HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, BELL, GAGELER AND KEANE JJ

FELICITY CASSEGRAIN APPELLANT

AND

GERARD CASSEGRAIN & CO PTY LTD RESPONDENT

Cassegrain v Gerard Cassegrain & Co Pty Ltd
[2015] HCA 2
4 February 2015
S141/2014

ORDER

1. *Appeal allowed in part.*

2. *Set aside paragraphs 2 and 3 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 18 December 2013 and, in their place:*

   (a) *declare that the appellant holds a half interest in the property described in Folio Identifiers 4/792413, 1/798316, 115/754434, 124/754434, 2/720827, 117/754434, 118/754434 and 174/754434 on trust for the respondent absolutely; and*

   (b) *order that the appellant execute a* Real Property Act *1900 (NSW) transfer of a one-half interest in the property referred to in paragraph (a) to the respondent.*

3. *The respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation

D F Jackson QC with P J Gormly and L M Jackson for the appellant (instructed by Peter Condon & Associates)

B W Walker SC with G B Colyer for the respondent (instructed by McCabes Lawyers Pty Limited)

CATCHWORDS

Cassegrain v Gerard Cassegrain & Co Pty Ltd

Real property – Torrens system land – Indefeasibility of title – Respondent company transferred property to appellant and appellant's husband ("Claude") – Claude acted fraudulently in purchasing property – Claude later transferred his interest in property to appellant for nominal consideration – Whether fraud brought home to appellant as registered proprietor or to her agent – Whether Claude appellant's agent – Whether appellant's title defeasible because Claude had acted as appellant's agent – Whether appellant's title defeasible because Claude and appellant were registered as joint tenants – Whether appellant's title defeasible because of Claude's fraud pursuant to s 118(1)(d) of *Real Property Act* 1900 (NSW).

Words and phrases – "agent", "brought home to the person whose registered title is impeached or to his agents", "fraud", "joint proprietor", "joint tenant", "registered as proprietor of the land through fraud", "through".

Real Property Act 1900 (NSW), ss 42(1), 100(1), 118(1).

FRENCH CJ, HAYNE, BELL AND GAGELER JJ.

The issues

1 The registered proprietor of Torrens system land, a company, transferred the land to husband and wife as joint tenants for consideration to be satisfied by debiting the husband's loan account with the company. The husband knew that the company did not owe him the amount recorded in the loan account. The debit was not recorded in the company's books until after the transfer had been registered. The husband subsequently transferred his interest in the land to his wife for a nominal consideration. Is the wife's title, first as joint proprietor with her husband, or second deriving from or through her husband under the subsequent transfer, defeasible by the company?

2 The issues are to be resolved by the proper construction and application of the relevant provisions of the *Real Property Act* 1900 (NSW) ("the RPA"), particularly s 42 (the paramountcy provision), s 100 (providing for registration as joint proprietors) and s 118 (protecting a registered proprietor from proceedings for the possession or recovery of land except in certain cases).

3 These reasons will show that the wife's title as joint proprietor was not defeasible on account of her husband's fraud but that, the wife not being a bona fide purchaser for value of her husband's interest in the land, the interest which she derived from him (an interest as tenant in common as to half) is defeasible and may be recovered by the company.

4 As may be expected, the facts which lie behind the issues require some elaboration.

The facts

5 The respondent company ("GC&Co") was registered under the RPA as proprietor of an estate in fee simple in land described in a number of Folio Identifiers. The land was referred to in the proceedings as the "Dairy Farm". Transfers of the Dairy Farm were registered, first from GC&Co to Claude Cassegrain and his wife, Felicity, as joint tenants, and second from Claude Cassegrain to Felicity. GC&Co sought to recover title as sole registered proprietor of the Dairy Farm from Felicity (the appellant in this Court).

6 In 1993, GC&Co settled some proceedings it had brought against the Commonwealth Scientific and Industrial Research Organisation ("CSIRO"). In settlement of the claim, CSIRO paid GC&Co $9.5 million. Entries were made in the books of GC&Co to recognise a loan account of $4.25 million on the footing that this part of the money received by GC&Co from CSIRO was owed to

Claude Cassegrain, one of the company's two directors. In this Court, it was accepted that Claude Cassegrain was never entitled to any part of the settlement sum and that GC&Co never owed him any part of the amount recorded in the loan account created in the company's books.

7 On 2 September 1996, Claude Cassegrain and his sister, Anne-Marie Cameron, who were then the directors of GC&Co, resolved to sell the Dairy Farm (and some associated assets) to Claude and Felicity Cassegrain as joint tenants. The directors further resolved, at the same meeting, that GC&Co should "debit the loan account of Claude Cassegrain in the books of the Company for the amount of the consideration payable ... and that the debiting of the ... loan account shall be full satisfaction of the amounts payable to the Company".

8 In February 1997, Claude Cassegrain instructed a solicitor, Mr Chris McCarron, to register "the transfer as exchanged". The transfer was executed, as transferor, by GC&Co under its common seal, attested by its directors (Claude Cassegrain and Anne-Marie Cameron), and, for Claude and Felicity Cassegrain as transferees, by Mr McCarron as solicitor. There followed some correspondence between Mr McCarron and Claude about the progress of registration. In March 1997, Mr McCarron informed Claude that the transfer had been registered.

9 Although the transfer (dated 14 September 1996) acknowledged receipt of the agreed consideration of $1 million, the books of account of GC&Co recorded that Claude Cassegrain's loan account was debited with that amount on 30 June 1997.

10 In 1996 (exactly when does not appear), four of Claude Cassegrain's siblings (Patrick, John, Denis and Catherine) brought oppression proceedings[1] in the Federal Court of Australia against Claude, Anne-Marie, their mother, GC&Co, the trustees of the Cassegrain Family Trust and 14 other companies with which members of the family were associated. The plaintiffs alleged that acts by or on behalf of GC&Co (and the other companies) had been oppressive or unfairly prejudicial to them. In July 1998, Davies J declared[2] (among other things) that Claude's conduct in treating the $4.25 million loan account as his

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1 Under s 260 of the Corporations Law of New South Wales (as set out in s 82 of the *Corporations Act* 1989 (Cth): *Corporations (New South Wales) Act* 1990 (NSW), s 7).

2 *Cassegrain v Cassegrain* [1998] FCA 811.

entitlement to be drawn down at his will and in drawing upon that account was oppressive and unfairly prejudicial to the members of GC&Co.

11 Nearly two years later, by a transfer dated 24 March 2000, Claude Cassegrain transferred "an estate in fee simple" in the Dairy Farm to Felicity Cassegrain for a consideration of $1. Again, Mr McCarron acted as solicitor. He witnessed Claude Cassegrain's signing of the transfer as transferor and signed it as solicitor for the transferee.

GC&Co's claims

12 More than eight years later, pursuant to leave granted in September 2008[3], Denis Cassegrain (one of the plaintiffs in the Federal Court oppression proceedings) brought a statutory derivative action in the Supreme Court of New South Wales on behalf of GC&Co against Claude and Felicity Cassegrain.

13 As ultimately framed, the action sought orders requiring Felicity Cassegrain to transfer the title to the Dairy Farm to GC&Co and various orders against Claude Cassegrain, including equitable compensation for alleged breaches of his fiduciary duties as a director.

14 GC&Co alleged that Claude's assertion of an entitlement to $4.25 million of the sum paid by CSIRO, and his causing the company to acknowledge that it was indebted to him in that amount, were fraudulent acts. GC&Co alleged that Claude "fraudulently obtained" the transfer of the Dairy Farm, that Claude and Felicity were registered as proprietors of the land through fraud and that Claude was Felicity's agent for the purpose of registering Felicity as joint tenant of the land pursuant to the transfer. GC&Co further alleged that, by the transfer of March 2000, Felicity derived the remaining interest in the land from a person registered as proprietor through fraud and otherwise than as a bona fide transferee for value, and that Claude was Felicity's agent for the purpose of Felicity's registration as sole registered proprietor of the land. Alternatively, GC&Co alleged that Felicity derived her interest in the land through the fraud of her agent, Claude.

