RECONSIDERING INDEPENDENT ADVICE: A FRAMEWORK FOR ANALYSING TWO-PARTY AND THREE-PARTY CASES

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What is the significance of the receipt of independent advice by the plaintiff in a claim to set aside a transaction on the basis of a vitiating factor – such as duress, undue influence or unconscionable conduct? The generally held view has been that it is highly significant. Indeed, the receipt of advice has been understood as an answer to many such claims. The High Court of Australia's decision in Thorne v Kennedy apparently changes this. Although that case concerned advice in relation to binding financial agreements under the Family Law Act 1975 (Cth), the decision has implications across banking, commercial and other areas of practice. This article, then, offers a reanalysis of this question in light of this decision and other developments. The authors propose a new framework – based around two key questions – for conceptualising the function and significance of independent advice in a particular case. The article considers and develops this framework with regard to the main general law vitiating factors in both two-party and three-party cases.

I INTRODUCTION: TWO KEY QUESTIONS

In claims to set aside transactions on the basis of a vitiating factor – such as duress, undue influence or unconscionable conduct – the generally held view has been that the receipt by the plaintiff of independent advice plays a significant role. Often, it provides an answer to a claim.[1] Indeed, independent advice has been described as a 'panacea'.[2] The High Court of Australia's decision in *Thorne*

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1 See, eg, Mark Sneddon, 'Lenders and Independent Solicitors' Certificates for Guarantors and Borrowers: Risk Minimisation or Loss Sharing?' (1996) 24(1) *Australian Business Law Review* 5, 6 ('Lenders and Independent Solicitors' Certificates').

2 See, eg, Katy Barnett, '*Thorne v Kennedy*: A Thorn in the Side of "Binding Financial Agreements"?' (2018) 31(3) *Australian Journal of Family Law* 183, 192 ('*Thorne v Kennedy*: A Thorn in the Side').

v Kennedy ('*Thorne*')[3] apparently changes this. Although that case concerned advice in relation to binding financial agreements under the *Family Law Act 1975* (Cth), it has implications across banking, commercial and other areas of practice. In *Thorne*, the plaintiff signed two binding financial agreements under the *Family Law Act 1975* (Cth) at the insistence of her husband-to-be. Before signing, the plaintiff received detailed advice on each agreement from an independent solicitor. That advice was unimpeachable. Notwithstanding this, both agreements were set aside on the grounds of unconscionable conduct[4] and, alternatively, undue influence.[5]

In the light of *Thorne*, this article reconsiders the role of independent advice in claims to set aside transactions on the basis of a vitiating factor. In all cases, the authors submit that the same two key questions arise. The first concerns the purpose of the advice. Is it to *emancipate* the plaintiff from the vitiating factor – in other words, to ensure that the plaintiff's decision to enter the transaction is free, independent and voluntary? Or, is it merely to ensure that the plaintiff *understands* the transaction, such that his or her decision to enter the transaction is informed? The second, closely related question concerns the approach to be taken in assessing whether advice has achieved its purpose. Is it a *subjective* approach, considered from the plaintiff's point of view, requiring that the plaintiff was *in fact* emancipated from the vitiating factor or *actually* understood the transaction? Or, is it an objective approach, assessed from the defendant's perspective, such that it is sufficient that the defendant *reasonably believed* the plaintiff was emancipated or took *reasonable steps* to ensure the plaintiff's understanding? These two questions provide the framework for analysis in this article. With these questions in mind, the article seeks to answer: what is the law in Australia? Further, what *should* the law be given the role of independent advice and the empirical evidence as to how well it is fulfilling that role? Finally, how, if at all, does *Thorne* change the law as it is or should be?

Independent advice may be legal, financial or other. However, independent *legal* advice will be the focus of this article. This is because the concern of most, if not all, of the cases has been independent legal advice.[6] The article will also focus on general law, as opposed to statutory,[7] vitiating factors. It will separately consider undue influence, unconscionable conduct, duress and the *Yerkey v Jones* ('*Yerkey*') wives' special equity.[8] The analysis differs for each.[9]

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3 (2017) 263 CLR 85.

4 Ibid 111–12 [63]–[65] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), 115–17 [74]–[78] (Nettle J), 127–9 [116]–[123] (Gordon J).

5 Ibid 108–11 [54]–[60] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

6 As noted by Mark Sneddon: see Mark Sneddon, 'Unfair Conduct in Taking Guarantees and the Role of Independent Advice' (1990) 13(2) *University of New South Wales Law Journal* 302, 304 ('Unfair Conduct').

7 See, eg, *Contracts Review Act 1980* (NSW) ss 7, 9(2)(h); *National Consumer Credit Protection Act 2009* (Cth) sch 1 ss 76(1), (2)(h).

8 (1939) 63 CLR 649.

9 This has been observed previously: see, eg, Sneddon, 'Lenders and Independent Solicitors' Certificates' (n 1) 9. See also, eg, Patrick Parkinson, 'Setting Aside Financial Agreements' (2001) 15(1) *Australian Journal of Family Law* 26.

The article will consider separately the so-called two-party and three-party cases. In a two-party case, there is a transaction between A and B. B is subject to a vitiating factor applied by A and B seeks to set aside the transaction as against A. In a three-party case, there is a transaction between B and C. B is subject to a vitiating factor applied by A and B seeks to have the transaction set aside as against C. C is a party to the transaction but is not the party who applies the vitiating factor.[10] The classic example is the guarantee: a guarantor, B, provides a guarantee in respect of the debts of the principal debtor, A, to a creditor, C. The principal debtor applies some vitiating factor to the guarantor and the issue is whether the guarantee can be set aside as against the creditor. As will be seen, in two-party cases the role of independent legal advice is to protect B against the vitiating factor. Meanwhile, in three-party cases it has a dual role: to protect both B, against the effect of the vitiating factor, and C, against the risk of the transaction being set aside. Accordingly, the courts have adopted different approaches in two-party and three-party cases.

Ultimately, this article offers a reanalysis of these issues in light of a recent High Court decision which, at least at first glance, changes the law in this area in quite fundamental ways. Further, the framework proposed here – the two key questions – is new. Although previous cases and commentators have grappled with the question of understanding or emancipation, this has not been matched with the objective or subjective inquiry. Similarly, there has been no previous consideration of these questions across all of the general law vitiating factors in both two-party and three-party cases.

The article is structured as follows. Part II will summarise the facts and result in *Thorne* and the High Court's analysis of the independent advice issue. Part III will consider the two-party cases looking first at undue influence, then unconscionable conduct and then duress. Part IV of the article will consider the three-party cases. It will focus, first, on the *Yerkey* wives' special equity before turning to a detailed analysis of undue influence. Part V draws out the comparisons as between each and Part VI is a conclusion.

II *THORNE V KENNEDY*

Mr Kennedy was a wealthy Australian property developer. He met Ms Thorne online on a website for prospective brides. They were soon engaged. Ms Thorne came to Australia from the Middle East, where she had been living, to marry and make a new life with Mr Kennedy. She brought little with her and, apart from Mr Kennedy, arrived to even less. The primary judge found that if her relationship with Mr Kennedy ended, 'she would have nothing. No job, no visa, no home, no place, no community'.[11] From the outset of their relationship, Mr Kennedy had intimated to Ms Thorne that his money was for his adult children

10 For a different use of the terms 'two-party case' and 'three-party case', see Dominic O'Sullivan, 'Developing *O'Brien*' (2002) 118 *Law Quarterly Review* 337, 340.

11 *Thorne v Kennedy* (2017) 263 CLR 85, 90 [1] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) ('*Thorne*'), quoting *Thorne v Kennedy* [2015] FCCA 484, [91] (Judge Demack).

and that she would have to 'sign paper'.[12] However, it was not until 11 days before their wedding that he presented her with a binding financial agreement for signature. Mr Kennedy told Ms Thorne that if she did not sign then the wedding was off and their relationship over. A mere six days before the wedding, Ms Thorne received independent legal advice about the agreement. The advice was unequivocal: the agreement was 'terrible', the 'worst' the solicitor had ever seen and Ms Thorne should not sign it.[13] Notwithstanding this, Ms Thorne signed and the wedding went ahead. Just over a month later, Mr Kennedy required her to sign a further agreement in essentially the same form. Ms Thorne again received advice not to sign and, again, signed despite it. The marriage lasted nearly four years before it was ended by Mr Kennedy. Soon afterwards, Ms Thorne sought to have both agreements set aside on the grounds of duress, undue influence and unconscionable conduct.[14]

In *Thorne*, therefore, the High Court had the opportunity to consider in detail the role of independent legal advice in relation to each of these vitiating factors. However, in finding unanimously that the agreements could be set aside on the ground of unconscionable conduct and, by majority,[15] that they were also vitiated by undue influence, the Court gave this issue fairly limited consideration.

In relation to undue influence, the joint judgment of Kiefel CJ, Bell, Gageler, Keane and Edelman JJ quoted the *Restatement (Third) of the Law of Restitution and Unjust Enrichment*,[16] which identifies, as a circumstance universally relevant to proof of undue influence, 'the extent to which the transferor acted on the basis of independent advice'.[17] Their Honours suggested that a factor that may have prominence in the context of binding financial agreements in particular is 'the independent advice that was received and whether there was time to reflect on that advice'.[18] On the facts, their Honours noted that the significant gap between Ms Thorne's understanding of her solicitor's strong advice not to sign the agreements, and her actions in doing so, was 'capable of being a circumstance relevant to whether an inference should be drawn of undue influence'.[19]

In relation to unconscionable conduct, Gordon J considered that it was not a sufficient response to the conclusion of unconscionable conduct to point to the fact that Ms Thorne had received independent legal advice and had chosen to reject it on each occasion.[20] Further, and in line with the joint judgment, her Honour found that the fact that Ms Thorne was willing to sign both agreements

12 Ibid 91 [5] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), quoting *Thorne* [2015] FCCA 484, [33] (Judge Demack).

13 Ibid 93–4 [12], 105 [44] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), 123 [104], 128–9 [123] (Gordon J).

14 Ibid 94 [15] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

15 Kiefel CJ, Bell, Gageler, Keane and Edelman JJ deciding, Nettle J not deciding, and Gordon J dissenting.

16 American Law Institute, *Restatement (Third) of the Law of Restitution and Unjust Enrichment* (2011) § 15, comment (a).

17 *Thorne* (2017) 263 CLR 85, 110 [59] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

18 Ibid 111 [60].

19 Ibid 109 [56]. See also Rick Bigwood, 'The Undue Influence of "Non-Australian" Undue Influence Law on Australian Undue Influence Law: Farewell *Johnson v Buttress*? Part I' (2018) 35(1) *Journal of Contract Law* 56, 67.

20 *Thorne* (2017) 263 CLR 85, 128–9 [123] (Gordon J).

despite being advised that they were 'terrible' tended to 'underscore the extent of the special disadvantage under which she laboured, and to reinforce the conclusion that in these circumstances, which Mr Kennedy had substantially created, it was unconscionable for him to procure or accept her assent'.[21]

This point merits some emphasis. In *Thorne*, where the advice was not followed but ignored, independent advice was relevant not as an answer to the vitiating factors relied upon, but as an indicium of them.

