Rethinking the special equity rule for wives: post Garcia, Quo Vadis, where to from here?

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CHARLES YC CHEW

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Introduction: Special equity rule—the search for a principle

Consumer groups have complained about consumer credit practices causing wo-
men who have become guarantors are not aware that their spousal or partners may be
homes and their financial security. One of their more urgent concerns has been
practice of credit providers requiring women to take some legal responsibility.
credit provided to their male spouses or partners and from which the wo-
involved received no benefit.

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Trade Practices Commission, Guarantors: Problems and Perspectives (Discussion Paper, 1
at 14.)
Although for the present, the case law in respect of the special equity rule has been restricted to wives 3 there have been suggestions that the principle could be extended to a wider range of relationships of trust and confidence such as those involving husbands as well as wives; de facto relationships and same-sex arrangements; parents and grandparents in respect of their financial transactions with children or grandchildren; members of extended families, such as aunts and uncles; and close friends. 4

The special equity rule originally evolved as a result of the courts' interpretation of the early English cases decided in respect of guarantees given by wives to secure the debts of their husbands. The courts did not apply the doctrines of undue influence or unconscionable conduct because they were somewhat vague in their deliberations and gave the impression that they were deciding the cases on the basis of a special principle which only applied to the guarantees wives gave.4

The existence of this special equity as an independent principle which applies to wives who became guarantors was clearly acknowledged in Australia in the landmark decision of Yerkey v Jones.5 This case involved Mr and Mrs Yerkey, the plaintiffs who sued upon a covenant to pay principal and interest contained in a mortgage of land owned by Mrs Jones. Mr Jones intended to purchase a property from the plaintiffs for the purpose of poultry farming. A condition of the debt was that Mr Jones should procure from his wife a second mortgage over her property to secure £1,000 of the £5,300 final payment. The solicitor of the creditors prepared the mortgage and Mr Jones persisted his wife to sign. Under the mortgage which was a 'guaranteed mortgage', Mrs Jones was made personally liable to pay the £1,000. Mr Jones failed in his poultry business having occupied the farm for about a year without paying any interest and abandoning it altogether.

Mrs Jones sought equitable relief, claiming that she did not understand the nature of the mortgage although the solicitor explained it to her in some detail. Mrs Jones did not receive any independent legal advice. In the Supreme Court of South Australia, Napier J held that on grounds of undue influence, misrepresentation and unilateral mistake, Mrs Jones was entitled to equitable relief against the personal covenant in the mortgage.

In the High Court it was held that a wife like Mrs Jones stands in a special position where she acts as a guarantor for her husband in that if she signs a written guarantee she has a prima facie right to have it set aside if her consent was obtained by fraud and she did not understand its effect.6 There Dixon J's judgment had to represent the authoritative statement of how equity will provide relief for a wife who has agreed to be surety for her husband's debt. His Honour examined a number of authorities on the position of wives as guarantors for their husbands such as Sams Ltd v Jones,7 Turnbull & Co v Dowell8 and Chaplin & Co Ltd v Brammall9 allowed the appeal explaining the position in this oft quoted passage:

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 with her personally, she has a prima facie right to have it set aside.10

Such an equitable principle was originally developed as a way of ameliorating harshness of the common law, which prevented a woman from dealing in property in her own name.11 The position of married women under common law has been explained by Blackstone in the following way:

By marriage the husband and wife are one person in law. The very being or legal existence of the woman is by the common law suspended during the marriage, or, at least it is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything.12

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6 Above n 5 at 683. It is an essential element of the principle in Yerkey that the wife obtaingible benefit from the transaction.
7 (1922) 128 LT 218.
8 (1962) AC 429.
9 (1908) 1 KB 233.
A Critical Analysis of The Yerkey Principle in the Context of Garcia v National Australia Bank

The Yerkey principle of special equity which provides wives with more liberal protection than the doctrine of undue influence was reluctantly applied in some cases and distinguished in others. Recent appellate courts in Australia and in England have rejected this principle. However, the recent surprising High Court decision in Garcia v National Australia Bank Ltd has once again reignited the debate on the judicial basis of the rule in Yerkey v Jones by reviving it from the brink of judicial irrelevance. The High Court preferred not to adopt the views expressed by the House of Lords in Barclays Bank v O'Brien by re-affirming the correctness of the Yerkey principle and addressing the strong criticisms against it. In so doing, the court provided an authoritative statement on the hitherto controversial status of Yerkey v Jones. The High Court in Garcia found it unnecessary to consider O'Brien in detail, and merely made the observation that in that case the House of Lords discounted what it understood was the special equity theory as stated by Dixon J in Yerkey v Jones.

