Commercial Bank of Australia Ltd v Amadio*² was not made out. He found that, even if the behaviour of the appellant's husband towards her in relation to the execution of the November 1987 guarantee had been unconscionable, the respondent had no notice of that unconscionability when "an intelligent articulate lady with a professional position called at the bank, appeared to be voluntarily signing a guarantee in respect of an account of which she was a director of the company concerned, and there was nothing to give the bank even suspicion ... [T]here was nothing to show that the disability of the plaintiff was sufficiently evidenced to the bank to make it unconscientious that it accept the plaintiff's assent to the impugned transaction."³
- 12 Although the appellant had pleaded a case of actual undue influence by her husband, the trial judge made no positive finding that the appellant's execution of the November 1987 guarantee had been procured by actual undue influence. He did find that "the husband pressured the wife to sign the document" and that "[s]he appeared to have done so because her husband consistently pointed out what a fool she was in commercial matters whereas he was an expert, and because she was trying to save her marriage"⁴. But it was not contended (whether in the Court of Appeal or in this Court) that this was a positive finding of actual undue influence by the husband such that the appellant's execution of the guarantee was not the exercise of her "independent and voluntary" will because it was overborne⁵.
- 13 The trial judge rejected an alternative case which the appellant put forward under the *Contracts Review Act* 1980 (NSW).
- 14 The respondent appealed to the Court of Appeal and the appellant cross-appealed. The appeal was allowed; the cross-appeal was dismissed.

1 (1939) 63 CLR 649.

2 (1983) 151 CLR 447.

3 *Garcia v National Australia Bank Ltd* (1993) 5 BPR 11,996 at 12,012.

4 (1993) 5 BPR 11,996 at 12,009.

5 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461 per Mason J; cf *Johnson v Buttress* (1936) 56 CLR 113 at 134 per Dixon J.

15 Sheller JA, who gave the leading judgment in the Court of Appeal, considered the decision of the House of Lords in *Barclays Bank Plc v O'Brien*⁶ and, in several respects, found difficulty in accepting the reasoning therein⁷. The New Zealand Court of Appeal has said that "the jurisprudential basis of *O'Brien* remains uncertain"⁸. After referring to the English authorities decided after *O'Brien*, Sir Anthony Mason has observed that "[t]he plethora of cases may suggest that all is not well with the *O'Brien* principle"⁹. It is unnecessary for us to enter upon the matter, beyond noting that in *O'Brien* the House of Lords discounted¹⁰ what it understood was the "special equity theory" supported by Dixon J in *Yerkey v Jones*.

16 The Court of Appeal held¹¹ that it was not bound to follow *Yerkey v Jones*. Sheller JA concluded that what had been said to be the principle in *Yerkey v Jones* is "a principle to which one judge only adhered"¹², namely Dixon J, and "at its heart ... is based upon general assumptions about the capacity of married women rather than upon evidence of the circumstances of the particular case"¹³. He identified in some recent cases¹⁴ an expression of "doubts about a principle founded on the assumption that a married woman is ipso facto under a special disadvantage in any transaction involving her husband and that the husband is in

6 [1994] 1 AC 180.

7 (1996) 39 NSWLR 577 at 594-597.

8 *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674 at 689.

9 Mason, "The Impact of Equitable Doctrine on the Law of Contract", (1998) 27 *Anglo-American Law Review* 1 at 15.

10 [1994] 1 AC 180 at 194-195.

11 (1996) 39 NSWLR 577 at 598 per Sheller JA (with whom Meagher JA agreed).

12 (1996) 39 NSWLR 577 at 598.

13 (1996) 39 NSWLR 577 at 598.

14 *European Asian of Australia Ltd v Kurland* (1985) 8 NSWLR 192 at 200 per Rogers J; *Warburton v Whiteley* (1989) 5 BPR 11,628 at 11,629-11,630 per Kirby P; cf *Akins v National Australia Bank* (1994) 34 NSWLR 155; *Teachers Health Investments Pty Ltd v Wynne* (1994) 6 BPR 13,499.

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this context the stronger party."¹⁵ Accordingly, Sheller JA concluded that "the so-called principle in *Yerkey v Jones* should no longer be applied in New South Wales."¹⁶

17 We consider the better view to be that the reasons for decision of Dixon J in *Yerkey v Jones* were not significantly different from the reasons of the other members of the Court. It should be emphasised that it is for this Court alone to determine whether one of its previous decisions is to be departed from or overruled¹⁷.

18 However, we do not base our decision upon some confined analysis of the case intended to identify its ratio decidendi. Rather, we consider that the principles spoken of by Dixon J in *Yerkey v Jones* are simply particular applications of accepted equitable principles which have as much application today as they did then.

19 *Yerkey v Jones* was said, in argument, to reflect outdated views of society generally and the role of women in society in particular. It was submitted that changes in Australian society since 1939, when *Yerkey v Jones* was decided, require that equitable rules move on to meet these changed circumstances.

20 That Australian society, and particularly the role of women in that society, has changed in the last six decades is undoubted. But some things are unchanged. There is still a significant number of women in Australia in relationships which are, for many and varied reasons, marked by disparities of economic and other power between the parties. However, the rationale of *Yerkey v Jones* is not to be found in notions based on the subservience or inferior economic position of women. Nor is it based on their vulnerability to exploitation because of their emotional involvement¹⁸, save to the extent that the case was concerned with actual undue influence.

15 (1996) 39 NSWLR 577 at 593.

16 (1996) 39 NSWLR 577 at 598.

17 cf *Jacob v Utah Construction and Engineering Pty Ltd* (1966) 116 CLR 200 at 207 per Barwick CJ.

18 *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 at 198 per Lord Browne-Wilkinson; cf *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674 at 689.

- 21 So far as *Yerkey v Jones* proceeded on the basis of the earlier decision of Cussen J in *The Bank of Victoria Ltd v Mueller*¹⁹, it is based on trust and confidence, in the ordinary sense of those words, between marriage partners. The marriage relationship is such that one, often the woman, may well leave many, perhaps all, business judgments to the other spouse. In that kind of relationship, business decisions may be made with little consultation between the parties and with only the most abbreviated explanation of their purport or effect. Sometimes, with not the slightest hint of bad faith, the explanation of a particular transaction given by one to the other will be imperfect and incomplete, if not simply wrong. That that is so is not always attributable to intended deception, to any imbalance of power between the parties, or, even, the vulnerability of one to exploitation because of emotional involvement. It is, at its core, often a reflection of no more or less than the trust and confidence each has in the other.
- 22 It may be that the principles applied in *Yerkey v Jones* will find application to other relationships more common now than was the case in 1939 - to long term and publicly declared relationships short of marriage between members of the same or of opposite sex - but that is not a question that falls for decision in this case. It may be that those principles will find application where the husband acts as surety for the wife but again that is not a problem that falls for decision here. This case concerns a husband and wife and it is to that relationship that the present decision relates, just as it is concerned only with the circumstance of the wife acting as surety for her husband. The resolution of questions arising in the context of other relationships may well require consideration of other issues. Thus to take one example, if cohabitation is taken as a criterion, what should a lender know or seek to find out about the nature of the relationship between the parties? But those issues did not arise and were not debated on the hearing of this appeal.
- 23 In his reasons for decision in *Yerkey v Jones*, Dixon J dealt with at least two kinds of circumstances: the first in which there is actual undue influence by a husband over a wife and the second, that dealt with in *Mueller*, in which there is no undue influence but there is a failure to explain adequately and accurately the suretyship transaction which the husband seeks to have the wife enter for the immediate economic benefit not of the wife but of the husband, or the circumstances in which her liability may arise²⁰. The former kind of case is one

19 [1925] VLR 642.

20 Dixon J also said that it is not clear how far the principle with respect to undue influence "is to be applied to a case where the wife is induced to become surety by the husband making some fraudulent or even innocent misrepresentation of fact which, though material, does not go to the nature and effect of the instrument or (Footnote continues on next page)

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concerning what today is seen as an imbalance of power. In point of legal principle, however, it is actual undue influence in that the wife, lacking economic or other power, is overborne by her husband and goes surety for her husband's debts when she does not bring a free mind and will to that decision²¹. The latter case is not so much concerned with imbalances of power as with lack of proper information about the purport and effect of the transaction. The present appeal concerns circumstances of the latter kind rather than the former.

24 In *Yerkey v Jones* Dixon J said²²:

"But it is clearly necessary to distinguish between, on the one hand, cases in which a 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. In the former case the fact that the creditor, on the occasion, for example, of the actual execution of the instrument, deals directly with the wife and explains the effect of the document to her will not protect him. Nothing but independent advice or relief from the ascendancy of her husband over her judgment and will would suffice. If the creditor has left it to the husband to obtain his wife's consent to become surety and no more is done independently of the husband than to ascertain that she understands what she is doing, then, if it turns out that she is in fact acting under the undue influence of her husband, it seems that the transaction will be voidable at her instance as against the creditor."

transaction": (1939) 63 CLR 649 at 684. We leave aside that possible third category of case.

21 See, eg, Howell, "Sexually Transmitted Debt: A Feminist Analysis of Laws Regulating Guarantors and Co-borrowers", (1994) 4 *Australian Feminist Law Journal* 93; Fehlberg, "The Husband, the Bank, the Wife and Her Signature - the Sequel", (1996) 59 *Modern Law Review* 675; Fehlberg, "Women in 'Family' Companies: English and Australian Experiences", (1997) 15 *Company and Securities Law Journal* 348.

22 (1939) 63 CLR 649 at 684.

Of the second of the two cases that we have referred to earlier, Dixon J said²³:

"In the second case, that where the wife agrees to become surety at the instance of her husband though she does not understand the effect of the document or the nature of the transaction, her failure to do so may be the result of the husband's actually misleading her, but in any case it could hardly occur without some impropriety on his part even if that impropriety consisted only in his neglect to inform her of the exact nature of that to which she is willing blindly, ignorantly or mistakenly to assent. But, where the substantial or only ground for impeaching the instrument is misunderstanding or want of understanding of its contents or effect, the amount of reliance placed by the creditor upon the husband for the purpose of informing his wife of what she was about must be of great importance.

If the creditor takes adequate steps to inform her and reasonably supposes that she has an adequate comprehension of the obligations she is undertaking and an understanding of the effect of the transaction, the fact that she has failed to grasp some material part of the document, or, indeed, the significance of what she is doing, cannot, I think, in itself give her an equity to set it aside, notwithstanding that at an earlier stage the creditor relied upon her husband to obtain her consent to enter into the obligation of surety. The creditor may have done enough by superintending himself the execution of the document and by attempting to assure himself by means of questions or explanation that she knows to what she is committing herself. The sufficiency of this must depend on circumstances, as, for example, the ramifications and complexities of the transaction, the amount of deception practised by the husband upon his wife and the intelligence and business understanding of the woman. But, if the wife has been in receipt of the advice of a stranger whom the creditor believes on reasonable grounds to be competent, independent and disinterested, then the circumstances would need to be very exceptional before the creditor could be held bound by any equity which otherwise might arise from the husband's conduct and his wife's actual failure to understand the transaction: Cf per *Cussen J*²⁴. If undue influence in the full sense is not made out but the elements of pressure, surprise, misrepresentation or some or one of them combine with or cause a misunderstanding or failure to understand the document or transaction, the final question must be whether the grounds upon which the creditor believed that the document was fairly obtained and executed by a woman sufficiently

23 (1939) 63 CLR 649 at 685-686.

24 *The Bank of Victoria Ltd v Mueller* [1925] VLR 642 at 649.

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understanding its purport and effect were such that it would be inequitable to fix the creditor with the consequences of the husband's improper or unfair dealing with his wife."

25 Thus, Dixon J was dealing with two kinds of case. In the former, the case of actual undue influence, as Dixon J says, explaining the effect of the document to the surety will not protect the creditor and "[n]othing but independent advice or relief from the ascendancy of her husband over her judgment and will would suffice"²⁵. In the latter, "[i]f the creditor takes adequate steps to inform [the wife] and reasonably supposes that she has an adequate comprehension of the obligations she is undertaking and an understanding of the effect of the transaction, the fact that she has failed to grasp some material part of the document, or, indeed, the significance of what she is doing"²⁶ cannot give her an equity to set the instrument aside.

