SUPREME COURT OF QUEENSLAND

CITATION:	*Agripay Pty Limited v Byrne* [2011] QCA 85
PARTIES:	**AGRIPAY PTY LIMITED** ACN 087 971 006 (appellant) **v** **JOAN ELIZABETH BYRNE** (respondent)
FILE NO/S:	Appeal No 6920 of 2010 SC No 10085 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 May 2011
DELIVERED AT:	Brisbane
HEARING DATE:	3 November 2010
JUDGES:	Margaret McMurdo P, White JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed with costs.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – UNDUE INFLUENCE AND DURESS – PRESUMPTION FROM RELATIONSHIP OF PARTIES – HUSBAND AND WIFE – where the respondent was guarantor for a loan agreement entered into by her husband – where the respondent sought to be relieved of the burden of her contract of suretyship on the basis of the principle in *Yerkey v Jones* (1940) 63 CLR 649 and *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 – whether the respondent did not understand the purport and effect of the transaction – whether the learned primary judge erred in his analysis of the evidence or the application of legal principles *Agripay Pty Ltd v The Estate of Murray Andrew Byrne and Anor* [2010] QSC 189, cited *Bank of Victoria Limited v Mueller* [1925] VLR 642; [1925] VicLawRP 74, cited *Barclays Bank Plc v O'Brien* [1994] 1 AC 180; [1993] UKHL 6, cited *Blomley v Ryan* (1956) 99 CLR 362; [1956] HCA 81, cited *Brueckner v The Satellite Group (Ultimo) Pty Ltd* [2002] NSWSC 378, cited

Chaplin & Co Ltd v Brammall [1908] 1 KB 233, cited
Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447; [1983] HCA 14, cited
Commonwealth v Verwayen (1990) 170 CLR 394; [1990] HCA 39, cited
Cranfield Pty Ltd v Commonwealth Bank of Australia [1998] VSC 140, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
Garcia v National Australia Bank Ltd (1998) 194 CLR 395; [1998] HCA 48, considered
Howes v Bishop [1909] 2 KB 390, cited
Kali Bakhsh Singh v Ram Gopal Singh (1913) LR41IndApp 23; (1913) 30 TLR 138, cited
Linderstam v Barnett (1915) 19 CLR 528; [1915] HCA 5, cited
Maguire v Makaronis (1997) 188 CLR 449; [1997] HCA 23, cited
Shears and Sons Ltd v Jones [1922] 2 Ch 802; (1922) 128 LT 218, cited
State Bank of New South Wales v Chia (2000) 50 NSWLR 587; [2000] NSWSC 552, cited
Talbot v Von Boris [1911] 1 KB 854; (1910) 27 TLR 95, cited
Turnbull and Co v Duval [1902] AC 429, cited
Yerkey v Jones (1939) 63 CLR 649; [1939] HCA 3, considered

COUNSEL: R Bain QC, with S Bell, for the appellant
A J Greinke for the respondent

SOLICITORS: Forbes Dowling Lawyers for the appellant
Shannon Donaldson Province Lawyers for the respondent

[1] **MARGARET McMURDO P**: I agree with my colleagues that this appeal should be dismissed.

[2] Dr Murray Byrne, the now deceased husband of the respondent, Dr Joan Byrne, borrowed funds from the appellant, Agripay Pty Limited, to invest in a tax avoidance agricultural managed investment scheme. The respondent guaranteed her husband's loan. This appeal turns on whether the trial judge erred in setting aside the guarantee because it was unconscionable to allow the appellant to enforce it.

The relevant legal principles

[3] The relevant legal principles are those discussed in *Yerkey v Jones*,[1] as more recently explained in *Garcia v National Australia Bank Ltd*:[2]

> "*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

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1 (1939) 63 CLR 649, Dixon J, 684-685; [1939] HCA 3.

2 (1998) 194 CLR 395, Gaudron, McHugh, Gummow and Hayne JJ, 404-412, esp [31]-[33]; [1998] HCA 48.

> guarantee. It holds … 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 … 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); (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."[3]

[4] There seems to be no sound reason why these principles should be limited to wives entering into guarantees of their husbands' liabilities. Human weaknesses and unconscionable conduct are not limited to heterosexual marriage relationships. These legal principles should apply equally to all vulnerable parties in personal relationships: see Kirby J's reasons in *Garcia*, especially at 435 [83] and Callinan J's observations at 442 [109].

The appellant's contentions

[5] The appellant has not challenged the trial judge's primary findings of fact.[4] Nor has it challenged the trial judge's conclusion that it must be taken to have known the respondent was married to Dr Murray Byrne[5] and that it did not explain the transactions to the respondent or ensure that an independent person explained them to her.[6]

[6] The appellant's primary contention was that the trial judge erred in concluding that the respondent did not understand the purport and effect of the guarantee she undertook in respect of Dr Murray Byrne's loan to participate in a tax avoidance agricultural managed investment scheme.

[7] The appellant also challenged the trial judge's conclusion that the respondent was a volunteer, arguing that she had the prospect of obtaining a financial benefit from the performance of the obligations which she agreed to guarantee. It emphasised that a superannuation fund for the joint benefit of Dr Murray Byrne and the respondent would have benefited the respondent if the investments eventually became profitable. It further emphasised that the family household of which the respondent was part would have benefited in the short term from the avoidance of Dr Murray Byrne's tax problems and eventually from the profits likely to be earned from the agricultural managed investment scheme.

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3 Above, 408-409, [31].

4 See *Agripay Pty Limited v Estate of Murray Andrew Byrne* [2010] QSC 189, [11]-[28].

5 Above, [46], [47].

6 Above, [48]-[51].

[8] The appellant's third contention was especially broad. The respondent knew when she entered into the guarantee that Dr Murray Byrne had a life insurance policy or policies in her favour which were intended to cover his debts in the event of his death. His life insurance policies were disclosed in the application documents she signed on 3 June 2006. Since his death, she had received at least $1 million from those policies. These factors in combination, the appellant argued, meant that it was not unconscionable for the appellant to insist she meet her obligations under the guarantee.

Was the respondent a volunteer?

[9] It is convenient to begin with the appellant's second contention, that the respondent was not a volunteer in the sense discussed in *Yerkey v Jones* and *Garcia*[7] as she obtained a financial benefit from the transactions she was guaranteeing. The appellant emphasised that the respondent and Dr Murray Byrne had a joint superannuation fund which ultimately may receive some financial benefit if Dr Murray Byrne's long term investment in the scheme, the loan for which the respondent guaranteed, became profitable. The appellant also contended that the respondent would benefit through Dr Murray Byrne's short term lower tax bill and in the long term by a boost to the family finances should the scheme ultimately prove profitable.

[10] The primary judge found that any eventual benefit to Dr Murray Byrne through the transactions guaranteed by the respondent was too indirect and prospective to preclude the respondent from being a volunteer.[8]

[11] That conclusion was apposite. The evidence before the primary judge was sparse, both as to the likelihood and extent of any profit to the joint superannuation fund or generally from the agricultural managed investment scheme. At best, it was that there was some prospect of an eventual profit which may have benefited the family unit if it remained functional; and some small portion of any eventual profit may have found its way to the joint superannuation fund. But the short term benefit of a lower tax bill and any profit received in the long term was essentially for Dr Murray Byrne. There was no clear evidence that the respondent would actually profit from the scheme. To exclude the respondent, a wife, from the category of volunteer in the sense discussed in *Garcia*[9] because she would benefit from the transaction she was guaranteeing, her gain must be direct or immediate: see Mandie J's observations in *Cranfield Pty Ltd v Commonwealth Bank of Australia*[10] and Einstein J's observations in *State Bank of New South Wales Ltd v Chia*.[11] The evidence favoured the conclusion that the prospect of any profit to the respondent was speculative. Even if she did receive some eventual modest benefit, it was likely to be neither direct nor immediate. This contention is not made out.

Did the respondent understand the purport and effect of the guarantee?

[12] The appellant's main contention was that the trial judge erred in concluding from his primary findings of fact that the respondent did not understand the purport and effect of the guarantee she undertook on behalf of Dr Murray Byrne.

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7 Set out at [3] of these reasons.

8 *Agripay Pty Limited v Estate of Murray Andrew Byrne* [2010] QSC 189, [44], [45].

9 Set out at [3] of these reasons.

10 [1998] VSC 140, [103]and [104].

11 (2000) 50 NSWLR 587, 601 referred to by the primary judge at [36], [37] of his reasons; [2000] NSWSC 552.

[13] It is true, as the appellant contends, that there are various aspects of this case which militate against his Honour's conclusion that the respondent did not understand the purport and effect of her guarantee. As Callinan J observed in *Garcia*, wives, especially those like the respondent, a well-educated, intelligent medical practitioner, may find it difficult to satisfy a court that they have succumbed to pressure or been misled by their husbands in financial matters.[12] Indeed, the respondent frankly conceded in cross-examination that she understood in general terms what a guarantee entailed. She had previous involvement in her husband's business ventures. And immediately above her signature to the loan application which she signed as "Applicant 2/Guarantor" on 3 June 2006 was a declaration[13] which included that she had received financial advice from Peter Cooke (an investment advisor) on this loan application and had either taken independent tax and legal advice or had been given the opportunity to receive independent tax and legal advice in relation to her obligations under the loan agreement; had been given the opportunity to read the loan agreement; had signed the loan agreement freely and voluntarily and not by reason of any undue influence of any person; accepted the terms and conditions of the loan agreement; was aware that the giving of security over her assets meant that those assets could be seized and sold if there was a default in paying moneys under the loan agreement; that the appellant recommended strongly that she obtain independent professional advice as to the investment; and that the appellant would be relying on this declaration.

[14] Although these matters favour the appellant's contention, they do not preclude a conclusion that the respondent did not understand the purport and effect of her guarantee. As Dixon J noted in *Yerkey v Jones*:

> "It is almost needless to say that the equitable grounds for setting aside a voluntary disposition, while well understood, recognize the indefinite variation of form which unconscientious conduct may assume."[14]

And more recently, Gaudron, McHugh, Gummow and Hayne JJ approved Mason J's observations to like effect in *Commercial Bank of Australia Ltd v Amadio*:[15] "… it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionable conduct."[16]

[15] The primary judge observed the respondent give her evidence. She was cross-examined at some length. His Honour accepted her as an honest and reliable witness.[17] The appellant does not suggest that this Court should reach a different conclusion and does not challenge the judge's primary findings of fact.