Standing back from what was said expressly by the High Court and looking at the result in the case: the agreements were set aside for unconscionable conduct and, alternatively, undue influence, notwithstanding the receipt by Ms Thorne of competent and comprehensive independent legal advice. Significantly, that advice extended beyond an explanation of the terms of the agreements to also include advice on the impropriety of Ms Thorne signing them. In short, despite the unimpeachable nature of the advice, it was not enough to negate a finding of unconscionable conduct or undue influence. The advice could not ameliorate the effects of the vitiating factors or cure the defects in Ms Thorne's consent flowing from them.[22]

As to the two key questions posed in the introduction to this article, the High Court plainly took the view that, in relation to undue influence and unconscionable conduct, the purpose of independent advice is to emancipate the plaintiff from the vitiating factor – not merely to ensure the plaintiff's understanding of the transaction. Ms Thorne understood the agreements but she was still labouring under undue influence or a special disadvantage when she signed them. Further, the High Court appears to have adopted a subjective approach to the assessment of whether this purpose had been achieved – the Court was concerned with whether in fact Ms Thorne had been emancipated, not whether Mr Kennedy reasonably believed this to be the case.

The reaction of commentators to this aspect of *Thorne* has been to suggest that the decision turns on its head the role of independent legal advice. To this extent, the decision has been described as 'groundbreaking'.[23] It has also been asked whether the decision overrides the generally held view of independent advice so as to potentially infantilise plaintiffs by making them incapable of making decisions, even after advice.[24]

The decision seemingly casts doubt on the ability of contracting parties to protect themselves against the risk of their contract being set aside on the basis of a vitiating factor.[25] This may raise significant questions about what can be done to minimise this risk. Will transactions with those potentially labouring under a vitiating factor simply not be made?

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21 Ibid.

22 See, eg, Barnett, '*Thorne v Kennedy*: A Thorn in the Side' (n 2) 183, 192–3.

23 See, eg, Monica Blizzard, 'Court Rules Binding Financial Agreements Invalid', *KHQ Lawyers* (Blog Post, 15 November 2017) <https://www.khq.com.au/legal-blog/court-rules-binding-financial-agreements-invalid/>.

24 See, eg, Barnett, '*Thorne v Kennedy*: A Thorn in the Side' (n 2) 192–3.

25 Consider, for example, the observations of Professor Katy Barnett: see Katy Barnett, 'Thorn in the Side of Prenuptial Agreements? *Thorne v Kennedy*', *Opinions on High* (Blog Post, 4 December 2017) <https://blogs.unimelb.edu.au/opinionsonhigh/2017/12/04/barnett-thorne/>.

The decision may also have created some perverse incentives. It appears that the stronger the advice of a solicitor not to enter a transaction, the more likely it is that the advice will serve as evidence of a vitiating factor if the plaintiff nevertheless enters the transaction.[26] So arguably, a plaintiff having received very strong advice not to enter a transaction from which some advantage may be gained may proceed to do so knowing that their chances of having the agreement set aside are increased. Perversely then, strong negative advice might actually encourage entry into these transactions.

The decision might even be described as a return to the 'Romilly heresy', according to which the recipient of a large gift bore the onus of proving that the gift was made by the donor freely and with full understanding of the consequences.[27]

The balance of this article will consider whether these concerns are well-founded. In particular, it will consider whether, as a result of the express statements of the Court or the result, *Thorne* really is inconsistent with the generally held view of the role of independent legal advice. As will be seen, the answer is not the same for all vitiating factors. It should also be emphasised that *Thorne* is a two-party case: the party against whom the transaction was sought to be set aside was the party who had applied the vitiating factor. This was expressly noted in the joint judgment:

> [T]his case concerns only the presence of a vitiating factor between parties to an agreement. It is not concerned with the circumstances in which a person can take the benefit of a transaction procured by the duress, undue influence, or unconscionable conduct of a third party. Where the recipient is not a volunteer, the duress, undue influence, or unconscionable conduct of a third party raises additional issues.[28]

So an important further issue, also considered below, is the extent to which the approach in *Thorne* is capable of applying, or should apply, to three-party cases.

III TWO-PARTY CASES

This Part considers the two key questions posed in the introduction to this article in relation to undue influence, unconscionable conduct and duress. It considers: what is the law? What should the law be? And, how does *Thorne* compare? As will be seen, the overriding principle in these cases is that the receipt of independent advice protects the plaintiff.

A Undue Influence

It is generally well-established that undue influence is concerned with the plaintiff's lack of free will. This is to say, the plaintiff is not a free agent because

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26 Ibid.

27 As to the 'Romilly heresy', see Murray Brown, 'Undue Confusion over *Garcia*!' (2009) 3(1) *Journal of Equity* 72, 81 ('Undue Confusion').

28 *Thorne* (2017) 263 CLR 85, 97 [25] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) (citations omitted).

of the dominant influence of – or, an excessive dependence upon – another. Therefore, his or her entry into the transaction is not the product of the exercise of free will or an independent or voluntary judgement.[29]

Proof that the plaintiff received independent legal advice may be relevant to establishing actual or presumed undue influence. However, most often, in two-party cases it will be relied upon as evidence to rebut a presumption of undue influence.[30] In such cases, depending on its nature and content, independent legal advice may merely ensure that the plaintiff understands the transaction. Advice which explains the transaction may serve this purpose. However, it may also have the effect that the plaintiff enters the transaction freely, emancipated from undue influence. Advice which extends to the propriety – the prudence or wisdom – of entering the transaction may achieve this purpose.

So what is the law? To rebut a presumption of undue influence in a two-party case, is it enough that the advice merely aids the plaintiff's understanding or must it emancipate the plaintiff from the influence? And, is this assessed from the plaintiff's or the defendant's point of view? In other words, must the plaintiff in fact be emancipated or is it sufficient that the defendant reasonably believes this to be so?

It is fairly well-settled that what is required is emancipation and that this is assessed subjectively. This emerges from English and Australian authorities dating back hundreds of years.[31] For example, in *Credit Lyonnais Bank Nederland v Burch*,[32] Millett LJ that in order to rebut the presumption of undue influence in a two-party case it is not sufficient that the plaintiff merely understands the transaction. This will not protect the plaintiff from undue influence. Instead, the court will examine the advice given and must be satisfied that the plaintiff was free from undue influence or that the receipt of advice placed the plaintiff in an equivalent position. Accordingly, the advice must extend to the propriety of the transaction. Further, the plaintiff must act on the advice, otherwise there is the risk that the same influence which produced the

29 Ibid 99–100 [31] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), 119 [87], 120–2 [91]–[93] (Gordon J) and cases there cited.

30 Not least because it is relatively difficult to succeed in a plea of actual undue influence. For example, in *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, Slade LJ observed at 953: 'In the majority of reported cases on undue influence successful plaintiffs appear to have succeeded in reliance on the presumption'.

31 In England, see *Huguenin v Baseley* (1807) 14 Ves Jun 273, 300 (Lord Eldon LC); *Allcard v Skinner* (1887) 36 Ch D 145, cited in *Powell v Powell* [1900] 1 Ch 243, 247 (Farwell J). As later developed, see also *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127, 134–6 (Lord Hailsham LC); *Permanent Trustee Company of NSW v Bridgewater* [1936] 3 All ER 501, 506 (Lord Russell). For a more recent summary of the principle see, eg, *Credit Lyonnais Bank Nederland v Burch* [1997] 1 All ER 144, 156 (Millett LJ). In Australia, see, eg, *Quek v Beggs* (1990) 5 BPR 11,761 (McLelland J). Also, in New Zealand, see *Brusewitz v Brown* [1923] NZLR 1106. Cf the discussion at n 42 below.

32 [1997] 1 All ER 144, 156 (Millett LJ):

> Accordingly, the presumption cannot be rebutted by evidence that the complainant understood what she was doing and intended to do it. The alleged wrongdoer can rebut the presumption only be showing that the complainant was either free from any undue influence on his part or had been placed, by the receipt of independent advice, in an equivalent position. That involves showing that she was advised as to the propriety of the transaction by an adviser fully informed of all the material facts.

desire to enter the transaction also caused the plaintiff to disregard the advice.[33] Similarly, in *Inche Noriah v Shaik Allie Bin Omar*,[34] the Privy Council insisted that to rebut a presumption of undue influence the advice must be such as a competent and honest adviser would give if acting solely in the interests of the plaintiff, and that the advice must place the plaintiff in as good a position as if he or she were in fact emancipated.[35] There is also existing authority that independent advice not to enter a transaction, if not followed, will not rebut a presumption of undue influence.[36]

This approach is also supported by commentators.[37] For example, Carter notes that in order to rebut a presumption of undue influence the defendant must establish that the transaction is the result of a free exercise of the plaintiff's will.[38] Similarly, Edelman and Bant argue that independent advice must be effective in order to emancipate the plaintiff from undue influence.[39] Further, numerous commentators accept that the advice must extend to the propriety of the plaintiff entering the transaction in order to have this effect.[40]

It is submitted that this is also what the law should be. The law should require emancipation, rather than mere understanding, and this should be assessed subjectively. Unless it can be demonstrated, in a two-party case, that the plaintiff was in fact emancipated from the defendant's influence, the law will fail to properly protect the plaintiff. This is so whether the relationship between the parties falls into a category of relationship giving rise to a presumption of undue influence, a case where the plaintiff has established that the defendant came to occupy or assume a position of ascendancy such that the presumption then arises or where actual undue influence is pleaded.[41]

Thorne takes the same approach. The analysis of the High Court, insisting as it does on emancipation rather than mere understanding and assessed subjectively, is consistent with both the existing state of the law and what the law should be.[42]

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33 Ibid 156 (Millett LJ).

34 [1929] AC 127.

35 Ibid 136 (Lord Hailsham LC).

36 See Sneddon, 'Unfair Conduct' (n 6) 326–7, citing *Powell v Powell* [1900] 1 Ch 243, 246 (Farwell J).

37 See, eg, Belinda Fehlberg, 'The Husband, the Bank, the Wife and Her Signature' (1994) 57(3) *Modern Law Review* 467, 473; Peter Birks and Chin Nyuk Yin, 'On the Nature of Undue Influence' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1995) 57, 75; Simone Wong, 'No Man Can Serve Two Masters: Independent Legal Advice and Solicitor's Duty of Confidentiality' [1998] (November/December) *Conveyancer and Property Lawyer* 457, 462 ('No Man Can Serve Two Masters'). See more recently, eg, Murray Brown, 'The Bank, the Wife and the Husband's Solicitor' (2007) 14(2) *Australian Property Law Journal* 147, 158 ('The Bank, the Wife').

38 JW Carter, LexisNexis, *Carter on Contract* (online at 28 April 2019) [24-110].

39 James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 238–40.

40 See, eg, Belinda Fehlberg, 'The Husband, the Bank, the Wife and Her Signature: The Sequel' (1996) 59(5) *Modern Law Review* 675, 686. See also Wong, 'No Man Can Serve Two Masters' (n 37) 464; Sneddon, 'Unfair Conduct' (n 6) 321–4.

41 See, eg, *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, 953 (Slade LJ). See generally JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies* (LexisNexis, 5th ed, 2015) 487–93.