15 Importantly, GC&Co did *not* allege, and has not submitted, in this Court or in the courts below, that Felicity was a participant in, or had notice of, Claude's fraud at the time that the Dairy Farm passed to them as joint tenants.

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3 *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2008) 68 ACSR 132.

Torrens title

16 Legislation implementing the Torrens system of land title is not uniform throughout Australia. Care must always be taken, therefore, to consider and apply the particular statute which is engaged. But a central and informing tenet of the Torrens system is that it is a system of title by registration, not a system of registration of title[4]. The title which a registered proprietor has "is not historical or derivative. It is the title which registration itself has vested in the proprietor."[5]

17 The title of a registered proprietor is not absolutely indefeasible. The RPA, like all versions of the Torrens legislation, provides for circumstances in which a registered title may be defeated or qualified. This case concerns the ambit of the "fraud" exceptions in ss 42(1) and 118(1).

18 Section 42(1) provides that the estate of a registered proprietor is paramount. It provides that, subject to some exceptions which are not relevant to this case:

> "Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, *except in case of fraud*, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, *but absolutely free from all other estates and interests that are not so recorded*". (emphasis added)

19 Section 118(1) provides that:

> "Proceedings for the possession or recovery of land do not lie against the registered proprietor of the land, except as follows:
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> ...
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> (d) proceedings brought by a person deprived of land by fraud against:
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> (i) a person who has been registered as proprietor of the land through fraud, or

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4 *Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ; [1971] HCA 70.

5 *Breskvar* (1971) 126 CLR 376 at 386 per Barwick CJ.

(ii) a person deriving (otherwise than as a transferee bona fide for valuable consideration) from or through a person registered as proprietor of the land through fraud".

20 Because GC&Co transferred the land to Claude and Felicity as joint tenants, it will also be necessary to consider s 100(1) of the RPA. It provides that:

> "Two or more persons who may be registered as joint proprietors of an estate or interest in land under the provisions of this Act, shall be deemed to be entitled to the same as joint tenants."

First instance

21 The derivative action was tried by Barrett J. No oral evidence was called. GC&Co tendered a number of documents and alleged that the determination of the oppression proceedings in the Federal Court yielded a number of relevant issue estoppels. It is not necessary to describe in any detail what was said or decided about issue estoppels.

22 The primary judge held[6] that the financial impact of Claude's conduct "was recorded within (and suffered by)" GC&Co only at 30 June 1997. The primary judge concluded[7] that it was only then that GC&Co acted upon and gave effect to the directors' resolution of September 1996 requiring satisfaction of the purchase price by debiting the loan account. The primary judge found[8] that the establishment of the loan account in the books of GC&Co did not represent the recording of genuine indebtedness of GC&Co to Claude in the amount recorded or at all. Accordingly, the primary judge concluded[9] that Claude acted not only in breach of fiduciary duty but also fraudulently. As noted earlier in these reasons, these findings are not challenged in this Court.

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6 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2011) 6 BFRA 77 at 104 [111]; [2011] NSWSC 1156.

7 (2011) 6 BFRA 77 at 104 [112].

8 (2011) 6 BFRA 77 at 105 [121].

9 (2011) 6 BFRA 77 at 107 [129].

23 The primary judge found[10] that there was no basis in the evidence for finding that "in any aspect of the events concerning the preparation of either [the first or second] transfer [relating to the Dairy Farm], its execution and the processes culminating in its registration, Claude had or exercised any actual or implied authority of Felicity". The primary judge held[11] that s 42(1) of the RPA applied with the consequence that Felicity held her interest in the land "free from any interest of GC&Co sourced in Claude's fraudulent breach of fiduciary duty and that the 'fraud' exception to [s 42(1)] does not operate to detract from Felicity's [then] current registered title".

24 The primary judge found[12] that Felicity derived her title as sole registered proprietor through Claude, by registration of the second transfer, and was not a transferee of his interest for valuable consideration. But the primary judge held[13] that the general rule stated in s 118(1) of the RPA (that proceedings for the possession or recovery of land do not lie against the registered proprietor of the land) was engaged and that the exception to that rule provided by s 118(1)(d) did not apply. That is, the primary judge held that the proceedings were not

> "brought by a person deprived of land by fraud against:
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> (i) a person who has been registered as proprietor of the land through fraud, or
>
> (ii) a person deriving (otherwise than as a transferee bona fide for valuable consideration) from or through a person registered as proprietor of the land through fraud".

25 The primary judge concluded[14] that s 118(1)(d)(i) did not apply because there was no fraud by Felicity.

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10 (2011) 6 BFRA 77 at 112 [158].

11 (2011) 6 BFRA 77 at 113-114 [167].

12 (2011) 6 BFRA 77 at 115 [177].

13 (2011) 6 BFRA 77 at 116 [180].

14 (2011) 6 BFRA 77 at 115 [176].

26 The primary judge's further conclusion that s 118(1)(d)(ii) did not apply depended upon two steps. First, the primary judge held[15] that s 118(1)(d)(ii) "deals with a much narrower and more specific subject-matter than the 'except in case of fraud' exception in s 42". His Honour identified[16] that narrower subject as "the process by which registration as proprietor was achieved". Second, the primary judge found[17] that the process by which the registration of Claude as a registered proprietor was achieved was not attended by fraud. The wrongful drawing of funds from GC&Co (or the provision of illusory consideration by reference to the false loan account) was said[18] to be "remote from the process of registration and therefore beside the point".

27 The primary judge dismissed the proceedings brought against Felicity Cassegrain. The primary judge rejected time-based defences advanced by Claude Cassegrain and ordered him to pay an amount of equitable compensation to be fixed after inquiry by an Associate Judge. The inquiry directed by the primary judge was[19] an inquiry about the sums drawn from the false loan account (including the sum of $1 million recorded as being applied to payment of the purchase price for the Dairy Farm) and the amount of interest to be allowed in respect of those drawings.

The Court of Appeal

28 GC&Co and Claude Cassegrain each appealed to the Court of Appeal against the primary judge's orders. Claude Cassegrain's appeal failed[20], and his application for special leave to appeal to this Court was refused[21].

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15 (2011) 6 BFRA 77 at 116 [178].

16 (2011) 6 BFRA 77 at 116 [178].

17 (2011) 6 BFRA 77 at 116 [179].

18 (2011) 6 BFRA 77 at 116 [179].

19 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1594 at [17].

20 *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2013) 305 ALR 648.

21 [2014] HCATrans 138.

29 By majority (Beazley P and Macfarlan JA, Basten JA dissenting) the Court of Appeal allowed[22] GC&Co's appeal against the primary judge's orders dismissing its claims against Felicity for recovery of the Dairy Farm. The Court of Appeal declared that Felicity holds the Dairy Farm on trust for GC&Co absolutely and ordered her to execute a transfer of the land to GC&Co. By special leave, Felicity appeals to this Court against the orders of the Court of Appeal.

30 Although the majority in the Court of Appeal, Beazley P and Macfarlan JA, concluded that Felicity should transfer the whole of her registered interest in the Dairy Farm to GC&Co, their reasons for that conclusion differed. The third member of the Court, Basten JA, would have declared that Felicity holds a half interest in the Dairy Farm on trust for GC&Co and would have ordered that she execute a transfer of a one-half interest in the land to GC&Co. The differences in reasoning concerned three matters: agency, joint tenancy and registration through fraud. Was Claude Cassegrain Felicity's "agent" in some relevant sense? What follows from the registration of Claude and Felicity as joint tenants? For the purposes of s 118 of the RPA, did Felicity derive her title (in whole or in part) "from or through a person registered as proprietor of the land through fraud"[23]?