[16] In addressing the appellant's contention, it is necessary to refer to some of those findings. Dr Murray Byrne was the husband of the respondent and the father of her two children. In June 2006, the children were still young, about seven and five. Dr Murray Byrne was the principal income earner in the family. His approach to medical practice was "entrepreneurial" while the respondent worked in the public health system[18] and had the prime responsibility in the relationship of maintaining

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12 (1998) 194 CLR 395, 443 [112].
13 Set out in [48] of White JA's reasons.
14 (1939) 63 CLR 649, 684.
15 (1983) 151 CLR 447, 461; [1983] HCA 14.
16 *Garcia* (1998) 194 CLR 395, 408, [29].
17 *Agripay Pty Limited v Estate of Murray Andrew Byrne* [2010] QSC 189, [9] and [28].
18 Above, [12].

the household.[19] Dr Murray Byrne's financial affairs had some complexities. He conducted them without close consultation with the respondent[20] and she was only peripherally involved in them.[21] She understood in 2005 that he was talking to Mr Cooke about the possibility of investing in agricultural managed investment schemes. By mid-2006, he was anxious about his tax liabilities. He pressured the respondent about her failure to make a sufficient contribution to family finances.[22]

[17] On Saturday 3 June 2006, a few weeks before the end of the financial year, Mr Cooke came to their home and spoke extensively with Dr Murray Byrne in the absence of the respondent[23] who was "pottering around to make sure the kids were sort of quiet … [and] doing various household stuff [and] offered … tea and coffee and that kind of thing." The first she knew that she was required to be involved in the scheme was when she was told she had some documents to sign so that Dr Murray Byrne could take advantage of the investments. If she did not sign, he could not use the scheme to solve his tax problem. Mr Cooke told her "You know, you should get legal advice for this" but he also said "You've got to sign this. If you don't sign it today, it's not going to – he's not going to be able to do it. He can't take advantage of it."

[18] The respondent did not read the application before she signed it as guarantor.[24] Although she understood in general terms the nature of a guarantee, she did not understand her actual potential liability as guarantor in this transaction. She did not know the amount being advanced to Dr Murray Byrne and mistakenly thought the term of the loan was for seven years, not 10 years. Nor did she know that the investments he was making were "relatively illiquid for want of a resale market" and more than $400,000 in management fees had to be paid in the first three years although no net proceeds were likely to be received for some years.[25] The respondent did not receive independent advice before she signed the application as guarantor. She was upset and felt she was being ambushed. She nevertheless signed to help her husband, believing he would pull through financially and they would maintain their luxurious lifestyles. She had blind faith in him, notwithstanding his sometimes indifferent personal treatment of her.[26]

[19] She signed the formal guarantee on or after 22 June 2006.[27] She did not receive any further information about the loan and investment scheme between 3 and 22 June when she signed the guarantee.[28] She explained in evidence that she thought she was bound when she signed the document on 3 June 2006.

[20] From the primary findings of fact, the trial judge concluded that, although the respondent had a general understanding of the obligations of a guarantor when she signed the application on 3 June 2006, she did not understand critical aspects of the transaction she was guaranteeing, including the amount of the principal debt, the term of the loan, and the risks of this unusual investment, particularly the high

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19 Above, [15].
20 Above, [14].
21 Above, [15] and [16].
22 Above, [18].
23 Above, [19].
24 Above, [22].
25 Above, [24].
26 Above, [25].
27 Above, [26].
28 Above, [28].

management fees in the early years of the loan and the illiquid nature of the investment because of the absence of a market for sale.[29] The respondent's lack of understanding of the transaction was not simply a failure to appreciate the degree of risk associated in it;[30] her misapprehension concerned essential aspects going to the heart of the transactions she was guaranteeing: see Einstein J's observations in *Chia*.[31]

[21] I again emphasise that the judge's primary findings of fact which I have set out, including his Honour's finding that the respondent gave honest and reliable evidence, have not been challenged by the appellant. On those findings, the respondent, despite her intelligence, education and experience of life, did not read or even browse through the application she signed as guarantor. She knew only that she was urgently required to guarantee Dr Murray Byrne's loan to invest in an agricultural managed investment scheme so that he could avoid his short term tax problem. Although she knew in general terms the obligations of a guarantor, no-one explained that the money from the loan she was guaranteeing was to be invested in an unusual scheme which had very high management fees in the early years and was relatively illiquid. Nor did she know the amount of the debt she was guaranteeing or the term of the loan. These were essential aspects of the transactions she was guaranteeing and she did not know about them. It may well be that, even had these matters been explained to the respondent by an independent advisor, she still would have signed the application as guarantor on 3 June 2006. But that is speculative and the evidence is silent on this issue. In any case, it does not seem to be a relevant consideration in determining whether a volunteer should obtain the benefit of the legal principles discussed in *Yerkey v Jones* as explained in *Garcia*.[32] I note that the cases referred to at [117] of McMeekin J's reasons, *Linderstam v Barnett*[33]and *Kali Bakhsh Singh v Ram Gopal Singh,*[34] did not concern guarantees and were determined before *Yerkey v Jones.*

[22] Accepting as I must the primary findings of fact by the trial judge, I agree with his Honour's conclusion that, in the unique combination of circumstances in this case, the respondent probably did not understand the purport and effect of the transaction she was guaranteeing, either on 3 June 2006 when she signed the application as guarantor or when she signed the further documentation some time after 22 June 2006. It follows that the appellant's primary contention also fails.

The effect of any life insurance policies in favour of the respondent

[23] When the respondent signed the application as guarantor, she knew that Dr Murray Byrne had a life insurance policy or policies in her favour. This was disclosed in the application document she signed as guarantor. She knew that Dr Murray Byrne's life insurance policies were intended, in a general sense, to cover his debts in the event of his death. Since his death, she has received at least $1 million from these policies. The appellant contended that these factors in combination meant that it was not unconscionable for the appellant to insist that the respondent meet her obligations under the guarantee.

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29 Above, [30].
30 See *Yerkey v Jones* (1939) 63 CLR 649, 686.
31 (2000) NSWLR 587, 600.
32 Set out in [3] of these reasons.
33 (1915) 19 CLR 528; [1915] HCA 5.
34 (1913) LR41 Ind App 23; (1913) 30 TLR 138.

[24] The primary judge rejected that contention as having nothing to do with the impugned transaction of suretyship or the principle transaction to which it related.[35]

[25] Like the primary judge, I find it difficult to apprehend what Dr Murray Byrne's life insurance policy or policies had to do with the apposite legal principles.[36] The respondent's evidence was that the life insurance policies were taken out well before the respondent signed the application as guarantor on 3 June 2006 and not for the purpose of the loan she guaranteed. They were taken out earlier to cover the mortgage amount on the family home in the event of Dr Murray Byrne's death. The trial judge accepted that the respondent did not read the application before signing it as guarantor on 3 June 2006. I have found the trial judge was right to conclude that she was a volunteer in the sense discussed in *Garcia*[37] and that when she signed the application as guarantor on 3 June 2006, and when she signed the actual guarantee sometime after 22 June 2006, she did not understand the essential purport and effect of the transactions she was guaranteeing. It is not in dispute that the appellant knew of the marriage relationship and did not explain or take steps to have explained to the respondent the purport and effect of the transactions she was guaranteeing. In those circumstances, I cannot see that the fact that the respondent has since received a benefit under her deceased husband's life insurance policies taken out well before June 2006 means that it is not unconscionable for the appellant to enforce the respondent's guarantee. The appellant's third contention is not made out.

Conclusion and orders

[26] The trial judge's primary findings of fact were generous to the respondent but they were open on the evidence. No doubt that is why the appellant has not challenged them. On the application of well-established orthodox legal principle[38] to those facts, the judge was right to conclude that the respondent was a volunteer who did not understand the purport and effect of her transaction of suretyship. It is not now disputed that the appellant knew of the marriage relationship and did not explain or have explained to the respondent the purport and effect of the transactions she was guaranteeing. In those circumstances, the judge correctly concluded that it was unconscionable to allow the appellant to enforce the respondent's guarantee.

[27] It may seem odd that in this case a practising medical practitioner with some business experience can avoid the obligations of her guarantee under *Garcia*.[39] But the respondent is not disentitled to the protection of the law because she is tertiary-educated. It must be remembered that the principles explained in *Garcia* over 13 years ago have long been the law in Australia. Commercial lenders like the appellant, which require partners of borrowers to guarantee their partners' loans, should be well aware of their legal obligations to ensure such guarantors understand the purport and effect of their guarantees and the transactions to which they relate. It would not have been difficult for the appellant to itself have explained, or to ensure that a competent, independent person had explained, to the respondent the true effect of the guarantee and the transactions to which it related: see *Garcia*.[40] Its failure to do so disentitles it to reliance on the respondent's guarantee.

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35 *Agripay Pty Limited v Estate of Murray Andrew Byrne* [2010] QSC 189, [52]-[54].

36 Set out in [3] of these reasons.

37 Above.

38 Above.

39 Above.

40 (1998) 194 CLR 395, Gaudron, McHugh, Gummow and Hayne JJ, 411 [41].

[28] For these reasons I agree with my colleagues that the appeal should be dismissed with costs.

ORDER:

Appeal dismissed with costs.

[29] **WHITE JA**: The appellant, who carried on a business of providing loans to investors in approved managed investment schemes[41], lent money to the late Dr Murray Byrne in June 2006 to assist in the purchase of units in a number of agricultural managed investment schemes, essentially as a vehicle for the minimisation of his tax indebtedness. At the same time, his wife, the respondent, Dr Joan Byrne ("Dr Byrne"), guaranteed the due performance of her husband's obligation under the loan agreement by a contract of guarantee and indemnity.

[30] Dr Murray Byrne died between 9 and 11 February 2007 aged 38 years. By his will he appointed his wife as his executor and sole beneficiary. His estate defaulted in the payment of interest due under the loan which triggered an obligation to repay the outstanding amount of the loan and interest.

[31] In September 2007 the appellant made a demand under the guarantee for $693,956.94, the sum then due and owing by the estate. Dr Byrne failed to pay and the appellant commenced proceedings against the estate as first defendant and Dr Byrne as second defendant.

[32] On 5 August 2009 summary judgment was entered against the estate for $786,492.39 (this sum contained an interest component of $207,393). The estate went into administration on 7 August 2009 on the application of Dr Byrne with the appellant as supporting creditor. The proceedings continued against Dr Byrne. She raised several defences but only that based on the principle of "special disadvantage" as explained in *Yerkey v Jones*[42] was live at the commencement of the trial. By counterclaim, she sought to have the contract of guarantee and indemnity set aside. If she were unsuccessful in the defence Dr Byrne agreed that judgment should be entered against her in the same sum as against the estate plus interest.