In Garcia the High Court expressed the view that Yerkey v Jones continues to stand law in Australia. In its analysis, the court did not see any requirement for presumption of undue influence nor did it see any necessity to characterize husband as the agent of the lender (as the House of Lords did in O'Brien). essence of the principle lies in the relationship of trust and confidence that exists between the guarantor and the borrower, and the creditor’s knowledge of relationship.

The facts of Garcia are relatively uncomplicated. The appellant Mrs Garcia, a quiet physiotherapist, in 1979 gave a mortgage with her husband to secure a loan for a business. The mortgage secured all monies they might owe including moneys secured by future guarantees. Mrs Garcia between 1985 and 1987 executed number of guarantees given by both her and Mr Garcia in support of the business agreements, which included a business of buying and selling gold through the company. She became shareholder and director of this company, although she was not directly involved in its operations over which her husband had control. After her divorce in 1988, she sought a declaration that the mortgage and guaranty were not binding on her and should be set aside. The respondent bank demarke payment of $327,189 under one of the guarantees ("the November 1987 guarantee and claimed possession of the home, her husband’s interest having been transferred to her in the divorce settlement. Mrs Garcia claimed that she did not understand transaction, being under the mistaken belief that the guarantee was of limb overdrawn accommodation to be applied only in the purchase of gold, and did not understand her obligations under the guarantee were secured by the mortgage over her family home. The husband’s business unfortunately proved to be a failure and the bank proceeded to sell the home for the debt owed. Mrs Garcia contended that she gave the guarantee in reliance of representations by her husband that she would be safe to do so. At first instance, her claim of actual undue influence on part of the husband and another based on the Contracts Review Act 1980 (NSW) b failed. Her claim based on Yerkey v Jones, on the other hand, succeeded, overturned by the Court of Appeal, but was eventually upheld by the High Court.

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14 National Australia Bank Ltd v Garcia (1996) 19 NSWLR 577; Atkins v National Australia Bank Ltd [1994] 34 NSWLR 155. In Gregg v Tasmanian Trustees [1997] 3 FCR 91 there was an action by a (school teacher) wife to set aside a mortgage of the matrimonial home which she had given jointly with her husband (who later became a bankrupt) to a creditor, the Tasmanian Trustees for a loan to a company, Tasmon, in which the husband had an interest. Here Merkel J (at 113-114) gave a summary of social development in Australia stressing that fundamental changes in the role of women in the Australian workforce in recent years have negated the necessity for any legal equities in favour of wives. On this basis he pointed out that Yerkey v Jones was no longer good law and that the equitable presumption in favour of a vulnerable wife as enunciated by Dixon J in Yerkey v Jones in 1939 had now been subsumed and or superseded by general principles relating to unconscionability as laid down by the High Court in Commercial Bank of Australia v Ansaide (1983) 151 CLR 447.

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Majority Judgment

The majority of the High Court in Garcia was able to resurrect the Yerkey doctrine by including as a ‘special disability’ the disadvantage suffered by a wife who acted as guarantor in a transaction from which she had received no benefit and without adequate explanation as to its nature and effect. The High Court defied the latest judicial predictions and trend towards favouring the adoption of the doctrine of unconscionability as enunciated in Commercial Bank of Australia v Amadio22 and indirectly criticised the lower courts’ reluctance to accept the validity of the special equity rule23 as evidenced by the majority of the justices cautioning that ‘it is for this court alone to determine whether one of its previous decisions is to be departed from or overruled’.24 The court contended that the ‘special equity’ rule for wives and the doctrine of unconscionability and notice have been crucial to the evolution of the modern law of guarantees. At the same time, in some situations, the development in these areas has also been affected by a number of statutory provisions.25

