Reported Decision :	(2003) Aust Contract Reports 90-157



New South Wales Court of Appeal

CITATION :	**Elkofairi v Permanent Trustee Co Ltd [2002] NSWCA 413**
FILE NUMBER(S) :	**CA** 41071/01
HEARING DATE(S) :	24 June 2002
JUDGMENT DATE :	18 December 2002
PARTIES :	Alia Elkofairi Permanent Trustee Co Ltd
JUDGMENT OF :	Beazley JA at 1; Santow JA at 87; Campbell AJA at 112

LOWER COURT JURISDICTION :	Supreme Court - Common Law Division
LOWER COURT FILE NUMBER(S) :	12144/99
LOWER COURT JUDICIAL OFFICER :	Newman AJ

COUNSEL :	T F Bathurst QC/P Bolster (A) V Stefano (R)

SOLICITORS :	Cumberland Frank (A) Hunt & Hunt (R)
CATCHWORDS :	Default on mortgage - Special disadvantage - Whether a volunteer - Surety - Express notice - Unconscionability - Unjust - Bring to account the benefit
LEGISLATION CITED :	Contracts Review Act 1980 (NSW) ss 7, 9

CASES CITED:	Yerkey v Jones (1939) 63 CLR 649 Commercial Bank of Australia Limited v Amadio (1988) 151 CLR 447 Garcia v National Australia Bank (1998) 194 CLR 395 Teachers Health Investments Pty Ltd v Wynne (1996) NSW Conv R 55-785 Abalos v Australian Postal Commission (1990) 171 CLR 167 Devries v Australian National Railways Commission (1993) 177 CLR 472 State Rail Authority v Earthline Constructions Pty Ltd (in liq) (1999) 160 ALR 588 Warren v Coombes (1979) 142 CLR 531 West v AGC (Advances) Ltd (1986) 5 NSWLR 610 Nguyen v Taylor (1992) 27 NSWLR 48 Baltic Shipping v Dillon "Mikhail Lermontov" (1991) 22 NSWLR 1 Elders Rural Finance Ltd v Smith (1996) 41 NSWLR 296 Esanda Finance Corp Ltd v Tong (1997) 41 NSWLR 482 Maguire v Makaronis (1997) 188 CLR 449 Duncan, Fox & Co v North and South Wales Bank (1880) 6 App Cas 1 Sherwin v McWilliams (1921) 17 Tas LR 94 Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd [1981] 2 WLR 554 Waltons Stores (Interstate) Pty Ltd v Maher (1988) 164 CLR 387 Commonwealth v Verwayen (1990) 170 CLR 394 Royal Bank of Scotland v Etridge (No 2) [2001] 3 WLR 1021 Vadasz v Pioneer Concrete (SA) Pty Ltd (1995) 184 CLR 102 Westpac Banking Corporation v Paterson (2001) 187 ALR 168 In re Pavlou [1993] 1 WLR 1046 Ryan v Dries (2002) NSWCA 3
DECISION :	Appeal allowed

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 4107/01
CL 12144/99

BEAZLEY JA
SANTOW JA
CAMPBELL AJA

Wednesday, 18 December 2002

ALIA ELKOFAIRI v PERMANENT TRUSTEE COMPANY LIMITED

FACTS

The appellant and her husband gave a mortgage to the respondent over their jointly owned home as security for a loan of approximately for $750,000. Of that about $470,000 was applied in discharge of the existing mortgage over the property. No monies have been paid off the mortgage loan and the respondent could bring possession proceedings for default. The appellant was unaware of how the balance of the monies were utilised.

In response to the claim the appellant sought relief from her obligations under the mortgage under the principles stated in *Yerkey v Jones* , *Commercial Bank of Australia v Amadio* or under the *Contracts Review Act* 1980 (NSW).

HELD per Beazley JA (Santow JA and Campbell AJA agreeing)

(i) The appellant has not established an entitlement to relief under *Yerkey v Jones* . The respondent did not have express notice or any other information sufficient to put it on notice that the appellant was partially a volunteer: *Yerkey v Jones* (1936) 63 CLR 649; *Garcia v National Australia Bank* (1998) 194 CLR 395.

(ii) The appellant was in a special position of disadvantage. She had no income and this was a large borrowing secured over her only asset. This was apparent to the respondent from the loan application form and sufficient to put the respondent on notice of the appellant's lack of capacity to meet the mortgage repayments and thus of the unconscionability of the transaction. It was not sufficient, for the

purposes of the respondent, that the loan was amply secured: *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447; *Teachers Health Investments v Wynne* (1996) NSW Conv R 55-785.

(iii) The trial judge failed, when concluding that the appellant understood the mortgage transaction, to have regard to the fact that the solicitor who witnessed the mortgage did not explain the full impact if the mortgage (in particular her personal obligation). Because of this omission it was not necessary to disturb his Honour's credit findings in relation to the solicitor.

(iv) The circumstances were also sufficient to make the mortgage contract unjust: *Contracts Review Act* 1980 (NSW) ss 7, 9; *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610; *Nguyen v Taylor* (1992) 27 NSWLR 48.

(v) The appellant must bring to account the benefit that she has received from the mortgage so as to discharge her from the mortgage: *Maguire v Makaronis* (1997) 188 CLR 449.

HELD per Santow JA (Campbell JA agreeing)

(i) Where a loan has joint and several obligations between the two parties to the mortgage but the benefit of the mortgage is partially or completely with one mortgagee, the other party may be a volunteer for the purposes of *Yerkey v Jones* to the extent of the benefit. This situation may be described as a constructive suretyship: *Duncan, Fox & Co v North and South Wales Bank*(1880) 6 App Cas 1. The application of these principles will depend upon the circumstances of each case.

(ii) When an unconscionable transaction is set aside, such an order may be conditional upon the repayment of an unwarranted benefit. *"This remedy to redress the effect of unconscionability should do no more than the minium necessary to do so"* . It is for this reason that the appellant must pay the respondent for the benefit she received from the mortgage, namely half of the monies used to refinance the prior mortgage on the property: *Westpac Banking Corporation v Paterson* (2001) 187 ALR 168.

ORDERS

(i) Appeal allowed;

(ii) Orders and judgment of Newman AJ set aside;

(iii) In lieu thereof an order that

(a) upon the appellant paying to the respondent the sum of one half of $469,000, namely $234,500, plus interest as specified in order (iv), the mortgage dated 7 February 1998 be set aside so far only as the appellant is concerned, and

(b) the respondent forthwith deliver to the appellant a discharge of the said mortgage in registrable form so far only as the appellant is concerned;

(iv) The sum of $234,500 is to bear simple interest at the rate of 7.5% from the date of the loan.

(v) Liberty to apply in respect of order (iii);

(vi) In the event that the respondent exercises power of sale over the Castle Hill property, the appellant's mortgage and any personal liability of the appellant thereunder, be discharged and she is to receive half the sale proceeds less $234,500 (plus interest as specified in order (iv)).

(vii) That the respondent pay the costs of the trial before Newman AJ and of the appeal, but is to have, if qualified, a certificate under the *Suitors' Fund Act* 1951 (NSW).

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IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 41071/01
CL 12144/99

BEAZLEY JA
SANTOW JA
CAMPBELL AJA

Wednesday, 18 December 2002

ALIA ELKOFAIRI v PERMANENT TRUSTEE COMPANY LIMITED

JUDGMENT

1 **BEAZLEY JA**: This is an appeal by the second defendant (the appellant) in proceedings brought by the Permanent Trustee Company from the judgment of Newman AJ in which his Honour made an order for possession of property known as 15 Chain Mail Crescent Castle Hill, folio identifier 5079/707960 (the Castle Hill property), together with judgment in the sum of $1,022,450.37, being the amount outstanding as at the date of judgment in respect of a mortgage over the property in favour of the respondent.

2 There was no issue in the proceedings that there had been default under the mortgage. Nor was there any issue that the appropriate procedural steps had been taken in order for the respondent to be entitled to an order for possession. The issue was whether the appellant was entitled to relief from the consequences of the mortgage under the principles stated in *Yerkey v Jones* (1939) 63 CLR 649, on the ground of unconscionability as elaborated in *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447, or under the provisions of the *Contracts Review Act* 1980 (NSW).

