

# REVISITING THE ‘WIVES’ SPECIAL EQUITY’: AN EXPLORATION OF THE VOLUNTEER REQUIREMENT

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*This paper revisits the ‘wives’ special equity’, the special rule of equity initially developed to protect volunteer wives who stand surety for their husband’s debts, by undergoing a comprehensive exploration of the volunteer requirement. While most of the commentary surrounding the wives’ special equity has concerned the extension of the equity beyond the traditional spousal relationship and the comparison of approaches taken in other jurisdictions, this paper explores a contentious area that has received limited attention by commentators. Through the exploration undertaken in this paper, the author outlines the content of the volunteer requirement and explores further issues arising from this requirement, including issues that must now be resolved by the High Court of Australia.*

## I INTRODUCTION

It has been over 15 years since the High Court of Australia (‘High Court’) last delivered a judgment considering the special rule of equity initially developed to protect volunteer wives who stand surety for their husband’s debts.<sup>1</sup> While this may suggest that the equity has been lying dormant since its previous High Court appearance in 1939,<sup>2</sup> in reality the equity has been considered repeatedly and in great depth by Supreme Courts throughout Australia (‘Supreme Courts’). This paper revisits the ‘wives’ special equity’ and, in particular, explores the requirement that the ‘wife’ be a volunteer for the equity to apply. As the focus of this paper is the volunteer requirement, other important issues relating to the equity, including its continued application to the traditional spousal relationship will not be explored.<sup>3</sup> It is noted, however, that it is widely accepted

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<sup>1</sup> *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 (‘Garcia’).

<sup>2</sup> *Yerkey v Jones* (1939) 63 CLR 649 (‘Yerkey’).

<sup>3</sup> Examples of these issues are whether the equity is still appropriate; whether the equity should apply to relationships besides that of husband and wife, including same-sex and de facto relationships; and whether the equity can be for the benefit of the husband: see, eg, *Garcia* (1998) 194 CLR 395, 404 [22] (Gaudron, McHugh, Gummow and Hayne JJ), 422-3 [66] (Kirby J), 442 [109] (Callinan J); *Liu v Adamson* (2003) 12 BPR 22,205; *ANZ Banking Group Ltd v*

that the equity will, in appropriate circumstances, extend beyond the husband and wife relationship. Notwithstanding this extension of the equity, for ease of reference the equity will be referred to as the 'wives' special equity' in this paper.<sup>4</sup>

The first part of this paper outlines the fundamentals of the wives' special equity through a detailed analysis of the two High Court cases that recognised and restated the equity: *Yerkey* and *Garcia* respectively. This part presents commentary on the elements of the equity and considers the modern rationale for the equity. The second part of this paper outlines the content of the volunteer requirement as articulated in the High Court and Supreme Court authorities and analyses the precise application of the requirement. The third and final part of this paper examines further issues relating to the volunteer requirement that arose in *Elkofairi v Permanent Trustee Co Ltd*,<sup>5</sup> in particular whether the creditor should have notice that the surety is a volunteer.

## II THE FUNDAMENTALS OF THE WIVES' SPECIAL EQUITY

The first detailed High Court consideration of the wives' special equity, and the case most commonly cited as authority for the equity, is *Yerkey*.

### A *Yerkey v Jones*

#### 1 Facts

In 1936 Estyn Jones decided to purchase a property in Payneham, South Australia ('the Payneham property') from John and Mary Yerkey. The price of the Payneham property was £3,500. Mr Jones wanted to use the Payneham property for keeping poultry and also for breeding dogs, with the aim of making a profit. Mr Jones only earned a modest salary and was a man of limited means. This is where Mr Jones' wife, Florence May Blanche Jones, became involved. At the relevant time Mr and Mrs Jones lived in a house in Walkerville ('the Walkerville property'), which was owned solely by Mrs Jones. Mr Jones had negotiated terms for the purchase of the Payneham property which only required a nominal deposit be paid. Payment of the balance of the purchase

*Alirezai* [2004] QCA 6 (6 February 2004); *Watt v State Bank of New South Wales Ltd* [2003] ACTCA 7 (13 March 2003); *State Bank of New South Wales v Hibbert* (2000) 9 BPR 17,543; *Kranz v National Australia Bank* (2003) 8 VR 310; *Australian Regional Credit Pty Ltd v Mula* (2009) 14 BPR 26,779; *Permanent Mortgages v Vandenberg* (2010) 41 WAR 353; *Choice Constructions Pty Ltd v Janceski (No 3)* [2011] WASC 358 (21 December 2011); *McIvor v Westpac Banking Corporation* [2012] QSC 404 (14 December 2012); *Commonwealth Bank of Australia v Starrs* [2012] SASC 222 (17 December 2012).

<sup>4</sup> Cf *Amtel Pty Ltd v Ah Chee* [2015] WASC 341 (11 September 2015) [254] (Pritchard J).

<sup>5</sup> (2002) 11 BPR 20,841 ('*Elkofairi*').

money was deferred: £200 was payable at the end of two years and £3,300 at the end of three years. Mr and Mrs Yerkey, wanting to protect their interests, requested that £1000 of the £3,300 payment be secured by a mortgage by Mrs Jones over the Walkerville property.

There were three agreements entered into between the Yerkeys and the Joneses. The first was the preliminary agreement between Mr Jones and the Yerkeys providing, among other things, that Mr Jones obtain his wife's consent to a mortgage over the Walkerville property. The second agreement was a bill of sale over the chattels personal to the Yerkeys to secure payment of the whole £3,500. The third agreement was the mortgage given by Mrs Jones to secure £1,000. This mortgage included a clause providing that on the default of payment of interest for three weeks or breach of any other term, the principal sum would become immediately due.

Mr Jones did not prosper in the new business and he fell behind in interest payments. After a year Mr and Mrs Jones left the Payneham property and went elsewhere. After unsuccessfully trying to negotiate cancellation of the sale, the Yerkeys commenced action against Mrs Jones to recover the principal and interest under the mortgage. The question before the High Court was whether a special equity in favour of Mrs Jones arose on these facts.

There are two striking facts about this case that should be noted. The first is that Mr Jones entered into a contract with the Yerkeys that created an obligation on him to procure Mrs Jones' agreement to enter into the mortgage. The particular wording of the preliminary agreement was that 'I [Estyn Jones] am to procure the execution by my wife Florence May Blanche Jones of a second mortgage to you [the Yerkeys] over her property at 7 Smith Street, Walkerville'. Napier J, the trial judge, accepted Mrs Jones' evidence that she signed the mortgage, 'believing that it was such a mortgage as she was bound to give in order to comply with the contract between her husband and the plaintiffs'.<sup>6</sup> Evidence was also led that Mrs Jones thought her husband would or might 'get into trouble' if she did not execute the mortgage. In light of this, the question must be asked whether Mrs Jones really had a completely free choice when entering into the mortgage? The second striking fact, which resounds quite closely with *Garcia*, was that Mrs Jones did not initially agree with the purchase of the Payneham property. Their Honours said that 'Mrs Jones was doubtful as to the wisdom of the enterprise',<sup>7</sup> that she was 'less optimistic [than her husband]'<sup>8</sup> and that 'she opposed the purchase'.<sup>9</sup>

<sup>6</sup> *Yerkey v Jones* [1938] SASR 201, 209 (Napier J) quoted in *Yerkey* (1939) 63 CLR 649, 659 (Latham CJ).

