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AKINS v NATIONAL AUSTRALIA BANK †

Court of Appeal: Clarke JA, Sheller JA and Powell JA

14 March, 5 August 1994

B *Guarantee and Indemnity — Action against surety — Principles of unconscionability — Whether separate principle in Yerkey v Jones to be followed — Whether principle exists — Application — Where wife receives benefit from mortgage or guarantee signed by her.*

Appeal and New Trial — Admission of fresh evidence — Court of Appeal — Leave to adduce fresh evidence — Principles involved.

Held: (1) The Court of Appeal will not grant leave to have fresh evidence C admitted unless, although such evidence is credible and could not have been obtained with reasonable diligence for use at the trial, there would be a high degree of probability that there would have been a different verdict. (160D)

Braddock v Tillotson's Newspapers Ltd [1950] 1 KB 47 at 53, applied.

(2) Where a wife signed a guarantee in respect of her husband's debts, the principles of unconscionability propounded in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, furnished adequate grounds of relief to her where she claimed that in doing so she was the subject of her husband's D improprieties and the creditor knew, or must be taken to have known, of the risk that such improprieties might have occurred or of facts raising that possibility in the mind of a reasonable person. (171G-172B)

Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447, applied.

Barclays Bank Plc v O'Brien [1994] 1 AC 180, considered.

Warburton v Whiteley (1989) 5 BPR 11,628 at 11,629; *European Asian of Australia Ltd v Kurland* (1985) 8 NSWLR 192 at 200, referred to.

E (3) Accordingly the principle in *Yerkey v Jones* (1939) 63 CLR 649, enunciated by Dixon J, that where a creditor procured a debtor to secure his wife's guarantee of a debt, the creditor was to be fixed with the consequences of the husband's improper or unfair dealing with his wife, ought no longer be applied in New South Wales. (168C, 173C)

Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447; *Barclays Bank Plc v O'Brien* [1994] 1 AC 180, considered.

F *Warburton v Whiteley* (1989) 5 BPR 11,628 at 11,629, overruled.

Turnbull & Co v Duval [1902] AC 429, not followed.

Yerkey v Jones (1939) 63 CLR 649, per Dixon J, not followed.

(4) In any event, even if the principle in *Yerkey v Jones* (1939) 63 CLR 649, was adopted, where mortgages and guarantees are executed by a wife to secure advances for her benefit, wholly or partly, that principle does not apply.

Warburton v Whiteley (1989) 5 BPR 11,628, followed.

G *Consideration* by Powell JA as to whether or not the judgment of Dixon J in *Yerkey v Jones*, properly understood, contained any special principle.

Note:

A Digest — APPEAL AND NEW TRIAL (3rd ed) [23-24]; (2nd ed) [27-28];

† [EDITORIAL NOTE: An application for special leave to appeal to the High Court has been filed.]

PRACTICE (2nd ed) [62]; GUARANTEE AND INDEMNITY (3rd ed) [35]; (2nd ed) [38]

CASES CITED

The following cases are cited in the judgments:

Bahr v Nicolay [No 2] (1988) 164 CLR 604.
Bank of Victoria Ltd v Mueller [1925] VLR 642.
Barclays Bank Plc v O'Brien [1994] 1 AC 180.
Braddock v Tillotson's Newspapers Ltd [1950] 1 KB 47.
Chaplin & Co, Ltd v Brammall [1908] 1 KB 233.
Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447.
Commonwealth v Verwayen (1990) 170 CLR 394.
European Asian of Australia Ltd v Kurland (1985) 8 NSWLR 192.
Foran v Wight (1989) 168 CLR 385.
Starr v Barbaro (Powell J, 4 June 1986, unreported); affirmed sub nom *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466.
Turnbull & Co v Duval [1902] AC 429.
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387.
Warburton v Whiteley (1989) 5 BPR 11,628.
Yerkey v Jones (1939) 63 CLR 649.

The following additional cases were cited in argument and submissions:

Bank of Montreal v Stewart [1911] AC 120.
Bank of New South Wales v Rogers (1941) 65 CLR 42.
Bosnjak v Farrow Mortgage Services Pty Ltd (In Liq) [1993] ASC 58,325.
Devries v Australian National Railways Commission (1993) 177 CLR 472.
European Asian of Australia Ltd v Lazich [1987] ASC 57,284.
Johnson v Buttress (1936) 56 CLR 113.
Whereat v Duff [1972] 2 NSWLR 147.

APPEAL

The plaintiff gave two mortgages and seven guarantees to the National Australia Bank. Her cross-claim against the bank to have these set aside was dismissed. She appealed against that decision. In the appeal she sought leave to lead fresh evidence.

The appellant in person.

R B S MacFarlan QC and *R J Weber*, for the respondent.

Cur adv vult

5 August 1994

CLARKE JA. The appellant, Mrs Akins, has appealed from a judgment of Giles J dismissing her amended cross-claim against the respondent, National Australia Bank. The proceedings in which his Honour gave the judgment involved a number of parties but the judgment with which the appeal was concerned was given upon a cross-claim brought by the appellant in which she sought orders declaring void mortgages and guarantees set out in the cross-claim and an order requiring the execution and delivery over of registrable discharges of mortgage. Some of those mortgages and guarantees were in favour of another cross-defendant, Carrington Confirmers Pty Ltd, but this appeal was limited to so much of his Honour's orders as dismissed

A the appellant's claim for relief in respect of mortgages and guarantees given in favour of the respondent.

The appellant, a qualified nurse, met Mr Akins in March 1983 when she was working as a temporary receptionist with Akins & Walker Pty Ltd (Akins & Walker). She was twenty-four years old at the time. Mr Akins told her that he was in partnership with David Walker in the company Akins & Walker but it is clear that he was involved in a number of companies whose B debts to various institutions were secured by mortgages and guarantees. The only companies with which this judgment is concerned are Akins & Walker and Powerplay Sports Pty Ltd (Powerplay) whose name prior to 1987 was Sports Unlimited Pty Ltd.

In about April or May 1983 the appellant and Mr Akins entered a de facto relationship. In September of that year, they moved into a house at Chatswood which had been purchased by Mr Akins. The appellant gave up C nursing and devoted herself to the relationship and renovating the house. However, when Mr Akins failed to propose to her, the appellant ended the relationship and moved out of the Chatswood home. She resumed her nursing career.

Shortly afterwards she discovered that she was pregnant and she was then persuaded by Mr Akins to return to the relationship. In December 1984 she gave up employment because of the pregnancy and she married Mr Akins on 22 December 1984. The appellant had no substantial assets of her own at the D time of the marriage and between that time and 1988 she remained unemployed and was financially dependant upon Mr Akins. Initially they lived in the Chatswood home but in October 1985 it was sold and they moved to live in a home at Wiseman's Ferry which they purchased as joint tenants for $200,000. The purchase was financed in part from the proceeds of the Chatswood property and in part by an advance from the National Australia Savings Bank Ltd (NASB) which was secured by a mortgage over E the property. The appellant does not remember anything about the purchase of this property apart from the fact that it was to be registered in both their names.