[33] The Chief Justice, who was the primary judge, concluded that Dr Byrne fell within the second class of case discussed in *Garcia v National Australia Bank Ltd*[43] finding that she did not understand the purport and effect of the primary transaction; that she should be regarded as a volunteer; that the lender knew of the marriage relationship; and that no explanation about the transaction was given to her. The appellant did not contest the third and fourth of these factors at trial and, while the first and second were the focus at trial, it was only with respect to the first that the appellant contended his Honour erred.

[34] The appellant contended below that two further matters should be taken into account in deciding whether it would unconscionable for the appellant to enforce its security against Dr Byrne. The life of Dr Murray Byrne had been insured for $2 million under several policies. Dr Byrne received $1 million from which she

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41 Admission; trial transcript 1-56 ll 15-18; AR 56.

42 (1939) 63 CLR 649 per Dixon J at 685.

43 (1998) 194 CLR 395; [1998] HCA 48; at 408-409, [31].

paid some debts and established a trust fund for her children. Other insurance payments went to the administration of the estate. The second was that as sole beneficiary of her husband's estate she was entitled to the benefits of the investments for which the money had been borrowed. His Honour regarded those further matters as irrelevant to the issue of the validity of the guarantee but, in any event, any benefits from the scheme would vest in the trustee of the bankrupt estate. His Honour set aside the contract of guarantee and indemnity with costs.

[35] It was accepted that Dr Byrne carried the onus of proving that she came within the principle enunciated in *Yerkey v Jones* as refined and developed in *Garcia v National Australia Bank Ltd.*[44] In *Yerkey v Jones*, after a review of the authorities, Dixon J concluded:[45]

> "… 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. …
>
> 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 …"

His Honour added:

> "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."[46]

[36] The High Court[47] in *Garcia* pronounced the proper approach where a wife as a surety for the debts of her husband seeks to be relieved of that obligation. Gaudron, McHugh, Gummow and Hayne JJ said:[48]

> "The principles applied in *Yerkey v Jones* do not depend upon the creditor having, at the time the guarantee is taken, notice of some

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44 (1998) 194 CLR 395; [1998] HCA 48.

45 (1939) 63 CLR 649 at 685.

46 At 685.

47 Kirby J and Callinan J wrote separate concurring judgments, Kirby J proposing a wider category of co-habitees who might be said to have a special disadvantage.

48 At [31]. Although their Honours referred at [43] to the fact that the wife was a director and shareholder of the company whose debt she had guaranteed, they did not discuss her obligations *as* a director merely that she had no control and obtained no financial advantage and thus was a volunteer. See J Pascoe *Director's Responsibilities: Now the forgotten factor in Garcia* cases (2003) 15 Aust Jnl of Corp Law 246.

> 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); (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."

Grounds of appeal

[37] The appellant challenges the trial findings that Dr Byrne did not have sufficient knowledge of the purport and effect of the transaction to bind her to the contract of guarantee and indemnity and that his Honour erred in not finding that there was no unconscionability in the attempted enforcement of the guarantee: expressed more broadly, that his Honour erred in finding that the requirements to warrant setting aside the guarantee as discussed in *Garcia* were met.

Evidence

[38] Dr Murray Byrne was born in Toowoomba in 1968. Dr Byrne was born in Scotland in 1966. After graduating in medicine in Scotland and briefly working, she responded to a invitation by Queensland Health and arrived in Australia in August 1993. She was sent by Queensland Health to serve as a medical officer in a number of western Queensland towns. She met Dr Murray Byrne in 1996 when working at the Royal Brisbane Hospital. They were married in Scotland in March 1998 and returned to Queensland to live. Two children were born of the marriage in 1999 and 2001. Dr Byrne had limited authorisation to work as a medical practitioner in Australia. Dr Murray Byrne was her sponsor to work under an area of need registration. By the time of the trial Dr Byrne had full general registration.

[39] Dr Byrne had limited business experience when she married, having worked in the National Health Service in Scotland and then for Queensland Health in Australia.

She and her husband operated a joint bank account and other property, such as their home, was in joint names. Dr Byrne paid all the household bills from the joint bank account. Dr Murray Byrne was one of a group of four doctors who had set up the St Vincent's Emergency Centre in Toowoomba as an alternative to the Base Hospital, as explained by Dr Byrne. It was a fee paying medical centre and operated through a company in which Dr Byrne had no involvement. She occasionally did some shifts in the St Vincent's Emergency Centre. That centre was sold in late 2005 for a significant sum which gave rise to a large tax liability for Dr Murray Byrne. At the same time, from about 2001, he was conducting an emergency department in the Greenslopes Medical Centre.

[40] A second medical centre was established. Dr Byrne said she had no involvement in setting up the business but that her husband had done so with the practice manager who had come from St Vincent's Hospital. She took some interest in items of furniture for the practice because she was then training in occupational medicine. The company which operated the centre was M J Byrne Pty Ltd, the directors of which were both Doctors Byrne. They had equal shareholding in the company. In an affidavit sworn in proceedings in relation to Dr Murray Byrne's will[49] Dr Byrne had deposed:[50]

> "Murray and I were both doctors and at the time of Murray's death we were both directors and shareholders in the company, MJ Byrne Pty Ltd ("the Company"). The Company owned and operated the business known as, "Curzon Medical Centre" ("the Medical Centre"). The Company entered into contracts with a number of doctors allowing them to utilise the premises leased by the Company and the administrative and nursing services provided by the Company and employed a number of administrative and nursing staff, … The Medical Centre commenced operation in September 2006 (before which Murray owned and operated the St Vincent's Emergency Centre)."

[41] A company, Balquhain Pty Ltd, was the trustee of a family trust established in about 2005 to purchase assets for the family. Both Doctors Byrne were directors. The M J Byrne Superannuation Fund was established after Dr Murray Byrne wished to make some investments but had insufficient funds. They each rolled over their money from Q Super into the fund, Dr Byrne about $65,000 and her husband about double that sum. Agribusiness investments were then arranged for Dr Murray Byrne through Timbercorp investments. Dr Byrne explained that she let her husband take what was his share out of the superannuation fund to make the investments. In response to the question "Why did you do that?" she answered, "So he could do the investment. I had to live with him."[51]

[42] Dr Byrne told the court that her husband had a serious tax problem in 2002 and had become "fairly aggressive". He blamed her for making insufficient financial contribution to the family money. He was particularly disorganised about his financial affairs and, although she attempted to manage his files, this was insufficient. Dr Byrne worked every second weekend for a year to help her husband pay his tax bill and obtained a loan from her own family to assist him in this regard. She described it as "a very unpleasant time". By the time the second tax crisis arose

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49 BS6809/07. Three paragraphs only were tendered in these proceedings, namely 3, 46 and 97, although the whole affidavit is in the appeal record.

50 AR 282.

51 Trial transcript 1-32; AR 32.

at the end of 2005 and the beginning of 2006 as a consequence of the sale of the St Vincent's Medical Centre, Dr Byrne said that he had become obsessed with a way of getting out of paying a great deal of tax.

[43] At the beginning of the week of 3 June 2006 Dr Murray Byrne told his wife that Peter Cooke was coming to Toowoomba to assist him in taking out investments to help with his tax problem. A statement of advice had been prepared for him by Mr Cooke, a certified financial planner through his company Planwealth Pty Ltd, an authorised representative of Hillross Financial Services Ltd. Hillross was a wholly owned subsidiary of AMP Life Ltd. The investments were all in the agribusiness field. There was no suggestion that Dr Byrne was shown a copy of that statement of advice by her husband or Mr Cooke at any time prior to her signing the application for loan or the guarantee proper.

[44] On Saturday 3 June 2006 the family returned early from a regular morning tea with Dr Murray Byrne's parents. Dr Byrne described herself as "pottering around to make sure the kids were sort of quiet given Murray was having a meeting".[52] Dr Murray Byrne and Mr Cooke sat at a table in what appears to have been an open-plan room surrounded by papers. Dr Byrne was not present throughout the meeting which lasted more than an hour but attended to the children and engaged in other domestic matters. After quite some time she said:[53]

> "… I was told to come over to sit down because I had some documents to sign. And this was the first time I'd heard anything about me having any involvement with this, me having documents to sign. I didn't know, you know, what it was about or anything at all. So, I basically came over and sat down at the table and basically was told, look, I have to sign these documents for Murray to take advantage of the investments and basically, if I didn't sign it, then he wasn't going to get, you know, the advantage of these investments, you know – "You know that he needs this for his tax problem." And at one stage I remember Peter Cooke saying, "You know, you should get legal advice for this." But, on the other hand, he is going, "You've got to sign this. If you don't sign it today, it's not going to - he is not going to be able to do it. He can't take advantage of it." And that's basically what happened. So, I signed the document."

Dr Byrne estimated that this took 10 to 15 minutes.

[45] Dr Byrne said she did not read the document(s) before she signed which she recalled as being a single sheet of paper, nor was she given any other documents to read. After she had signed Mr Cooke[54] said to her:

> "'Well, you had better come and see what you have signed up for.' and then produced this piece of paper which was like A4 size but sort of extended out, like, four or five of these A4 sizes and there is figures and coloured lines going absolutely everywhere and for some reason in my head I got the idea it was seven years. I don't know

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52 Trial transcript 1-17; AR 17.

53 Trial transcript 1-17; AR 17.

54 Mr Cooke did not give evidence nor was any evidence called by the appellant. The basis for the entry of summary judgment was the conclusion by the defendants that a case in agency in relation to Mr Cooke could not be established, Trial transcript 1-2; AR 2, l 50.

> where I got the idea, if I had read it, misread it, heard it, but I had this idea that it was seven years."[55]

As he was leaving, there was some comment from Mr Cooke about Dr Murray Byrne's life insurance. Dr Byrne recalled mentioning difficulties in obtaining cover because of her husband's diabetes.

