

## Indefeasibility of title – the ambit of the “fraud” exceptions

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Karin Ottesen

### Introduction

1. An important exception to the indefeasibility of title of registered proprietors of land under Torrens legislation is fraud. The High Court of Australia in *Cassegrain v Gerard Cassegrain & Co Pty Ltd*<sup>1</sup> recently clarified the ambit of the “fraud” exceptions to the principle of indefeasibility of title found in ss 42(1) and 118(1)(d) of the *Real Property Act 1900* (NSW) (“RPA”).

### Background

#### *Facts*

2. A company, Gerard Cassegrain & Co Pty Ltd (“**Company**”) was registered under the RPA as the proprietor of certain land (“**Dairy Farm**”).
3. Claude Cassegrain and his sister, who were then the directors of the Company, resolved that the Company should sell the Dairy Farm to Claude and Claude’s wife, Felicity, as joint tenants for a consideration of \$1 million and that the amount of the consideration should be satisfied by a debit to a loan account standing in Claude’s favour in the books of the Company.
4. In fact, the amount recorded in Claude’s loan account (an amount in excess of \$4 million) was part of a sum of money which had been paid to the Company in settlement of certain court proceedings brought by the Company against a third party and Claude was not entitled to any part of the settlement sum and the Company did not owe Claude any part of the amount recorded in the loan account.
5. A transfer of the Dairy Farm to Claude and Felicity as joint tenants was executed and later registered. Although the transfer acknowledged receipt of the \$1 million, Claude’s loan account was not debited with that amount until after the transfer had been registered.
6. A number of years later, Claude transferred his interest in the Dairy Farm to Felicity for a consideration of \$1.00 and Felicity became the sole registered proprietor of the Dairy Farm.

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<sup>1</sup> [2015] HCA 2.

### *Proceedings*

7. A statutory derivative action was brought on behalf of the Company against Claude and Felicity in the Supreme Court of New South Wales.
8. The Company claimed that Claude had engaged in a fraudulent breach of fiduciary duty and Barrett J, who heard the matter at first instance, upheld the claim. His Honour concluded, amongst other things, that Claude's conduct in connection with his and Felicity's acquisition of the Dairy Farm as joint tenants was a dishonest or fraudulent breach of fiduciary duty because Claude had drawn on a false loan account to pay the purchase price and had thereby obtained from the Company value to which he had had no entitlement. His Honour ordered *inter alia* that Claude pay equitable compensation to the Company.<sup>2</sup>
9. In relation to Felicity, the Company did not allege that she was a participant in, or had notice of, Claude's fraud at the time she and Claude acquired the Dairy Farm as joint tenants. Rather, the Company claimed that her title to the Dairy Farm as joint proprietor with Claude was defeasible on account of Claude's fraudulent conduct because Claude had acted as her agent. The Company further claimed that Felicity's title as sole proprietor was defeasible because she had derived the remaining interest from or through a person registered as a proprietor through fraud (that is, Claude) and otherwise than as a transferee bona fide for valuable consideration. The Company sought an order that Felicity execute a transfer of the Dairy Farm to the Company.
10. Barrett J dismissed the Company's claims against Felicity.<sup>3</sup>
11. Claude and the Company each appealed to the New South Wales Court of Appeal against Barrett J's orders.
12. Claude's appeal was dismissed by the Court of Appeal<sup>4</sup> and an application by him for special leave to appeal to the High Court was refused.<sup>5</sup>
13. The Company's appeal was allowed. The Court of Appeal (Beazley P and Macfarlan JA, Basten JA dissenting) declared that Felicity held the Dairy Farm on trust for the Company absolutely and ordered her to execute a transfer of the whole of the land to the Company.<sup>6</sup>

### **Appeal to the High Court**

14. By special leave, Felicity appealed to the High Court against the orders of the Court of Appeal. The High Court (French CJ, Hayne, Bell and Gageler JJ, Keane J dissenting) allowed the appeal in part and declared that Felicity held a half interest in the Dairy Farm on trust for the Company absolutely and ordered her to execute a transfer of a

<sup>2</sup> See *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1156.

<sup>3</sup> Above, n 2.

<sup>4</sup> See *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2013] NSWCA 454; (2013) 305 ALR 648.

<sup>5</sup> See *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2014] HCA Trans 138.

<sup>6</sup> See *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2013] NSWCA 453; (2013) 305 ALR 612.

one-half interest in the land to the Company. The reasons of the four members of the majority were given in a joint judgment.

### High Court's reasoning

#### *Issue and relevant provisions*

15. The issue on the appeal was whether Felicity's title, first as joint proprietor with Claude, or second deriving from or through Claude under the subsequent transfer, was defeasible by the Company.<sup>7</sup>
16. The resolution of this issue required the High Court to construe and apply ss 42(1), 100(1) and 118(1)(d) RPA.
17. Section 42(1) RPA provides an exception to the indefeasible title of registered proprietors of land in the case of fraud:

*"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 except [those identified in paras (a)-(d)]".*

18. Section 100(1) RPA deals with registered co-tenants and 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."*

19. Section 118(1) RPA generally bars proceedings for the recovery of land against registered proprietors except in certain cases. It relevantly provides that:

*"(1) Proceedings for the possession or recovery of land do not lie against the registered proprietor of the land, except as follows:*

*...*

*(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".*

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<sup>7</sup> Above, n 1, at [1].

