Confirming Torrens Orthodoxy: The High Court Decision in Cassegrain v Gerard Cassegrain & Co Pty Ltd

Penny Carruthers and Natalie Skead
CONFIRMING TORRENS ORTHODOXY: 
THE HIGH COURT DECISION IN CASSEGRAIN V GERARD CASSEGRAIN & CO PTY LTD

Penny Carruthers* and Natalie Skead**

INTRODUCTION

Given the relative rarity of High Court cases on land law, it is with some excitement that Australian property lawyers read new decisions of the High Court that deal exclusively with fundamental aspects of the operation and application of Torrens indefeasibility. Such was the case with the Court’s recent decision in Cassegrain v Gerard Cassegrain & Co Pty Ltd (Cassegrain).

A ‘central and informing tenet’ of the Torrens system of land title registration in Australia is that it is a system of ‘title by registration’. As Barwick CJ has famously said, the registered proprietor’s title ‘is not historical or derivative. It is the title which registration itself has vested in the proprietor.’ Accordingly, in the absence of fraud, title to land is acquired by registration regardless of any invalidity or defect in either the instrument registered or in the process or dealings leading up to registration. The title of the non-fraudulent registered proprietor is said to be immediately indefeasible and immune from adverse claims other than those specifically excepted.

So pervasive and important is the principle of indefeasibility that it has been described variously as the ‘foundation’ and the ‘most fundamental feature’ of the Australian land registration system and one which ‘must be given the utmost respect’. This acceptance of the paramountcy of immediate indefeasibility is referred to in this article as ‘Torrens orthodoxy’. Undoubtedly, Torrens orthodoxy has the potential to produce unjust outcomes in certain cases. This has led, increasingly, to robust questioning as to the place of immediate indefeasibility in our system.

---

* Faculty of Law, The University of Western Australia.
** Faculty of Law, The University of Western Australia.
1 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2.
2 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [16].
3 Breskvar v Wall (1971) 126 CLR 376, 385.
4 Ibid, 386.
5 The most emphatic expression of the nature of indefeasibility is set out in the ‘paramountcy’ provision in the Torrens statutes, see: Land Titles Act 1925 (ACT) s 58; Real Property Act 1900 (NSW) s 42(1); Land Title Act 2000 (NT) s 188 and s 189; Land Title Act 1994 (Qld) s 184 and s 185; Real Property Act 1886 (SA) s 69 and s 70; Land Titles Act 1980 (Tas) s 40; Transfer of Land Act 1958 (Vic) s 42(1); Transfer of Land Act 1893 (WA) s 68.
7 Perpetual Ltd v Barghachoun [2010] NSWSC 108, [25].
8 Conlan (as Liquidator of Oakleigh Acquisitions Pty Ltd) v Registrar of Titles (2001) 24 WAR 299, [196].
9 A recent example of the perceived injustice of the Torrens system is the case of Roger Mildenhall whose house in suburban Perth was the subject of a fraudulent sale by overseas scammers to an innocent purchaser who obtained an indefeasible title on registration. For a discussion of this case, see: Rouhshi Low and Lynden Griggs, ‘Identity Verification in Conveyancing: The Failure of Current Legislative and Regulatory Measures, and Recommendations for Change’ (2012) 76 The Conveyancer and Property Lawyer 363, 369.
10 This questioning of immediate indefeasibility has resulted in recent amendments to the Torrens legislation in Queensland, Victoria and New South Wales which effectively introduce a hybrid form of
despite these challenges, the general perception continues to be that ‘[p]ublic confidence in the Torrens system depends on the rock-solid effect of registration.’ As Rothman J has commented,

The Torrens system has enabled conveyance with certainty in Australia and, even though there may be occasions where notions of comparative justice may seem to have been transgressed, it is essential that indefeasibility of title is not transgressed.  

The High Court decision in Cassegrain confirmed and applied Torrens orthodoxy. In Cassegrain, a transfer of land from a company to a husband and wife as joint tenants was registered. The husband, though not the wife, was found to have been guilty of fraud in becoming registered. The wife was a non-fraudulent recipient of the land. Before action was taken by the company, the husband transferred his interest to the wife for $1 and she became the sole registered proprietor of the land.

The case raised a number of important questions. Should the husband be treated as the agent of the wife? Since the husband and wife were registered as joint tenants, did the husband’s fraud affect the wife’s title to the land in the first transfer? Did the ‘ejectment’ provision  in the Torrens statutes operate so as to allow the company to recover the husband’s interest from the wife in the second transfer?

The purpose of this article is to examine in detail the various decisions in the Cassegrain series of cases,  (‘Cassegrain’). In exploring the questions raised by Cassegrain this article analyses the issues of agency, joint tenancy and the operation of the ejectment provision in the context of the Torrens legislation.

THE FACTS

Gerard Cassegrain & Co Pty Ltd (GC&Co) was the registered proprietor of land (the Dairy Farm) under the Real Property Act 1900 (NSW) (RPA). In September 1996, the directors of GC&Co, Claude Cassegrain (Claude) and his sister Anne-Marie Cameron, resolved that GC&Co would transfer the Dairy Farm to Claude and his wife, Felicity, as joint tenants (the first transfer). The consideration payable by Claude and Felicity for the Dairy Farm was $1 million. It was resolved further that the purchase price would be debited against Claude’s loan account with GC&Co and that no other moneys would be payable by Claude and Felicity to GC&Co for the transfer deferred indefeasibility in relation to registered forged mortgages. In these jurisdictions, where a non-fraudulent mortgagee registers a forged mortgage instrument and has failed to take reasonable steps to verify the identity of the mortgagor, in Queensland the registered mortgage will not obtain the benefits of indefeasibility, and in Victoria and New South Wales the Registrar has a discretion as to whether to cancel the registration of the mortgage. See: Land Title Act 1994 (Qld) s 11A(2) and s 11B(2); Real Property Act 1900 (NSW) s 56C; and Transfer of Land Act 1958 (Vic) ss87A and 87B.


Perpetual Ltd v Barghachoun [2010] NSWSC 108, [25].

The ejectment provision broadly provides that no action of ejectment or recovery of land can be brought against the registered proprietor except in certain named circumstances. See: Land Titles Act 1925 (ACT) s 152; Real Property Act 1900 (NSW) s 118; Land Titles Act 1980 (Tas) s 149; Transfer of Land Act 1958 (Vic) s 44(2); Transfer of Land Act 1893 (WA) s 199.

The series of cases are: Gerard Cassegrain & Co Pty Ltd v Cassegrain [2011] NSWSC 1156, at first instance; Gerard Cassegrain & Co Pty Ltd v Cassegrain [2013] NSWCA 453, before the Court of Appeal; Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, in the High Court.

of the Dairy Farm. 16 Claude and Felicity were registered as the proprietors of the Dairy Farm in March 1997.

The circumstances in which Claude’s loan account with GC&Co arose were critical to GC&Co’s claim against Felicity in Cassegrain. In 1993 GC&Co received $9.5 million from the Commonwealth Scientific and Industrial Research Organisation (CSIRO) in settlement of an earlier claim GC&Co brought against the CSIRO. On receipt of this settlement, a loan account of $4.25 million in favour of Claude was raised in the financial accounts of GC&Co on the basis that Claude was entitled to that portion of the settlement from the CSIRO. 17 This division of the settlement payment by CSIRO between GC&Co and Claude was to minimise capital gains tax payable by GC&Co on the settlement. As noted by the Trial Judge, Barrett J, ‘the establishment of the $4.25 million loan account in the books of GC&Co did not represent the recording of genuine indebtedness of GC&Co to Claude in that (or any other) amount’ and, further, ‘[t]he loan account was a false loan account’. 18

In 1996 four of Claude’s siblings commenced oppression proceedings19 against 19 defendants including Claude, his mother, Anne-Marie and GC&Co. Claude’s four siblings alleged that acts by the defendants, including Claude, for and on behalf of GC&Co, were oppressive and/or prejudicial to the siblings as members of GC&Co. Relevant to Cassegrain, in 1998 Justice Davies of the Federal Court of Australia declared Claude’s conduct in treating the $4.25 million as a legitimate debt which was owed to him by GC&Co and ‘the subsequent use of the money by Claude as if it were his own’ to be both oppressive and unfairly prejudicial to the shareholders of GC&Co. 20

In March 2000, three years after the Dairy Farm was transferred to Claude and Felicity, Claude transferred his registered interest in the Dairy Farm to Felicity for the consideration of $1 (the second transfer). Felicity was registered as the sole proprietor of the Dairy Farm in April 2000.