<sup>7</sup> *Yerkey* (1939) 63 CLR 649, 656 (Latham CJ).

<sup>8</sup> *Ibid* 667 (Dixon J).

<sup>9</sup> *Ibid*.

## 2 Decision

The most important judgment in *Yerkey* for the purposes of the wives' special equity is the formative judgment of Dixon J.

Dixon J commenced his judgment by outlining three propositions:

- If a voluntary disposition in favour of the husband is questioned, the *burden of establishing* that it was not improperly or unfairly procured may be placed upon him by proof of circumstances raising any doubt or suspicion;
- The position of *third parties* who deal through the husband with the wife in a transaction operating to the husband's advantage may, *by that fact alone*, be affected by any equity which as between the wife and the husband might arise from his conduct. In other words, if the third party had *notice* of the relationship of husband and wife their interest will be subject to the equity; and
- It still is or may be a condition of the validity of a voluntary dealing by the wife for the advantage of her husband that she obtained an *adequate understanding* of the actual *nature and consequences* of the transaction.<sup>10</sup>

In outlining the equity his Honour stated the general proposition that:

[I]f 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.<sup>11</sup>

In the application of this general proposition Dixon J made a distinction between the two limbs of the equity.<sup>12</sup> The first is where a wife, with full understanding of the nature and effect of the obligation she is undertaking, becomes her husband's surety by the application of actual undue influence. In this situation 'nothing but independent advice or relief from the ascendancy of her husband over her judgment and will would suffice'.<sup>13</sup> The second is where the wife does not understand the effect of the document or the nature of the transaction of suretyship. In this situation if the creditor takes adequate steps to inform the wife and reasonably supposes that the wife has an adequate understanding of her obligations and the effect of the transaction, then the transaction will not be set aside.

On the facts of the case Dixon J found that, notwithstanding that Estyn

<sup>10</sup> Ibid 675-7 (Dixon J) (emphasis added).

<sup>11</sup> Ibid 683 (Dixon J) (emphasis added).

<sup>12</sup> Ibid 684 (Dixon J).

<sup>13</sup> Ibid 684 (Dixon J).

Jones ‘no doubt did what he ought not to have done’, the equity had not been made out.<sup>14</sup> As there was no actual undue influence exerted by Mr Jones, this could only fall into the second limb outlined by his Honour. Dixon J found that the Yerkeys and their solicitor had taken adequate steps to inform Mrs Jones and they reasonably thought that Mrs Jones had an adequate understanding of her obligations and the effect of the transaction.

Almost 60 years passed before the wives’ special equity was again considered by the High Court in *Garcia*.

## B *Garcia v National Australia Bank*

### 1 *Facts*

In 1979 Jean Balharry Garcia and her husband Fabio Garcia executed a mortgage over their family home in favour of a bank with which the National Australia Bank Ltd (‘NAB’) subsequently merged. This mortgage secured all money which Mr and Mrs Garcia might owe NAB at any time, including money owed under future guarantees given by them to NAB. Mr Garcia ran a business called Citizens Bullion Exchange Pty Ltd (‘Citizens Gold’) which bought and sold gold. Mrs Garcia was a director of Citizens Gold, however Mrs Garcia was not directly involved in Citizens Gold. Four guarantees were signed by Mrs Garcia between 1985 and 1987. The final guarantee, the one to which this case pertained, was made in November 1987 (‘the 1987 guarantee’). It guaranteed the debts of Citizens Gold to a limit of \$270,000 plus interest, costs and charges.

Mrs Garcia signed the 1987 guarantee following requests by Mr Garcia. On the evidence Mrs Garcia appears to have signed the 1987 guarantee as a result of:

- Mr Garcia telling Mrs Garcia that he needed her to do this so that he could deal in large quantities of gold;
- Mr Garcia saying that the guarantee was ‘risk proof’ because ‘if the money isn’t there the gold is there’;
- Mr Garcia consistently pointing out to his wife what a fool she was in commercial matters whereas he was an expert; and
- Mrs Garcia trying to save her failing marriage.<sup>15</sup>

The trial judge accepted evidence that when Mrs Garcia went to sign the 1987 guarantee the process of signing took less than one minute and included

<sup>14</sup> *Ibid* 687-90 (Dixon J).

<sup>15</sup> *Garcia* (1998) 194 CLR 395, 401 [8]-[10], 402 [12] (Gaudron, McHugh, Gummow and Hayne JJ), 415 [52] (Kirby J); *Garcia v National Australia Bank Ltd* (1993) 5 BPR 11,996, 12,007-12,009 (Young J).

no explanation of the transaction.<sup>16</sup> The trial judge also found that even though Mrs Garcia, a physiotherapist who had set up her own practice, 'presented herself [at trial] as a capable and presentable professional', there were some aspects of the guarantee which Mrs Garcia did not understand.<sup>17</sup>

Mr Garcia and Mrs Garcia separated in 1988 and were divorced in 1990. In 1990 Mrs Garcia commenced proceedings in the Supreme Court of New South Wales seeking a declaration that the mortgage and the three guarantees given in relation to Citizens Gold, including the 1987 guarantee, were invalid. NAB counterclaimed demanding payment under the 1987 guarantee and under the 1979 mortgage. The question for the High Court, among others, was whether the wives' special equity was made out on these facts.

## 2 Decision

The plurality in *Garcia* consisted of Gaudron, McHugh, Gummow and Hayne JJ. Their Honours outlined that in *Yerkey* Dixon J treated the equity as having two limbs:

[T]he first in which there is actual undue influence by a husband over a wife and the second ... 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* ... The latter case is ... concerned with ... *lack of proper information about the purport and effect* of the transaction.<sup>18</sup>

Their Honours commented that the principles applied in *Yerkey* do not depend upon the creditor having notice of a vitiating factor and that an application of the principles in *Yerkey* 'begins with the recognition that the surety is a volunteer'.<sup>19</sup> Their Honours went on to rationalise the equity by saying that it would be unconscionable to: (a) enforce a voluntary transaction against a surety when the surety did not bring a free will to its execution; or (b) enforce a transaction against the surety if the surety did not understand the purport and effect of the transaction of suretyship.

As *Garcia* was a case dealing with the second limb that Dixon J outlined in *Yerkey*,<sup>20</sup> their Honours went on to provide a set of four circumstances which together would result in a suretyship being unconscionable:

<sup>16</sup> *Garcia* (1998) 194 CLR 395, 401 [9] (Gaudron, McHugh, Gummow and Hayne JJ); *Garcia v National Australia Bank Ltd* (1993) 5 BPR 11,996, 12,008 (Young J).

<sup>17</sup> *Garcia* (1998) 194 CLR 395, 401 [10] (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>18</sup> *Ibid* 404-5 [23] (Gaudron, McHugh, Gummow and Hayne JJ) (emphasis added).

<sup>19</sup> *Ibid* 408 [31] (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>20</sup> *Ibid* 405 [23] (Gaudron, McHugh, Gummow and Hayne JJ).