Background Facts

3 The appellant, who was aged 56 at the time of trial, comes from a poor rural background in Syria. Her father, who was a farmer, died when she was about 7 or 8 and from that time she helped her mother work the farm with older siblings. She described her family circumstances as being very poor. She did not leave the farm until she married Michael Elkofairi in 1969 when she was aged 24 years. Michael Elkofairi was the first defendant in the proceedings brought by the respondent. He was a joint tenant with the appellant of the Castle Hill property. He was a bankrupt at the time of the proceedings before Newman AJ and no order was sought in the proceedings which affected his trustee in bankruptcy.

4 The appellant and her husband migrated to Australia in about 1973. They have three children now aged in their mid to late twenties. The appellant's marriage deteriorated from about 1974. The appellant described her husband as being domineering, non-consultative about family decisions, aggressive and intimidating.

5 The appellant gave evidence that she is completely uneducated and cannot read or write in either her first language of Arabic or English, although she is able to sign her name by printing the letters. The appellant also said she could not understand spoken English except for a few very simple expressions. This was corroborated by her daughter, who was not cross-examined to the contrary. Mr Maley, the solicitor who had acted for the appellant and her husband in respect of a number of conveyancing transactions, said, however, that he was experienced in dealing with clients whose native tongue was not English and if he was in doubt as to the ability of a client to understand he employed an interpreter. He said he did not feel the need to do so with the appellant.

6 The trial judge accepted Mr Maley as a witness of truth. Senior counsel for the appellant submitted that there was nothing in Mr Maley's evidence from which the trial judge could have drawn the conclusion that an illiterate woman, whose command of English was, at the best, extremely limited, understood the nature and effect of the mortgage. I will return to his Honour's credit findings later. However, even on Mr Maley's evidence it is apparent that he did not, even in giving a general explanation, explain the power of sale under the mortgage. The respondent did not assert otherwise.

7 Commencing in about 1975, the appellant worked in a refrigeration factory for a total period of about four or five years over two separate periods of employment, although she was not permitted by her husband to retain or manage the money she earned. In 1978, the husband informed the appellant he was buying a fruit shop at Punchbowl. The appellant worked in the fruit shop although she did not operate the cash register. The shop was sold after about two years.

8 The appellant and her husband operated a coffee shop in Ermington in 1984 and 1985. The appellant's husband told her that he had purchased the business for $15,000. The appellant believes that shop was sold. The family then returned to Syria for a period of six months. Upon their return to Australia, the appellant's husband informed her that he wanted to look for a business and she said that she would sometimes go with him for this purpose. Thereafter, the appellant's husband brought a number of businesses. From time to time during the course of those businesses her husband would ask her to sign papers, which she did. He did not tell her what the papers were nor did she ask.

9 The appellant and her husband also purchased a number of homes over the years. The first was at Punchbowl. The appellant does not know whether her name was on the title to that property or not. Subsequently, they purchased a home at Westmead. The appellant does not recall seeing a solicitor or having documents explained to her about this purchase.

10 The appellant left her husband briefly in 1984, but returned because she wanted to be with the children. The husband had previously threatened that if she did leave him then he would keep the children.

11 The marital difficulties between the appellant and her husband continued and in about 1992 the appellant attempted suicide. During this time the appellant and her husband also lived in rented accommodation in different places to facilitate the children's attendance at schools. It appears that the home which had been purchased at Westmead was not sold until 1993 or 1994. The appellant was told about the sale by her husband but was again not otherwise consulted about it.

12 The appellant has suffered from ill health since about the mid 1980s. In April 1996, she became eligible for a disability pension which she has been receiving since. In May 1996 the appellant suffered further health problems and was hospitalised for a period of six weeks. Immediately prior to that she had been living in a women's refuge. During her hospitalisation she obtained an apprehended violence order against her husband. Notwithstanding that, shortly after her discharge from hospital the appellant returned to the family home. Her reason for doing so was because of her wish to preserve her status with her children. The appellant and her husband are members of the Druze community. It is a belief within that community that if a husband and wife separate it is due to the fault of the wife and that belief is passed onto the children.

13 The Castle Hill property subject of the possession order in these

proceedings was purchased in 1994 by the appellant and her husband as joint tenants for $210,500. The purchase of this property was financed by the sale of the home owned by the appellant and Mr Elkofairi at Westmead, together with a loan in the amount of $165,500 from the ANZ Banking Group, secured by way of a mortgage over the property. Between May and December 1994, Mr Elkofairi borrowed a further $166,000 from the ANZ Bank, which sums were also secured by the mortgage over the subject property.

14 The appellant was not consulted about the purchase of the Castle Hill property, but was told by her husband that it was purchased from money that they had received from the Westmead property and other money that they had saved. So far as she was aware, there was no borrowing to assist with the purchase of that property. The appellant recalls that from time to time she signed papers but did not know what they were and does not recollect attending upon any solicitors to sign papers in relation to the purchase of the property. The appellant was not cross-examined about this.

15 On 16 November 1995, the ANZ loan, which then stood at $359,000, was paid out and a further loan obtained from the St George Bank in the sum of $440,000, again secured over the Castle Hill property, which had increased in value to $900,000. The balance of the St George money in the sum of $78,000 was made payable to the Elkofairis. The appellant stated that she was not aware that these moneys were received and she did not know where the money went. She said that to the best of her recollection she had never received any of the balance for her own benefit. She was not cross-examined on this aspect of her evidence.

16 On 6 February 1998, the St George Bank was paid out with moneys borrowed from the respondent (the Permanent Trustee loan).

17 The application for the Permanent Trustee loan was made in about November 1997. In the loan application form the purpose of the loan was stated to be *"refinance/investment"*. The application form also contained a section **"Declaration as to purpose of credit"** which stated *"we declare that the credit is to be provided to ... us by the credit provider is to be applied wholly or predominantly for business or investment purposes (or for both purposes)"*. There then followed a note advising the borrower that the declaration should not be signed unless that was the whole or predominant purpose. The declaration bore the signature of both Mr Elkofairi and the appellant. However, the signature of the appellant was forged.

18 Although the respondent was the financier and mortgagee in respect of the loan, the application for finance was made to Aussie Home Loans and was processed by Queensland State Home Loans in late December 1997. In its recommendation for approval of the loan, Queensland Home Loans stated that the purpose of the loan was to refinance existing debt of $446,000 and *"additional funds of $350,000 for business purposes".* The document also stated that an independent valuation had been carried out and there had been a *"credit check on each loan applicant".*

19 The pro forma application form required an applicant to set out details of assets and liabilities and the income of each of the borrowers. The husband disclosed assets of $1.2 million (the Castle Hill property) and a motor vehicle worth $40,000. The only liability disclosed was the amount owing to the St George Bank. The income section was left blank.

20 Subsequently, Mr Elkofairi's accountant, wrote three letters in support of the loan application. In the first, dated 2 December 1997, the accountant stated:

> "[we] have not yet prepared or lodged the 1997 taxation return for Mr El Kofairi due to our work overload. However, Mr El Kofairi is an honest and a reliable person and, in due course, we will be preparing his financials."

21 The second letter was dated 12 December 1997. It referred to the accountant's understanding that the proposed borrowing was in the sum of $746,000, and that the loan was repayable by monthly instalments of $4,446 over five years at a rate of 7.5%. The letter continued *"[f]urther we are not aware of any factors which may affect the Borrower's ability to make the repayments or which may cause substantial hardship to the Borrower to make repayments"*. The accountant added *"[w]e understand that you are relying on this letter in agreeing to make a loan to the borrower however we have not carried out an audit nor do we accept responsibility to anyone relying on this letter"*.

22 Then, on 17 December 1997, the accountant provided a further letter, again referring to the amount and term of the loan. The letter then stated:

> "We know the borrower's income and expenditure and based on that knowledge and my understanding of the borrower's financial position. We are of the opinion that the borrower is able to repay the loan in accordance with its terms and can do so without hardship."