In March 2008, having been granted special leave, 21 GC&Co commenced a statutory derivative action against Claude and Felicity relating to the first and second transfers. Relevant to this article is the claim brought by GC&Co against Felicity pursuant to which GC&Co sought an order that Felicity transfer the Dairy Farm to GC&Co.

The case was heard at first instance by Barrett J22 who dismissed the claim against Felicity. GC&Co appealed to the Court of Appeal. 23 The majority of the court, comprising Beazley P and Macfarlan JA, for different reasons, allowed the appeal and declared that Felicity held the Dairy Farm on trust absolutely for GC&Co. Basten JA also allowed the appeal but declared that Felicity held only a half interest in the Dairy

18 Gerard Cassegrain & Co Pty Ltd v Cassegrain [2011] NSWSC 1156, [121].
19 These proceedings were brought pursuant to s260 of the Corporations law of New South Wales as set out in s82 of the Corporations Act 1989 (Cth) read with s7 of the Corporations (New South Wales) Act 1990 (NSW).
Farm on trust for GC&Co. Felicity appealed the Court of Appeal’s decision to the High Court in *Cassegrain* and the majority, French CJ, Hayne, Bell and Gageler JJ (Keane J dissenting) agreed with Basten J in the Court of Appeal and declared that Felicity held a half interest in the Dairy Farm on trust for GC&Co. Justice Keane concluded that GC&Co was entitled to recover the Dairy Farm from Felicity.

As noted by the High Court, the differences between the judges in *Cassegrain* concerned three matters: agency, joint tenancy and the operation of the New South Wales ejectment provision, s118 of the *Real Property Act 1900 (NSW)* (RPA). Before turning to consider each of these matters, a brief comment regarding the fraud exception to indefeasibility and its application in *Cassegrain* is warranted.

**FRAUD**

**General principles**

‘Fraud’ is an express exception to indefeasibility. An early seminal case on fraud in the Torrens system is *Assets Co Ltd v Mere Roihi* (Assets) in which the Privy Council provided a comprehensive definition of statutory fraud:

… by fraud … is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud… Further, … 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 from whom he claims does not affect him unless knowledge of it is brought home to him or his agents.

This definition is revealing. Fraud does not include constructive or equitable fraud but entails actual fraud, dishonesty of some sort, which is ‘brought home to’ the registered proprietor or his or her agent. Critically, *Assets* suggests that fraud by persons from whom the registered proprietor claims title does not affect the current registered proprietor for value unless the current registered proprietor or his or her

---

24 *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] HCA 2 [30].
25 See: *Land Titles Act 1925 (ACT)* s 58; *Real Property Act 1900 (NSW)* s 42(1); *Land Title Act 2000 (NT)* s 188 and s 189; *Land Title Act 1994 (Qld)* s 184 and s 185; *Real Property Act 1886 (SA)* s 69 and s 70; *Land Titles Act 1980 (Tas)* s 40; *Transfer of Land Act 1958 (Vic)* s 42(1); *Transfer of Land Act 1893 (WA)* s 68. The comments here concerning the general principles of the fraud exception and, later in this article, concerning agency principles, are adapted from an earlier article by the authors: Skead N, and Carruthers P, ‘Fraud against the registrar – An unnecessary, unhelpful and, perhaps, no longer relevant complication in the law on fraud under the Torrens system’ (2014) 40(3) *Monash University Law Review* (forthcoming).
26 *Assets Co Ltd v Mere Roihi* [1905] AC 176
28 More recent cases have suggested that equitable fraud may suffice. As noted by Beazley P in *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2013] NSWCA 453, ‘In *Bahr v Nicolay (No 2)*, Mason CJ and Dawson J, at 614, considered that not all species of equitable fraud stood outside s 42. In *Bank of South Australia Ltd v Ferguson* [1998] HCA 12; 192 CLR 248, at [10], the High Court said “[n]ot all species of fraud which attract equitable remedies will amount to fraud in the statutory sense”, thus arguably leaving scope for the operation of equitable fraud for the purposes of s42.’ In *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* [1965] HCA 17; 113 CLR 265 at 273–274 the High Court found the existence of equitable fraud in circumstances where there was a collusive sale by a mortgagee to a subsidiary in breach of the mortgagee's duty in exercising the power of sale.
agent had knowledge of the fraud. This narrow definition of fraud is reinforced by the ‘notice’ provisions in the Torrens statutes.29

The fraud exception in Cassegrain

In Cassegrain, GC&Co argued that Felicity’s title to the Dairy Farm was defeasible on the basis of the fraud exception.

Relying on the findings of Davies J in the oppression proceedings,30 Barrett J found at first instance, and it was accepted on appeal, that Claude was aware that the amount standing to the credit of his loan account with GC&Co was not owing to him.31 His Honour went further, stating that when Claude ‘later drew on the loan account ... he did so knowing that he had no proper claim upon the company by reference to the loan account. He therefore obtained the relevant money or value dishonestly’.32 It followed, therefore, that purporting to settle the purchase price owing by Claude and Felicity to GC&Co pursuant to the first transfer by debiting Claude’s loan account with GC&C was an act of statutory fraud by Claude.33

Importantly, however, it was not alleged by GC&Co, nor was it found by the court, that Felicity was a participant in, and/or had notice of, Claude’s fraud.34 As a result, because the fraud by which Claude and Felicity came to be the registered proprietor/s of the Dairy Farm could not directly be ‘brought home to’35 Felicity and she had no ‘knowledge of’36 Claude’s fraud. Felicity held her interest ‘free from any interest of GC&Co sourced in Claude's [fraud] ... and ... the "fraud" exception to that section [did] not operate to detract from Felicity's current registered title’.37 Similarly, Beazley P in the Court of Appeal found there was ‘no relevant fraud of which Felicity had knowledge such as to impugn her indefeasible title’ to the Dairy Farm.38

Accordingly, it was necessary for GC&Co to rely on some other basis for arguing that Felicity’s registered and otherwise indefeasible title was to be set aside on the grounds of fraud. GC&Co raised three separate arguments: first, that in committing the fraud in relation to the first transfer, Claude was acting as Felicity’s agent and, therefore, his

---

29 The ‘notice’ provisions provide, relevantly, that a registered transferee of an interest in land is not to be affected by actual or constructive notice of any pre-existing unregistered interest or trust. See: Land Titles Act 1925 (ACT) ss 59, 60(2); Real Property Act 1900 (NSW) s 43(1); Land Title Act 2000 (NT) s 188 (2); Land Title Act 1994 (Qld) s 184 (2); Real Property Act 1886 (SA) ss 186, 187; Land Titles Act 1980 (Tas) ss 41(1) and (2); Transfer of Land Act 1958 (Vic) s 43; Transfer of Land Act 1893 (WA) s 134.
33 Gerard Cassegrain & Co Pty Ltd v Cassegrain [2011] NSWSC 1156, [129]. On appeal to the Court of Appeal, Beazley P commented, ‘Claude was fraudulent within the meaning of s 42 when as a Director, he and Anne-Marie resolved that the Dairy Farm be transferred to Claude and Felicity and that the $1 M consideration be satisfied by a debit to Claude’s loan account, knowing he had no entitlement to the credit in that account’. See, Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [18].
34 Gerard Cassegrain & Co Pty Ltd v Cassegrain [2011] NSWSC 1156, [170].
36 Ibid.
38 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [61].
fraud was to be imputed to Felicity on agency principles; second, again in relation to the first transfer, that as Claude and Felicity took transfer of the Dairy Farm as joint tenants, Claude’s fraud infected Felicity’s title as ‘joint tenants are treated by the law as in effect one person only’, and; third, in relation to the second transfer, as Felicity had not provided valuable consideration and had derived her title from or through Claude who himself was registered through fraud, she was not protected from actions for the recovery of land under the ‘ejectment’ provision, RPA s118(1)(d)(ii).