The High Court then expressed the view that Amadio was not intended to mark out the boundaries of the field of unconscionability.26 The majority referred to what was said in Amadio that ‘it is impossible to describe definitely all the situations in which relief will be granted on the ground of unconscionable conduct’.27 Unlike Yerkey, the unconscionable conduct depicted in Amadio concerned actual misconduct which brought about the entry of the surety into the transaction.28 The court was able to identify the crucial difference between the doctrine of Yerkey/Garcia and that of Amadio. The Amadio principle was used as a ground for setting aside a transaction for unconscionability in situations where the weaker party was under a special disability, and the disability was evident to the stronger party to make it unfair or unconscionable that he or she procure or accept, the weaker party’s assent to the impugned transaction.29 If these criteria are met, the burden shifts to the strong party to show that the transaction was fair, just and reasonable.30

The idea of a ‘special disability’ (when considering unconscionability) as mentioned is a pivotal one in Amadio where it must be sufficiently evident to the lender, reality, there are a great number of cases in which practical problems encountered by guarantor wives have rendered them unable to demonstrate they are under a ‘special disability’ that is sufficiently evident to the lender.31 This means that the only option left for the court is to grant relief to the guarantor wife under the Yerkey v Jones principle, as is happening in Garcia.32

In Amadio, despite the fact that the bank did not leave the acquisition of the execution of the mortgage transaction to the son, it nonetheless had notice of the circumstances of the Amadis may have been acting under their son’s influence and it did result in making certain that they received independent advice. On the other hand, it should be noted that in Garcia, the guarantor wife’s status as a professional, director of the company, as well as her interest in the family business would strongly qualify her from relying on Amadio. Yet the circumstances may raise in the mind the lender a suspicion or doubt as to the ability of the guarantor wife to secure the debt and her knowledge of financial matters to enter into the transaction. It is possible to look at this suspicion or doubt as being related to the concept of constructive notice.

Despite the questionable validity of the ‘special equity’ rule, the High Court has given no endorsement Garcia which means that it will remain as good law Australia for sometime to come. It is submitted that although a number of aspects the judgment have been welcome, especially the concept that a wife’s particular vulnerability may be extended to other relationships of ‘trust and confidence’ such ‘long term and publicly declared relationships short of marriage between members

22 (1983) 151 CLR 447.
24 Above n 17, at 619 per Gaudron, McHugh, Gummow and Hayne JJ.
25 See, for example, ss 51AA, 51 AC, 52.
26 Above n 17, 622.
27 Ibid 622.
28 Above n 17, 622.
29 Above n 17, 622.
30 Above n 17, 622.
31 For example, Teachers Health v Wynne (1994) NSW Conv R 55-718; Akins v National Australia Bank (1994) 34 NSWLR 155.
the same or opposite sex', Garcia has not adequately resolved many uncertainties which dominate this contentious area of the law. The main judgment was given by the majority, namely, Gaudron, McHugh, Gummow and Hayne JJ (with Callinan J delivering a separate judgment) who believed that the rule in Yerkey v Jones remains good law but did not go into a detailed analysis of conflicting authorities. Their Honours nevertheless held instead that the reasons given in the judgment of Dixon J were 'not significantly different' from the reasons of the other members of the court. The decision was to be seen as particular applications of accepted equitable principles which have as much application today as they did then. The majority then concluded that the authority of Yerkey v Jones should be considered as of continuing legal utility because of the 'significant number of women in relationships...marked by disparities of economic and other power between the parties'. They argued that Dixon J conveniently examined two of circumstances in which it could be said that the guarantor was a volunteer, albeit a 'mistaken volunteer' who obtained no financial benefit from the transaction and who entered into an improvident bargain.

The first circumstance is where there is actual influence by the husband over the wife. In this case, Dixon J said that it will not be sufficient to merely explain the effect of the guarantee to the guarantor. Their Honours quoting Dixon J in Yerkey v Jones explained that 'nothing but independent advice or relief from the ascendency of the husband over her judgment and will would suffice'. The second circumstance is where there is no undue influence, but where "if 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 cannot give her an equity to set the instrument aside". In this situation, the High Court reasserts the proposition that avoid the imputation of a transaction of this nature, the creditor must take adequate steps to inform the wife, and the creditor must have reasonable ground suppose that she has an adequate comprehension of the obligation she is undertaking and an understanding of the effect of the transaction.

The majority contended that the changes in Australian society and the role of women since Dixon J's judgment should be viewed as 'particular applications of accept equitable principles which have as much application today as they did then'. The majority did not assess Yerkey on the basis of the alleged inferior economic, social or domestic position of women generally; instead, they observed that:

So far as Yerkey v Jones proceeded on the basis of the early decision of Cussen J in The Bank of Victoria v Mueller, it is based on trust and confidence in the ordinary sense of those words, between marriage partners.