The National Australia Savings Bank mortgage was not challenged in these proceedings but on the completion of the purchase of the Wisemans Ferry property on 22 October 1985 a mortgage was given over that property to National Australia Bank (NAB). This mortgage operated to pick up and F secure the mortgagors' liability under guarantees given to National Australia Bank. While there was some doubt in the evidence as to the date on which the appellant signed two guarantees in favour of National Australia Bank they bore the date 31 October 1985 and his Honour was inclined to the view that they probably were not signed at the same time as she signed the mortgage. One of these guaranteed the indebtedness of Akins and Walker to a limit of $50,000 and the other the indebtedness of Powerplay to a limit of $30,000.

G The next guarantee signed by the appellant in favour of National Australia Bank was dated 21 October 1986 guaranteeing the indebtedness of Powerplay to a new limit of $400,000. By guarantee in favour of National Australia Bank dated 9 March 1987 the appellant guaranteed the indebtedness of Akins & Walker to an increased limit of $115,000. This in turn was supplanted by a guarantee dated 4 May 1987 in favour of National

Australia Bank guaranteeing the debts of Akins & Walker to a limit of $400,000.

On or about 2 March 1988, Mr Akins signed a transfer of his one-half share in the Wiseman's Ferry property to the appellant. Although the transfer was signed about that date it was not put into effect until later in the year. It was expressed to be in consideration of $225,000, acknowledged as received, and was subject to the mortgages to National Australia Savings Bank, National Australia Bank and another mortgagee. The appellant did not pay, or expect to pay, the consideration stated in the transfer and as far as she was concerned it took place because Mr Akins thought it should for reasons connected with his business activity.

The next apparently relevant documents signed by the appellant were two guarantees in favour of National Australia Bank dated 25 March 1988. One was a guarantee of the indebtedness of Akins & Walker to a limit of $330,000 and the other was a guarantee of the indebtedness of Powerplay to a limit of $350,000. Although the limits were lower than the previous guarantees there were, it seems, additional guarantors.

Following the transfer by Mr Akins of his half share in the Wiseman's Ferry property to the appellant she signed a fresh mortgage in favour of National Australia Bank on 13 July 1988. The appellant said she had no recollection of the occasion.

It is pertinent at this stage to record a number of important findings of fact made by his Honour. The most convenient method of doing this is to quote directly from the judgment under appeal, omitting from the quotation findings which do not seem to me to be of particular significance:

> "She knew that her husband's business activity involved the importation and sale of sporting goods, … and that National (NAB) was the banker for the business. In particular, she knew of the retail store or stores in Perth, which she associated with Sports Unlimited. However, I think it correct that she had no detailed knowledge of the business or of the various companies by or through which it was conducted. A child was born to Mr and Mrs Akins in 1985, and another child was born in May 1987. Wisemans Ferry was, on Mrs Akins' account a desirable property, and in the few years following its purchase there was spent on its improvement an amount which she estimated at $250,000. She said that there was always plenty of cash available for household requirements, and that Mr Akins attended to the mortgage payments (by which I think she meant the payments to National Australia Savings Bank Ltd). The income for the family unit came from the business conducted by or through the companies, and it was plentiful — indeed, Mr Akins said to Mrs Akins on many occasions that he had achieved financial independence for life. It is, perhaps, not surprising that Mrs Akins was not concerned to inquire into the various documents which she signed."

There then followed a statement of some incidents in which Mr Akins was said to have used violence and a description of the events which led to a divorce in 1990. His Honour then continued:

> "While these circumstances must be borne in mind, I should make it clear that Mrs Akins did not say that she had signed any of the documents in fear of violence if she declined, or that she was influenced

A to do so by any physical or verbal assault which may have occurred at any time beforehand.

However, even without a detailed understanding of the affairs of the business or of the companies by or through which it was conducted, and without any significant enquiry into the documents which she signed, Mrs Akins knew that Wisemans Ferry was being mortgaged, that it was security for money due to Carrington or National (as the case may be), and that if the money which was owing was not paid the mortgaged property could be sold to meet the payment. In her statement she said that she believed that the exposure was limited to 'the value of my half of the property at the time the document was signed'. She went on to say that since Wisemans Ferry had been purchased for $200,000 she thought that her total exposure under the mortgages would not exceed $100,000, and added in the next sentence that she thought that the debt under a mortgage 'could not extend over the value of the property'. So far as this amounted to saying that she thought her exposure was fixed at something like $100,000, I think it became quite clear in the course of her oral evidence that Mrs Akins understood that the mortgages meant that Carrington or National could have recourse to Wisemans Ferry to recover whatever was owing to it up to the full value of the property from time to time, and could sell the property in order to obtain its money.

… Whether in relation to the mortgages or in relation to the guarantees, I do not think she lacked an understanding which would have enabled her, had she turned her mind to it, to well appreciate what was involved in a mortgage or a guarantee. I do not think that Mrs Akins distinguished between money owing on account of any particular company by or through which the business was conducted. … Save so far as it may have been indicated to her by the limits stated in the various guarantees given to National, however, I am satisfied that she did not have any understanding of the precise amount owing to Carrington or National from time to time."

There were four different bases upon which the appellant launched her attack on the mortgage and guarantees. First, she sought relief under what has come to be described as the principle in *Yerkey v Jones* (1939) 63 CLR 649. Secondly, she claimed that she had signed the documents as a consequence of the exercise of undue influence on the part of Mr Akins. Thirdly, she based a claim for relief on the unconscientious use of the superior position of National Australia Bank pursuant to the principles expressed in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 and, fourthly, she relied on the provisions of the *Contracts Review Act* 1980.

Upon the hearing of the appeal the appellant, in her written submissions, relied upon the first, third and fourth grounds taken below. She does not appear to have raised undue influence but she has asserted a separate ground entitling her to relief and that is that she was induced to sign the documents by misrepresentations on the part of Mr Akins. In this context I should observe that although the appellant presented her own oral argument to the Court (and did so in a highly commendable fashion) there can be no doubt that her written submissions were drafted by a lawyer.

At the outset of the hearing the appellant sought leave to lead fresh evidence in the form of an affidavit by her which had been filed in court on 21 February 1994. The ground upon which she sought to rely on fresh evidence appeared in par (1) of that affidavit which, relevantly, read:

> "This affidavit concerns fresh evidence which I was unprepared for, and unable to produce at the time of the original hearing. With this fresh evidence, I believe that I can establish that the evidence given by Philip Austin Chamberlain, Bank Manager, was untrue and that allegations against me by the bank were unfair and prejudiced me, considering the circumstances I was in at the time they were made in the original hearing. I know at the time, had I been prepared with the evidence set out in this affidavit, H H Justice Giles may not have come to the various conclusions regarding my state of knowledge about NAB mortgagees and guarantees involving substantial liabilities, and that I appreciated them."

The bulk of this affidavit is concerned with the circumstances surrounding the appellant taking her banking business away from National Australia Bank and her denial that she closed her Mastercard account at the time asserted in evidence by Mr Chamberlain one of the witnesses who gave evidence in support of National Australia Bank's case. Although there is other material relating to Mr Akins' conduct there is no basis which has been advanced which would enable this Court to admit it.