*Specific matters for determination*

20. The specific matters for determination by the High Court were, in essence, as follows:

- whether Felicity’s title as joint proprietor with Claude was defeasible pursuant to the fraud exception in s 42(1) RPA because Claude had acted fraudulently and was her “agent”;
- whether it followed from Felicity’s registration as joint tenant that Felicity was ‘infected’ with Claude’s fraud; and
- whether the Company was entitled to bring proceedings for the recovery of the Dairy Farm against Felicity pursuant to s 118(1)(d)(ii) RPA because Felicity had derived her title (in whole or in part) from or through a person registered as proprietor of the land through fraud.

*Was Claude Felicity’s agent?*

21. The joint judgment noted<sup>8</sup> that the Privy Council in *Assets Company Ltd v Mere Roihi*<sup>9</sup> had declared that the fraud required to invalidate the title of a registered proprietor had to be “brought home to the person whose registered title is impeached or to his agents”.

22. The joint judgment further noted<sup>10</sup> that the majority of the Court of Appeal had concluded that Felicity’s title as joint proprietor with Claude was defeasible under s 42(1) RPA on the basis that there was sufficient evidence from which an inference could be drawn that Claude had been her “agent”. The evidence consisted of instructions which Claude had given to a solicitor for the registration of the transfer.<sup>11</sup>

23. The joint judgment disagreed with the approach taken by the majority of the Court of Appeal, saying that the word “agent” appeared to have been used as a term “explaining how events happened rather than as a term attributing legal responsibility for those events”; that “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)”; and that the word “agent” had been used as a statement of conclusion when it should have been used “to begin, not end, the relevant inquiry.”<sup>12</sup>

24. After noting that the meaning of the word “agents” as used in the Privy Council’s statement that fraud had to be “brought home to the person whose registered title is impeached or to his agents” had never been explored in previous High Court decisions, the joint judgment considered the possible meanings that it could have and

<sup>8</sup> Above, n 1, at [32].

<sup>9</sup> [1905] AC 176 at 210.

<sup>10</sup> Above, n 1, at [33]-[34].

<sup>11</sup> Above, n 6, at [37]-[38] per Beazley P; [155] per Macfarlan JA. Beazley P also drew inferences from the evidence to conclude that Claude was also Felicity’s agent for the subsequent transfer: at [42].

<sup>12</sup> Above, n 1, at [37]-[38].

concluded that it was to be understood in the way in which Street J had understood it in *Schultz v Corwill Properties Pty Ltd*,<sup>13</sup> namely:

*"as posing ... questions about scope of authority and whether the agent's knowledge of the fraud is to be imputed to the principal."*<sup>14</sup>

25. The joint judgment then gave consideration as to why Claude's knowledge of his fraud should be imputed to Felicity. The joint judgment said that concluding that Claude had taken steps to bring about the registration of the transfer from the Company to Felicity and him as joint tenants only proved that Claude had performed tasks that were advantageous to Felicity. It did not show that Claude's fraud was within the scope of any authority Felicity had given to him and it did not show that knowledge of his fraud had been "brought home" to her.<sup>15</sup>

26. It was noted that it was not claimed nor found that Claude had acted as Felicity's agent in any other way, such as by negotiating the acquisition with the Company or by representing that the purchase price for the Dairy Farm could be satisfied by debiting the loan account. In these circumstances, the joint judgment concluded that:

*"[s]o 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."*<sup>16</sup>

27. Accordingly, it was held that Felicity's title as joint tenant was not defeasible on account of Claude's fraud because Claude was not her "agent" in any relevant sense.<sup>17</sup>

*Did registration as joint tenant infect Felicity with Claude's fraud?*

28. In the Court of Appeal, Macfarlan JA had held that Felicity's registration as joint tenant had 'infected' her with Claude's fraud because joint tenants were treated by the law as in effect one person only.<sup>18</sup> On the other hand, Basten JA had stated 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. The contrary view would impute fraud to a party who was not herself fraudulent."*<sup>19</sup>

<sup>13</sup> [1969] 2 NSW 576 at 582-583.

<sup>14</sup> Above, n 1, at [40].

<sup>15</sup> Above, n 1, at [41]-[42].

<sup>16</sup> Above, n 1, at [41].

<sup>17</sup> Keane J, in her dissenting judgment, also found that Claude was not Felicity's agent: above, n 1, at [100]-[102].

<sup>18</sup> Above, n 6, at [156].

<sup>19</sup> Above, n 6, at [138].