AGENCY

General principles

The Privy Council made it clear in Assets that a registered proprietor’s title may be challenged on the basis of fraud, even though the registered proprietor was not personally fraudulent, if it can be established that the registered proprietor’s agent was guilty of fraud or had knowledge of fraud. GC&Co sought to establish the application of the fraud exception to Felicity’s registered title on the basis that, in committing fraud, Claude was acting as Felicity’s agent and, therefore, Claude’s fraud must be sheeted home to Felicity on agency principles.

The judgment of Street J in Schultz v Corwill Properties Pty Ltd (Schultz) is generally considered the leading authority on fraud and agency in the Torrens context in Australia. In Schultz, Street J identified two circumstances in which fraud by an agent may be imputed to the principal: first where the fraud is committed by the agent; and second where the agent has knowledge of fraud. In the first circumstance the general principle, ‘respondeat superior’, applies. Provided the fraudulent conduct by the agent was within the agent’s actual or apparent authority, that fraudulent conduct will be sheeted home to the principal so as to make the principal’s registered title defeasible through fraud. The second circumstance, where the agent has knowledge of fraud with regards the transaction under which the principal became registered, is governed by a generally irrebuttable presumption that an agent communicates to his or her principal all information concerning the transaction. The agent’s knowledge of fraud is thereby imputed to the principal. In Schultz, Street J identified an exception to this general rule; namely, if the knowledge to be imputed is knowledge of the agent’s own fraud then the principal may bring evidence to rebut the presumption of knowledge and may prove ignorance of the agent’s fraud.

While the restrictive application of respondeat superior to the facts in Schultz, and the lack of logic in the exception to the irrebuttable presumption, have been

41 Schultz v Corwill Properties Pty Ltd (1969) 90 WN (Pt 1) (NSW) 529, 537.
42 Schultz v Corwill Properties Pty Ltd (1969) 90 WN (Pt 1) (NSW) 529, 539.
43 In Schultz, Street J held that it was not within the scope of the agent’s actual or apparent authority to forge the mortgage. The principal had instructed the agent to obtain a valid mortgage and a safe security for her investment. The forged execution of the mortgage was an ‘independent activity entirely in furtherance of his own interests and in no way done for or on behalf of [the principal].’ (540). There are two difficulties with this application of respondeat superior by Street J. First, Street J narrowly defined the scope of the agent’s authority as limited to obtaining a valid mortgage. In forging the mortgage, the agent was acting outside the scope of his authority and therefore his forgery could not be imputed to the registered mortgagee. This application of respondeat superior implies that a
criticised in recent cases and commentaries, the general principles expressed in *Schultz* are largely considered correct.

These principles were further elaborated upon, with some refinement, in the New Zealand Supreme Court case of *Dollars and Sense Finance Ltd v Nathan* (Dollars and Sense). In this case, the court identified the two broad questions to be answered when assessing whether a registered proprietor’s title is to be impugned on the basis of fraud committed by the registered proprietor’s agent. First, did the fraudster have the authority, either express or implied, to act as agent for the principal registered proprietor? In answering this threshold question a court is to scrutinise all the circumstances of the case paying particular attention to the tasks undertaken by the alleged agent. Second, if an agency is established, the second question arises: was the agent’s forgery and fraud within the course and scope of the agency? In this article, the authors refer to the first threshold question as dealing with ‘substantive agency’ and the second question as concerned with ‘procedural agency’.

In relation to the second question, the court identified a two stage inquiry: first, what acts has the principal authorised and, secondly, is the agent’s act so connected with those acts that it can be regarded as a mode of performing them? Contrary to the restrictive application of the respondeat superior principle by Street J in *Schultz*, the court commented that:

[A]n act can be within the scope of the agency even when it is the antithesis of what the principal really wanted. ... The true test is whether the tortious act has a sufficiently close connection with the task so that the commission of the tort can be regarded as the materialisation of the risk inherent in that task.

The court in *Dollars and Sense* also refuted the appropriateness of the exception to the irrebuttable presumption identified by Street J in *Schultz*. In the view of the court, in cases of fraud by an agent due to the agent’s own fraudulent conduct, the principal’s liability is to be determined solely on the basis of the general principle of respondeat superior and the exception precluding imputation of knowledge is inapplicable.

---

44 It is argued that there is ‘illogicality’ in an exception to the irrebuttable presumption that is based solely on the agent’s knowledge of fraud being the agent’s knowledge of his or her own fraud: P Butt *Land Law* Lawbook Co 6th ed 2010, [20.77].
46 *Dollars and Sense Finance Ltd v Nathan* [2008] 2 NZLR 557.
47 *Dollars and Sense Finance Ltd v Nathan* [2008] 2 NZLR 557, [8].
48 *Dollars and Sense Finance Ltd v Nathan* [2008] 2 NZLR 557, [8]-[28].
49 *Dollars and Sense Finance Ltd v Nathan* [2008] 2 NZLR 557, [29].
50 *Dollars and Sense Finance Ltd v Nathan* [2008] 2 NZLR 557, [32].
51 *Dollars and Sense Finance Ltd v Nathan* [2008] 2 NZLR 557, [46].
52 *Dollars and Sense Finance Ltd v Nathan* [2008] 2 NZLR 557, [43].
Although a New Zealand case, the articulation and application of the general principles relating to agency fraud by the court in *Dollars and Sense* is freed of the criticisms attendant upon the application and restriction of those principles by Street J in *Schultz* and is both sensible, and in the authors’ view, correct. While the various courts in Cassegrain did not refer to *Dollars and Sense*, the dual inquiry set out in this case provides a useful basis for examining and analysing the different decisions on whether Claude’s fraud should be imputed to Felicity on agency principles.

**Agency in Cassegrain**

*Substantive agency - Was Claude acting as Felicity’s agent?*

On the first threshold question of whether Claude was acting as Felicity’s agent in relation to the first and/or second transfers, Beazley P of the Court of Appeal held in the affirmative in relation to both transfers. Justice Macfarlan of the Court of Appeal agreed with Beazley P in relation to the first transfer only. Justice Barrett at first instance, Basten J in the Court of Appeal and the majority of the High Court disagreed, finding no agency relationship between Claude and Felicity in relation to either transfer. Justice Keane also found no basis for imputing Claude’s fraud to Felicity.

**First Instance**

Following a brief discussion, Barrett J dismissed GC&Co’s submission that in acting fraudulently Claude was acting as Felicity’s agent. His Honour emphasised that the burden of proof in this regard was on GC&Co and that this burden had not been discharged since there was no evidence that, ‘in any aspect of the events concerning the preparation of either transfer, its execution and the processes culminating in its registration, Claude had or exercised any actual or implied authority of Felicity’.  

