IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S141 of 2014**

BETWEEN: **FELICITY CASSEGRAIN**
Appellant

10 **and**

GERARD CASSEGRAIN & CO PTY LTD
Respondent

APPELLANT'S SUBMISSIONS

PART I: Suitability for publication

1. The appellant certifies that this submission is in a form suitable for publication on
20 the internet.

PART II: Issues

2. Whether it was appropriate to infer that Claude Cassegrain as the appellant's agent in effecting registration of the transfers referred to in paragraphs 2 and 3 of the Notice of Appeal when the evidence was inconclusive and the principles in *Blatch v Archer* were applied to the appellant but not applied to the party having the onus of proof, the respondent.

3. Whether the fraud exception to indefeasibility contained in s. 42 of the *Real Property Act 1900* (NSW) applies where the person acquiring title by registration is not in any way implicated in the fraud, complicit in it or otherwise infected by it.

30 4. Whether s. 118(1)(d) of the *Real Property Act* had any application to the circumstances.

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PART III: Judiciary Act 1903, s. 78B

5. The appellant has considered whether notice should be given pursuant to s. 78B of the *Judiciary Act* and has formed the view that no such notice is required.

PART IV: Decisions below

6. The decisions below are unreported. The Internet citations are:

   (a) Barrett J. [2011] NSWSC 1156.

   (b) Court of Appeal [2013] NSWCA 453. As Beazley P. there said at CA[2], the decision is to be read with [2013] NSWCA 454.

PART V: Facts

7. The action in the Supreme Court of New South Wales was brought by the respondent against Claude Cassegrain ("Claude") and his wife Felicity (the appellant).

8. The appellant is the sole registered proprietor of a property referred to as "the Dairy Farm" which has been her home for 17 years. Her sole ownership came about from two transfers.

9. On 2 September 1996 Claude and Anne Marie Cassegrain, as directors of the respondent, resolved that the company transfer the property ("the Dairy Farm") to Claude and the appellant as joint tenants for a consideration of $1 million and otherobligations: J[105]. There was no suggestion that the transaction was at an undervalue from the respondent's perspective. The resolution provided that the consideration payable by the appellant was to be satisfied by debiting the loan account of Claude in the books of the respondent.

10. As provided by that resolution, the first instrument of transfer transferred the Dairy Farm from the respondent to Claude and the appellant as joint tenants. It was executed on 14 September 1996 by Claude and Anne Marie Cassegrain for the transferor and Chris McCarron as solicitor for the transferees: see Barrett J. at J[107]. There was no allegation by the respondent of wrongdoing by Anne Marie Cassegrain or by Mr McCarron.

11. On 27 February 1997 a facsimile letter from the respondent (signed by "Claude Cassegrain Managing Director" and bearing the heading "Re: Purchase of Dairy – C

& F Cassegrain" asked Mr McCarron to "Please register the transfer as exchanged." On the same day Mr McCarron replied to "Mr C Cassegrain C/- Gerard Cassegrain & Co Pty Ltd" advising that the transfer had been dated 14 September 1996 and would be lodged for registration once the title deeds were obtained and the transfer returned from the Office of State Revenue.

12. On 6 March 1997 Mr McCarron wrote advising that the transfer had been sent for registration and on 14 March 1997 wrote confirming that the transfer had been registered. Each such letter was addressed to "Mr C Cassegrain C/- Gerard Cassegrain & Co Pty Ltd".

10 13. At first instance it was held that it was dishonest for Claude to use money in his loan account with the respondent as consideration for the acquisition of the Dairy Farm. That was because his claim to be entitled to $4.5m of a $9.5m settlement of litigation with CSIRO was, and was known to Claude to be, without substance: J[114]-[129].

14. The second instrument of transfer was executed on 24 March 2000. It transferred the Dairy Farm to Felicity as sole proprietor. It was signed by Claude as transferor and Mr McCarron on behalf of the transferee. It was then registered on 18 April 2000. The consideration was $1: J[113].

15. No witness was called at trial. The relevant documentary evidence is essentially that referred to above: J[35].

20 16. Barrett J. at first instance dealt with the case against the appellant at J[148]-[180]. He held that the respondent was not entitled to any relief against the appellant in relation to her interest in the Dairy Farm: J[184]. He held, however, that the claim against Claude for equitable compensation should succeed: see at J[122], [127], [129], [182], [183], [243], [248].

17. Each losing party appealed. Claude's appeal failed[1]. The respondent's appeal succeeded[2]. As noted by Beazley P. at CA[2], however, the Court of Appeal's reasons in the two matters are to be read together

18. There was no allegation that the appellant knew of Claude's fraudulent conduct in using the credit balance in the loan account for the purchase of the Dairy Farm:

[1] [2013] NSWCA 454. Special leave to appeal was refused on 20 June 2014: [2014] HCA Trans 138.
[2] Beazley P. and Macfarlan JA, Basten JA dissenting in relation to the first transfer.