The argument in support of the admission of the material relating to the closing of the Mastercard account is that the matter was raised unexpectedly during the hearing and the appellant had not been able to carry out the inquiries and searches necessary to put evidence before the Court (or enable her counsel to cross-examine) in order to establish the suggested falsity of the evidence given by Mr Chamberlain.

The Court is empowered to receive further evidence upon the hearing of an appeal (s 75A(7)) of the *Supreme Court Act* 1970) but pursuant to subs (8) of that section may not receive further evidence after a trial on the merits "except on special grounds". Although it is not possible to formulate a test which should be applied in every case to determine whether or not special grounds exist there are well understood general principles upon which a determination is made. These principles require that, in general, three conditions need be met before fresh evidence can be admitted. These are: (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) The evidence must be such that there must be a high degree of probability that there would be a different verdict; (3) The evidence must be credible.

Let me assume in the appellant's favour that conditions (1) and (3) have been met and confine my remarks to the second condition which, in my opinion, is fatal to her application.

In *Braddock v Tillotson's Newspapers Ltd* [1950] I KB 47, Tucker LJ said (at 53):

> "… If, however, this court is to depart from its invariable practice of confining such evidence to the relevant issues and is to admit fresh evidence directed solely to credit, I am of opinion that such a course would, if ever, only be justified where the evidence is of such a nature and the circumstances of the case are such that no reasonable jury could

A be expected to act upon the evidence of the witness whose character had been called in question. It would, in my view, be wrong for this court to admit fresh evidence directed solely to credit, merely because there is a possibility, or merely a reasonable probability, that such evidence would result in a different verdict. There are two conflicting principles always operating in these matters; one is that everything should be done in order to ascertain the truth; the other is that there should be some finality in litigation, and, so far as possible, a reasonable limitation of costs. It is in order to achieve the latter result that it is necessary for the court to impose some limit to the reopening of decided issues, even at the risk that injustice may result, or it may appear that there is a possibility of injustice resulting."

I agree, with respect, with his Lordship's statement of the principles which were concurred in by the two other judges of the court. In this case even if one accepted that the new evidence might reflect adversely on the credit of Mr Chamberlain it does not appear to me that it would have had any affect on the outcome of the proceedings. Nor do I regard it as being capable of demonstrating that the appellant had less knowledge of the documents which she was signing than his Honour found that she had. In these circumstances I would conclude that it is not open to this Court to receive the further evidence.

It is necessary now to direct attention to the circumstances in which the appellant signed the various mortgages and guarantees. The witness to her signature on the mortgage of 22 October 1985 and the guarantees dated 31 October 1985 was Mr McCauley then the securities clerk of the Chatswood Branch of National Australia Bank. He recalled meeting the appellant "on only the occasion when she attended with Mr Akins for the purpose of witnessing their execution of security documents", and he remembered that the meeting took place in his office. He had no recollection of what he said to them in relation to the execution but gave evidence of his practice. In relation to a mortgage he would say that the mortgage was held by the Bank as security against borrowings, that the persons to whom he was speaking were liable "for the amount of borrowings plus interest taken out against this mortgage", and that in the event of default the Bank "has a right to foreclose on your mortgage". In relation to a guarantee he would identify the guarantors, the principal debtor, and the figure specified as the liability under the guarantee, and would say that in signing the guarantee "each of you as the guarantors are wholly liable for any debts in relation to the company". If the guarantee was secured by a mortgage he would say so. (His Honour observed that the appellant said that she was alone when she signed these documents and to that extent her recollection differed from Mr McCauley.)

The witness to her signature on the guarantee dated 21 October 1986 was Mr McManis, then Customer Services supervisor at the Chatswood Branch of National Australia Bank. He had no recollection of the occasion and his evidence was restricted to the details of his practice. He said that he would inform each guarantor that he or she was responsible for the amount of the guarantee and would include pointing out that amount. If the guarantee was taken because of an increase in the customer's facilities he would advise the

guarantor that it was needed to replace the existing guarantee as the facilities had increased to the level of the amount in the guarantee. A

The execution of the guarantee on 9 March 1987 was witnessed by Mr Ashbrooke then the manager of the Chatswood Branch of National Australia Bank. He recalled meeting the appellant on three or four occasions when she attended to sign security documents. He did not remember what was said on those occasions, but believed that he would have followed his normal practice and he had the general recollection that she had seemed to understand the documents she was signing and the nature of the obligations she was incurring. (His Honour observed that other bank officers who gave evidence said the same.) His practice included pointing out that each party to the guarantee was personally responsible for the amount specified in the guarantee, which amount he would identify, giving an opportunity for the reading of the document and explaining the link with any mortgage already held. He also produced a customer interview record dated 9 March 1987 relating to the signing of this guarantee but his Honour found that little reliance could be placed on this document and there is no need to refer to it further. Mr Ashbrooke also witnessed the 4 May 1987 guarantee. B C

Mr Clarke, the manager's clerk/lending officer at the Chatswood Branch of National Australia Bank witnessed the execution of the guarantee dated 25 March 1988. He recalled both the appellant and Mr Akins attending, signing the documents, and fixing and attesting the seals of two companies on the documents. He did not recall what was said but like the other bank officers gave evidence of his practice. His explanation was substantially similar with that given by the witnesses to whom I have already referred and he also produced customer interview records which, as I have indicated, his Honour thought of little assistance. He also witnessed the 13 July 1988 mortgage. He recalls telling the appellant that the mortgage replaced the one previously given by the appellant and her husband and said that his practice was to point out that the mortgage was used to secure a guarantee. D E

It will be observed that Mr Chamberlain did not witness any of the documents under examination in this appeal. His evidence related, relevantly, to the rejection of a cheque for $400 which the appellant wished to have cashed. The ground of rejection was the absence of an authorised co-signatory and his Honour allowed the evidence in only upon the basis that "there had already been cross-examination and in order to have the entire evidence so that the purpose which was apparent from the cross-examination could be the subject of addresses". It would seem from the contents of the judgment under appeal that in the end the matter was one of little, if any, significance. F

The appellant gave the following evidence concerning her understanding:

> "Q. At the time you signed the mortgages which are exhibits NAB4 and NAB3 in October 1985 what did you understand a mortgage was? A. At that time I understood a mortgage to be, one, money that was borrowed to buy a property and, two, that a mortgage could secure the business to a certain extent. G
>
> Q. How did you understand it secured the business? A. Well, I understand it to secure a business on — that money could be loaned and to pay back as a mortgage is paid back on a property.
>
> Q. What did you understand happened if the money was not paid

back? A. Well, if the money wasn't paid back then the property was used as collateral.

Q. How did you understand the property was used as collateral if the money was not paid back? A. Well, I understood that — sorry?

Q. How did you understand that the property would be used as collateral if the money was not paid back. A. How did I understand? Well, I just gathered that.

Q. But what was your understanding of what would happen if the money was not paid back? A. If the money was not paid back then that the property could be sold.