42 It might be argued that the approach taken by the plurality in *Thorne* does, or has, departed from earlier authorities in respect of other aspects of the jurisdiction. For example, Dixon J in *Johnson v Buttress*

B Unconscionable Conduct

The elements of unconscionable conduct can be stated as follows: the plaintiff is subject to a special disadvantage and the defendant, with knowledge, takes unconscientious advantage of that disadvantage.[43] The receipt of independent advice by the plaintiff may be relevant, or provide an answer to, any of the elements of unconscionable conduct. However, it is most likely to bear upon: first, whether or not the plaintiff was suffering from a special disadvantage; and secondly, whether the defendant took unconscientious advantage of that disadvantage.[44]

In relation to the first of these elements, the plaintiff's special disadvantage may arise from personal or situational characteristics of the plaintiff.[45] It is settled that for the disadvantage to be 'special' it must render the plaintiff seriously unable to make a worthwhile judgement as to his or her own best interests.[46] Where the special disadvantage is of a kind which precludes or diminishes the plaintiff's capacity to *understand* the transaction – for example, lack of education, ignorance, limited English or lack of business acumen or experience – independent legal advice which *explains* the transaction may have the effect of allowing the plaintiff understanding which would then emancipate the plaintiff from the special disadvantage.[47] In these cases, independent legal advice simultaneously achieves the purpose of ensuring the plaintiff understands the transaction and of emancipating the plaintiff from the special disadvantage. On

(1936) 56 CLR 113 described the legal burden placed on the influential party as requiring that it be shown that the subordinate party's decision to enter the transaction was an independent act based on free judgment, well understood, *and* 'based *on information as full as that of the donee*': at 134 (emphasis added). This conception then imbues the jurisdiction with a 'fiduciary character' that is, arguably, absent from the joint judgment in *Thorne*. Further consideration of this issue is beyond the scope of this article. Notwithstanding, it does not change the thesis advanced here.

43 See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J) ('*Amadio*') and particularly *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 439–40 [161] (the Court) ('*Kakavas*'). See also *Thorne* (2017) 263 CLR 85, 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), 115–6 [74] (Nettle J), 125 [110] (Gordon J). Cf *Amadio* (1983) 151 CLR 447, 474 (Deane J). See also, eg, Hayden Fielder, 'Unconscionable Conduct in Equity and Under Statute: The *Australian Consumer Law* and the *Lux* Decision' (2015) 23(3) *Australian Journal of Competition and Consumer Law* 161, 162, 165.

44 See, eg, *Wu v Ling* [2016] NSWCA 322, [15]–[20] (Leeming JA), where the receipt of advice was significant in finding that the defendant had not taken unconscientious advantage of the plaintiff.

45 See *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2000] FCA 1376, [122] (French J); *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301, 322–3 [64]–[66] (the Court). Gummow and Hayne JJ noted this distinction between 'situational' and 'constitutional' disadvantages, though did not positively approve or disapprove of it, in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 75 [48].

46 See particularly *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 62 [5], 64 [12] (Gleeson CJ), 76–7 [55] (Gummow and Hayne JJ), 115 [184] (Callinan J) and the cases cited therein; *Thorne* (2017) 263 CLR 85, 103 [38], 112 [64] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) 117 [81], 126 [113] (Gordon J). See also *Amadio* (1983) 151 CLR 447, 461–2 (Mason J).

47 See, eg, Fielder (n 43) 165.

the other hand, where – as in *Thorne*[48] – the special disadvantage is the effect on the plaintiff of some relationship of influence, advice which merely explains the transaction is unlikely to emancipate the plaintiff from the special disadvantage. As seen above, the advice most likely to achieve that purpose is advice as to the propriety of the transaction. Further, there will be some kinds of, particularly situational, special disadvantage for which no advice can assist or emancipate – for example, a perilous financial situation.[49]

In relation to the second element, the defendant's unconscientious taking advantage of the plaintiff's special disadvantage, whether independent legal advice provides an answer will again depend on the nature of the special disadvantage and the nature of the advice.[50] For example, where the plaintiff's special disadvantage has the effect that the plaintiff does not understand the transaction, and the plaintiff receives advice which explains the transaction, then that advice might provide an answer to this element of unconscionable conduct. But where, for example, undue influence supplies the special disadvantage, advice explaining the transaction, but doing no more, may not.

Of course, to defeat a claim of unconscionable conduct, the defendant need only establish that the receipt of independent legal advice provides an answer to *one* of the elements.[51]

So what is the law? Again, is it enough that the advice merely aids the plaintiff's understanding or must it emancipate the plaintiff? And, is this assessed from the plaintiff's or the defendant's point of view? Must the plaintiff in fact be emancipated or is it sufficient that the defendant reasonably believes this to be so?

Commercial Bank of Australia Ltd v Amadio ('*Amadio*') remains a leading authority on unconscionable conduct in Australia. In that case, Mason J, Deane J and Wilson J found that the bank officer was bound to ensure that the Amadios understood the transaction by advising them to seek independent advice or at least allowing them the opportunity to do so.[52] This appears to focus on the plaintiff's understanding – although it must be noted that the plaintiffs' special disadvantage in *Amadio* was largely one of lack of understanding. However, Deane J also employed language consistent with the test for the adequacy of advice being whether there was 'any reasonable degree of equality' between the parties.[53] This may suggest that what is required is emancipation from the special disadvantage and that this is objectively assessed. The subsequent cases have not reached a consistent position. There have been several decisions insisting that

48 Kiefel CJ, Bell, Gageler, Keane and Edelman JJ took the view that the fact that the plaintiff was labouring under undue influence also supplied the special disadvantage for the purposes of unconscionable conduct: see *Thorne* (2017) 263 CLR 85, 103–4 [40].

49 Consider *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2000] FCA 1376, [122] (French J); *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301, 322–3 [64]–[66] (the Court).

50 Again, the receipt of independent advice was significant in reasoning that the defendant had not taken unconscientious advantage of the plaintiff in *Wu v Ling* [2016] NSWCA 322, [15]–[20] (Leeming JA).

51 See generally Sneddon, 'Lenders and Independent Solicitors' Certificates' (n 1) 11.

52 *Amadio* (1983) 151 CLR 447, 464, 466 (Mason J), 468–9 (Wilson J), 472, 476 (Deane J).

53 Ibid 474, 477 (Deane J).

independent advice must actually address the substance of what would otherwise be the impact of the special disadvantage.[54] These decisions support a subjective approach.

Given this uncertainty, it becomes even more important to ask: what *should* the law be? In relation to the special disadvantage element of unconscionable conduct, it is submitted that, in order to properly protect the plaintiff, independent legal advice should emancipate the plaintiff from the special disadvantage and it should do so in fact.[55] Following, whether or not the plaintiff has been emancipated should be assessed subjectively and from the plaintiff's point of view. This treats unconscionable conduct, so far as concerns the special disadvantage element, in the same way as undue influence in two-party cases. This is appropriate because both undue influence and the special disadvantage element of unconscionable conduct are concerned with the effect on the plaintiff of particular facts and circumstances. Indeed, it was observed in *Thorne* that undue influence may itself supply the special disadvantage.[56] As seen, the nature of the advice necessary to achieve the plaintiff's emancipation will depend on the nature of the plaintiff's special disadvantage and may need – as with undue influence – to extend to the propriety of the transaction.

In relation to the unconscientious taking advantage element of unconscionable conduct, it is submitted that a different approach is justified. This element is concerned with what the defendant did, or failed to do, having knowledge of the plaintiff's special disadvantage. For this reason, it is submitted that it is appropriate to approach the role of advice from the perspective of the defendant. To ensure the proper protection of the plaintiff, the question should still be whether the plaintiff has been emancipated from the special disadvantage rather than whether the plaintiff merely understood the transaction. However, this should be assessed from the defendant's point of view. The question should be whether the defendant *believed* that the plaintiff was emancipated from the special disadvantage rather than whether the plaintiff actually was. Further, this should be an objective enquiry: did the defendant believe *on reasonable grounds* that the plaintiff was emancipated?[57] If the defendant did so believe, because of the receipt of independent legal advice, then the defendant's conscience will not be affected and there will have been no unconscientious taking advantage of the plaintiff's special disadvantage.[58]

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54 See, eg, *Aboody v Ryan* (2012) 17 BPR 32,359, 32,378 [80] (Allsop P).

55 Cf Sneddon, 'Lenders and Independent Solicitors' Certificates' (n 1) 11; Sneddon, 'Unfair Conduct' (n 6) 319–20; Fielder (n 43) 166.

56 See *Thorne* (2017) 263 CLR 85, 99–102 [30]–[36] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

57 Cf Sneddon, 'Lenders and Independent Solicitors' Certificates' (n 1) 11; Sneddon, 'Unfair Conduct' (n 6) 320; Fielder (n 43) 156.

58 This is consistent with the judgment of the High Court in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 439–40 [161] (the Court), in which it was held that, for the jurisdiction to be engaged, the defendant must have, *with knowledge*, exploited the special disadvantage. That is to say, knowledge is necessarily a precondition of exploitation such that the plaintiff will fail to discharge the legal burden where the defendant can rely on the plaintiff's receipt of independent advice to successfully prove that they thought the plaintiff was not labouring under – that is, had been *emancipated from* – the special disadvantage. Given the approach advanced here dictates an objective inquiry, it is consistent whether

How does *Thorne* compare? It is submitted that the case is consistent with this analysis of what the law should be, at least in relation to the special disadvantage element. It is noted that only Gordon J considered the role of advice as regards unconscionable conduct. As seen, her Honour – consistent with the approach advanced here – required that the plaintiff was emancipated in fact from her special disadvantage. However, Gordon J did not expressly consider the role of advice in relation to the unconscientious taking advantage element. This is an essential part of the analysis because, if the receipt of independent advice provides an answer to this element, it need not also provide an answer to the special disadvantage element. Again, to successfully defend a claim of unconscionable conduct, the defendant need only defeat one – and any one – of the elements. In particular, Gordon J did not explicitly address whether it would be sufficient that the defendant believed, on reasonable grounds, that the plaintiff was emancipated from their special disadvantage given the receipt of advice. Nevertheless, her Honour reasoned that Ms Thorne's special disadvantage arose out of circumstances known to and partly created by Mr Kennedy. It may be implicit in this that her Honour considered that Mr Kennedy could *not* have believed on reasonable grounds that the advice received by Ms Thorne had emancipated her from her special disadvantage.[59] That reasoning is consistent with the approach proposed in this article.

C Duress

Turning to duress, this vitiating factor is concerned with the effect on the plaintiff of a particular kind of pressure. In two-party duress cases, the defendant applies pressure to the plaintiff, usually by means of a threat, which reduces the plaintiff's options. The plaintiff has an absence of reasonable choice. He or she has no other practical option or reasonable alternative open. The plaintiff is confronted with an unfair choice situation and is compelled to act. He or she is unwilling to submit to the defendant's demand but, in the circumstances, does so.[60]

Kakavas is interpreted as requiring either actual or constructive notice. Compare *Wilkinson v ASB Bank Ltd* [1998] 1 NZLR 674, 695:

> I prefer that approach to one which implies that the taking of the necessary steps puts the creditor "off notice", as some of the English cases put it; albeit the concept of going off notice may be a convenient shorthand expression. The notice, actual or constructive, is the reason why the creditor's conscience is affected and remains affected in equity until the equitable duty arising from the notice is satisfied.

59 See *Thorne* (2017) 263 CLR 85, 128 [119]–[122] (Gordon J).

60 In England see, eg, *Barton v Armstrong* [1976] AC 104, 121 (Lord Wilberforce and Lord Simon), cited with approval in *Pao On v Lau Yui* [1980] AC 614, 635 (Lord Scarman). See also *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366, 384 (Lord Diplock), 400 (Lord Scarman). In Australia, see *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40, 45–6 (McHugh JA). See also Rick Bigwood, 'Throwing the Baby out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales' (2008) 27(2) *The University of Queensland Law Journal* 41, 51–3. For earlier commentary see MP Sindone, 'The Doctrine of Economic Duress: Part 1' (1996) 14(1) *Australian Bar Review* 34, 58; Matthew DJ Conaglen, 'Duress, Undue Influence, and Unconscionable Bargains: The Theoretical Mesh' (1999) *New Zealand Universities Law Review* 509, 513. See generally also K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's*

In particular, it is the plaintiff's *circumstances* which give rise to this absence of reasonable choice. This is important because the receipt of independent legal advice by the plaintiff usually cannot alter those circumstances. It cannot expand the plaintiff's choices[61] or do anything to 'eliminate the invidious choice the plaintiff is being compelled to make between two unpalatable alternatives'.[62] So, generally, advice cannot emancipate the plaintiff from duress. It might, however, inform the plaintiff and ensure the plaintiff's understanding of the transaction.