- (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.<sup>21</sup>

On the facts of *Garcia* the plurality held that Mrs Garcia had made out the equity.<sup>22</sup> While Mrs Garcia had some understanding, she did not fully understand the effect of the 1987 guarantee and her obligations under the 1987 guarantee and the 1979 mortgage. NAB took no steps to explain the transaction to Mrs Garcia and knew of no independent advice given to Mrs Garcia. It was also found that Mrs Garcia was a volunteer. This aspect of the judgment is explored in more depth below.

### C Summary of the Elements of the Wives' Special Equity

Before the equity is applied, whether it be under the first or second limb outlined by Dixon J in *Yerkey*, there are four prerequisites that must be present. These preliminary prerequisites are that:

1. The debtor and surety<sup>23</sup> must, in fact, be husband and wife;
2. The creditor who lends the money must have notice of the marital relationship;
3. The surety must be a volunteer;<sup>24</sup> and
4. The creditor must rely on the debtor to obtain the surety's consent to the transaction.<sup>25</sup>

<sup>21</sup> Ibid 408-9 [31] (Gaudron, McHugh, Gummow and Hayne JJ) (emphasis added).

<sup>22</sup> Ibid 411-2 [42]-[43] (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>23</sup> Although in the vast majority of cases the surety is a wife, in light of the recognition that the equity operates beyond the spousal relationship, the term 'surety' is used in this paper to describe the person who is relying on the equity, regardless of whether they are a wife and regardless of whether they are a guarantor, mortgagor, or otherwise. Surety, as used in this paper, is a person who takes responsibility for the debtor's performance of an undertaking.

<sup>24</sup> Authority for the volunteer requirement being dealt with as a preliminary prerequisite has direct authority from *Garcia* where the plurality said that *Yerkey* 'begins with the recognition that the surety is a volunteer': *Garcia* (1998) 194 CLR 395, 408 [31] (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>25</sup> Elucidation of these prerequisites by Dr Natalie Skead is acknowledged.

Once these preliminary prerequisites have been established, then either of the two limbs may apply. The first limb is where the surety's consent to the suretyship transaction is procured by actual undue influence, or another vitiating factor.<sup>26</sup> In this situation only independent advice would save the suretyship from being invalid. The second limb is where the surety does not understand the purport or effect of the transaction. This limb is entirely independent of there being any vitiating factor. In this circumstance the suretyship transaction will only be enforceable against the surety if the creditor has explained the suretyship transaction to the surety and reasonably supposes that the surety understood the transaction.

D *What is the Modern Rationale for the Wives' Special Equity?*

In *Garcia* the plurality held that the rationale for the wives' special equity is the trust and confidence that a husband and wife typically repose in each other. In particular their Honours stated that the equity:

is based on *trust and confidence, in the ordinary sense of those words, between marriage partners*. The marriage relationship is such that one, often the woman, may well leave many, perhaps all, business judgments to the other spouse. In that kind of relationship, business decisions may be made with little consultation between the parties and with only the most abbreviated explanation of their purport or effect. Sometimes with not the slightest hint of bad faith, the explanation of a particular transaction given by one to the other will be imperfect and incomplete, if not simply wrong. That that is so is not always attributable to intended deception, to any imbalance of power between the parties, or, even, the vulnerability of one to exploitation because of emotional involvement. It is, *at its core*, often a *reflection of no more or less than the trust and confidence each has in the other*.<sup>27</sup>

Their Honours stated beyond doubt that the rationale for the equity does not in any way rest on notions of the subservience, inferior economic position or vulnerability to exploitation of wives.<sup>28</sup> In light of the modern rationale of the equity, a dinner conversation between Mr and Mrs Garcia is very interesting for our purposes. In the context of the 1987 guarantee Mrs Garcia said to her

<sup>26</sup> The first category in *Yerkey* may still be applicable if a vitiating factor besides actual undue influence, such as illegitimate pressure or misrepresentation, is applied by the debtor: *Yerkey* (1939) 63 CLR 649, 686 (Dixon J). See also *Garcia* (1998) 194 CLR 395, 413 [49] (Kirby J), 442-3 [110]-[112] (Callinan J). The plurality in *Garcia* explicitly did not deal with this issue, however their Honours suggested that where the equity is applied in relation to vitiating factors besides undue influence it may form a third limb to the equity: *Garcia* (1998) 194 CLR 395, 405 [23] n 49 (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>27</sup> *Garcia* (1998) 194 CLR 395, 404 [21] (Gaudron, McHugh, Gummow and Hayne JJ) (emphasis added).

<sup>28</sup> *Ibid* 404 [20] (Gaudron, McHugh, Gummow and Hayne JJ).

husband ‘I know you think I’m boring and stupid. I do *trust* you but I worry about *things I don’t understand*’, to which Mr Garcia replied ‘You shouldn’t worry. You *should trust me*.’<sup>29</sup>

Arguably, on the basis of *Garcia*, there is also a broader rationale for the equity. This rationale is simply that to enforce transactions that satisfy the prerequisites and then fall into the first or second limbs, or both limbs, would be unconscionable.<sup>30</sup> In this context unconscionability equates to characterising the result of enforcing the transaction,<sup>31</sup> rather than discussing it as the independent doctrine of unconscionable dealing in *Amadio*.<sup>32</sup>

### III CONTENT OF THE VOLUNTEER REQUIREMENT

What is clear from the examination of both *Yerkey* and *Garcia*, above, is that in order for the wives’ special equity to apply the surety must be a volunteer.

#### A High Court Authority for the Content of the Volunteer Requirement

An analysis of the content of the volunteer requirement must necessarily start with High Court authority. From the initial recognition of the wives’ special equity the High Court has made it clear that the notion of voluntariness for the purposes of the equity would be wide. In *Yerkey* Dixon J said that a voluntary transaction would be *any transaction* where one person confers a large pecuniary benefit on another.<sup>33</sup> His Honour also said that for the equity to apply the surety must act without any ‘recompense, except the advantage of her husband’.<sup>34</sup> From the facts of *Yerkey* it is clear that the wife may still be regarded as a volunteer despite obtaining some incidental benefit from the transaction. Such benefits may include, for example, the provision of a residence, although on the facts of *Yerkey* perhaps only if the residence is secondary to the husband’s business which operates on the property. In addition, on the basis of *Yerkey* it would seem that any pecuniary benefits that the husband may make as a result of the borrowing for which the wife has stood surety would not be seen as being to the wife’s benefit.

In *Garcia* the plurality provided two tests as to when a surety will be a volunteer. The first is that the surety must be a ‘person who obtained *no financial benefit from the transaction*’ and the second is that a surety will be a

<sup>29</sup> *Garcia v National Australia Bank Ltd* (1993) 5 BPR 11,996, 12,007 (Young J) (emphasis added).

<sup>30</sup> *Garcia* (1998) 194 CLR 395, 408-10 [31]-[34] (Gaudron, McHugh, Gummow and Hayne JJ). See generally G Dal Pont, ‘The Varying Shades of “Unconscionable” Conduct – Same Term, Different Meaning’ (2000) 19 *Australian Bar Review* 135.

<sup>31</sup> *Garcia* (1998) 194 CLR 395, 409-10 [34] (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>32</sup> *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 (*‘Amadio’*).

<sup>33</sup> *Yerkey* (1939) 63 CLR 649, 679 (Dixon J) (emphasis added).