Q. And what was your understanding about who could sell the property? A. Well, I understood — I understood that, that as far as — if there was a debt owed on the house, on a business, that the property could be sold. I didn't — I don't understand.

Q. Did you have any understanding of who could sell the property if the money was not paid? A. Yes. I knew that Carringtons could sell the property if the money wasn't paid.

Q. If they were the mortgagees in question? A. Yes.

Q. And if the bank were the mortgagees the bank could sell? A. To whoever the debt was owed, yes.

Q. And if the mortgagee sold the property, what was your understanding about what happened to the money for the sale? A. Well, they would claim what they — what the debt would be.

Q. And what if there was money left over? What was your understanding about that? A. Well, I just didn't believe that you could extend finance beyond the value of a property — in fact extend finance beyond whatever mortgage was taken on the property — a remainder of that, that finance couldn't be extended beyond that.

Q. If there was not enough money from the sale that was your understanding, was it? A. If there wasn't enough money?

Q. Yes. A. Yes. I just wouldn't — I just never believed that there wasn't enough money.

Q. I am asking you about your understanding of how the mortgage worked in circumstances where the mortgagee sold, and I would like to ask you what your understanding was if there was a surplus of money from the sale? A. Oh, that would belong to myself and the owners of the property.

Q. And if there was a deficiency on the sale what was your understanding about what happened then? A. Well, I didn't think about that. If there was a deficiency on the sale, I just — that would be that. I just did never think along those terms due to my understanding of the mortgage.

Q. At some time in October 1985 you also executed two documents in favour of the bank which are entitled "Guarantee and Indemnity". Do you recall looking at those two documents recently? A. Yes.

Q. Can you tell me what your understanding was at that time about what was a guarantee and indemnity? A. Well, I just — I just didn't understand that I was a guarantee, so to speak, or guarantor. My understanding of a guarantee is that — I know on personal loans I had

to have a guarantee, guarantor at one stage in my life, and that was that. Indemnity, I don't know.

Q. You did not know what an indemnity means? A. No.

Q. How do you think a guarantee works? I am sorry, how in October 1985 when you signed these documents did you think a guarantee worked? A. I didn't.

Q. I think you just said you knew something about — —? A. Well, that's how I believed it worked — that I had the money to cover a loan.

Q. Can you explain to us how that worked in your mind? A. Well, in my mind I had to have the asset there to cover that loan in some way, in some way.

Q. What was the asset? A. Well, what I owned at the particular time. …

Q. You see, I am only putting to you hypotheses? A. On what you are saying I'd have to say yes.

Q. Just hypothetically, if you had made yourself responsible personally after the title of the property was transferred into your name — ? A. Yes.

Q. — for the debts of your husband's businesses — if you had made yourself responsible for those debts as a guarantor and if that responsibility was secured on the property, on your understanding in 1988 those debts would come out of the proceeds of the sale? A. Yes sir."

This evidence was given in the context that in her statement she had said that she did not at any time read any of the documents which she signed at the Bank and she did not have any understanding of the legal effect of the documents except in so far as she assumed or may have been told they were in connection with the business being conducted in Perth.

In later cross-examination she gave the following evidence:

"Q. You would not deny would you that the bank officer said to you 'Before you put pen to paper this is a guarantee document you are here to sign, as you can see it is in favour of Sports Unlimited'? A. He may have said that, yes.

Q. I put to you he said the guarantee is from you? A. Right.

Q. Your husband and Mr Drummond? A. Right.

Q. You do not deny he said that do you? A. I know that on any occasion that I signed documents at the bank they were related to the business and I was interested in signing the documents. I am not denying there was an attempt of explanation, okay, I do deny that it registered and I do deny that it was in an organised manner of my circumstances. Okay, and I do remember that at times I had to say 'Excuse me'. Okay, so it was a disjointed situation and where did I sign, I am saying that that is a scenario, yes.

Q. And would you say 'Where do I sign'? A. Because I have got to get out of here.

Q. And your understanding would be that the bank was relying on you to commit yourself to writing on one of these documents? A. Yes.

Q. And that there were some responsibility that was carried with the circumstances that you were signing a document at the bank in favour of the bank? A. Yes.

A Q. So far as you were concerned you were prepared to undertake that responsibility? A. Yes.

Q. Because you were accommodating your husband's wishes? A. Yes.

Q. And you really did not pay any attention or heed to what the bank officer may have been saying to you? A. In a jargon like manner it was — I am not saying the officer put the documents, turned to the page and said 'Sign here'.

B Q. But he did ask you if you understood what you were signing? A. No, I do not remember that.

Q. If he had asked you that question what would you have said on this occasion for instance? A. I would probably say yes, no, well, I do not know, it is what I might have done that I didn't do.

Q. And the officer said to you, he pointed to the figure of $400,000 on the first page and said 'This is the amount of the guarantee, this is the amount of the guarantee', and asked you to look at it? A. That he may C have done that, is that what you are saying? He may have done that?

Q. You do not deny he did? A. I do not remember the context of words that the bank officers used with me but they were short and they were brief and I signed and it was not a lengthy exercise. …

Q. Did he use the word 'guarantee' at all? A. He could — he may have.

Q. You have seen each of the documents that have now been D tendered before you since lunch time from 1985 to 1988, the white documents? A. Yes.

Q. Some I have passed to you, others went straight to his Honour? A. Yes.

Q. All called guarantee and indemnity? A. I didn't read it.

Q. There is no doubt, is there, that in the course of conversation over that period inclusive of 1985, 1986, 1987 and 1988 you spoke to a E number of bank officers about those documents? A Yes.

Q. And you don't suggest, do you, that none of them ever used — none of them ever identified those documents as being guarantees? A. They may have.

Q. It is certain they did, isn't it? A. I am sorry …?

Q. It is certain they did, isn't it? A. Not certain.

Q. Each one of those officers put the document before you to have a F look at and to sign, they turned it around so you could read it, didn't they, each of them, 1985, 1986, 1987 and 1988? A. Each one of them — I don't recall that.

Q. And each one of them identified the nature of the document to you — each one of them said — called the document a guarantee? A. They may have.

Q. They never called it any other document, did they? A. I am not denying that. …

G Q. Do you deny that he told you that the guarantee was for facilities for Power Play? A. I don't deny that there was some — I don't know if that was exactly what was said to me and when and in what circumstance I was in at that particular time.

Q. Do you deny he said to you that you are a guarantor? A. He may have, so I can't —

Q. And that he said to you that you are a guarantor with your husband, each of the Drummonds and the companies, do you deny that? A. He may have."

His Honour found that in general the bank officers would have followed the practices of which they gave evidence. The appellant herself said that her contact with the bank officers was little more than fleeting, was sandwiched into a hasty visit to the Bank, and was distracted by the presence of her small children. His Honour's conclusion was expressed in these terms:

"But the general evidence which she gave along those lines was too general, and here I am unable to accept what Mrs Akins said. No doubt in varying ways and to varying extents, I am satisfied that explanations generally in accordance with the practices of which the bank officers gave evidence were given to her, and not in circumstances which prevented her from appreciating them."