What is the law? Again, in relation to duress, is it enough that the advice merely aids the plaintiff's understanding or must it emancipate the plaintiff from the pressure? And, is this assessed from the plaintiff's or the defendant's point of view?

These questions do not appear to have come squarely before the courts. So again, it is important to consider what the law should be. It is submitted that, consistent with the analysis in relation to undue influence and unconscionable conduct, in order to properly protect the plaintiff the advice must actually emancipate the plaintiff from the duress. However, for the reasons identified above, advice will rarely be capable of doing this. Unless advice can increase the plaintiff's choices it cannot remove the effects of the pressure.[63] It follows that advice will not often provide an answer to a claim to set aside a transaction on the ground of duress.[64]

How does *Thorne* compare? None of the judgments considered the role of independent advice in relation to duress. However, the Full Court of the Family Court held that because, inter alia, Ms Thorne had received independent legal advice she had not been subject to duress.[65] It is respectfully submitted that this analysis should be rejected. This is because nothing said to Ms Thorne by her solicitor expanded her choices and so could not have resulted in her emancipation from the pressure to which she was subject.

Restitution Law in Australia (LexisNexis Butterworths, 3rd ed, 2016) 221 [521]; Carter (n 38) [23-020]; Edelman and Bant, *Unjust Enrichment* (n 39) 198, 201.

61 See, eg, MP Sindone, 'The Doctrine of Economic Duress: Part 2' (1996) 14 *Australian Bar Review* 114, 132.

62 See, eg, Parkinson (n 9) 15. See also Sneddon, 'Unfair Conduct' (n 6) 326.

63 An analogy can be drawn here with unconscionable conduct and, in particular, special disadvantages that are 'situational' in character. It has been judicially observed that such disadvantages cannot be overcome by the provision of legal advice: see, eg, *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2000] FCA 1376, [122] (French J), cited by Gummow and Hayne JJ in the subsequent appeal to the High Court: *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 75 [48]. See further discussion above at Part III(B).

64 To this, it may be responded that independent advice might, in some cases, inform the plaintiff as to choices that the plaintiff had not previously considered or been aware of. And, one or some of those choices may be reasonable such that the plaintiff is no longer confronted with the invidious choice giving rise to duress: see, eg, *Pao On v Lau Yiu Long* [1980] AC 614. However, it would be a rare case in which the *advice itself* could expand the plaintiff's choices and thereby relieve the plaintiff of the pressure, rather than the advice merely educating the plaintiff as to facts of which they were previously unaware.

65 *Kennedy v Thorne* [2016] FamCAFC 189, [167] (the Court).

IV THREE-PARTY CASES

This Part examines the three-party cases. Perhaps the paradigm three-party case is that of the surety wife. A wife provides a personal guarantee to a bank in relation to the debts of her husband or a corporation he controls. The husband applies a vitiating factor to the wife – for example, undue influence – and the issue is whether, on that basis, the wife can set aside the guarantee as against the bank. Many cases of this kind came before Australian and English courts in the 1980s and 1990s. As will be seen, the responses of the courts in Australia and England were not identical. However, the courts in each jurisdiction did agree that the considerations which apply in these, and other, three-party cases are different from those that apply in two-party cases. Accordingly, that a different approach from that taken in two-party cases was justified. As discussed below, this may well be true in relation to undue influence and the peculiarly Australian vitiating factor, the *Yerkey* wives' special equity. However, it is suggested that in relation to unconscionable conduct and duress the approach taken to the role of independent advice should be the same in all cases – both two-party and three-party.

A Unconscionable Conduct and Duress

As to unconscionable conduct, it ought to be noted that a case in which the plaintiff relies on this vitiating factor is more likely to be a two-party than a three-party case. This is because, even where a plaintiff suffering from a special disadvantage can demonstrate unconscientious advantage-taking by a third party, the plaintiff is more likely to argue that the defendant itself – rather than the third party – engaged in unconscionable conduct.[66] That is to say, the plaintiff will rely on the defendant's own knowledge and unconscientious advantage-taking to make out unconscionable conduct, rather than alleging that the third party's conduct gave rise to an equity to which the defendant must take subject. It follows that the analysis of unconscionable conduct above, in relation to two-party cases, should also apply here. To repeat, in order to defeat the first element, the defendant must prove that the receipt of independent legal advice by the plaintiff in fact emancipated him or her from the special disadvantage. However, in order to defeat the second element, the defendant need only prove that it believed on reasonable grounds that the plaintiff had been emancipated from the special disadvantage.

As to duress, it is accepted that pressure applied to the plaintiff by a third party can provide a basis for setting aside a transaction as between the plaintiff and the defendant.[67] Nevertheless, and as with unconscionable conduct, the same

66 Sneddon, 'Unfair Conduct' (n 6) 318.

67 See, eg, Carter (n 38) [23-220]. Cf, eg, *Smith v William Charlick Ltd* (1924) 34 CLR 38, 56 (Isaacs J). It might be argued that such a case engages the jurisdiction of unconscionable conduct and not duress because the defendant itself is not applying pressure and is instead, relevantly, exploiting a condition of special disadvantage. This matter is beyond the scope of the article but does not affect the analysis here. There may also be cases in which the defendant applies pressure to a third party and thereby catches a bargain from the plaintiff. These cases are properly characterised as two-party duress cases. The pressure

analysis should apply in both two-party and three-party cases. In all cases, independent legal advice should have a limited role because it cannot usually increase the plaintiff's choices and so cannot emancipate the plaintiff from duress.

For these reasons, the balance of this Part considers the two key questions posed in the introduction to this article in relation to just two vitiating factors: the *Yerkey* wives' special equity and undue influence.

B The *Yerkey* Wives' Special Equity and Undue Influence

In three-party cases – and surety wife cases in particular – the courts have repeatedly pointed to the need to balance competing policy considerations. It is this need which is said to justify a different approach. These competing considerations were identified by Lord Browne-Wilkinson in *Barclays Bank plc v O'Brien* ('*O'Brien*')[68] and repeated by the House of Lords in *Royal Bank of Scotland plc v Etridge [No 2]* ('*Etridge [No 2]*').[69] The same considerations have been identified in Australian decisions.[70] On one side is the need to protect wives and other vulnerable parties. On the other is the need to ensure that guarantees and similar securities provided by such parties continue to be available, that wealth tied up in the matrimonial home does not become economically sterile and that loan capital continues to flow so that small businesses may survive and thrive.[71] It has also been suggested that, in striking this balance, the courts must not impose unduly burdensome requirements but should endeavour to minimise compliance costs as well as the costs of contract failure.[72] Further, the courts should aim for a measure of certainty.[73] It might be asked whether these policies are appropriate and whether courts are best placed to decide what policy considerations should be taken into account or the weight to be given to them. As will be seen, there is also a real question whether the courts have yet achieved a satisfactory balance.[74] What is clear, however, is that in three-party cases the role of independent advice is not just to protect the plaintiff. The receipt of advice also protects the defendant from the risk of having the transaction set aside on the basis of a vitiating factor applied by a third party.

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applied to the third party by the defendant, in effect, exerts pressure on the plaintiff. The relevant pressure is still that exerted on the plaintiff by the defendant: see, eg, *Williams v Bayley* (1866) LR 1 HL 200.

68 [1994] 1 AC 180, 188 ('*O'Brien*').

69 [2002] 2 AC 773, 793 [2] (Lord Bingham), 801 [37] (Lord Nicholls) ('*Etridge [No 2]*').

70 See, eg, KN Scott, 'Evolving Equity and the Presumption of Undue Influence' (2002) 18(2) *Journal of Contract Law* 236, 237.

71 See, eg, Mark Giancaspro, '"I Now Pronounce You … in a State of Uncertainty": Contemporary Treatment of the Wives' Special Equity and a Plan for the Future' (2017) 11(1) *Journal of Equity* 80, 102. See also, eg, Fehlberg, 'The Husband, the Bank, the Wife and Her Signature: The Sequel' (n 40) 677.

72 See, eg, Anthony J Duggan, 'Till Debt Us Do Part: A Note on *National Australia Bank Ltd v Garcia*' (1997) 19(2) *Sydney Law Review* 220, 222; Elizabeth Stone, 'The Distinctiveness of *Garcia*' (2006) 22(2) *Journal of Contract Law* 170, 170.

73 See, eg, Jenni Millbank and Jenny Lovric, 'Relationship Debt and Guarantees: Best Practice v Real Practice' (2004) 15(2) *Journal of Banking and Finance Law and Practice* 89, 112.

74 Ibid 112–13. See also, eg, Fehlberg, 'The Husband, the Bank, the Wife and Her Signature' (n 37) 474; Fehlberg, 'The Husband, the Bank, the Wife and Her Signature: The Sequel' (n 40) 693–4.

It will not be every case in which the application of a vitiating factor by a third party to the plaintiff provides a basis for setting aside the transaction between the plaintiff and the defendant. So the question is: in which cases will it do so? The answer is different in *Yerkey* wives' special equity cases and in undue influence cases. However, it has been elsewhere argued that whatever the vitiating factor, the ultimate question is whether the defendant *took the risk* of the plaintiff's consent to enter the transaction being impaired.[75] As will be seen, the steps required of the defendant go to this question.

1 Yerkey Wives' Special Equity

What follows considers the existing state of the law, then what the law should be and finally whether – if at all – *Thorne* has changed the law.

(a) What Is the Law?

Yerkey was a volunteer surety wife case.[76] Mr Jones agreed to buy a poultry farm from the Yerkeys with part of the purchase price secured by a second mortgage over a property owned by Mrs Jones. Mrs Jones agreed to provide the mortgage while under some pressure from her husband. That pressure did not amount to undue influence. The situation deteriorated and Mrs Jones sought to have the mortgage set aside as against the Yerkeys. When the case reached the High Court, Dixon J (writing the leading judgment) distinguished two classes of case. The first was cases in which a wife, 'alive to the nature and effect of the obligation she is undertaking, is procured to become her husband's surety by the exertion by him upon her of undue influence, affirmatively established'.[77] The second class was cases where the wife 'does not understand the effect of the document or the nature of the transaction of suretyship'.[78]

For each class of case, the issue is the same: whether the wife's transaction with the bank can be set aside because of the actual undue influence applied by the husband (in the first class of case) or the wife's lack of understanding (in the second). In other words, does the equity arising in the wife's favour, as a result of the undue influence or lack of understanding, prevail against the bank? Further, what can the bank do to avoid this? Dixon J explained that the answer to these questions differs as between the two classes of case. In the first class: 'Nothing but independent advice or relief from the ascendancy of her husband over her judgment and will would suffice'.[79] However, in the second class, the bank need only take 'adequate steps' to inform the wife and, if the bank 'reasonably supposes that she has an adequate comprehension of the obligations she is

75 James Edelman and Elise Bant, 'Setting Aside Contracts of Suretyship: The Theory and Practice of Both Limbs of *Yerkey v Jones*' (2004) 15(1) *Journal of Banking and Finance Law and Practice* 5, 11–19.