[46] The document which Dr Byrne had signed was an application for the allocation of units and loans to purchase them. Pintle Pty Ltd, a company of which Dr Murray Byrne was the sole director, was also a guarantor. At the time she signed the document(s) Dr Byrne said that she had not, so far as she was aware, signed any guarantees. She said that she did not know who the loan and guarantee was with and that no one explained the legal effect of the guarantee to her or the consequences for her if her husband were to default on the loan. In response to the question "Did anyone explain the investments to you in terms of what Murray was doing with the investments?" Dr Byrne answered:

> "I understood that some of the investments were almonds and avocados and pearls and there was something else. I can't remember what the something else was but I don't – I don't understand – I still don't understand it. All I understood that he was doing this to try and minimise his tax."[56]

Dr Byrne recalled that she was given only one page to sign but she said:

> "I think I was also very agitated and upset at the time as well. I just felt that I was being – like, I had been ambushed. I wasn't given a chance to really think about it. I didn't get a chance to say, you know, 'What is this? Why do I have to be involved in it?' I didn't understand why I had to be involved with it. I always understood it was just to be Murray's investment."[57]

[47] No one explained to her the structure of the loans which was to apply for a number of units and the funds to purchase them in each agribusiness project on an interest only basis; the identity of the lender; the term of the loan; the level of the management fees (approximately $400,000); or the amount of commission Mr Cooke would receive (approximately $85,000). Neither was there any information given to her that there may be a difficulty in selling the investments should the money be needed. The following appeared in the Statement of Advice:

> "The Projects are not intended to be a short term investment and should be viewed as being one for a fixed term. The investment in these Projects will be relatively illiquid because there is unlikely to be a formal secondary market for the sale of interests."[58]

That warning was in bold type.

[48] Dr Byrne identified her signature in a number of places in the application documents.[59] Included in the application was documentation which she had not

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55 Trial transcript 1-19; AR 19, l 21.
56 Trial transcript 1-19; AR 19.
57 Trial transcript 1-47; AR 47.
58 AR 120.
59 AR 85, 88, 157 (authority to debit from joint account), 159 (declarations of having received advice, etc), 160, 161 and 162.

read which showed her as having assets in excess of $9 million. Those figures were not in her writing and she regarded the information as grossly inflated. The only figure that she agreed was correct was her own $2 million life insurance. The check documents for her as guarantor were not in her writing and she doubted the correctness of the driver's licence particulars. Dr Byrne signed as guarantor the following declaration:[60]

> "1. I/We have read and understood the particulars in this enquiry and declare that the information provided by me/us is true and correct and that no information has been withheld which may affect your decision.
> 2. This application is conditional upon me/us being allotted or issued the interest in Projects described in the Section 7 (this does not apply to refinance of existing Loans)
> 3. I/We authorise AgriPay Limited (or its nominees) to make any other enquiries which it considers necessary to evaluate this enquiry for finance.
> 4. I/We understand that this enquiry for finance does not constitute an offer or acceptance for the provision of credit and is not a contractual document.
> 5. I/We understand that if my/our enquiry for finance is not proceeded with for whatever reason the [sic] AgriPay is not obliged to refund any fees expenses and costs already paid by me/us.
> 6. The information provided in the Loan Application is true and correct;
> 7. I/we have received financial advice in relation from the Advisor named in section 2 of this Loan Application on taking out a Loan with AgriPay based on the enquiry for finance submitted to AgriPay and have either taken independent tax and legal advice and or have been given the opportunity to receive independent tax and legal advice in relation to my/our obligations under the AgriPay Loan Agreement
> 8. I/we have received the AgriPay Loan Agreement and have been given the opportunity to read the Agripay Loan Agreement;
> 9. I/we have signed the AgriPay Loan Agreement freely and voluntarily and not by reason of any undue influence of any person;
> 10. I/we understand the effect of the AgriPay Loan Agreement any [sic] my/our obligations under it and approve of and accept the terms and conditions of the Loan Agreement;
> 11. I/we am aware that where I/we give or have given security of any of my/our assets as security for the AgriPay Loan, those assets can be seized and sold if I/we default or do not pay any monies owing under the AgriPay Loan Agreement;
> 12. Before signing this document I/we carefully considered my/our capacity to pay the AgriPay Loan principal and to pay interest on the AgriPay Loan and other monies which

[60] AR 159.

may be payable by me/us under the AgriPay Loan Agreement;

13. AgriPay expressly disclaims and takes no responsibility for any part of the Prospectus, PDS or any product ruling issued by the Australian Taxation Office relating to the relevant Project and makes no representation or warranty regarding the truth or accuracy of the contents of either of them;
14. AgriPay makes no recommendation in connection with any investment in the Projects;
15. AgriPay recommends strongly that I/we obtain independent professional advice as to whether investement in the Projects is appropriate, or is fit for any purpose that is required or is of the nature or quantity to achieve any result that is desired;
16. I/we have not committed an act of bankruptcy or entered into any arrangement, composition or assignment for the benefit of creditors;
17. I/we acknowledge that AgriPay will be relying on this Declaration, Consent and Acknowledgement in providing financial accommodation to me/us."

[49] The loan agreement and guarantee was executed on a date unknown between 22 and 30 June 2006 after acceptance of the application on 14 June 2006 addressed to Dr Murray Byrne. Dr Byrne, however, thought that once she had signed on 3 June she was legally bound. No further discussion that she could recall occurred with Mr Cooke or anyone else about the transaction before she executed the guarantee. Although it would appear that Mr Cooke had witnessed Dr Byrne's subsequent signatures she could not recall seeing him other than on 3 June at home.

[50] She was challenged in cross-examination that she had access to accountants and could have obtained independent advice between 3 June and approximately 22 June when the agreement was concluded. She agreed that she had an accountant for her tax returns and the family solicitor in Toowoomba. She had no access to a personal financial advisor. In para 97 of her affidavit she had deposed:

> "Murray was also actively involved in a number of businesses and companies. At the time of his death he was the director of three (3) companies, had a self-managed superannuation fund and a family trust. Murray had also just recently transferred shares in a few companies. Because of Murray's and my varied and substantial business and financial arrangements, we employed not only a solicitor, but also two (2) accountants, a financial advisor and an insurance broker. Murray had always left it for his professional advisors to handle all important financial matters for him."[61]

Dr Byrne explained that her husband's affairs were so complex that although they had the same family solicitor, her husband had two accountants, one in Tasmania in respect of an investment property, Mr Cooke, and a Mr Hartman who had set up the superannuation trust and another accountant. The learned primary judge accepted Dr Byrne's explanation that these professional advisors were largely for

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61 AR 295.

Dr Murray Byrne's financial affairs not hers and that, in any event, she believed that she was bound from 3 June.

[51] Dr Byrne was a co-mortgagor in respect of the family home which was purchased for about $1 million in 2005. The mortgage repayments for that property came out of the joint bank account. She understood that if the mortgage repayments were not met the mortgagee was liable to repossess the property and, if the sale price did not meet the outstanding amount, then she would be liable personally. On her understanding of a guarantee, the following exchange occurred in cross-examination:

> "MR BELL: I suggest to you, you understood back in 2 [sic] June 2006 is that if Murray didn't pay back the loans to AgriPay you would then be liable for those loans? - -Sorry, could you just repeat that again, sorry.
>
> I suggest to you back in – in June 2006 you understood that if Murray didn't pay back the money he was borrowing from AgriPay, you would be responsible for paying back the money? - - I suppose I would be, yes."[62]

She agreed that she had confidence that her husband would actually pay back the money that he was borrowing because he was earning a lot of money. She understood the purpose of her husband's life insurance policies which aggregated to approximately $2 million was to pay for the house and her husband's debts.

[52] Dr Byrne was asked about the family's "affluent" lifestyle and that were her husband able to lower his tax bill she and the children would benefit. She agreed that although she did not view reducing the tax liability "like that" that would be the case. She was concerned about her husband's tax bill and said "Yes, I was concerned, yes. I was concerned as to what would happen. I had walked on eggshells for three years."[63] The following further exchange occurred in cross-examination:[64]

> "THE CHIEF JUSTICE: Are you saying that you did not understand in June 2006 that the document you were signing was a guarantee? - - I didn't – I didn't really understand it at all. I did it because he wanted the tax advantage. I didn't want to go through – I had three years of walking on egg shells. I didn't want to go through it again. I didn't want any more accusations. I didn't want any verbal abuse. I just wanted it to stop."

Primary decision

[53] The learned primary judge accepted Dr Byrne's evidence as "honest and reliable".[65] He noted that Dr Murray Byrne "did not run his financial affairs in close consultation with his wife".[66] His Honour described Dr Byrne as being only "peripherally" involved in her husband's business affairs and that her own

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62 Trial transcript 1-40; AR 40.
63 Trial transcript 1-44; AR 44.
64 Trial transcript 1-47; AR 47.
65 Reasons [9].
66 Reasons [14].

involvement was in her public health work which she carried on to supplement her husband's substantial earnings and maintained the household which was her prime responsibility. Notwithstanding her directorship of M J Byrne Pty Ltd and some suggestion in her affidavit in the will proceedings in para 48 that she did have some involvement in the medical centre, his Honour

> "… accepted Dr Byrne's evidence that she had no substantial involvement in the workings of that centre. As to Balquhain Pty Ltd, a family trust company set up in 2005 to acquire art works, although a director, her role was substantially subordinate to Murray's."[67]

[54] His Honour accepted that Dr Byrne did not read the finance application on 3 June 2006. Had she done so she would have realised that the statement of assets and liabilities was substantially incorrect. The value of jointly owned property was considerably inflated while the mortgage repayments were then greater than stated. He noted that she was unaware of the amount of the liability being guaranteed; that she knew she was signing as intended guarantor of her husband's debts and if he did not discharge his obligations she would, as guarantor, be liable. His Honour inferred that she was confident that her husband would be able to meet his obligations because he was earning a lot, and, should he die, she had the prospective benefit of insurance policies worth $2 million.

[55] On her understanding of the transaction the learned primary judge found:

> "Yet Dr Byrne signed the finance application without any proper understanding of her actual, potential liability. She did not know the amount being advanced, or the term of the loan. She mistakenly thought the term of the loan was seven years, whereas it was ten. When, subsequently to her signing, Cooke showed her a spreadsheet setting out matters of detail, she could not understand it.[68] She did not know the consequences should Murray default, which were peculiarly significant in two respects: first, this was not a short-term plantation investment, but one described as "relatively illiquid" for want of a resale market (p 18 Exhibit 1); and second, the management fees which had to be paid in the first three years were comparatively substantial (more than $400,000), whereas no net proceeds were expected to be received over that period."[69]

His Honour then discussed Dr Byrne's motivation in signing the guarantee concluding:

> "Dr Byrne said that she signed, notwithstanding she had not received independent advice as recommended, even though she was upset and felt that she was being "ambushed"… I accepted her evidence about that. I infer that she signed to help her husband in the confidence that he would pull through financially and that they would be able to maintain their financially luxurious lifestyles … Dr Byrne had faith in Murray, in short, maybe blind faith notwithstanding his sometimes indifferent personal treatment of her."[70]

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67 Reasons [16].