31 Rather than set out a summary of the separate reasons of each member of the Court of Appeal, it is convenient to deal with the issues by reference to the three matters identified.

Agency

32 Much attention was given in argument, both in this Court and in the Court of Appeal, to whether Claude Cassegrain was Felicity's "agent". The framing of argument in this way can be traced to the decision of the Privy Council in *Assets Company Ltd v Mere Roihi* and the well-known statement[24] of Lord Lindley that:

> "the fraud which must be proved in order to invalidate the title of a registered purchaser for value ... must be brought home to the person whose registered title is impeached *or to his agents*. Fraud by persons

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22 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612.

23 s 118(1)(d)(ii).

24 [1905] AC 176 at 210. See also *Butler v Fairclough* (1917) 23 CLR 78 at 97 per Isaacs J; [1917] HCA 9.

> from whom he claims does not affect him unless knowledge of it is brought home to him *or his agents*." (emphasis added)

Thus much of the argument was framed in terms of whether fraud was "brought home" to Felicity because Claude was fraudulent and was her "agent".

33 In the present case, Beazley P found[25] that there was sufficient evidence to infer that "Claude was Felicity's agent for the purposes of directing Mr McCarron [the solicitor] to register the first transfer". And her Honour held[26] that the consequence of that conclusion was that "the title that Felicity took as registered proprietor jointly with Claude was defeasible as a result of the fraud of her agent". Likewise, her Honour found[27] that "the probabilities are that Claude acted as [Felicity's] agent in respect of the second transfer" and that her title as sole registered proprietor was affected by his fraud.

34 Macfarlan JA agreed[28] with Beazley P that Claude acted as Felicity's agent with respect to the first transfer. But Macfarlan JA rested[29] his conclusion that Felicity's subsequently acquired interest as sole registered proprietor was defeasible on the footing that, having been registered as a joint tenant through fraud, she "did not shed her (imputed) fraudulent knowledge and character by taking a transfer from her co-tenant in whose fraud she was deemed to have participated".

35 By contrast, Basten JA held[30] that it should not be inferred that Claude acted as Felicity's agent for the purposes of the transaction which led to their registration as joint tenants. But his Honour held[31] that Claude obtained his title as joint tenant through fraud and that, because Felicity was not a transferee of

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25 (2013) 305 ALR 612 at 622 [37].

26 (2013) 305 ALR 612 at 622 [38].

27 (2013) 305 ALR 612 at 623 [42].

28 (2013) 305 ALR 612 at 645 [155].

29 (2013) 305 ALR 612 at 646 [157].

30 (2013) 305 ALR 612 at 638 [125].

31 (2013) 305 ALR 612 at 643 [144]-[147].

Claude's interest bona fide for valuable consideration, GC&Co was entitled to an order that she transfer a half share in the Dairy Farm to it.

36 It has long been recognised[32] that "[n]o word is more commonly and constantly abused than the word 'agent'". Close attention, therefore, must be given to what is meant when it is said that Claude Cassegrain was Felicity's "agent".

37 At least for the most part, the word "agent" appears to have been used in the Court of Appeal as a term explaining how events happened rather than as a term attributing legal responsibility for those events. The relevant question was treated as one of fact. That is, what inference should be drawn about how and why the registration of a transfer to Claude and Felicity as joint tenants came about? Or, can it be inferred that Felicity knew that Claude was arranging for the transfer of the Dairy Farm to them both as joint tenants? And because the question seems to have been treated as one of fact, reference was made to *Blatch v Archer*[33] and the proposition that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted".

38 It is important, however, to keep at the forefront of consideration that GC&Co did not allege, and the courts below did not find, that Felicity knew of Claude's fraudulent conduct. Yet the conclusion that Claude was Felicity's "agent" was treated by the majority in the Court of Appeal as a sufficient basis for concluding that the fraud exception provided by s 42(1) of the RPA applied and that her title as registered proprietor was defeasible. That is, what was seen as a factual inquiry about whether Claude brought about the transfer to Claude and Felicity as joint tenants with her knowledge (but without her knowing of the fraud) was treated as concluding the legal issue presented by s 42(1). But why that step should be taken was not explained. Rather, the word "agent" was used as a statement of conclusion. And, as has been said[34] in a closely related context, using a word like "agent" is to begin, not end, the relevant inquiry.

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32 *Kennedy v De Trafford* [1897] AC 180 at 188 per Lord Herschell. See also *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 50 per Dixon J; [1931] HCA 53.

33 (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

34 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 172 [29] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 19. See also

(Footnote continues on next page)

39 In *Clements v Ellis*, Dixon J examined[35] the decision in *Assets Company* in great detail. But what Lord Lindley meant by his reference to "agents" was not explored then or in later decisions of this Court. It may be thought that the reference to "agents" was intended to do no more than refer to those natural persons through whom the corporation, Assets Company Limited, had acted in acquiring the registered title that it did. That understanding of the reference would be consistent with the discussion of the issue in the Court of Appeal of New Zealand in one of the several cases[36] which were the subject of the consolidated appeals to the Privy Council, but it is not an understanding that would exhaust the meaning given to the dictum, at least inferentially, in later cases. It may also be thought that the reference reflected a view of "deferred" indefeasibility consistent with *Gibbs v Messer*[37], but that understanding would not sit easily with what was later said in *Frazer v Walker*[38] about *Assets Company*.

40 Instead, the reference to fraud "brought home to the person whose registered title is impeached or to his agents" should be understood, as it was by Street J in *Schultz v Corwill Properties Pty Ltd*[39], as posing, in the case of an agent, questions about scope of authority and whether the agent's knowledge of the fraud is to be imputed to the principal.

41 In the present case, those questions required consideration of *why* Claude's knowledge of his fraud should be imputed to Felicity. Concluding that Claude had taken the steps necessary to procure registration of the transfer from the company to Felicity and him as joint tenants showed no more than that Claude

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Scott v Davis (2000) 204 CLR 333; [2000] HCA 52; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; [2001] HCA 44; *New South Wales v Lepore* (2003) 212 CLR 511; [2003] HCA 4.

35 (1934) 51 CLR 217 at 245-260; [1934] HCA 18.

36 *Mere Roihi v Assets Company* (1902) 21 NZLR 691 at 719 per Williams J (dissenting), 750-751 per Edwards J; cf *Panapa Waihopi v Assets Company* (1902) 22 NZLR 37 at 43 per Stout CJ.

37 [1891] AC 248.

38 [1967] 1 AC 569 at 580.

39 [1969] 2 NSWR 576 at 582-583. See also *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265 at 273-274 per Kitto J; [1965] HCA 17.

had performed tasks that were of advantage to Felicity[40]. It was neither alleged nor found that Claude had acted as Felicity's agent in any other way, whether by negotiating[41] the transaction with GC&Co or by representing[42] that the price for the land could be met by debiting the loan account. So far as the evidence and argument went, Felicity was no more than the passive recipient of an interest in land which her husband had agreed to buy, but which he wanted (with her acquiescence) put into their joint names.

42 Without more, the conclusion that Claude had taken the steps necessary to procure registration of the transfer from the company to Felicity and him as joint tenants did not show that his fraud was within the scope of any authority she had, or appeared to have, given to him. Without more, it did not show that knowledge of his fraud was to be imputed (in the sense of "brought home") to her. And in this case, there was nothing more identified, whether in argument or in the reasons of the Court of Appeal.