76 The balance of this section focuses on such transactions. Further examination of the relevant differences, if any, between three-party volunteer transactions and three-party transactions for value is not pursued here. See generally Pauline Ridge, 'Third Party Volunteers and Undue Influence' (2014) 130 (January) *Law Quarterly Review* 112.

77 *Yerkey v Jones* (1939) 63 CLR 649, 684 (Dixon J) ('*Yerkey*').

78 Ibid.

79 Ibid.

undertaking and an understanding of the effect of the transaction', then 'the fact that she has failed to grasp some material part of the document, or, indeed the significance of what she is doing, cannot … in itself give her an equity to set it aside'.[80] Further:

> [I]f the wife has been in receipt of the advice of a stranger whom the creditor believes on reasonable grounds to be competent, independent and disinterested, then the circumstances would need to be very exceptional before the creditor could be held bound by any equity which otherwise might arise from the husband's conduct and the wife's actual failure to understand the transaction.[81]

However, in relation to these cases, Dixon J also said that the ultimate question is 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'.[82]

It is clear from this that Dixon J did not envisage, in either class of case, that *only* independent legal advice could provide an answer to the wife's claim to set aside the transaction. However, his Honour clearly recognised that advice can play a significant role. Specifically, in lack of understanding cases the purpose of independent advice is to ensure that the wife *understands* the transaction. This is obvious because the wife's vulnerability in these cases is her lack of understanding. This is what vitiates her consent to the transaction. So in ensuring the wife's understanding of the transaction, the independent legal advice emancipates the wife from her vulnerability. In these cases, there is no competition between the two possible purposes – ensuring understanding and ensuring emancipation – of independent advice. By achieving the former, the receipt of advice also achieves the latter.

In lack of understanding cases, the understanding – and therefore emancipation – of the wife is undoubtedly assessed objectively. The inquiry is viewed from the bank's perspective and the bank need only believe on reasonable grounds that the advice received was competent, independent and disinterested. The bank is not required to prove that, in fact, the wife understood the transaction.

In undue influence cases, it is somewhat unclear from Dixon J's dicta whether independent advice, if relied upon, must emancipate the wife from undue influence or whether it is sufficient for the advice to educate. Dixon J's use of 'or' between 'independent advice' and 'relief from ascendancy' might be interpreted to mean 'or other' so that whatever means is used – be it advice or something else – the end sought to be achieved is the relief of the wife from the ascendancy of her husband. On the other hand, the 'or' might be interpreted to distinguish between steps other than independent advice, which must relieve the wife from the ascendancy of her husband, and independent advice, which need not. However, it seems unlikely that this is what Dixon J intended. His Honour's

80 Ibid 685 (Dixon J).
81 Ibid 685–6 (Dixon J).
82 Ibid (Dixon J) (emphasis added).

later reference to whether the transaction was 'fairly obtained and executed' suggests a concern for emancipation rather than mere understanding. It is noted that various commentators argue that it is implicit in this part of Dixon J's judgment that for independent advice to be effective it must 'neutralise the influence'[83] and emancipate the wife from her husband's influence.[84] For this reason, the advice must go beyond explanation and encompass the propriety of the wife entering the transaction.[85]

Whether an objective or subjective approach applies in undue influence cases is less clear from the language used by Dixon J. However, it is submitted that for consistency, and for the reasons discussed further below,[86] the approach in these cases should also be objective.

The *Yerkey* wives' special equity was considered again by the High Court some 60 years later in *Garcia v National Australia Bank* ('*Garcia*').[87] By majority, Kirby J dissenting, the Court confirmed that the equity continued to exist despite changed societal conditions. The focus of the Court, however, was the class of cases where the wife did not understand the transaction, rather than undue influence cases. Gaudron, McHugh, Gummow and Hayne JJ defined the elements of these cases as follows:

> (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.[88]

The rationale for affirming the equity was that, in these circumstances, it would be 'unconscionable' for the bank to enforce the transaction.[89]

Gaudron, McHugh, Gummow and Hayne JJ also considered the role of independent advice in these cases. Following Dixon J in *Yerkey*, their Honours explained that a bank can 'readily avoid the possibility that the wife will later claim not to have understood the purport and effect of the transaction' if the bank 'itself explains the transaction sufficiently or *knows* that the surety has received "competent, independent and disinterested" advice from a third party'.[90] Earlier, their Honours had described *Yerkey* as holding that it would be unconscionable for the bank to enforce the transaction against the wife if it 'took no steps itself to

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83 Stone (n 72) 176.

84 Brown, 'Undue Confusion' (n 27) 93; Brown, 'The Bank, the Wife' (n 37) 158. See also Sneddon, 'Unfair Conduct' (n 6) 312; Giancaspro (n 71) 103.

85 See, eg, Sneddon, 'Unfair Conduct' (n 6) 321–4; Sneddon, 'Lenders and Independent Solicitors' Certificates' (n 1) 22–4; Brown, 'Undue Confusion' (n 27) 93–4; Brown, 'The Bank, the Wife' (n 37) 158–9.

86 See Part IV(B)(2)(b).

87 (1998) 194 CLR 395 ('*Garcia*').

88 Ibid 409.

89 Ibid. The joint judgment explained that 'unconscionable' characterises 'the result' rather than identifying 'the reasoning that leads to the application of that description': see 409–10 [34].

90 Ibid 411 (Gaudron, McHugh, Gummow and Hayne JJ) (emphasis added).

explain its purport and effect to her or did not *reasonably believe* that its purport and effect had been explained to her by a competent, independent and disinterested stranger'.[91] It is to be noted that, in stating the steps that the bank must take, their Honours did not use the language of reasonable belief. This has led at least one commentator to suggest that, in *Yerkey* lack of understanding cases, *Garcia* requires the bank to prove that the wife *actually* understood the transaction – in other words, that whether the wife was emancipated from her lack of understanding is assessed *subjectively*.[92] Brown argues that *Garcia* is therefore tainted by the 'Romilly heresy' that was mentioned earlier.[93] However, it is submitted that Gaudron, McHugh, Gummow and Hayne JJ in *Garcia* clearly intended to follow *Yerkey* – there is nothing else in *Garcia* to suggest that their Honours sought to make a fundamental change in approach, from objective to subjective, when assessing emancipation. So, it is submitted, the better view is that *Garcia*, like *Yerkey*, requires that in lack of understanding cases independent advice must emancipate the wife[94] and that this is assessed objectively.

(b) What Should the Law Be?

For the reasons set out below in relation to undue influence,[95] it is submitted that in *Yerkey* wives' special equity cases the law should require that independent advice emancipate the plaintiff; and that the advice should be assessed objectively from the point of view of the defendant. This approach is required, it is submitted, in order to properly protect the plaintiff and simultaneously best strike a balance between the competing policy considerations at play in three-party cases.

(c) How Does Thorne Compare?

Recall that Thorne was a two-party case, not a three-party case – Ms Thorne sought to set aside the agreements against the party who had applied the vitiating factors, Mr Kennedy. For this reason, the Yerkey wives' special equity was not argued. Indeed, the equity is not mentioned in the case at all. It is therefore a considerable stretch to suggest that anything said in *Thorne* in relation to the role of independent legal advice has any application to three-party cases in which the Yerkey wives' special equity is relied upon. Plainly however, *Thorne* is inconsistent with the objective approach applied in these cases.

2 Undue Influence

Again, what follows considers the existing state of the law, then what the law *should* be and finally whether – if at all – *Thorne* has changed the law.

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91 Ibid 408–9 (Gaudron, McHugh, Gummow and Hayne JJ) (emphasis added).
92 Brown, 'Undue Confusion' (n 27) 81.
93 See above at Part II.
94 As noted earlier, ensuring the wife's understanding in these cases will ensure her emancipation.
95 See Part IV(B)(2)(b).

(a) What Is the Law?

As to undue influence, the leading cases in a three-party context were decided in England by the House of Lords in 1994, in *O'Brien*,[96] and in 2001, in *Etridge [No 2]*.[97] In these cases, the House of Lords gave detailed consideration to the circumstances in which a wife may set aside a guarantee against a bank on the basis of undue influence applied by her husband. In particular, their Lordships set out comprehensively what a bank must do to avoid having the guarantee set aside. As will be seen, those steps include requiring that the wife obtain independent legal advice. It has been suggested that, if a bank follows these steps, it will 'invariably'[98] be protected; the steps amount, effectively, to a fail-safe defence.[99]

(i) Barclays Bank plc v O'Brien

In *O'Brien*, Mrs O'Brien's husband had misled her as to the security she was providing to the bank. However, Lord Browne-Wilkinson – delivering the judgment of the House – stated that his remarks applied to cases involving undue influence, misrepresentation or 'some other legal wrong'.[100] Where such a wrong was committed by a husband against his wife in order to procure her assent to the provision of security to a bank, the question was whether the equity arising in favour of the wife was enforceable against the bank. Lord Browne-Wilkinson opined that the wife's equity would be enforceable where the bank had actual or constructive notice of the equity. That is, the bank would take subject to the wife's equity unless the bank could avoid being fixed with notice.[101] Generally, the bank could do this by taking 'reasonable steps' to satisfy itself that the wife's agreement was 'properly obtained' and that the wife had entered the transaction 'freely and in knowledge of the true facts'.[102] Specifically, Lord Browne-Wilkinson required that, in the ordinary case, the bank should hold a private meeting with the wife (in the absence of her husband) at which the wife was told of the extent of her liability, warned of the risks and urged to seek independent legal advice. However that, in exceptional cases where the bank knew facts rendering undue influence not only possible but probable, the bank must *insist* that the wife obtain independent legal advice.[103]

Lord Browne-Wilkinson's overarching requirement was that the bank take reasonable steps to satisfy itself that the wife had entered the transaction freely and in knowledge of the true facts. This is clearly an objective approach to be considered from the perspective of the bank. It suggests a concern not only with

96 *O'Brien* [1994] 1 AC 180.
97 *Royal Bank of Scotland plc v Etridge [No 2]* [2002] 2 AC 773.
98 See, eg, James O'Donovan and John C Phillips, *Modern Contract of Guarantee* (Thomson Reuters, 4th ed, 2004) [4.9850].
99 Fehlberg, 'The Husband, the Bank, the Wife and Her Signature' (n 37) 472.
100 *O'Brien* [1994] 1 AC 180, 195 (Lord Browne-Wilkinson).
101 Ibid 196 (Lord Browne-Wilkinson).
102 Ibid 196, 198 (Lord Browne-Wilkinson).
103 Ibid 197 (Lord Browne-Wilkinson).

whether the wife understood the transaction,[104] but also with whether she entered the transaction voluntarily in the exercise of her free will.[105] However, Lord Browne-Wilkinson's more detailed description of the steps required of the bank concern only with the wife's understanding.

O'Brien has been strongly criticised. It has been described as a very 'bank-friendly' decision.[106] The steps ordinarily required of a bank are minimal and easy to satisfy. They may ensure the wife's understanding of key aspects of the transaction but they will do nothing to relieve her of the influence to which she is or may be subject.[107] Further, where the wife does obtain independent legal advice, the bank is entitled to assume that the solicitor has properly discharged his or her duties to the wife. However, empirical evidence suggests that this may often not be the case.

