Case Notes

National Australia Bank Ltd v Garcia (unreported, 3 July 1996, NSW Court of Appeal) *Teachers Health Investments Pty Ltd v Wynne* (unreported, 16 July 1996, NSW Court of Appeal)

The question whether *Yerkey v Jones*[1] which espouses a special equity in favour of a woman who guarantees the debt of her husband or his company represents the law in New South Wales has recently been raised again in two Court of Appeal decisions delivered respectively on 3 July 1996 and 16 July 1996.[2]

The Court of Appeal in *National Australia Bank Ltd v Garcia*[3] was asked to adjudicate on the validity of a mortgage and three guarantees, executed in favour of National Australia Bank Limited (NAB) by Mrs Garcia and her then husband. NAB's main claim was under the 1987 guarantee, although it also sought to enforce two other guarantees signed respectively in 1985 and 1986. The guarantees were to secure facilities granted to a company (Citizens Gold Bullion Exchange Pty Limited) controlled by Mrs Garcia's husband. The 1987 guarantee was secured by a mortgage over the couple's matrimonial home signed in 1979. At first instance,[4] Young J found that Mrs Garcia was, together with Mr Garcia, a shareholder and director of Citizens Gold. His Honour also found that Mr Garcia was in complete control of the company and Mrs Garcia was not directly involved in the company's business and did not have a substantial interest

1 (1939) 63 CLR 649. In *Yerkey v Jones* Dixon J held that a creditor is unable to enforce the security against a married woman who did not fully understand the nature and effect of the transaction, unless it has taken adequate steps to inform her or has reason for supposing that she had an adequate comprehension of the obligations she was undertaking and an understanding of the effect of the transaction. See also C Shum, "Protection of Married Women As Guarantors" (1996) 14 *Aust Bar Rev* 229.

2 *National Australia Bank Ltd v Garcia*, unreported, 3 July 1996, Court of Appeal no. 40231/93; and *Teachers Health Investments Pty Ltd v Wynne*, unreported, 16 July 1996, Court of Appeal no. 40529/94.

3 Unreported. Court of Appeal no. 40231/93, 3 July 1996.

4 *Garcia v National Australia Bank Ltd* (1993) NSW ConvR 55-662.

in the company. There was evidence that the husband pressured the wife to sign the guarantee. 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. Young J, at first instance, found that NAB had not shown that it sufficiently explained to the wife the fact that her liability under the guarantee was secured by the mortgage. Further, there were no other means by which the wife was aware of what was going on. Accordingly, if the guarantee was to stand at all, it was to stand on an unsecured basis. His Honour continued:

> "As to the guarantee, there is no difficulty at all about a person comprehending that a document headed 'Guarantee' which her husband has explained is to guarantee the Bank's overdraft is just what it says. Moreover, the plaintiff had signed guarantees in 1985 and 1986 and another one in connection with Planet International Ltd to the Standard Chartered Bank. The Standard Bank guarantee was signed, it would seem in front of a bank manager on 10 December 1987. Indeed, Mrs Garcia's whole evidence is consistent with her having agreed to guarantee the company's overdraft. The vice, however, was that the husband assured Mrs Garcia that there was either the money or the gold there and there would be no risk...Accordingly we have 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 guarantee aside."[5]

Young J held that under the *Yerkey v Jones* principle Mrs Garcia was not indebted to NAB under the mortgage and that the guarantees be set aside. His Honour felt bound to follow *Yerkey v Jones*. His Honour said:

> "[I]t seems to me that either it is not open to a single Judge to find that *Yerkey v Jones* has been subsumed into the *Amadio* principle, or alternatively a single Judge would be most unwise to take this step. It seems to me that the Court of Appeal has taken the view that *Yerkey v Jones* is until the High Court decides otherwise, a separate principle and I should maintain that point of view. In *Warburton v Whiteley & Ors* (1989) NSW ConvR 55-453 at 58,287, Kirby P thought that the rule was anomalous, anachronistic and inappropriate, yet recognized that the Court of Appeal must still follow it until the High Court decided otherwise."[6]

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5 Above, note 4 above at 59790.