J[164], CA[6], [52], [123]. Nor was it contended that the appellant was in any way implicated in that conduct, or had contributed to it.

19. The basis on which the Court of Appeal found against the appellant in relation to the first transfer was as follows:

(a) Beazley P. held that the fraud exception to indefeasibility in s. 42(1) of the *Real Property Act* applied because Claude was the appellant's agent to effect registration of the transfer and the appellant was bound by the fraud of Claude as such agent: CA[25], [30], [37], [38]. Macfarlan JA, at CA[156], agreed with Beazley P. Basten JA at CA[123]-[125] dissented on this issue. He refused to find that Claude had been the appellant's agent.

(b) Macfarlan JA held that the appellant "was infected with Claude's fraud" because she and Claude had taken title from the respondent as joint tenants and should be treated as one person: CA[156]-[157]. Neither Beazley P. nor Basten JA agreed with this view: see CA[55]-[61]; [126]-[139] respectively.

20. The basis on which the Court of Appeal found against the appellant in relation to the second transfer was as follows:

(a) Beazley P. was of the view that by reason of her finding that Claude was the appellant's agent to effect registration, the fraud exception in s. 42 applied, and the respondent was entitled to recover the Dairy Farm because of s. 118(1)(d)(i) of the *Real Property Act*: CA[61], [65], [71][3]. Macfarlan JA at CA[157] appears to have adopted a similar view. Macfarlan JA at CA[157] also relied on his "joint tenants" approach.

(b) Beazley P. also held that, if she were wrong on the issue of agency, the respondent was entitled to recover the Dairy Farm by reliance on s. 118(1)(d)(ii) of the *Real Property Act*, holding that the appellant had derived her title from or through a person (Claude) registered as proprietor through fraud: CA[67], [84], [90], [96]-[99]. Macfarlan JA agreed with Beazley P. on this issue: CA[158]. Basten JA, at CA[144]-[147], appears to have treated s. 118(1)(d)(ii) as applicable only to the interest acquired by the second transfer to the second transfer.

[3] Whilst s. 118 was not in force until 15 September 2000, it applies to circumstances before that date: *Real Property Amendment (Compensation) Act 2000* (NSW), P. 3, Sch 1, cl. 13.

Part VI: Argument

21. **Agency.** The appellant contends that the reasoning in the Court of Appeal erred in two significant respects:

(a) in acceding to the view that an inference could be drawn that Claude was the appellant's agent because the appellant did not herself give evidence, or call Claude or Mr McCarron to refute agency;

(b) in holding that the fraud exception in s. 42 applied in circumstances where the agent of the person achieving registration has been fraudulent in doing so, but the principal was unaware of the fraud, was not in any way complicit in it, and had not played any part[4] in itsoccurrence.

These issues are discussed in that order.

22. ***Drawing the inference that Claude was the appellant's agent.*** As Barrett J. said at J[158], the respondent bore the burden of establishing that Claude had, or exercised, any actual or implied authority of the appellant in any aspect of the events.

23. The evidence regarding both transfers was summarized by Barrett J. at J[155]-[158]:

> "155 The evidence regarding both transfers in sparse. On the face of each, it is clear that Felicity did not sign as transferee. In each case, the transfer was accepted by Mr McCarron as solicitor for the transferees or transferee. There is no evidence of the giving of any instruction to him by Felicity in relation to signing of the transfer (compare *Davis v Williams* [2003] NSWCA 371; (2003) 11 BPR 21, 313 at [59]).
>
> 155 The only evidence of any relevant contact with Mr McCarron in relation to the first transfer comes from a letter of 27 February 1997 – that is, some five months after the date of the transfer – by which Mr McCarron was instructed to "register the transfer as exchanged". But that was a letter on GC & Co letterhead signed "Claude Cassegrain – Managing Director". It thus conveyed an instruction from the transferor, not either or both of the transferees; and an instruction, moreover, with respect to an already existing document. It related to an already existing document because it referred to the transfer "as exchanged" (in the past) and because the document is dated 14 September 1996. The letter is thus unrelated to the execution of the transfer.
>
> 156 As regards the second transfer, there is no evidence at all of the circumstances in which it was signed by Mr McCarron as solicitor for the transferee (Felicity).

[4] As by "wilful blindness".

157 In short, there is no basis in the evidence for a finding 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. It was for GC & Co to prove such authority, not for Claude or Felicity to disprove it."