For example, in a 2004 Australian study, Millbank and Lovric found that, in the great majority of cases, wives do not obtain independent legal advice.[108] Indeed, for most wives, it is never suggested that they should. In the few cases in which advice is sought, it tends to be perfunctory, partial and partisan. The wife is often given little time to reflect on the advice which rarely clarifies her thoughts or has any real utility.[109] Moreover, most solicitors view this as consistent with their duties. They generally see their role as being to provide an explanation of the transaction to ensure the wife's understanding and not to provide advice on the propriety of the transaction.[110] In these circumstances, even wives given strong advice not to proceed tend to do so.[111]

In light of this evidence, *O'Brien* has been criticised for elevating form over substance[112] and for shifting the risk of these transactions from banks to

104 Note Lord Browne–Wilkinson's use of 'in knowledge of the true facts': ibid 198.

105 Note Lord Browne–Wilkinson's use of 'freely': ibid.

106 See, eg, Anne Matthew, 'London: Recent Developments in Independent Legal Advice: *Royal Bank of Scotland v Etridge*' (2002) 13(2) *Journal of Banking and Finance Law and Practice* 129, 129; Simone Wong, 'Revisiting *Barclays Bank v O'Brien* and Independent Legal Advice for Vulnerable Sureties' [2002] (July) *Journal of Business Law* 439, 456 ('Revisiting *Barclays Bank v O'Brien*'). See also Fehlberg, 'The Husband, the Bank, the Wife and Her Signature' (n 37) 472; Fehlberg, 'The Husband, the Bank, the Wife and Her Signature: The Sequel' (n 40) 675.

107 See, eg, Fehlberg, 'The Husband, the Bank, the Wife and Her Signature' (n 37) 472–3; Brown, 'Undue Confusion' (n 27) 80.

108 See generally Millbank and Lovric (n 73).

109 Ibid 107.

110 Ibid 103–8. See also, eg, Charles YC Chew, 'Another Look at the Giving of Independent Advice to Sureties: Some Uncertainties and Evolving Concerns' (2006) 18(1) *Bond Law Review* 45, 48.

111 Millbank and Lovric (n 73) 107. Millbank and Lovric's Australian study reached similar conclusions to earlier empirical research in England: see Fehlberg, 'The Husband, the Bank, the Wife and Her Signature: The Sequel' (n 40) 676, 686 and generally Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Clarendon Press, 1997). In summary, Fehlberg found that legal advice, where obtained in surety wife cases, generally amounted to no more than a basic explanation of the key terms of the transaction. It was often not independent and was frequently inadequate, providing limited assistance to the wife. Further, even where the advice was independent and adequate, many wives would still sign, for emotional reasons, including the desire to preserve their marriage.

112 Fehlberg, 'The Husband, the Bank, the Wife and Her Signature: The Sequel' (n 40) 686.

solicitors.[113] As Lord Millett has put it writing extra-judicially: 'We have substituted an inappropriate bright line rule for a proper investigation of the facts and have failed the vulnerable in the process'.[114]

(ii) Royal Bank of Scotland plc v Etridge [No 2]

In *Etridge [No 2]*, the House of Lords affirmed Lord Browne-Wilkinson's constructive notice approach.[115] Their Lordships then gave detailed consideration to the steps required of a bank to avoid being fixed with such notice, including in relation to independent legal advice.

Lord Nicholls delivered the leading speech. His Lordship noted that, normally, advice should bring home to the wife a proper understanding of the transaction. However, a wife with proper understanding might still be acting under undue influence.[116] In Lord Nicholls' view, short of prohibiting these types of suretyship, there was no way of ensuring that the wife was not subject to undue influence. Accordingly, that the courts must find a compromise between the competing policy considerations identified above.[117]

Lord Nicholls then set out a regime that, in his Lordship's view, achieved an appropriate compromise. His Lordship said that a bank must 'take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction'.[118] Lord Nicholls identified four steps which, taken together, would be reasonable. First, the bank should check with the wife whether she has a solicitor whom she would like to act for her. Secondly, the bank must provide that solicitor with all necessary financial information regarding the transaction. Thirdly, if the bank suspects that the wife may be lacking free will, the bank must inform the solicitor of this. And fourthly, the bank should obtain written confirmation from the solicitor that he or she has advised the wife.[119]

Lord Nicholls also considered the duty of the solicitor, with particular reference to the content of the advice which a solicitor should give. His Lordship noted that the solicitor has no obligation to cease acting even if he or she cannot sensibly advise the wife to enter the transaction.[120] Rather, Lord Nicholls opined, that the solicitor should advise the wife, first, as to the nature and practical consequences of the transaction, secondly, as to the risks she is running, and thirdly, that she has a choice as to whether or not to enter the transaction. The solicitor should then check with the wife whether she wishes to proceed or

113 See Sneddon, 'Lenders and Independent Solicitors' Certificates' (n 1) 7. See also *Royal Bank of Scotland v Etridge [No 2]* [1998] 4 All ER 705, 711 (Stuart–Smith LJ); *Etridge [No 2]* [2002] 2 AC 773, 805 [52] (Lord Nicholls), 825–6 [115] (Lord Hobhouse).

114 Peter Millett, 'Equity's Place in the Law of Commerce' (1998) 114 (April) *Law Quarterly Review* 214, 220.

115 *Etridge [No 2]* [2002] 2 AC 773, 801–3 [37]–[43] (Lord Nicholls). See also Scott (n 70) 245.

116 *Etridge [No 2]* [2002] 2 AC 773, 798 [20] (Lord Nicholls).

117 See Part IV(B).

118 *Etridge [No 2]* [2002] 2 AC 773, 805 [54] (Lord Nicholls).

119 Ibid 811–12 [79], [80] (Lord Nicholls).

120 Ibid 806–7 [58]–[63] (Lord Nicholls). Cf the view of the Court of Appeal: see *Royal Bank of Scotland plc v Etridge [No 2]* [1998] 4 All ER 705, 715 (Stuart-Smith LJ).

whether she would prefer, for example, that the solicitor attempt to renegotiate the transaction for her.[121]

The reasonable steps set out by Lord Nicholls, and the content of the advice which his Lordship described, are – again – mainly focused on ensuring the wife's understanding. The approach also plainly requires an objective assessment of the effect of the advice. The bank need only take 'reasonable steps'. It need not show that the wife *in fact* understood the transaction.

Lord Scott's speech in *Etridge [No 2]* identifies even more clearly that the purpose of independent legal advice is to ensure the understanding of the wife and not her emancipation from undue influence.[122] His Lordship considered that, in the ordinary case, it was sufficient for the bank to urge the wife to obtain independent legal advice. The bank could then assume that the solicitor had adequately explained the transaction to the wife and she had reached a sufficient understanding.[123]

On the other hand, Lord Hobhouse insisted that independent legal advice must emancipate: if a bank is to avoid constructive notice, the transaction must have been entered into freely by the wife.[124] His Lordship expressly disagreed with Lord Scott that it was sufficient that the bank believed the wife understood the transaction. Lord Hobhouse emphasised that ensuring the wife's comprehension does not guard against the risk of undue influence.[125] Despite this – perhaps pragmatically, perhaps optimistically – Lord Hobhouse concluded that the best solution was to adopt Lord Nicholls' regime. In his Lordship's view, that would ensure truly independent advice and real consent.[126]

Etridge [No 2] has also been criticised. For example, various commentators have noted that, although the decision involves some softening of approach and increases the duty of disclosure on banks, it is still pro-creditor.[127] Importantly, it is still firmly focused on whether the wife is informed of the basic elements of the transaction rather than on relieving the wife from the ascendancy of her husband.[128] The decision still substitutes, therefore, a bright line rule for proper investigation and represents a continuing shift in focus from banks to solicitors.[129]

(iii) Australian Authorities

O'Brien and *Etridge [No 2]* have not been warmly received in Australia. *Etridge [No 2]* has been criticised as overly prescriptive in its statement of the steps a bank must take and the advice a solicitor should give.[130] Speaking extra-

121 *Etridge [No 2]* [2002] 2 AC 773, 807–9 [64]–[68] (Lord Nicholls).
122 Ibid 838–9 [147]–[148], 843–4 [164]–[165] (Lord Scott).
123 Ibid 843–4 [164]–[165], 845 [171]–[172], 847 [182] (Lord Scott).
124 Ibid 823–4 [111] (Lord Hobhouse).
125 Ibid 828 [120]–[121] (Lord Hobhouse).
126 Ibid 826–7 [116] (Lord Hobhouse).
127 See, eg, Matthew (n 106) 129, 132–6; Edelman and Bant, 'Setting Aside Contracts of Suretyship' (n 75) 19; Scott (n 70) 248.
128 See, eg, Stone (n 72) 176–8; Scott (n 70) 246–7; O'Sullivan (n 10) 346; Wong, 'Revisiting *Barclays Bank v O'Brien*' (n 106) 453–6.
129 See, eg, Millett (n 114) 220; Scott (n 70) 248.
130 See, eg, Peter Butt, 'Conveyancing and Property' (2002) 76(1) *Australian Law Journal* 7, 8–10.

judicially in 2002, Justice Muir opined that it was unlikely that Australian courts would embrace the decision in its entirety. His Honour criticised the 'one-size-fits-all' approach adopted by the House of Lords and noted that it is not the usual role of the courts to prescribe procedures in this way.[131]

The High Court in *Garcia* expressly rejected the constructive notice approach of the House of Lords instead preferring to rely on the 'unconscionability' of enforcing legal rights in these cases.[132] Similarly, several commentators note that *Yerkey* does not require the bank to have any notice of the wife's equity.[133] Rather, all that the bank must have notice of is that the husband and wife are, in fact, married.[134]

Accordingly, it is unlikely that *Etridge [No 2]* represents the law in Australia today.[135] Nevertheless, there are several Australian cases which are broadly consistent with its approach.[136] These cases emphasise the role of advice in achieving the plaintiff's understanding. They hold that a defendant can ordinarily assume that a solicitor who has advised the plaintiff has adequately explained the transaction and discharged his or her duties to the plaintiff. So these cases see advice as ensuring understanding, not emancipation, and take an objective approach to this question.

Other Australian decisions – some of high authority – take a different approach. These cases suggest that the purpose of advice is not only to educate but also to emancipate. In *Bank of New South Wales v Rogers*,[137] the High Court insisted that to avoid the consequences of undue influence the defendant must demonstrate that the plaintiff is emancipated. According to Starke J, the defendant must prove that the plaintiff is 'free from undue influence' and that the entry into the transaction is the 'voluntary' and 'well-understood act' of the plaintiff's mind.[138] Similarly, McTiernan J held that the defendant bore the onus of proving that the transaction was the 'pure, voluntary and well-understood act of her mind'.[139] Williams J said that the defendant bore the onus of proving that

131 See Lex MacGillivray, 'Guarantee by Wife of Her Husband's Obligations' (2002) 22 *Proctor* 30, 30.

132 *Garcia* (1998) 194 CLR 395, 410–11 [39] (Gaudron, McHugh, Gummow and Hayne JJ). See generally Giancaspro (n 71) 107.

133 See, eg, Carter (n 38) [24-060]; Brown, 'Undue Confusion' (n 27) 90–1; Brown, 'The Bank, the Wife' (n 37) 160.

134 An opposing view is that Dixon J in *Yerkey* effectively adopted a notice approach, so there is no real distinction between his Honour's approach and that of the English courts: see, eg, Andrew Phang and Hans Tjio, 'From Mythical Equities to Substantive Doctrines: *Yerkey* in the Shadow of Notice and Unconscionability' (1999) 14(1) *Journal of Contract Law* 72, 79. See also Sneddon, 'Unfair Conduct' (n 6) 306, 308–9; Edelman and Bant, 'Setting Aside Contracts of Suretyship' (n 75) 13.