<sup>34</sup> *Ibid* 676 (Dixon J).

volunteer if the surety obtains 'no gain from the contract the performance of which was guaranteed'.<sup>35</sup> The important concepts in each of these tests are 'financial benefit' and 'gain' respectively. Even though Kirby J decided *Garcia* by the application of a modified English principle, his Honour still provided some commentary on the content of the volunteer requirement. His Honour discussed voluntariness in terms of the surety having 'economic advantages' or having 'economic interests in the success of [the debtor's] business ventures'.<sup>36</sup>

The facts of *Garcia* provide some assistance in outlining the boundaries of the volunteer requirement. In particular, the plurality found that even though Mrs Garcia was a director and shareholder of Citizens Gold, the fact that Mr Garcia was in 'complete control' of the company and that Mrs Garcia was not 'directly involved' in the company meant that in effect Mrs Garcia obtained 'no real benefit from her entering the transaction'.<sup>37</sup> What this means for the volunteer requirement is that a surety may still be a volunteer despite being a director and shareholder of the debtor's company, provided that the debtor is in complete control of the debtor company and the surety obtains no real or direct benefit. This, therefore, suggests a test of *control* when the secured borrowing is applied to financing a company or other business entity. In *Garcia* both the plurality and Callinan J were satisfied that Mrs Garcia was a volunteer, notwithstanding that some incidental benefits might have potentially flowed to her and her family from Citizens Gold.<sup>38</sup>

### B Supreme Court Authority for the Content of the Volunteer Requirement

In terms of the approach to be taken, it has been held that voluntariness for the purposes of the wives' special equity must be determined as a 'matter of substance'<sup>39</sup> and 'not ... conclusively by the examination of legal rights and interests'.<sup>40</sup> What this means is that determining whether a surety is a volunteer is not as simple as asking whether the surety would be a volunteer for the purposes of contract law, especially in terms of consideration.<sup>41</sup>

In *State Bank of New South Wales v Chia*,<sup>42</sup> a decision relatively soon after *Garcia*, Einstein J handed down a judgment which sets out the content of the volunteer requirement. His Honour, relying on authority, identified the following principles as relevant to the volunteer requirement:

<sup>35</sup> *Garcia* (1998) 194 CLR 395, 408-9 [31] (Gaudron, McHugh, Gummow and Hayne JJ) (emphasis added).

<sup>36</sup> *Ibid* 415 [53] (Kirby J).

<sup>37</sup> *Ibid* 411-2 [43] (Gaudron, McHugh, Gummow and Hayne JJ) (emphasis added).

<sup>38</sup> *Ibid* 412 [43] (Gaudron, McHugh, Gummow and Hayne JJ), 438 [98] (Callinan J).

<sup>39</sup> *Bylander v Multilink* [2001] NSWCA 53 (14 March 2001) [15] (Handley JA). See also *Amtel Pty Ltd v Ah Chee* [2015] WASC 341 (11 September 2015) [272] (Pritchard J).

<sup>40</sup> *Dubois v Ong* [2004] QCA 185 (28 May 2004) [56] (Muir J).

<sup>41</sup> *Bylander v Multilink* [2001] NSWCA 53 (14 March 2001) [15] (Handley JA).

<sup>42</sup> (2000) 50 NSWLR 587.

- It is not sufficient that the surety has received consideration, in terms of the law of contract;
- The ‘consideration’ for the transaction must be of ‘real benefit’ to the surety;
- Incidental benefit which accrues generally to the family of which the surety is a member is not a sufficient benefit to make the transaction non-voluntary;
- Where the surety expects to reap *direct profit* from the transaction, the transaction cannot be said to be voluntary;
- Where the money secured by the guarantee is used to purchase an asset where the surety is as equally interested as the debtor it will not be voluntary; and
- If the interest of the surety is a shareholding in the company through which the debtor conducts the debtor’s business and in which the surety has no real involvement, then a guarantee given by the surety over the company’s debts will be voluntary. However, if the surety has an active and substantial interest in the conduct of, and the fortunes of, the business run by the debtor, the surety will not be a volunteer in relation to any guarantee over the debts of that business.<sup>43</sup>

It is submitted that this judgment by Einstein J provides a comprehensive statement of the content of the volunteer requirement that is consistent with the authority laid down by the High Court in *Yerkey* and *Garcia*.

### 1 *What are the Limits on Benefits that may Flow to the Surety?*

We know from *Garcia* that some benefits may flow to the surety through the debtor’s business. The question that must be answered, however, is what are the limits and boundaries of these benefits. On the basis of the cases, it appears that benefits will only be able to flow to the surety if they are ‘incidental’ or if they ‘accrue generally’.<sup>44</sup> By way of example, a husband paying out the lease on the car used by his wife and also paying back an \$8,500 loan to his wife were found to be consistent with the wife being a volunteer in *Wenczel v Commonwealth Bank of Australia*.<sup>45</sup>

In *Bank of Western Australia v Abdul*<sup>46</sup> Croft J held that the wife’s salary of

<sup>43</sup> Ibid 601 (Einstein J) (emphasis added) (citations omitted).

<sup>44</sup> *Armstrong v Commonwealth Bank of Australia* (1999) 9 BPR 17,035, 17,053-17,054 [32]-[33]; *State Bank of New South Wales v Chia* (2000) 50 NSWLR 587, 601 (Einstein J); *Chandran v Narayan* [2006] NSWSC 104 (21 February 2006) [53] (Young J); *National Australia Bank Ltd v Wehbeh* [2014] VSC 431 (9 September 2014) [58] (Macaulay J) cf Samantha McNee, ‘Why Women Should Love, Honour and Obey – An Attempt to Make the Wife’s Special Equity a Statutory Defence’ (2003) 11 *Insolvency Law Journal* 147, 160.

<sup>45</sup> [2006] VSC 324 (8 September 2006) [121]-[122] (Habersberger J).

<sup>46</sup> [2012] VSC 222 (1 June 2012) (*Abdul*).

around \$700 a fortnight, paid by one of her husband's companies for the wife's administrative work, was an incidental benefit and that this situation was closely analogous to *Garcia*.<sup>47</sup> With respect to his Honour, the decision in *Garcia* was largely based on Mrs Garcia receiving 'no real benefit' whatsoever directly from Citizens Gold. In *Abdul* the wife's salary, paired with the administrative tasks she did for her husband's companies, are clearly distinguishable from the incidental benefits Mrs Garcia stood to gain in *Garcia*. In *Abdul*, however, Croft J's finding that the company's repayment of interest payments on the family home was 'incidental' was, with respect, a correct and proper application of the authorities. In light of *Garcia* it would be a very difficult, if not untenable, proposition to maintain that a surety would be a volunteer if the surety was paid a salary from the debtor's company.