**Court of Appeal**

President Beazley was the only judge in Cassegrain to find that Claude was acting as Felicity’s agent in relation to both transfers. Her Honour’s reasoning in this regard centred on the role of the solicitor, Mr McCarron (McCarron), who attended to the transfers and the source of McCarron’s instructions. In relation to the first transfer, McCarron signed the transfer forms as solicitor for Claude and Felicity. In relation to the second transfer he signed as solicitor for Felicity. However, there was no evidence Felicity had instructed McCarron in relation to either transfer.

Following a careful analysis of the parties’ submissions and the facts leading up to the transfers, Beazley P concluded that there was sufficient evidence to suggest that McCarron’s instructions in relation to both transfers came from Claude personally on behalf of the transferees: Claude and Felicity in the first transfer; and Felicity in the second transfer. In giving these instructions to McCarron, Claude was found to be acting for both himself and also as agent for Felicity insofar as her interests were concerned. Her Honour acknowledged, however, that to establish an agency

---

53 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1156, [158].

relationship it is necessary to show that the agent was acting on the authority of the principal. Such authority can be implied and be inferred from the conduct of the parties and ‘a course of dealing between principal and agent’. Although it was clear from Claude’s conduct that he ‘assumed authority on behalf of Felicity’, her Honour considered that was not sufficient; ‘[t]here has to be evidence of conferral of authority’ by Felicity.

Despite Felicity’s silence in this regard, Beazley P concluded that ‘there was evidence from which the inference could be drawn and I consider that the inference ought to be drawn that in respect of the first transfer, Claude acted as Felicity’s agent in giving instructions to Mr McCarron’. It followed, therefore, that Felicity’s registered title to the Dairy Farm pursuant to the first transfer ‘was defeasible as a result of the fraud of her agent’.

Similarly, in relation to the second transfer, Beazley P concluded that ‘[a]lthough the evidence is slight, it is sufficient, … [to infer] … that the probabilities are that Claude acted as [Felicity’s] agent’. Felicity’s registered title as sole proprietor of the Dairy Farm pursuant to the second transfer was, therefore, defeasible on the basis of the fraud of her agent.

Of interest in President Beazley’s reasoning, was her Honour’s focus solely on the first threshold question of whether Claude was acting as Felicity’s agent. Having answered this question in the affirmative, her Honour proceeded immediately to the conclusion that Felicity’s title to the Dairy Farm was, therefore, defeasible. Absent from her Honour’s reasoning was an analysis of the second question identified in *Dollars and Sense* whether Claude’s fraudulent conduct could and should be imputed to his principal, Felicity, on the agency principles espoused in *Schultz*. This leap in the reasoning of Beazley P was picked up by the majority of the High Court and is explored further below.

Justice Macfarlan agreed with President Beazley’s reasoning and her conclusion that Claude acted as Felicity’s agent for the purposes of the first transfer but expressed no view on the second transfer.

Acknowledging ‘the serious consequence of drawing an inference’ that Claude acted as Felicity’s agent in relation to the first and second transfer, and examining the relevant evidence, Basten JA agreed with the trial judge that ‘the preferable inference is that [Felicity] acted on her own behalf’.

**High Court**

---

55 *Gerard Cassegrain & C0 Pty Lid v Cassegrain* (2013) 305 ALR 612 [32].
56 *Gerard Cassegrain & C0 Pty Lid v Cassegrain* (2013) 305 ALR 612 [33].
57 *Gerard Cassegrain & C0 Pty Lid v Cassegrain* (2013) 305 ALR 612 [33].
58 *Gerard Cassegrain & C0 Pty Lid v Cassegrain* (2013) 305 ALR 612 [37].
59 *Gerard Cassegrain & C0 Pty Lid v Cassegrain* (2013) 305 ALR 612 [38].
60 *Gerard Cassegrain & C0 Pty Lid v Cassegrain* (2013) 305 ALR 612 [42].
61 *Gerard Cassegrain & C0 Pty Lid v Cassegrain* (2013) 305 ALR 612 [155].
62 *Gerard Cassegrain & C0 Pty Lid v Cassegrain* (2013) 305 ALR 612, [125].
The majority of the High Court concluded that Claude’s fraud was not to be imputed to Felicity on agency principles. Drawing on the fact that ‘it was neither alleged nor found that Claude had acted as Felicity’s agent … whether by negotiating the transaction with GC&Co or by representing that the price could be met by debiting the loan account’ their Honours considered that Felicity did no more than passively receive the benefits of a transaction orchestrated and arranged entirely by her husband.

Referring to the two principles expounded in Schultz, their Honours considered, first, that the mere fact that Claude took steps to procure the registration of the transfer of the Dairy Farm to both him and Felicity as joint tenants ‘did not show that [Claude’s] fraud was within the scope of any authority [Felicity] had, or appeared to have, given to him’ and, second, that the evidence ‘did not show that knowledge of [Claude’s] fraud was to be imputed … to [Felicity]’. 64

In rejecting the reasoning of Beazley P, the majority cautioned against the misuse of the word ‘agent’ 65 and pointed out that Beazley P used the word to describe what the authors of this article refer to as ‘procedural agency’ rather than ‘substantive agency’. That is, her Honour used ‘agency’ as an issue of fact to describe how the two transfers came about rather than as an issue of law to ‘attribute legal responsibility for those events’ by describing the legal relationship between Claude and Felicity in relation to the transfers. 66 It was this misconstruction of the word ‘agent’ that resulted in Beazley P treating the factual conclusion that ‘Claude brought about the transfer to Claude and Felicity as joint tenants with Felicity’s knowledge (but without her knowing of the fraud)’ as also ‘concluding the legal issue’ that Claude’s fraud was to be imputed to Felicity on agency grounds. 67 This was to use agency improperly: to end rather than to begin the inquiry. 68

As clearly set out in Dollars and Sense 69 and, indeed, albeit implicitly, in Schultz, 70 an agency inquiry in the context of the fraud exception entails a dual inquiry. It begins with the substantive legal question – was the fraudster the agent of the registered proprietor principal? Only if this question is answered in the affirmative does the second procedural question arise, that is, whether in the process of effecting the registration of the dealing the agent was acting within the course and scope of the agent’s actual or apparent authority. Effectively by focusing on how the two transfers came about, Beazley P focused in the first instance on the second question without correctly analysing the first substantive legal question.

In emphasising the dual nature of the agency inquiry, the majority of the High Court confirmed a logical and orthodox approach to fraud by an agent in a Torrens context.

Procedural agency - Was Claude acting within the course and scope of his agency?

63 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [41].
64 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [42].
65 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [36].
66 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [37].
67 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [38].
68 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [38].
69 Dollars and Sense Finance Ltd v Nathan [2008] 2 NZLR 557, [8].
70 Schultz v Corwill Properties Pty Ltd (1969) 90 WN (Pt 1) (NSW) 529, 541.
Having found no agency relationship between Claude and Felicity in relation to either transfer, the trial judge, Basten J in the Court of Appeal and the majority in the High Court did not consider whether Claude’s fraudulent act was within the course and scope of his actual or apparent authority.

As noted above, the majority was critical of President Beazley’s decision that Felicity’s title to the Dairy Farm was defeasible on the grounds of fraud. This criticism was based on the fact that her Honour focused on this second question of whether in committing the fraud against GC&Co, Claude was acting within the course and scope of his agency with Felicity without first deciding the threshold substantive question of whether Claude was in fact acting as Felicity’s agent in relation to the transfers. For the reasons explained above, Beazley P concluded that in carrying out the fraud Claude was acting within the course of his agency and, therefore, that Felicity’s title to the Dairy Farm was defeasible under the fraud exception in s42(1) RPA under respondeat superior.