23 There was no reference to the appellant or her financial position in any of this correspondence, nor did the accountants purport to be her accountants or to know anything of her financial affairs.

24 Notwithstanding the statements in the letters from the accountants, the financial position of Mr Elkofairi at the time of making the application for the Permanent Trustee loan was as follows. Mr Elkofairi had sold the last business that he had been operating in 1996. As at January 1997, Mr Elkofairi owed the Australian Taxation Office (ATO) almost $25,000 and Mrs Elkofairi owed an amount slightly in excess of $25,000. Each had been advised by the ATO that unless payment was made judgment would be entered against them. It is apparent from the evidence that the liability to the ATO had been outstanding for quite some time and, it would appear the Elkofairis had failed to honour a debt reduction arrangement reached with the ATO in 1996. The firm of solicitors of which Mr Maley was a partner acted for the Elkofairis in relation to their problems with the Taxation Commissioner. However, Mr Maley denied any personal knowledge of those

problems.

25 At about the time that arrangements were made with the ATO to reduce the debt by instalments, Mr Elkofairi and the appellant separated. Mr Elkofairi informed his solicitor of this but also gave instructions that he wished to pay off both debts. The solicitors dealt with the ATO on that basis. At that time, that is in about April 1996, Mr Elkofairi had no income. There was no evidence that the position was different at the time of making the loan application to the respondent. The appellant was an invalid pensioner throughout this period.

26 At the time that the Elkofairis applied to the respondent for the further finance, the appellant and Mr Elkofairi were being pressed by the St George Bank to repay its loan. In this regard, no repayments had been made since the inception of the loan, which, as a result of the accrual of interest had increased to $468,775. The St George Bank in fact commenced possession proceedings against the Elkofairis in January 1998.

27 Messrs Hunt and Hunt solicitors acted for the respondent on the mortgage. They forwarded the mortgage and other documentation directly to the Elkofairis at the Castle Hill property. Included in those documents were two pro forma documents. The first was an *"Acknowledgement as to not receiving legal advice".* The second was a Schedule One Solicitor's Certificate which was to be signed if legal advice was received. The Elkofairis signed the *"Acknowledgement as to not receiving legal advice* which was in the following terms:

> "I acknowledge that:
> 1. The mortgagee has advised me to take independent legal advice before signing the mortgage, and I have had an opportunity to do so.
> 2. I have chosen not to take independent legal advice on the nature and effect of the mortgage.
> 3. I have read and understood the nature and effect of the mortgage.
> 4. I have signed the mortgage freely and voluntarily."

28 Although the documents had been forwarded directly to the Elkofairis, Mr Maley witnessed the Elkofairis signatures on the mortgage and returned the documents to Hunt and Hunt. Mr Maley said that it was his practice that if a client did not wish to take independent legal advice he would still give a general summary of the document to the client. He said that he believed he followed his general practice when he witnessed the Elkofairis' signatures on the mortgage. He explained his practice as follows:

> "A … I would say to them that what you are signing is a mortgage document with which the bank were entitled to their money back. They are entitled to – and I do hand actions – all their principal, their interest, arrears of interest, their fees, their accountant's fees, their chase-up fees, their re-valuation fees, and anything associated with getting the money back they are entitled to charge. They are entitled to

charge if you don't pay as they say, if you don't keep the place maintained, if you don't keep the place insured and the property decreases in value to a level where they have not got enough security, if you lose your job or cannot show the bank to their satisfaction you can cover the repayments, and if you die they can ask for the money back. They are also entitled to change the terms and conditions, e.g. the interest rate, but they are entitled to change all the terms and conditions.
Q And did you explain the consequences of default?
A Yes, in that form of, if you don't pay as they say, don't keep the place insured, don't keep the place maintained, place decreases in value to the level where they have not sufficient security, you haven't got a job, or you die, they are entitled to ask for their money back, is the way I do it."

29 Mr Maley had no recollection of this particular transaction but believed he followed his usual practice of going through each of the documents forwarded by a mortgagee as well as the mortgage itself. He said that in doing that he explains *"some points that I think are important and then we go through and execute them"*.

30 Mr Maley said that he went through the *"mortgagor's acknowledgment"* with the Elkofairis. He accepted, however, that Mrs Elkofairi did not read any portion of the mortgage documents. He said that he did not know whether the appellant could read. He did not accept however, that it was untrue for Mrs Elkofairi to have signed the document, including, as it did, cl 3, which stated *"I have read and understood the nature and effect of the mortgage"*. He said that in his experience, clients never read a mortgage from beginning to end. He agreed with a question from his Honour that the important part of the Acknowledgment was the portion which stated that the mortgagor executing the document *"...understand[s] the nature and effect of the mortgage"*.

31 Mr Maley expressed the opinion that the appellant was aware of what she was signing. He said that he would not have witnessed the document if he had not explained that the nature of the mortgage involved a borrowing of money secured over the Castle Hill property.

32 Mr Maley agreed that he was aware that Mr Elkofairi and the appellant each had a tax problem although he had handed the file over to another person in the office and did not know the ultimate outcome. He also said that he did not act for them often enough to know that in 1997 and January 1998 at the time the mortgage was signed, that neither of them was working. He said that he did not recollect asking either Mr Elkofairi or the appellant whether either was working. He also said he did not consider that to be important. He said *"I wasn't giving them financial advice"*. He had no recollection of the appellant having obtained an apprehended violence order (AVO) against her husband in April 1996, notwithstanding that his firm had acted on that matter for Mr Elkofairi.

33 The total amount borrowed from the respondent was $746,000 and was secured on the Castle Hill property.

34 The appellant accepts that part of the *"refinancing"* portion of this loan was to be applied to pay out the St George loan, a portion of which, in turn, related directly to the financing of the Castle Hill property. Of the total amount borrowed from the respondent, an amount of almost $470,000 was applied to pay out the St George Bank loan.

35 On settlement of the mortgage, which occurred on 4 February 1998, after payment out of St George and various legal and other expenses, a cheque in the sum of $250,234.59 was made payable to *"M and A Elkofairi"*. The appellant says that she was not aware that that payment had been made and that to the best of her recollection she had not received the benefit of any of that money. She was not cross-examined on this evidence.

36 The first loan instalment was due on 20 February 1999. It was not paid, nor has any instalment been paid. The default has led to the commencement of these proceedings.

Issues on the Appeal

37 The appellant contends that she was entitled to have the mortgage set aside against her on three grounds: first, on the basis of the principles outlined in *Yerkey v Jones*; secondly, upon the principles enunciated in *Commercial Bank of Australia Limited v Amadio*; and thirdly, under the provisions of the *Contracts Review Act*. It was submitted that contrary to the finding of the trial judge the appellant did not know or understand the nature and effect of what she was signing. It was submitted, alternatively, that even if the trial judge's findings were given their fullest operation, in the circumstances of this case, it would not be enough to deprive the appellant of relief.

Yerkey v Jones

38 Senior counsel for the appellant submitted that the appellant was entitled to relief in accordance with the principles established in *Yerkey v Jones*, notwithstanding that she was not, stricto senso, a volunteer.

39 The principles stated by Dixon J in *Yerkey v Jones* were reaffirmed by the High Court in *Garcia v National Australia Bank* (1998) 194 CLR 395 as being applicable to modern day transactions involving husband and wife. The majority (Gaudron, McHugh, Gummow and Hayne JJ) explained at 404 the basis of the decision:

> "In his reasons for decision in *Yerkey v Jones* , Dixon J dealt with at least two kinds of circumstances: the first in which there is actual undue influence by a husband over a wife and the second, that dealt with in *Mueller* , in which there is no undue influence but there is a failure to explain adequately and accurately the suretyship transaction which the husband

> seeks to have the wife enter for the immediate economic benefit not of the wife but of the husband, or the circumstances in which her liability may arise. The former kind of case is one concerning what today is seen as an imbalance of power. In point of legal principle, however, it is actual undue influence in that the wife, lacking economic or other power, is overborne by her husband and goes surety for her husband's debts when she does not bring a free mind and will to that decision. The latter case is not so much concerned with imbalances of power as with lack of proper information about the purport and effect of the transaction."