The majority argued that it would be unconscionable for a creditor to enforce a guarantee against a surety-wife who was a volunteer, if it can be shown that she did not understand the object and effect of the transaction and the creditor took no steps to explain the transaction and did not reasonably believe that a competent independent and disinterested stranger had done the same. Thus what made unconscionable to enforce was a combination of circumstances, where:

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

The majority did consider the possibility of extending the rule in the future to husbands acting as sureties and to relationships which are 'long term and publicly...

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33 Garcia, above n 17, [22] per Gaudron, McHugh, Gummow and Hayne JJ and [109] per Callinan J.
34 Robyn Baxendale, "Garcia v National Bank Limited - Ensuring Equity in Surety Transactions: A Legal Debt-End" (1999) 21 Sydney Law Review 313 at 313. It should be pointed out that the thorny question of what relationships may be given protection in third party guarantees has been clarified. There is 'no rational cut-off point' as to the kinds of relationships which may be susceptible to undue influence in guarantee contracts. In the absence of banks evaluating the extent to which a debtor may have influence over a guarantor 'the only practical way forward is to regard banks as "put on inquiry" in every case where the relationship between the surety and the borrower is non-commercial'. See Royal Bank of Scotland plc v Etridge (No 2) [2002] 2 AC 773, para 87 per Lord Birkhead.
35 Above n 17, at 618-619 where the majority gave only a superficial consideration to the judgment of Shearer J in Garcia v National Australia Bank (1996) 39 NSWLR 77, 598.
36 Above n 17, 619.
37 Ibid 619.
38 Ibid.
40 Ibid 621.
declared relationships short of marriage between members of the same or opposite sex.17 The court stopped short of elaborating, pointing out that such issues were not the focus of the present case and that ‘the resolution of questions arising in the context of other relationships may well require consideration of other issues’.18 So, although no clear guidance is given, the possible extension of the rule in the future may signal a departure from the Yerkey principle in the sense that courts hereafter can look to cohabitation and emotional dependency rather than concentrate on the marital status of the parties.

Minority Judgments

Kirby J contended that Dixon J’s analysis in Yerkey v Jones was a ‘judicial statement worthy of the greatest respect but not commanding obedience as a matter of binding precedent’.19 His Honour delivered a strong dissent by saying that a principle which placed a wife in an ‘advantageous position that she would not have enjoyed had she not been married to the principal debtor’, entrenched discriminatory stereotypes - a position that he held earlier as anachronistic when he was a member of the New South Wales Court of Appeal in Warburton v Whitley.20 The rationale of his Honour’s judgment is that if the legal basis of the Yerkey rule is challenged, it cannot be justified in terms of social policy and legal principle.

Kirby J made the observation that recent changes pertaining to the status of married women, and domestic relationships, require courts to refrain from classifying unnecessarily by gender, where more accurate and impartial principles could be discerned.21 His Honour believed that qualities such as trust and confidence, vulnerability and dependence were not necessarily unique to marriage, but could be regarded as much wider ‘relationship’ issues.22 His Honour did admit that there may be situations in which the Yerkey principle can give assistance to married women who might come within the ambit of the unconscionability rules of Amadio. These cases gender - neutral,23 With this in mind, and drawing on the reasoning of the House of Lords in Barclays Bank v O’Brien,24 Kirby J decided to restate the law in a ‘principled and certain form’. To do this His Honour favoured a reformulation of the principle as expressed by Lord Browne-Wilkinson in O’Brien.25

Under the reformulated O’Brien principle of Kirby J, the creditor 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.26 When constructive notice is properly understood as a principle which is wide and flexible, there is no reason why it should not give rise to liability.27 What is crucial is to recognise and identify the circumstances in which the creditor will be taken to have notice of the guarantor’s equity to render the transaction unenforceable. Kirby J saw his modified O’Brien principle as having a wider application in that it is relevant 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