6 Above, note 4 above at 59786.

Mrs Garcia also relied upon *Commercial Bank of Australia Ltd v Amadio*[7] and the *Contracts Review Act 1980*. Young J held that Mrs Garcia was not entitled to relief under the unconscionability principle because of NAB's lack of knowledge, actual or constructive, of Mr Garcia's conduct. His Honour also held that the Contracts Review Act 1980 dealt with conduct up to the making of the contract and the terms of the contract itself, whereas Mrs Garcia's claim was that what happened after the making of the contract was unfair. The fact that unjust consequences flowed from a contract would be insufficient for the operation of the Act. Further, the mortgage was signed before the *Contracts Review Act 1980* came into force and so the Act could not apply to it. Also, it was initially entered into to secure loans in a perfectly ordinary way and in a way in which the wife appreciated the significance of what she was doing. The best that the wife could hope for was a declaration that no moneys were owing under the mortgage and a consequential order for discharge.

On appeal, NAB argued that *Yerkey v Jones* had been subsumed within *Commercial Bank of Australia Ltd v Amadio*, while Mrs Garcia submitted on her cross appeal that NAB had acted unconscionably. The Court of Appeal allowed the appeal. It held that the principle in *Yerkey v Jones* should no longer be applied in New South Wales, and that the High Court decision of *Commercial Bank of Australia Ltd v Amadio* is the authoritative statement on equity's jurisdiction to grant relief against unconscionable conduct. The Court of Appeal agreed with Young J that there was nothing to show that Mrs Garcia's lack of understanding of the risk was sufficiently evidenced to the bank to make it unconscientious that it accept her assent to the transaction, and that there was nothing of which the bank was aware that might reasonably have led it to suspect that Mr Garcia was bringing pressure on her to execute the documents or that she was doing so other than voluntarily. The Court also held that discretion to grant relief under the *Contracts Review Act 1980* would not generally be exercised if the disability complained of was one of which the other party was unaware, and that Young J correctly refused to grant relief under the *Contracts Review Act*.

The principal judgment in the Court of Appeal was delivered by Sheller JA with whom Meagher JA agreed. Mahoney P agreed with the orders proposed by Sheller JA and in general with his Honour's reasons. But in view of the nature of the issues involved, Mahoney P indicated briefly the basis of his views in relation to the main matters at issue. His Honour said:

> "In my opinion it is wrong to approach the position of a party to transactions of the kind here in question upon the basis that there is a principle or a presumption that either party has been less than fully capable of dealing with his

[7] (1983) 151 CLR 447.

or her affairs. It is wrong to treat the position of a party - in the present case it is the position of a married woman - as being in principle one of disadvantage. Each case must, for such purposes, be considered according to its own facts...Nor, in my opinion, should the position of any party, whether wife, husband or otherwise, be approached upon the basis that an inference of fact is to be drawn (in principle, prima facie, or otherwise) as to the capacity of that person to deal with his or her own affairs by reason only of his or her matrimonial position or family relationship. Again, each case must be examined and determined by reference to its own facts...The present appeal concerns the position of a woman in a matrimonial relationship. One suggestion has been that, because she was a married woman and/or because her husband was involved in the transactions, the conclusion should be drawn that she lacked the capacity or will to enter into them. The suggestion was that the cases to which Sheller JA has referred warrant that conclusion. One may find that the circumstances of the life of a married woman may be such that it may be inferred, as a matter of factual probability, that she had not had sufficient experience of business transactions to enable her to form a sound judgment of the transactions in question. One may find that her matrimonial relationship to her husband was such that it may be inferred that she did not exercise a free will but was unduly influenced by him. But in my opinion such matters should not now be inferred merely from the fact that she was married and that her husband was involved. In the past, the matrimonial relationship and the experience of married woman may have been such that it was proper to infer such matters as facts or even to accept that in principle such was the case. To infer such matters now would so often be contrary to experience that it is wrong to accept them to be so, in principle or as a presumption of fact. Whether a person has knowledge and/or experience in this regard can, I believe, readily be proved in evidence. I am not now prepared to draw inferences of this kind merely from the state of the matrimonial or other relationship of a man or woman. In my opinion, factual findings as to capacity and the like should be approached upon that basis."[8]