26 The term "unconscionable" does not appear in any of the judgments in *Yerkey v Jones*. In *The Commonwealth v Verwayen*²⁷, Deane J said:

"I prefer the word 'unconscientious' to 'unconscionable' in this and other areas where equity has traditionally intervened to vindicate the requirements of good conscience. In deference to the generally accepted usage of 'unconscionable' and 'unconscionability' in this area by judges and writers however, I have thought it preferable to use those words in this judgment."

25 (1939) 63 CLR 649 at 684; cf *Bank of New South Wales v Rogers* (1941) 65 CLR 42.

26 (1939) 63 CLR 649 at 685.

27 (1990) 170 CLR 394 at 446.

In *Amadio*²⁸, Mason J said:

"Historically, courts have exercised jurisdiction to set aside contracts and other dealings on a variety of equitable grounds. They include fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience. But relief on the ground of 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage ... Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position."

27 It was submitted that *Yerkey v Jones* has been overruled by *Amadio* or that the principles applied in *Yerkey v Jones* had been subsumed in principles applied in *Amadio*.

28 There are several answers to this contention. First, there is nothing in *Amadio* that suggests that it was intended to overrule *Yerkey v Jones* or to subsume the rules applied there in some broader principle enunciated in *Amadio*.

29 Secondly, far from anything said in *Amadio* suggesting that it was intended to mark out the boundaries of the whole field of unconscionable conduct, as Mason J said²⁹:

"It goes almost without saying that it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionable conduct."

28 (1983) 151 CLR 447 at 461; see also Deane J at 474.

29 (1983) 151 CLR 447 at 461.

30 Thirdly, *Amadio* was a case of unconscionable conduct very different from the cases considered in *Yerkey v Jones*. In *Amadio* there was actual misconduct on the part of the son of the respondents which affected their entry into the mortgage and guarantee and the bank was on notice of that misconduct. There was no allegation of undue influence by the son with notice on the part of the bank (a situation corresponding to that in *Bank of New South Wales v Rogers*³⁰), nor was the alleged case of undue influence on the part of the bank made out. What Mason J identified as "[t]he critical issue" was whether the plaintiffs were entitled to relief on the ground of unconscionable conduct³¹. The transaction was not enforced against the respondents because it would have been unconscionable for the bank to do so. And it was unconscionable for the bank to enforce it because the bank's employee had shut his eyes to the vulnerability of the respondents and the misconduct of their son³².

31 The principles applied in *Yerkey v Jones* do not depend upon the creditor having, at the time the guarantee is taken, notice of some unconscionable dealing between the husband as borrower and the wife as surety. *Yerkey v Jones* begins with the recognition that the surety is a volunteer: a person who obtained no financial benefit from the transaction, performance of the obligations of which she agreed to guarantee. It holds, in what we have called the first kind of case, that to enforce that voluntary transaction against her when in fact she did not bring a free will to its execution would be unconscionable. It holds further, in the second kind of case, that to enforce it against her if it later emerges that she did not understand the purport and effect of the transaction of suretyship would be unconscionable (even though she is a willing party to it) if the lender took no steps itself to explain its purport and effect to her or did not reasonably believe that its purport and effect had been explained to her by a competent, independent and disinterested stranger. And what makes it unconscionable to enforce it in the second kind of case is the combination of circumstances that:

- (a) in fact the surety did not understand the purport and effect of the transaction;
- (b) the transaction was voluntary (in the sense that the surety obtained no gain from the contract the performance of which was guaranteed);

30 (1941) 65 CLR 42.

31 (1983) 151 CLR 447 at 464.

32 (1983) 151 CLR 447 at 467-468 per Mason J, 477-479 per Deane J.

- (c) the lender is to be taken to have understood that, as a wife, the surety may repose trust and confidence in her husband in matters of business and therefore to have understood that the husband may not fully and accurately explain the purport and effect of the transaction to his wife; and yet
- (d) the lender did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her.

32 To hold, as *Yerkey v Jones* did, that in those circumstances the enforcement of the guarantee would be unconscionable represents no departure from accepted principle. Rather, it "conforms to the fundamental principle according to which equity acts, namely that a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct"³³.

33 It will be seen that the analysis of the second kind of case identified in *Yerkey v Jones* is not one which depends upon any presumption of undue influence by the husband over the wife. As we have said, undue influence is dealt with separately and differently. Nor does the analysis depend upon identifying the husband as acting as agent for the creditor in procuring the wife's agreement to the transaction³⁴. Rather, it depends upon the surety being a volunteer and mistaken about the purport and effect of the transaction, and the creditor being taken to have appreciated that because of the trust and confidence between surety and debtor the surety may well receive from the debtor no sufficient explanation of the transaction's purport and effect. To enforce the transaction against a mistaken volunteer when the creditor, the party that seeks to take the benefit of the transaction, has not itself explained the transaction, and does not know that a third party has done so, would be unconscionable.

34 We acknowledge that the statement that enforcement of the transaction would be "unconscionable" is to characterise the result rather than to identify the reasoning that leads to the application of that description³⁵. But that the description

33 *Legione v Hateley* (1983) 152 CLR 406 at 444 per Mason and Deane JJ citing Story, *Commentaries on Equity Jurisprudence*, 12th ed (1877), vol 2, par 1316. See also *Thompson v Palmer* (1933) 49 CLR 507 at 537 per Dixon J; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 441 per Deane J.

34 cf *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 at 194 per Lord Browne-Wilkinson.

35 cf Finn, "Equity and Contract" in Finn (ed) *Essays on Contract*, (1987) 104 at 104-110.

of "unconscionable" can and should be applied in these circumstances is supported by reference to other circumstances in which that description has been applied.

- 35 Thus, in *Mueller*, Cussen J drew support for his conclusion that a guarantee should be set aside in circumstances such as those now under consideration from a comparison with equity's treatment of gifts made by a mistaken donor. He said³⁶:

"In the first place, it is obvious that a large benefit is conferred both on the creditor and the debtor, which, so far as any advantage to the guarantor is concerned, is voluntary, though no doubt 'consideration' exists so far as the creditor is concerned, so soon as forbearance is in fact given or advances are in fact made. It is, I think, to some extent by reference to the rule or to an extension of the rule that, in the case of a large voluntary donation, a gift may be set aside in equity if it appears that the donor did not really understand the transaction, that such a guarantee may be treated as voidable as between the husband and wife."

- 36 In addition, some comparison can be drawn between the refusal to permit enforcement of the guarantee in the circumstances identified in *Yerkey v Jones* and the equally well recognised and long established principles which would preclude enforcement of a guarantee in some cases where the creditor has not disclosed to the intending surety some features of the transaction³⁷.

- 37 We do not pause to attempt to specify what features of such a transaction should be identified by the creditor to the surety and we are not to be taken as suggesting that the principles dealt with in *Yerkey v Jones* are to be seen as no more than some particular application of these rules. Nevertheless, the intervention of equity in cases of that kind may also be seen as rooted in the conclusion that to permit enforcement of the guarantee against a mistaken surety (mistaken in that kind of case because the creditor should have, but did not, inform the surety of some particular fact) would be unconscionable.

36 [1925] VLR 642 at 649.

37 *Amadio* (1983) 151 CLR 447 at 454-455 per Gibbs CJ citing *Goodwin v National Bank of Australasia Ltd* (1968) 117 CLR 173; *Union Bank of Australia Ltd v Puddy* [1949] VLR 242; *Hamilton v Watson* (1845) 12 Cl & F 109 [8 ER 1339]; *Lee v Jones* (1864) 17 CB(NS) 482 [144 ER 194]; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72; *Lloyds Bank Ltd v Harrison* (1925), unreported, cited in *Paget's Law of Banking*, 7th ed (1966) at 583. See also *Behan v Obelon Pty Ltd* (1985) 157 CLR 326 at 329-330.

38 No doubt these cases are no more than analogies. They are not to be treated as defining what is meant by "unconscionable" or as, in some way, governing the present circumstances. They are, however, useful illustrations of why the enforcement of the guarantee in this case would be unconscionable.

39 As is implicit in what we have said, we prefer not to adopt the analysis made by Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* which proceeded from identifying "the circumstances in which the creditor will be taken to have had notice of the wife's equity to set aside the transaction"³⁸. Sir Anthony Mason has pointed out that³⁹:

"constructive notice in *O'Brien* is used in order to ascertain whether a transaction about to be entered into is impeachable, not so as to fix a person who acquires an interest in the property with knowledge of an antecedent interest in property, that being the traditional function of constructive notice".

Such an analysis may be required in ordering the priority of competing interests in property but in the present context it may well distract attention from the underlying principle: that the enforcement of the legal rights of the creditor would, in all the circumstances, be unconscionable.

40 We consider that the only question of notice that arises is whether the creditor knew at the time of the taking of the guarantee that the surety was then married to the creditor. Other questions of notice do not intrude.

41 As is apparent from what was said in *Yerkey v Jones* the creditor may readily avoid the possibility that the surety will later claim not to have understood the purport and effect of the transaction that is proposed. If the creditor itself explains the transaction sufficiently, or knows that the surety has received "competent, independent and disinterested"⁴⁰ advice from a third party, it would not be unconscionable for the creditor to enforce it against the surety even though the surety is a volunteer and it later emerges that the surety claims to have been mistaken.

38 [1994] 1 AC 180 at 195.

39 Mason, "The Impact of Equitable Doctrine on the Law of Contract", (1998) 27 *Anglo-American Law Review* 1 at 15 (footnote omitted).

40 *Yerkey v Jones* (1939) 63 CLR 649 at 686 per Dixon J.

15.

42 What then of the present case? The trial judge found that the appellant did not understand the purport or effect of the transaction. She knew it was a guarantee but she thought it was a guarantee of limited overdraft accommodation to be applied only in the purchase of gold. Nor did she understand that her obligations under the guarantee were secured by the mortgage which she had given over her home. It being found that the bank took no step to explain the transaction to her and knew of no independent advice to her about it (there having been no such independent advice) the conclusion that the appellant was entitled to succeed in her claim to set the transaction aside was inevitable if she was a volunteer.

43 The trial judge found that the appellant was not "directly involved" in Citizens Gold⁴¹. And he made this finding notwithstanding that the surety was shown in records held by the Australian Securities Commission to be both a director of, and a shareholder in, the company. The records of Citizens Gold held at the Australian Securities Commission presented, however, a confusing picture of movements in shareholdings over the years: so confusing that the trial judge said that it could be "seen from the records that the exact beneficial holding in the various companies [including Citizens Gold] is quite obscure"⁴². Although the trial judge found that from time to time some benefit flowed to the family from the companies, he found that they were companies that were in the "complete control" of the appellant's husband. Taken as a whole, those findings demonstrate that the appellant in fact obtained no real benefit from her entering the transaction; she was a volunteer. The fact that she was a director of the company is nothing to the point if, as the trial judge's findings show, she had no financial interest in the fortunes of the company.

44 We would therefore allow the appeal.

45 The parties agreed that, if the appeal were allowed, the orders made by the trial judge should be reinstated. Having succeeded in this Court the appellant should have her costs in this Court and the costs of the appeal to the Court of Appeal. The order dismissing her cross-appeal to the Court of Appeal (with costs) should stand.

46 Accordingly, we would order that:

1. The appeal be allowed with costs.

41 (1993) 5 BPR 11,996 at 12,006.

42 (1993) 5 BPR 11,996 at 12,005.

Gaudron J
McHugh J
Gummow J
Hayne J

16.

2. Paragraphs 1 to 8 of the orders made by the Court of Appeal of New South Wales on 3 July 1996 be set aside and in lieu there be orders that the appeal to that Court be dismissed with costs.

- 47 KIRBY J. We have it on the authority of Lord Radcliffe that judges, holding to the "conviction of Galileo", know that "somehow, by some means, there is a movement that takes place" in the exposition of legal principle. The movement may be readily perceived at a distance. Yet, although we may sometimes be unable to say how the law gets from one point to another, no one doubts that movement occurs or that it is "in response to the developments of the society in which [the law] rules"⁴³. Gummow J has pointed out that the principles and doctrines of equity never pretended "like the rules of the Common Law ... to have been established from time immemorial". Rather, they were "established from time to time - altered, improved, and refined from time to time"⁴⁴. So it is in this case.