48 Ibid.
49 Ibid 633.
50 Ibid 634.
52 Ibid 631-33.
53 Kirby J’s reformulation has been described as ‘a generally well-reasoned judgment’. His Honour’s approach effectively removed the gender-based ‘special equity’ theory and replaced it with a formulation that is expressed in non-discriminatory terms. It encompassed all other categories of relationship that are ‘emotional dependence’ based. It has the advantage of recognising that a substantial proportion of business decisions are made by husbands, and at the same time, circumventing the legal foundation of equitable presumption of ‘invalidating tendency’. See W Weerasoria and D Turner, ‘High Court Re-
56 Above n 17, 642-643. At 641 Kirby J restated the O’Brien principle thus: (1) where a person guarantees the debt of another and the creditor knows that there is a relationship involving an emotional dependence on the part of the guarantor towards the debtor, the surety obligation will be enforceable unless the guarantee was procured by undue influence, misrepresentation or other legal wrong of the debtor; (2) where 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 guarantor had entered into the contract freely, the credit provider will not be able to enforce the surety obligation because it will be fixed with notice of the guarantor’s right to set aside the transaction.
57 In Bank of New South Wales v Rogers (1941) 65 CLR 42, for example, where the debtor was the guarantor’s uncle with whom she was in a dependency relationship, the court said that the credit provider knew enough about this relationship to put it on inquiry as to the circumstances in which the guarantee was given.
debts, or where the creditor is, or ought reasonably to be aware that the surety repose trust and confidence in the debtor in relation to his financial affairs.\(^9\)

Callinan J in a separate and minority judgment did not, unlike Kirby J, favour extending the special equity principle beyond married couples. Although conceding that sexual and matrimonial relationships in recent times have undergone changes, his Honour expressed the view that to state a principle to encompass all cases would not be a feasible idea. He pointed out that:

"...given the diversity of human relationships... I would not with respect adopt the principle... that any exceptions 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 all co-habitees.\(^{60}\)

His Honour believed in any case that this was an area for legislative rather than judicial intervention. He expressed his approval of Yerkey thus:

"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 Australia, 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.\(^{61}\)

Where to From Here?

The recent trend of case law before the appeal of Garcia to the High Court is unmistakable. There is not going to be any special entitlement to protection in equity according to the principle in Yerkey. A wife is to be treated like any other disadvantaged person and can get protection from equity if the transaction is "unconscionable" as the term is explained in Amadio. At the same time, it appears that in the event that equity does not provide relief, it will not be available under the equitable remedies as embodied in, for example, the Contracts Review Act 1980 (NSW).

The recent cases demonstrate that in the absence of any general duty to advise the guarantor, the creditor's position will be protected except in those situations where the guarantor gets no benefit from the transaction. O'Brien, which belongs to this category of cases, raises, in addition, serious policy questions concerning whether the transaction is more easily avoided than for others; or whether the test potential unconscionability leading to and justifying avoidance. O'Brien was : marriages it is still the husband who has the business experience and the wife tends to be in the position of following his advice and not having a truly independent mind in making judgments concerning financial matters. The wife is nevertheless given tender treatment. One aspect of this treatment can be seen in the fact that O'Brien fixes a creditor with constructive notice of the wife's equity when transaction is on the face of it not made to the wife's financial benefit and carry risk of the husband committing a legal or equitable wrong resulting in the guarantor being set aside.

O'Brien can be seen as a viable synthesis of existing principles and is consonant with some recent Australian authority. In European Asian Pty Ltd v Karland,\(^2\) for example it was forcefully stated that any special principle for wives which is based on Yerke and which is seen to represent a woman's "inferior position" is anachronistic and not applicable in contemporary Australian society.\(^{62}\) The burden seems to fall on the creditor to show that informed consent has been obtained by the provision independent advice. In Beneficial Finance Corp v Karanas,\(^4\) Kirby P, for example explained that for a transaction to be considered just (in this case within the terms of the Contracts Review Act 1989 (NSW)) a duty may have to be imposed on the lender to ensure independent legal advice is obtained although this may involve delay in cost.

When all is said and done, it can be concluded, however, that although one may be sympathetic with the approach in O'Brien, it is simply not up the courts in Austral to espouse it in open disregard to the approach taken by the High Court in Yerkey Jones. To do so would be to ascribe too much importance to O'Brien which after all a House of Lords decision having only persuasive authority in Australia.

It is submitted that the value judgments and assumptions which are implied in the High Court's decision in Garcia are not universally shared, and are therefore subject to criticism. Despite the affirmation in Garcia of the Yerkey rule with its uncertainties it is likely that courts will apply other general law and statutory regimes. Yet the decision in Garcia is instructive in many ways. It allows the High Court to give it

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\(^{59}\) Above n 17, 642-643.