68 If those are the spreadsheets included in the Appeal Record, they are not readily understandable, AR 121 and following.

69 Reaons [24].

70 Reasons [25].

His Honour concluded, uncontroversially, that nothing had occurred between the finance application and the signing of the formal guarantee on or shortly after 22 June 2006.

[56] The learned primary judge then discussed the four factors identified in *Garcia* which would assist in identifying whether it would be unconscionable of the appellant to enforce the guarantee. His Honour concluded that while Dr Byrne knew that she was assuming an obligation as guarantor of her husband's liability and knew in general terms what a guarantee entailed

> "… she was not aware of or informed about important aspects of this particular transaction: the amount of the principal debt, the identity of the lender, the term of the loan, and the risks peculiar to the investment being facilitated, in relation to upfront management fees and the absence of a secondary market for sale."[71]

[57] It had been submitted on behalf of the appellant to the learned primary judge that all that was necessary was that Dr Byrne had an understanding of what a suretyship involved. His Honour held that where *Garcia* spoke of "the transaction of suretyship"[72] the court was referring to the particular transaction into which the guarantor had entered. His Honour relied upon the approach of Campbell J in *Brueckner v The Satellite Group (Ultimo) Pty Ltd*[73], particularly at paras 185 and 186. In those passages Campbell J quoted from *State Bank of New South Wales Ltd v Chia*[74] where Einstein J said:

> "An understanding of the 'purport and effect' of the transaction includes, at least, an understanding of the fact of liability, the general extent of liability and the possible consequences of default: *Yerkey v Jones* (at 689). However, it is not productive of an equity that the wife misunderstood or failed to appreciate the *degree* of risk associated in the transaction, or the improvidence or unwisdom of the uses to which the money so secured will be put: *Yerkey v Jones* (at 686). Further, the wife's misapprehension must be of a material matter: *Bank of Victoria Ltd v Mueller* (at 648); that is, *material to the liability* the creditor wishes to impose upon the wife."

[58] On appeal Mr R G Bain QC for the appellant submitted that *Brueckner*, upon which the learned primary judge relied, set the bar too high in requiring a level of detail not required by *Yerkey v Jones* or *Garcia* as to a surety's understanding of the purport and effect of the transaction and in doing so his Honour fell into error. Mr Bain referred to the following passage in *Yerkey v Jones*:[75]

> "But, if the general nature and effect of an instrument such as a mortgage executed by a married woman is understood or on reasonable grounds the creditor or other party or his agents believes it to have been understood, it is no ground for setting it aside that some of its details or its possible consequences or applications are not comprehended, notwithstanding that the husband is the person who has obtained her consent to the transaction."

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71 Reasons [30].
72 At [31].
73 [2002] NSWSC 378.
74 (2000) 50 NSWLR 587 at 600-601.
75 At 689.

But that passage immediately followed his Honour's statement about what the security entailed after the wife was given an explanation in the solicitor's office before the documents were executed:

> "His [the solicitor's] explanation of the mortgage appears to me to have been simple enough and complete enough to ensure that any woman of average intelligence would understand that she was making herself liable for interest on the £1,000 and that, if it was not paid, the principal might be called up and that she bound herself to pay it so that she might be sued and her property sold. As to the effect of the clauses directed to the exclusion of the principles of law by which a surety may be discharged from his obligations though the debt is not paid, probably the explanation was incomplete, and, if complete, it doubtless would have failed to produce any impression except a confused idea that some possibility of the mortgagee escaping was excluded."[76]

There was, accordingly, nothing, with respect, insufficient in Einstein J's shorthand description which misstated the effect of Dixon J's dictum.

[59] Mr Bain also contended that the learned primary judge was "too mechanistic" in his approach to the four factors identified in *Garcia*. What was required was not the individual significance of each but an overall assessment as to whether it would be unconscionable for a creditor to enforce the security in the particular circumstances and those circumstances included recourse by Dr Byrne to the insurance policies. There is no sense that his Honour did not understand that those four factors involved a disciplined way of looking at the overall issue and that, in combination, they made it unconscionable to enforce the security. His Honour did not disregard the policies. He thought them irrelevant. They had not been taken out expressly for the appellant's loan. Indeed, what evidence there was, suggested that it was mortgage security insurance for the home loan.

[60] Mr Bain further submitted that the learned primary judge ought not to have relied on *Brueckner*[77] because it was, factually, a most unusual case and bore little resemblance to the present case. The facts in *Brueckner* were complex. It is unnecessary to mention any except insofar as they relate to the *Garcia* defence. The plaintiff, Mr Brueckner, had entered into contracts to purchase two units in a development to be financed by a bank and paid the whole purchase price as a deposit. Ms Broster was a director of the development company and guaranteed the due performance of the development contract with Mr Brueckner. Her husband, who was disqualified from being a company director, was company secretary and actively involved in the development. Ms Broster could not recall signing the guarantee nor being given an explanation about the nature of the transaction. Her evidence was accepted. Mr Broster said that although a director, his wife had no involvement in the company and that he pressured her into signing urgently because Mr Brueckner was going overseas and she had no opportunity to read the document. He did not explain the unusual features of the contract to her. The trial judge accepted his evidence. Mr Brueckner made no enquiries as to Ms Broster's knowledge of the transaction. Ms Broster was a well educated woman who worked as a computer programmer but had little business experience. She had two young

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76 At 689.

77 [2002] NSWSC 378.

children and her marriage was under considerable stress due to her husband's turbulent style of dealing with their financial affairs, urging her signature on documents in circumstances of great urgency. She had some understanding of what a guarantee entailed. The trial judge concluded that she did not understand that giving the guarantee would have the consequence that she could lose her home or be made bankrupt. She thought she was signing a sales contract in respect of the two units. The evidence revealed that unrealised by her Ms Broster was a director of some 21 companies and had guaranteed upwards of $100 million in debt.

[61] It is thus understandable that the learned primary judge found *Brueckner* useful, not so much that the nature of the financial dealings was similar but there were parallels in the personal relationships between the wife and her husband and the pressured circumstances of signing. These agricultural transactions were also quite complex. Dr Byrne understood that the loans were for units in different enterprises but had no understanding of important aspects which made them far from straight forward.

[62] The learned primary judge dealt with the issue of voluntariness which is no longer an aspect of the appeal. It may be noted merely that the appellant had contended that Dr Byrne directly benefited from the transaction because the M J Byrne Superannuation Fund of which she was a trustee and beneficiary was a joint venture applicant for funding together with Dr Murray Byrne. As his Honour explained, Dr Murray Byrne applied for 35 lots in an almond project worth $262,500 and 34 lots in an avocado project worth $317,900 totalling $580,400, the entire amount of the overall investment in Timbercorp Securities Project. The loan from the appellant funded only part of that joint venture investment limited to nine almond lots worth $67,500 and 13 avocado lots worth $121,550. The balance loan monies were used to make a lump sum payment of $189,050 against the earlier loan from Timbercorp Securities. He concluded:

> "It may therefore be seen that the prospect of any profit would provide 'only long term and uncertain returns to the superannuation fund', as submitted for Dr Byrne, 'indirect through the mechanism of the superannuation fund and subject to applicable superannuation rules'."[78]

The submission had been made that the amount of the loan which could be traced into Dr Byrne's superannuation interest was in the vicinity of five per cent.[79] The learned primary judge concluded that the prospect of such a return, uncertain and indirect as it was, was an insufficient benefit and any lifestyle benefit through the lowering of her husband's tax bill was too indirect and prospective to deny her the capacity of volunteer:

> "From Dr Byrne's point of view, there was no 'real benefit' from the principal transaction (*Garcia*), no 'direct or immediate gain' (*Cranfield*). She should be regarded as a volunteer in this suretyship."[80]

Discussion

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78 Reasons [42].

79 AR 62.

80 Reasons [45].

[63] The dispute between the parties to the appeal is the degree of want of understanding of the transaction which Dr Byrne must demonstrate. In *Garcia*, Gaudron, McHugh, Gummow and Hayne JJ said:[81]

> "It will be seen that the analysis of the second kind of case identified in *Yerkey v Jones* … 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."

They added:

> "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 description."[82]

[64] Their Honours did not to attempt to specify the particular features of a transaction which should be identified by the creditor to the surety to avoid challenge to the binding effect of the contract but said:

> "…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."[83]

They concluded:[84]

> "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' 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."

In *Garcia,* itself, the wife knew she was signing a guarantee but thought it was a limited overdraft accommodation to be applied only in the purchase of gold whereas it embraced all indebtedness up to a limit.

[65] It is useful to recall Dixon J's observation in *Yerkey v Jones*:

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81 At [33].

82 At [34]. Their Honours referred to Professor Finn (as his Honour then was) in Finn (ed) *Essays on Contract* (1987) at 104-110. At 106 he said "It is more profitable, it is suggested, to approach equity's reach into contract by isolating its behavioural concerns, by identifying its techniques and by highlighting the limitations of its remedial capabilities" rather than resort to pejorative adjectives of, for example, unconscionable.

83 At [37].

84 At [41].

> "It is almost needless to say that the equitable grounds for setting aside a voluntary disposition, while well understood, recognize the indefinite variation of form which unconscientious conduct may assume.
>
> The difficulty, if not danger, thus created of attempting to state the conditions which must be fulfilled before a given kind of conduct or of unfairness amounts to an invalidating cause is greatly increased by the introduction of the consideration that the equity must be such as ought to prevail against the claims of the creditor as a possibly innocent third party."[85]

Whatever may be thought of the historical origins and subsequent analysis of the nineteenth century cases in *Yerkey v Jones*[86] and any perceived oddity in retaining a specific immunity for married women in the twenty-first century when they guarantee their husband's indebtedness, as Callinan J observed in *Garcia*:

> "… 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."[87]

That did not occur in *Amadio*[88] nor in *Garcia*, save for Kirby J who would have adopted a principle applicable to other co-habitees derived from *Barclays Bank Plc v O'Brien*.[89]

[66] Ultimately, cases where a wife seeks to be relieved of the burden of her contract of suretyship will depend on a close analysis of the particular facts. Mr Bain submitted that the learned primary judge took an indulgent view of Dr Byrne's want of understanding against her involvement in many of the financial activities of her husband. This is to elevate too highly those activities. The use of a family trust to protect assets in this case involved the purchase of two or three paintings by well known Australian artists. The learned primary judge's acceptance of Dr Byrne's limited involvement in the running of her husband's medical practice was open on the facts. Her evidence that she attempted to bring some financial order into her husband's affairs by managing the household bills from their joint account (required as a condition of her visa) was not challenged. But she was unable, apparently, to exercise any influence over him to plan for his tax obligations and her evidence of his purchase of a $390,000 car when he had looming liabilities suggests just how little influence she had. No matter how intelligent she might have been, the emotional pressure that she felt at the time the transactions were entered into was of a kind for which in part the rule had been developed and in respect of which the appellant could relatively easily have dealt. That the appellant knew what was required is seen in the provisions in the application set out above.[90] Mr Bain also submitted that Dr Byrne gave no evidence to the effect that if fully informed and given time to reflect she would not have entered into the contract. She did not need

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85 At 684.