His Honour also pointed out that the appellant appeared to retreat from the position that she had no greater understanding than that she assumed that the documents were to do with the Perth business. She did say, however, that whatever might have been explained to her none of it registered. Again his Honour was unable to accept this evidence and concluded that there were neither intellectual incapacity, haste nor distractions sufficient to prevent her from knowing that the documents exposed her and the property to major liabilities, of the order of the various "basic liabilities".

In answer to the question which he posed for himself — why did she sign all the documents? — his Honour said:

"She undertook the role of homemaker and mother, and devoted her attention to the small children and, I have no doubt, to the refurbishment of Wisemans Ferry. She left business and financial matters to Mr Akins. That was the division of functions by which she proceeded. She was content to sign the documents which Mr Akins asked her to sign, whether they were the documents which he presented to her or the documents which he asked her to go to the bank to sign, because she was content to act in that way in furtherance of the business which *provided the not inconsiderable material welfare which she enjoyed*." (My emphasis.)

In conclusion his Honour was of opinion that she had been told that her guarantees to National Australia Bank involved a possible liability of hundreds of thousands of dollars and his Honour did not accept that she was made incapable by emotional confusion, distractions of children, or other matters from appreciating her position.

Before turning to consider the challenges to the conclusions of the trial judge it is appropriate to deal with the appellant's challenges to some of his Honour's findings of fact. A number of these challenges related to observations which were made by his Honour which were in a real sense peripheral to the issues joined between the parties. For instance, the first finding challenged was that "Mrs Akins could have asked Mr Akins for further information and I see no reason to conclude that he would not have told her". Speaking generally it seems to me that these findings were open to his Honour but they did not impact in a significant way upon the ultimate decision in the case. Other findings were of more direct relevance. Examples were the findings that "I am satisfied that she had a general understanding …

A that the amount … owing to Carrington … was substantial" and there was nothing "to prevent Mrs Akins from knowing that the documents she signed at the Chatswood Branch of National exposed her and the property to major liabilities, of the order of the various 'basic liabilities'". The challenges are based in substance upon what is said to be unchallenged evidence of hers relating to the extent of her knowledge and her shock when she found out the extent of the debts.

B It may be that evidence given by her as to her state of mind was not directly challenged but, if so, that was hardly surprising in the circumstances of the case. There can be no doubt, however, that she was directly challenged on her claims of ignorance and her general assertion that any advice which was given to her by bank officers was communicated in such a disjointed manner as to be of no real value. In my view there was material, to some of which I have already referred, which justified the drawing of the inferences by his Honour but what should not be overlooked is that in large measure C her case depended upon his Honour's acceptance of evidence given by her as to her state of ignorance. The findings rejecting her evidence, or the substance of it, have already been referred to and bearing in mind that these findings were based in part upon his Honour's assessment of the appellant I do not think they are open to challenge in this Court.

Although reference to some evidence given by bank officers, such as Mr Ashbrooke, to the effect that the appellant may have been distracted by D her children when signing documents at the Bank tend to establish a lack of total concentration by her upon the task in question they do not go so far, in my opinion, as to undermine the findings of fact made by his Honour as to her general understanding. Having considered all the many findings of fact challenged I have reached the conclusion that no basis has been shown for setting aside his Honour's factual findings, based as they were, in part at least, on an assessment of the various witnesses. Indeed I would go further E and say that the substance of those findings was in my opinion correct.

I turn then to consider the appeal against the judge's conclusions upon the four ways which she put her case. Although he considered the four grounds separately it is convenient for my purposes to examine the first three grounds together reserving only the ground under the *Contracts Review Act* for separate consideration.

In his judgment his Honour set out the general proposition articulated by Dixon J in *Yerkey* (at 683):

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> "… That exposition, I think, shows that these cases are consistent with and recognize the proposition that, if a married woman's consent to become a surety for her husband's debt is procured by the husband and without understanding its effect in essential respects she executes an instrument of suretyship which the creditor accepts without dealing directly with her personally, she has a prima-facie right to have it set aside."

G Because this Court had said in *Warburton v Whiteley* (1989) 5 BPR 11,628 at 11,629 that the principles in *Yerkey* should be applied his Honour concluded that, despite some misgivings that the principles were anachronistic, he should himself apply them.

The general proposition is very widely expressed but reference to later passages in the judgment of Dixon J makes it clear, in my opinion, that his

Honour was propounding the principles upon which a creditor could be fixed with equities arising from a husband's improper or unfair dealing with his wife. Dixon J considered two different cases. The first where a wife, alive to the nature and effect of the obligation she was undertaking, was procured to become her husband's surety by the exertion by him upon her of undue influence, affirmatively established (at 684). In that situation, Dixon J expressed the opinion that: "Nothing but independent advice or relief from the ascendancy of her husband over her judgment and will would suffice." Otherwise the guarantee would not be binding upon the wife.

In the second case, where the substantial or only ground for impeaching the instrument was a misunderstanding or want of understanding of its contents or effects, his Honour concluded that 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. Although his Honour did not refer in that statement to the need for the existence of some form of impropriety, or unconscientious conduct, on the part of the husband it is clear to me, both from what appeared before and after the statement in question, that his Honour was not expounding a general principle whereby a wife who did not understand the document and who could not establish any impropriety on the part of her husband could nonetheless avoid liability under the transaction in question. His Honour was, as I understand the judgment, expressing a special principle applying in cases in which a creditor procured a debtor to secure his wife's guarantee of a debt whereby the creditor might be fixed with "the consequences of the husband's improper or unfair dealing with his wife".

That principle has been much criticised upon the basis that it fails to pay regard to the advance in the status and education of women, the increasing role of women (including wives) in business and commercial affairs and the variety of personal relationships today: Kirby P in *Warburton* (at 11,629); Rogers J in *European Asian of Australia Ltd v Kurland* (1985) 8 NSWLR 192 at 200. Nonetheless, as I earlier indicated, this Court decided, in *Warburton*, that the principle should be applied. Since that decision the House of Lords has unanimously decided that there is no basis for articulating a special principle for the protection of wives in relation to surety transactions: *Barclays Bank Plc v O'Brien* [1994] 1 AC 180. This case, and the content of Lord Browne-Wilkinson's speech provoke, the need for the Court to reconsider whether it should continue to apply *Yerkey*.

In his speech Lord Browne-Wilkinson, with whom the other Law Lords concurred, concluded that there was no basis for a special rule for wives in particular situations and that, provided that proper recognition was accorded to the "invalidating tendency" referred to by Dixon J, general equitable principles provide adequate protection for wives and, indeed, for all cases where one cohabitee stands surety for the other cohabitee's debts and the creditor is aware that there is an emotional relationship between the cohabitees. One aspect of the speech of Lord Browne-Wilkinson which is of particular importance is the compelling argument for the view that the decision of the Privy Council in *Turnbull & Co v Duval* [1902] AC 429 proceeded upon a mistaken basis and that the decision could not be sustained. That case was considered at some length by both Latham CJ and

Dixon J in *Yerkey* and, bearing in mind that it was binding upon the High Court, was a material force in Dixon J's judgment.