43 Did her registration as joint tenant bridge that gap?

Joint tenancy

44 In the Court of Appeal, Beazley P held[43] that, even if the title which Felicity had held jointly with Claude was defeasible, it did not follow that the title she took on registration of the transfer of Claude's interest to her was. There was, in her Honour's view[44], "no relevant fraud of which Felicity had knowledge such as to impugn her indefeasible title as the sole joint tenant". By contrast, as already noted, Macfarlan JA held[45] that "Felicity was infected with Claude's fraud because she and Claude took title from [GC&Co] as joint tenants ... [and] *joint tenants are treated by the law as in effect one person only*" (emphasis

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40 cf *Sweeney* (2006) 226 CLR 161 at 167 [13] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

41 cf *Australasian Brokerage Ltd v Australian and New Zealand Banking Corporation Ltd* (1934) 52 CLR 430 at 450-452 per Dixon, Evatt and McTiernan JJ; [1934] HCA 34.

42 cf *Sibley v Grosvenor* (1916) 21 CLR 469 at 482-483 per Isaacs J; [1916] HCA 14.

43 (2013) 305 ALR 612 at 626 [60].

44 (2013) 305 ALR 612 at 626 [61].

45 (2013) 305 ALR 612 at 645 [156].

added). Basten JA held[46] that it was "preferable in principle to treat the shares of the joint tenants, holding title under the [RPA], prior to any severance, as differentially affected by the fraud of one, to which the other was not party".

45 The conclusion reached by Basten JA is right. As his Honour said[47], "[t]he contrary view would impute fraud to a party who was not herself fraudulent". That observation is reason enough to reject the contrary view. But it is important to demonstrate that the contrary view cannot be supported by general assertions that "the law" treats joint tenants as "in effect" one person. That demonstration must begin in the text of the RPA.

46 Section 100 of the RPA provides for registration as co-tenants. Sub-sections (2) and (3) deal with proprietors of a life estate and an estate in remainder, and with tenants in common. Their detail need not be noticed. Section 100(1) provides that two or more persons registered as joint proprietors of an estate or interest in land "shall be deemed to be entitled to the same as joint tenants". What is the effect of the deeming? That question requires reference to some aspects of the general law of real property.

47 In *Wright v Gibbons*[48], Dixon J described joint tenancy as "a form of ownership bearing many traces of the scholasticism of the times in which its principles were developed". And as his Honour's discussion[49] of the writers shows, the "pedantic, needlessly subtle"[50] thinking of that time was often compressed into maxims: especially "*nihil tenet et totum tenet*" (he holds nothing and he holds the whole) and "*per my et per tout*" (for nothing and for everything). But, as *Wright v Gibbons* demonstrates, those maxims cannot and

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46 (2013) 305 ALR 612 at 641 [138].

47 (2013) 305 ALR 612 at 641 [138].

48 (1949) 78 CLR 313 at 330; [1949] HCA 3.

49 (1949) 78 CLR 313 at 330, referring to Woodbine's edition of Bracton, *De Legibus et Consuetudinibus Angliae* (see Thorne trans (1977), vol 4, fo 430 at 336), *Coke on Littleton* (see (1628) at 186a) and Serjeant Manning's notes to *Daniel v Camplin* (1845) 7 Man & G 167 at 172, note (c) [135 ER 73 at 75] and *Murray v Hall* (1849) 7 CB 441 at 455, note (a) [137 ER 175 at 180].

50 *The Oxford English Dictionary*, 2nd ed (1989), vol XIV at 630, "scholastic", sense A4.

must not be treated as constituting a complete or wholly accurate description of the legal nature of a joint tenancy.

48 The hinge about which the reasoning of Dixon J turned in *Wright v Gibbons* was that the maxims (and similar statements by later writers to the effect that joint tenants are "considered by the law as one person for most purposes"[51]) cannot be taken as the premise for deductive reasoning about the effect of a joint tenancy. As Dixon J pointed out[52], by reference to *Coke on Littleton*, "[f]or purposes of alienation each [joint tenant] is conceived as entitled to dispose of an aliquot share". That is because, as Dixon J also said[53]:

> "Logical as may seem the deduction that joint tenants have not interests which in contemplation of law are sufficiently distinct to assure mutually one to another, there are many considerations which show that, *to say the least*, the consequence cannot be called an unqualified truth. *The fact is that the principle upon which the deduction is based must itself be very much qualified*." (emphasis added)

Only by recognising the necessity to qualify those statements of principle is it possible to account for the cases of forfeiture suffered by, and execution against, one of several joint tenants referred[54] to by Dixon J.

49 Once qualifications of the principle that joint tenants are "considered by the law as one person for most purposes"[55] are admitted to be necessary, bare statement of the principle cannot stand as a premise for deductive argument. It certainly provides no sufficient premise from which a deduction can be drawn about the operation of relevant provisions of the RPA with respect to "[t]wo or more persons who may be registered as joint proprietors of an estate or interest in land under the provisions of [that] Act". Even under the general law of real property, the deeming which is worked by s 100(1) would not entail that those

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51 (1949) 78 CLR 313 at 330, referring to Williams, *The Seisin of the Freehold*, (1878) at 117.

52 (1949) 78 CLR 313 at 330.

53 (1949) 78 CLR 313 at 330.

54 (1949) 78 CLR 313 at 330-331.

55 (1949) 78 CLR 313 at 330, referring to Williams, *The Seisin of the Freehold*, (1878) at 117.

registered as joint tenants are to be treated for all purposes as though they were the one person.

50 Like so many maxims, great care must be used lest "*nihil tenet et totum tenet*" or "*per my et per tout*" be used only as slogans stating an asserted conclusion. But in the present case, particular care must be exercised in applying maxims of the kind described. The issue in this case arises, and can only arise, in the context of a statutory system for title by registration. Questions of indefeasibility of registered title simply do not arise in the general law of real property. And no analogy can usefully be drawn between the issue that must be decided in this case and any issue that can arise in the general law of real property.

51 It is wrong, therefore, to begin the inquiry about the application of the fraud exceptions to ss 42(1) and 118(1) by asking what would follow from the "captivating appearance of symmetry and exactness"[56] of the four unities (of interest, title, time and possession) necessary for the creation of a joint tenancy under the general law of real property. An inquiry of that kind, adverted[57] to by Macfarlan JA, is directed to the nature of the title which a joint tenant would acquire under the general law.

52 It is also wrong to begin by asking only what consequences can be said to follow from s 100(1) of the RPA and its provision that persons registered as joint proprietors "shall be deemed to be entitled to the [relevant estate or interest] as joint tenants". Instead, the question is how that provision intersects with the provisions of s 42. More particularly, does the deeming effected by s 100(1) require that the fraud of one of the persons registered as joint proprietors denies *all* those persons the protection otherwise given by s 42(1)?

53 To hold that the deeming effected by s 100(1) denies all persons registered as joint proprietors the protection otherwise given by s 42(1) when one of their number has been guilty of fraud would constitute a significant departure from the accepted principle that actual fraud must be brought home to the person whose title is impeached. Both s 100(1) and s 42(1) take their place in an Act providing for title by registration, not registration of title. Both sections are directed to the consequences of registration and focus upon the position of the registered

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56 Sweet, *Challis's Law of Real Property*, 3rd ed (1911) at 367; cf Megarry and Wade, *The Law of Real Property*, 8th ed (2012) at 497.

57 (2013) 305 ALR 612 at 645 [156], citing *Diemasters Pty Ltd v Meadowcorp Pty Ltd* (2001) 52 NSWLR 572 at 579-580 [17].

proprietor, not title in the abstract. Section 42(1) provides that the *registered proprietor* "shall, except in case of fraud, hold the [relevant estate or interest]" subject to registered interests but otherwise absolutely free from all other interests except those identified in s 42(1)(a)-(d). Section 100(1) provides that *persons registered* as joint proprietors "shall be deemed to be entitled to the same as joint tenants". The question here is whether a title acquired by registration is defeasible.