JOINT TENANCY

General principles

Joint tenancy and tenancy in common are forms of co-ownership where two or more people are simultaneously entitled to enjoyment of land. Unlike tenants in common, joint tenants do not hold distinct shares in the land. Rather, according to joint tenancy maxims, each joint tenant is said to be seised ‘per my et per tout’ (‘for nothing and for everything’)71 and is entitled, along with the other joint tenants, to enjoy the whole property. Joint tenancies are characterised by the presence of the four unities of possession, interest, title and time; and by the right of survivorship, which means that on the death of one joint tenant the surviving joint tenants remain entitled to the whole of the land.

Unity of possession is essential for both forms of co-ownership. If this unity is present and the other unities are absent, or if there is no right of survivorship, then the co-ownership is a tenancy in common. The unity of possession requires that all joint tenants are simultaneously entitled to possession of the whole of the land. Unity of time and title require that the joint tenants’ interests vested at the same time and under the same instrument and unity of interest requires the joint tenants’ interests to be identical in nature, duration and extent.

Joint tenancy in Cassegrain

In Cassegrain, Claude and Felicity took their interest in the Dairy Farm under the first transfer as joint tenants. Claude, though not Felicity, was guilty of fraud in becoming registered. GC&Co relied on the statement of Dixon J in Wright v Gibbons72 (Wright) 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

---

71 In similar vein is the maxim ‘nihil tenet et totum tenet’ (‘he holds nothing and he holds the whole’).
See Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [47].
72 Wright v Gibbons (1949) 78 CLR 313.
possession’. GC&Co argued that the effect of s100 of the RPA was to preserve the common law in respect of joint tenancies, ‘including the principle that persons who take as joint tenants take the same interest ... and thus are all affected by notice of fraud given to or acquired by one of them.’

Section 100(1) of the RPA is as follows:

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.

In reviewing the reasoning of the judges in Cassegrain with regards the joint tenancy arguments, two broad strands may be seen. First, a view that focused on the joint tenancy maxims and the principle that ‘joint tenants are treated by the law as in effect one person only’. Second, a view that not only questioned the unqualified application of the joint tenancy maxims to general law land but which, more relevantly, was critical of the application of these maxims to the wholly different Torrens system of ‘title by registration’ where a non-fraudulent registered proprietor obtains an immediately indefeasible title. President Beazley and Macfarlan JA of the Court of Appeal and Keane J of the High Court adopted the first strand. Justice Basten of the Court of Appeal and the majority in the High Court adopted the second strand.

The first transfer

Court of Appeal

In relation to the first transfer, the conclusions of Beazley P and Macfarlan JA were similar. President Beazley commented that ‘a consequence of joint tenancy is that if a joint tenancy is taken in circumstances which bound the conscience of one joint tenant in a way that gives rise to an equitable encumbrance, that encumbrance affects the title of both joint tenants’. Accordingly, Beazley P found that Claude’s fraud affected both Claude and Felicity as joint tenants and therefore, at that point in time, ‘their registered title was liable to be impugned by operation of the fraud exception in s 42.’

Justice Macfarlan referred with approval to the ‘forcefully reasoned’ judgment of Windeyer J in Diemasters Pty Ltd v Meadowcorp Pty Ltd that ‘where

---

74 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [44].
75 New South Wales v Loh Min Choo [2012] NSWCA 275, [72]. This quote was referred to by Macfarlan J in Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [156].
76 Justice Barrett, at first instance, does not make a firm comment with regard the position in relation to the first transfer. His Honour’s focus was on the ultimate effect of the second transfer under which Felicity enjoyed a full and unencumbered registered title on the face of the register. Justice Barrett’s judgment is considered below in the discussion of the second transfer.
77 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [53]. These comments of Beazley P were based on observations made by Barrett J in Gerard Cassegrain & Co Pty Ltd v Cassegrain [2011] NSWSC 1156, [161].
78 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [53].
79 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [156].
one of two joint purchasers of Real Property Act land under a single instrument had participated in fraud, both took title subject to the interests of the defrauded party. 81

Justice Macfarlan went on to say that this conclusion ‘reflected the law’s requirement that joint tenants have unity of interest’ and that their interests must therefore be ‘identical in nature, extent and duration.’ 82

Unlike Beazley P and Macfarlan JA, Basten JA was critical of the notion that joint tenants should be treated as ‘one person for most purposes’. 83 Justice Basten referred to the remarks of Lord Nicholls of Birkenhead in Burton v Camden LBC 84 that the concept of co-ownership is ‘an esoteric notion remote from the realities of life. It should be handled with care and applied with caution’. 85 In commenting on the judgment of Windeyer J in Diemasters, Basten JA noted that the joint tenant purchasers in that case were not registered proprietors under the RPA and accordingly, ‘no issue arose as to the proper analysis with respect to registered title’. 86

As noted, GC&Co relied on s100 of the RPA to preserve the common law in respect of joint tenancies under the Torrens legislation and, in particular, the principle that all joint tenants are affected by notice of fraud acquired by one of them. However, Basten JA rejected this argument and commented that the section does not ‘prescribe that all principles applying to a joint tenancy under the general law operate with respect to registered title, nor indeed that any specific incidents apply’. 87 Justice Basten referred to the comments of Rich J in Wright that ‘some confusion has occurred by concentrating attention on the principles of common-law conveyancing and not observing the innovation effected by the new or Torrens system’. 88

Importantly, Basten JA concluded,

[I]t is preferable in principle to treat the shares of the joint tenants, holding 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. 89

Accordingly, Basten JA found that Felicity, despite being a volunteer, obtained an indefeasible title as to her interest in the joint tenancy which was assumed to be a one-half interest. The interest of Claude was, however, affected by his own fraud and so

80 Diemasters Pty Ltd v Meadowcorp Pty Ltd (2001) 52 NSWLR 572.
82 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [156].
83 This expression was used by Joshua Williams in his Lectures on the Seisin of Freehold, 1878, pp117, and referred to by Basten JA in Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [127].
84 Burton v Camden LBC [2000] 2 AC 399.
86 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [131].
87 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [137].
88 Wright v Gibbons (1949) 78 CLR 313 at 326. Referred to by Basten JA in Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [137].
89 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [138].
the principle of indefeasibility would not have protected him at the time he was still registered as a joint tenant with Felicity.

High Court

The majority in the High Court commented that Justice Basten’s conclusion was ‘right’. In considering the question of the effect of s100 of the RPA, their Honours said, ‘That question requires reference to some aspects of the general law of real property.’ In their Honours’ view, the general law joint tenancy maxims, noted above, ‘cannot and must not be treated as constituting a complete or wholly accurate description of the legal nature of a joint tenancy’ and ‘cannot be taken as the premise for deductive reasoning about the effect of a joint tenancy’. The majority noted, ‘[e]ven under the general law of real property, the deeming which is worked by s100(1) would not entail that those registered as joint tenants are to be treated for all purposes as though they were the one person’.

Since the issue in this case arose in the context of registered Torrens land, ‘no analogy can usefully be drawn between the issue ... in this case and any issue that can arise under the general law of real property’. Their Honours commented, it is ‘wrong’ to begin by asking what are the consequences of s100(1) of the RPA in deeming that persons registered as joint proprietors are deemed to be joint tenants, instead,

[T]he question is how that provision intersects with the provisions of s42. More particularly, does the deeming effected by s100 (1) require that the fraud of one of the persons registered as joint proprietors denies all those persons the protection otherwise given by s42(1)? (Emphasis added by High Court)

In their Honours’ view, it would be a ‘significant departure’ from the accepted and narrow interpretation of the fraud exception to hold that s100(1) of the RPA had the effect of denying indefeasibility of title to the non-fraudulent registered joint tenants. Accordingly, since the fraud of Claude was not ‘brought home’ to Felicity, her title as joint tenant was indefeasible.