The issues

- 48 The threshold question is whether the New South Wales Court of Appeal⁴⁵ erred in holding that the primary judge⁴⁶ was mistaken in applying to the facts as found the principle⁴⁷ stated by Dixon J in *Yerkey v Jones*⁴⁸. The Court of Appeal held that, when *Yerkey* was properly analysed, it disclosed that Dixon J's principle had not been adopted by this Court, although it is commonly attributed to it. The principle therefore amounted to an opinion of Dixon J alone⁴⁹. Having so concluded, the Court of Appeal determined that the later decision of this Court in

43 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 592.

44 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 179 citing *In re Hallett's Estate* (1880) 13 Ch D 696 at 710; cf *Cowcher v Cowcher* [1972] 1 WLR 425 at 430; 1 All ER 943 at 948 per Bagnall J. See Mason, "The Impact of Equitable Doctrine on the Law of Contract", (1998) 27(1) *Anglo-American Law Review* 1 at 3.

45 *National Australia Bank Ltd v Garcia* (1996) 39 NSWLR 577 per Mahoney P, Meagher and Sheller JJA.

46 *Garcia v National Australia Bank Ltd* (1993) 5 BPR 11,996 per Young J.

47 For a statement of the principle, see Sheller JA in *National Australia Bank Ltd v Garcia* (1996) 39 NSWLR 577 at 581.

48 (1939) 63 CLR 649.

49 (1996) 39 NSWLR 577 at 598.

*Commercial Bank of Australia Ltd v Amadio*⁵⁰ properly described the jurisdiction of equity to relieve a surety against unconscionable dealings⁵¹:

"Once the principles of ... *Amadio* were applied to the facts of the case there should be no room for resort to the special rule in *Yerkey v Jones*."

The primary judge had held that the principles in *Amadio* did not give rise to relief. A cross-appeal challenging that finding was dismissed. No other ground for relief was upheld⁵². Accordingly, the Court of Appeal refused the claim for equitable and other relief. It was from that outcome, but particularly to challenge the view taken of the authority and application of the supposed principle in *Yerkey*, that special leave was granted to permit an appeal to this Court.

49 The issues arising are therefore:

1. Does the principle stated by Dixon J in *Yerkey* express a special rule of equity applicable to a case where a wife gives a guarantee of a debt for the benefit of her husband (or entities controlled by him) and where the wife's agreement to give the guarantee was obtained by undue influence, pressure or misrepresentation on the part of the husband or without an adequate understanding of the nature and effect of the transaction? Does that principle represent the holding of this Court or simply an opinion of Dixon J, never specifically endorsed by the Court as a binding rule? (The *Yerkey v Jones* point).
2. Whatever the status of the opinion of Dixon J in *Yerkey*, should any rule which *Yerkey* may have stated in 1939 now be regarded as obsolete and subsumed in the principles expressed in later decisions such as *Amadio*? Should this be done having regard to changes in society affecting married women, their legal status, the expansion of the availability of financial credit to them and the desirability of avoiding reliance upon discriminatory criteria for the provision of equitable relief and the development of equitable doctrine? (The *Commercial Bank of Australia Ltd v Amadio* point).

50 (1983) 151 CLR 447.

51 (1996) 39 NSWLR 577 at 597 referring to *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 172-173.

52 Specifically, the Court of Appeal rejected the challenge to the findings concerning the application of the *Contracts Review Act* 1980 (NSW) and the argument that the Court should follow *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 at 196: (1996) 39 NSWLR 577 at 598-600.

3. If the equitable principle expressed by Dixon J in *Yerkey* is revealed as his individual opinion, is overruled as obsolete or now treated as absorbed in the broader doctrines of equity, does the exposition of such doctrine in *Amadio* sufficiently meet the particular problem of sureties who are emotionally vulnerable or dependent on the debtor? Or is a broader statement of equitable principle required than that expressed in *Amadio*? In particular, should this Court follow the decision of the House of Lords in *Barclays Bank Plc v O'Brien*⁵³ or some modified version of the principles there stated? (The *Barclays Bank Plc v O'Brien* point).

The facts

50 The facts of this case, and the history of the litigation, are set out in the reasons of the other members of this Court. I will not repeat what is said. Let me state the features of the evidence which appear to me to be most telling when considering the invocation of equitable doctrine to protect the interests of Mrs Jean Garcia (the appellant) ("the wife"). I start this review with three holdings of the primary judge, which were not disturbed by the Court of Appeal, and which were adverse to the wife's various claims for relief:

1. That she had failed to establish that she executed the relevant guarantee as a result of the exercise of actual undue influence on the part of Mr Fabio Garcia ("the husband").
2. That if the suggested principle in *Yerkey* had been absorbed in, or subsumed by, the principles stated in *Amadio*⁵⁴, the latter would not entitle the wife to relief because, unless it arose from her then relationship of marriage to her husband, there was no other basis upon which it could be established that National Australia Bank Limited (the respondent) ("the Bank") knew of the unconscionability of the husband's conduct. Specifically, there was no evidence that the Bank had knowledge of his deceptive conduct, or had wilfully shut its eyes to what a reasonable lender in its position would have perceived as fraud.
3. That there was no basis upon which the wife was entitled to relief under the *Contracts Review Act 1980* (NSW).

51 It was in this way that the primary judge was obliged to consider the authority of *Yerkey*. He made it abundantly clear that, were it not for what he took to be the "exceptional case" established by that decision (which he did not regard as having been absorbed in, or superseded by, *Amadio*), he would have rejected the wife's

53 [1994] 1 AC 180.

54 (1983) 151 CLR 447 at 474-475.

claim. But for *Yerkey* he would have held the wife to the legal obligation which she assumed when she signed the guarantee.

52 Amongst the facts which the primary judge found which tend to support the provision of equitable relief were the following:

1. As between the wife and the husband: That he pressured her to sign the guarantee. He constantly pointed out what a fool she was in financial matters. Her relationship with him was at risk and this was relevant both to her future and to the welfare of the two children of the marriage. He assured her that there was no real risk to her interests because transactions with the Bank were covered by purchases of gold. She did not understand that the guarantee to the Bank was secured by an "all moneys" mortgage which put in danger the matrimonial home which had been built on a block of land originally acquired in her own name with financial support from her father. Such land had only later been transferred to be owned jointly by the wife and the husband when the Bank insisted on having a "breadwinner" on the title to permit a loan to be authorised for the purpose of building a house which, when built, became the matrimonial home.
2. As between the wife and the Bank: The Bank knew that she was the borrower's wife for she was so described in its documents. It took no steps to explain the extent of the obligations under the guarantee nor to recommend, or insist, that she obtain independent advice concerning the new obligations which she was assuming. As found, the whole transaction in which the wife signed the guarantee was concluded in less than a minute. The Bank's officer put some documents down and indicated with her finger where the wife should sign. She duly did so.

53 On the other hand, the chief factual considerations which suggest that equity might not provide relief to the wife are as follows:

1. As between the wife and the husband: The wife was fully aware that she was guaranteeing her husband's transactions and those of Citizens Gold, the company through which he operated. She was herself involved in Citizens Gold, both as a shareholder and director. The wife was not deluded nor coerced by the husband into signing the guarantee. Nor was her will overborne in a technical sense. Had the husband's investments prospered, in ordinary circumstances this would have secured economic advantages for the wife, or at least the children of the marriage. She was therefore not entirely a volunteer, in the sense of having no economic interest in the success of his business ventures. The couple lived together in a jointly owned home. By inference, the reason for her accepting an office of director in Citizens Gold, and for providing the guarantee, was that the husband's economic position was, however indirectly, bound up in the economic position of the whole family. If the financial transactions in which Citizens Gold was involved had

proved profitable, and if the personal relationships of the husband and wife had improved, it scarcely seems likely that the wife would have disclaimed the economic benefits as vigorously as she has now sought to escape the economic burdens.

2. As between the wife and the Bank: The wife presented in court as "a capable and presentable professional"⁵⁵. It was specifically found that she would have appeared to the Bank as "an intelligent articulate lady with a professional position calling at the bank, appear[ing] to be voluntarily signing a guarantee in respect of an account of which she was a director of the company concerned, and there was nothing to give the bank even suspicion"⁵⁶. The wife knew what a guarantee was. She knew that the document she was executing was a guarantee. If the transaction at the Bank took only a minute, this was, at least in part, because the wife asked no questions. She sought no information or advice. She gave the appearance of knowing what she was doing. She had previously set up her own professional business as a physiotherapist. Whilst it is true that the Bank did not interrogate her about her relationship with her husband and her awareness that his transactions, and those of the company in which they were both apparently involved, might put her own interests in the matrimonial home at risk, such questions might have appeared intrusive or irrelevant. At least they might have done so, having regard to the assurance, which the wife appeared to demonstrate, that she knew what she was doing. In this case, the Bank did not leave it to the husband to procure the wife's execution of the guarantee. The primary judge did not find that, when the guarantee was given by the wife, the husband intended to use the overdraft differently from the way he had represented to the wife or that the Bank ought to have known that he or his company might do so. So far as the Bank was concerned, there was nothing on the face of the transaction which was to the disadvantage of the wife. On the contrary, the Bank knew that she was an officer of Citizens Gold. The suggestion for the wife (later withdrawn) that the Bank had no basis for such knowledge flies in the face of findings of the primary judge for which there was ample supporting evidence. This was material provided by the couple to the Bank, confirmed by the public record, concerning the officers and shareholding of Citizens Gold maintained by the Australian Securities Commission. It showed the wife's involvement in that company.

- 54 Assembled in this way, the respective factual assertions of the parties can be adequately understood. The wife submits that, like other wives and persons in similar positions of vulnerability and dependence, she has been misled by her husband. She submits that she could have been protected by the Bank ensuring

55 (1993) 5 BPR 11,996 at 12,005.

56 (1993) 5 BPR 11,996 at 12,012.

that she was provided with rudimentary information about the serious risks which she was running, especially to the family home. She asks for reaffirmation of the authority of *Yerkey*. If, for any reason, that decision is regarded as overtaken by later, more general and non-discriminatory principles, the wife asks that those principles be clarified so that they require a credit provider to give basic information as to the risks assumed by sureties such as herself and to ensure that they are advised about, or secure independent information concerning, the obligations which they are assuming, given that emotional dependence might sometimes overwhelm rational economic decisions.

- 55 The Bank submitted that *Yerkey* did not establish a special equity for surety wives. If it ever did so, it should now be overruled or re-expressed in terms less discriminatory in ambit and more rational in operation. The doctrine of notice lies at the heart of equity⁵⁷. The only foundation for the Bank to have notice of the alleged vulnerability of the wife was her status as a wife. Such status is not now sufficient, or relevant, to put a credit provider on notice of the needs of the wife to secure independent advice and information. The imposition of any such obligation should be left to the self-regulation of the banks⁵⁸ or to legislation⁵⁹. It is not the province of the courts to require the provision of independent advice under the guise of adapting equitable doctrine. So went the Bank's submissions.

Deriving the rule in *Yerkey v Jones*

- 56 It is fundamental to the ascertainment of the binding rule of a judicial decision that it should be derived from (1) the reasons of the judges agreeing in the order disposing of the proceedings; (2) upon a matter in issue in the proceedings; (3) upon which a decision is necessary to arrive at that order⁶⁰. Thus, the opinions

57 *O'Brien* [1994] 1 AC 180 at 195.

58 Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (ALRC 69, Pt II), (1994) at 251-261. Describes developments in banking industry practice including the ABA Code of Banking Practice and the establishment of the Australian Banking Industry Ombudsman.

59 Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (ALRC 69, Pt II), (1994) at 259-261. See also Report by the Expert Group on Family Financial Vulnerability, *Good Relations, High Risks: financial transactions between family and friends*, (February 1996) proposing amendments to the *Trade Practices Act* 1974 (Cth). Discussed in Pascoe, "Wives, Business Debts and Guarantees", (1997) 9 *Bond Law Review* 58 at 76-80.

60 *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 313-314; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188; *Great Western Railway Co v Owners of SS Mostyn* [1928] AC 57 at 73-74. See MacAdam and Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia*, (1998), Ch 10.

of judges in dissent are disregarded for this purpose, however valuable they may otherwise be. Judicial remarks of a general character upon tangential questions or issues not necessary to the decision are likewise discarded, however persuasive the reasoning may appear. In this sense, the rules governing the ascertainment of binding precedent observe principles which are at once majoritarian and precise. Even so great a Justice of this Court as Dixon J cannot speak for the Court unless his reasoning attracts the support, express or implied, of a majority of the participating Justices (disregarding for this purpose any who did not agree in the order of the Court disposing of the proceedings on the point in question). Even then, the remarks will not be part of a binding rule unless they relate to an issue in contention which had to be decided by the Court to reach its order.