\(^{60}\) Above 17, [109]. In light of the majority's reasoning, it is possible that Callinan J's comments may not survive future judicial extension of the principle to other relationships.\(^{61}\)

\(^{61}\) Ibid [107].

\(^{62}\) (1985) 8 NSWR 192, 200.

\(^{63}\) See also Commonwealth Bank v Cohen (1988) ASC 58 at 146; European Asian Pty Ltd v Lazio (1987, ASC 55-56).\(^{64}\)

\(^{64}\) (1991) 21 NSWR 256.
endorsement of the time honoured proposition that guarantors who are vulnerable and who are not just guarantor wives, often enter into contracts of guarantee only on the basis of a personal relationship and with no understanding of the legal implications involved. When seen in conjunction with the apparent inconsistency of the majority of the court in their widening of the application of the Yerked principle with its historical basis, it may be possible to conclude that despite their endorsement, the demise of the principle is imminent. Although the limitations of the special equity rule are obvious enough, it has the effect of providing a legal mechanism to accommodate the wide number of specific pressures which arise where a domestic relationship takes on a commercial flavour.46 In this sense, it can be said that the strength of Yerked as applied in Garcia is that it is sufficiently flexible to accommodate a blurring of commercial and personal relationships by reducing a guarantor's burden of proving undue influence or unconscionable dealing.47

It is almost certain that in Garcia, the majority expressed the view that there is a presumption of undue influence arising from, but not confined to the relationship of marriage, leading to the risk that the guarantor may receive unsatisfactory explanation and the transaction be set aside for unconscionability. The judgments apply the concept of undue influence in requiring a relationship of trust and confidence, but bring the contract of guarantee into the ambit of an unconscionable transaction, by examining the quality of the assent of the party who has the stronger bargaining power. The presumptions of undue influence and unconscionability may be rebutted by the availability of independent advice, useful and helpful explanation, or evidence of the fact that the guarantor does not benefit from the transaction.

It will be interesting to see if or how far the courts in future will accept the High Court's invitation to broaden the scope of Yerked and Garcia to include other types of relationships.48 The judgment of Kirby J will no doubt generate interest in that it enquired why the High Court in Garcia should endorse a principle designed to apply specifically to one class of sureties, namely wives. His Honour's line of reasoning has delineated 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.49 As to whether the fears of Kirby J that women may use the 'special equity' to avoid their lawful obligations are realised remains to be seen.

46 See, for example, ANZ Bank Group v Alirezai [2002] ANZ Conv R 597.
48 O'Donovan, above n 19, 309.
49 Above n 17, 638 per Kirby J.
50 Ibid.
guarantors were entitled to ‘every sympathy’ and are to lose their home and possibly their life savings, the Garcia principle was not available to them. Their Honours were of the opinion that the Garcia defence applies only to marriage and possibly similar relationships, as it is only in these relationships that the trust and confidence between the parties might be sufficient for one to act in ‘unquestioning reliance’ on a request by the other to become guarantor and as a result receive from the debtor no sufficient explanation of the transaction’s purport and effect. Their Honours explained their justification for this conclusion in the following terms:

The real vulnerability of parents usually stems not from a failure to comprehend the nature of the transactions in which they have been asked to participate or from insufficient information concerning their implications. It stems from their love of their children. Their desire to help and protect them, to advance their interests, to maintain a close relationship, to avoid causing disappointment, hurt or distress, to maintain the relationship may all make it difficult to say no. The principles in Yerkey v Jones and Garcia offer no protection for people lured into improvident transactions by feelings of this kind.77

Armstrong v Commonwealth of Australia 78 was decided in a similar way to Watt. In Armstrong, although the wife was a 25 per cent shareholder in the company which received the loan, Bryson J refused to extend the special equity principle of Garcia to de facto wives.

In some decisions an attempt has been made to limit what might be thought to be the potential scope of the Garcia defence. In State Bank of New South Wales v Hibbert,79 for example, Bryson J adopted a conservative approach to the possible extension of Garcia to other committed relationships based on emotional ties by not granting relief to de facto partners who jointly provided a mortgage and guarantee in favour of the plaintiff bank by saying that:

the extension of the principles acted on in Garcia from wives to all married persons, or to all women, or to all persons who are living in de facto relationships...does not appear to me a development which the law can realistically be expected to take.80