Sheller JA revisited *Yerkey v Jones*, and reviewed a number of other cases involving women sureties, including *Turnbull & Co v Duval*[9], *Chaplain & Co Ltd v Brammall*[10], *Bank of Victoria Ltd v Mueller*[11], *European Asian of Australia Ltd v Kurland*[12], *Warburton v Whiteley*[13], *Barclays Bank PLC v O'Brien*[14], *Akins v National Australia Bank Ltd.*[15]

It will be recalled that *Yerkey v Jones* was based mainly on *Turnbull & Co v Duval* and *Bank of Victoria Ltd v Mueller*. But *Turnbull & Co v Duval* was criticised by Lord Browne-Wilkinson in *Barclays Bank plc v O'Brien* because:

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8 Above, note 3 above at 1-3 (per Mahoney P).
9 [1902] AC 429.
10 [1908] 1 KB 233.
11 [1925] VLR 642.
12 (1985) 8 NSWLR 192.
13 (1989) NSW ConvR 55-453.
14 [1994] 1 AC 180.
15 (1994) 34 NSWLR 155.

"[t]he pleadings [in that case] contain no allegation of undue influence or misrepresentation by Mr. Duval. Mrs Duval did not in evidence allege actual or presumptive undue influence. The sole ground of decision in the courts below was Campbell's fiduciary position. There is no finding of undue influence against Mr Duval. No one appeared for Mrs Duval before the Privy Council. Therefore the second ground of decision sprung wholly from the Board and Lord Lindley's speech gives little insight into their reasoning."[16]

This criticism was accepted by the New South Wales Court of Appeal (Clarke JA, Sheller JA and Powell JA) in *Akins v National Australia Bank*. In *Akins'* case, Clarke JA said:

"In circumstances where the primary decision on which *Yerkey* was based contained no reasoning supporting the presently relevant ground of decision and has been criticised with such compelling force by the House of Lords it seems to me that the Court should now reconsider whether it should continue to accept that there is a special rule relating to wives where they become guarantors for their husbands or their husband's businesses."[17]

and:

"I would conclude that the special rule should no longer be applied and that the principles discussed in *Commercial Bank of Australia Ltd v Amadio* should be applied to the resolution of a case such as the present. I would add the observation that I do not regard *Turnbull* as an authority which binds the Court to apply the special rule articulated in *Yerkey*. Indeed one of the difficulties in *Turnbull* is that it is not possible to discern the basis for the relevant ground of decision"[18]

Sheller JA agreed with Clarke JA. But in *Garcia's* case, Sheller JA has changed his view, because his Honour now finds:

"this criticism strange. Whatever the state of the pleading the findings of fact supported a conclusion that Mr Duval had acted at the least improperly. At 431 Lord Lindley observed that Mr Duval was indebted to all three branches of Turnbulls in London, New York and Jamaica. To London he owed £22, to New York £1,500 and to Jamaica £1,000, the last mainly for the supply of beer. Mrs Duval gave evidence that she never authorised her husband to offer her property as security and never requested anyone not to take proceedings against her husband. She talked with her husband about giving security and knew that he was in difficulties about the beer business believing that £1,000 would get him out of his troubles. She knew that he had a brick factory and machinery but not that he was in difficulties with reference to this. She knew nothing about any document she was to sign until it was brought to her by

16 [1994] 1 AC 180, at 192.
17 (1994) 34 NSWLR 155, at 170.
18 (1994) 34 NSWLR 155, at 173.