24. In the Court of Appeal Basten JA at CA[124] – dissenting on this issue - noted that Barrett J's finding on this issue was challenged and went on to say, at CA[125]:

"125 The letter requested the solicitor, Mr McCarron, to register the transfer "as exchanged". The transfer was dated 14 September 1996 (some five months before the date of the letter) and had been signed by Mr McCarron on behalf of the transferees, being Claude and Felicity Cassegrain. Although there are indications that the instruction to register the transfer was given on behalf of the transferees – the letter was headed "Re: Purchase of diary – C & F Cassegrain" – it could not have provided instructions for Mr McCarron to sign on behalf of both Claude and Felicity Cassegrain: those instructions must have been given some months earlier. There was simply no evidence as to how the initial instructions were given on behalf of Felicity Cassegrain. It is entirely plausible that she spoke to the solicitor directly to give such instructions. (The reason for the letter, requesting registration months after the transaction had been effected is obscure). Given the serious consequence of drawing an inference that the instructions were in fact given by Claude as her agent, the preferable inference is that she acted on her own behalf. (There is no basis for inferring that Mr McCarron signed on her behalf without instructions from her.)".

25. The approach taken by Beazley P. on this issue was as follows:

(a) At CA[23]-[27] her Honour recited the submissions of the respondent and at CA[28]-[29] those on behalf of the appellant. She then at CA[30] took the view that the letter of 27 February 1997 had been written on behalf of Claude and the appellant, and was a direction to register the transfer.

(b) Her Honour noted at CA[32] that the respondent's contention was one of implied (rather than express) authority. At CA[33] she took the view that Claude had assumed authority to act on behalf of the appellant, but recognized that that was not sufficient to establish implied agency. Evidence of conferral of authority by the appellant was required.

(c) Beazley P. at CA[34] and [37] then appeared to take the view that the evidence so far referred to was not determinative, but that the inference of agency in relation to the first transfer could be drawn because the appellant had not herself given evidence and had not adduced evidence from Claude or

Mr McCarron who could have refuted agency. Accordingly she held, at CA[38], that the appellant's title in consequence of the first transfer, was defeasible by reason of Claude's fraud.

26. In relation to agency and the *second* transfer Beazley P.'s reasons are at CA[41], [42]. Those reasons are in essence:

(a) Mr McCarron had both witnessed Claude's signature as transferor and signed for the appellant as transferee.

(b) When the matters in (a) were added to the finding of agency on the first transfer, the appellant risked the drawing against her of the inference of agency if she did not give evidence of the circumstances by which she became registered as proprietor.

27. Beazley P.'s reasons on this issue were based on the application of the principle in *Blatch v. Archer* (1774) 1 Cowp 63, 98 E.R. 969: see CA[26], [37], [42].

28. The principle in *Blatch v. Archer* is that[5]:

> "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted".

It is accepted that in some cases where some of the facts essential to a plaintiff's case are peculiarly within the knowledge of a defendant and it is difficult in the nature of things for the plaintiff to produce evidence of them, slight evidence of such facts may be enough unless explained away by the defendant and the evidence should be weighed according to the power of a party to produce it (*Hampton Court Ltd v. Crooks* (1957)) 97 CLR 357 at 371-2 (Dixon C.J.)). As there noted, however, a plaintiff is not relieved of the necessity of offering some evidence by the fact that the material circumstances are peculiarly within the knowledge of the defendant.

29. The approach taken by Beazley P. on this issue was erroneous. In the first place, it turns on the terms of the letter of 27 February 1997. Those terms are discussed by Beazley P. at CA[30]-[31]. In that regard:

(a) The letter of 27 February 2007, as Barrett J. said at J[156], was on the respondent's letterhead, and was signed by Claude as managing director. It clearly conveyed, it is submitted, a direction purporting to be on behalf of the

[5] 1 Cowp at 65, 98 ER at 970.

company, the transferor. It may be, as Beazley P. said at CA[30], that the letter was written by Claude in pursuance of his fraud, but it does not follow that "Claude must have written the letter on behalf of the transferees".

(b) It also does not follow that – CA[31] – the letter of 27 February 1997 "was evidence that he" was acting for both himself and Felicity.

30. Secondly what was described by Beazley P. at CA[31] as "the final factor" was that Mr McCarron signed on behalf of both Claude and Felicity. But this would lead to the contrary view. If Mr McCarron was acting on behalf of both Claude and the appellant, it militated against the view that *Claude* was the appellant's agent.

10 31. Further the evidence on the issue was not "peculiarly within the knowledge" of the appellant. There was no reason why the respondent could not have called Mr McCarron to give evidence of the events and - as Basten JA said at CA[125] - it was "entirely plausible" that the appellant herself spoke to Mr McCarron to give him the instructions.