54 No light is shed on that issue by asking what title GC&Co lost as a result of the fraud. The relevant question is whether the title of a registered proprietor is defeasible, not what loss the company suffered as a result of the fraud. Thus, observing that GC&Co was deprived of the whole of its interest in the land by Claude's fraud is right but irrelevant. And no light is shed on the issue by asking what would have happened if Claude had died before he transferred his interest in the land to Felicity. In particular, noting that, if Claude had died before the second transfer, Felicity would have been entitled to registration under s 101 of the RPA as the surviving joint tenant says nothing about whether, before registration of a survivorship application, her title as joint tenant was defeasible on account of Claude's fraud.

55 Felicity's title as joint tenant of the Dairy Farm was not defeasible by showing that Claude had acted fraudulently to deprive GC&Co of its land. His fraud was not brought home to Felicity. Because his fraud was not brought home to her, her title as joint tenant was indefeasible.

56 In light of these conclusions, there is no need to consider GC&Co's notice of contention. The grounds advanced in that notice were premised on Claude being found to have been Felicity's agent.

57 There remains for consideration the operation of s 118.

Section 118 of the RPA

58 It will be recalled that the primary judge held that, although Felicity derived her title as sole registered proprietor through Claude, and not as a transferee of his interest for valuable consideration, s 118(1)(d) did not apply because Claude was not registered as proprietor of the land through fraud. It will further be recalled that the primary judge treated s 118(1)(d)(ii) as dealing only

with "the process by which registration as proprietor"[58] is achieved, a subject said to be narrower and more specific than the fraud exception to s 42(1).

59 All members of the Court of Appeal rightly rejected[59] this interpretation of s 118(1)(d)(ii). Neither s 118 generally nor s 118(1)(d)(ii) in particular should be read as directed only to fraud in the process of registration. Exactly what would fall within fraud "in the process" of registration may be open to debate. But it is not a debate that need be had, because s 118 should be construed in a way which is consonant with the operation of s 42(1). In particular, s 118 must not be read in a way which would preclude action to recover the land in a case where the fraud exception to s 42(1) applies. Hence, the reference in s 118(1)(d)(i) to proceedings brought by a person deprived of land *by fraud* against a person who has been registered as proprietor of the land *through fraud* must be read as embracing every kind of fraud which falls within the relevant exception to s 42(1). If actual fraud is brought home to the registered proprietor, s 118(1)(d)(i) is engaged and the general bar to proceedings for the possession or recovery of land against that registered proprietor is lifted.

60 Conversely, but equally importantly, if the fraud exception to s 42(1) does *not* apply to the person who is registered as proprietor, the general bar to proceedings for the possession or recovery of land against the registered proprietor will apply and the exception provided by s 118(1)(d)(i) will not be engaged. That is, the exception for which s 118(1)(d)(i) provides does not diminish the protection given by s 42(1). It does not enlarge the rights which a person deprived of land by fraud has against the registered proprietor.

61 By contrast, the exception provided by s 118(1)(d)(ii) *does* enlarge the rights which a person deprived of land by fraud has against a registered proprietor. Unless the registered proprietor is a transferee bona fide for valuable consideration, a person deprived of land by fraud may bring proceedings for the possession or recovery of the land against a person deriving from or through a person registered as proprietor of the land through fraud. But as with s 118(1)(d)(i), the expression "registered as proprietor of the land through fraud" must be read in a manner consonant with s 42(1).

62 Hence, in the present case, Claude, but not Felicity, was registered as proprietor of (an interest in) the land (as joint tenant) through fraud. By the

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58 (2011) 6 BFRA 77 at 116 [178].

59 (2013) 305 ALR 612 at 631-632 [90]-[93], 633 [98] per Beazley P, 642-643 [143]-[145] per Basten JA, 646 [158] per Macfarlan JA.

second transfer, Felicity derived from or through Claude an interest as tenant in common as to half. Felicity derived that interest from or through a person registered as proprietor of (an interest in) the land (as joint tenant) through fraud. Felicity was not a transferee of the interest for valuable consideration. Section 118(1)(d)(ii) is thus engaged. Proceedings brought by GC&Co (as a person deprived of the land by fraud) for the recovery of that interest in the land (as tenant in common as to half) lie against Felicity.

Improvements to the land

63 On the hearing of the appeal to this Court, Felicity sought to adduce evidence that the land had been improved in various ways since 1997. She submitted that if GC&Co could recover an interest in the land as tenant in common as to half, the matter should be remitted to the Court of Appeal to determine what orders should be made and, in particular, whether some allowance should be made to her for the improvements.

64 Hitherto, Felicity has made no claim for allowances on account of improvements to the land. No evidence was led at trial about improvements. It is now too late for her to make such a claim. The principles discussed and applied in cases like *Suttor v Gundowda Pty Ltd*[60] and *Coulton v Holcombe*[61] preclude her from doing so.

Conclusion and orders

65 Felicity's title as joint tenant was not defeasible on account of Claude's fraud. Claude was not her "agent" in any relevant sense. Nor did it follow from Felicity's registration as joint tenant that her title was defeasible. Section 100(1) does not require that the fraud of one of the persons registered as joint proprietors denies all those persons the protection otherwise given by s 42(1). The fraud must be brought home to the person whose title is impeached. Claude's fraud was not brought home to Felicity.

66 But the interest which Felicity derived from or through Claude (an interest as tenant in common as to half) may be recovered by GC&Co. Felicity was not a bona fide purchaser for value of Claude's interest in the land.

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60 (1950) 81 CLR 418; [1950] HCA 35.

61 (1986) 162 CLR 1; [1986] HCA 33.

67 For these reasons the appeal to this Court should be allowed and there should be orders in the form proposed by Basten JA in the Court of Appeal and sought in this Court by Felicity Cassegrain if her appeal succeeded to the extent these reasons would allow. Orders 2 and 3 of the Court of Appeal of the Supreme Court of New South Wales made on 18 December 2013 should be set aside and, in their place, there should be (a) a declaration that Felicity Cassegrain holds a half interest in the property described in Folio Identifiers 4/792413, 1/798316, 115/754434, 124/754434, 2/720827, 117/754434, 118/754434 and 174/754434 on trust for Gerard Cassegrain & Co Pty Ltd absolutely; and (b) an order that Felicity Cassegrain execute a *Real Property Act* transfer of a one-half interest in the property referred to in par (a) to Gerard Cassegrain & Co Pty Ltd. Although the appellant has had only limited success in her appeal to this Court, she should have her costs of the appeal.

68 KEANE J. The appellant is the registered proprietor of a farming property in New South Wales ("the Dairy Farm") which was previously owned by the respondent. The appellant's title to the Dairy Farm is the subject of the respondent's claim in these proceedings. The appellant's title was acquired through the fraudulent conduct of her husband, Claude Cassegrain ("Claude"), as a director of the respondent. The issue in these proceedings is whether the appellant's title as registered proprietor is indefeasible.

69 The resolution of this issue depends on the operation of the *Real Property Act* 1900 (NSW) ("the Real Property Act"). Before turning to the relevant provisions of the Real Property Act, and the differing views of the courts below as to their operation in this case, the facts which gave rise to the issue should be briefly summarised.

Factual background

70 On 2 September 1996, Claude and Anne-Marie Cameron, the directors of the respondent at that time, resolved that the respondent should transfer the Dairy Farm to Claude and the appellant as joint tenants for a consideration of $1 million and the performance of some other obligations. The instrument of transfer was executed on 14 September 1996 by the respondent as transferor under its common seal, attested by Claude and Anne-Marie Cameron, and Mr Chris McCarron as solicitor for Claude and the appellant as transferees[62].

71 On 27 February 1997, a letter was sent on behalf of the respondent, signed by "Claude Cassegrain Managing Director", requesting Mr McCarron to "register the transfer as exchanged." On the same day, Mr McCarron sent a response to "Mr C Cassegrain c/- Gerard Cassegrain & Co Pty Ltd" informing Claude that the instrument of transfer would be lodged for registration.