## 2 Companies and the Concept of Control

As is clear from *Garcia*, a surety will still be considered a volunteer if the surety is a shareholder and director in the debtor's company provided that the company is controlled by the debtor and that the surety does not obtain any 'real benefit' from entering the transaction. This position has been frequently applied by the Supreme Courts.<sup>48</sup> What must be noted is that the test to be applied is not merely one of asking who controlled the company. While the debtor controlling the company is highly indicative, in order to reach the threshold established in *Garcia* the company must be solely the debtor's 'creation'.<sup>49</sup> An example of where a case correctly met this threshold, it is submitted, is *Brueckner v Satellite Group (Ultimo) Pty Ltd*.<sup>50</sup> In this case the husband had become bankrupt and as a result was unable to be a director of a company. In order to proceed with his business the husband set up a company with his wife as sole director, with the husband telling his wife that 'she would be a director on paper only'.<sup>51</sup> The judge found that the wife was a volunteer as 'she was a director in name only'.<sup>52</sup>

Just because the debtor is found to be in control of the company it does not mean that the surety will necessarily be a volunteer. The surety must also not have obtained any 'real benefit'. As discussed above, in *Abdul* while the wife may not have been in control of the company, she still obtained a benefit from

<sup>47</sup> Ibid [59]-[62].

<sup>48</sup> *Bylander v Multilink* [2001] NSWCA 53 (14 March 2001) [17] (Handley JA); *Brueckner v Satellite Group (Ultimo) Pty Ltd* (2002) 15 BPR 28,885, 28,920-28,921 [189]-[192] (Campbell J); *Chandran v Narayan* [2006] NSWSC 104 (21 February 2006) [53] (Young J); *Commonwealth Bank of Australia v Horkings* [2000] VSCA 244 (22 December 2000) [55] (Winneke P).

<sup>49</sup> *Garcia* (1998) 194 CLR 395, 401 [7] (Gaudron, McHugh, Gummow and Hayne JJ) citing *Garcia v National Australia Bank Ltd* (1993) 5 BPR 11,996, 12,006 (Young J).

<sup>50</sup> (2002) 15 BPR 28,885.

<sup>51</sup> Ibid 28,916 [162] (Campbell J).

<sup>52</sup> Ibid 28,920 [189] (Campbell J).

the company in the form of a salary. This point was recently expressed by Adamson J where her Honour stated that just because the surety ‘did not exercise control with respect to the companies, does not mean that she had none or that she derived no benefit from the transaction’.<sup>53</sup> The concept of benefit, of which control will not always be indicative of, must always be kept at the forefront of the analysis. As Robson J reminded us ‘[t]he ultimate question is whether or not [the surety] obtained any real benefit from entering into the transaction.’<sup>54</sup>

### 3 *Direct and Immediate Benefit*

There is a line of cases which have held that a surety will be a volunteer if the surety does not receive a ‘direct and immediate’ benefit. This test of ‘direct and immediate’ benefit has its origins in *Cranfield Pty Ltd v Commonwealth Bank of Australia*.<sup>55</sup> In *Garcia* the concept of immediacy is mentioned only once – in the judgment of the plurality in which their Honours said that the transaction must be for the ‘*immediate* economic benefit ... of the husband’.<sup>56</sup> Despite the lack of High Court endorsement, the test of ‘direct and immediate’ benefit has been referred to in several Supreme Court cases.<sup>57</sup> In most applications of this test the outcome is the same as it would be if any of the other tests discussed above were applied. By way of example, in *Dowdle v Pay Now For Business Pty Ltd*<sup>58</sup> the ‘direct and immediate’ test was applied in reaching the conclusion that the wife was a volunteer as the money was solely for her husband’s purposes.<sup>59</sup> The same outcome would have been reached if the ‘financial benefit’ test or ‘gain’ test from *Garcia* had been applied.

There has been one application where the ‘direct and immediate benefit’ test has produced very odd reasoning, however. The word ‘immediate’ in the test can have two meanings. The first is ‘immediate’ in terms of being direct, which is consistent with *Garcia* and also the original application in *Cranfield*. The second, however, treats ‘immediate’ as importing a *temporal* aspect, namely

<sup>53</sup> *ANZ Banking Group v Londish* [2014] NSWSC 202 (12 March 2014) [144] (Adamson J).

<sup>54</sup> *Euroasia (Pacific) Pty Ltd v Michael* [2008] VSC 153 (13 May 2008) [128] (Robson J).

<sup>55</sup> [1998] VSC 140 (20 November 1998) [104] (Mandie J) (*‘Cranfield’*).

<sup>56</sup> *Garcia* (1998) 194 CLR 395, 404 [23] (Gaudron, McHugh, Gummow and Hayne JJ) (emphasis added).

<sup>57</sup> *Agripay Pty Ltd v Byrne* [2011] 2 Qd R 501, 508 [11] (McMurdo P), 528 [78] (McMeekin J); *Agripay Pty Ltd v Byrne* [2010] QSC 189 (8 June 2010) [36] (de Jersey CJ); *Abdul* [2012] VSC 222 (1 June 2012) [59] (Croft J); *Vella v Buchanan* [2012] FamCA 500 (5 June 2012) [56]; *Dowdle v Pay Now For Business Pty Ltd* [2012] QSC 272 (13 September 2012) [103] (Mullins J); *Capital One Securities Pty Ltd v Soda Kids Holdings Pty Ltd* [2014] VSC 168 (24 April 2014) [227] (Ginnane J); *Amtel Pty Ltd v Ah Chee* [2015] WASC 341 (11 September 2015) [278] (Pritchard J); *Schultz v Bank of Queensland Ltd* [2015] QCA 208 (27 October 2015) [1], [2], [46], [48] (Boddice J with Holmes CJ and Philippides JA agreeing).

<sup>58</sup> [2012] QSC 272 (13 September 2012) [103] (Mullins J).

<sup>59</sup> *Ibid* [103].

if the benefit for the surety would take a very long time to eventuate it is not considered 'immediate'. An example of this is in the *Agripay* cases<sup>60</sup> in which the court at both first instance and on appeal held that the wife was not a volunteer as the benefit of her husband's tax being minimised, potentially enjoying profits from the husband's managed investment scheme and the husband's superannuation returns were 'indirect and prospective' and 'long term and uncertain'.<sup>61</sup> It is submitted that in these cases, it would have been better for the court to discuss the volunteer question in terms of permissible incidental benefits, as discussed above, rather than the long-term nature of the benefit.

### C Analysis

#### 1 *Can a Universal Test for the Volunteer Requirement be Elucidated?*

As can be seen from the preceding discussion, the tests applied in determining whether a surety is a volunteer are wide and varied. It is therefore submitted that it is not possible to elucidate a universal test for the content of the volunteer requirement. This is not a bad thing, however. As Young J reminds us, when approaching a case involving the wives' special equity 'each case must be dealt with on its own facts'.<sup>62</sup> The tests discussed above will each have application depending upon the facts presented. There is, however, one qualification that should be made. It is submitted that *Garcia* proposes two types of test for voluntariness: primary tests and secondary tests. The primary tests are the tests espoused by the plurality in *Garcia* as a matter of general principle, namely that the surety obtain no financial benefit and no gain. On the other hand, the secondary tests are the tests which the Supreme Courts have developed from the High Court's application of the general principles to the facts in *Garcia*, such as the concepts of control, real benefit and incidental benefit. It is submitted that the primary tests should be the paramount principles and that the secondary tests should be subject to the primary tests.

#### 2 *Is this Satisfactory?*

The question must necessarily be asked whether it is satisfactory that there is no universal test for the content of the volunteer requirement in the wives' special equity. Dal Pont asks: '[i]s there a clear dividing line between wives who are volunteers and those who are not, or is it more in the nature of a continuum? If it is the latter, is it appropriate to premise potentially serious equitable

<sup>60</sup> *Agripay Pty Ltd v Byrne* [2011] 2 Qd R 501; *Agripay Pty Ltd v Byrne* [2010] QSC 189 (8 June 2010).