57 It was with these principles in mind that the Court of Appeal approached the analysis of the reasoning of the Justices who participated in *Yerkey*. They were Latham CJ, Rich, Dixon and McTiernan JJ. As all of the Justices concurred in the order of the Court allowing the appeal in that case, the reasoning of none could be discarded. As none of the Justices expressly concurred in the reasoning of another, the analysis depends upon a comparison of the reasons which each gave. A question having arisen as to the precise nature of the rule established by the decision, the course followed by Sheller JA in the Court of Appeal was not only proper, it was essential. Nothing in his Honour's reasons suggested that he or the Court of Appeal were usurping the entitlement of this Court to decide that a binding rule, established by it, is to be departed from or overruled. Rather, what the Court of Appeal was endeavouring to do, with appropriate technical accuracy, was to ascertain what the holding in *Yerkey* was which was binding on them and whether it had any application to the facts of the present case.

58 Given the relatively small number of cases about the general law which this Court can accept, it would be unreasonable and undesirable to extend the ambit of dutiful obedience beyond the holdings of the Court to everything said by majority Justices in every decision. That would not only amount to a departure from settled principles governing the doctrine of binding precedent. It would also constitute a departure from the recent encouragement given by this Court to the appellate courts of Australia to play their part in the refinement, development and re-expression of legal principle which cannot, in the nature of things, be wholly left to this Court⁶¹.

59 Whilst Courts of Appeal and Full Courts throughout Australia may be expected to pay close attention to the opinions on legal principle of individual Justices of this Court, particularly where they are part of a majority on a given issue, those courts are not bound in law by such observations or by obiter dicta or analysis that is not essential to the holding of the Court sustaining its orders. We

61 *Nguyen v Nguyen* (1990) 169 CLR 245 at 268-270; cf *Warburton v Whiteley* (1989) 5 BPR 11,628 at 11,633-11,634.

should not seek to impose a precedential straight-jacket at a time when, because of social and other changes, refinement and development of legal principle is often more important than it was in the past. The present case is a good illustration of that need.

- 60 In *Yerkey* the reasons of Rich J and of McTiernan J were very brief. McTiernan J contented himself, "with some doubt", with the remark that the facts did not "raise an equity" entitling the wife there to be relieved of her covenant⁶². Rich J likewise felt that the case turned on its facts⁶³. However, he endorsed the opinion of Cussen J in *Bank of Victoria Ltd v Mueller*⁶⁴. But that was a case where, as Latham CJ pointed out, the husband had procured his wife's assent to the guarantee by making a material misrepresentation as a result of which she did not understand the true nature of her liability. She was given no explanation by the bank. Missing from the analysis of the applicable principle in the reasons of Latham CJ, Rich J and the short statement of McTiernan J, was any endorsement of the notion that the law adopted a universal presumption that a wife as such, because she was a married woman, was under a special disadvantage needing the protection of a special equity. Far from accepting that principle, Latham CJ recognised that the wife's case in *Yerkey* had to depend⁶⁵:

"upon some special rules applying to a wife who becomes a surety for her husband. The rule relied upon is a rather vague and indefinite survival from the days when a married woman was almost incapable in law and when the courts of equity gave her special protection in relation to transactions affecting her separate property".

- 61 The most that Latham CJ was willing to accept in *Yerkey* was that a special rule applied where a lender had depended upon the wife's signature being obtained "through the agency of the husband"⁶⁶. This was the way the principle had been stated in *Halsbury's Laws of England*, 2nd ed, vol 15, at 282. Even then, Latham CJ was able to assume that principle but to distinguish the case on the facts.

62 (1939) 63 CLR 649 at 690.

63 (1939) 63 CLR 649 at 666.

64 [1925] VLR 642.

65 (1939) 63 CLR 649 at 663.

66 (1939) 63 CLR 649 at 664.

62 As Sheller JA demonstrated in the Court of Appeal⁶⁷, the result is, that as a matter of technicality, none of the other Justices constituting this Court in *Yerkey* expressly agreed in the opinion of Dixon J. Nor did they do so by implication in reasons suggesting the adoption of the same legal analysis⁶⁸. Yet for a long time the case has been regarded as standing for the principle stated in the separate reasons of Dixon J⁶⁹. In the New South Wales Court of Appeal, I have myself assumed that it was so⁷⁰. So have other Australian courts⁷¹ and courts overseas⁷². Even where some of the reasoning, and expression of the rule, in Dixon J's opinion in *Yerkey* was thought to be anomalous or inappropriate to modern circumstances (as was increasingly the case in recent years)⁷³, the course was generally taken of distinguishing *Yerkey* or regarding it as having been overtaken by the broader refinement of principles stated in *Amadio*⁷⁴. This was eventually the course followed by the New South Wales Court of Appeal⁷⁵.

63 Certainly, the reasons of Dixon J in *Yerkey* contain the lengthiest and most detailed analysis of the facts, legal authority and principles in question. But because the analysis was not adopted expressly, or by necessary implication, by any of the other Justices, it is not (unless later endorsed in a holding of this Court) binding as such on the courts subject to this Court's authority. It was not until these proceedings, and because of different opinions in New South Wales courts about the state of authority, that the Court of Appeal undertook the detailed analysis of

67 (1996) 39 NSWLR 577 at 598.

68 cf Fehlberg, "Women in 'Family' Companies: English and Australian Experiences", (1997) 15 *Company and Securities Law Journal* 348 at 355.

69 (1939) 63 CLR 649 at 666-690.

70 *Warburton v Whiteley* (1989) 5 BPR 11,628 at 11,634.

71 *ANZ Banking Group Ltd v Dunosa Pty Ltd* [1995] ANZ Conv R 86; *Teachers Health Investments Pty Ltd v Wynne* [1995] ANZ Conv R 74 at 80; *Peters v Commonwealth Bank of Australia* (1992) ASC ¶56-135; *Geelong Building Society (in liq) v Thomas* [1996] Aust Contract R ¶90-068.

72 *E & R Distributors v Atlas Drywall Ltd* (1980) 118 DLR (3d) 339.

73 See eg *European Asian of Australia v Kurland* (1985) 8 NSWLR 192 at 200-201.

74 cf (1983) 151 CLR 447 at 475 per Deane J, 486 per Dawson J (diss).

75 *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 173. This followed and was clearly influenced by the criticism of *Yerkey* expressed by the House of Lords in *O'Brien* [1994] 1 AC 180 at 195.

the opinions expressed in *Yerkey*, in order to derive the precise rule that was binding on it.

- 64 I appreciate that the other members of the Court expressly refrain from basing their decision in this appeal on "some confined analysis" of *Yerkey*, designed to identify its ratio decidendi. However, I have thought it proper to undertake the same analysis as Sheller JA for three reasons. First, to dispel any suggestion of disobedience to authority on the part of the Court of Appeal which I regard as quite unjustified. Secondly, because such analysis cuts away the binding authority of what was said by Dixon J, leaving it as a judicial statement worthy of the greatest of respect but not commanding obedience as a matter of binding precedent. Never having thereafter been expressly endorsed by this Court, Dixon J's opinion is more vulnerable to revision when the law moves from protection of a single category to protection of defined relationships of which that category was, at one time, considered to be an illustration. Thirdly, it removes any impediment to this Court's reviewing the issue as one of legal principle rather than of long-standing authority of the Court. Were it the latter, one would be hesitant to disturb it where it had stood as a rule for 60 years. Upon this analysis, the opinion of Dixon J in *Yerkey* is neither expressly nor impliedly a statement of a holding of this Court. Should it nonetheless, in light of its provenance, apparent durability and suggested continuing applicability now be accepted by the Court, as the majority think? In my opinion, it should not.

Reasons for rejecting Justice Dixon's *Yerkey* principle

- 65 The equitable presumption expressed by Dixon J in *Yerkey* was stated in these terms⁷⁶:

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

This means that, if there is any doubt and the credit provider has relied on the husband to arrange the guarantee, the onus is on the credit provider to show that the guarantee was obtained fairly and with the free consent of the wife⁷⁷. The principle has two limbs⁷⁸:

"[I]t is clearly necessary to distinguish between, on the one hand, cases in which a 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."

In the former case nothing but independent advice or relief from the ascendancy of the husband would suffice. In the latter case if the credit provider reasonably supposes that the wife has an adequate comprehension she may have no equity to have the document set aside notwithstanding that at an earlier stage the credit provider relied on the husband to obtain her consent.

- 66 Assuming that the plaintiff is entitled to rely on this presumption, why should this Court, in 1998, endorse a principle expressed to apply specifically to one class of citizens only, namely "married women"? For several reasons it should not. It should instead search for, and identify, a broader principle which is not confined to one group whose members have attributed to them particular needs and vulnerabilities which are certainly not confined to that group and which, in many cases, will not be present in members of that group. The classification is at once too narrow and too broad. Too narrow, for "[i]t is not based on and it inhibits a more developed understanding ... of the broad features of social inequality in Australia". Too broad, for it ignores "the diversity of the experiences of women

76 (1939) 63 CLR 649 at 683.

77 (1939) 63 CLR 649 at 675.

78 (1939) 63 CLR 649 at 684.

in Australia"⁷⁹. It may have accommodated a perceived problem when Dixon J wrote his opinion in *Yerkey* in 1939. It is inappropriate to Australian circumstances today. It should not now receive the endorsement of this Court.

1. *Historical anachronism*: The first reason for rejecting Dixon J's supposed principle in *Yerkey* is that, even in 1939, it represented an historical anachronism. This was pointed out by Latham CJ⁸⁰. His Honour explained that the cases invoked by the wife in that appeal would place her in an advantageous position that she would not have enjoyed had she not been married to the principal debtor. Central to Dixon J's statement of principle in *Yerkey* are the equitable doctrines that arose out of the inability of married women to deal with property at common law⁸¹. Even prior to the abolition by the series of *Married Women's Property Acts* of the prescribed legal disabilities of married women, the apparent rigour of the common law was mitigated by the development of equitable doctrines which recognised a separate equitable estate in married women in certain circumstances⁸². Equity did not prohibit married women from advancing a separate estate which its principles secured to them in cases involving guarantees of their husband's business or other obligations⁸³. However, "courts of equity examine[d] every such transaction between husband and wife with an anxious watchfulness and caution, and dread of undue influence"⁸⁴.

In *Yerkey*, Dixon J confirmed that although equity would not presume undue influence in the case of husband and wife, it still preserved a general watchfulness in guarantee transactions. According to Dixon J, the relationship of wife and husband had "never been divested completely of

79 Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (ALRC 69, Part II), (1994) at 249.

80 (1939) 63 CLR 649 at 655.

81 (1939) 63 CLR 649 at 670-677. See Blackstone, *Commentaries*, 21st ed (1844), vol I at 442: "[T]he very being or legal existence of a woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing."

82 See generally Staves, *Married Women's Separate Property in England, 1660-1833*, (1990).

83 *Baskerville v Sinthome* (1614) Tothill 95 [21 ER 134]; *Grigby v Cox* (1750) 1 Ves Sen 517 [27 ER 1178]; (1939) 63 CLR 649 at 670-674 per Dixon J.

84 Story, *Commentaries on Equity Jurisprudence*, 18th ed (1861), vol 2 at §1395 cited in (1939) 63 CLR 649 at 674 per Dixon J.

what may be called equitable presumptions of an invalidating tendency"⁸⁵. These equitable principles established for the benefit of married women prior to the *Married Women's Property Acts*, and not, as such, the trust and confidence between marriage partners, form the true basis of the supposed rule in *Yerkey*. Today, the capacity of a married woman to deal with her property freely as a feme sole is long established. I would therefore conclude in the language of O W Holmes⁸⁶:

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

One particular need for deriving a new principle rather than following the supposed rule in *Yerkey* is that, since Dixon J expounded the latter in 1939, there have been enormous social changes relevant to women, married women and domestic relationships more generally. The anomalous character of the supposed rule in *Yerkey* is clear when it is remembered that the presumption does not, as stated, protect other classes of sureties in arguably analogous positions. For example, it gives no protection to a de facto spouse, an unmarried child in a position of dependence, a parent who is vulnerable to pressure from a child or a companion of either sex having a long-term domestic relationship with the borrower, the existence of which might easily have been elicited by acceptable questioning by the credit provider⁸⁷. The recognition of these changes has eventually led to a growing chorus of judicial opinion critical of the supposed *Yerkey* principle as discriminatory and outmoded⁸⁸. That chorus became a clamour after the House of Lords, in *O'Brien*, unanimously rejected the rule stated by Dixon J in *Yerkey* and

85 (1939) 63 CLR 649 at 675. Dixon J synthesised these presumptions into three principles at 675-676.