72 Registration of the transfer ("the first transfer") was effected on 10 March 1997. Mr McCarron confirmed that this had occurred by a letter dated 14 March 1997 addressed to "Mr C Cassegrain c/- Gerard Cassegrain & Co Pty Ltd".

73 Claude purported to pay for the Dairy Farm by debiting a loan account standing in his favour in the sum of $4.5 million in the books of the respondent. The debiting occurred on 30 June 1997. In fact, as was held below and is no longer in contest, the respondent was not indebted to Claude in terms of the loan account; and Claude's claim to debit the loan account was a false claim which was known by him to be false.

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62 There was no allegation that the $1 million consideration was an undervalue, nor was there any allegation of wrongdoing by Anne-Marie Cameron or Mr McCarron.

74 On 24 March 2000, Claude executed an instrument of transfer of his interest in the Dairy Farm to the appellant for a consideration of one dollar. The instrument of transfer was executed by Claude as transferor, and by Mr McCarron on behalf of the appellant as transferee. This transfer was registered on 18 April 2000 ("the second transfer").

The proceedings

75 The respondent commenced proceedings in the Supreme Court of New South Wales against Claude and the appellant. Against Claude, the respondent sought an order that he pay equitable compensation for breach of his fiduciary duty to the respondent. Against the appellant, the respondent sought an order that the appellant transfer the Dairy Farm to it, and, alternatively, a declaration that the appellant held the Dairy Farm on trust for the respondent.

76 In these proceedings, the respondent did not seek to plead or prove that the appellant knew, at the time of the first transfer, that Claude's intention was to cheat the respondent out of its title to the Dairy Farm for nothing. The appellant contended that her title as sole registered proprietor of the Dairy Farm is indefeasible under the Real Property Act.

The Real Property Act

77 Section 42 of the Real Property Act provides that the estate or interest of a registered proprietor under the Act is indefeasible, "except in case of fraud":

> "(1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded".

78 Section 118 provides for the working out of the operation of the fraud exception to the indefeasibility of registered title established by s 42. Section 118(1)(d) provides:

> "(1) Proceedings for the possession or recovery of land do not lie against the registered proprietor of the land, except as follows:
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> ...
>
> (d) proceedings brought by a person deprived of land by fraud against:

(i) a person who has been registered as proprietor of the land through fraud, or

(ii) a person deriving (otherwise than as a transferee bona fide for valuable consideration) from or through a person registered as proprietor of the land through fraud".

79 By the registration of the first transfer the appellant and Claude were registered as joint proprietors of a fee simple estate in the Dairy Farm. In this regard, it is to be noted that s 100(1) of the Real Property Act provides:

> "Two or more persons who may be registered as joint proprietors of an estate or interest in land under the provisions of this Act, shall be deemed to be entitled to the same as joint tenants."

The decision of the primary judge

80 The primary judge (Barrett J) found that "to the extent that Claude received payments from [the respondent] ... he took moneys of [the respondent] that it was not legally obliged to pay to him"[63] in breach of his fiduciary duty to the respondent and dishonestly[64].

81 The primary judge concluded that the appellant's title as sole registered proprietor was indefeasible so that the respondent's claim against the appellant "for the possession or recovery of land" was precluded by s 118(1)(d) of the Real Property Act.

82 The primary judge found that there was a lack of evidence to conclude that Claude exercised actual or implied authority on behalf of the appellant in relation to either the first or second transfer of the Dairy Farm[65] so as to sheet home his fraud to her.

83 His Honour said[66]:

> "In the particular statutory context, 'fraud' is 'to be construed as meaning something more than mere disregard of rights of which the

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63 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2011) 6 BFRA 77 at 106 [121].

64 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2011) 6 BFRA 77 at 107 [129].

65 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2011) 6 BFRA 77 at 112 [158].

66 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2011) 6 BFRA 77 at 114 [168].

> person sought to be affected had notice, and as importing something in the nature of personal dishonestly [sic] or moral turpitude'[67] ... [The] relevant fraud or dishonesty is 'dishonesty on the part of the registered proprietor in securing his registration as proprietor.'[68]"

84 In addition, the primary judge held that, while the appellant may have been accountable in equity to the respondent, ss 42 and 118(1)(d) of the Real Property Act operated so that her title as sole registered proprietor of the Dairy Farm was indefeasible[69]. In relation to the second transfer, in particular, his Honour concluded[70]:

> "Claude, the person 'from or through' whom [the appellant] derived her interest, was not 'registered as proprietor of the land through fraud'. These are the operative words of the section. Their focus is exclusively on the process by which registration as proprietor was achieved and the question whether that process was achieved by fraud. … Section 118(1)(d)(ii) thus deals with a much narrower and more specific subject-matter than the 'except in case of fraud' exception in s 42."

The decision of the Court of Appeal

85 The Court of Appeal, by majority (Beazley P and Macfarlan JA, Basten JA in dissent), allowed the respondent's appeal, declared that the appellant held the Dairy Farm on trust for the respondent absolutely, and ordered that the appellant transfer the Dairy Farm to the respondent.

86 Beazley P proceeded to consider the respondent's argument that Claude was acting as the appellant's agent in procuring both the first and second transfers[71]. Her Honour said that:

> "[t]he letter of 27 February 1997 ... should be viewed in the context ... of Claude's fraud in having the dairy farm transferred … to him and [the

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67 *Stuart v Kingston* (1923) 32 CLR 309 at 329; [1923] HCA 17.

68 *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 614; [1988] HCA 16.

69 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2011) 6 BFRA 77 at 113-114 [164], [167].

70 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2011) 6 BFRA 77 at 115-116 [178].

71 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 618 [19].

> appellant] ... Claude must have written the letter on behalf of the transferees."[72]

87 Her Honour was satisfied that, in the absence of evidence to the contrary, this was sufficient evidence to draw an inference that the appellant impliedly authorised Claude's actions in procuring the first transfer[73]. Her Honour concluded that Claude and the appellant[74] obtained their registered title to an estate as joint tenants as a result of fraud; that title was, therefore, defeasible[75].

88 In relation to the second transfer, her Honour again drew "the inference, on the available evidence, that the probabilities are that Claude acted as her agent in respect of the second transfer"[76]. Beazley P disagreed with the primary judge's view that the operation of s 118(1)(d)(ii) was confined to the process whereby registration is achieved[77], concluding that, on the ordinary meaning of the words, the appellant was a person deriving her interest as sole registered proprietor "from or through" Claude[78]. Because Claude was a person whose title was registered through fraud, "[the appellant's] title is vulnerable at the suit of [the respondent]."[79]

89 Macfarlan JA agreed with Beazley P that "the inference should be drawn that Claude acted as [the appellant's] agent for the purposes of their acquisition of the property and its registration in their joint names"[80].

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72 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 621 [30].

73 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 622 [37].

74 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 623 [42].

75 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 622 [38].

76 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 623 [42].

77 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 633 [98].

78 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 631 [89].

79 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 632 [94].

80 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 645 [155].

90 In addition, Macfarlan JA held that the appellant "was infected with Claude's fraud because she and Claude took title from the [respondent] as joint tenants."[81] His Honour explained[82]:

> "As [the appellant] was infected with Claude's fraud both because he acted as her agent and because they were registered as joint tenants, she was a person who, within the terms of s 118(1)(d)(i), was registered as a joint tenant 'through [her own] fraud'. She did not shed her (imputed) fraudulent knowledge and character by taking a transfer from her co-tenant in whose fraud she was deemed to have participated. That transfer again led to her registration 'through [her own] fraud': it was only possible because of their existing fraudulent registration."

91 Basten JA held that the respondent's case that the appellant was complicit in Claude's fraud was deficient in that the respondent failed to establish that the appellant knew of Claude's fraudulent design[83].