<sup>61</sup> *Agripay Pty Ltd v Byrne* [2011] 2 Qd R 501, 508 [10]-[11] (McMurdo P), 528 [78] (McMeekin J); *Agripay Pty Ltd v Byrne* [2010] QSC 189 (8 June 2010) [42]-[43] (de Jersey CJ).

<sup>62</sup> *Chandran v Narayan* [2006] NSWSC 104 (21 February 2006) [54] (Young J).

intervention on a concept that lacks objectivity?’<sup>63</sup> To answer this question it is best to look back to the foundational judgment of Dixon J in *Yerkey*. His Honour relevantly stated that ‘[e]quities invalidating contractual obligations effectual at law often depend upon a combination of a large number of circumstances affecting the transaction and cannot be *reduced to a series of syllogistic propositions*.’<sup>64</sup> What his Honour was warning against here was the attractive notion of trying to reduce the application of the equity, or aspect of the equity, to a set of fixed tests. This supports the idea that a test of universal application for the content of the volunteer requirement may not be appropriate.

#### IV SHOULD THE CREDITOR HAVE NOTICE OF THE SURETY BEING A VOLUNTEER?

##### A *High Court Commentary on Notice*

The High Court stated in *Garcia* that the only question of notice was whether the creditor had notice of the relationship between the debtor and the surety. The plurality said that: ‘[w]e consider that the only question of notice that arises is whether the creditor knew at the time of the taking of the guarantee that the surety was then married to the [debtor]. *Other questions of notice do not intrude*.’<sup>65</sup> Given the High Court’s express statement that no other questions of notice are relevant in applications of the equity, it would take aerobic and extraordinary legal reasoning to suggest that the creditor should have notice of the surety being a volunteer. Therefore, the proposition discussed in this part of the paper has, from the beginning, a significant hurdle to overcome.

##### B *Drawing a Distinction Between Guarantees and Mortgages: Elkofairi v Permanent Trustee Co Ltd*

In dealing with the situation where the wife was named as a borrower under a mortgage but, in fact, was a volunteer in respect of all or part of the borrowed money, the court in *Elkofairi* stated that the wife could still invoke the wives’ special equity if the creditor had notice of her being a volunteer.

##### 1 *Facts*

The facts of *Elkofairi* can only be described as unfortunate. Mrs Elkofairi, a woman aged in her fifties, came from a poor rural background and was completely uneducated. Mrs Elkofairi could not read or write in her native

<sup>63</sup> G E Dal Pont, *Equity and Trusts: Commentary and Materials* (Lawbook, 5<sup>th</sup> ed, 2011) 276.

<sup>64</sup> *Yerkey* (1939) 63 CLR 649, 669 (Dixon J) (emphasis added).

<sup>65</sup> *Garcia* (1998) 194 CLR 395, 411 [40] (Gaudron, McHugh, Gummow and Hayne JJ) (emphasis added).

language of Arabic or in English, and was only able to sign her name by printing the letters. In addition Mrs Elkofairi could only understand very limited spoken English.

Mr and Mrs Elkofairi's marriage was troubled. Mrs Elkofairi described her husband as being 'domineering, non-consultative about family decisions, aggressive and intimidating'.<sup>66</sup> Mrs Elkofairi left her husband briefly in 1984, but returned only because she wanted to be with her children, as her husband had threatened that if she left him he would keep the children. The marital difficulties continued and in 1992 Mrs Elkofairi attempted suicide. Throughout this period Mrs Elkofairi suffered mental health issues, was hospitalised for a period and also spent some time in a women's refuge. While living in the refuge Mrs Elkofairi obtained an apprehended violence order against Mr Elkofairi.

The transaction that was the subject of this case was a mortgage over Mr and Mrs Elkofairi's house. The mortgage was for \$750,000, of which \$470,000 was used to discharge an existing mortgage on the family house, and the remaining money was used by Mr Elkofairi for his own business activities. None of the loan instalments were repaid and Mr and Mrs Elkofairi eventually defaulted.

## 2 Decision

The two important judgments in *Elkofairi* were those of Beazley and Santow JJA. Campbell AJA agreed with both judgments.

### (a) Judgment of Beazley JA

As undue influence was not pleaded or argued, only relief under the second limb of the wives' special equity was available to Mrs Elkofairi.<sup>67</sup> A challenge for Beazley JA was that this case did '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'.<sup>68</sup> Mrs Elkofairi argued that she was in part a volunteer and that the equity should be applied to protect her in respect of that part of the transaction. The creditor, Permanent Trustee Co Ltd, argued that the equity 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. Beazley JA reasoned that when the High Court in *Garcia* made their comments about there only being one question of notice, this only applied where the instrument being signed by the wife was a guarantee. Beazley JA continued:

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

<sup>66</sup> *Elkofairi* (2002) 11 BPR 20,841, 20,842 [4] (Beazley JA).

<sup>67</sup> *Ibid* 20,847 [40] (Beazley JA).

<sup>68</sup> *Ibid* 20,848 [43] (Beazley JA).

volunteer in respect of her husband's obligations ... it would be necessary for the creditor to be *on notice that the person seeking to impugn the transaction was a volunteer*.<sup>69</sup>

On this basis, her Honour held that as this case involved a mortgage and as the bank did not have express notice or any other information sufficient to put it on notice that Mrs Elkofairi was a volunteer, the equity could not be made out.<sup>70</sup>

At the end of the judgment Beazley JA provided an important qualification on her Honour's findings. Her Honour said that:

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 [sic] 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.<sup>71</sup>

(b) *Judgment of Santow JA*

Santow JA began his judgment by stating that the wives' special equity operates as a 'subset of the doctrine of unconscionability'.<sup>72</sup> With respect to his Honour, this language should be avoided as the *doctrine* of unconscionability more aptly describes the equity of unconscionable conduct as expressed by the High Court in *Amadio* rather than the wives' special equity.

In Santow JA's view, the issues raised by *Elkofairi* were how the equity applies where the transaction was a mortgage rather than a guarantee and how the equity would apply where the wife was only a volunteer as to part of the money lent. His Honour stated that in *Elkofairi* the second issue had largely been subsumed into the first. Santow JA's answer to these issues was to invoke and apply the concept of 'constructive suretyship'.<sup>73</sup> The idea behind this is that where, through a mortgage, the surety is a co-borrower of money that is in reality solely for the debtor's purposes, the court should see the transaction as being, in effect, a guarantee.

Similarly to Beazley JA, Santow JA provided a qualification as to the reasons given. His Honour said that:

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

<sup>69</sup> Ibid 20,849 [47] (Beazley JA) (emphasis added).

<sup>70</sup> Ibid 20,849 [49] (Beazley JA).

<sup>71</sup> Ibid 20,849 [49] (Beazley JA) (emphasis added).

<sup>72</sup> Ibid 20,857 [89] (Santow JA).

