



HIGH COURT OF AUSTRALIA

4 February 2015

FELICITY CASSEGRAIN v GERARD CASSEGRAIN & CO PTY LTD

[2015] HCA 2

Today the High Court, by majority, allowed in part an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales. The Court held that the appellant's title to land as joint tenant was not defeasible on account of the fraud of her husband, who was also a joint tenant, but that the interest as tenant in common as to half which the appellant subsequently derived from her husband was defeasible and could be recovered by the respondent company.

The registered proprietor of Torrens system land, Gerard Cassegrain & Co Pty Ltd ("the company"), transferred the land to a wife and husband, Felicity Cassegrain ("Felicity") and Claude Cassegrain ("Claude"), as joint tenants for consideration to be satisfied by debiting Claude's loan account with the company. Claude was a director of the company and knew that the company did not owe him the amount recorded in the loan account. Claude subsequently transferred his interest in the land to Felicity for a nominal consideration. The company sought to recover title as sole registered proprietor of the land from Felicity.

Section 42(1) of the *Real Property Act* 1900 (NSW) provides that the estate of a registered proprietor is paramount "except in case of fraud". The company alleged that Claude's fraud was brought home to Felicity because he was her agent. Section 118(1)(d) of the Act provides that proceedings for the possession or recovery of land do not lie against the registered proprietor of the land, except 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. Section 100(1) of the Act provides that two or more persons registered as joint proprietors of an estate or interest in land shall be deemed to be entitled to the same as joint tenants.

The primary judge concluded that Claude had acted fraudulently but dismissed the company's proceedings against Felicity. The Court of Appeal allowed the company's appeal. By special leave, Felicity appealed to the High Court. It was not alleged in any court that Felicity was a participant in, or had notice of, Claude's fraud at the time the land passed to them as joint tenants.

The High Court, by majority, allowed Felicity's appeal in part. It held that Felicity's title as joint tenant was not defeasible on account of Claude's fraud, because Claude was not her "agent" in any relevant sense. Claude's fraud was not within the scope of any authority Felicity had, or appeared to have, given to him. Nor did registration as joint tenant mean that Felicity's title was defeasible: s 100(1) does not require that the fraud of one of the persons registered as joint proprietors denies all persons registered as joint proprietors the protection otherwise given by s 42(1). The fraud must be brought home to the person whose title is impeached, and Claude's fraud was not brought home to Felicity. The Court also held that because Felicity was not a bona fide purchaser for value of Claude's interest in the land, s 118(1)(d)(ii) was engaged so that the company could recover the interest which Felicity derived from or through Claude (an interest as tenant in common as to half).

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*