

BETWEEN:



FELICITY CASSEGRAIN
Appellant

and

GERARD CASSEGRAIN & CO PTY LIMITED
Respondent

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APPELLANT'S FURTHER SUBMISSION

1. At the hearing of the appeal on 13 November 2014, the appellant will seek leave to make the further submission set out below. It concerns the form of order to be made if the appeal succeeds as to the first, but not the second, of the transfers in issue.
2. The Appellant's Submissions (AS) deal with that issue at AS68(c), where the order sought is that proposed by Basten JA at CA [150], AB 267-268. Since the AS were filed a question has arisen whether that would be the correct order.
3. The question has arisen because in the period since the first transfer (in 1997) various improvements have been made to the Dairy Farm, concerning the residence on the premises, installation of a swimming pool, a farmer's cottage, fencing, dams, weirs and troughs and other matters, pasture paddocks and cattle grids. A summary of these matters is set out in the affidavit of Peter Condon sworn 7 November 2014.
4. When the matter was before Barrett J., the claim against Claude for equitable compensation succeeded, but the claim against Felicity failed. Accordingly no question of allowance for matters of the kind referred to in paragraph 3 arose in respect of Felicity.
5. The issue arose to an extent in working out the order for compensation against Claude. There the following steps were taken.
6. First, in his reasons for judgment of 29 September 2011, Barrett J. held at J[182]-[183], AB 162-163:

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“182 Subject to the question of defences about to be mentioned, GC & Co is entitled to appropriately framed declaratory relief accordingly, as well as an injunction restraining future resort to the loan account and an order for an inquiry to establish the amount of all money and value obtained by Claude in breach of duty.

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183 Subject to the same qualification, there should also be an order that Claude pay equitable compensation to GC & Co, with the quantum to be determined after inquiry made in accordance with the court’s order. There will be a need for further submissions as to the precise method of assessing equitable compensation having regard to both accrual of “value to the misappropriating fiduciary” (to quote words used by Thomas JA in *Ferrari v Ferrari Investments (Townsville) Pty Ltd* [2002] 2 Qd R 359; [1999] QCA 230) and financial detriments to GC & Co resulting, in each case, from Claude’s recourse to the supposed loan account.”

7. Barrett J. directed the parties to provide draft orders for further consideration: J[250], AB 182.

8. Having received the draft orders, Barrett J. on 20 December 2011 gave the decision which commences at AB 184.

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9. In that decision he noted (at J[2], AB 185) the orders he had made in dismissing the claim against Felicity. He rejected a number of claims by Claude for “just allowances” – not presently relevant – to be taken into account in his favour when assessing equitable compensation: see J[4]-[11], AB 186-188.

10. Barrett J. then held (at J[13]-[14], AB 189) that there should be an inquiry to establish the amount of the equitable compensation payable by Claude but, as he said at J[14], there remained the question as to the appropriate method of calculation of compensation.

11. He dealt with that issue at J[15]-[18], AB 189-190:

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“15 In relation to the moneys applied to the dairy farm acquisition, GC & Co says that regard should be had to the value of the land, so that compensation is measured as the present value less any part of that value shown to have come from improvements paid for from funds that did not come from GC & Co. Claude’s position is that the appropriate measure in relation to the dairy farm aspect is the sum of \$1 million drawn from the loan account to finance the acquisition (plus appropriate interest).

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16 I accept Claude’s submissions in that respect. The situation was not one in which Claude, in breach of fiduciary duty, took (or procured to be taken) the land and other farm property. What he took (or procured to be taken) in breach of duty was the \$1 million drawn on the false loan account. The price of \$1 million was not alleged to be

an undervalue (see paragraph [106] of the judgment). The wrongful taking was thus of money, not of the dairy farm property.

17. In these circumstances, the inquiry should be as to all sums drawn from the false loan account (including the \$1 million for the dairy farm); and the order should be that equitable compensation be in the aggregate of the sums found to have drawn, with interest on each component thereof from the date of its drawing to the date of the order.
18. Interest on each component should be calculated in accordance with Practice Note SC Gen 16.”