<sup>73</sup> Ibid 20,858 [92] (Santow JA).

wholly volunteer wife. It is not for an intermediate appellate court to do so.<sup>74</sup>

### C Subsequent Treatment of *Elkofairi*

#### 1 Judicial Authority in Support of *Elkofairi*

There have been several Supreme Court decisions which have applied Beazley JA's requirement in *Elkofairi* that for the surety to rely on the equity in relation to a mortgage, rather than a guarantee, the creditor must have had notice of the surety being a volunteer.<sup>75</sup>

There have been two cases which have applied the partial volunteer concept from *Elkofairi*, however in both of these cases the sureties were not found to be partial volunteers.<sup>76</sup>

It also seems that Santow JA's use of 'constructive suretyship' has been taken up and applied in a few cases with the courts asking whether the transaction was a guarantee in substance.<sup>77</sup> By way of example, in *Abdul* the court held that a financial facility was, in substance, a guarantee.<sup>78</sup>

#### 2 Judicial Authority in Opposition to *Elkofairi*

There is a number of Supreme Court cases which have brought various aspects of *Elkofairi* into question.

##### (a) Extending the Wives' Special Equity Beyond Guarantees

In *Narain v Euroasia (Pacific) Pty Ltd* Nettle JA, with Bongiorno JA and Byrne AJA agreeing, rejected the contention that the wives' special equity can be applied in relation to instruments other than guarantees which operate to the husband's advantage or which confer a voluntary benefit on him.<sup>79</sup> Nettle JA

<sup>74</sup> Ibid 20,859 [96] (Santow JA).

<sup>75</sup> *King Mortgages v Satchithanatham* [2006] NSWSC 1303 (8 December 2006) [124]-[127] (Bell J); *Australian Regional Credit Pty Ltd v Mula* (2009) 14 BPR 26,779, 26,798-26,799 [145]-[149] (McCallum J); *National Australia Bank Ltd v Savage* [2013] NSWSC 1718 (21 November 2013) [93]-[95] (Adamson J) ('Savage'). See also *Perpetual Trustees Victoria Ltd v Burns* [2015] WASC 234 (30 June 2015) [230] (E M Heenan J).

<sup>76</sup> *BNY Trust Company of Australia Ltd (formerly known as JP Morgan Trust Australia Ltd) v Glambedakis* [2009] NSWSC 815 (14 August 2009) [79] (Johnson J); *Choice Constructions Pty Ltd v Janceski (No 3)* [2011] WASC 358 (21 December 2011) [360] (Simmonds J).

<sup>77</sup> *Australian Regional Credit Pty Ltd v Mula* (2009) 14 BPR 26,779, 26,799 [146]-[148] (McCallum J); *Choice Constructions Pty Ltd v Janceski (No 3)* [2011] WASC 358 (21 December 2011) [123] (Simmonds J); *Abdul* [2012] VSC 222 (1 June 2012) [83]-[91] (Croft J). See also *Perpetual Trustees Victoria Ltd v Burns* [2015] WASC 234 (30 June 2015) [229]-[231] (E M Heenan J).

<sup>78</sup> *Abdul* [2012] VSC 222 (1 June 2012) [89] (Croft J). In holding this Croft J explained that a facility was an 'extension of credit' to the company.

<sup>79</sup> *Narain v Euroasia (Pacific) Pty Ltd* (2009) 26 VR 387, 396 [45] (Nettle JA) ('Narain').

expressed serious doubts in coming to this conclusion. His Honour's conclusion was heavily based on *stare decisis* and not wanting to depart from *Elkofairi* as it was not plainly wrong.<sup>80</sup> However, Nettle JA's conclusion was based on an incorrect reading of *Elkofairi*. In *Elkofairi* the court held that the equity *could* apply to transactions beyond guarantees but on the facts Mrs Elkofairi was not successful on the wives' special equity ground as the creditor did not have notice that she was a volunteer.

There are several cases that have automatically applied the wives' special equity to mortgages without discussing or considering whether there is a distinction between guarantees and other types of transaction.<sup>81</sup> It is suggested that these cases applied the equity to mortgages because on their Honours readings of *Yerkey* and *Garcia* it was obvious and without question that the equity would have application outside of guarantees. This casts considerable doubt upon the premise in *Elkofairi* that there is a distinction between guarantees and other types of transactions.

(b) *Notice of Voluntariness*

In *National Australia Bank v Satchithanatham*<sup>82</sup> McCallum J questioned the need for the creditor to have notice of the surety being a volunteer. Her Honour said that 'such notice does not appear to me to be an indispensable requirement of the principle [in *Yerkey v Jones*]'.<sup>83</sup> In her judgment, however, McCallum J raises another far more fundamental point. Her Honour said that the:

[D]iscussion [in *Elkofairi*] was limited to the second limb of *Yerkey v Jones* ... It is doubtful whether the reasoning ... in *Elkofairi* as to the existence (outside a guarantee case) of a requirement to establish notice of the fact that the person seeking to impugn the transaction was a volunteer applies to a case of the first kind discussed in *Yerkey v Jones*.<sup>84</sup>

This is very significant because it is the first time that it has been suggested that the content of the volunteer requirement may be different as between the first and second limbs of the equity. This proposition should be rejected for two reasons. Firstly, it would bring undue complexity in having different principles to apply depending on whether you are dealing with the first or second limb. The second reason is that as the volunteer requirement, in line with *Garcia*, is treated as a preliminary prerequisite, in practice the question of whether a

<sup>80</sup> Ibid 396 [44] (Nettle JA).

<sup>81</sup> *Westpac Banking Corporation v Mitros* [2000] VSC 465 (3 November 2000); *ANZ Banking Group Ltd v Alirezai* [2004] QCA 6 (6 February 2004); *Roseville Estate Pty Ltd v Bouris* [2006] VSC 49 (23 February 2006).

<sup>82</sup> [2009] NSWSC 21 (6 February 2009) ('*Satchithanatham*').

<sup>83</sup> Ibid [73].

<sup>84</sup> Ibid [71].

surety is a volunteer must be answered *before* the limbs of the equity are looked at. On appeal, three Justices of Appeal upheld McCallum J's ruling in relation to the wives' special equity and said that it was 'undeniably correct'.<sup>85</sup>

(c) *Partial Volunteers*

There have also been comments in Supreme Court cases that cast doubt on whether, as a matter of principle, a surety can be a partial volunteer. In *Savage Adamson* J stated that:

Although the obiter remarks of Santow J[A] in *Elkofairi* might appear to lend some support to the proposition that one ought dissect the monies advanced by reference to the use to which any portion will be put to determine, in respect of any part, the wife is a volunteer, I do not consider that is an accurate statement of the present law.<sup>86</sup>

On the same point, but in more depth, McCallum J said in *Satchithanatham* that:

[T]he question remains whether the principle in ... *Yerkey v Jones* protects a "partial volunteer" in respect of that part of the transaction. For my part, I doubt that it should. The majority in *Garcia* used the term "voluntary" in the sense that the surety obtained "no financial benefit" or "no gain" from the contract the performance of which was guaranteed. Dixon J referred to principles he said were of special importance "when the transaction in question is one of suretyship and the wife without any recompense, excepts the advantage of her husband, saddles her separate property with a liability for his debt or debts". What pricks good conscience, in such a case, is the *complete absence of benefit*; the fact that a person's separate assets are exposed entirely in the interests of another.<sup>87</sup>

It is submitted that their Honours are correct in their comments. In *Garcia*, when determining whether Mrs Garcia was a volunteer, the plurality said that the facts 'as a whole' demonstrated that she was a volunteer.<sup>88</sup> In light of this, it seems counterintuitive to determine whether a surety was partially a volunteer, as this would not involve looking at the facts as a whole.