> her husband. She had no advice about it; she did not read it; it was not explained to her. She signed it because her husband pressed her to do so and told her he was being pressed by Campbell and because she believed that if she would sign it for £1,000 it would enable her husband to settle the beer contract. She meant to lend him £1,000 to get him out of his trouble. Lord Lindley said that her statements as to what she knew of her husband's affairs, of what he told her, and of the pressure under which she signed the security, were all corroborated by her husband. At 193 in *Barclays Bank PLC v O'Brien* Lord Browne-Wilkinson said that it was the lack of any sound basis for holding the [sic-that] Mr Duval was guilty of a legal wrong, for which Turnbulls were indirectly held liable, which led to the theory that the creditors, Turnbulls, were themselves in breach of some duty owed by them as creditors directly to the surety, Mrs Duval. His Lordship, I think, had particularly in mind the requirement that the creditors take steps to ensure not only that the husband had not used undue influence or made a misrepresentation but also that the wife had "an adequate understanding of the nature and effect" of what she was doing. The latter was imposing on the creditors vis-a-vis a particular class of surety a duty greater than that which, under the ordinary law, a husband would owe to his wife. I interpolate that in Australia since *Amadio* a husband may owe such a duty to his wife who is contemplating making a voluntary disposition in his favour."[19]

His Honour was not persuaded that *Turnbull & Co v Duval* proceeded on a wrong basis or that, on its particular facts, Lord Lindley's reasons for the conclusion he came to were wrong.[20]

With respect, it seems that there is justification for Lord Browne-Wilkinson's criticism of *Turnbull* because the Privy Council decided the case on the basis of an issue not argued before it, and the facts found by the court had nothing to do with the question whether or not Campbell was in breach of his fiduciary duties towards Mrs Duval. In other words, the statement of law from Lord Lindley was based upon facts which were not material to the question of Campbell's fiduciary position. Sheller JA might have read too much from Lord Browne-Wilkinson's judgment in so far as his Honour suggested that his Lordship had particularly in mind the requirement that the creditors take steps to ensure not only that the husband had not used undue influence or made a misrepresentation but also that the wife had an adequate understanding of the nature and effect of what she was doing. His Lordship said:

> "No one has ever suggested that in the ordinary case of principal and surety the creditor owes any duty of care to the surety: in the normal case it is for the surety to satisfy himself as to the nature and extent of the obligations he is assuming."[21]

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[19] Unreported 3 July 1996, NSW Court of Appeal, per Sheller, at 28-29.
[20] Above, note 19, at 33.
[21] *Barclays Bank PLC v O'Brien*, above, at 193

Further, his Lordship said:

> "In my judgment, if the doctrine of notice is properly applied, there is no need for the introduction of a special equity in these types of cases. A wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong has an equity as against him to set aside that transaction. Under the ordinary principles of equity, her right to set aside that transaction will be enforceable against third parties (eg against a creditor) if either the husband was acting as the third party's agent or the third party had actual or constructive notice of the facts giving rise to her equity...The key to the problem is to identify the circumstances in which the creditor will be taken to have had notice of the wife's equity to set aside the transaction...[A] creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction. It follows that unless the creditor who is put on inquiry takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained, the creditor will have constructive notice of the wife's rights...[I]n my judgment a creditor will have satisfied these requirements if it insists that the wife attend a private meeting (in the absence of the husband) with a representative of the creditor at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice. If these steps are taken in my judgment the creditor will have taken such reasonable steps as are necessary to preclude a subsequent claim that it had constructive notice of the wife's rights."[22]

Sheller JA thought that this formulation of the principle "appears to be a traditional approach to the problem", and his Honour believed "not contrary to anything that was said in *Turnbull & Co v Duval*."[23] His Honour seemed to have agreed with Mr Jackson QC, who appeared for Mrs Garcia, that Lord Browne-Wilkinson's formulation of the principle "was a re-statement of what has been said to be the rule in *Yerkey v Jones* substituting the words "there is a substantial risk" for the words "there is a presumption." His Honour continued:

> "In my opinion, even if Lord Lindley's statement of facts in *Turnbull & Co v Duval* is insupportable, the principle he enunciated, if the husband was truly the agent of the creditor, is unexceptionable. But if the husband was not acting as agent for the creditor to procure the guarantee, the question remains what is the authority for saying that the creditor, without notice of the wife's lack of understanding or the husband's impropriety, must ensure that the wife had an adequate understanding of the nature and effect of what she was doing

22 Above, at note 21, at 194

23 Above, at note 19, at 31.

or will be affected in equity by the impropriety. Lord Browne-Wilkinson's criticisms are potent. Indeed the proposition does seem to reintroduce by the back door either a presumption of undue influence and perhaps, in part, the Romilly heresy."[24]