32. The respondent was inviting the Court to draw an inference that the appellant, herself innocent of fraud, was to be deprived of title because of the fraud of a supposed agent. The evidence was in no way sufficient to allow the inference to be drawn.

33. The finding of Beazley P. in relation to the second transfer was based upon her
20 finding in relation to the first transfer.

34. In summary, the decision of the majority on these issues was erroneous:

(a) The respondent bore the burden of establishing agency in order to attract the fraud exception to s. 42.

(b) If a *Blatch v. Archer* inference were to be drawn it should have been against the respondent. It could have called Mr McCarron as easily as the appellant. Further, if a *Jones v. Dunkel* inference was to be drawn (CA[155]) it should have been against the respondent, on the basis that its failure to call Mr McCarron indicated that his evidence would not have assisted the respondent.

(c) The Court of Appeal was engaged in a rehearing (CA[35]). It should have
30 given weight to the fact that Anne Marie Cassegrain, another director of the respondent, signed as transferor along with Claude. There was no suggestion

of wrongdoing by Anne Marie Cassegrain nor was any evidence adduced on the circumstances and understanding of the directors of the company with regard to the first transfer.

(d) The interpretation given to the letter of 27 February 1997 went far beyond its terms.

35. Her Honour also erred by failing to consider the serious consequences of drawing the inference of Claude being the appellant's agent from very limited evidence. Although the appellant was never alleged to have been other than innocent, the consequence of the finding of agency was that the title of Felicity's family home was liable to be lost as a result of the fraud of her agent. Basten JA was correct, at CA[125], in making reference to the serious consequences of a finding of agency.

36. ***Agent fraudulent but principal unaware of the fraud.*** The Court of Appeal does not appear to have appreciated that in cases where the fraud exception to indefeasibility is involved, it is necessary to demonstrate *some* personal responsibility in a principal who has procured registration.

37. At CA[14] and [15] Beazley P. referred to *Assets Co v. Mere Roihi* [1905] AC 176 at 210 where the Privy Council referred to the fact that:

> "... the fraud which must be proved in order to invalidate the title of a registered purchaser .... *must be brought home to the person whose registered title is impeached or to his agents.* Fraud by persons from whom he claims does not affect him *unless knowledge of it is brought home to him or his* agents. The mere fact he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. *A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.*" (Emphasis added)

38. The operation of these concepts (and the apparent conflict between the two references to "his agents" on the one hand, and the last sentence of the passage quoted in paragraph) has been discussed in a number of cases.

39. In *Schultz v. Corwill Properties Pty Ltd* [1969] 2 NSWR 576, Street J. at 582.41-585.7 held that the Privy Council was referring to two alternative situations. The first was one in which the fraud was actually committed by ("brought home to") the

person whose title was impeached or his agent. The second was where the person whose title was impeached or his agents had knowledge that a fraud has been committed whereby the previous registered proprietor is being deprived of some or all of his interests: at 582.41-52.

40. The first situation involved the application of the ordinary principles governing responsibility of a principal for the fraud of his agent. An act within actual or apparent authority did not cease to bind a principal merely because the agent was acting fraudulently and in furtherance of his own interests. However, the mere fact that the principal, by appointing the agent, had given the agent the opportunity to act fraudulently did not without more make the principal liable: *Schultz* at 582.53-583.14.

41. The second situation involved the person whose title is impeached, or his agents, having knowledge of the presence of a fraud in the transaction under investigation. So far as knowledge of an agent is concerned, the mere fact that the existence of a fraud was known to the agent would not, of itself, affect the indefeasibility of the title when registered: *Schultz* at 583.15-583.29.

42. Street J. went on to say, at 583.30, that:

> "It is not enough simply to have a principal, a man who is acting as his agent, and knowledge in that man of the presence of a fraud"

but that:

> "There must be the additional circumstances that the agent's knowledge of the fraud is to be imputed to his principal. This approach is necessary in order to give full recognition to (a) the requirement that there must be a real, as distinct from a hypothetical or constructive, involvement by the person whose title is impeached, in the fraud, and (b) the extension allowed by the Privy Council that the exception of fraud under s. 42 can be made out if "knowledge of it is brought home to him or his agents."

43. The agent's knowledge of the fraud would be imputed to the principal when the agent was held out as representing the principal, but that was subject to the "important exception" that if the agent's own fraud was involved, the principal was not bound by the imputation of knowledge: *Schultz* at 583.50-584.18.