D *Is the Distinction Between Guarantees and Mortgages Illusory?*

It is the author's view that the distinction between guarantees and mortgages, and between guarantees and other types of transactions, for the purpose of the

<sup>85</sup> *Satchithanatham v National Australia Bank Ltd* [2009] NSWCA 268 (2 September 2009) (Young JA with Giles and Hodgson JJA agreeing) [1], [2], [46].

<sup>86</sup> *Savage* [2013] NSWSC 1718 (21 November 2013) [92] (Adamson J).

<sup>87</sup> *Satchithanatham* [2009] NSWSC 21 (6 February 2009) [74] (McCallum J) (citations omitted) (emphasis added).

<sup>88</sup> *Garcia* (1998) 194 CLR 395, 412 [43] (Gaudron, McHugh, Gummow and Hayne JJ).

wives' special equity is illusory.

The first justification for this proposition is that in *Yerkey* and *Garcia* the judges discussed the general principles without mentioning guarantees. For example, Dixon J spoke about 'an instrument of suretyship'.<sup>89</sup> In discussing the general principles of the equity in *Garcia* the plurality used the phrase 'transaction' many times.<sup>90</sup>

Secondly, historical considerations support the fact that the equity has application to transactions besides guarantees. In *Yerkey* Dixon J based his judgment, in no small part, on three older cases.<sup>91</sup> These cases dealt with a charge, a guarantee and a bill of sale respectively. The plurality in *Garcia* indicated that Dixon J's judgment in *Yerkey* was not the genesis of the equity, but was instead a particular application of 'accepted equitable principles'.<sup>92</sup> What this means is that the content of the equity is informed by the law preceding *Yerkey* and therefore as Dixon J relied on cases which involved transactions besides guarantees, the equity has an application beyond just guarantees.

The third justification was articulated by Nettle JA in *Narain* in which his Honour explained, contrary to his Honour's holding in the case, why there is no policy or reason otherwise for there to be a distinction between guarantees and other types of transactions. In particular his Honour said that:

Were it not for *Elkofairi*, I should have thought that it was open to this court to construe *Yerkey* as capable of application to instruments apart from suretyship which operate to a wife's husband's advantage or confer a voluntary benefit on him. I say that because, although Dixon J reasoned in *Yerkey* from the premise that the three invalidating presumptions "have a special importance when the transaction in question is one of suretyship", I find it hard to see why in *logic* or *principle* those presumptions should have any less importance in cases of other instruments operating to a husband's advantage ... I know of no policy which would dictate a different result. This point of distinction appears to be *arbitrary*.<sup>93</sup>

Whether the equity applies to transactions beyond guarantee is now clearly a matter for the High Court to resolve.<sup>94</sup> There is significant uncertainty on this

<sup>89</sup> *Yerkey* (1939) 63 CLR 649, 683 (Dixon J).

<sup>90</sup> *Garcia* (1998) 194 CLR 395, 408-9 [31] (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>91</sup> *Turnbull & Co v Duval* [1902] AC 429; *Chaplin & Co Ltd v Brammall* [1908] 1 KB 233; *Shears & Sons Ltd v Jones* [1922] 2 Ch 802.

<sup>92</sup> *Garcia* (1998) 194 CLR 395, 403 [18] (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>93</sup> *Narain* (2009) 26 VR 387, 396 [43] (Nettle JA) (emphasis added). See also Paul Vout (ed), *Unconscionable Conduct: The Laws of Australia* (Lawbook, 2<sup>nd</sup> ed, 2009) 404.

<sup>94</sup> This issue almost went before the High Court for an application for special leave, however it was discontinued for reasons not relevant to the wives' special equity: Transcript of Proceedings, *Narain v Euroasia (Pacific) Pty Ltd* [2010] HCATrans 188 (30 July 2010); *Narain v Euroasia (Pacific) Pty Ltd* [2010] FCA 1352 (6 December 2010) [19]-[20], [56]-[57] (Gray J).

issue with some Supreme Court judges demonstrating a reluctance to apply the equity beyond guarantees.<sup>95</sup> Part of this reluctance, it is submitted, is the Supreme Courts' deference to the High Court's role, especially in light of the plurality in *Garcia* warning that 'it is for this Court alone to determine whether one of its previous decisions is to be departed from or overruled'.<sup>96</sup> This deference is reflected in *Elkofairi* by both Beazley and Santow JJA providing such strong qualifications in their reasons.

E *Should the Creditor Have Notice of the Surety Being a Volunteer in all Applications of the Equity?*

If, as has been argued, there is to be no distinction between the types of transactions to which the wives' special equity can apply, the question must be asked whether a creditor should have notice of the surety being a volunteer in all applications of the equity. The answer is undoubtedly 'no'. The plurality in *Garcia* provided unequivocal support for this position in saying that the 'principles applied in *Yerkey v Jones* do not depend upon the creditor having ... notice of some unconscionable dealing between the husband as borrower and the wife as surety'.<sup>97</sup> To use the words of Dixon J, 'the position of strangers who deal through the husband with the wife in a transaction operating to the husband's advantage may, by that fact alone, be affected by any equity which as between the wife and the husband might arise from his conduct'.<sup>98</sup>

V CONCLUSION

The wives' special equity has been considered repeatedly and in great depth by the Supreme Courts over the past 15 years. The exploration of the volunteer requirement undertaken in this paper has highlighted the content of this requirement with greater precision. Generally, the state of the law in regards to the content of the volunteer requirement is satisfactory. By looking at some of the issues that arose in this regard in *Elkofairi*, this paper demonstrates the consequences of Supreme Courts applying the equity without a close consideration of the equity as expressed by the High Court. The wives' special

<sup>95</sup> See, eg, *Permanent Mortgages v Vandenberg* (2010) 41 WAR 353, 422 [354] (Murphy JA); *Perpetual Trustee Victoria Ltd v Yap* [2010] NSWSC 761 (16 July 2010) [186]-[189] (James J); *Capital One Securities Pty Ltd v Soda Kids Holdings Pty Ltd* [2014] VSC 168 (24 April 2014) [233] (Ginnane J); *ABL Nominees Pty Ltd (ACN 106 756 521)* [2014] VSC 529 (22 October 2014) [29]-[30] (Derham As); *HSBC Bank Australia Ltd v Mavaddat* [2015] WASC 153 (4 May 2015) [44]-[45] (Acting Master Gething); *Perpetual Trustees Victoria Ltd v Burns* [2015] WASC 234 (30 June 2015) [231] (E M Heenan J).

<sup>96</sup> *Garcia* (1998) 194 CLR 395, 403 [17] (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>97</sup> *Ibid* 408 [31] (Gaudron, McHugh, Gummow and Hayne JJ).

<sup>98</sup> *Yerkey* (1939) 63 CLR 649, 676 (Dixon J) (emphasis added).

equity must always be applied with *Yerkey* and *Garcia* at the forefront of the analysis. Not doing so may result in inconsistency and confusion as is currently the situation with the question of whether the equity applies to transactions beyond guarantees: an issue that now calls out for High Court clarification.