135 See, eg, *Kranz v National Bank of Australia Ltd* (2003) 8 VR 310, 339 [87] (Eames JA).

136 See, eg, *Ribchenkov v Suncorp-Metway Ltd* (2000) 175 ALR 650; *Burrawong Investments Pty Ltd v Lindsay* [2002] QSC 82; *Bank of Western Australia v Ellis J Enterprises Pty Ltd* [2012] NSWSC 313; *Williams v Commonwealth Bank of Australia* [2013] NSWSC 335; *National Australia Bank Ltd v Wehbeh* [2014] VSC 431; *Alceon Group Pty Ltd v Rose* [2015] NSWSC 868.

137 (1941) 65 CLR 42. This case was cited in *Thorne* as an authority relevant to the 'additional issues' that arise in three-party cases: see *Thorne* (2017) 263 CLR 85, 97 [25] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

138 *Bank of New South Wales v Rogers* (1941) 65 CLR 42, 51–2, 55 (Starke J).

139 Ibid 60–1, 74 (McTiernan J).

the plaintiff acted 'spontaneously'.[140] The references by their Honours to 'free', 'voluntary', 'pure' and 'spontaneous' conduct by the plaintiff plainly add something to the requirement that her entry into the transaction is well-understood.[141] It is not clear from the judgments whether this is to be assessed objectively or subjectively.

More recently, in *St Clair v Petricevic*,[142] Hope JA in the New South Wales Court of Appeal said that it was necessary for a court to consider *what* advice the plaintiff had received and 'whether it diminished or removed the effect of the circumstances on which [the plaintiff] relied'.[143] Similarly, in *McIvor v Westpac Banking Corporation*,[144] Applegarth J in the Queensland Supreme Court required that the independent advice received by the plaintiff had the effect that her entry into the transaction was the product of the free exercise of her independent will.[145]

These cases cast some doubt on the proposition that, in Australia, the purpose of independent legal advice in three-party cases is merely to ensure the plaintiff's understanding of the transaction rather than her emancipation. They do not however make clear whether this is an objective or subjective enquiry.

(b) What Should the Law Be?

Given the inconsistency and uncertainty in the Australian authorities, it is again important to consider what the law should be. As a starting point it is submitted that, whatever the purpose of independent legal advice, whether that purpose has been achieved should be assessed objectively rather than subjectively. The defendant need only *believe, on reasonable grounds*, that the plaintiff understood the transaction, or was emancipated from undue influence. This need not be so *in fact*. The reasons for and against this will be considered in turn.

There are strong arguments against a subjective approach. In *Etridge [No 2]*, Lord Nicholls considered that what passes between a husband and wife in the privacy of their own home is not capable of investigation.[146] It would be intrusive, inconclusive, expensive and disproportionate to require a bank to inquire into the plaintiff's subjective state of mind.[147] Lord Scott also considered that an objective approach was entirely consistent with contract law generally, concerned as it is with objective manifestations of consent.[148] His Lordship had expressed the same view, in even stronger terms, in the earlier case of *Banco Exterior Internacional v Thomas*,[149] stating that it would be an 'unwarrantable impertinence' for the bank to inquire into the relationship between a husband and

140 Ibid 85, 87 (Williams J).
141 See further Stone (n 72) 188; Carter (n 38) [24-050].
142 (1988) ASC ¶55-688. This was a three-party case under the *Contracts Review Act 1980* (NSW).
143 Ibid 105.
144 [2012] QSC 404.
145 Ibid [81]–[85], [118] (Applegarth J). See also *Amadio* (1983) 151 CLR 447, 473 (Deane J).
146 *Etridge [No 2]* [2002] 2 AC 773, 801 [37] (Lord Nicholls).
147 Ibid 805 [53], 813 [84] (Lord Nicholls).
148 Ibid 837 [144] (Lord Scott).
149 [1997] 1 All ER 46.

wife: 'A bank is not to be treated as a branch of the social services'.[150] It is noted that various commentators agree. These commentators observe that it would be entirely impractical for a bank to investigate whether a wife was actually subject to undue influence. The process would be costly, unreliable and an offensive invasion of privacy.[151]

There are, however, some dissenting voices. In *Garcia*, Kirby J considered that a bank could make discreet inquiries which need not be intrusive if properly and politely explained to the wife and her husband. Indeed, in his Honour's view, prudent business banking practices demanded this.[152] A handful of commentators also consider that such investigation forms part of a proper risk assessment to be undertaken by banks before lending.[153]

It is conceded that these opposing arguments have some merit. However, it is submitted that to require a subjective assessment of whether the plaintiff understood the transaction, or was transacting under undue influence, would give rise to real concerns. It is difficult to see how such a requirement could be workable in practice. The inquiries required of banks, solicitors and other defendants would be delicate and the assessments difficult. Further, the whole system of banks referring security-providers to solicitors, and being able to rely on written confirmation of advice, would be undermined.[154] This would result, at least, in short-term disruption. Indeed, banks might in the short and longer term cease to accept security from wives and others in a similar position.

The same arguments do not apply to the question whether independent legal advice should ensure the plaintiff's understanding or emancipation. Rather, and consistently with what was suggested above in relation to unconscionable conduct and the *Yerkey* wives' special equity,[155] it is submitted that the defendant should believe on reasonable grounds that the plaintiff is *emancipated* from undue influence. This approach finds support in commentary.[156] It is also supported by the High Court in *Bank of New South Wales v Rogers* and the later Australian cases referred to earlier.[157] Further, this approach better protects the plaintiff than a regime, like that adopted in England, which mainly focuses on the plaintiff's understanding.

In practice, this approach could work in much the same way as the English regime, albeit with one important difference as under that regime defendants could rely on written confirmation of independent legal advice provided by a solicitor. The important difference would be that the solicitor should also advise

150 Ibid 55–6 (Scott V-C).
151 See, eg, Stone (n 72) 175; O'Donovan and Phillips (n 98) [4.9870]; Butt (n 130) 8; Scott (n 70) 247, 249; Giancaspro (n 71) 109.
152 *Garcia* (1998) 194 CLR 395, 434–5 [79], [81] (Kirby J). See also Giancaspro (n 71) 109.
153 See, eg, Michael Draper, 'Undue Influence: A Review' [1999] (May/June) *Conveyancer and Property Lawyer* 176, 182.
154 O'Donovan and Phillips (n 98) [4.9870].
155 See Parts III(B) and IV(B)(1)(b).
156 See, eg, Sneddon, 'Unfair Conduct' (n 6) 312, 315; Sneddon, 'Lenders and Independent Solicitors' Certificates' (n 1) 9; Wong, 'Revisiting *Barclays Bank v O'Brien*' (n 106) 453–6; Edelman and Bant, 'Setting Aside Contracts of Suretyship' (n 75) 11, 17, 19.
157 (1941) 65 CLR 42. See Part IV(B)(2)(a)(iii).

the plaintiff as to the *propriety* of the transaction. This is because advice of this kind is most likely to emancipate the plaintiff from undue influence.[158] There are some cases which have recognised that a solicitor providing advice to a surety wife should advise her as to the propriety of the transaction.[159] Indeed, various commentators have also expressed this view. For example, almost 30 years ago, Sneddon argued that 'adequate independent advice' required that the advice address the propriety of the transaction for the plaintiff.[160]

It might be asked whether this approach demands too much of solicitors. However, it is submitted that, provided the duty of solicitors to advise as to propriety is circumscribed and well-understood, the approach is workable and strikes an appropriate balance between solicitors, banks and other defendants.[161] In particular, solicitors should not be expected to provide comprehensive advice addressing all the financial risks assumed by the plaintiff. Rather, as Wong suggests,[162] solicitors should assess the principal debtor's credit application form and the bank's letter of offer of credit. These documents will set out the principal debtor's existing borrowings, where those are being extended, and any disparity with the security to be provided by the plaintiff. On the basis of this assessment, the solicitor should then offer advice to the plaintiff about the short-term risks of the transaction. This ought to be within the competence of most solicitors. Insofar as the solicitor has reason to believe there may be longer term risks, the solicitor should advise the plaintiff to seek more detailed financial advice from a qualified professional. Ultimately, in providing advice to the plaintiff as to the propriety of the transaction, the solicitor should be satisfied that the transaction is one into which the plaintiff could sensibly enter if free from undue influence.[163]

This approach is conditioned on banks disclosing all necessary information to the solicitor – including, in particular, the credit application form and the letter of offer of credit.[164] A bank could not disclose this information without the consent

158 This has been observed by Patrick O'Hagan: see Patrick O'Hagan, 'Legal Advice and Undue Influence: Advice for Lawyers' (1996) 47(1) *Northern Ireland Legal Quarterly* 74.

159 See, eg, *McNamara v Commonwealth Trading Bank* (1984) 37 SASR 232, 241 (King CJ). Cf the cases which indicate that solicitors need not advise as to the propriety of the transaction: see, eg, *Citibank Savings Ltd v Nicholson* (1997) 70 SASR 206, 233–4 (Perry J). See generally Sneddon, 'Unfair Conduct' (n 6) 320–4; Elizabeth Lanyon, 'Aspects of Third Party Guarantees and Solicitors' Certificates' (2001) 29 *Australian Business Law Review* 231.

160 Sneddon, 'Unfair Conduct' (n 6) 321; Sneddon, 'Lenders and Independent Solicitors' Certificates' (n 1) 24–8. See also Brown, 'The Bank, the Wife' (n 37) 158; Stone (n 72) 177. In 2001, a detailed proposal in the terms suggested by Sneddon was approved by the Banking, Finance and Consumer Credit Committee of the Law Council of Australia as part of its investigation into the role of banks, solicitors and independent legal advice in guarantee cases. However, the various Australian jurisdictions have yet to adopt a uniform, national approach: see generally Lanyon (n 159) 243. For example, see *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015* (NSW) r 11; Law Institute of Victoria, *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015* (at 5 May 2019) r 11.

161 See also, eg, Sneddon, 'Unfair Conduct' (n 6) 321–4; Sneddon, 'Lenders and Independent Solicitors' Certificates' (n 1) 22–35; Wong, 'No Man Can Serve Two Masters' (n 37) 464; Wong, 'Revisiting *Barclays Bank v O'Brien*' (n 106) 456.

162 Wong, 'No Man Can Serve Two Masters' (n 37) 464.

163 See, eg, Draper (n 153) 200.

164 This has been observed by, eg, Sneddon, 'Unfair Conduct' (n 6) 340–1. Cf *Etridge [No 2]* [2002] 2 AC 773, 812 [81] (Lord Nicholls).

of the principal debtor. However, if that consent was not forthcoming, the bank should refuse to proceed with the transaction.

It is recognised that expanding the duties of banks, solicitors and other defendants in this way might increase the costs of transactions of this kind or result in some delay. However, it is submitted that this is a reasonable price for ensuring that independent legal advice achieves its purpose of emancipating the plaintiff from undue influence and, in doing so, properly protects the plaintiff.

This approach also brings into line the duties of solicitors in two-party and three-party cases.[165] In both kinds of case, in order for the defendant to avoid the consequences of undue influence, a solicitor must advise the plaintiff as to the propriety of entering the transaction. This is because without such advice it is unlikely that the undue influence will be cured.

(c) How Does Thorne Compare?

As seen above,[166] in *Thorne*, Kiefel CJ, Bell, Gageler, Keane and Edelman JJ considered the role of independent advice in undue influence cases and held, expressly or by implication, that it must emancipate the plaintiff from the vitiating factor and that this is to be assessed subjectively. Of course, as has been noted, *Thorne* was a two-party case. As such, there remains a real question as to whether, and if so how much of, what it decided can be applied to three-party cases.

Arguably, it follows from *Thorne* that in any case, two-party or three-party, independent advice *not to enter a transaction* and which is *ignored* is not an answer to a claim based on undue influence but instead an *indicium* of it.[167] If this does follow, how would it apply in three-party cases?