The conclusion of the majority gives rise to something of a conundrum. It is true, as Macfarlan JA commented, that the interests of joint tenants under the general law are identical in nature, extent and duration. However, the majority in the High Court, whilst seemingly accepting that Felicity and Claude were joint tenants, treated their interests as not identical: Felicity’s interest was indefeasible, while Claude’s interest was defeasible. This kind of conflict is inherent in the Torrens system because the...

---

90 Cassiegrain v Gerard Cassiegrain & Co Pty Ltd [2015] HCA 2, [45].
91 Cassiegrain v Gerard Cassiegrain & Co Pty Ltd [2015] HCA 2, [46].
92 Cassiegrain v Gerard Cassiegrain & Co Pty Ltd [2015] HCA 2, [47].
93 Cassiegrain v Gerard Cassiegrain & Co Pty Ltd [2015] HCA 2, [48].
94 Cassiegrain v Gerard Cassiegrain & Co Pty Ltd [2015] HCA 2, [49].
95 Cassiegrain v Gerard Cassiegrain & Co Pty Ltd [2015] HCA 2, [50].
96 Cassiegrain v Gerard Cassiegrain & Co Pty Ltd [2015] HCA 2, [51].
97 Cassiegrain v Gerard Cassiegrain & Co Pty Ltd [2015] HCA 2, [52]. Section 42(1) is the paramountcy provision in the RPA.
98 Cassiegrain v Gerard Cassiegrain & Co Pty Ltd [2015] HCA 2, [53].
99 Cassiegrain v Gerard Cassiegrain & Co Pty Ltd [2015] HCA 2, [54].
system is ‘bijural’ in nature, that is, it ‘straddle[s] two bodies of law’ – the Torrens land title registration system that guarantees an indefeasible title to the non-fraudulent registered proprietor and the general property law rules. The authors respectively submit that the conclusion of the majority in the High Court represents the correct and indeed, the only feasible, resolution of this conflict. In favouring the fundamental Torrens principle of indefeasibility of title over general law joint tenancy notions, the High Court in Cassegrain has effectively and firmly confirmed Torrens orthodoxy.

In contrast to the majority, Keane J endorsed and applied the principle 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 and separate title.’ Justice Keane acknowledged that the law had departed from the ‘rigorous application’ of the joint tenancy maxims in relation to the ability of a joint tenant to alienate his or her aliquot share. However, his Honour considered that in relation to the acquisition of title by joint tenants, modern authority confirms ‘that a transfer of land to two or more joint tenants “operates so as to make them, vis a vis the outside world, one single owner.”’ Justice Keane considered that s 100 of the RPA confirms that the joint proprietorship of a registered title is in the nature of a joint tenancy, ‘at least until it is severed’.

His Honour concluded that Felicity had acquired title to one estate jointly with Claude. This title had been acquired through fraud, and this was regardless of the fact that Felicity did not participate in Claude’s fraudulent intent. In his Honour’s view, it would be ‘no stretch of language’ to view Felicity and Claude as ‘registered as proprietor of land through fraud’ under s118(1)(d)(i) of the RPA (the ejectment provision) and accordingly, in the period prior to the second transfer, GC&Co would have been entitled to recover the land.

The second transfer

By the time GC&Co brought an action to recover the Dairy Farm, Claude had transferred his interest by way of the second transfer to Felicity and she had become the sole registered proprietor of the Dairy Farm. The main focus of discussion with regards the second transfer concerned the operation and application of the ejectment provision, s118 of the RPA, which is considered in detail in the next section of this article.

However, for three of the judges, Barrett J, Beazley P and Macfarlan JA, there was a more detailed consideration as to how the joint tenancy implications in the first transfer would impact in relation to the second transfer. In particular, if one were to find that Felicity’s title as joint tenant under the first transfer was impugned by

---

101 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [113]. Justice Keane’s quote was from Dixon J in Wright v Gibbons (1949) 78 CLR 313, 329.
102 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [112].
104 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [115].
105 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [117].
106 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [117].
Claude’s fraud due to the notion that joint tenants hold a ‘single title’,\(^\text{107}\) would this mean that on the second transfer the non-fraudulent Felicity would obtain an indefeasible title or would the taint of fraud from the first transfer remain such that her title would be defeasible. Again, two strands of reasoning may be discerned. For Barrett J and Beazley P, the fact that Felicity was neither involved with, nor had knowledge of, Claude’s fraud, meant Felicity, as sole registered proprietor under the second transfer, obtained an indefeasible title. For Macfarlan JA, the fraud exception in the paramountcy provision, ‘as reflected in s118(1)(d)(i) of the Act’\(^\text{108}\) was applicable and Felicity’s title was defeasible.

First instance

In his judgment, Barrett J endorsed the notion that joint tenants obtain a single estate in the land such that where there is a conveyance to joint tenants and the conscience of one is bound so as to give rise to an equitable encumbrance on a sole owner’s title, ‘the equitable encumbrance affects the title held by both joint tenants together’.\(^\text{109}\) However, it is not absolutely clear as to whether Barrett J intended these comments to apply to joint tenants registered under the Torrens legislation.\(^\text{110}\) In any event, the focus of his Honour’s judgment was on the impact of the paramountcy provision, s42 of the RPA, on Felicity’s sole registered title under the second transfer. In this context, Barrett J emphasised the narrow definition of the fraud exception in the Torrens legislation and commented that though Felicity took under the first transfer as a joint tenant with Claude that did not warrant the conclusion that her title as sole registered proprietor was tainted with dishonesty.\(^\text{111}\) The effect of the registration of the second transfer was to extinguish Claude and Felicity’s interests as joint tenants and ‘to cause to arise in Felicity as sole registered proprietor a “new and different indefeasible title for the lot”, that is, a title distinct from both the pre-existing interests’.\(^\text{112}\)

Justice Barrett concluded that though Felicity may, ‘[a]t worst’,\(^\text{113}\) have had notice of conduct by Claude giving rise to an unregistered interest in GC&Co, that did not constitute fraud. Therefore, following the second transfer, Felicity obtained an indefeasible title to the Dairy Farm that was free from GC&Co’s unregistered interest.

The authors agree with Barrett J that the notice provision in the Torrens legislation precludes the attribution of fraud to a person who merely becomes registered knowing of an unregistered interest and knowing that his or her interest will defeat the unregistered interest.\(^\text{114}\) However, the authors consider that this protection from notice

---

\(^{107}\) As noted above, this was the view of Beazley P and Macfarlan JA, and was arguably, as noted below, also the view of Barrett J.

\(^{108}\) *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2013) 305 ALR 612, [157].

\(^{109}\) *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1156, [161].

\(^{110}\) In this regard, Barrett J referred to *Heperu Pty Ltd v Belle* [2009] NSWCA 252, and the point made in that case at [167] that ‘no issue was raised at trial or on appeal by way of defence referable to any effect of the Real Property Act 1900’. His Honour then commented ‘Felicity does raise such an issue. She says that s42 of the real Property Act precludes recognition, as against her, of any interest of GC&Co detracting from the full and unencumbered registered title she now enjoys on the face of the register’, see, *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1156, [165].

\(^{111}\) *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1156, [170].

\(^{112}\) *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1156, [171].

\(^{113}\) *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1156, [172].