In National Australia Bank v Starbronz,81 the court decided not to grant relief to surety who entered into a guarantee following misrepresentations as to its effect on the borrower. This was because the relationship between the surety and borrower, that of brothers-in-law, was not sufficiently intimate to attract the operation of the Garcia principle. Coldrey J justified the decision of the court by commenting that ‘the fact that a person may have trust and confidence in another cannot with the added dimension of intimacy, attract this aspect of the doctrine unconscionability’.82

To a similar effect is Equitllloans Securities Ltd v Malrine83 where the court had to decide whether the Garcia defence should be applied where the creditor was aware that the guarantor was emotionally dependent on the debtor. On this basis, Master Conru turned down relief for the surety as there was nothing in his relationship with the debtor to take it beyond a long-term friendship.84

Yet, in Liu v Adamson85 the court showed a softening of attitude in Groom v Hibb. The facts involve a de facto husband and wife who both signed a costs agreement with a solicitor for legal costs incurred in connection with the husband’s restaurant and nightclub business. Under the costs agreement they also provided a guaranty and a mortgage over their jointly owned home. The wife brought proceedings to set aside the costs agreement and the mortgage under the special wives’ equity. Macready J in giving recognition to changes to the community’s acceptance of de facto relationships said:

The matter before me involves a simple long-standing de facto relationship between a man and a woman...and the role each plays would fit many marriages. It has endured seventeen years and the parties to it have five children. In these circumstances it seems to me that the principle in Yerkey v Jones should be extended to cover the situation presently before me.86

The approach taken by the Australian Capital Territory Court of Appeal in Watt was contrasted with that taken by the Victorian Court of Appeal in Kranz v National Australia Bank,87 which rejected the argument that the Garcia defence could only be invoked where the surety is married to the debtor or is involved with the latter in

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75 Above n 73, 34.
76 Above n 73, 21.
77 Above n 73, 21.
80 Above n 79, para 60.
81 [2000] VSC 325.
82 Above n 81, 84.
84 Above n 83, para 7.
85 [2003] NSWSC 74 (21 February 2004); BC 200300579.
86 Above n 85, para 23.
similar long-term relationship. According to the facts, Lefkovic asked his brother-in-law Kranz, the plaintiff, to provide further security for a loan from the bank. The object of the loan was to acquire a private placement of shares to be held by a shelf company which was set up by Lefkovic. Kranz executed a guarantee for the debts of the company in favour of the bank. Lefkovic defaulted on the loan and the bank decided to enforce the guarantee. The appellant Kranz who did not read the documentation, and did not have it explained to him by any one except Lefkovic (who misrepresented the facts), sought to set aside the guarantee, relying on the Garcia defence and arguing that the respondent either knew or should have known that the relationship of trust and confidence existed between himself and Lefkovic.

The Victorian Court of Appeal in Kranz adopted a more liberal view of the possibility of extending the Garcia principle to other relationships. Charles JA disagreed with the necessity of restricting the Garcia defence to only ‘the most intimate of family relationships’. His Honour believed that this would ‘confine the application of the principles applied in Garcia within limits that cannot be justified’. This softening of the approach of the court at the appellate level will probably in time lead to an opening of the door a little wider in future cases.

What then are we to make of these apparently conflicting authorities? It looks as if the Garcia principle must be applied at least where the lender is aware that a female surety and a male debtor are in a sexual and emotional relationship analogous to marriage – that is, where the lender is aware that the surety and the debtor are cohabiting. On this basis, there is no reason to treat these relationships as but pale shadows of marriage.

Credit providers after the High Court’s decision in Garcia should be more cautious and should not depart from their usual practices and procedures when dealing with a guarantor wife. This is regardless of whether the woman is a director of the husband’s company or just a participant or employee of his business. In the case of vulnerable guarantors of business debts who technically fall outside the ambit of the Yerkey principle, they may now have recourse to the new legislative remedy under s 51AC of the Trade Practices Act 1974 (Cth).

Mrs Garcia could be regarded as being very fortunate in coming within the principle, and being given the benefit of any doubt by the High Court justices in respect of her status as a volunteer. This is despite her qualifications and professional experience, as well as the controversial evidence as to the precise details of her shareholding in her husband’s companies. She was also a company director, with a history of the did not understand the nature of the obligation into which she entered. At that time their documentation is clear, their explanations thorough and comprehensible and there is a need to remove the traditional concepts that there is no obligation to disclose risks to guarantors especially where these are wives dealing with their husbands’ debts.

