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

BETWEEN **FELICITY CASSEGRAIN**
Appellant

HIGH COURT OF AUSTRALIA
FILED
15 AUG 2014
THE REGISTRY SYDNEY

and

GERARD CASSEGRAIN & CO. PTY LIMITED (IN LIQ)
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 Whether the appellant's husband was registered as proprietor of the subject land in 1997 through fraud within the meaning of s.118(1)(d)(ii) of the *Real Property Act, 1900* (NSW) (**the Act**).

3 Whether the appellant was affected by her husband's knowledge of his own fraud at the time of the first transfer of the subject land in 1997 by virtue of them being registered as joint tenants.

4 Whether it was appropriate to find that the fraud was the appellant's agent in effecting the first transfer of the subject land in 1997 and in effecting the second transfer of the subject land in 2000.

Part III: Notice under sec 78B of the *Judiciary Act 1903*

5 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Facts

6 With the following exceptions, nothing in AWS paras 7-20 or the appellant's chronology is contested, as fair references or summaries.

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7 The penultimate sentence of AWS subpara 20(a) does not mention that Macfarlan JA also held {CA [157]} that the appellant did not shed her imputed fraudulent knowledge and character by taking a subsequent transfer from her husband.

8 The final sentence of AWS subpara 20(b) does not mention that Basten JA held {CA [143] – [146]} that the trial judge was wrong to conclude that Claude Cassegrain was not registered as proprietor of the land through fraud within the meaning of s.118(1)(d)(ii) of the Act, and that on any view the terms of that section were satisfied in this case.

9 The third item in the appellant's chronology does not mention that on 27th February 1997 Chris McCarron wrote to Claude Cassegrain referring to the latter's telephone and facsimile instructions of the same date, and confirming that Priests with McCarron Sork (Mr McCarron's firm) had dated the transfer 14th September 1996.

Part V: Legislation

10 With the exception of what follows, the appellant's statement of applicable statutes is accepted. None of the errors identified below bear upon the provisions in force at the time of the relevant transactions or claims for relief in this appeal.

11 Section 97 of the Act has not been in the same form at all times: Am 1928 No 25, sec 4(f); 1970 No 52, Second Sch; 1976 No 96, Sch 10(1)(2); 1979 No 164, Sch 17(1). Rep 1986 No 167, Sch 2(13). Ins 1997 No 95, Sch 1[10]. Am 1999 No 58, Sch 1[12]-[17].

12 Section 100 of the Act has not been in the same form at all times: Am 1928 No 25, sec 4(g); 1970 No 23, sec 15(b); 1976 No 96, Sch 12(6); 1979 No 164, Sch 17(2).

13 Section 118 was re-inserted by Schedule 1[12] of the *Real Property Amendment (Compensation) Act 2000* (NSW), not Schedule 1[6] – which relates to section 45.

Part VI: Argument

14 The judgement below has been reported: (2013) 305 ALR 612 and (2013) 17 BPR 32,389. The related judgement below against Claude Cassegrain has also been reported: (2013) 305 ALR 648, (2013) 281 FLR 409, and (2013) 97 ACSR 244.

15 The error described in AWS subpara 21(a) did not occur because there was evidence that Claude caused the first transfer to be registered as part of his fraud on the respondent – and there was a proper basis upon which to employ the principle in *Blatch v Archer* (1774) 1 Cowp 63; 98 E.R. 969 to conclude that Claude had exercised an implied authority to act as the appellant's agent in relation to the registration of that transfer. The Court of Appeal did not find that Claude was the appellant's agent for the purpose of registering the second transfer. The latter issue arises in this appeal by ground 2 of the notice of contention filed on 11 July

2014. However, as the appellant's submissions deal with the transfers together, these submissions will adopt the same course.

16 The proposition advanced in AWS subpara 21(b) is potentially at odds with *Assets Co v Mere Roihi* [1905] AC 176 at 210 – in that it appears to suggest that fraud brought home to the agent of the person whose registered title is impeached is not sufficient for the purposes of section 42.

17 The respondent accepts, as is put in AWS para 22, that it bore the onus of establishing that Claude exercised implied authority on behalf of the appellant.