Arguably, his Lordship in *O'Brien* was propounding the principles upon which a creditor would be fixed with constructive notice of a wife's rights arising from her husband's (ie the principal debtor's) improper dealing with his wife. The wife is still given tender treatment in that (1) she does not have to show that the bank has actual or constructive knowledge of the equity resulting from her husband's legal wrong; the court automatically fixes a creditor with constructive notice of the wife's equity when the transaction is on the face of it not to the wife's financial advantage and carries a substantial risk of the husband committing a legal or equitable wrong entitling the wife to set aside the transaction; and (2) the bank must explain the position to the wife in a personal interview, in the absence of her husband.[25] But *Yerkey v Jones* focuses on the creditor's duty to ensure that the guarantor wife has an adequate understanding of the nature and effect of what she is doing. Once the wife is able to prove the factual situation, prima facie she is entitled to have the transaction set aside under *Yerkey*. The wife's equity may arise as a result of the husband's "neglect to inform her of the exact nature of that to which she is willing blindly, ignorantly or mistakenly to assent"[26]. "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."[27]

Does *Amadio* impose a duty on the husband to ensure that the guarantor wife has an adequate understanding of the nature and effect of the guarantee? *Amadio* is predicated on the presumption that there are a stronger party and a weaker party who is under a special disability or disadvantage. It seems that the proper approach is to regard both the wife and the husband as equally capable and intelligent in dealing with their own affairs. In fact, it is hard to find a statement of law in *Amadio* to the effect that if a wife is to become a guarantor for her husband's debt, the husband is legally obliged to ensure that the wife understands the nature and effect of the guarantee, and that the wife is presumed to be under a special disability or disadvantage when dealing with the husband.

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[24] Above, at note 19, at 31-32.

[25] A Berg, "Wives' Guarantees-Constructive Knowledge and Undue Influence", [1994] *LMCLQ* 34.

[26] See *Yerkey*, per Dixon J at 685.

[27] Above, at note 26, at 685-686.

In *O'Brien*, Lord Browne-Wilkinson examined a number of authorities including *Bank of Victoria Ltd v Mueller*, which his Lordship described as a decision reached by applying the heresy, propounded by Lord Romilly, to the effect that when a person has made a large voluntary disposition the burden is thrown on the party benefiting to show that the disposition was made fairly and honestly and in full understanding of the nature and consequences of the transaction.[28] Although this heresy has never been formally overruled, it has rightly been regarded as bad law for a very long time[29]. Sheller JA disagreed that *Mueller* was a decision reached by applying the Romilly heresy. His Honour said:

> "With the greatest respect quite clearly it was not. As Dixon J underlined in *Yerkey v Jones* at 680, Cussen J prefaced his proposition with the words "disregarding any question as to the onus of proof which may be a doubtful matter-see *Henry v Armstrong*."[30]

In this regard, Sheller JA's comments are potent. *Mueller* was clearly not based on *Hoghton v Hoghton*. Cussen J cited *Hoghton* as an authority for the principle that the court will not as a rule recognize a voluntary deed of gift when it appears that it was not understood by the donor. Cussen J said:

> "Disregarding any question as to the onus of proof, which may be a doubtful matter-see Henry v Armstrong-and disregarding any question as to undue influence, I shall presently show, by reference to authorities, that this doctrine as to the necessity for fully understanding the transaction is extended to transactions of a commercial nature, such as guarantees given to a creditor by a wife for the benefit of her husband, particularly if there is a heavy past indebtedness to the secured. In such cases the relation of husband and wife and the past indebtedness may put the creditor in such a position that, if he does not take care to fully explain the transaction, he may find himself defeated by proof that the wife did not fully understand it."[31]

Sheller JA had some difficulty with the propositions Lord Browne-Wilkinson advanced at 196 which led his Lordship to identify a number of other special relationships, including that of a son to his elderly parents, which would put a creditor accepting a security from the party assumed to be the weaker, on inquiry. But his Honour agreed with Clarke JA in *Akins v National Australia Bank Ltd* that in Australia the High Court's decision in *Amadio* describes the jurisdiction in equity to relieve against unconscionable dealing, and that once the principles of *Amadio* were

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[28] See *Hoghton v Hoghton* (1852) 15 Beav 278; 51 ER 545.