86 Holmes, "The Path of the Law", in *Collected Legal Papers*, (1921) at 187 cited in Williams, "Equitable Principles for the Protection of Vulnerable Guarantors: Is the Principle in *Yerkey v Jones* Still Needed?", (1994) 8 *Journal of Contract Law* 67 at 82.

87 Lehane, "Undue Influence, Misrepresentation and Third Parties", (1994) 110 *Law Quarterly Review* 167 at 169.

88 See eg *Warburton v Whiteley* (1989) 5 BPR 11,628 at 11,629-11,630; *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 172; *European Asian of Australia v Kurland* (1985) 8 NSWLR 192 at 200; *Carrington Confirmer Pty Ltd v Akins* unreported, Supreme Court of New South Wales, 23 April 1991.

disapproved of earlier authority on which it had been based⁸⁹. That authority, a decision of the Privy Council of 1902⁹⁰, was described as providing only "unsure foundations" for a correct approach. Lord Browne-Wilkinson gave a warning which is, I believe, applicable to this Court when expressing a legal principle binding throughout Australia⁹¹:

"Like most law founded on obscure and possibly mistaken foundations it has developed in an artificial way, giving rise to artificial distinctions and conflicting decisions. ... [Y]our Lordships should seek to restate the law in a form which is principled, reflects the current requirements of society and provides as much certainty as possible."

A similar issue faced this Court in *Gronow v Gronow*⁹². Remarking upon the principle or presumption that a young child, especially a girl, should remain in the custody of her mother, Stephen J observed that⁹³:

"The increase in the proportion of working mothers in the community has no doubt led to significant changes in the respective roles of husband and wife in family life: family life itself has much changed ... a full investigation of the relevant circumstances must necessarily provide a much more accurate assessment of the suitability of each parent than will any arbitrary presumption or rule, applied regardless of the infinite variability of human beings."

2. *Rejecting discriminatory stereotypes*: A principle which accords to *all* married women a "special equity" based on their supposed need for protection rests upon a stereotype of wives to which this Court should give no endorsement. All persons of full capacity, including married women, should ordinarily conform to commercial transactions which they enter unless statute or judicial law affords relief. Marriage, and being the female member to a marriage, is not, as such, a relevant reason for relief from legal obligations. Some additional or different basis is required if relief is to be afforded. Whatever may have been the position in Australian society of 1939, it is offensive to the status of women today to suggest that all married women, as such, are needful of special protection supported by a legal presumption in their favour. Other cohabitees of a borrower may, in

⁸⁹ [1994] 1 AC 180 at 195.

⁹⁰ *Turnbull & Co v Duval* [1902] AC 429.

⁹¹ *O'Brien* [1994] 1 AC 180 at 194-195.

⁹² (1979) 144 CLR 513.

⁹³ (1979) 144 CLR 513 at 521. See also Mason and Wilson JJ at 527.

particular circumstances, be in a position at least as vulnerable as some wives. Some may be more so. Given the very significant number of Australians who now live in relationships of potential dependence and vulnerability outside marriage, it is inappropriate to affirm as a binding principle of Australian law a rule expressed to derive from the married relationship itself and then to apply it only to one party to that relationship, namely the wife. Adopting that approach reinforces outdated assumptions without addressing the problem of people in vulnerable and dependent relationships which are only sometimes illustrated by the case of a married woman.

Defenders of the supposed *Yerkey* principle have referred to the need to maintain it for the occasional assistance which it provides to married women who could not otherwise bring themselves within the *Amadio* principle⁹⁴. Such an approach is unprincipled. It depends on gender loyalty or sympathy rather than on principle⁹⁵. It implies that because a guarantor is female and is married to the debtor, she has necessarily lost her own capacity to safeguard her own interests in a way that all male sureties and all unmarried female sureties are deemed by the law capable of doing. It is legitimate to test the supposed principle in *Yerkey* by such criteria. For this Court to accept that principle is to accord legitimacy to a discriminatory rule expressed in terms which are unduly narrow, historically and socially out of date and unfairly discriminatory against those who may be more needful of the protection of a "special equity" but who do not fit within the category of married women.

3. *Marriage is not a suspect category*: Given the rejection by our law of the notion that a presumption of undue influence arises from the relationship of marriage⁹⁶, it is inconsistent to persist with a presumption which rests upon the "invalidating tendency" by which a court will be more ready to find that a husband had exercised undue influence over his wife than in other cases. There are several reasons, apart from those of legal theory, for rejecting this notion. I have already mentioned the changing nature of domestic relations

94 See eg Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (ALRC, 69 Pt II), (1994) at 250; Pascoe, "Wives, Business Debts and Guarantees", (1997) 9 *Bond Law Review* 58 at 72.

95 "The struggle for women's rights is ... not a matter of gender loyalty. It is a matter of ethical principle, and as such, it does not dictate automatic allegiance to the women's side in any given argument": Heller, "Ill-founded outrage", *The Times Literary Supplement*, 13th August 1993 at 11.

96 *Howes v Bishop* [1909] 2 KB 390; *Bank of Montreal v Stuart* [1911] AC 120.

in modern Australia which are as true in this country as in England⁹⁷, New Zealand⁹⁸ and elsewhere. Why should undergoing the ceremony of marriage make only a female partner to the relationship more needful of protection from equity than an unmarried female partner? The opposite might often be the case.

To select marriage as a criterion of vulnerability also appears inappropriate at this stage in the evolution of personal relationships in this country. Rather than choose the fact of marriage and the sex of one party to it as an objective indication of vulnerability for legal purposes, it would seem more rational to look at all of the facts of the relationship between the surety and the borrower. So long as married women, as such, are treated as necessarily vulnerable, whatever the facts of their particular relationship, the focus of the law will remain upon a consideration which, in most cases, is simply irrelevant.

4. *Economic arguments:* In *O'Brien*, the House of Lords, after rejecting the reasoning of Dixon J in *Yerkey*, referred to an additional economic argument⁹⁹:

"Wealth is now more widely spread. Moreover a high proportion of privately owned wealth is invested in the matrimonial home. Because of the recognition by society of the equality of the sexes, the majority of matrimonial homes are now in the joint names of both spouses. Therefore in order to raise finance for the business enterprises of one or other of the spouses, the jointly owned home has become a main source of security. The provision of such security requires the consent of both spouses. ... [There is a] need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile. ... It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions."

The desirability of protecting vulnerable persons from loss of their assets, particularly their homes, must therefore be balanced against the undesirability of economically sterilising those assets¹⁰⁰. Ironically, any

97 *R v J (rape: marital exemption)* [1991] 1 All ER 759 at 760; cf Cretney, "The Little Woman and the Big Bad Bank", (1992) 108 *Law Quarterly Review* 534 at 536-537.

98 Law Commission of New Zealand, *Succession Law* (Report 39), (August 1997), at 8-10.

99 [1994] 1 AC 180 at 188.

100 *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674 at 689.

judicial response which imposes upon lenders an unrealistic standard would also be tantamount to a judicial divestiture of a married woman's legal capacity to execute a guarantee¹⁰¹. With capacity comes obligation.

There is yet another economic reason which Professor Cretney¹⁰² has mentioned. He described it as a "more disturbing implication" of affording a specially protected status to married women, whatever the facts of their vulnerability or lack thereof. This is, that such a principle is likely to encourage a particular category of borrowers, and those associated with them, to seek to escape their lawful obligations by challenging the adequacy of the explanations given to their wives for the documents they have signed, beyond the protection now amply provided by statute¹⁰³. An indication that this problem may not be wholly theoretical is found in the large number of cases of the present kind coming before the courts, both in Australia¹⁰⁴ and England¹⁰⁵. To the extent that the law encourages an endeavour to escape apparently binding obligations (the profits from which borrowers would gladly have reaped) necessarily adds a cost, and a disincentive, to the provision of capital to the class artificially singled out for special protection. Instead of requiring that vulnerability be ascertained in a rational way by an inquiry that elicits real considerations pertinent to the grant of equitable relief, this Court will endorse a presumption of vulnerability by reference to considerations of sex and matrimonial status which may be completely irrelevant in the particular case.

5. *Unacceptable discrimination:* There is a final reason for rejecting the special equity found by Dixon J in *Yerkey*. Since 1939, Australian society and its legal systems have moved away from irrelevant discrimination, whether on

101 Streeton, "Feminist Perspectives on the Law of Insolvency" in Streeton & Langford, *Aspects of Real Property and Insolvency Law*, Adelaide Law Review Research Paper No 6, University of Adelaide, 1994 at 63.

102 Cretney, "The Little Woman and the Big Bad Bank", (1992) 108 *Law Quarterly Review* 534 at 538-539.

103 cf *National Westminster Bank Plc v Morgan* [1985] AC 686 at 708 per Lord Scarman.

104 Duggan, "Till Debt Us Do Part", (1991) 19 *Sydney Law Review* 220; cf *Gough v Commonwealth Bank of Australia* (1994) ASC ¶56-270 at 58,832.

105 *O'Brien* [1994] 1 AC 180 at 185; cf Millett, "Equity's Place in the Law of Commerce", (1998) 114 *Law Quarterly Review* 214 at 220.

the ground of sex, matrimonial status or otherwise¹⁰⁶. Any modern expression of a "special equity" by this Court should similarly avoid unprincipled discriminatory categories¹⁰⁷. The stereotype underlying *Yerkey* may hold true for some, perhaps even a significant number of, wives. But this Court should, where possible, refuse to "classify unnecessarily and overbroadly by gender when more accurate and impartial" principles can be stated¹⁰⁸. The Court should not be misunderstood as endorsing or upholding such discrimination where so much legislative and judicial effort in Australia has been directed at removing it. When an opportunity is presented legitimately to refashion an equitable principle so that it is not expressed, irrelevantly, in discriminatory terms, this Court should accept that opportunity, as the House of Lords did. In *O'Brien*, their Lordships rejected the suggestion that equity provided a special protection to wives, as such, in relation to surety transactions. Their Lordships accepted that the position of some wives was vulnerable. But they reconceptualised the vulnerability. It was a species of a wider genus which exists where there is an "emotional relationship between cohabitantes". Lord Browne-Wilkinson explained¹⁰⁹:

"The 'tenderness' shown by the law to married women is not based on the marriage ceremony but reflects the underlying risk of one cohabitee exploiting the emotional involvement and trust of the other. Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this. Legal wives are not the only group which are now exposed to the emotional pressure of cohabitation. Therefore if, but only if, the creditor is aware that the surety is cohabiting with the principal debtor, in my judgment the same principles should apply to them as apply to husband and wife."

106 *Sex Discrimination Act* 1984 (Cth), ss 5, 6, 7D(1). See also *Anti-Discrimination Act* 1977 (NSW), ss 24 and 39; *Equal Opportunity Act* 1995 (Vic), ss 6-9; *Anti-Discrimination Act* 1991 (Q), ss 7-11; *Equal Opportunity Act* 1984 (SA), s 29; *Equal Opportunity Act* 1984 (WA), ss 8-10; *Sex Discrimination Act* 1994 (Tas), ss 14-16; *Discrimination Act* 1991 (ACT), ss 7 and 8; *Anti-Discrimination Act* 1992 (NT), ss 19 and 20. See *Gregg v Tasmanian Trustees Ltd* (1997) 73 FCR 91 at 114 per Merkel J.

107 "What will be sufficient to warrant equitable intervention ... will in the end depend upon the court's judgment of the circumstances of the case and *what currently is seen as unacceptable*" (italics added): *Stivactas v Michaelatos [No 2]* [1993] Aust Contract Reports ¶90-031 at 89,669 per Mahoney JA.