The ratio of *Turnbull* was expressed by Lord Lindley in these terms (at 434-435):

> "… In the face of such evidence, their Lordships are of opinion that it is quite impossible to uphold the security given by Mrs Duval. It is open to the double objection of having been obtained by a trustee from his cestui que trust by pressure through her husband and without independent advice, and of having been obtained by a husband from his wife by pressure and concealment of material facts. Whether the security could be upheld if the only ground for impeaching it was that Mrs Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it. It is, in their Lordships' opinion, quite clear that Mrs Duval was pressed by her husband to sign, and did sign, the document, which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull and Co are unaffected by such pressure and ignorance. *They left everything to Duval, and must abide the consequences*." (My emphasis.)

Notwithstanding that the decision could be justified upon the first basis set out by his Lordship it is clear, as Dixon J said, that the Privy Council also based its decision upon the conclusion expressed in the last sentence.

During the argument before the House of Lords in *Barclays Bank* counsel handed up the case lodged on appeal to the Privy Council in *Turnbull*. Lord Browne-Wilkinson had this to say about it (at 192):

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

His Lordship then continued (at 192-193):

> "For myself I can only assume that, if the Board considered that Mr Duval had committed a wrongful act vis-à-vis his wife, it proceeded on a mistaken basis…. It is impossible to find a sound basis for holding that Mrs Duval was entitled to set aside the transaction as against her husband. How then could she set it aside as against Turnbulls?"

Returning to *Yerkey* it should be observed that Dixon J alone propounded the principles which have been relied on in courts in Australia since that time. Latham CJ referred to a principle in similar terms set out in *Halsburys Laws of England*, 2nd ed, vol 15 at 282, and noted that there were authorities to support that statement of principle. Those referred to by the Chief Justice were *Turnbull, Chaplin & Co, Ltd v Brammall* [1908] 1 KB 233, which applied *Turnbull* and *Bank of Victoria Ltd v Mueller* [1925] VLR 642, which also applied *Turnbull*. His Honour, however, distinguished the facts in *Yerkey* and held that the principle, which he obviously considered a relic

from the past and for which he entertained no enthusiasm, did not apply. Rich J and McTiernan J did not embark upon a discussion of the principles, preferring to decide the case on the facts.

In circumstances where the primary decision on which *Yerkey* was based contained no reasoning supporting the presently relevant ground of decision and has been criticised with such compelling force by the House of Lords it seems to me that the Court should now reconsider whether it should continue to accept that there is a special rule relating to wives where they become guarantors for their husbands or their husband's businesses. Although it can be accepted that wives may have signed, and might in the future sign, guarantees at the suit of their husband in circumstances where it could be regarded as unjust that they be held to those guarantees there is a strong argument for concluding, as Lord Browne-Wilkinson did, that protection can be afforded to them under ordinary legal principles. Although the whole of his Lordship's judgment deserves careful reading it is sufficient for my purposes to refer only to his summary at the end of his judgment which proceeds upon the recognition that the invalidating tendency to which reference has been made applies to wives and, as well, other cohabitees. His Lordship said (at 198-199):

> "I can therefore summarise my views as follows. Where one cohabitee has entered into an obligation to stand as surety for the debts of the other cohabitee and the creditor is aware that they are cohabitees: (1) the surety obligation will be valid and enforceable by the creditor unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor; (2) if there has been undue influence, misrepresentation or other legal wrong by the principal debtor, unless the creditor has taken reasonable steps to satisfy himself that the surety entered into the obligation freely and in knowledge of the true facts, the creditor will be unable to enforce the surety obligation because he will be fixed with constructive notice of the surety's right to set aside the transaction; (3) unless there are special exceptional circumstances, a creditor will have taken such reasonable steps to avoid being fixed with constructive notice if the creditor warns the surety (at a meeting not attended by the principal debtor) of the amount of her potential liability and of the risks involved and advises the surety to take independent legal advice.
>
> I should make it clear that in referring to the husband's debts I include the debts of a company in which the husband (but not the wife) has a direct financial interest."

In deciding what the law is in New South Wales it is necessary to consider the landmark decision of the High Court in *Commercial Bank of Australia Ltd v Amadio*. This case concerned a mortgage (which contained guarantees) executed by Italian migrants of advanced years with limited knowledge of written English to secure an overdraft in favour of a company carried on by their son, which company was at the time insolvent. The High Court set aside the transaction upon the basis of unconscionable conduct by the Bank There are extensive discussions of the concept of unconscionable conduct, particularly in the judgments of Mason J and Deane J, which are well-known and to which it is unnecessary to refer. There is, however, one aspect of the discussion to which reference should be made. That is the extent to which a

creditor may be fixed with knowledge that a guarantor is in a situation of special disadvantage (as that concept was discussed in the case) in relation to the transaction of guarantee. Mason J said (at 467):

> "Whether it be correct or incorrect to attribute to Mr Virgo knowledge of this possibility, the facts as known to him were such as to raise in the mind of any reasonable person a very real question as to the respondents' ability to make a judgment as to what was in their own best interests. In *Owen and Gutch v Homan* ((1853) 4 HLC at p 1035 [10 ER, at p 767]), Lord Cranworth LC said:
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> > '… it may safely be stated that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain' [the concurrence of the surety], 'he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge.'
>
> The principle there stated applies with equal force in this case. The concept of fraud in equity is not limited to common law deceit; it extends to conduct of the kind engaged in by the respondents' son when he took advantage of the confidence and reliance reposed in him to induce his parents to enter into a transaction in order to serve his ends, thereby depriving them of the ability to make a judgment as to what is in their interests.
>
> As we have seen, if A having actual knowledge that B occupies a situation of special disadvantage in relation to an intended transaction, so that B cannot make a judgment as to what is in his own interests, takes unfair advantage of his (A's) superior bargaining power or position by entering into that transaction, his conduct in so doing is unconscionable. And if, instead of having actual knowledge of that situation, A is aware of the possibility that that situation may exist or is aware of facts that would raise that possibility in the mind of any reasonable person, the result will be the same.
>
> The knowledge of Mr Virgo was the knowledge of the bank. Whether we treat Mr Virgo as having knowledge of the possibility already discussed or as having knowledge of facts which would raise that possibility in the mind of any reasonable person the inevitable conclusion is that the bank was guilty of unconscionable conduct by entering into the transaction without disclosing such facts as may have enabled the respondents to form a judgment for themselves and without ensuring that they obtained independent advice."

(Mr Virgo was the branch manager of the appellant bank.) (See also Deane J (at 477, 480).)