40 On the unchallenged facts it would have been hard to resist an argument that this was a clear case of imbalance of power. However, undue influence was neither pleaded nor argued and accordingly, if the principle is to apply, it would be because the case falls into the second category. In relation to that category, Dixon J said in *Yerkey v Jones* at 685-686:

> "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. … 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."

41 Relevantly, for the purposes of this case two specific features of a transaction are required to attract the application of the principles in *Yerkey v Jones.* In discussing them, I will refer only to a case where there is a marital relationship and the wife is the party seeking relief, being the circumstances of this case. First, the application of the principle is not dependent upon the creditor having notice of any unconscionable dealing between the husband and wife. Secondly, and most relevantly in this case, and as it was put in *Garcia* at 408:

> " *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." (emphasis added)

42 Their Honours continued at 409:

> "… 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."

43 It will be immediately apparent that this case does not fall classically into the *Yerkey v Jones* mould because the appellant was not, either on the face of the transaction or in fact, a volunteer. Part of the borrowing was to refinance the mortgage on the home of which she was a joint owner. Senior counsel for the appellant submitted, however, that the appellant was in part a volunteer and the principles applied to protect her in respect of that part of the transaction. The transaction was, it was submitted, voluntary in part because the appellant did not receive any benefit of the sum borrowed over

and above the amount necessary to pay out the mortgage on the home.

44 The respondent submitted that there was no sense in which the appellant was a volunteer in respect of this transaction. The loan monies were applied partly to pay out the mortgage on the property and the balance of $210,500 was paid to Mr Elkofairi and the appellant by a cheque made payable to both. There was no evidence as to what happened to that cheque. The respondent submitted that that was irrelevant, the fact of the cheque being payable jointly to the parties was sufficient to make her a beneficiary of that payment. But in any event, the respondent submitted that *Yerkey v Jones* only applies where the party to the transaction is a complete volunteer so that if the wife received any benefit from the loan, the principle did not apply.

45 The appellant's reliance on *Yerkey v Jones* involves the proposition that it extends to transactions which are not contracts of guarantee or otherwise purely voluntary. It also requires resolution of the question whether it is necessary for the creditor to have some knowledge or information from which it might have an appreciation that the transaction is not for the benefit or the entire benefit of the wife. These two issues overlap as I shall endeavour to explain.

46 In *Garcia* the majority said that the only notice that was relevant was that the creditor knew the surety was married to the principal debtor at the time of taking the guarantee. The reason for that is obvious – as the Court stated in the passage to which I have referred above – *Yerkey v Jones* begins with the premise that a surety is a volunteer. Notice of the fact of being a volunteer is not, therefore, required in the case of a guarantee. If the creditor wishes to displace that premise, it bears the onus of doing so.

47 This case is not one of guarantee. If it is sought to make the principles in *Yerkey v Jones* applicable to a case which is outside the case of a guarantee given by a wife as a volunteer in respect of her husband's obligations (again without commenting upon the possible application of the principle to other relationships) it would be necessary for the creditor to be on notice that the person seeking to impugn the transaction was a volunteer. Otherwise, the underlying premise upon which the principle operates is missing.

48 Here, Mr Elkofairi and the appellant, as joint tenants of the property, applied for a joint loan secured on their joint property. The loan was, on its face, partly for refinancing and partly for business purposes. The respondent knew, by time it approved the loan that the refinancing part of the transaction was to pay out an existing debt, although the nature of that debt was not explained. It also knew that the balance of the monies were for business purposes and the home was the only security. There was no provision in the application form for any elaboration of the nature of the business to be undertaken or the interest of either of the borrowers in the proposed business and there was no evidence that this information was obtained or even sought. Against that, however, the appellant was described on the form as a businesswoman and Mr Elkofairi as a

businessman, both having 5 years experience in their previous business. There was nothing on the face of the document or in the circumstances of the transaction to put the respondent on notice that Mrs Elkofairi's signature on the application form was forged.

49 The respondent did not have express notice or any other information sufficient to put it on notice that the appellant was partially a volunteer. Accordingly, the appellant has not established an entitlement to relief under the principles in *Yerkey v Jones*. In reaching this conclusion I have not sought to determine whether as a matter of principle, such relief is available in respect of transactions other than those of guarantee. Nor I have sought to determine whether, if the principle does apply outside of contracts of guarantee, actual notice of the voluntary nature of the transaction is required or whether some lesser form of notice would be sufficient.

Commercial Bank of Australia Limited v Amadio

50 The appellant next submitted that the transaction was unconscionable in the sense explained in *Amadio*. In that case Mason J said at 461:

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

51 In *Teachers Health Investments Pty Ltd v Wynne* (1996) NSW Conv R 55-785, a case which bore a particular similarity to this case, to which I shall refer, I said at 56,029:

> "… two matters need to be established to invoke the court's jurisdiction to set aside an unconscientious transaction. The first is that the party seeking to impugn the transaction was

under a relevant disability. In describing this disability, Deane J at 476 referred to the statement of McTiernan J in *Blomley v Ryan* (1956) 99 CLR at 392 that:

> '… as taking surreptitious advantage of the weakness, ignorance or necessity of another. The essence of such weakness is that the party is unable to judge for himself.'

…

The second element [required to establish an entitlement to relief under *Amadio* is that this disability], as Deane J said at 477:

> 'sufficiently evident to the [other party to the transaction] to make it prima facie unfair or 'unconscientious' of the [other party to the transaction] to procure [the] execution of the [contract] in the circumstances in which the execution was procured.'"

52 How do these considerations apply in this case?

53 The appellant's educational background, her inability to read or write English or to understand other than the most basic spoken English and her difficult domestic circumstances were such that the appellant was in a special position of disadvantage in the sense explained in *Blomley v Ryan*. However, none of those matters were known to the respondent. Accordingly, it is necessary to consider whether there were any other features of the transaction which made it unconscientious for the respondent to enter into this transaction with the appellant given the circumstances in which her execution of the contract was procured.

54 At the time that the respondent loaned the moneys it was aware that Mr Elkofairi was in his late 50's but had only 5 years experience as a 'businessman' and that the appellant was also in her fifties with only 5 years experience as a businesswoman. It knew that 40% of the loan was to be used for business or investment purposes. There was no information in the loan application form as to the nature of the business or investment to be undertaken, what income it was likely to generate, whether a new business was to be established or whether the loan was to assist the purchase of an existing business or whether some other form of investment was involved. On the face of application form neither Mr Elkofairi nor the appellant was in receipt of any income, as in fact was the case.

55 The only information in respect of Mr Elkofairi's financial situation were the 3 letters from his accountants. Those letters were exceptional in their total lack of detail relating to Mr Elkofairi's financial position. To the extent they represented that Mr Elkofairi would have no difficulty in servicing the loan they were incorrect. Whether the respondent actually appreciated this or not, the total absence of financial information, both in the application form and in the information provided by the accountants and the fact that no income was stated for either Mr or Mrs Elkofairi, should certainly have

sounded a warning bell to a lender in respect of any borrowing, let alone a borrowing in the order of three quarters of a million dollars. In addition, there were the added factors that the respondent was aware that the appellant did not have legal advice in respect of the mortgage. Nor did it have any information as to her ability, existing or prospective, to service the loan.

56 In my opinion, notwithstanding that the respondent did not have knowledge of the appellant's lack of education and her language and domestic difficulties, her lack of income, in the circumstances of this transaction – that is a large borrowing secured over her only asset, in circumstances where the application form failed to disclose any income for either husband or wife – placed her in a special position of disadvantage. Though the full extent of that special position of disadvantage was not known to the respondent, nonetheless the absence of any relevant financial information was sufficient to put the respondent on notice of the appellant's lack of capacity to meet the repayment obligations under the mortgage. That left as the only source of repayment the selling of her only asset, as again the respondent must be taken to have known.