108 *Miller v Albright* 66 USLW 4266 (1998) per Ginsburg J.

109 [1994] 1 AC 180 at 198.

This Court, in a series of cases, has also rejected the unnecessary compartmentalisation of equitable principle¹¹⁰. It should not hold back now. Nor should it content itself with the possibility that, in the future, the *Yerkey* principle may find application to other "long term and publicly declared relationships short of marriage"¹¹¹. In my respectful view, to say this is to suggest that other relationships that give rise to risk of vulnerability are but pale shadows of marriage. For some citizens marriage may not be an available option¹¹². For others it may not be desired. Like their Lordships, we should search for the causes which occasion the protection of equity and the indications which do, or should, bring those causes to the notice of the credit provider.

Although it is suggested that *Yerkey* may sometimes provide an appropriate means to afford protection to a vulnerable person who happens to be a wife, its expression is in my view completely unacceptable as a principle of contemporary Australian law. It should be rejected not because (as the Bank put it) it is demeaning to women but because it lends the authority of this Court, and thus of Australian law, to an exposition of principle which is completely inappropriate¹¹³. As this Court has done of late in many other areas of the law, it should progress from species to genus: from category to concept¹¹⁴. Most especially should it do so when, once examined, the species and the category are seen as discriminatory and as failing to reflect the requirements of contemporary society.

- 67 If it is true that some (but not all) wives continue to need the protection of a special rule of equity, the duty of a court such as this, absent applicable statutory provisions or judicial authority accepted as binding, is to "restate the law in a form which is principled, reflects the current requirements of society and provides as

110 See eg *Waltons Stores (Interstate) Ltd 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.

111 *Garcia v National Australia Bank Ltd* [1998] HCA 48 at 22.

112 cf *Quilter v Attorney-General* [1998] 1 NZLR 523. The New Zealand Court of Appeal unanimously held that marriage was not available under the *Marriage Act* 1955 (NZ) to same sex partners. But see *Baehr v Lewin* 852 P 2d 44 (Hawaii 1993).

113 Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (ALRC 69, Part II), (1994) at 250.

114 For example, *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 16, 38; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 545-550.

much certainty as possible"¹¹⁵. That may involve seeking out and stating a new and more apposite principle. And then asking whether that principle gives rise to relief in the particular case on a foundation which is not susceptible to criticism as an historical anachronism or impermissibly discriminatory.

- 68 With respect to those who are of the contrary view, I could not agree to endorsing the principle stated by Dixon J in *Yerkey*, limited as it is to married women. This Court should not adopt such criteria. As a matter of legal authority, it is not bound to do so. As a matter of legal principle, it should not do so¹¹⁶.

The authority of *Amadio* and *O'Brien*

- 69 The primary judge rejected the wife's application for relief based on *Amadio*¹¹⁷. Having found that *Yerkey* had "no sure foundation in Australian law", the Court of Appeal treated *Amadio* as describing the "jurisdiction in equity to relieve against unconscionable dealing"¹¹⁸. The difficulty presented to the wife, deprived of the *Yerkey* presumption, was that *Amadio* requires that the disability of the weaker party should be "sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances"¹¹⁹. This rule took the Court of Appeal to an examination of the knowledge which the Bank had concerning the wife's situation. Once the special rule in *Yerkey* was excluded, there was no foundation in the facts to give rise to equitable relief on the basis of *Amadio*¹²⁰. That claim therefore failed. Having regard to the facts found and the matters argued in the appeal, I would not disturb that conclusion¹²¹.

115 *O'Brien* [1994] 1 AC 180 at 195.

116 The general approach of the Court in adopting non-discriminatory expositions of legal principle is illustrated by the observations of Gaudron J in *M v The Queen* (1994) 181 CLR 487 at 515.

117 (1993) 5 BPR 11,996 at 12,012.

118 (1996) 39 NSWLR 577 at 597 per Sheller JA.

119 *Amadio* (1983) 151 CLR 447 at 474.

120 (1996) 39 NSWLR 577 at 598-599.

121 It is complained that *Amadio* is rarely available to protect women in a vulnerable position: see Duggan, "Tell Debt Us Do Part", (1997) 19 *Sydney Law Review* 220 at 228; Pascoe, "Wives, Business Debts and Guarantees", (1997) 9 *Bond Law Review* 58 at 67-68; Fehlberg, "Women in 'Family' Companies: English and Australian Experiences", (1997) 15 *Company and Securities Law Journal* 348 at 356.

70 Nevertheless, by her notice of appeal, the wife raised a case alternative to that of reliance on *Yerkey*. She contended, as she had in the Court of Appeal¹²², that she was entitled to relief on the basis of the equity described in the House of Lords in *O'Brien*¹²³. That argument was rejected in the Court of Appeal on the basis that, for Australian courts, the applicable principle was, and was only, that stated in *Amadio*.

71 What approach should this Court adopt? The principle stated by Dixon J in *Yerkey* is outmoded. Nonetheless, while "society's recognition of the equality of the sexes has led to a rejection of the concept that the wife is subservient to the husband in the management of the family's finances. ... The number of recent cases in this field shows that in practice many wives are still subjected to, and yield to, undue influence by their husbands."¹²⁴

72 The majority in their reasons have shown that *Amadio* was not intended, or aptly expressed, to cover the whole field of unconscionable conduct. The fact that the *Amadio* principle is incapable of protecting volunteers who, because of the vulnerability of their personal relations with a borrower, and the lack of advice and information, bind themselves to a potentially prejudicial transaction,

122 (1996) 39 NSWLR 577 at 599. The decision of the House of Lords in *O'Brien* was delivered between the judgment of the primary judge and argument in the Court of Appeal.

123 [1994] 1 AC 180 at 198-199.

124 *O'Brien* [1994] 1 AC 180 at 188.

has been demonstrated several times¹²⁵. Suggestions¹²⁶, including some that I have made myself¹²⁷, that *Amadio* covered the field of available equitable relief must now be regarded as incorrect. There is, it seems to me, no difficulty in recognising that the same set of facts might give rise to two types of liability in the credit provider: one coming from the credit provider's own wrongful conduct and the other from the credit provider's notice of someone else's wrongful conduct. However, the two are analytically distinct¹²⁸. Constructive notice should not be sufficient for unconscientious dealing¹²⁹.

- 73 I favour a re-formulation of the principle expressed by Lord Browne-Wilkinson in *O'Brien*. It is my view that the principle should be stated thus: Where a person has entered into an obligation to stand as surety for the debts of another and the credit provider knows, or ought to know, that there is a relationship involving emotional dependence on the part of the surety towards the debtor¹³⁰: (1) the surety obligation will be valid and enforceable by the credit provider unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor; (2) if there has been undue influence, misrepresentation or other legal wrong by the principal debtor, unless the credit provider has taken reasonable steps to satisfy itself that the surety entered into the obligation freely and in knowledge of the true facts, the credit provider will be unable to enforce the surety obligation because it will be fixed with notice of the surety's right to set aside the transaction; (3) unless there are special exceptional circumstances or the risks are large, a credit provider will have taken such

¹²⁵ See footnote 121. Cases where on the facts it was held that the conduct of the credit provider had not been unconscionable as determined in *Amadio*, but nonetheless the guarantor was able to obtain relief under the rule in *Yerkey*, include *Warburton v Whiteley* (1989) 5 BPR 11,628; *Williams v State Bank of New South Wales* unreported, Supreme Court of New South Wales, 7 April 1993; *Peters v Commonwealth Bank of Australia* (1992) ASC ¶56-135; *Australia & New Zealand Banking Corp Ltd v McGee* (1994) ASC ¶56-278; *Matthew v Independent Holdings Ltd* (1993) 173 LSJS 342.

¹²⁶ See eg *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 172-173; *National Australia Bank Ltd v Garcia* (1996) 39 NSWLR 577 at 597.

¹²⁷ *Warburton v Whiteley* (1989) 5 BPR 11,628 at 11,634.

¹²⁸ Moore, "Equity, Restitution and in personam claims under the Torrens system", (1998) 72 *Australian Law Journal* 258 at 262.

¹²⁹ Parkinson (ed), *The Principles of Equity*, (1996) at 411.

¹³⁰ In *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674 at 691, the New Zealand Court of Appeal expressed the relationship as "involving an emotional tie or dependency on the part of the guarantor towards the principal debtor".

reasonable steps to avoid being fixed with constructive notice if it warns the surety (at a meeting not attended by the principal debtor) of the amount of the surety's potential liability, of the risks involved to the surety's own interests and advises the surety to take independent legal advice. Out of respect for economic freedom, the duty of the credit provider will be limited to taking reasonable steps only¹³¹.

- 74 In this way, equity is capable of affording a principle for relief in cases of this kind which (1) is expressed in non-discriminatory terms; (2) is addressed to the real causes of the vulnerability; and (3) recognises the credit provider's superior powers to insist that volunteers in a vulnerable position are afforded access to relevant information and, where necessary, independent advice. The House of Lords concluded in this general way in *O'Brien*. This Court should follow and adopt that decision. It is applicable to the circumstances of this case. The Court can properly do so without procedural unfairness to the Bank. The point was reserved and argued below. It was also debated at some length on the hearing of this appeal¹³². No different evidentiary foundation is suggested by the wife. She merely sought the application of the applicable equitable principles to the facts as found by the primary judge.

The modified *O'Brien* principle

- 75 In *Wilkinson v ASB Bank Ltd* the New Zealand Court of Appeal observed¹³³:

"When it is said that undue influence has been exercised by the principal debtor on a guarantor (either positively by application of pressure or by taking advantage of the guarantor's dependency) or that the principal debtor has persuaded the guarantor to enter into the transaction by a misrepresentation, the guarantor is not asking the Court to set the transaction aside because of any unconscionable behaviour *by the creditor*. The guarantor does so, rather, because the creditor has taken the benefit of the guarantee with actual or constructive knowledge of what has occurred, or is presumed to have occurred, between the principal debtor and the guarantor."

131 Price, "Undue Influence: Nullus Finis Litium", (1998) 114 *Law Quarterly Review* 186 at 187-188; cf *Massey v Midland Bank plc* [1995] 1 All ER 929; *Banco Exterior Internacional v Mann* [1995] 1 All ER 936; *Bank of Baroda v Rayarel* [1995] 2 FLR 376.

132 *Garcia v National Australia Bank Limited*, Transcript of Proceedings, High Court of Australia, 4 March 1998 at 31-36, 59-60, 66-71.

133 [1998] 1 NZLR 674 at 689. The New Zealand Court of Appeal adopted the decision of the House of Lords in *O'Brien*.

Thus the credit provider will be fixed with constructive notice if it knows facts sufficient to put it on inquiry as to the possibility of wrongdoing by the debtor and it fails to inquire. In *Bank of New South Wales v Rogers*¹³⁴, for example, the debtor was the surety's uncle with whom she was in a long-standing relationship of dependency. It was held that the credit provider knew enough about their relationship to put it on inquiry as to the circumstances in which the guarantee was given. Judges have warned against the extension of the equitable doctrine of constructive notice to commercial transactions¹³⁵. However, once the doctrine of constructive notice is understood as a principle which is wider and more flexible than the strict conveyancing standard, there is no reason why it should not give rise to liability¹³⁶. The key is to identify the circumstances in which the credit provider will be taken to have notice of the surety's equity to set aside the transaction.

- 76 A credit provider will be put on inquiry by a combination of two factors: (1) the transaction is not on its face to the personal financial advantage of the party offering the security; and (2) there is a relationship which is known, or which ought to be known, by the credit provider involving an emotional dependency on the part of the surety towards the debtor¹³⁷. The relationship of emotional dependency is singled out because of the possible effects of the sexual and/or relationship ties between the parties, on their financial dealings with each other. The "fear of destroying or damaging the wider relationship" between persons makes these ties "a ready weapon for undue influence"¹³⁸. Moreover, the informality of business dealings raises a "substantial risk" of misrepresentation as to the nature of the liability concerned¹³⁹. A credit provider will therefore be put on inquiry if it is aware that the surety reposes trust and confidence in the debtor in relation to his or her financial affairs. Cohabitation, as such, may alert the credit provider to the need for further inquiry. So may marriage, de facto marriage, or long term relationships with respect to sureties and borrowers of either sex. So may other information as to the relationships of the parties which comes to the notice of the credit provider or which it, out of prudence, requests and obtains. A rudimentary

134 (1941) 65 CLR 42.