It is impossible to describe definitively all the circumstances in which it will be found that a person is at a special disadvantage. As at present advised I do not think that the mere fact that, for instance, the guarantor is the wife of the debtor who is benefiting from the execution of the guarantee per se demonstrates a position of special disadvantage. Where, however, a creditor leaves it to the debtor husband to procure the execution of the guarantee and takes no steps to ensure that the wife understands the responsibility and liability that she is undertaking, or that she is independently advised, the view

may well be open, depending on the particular facts of the case, that the creditor should be held to be aware of the possibility that the wife was in a position of special disadvantage. A

If this be correct it is difficult to support the existence of a special rule applying to wives who sign guarantees in respect of their husbands' debts. On the contrary, as it seems to me, the principles of unconscionability propounded in *Commercial Bank of Australia Ltd v Amadio* furnish adequate grounds of relief to a wife who claims to have been the subject of her husband's improprieties and, in circumstances where, for instance, a creditor knew, or must be taken to have known of the risk that that might have occurred (or facts raising that possibility in the mind of a reasonable person). B

Two passages from the judgment of Deane J (at 474-475) support that view:

> "… The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable: 'the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract'…. C D
>
> Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogues. In *Blomley v Ryan* ((1956) 99 CLR, at 405), Fullagar J listed some examples of such disability: 'poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary'. As Fullagar J remarked, the common characteristic of such adverse circumstances 'seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other'." E F

Although there are differences between this approach and that evidenced in *Barclays Bank* it is evident from the passage of the speech of Lord Browne-Wilkinson which appears below they both focus on the circumstances in which a third party will be fixed with notice of the wife's special disability or the husband's impropriety. G

Lord Browne-Wilkinson said (at 196):

> "Therefore in my judgment a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind

A that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.

It follow that unless the creditor who is put on inquiry takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained, the creditor will have constructive notice of the wife's rights."

B I would add that once the principles of *Commercial Bank of Australia Ltd v Amadio* are applied to the facts of a case there should be no room for resort to the special rule in *Yerkey*. Indeed, if relief is available on either the ground articulated in *Yerkey* or the ground in *Commercial Bank of Australia Ltd v Amadio* there is a theoretical possibility that conduct found not to be unconscionable (or unconscientious) could nevertheless provide grounds for relief under *Yerkey*. This is, in my view, quite inconsistent with the principles which inform equitable relief.

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

D Although I have spent some time with *Yerkey* I would decline to uphold the appeal which ever view of the law was accepted. There are a number of reasons which would lead me to that conclusion. In the first place there was no allegation by the appellant that she was subjected to undue influence. She did say that her husband had misrepresented her financial position and his wealth to her but that would provide no ground in the circumstances of this case for setting aside the transactions or giving her relief from the claims by E National Australia Bank.

My second reason relates to her claim that she never really understood the obligations she was undertaking and, not having had adequate instruction by bank officers or independent persons as to the nature and extent of those obligations, she should be relieved from them. Although it is possible to argue that the explanations given to her by the various bank officers were wanting in various respects his Honour made two important factual findings F which I have held cannot be upset. The first was that the explanations given by the bank officers were generally in accordance with the practices to which they attested in evidence and the second was that she was told that her guarantees to National Australia Bank involved a possible liability of hundreds of thousands of dollars. I have already referred to the broad outline of those explanations which were, or should have been, sufficient to bring home to the appellant the fact that the property was at risk under the mortgage and that in signing the guarantee she was rendering herself wholly G liable for the debts of the debtor company up to the stipulated limit. Her answer that the explanations did not register with her cannot avail her, in the light of his Honour's finding, that she was not made incapable by emotional confusion, distractions of children or other matters from appreciating her position.

My third reason is the ground primarily relied upon by his Honour, that is,

that the mortgages and guarantees were for her benefit in a substantial sense. This was not a case in which a wife was, in effect, making a voluntary disposition for the benefit of her husband or his company. The present case is quite different from *Yerkey* and those cases in which the principle has been applied, and as Lord Browne-Wilkinson said in *Barclays Bank* (at 188), there are policy considerations which require that the courts keep a sense of balance in these cases. His Lordship said:

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

This does not mean that there will not be cases in which mortgages of a matrimonial home may not be set aside at the suit of a wife. It is no more than a recognition that the matrimonial home is an important asset of which advantage can be taken for business purposes and for the benefit of the family unit as a whole. This was such a case.

The appellant brought no assets to the relationship and in no sense was she providing her own capital for her husband's benefit much less to pay or secure his past indebtedness. The house at Wiseman's Ferry was purchased with funds provided either by Mr Akins or National Australia Savings Bank. The funds for its improvement, and they were considerable, were undoubtedly derived from the businesses and it is fairly clear that those moneys would not have been available without the proffer of the securities. Her acquisition of Mr Akins' half share did not cost her any money and I do not doubt that it could only have been completed upon the provision of the mortgage in 1988 in substitution for the earlier mortgage. *Warburton* itself stands as authority for the proposition that documents executed to secure advances for the benefit, wholly or partly of the wife, would not fall within the *Yerkey* principle, and there is no basis in the facts of this case for a finding of unconscionability. For these reasons I agree with Giles J.

There remains only the claim for relief under the *Contracts Review Act* 1980, which I would dismiss substantially for the reasons given by Giles J. I should make it clear, however, that the reasons I have already given in relation to the other claims for relief lead to that conclusion.

I have referred in these reasons specifically to the mortgages (2) and guarantees (7) given by the appellant in favour of National Australia Bank. It is, in a sense, misleading to confine my consideration of the issues in that manner. I have adopted that approach for convenience but having done so I am bound to explain that the evidence revealed that the appellant signed at least one other mortgage and many other guarantees during the period in question. This was undoubtedly an important consideration in his Honour's assessment of her claims of ignorance.

I would dismiss the appeal with costs.

A **SHELLER JA.** I agree with Clarke JA.

POWELL JA. I have had the advantage of reading in draft the judgment which has been prepared by Clarke JA. While I am content to adopt his Honour's statement of facts and while — for reasons which, in broad general terms, accord with those expressed by him — I agree that this appeal ought to be dismissed with costs, I would, on this occasion, wish to add some additional comment of my own.

B It will be apparent from what Clarke JA has written that the appellant's primary complaint was that Giles J "did not apply the principles of *Yerkey v Jones* (1939) 63 CLR 649, as also will it be apparent that the burden of Clarke JA's judgment is that the "principle in *Yerkey v Jones*" ought no longer to be applied in this State, it following, that, even if — as his Honour has held was not the case — the facts of the present case fell within the so-called "principle in *Yerkey v Jones*", the appeal should be dismissed.

C Although I appreciate that my views on this matter may be regarded as radical in the extreme, the reasons for my concluding that the appeal should be dismissed go beyond those which his Honour has expressed.

The debate over whether or not there ever was "a principle in *Yerkey v Jones*" and, even if there were, whether it ought any longer to be recognised and applied, is but one instance of the tendency — even the felt need — of lawyers, be they practising lawyers — such as judges, barristers or solicitors D — or teachers of law — to reduce legal principles from the general to the particular with a view to creating groups of factual situations with associated remedies which might then neatly be stored away in pigeon holes — other examples, of recent times, of this tendency are to be found in those cases which seek to delimit "equitable estoppel", "promissory estoppel", "proprietary estoppel" and the like. The nett result of this tendency is, as it seems to me, more and more to obscure the general principle which gives E rise to the particular example of its applications which are so neatly stored away in pigeon holes.

