

IN THE FULL COURT
OF THE FEDERAL COURT OF AUSTRALIA

NO CIV 261 OF 364

BETWEEN:

LAURA LOW (APPELLANT)

and

AGILE LOANS PTY LTD (RESPONDENT)

RESPONDENT'S OUTLINE OF SUBMISSIONS

SENIOR COUNSEL JANELLE KOH

JUNIOR COUNSEL OLIVIA KING

INSTRUCTING SOLICITOR JIAXI WEI

Summary of Submissions

- 1. The existence of a marriage relationship is central to enlivening the principles of *Yerkey v Jones*, as affirmed in *Garcia*.**
- 2. Ms Low was not a volunteer for the purposes of the transaction.**
- 3. Ms Low's decision to enter into the guarantee and mortgage was not the result of undue influence.**
- 4. There was no need for Ms Low to safeguard the transaction by obtaining independent legal advice.**

1. The existence of a marriage relationship is central to enlivening the principles of Yerkey v Jones, as affirmed in Garcia.

1.1. A relationship of trust and confidence between husband and wife must exist to enliven the application of the principles in Yerkey v Jones.

- *Yerkey v Jones [1939] HCA 3.*

1.1.1. This proposition has been evidenced by the decision in Garcia.

- *Garcia v National Australia Bank Limited [1998] HCA 48, [21].*

1.1.2. While there is scope for these principles to extend to trust and confidence in other relationships, there has not yet been definitive judicial authority to that effect.

- *Garcia v National Australia Bank Limited [1998] HCA 48, [22].*
- *Permanent Mortgages Pty Ltd v Vandenberg and Another [2010] WASC 10 [60].*
- *Royal Bank of Scotland v Etridge (No 2) [2001] UKHL 44.*

1.1.3. Since Ms Low and Dr Dor are not married, the principles of Yerkey v Jones do not apply.

2. Ms Low was not a volunteer for the purposes of the transaction.

2.1. Ms Low was a person who obtained benefit, financial or otherwise, from the transaction for which she was guarantor.

- *Garcia v National Australia Bank Limited [1998] HCA 48, [31].*

2.1.1. Her willingness and ability to make decisions as director of Fertility Solutions distinguishes her from the appellant in Garcia.

- *Garcia v National Australia Bank Limited [1998] HCA 48, [43].*

2.2. Ms Low had a direct and immediate interest in her and Dr Dor's financial stability, which is evidenced by her director position with Fertility Solutions.

- *Cranfield Pty Ltd v Commonwealth Bank [1998] VSC 140, [104].*
- *State Bank of New South Wales Ltd v Chia [2000] NSWLR 587, [169].*

2.2.1. Ms Low thus had an "active and substantial interest" in the conduct and fortunes of the company, and is not a volunteer.

- *State Bank of New South Wales Ltd v Chia [2000] NSWLR 587, [169].*

3. Ms Low's decision to enter into the guarantee and mortgage was not the result of actual undue influence.

3.1. Ms Low brought a free mind and will to her decision to guarantee Dr Dor's debts.

- *Garcia v National Australia Bank Limited [1998] HCA 48, [23]*.

3.1.1. Ms Low was not in a position of vulnerability that gave rise to actual undue influence.

- *Johnson v Buttress [1936] 56 CLR 113 [136]*.

3.1.2. The will of Ms Low was not overborne by Dr Dor in a manner that gave rise to actual undue influence.

- *Garcia v National Australia Bank Limited [1998] HCA 48, [23]*.
- *Johnson v Buttress [1936] 56 CLR 113 [138]*.

4. There was no need for Ms Low to safeguard the transaction by obtaining independent legal advice.

4.1. There is no actual undue influence which Ms Low must be relieved from through the obtaining of independent legal advice.

- *Garcia v National Australia Bank Limited [1998] HCA 48, [25]*.
- *Yerkey v Jones [1939] HCA 3, 684*.

AUTHORITIES CITED

A. Cases

Australia:

Bar-mordecai v Hillston [2004] NSWCA 65

Commonwealth Bank of Australia v Khouri [1998] VSC 128

Cranfield Pty Ltd v Commonwealth Bank [1998] VSC 140

Hillston v Bar-mordecai [2002] NSWSC 973

Johnson v Buttress [1936] 56 CLR 113

Kranz & Anor v National Australia Bank Ltd [2003] VSCA 92

Garcia v National Australia Bank Limited [1998] HCA 48

Liu v Adamson [2003] NSWSC 74

National Australia Bank Ltd v Garcia [1996] NSWLR 577

Permanent Mortgages Pty Ltd v Vandenberg and Another [2010] WASC 10

State Bank of New South Wales Ltd v Chia [2000] NSWLR 587

State Bank of New South Wales v Hibbert [2000] NSWSC 628

Yerkey v Jones [1939] HCA 3

United Kingdom:

Royal Bank of Scotland v Etridge (No 2) [2001] UKHL 44.