135 *Manchester Trust v Furness* [1895] 2 QB 539 at 545-546 per Lindley LJ.

136 *Macmillan Inc v Bishopsgate Investment Trust (No3)* [1995] 1 WLR 978 at 1000; 3 All ER 747 at 769; Fox, "Constructive Notice and Knowing Receipt: An Economic Analysis", (1998) 57(2) *Cambridge Law Journal* 391; cf Mason, "The Impact of Equitable Doctrine on the Law of Contract", (1998) 27(1) *Anglo-American Law Review* 1 at 15.

137 *O'Brien* [1994] 1 AC 180 at 196.

138 *O'Brien* [1994] 1 AC 180 at 190-191.

139 *O'Brien* [1994] 1 AC 180 at 196.

question as to the address of the parties and the discovery that they are (or have been) cohabitantes would ordinarily be enough to set alarm bells ringing. This is because of the added vulnerability which cohabitation may bring to a relationship, otherwise unexplained, under which one person guarantees the debt of another by assuming their risks if things go wrong.

77 In *O'Brien* the House of Lords proceeded to offer some practical guidance to credit providers. In the absence of known facts suggesting that influence is not only possible but probable, the duty of inquiry will be satisfied if the credit provider explains to the surety, at a meeting not attended by the debtor, the extent of liability he or she is undertaking and the risk which he or she is incurring, and advises him or her to take independent advice. In cases where the influence is not only possible but probable or where the risks are large, the credit provider will only be safe if independent advice is taken.

78 The wife submitted in this case that the principle stated in *O'Brien* was simply an extension of the *Yerkey* principle. In terms of operation, although not of history, that may be so. However that may be, it is an extension freed from most, if not all, of the disadvantages which attend the 1939 language of Dixon J in *Yerkey*. It is not based on out-dated stereotypes. Nor does it perpetuate a paternalistic approach to women in relation to their financial dealings. It does, however, recognise the fact that in a substantial proportion of marriages or analogous relationships it is still the husband (or the principal male partner) who has the business experience and the wife (or subordinate partner) who is willing to follow his advice without bringing a truly independent mind and will to bear on such financial decisions. The principle has a wider application in that it applies to all other cases where there is a relationship of emotional dependence between the debtor and the person conferring the advantage. It may apply to the situation where the husband guarantees his wife's debts, or where parents guarantee a debt of their child¹⁴⁰, where the credit provider is, or ought reasonably to be, aware that the surety reposes trust and confidence in the debtor in relation to his financial affairs¹⁴¹. And it provides clearer guidance to the credit provider as to what it should do to avoid being fixed with constructive notice.

79 Under the stimulus of legislation such as the *Contracts Review Act* and self-regulation, credit providers in Australia have already adapted their procedures to circumstances where volunteers, in family or other relationships, enter into

140 cf *Beneficial Finance Corp v Karavas* (1991) 23 NSWLR 256, a case under the *Contracts Review Act* 1980 (NSW).

141 See *Gold v Rosenberg* (1997) 152 DLR (4th) 385.

surety and like transactions not ostensibly to their personal advantage¹⁴². Although the adapted *O'Brien* principle which I favour would add a marginal cost to financial transactions and deprive some potential borrowers and their family businesses of the provision of capital, if it were to improve the quality of decisions of great importance to individual sureties, discourage the improvident assumption of risk, ill-advised (or unadvised) arrangements and diminish the number of litigious challenges when such arrangements go bad, the cost would be justified.

- 80 To the argument that this re-expression of equitable doctrine should be left to Parliament, there are two answers. First, the refinement has already taken place at the highest judicial level in England, a large financial market and a major legal jurisdiction from which Australian law originally derived its equitable doctrines. Secondly, as mentioned at the outset of these reasons, equitable principles are themselves in a constant state of evolution in response to the developments of society. Borrowing against the family home to support a business venture is one such development which was not prevalent in earlier times. The changing nature of domestic relationships is another such development. Equitable doctrine is perfectly capable of adjustment to such changes. It does not need to use outmoded concepts, or anachronistic language, which pretend that things have remained the same as they were in 1939 when *Yerkey* was decided.

Application of the modified *O'Brien* principle and conclusion

- 81 When I turn to apply the principle in *O'Brien*, modified in the way that I have re-expressed it, I consider that (although for reasons different than he expressed), the orders of the primary judge were correct. The Bank knew, or could readily have discovered, that Mrs Garcia reposed trust and confidence in her husband in relation to her financial affairs. Mrs Garcia was thus in a position of potential vulnerability to demands that she should act as a surety, even if the Bank had no reasonable means of knowing the details of the particular stresses of her personal relationship. Breakdown of personal relationships is sufficiently common in Australia to have alerted a credit provider, such as the Bank, to the potentiality of this surety's vulnerability. This is particularly so where (as here) a domestic home in which the borrower lived was put at risk by the surety arrangements. The Bank could readily, without unduly intrusive questions, have discovered the nature of the parties' relationship. It was already aware that they were cohabiters. Formalities and public declaration of their relationship (assuming the latter to be

142 Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (ALRC 69, Pt II), (1994) at 251-259 ("Developments in industry practice"). See also Reid, "The Australian Bankers' Association Perspective" and Morgan, "Esanda Policy on Loans" in Victorian Consumer Affairs Committee, *Women and Credit*, (March 1991) at 15-18. Similar development is said to have occurred in bank practice in the United Kingdom. See Millett, "Equity's Place in the Law of Commerce", (1998) 114 *Law Quarterly Review* 214 at 220.

43.

possible and appropriate) would not be necessary. Sufficient that basic questioning disclosed a transaction on its face of little or no specific advantage to the proposed surety and that such party stood at high risk in relation to the roof over her head.

82 Misrepresentation by Mr Garcia to his wife being established, together with constructive notice of the potential vulnerability of the wife, the Bank is unable to enforce the surety obligation against her because it is fixed with constructive notice of her right to set aside the transaction having regard to its failure to take reasonable steps to satisfy itself that she entered the obligation freely and with knowledge of the relevant facts. It is here that the principal weakness in the Bank's case is obvious. As the primary judge found, in this case the Bank's ordinary procedures were not followed. Mrs Garcia was given no advice or explanation of the documents which she was signing. Still less was she told to seek independent advice or that such evidence would be a pre-condition to the Bank's acceptance of her guarantee. The fact that she was a director of the company and that she presented as an "intelligent articulate lady" in a professional position is certainly relevant. But it is not ultimately determinative. To the knowledge of the Bank, the home in which she lived was being placed in jeopardy. The Bank failed to insist that she was made fully aware of that risk. In such circumstances, there being no exceptional reasons to hold otherwise, the Bank was unable to enforce the surety obligation. Although the case is not clear cut and some of the evidence supported the Bank's arguments, I have concluded that the primary judge was right to hold as he did. Banks and other credit providers can protect themselves from this result. Most already do so.

83 The result to which I have come flows not from the fact that Mrs Garcia was a married woman in need of special protection, as such, from the law of equity. It flows from a broader doctrine by which equity protects the vulnerable parties in a relationship and ensures that in proper cases they have full information and, where necessary, independent advice before they volunteer to put at risk the major asset of their relationship for the primary advantage of those to whose pressure they may be specially vulnerable.

Orders

84 I agree in the orders proposed.

85 CALLINAN J. The appellant is a physiotherapist who married Fabio Benjamin Garcia on 30 January 1970 in California; she was an Australian, he was a Colombian national living in the United States. They had two sons born on 5 November 1970 and 1 June 1973. They separated in September 1988 and were divorced on 30 November 1989. The decree became absolute on 1 January 1990.

86 In 1971 the appellant purchased a block of land at Wahroonga, Sydney, in her own name with financial assistance from her father. She and her husband and their first child moved permanently to Australia in the next year. They resided with her mother.

87 The appellant transferred the property to herself and her husband as joint tenants. A loan was then obtained to finance the construction of a house on the land. The lender insisted that the husband be registered as a proprietor on the title to the land.

88 The appellant's husband went into business on his own account as a foreign exchange broker in about 1977.

89 On 9 August 1979 the appellant and her husband signed an "all moneys" mortgage in favour of the respondent to secure loans made to her and her husband. Those loans were repaid, but the mortgage was not discharged.

90 In the period 1985-1987 the appellant signed guarantees in favour of the respondent on four occasions -

- (i) on 11 February 1985, in respect of advances to Citizens Gold Bullion Exchange Pty Ltd ("Citizens Gold") for an amount of \$100,000;
- (ii) in September 1985 in respect of advances to Citizens Finance Corp Pty Ltd for an amount of \$150,000;
- (iii) on 17 November 1986 in respect of advances to Citizens Gold for an amount of \$400,000;
- (iv) on 25 November 1987, in respect of advances to Citizens Gold for an amount of \$270,000.

91 The last guarantee was signed in the presence of a bank officer but in circumstances in which an explanation of it was not and could not have been given.

92 On 31 May 1990, after the divorce, an order was made by the Family Court transferring to the appellant the husband's interest in the property at Wahroonga subject to the mortgage to the respondent.

93 The appellant commenced proceedings to have the guarantees set aside on 28 June 1990. On 23 August 1990 the respondent made demand on the appellant for \$327,189.69 under the guarantee dated 25 November 1987.

94 The trial judge held that the guarantees of the liabilities of Citizens Gold executed in 1985 and 1986 could not be relied on by the respondent because the demand required pursuant to them had not been made. The respondent does not seek to enforce the 1985 and 1986 guarantees in these proceedings and accordingly the Court is concerned only with the guarantee given in 1987.

95 At first instance Young J¹⁴³ in the Equity division made these statements and determined to apply *Yerkey v Jones*¹⁴⁴:

"Accordingly we have here a situation where Mrs Garcia was informed by her husband that there would be no risk, she signed the guarantee on that basis and were it not for something that happened thereafter, there would have been no problem. The bank seeks to enforce the guarantee in the problem circumstances and the onus is on it because of the special tenderness equity shows to wives, to show that the transaction was not unconscionable. In my view it has failed to satisfy me on that score. Accordingly in my view the plaintiff is entitled to relief setting the guarantees aside.

... Were I not of the view that the plaintiff is entitled to invoke the *Yerkey v Jones* principle, I do not think she would be entitled to relief under the unconscionability principle. That principle seems to apply in the present situation only if the plaintiff can satisfy two tests, viz (1) was the conduct of the plaintiff's husband unconscionable; and (2) if the answer to (1) is yes, did the bank know, or at least be in a position where knowledge would be imputed to it, of such unconscionability. Unless the plaintiff can satisfy both limbs, she cannot succeed: *Contractors Bonding Ltd v Snee*¹⁴⁵."

143 (1993) 5 BPR 11,996 at 12,011.

144 (1939) 63 CLR 649.

145 [1992] 2 NZLR 157.

- 96 His Honour therefore set aside the guarantee given in 1987 on the basis of *Yerkey* but rejected the unconscionability case founded on *Commercial Bank of Aust Ltd v Amadio*¹⁴⁶. His Honour also rejected the case the appellant sought to make on the *Contracts Review Act* 1980 (NSW).
- 97 In the Court of Appeal¹⁴⁷ (Mahoney P, Meagher and Sheller JJA) their Honours differed in their reasoning and in the result from the trial judge. They effectively held that *Yerkey* no longer stated the law in Australia in a case of this kind and that the relevant tests were now to be found exclusively in *Commercial Bank of Australia Ltd v Amadio*¹⁴⁸. The Court of Appeal therefore allowed the appeal of the respondent and dismissed a cross-appeal by the appellant.
- 98 The primary judge thought that the appellant presented herself in court as intelligent and articulate. He found that she had lied in the past for her own economic interest. It was also established that she had previously invested \$130,000 in a motel in Dorriggo with her husband and others, that she had been involved with other companies of which she had been a director and that she had been earlier warned by the Registrar in Equity in 1984 not to sign documents without reading them. Furthermore, she conducted her own physiotherapy practice using a trustee service company to buy her equipment. It seems also to be the case that the appellant was, and held herself out to be, a director of the principal debtor from whom some minor financial benefits had been received by her or her family. In view of these matters it is somewhat surprising that his Honour made the critical findings to which I have referred and others that I will refer to below.
- 99 In *Yerkey*,¹⁴⁹ members of the Court acknowledged the assistance that they obtained from the judgment of Cussen J in *The Bank of Victoria Limited v Mueller*¹⁵⁰. Dixon J expressly adopted his Honour's exposition of earlier cases in *Mueller*¹⁵¹:

¹⁴⁶ (1983) 151 CLR 447.