86 See Sheller JA in the New South Wales Court of Appeal in *National Australia Bank Ltd v Garcia* (1996) 39 NSWLR 577 at 598.

87 At [107].

88 (1983) 151 CLR 447.

89 [1994] 1 AC 180.

90 At [20] above, AR 159.

to do so. This was not a defence of misrepresentation by Mr Cooke which was one of the defences advanced in *Brueckner* to which Mr Bain referred when making this submission.[91]

[67] This was a very complex transaction with many features which ought to have been drawn to Dr Byrne's attention, particularly the illiquid nature of the investment. The learned primary judge did not fall into error in his analysis of the evidence or the application of legal principles. I would dismiss the appeal with costs.

[68] **McMEEKIN J**: I have had the benefit of reading draft judgments of the President and White JA. They have fully set out the facts and submissions. I will refer to those only as needed to explain my views.

[69] At trial the respondent, Dr Byrne, sought an order setting aside a guarantee and indemnity given by her in favour of the appellant, Agripay Pty Limited, in respect of her husband's indebtedness to the appellant in the amount, by the time of trial, of $786,492.39.

[70] The Chief Justice held that it was unconscionable for the appellant to insist on its legal rights under that guarantee in reliance on the principles discussed by Dixon J in *Yerkey v Jones*[92] and confirmed by the High Court in *Garcia v National Australia Bank Ltd*[93].

[71] The appellant contends that his Honour erred in the application of those principles.

The Married Woman's Equity

[72] The starting point is to acknowledge that Dr Byrne is in a special position. She is entitled to take advantage of what has become known as the "married woman's equity". That is so because, according to Dixon J in *Yerkey*, the relationship of wife and husband had "never been divested completely of what may be called equitable presumptions of an invalidating tendency."[94]

[73] To act as surety for another meant here that Dr Byrne was taking on obligations to which she was, in a sense, a volunteer. She was at the material time the wife of the principal debtor. Because of those matters, of which the appellant was well aware, the appellant was required to show that it was not unconscionable for it to insist on its legal rights in relation to the guarantee and indemnity. In *Garcia* it was held that to avoid a finding of unconscionability the lender had to show that it took steps to explain the transaction to Dr Byrne. If the appellant did not take such steps then the appellant had to demonstrate that Dr Byrne did in fact understand the "purport and effect" of the transaction, or was, in fact, not a volunteer.

[74] It is common ground that "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" and common ground that no stranger did in fact explain the transaction to the respondent.

[75] While *Garcia* is but an example of the application of the principles, and not a template for all such actions, it is worth noting that there are significant

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91 Outline [23].
92 (1939) 63 CLR 649 at 675.
93 (1998) 194 CLR 395; [1998] HCA 48.
94 (1939) 63 CLR 649 at 675.

similarities between the facts in this case and the facts in *Garcia* – both involve professional women, both were of mature years, both knew perfectly well what a guarantee was, and both knew that they were signing a guarantee. Both were involved, at least on the periphery, of their husband's affairs. Neither bothered to ask questions about the transactions. Neither could be said to be wholly a volunteer – there were undoubted benefits to be gained, indirectly at least, by their husbands entering into the transaction that they were guaranteeing. Dr Byrne and her family enjoyed an opulent life style threatened, at the time, by an impending tax liability. Thus the benefits that Kirby J identified in *Garcia* are present here:

> "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 providing the guarantee, was that the husband's economic position was, however indirectly, bound up in the economic position of the whole family."

[76] The majority in the High Court[95] held that it was unconscionable in these circumstances for the lender to insist on its legal rights. Given those similarities, if no other significant distinction can be drawn between the two cases, then it should follow that the respondent would be entitled to the relief she seeks.

The Issues on Appeal

[77] The appeal was argued on the basis that there were two issues: Did the respondent have a sufficient understanding of the purport and effect of the transaction to avoid the application of the equity? Was she a volunteer?[96] However it ought not to be overlooked that both issues are but subsidiary to the principal question – would it be unconscionable for the lender to insist on its legal rights?

[78] As to the second issue I am content to accept that the benefits of the transaction were not sufficiently significant or proximate to disqualify Dr Byrne from the protection afforded by the equity in question for the reasons that the President and White JA have explained. That is not to say that I consider that it was an irrelevant circumstance, when considering the principal question, that there were benefits expected from the transactions.

Dr Byrne's Level of Understanding of the "Purport and Effect" of the Transactions

[79] Dr Byrne first learnt of the proposed transactions in late May 2006 when her husband mentioned them to her. On 3rd June 2006 a commission agent attended on her husband at their home. She was not involved in the discussions until the very end when she was called on to sign documents. That was her first notice that she had to sign anything. She understood that she was to be a guarantor. She knew that her husband wanted to enter into these arrangements to minimise his substantial income tax obligations. On that date, after 10 or 15 minutes of discussion, she

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95 Gaudron J, McHugh J, Gummow J and Hayne J. Kirby and Callinan JJ agreed in the result.

96 See Mr Bain's oral submissions on appeal at T1-2/58 – 1-3/1;1-4/50 - 1-5/25.

executed documents by which she offered to become guarantor if the advance then being sought by her husband was provided.

[80] The execution of the guarantee took place nearly three weeks later. The respondent made no further enquiry about the matter because she believed she was bound to the transaction from the time of the application. The monies were advanced on about the 30th June 2006.

[81] Here there were elements of both pressure and surprise. The surprise was in the requirement that the respondent sign anything at all. The pressure was in the stated need to sign that very day to achieve the desired tax effects. The Chief Justice accepted her description of the events surrounding the signing of the application as an "ambush".

[82] There was ample evidence before the Chief Justice, which he was entitled to accept, that the respondent did not understand significant aspects of the financial arrangements that her husband was proposing to involve her in when signing the application. His Honour's findings were:

> "Yet Dr Byrne signed the finance application without any proper understanding of her actual, potential liability. She did not know the amount being advanced, or the term of the loan. She mistakenly thought the term of the loan was seven years, whereas it was ten. When, subsequently to her signing, Cooke [a representative of the lender] showed her a spreadsheet setting out matters of detail, she could not understand it. She did not know the consequences should Murray [her husband] default, which were peculiarly significant in two respects: first, this was not a short-term plantation investment, but one described as "relatively illiquid" for want of a resale market (p 18 Exhibit 1); and second, the management fees which had to be paid in the first three years were comparatively substantial (more than $400,000), whereas no net proceeds were expected to be received over that period."[97]

[83] One might suspect that a person of average intelligence knowing that they were signing a guarantee would at the minimum enquire about the amount of the indebtedness, the term of the loan, and the prospects of a guarantee being called on. But there was no evidence that Dr Byrne was told these things and she claims that she did not know them.

[84] In my view there is no proper basis for overturning the Chief Justices' findings.[98] There was certainly evidence to support them.

[85] However several points might be made about Dr Byrne's knowledge. First, she knew that she was signing a guarantee.

[86] Secondly, she knew what that meant – she could be called on to pay the debts that her husband was then taking on.[99]

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97 AR 335-336 at [24] of the reasons for judgment.

98 See *Fox v Percy* (2003) 214 CLR 118.

99 AR 40/15-50.

[87] Thirdly, she knew that she did not understand the complexities of the investment despite some attempt to explain them to her over some 10 to15 minutes. What she plainly did know was that the investment was indeed complex and that she did not understand it.

[88] Fourthly, Dr Byrne did know the general nature of the "investments" under discussion. Her evidence was that the "investment" that her husband was contemplating involved "almonds and avocados and pearls and there was something else".[100] While that demonstrates the limited extent of her understanding it can be inferred from this that Dr Byrne must have realised the possibility that risks might attach to such investments.

[89] Fifthly, Dr Byrne must have appreciated that the debt then being taken on was significant. Her evidence was that her husband was entering into these arrangements to lower his tax bill "because he had such a big gain from St Vincent's emergency centre"[101] – a reference to the profit from the sale of that centre. She said she did not know the amount of the loan but she could not have been under any illusion but that it was substantial.

[90] Sixthly, she held no mistaken belief of any significance. In so putting the matter I do not accept that her belief that the term of the loan was seven years as opposed to 10 years was material in any sense. I cannot see how it was of any significance and Dr Greinke, who appeared for Dr Byrne, could not advance any suggestions as to why it might have been.[102]

[91] The appellant sought to argue that this level of comprehension was insufficient to attract the principle applied in *Garcia* and *Yerkey*.

What Level of Understanding is Necessary?

[92] In *Garcia* the majority specifically avoided making any finding as to "what features of such a transaction should be identified by the creditor to the surety".[103]

[93] In *Yerkey* Dixon J made several references to the degree of understanding that was required to avoid the application of the equity. He did so in the context of considering the prior statements of authority on the issue. The allusions are to "an adequate understanding of the actual nature and consequences of the transaction", "she fully understood the transaction", "a wife fully understood a guarantee", "the necessity for fully understanding the transaction", and "without understanding its effect in essential respects".

[94] Dixon J's own conclusion is in the following passage:

> "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

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100 AR 19/40.
101 AR 44/30.
102 Appeal transcript 1-33/35-40.
103 At [37].

> 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." (emphasis added)

[95] That analysis tends to leave unresolved the degree of comprehension required. However the references each suggest that a significant degree of comprehension is necessary to avoid the application of the equity.

[96] The Chief Justice was guided by a decision of Campbell J in NSW on this point – *Brueckner v The Satellite Group (Ultimo) Pty Ltd*[104] - which in turn adopted what was said in *State Bank of New South Wales Ltd v Chia*[105] where Einstein J attempted a statement of the minimum requirements:[106]

> "An understanding of the 'purport and effect' of the transaction includes at least an understanding of the fact of liability, the general extent of liability and the possible consequences of default: *Yerkey v Jones* (at 689). However, it is not productive of an equity that the wife misunderstood or failed to appreciate the *degree* of risk associated in the transaction, or the improvidence or unwisdom of the uses to which the money so secured will be put: *Yerkey v Jones* (at 686). Further, the wife's misapprehension must be of a material matter: *Bank of Victoria Ltd v Mueller* (at 648); that is, *material to the liability* the creditor wishes to impose upon the wife."

