

Introduction

On 4 February 2015, in *Felicity Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] HCA 2, the majority of the High Court observed that:

'It has long been recognised that "[n]o word is more commonly and constantly abused than the word 'agent'". Close attention, therefore, must be given to what is meant when it is said [that one person is another's] "agent".'

[references omitted]

In making this observation the Court was considering the defeasibility of title to torrens system land where the title of the registered proprietor was procured by the fraud of a former joint tenant.

The decision provides guidance on the operation of the fraud exception under the relevant sections of the *Real Property Act 1900* (NSW) (**the Act**) and the role of agency in attributing fraud to a principal. The judgment sounds a warning against the misuse of the concept of agency to attribute legal responsibility and in that respect is likely to be of application beyond the property context.

Analysis

Section 42(1) of the Act relevantly provides as follows:

'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.'

[emphasis added]

Section 118(1) of the Act relevantly provides as follows:

'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.'

It is important to note (as observed by the majority at [16] and [17]):

- '16. Legislation implementing the Torrens system of land title is not uniform throughout Australia. Care must always be taken, therefore, to consider and apply the particular statute which is engaged. But a central and informing tenet of the Torrens system is that it is a system of title by registration, not a system of registration of title. The title which a registered proprietor has "is not historical or derivative. It is the title which registration itself has vested in the proprietor."

17. The title of a registered proprietor is not absolutely indefeasible. The RPA, like all versions of the Torrens legislation, provides for circumstances in which a registered title may be defeated or qualified. This case concerns the ambit of the "fraud" exceptions in ss 42(1) and 118(1).'

[references omitted]

The facts before the Court can be conveniently summarised as follows:

- Gerard Cassegrain & Co Pty Limited (**the Company**) was the registered proprietor of torrens system land which operated as a dairy farm (**the property**);
- Claude Cassegrain was a director of the Company. Claude and Felicity Cassegrain were husband and wife;
- in or about February 1997, the Company transferred the property to Claude and Felicity (as joint tenants) for consideration which was to be satisfied by debit to Claude's loan account with the Company;
- after the transfer, four of Claude's siblings initiated proceedings against, *inter alia*, Claude and the Company, alleging that certain acts on behalf of the Company had been oppressive and unfairly prejudicial to them. This included the maintenance of the loan account in favour of Claude (being the loan account debited as consideration for the sale of the property). In July 1998, it was declared that Claude's conduct in this regard was oppressive and unfairly prejudicial to the members of the Company and in this case Claude's fraudulent role in this relevant transaction is not disputed;
- on or about 24 March 2000, Claude transferred his interest in the property to Felicity for nominal consideration and Felicity became the sole registered proprietor of the property;
- it was not alleged and there was no evidence to support any suggestion that Felicity was a participant in, or had notice of Claude's fraud at the time the property was transferred to them as joint tenants;
- in September 2008 the Company (by derivative action commenced by one of Claude's siblings in the oppression proceedings) sought to recover the property from Felicity on the basis that she had obtained the property through the fraud of Claude and as such, the fraud exception in s 42(1) of the Act applied, as did the exception in s 118(1)(d)(ii).

The central arguments advanced by the Company against Felicity were:

- Claude was Felicity's agent in respect of the fraudulent transaction and thus Felicity was responsible for the fraud of her agent;
- as the property was registered as joint tenants, the fraud of either joint tenant (regardless of any agency) infects the property for the purpose of s 42 of the Act; and
- pursuant to s 118 of the Act, Felicity derived her title 'from or through a person [Claude] registered as proprietor of the land through fraud'.

The majority of the High Court dealt with each of the three key items as follows.

Agency

It was never alleged by the Company that Felicity knew of Claude's fraudulent conduct. However, in the courts below, it was accepted that assuming that Claude was Felicity's 'agent' in the sense that Claude brought about the transfer of the property with her knowledge (albeit, without knowledge of the fraud), this was sufficient to conclude the legal implications of 'agent' in the context of s 42(1) of the Act.

The High Court held that even though Claude was acting as Felicity's agent in taking steps to procure the property on behalf of Felicity, the scope of the authority to act as agent did not extend to the fraudulent acts of Claude. Section 42 of the Act requires the fraud to be 'brought home' to the person whose title is sought to be impeached. Without knowledge or notice, the fraud was never brought home to Felicity.

The majority held at [42]:

'Without more, the conclusion that Claude had taken the steps necessary to procure registration of the transfer from the company to Felicity and him as joint tenants did not show that his fraud was within the scope of any authority she had, or appeared to have, given to him. Without more, it did not show that knowledge of his fraud was to be imputed (in the sense of "brought home") to her. And in this case, there was nothing more identified, whether in argument or in the reasons of the Court of Appeal.'

In a dissenting judgment, Keane J largely agreed with this proposition. For example, at [102] his Honour held:

'That being so, the appellant could not be said to be knowingly involved in Claude's dishonest conduct; accordingly, she could not be held to have been a party to his fraud.'

Joint Tenancy

In the Court of Appeal, Macfarlan JA (at [156]) held that 'joint tenants are treated by the law as in effect one person only'. The Company advanced that because one of the joint tenants acted fraudulently in the procurement of the property, the exception in s 42 of the Act applied as the joint tenants are treated as one registered proprietor.

Section 100(1) of the Act provides that two or more persons registered as joint proprietors of land 'shall be deemed to be entitled to the same as joint tenants'. The majority of the High Court held that if s 100(1) of the Act had the 'deeming' effect of denying all persons registered as joint tenants from the protection in s 42(1) of the Act, this would be a significant departure from the principle that fraud was to be 'brought home' to the person whose title is sought to be defeated. As Felicity became a registered proprietor of the property without any knowledge of fraud, she cannot be deprived of the protection offered in s 42(1) of the Act, regardless of the manner in which she held the property.

Justice Keane disagreed with this proposition. In his dissenting judgment, his Honour held that the real question was 'whether the respondent was deprived of land by registration of a title to the land obtained through the fraud of the registered proprietor' (at [108]). Justice Keane thought this to be the case, regardless of whether one of the joint tenants acquired that interest fraudulently or not.

Section 118 of the Act

Section 118 of the Act provides standing for a person deprived of property by way of fraud to commence proceedings against either the fraudulent registered proprietor, or against a person who obtained the property from the fraudulent registered proprietor (otherwise than as a transferee bona fide for valuable consideration).

There was no argument Claude obtained his share of the property fraudulently. He then transferred his (fraudulent) share of the property to Felicity for nominal consideration so that Felicity became the sole registered proprietor. This transfer resulted in s 118(1)(d)(ii) having effect allowing the Company to recover half of the interest in the property (being Claude's initial share) from Felicity.

Observations

The central difference between the majority and the dissenting judgment is that the majority held that only the interest directly obtained by the fraud was affected (the appeal succeeded to the extent of the Company regaining the original interest of Claude in the property and Felicity retaining the balance) whereas the dissenting Justice found the existence of one fraudulent joint tenant was sufficient to affect the whole title (in which case the Company regained the whole of the property).

This judgment represents an important clarification of the intersection of fraud and defeasibility of title. Whilst it is likely to have relevance to the operation of those issues in every state it is important to repeat, as the majority observed, that particular consideration of the relevant statute is required in each instance.

Whilst the clarification of the operation of the statute in this context will be closely examined by property lawyers, the observations and comments of the court in respect of attributing the fraudulent conduct of an agent to a principal are likely to attract attention in many different

contexts. The facts of each case will remain determinative but it would appear that an essential ingredient is that the principal will need knowledge or notice of the fraud of the agent to be held responsible.

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