44. In *Chasfild Pty Ltd v. Taranto Pty Ltd* [1991] 1 VR 225, however, Gray J. held that a mortgagee which had obtained registration without fraud on its part or any knowledge of fraud had a defeasible title because the mortgagor's signature had been forged. *Chasfild* was not followed by Hayne J. in *Vassos v. State Bank of South*

Australia [1993] 2 VR 316: see at 322.4-322.10, 328.20-328.27. At 328.20-27 Hayne J. held that "the title obtained ... on registration is not to be defeated save by fraud on the part of the bank or to which it was privy". See to similar effect Smith J. in *Eade v. Vogiazopoulos* (1993) V. Conv. R 54, 548, Coldrey J. in *Rasmussen v. Rasmussen* [1995] 1 VR 613 at 631, Mandie J. in *Beatty v. ANZ Banking Group Ltd* [1995] 2 VR 301 at 314.

45. In *Pyramid Building Society (In liq.) v. Scorpion Hotels Pty Ltd* [1998] 1 VR 188, it was held per Hayne JA (Brooking and Tadgell JJ.A. concurring) that the exception "in case of fraud" was "limited to fraud by or on behalf of the party obtaining registration". See at 191.25-192.10. See too *Macquarie Bank Ltd v. Sixty Fourth Throne Pty Ltd* [1998] 3 VR 133 at 146 per Tadgell JA and *Russo v. Bendigo Bank Ltd* [1999] 3 VR 376 at 385, [34] (Ormiston JA) and at 392, [55] per Batt JA. Batt JA there said, speaking of *Assets Co*:

> "... the Privy Council made it clear that the fraud "must be brought home to" the registered proprietor or his agents. That means that it must be sheeted home to the registered proprietor or his agents, that he or they must be shown to be infected by it or complicit in it".

Batt JA also referred to the "perceptive analysis" of Street J. in *Schultz*.

46. *Schulz* was followed by Owen J. in *Conlan v. Registrar of Titles* (2001) 24 WAR 299 at 344, [233]-[235]. Owen J. at 345, [237] adopted the observations of Batt JA in *Russo* referred to above.

47. In *Davis v. Williams* (2003) 11 BPR 21, 313 at [115]-[116] Young CJ in Eq. appeared to accept that even constructive notice of the fraudulent acts of others and taking advantage of them would not amount to fraud for the purposes of s. 42. The Queensland Court of Appeal in *Tara Shire Council v. Garner* [2003] 1 Qd R 556 followed *Macquarie Bank Ltd v. Sixty-Fourth Throne Pty Ltd.* See Davies JA at 568, [34], Atkinson J. at 583, [87].

48. It may be noted that Macfarlan JA – at CA[155] – has treated *Breskvar v. Wall* (1971) 126 CLR 376 as one where the agent's fraud was imputed to the principal, but it is clear from Menzies J.'s reasons at 394.5 and 395.3 that the principal (Wall) was himself implicated in the fraud.

49. It is submitted that there was nothing whatsoever to show that the appellant was in any way complicit in the fraud found against Claude, and that there was no conduct

of hers which would render the title she had acquired by registration liable to be set aside on the basis of fraud by Claude as her agent.

Joint Tenancy

50. Macfarlan JA erred when he took the view that the appellant "was infected with Claude's fraud" because she and Claude were joint tenants: CA[156]-[157].

51. This view was not agreed with by either Beazley P. (CA[44] to [61]), especially at CA[60]-[61] or Basten (CA[138]-[139]). For the reasons given by Beazley P. and Basten JA, Macfarlan JA's view should not be accepted.

Section 118(1)(d) *Real Property Act*

10 52. Section 118(1)(d) provides:

> "(1) Proceedings for the possession or recovery of land do not lie against the registered proprietor of the land, except as follows:
>
> ...
>
> (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
> 20 registered as proprietor of the land through fraud ...".

53. It was clear, of course, that the appellant was the "registered proprietor" of the land. It is equally clear, it is submitted, that unless Claude were treated as the appellant's agent in committing the fraud, s. 118(1)(d)(i) could have no application. Beazley P. recognized this at CA[71].

54. Turning to s. 118(1)(ii), its only possible application could be to the second transfer, i.e. of Claude's interest as joint tenant.

55. It is accepted that the appellant did not give valuable consideration for that transfer. It is accepted also that by the second transfer the appellant derived "from or through" Claude.

30 56. It did not follow, however, that Claude had become "registered as proprietor of the land through fraud".

57. As is apparent from the reasons of Barrett J.:

(a) The respondent's resolution of 2 September 1996 was for a transfer of the Dairy Farm to Claude and the appellant for $1m: J[105]. The transaction was not at an undervalue: J[106], [122].

(b) The actual debiting of the consideration to Claude's loan account did not take place until 30 June 1997: J[108]-[111]. It was then that the financial impact was suffered by the respondent: J[111], [112].