[97] The appellant submitted that Einstein J's summary overstated the level of comprehension required and was unsupported by authority. Einstein J explained his analysis in the following passage:

> "The explanation given to the appellant in *Yerkey v Jones* was, according to Dixon J, "simple enough and complete enough to ensure that any woman of average intelligence would understand that she was making herself liable for interest on the £1,000 and that, if it was not paid, the principal might be called up and that she bound herself to pay it so that she might be sued and her property sold" (at 689). From this passage the matters Dixon J considered to be

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104 [2002] NSWSC 378 at [185]-[186] per Campbell J

105 (2000) 50 NSWLR 587 per Einstein J

106 (2000) 50 NSWLR 587 at 600-601 [169]

> within the "general nature and effect" (at 689) of the transaction required to be understood by, or explained sufficiently to, a woman supplying a guarantee over her husband's business debts, may be discerned as including, at least, the fact of liability, the general extent of the liability and the consequences to herself of a default by her husband."[107]

[98] It might fairly be said that Dixon J, in the passages relied on by Einstein J, was not attempting to state a minimum standard but merely asserting that if so much was shown then there was sufficient understanding of the transaction to avoid the application of the equity.

[99] However if the principle be so wide as Einstein J set out in the early part of the passage quoted from *Chia,* and on which the Chief Justice relied, then prima facie the equity applies in this case. In my view ignorance of the amount of the loan and the consequences of default combined with a lack of "any proper understanding of her actual, potential liability" are sufficient to demonstrate an inadequate comprehension of the obligations that Dr Byrne was undertaking in the sense discussed by Dixon J in *Yerkey*.

[100] The questions that have concerned me however are whether the principle is so wide and whether, given the totality of the circumstances here, it is unconscionable to permit the lender to insist on its legal rights.

[101] There are two considerations – first, the respondent does not claim to have entertained any material mistaken belief as to the nature of the obligations that she was taking on, plainly had a general notion of those obligations, and allied with that there is no claim that she would have acted differently if the true nature of the transactions had been explained to her; and secondly, there was in place an insurance policy that was expressly intended to meet the debts of the husband in the events that triggered the plaintiff's liability.

Misapprehension in the Earlier Cases

[102] As to the first of those matters the striking thing about the earlier authorities is that they each involve a misapprehension. In every case to which Dixon J referred, and in every case to which we were taken, where the principle has been applied to relieve a wife of her obligations, the wife has either not known that she was signing a guarantee at all or, where she did appreciate the document was a guarantee, was mistaken in a material way as to what her obligations were under the guarantee in question.

[103] The starting point in any consideration of the Australian cases is the decision of Cussen J in *Bank of Victoria Ltd v Mueller*.[108] Dixon J in *Yerkey* conceded that much of what he wrote in *Yerkey* was "no more than an echo and discussion" of Cussen J's views as Cussen J had subjected the then modern authorities to "a full and very accurate examination". Cussen J opined that the wife was entitled to relief where amongst other matters it could be shown:

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107 (2000) 50 NSWLR 587 at 599 [166].

108 [1925] VLR 642.

> " … that the husband in procuring and pressing for such consent misrepresents in a material respect what is proposed to be the nature of her liability as guarantor, and that, by reason of such misrepresentation, the wife in respect of such matter does not understand the true nature of her liability as expressed in a form of guarantee signed by her."[109]

[104] That *dicta* does not determine that the principle might not be capable of wider expression but *Mueller* is authority for no more.

[105] In *Yerkey* Dixon J identified the "three principal modern cases in which a wife's instrument of suretyship for her husband's obligations has been set aside"[110] as *Turnbull & Co v Duval*[111]; *Chaplin & Co Ltd v Brammall;*[112] and *Shears and Sons Ltd v Jones*.[113] In the first and third of those cases the wife was plainly under a misapprehension. In *Turnbull* the wife erroneously supposed that she was lending the money to her husband to enable him to settle a particular account and not providing a charge as surety for her husband's debts generally. In *Shears* it was found that the wife did not know that she was placing her furniture at risk for the purpose of giving security to the creditors for a debt due by her husband under a judgment. In the remaining case, that of *Chaplin*, the wife's evidence was that she did not know that the document that she signed was a guarantee or of any importance.[114] Vaughan Williams LJ held that the case came squarely within the principle explained in *Duval* where the document the wife signed "was very different from what she supposed it to be".[115]

[106] Two other early decisions were mentioned by Dixon J as relevant. In the first, *Howes v Bishop*,[116] the finding was that there was sufficient explanation given to the wife and the plaintiff creditor was successful. In the second, *Talbot v Von Boris*,[117] the wife believed that she was incurring a liability for £100 and not £400 as the note recorded and judgment was limited to the £100 – that is the wife was held liable to the extent of her understanding.

[107] Thus the cases on which Dixon J rested his judgment in *Yerkey* did not protect a wife who was indifferent to the obligations taken on, but rather protected one who had been misled or was operating under an active misunderstanding. No case was cited in which a wife had successfully invoked the equity unless she misunderstood the import of what she had undertaken. In *Yerkey* itself the wife failed to have the transaction set aside it being held that she was under no material misunderstanding of the effect of the transaction.

[108] Likewise the cases decided since *Yerkey* to which we were taken have each involved a misapprehension or an acceptance of a need for one. Thus Einstein J, in his analysis of the relevant principles in *Chia*, went on to assume the need for a material misapprehension:

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109 At 648 – underlining added.
110 (1939) 63 CLR 649 at 681.
111 [1902] AC 429.
112 [1908] 1 KB 233.
113 (1922) 128 LT 218.
114 See the summary of facts at p234.
115 At p 238.
116 [1909] 2 KB 390, 100 L.T. 826.
117 (1910) 27 TLR 95, [1911] 1 KB 854 , 104 L.T. 524 per Phillimore J.

> "Further, the wife's misapprehension must be of a material matter: *Bank of Victoria Ltd v Mueller* (at 648); that is, *material to the liability* the creditor wishes to impose upon the wife."[118]

And later where Einstein J held that the creditor's explanation need not "successfully disabuse the wife of her misapprehensions".[119]

[109] Similarly in *Brueckner* the wife did not understand that she could lose her house and be made bankrupt by the signing of the guarantee. Indeed she did not realise that she was signing a guarantee.[120]

[110] Certainly in *Garcia* itself there was a misapprehension. The majority described the wife's position thus: "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."[121]

What is the Unconscionability Involved Here?

[111] It was no part of Dr Byrne's case that she was operating under a mistake as to her obligations. She simply did not understand what they might be. So here there needs to be an acknowledgment that if the equity is to apply to protect Dr Byrne from the effect of her guarantee and indemnity then it is necessary to do so in a different factual situation than in any case to which we were taken. I would only take that step if compelled by authority to do so. That is so because the unconscionability of the lender insisting on its legal rights in such circumstances is not so clear.

[112] What makes it unconscionable to insist on the wife honouring the guarantee and indemnity that she has given? That might be best answered by considering when it is that the law does not so characterise the transaction. The High Court held in *Garcia* that the transaction would not be so characterised if the lender or a stranger explained the transaction to the wife. Why? Presumably because the wife is assumed to be acting rationally and to make a rational decision on whether she wants to expose herself to the liability she requires sufficient knowledge of the "purport and effect" of the transaction. I note that this is not advice as to the wisdom of the transaction, or the risks involved in it, but rather what it entails.[122]

[113] That makes perfect sense if the wife thinks she does understand the obligations involved but her understanding is mistaken. In that case I can readily understand the inequity of permitting a lender taking advantage of the relationship of trust and confidence between her and her husband. The relevant point is that the lender may not have obtained the benefit of the guarantee had the true position been revealed. Effectively the application of the equity returns the innocent party to the position she would have been in had the parties' behaved conscientiously.

[114] But that aspect is not present in this case. Where the wife knows full well that she is signing a guarantee and what that means, that she does not comprehend what the

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118 (2000) 50 NSWLR 587 at 601 para [169] – underlining added.
119 *Ibid* at 602 para [169].
120 [2002] NSWSC 378 at [186] – [187].
121 (1998) 194 CLR 395 at 411 para [42].
122 *Yerkey* at p 686.

obligations are but appreciates that they are not straightforward, and that they involve investments that on their face are hardly risk free, and still proceeds, the need for equity's concern that there be sufficient explanation is much less apparent. That is so, in my judgment, because, in a case of indifference, the necessary underlying assumption that sufficient explanation might influence the wife's decision, is hardly justified.

[115] The unspoken and implicit assumption in the respondent's case is that there is no need for proof of a causal link between the absence of a full explanation and the entering into of the transaction. No authority was cited for the proposition, save perhaps that the statement of principle in *Garcia* did not require such proof.

[116] As Einstein J pointed out in *Chia*[123] in some instances equity clearly does not require proof of any causal link - for example in cases of breach of fiduciary duty: see *Maguire v Makaronis* (1997) 188 CLR 449. But there is no general principle to that effect applicable to all equitable remedies.

[117] Certainly in related areas of the law equity has looked to the practicality of the proposed measure that it said should have been complied with. For example in *Linderstam v Barnett*[124] the plaintiff sought to set aside a deed of settlement by which she settled certain property upon herself for life, and then absolutely upon her four children by a previous marriage. She complained that she had received no independent advice. Isaacs J held the absence of such advice irrelevant because he entertained no doubt that even if the plaintiff "had had the advice and assistance of any solicitor wholly unconnected with her family or the trustees of her father's will, the result would have been the same."

[118] To like effect is the decision of the Privy Council in *Kali Bakhsh Singh v. Ram Gopal Singh,*[125] referred to by Isaacs J in *Linderstam,* where Lord Shaw said: "…if the conclusion was reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand."[126]

[119] Einstein J's solution in *Chia* was to determine whether the misunderstandings of the wife were as to material matters. He held, relying on dictum of Kirby J in *Makaronis* that the "the need for materiality provides that link between the misunderstanding of the wife and the unconscionability of the creditor's attempt to enforce the guarantee. Without that link any claimed equity founders."[127] I accept that as the guiding principle here. But there is a distinction between indifference to material matters and a misunderstanding of material matters. In the former case it is difficult to see why the Court should assume, in the absence of any evidence, that the transaction would not have been entered into had Dr Byrne understood the precise complexities or had independent advice been given. She was not purporting to make any rational decision about the matter.