57 Counsel for the respondent submitted that the respondent did not need to be concerned with the fact that the borrowers, or the appellant at least, had no income. It was sufficient for its purposes that the loan was amply secured. That was a position, according to the respondent, which the respondent was entitled to take. I do not agree. In fact, it demonstrates the unconscientious nature of the transaction and the advantage the respondent took of the appellant's disadvantageous position. On its own submission, the respondent was only concerned with its ability to recoup any amount outstanding on the loan in circumstances where it must be taken to have known, because on the only information the respondent had, the appellant had no income, that the appellant, who was exposed to liability for the whole of the loan, had no ability to make even the first payment. The unconscientious nature of the transaction was that she was thereby at risk of losing her only asset. That risk was both immediate and real.

58 It is no answer that the respondent was content with the transaction because the loan was well secured. Nor is it an answer that the respondent had assurances from Mr Elkofairi's accountants of his ability to repay. Even if it could be said that the respondent was entitled to assume that the husband would bear the liability for the repayments (an assumption which I do not consider is available), the vagueness and unparticularised nature of the accountant's letters were not sufficient, in this case, to entitle the respondent to make the assumption that the lending to the appellant was not unconscientious.

59 In my opinion, therefore, it was unconscientious for the respondent to lend a large sum of money to a person with no income with full knowledge that if the repayments under the loan were not met, it could sell that person's only asset.

60 A somewhat similar situation arose in *Teachers Health Investments Pty Ltd v Wynne.* In that case the husband's company had applied for finance to carry on its business operations. It was apparent from the information provided in the loan application that the transaction was perilous from the principal debtor's point of view and improvident from the point of view of the wife, who had agreed to the jointly owned matrimonial home being used as security. It also appeared that the creditor's concern in that case was only with the adequacy of the security. This Court held that the transaction was unconscionable in the *Amadio* sense. A distinguishing feature of that case compared to this, is that the borrowing, on the face of the application, was for the husband's purposes and not for the wife's. Notwithstanding that, for the reasons I have given, I consider that the respondent took unconscientious advantage of its position in lending the sum of $750,000 to a person sufficiently known to the lender to have no income, and which sum was secured over her only asset.

61 I have reached this conclusion on the basis that the trial judge's finding in respect of Mr Maley's evidence is protected by the principles in *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178-179; *Devries v Australian National Railways Commission* (1993) 177 CLR 472; *State Rail Authority of New South Wales v Earthline Constructions Pty Limited (in liq)* (1999) 160 ALR 588 (to which I will refer generally as the *Abalos* principle). However, the Abalos principle only protects a trial judge's finding as to credit. It does not mean that an appellate court must thereby accept the inferences drawn by the trial judge from the proved facts or the ultimate conclusion: *Warren v Coombes* (1979) 142 CLR 531. As I have already pointed out, Mr Maley's evidence indicated he did not, in giving his usual explanation, avert to the fact that the appellant had a personal liability under the mortgage beyond saying *"they are entitled to ask for their money back"*. Nor did he explain the presence, let alone the implications, of a power of sale under the mortgage. This omission was particularly egregious in this case where neither mortgagee had income or other material assets. The trial judge failed to have regard to these considerations in reaching his conclusion that the appellant *"at all relevant times well understood the nature of the transactions into which she entered"*. In my opinion, that finding cannot stand in circumstances where Mr Maley failed to explain the full effect of the mortgage and in particular failed to explain those provisions which would have particular, in the sense of almost immediate, ramifications for the appellant and her husband. My conclusion in this regard does not affect the conclusion I have already reached, namely that the transaction was unconscionable in the *Amadio* sense. To the extent it has any relevance, it reinforces the conclusion to which I have come.

***Contracts Review Act* 1980 (NSW)**

62 The final basis upon which the appellant claimed entitlement to relief was under the *Contracts Review Act*.

63 That Act is an Act with respect to the judicial review of certain contracts

and the grant of relief in respect of harsh and oppressive unconscionable and unjust contracts. It provides:

> " **7 Principal relief**
> (1) Where the Court finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result, do any one or more of the following:
> (a) it may decide to refuse to enforce any or all of the provisions of the contract
> …
> **9 Matter to be considered by Court**
> (1) In determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the Court shall have regard to the public interest and to all the circumstances of the case, including such consequences or results as those arising in the event of:
> (a) compliance with any or all of the provisions of the contract, or
> (b) non-compliance with, or contravention of, any or all of the provisions of the contract.
> (2) Without in any way affecting the generality of subsection (1), the matters to which the Court shall have regard shall, to the extent that they are relevant to the circumstances, include the following:
> (a) whether or not there was any material inequality in bargaining power between the parties to the contract,
> (b) whether or not prior or at the time the contract was made its provisions were the subject of negotiation,
> (c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract,
> …
> (f) the relative economic circumstances, educational background and literacy of:
>
> > (i) the parties to the contract (other than a corporation) …
>
> …
> (h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act,
> (i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their

effect,

(j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:

(i) by any other party to the contract,

...

(4) In determining whether a contract or a provision of a contract is unjust, the Court shall not have regard to any injustice arising from circumstances that were not reasonably foreseeable at the time the contract was made.

..."

64 Both the appellant's circumstances and the circumstances in which the contract were entered into are such that each of the paras in subs (2) set out above are satisfied. That does not, however, necessarily entitle the appellant to relief. As McHugh JA (as he then was) stated in *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 620:

> "Under s 7(1) a contract may be unjust in the circumstances existing when it was made because of the way it operates in relation to the claimant or because of the way in which it was made or both. Thus a contractual provision may be unjust simply because it imposes an unreasonable burden on the claimant when it was not reasonably necessary for the protection of the legitimate interests of the party seeking to enforce the provision: cf s 9(2)(d). In other cases the contract may not be unjust per se but may be unjust because in the circumstances the claimant did not have the capacity or opportunity to make an informed or real choice as to whether he should enter into the contract: cf s 9(2)(a), 9(2)(e), 9(2)(f), 9(2)(g), 9(2)(i), 9(2)(j). More often, it will be a combination of the operation of the contract and the manner in which it was made that renders the contract or one of its provisions unjust in the circumstances. Thus a contract may be unjust under the Act because its terms, consequences or effects are unjust. This is substantive injustice. Or a contract may be unjust because of the unfairness of the methods used to make it. This is procedural injustice. Most unjust contracts will be the product of both procedural and substantive injustice."

65 His Honour added at 621:

> "It is important to bear in mind that it is the contract or its provisions which must be unjust. ... The *Contracts Review Act* regulates contracts not investments."

66 McHugh JA continued at 622:

> "[A] contract will not be unjust as against a party unless the contract or one of its provisions is the product of unfair conduct on his part either in the terms which he has imposed

or in the means which he has employed to make the contract."

67 It follows, as his Honour had earlier pointed at 621:

> "If a defendant has not been engaged in conduct depriving the claimant of a real or informed choice to enter into a contract and the terms of the contract are reasonable as between the parties, I do not see how that contract can be considered unjust simply because it was not in the interest of the claimant to make the contract or because she had no independent advice."

68 McHugh JA reached this conclusion notwithstanding that the Act does not require the party against whom relief is sought to have knowledge of the circumstances relied upon by the claiming party. However, his Honour considered that *"lack of knowledge may render the circumstance of less materiality than it would if he was aware of it"* (per McHugh JA at 620).

69 In *Nguyen v Taylor* (1992) 27 NSWLR 48, the Court was careful to draw a distinction between the consideration as to whether a contract was unjust (the s 9 issue) and the discretion to grant relief (the s 7 issue): per Kirby P at 54-55; Sheller JA at 71. In *Nguyen* the Court held that the contract (an option to purchase real property) was unjust in the circumstances in which it was made where the vendor had been misled by his agent into making the contract. However, the Court, in the exercise of its discretion, refused relief, because the purchaser had been both innocent and ignorant of any misleading conduct. Relevant to the Court's consideration in refusing relief was not only McHugh JA's observation in *West v AGC* at 620 quoted above, but also the notion that *"the general policy of the law is that people should honour their contracts"*: per Sheller JA at 70. As Gleeson CJ pointed out in *Baltic Shipping v Dillon "Mikhail Lermontov"* (1991) 22 NSWLR 1 at 9 *"that policy forms part of our idea of what is just"*.

