IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S141 of 2014

BETWEEN:

FELICITY CASSEGRAIN
Appellant

and

GERARD CASSEGRAIN & CO PTY LTD
Respondent

APPELLANT'S REPLY

Part I: Suitability for publication

1. This submission is in a form suitable for publication on the internet.

Part II: Reply

2. *Re RS [15].* Evidence of any fraud on the part of Claude is not necessarily evidence of agency that provides a proper basis upon which to employ, *as against the appellant*, the principle in *Blatch v Archer* (1774) 1 Cowp 63; 98 E.R. 969.

3. It is accepted that it may not be *entirely* clear whether a majority in the Court of Appeal found that Claude was the appellant's agent for the purposes of registering the second transfer. Beazley P. at CA[42] certainly took that view and Macfarlan JA at CA[151] and [157] appears to agree. Basten JA at CA[125] was not of that view.

4. *Re RS [16].* The respondent's contention should not be accepted. As appears from AS [22]-[25] and AS [36]-[49] a finding of fraud by an agent is not sufficient. The fraud must be "brought home" to the appellant.

5. *Re RS [17]-[20].* The matters in these paragraphs do not establish that Claude exercised the implied authority of the appellant. There is no evidence that the appellant as principal held out Claude as her agent and the respondent's summary at RS [18]-[20] of the additional issues, evidence and circumstances canvassed by the Court of Appeal adds nothing that would support its contention at RS [21]-[22] that Beazley P. was correct in drawing an inference that the appellant was complicit in any fraud because Claude had assumed authority to act on her behalf by causing the first transfer to be registered.

6. The assertion at RS [20] that Claude "was bent on controlling every significant step in his scheme against the interests in his fiduciary" (RS [20]) suggests that it is not safe to draw the inference that the absence of any dissent for the appellant to Claude's apparent agency meant that the appellant somehow gave Claude ostensible authority to act on her behalf. There is an equally available inference that the appellant had no knowledge that Claude had assumed any authority to act

Peter Condon & Associates
Level 1, 308-310 Darling Street
Balmain NSW 2041

Telephone: 02 9818 8776
Fax: 02 9818 8779
Ref: 453

for her in relation to the acquisition or registration of the Dairy Farm from which she could or should have expressed her dissent.

7. *Re RS [23]-[27].* The suggestion that the absence of dissent by one spouse to the receipt of a benefit from the other spouse will suffice as evidence of implied agency, cannot be supported in a case where the same circumstances support as readily an inference that Claude was acting for himself in procuring the registration of himself and the appellant as owners of the Dairy Farm.

10 8. An analogy may be found in cases involving unconscionability and the *Yerkey v Jones* principle[1]. See the comments of Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 (at 194):[2]

> "...in the majority of the cases the reality of the relationship is that, the creditor having required of the principal debtor that there must be a surety, the principal debtor on his own account in order to raise the necessary finance seeks to procure the support of the surety. In so doing he is acting for himself not for the creditor."

20 9. *Re RS [30]-[34].* The last sentence of RS [30] supports a view opposed to that in RS [32]. Further, if Claude had "good reason to conceal the truth from as many people as possible when carrying out his plan" (RS [33]) an inference could not be safely drawn that the appellant bore the burden of adducing evidence.

10. The point made at AS [34](b) may be expressed another way: In the face of equally plausible possibilities any *Jones v Dunkel*[3] inference should not be drawn to fill in gaps in the evidence as to agency so as to conclude the appellant was affected by Claude's fraud. For this reason the respondent's submissions at RS [29]-[30] and [32], [34]-[36] and [38], [42], [49] should be rejected.

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11. *Re RS [36]-[47].* The appellant relies on its submissions in AS [36]-[49] and would add:

    (a) There is, contrary to RS [36]-[37], an apparent conflict in the passage from *Assets Co v. Mere Roihi* referred to at AS [37]. That is why the later decisions have developed in the way set out in AS [38]-[47].

    (b) The passage from Hayne J. in *Vassos v. State Bank of South Australia* [1993] 2 VR 316 supports, rather than defeats or qualifies the appellant's contentions.

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12. *Re RS [49]-[63].* The respondent's contentions as to the effect of joint tenancy should not be accepted. The argument draws – RS [61] – on the notion of agency, but assumes a wider view of agency than is provided for by s. 42 of the *Real*

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[1] (1939) 63 CLR 649, namely that cohabitation may put a credit provider on inquiry if it considers that a surety reposes trust and confidence in the debtor in relation to his or her financial affairs.