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123 (2000) 50 NSWLR 587 at 604 para [177].
124 (1915) 19 CLR 528.
125 (1913) 30 TLR 138.
126 At p 139.
127 (2000) 50 NSWLR 587 at 604 para [179].

[120] That there should be no necessary assumption is reinforced by the fact that Dr Byrne did have a motivation to proffer the guarantee – the maintenance of her "financially luxuriant lifestyle"[128] by the minimisation of an impending tax liability.

[121] If compliance with the requirements of the principle identified in *Garcia* would have made no difference, or is not shown to have been likely to make a difference, then the unconscionability of a lender in insisting on its legal rights in the absence of full explanation is not so apparent.

[122] As I have said, unless compelled by authority I would not take that step.

[123] I turn then to the exposition of principle in the cases that bind us to determine whether in the circumstances Dr Byrne comes within the principle.

Authority Protects the Indifferent

[124] In *Yerkey* there was no misapprehension and the wife was denied relief. Despite this Dixon J expressed the principle in *Yerkey* as covering the case of a wife who merely does not understand as opposed to one who has been under a misapprehension. Dixon J included within the principle cases where there had been "neglect to inform [the wife] of the exact nature of that to which she is willing blindly, ignorantly, or mistakenly to assent" (at p 685) and see his reference to "misunderstanding or want of understanding of its contents or effect" (at p 685) and "a misunderstanding or failure to understand" (at p 686).

[125] The majority in the High Court in *Garcia* appear to me to have accepted that view. So much I think follows from the passage in the majority judgment where their Honours said:

> "[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 further…. 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 … 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); (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

[128] The reasons of the Chief Justice at [25].

> (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."[129]

[126] There the majority seem plainly to be endorsing the views of Dixon J in *Yerkey* and, in the first of their relevant circumstances, encompassing lack of understanding as opposed to active misapprehension. It would have been a relatively simple matter to restrict the principle to those wives who were actively mistaken on a material matter as opposed to those who were indifferent to the obligations being taken on. That this was a deliberate decision seems apparent given that both Kirby J and Callinan J, who did not join with the majority, were clearly influenced by the finding that the husband had misled the wife such that she was operating under a mistake. Kirby J said:

> "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."[130]

[127] Similarly Callinan J gave emphasis to the fact of the wife being misled by a misrepresentation made by the husband to her:

> "The trial judge in this case made two critical findings in favour of the appellant:
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> > '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.'
> >
> > '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.'
>
> These two findings as to pressure and misrepresentation are almost precisely within the language used by Dixon J in *Yerkey*:
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> > '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

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129 (1998) 194 CLR 395 at 408-409, para [31].

130 At [82].

> would be inequitable to fix the creditor with the consequences of the husband's improper or unfair dealing with his wife.'"[131]

[128] I am conscious that it would be possible to mount a case that the majority in the High Court did not intend to indorse the wider view of the application of the equity. First, the *ratio* of the case did not require so wide a statement of principle, as the wife there operated under a misapprehension; secondly, a lack of understanding of the "purport and effect" is not inconsistent with labouring under a misapprehension; and thirdly, the majority judgment appears to have later restricted the decision to one involving a mistaken understanding. I refer to the passages which read:

> "[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 transaction… 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."[132]

[129] That reference to "mistaken volunteer", however, needs to be read with a later passage where "mistaken" is plainly used in a special sense:

> "[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."[133]

[130] As well the purpose of the rule is to protect wives from the pressure husbands might exert. A preparedness to enter into a guarantee despite a complete lack of understanding might reflect a greater degree of pressure than in the case of the mistaken wife. There is no evident reason why equity should not protect a wife in the former case.

[131] Given that consideration, and given the special meaning of "mistaken" and the difference in the expression of principle between the majority on the one hand and

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131 At [111].

132 Underlining added and footnotes omitted.

133 Underlining added.

Kirby J and Callinan J on the other, I conclude that *Garcia* extends the principle to the indifferent wife as well as the mistaken wife.

[132] Here the creditor did not inform the surety of the facts that were salient to the obligation taken on, nor ensure that someone else did. She was "mistaken" in the sense intended by the majority in *Garcia*. Prima facie, Dr Byrne is entitled to protection.

[133] That does not necessarily mean that there is no distinction between a mistaken wife and an indifferent wife. Equity might have more concern for the former's position. Much will depend on the precise facts. But each can qualify under the principle. In the case of the mistaken wife the enquiry centres on the materiality of the mistaken matter. In the case of the indifferent wife – where all material matters are unknown – it seems to me that the Court needs to examine closely what the wife did know and weigh that up with all the circumstances to see if the lender acts unconscionably in insisting on its legal rights.

The Insurance Policy

[134] That brings me to the second of the considerations that I find worrying. Here the parties expressly recognised that Dr Byrne was the beneficiary of an insurance policy over her husband's life. That was recorded in the assets of the parties in the loan application.[134] Dr Byrne acknowledged that the express purpose of the policy was to pay the husband's debts in the event of his death, albeit not limited to the debts then being taken on.[135]

[135] Dr Byrne's expectation was that her husband's earnings would service the loan.[136] The reason that the guarantee was called on was that her husband died suddenly in February 2007 and his substantial earning capacity was no longer available. What then became available was the insurance fund, a fund which both parties had expected would be available in such an eventuality. I do not see that that characterisation should depend on the timing of the taking out of the policy.

[136] The Chief Justice held that the receipt of the benefits of the insurance policy was a "quite separate matter" and had "nothing to do with this impugned transaction of suretyship".[137]

[137] Whilst I respectfully accept that the availability of proceeds from an insurance policy is a separate matter to the questions surrounding the wife's appreciation of the transaction and whether she is a volunteer I cannot accept that, in the circumstances that have in fact come to pass, it is irrelevant to the ultimate question of whether the wife should be afforded relief on the basis that the lender is acting unconscionably when insisting on its legal rights.

[138] As Fullagar J explained in *Blomley v Ryan*, in speaking of the different approaches of the common law and equity to unconscientious bargains:

> "Equity traditionally looked at the matter rather from the point of view of the party seeking to enforce the contract and was minded to inquire whether, having regard to all the circumstances, it was

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134 See AR 151.
135 AR 41/1-30.
136 AR 40/45-50.
137 AR 341 at [53].

> consistent with equity and good conscience that he should be allowed to enforce it."[138]

[139] In looking at the matter from the point of view of the creditor I cannot accept that it is an irrelevant circumstance that there was a substantial policy of insurance in place, known to both parties, and sufficient to provide protection to the wife in the event of her husband's death.

[140] That is so because the nature and extent of the detriment to which Dr Byrne would be exposed by the claimed unconscientious conduct complained of is significantly altered when one brings into account the receipt of the benefits of the insurance policy. It is not, as the respondent's submission seemed to assume,[139] that the insurance policy was in existence at the time the guarantee was called on that is the material point. Dr Byrne proffered the guarantee in the knowledge that if she was called on to pay her husband's debts because he had died and his earning capacity was no longer available to service and maintain these loans, then she would be protected. She put at risk nothing in those circumstances save that the "benefit" that she received on death would be reduced by the amount of the debt, as expected. Conversely the appellant extended the credit with that same knowledge.

[141] The significant point is that the circumstance that triggered the respondent's exposure to the obligations of the guarantee also triggered the receipt of the policy benefits. The policy benefits are not simply another asset in the respondent's pool of assets. They constituted the respondent's protection from the loss of her husband's earning capacity and, importantly, protection which the lender knew was in place when securing the guarantee.

Conclusion

[142] In *Garcia* Callinan J suggested that "very rarely" would there be occasion to invoke the equity relevant here for a wife "with the qualifications, experience and other attributes possessed by this appellant".[140] As I have said there are many similarities between the situation of Dr Byrne in this case and the appellant in *Garcia.* However the factors that militate against the application of the equity were not present in *Garcia.*

[143] The onus is on Dr Byrne to demonstrate that the guarantee and indemnity ought to be impeached. I am conscious of the pressure and surprise to which Dr Byrne was subject. Both pressure and surprise were exerted as a result of the existence of the relationship between Dr Byrne and her husband. As White JA points out the rule under discussion was developed to meet such "emotional pressure". Dr Byrne was ignorant of essentially all material aspects of the transaction, perhaps as a result of that pressure and surprise. As well the transactions were more than usually complex. They are all factors favouring the application of the equity.

[144] Balanced against those considerations are a number of factors. First, Dr Byrne did have a sufficient degree of knowledge about the transaction that would have alerted any averagely intelligent person to the fact that it was not straight forward, probably involved a significant sum, and had its risks. I look at the matter from the point of

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138 (1956) 99 CLR 362 at 401- 402 – underlining added

139 Respondent's Written Outline para 25

140 At [112]

view of the creditor. Secondly, she had no misapprehension about any relevant matter. Thirdly, there is no reason to think that sufficient explanation of the precise complexities would have made any difference and some reason to think that it would not. Fourthly, Dr Byrne expected the transaction to bring benefits to her family. Finally, both parties were aware, when contracting, of the existence of an insurance policy sufficient to put Dr Byrne in funds to protect her in the circumstances that have come to pass. Not one of these factors is compelling in itself.

[145] If the test to apply in determining whether the appellant is acting unconscionably is that stated by Deane J in *Commonwealth v Verwayen* - that is, that the lender's conduct in relying on the guarantee and indemnity is "unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing"[141] - then I would have some difficulty in so finding. However in this class of case the emphasis is a little different. As Einstein J put it in *Chia*, "what impeaches the conscience of the creditor is its failure to properly explain or ensure that a guarantor properly understands a transaction, where it knows that the transaction is not substantially for the benefit of the guarantor but is for the benefit of her husband."[142] That failure is shown here.

[146] I have found the resolution of this appeal a difficult one. With some hesitation I have concluded that a principled application of the rule laid down in *Yerkey* and confirmed in *Garcia* requires that Dr Byrne be protected. To the appellant's complaint that the rule works a hardship on it the answer is that it has been the law now for seventy years that a creditor can avoid the application of the equity by relatively simple means and here the appellant failed to adopt those means.

[147] I agree that the appeal must be dismissed with costs.

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141 *Commonwealth v Verwayen* (1990) 170 CLR 394 per Deane J at 440-441.

142 (2000) 50 NSWLR 587 at p 603 para [175].