\(^{114}\) See, for example *Mills v Stockman* (1967) 116 CLR 61, 78. The notice provisions are referenced above, n 31.
does not extend to a situation where a person has notice of fraudulent conduct. Arguably, if Felicity had ‘notice of matters involving Claude’s wrongdoing’, this would be notice of fraud and Felicity’s title would, it is submitted, be defeasible through fraud.\footnote{Gerard Cassegrain & Co Pty Ltd v Cassegrain [2011] NSWSC 1156, [173].}

**Court of Appeal**

Both Beazley P and Macfarlan J considered that Felicity’s registered title as joint tenant with Claude was a single title and was therefore defeasible as a result of Claude’s fraud. In relation to the second transfer, Beazley P posed the question as, ‘whether a person, in the absence of actual notice of the fraud, whose joint title is impugned by the fraud of the other joint tenant, may acquire an indefeasible title as sole proprietor, free of the prior encumbrance that arose due to that fraud’.\footnote{Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [61].}

On this question, Beazley P and Macfarlan JA differed. For Beazley P, in order for GC&Co successfully to impugn Felicity’s sole registered title it had to establish ‘that that title is affected by fraud’.\footnote{Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [55].} The fact Felicity’s jointly owned title with Claude was affected by Claude’s fraud did not mean that ‘her present title is defeasible.’\footnote{Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [60].} Her Honour did not consider that Felicity had knowledge of Claude’s fraud and concluded that, ‘[a]gency aside, therefore, there was no relevant fraud of which Felicity had knowledge such as to impugn her indefeasible title as the sole joint tenant (sic)’\footnote{Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [61].} and, absent her Honour’s conclusion as to agency, ‘I would have concluded that Felicity’s sole registered title was not affected by fraud within the meaning of s42’.\footnote{Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [61].}

Interestingly, in this aspect of President Beazley’s judgment, her Honour adopted rigid Torrens orthodoxy: Felicity was not guilty of fraud under the second transfer and, agency aside, Felicity’s title was therefore indefeasible. This is in contrast to her Honour’s position in relation to the first transfer where, despite Felicity’s non-fraudulent conduct, her registered title was defeasible by virtue of her status as a joint tenant with the fraudulent Claude. For her Honour, general law joint tenancy notions trumped indefeasibility for a non-fraudulent registered proprietor. The authors recognise the difficulties for the judiciary in resolving bijuralism in the Torrens system. However, where the matter in issue concerns the imputation of Torrens fraud to a non-fraudulent registered proprietor on the basis of joint tenancy maxims,\footnote{The majority in the High Court commented that ‘great care must be used lest’ the joint tenancy maxims be used ‘only as slogans stating an asserted conclusion’. Their Honours went on to say that particular care must be used in applying the maxims to a system of title by registration where questions of indefeasibility of title simply did not arise under the general law. See, Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [50].} the authors submit that indefeasibility should trump the general law and, consistently with the majority view in the High Court, Torrens orthodoxy ought to prevail.

\footnotesize
\begin{itemize}
  \item \footnote{Gerard Cassegrain & Co Pty Ltd v Cassegrain [2011] NSWSC 1156, [173].}
  \item As noted in Assets: ‘Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents.’ See, Assets Co Ltd v Mere Roihi [1905] AC 176, 210.
  \item Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [55].
  \item Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [60].
  \item Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [60].
  \item Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [61]. It is submitted that a preferable expression to ‘sole joint tenant’ in this context is ‘sole registered proprietor’.
  \item Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [61].
  \item The majority in the High Court commented that ‘great care must be used lest’ the joint tenancy maxims be used ‘only as slogans stating an asserted conclusion’. Their Honours went on to say that particular care must be used in applying the maxims to a system of title by registration where questions of indefeasibility of title simply did not arise under the general law. See, Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [50].}
\end{itemize}
Justice Macfarlan, on the other hand, disagreed with Beazley P and found that Felicity was ‘infected with Claude’s fraud both because he acted as her agent and because they were registered as joint tenants’. His Honour concluded that Felicity ‘did not shed her (imputed) fraudulent knowledge and character by taking from her co-tenant in whose fraud she was deemed to have participated’. Felicity’s title was therefore defeasible as she was a person who, within the terms of s118(1)(d)(i) of the RPA, was registered ‘through [her own] fraud’.

**THE EJECTMENT PROVISION**

A third attack by GC&Co on Felicity’s otherwise indefeasible title to the Dairy Farm was based on the ‘ejectment provision’ in s 118(1)(d) of the RPA. The ejectment provision provides relevantly as follows:

118 Registered proprietor protected except in certain cases

(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,

GC&Co argued that, because Felicity derived her title to the Dairy Farm through Claude who was himself registered through his own fraud, pursuant to the exception in s 118(1)(d)(ii) of the RPA Felicity was not entitled to protection under the ejectment provision. It followed, therefore, that GC&Co could recover the Dairy Farm from Felicity. The various judicial responses to GC&Co’s submission in this regard essentially turned on the meaning ascribed to the word ‘fraud’ as used in s 118(1)(d) of the RPA. Justice Barrett at first instance rejected GC&Co’s argument on the ejectment provision, thereby upholding Felicity’s indefeasible title to the Dairy Farm. The Court of Appeal and the High Court unanimously upheld GC&Co’s submissions on this issue. However, there were differences in the conclusions as to the extent to which GC&Co could recover title to the Dairy Farm from Felicity.

**First instance**

The Trial Judge found that Felicity, as the sole registered proprietor of the Dairy Farm following the second transfer, was entitled to protection under the ejectment provision. As a result, GC&Co could not recover title to the Dairy Farm from Felicity. In so finding, Barrett J ascribed a ‘much narrower and more specific’ meaning to ‘fraud’ as used in the ejectment provision than the broader meaning ascribed to the fraud exception found in s 42 of the RPA. While Barrett J accepted that Felicity acquired a ‘new and different indefeasible title’ as a result of the second transfer, he

---

considered that she had not derived that title ‘from or through a person registered as proprietor of the land through fraud’. Specifically, Claude, from whom Felicity derived her title, was not registered as the proprietor of the Dairy Farm through fraud. According to Barrett J, ‘fraud’ for the purposes of s 118(1)(d)(ii) of the RPA is focused exclusively ‘on the process by which registration as proprietor was achieved’. On the facts His Honour found:

The process by which Claude came to be registered as one of two proprietors involved the lodgment of a transfer for registration, followed by registration itself. The transfer was regularly executed under the common seal of GC&Co. It was a genuine instrument, regular on its face and suitable to be registered. … the process by which the registration of Claude as registered proprietor was achieved was not attended by fraud. The fact that he had wrongfully drawn funds from GC&Co to satisfy the consideration expressed in the transfer … is remote from the process of registration and therefore beside the point.

Felicity therefore retained an indefeasible title to the Dairy Farm as sole registered proprietor. Justice Barrett’s treatment of s 118(1)(d)(ii) in the RPA and, in particular, His Honour’s interpretation of ‘fraud’ in the ejectment provision was subject to criticism in both the Court of Appeal and the High Court.

**Court of Appeal**

President Beazley P, with whose reasoning and finding Macfarlan JA concurred, disagreed with Justice Barrett’s narrow construction of fraud in s 118(1)(d). In doing so, her Honour referred to the decision of Mason J in Registrar of Titles (WA) v Franzon that ‘[i]t is a sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise’. It follows, per Assets, that fraud for the purposes of the exceptions in s 118(1)(d) of the RPA means actual fraud by the person who has become registered or his or her agent.

As noted above, Beazley P found that in carrying out the fraud associated with the transfer of the Dairy Farm, Claude was acting as Felicity’s agent. Claude’s fraud was, therefore, imputed to Felicity. Following this reasoning Beazley P concluded that GC&Co was deprived of the Dairy Farm through the fraud of Felicity. As a result, GC&Co was entitled to recover the Dairy Farm from Felicity under s 118(1)(d)(i) of the RPA.