[29] See the account given by Dixon J in *Yerkey v Jones* (1939) 63 CLR 649 at 678 et seq per Lord Browne-Wilkinson at 193.

[30] Above, note 3, at 30.

[31] *Yerkey*, above, at 651.

applied to the facts of the case there should be no room for resort to the special rule in *Yerkey v Jones*. Sheller JA set out the reasons why *Yerkey* should not be applied in New South Wales:

> "It is the duty of this Court to accept loyally the decisions of the High Court; *Broome v Cassell & Co* [1972] AC 1027 at 1054; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 129. *Yerkey v Jones* was decided nearly sixty years ago. If a majority of the Court had agreed with Dixon J's reasons for judgment I think this Court would have been bound to follow it regardless of what the House of Lords said about it in *Barclays Bank PLC v O'Brien*. However in none of the judgments of the other three Justices is there support for the principles which have been said to flow from Dixon J's decision. At best what is said to be the principle in *Yerkey v Jones* is a principle to which one Judge only adhered. Moreover at its heart it is based upon general assumptions about the capacity of married women rather than upon evidence of the circumstances of the particular case. Accordingly my conclusion is unchanged that Clarke JA was correct to say that the so-called principle in Yerkey v Jones should no longer be applied in New South Wales."[32]

It should be noted that Kirby P in the Court of Appeal in *Warburton v Whiteley & Ors*[33] felt bound to follow *Yerkey*. His Honour said:

> "It is possible that the High Court, with a fresh opportunity to review *Yerkey*, would refine the principle there stated. It might subsume it within what I respectively consider to be the more appropriate, modern and satisfactory general principle elaborated in *Amadio*. But until the High Court, or the legislature, does so I do not believe that this Court is free to act as the creditors urge."

So the Court of Appeal in New South Wales is divided as to whether *Yerkey v Jones* should be followed.

The appeal in *Teachers Health Investments Pty Ltd v Wynne*[34] raises questions similar to those considered in *National Australia Bank Ltd v Garcia*. In this case the wife mortgaged her matrimonial home to the creditor as security for a loan from the creditor to the husband. Hunter J sitting in the Common Law Division of the Supreme Court of New South Wales[35] held that the wife was entitled to relief in respect of the mortgage transaction upon the second of the equitable presumptions in *Yerkey v Jones*.[36] His Honour held, however, that the mortgage transaction was not unconscionable under *Amadio* and was not unjust within the meaning of the *Contracts Review Act 1980*. Nor did his Honour find conduct which contravened the provisions of s52 of the *Trade Practices Act 1974* nor any misrepresentation.

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[32] See above, at note 3, at 34.
[33] (1989) NSW ConvR 55-453.
[34] Unreported CA 40529/94, 16 July 1996.
[35] (1994) NSW ConvR 55-718.
[36] (1939) 63 CLR 649 per Dixon J at 676

The principal judgment of the Court of Appeal was delivered by Beazley JA, with whom Waddell AJA agreed. Upon the basis of the views expressed in *National Australia Bank Ltd v Garcia,* Mahoney J agreed with the judgment of Beazley JA and in general with her Honour's reasons. Beazley JA said:

> "There are now two decisions of this Court which have held that *Yerkey v Jones* no longer represents the law in New South Wales. Having regard to the examination of the question in *Akin* and the detailed review of the authorities in *Garcia,* it is not necessary to revisit this area of the law. *Garcia* is a considered decision of this court where the application of *Yerkey v Jones* was directly in issue and follows a strong obiter statement in *Akin* to the same effect. In my opinion it should be followed. The result for the present case is that the trial judge's decision, based as it was on the principles in *Yerkey v Jones,* cannot stand. It is not necessary therefore to consider the appellant's second submission that his Honour wrongly applied *Yerkey v Jones* to the facts."[37]