58. If Claude and the appellant had paid the respondent from their own pockets for the Dairy Farm there might have been no attack on the transaction: J[122]. As Barrett J. said, however (at J[122]):

> "The attack that GC & Co mounts in these proceedings is made because there was no actual payment and because Claude, with the concurrence of his co-director Anne-Marie, purported to pay GC & Co by recording a reduction in the balance owing and payable by GC & Co to him in respect of the false loan account. That was, in reality, no giving of valuable consideration in return for the transfer of the Dairy Farm to Claude and Felicity."

59. Barrett J. went on to hold, at J[124], that:

> "The establishment of the loan account – in the sense of the making of entries in GC & Co's books of account recording a liability to Claude – was improper in the sense that there was no legal basis for any such recognition of indebtedness of the company. But the establishment and recording of the loan account did not, of itself, cause harm to the company in any immediate way. Its asset base remained intact while matters remained at the level of the mere recording of non-existent indebtedness to Claude. It is not shown that any prejudice accrued to the company because of that mere recording."

60. In discussing actual drawings on Claude's loan account, Barrett J. noted at J[125] that appropriations were made either when there was an actual outlay of funds:

> "... or, as in the case of the Dairy Farm, by recording a reduction in satisfaction of some indebtedness, again on the footing of some entitlement of Claude. ...In cases exemplified by the case of the Dairy Farm, where no payment as such was made, appropriation occurred upon recording in the books of a reduction in the company's indebtedness to Claude and satisfaction of the concomitant financial obligation to the company."

61. And at J[128]-129]:

> "128 ....His actions in relation to the creation of the loan account were therefore dishonest. When he later drew on the loan account (including in connection with the consideration for the first Dairy Farm transfer), 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.
>
> 129 It follows that, on each occasion on which Claude obtained money or value from GC & Co which reflected in a reduction of the loan

> account balance, he acted not only in breach of fiduciary duty but also dishonestly. It is therefore correct to categorise his conduct as dishonest or fraudulent breach of fiduciary duty. It went beyond the pleaded alternative of recklessness."

62. The registration of the transfer from the respondent took place on 10 March 1997 (J[148]). The debiting of the consideration to Claude's loan account did not take place until later, namely on 30 June 1997.

63. Barrett J. was correct in focusing, at J[178], on the question whether Claude had been "*registered* as proprietor of the land through fraud". And it is submitted that he was correct in his conclusion, at J[179]:

> "179 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. There is nothing calling in question the integrity of the transfer or of the registration process to which it was subjected following its lodgment. The process by which the registration of Claude as a registered proprietor was achieved was not attended by fraud. The fact that he had wrongfully drawn funds from GC & C to satisfy the consideration expressed in the transfer (or, perhaps more accurately, that he gave illusory consideration by reference to the false loan account) is remote from the process of registration and therefore beside the point."

64. Beazley P.'s view - CA[96] - was that (despite recognizing at CA[12] THAT THE Torrens system is a system of title by registration) there was no warrant to confine s. 118(1)(d)(ii) to the process of registration. Macfarlan JA at CA[157] agreed with Beazley P. on this issue. Registration, however, is the matter to which the provisiondirects attention. In some cases, as here, the party deprived of title by fraud will not be able to render the registration inefficacious but will be restricted to a claim for compensation against the fraudster

65. Basten JA's view, at CA[144]-[145] was that Barrett J. had attacked the concept of fraud "only to the administrative process of registration" and that the registration was "step in the execution of the fraud". The difficulty with this view, however, was that the fraud did not occur until a later event, namely when the loan account was debited with the amount of the consideration for the Dairy Farm.

PART VII: Applicable provisions

66. See Annexure "A".

PART VIII: Orders sought

67. If the appellant's case succeeds *in toto*, the appellant seeks the following orders:

    (a) Appeal allowed with costs.

    (b) Judgment of the Court of Appeal dated 18 December 2013 be set aside.

    (c) In lieu thereof it be ordered that the respondent's appeal to that court be dismissed with costs.

68. If the appellant's case succeeds in relation only to the first transfer, the appropriate orders would be:

    (a) Appeal allowed with costs.

    (b) Judgment of the Court of Appeal dated 18 December 2013 be set aside.

    (c) In lieu thereof there be orders as set out in Basten JA's reasons at CA[150].

PART IX: Estimate of time

69. The appellant's counsel estimate that the presentation of the appellant's oral argument will take two hours.

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S141 of 2014**

BETWEEN: **FELICITY CASSEGRAIN**
Appellant

10 **and**

GERARD CASSEGRAIN & CO PTY LTD
Respondent

ANNEXURE "A" TO APPELLANT'S SUBMISSIONS

Annexure A contains:

1. Section 42 of the *Real Property Act 1900* as at 14 March and 18 April 2000 (the
20 date the second transfer was lodged for registration). Subsection (3), not presently relevant, was added on 13 May 2009.