The difficulty with this analysis is that it focuses solely on the first transfer whereby Felicity acquired a joint interest in the Dairy Farm with Claude. On President Beazley’s reasoning, GC&Co is no doubt entitled to recover as against Felicity the interest she acquired as joint tenant in the Dairy Farm pursuant to the first transfer. This is the transfer that was tainted by Claude’s fraud. For the same reasons GC&Co would have also been entitled to recover as against Claude his interest in the Dairy Farm as joint tenant. However, GC&Co was seeking to recover Felicity’s title as the

---

129 Registrar of Titles (WA) v Franzon (1975 ) 132 CLR 611, 618.
130 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [71].
sole registered proprietor acquired pursuant to the later second transfer. This title was accepted by Barrett J as a ‘new and different indefeasible title’ from the joint interest she acquired under the first transfer. It was not alleged by GC&Co, nor was it found in any of the Cassegrain decisions, that Claude committed fraud in transferring his joint interest in the Dairy Farm to Felicity under the second transfer. Therefore, although it is clear that GC&Co was deprived of its interest in the Dairy Farm through fraud, it cannot be said that Felicity, as registered proprietor of the Dairy Farm, acquired her ‘new and different indefeasible title’ through fraud.

President Beazley then turned her attention to the exception to the ejectment provision contained in s 118(1)(d)(ii) of the RPA which effectively leaves open to a claim for recovery of land a registered volunteer who acquired title from a registered proprietor who became registered through their own fraud. Her Honour confirmed that Felicity’s title as sole registered proprietor pursuant to the second transfer was not defeasible simply on the basis that she did not provide valuable consideration for her interest. Citing the unanimous decision of the New South Wales Court of Appeal in Bogdanovic v Koteff and the High Court in Farah Construction Pty Ltd v Say-Dee Pty Ltd, Beazley P confirmed that a registered proprietor’s title is not defeasible simply on the basis of the registered proprietor being a volunteer. This fact, does, however make the exception in s 118(1)(d)(ii) of the RPA operative.

The question to be answered, according to Beazley P was ‘whether [Felicity] acquired title “from or through a person registered as proprietor of the land through fraud”’. Her Honour considered that on a proper construction of ‘from or through’ the person from or through whom Felicity acquired her title as sole registered proprietor was Claude. It was, therefore, Claude’s fraud that was relevant. On the meaning of fraud in this context Her Honour rejected the narrow meaning ascribed to the word fraud by Barrett J at first instance and stated that ‘there is no reason either from the text or context of the provision why a different meaning would be attributed to it. If that is right, there is no basis for confining para (ii) to the registration process’. This broader meaning of fraud encompassed Claude’s dishonest conduct in arranging payment to GC&Co for the Dairy Farm by debiting the loan account. It was, therefore, open to GC&Co to recover the Dairy farm from Felicity under s 118(1)(d)(ii) of the RPA.

While the authors agree with the decision of Beazley P on the meaning of fraud in s 118(1)(d)(ii) of the RPA, they don't agree with her Honour’s application of this section. It was noted by the majority in the High Court that Claude executed the second transfer as transferee of ‘an estate in fee simple’ in the Dairy Farm to Felicity. However, Felicity was already registered proprietor of a joint interest in the Dairy Farm. Claude could, therefore, only have been transferring his interest as joint tenant to Felicity under the second transfer. It follows that it is only this interest

132 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [84].
135 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [79]-[83].
136 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [84].
137 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [93].
138 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [99].
that can be recovered from Felicity under s 118(1)(d)(ii) of the RPA. This was the conclusion reached by Basten J in the Court of Appeal. 140

High Court

The majority of the High Court agreed with the reasoning of Beazley P on s 118(1)(d)(i) of the RPA and, in particular, with her Honour’s conclusion that fraud as contemplated in the ejectment provision has the same meaning as fraud as used in the fraud exception to indefeasibility found in s42 of the RPA. It follows, therefore, that if Claude’s fraud could be imputed to Felicity under agency principles, which the majority found it could not, then under s 118(1)(d)(i) of the RPA, GC&Co could bring proceedings to recover Felicity’s interest from her on the basis that GC&Co is a ‘person deprived of land by fraud’ and that Felicity is ‘a person who has been registered as proprietor of [an interest in] the land through fraud’. 141 In this regard, the majority considered that the exception provided for in s 118(1)(d)(i) of the RPA neither ‘diminish[es] the protection’ given by the fraud exception nor does it ‘enlarge the rights’ available against a registered proprietor. 142 In effect, it operates alongside and in confirmation of the fraud exception.

By contrast, the majority considered that ‘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’. 143 As a result, even if the current registered proprietor, in this case Felicity, was not registered as sole registered proprietor of the Dairy Farm through fraud and, therefore, her registered title cannot be impugned under the fraud exception, if the person from whom she acquired title, here Claude, was registered through fraud, which he was, such fraud is a basis for defeating Felicity’s registered title. However, consistently with the authors’ views expressed above, the majority noted that:

Claude, but not Felicity, was registered as proprietor of (an interest in) the land (as joint tenant) through fraud. By the 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 (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 … for the recovery of that interest in the land (as tenant in common as to half) lie against Felicity. 144

Although Keane J did not find that Claude was acting as Felicity’s agent in relation to the first transfer, his Honour adopted the view that, following the first transfer, as joint tenants Claude and Felicity held the whole estate in the Dairy Farm jointly ‘and no one of them ha[d] a distinct or separate title’. 145 They were ‘vis-à-vis the outside world, one single owner’. 146 As Claude and Felicity acquired that single estate through Claude’s fraud, it was defeasible, notwithstanding that Felicity did not

140 Cassegrain v Gerard Cassegrain & Co Pty Ltd (2013) 305 ALR 612, [147].
141 Real Property Act 1900 (NSW), s 118(1)(d)(i).
142 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [60].
143 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [61].
144 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [62].
145 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [113].
146 Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2, [114].
participate in Claude’s fraud.\textsuperscript{147} It follows, according to Keane J, that prior to the second transfer, GC&Co could have recovered the whole of the Dairy Farm from Claude and Felicity under the s 118(1)(d)(i) exception to the ejectment provision.\textsuperscript{148} The fact of the second transfer enlivened the exception in s 118(1)(d)(ii) of the \textit{RPA} in relation to that interest in the Dairy Farm Claude transferred to Felicity. His Honour agreed with the broader meaning ascribed to fraud under this exception by the Court of Appeal and that Claude’s fraud was captured by this provision.\textsuperscript{149} On this reasoning, Keane J concluded that Felicity’s title to the Dairy Farm was defeasible under the joint operation of both exceptions to the ejectment provision in s 118(1)(d) of the \textit{RPA}.

\textbf{CONCLUSION}

In many respects the High Court decision in \textit{Cassgrain} presented no surprises. There were no surprises that the majority decision confirmed: the immediately indefeasible nature of a registered proprietor’s, including a registered volunteer’s, title to land; the limitation of the fraud exception to fraud by the registered proprietor or his or her agents; the need to establish an agency relationship before assessing whether an alleged agent’s fraud can be imputed to the registered proprietor; the consistent meaning to be ascribed to the word ‘fraud’ throughout a Torrens statute; and the defeasibility of a non-fraudulent volunteer registered proprietor’s title where that title is derived from or through a person who acquired title through fraud.

The real value and significance of \textit{Cassgrain}, apart from the simplicity, clarity and rigour of the judgment, lies in its comprehensive application and endorsement of Torrens orthodoxy. For Australian property lawyers, the decision is a welcome and valuable addition to our Torrens library.

\textsuperscript{147} \textit{Cassgrain v Gerard Cassgrain & Co Pty Ltd} [2015] HCA 2, [115].
\textsuperscript{148} \textit{Cassgrain v Gerard Cassgrain & Co Pty Ltd} [2015] HCA 2, [117].
\textsuperscript{149} \textit{Cassgrain v Gerard Cassgrain & Co Pty Ltd} [2015] HCA 2, [119].