70 McHugh JA's statement in *West* that the Act is concerned with contracts not transactions has occasioned both debate as to its meaning and some variance in the juridical approach to the operation of the Act. The question arose directly in *Elders Rural Finance Ltd v Smith* (1996) 41 NSWLR 296. In that case, the Smiths had obtained 100% finance from Elders to purchase a rural property in addition to properties they already owned and operated.

71 Mahoney P noted at 298, that in considering the meaning of "unjust" the Court had consistently applied McHugh JA's statement that the Act is concerned with the contract. He observed however, that *"the meaning of injustice lies in the reaction of the individual judge, informed by what has been said [by] those to whom he should pay regard"*. His Honour continued at 298-299:

> "Without limiting the ambit of the term [unjust] – what I say should not be seen as a paraphrase of it – regard may be had in the application of it to the present facts to matters such as the following. The contract had a potential 'at the time it was

made' to result in the future in the imposition on the plaintiffs of great burdens and, perhaps, benefits of significant dimensions. The likelihood, at that time, of its doing so – particularly the likelihood of its imposing burdens – and the possibility that the burdens would be heavy was substantial. The capacity of the plaintiffs to appreciate these possibilities, to assess them, and to determine whether they should be accepted and with what safeguards, was limited. The position of the parties, particularly their financial position, and accordingly their capacity to bear the burdens which might result from the contract, was a matter of importance. It was important that, if the contract proved to be burdensome rather than beneficial, the plaintiffs might well be financially destroyed. It was relevant in considering the justice of the contract in the circumstances in which it was made that one of the parties, Elders, knew and appreciated the extent of the risks and what might happen to the plaintiffs and that the other party, the plaintiffs, did not understand this or the real implications of it. And I think that, knowing what they did, Elders were under a duty, not legal but in justice, to ensure that the plaintiffs appreciated the extent of the burdens which might fall upon them and the likelihood that they would. I do not mean by this that there was, in law or in judging the justice of the contract, a duty on Elders to dissuade the plaintiffs from the contract. … **But the Act requires that the Court is to look at the justice of a contract which results from its conduct. In determining what is just, it is in my opinion proper to have regard to what one person knew and the other did not of the potential consequences of the contract** ." (emphasis added)

72 Mahoney P did not find error in the finding of the trial judge that the contract was unjust, however, when exercising his discretion he did not grant relief under s 7. In doing so, and from the passage which I have just quoted, it appears that his Honour's approach was to look at the effect of the contract or the consequences of entering into it as known to one party to the contract but not known or not appreciated by the other.

73 Meagher JA dissented, being of the view that to grant relief under the statute on the facts of the case was *"to penalise a transaction rather than reform an unjust contract. [The trial judge] was minded to regard the investment, not the parties' agreement"*.

74 Handley JA agreed with Mahoney P that there was no error in the finding that the contract was unjust. In doing so he distinguished *West*:

"The distinction drawn in *West v AGC (Advances) Ltd* between the transaction or investment on the one hand, and the contract on the other, was important in that case where

> the lender played no part in the investment decision, and was not involved in the wider transaction. No such distinction can be drawn in this case."

75 Elders was, on the evidence, amongst other matters:

> "… closely and directly involved in the compilation of the financial projections which were crucial to its decision to lend."

76 It is arguable the approach of McHugh JA and that of Handley JA may only reflect a different emphasis on the circumstances which relate to the making of the contract. In *West*, AGC was a finance provider operating at arms length from the borrowers and the guarantors. It was not, and had no reason to be, concerned with the business deal it was financing. In *Smith*, Elders were intimately and exclusively involved in assessing the viability of the underlying transaction for the purposes of determining whether to lend. In *Nguyen*, the emphasis was also on the circumstances in which the contract was made.

77 However, as Handley JA observed in *Esanda Finance Corp Ltd v Tong* (1997) 41 NSWLR 482 at 491:

> "… as this Court held in *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, a contract is not unjust merely because it was not in someone's interest to enter into it, or because a person is unable to pay the debt when called upon to do so, or because its enforcement will lead to the loss of a home."

78 It would appear that the trend of authority since *West* is that the *Contracts Review Act* permits a court not only to look at the terms of the contract *per se*, to see its terms are unjust, but to look at the circumstances in which the contract was made and its effect, having regard to those circumstances. It is not sufficient, however, for a claimant for relief under the Act merely to point to a loss or inopportune transaction. This approach, in my view, is not inconsistent with what McHugh JA said in *West*. Rather, as Mahoney P pointed out in *Elders v Smith*, it gives full effect to what McHugh JA said.

79 This case does not fit neatly into either of the factual scenarios presented in *West* and in *Smith*. However, it is characterised by two significant features. First, it was a substantial loan, security for which was the appellant's only asset – her interest in the property. The debt to asset ratio was almost 75%. Secondly, the respondent knew that the appellant had no income nor other assets. None was disclosed on the loan application. The only confirmation the respondent had that the payments under the loan would be met was the series of letters from the accountant, which only related to Mr Elkofairi, and which contained no particulars of Mr Elkofairi's income and included a disclaimer *"as to the accuracy of the information"* provided. The consequence was, as submitted by the respondent's counsel, that the respondent was content to lend on the value of the security only. In my opinion, these factors taken in consideration with the matters to which I

have referred in para 53, are sufficient to make the contract unjust in the circumstances in which it was made: s 9; and sufficient for the Court to exercise its discretion under s 7.

80 What order then is appropriate? Senior counsel for the appellant acknowledged the force of the proposition that account should be taken of the benefit the appellant derived from the transaction, namely the extent to which the loan moneys were applied to the appellant's interest in the Castle Hill property, that being an interest as joint tenant with her husband, together with interest on those monies: see *Maguire v Makaronis* (1997) 188 CLR 449 at 475-478. In that case Brennan CJ, Gaudron, McHugh and Gummow JJ said at 476:

> "There was a well-developed body of principle in suits in which borrowers sought equitable relief in respect of contracts rendered void by the old usury laws. Equity intervened, but on terms that the plaintiff pay the defendant what was 'bona fide due' after disallowing the interest above the permitted statutory rate."

81 Their Honours continued at 477:

> "There also are authorities which indicate that unconscientious transactions, particularly mortgages of reversionary interests, stipulating an exorbitant, albeit not illegal, rate of interest may be set aside on terms that the plaintiff pay interest at a reduced and reasonable rate."

82 They observed that in the case before them, there was no suggestion that the rate of interest was excessive so that the rate specified in the mortgage documents was applied.

83 In this case the appellant advanced two possible scenarios to meet this requirement. The first was that credit would have to be given for the interest the appellant had in the sum of $165,000, being the amount of the initial borrowing on the property. Senior counsel acknowledged in accordance with the above principles that interest on that amount would be payable. He suggested that an interest rate of 7.5% be applied, being the rate specified in the mortgage and which was *"not unreasonable"* given present day rates. No argument to the contrary was put.

84 The second possibility was that credit be given in respect of the sum of $469,000, being the amount owed to the St George Bank immediately prior to the discharge of that mortgage together with interest.

85 In my opinion, credit should be given in respect of the St George mortgage. That mortgage has not been impugned and the ANZ mortgage must therefore be taken to have been subsumed by it. However, the appellant's interest should not to be taken to be the equivalent of a 100% interest in the relevant benefit. Conceptually, her interest is in one half of the benefit, as it derives from her interest as joint tenant with Mr Elkofairi in the Castle Hill property. That she is 100% liable under that encumbrance is not to the point. If the jointure were severed, her position vis a vis her

husband, as the respondent must be taken to know, is effectively a half interest. That, therefore, is the benefit which she must bring to account, so as to discharge her, but not her husband, from the mortgage. That sum should bear interest. I accept that a rate of 7.5% should be applied.