2. Section 45 of the *Real Property Act*. Section 45 was repealed between 1970 and 15 September 2000. The *Real Property Amendment (Compensation) Act 2000* (NSW) Schedule 1[6] re-inserted s. 45 into the Act. Date of assent: 5 June 2000. Date of commencement: 15 September 2000.

3. Section 97 of the *Real Property Act*. This has been in the same form at all times.

4. Section 100 of the Real Property Act. This has been in the same form at all times.

5. Section 118 of the *Real Property Act* was repealed between 1970 and 15 September 2000. The *Real Property Amendment (Compensation) Act 2000* (NSW) Schedule
30 1[6] and [12] re-inserted s. 118 into the *Real Property Act*. Date of assent: 5 June 2000. Date of commencement: 15 September 2000. It is applicable to this case because of cl. 13 of Schedule 3, Part 5 inserted by Item [15] of Schedule 1 to the *Real Property Amendment (Compensation) Act 2000*.

6. Section 135 of the *Real Property Act* as in force 1979 until 15 September 2000. Section 135 was contained in Part 14 of the *Real Property Act* and was repealed by Item [12] of Schedule 1 to the *Real Property Amendment (Corporation) Act 2000*.

7. Clause 13 of Schedule 3 Part 5 to the *Real Property Act.*

42 Estate of registered proprietor paramount

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

(a) the estate or interest recorded in a prior folio of the Register by reason of which another proprietor claims the same land,

(a1) in the case of the omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act or a Commonwealth Act,

(b) in the case of the omission or misdescription of any profit à prendre created in or existing upon any land,

(c) as to any portion of land that may by wrong description of parcels or of boundaries be included in the folio of the Register or registered dealing evidencing the title of such registered proprietor, not being a purchaser or mortgagee thereof for value, or deriving from or through a purchaser or mortgagee thereof for value, and

(d) a tenancy whereunder the tenant is in possession or entitled to immediate possession, and an agreement or option for the acquisition by such a tenant of a further term to commence at the expiration of such a tenancy, of which in either case the registered proprietor before he or she became registered as proprietor had notice against which he or she was not protected:

Provided that:

(i) The term for which the tenancy was created does not exceed three years, and

(ii) in the case of such an agreement or option, the additional term for which it provides would not, when added to the original term, exceed three years.

(iii) (Repealed)

(2) In subsection (1), a reference to an estate or interest in land recorded in a folio of the Register includes a reference to an estate or interest recorded in a registered mortgage, charge or lease that may be directly or indirectly identified from a distinctive reference in that folio.

45 Bona fide purchasers and mortgagees protected in relation to fraudulent and other transactions

(1) Except to the extent to which this Act otherwise expressly provides, nothing in this Act is to be construed so as to deprive any purchaser or mortgagee bona fide for valuable consideration of any estate or interest in land under the provisions of this Act in respect of which the person is the registered proprietor.

(2) Despite any other provision of this Act, proceedings for the recovery of damages, or for the possession or recovery of land, do not lie against a purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act merely because the vendor or mortgagor of the land:

(a) may have been registered as proprietor through fraud or error, or by means of a void or voidable instrument, or

(b) may have procured the registration of the relevant transfer or mortgage to the purchaser or mortgagee through fraud or error, or by means of a void or voidable instrument, or

(c) may have derived his or her right to registration as proprietor from or through a person who has been registered as proprietor through fraud or error, or by means of a void or voidable instrument.

(3) Subsection (2) applies whether the fraud or error consists of a misdescription of the land or its boundaries or otherwise.

97 Severance of joint tenancy by unilateral action

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

(2) If a joint tenancy is proposed to be severed by unilateral action by one joint tenant, the Registrar-General may require the person who proposes to sever the joint tenancy to provide the Registrar-General, before recording the instrument that severs the joint tenancy, with:

(a) the names and addresses of the joint tenants or, if the addresses are unknown, evidence of the efforts made by the person to locate the addresses of the joint tenants, and

(b) a statement that the person is not aware of any limitation or restriction on his or her capacity or entitlement to sever the joint tenancy (arising, for example, from the capacity in which the person holds an estate or interest in the land concerned or from a private agreement).

(3) The Registrar-General may require the person who proposes to sever a joint tenancy to provide additional information concerning:

(a) other persons who may be affected by the severance of the joint tenancy, and

(b) any limitation or restriction on the capacity or entitlement of the person to sever the joint tenancy, and

(c) any other matter that the Registrar-General considers appropriate.