[2] See also *Garcia v National Bank Ltd* (1998) 194 CLR 395 at [33].

[3] *Jones v Dunkel* (1959) 101 CLR 298.

Property Act. It then seeks to expand that concept to the case of joint tenancy. That extension is not merited by the Act.

13. The passages relied on at RS [57]-[60] have to be read in their several contexts. When one comes to a context such as this the initial question is the application of s. 42.

14. In this regard a joint tenant is the holder of an estate or interest in land recorded in the register. That estate or interest can be disposed of separately from that of another joint tenant. The reference to "fraud" in s. 42 should be regarded as fraud by or, in the sense referred to above, on behalf of the joint tenant whose interest is in question. The holding in *Diemasters Pty Ltd v. Meadowcorp Pty Ltd* (2001) 52 NSWLR 572 referred to at RS [60(a)] should be treated as erroneous.

15. *Re RS [66]-[75].* The respondent's submission at RS [66]-[68] that the reasoning of the Court of Appeal was sound in relation to the applicability of s.118(1)(d)(ii) should be rejected for reasons discussed at AS [56]-[65]. The appellant did not become *registered* as proprietor of the land through fraud because, as explained by Barrett J at [179], the transfer was regularly executed and the illusory consideration given for the transfer was remote from the process of registration.

16. Good reasons of policy support Barrett J.'s conclusion at [179] that Claude did not become registered as the proprietor of the land through fraud. In a contest between two innocent parties, title by registration gives protection to a purchaser, when that party may not be in a position to question the circumstances behind the transfer. As Barwick C.J. stated in *Breskvar v Wall* (1971) 126 C.L.R. 376 at 385-6:

> "The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void."

17. Hayne J. in *Vassos v State Bank of South Austalia* [1993] 2 VR 316 at 326-327 referred to this policy in relation to s. 43 of the *Transfer of Land Act* 1958 (Vic) and stated:

> "Section 43 again uses the expression "except in the case of fraud" but it is directed to the position of persons who deal with the registered proprietor and it is to the position of a party dealing on the faith of the register that the section is directed both in giving protection by restricting the application of doctrines of notice and providing for an exception to that protection. I doubt that s. 43 refers to fraud on the part of the same person as does s. 42..."

18. It is apparent that s. 118(1)(d) does operate differently from s.42 and therefore it should be read in terms of its operation within the statute. Section 42 is of general application and recovery based on the rights granted by that section is variously

available under ss 118 or 120 of the *Real Property Act 1900* (NSW). Section 120[4] stated:

> "(1) Any person who suffers loss or damage as a result of the operation of this Act in respect of any land, where the loss or damage arises from:
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> (a) fraud, or
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> (b) any error, misdescription or omission in the Register, or
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> (c) the land being brought under the provisions of this Act, or
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> (d) the registration (otherwise than under section 45E) of some other person as proprietor of the land, estate or interest,
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> may take proceedings in any court of competent jurisdiction for the recovery of damages.
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> (2) Such proceedings may be taken:
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> (a) against the person whose acts or omissions have given rise to the loss or damage referred to in subsection (1), or
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> (b) against the Registrar-General.
>
> (3) Proceedings against the Registrar-General are to be taken in accordance with Part 14."

19. The very fact that s. 120 provides damages toa person who suffers loss or damage as a result of a transfer of their land *arising from* fraud indicates a "legislative preference" in the Act that a registered proprietor has the benefit of the protections found in s 118(1)(d) except where that persons has been registered as proprietor of the land *through* fraud .

20. Basten JA's reasons, summarised at RS [69], misapply the exception to immediate indefeasibility of title found in s. 42. For that reason the submissions at RS [70]-[71] should be rejected.

D.F. Jackson QC

Telephone: (02) 8224 3009
Facsimile: (02) 9233 1850
Email: jacksonqc@sevewentworth.com.au

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[4] Section 120, like section 118, was amended on 15 September 2000 by the *Real Property Amendment (Compensation) Act 2000* Sch 1 [12] and it has application pursuant to cl. 13 of Part 5 of Schedule 3 of the *Real Property Act 1900*.

Name: Phillipa Gormly

Telephone: (02) 9220 9884
Facsimile: (02) 8815 9573
Email: pgormly@blackstone.com.au

L.M.Jackson
Telephone: (02) 9151 2221
Email: lmjackson@level22.com.au