29. The joint judgment agreed with Basten JA's conclusion.<sup>20</sup>
30. The joint judgment observed that even under the general law of real property, it did not follow from s100(1) RPA, which provides that two or more persons registered as joint proprietors "shall be deemed to be entitled to the same as joint tenants", that persons registered as joint tenants were to be treated for all purposes as though they were one person.<sup>21</sup>
31. Furthermore, the joint judgment said that the correct approach to the matter required consideration of how s 100(1) intersected with the provisions of s 42.<sup>22</sup> After giving consideration to this, the joint judgment concluded that:

*"[t]o 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."*<sup>23</sup>

32. Accordingly, since Claude's fraud had not been brought home to Felicity, her title as joint tenant of the Dairy Farm was indefeasible.<sup>24</sup>

*Was the Company entitled to bring proceedings under s118(1)(d)(ii)?*

33. At first instance, Barrett J had held that the Company was precluded from bringing proceedings for recovery of the Dairy Farm.
34. His Honour had found that the exception in s 118(1)(d)(i) did not apply because there had been no fraud by Felicity and so she had not been registered as a proprietor of the Dairy Farm through fraud.<sup>25</sup>
35. His Honour had also found that the exception in s 118(1)(d)(ii) did not apply. Although Felicity was not a transferee bona fide for valuable consideration, his Honour had said that she had not derived her title "from or through a person registered as proprietor of the land through fraud" because:
- s 118(1)(d)(ii) was confined to the process by which registration as proprietor was achieved and the question whether that process was achieved by fraud and so dealt with a narrower subject-matter than the fraud exception in s 42(1); and
  - the process by which Claude had come to be registered as a joint proprietor had not been attended by fraud because the giving of the illusory

<sup>20</sup> Above, n 1, at [45].

<sup>21</sup> Above, n 1, at [49].

<sup>22</sup> Above, n 1, at [52].

<sup>23</sup> Above, n 1, at [53].

<sup>24</sup> Above, n 1, at [55]. Keane J, dissenting, held that the title of the joint registered proprietors was defeasible in these circumstances: at [98]-[99]; [115].

<sup>25</sup> Above, n 2, at [176].

consideration by reference to the false loan account was remote from the process of registration.<sup>26</sup>

36. All members of the Court of Appeal had rejected Barrett J's construction of s 118(1)(d)(ii) and the joint judgment said that they were correct to do so. The joint judgment said that neither s 118 generally nor s 118(1)(d)(ii) in particular was to be construed as directed only to fraud in the process of registration.<sup>27</sup>

37. The joint judgment further said that s 118 was to be read in a way which was consonant with the operation of s 42(1) and, in particular, was not to be construed in a way which would prevent action to recover the land in a case where the fraud exception to s 42(1) applied.<sup>28</sup> This meant that s 118(1)(d) was to be construed in the following way:

- The reference to "fraud" in s 118(1)(d)(i) encompassed every kind of fraud which fell within the fraud exception to s 42(1). If actual fraud was brought home to the registered proprietor, then s 118(1)(d)(i) was engaged and the general bar to proceedings for recovery of land against the registered proprietor was lifted. If the fraud exception to s 42(1) was not applicable to the registered proprietor, then the general bar to proceedings applied and s 118(1)(d)(i) was not engaged. Thus, s 118(1)(d)(i) did not reduce the protection given by s 42(1) nor enlarge the rights which a person deprived of land by fraud had against the registered proprietor.<sup>29</sup>
- Section 118(1)(d)(ii), on the other hand, did enlarge the rights which a person deprived of land by fraud had against the registered proprietor because, unless the registered proprietor was a transferee bona fide for valuable consideration, the deprived person could bring proceedings for the recovery of the land against a person deriving from or through a person registered as proprietor of the land through fraud.<sup>30</sup>

38. The joint judgment then found that Claude, but not Felicity, had been registered as proprietor of the Dairy Farm as joint tenant through fraud and that, by the subsequent transfer, Felicity had derived from or through Claude an interest as tenant in common as to half. Felicity had therefore derived that half-interest from or through a person registered as proprietor of the land through fraud and, as she was not a transferee bona fide for valuable consideration of that interest, s 118(1)(d)(ii) applied and the Company, being a person deprived of the land by fraud, could recover that interest in the land from Felicity.<sup>31</sup>

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<sup>26</sup> Above, n 2, at [177]-[179].

<sup>27</sup> Above, n 1, at [59]. Keane J also agreed that s 118(1)(d)(ii) was not confined to the process of registration: at [118]-[119].

<sup>28</sup> Above, n 1, at [59].

<sup>29</sup> Above, n 1, at [59]-[60].

<sup>30</sup> Above, n 1, at [61].

<sup>31</sup> Above, n 1, at [62].

39. Accordingly, it was declared that Felicity held a half interest in the Dairy Farm on trust for the Company absolutely and she was ordered to execute a transfer of a one-half interest in the land to the Company.

K Ottesen

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