On an earlier occasion (*Starr v Barbaro* (Powell J, 4 June 1986, unreported) affirmed; sub nom *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466) I said:

> "Although I recognise that the law still has not escaped, and that it may never escape, the bonds of history to embrace a single generalised equity based upon unconscionable conduct, or fraud in equity, one F cannot escape the fact that the equity known as 'proprietary estoppel' is recognised and given effect to because 'the defendant, by setting up his right, is taking advantage of the plaintiff in a way which is unconscionable, inequitable and unjust' (*Crabb v Arun District Council* [1976] Ch 179 at 195 per Scarman LJ), it following, in my view, that if, in any case, it can be said that, in the circumstances, the setting up against the plaintiff of a right claimed by the defendant is G unconscionable, then equity will afford a remedy."

More recently, the High Court in a series of decisions (see, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Bahr v Nicolay [No 2]* (1988) 164 CLR 604; *Foran v Wight* (1989) 168 CLR 385; *The Commonwealth v Verwayen* (1990) 170 CLR 394) appears to have been moving towards reviewing all these cases with a view to reducing what is said to be

the group of principles applicable to each to a body of doctrine based on a broad general principle, that principle being that, in any case in which a court of equity is faced with conduct which is unconscionable, or which is held to constitute fraud in equity, then the court will provide a remedy — whether in a positive form as by the imposition of a constructive trust, or in a negative or defensive form, whether by way of a plea in bar or a dilatory plea — which remedy will be commensurate with and adequate to protect the subject person against the detriment to which that person would otherwise have been subjected by reason of the other's unconscionable conduct.

Such a principle would explain why it was that, in some cases — but not in *Yerkey v Jones* — a wife who, at the request of her husband, becomes a surety for her husband's debts and, to provide security for those debts. encumbers her separate property which was otherwise unencumbered, may be entitled to be relieved from the consequences of her so doing, but only in cases in which it could be said that the creditors insistence on enforcing the surety and the security would constitute unconscionable conduct. If this be so, then, the truth of the matter is that there never was a "principle in *Yerkey v Jones*", if by that phrase is meant no more than what I have written above. That, upon a proper analysis, the judgment of Dixon J, as he then was, in *Yerkey v Jones* said no more than what I have written above is, I suggest, indicated by the following passage (at 683-686) from that judgment which I set out below:

> "It will be apparent from what has been said that the course of development which the rules of equity governing the voidability of instruments of suretyship entered into by married women for debts of their husbands have followed has left the state of the law somewhat indefinite, if not uncertain. To such transactions the same general principles are considered applicable as affect the validity of voluntary alienations of valuable property in favour of the husband, but the application of these principles is necessarily qualified by considerations arising out of the position of the creditor as a third party giving value to the husband and possible bona fide. 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 possible innocent third party. But it is clearly necessary to distinguish between, on the one hand, cases in which a wife, alive to the nature and effect of the obligation she is undertaking, is procured to become her husband's surety by the exertion by him upon her of undue influence, affirmatively established, and on the other hand, cases where she does not understand the effect of the document or the nature of the transaction of suretyship. In the former case the fact that the creditor, on the occasion, for example, of the actual execution of the instrument, deals directly with the wife and explains the effect of the document to her will not protect him. Nothing but independent advice or relief from the

ascendancy of her husband over her judgment and will would suffice. If the creditor has left it to the husband to obtain his wife's consent to become surety and no more is done independently of the husband than to ascertain that she understands what she is doing, then, if it turns out that she is in fact acting under the undue influence of her husband, it seems that the transaction will be voidable at her instance as against the creditor. It is not clear how far the same principle is to be applied to a case where the wife is induced to become surety by the husband making some fraudulent or even innocent misrepresentation of fact which, though material, does not go to the nature and effect of the instrument or transaction. It may be said that the making of such a representation is no more to be anticipated by a creditor when a husband procures his wife's guarantee than when any other principal debtor procures a surety. On the other hand, the basal reason for binding the creditor with equities arising from the conduct of the husband is that in substance, if not technically, the wife is a volunteer conferring an important advantage upon her husband who in virtue of his position has an opportunity of abusing the confidence she may be expected to place in him and the creditor relies upon the person in that position to obtain her agreement to become his surety. Misrepresentation as well as undue influence is a means of abusing the confidence that may be expected to arise out of the relation.

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

If the creditor takes adequate steps to inform her and reasonably supposes that she has an adequate comprehension of the obligations she is undertaking and an understanding of the effect of the transaction, the fact that she has failed to grasp some material part of the document, or, indeed, the significance of what she is doing, cannot, I think, in itself give her an equity to set it aside, notwithstanding that at an earlier stage the creditor relied upon her husband to obtain her consent to enter into the obligation of surety. The creditor may have done enough by superintending himself the execution of the document and by attempting to assure himself by means of questions or explanation that she knows to what she is committing herself. The sufficiency of this must depend on circumstances, as, for example, the ramifications and complexities of the transaction, the amount of deception practised by the husband upon his wife and the intelligence and business understanding of the woman. But, if the wife has been in receipt of the advice of a stranger whom the creditor believes on reasonable grounds

> to be competent, independent and disinterested, then the circumstances would need to be very exceptional before the creditor could be held bound by any equity which otherwise might arise from the husband's conduct and his wife's actual failure to understand the transaction: cf per Cussen J *Bank of Victoria Ltd v Mueller* ((1925) VLR, at p 649). If undue influence in the full sense is not made out but the elements of pressure, surprise, misrepresentation or some or one of them combine with or cause a misunderstanding or failure to understand the document or transaction, the final question must be whether the grounds upon which the creditor believed that the document was fairly obtained and executed by a woman sufficiently understanding its purport and effect were such that it would be inequitable to fix the creditor with the consequences of the husband's improper or unfair dealing with his wife."

If, however, what Dixon J said in his judgment is to be taken as meaning something more than what I have earlier written then, I can but say that, on this occasion, Homer nodded: Horace, *Ars Poetica* 323.

But, whatever be the correct view, the fact that, as part of the process whereby she acquired her interest as a joint tenant in the property, Mrs Akins encumbered that interest by joining in an "all moneys mortgage" — no doubt in contemplation of executing the guarantees which were executed shortly thereafter — and that, as part of the process whereby she became registered as the sole registered proprietor of the property — her husband's share at that time clearly being potentially encumbered with liability in respect of all the guarantees which had been given to the Bank — Mrs Akins executed a fresh "all moneys mortgage", the terms of which were sufficient to render the property liable as security for the payment of moneys which she might be called upon to pay pursuant to any of the guarantees previously given, facts which, at least in broad terms, she understood, would indicate to me that this is not a case in which the Bank's conduct in seeking to enforce its guarantees and its security could be regarded as having been unconscionable.

As I have earlier indicated, I agree with Clarke JA that the appeal should be dismissed with costs.

Appeal dismissed

Solicitors for the respondent: *Mallesons Stephen Jaques*.

R J DESIATNIK,
Barrister.