(4) The Registrar-General may require any information provided for the purposes of this section to be provided by statutory declaration.

(5) The Registrar-General must give notice of the lodgment of a dealing for registration or recording that may sever a joint tenancy to all joint tenants in the joint tenancy (other than any joint tenant who executed the dealing, or on whose behalf the dealing was executed). Section 12A (2) and (3) applies to and with respect to a notice given under this section.

(6) Despite subsection (5), the Registrar-General is not required to give notice of the lodgment of a dealing for registration or recording that may sever a joint tenancy to a joint tenant in any of the following circumstances:

(a) if the proposed severance is to arise from the recording of a court order made in proceedings to which the joint tenant is a party,

(b) if the proposed severance is to arise from the registration of a transfer pursuant to a writ in respect of an interest of any of the joint tenants,

(c) if the dealing concerned is witnessed by the joint tenant and the dealing indicates that the joint tenancy is to be severed,

(d) if the dealing is accompanied by a written acknowledgment by the joint tenant that he or she has received legal advice as to the effects of the severance of the joint tenancy,

(e) if the proposed severance is to arise out of registration following an application under section 90.

100 Registered co-tenants

(1) 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.

(2) Subject to subsection (3), where persons are entitled to be registered as proprietors of a life estate and an estate in remainder in, or as tenants in common of shares in, land under the provisions of this Act (other than land comprised in a folio of the Register created pursuant to section 32 (3)), or are entitled to be so registered in respect of land in the course of being brought under the provisions of this Act pursuant to Part 4, Part 4A or Part 4B, the Registrar-General may, in respect of the life estate and estate in remainder or, as the case may be, the shares:

(a) create separate folios of the Register and issue separate certificates of title,

(b) create a folio or folios of the Register and issue such certificate or certificates of title as the Registrar-General thinks proper, or

(c) deliver any existing certificate of title after making thereon and in the Register such recording as may be required by this Act.

(3) The Registrar-General shall not refuse to act in accordance with subsection (2) (a) if the Registrar-General is requested so to act and the Registrar-General's expenses for so acting are paid.

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:

(a) proceedings brought by a mortgagee against a mortgagor in default,

(b) proceedings brought by a chargee or covenant chargee against a charger or covenant charger in default,

(c) proceedings brought by a lessor against a lessee in default,

(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,

(e) proceedings brought by a person deprived of, or claiming, land that (by reason of the misdescription of other land or its boundaries) has been included in a folio of the Register for the other land against a person who has been registered as proprietor of the other land (otherwise than as a transferee bona fide for valuable consideration),

(f) proceedings brought by a registered proprietor under an earlier folio of the Register against a registered proprietor under a later folio of the Register where the two folios have been created for the same land.

(2) Despite any rule of law or equity to the contrary:

(a) the production of a manual folio is an absolute bar and estoppel to any such proceedings commenced before the production of the folio against the person named in the folio as a registered proprietor or lessee of the land, and

(b) the production of a computer folio certificate for a computer folio is an absolute bar and estoppel to any such proceedings commenced before the time specified in the certificate against the person named in the certificate as a registered proprietor or lessee of the land.

(3) Subsection (2) does not apply to proceedings of the kind referred to in subsection (1) (a)–(f).

(4) This section does not affect:

(a) any proceedings in relation to land for which a qualified folio of the Register has been created, being proceedings based on a subsisting interest within the meaning of Part 4A, or

(b) any proceedings brought by a person deprived of, or claiming, land that (by reason of the misdescription of other land or its boundaries) has been included in a limited folio of the Register for the other land, whether or not the registered proprietor of the other land is a transferee of the land bona fide for valuable consideration.

135 Purchasers and mortgagees protected

Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages as aforesaid, or to proceedings in the Supreme Court or the District Court for possession of land or other proceedings or action for the recovery of land, or to deprivation of the estate or interest in respect to which a person is registered as proprietor, any purchaser or mortgagee bona fide for valuable consideration of land under the provisions of this Act on the plea that the vendor or mortgagor concerned may have been registered as proprietor, or procured the registration of the transfer to such purchaser or mortgagee through fraud or error, or under any void or voidable instrument, or may have derived from or through a person registered as proprietor through fraud or error, or under any void or voidable instrument, and this whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.

Part 5 Real Property Amendment (Compensation) Act 2000

13 Future proceedings commenced in relation to existing matters

Parts 13 and 14 of this Act, as substituted by Schedule 1 [12] to the amending Act, apply to and in respect of any matter in respect of which proceedings are commenced on or after

the commencement of those Parts, including any matter that occurred before that commencement.