86 Accordingly, I would propose the following orders:

(i) Appeal allowed;

(ii) Orders and judgment of Newman AJ set aside;

(iii) In lieu thereof an order that

(a) upon the appellant paying to the respondent the sum of one half of $469,000, namely $234,500, plus interest as specified in order (iv), the mortgage dated 7 February 1998 be set aside so far only as the appellant is concerned, and

(b) the respondent forthwith deliver to the appellant a discharge of the said mortgage in registrable form so far only as the appellant is concerned;

(iv) The sum of $234,500 is to bear simple interest at the rate of 7.5% from the date of the loan.

(v) Liberty to apply in respect of order (iii);

(vi) That the respondent pay the costs of the trial before Newman AJ and of the appeal, but is to have, if qualified, a certificate under the *Suitors' Fund Act* 1951 (NSW).

(vii) In the event that the respondent exercises power of sale over the Castle Hill property, the appellant's mortgage and any personal liability of the appellant thereunder, be discharged and she is to receive half the sale proceeds less $234,500 (plus interest as specified in order (iv)).

87 **SANTOW JA**: I agree with Beazley JA. I wish to add only some brief observations of my own on two aspects. The first concerns the form the transaction takes. In particular, what are the implications for relief where

(i) the wife's obligation arises not under a conventional guarantee but under a secured mortgage which renders her liable as co-principal, but

(ii) she is nonetheless a volunteer, though as to part only of the monies lent.

88 The second concerns the quantification of any unwarranted benefit, to be surrendered as a condition of relief, in moulding it to the circumstances of the case.

Form of Transaction

89 When it is said that relief is available under principles enunciated by Dixon J in *Yerkey v Jones* (1939) 63 CLR 649, that relief, operating as a subset of the doctrine of unconscionability (compare *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447), applies where the conditions for its availability are satisfied. These include that the wife, failing to understand the purport and effect of the transaction is liable as a volunteer under a guarantee; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 408 per Gaudron, McHugh, Gummow and Hayne JJ. The High Court was concerned with a conventional guarantee. It did not have to explore the varieties of transaction which might come within a broader category of joint obligation, as where each obligor is responsible for the joint obligation of the other. A guarantee in the strict sense is a transaction where one party stands surety for another, by accepting a liability to meet the obligation of the other party who is primarily liable. Typically each party is thus bound to a lender. The one who is the guarantor is liable upon the other failing to pay. Thus the essence of a guarantee is that the person on whose behalf that liability is undertaken has the primary obligation: “The Modern Contract of Guarantee” by James O’Donovan and John Phillips (LBC, 1996) at 8.

90 Guarantees of that classic sort typically provided that the lender might look to the guarantor as if the guarantor were a principal obligor. It was thus a short step for lenders to make loans on terms which eliminated that already elided distinction between principal obligor and guarantor. This was done by making, or deeming, the loan to be to both and rendering each primarily liable for the same obligation. This was so, even if, as here, the loan in reality was for the business purposes of only one of the two obligors though the house portion was for the benefit of both. Thus the lender would not usually concern itself as to who was the true borrower. Both obligors were rendered jointly and severally liable as principal debtors, or more accurately, co-principal debtors.

91 That indeed was the case here, the loan being in form a joint loan, and jointly secured. However, the evidence shows that, as to the part of the loan not applied to the refinance of their house purchase, only the husband was the true borrower. In reality he borrowed for what was his business, not a jointly owned business enterprise. Because, as regards the family home, the part borrowed for its re-finance was truly borrowed by both husband and wife, the wife was not a volunteer as to that portion. Thus if one considered the loan globally, the wife was not a volunteer. If one split the loan between its two applications, the wife here was a volunteer as to the business portion, but not the house portion, yet the loan was in each case expressed to be to both husband and wife. There is nothing in the evidence to indicate one way or the other whether the lender knew the husband wholly owned the business, though an enquiry as to that would be expected.

92 Thus when it came to apply the principles articulated by Dixon J in *Yerkey v Jones* (supra), as applied by *Garcia v National Australia Bank Ltd* (supra), that doctrine (at 408) *“begins with the recognition that the surety is*

a volunteer: A person who obtains no financial benefit from that transaction, performance of the obligations of which she agreed to guarantee". In the present case, relief purely under *Yerkey v Jones* principles would therefore involve their extension in two respects. First to a transaction where the wife was a volunteer only as to part. Second, to a transaction not framed as a guarantee. The latter point seems in argument to have been subsumed in the first. It was not as such part of the reasoning of the trial judge. Because relief is available under the wider doctrine of unconscionability, for the reasons stated by Beazley JA, it has not been necessary to consider whether the form of the transaction should matter. Here the lender lends under a transaction where the money is intended to go to the husband, though framed in terms rendering husband and wife jointly liable as co-principals. Such a situation may, in the eye of equity, involve a transaction of guarantee or, as sometimes described, constructive suretyship.

93 The latter is close to the third situation described by Lord Selborne in *Duncan, Fox & Co v North and South Wales Bank*(1880) 6 App Cas 1 at 11-12. As O'Donovan & Phillips (supra) at 14 point out, such a constructive suretyship is not dependent upon a contract of suretyship. It arises when there is a primary and secondary liability of two persons, A and B, for the same debt but the debt is, as between the two, the debt of A only. *Sherwin v McWilliams* (1921) 17 Tas LR 94 held that such an agreement between the two debtors does not in itself affect the rights of the creditor. Lord Selborne at 13 identified this third class of case in this way:

> "Cases in which there is, strictly speaking, no contract of suretyship, but in which there is a primary and secondary liability of two persons for one and the same debt, by virtue of which, if it is paid by the person who is not primarily liable, he has a right of reimbursement or indemnity from the other."

94 Indeed, in this form of constructive suretyship, equity ensures that B's rights are not materially different from those of a surety by express agreement at law.

95 Moreover, Lord Selborne's third situation might not be the only context in which suretyship arises in the absence of a contract of suretyship. As O'Donovan and Phillips point out, recent developments in relation to estoppel suggest that suretyship may also arise where there is no binding contract of guarantee but merely a gratuitous promise to answer for the debt or liability of another. This suggestion first stemmed from obiter of Goff J at first instance in *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1981] 2 WLR 554 at 574. Subsequent developments (*Waltons Stores (Interstate) Pty Ltd v Maher* (1988) 164 CLR 387; *Commonwealth v Verwayen* (1990) 170 CLR 394) on estoppel in Australia indicate that it is probable that a party who acts unconscionably in inducing an assumption by the creditor that a contract of guarantee exists (or will exist) will be estopped from denying this state of affairs, where the creditor acts on that assumption, as by making advances

to the principal. Although no contract of suretyship exists, the party estopped would, in the words of Lord Selborne at 12, incur *"a secondary liability ... for one and the same debt, by virtue of which ...he has a right of reimbursement or indemnity from the [principal debtor]"*.

96 The relevance of this analysis in the present context is not to anticipate what the High Court might, or might not, do in extending the doctrine of *Yerkey v Jones* to cases outside the conventional guarantee by a wholly volunteer wife. It is not for an intermediate appellate court to do that. Rather it is to support the proposition that, when resorting instead to the wider doctrine of unconscionability, here in granting relief to the wife (compare *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447) the fact that the transaction is in the strict sense not one of guarantee need not provide an insuperable obstacle to relief. Nor that the wife is only a volunteer as to a portion of the loan. Each circumstance must be taken into account in looking at all the circumstances, to see if indeed it would be unconscionable for the lender to enforce the rights against the wife. The circumstances which here justify the conferring of relief can be briefly stated. The Respondent bank made no attempt to find out if the business portion of the loan was for a business owned also by the wife, but lent it under documentation describing it as a joint loan, jointly secured. The loan was of a substantial sum lent to a couple with, to the knowledge of the bank, no money or income to meet its repayment, let alone interest. That left no means to satisfy the loan other than selling the family home, being the wife's only asset. The home was being used not just to refinance monies lent originally for its joint purchase, but to support the husband's own business in which the wife had no interest. The improvidence of the loan was manifest as should have been apparent to the Respondent. The evidence shows the wife received no proper explanation of the transaction and clearly could not have appreciated its effect in any adequate sense.