It will be recalled that Hunter J, at first instance, found that the appellant's conduct did not fall within the principles governing the court's jurisdication relating to unconscionable bargains. Beazley LJ disagreed, because "his Honour did not engage in any examination of the principles propounded in *Amadio* as they might apply to the facts of this case."[38] Her Honour held that two matters need to be established to invoke the court's jurisdiction to set aside an unconscientious transaction. The first is that the party seeking to impugn the transaction was under a relevant disability. Her Honour found that the wife was not only in a highly vulnerable state, her will had in fact been overborne. Education or experience may not be sufficient to overcome such vulnerability, and, in this case, it clearly was not. In her Honour's opinion, the respondent was in a position such that she was unable to judge for herself whether the transaction was provident or not. In other words, she had established that she was in a special position of disadvantage sufficient to satisfy the first element of the principles governing unconscionable bargains.[39] On the question whether the appellant should have known of the respondent's special disadvantage, her Honour found:

1. Even a cursory consideration of the financial information provided would have demonstrated that the principal debtor had no ability to service the interest on the loan. In the circumstances, the appellant should have been on notice that the transaction was perilous from the principal debtor's point of view and improvident from the respondent's point of view.[40]

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[37] Above, at note 34, at 19.
[38] Above, at note 34,
[39] Above, at note 34, at 24-25.
[40] Above, at note 34, at 25-26.

2. There was no direct dealing between the appellant, the principal debtor or the respondent. At all times, the appellant acted through the agency of its solicitors, who did not act for the respondent.

3. The respondent did not know the perilous financial position of the principal debtor or Banksia Settlements Pty Ltd, the trustee of a discretionary family trust controlled by the principal debtor. Her Honour found that there are clear indications in *Amadio* that adequate advice may need to include advice as to the financial circumstances of the principal debtor or the principal debtor's business. In the present case, the respondent was not in receipt of any advice as to the providence of the transaction, was not adequately advised by her own solicitor of the financial risks of the transaction and by her father who was old and frail.

   It was incumbent in these circumstances for the appellant, at the very least, to advise the respondent to obtain advice relating to the propriety of the transaction from her point of view. The appellant's failure to so advise, whether that failure be innocent, due to ignorance or oversight, or because it was considered unnecessary or irrelevant to inquire, renders its conduct unconscionable.[41]

Accordingly, her Honour found the wife was entitled to relief in accordance with the principles in *Commercial Bank of Australia Ltd v Amadio.* But it should be noted that the trial judge found that the respondent understood the terms and effect of the mortgage and had been advised by her solicitor in connection with the transaction and her own solicitor actually witnessed her signature on the mortgage document. However, both the trial judge and Beazley JA found the advice inadequate. Another important feature of this case is that the marriage of the respondent and the principal debtor had been in difficulty for some time prior to her entry into the mortgage. "She clearly wanted to believe in the genuineness of the principal debtor's conduct in the hope that his return to the matrimonial home presaged a re-establishment of their married relationship, as much for the benefit of their children as for herself."[42]

Arguably, Beazley JA in *Wynne's* case has shown undue tender treatment to the wife. The wife was not under any special disability because she knew what she was doing. Even if she was under a special disability in dealing with the appellant, that disability was not *sufficiently* evident to the appellant to make the transaction prima facie unfair or unconscientious. It seems Beazley JA has placed too onerous a burden on the creditor when dealing with a women surety. It has to inquire of the wife as to her marital relationship with her husband (the principal debtor)

[41] Above, at note 34, at 28-29.
[42] Above, at note 34, at 13.

and to investigage the surrounding circumstances leading to the signing of the instrument. It is legally obliged to ask the wife whether at the time of the contract she was in a vulnerable emotional position, despite her education and experience. It has to inquire into the adequacy of the advice she has received. Legal advice from her own solicitor may not be sufficient. The transaction may be set aside if she has not been given financial advice relating to the transaction.

It seems that the Court of Appeal in *Wynne* is unable to throw off the shackles of the principles in *Yerkey v Jones* which are reintroduced by the back door through invoking the principle in *Commercial Bank of Australia Ltd v Amadio.*

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