Usually, the content of independent legal advice is a matter between the solicitor and his or her client. The advice will be confidential. Accordingly, save to the extent that the general nature of the advice is set out in a written confirmation provided to the defendant, the defendant will have no notice of the advice given.

The written confirmation might take the form of a solicitor's certificate of advice.[168] In practice, it is not usual for a solicitor's certificate to specify whether the solicitor advised their client not to enter into the transaction. As such, the defendant will not know whether this advice was given or whether the client, by signing, is going against the solicitor's advice. If a certificate is provided in these circumstances, it is submitted that the defendant should be entitled to rely on it. Insofar as it holds to the contrary, it is submitted that *Thorne* goes too far.

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165 As observed by O'Hagan: see O'Hagan (n 158) 74–9.

166 See Part II.

167 Barnett, '*Thorne v Kennedy*: A Thorn in the Side' (n 2) 183, 192–3.

168 As is currently the practice in Queensland: see 'Independent Solicitor Certificate for Finance', *Queensland Law Society* (Web Page, 28 April 2019) <www.qls.com.au/Knowledge_centre/Practising_resources/Independent_solicitor_certificate_for_financ>.

However, in such circumstances, a solicitor acting in discharge of his or her duties to the client might refuse to provide a certificate.[169] A defendant expecting a solicitor's certificate, which is not received, would proceed with the transaction at its own risk. A bank might therefore decide not to proceed with a transaction at all. In that event, the second competing policy consideration identified by Lord Browne-Wilkinson in *O'Brien* – ensuring the continued flow of loan capital – might fail. However, these cases – in which the transaction is so improvident from the plaintiff's point of view that a solicitor advises him or her not to enter it and then refuses to provide a certificate – will be exceptional. In such cases, it may indeed be best that the transaction does not proceed.[170] Indeed, the overall effect may be to reduce the risk of money being loaned to those who cannot realistically repay it, resulting in less debtor defaults and less exposure to liability of guarantors and creditors.[171]

More problematic may be those cases where the written confirmation of advice is in the form of a guarantor's acknowledgment.[172] A plaintiff labouring under undue influence who is advised by a solicitor not to enter a transaction may still proceed and provide a guarantor's acknowledgment to the defendant – the signing of the acknowledgment itself the result of the undue influence. In this kind of case, if *Thorne* applies to three-party cases in the way suggested here, such transactions would be set aside for undue influence notwithstanding the advice. So in a three-party case where the plaintiff had received unimpeachable independent legal advice, confirmed to the defendant, the transaction would still be set aside. In these circumstances, it might be asked: what more could the defendant do to protect itself?[173] Moreover, if unimpeachable advice that encompasses the propriety of the transaction is insufficient to emancipate the plaintiff, what is sufficient? It may be that, as suggested by the empirical evidence considered above,[174] the emotional pressures on some plaintiffs are so significant that nothing will prevent them entering into these transactions.

It is submitted that if *Thorne* is applied to three-party cases in which a plaintiff has received independent legal advice, including as to the propriety of

169 This approach was averted to by Lord Nicholls in *Royal Bank of Scotland plc v Etridge [No 2]* [2002] 2 AC 773, 807 [61].

170 Kirby J took this view in *Garcia* (1998) 194 CLR 395. His Honour considered that the cost of depriving some borrowers of access to loan capital would be 'marginal' and one worth paying to 'improve the quality of decisions of great importance to individual sureties, discourage the improvident assumption of risk, ill-advised (or unadvised) arrangements and diminish the number of litigious challenges when such arrangements go bad': *Garcia* (1998) 194 CLR 395, 434 [79]. See also, eg, Brown, 'The Bank, the Wife' (n 37) 157.

171 See, eg, Giancaspro (n 71) 102.

172 A guarantor's acknowledgment is a statutory declaration sworn by the guarantor which certifies, for example, that the guarantor is signing the guarantee voluntarily. See generally Sneddon, 'Lenders and Independent Solicitors' Certificates' (n 1) 35. It is currently the practice in New South Wales and Victoria for guarantors' acknowledgments to be made, rather than for solicitors' certificates of advice to be given: see *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015* (NSW) r 11; Law Institute of Victoria, *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015* (at 5 May 2019) r 11.

173 One answer may be to obtain a certificate of advice from a solicitor. However, in some jurisdictions, solicitors' certificates of advice are not provided: for example, New South Wales and Victoria.

174 See Part IV(B)(2)(a)(i).

the transaction, and that advice is confirmed to the defendant by the plaintiff or a solicitor then *Thorne* goes too far. Such an approach would leave banks and other defendants unable to protect their interests. They will have no notice that the advice given was not to enter the transaction or that the plaintiff ignored that advice. On the contrary, given the confirmation, the defendant would have reasonable grounds to believe that the plaintiff had been emancipated from undue influence. In three-party cases, as seen, independent advice serves a dual role of protecting the plaintiff and the defendant. Again, if *Thorne* applies to three-party cases in this way then the balance will tip too far in favour of plaintiffs.

In summary, as the joint judgment at least implicitly indicates,[175] *Thorne* should be confined to its facts insofar as it concerns the role of independent advice in undue influence cases. Specifically, it should apply to two-party cases such that, in those cases, advice will provide an answer to a plea of undue influence only if the advice in fact emancipated the plaintiff. Further, in such cases, it will be an *indicium* of undue influence – rather than an answer – if the advice was not to enter into the transaction and that advice was ignored.

V COMPARISON OF TWO-PARTY AND THREE-PARTY CASES

As has been observed above, the role of independent advice is not the same in two-party and three-party cases. This final Part draws out the comparisons between each type of case.

In all cases, whatever the vitiating factor, the law requires – or at least, *should* require – that the advice emancipates the plaintiff from the vitiating factor, rather than merely ensuring the plaintiff's understanding of the transaction. However, in two-party cases this is assessed subjectively while in three-party cases it is assessed objectively. This means, effectively, that a higher standard applies in two-party cases.[176] Is this difference in approach in two-party and three-party cases justifiable? Some commentators suggest that it is not pointing out that, in all cases, the vitiating factor has the same effect. Further, that the advice serves the same role – the protection of the plaintiff – and is sought to avoid the same 'evil'. Moreover, solicitors owe the same duties to their clients, irrespective of whether a third party is involved.

Notwithstanding this, it is submitted that three-party cases are different. Three-party cases do not involve a simple contest between 'right' and 'wrong' – the 'innocent' plaintiff and the 'guilty' defendant – as in two-party cases. Rather, they involve a competition between 'right' and 'right' – an 'innocent' surety and an 'innocent' creditor. In the paradigm three-party case, for example, neither the wife nor the bank will have committed any relevant 'wrong' – rather, both are 'victims' or potential victims of the husband who applies the vitiating factor. Further, and as a result, there are competing policy considerations at play in three-party cases. The public interest in the continued availability of credit is real

175 *Thorne* (2017) 263 CLR 85, 97 [25] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

176 This has been observed by Wong: see Wong, 'No Man Can Serve Two Masters' (n 37) 262.

and important. Although it may be argued that the House of Lords in *O'Brien* and *Etridge [No 2]* overemphasised this concern, those who argue that the approach should be the same in two-party and three-party cases give it inadequate weight. In three-party cases, advice must serve a dual role. It must seek to protect not only the plaintiff but also the defendant. A pragmatic compromise is therefore essential. The compromise suggested here is that in three-party cases it is not necessary – as it is in two-party cases – to demonstrate that the advice *in fact* emancipated the plaintiff. Rather, it is sufficient if the defendant has reasonable grounds for believing this to be so. It is submitted that this approach best serves both roles of independent advice in three-party cases and gives the greatest possible protection to the plaintiff and the defendant.

VI CONCLUSION

This article has reconsidered, in the light of the High Court's decision in *Thorne* and other developments, the role of independent legal advice in claims to set aside a transaction on the basis of a vitiating factor. In relation to both two-party and three-party cases, the article has proposed a framework for analysis comprising two key questions. These questions are as follows. First, is the purpose of independent legal advice to emancipate the plaintiff from the vitiating factor or merely to ensure the plaintiff understands the transaction? And secondly, in assessing whether the advice has achieved its purpose, is a subjective or an objective approach taken? To that end, the article has considered various general law vitiating factors in two-party and three-party cases and considered: what is the law, what should the law be and does *Thorne* change things?

In two-party cases, the role of independent advice is to protect the plaintiff. In order to best fulfil this role, this article has suggested that advice must emancipate the plaintiff from the vitiating factor and that this should be assessed subjectively. In particular, in relation to undue influence, it has been argued that this is what the law is and should be. Further, it has been shown that *Thorne* is consistent with this. In relation to unconscionable conduct, it is less clear what the law is. However it has been submitted, insofar as the special disadvantage element is concerned, that the same approach should apply: the advice should emancipate the plaintiff in fact from the disadvantage. Meanwhile, insofar as the unconscientious advantage-taking element is concerned, it has been argued that this should be an objective enquiry. This is because this element is focused on what the defendant did or did not do and the tainting of the defendant's conscience. It has been shown that *Thorne* is consistent with this approach at least in relation to the special advantage element. In relation to duress, what the law requires is also unclear. But it has again been argued that the advice should actually emancipate the plaintiff. In most cases, however, advice cannot do this because it cannot expand the plaintiff's choices. Accordingly, independent legal advice will likely, and should, play a limited role in duress cases.

In three-party cases, independent legal advice has a dual role of protecting not only the plaintiff but also the defendant. In relation to the first category of *Yerkey* wives' special equity cases – involving actual undue influence – the better view is that the law requires, and should require, that the advice emancipates the plaintiff. However, that should be assessed objectively. Similarly, in the second category of *Yerkey* cases – involving a lack of understanding – the law requires, and should require, emancipation. In these cases, emancipation means that the plaintiff achieves an understanding of the transaction. This is and should also be assessed objectively. *Thorne* has nothing to say about the *Yerkey* wives' special equity. Finally, in relation to undue influence in three-party cases, generally, the law in England requires only that the independent legal advice ensures the plaintiff's understanding of the transaction which is to be assessed objectively. In Australia, what the law requires is less clear as the cases pull in different directions. It has been submitted that the law should require that the advice emancipates the plaintiff from undue influence and that the defendant reasonably believes this to be so. There is a real question whether *Thorne*, again a two-party case, applies to three-party undue influence cases. It has been argued that, insofar as it does, it may go too far.

In summary, in both two-party and three-party cases, whatever the vitiating factor, the law requires – or, at least, should require – that independent legal advice emancipates the plaintiff from the vitiating factor, rather than merely ensuring the plaintiff's understanding. However, in two-party cases this is assessed subjectively while in three-party cases it is assessed objectively. Accordingly, it can be seen that two-party and three-party cases should be treated differently. This difference in treatment is justifiable because, as the High Court noted in *Thorne*, three-party cases raise additional issues. Generally speaking, they involve a competition between 'right' and 'right' rather than 'right' and 'wrong'. Such cases also require a balancing of competing policy considerations, including the public interest in the availability of credit. This article has argued that an objective assessment of the emancipating effect of independent legal advice in three-party cases is the best way of serving this dual role and of providing the greatest possible protection to the plaintiff and the defendant.

It may be observed therefore that, at least if the High Court's decision is confined to its facts as a two-party case, the role of independent advice is not much changed following *Thorne*. As before, independent advice plays a significant role. However, it is not a panacea. It is neither necessary nor sufficient in every case. It is but one possible protective measure in claims to set aside a transaction on the basis of a vitiating factor. This article has restated the relevant principles and elucidated on the practical application of them.