¹⁴⁷ *National Australia Bank Ltd v Garcia* (1996) 39 NSWLR 577.

¹⁴⁸ (1983) 151 CLR 447.

¹⁴⁹ (1939) 63 CLR 649 at 664-665 per Latham CJ, 665-666 per Rich J.

¹⁵⁰ [1925] VLR 642.

¹⁵¹ (1939) 63 CLR 649 at 683.

"For myself I fully accept the exposition by Cussen J¹⁵² of *Howes v Bishop*¹⁵³ and *Talbot v Von Boris*¹⁵⁴. That exposition, I think, shows that these cases are consistent with and recognize the proposition that, if a married woman's consent to become a surety for her husband's debt is procured by the husband and without understanding its effect in essential respects she executes an instrument of suretyship which the creditor accepts without dealing directly with her personally, she has a prima-facie right to have it set aside. This is contained within the proposition stated by Cussen J as the minimum necessary for the decision of *Bank of Victoria Ltd v Mueller*¹⁵⁵, subject to the qualification he expresses in the introductory condition which speaks of the husband's plight as a debtor."

His Honour explained the rationale for the rule in this case¹⁵⁶:

"... the basal reason for binding the creditor with equities arising from the conduct of the husband is that in substance, if not technically, the wife is a volunteer conferring an important advantage upon her husband who in virtue of his position has an opportunity of abusing the confidence she may be expected to place in him and the creditor relies upon the person in that position to obtain her agreement to become his surety. Misrepresentation as well as undue influence is a means of abusing the confidence that may be expected to arise out of the relation."

100 I do not read the judgments of the other members of the Court, Latham CJ¹⁵⁷, Rich J¹⁵⁸ and McTiernan J¹⁵⁹ as dissenting from the views and statements of principle of Dixon J.

101 The starting point for the Court of Appeal in this case was to question whether *Amadio*, a case concerned with specially disabled persons, had overruled *Yerkey* or in some way subsumed it. Their Honours concluded that it had. I do not think

152 [1925] VLR 642 at 654-655.

153 [1909] 2 KB 390.

154 [1911] 1 KB 854.

155 [1925] VLR 642 at 648.

156 *Yerkey v Jones* (1939) 63 CLR 649 at 684-685.

157 (1939) 63 CLR 649 at 664-665.

158 (1939) 63 CLR 649 at 665-666.

159 (1939) 63 CLR 649 at 690.

it has. The majority (Mason, Wilson and Deane JJ) in *Amadio*, which was an unconscionability case, applied *Blomley v Ryan*¹⁶⁰ in which McTiernan J said¹⁶¹:

"His weakness was of the kind spoken of by Lord *Hardwicke* in defining the fraud characterised as taking surreptitious advantage of the weakness, ignorance or necessity of another. The essence of such weakness is that the party is unable to judge for himself."

- 102 Plainly his Honour was not there speaking of a presumed weakness arising out of a particular legal relationship or status. Mason J¹⁶² in *Amadio* quoted passages from the judgments of Fullagar J¹⁶³ and Kitto J¹⁶⁴ in *Blomley v Ryan*:

"The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage *vis-à-vis* the other."

"This is a well-known head of equity. It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands."

- 103 None of these passages is directed to the relationship and financial dealings between husband and wife. In *Amadio*, Deane J (with whom Wilson J generally agreed) discussed *Mueller*. His Honour said this¹⁶⁵:

"Cussen J's above analysis was made in the context of a guarantee procured by a husband from his wife in favour of the husband's bank. There is,

160 (1956) 99 CLR 362.

161 (1956) 99 CLR 362 at 392.

162 (1983) 151 CLR 447 at 461-462.

163 (1956) 99 CLR 362 at 405.

164 (1956) 99 CLR 362 at 415.

165 (1983) 151 CLR 447 at 475.

however, no basis in principle or in policy for confining the process of reasoning therein contained to cases of the relief of female spouses. It is appropriate to the circumstances of the present case."

104 I do not take his Honour to be saying other than that the approach and reasoning applicable to cases of husband and wife may be equally applicable to other relationships, in the context however, of the facts of the case before the court there, a case of a special disability¹⁶⁶.

105 Accordingly, the majority in *Amadio* held that the special disability of the exploited parents was sufficiently evident to the bank to make it prima facie unfair or unconscionable for it to be permitted to enforce the guarantee; and that the bank had not discharged the onus which lay upon it to rebut the prima facie unfairness or unconscientiousness of the giving of the guarantee.

106 In the Court of Appeal in this case Sheller JA, who wrote the principal judgment, undertook an analysis of the reasons of all of the judges in *Yerkey*. His Honour concluded that the reasoning of the other judges did not support the broad principles expounded by Dixon J, and cast doubt upon the genesis of those principles themselves¹⁶⁷. Sheller JA referred to a criticism of *Yerkey* by Rogers J in *European Asian of Australia Ltd v Kurland*¹⁶⁸ and quoted with apparent approval what his Honour said there to the effect that the retention of a specific immunity of married women in a case of this kind is an anachronism¹⁶⁹.

107 For myself I would take the view that the principles stated by Dixon J have now stood and been accepted for so long as the law in Australia¹⁷⁰, and that during that time they have served the ends of justice so well, they should be taken as the law unless and until this Court has held or should now hold to the contrary. That

166 See for example (1983) 151 CLR 447 at 477.

167 *National Australia Bank Ltd v Garcia* (1996) 39 NSWLR 577 at 598.

168 (1985) 8 NSWLR 192 at 200.

169 *National Australia Bank Ltd v Garcia* (1996) 39 NSWLR 577 at 583.

170 See *Warburton v Whiteley* (1989) 5 BPR 11,628; *Jenyns v Public Curator of Queensland* [1953] QSR 225; *Borg-Warner Acceptance Corporation (Aust) Ltd v Diprose* (1987) 4 BPR 9408; *Australia & New Zealand Banking Group Ltd v McGee* (1994) ASC ¶56-278; *Broadlands International Finance Ltd v Sly* (1987) 4 BPR 9420; *Re Halstead*; *Ex parte Westpac Banking Corporation* (1991) 31 FCR 337; *Peters v Commonwealth Bank of Australia* (1992) ASC ¶56-135; *Quek v Beggs* (1990) 5 BPR 11,761.

point was not reached in or by the decision in *Amadio*. Mason J¹⁷¹ and Deane J¹⁷² there clearly accepted the correctness of *Mueller*, (upon which Dixon J relied in *Yerkey*) and Dawson J¹⁷³ expressly accepted *Yerkey* as authority for the special position of a wife whose guarantee has been procured by the husband.

108 *Yerkey* was recently considered by the House of Lords in *Barclays Bank Plc v O'Brien*¹⁷⁴ in which Lord Browne-Wilkinson discussed policy considerations of the kind debated before us, particularly by the *amicus* Consumer Credit Legal Centre (NSW) Inc to whom the Court gave leave to appear¹⁷⁵:

"The large number of cases of this type coming before the courts in recent years reflects the rapid changes in social attitudes and the distribution of wealth which have recently occurred. Wealth is now more widely spread. Moreover a high proportion of privately owned wealth is invested in the matrimonial home. Because of the recognition by society of the equality of the sexes, the majority of matrimonial homes are now in the joint names of both spouses. Therefore in order to raise finance for the business enterprises of one or other of the spouses, the jointly owned home has become a main source of security. The provision of such security requires the consent of both spouses.

In parallel with these financial developments, society's recognition of the equality of the sexes has led to a rejection of the concept that the wife is subservient to the husband in the management of the family's finances. A number of the authorities reflect an unwillingness in the court to perpetuate law based on this outmoded concept. Yet, as Scott LJ in the Court of Appeal rightly points out¹⁷⁶, although the concept of the ignorant wife leaving all financial decisions to the husband is outmoded, the practice does not yet coincide with the ideal. In a substantial proportion of marriages it is still the husband who has the business experience and the wife is willing to follow his advice without bringing a truly independent mind and will to bear on financial decisions. The number of recent cases in this field shows that in practice many wives are still subjected to, and yield to, undue influence by their husbands. Such wives can reasonably look to the law for some

171 (1983) 151 CLR 447 at 463.

172 (1983) 151 CLR 447 at 475.

173 (1983) 151 CLR 447 at 486.

174 [1994] 1 AC 180 at 190, 194-195.

175 [1994] 1 AC 180 at 188.

176 [1993] QB 109 at 139.

protection when their husbands have abused the trust and confidence reposed in them.

On the other hand, it is important to keep a sense of balance in approaching these cases. It is easy to allow sympathy for the wife who is threatened with the loss of her home at the suit of a rich bank to obscure an important public interest viz, the need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile. If the rights secured to wives by the law renders vulnerable loans granted on the security of matrimonial homes, institutions will be unwilling to accept such security, thereby reducing the flow of loan capital to business enterprises. It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions."

109 As extensive as the changes - perhaps more apparent than real - in sexual and matrimonial relationships may in recent times have been, I would not wish in this case to attempt to state a principle to encompass all cases. Indeed, given the diversity of human relationships, it would not only be imprudent but probably also impossible to do so. I would not, with respect, adopt the principle settled by the House of Lords in *Barclays Bank Plc v O'Brien*, that any exceptional rules formerly applicable to guarantees by wives of husbands' obligations should be extended to co-habitees in cases in which the creditor is aware of an emotional relationship between the co-habitees. Such a principle might, in some circumstances (leaving aside potential difficulties associated with the proof and definition of an emotional relationship) narrow the range of people deserving of protection by reason of their occupation of a special position, or the suffering of a special disability of the kind considered by the Court in *Amadio*. Indeed, this may, in any event, be an area more fit for legislative than judicial intervention.

110 The trial judge in this case made two critical findings in favour of the appellant:

"In the instant case, the husband pressured the wife to sign the document. She appeared to have done so because her husband consistently pointed out what a fool she was in commercial matters whereas he was an expert, and because she was trying to save her marriage."¹⁷⁷

"Accordingly we have here a situation where Mrs Garcia was informed by her husband that there would be no risk, she signed the guarantee on that

¹⁷⁷ *Garcia v National Australia Bank Ltd* (1993) 5 BPR 11,996 at 12,009 per Young J.

basis and were it not for something that happened thereafter, there would have been no problem."¹⁷⁸

- 111 These two findings as to pressure and misrepresentation are almost precisely within the language used by Dixon J in *Yerkey*¹⁷⁹:

"If undue influence in the full sense is not made out but the elements of pressure, surprise, misrepresentation or some or one of them combine with or cause a misunderstanding or failure to understand the document or transaction, the final question must be whether the grounds upon which the creditor believed that the document was fairly obtained and executed by a woman sufficiently understanding its purport and effect were such that it would be inequitable to fix the creditor with the consequences of the husband's improper or unfair dealing with his wife."

- 112 I was impressed by the submissions of the respondent that on the evidence the findings of pressure and want of understanding on the part of the appellant were not open, but not sufficiently so to reach a different conclusion on those basic factual findings. 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. One aspect of the change that has occurred in the enhancement of women's opportunities and relief from discrimination is that in practice, wives may find it more difficult to satisfy a court that they have succumbed to pressure or have been misled by their husbands in financial matters.

- 113 I do not doubt however that there are likely today to be many married women still in need of the special protection that *Yerkey* offers. Furthermore I do not think that there is any injustice to a lender in requiring it to be diligent in the way in which *Yerkey* prescribes in the case of married women who enter into transactions advantageous to husbands or legal personalities controlled by them, but which are disadvantageous or potentially so to the wife. No occasion arises in this case to express any different principles from those stated in *Yerkey*. On his findings the learned trial judge was bound to apply *Yerkey* and correctly did so. I would uphold the appeal and agree with the orders of Gaudron, McHugh, Gummow and Hayne JJ.

¹⁷⁸ *Garcia v National Australia Bank Ltd* (1993) 5 BPR 11,996 at 12,011 per Young J.

¹⁷⁹ (1939) 63 CLR 649 at 686.