92 As to the argument that the joint tenancy which resulted from the first transfer meant that Claude's fraud "infected" the appellant's title, as Macfarlan JA held, Basten JA said[84]:

> "[I]t is preferable in principle to treat the shares of the joint tenants, holding title under the Real Property Act, prior to any severance, as differentially affected by the fraud of one, to which the other was not party. The contrary view would impute fraud to a party who was not herself fraudulent. On that approach, [the appellant] should be treated as having a half interest in the dairy farm, from March 1997, which was indefeasible, because unaffected by [Claude's] fraud."

93 Basten JA went on to hold that, pursuant to s 118(1)(d)(ii) of the Real Property Act, the respondent was entitled to succeed in recovering Claude's half share in the Dairy Farm, the subject of the second transfer. In this regard, Basten JA said[85]:

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81 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 645 [156].

82 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 646 [157].

83 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 637-638 [123]-[125].

84 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 641 [138].

85 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 643 [146]-[147].

> "The finding that [the appellant] was not a transferee bona fide for valuable consideration was not challenged. …
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> In the result, the [respondent] is entitled to obtain an order that [the appellant] transfer a half share in the dairy farm (being the share obtained from [Claude]) to the [respondent]."

The parties' submissions

94 In this Court, the appellant submitted that s 118(1)(d)(i) of the Real Property Act was not applicable unless Claude was found to be the appellant's agent in committing the fraud which led to the registration of the first transfer. The appellant submitted that the majority in the Court of Appeal were wrong to conclude that Claude could be regarded as the appellant's agent so as to taint her with his fraud in respect of either transfer.

95 In relation to s 118(1)(d)(ii), the appellant accepted that her title was derived from or through Claude, but supported the view of the primary judge that, because the registration of the first transfer took place on 10 March 1997, and the debiting of the loan account did not occur until 30 June 1997, Claude was not *registered* as proprietor through fraud[86] for the purposes of s 118(1)(d)(ii) of the Real Property Act.

96 The respondent contended that there was sufficient evidence to infer that Claude procured the first transfer as the appellant's agent. In this regard, the respondent relied on the reasoning[87] of Beazley P that:

(a) Claude had written the letter of 27 February 1997 instructing Mr McCarron to register the first transfer;

(b) in writing that letter, Claude had assumed authority to act on the appellant's behalf; and

(c) given that the appellant failed to adduce evidence that she opposed Claude's assumption of authority, it could be inferred that Claude had acted as her agent in procuring the first transfer.

97 Beazley P's conclusion was said to be justified on the basis of the principle in *Blatch v Archer*[88] that "all evidence is to be weighed according to the proof

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86 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2011) 6 BFRA 77 at 116 [179].

87 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 620-622 [30]-[38].

88 (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

which it was in the power of one side to have produced, and in the power of the other to have contradicted."

98 Pursuant to a notice of contention, the respondent sought to sustain the decision of the majority of the Court of Appeal on the additional basis favoured by Macfarlan JA, that is, that the appellant's registered title to the Dairy Farm as sole proprietor was defeasible by reason of Claude's fraud in procuring the transfer of the Dairy Farm to himself and the appellant as joint tenants. The respondent relied in this regard upon the decision of the Supreme Court of New South Wales in *Diemasters Pty Ltd v Meadowcorp Pty Ltd*[89], where Windeyer J held that where one of two joint purchasers of land engages in fraud in procuring the title of the joint registered proprietors, the title of the joint registered proprietors is defeasible by the defrauded party.

99 This contention should be accepted and the decision of the Court of Appeal affirmed on the additional ground stated by Macfarlan JA.

Agency

100 The decision of the Court of Appeal cannot be sustained on the basis that Claude's fraud could be sheeted home to the appellant as a matter of agency. Fraud, for the purpose of ss 42 and 118(1)(d) of the Real Property Act, is the depriving of a person of an interest[90] by actual dishonesty. In *Assets Co Ltd v Mere Roihi*[91], it was said:

> "the fraud which must be proved in order to invalidate the title of a registered purchaser ... must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents ... A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

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89 (2001) 52 NSWLR 572 at 579-580 [17].

90 *Attorney-General (NSW) v Peters* (1924) 34 CLR 146 at 149-150, 151-152; [1924] CLR 31.

91 [1905] AC 176 at 210.

101 As Street J said in *Schultz v Corwill Properties Pty Ltd*[92]:

> "It is not enough simply to have a principal, a man who is acting as his agent, and knowledge in that man of the presence of a fraud. There must be the additional circumstance that the agent's knowledge of the fraud is to be imputed to his principal. This approach is necessary in order to give full recognition to (a) the requirement that there must be a real, as distinct from a hypothetical or constructive, involvement by the person whose title is impeached, in the fraud, and (b) the extension allowed by the Privy Council that the exception of fraud under s 42 can be made out if 'knowledge of it is brought home to him or his agents'."

102 The respondent did not seek to plead or prove a case that the appellant was knowingly engaged in Claude's scheme to deprive the respondent of its land for nothing. That being so, the appellant could not be said to be knowingly involved in Claude's dishonest conduct; accordingly, she could not be held to have been a party to his fraud. In these circumstances, the principle in *Blatch v Archer*[93] cannot avail the respondent.

Joint tenancy

103 It is not in dispute that Claude acted fraudulently in relation to both the first and second transfers, as he deliberately sought to cheat the respondent out of its title to the Dairy Farm. Nor is there any question that the respondent was deprived of its title to the land through the fraud perpetrated by the first transfer.

104 If Claude had procured the registration of the transfer from the respondent to himself as sole registered proprietor of the land, and then transferred the land to the appellant for one dollar, there could be no doubt that the respondent would be entitled to recover the land from the appellant under s 118(1)(d)(ii) of the Real Property Act. The question for decision is whether the respondent is to be denied recovery of the entirety or one-half of its land because Claude adopted the expedient of a fraudulent transfer to himself and the appellant before effecting the second transfer[94].

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92 [1969] 2 NSWR 576 at 583.

93 (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

94 It may be said that if Claude had simply transferred the land directly to the appellant and that transfer had been registered, without any involvement on her part in his fraud, the appellant's title would clearly have been indefeasible. On this basis, it might be said that there is nothing particularly odd about regarding the appellant's title as indefeasible merely because it was the consequence of two transfers. In practical terms, however, by the first transfer Claude obtained a legal

(Footnote continues on next page)

105 The issue may be analysed in this way. By virtue of s 100(1) of the Real Property Act, the estate acquired by the appellant and Claude as a result of the registration of the first transfer was but one estate held by them jointly. That title was acquired through the fraud of the registered proprietor, the title of Claude and the appellant being one and indistinguishable. On that basis, s 118(1)(d)(i) was engaged in favour of the respondent. For the purposes of s 118(1)(d)(i), the appellant and Claude were jointly registered proprietors of the single title created by the registration of the first transfer. After the registration of the second transfer, the appellant's title to the then severed half share thereby acquired by her from Claude was defeasible under s 118(1)(d)(ii). That is because the appellant was a person who derived that title from Claude, and he was a person who had been registered as a proprietor of his (then severed) aliquot share through fraud.

106 According to the authoritative exposition of ss 42 and 118(1)(d) of the Real Property Act (and their Torrens title analogues), an indefeasible title is acquired by a registered proprietor by the fact of registration; and the fraud exception to indefeasibility operates only where the registration of a proprietor is obtained by the fraud of the registered proprietor or its agents[95]. Thus, in *Registrar of Titles (WA) v Franzon*[96], Mason J, with whom Barwick CJ and Jacobs J agreed, said of the Western Australian analogue of the Real Property Act:

> "[T]he section identifies the person against whom action may be brought as the person 'who acquired title to the estate or interest *through such fraud*'. These words strongly suggest that the section is directed to fraud perpetrated by or on behalf of the person who secures registration." (emphasis of Mason J)

107 This exposition was not directed to a case of acquisition by joint tenants. Accordingly, it does not foreclose the analysis summarised above.