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His orders appear at J[25], AB 191-193.

12. The parties arrived at agreement on the number of dollars involved and on 22 May 2012 the following orders were made by consent:

“The Court declares that:

1. For the purpose of order 5 made by Justice Barrett on 20 December 2011, the total amount of equitable compensation payable by the first defendant, Claude Cassegrain, to the first plaintiff, Gerard Cassegrain & Co Pty Limited, including interest to 20 December 2011, is \$3,743,422.06 as at 20 December 2011 with interest accruing at the rate of:
 - (a) \$388.77 per day from 21 December 2011 to 31 December 2011; and
 - (b) \$365.55 per day from 1 January 2012 to the date of payment.

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The Court orders that:

2. The first defendant, Claude Cassegrain, pay to the first plaintiff, Gerard Cassegrain & Co Pty Limited, as equitable compensation \$3,743,422.06, being an amount which includes interest up to 20 December 2011, plus interest at the rate of:
 - (a) \$388.77 per day from 21 December 2011 to 31 December 2011; and
 - (b) \$365.55 per day from 1 January 2012 to the date of payment.
3. The inquiry listed for hearing before Justice Davies on 29 May 2012 be vacated.
4. Each party is to pay their own costs of the inquiry.”

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13. The orders sought against Felicity in the Court of Appeal appear at AB 206. They are relevantly:

- “3. Order Felicity Cassegrain to execute a Real Proprety Act transfer of her legal title to the property described in Folio Identifiers to the previous registered proprietor, Gerard Cassegrain & Company Pty Ltd
4. In the alternative to Order 3, declare that Felicity Cassegrain holds the legal title to the property described in Folio Identifiers on trust for Gerard Cassegrain & Company Pty Ltd ... absolutely.”

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14. It will be seen that the orders sought in paragraphs 3 and 4 were sought as alternatives. The orders actually *made*, however, were relevantly as follows:

“(2) Declare that Felicity Cassegrain holds the property described in Folio identifiers 4/792413, 1/798316, 115/54434, 124/7544434, 2/720827, 117/754434, 118/754434 and 174/754434 on trust for Gerard Cassegrain & Co Pty Ltd absolutely.

(3) Order that Felicity Cassegrain execute a Real Property Act transfer for the property so described to the previous registered proprietor, Gerard Cassegrain & Co Pty Ltd [CAN 000 342 174] by Friday 14 February 2014.”

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15. The Court of Appeal, however, has not resolved the order appropriate if the appellant were to have the limited success referred to in paragraph 1. Only Basten JA sought to formulate such an order.

16. The appellant, if successful in the manner referred to in paragraph 1, would ask that the orders made by this Court be as follows:

“1. Appeal allowed with costs.

2. Judgment of the Court of Appeal dated 18 December 2013 be set aside.

3. The matter be remitted to the Court of Appeal to determine, in accordance with this judgment, the orders to be made to dispose of the matter, and as to costs in that Court and at first instance.”

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17. It is accepted that evidence of the matters referred to in paragraph 3 was not adduced in the courts below. The way in which the claim against Felicity was dealt with in each court meant that the issue did not strictly arise.

18. If Felicity’s appeal in this Court succeeds as to the first transfer, however, the result is analogous to the position arising on claims as between co-owners for an account or allowance in respect of improvements, mortgage repayments, repairs and other like expenditure. See *Ryan v. Dries* (2002) 10 BPR 19,947; *Silvester v. Sands* [2004] WASC 266 at [139]-[141]; *Maio v. Sacco* (2009) 14 BPR 27, 591 at [6], [7].

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19. The appellant accepts also that this Court would not itself enter into the substance of these matters. All that is sought is to have the matter remitted to the Court of Appeal in order to enable that Court to determine the orders it should make. As part of doing so it will have to determine whether to allow, at this stage of the proceedings, evidence of the matters referred to in paragraph 3.

20. This Further Submission is in a form suitable for publication on the internet.
21. Copies of this Submission and the accompanying affidavit are to be served on the respondent's solicitors today.

Dated: 7 November 2014



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