It should be noted that the special equity for wives doctrine in Garcia remains unique to Australia, having been specifically rejected in England66 New Zealand67 and now been completely adopted in Canada. In O’Brien, the House of Lords expressed the view that there was no need for a special wives equity because adequate protecive could be afforded under ordinary principles.68 As Lord Browne-Wilkinson observe the the Yerkey principle was based on uncertain foundations and failed to reflect the current requirements of contemporary society.69 Under the O’Brien approach, woman will not be able to set aside a transaction purely on the grounds that she did not understand it and was relying on ordinary principles of undue influence. The exception here would be in cases where undue influence is proven and the credit knew of the marriage relationship. Ultimately, the creditor will not be able to enforce the contract of guarantee unless it can prove that it was reasonably satisfied that the wife understood the transaction and entered into it at her own free will.70

Confronted with perpetuating the relevance of the Yerkey doctrine in light of English developments, the High Court in Garcia came up against a range of competing legal and policy considerations. One of these was the discrepancy between the perceptions of modern gender roles and the reality of domestic relationships. At the same time

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66 See also ANZ Banking Group Ltd v Altrezzi [2004] QCA 6 (6 February 2004); BC 200400178 which is to a similar effect.
67 Garcia v National Australia Bank, above n 17.
68 Barclays Bank plc v O’Brien, above n 16.
69 See Wilkinson v ASB Bank (1998) 6 NZBLC 102,427, where the Court of Appeal adopted modified O’Brien approach.
70 In Canada there is no consistent approach. In British Columbia the Yerkey principle has been followed. This is evident in E & R Distributors v Atlas Drywall Ltd (1980) 118 DLR (3d) 339 which was nevertheless qualified in North West Life Assurance Co of Canada v Shannon Heights Developments Ltd (1987) 12 BCLR (2d) 346,349. The other Canadian province disapproved of Yerkey. See, for example, Bank of Montreal v Featherstone (1989) 58 DLR (4th) 567 (Ont CA); Royal Bank of Canada v Poisson (1977) 103 DLR (3d) 735. On the whole, it can be said that Canada seems poised to follow the approach taken in O’Brien considering that its defining guidelines were applied in the different context of a “knowing receipt” constructive trust in Gold v Rosenburg (1997) 152 DLR (4th) 385 (SCC).
71 As was proposed in CIBC Mortgages Plc v PM (1994) 1 AC 200.
72 Barclays Bank v O’Brien, above n 16, 194-5.
although contemporary society in this country accepts equality between the sexes and supports the concept of mutual respect between marriage partners, it should be stressed that a large number of women remain subservient to their husbands, and would not normally question their spouses' business affairs. And the overturning of the security devices may have the effect of reducing the flow of private capital to businesses because of institutional cautionfulness that would come about. A final issue of concern is that the over-reliance on Yerkey may embolden husbands to find a way out of their obligations by allowing them to challenge the very explanations they themselves gave their wives of the need to execute guarantee transactions.

It is also true to say that despite their many limitations, personal guarantees are extremely useful transactions since they are the main source of funding for the family and other forms of small business. Such guarantees must be protected and the common theme running through cases such as Garcia is the need to increase awareness of the nature and effect of these guarantees. A number of protective measures for the guarantors of relationship debts may be considered: relevant statutory provisions; industry codes of practice; making the debtor's loan application and creditor's offer available to the guarantor and the setting up of mechanisms for the review or termination of the guarantor's liability etc.

**Conclusion**

It can be said that Garcia ensures the survival of the special equity rule for wives in Yerkey v Jones. This states that if a wife is a volunteer to a guarantee contract, and does not understand its effects in essential respects, she may be in a position to set it aside, even if there is no unfair dealing involved, and even if the creditor did not make efforts to explain the transaction or to recommend the guarantor seek independent advice. Yet since Garcia was handed down solicitors and barristers did not think the decision had such a large impact on the law. There has been some uncertainty concerning the scope of the application of the Garcia defence. Certainly,

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98 See, for example, the Sex Discrimination Act (Cth) s 5-6, 7 D (1); and The Equal Opportunity Act 1995 (Vic) s 3-6.
100 See Kirby J in Garcia v National Australia Bank, above n 17, 644; see also SM Cretney, The Little Woman and the Big Bad Bank', (1992) 108 Law Quarterly Review 534.
101 Yerkey v Jones above n 5.
103 Above n 105.