97 The UK *O'Brien* doctrine, as more recently interpreted in *Royal Bank of Scotland v Etridge (No 2)* [2001] 3 WLR 1021, operates more narrowly. Though the wife fails to understand the transaction, it affords her no relief unless she suffered undue influence. That undue influence is not to be presumed, save where the wife places trust and confidence in the husband and the transaction calls for explanation: see Dominic O'Sullivan "Developing O'Brien" (2002) 118 LQR 337 at 339. But that should not, on High Court authority, be a deterrent to recognising the circumstances which here apply as justifying relief under the wider doctrine of unconscionability. This is so, though the wife be only a volunteer as to part and the transaction be not framed as a conventional guarantee. But that said, it is still necessary to consider the consequences of those factors for the extent of relief. I turn to that now.

Restoring An Unwarranted Benefit

98 When a transaction is set aside for unconscionability or fraud, such order may be conditional on the repayment of any unwarranted benefit. The

remedy to redress the effect of unconscionability should do no more than the minimum necessary to do so. The Court thereby seeks to achieve *"practical justice"*.

99 Thus the High Court of Australia in *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at 114 held that:

> "(U)nconscionability works in two ways. In its strict sense, it provides the justification for setting aside a transaction. More loosely it provides the justification for not setting aside the transaction in its entirety or in doing so subject to conditions so as to prevent one party obtaining an unwarranted benefit at the expense of the other."

100 In the later case of *Maguire v Makaronis* (1996) 188 CLR 449, this principle was again applied. The Court held that the mortgage could only be set aside on the condition that the mortgagors repay the principal advanced with interest. This was because otherwise the mortgagors would have been left with the fruits of the impugned transaction.

101 Following this line of authority in *Westpac Banking Corporation v Paterson* (2001) 187 ALR 168 at [39]-[41], the Full Federal Court said by way of obiter, that if a mortgage were to be set aside, the respondent ought to be required to repay any *"unwarranted benefit"* retained at the expense of the appellant. The words *"at the expense of the appellant"* focuses upon the position of the mortgagee or lender, though regard must also be had to the rights of any innocent other third parties.

102 This approach has also been adopted by the state appellate courts: see *Esanda Finance Corporation Ltd v Tong* (1996) 41 NSWLR 482.

103 The question of assessing Mrs Elkofairi's "unwarranted benefit" is thus important. The *combined* benefit that Mr and Mrs Elkofairi received from the Respondent's mortgage loan, owning their home as joint tenants, was the discharge of the mortgage owed to ANZ bank for the home loan in the amount $469,000. For reasons elaborated below I consider that the *individual* benefit that Mrs Elkofairi received, from the joint loan, and thus from an order discharging her liability under it, would only be 50% of that discharge figure for the home loan portion. Mr Elkofairi would obtain the remaining half of that benefit. He would thus receive a windfall benefit in that amount (half of $469,000) if Mrs Elkofairi, as a condition of her relief, had to pay the whole $469,000.

104 That is why Mrs Elkofairi, as joint tenant, would be entitled to seek contribution or an indemnity from the other joint tenant (Mr Elkofairi) were she to have paid off the whole $469,000 of the Respondent's loan. Thus an order setting aside the mortgage would benefit the wife only as to half of $469,000 and that, *prima facie*, is the measure of any unwarranted benefit. I say *prima facie*, because I consider shortly the reciprocal position of the lender.

105 But to return to the basis for contribution. In "Land Law" 4th ed (2001)

Peter Butt at 213 comments that a co-owner who pays the whole of the instalments should be able to recover from the other co-owners their proportionate amounts, on the basis of the doctrine of equitable contribution. In an English bankruptcy matter, *In re Pavlou* [1993] 1 WLR 1046, Millett J was of the view that in an equitable accounting, there was no distinction to be made between a beneficial tenancy in common and a beneficial joint tenancy. *In re Pavlou* was a bankruptcy matter and although the wife and husband were joint tenants, the wife had sought a divorce. This case was referred to favourably by Sheller JA in *Ryan v Dries* (2002) NSWCA 3, though *Ryan v Dries* involved co-owners who were tenants in common (a case concerning orders pursuant to s20 of the *Property (Relationships) Act* 1984).

106 But *"unwarranted benefit"* needs also to be looked at from the viewpoint of the lender, to see if the supposed benefit involved an unwarranted detriment to the lender. Here, there is no evidence that the lender would not be repaid, were this Court to impose as a condition of relief that the wife tender only half the $469,000. To require the wife to tender the whole $469,000 as a condition of relief merely gives the husband a windfall benefit, albeit potentially recoverable by way of equitable contribution. There is nothing in the facts to warrant treating the husband as entitled to such a windfall benefit.

107 Thus In considering the *"practical justice"* of this approach, assessment of the calculations involved may be helpful, incorporating the values and amounts in evidence where known. In both scenarios the liability claimed by the bank is satisfied. It demonstrates that under either scenario, the Respondent has reasonable prospect of repayment of the whole or most of the loan. But under the first scenario, where Mrs Elkofairi is liable for the whole discharge figure ($469,000) the husband in the first instance gets an unwarranted windfall gain, even if subject to reinstating it via contribution.

108 ***Scenario 1 – Mrs Elkofairi liable for the whole discharge figure***

(i) The value of the property is estimated at $1,200,000.
(ii) Assume the joint tenancy is severed in equal portions: Mrs Elkofairi then receives $600,000 and Mr Elkofairi receives $600,000.
(iii) A debt of $746,000 is claimed by the mortgagee.
(iv) Mrs Elkofairi is liable for $469,000 of this debt (discharge figure)
(v) Mrs Elkofairi retains $131,000.
(vi) Mr Elkofairi is liable for the remaining debt of $277,000.
(vii) Mr Elkofairi retains $323,000.

109 ***Scenario 2 – Mrs Elkofairi liable only for her 50% portion of the discharged mortgage***

(i) The value of the property is estimated at $1,200,000.
(ii) Assume the joint tenancy is severed in equal portions: Mrs Elkofairi then receives $600,000 and Mr Elkofairi receives $600,000.
(iii) A debt of $746,000 is claimed by the mortgagee.
(iv) Mrs Elkofairi is liable for $234,500.
(v) Mrs Elkofairi retains $365,500.

(vi) Mr Elkofairi is liable for remaining 50% of discharge figure $234,500 plus the remaining outstanding liability of $277,000. His total liability is $511,500.
(vii) Mr Elkofairi retains $88,500.

110 What is to be treated as an unwarranted benefit is only half the $469,000 attributable to the house loan, for reasons summarised as follows:

(i) the Appellant has only an effective half interest in the property, with a joint, co-equal liability under the mortgage with her estranged husband;
(ii) severance of her interest is imminent, by the exercise of the mortgagee's power of sale (if not a partition by husband and wife);

(iii) the property, worth $1.2 million, appears, *prima facie*, more than sufficient to secure the overall loan of $746,000;

(iv) the lender, whose conduct was unconscionable, is not to be heard to complain if remediation favours the innocent party. This is more especially when it is reasonably possible, if not certain, that the lender can still recover the loan from the husband's interest in the property, for the full amount he owes, unabated, even bringing to account as benefit for the Appellant not a release from 100% of a co-equal liability but only 50%;

Summing Up

111 The benefit to the Appellant, when viewed taking into account the co-equal liability with her husband and the effect of any contribution which would be required were she called upon to pay out under the mortgage, is in fact 50% rather than 100%; accordingly the discharge of that liability is in terms of benefit to her in reality the discharge of 50% of the relevant obligation even though as against the lender it is an obligation to pay 100%. Put another way, the only benefit to the wife which, vis a vis the lender, could be considered unwarranted, is 50% of the $469,000. To require her as a condition of relief to repay more would not be just and would simply give a windfall to the husband, when in the circumstances the consequence of the inadequate explanation of the loan is not one from which either lender or husband should be shielded.

112 **CAMPBELL AJA**: I agree with the judgment of Beazley JA and with the observations of Santow JA.

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