108 There was only one registered title in the land which was obtained by the registration of the first transfer, and that was acquired by Claude and the appellant, "as joint proprietors"[97]. Because there was no separate title acquired

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estate for himself as well as the appellant, which could not have been achieved by procuring a transfer to the appellant as sole proprietor.

95 *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210; *Breskvar v Wall* (1971) 126 CLR 376 at 384; [1971] HCA 70; *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618; [1975] HCA 41.

96 (1975) 132 CLR 611 at 618.

97 Real Property Act, s 100(1).

by the appellant upon registration of the first transfer, the issue is not so much, as Basten JA put it, whether it is appropriate to "impute fraud to a party who was not herself fraudulent"[98], but whether the respondent was deprived of land by the registration of a title to the land obtained through the fraud of the registered proprietor.

109 In this regard, s 118(1)(d)(ii) renders defeasible the title of a non-fraudulent registered proprietor who, not being a transferee bona fide for valuable consideration, derives his or her title from or through a person who had been registered as proprietor of the land through fraud. That being so, it is difficult to ascribe to s 118(1)(d)(i) an intention to render indefeasible a jointly held registered title acquired through the fraud of one of two joint registered proprietors in circumstances where the other joint proprietor was not a transferee bona fide for valuable consideration.

110 It was the registration of the appellant and Claude as joint proprietors which, in a system of title by registration[99], effected that deprivation in this case. The appellant and Claude, as joint proprietors, acquired a single estate in the Dairy Farm. The respondent was deprived of its title by the registration of their title to that estate or interest. That title was acquired by fraud "sheeted home" to the appellant, not because the appellant claimed her title through Claude as her agent, but by virtue of the nature of the joint tenancy of the single estate to which they were entitled.

111 In *Wright v Gibbons*[100], Dixon J reflected upon the basal proposition that "in contemplation of law joint tenants are jointly seised for the whole estate they take in land and no one of them has a distinct or separate title, interest or possession." Dixon J surveyed the authorities which support that proposition, his survey culminating in the statement of Mr Joshua Williams in his lectures on *The Seisin of the Freehold*[101] that joint tenants were considered by the law as one person for most purposes.

112 Dixon J went on to observe that, for some purposes, the law has departed from the rigorous application of that basic proposition, instancing the ability of

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98 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 641 [138].

99 *Frazer v Walker* [1967] 1 AC 569 at 580.

100 (1949) 78 CLR 313 at 329; [1949] HCA 3.

101 (1878) at 117.

one joint tenant to alienate an aliquot share of the title formerly held in common, and then said[102]:

> "If one joint tenant suffered a forfeiture it was not the whole estate but only his aliquot share that was forfeited. If one joint tenant proved to be an alien the Crown, on office found, took only his share. Execution on a judgment for debt against one joint tenant bound his aliquot share and continued to do so in the hands of the survivor if the execution debtor afterwards died. ... Each joint tenant could declare uses and they could declare different uses of their respective shares".

113 The examples given by Dixon J are cases of alienation, whether voluntary or not, of the severable interest of a joint tenant. These examples do not deny the truth of the proposition that, at least so far as the acquisition of a joint title is concerned, "in contemplation of law joint tenants are jointly seised for the whole estate they take … and no one of them has a distinct or separate title".

114 The proposition that the title obtained by the appellant and Claude upon the registration of the first transfer was, "for the purpose of tenure"[103], the single estate held by them in common may be, as Dixon J described it, one of the "many traces of the scholasticism of the times in which [the] principles of [joint tenancy (as a form of ownership)] were developed."[104] Nevertheless, modern authority confirms that the historical understanding of the nature of the title acquired by joint tenants remains an accurate statement of the legal status thereby acquired as against the outside world. Thus, in *Hammersmith and Fulham London Borough Council v Monk*[105], Lord Browne-Wilkinson said that a transfer of land to two or more joint tenants "operates so as to make them, vis à vis the outside world, one single owner." And, in *Peldan v Anderson*[106], Gummow ACJ, Kirby, Hayne, Callinan and Crennan JJ were not dismissing a mere historical curiosity of no current legal relevance when they referred to joint tenants as "together composing one single owner, each being seised per my et per tout".

115 Importantly, s 100 of the Real Property Act confirms that, for the purposes of that Act, the joint proprietorship of a registered title is in the nature of a joint tenancy, at least until it is severed. Upon the registration of the first transfer, in

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102 *Wright v Gibbons* (1949) 78 CLR 313 at 330-331.

103 *Wright v Gibbons* (1949) 78 CLR 313 at 331.

104 *Wright v Gibbons* (1949) 78 CLR 313 at 330.

105 [1992] 1 AC 478 at 492.

106 (2006) 227 CLR 471 at 480 [19]; [2006] HCA 48.

conformity with s 100, the appellant acquired title to one estate jointly with Claude. The registered proprietors of that title acquired it through fraud; and that is no less true because the appellant herself did not actually participate in Claude's fraudulent intent.

116 That a joint tenancy is readily severable, as indeed s 97 of the Real Property Act[107] contemplates, does not lead to a different conclusion: it is not suggested by any party that the joint tenancy of Claude and the appellant was severed at any time before the registration of the second transfer. To recognise the ease of severance and an effective alienation of an aliquot share by one joint tenant to another is not to deny that until the alienation occurs joint tenants are seised of their joint estate or interest as one single owner of that estate or interest.

117 If the second transfer had not occurred, and the respondent had brought proceedings against both Claude and the appellant under s 118(1)(d)(i), no stretch of language would have been involved in accepting that they were persons who, viewed together, were "registered as proprietor of the land through fraud". No decided case precludes the application of that description to them; indeed, given that s 118(1)(d) "restricts, in the interests of indefeasibility of title, rights which would exist otherwise at law or in equity"[108], the judicial gloss on the fraud exception should not be extended to defeat the respondent's claim.

118 As to the second transfer, and s 118(1)(d)(ii) of the Real Property Act, the judges of the Court of Appeal were right to hold that there is no good reason to construe the phrase "registered ... through fraud" as being confined narrowly to the administrative process of registration. The words "through fraud" naturally mean "accomplished by means of fraud"; they are wide enough to capture Claude's fraudulent conduct in effecting the transfer of the Dairy Farm with the intention of taking the land without any payment to the respondent.

119 It is wrong to read s 118(1)(d)(ii) as narrower in scope than the fraud exception to indefeasibility in s 42(1) of the Act, and as concerned only with the "administrative process of registration". That is so for two reasons: first, it is to narrow, in an uncertain way not warranted by the text, the scope of a provision intended to permit the vindication of rights which would otherwise exist at law or

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107 Section 97(1) of the Real Property Act provides:

> "Registration of a transfer by a joint tenant of the joint tenant's interest in the land that is the subject of a joint tenancy to himself or herself severs the joint tenancy."

108 *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 615. See also *Stuart v Kingston* (1923) 32 CLR 309 at 345.

in equity[109]; and secondly, it is to fail to appreciate the role of s 118(1)(d) as working out the practical operation of the fraud exception to the general rule stated in s 42(1) of the Act[110]. As was rightly said by Basten JA in the Court of Appeal[111]:

> "[T]hat s 118(1) deals with a narrower subject matter than the exception in s 42 ... would be surprising, because it would appear to leave no statutory mechanism for the defrauded landowner to recover the land, despite the exception in s 42(1), leaving the transferee's title defeasible."

Conclusion and orders

120 The registration of neither the first nor the second transfer created an indefeasible title in the appellant. The appellant and Claude were registered as proprietors of the land through fraud. And the appellant derived Claude's half share upon the second transfer from Claude, a person who had been registered as proprietor through his fraud. Accordingly, the respondent is entitled to recover its land from the appellant.

121 The appeal should be dismissed with costs.

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109 *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 615.

110 *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618.

111 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 305 ALR 612 at 643 [144].