18 The extracts from the primary judgement and the dissenting judgement below on agency reproduced in AWS paras 23 and 24, and the summary of the majority's findings below about agency in relation to the registration of the first transfer in AWS para 25, do not mention or appear to take sufficient account of any of the following:

(a) It is the transferee who requires registration in order to obtain a registered title {CA [30], [155]}.

(b) Once completion has occurred, as a matter of conveyancing practice it is usually a matter for the transferee to attend to registration {CA [30], [155]}.

(c) In this case, the respondent, as the purported transferor, had no interest in having the transfer registered because it was being defrauded {CA [30], [155]}.

(d) Claude Cassegrain's letter of 27th February 1997 instructing Mr Carron to register the first transfer should be viewed in the context it was written, namely, in the context of Claude's fraud in having the property transferred to himself and the appellant {CA [30], [155]}.

(e) The solicitor for the transferees, Mr McCarron, could only act upon instructions from his clients {CA [30], [155]}.

(f) Claude Cassegrain's letter of 27th February 1997 contained an instruction to the solicitor for the transferees to register the first transfer {CA [21]}.

(g) Claude Cassegrain's letter of 27th February 1997 was headed '*Re Purchase of Dairy – C & F Cassegrain*'. If the letter had truly been from GC & Co. it would more likely have been entitled by reference to the sale of the property {CA [25]}.

(h) Mr McCarron's reply to the aforementioned letter was directed to '*Mr C Cassegrain, c/- Gerard Cassegrain & Co Pty Ltd*', indicating that the company

address was an address for Claude, both as Managing Director of GC & Co., and personally {CA [25}.

(i) The payment of stamp duty on the first transfer, being an obligation of the transferees, was initiated by a cheque being forwarded to Mr McCarron under cover of a '*with compliments*' slip of GC & Co. – indicating that Claude used company stationery for personal purposes {CA [25]}.

(j) Even if, for some reason, Claude's letter of 27th February 1997 also constituted an instruction in which GC & Co. joined, the letter must have conveyed an instruction from or on behalf of the transferees {CA [24]}.

19 In {CA [31]} the following matters were held to constitute more than slight, albeit not necessarily determinative, evidence that Claude was acting as the appellant's agent in relation to the registration of the first transfer:

(a) The fraudulent nature of the transaction;

(b) The premise that Mr McCarron was acting properly in the transaction;

(c) Claude's letter of 27th February 1997 giving instructions for the registration of the transfer; and

(d) The payment of stamp duty using GC & Co.'s stationery, thereby negating the possibility in this case of making any reliable finding which attached significance to that stationery's use when Claude gave the instruction to register the transfer.

20 It makes perfect sense in this case to consider all of the evidence in light of the near certainty that the fraud was bent on controlling every significant step in his scheme against the interests of his fiduciary. And when it came to acquiring the title to the dairy farm from the company, there was no more significant step than the act of securing registration.

21 It follows that Justice Beazley's finding that Claude assumed authority to act on behalf of the appellant in causing the first transfer to be registered {CA [33]} was apt.

22 Then, as is noted in AWS subpara 25(b), the President turned to the question of whether there was evidence of conferral of authority by the appellant such that the necessary inference of implied authority could be drawn – and in {CA [33]} her Honour observed that an absence of dissent to the other party's assumption of authority could suffice.

23 In this case, the search for evidence of conferral of authority should proceed from the premise that it has already been comfortably established by this stage in process of the accumulation of facts that the fraud assumed authority over securing registration – with the

consequence that it should be accepted at this point that there is evidence of Claude acting as if he were the appellant's agent. Upon the further assumption that the appellant was not party to or personally aware of the fraud at the time of registration, and by reference again to the particular nature of the fraud being practised in this case, implied authority is sufficiently established in relation to the first transfer by an absence of dissent to the fraud's clear assumption of authority.

24 The spousal relationship and the doing of an act in the interests of one's spouse – followed by an absence of dissent by the recipient of the benefit – also suffice as some evidence of implied agency.

25 In this context it was appropriate to apply the principle in *Blatch v Archer* in light of the appellant's decision not to give evidence herself or call Claude or Mr McCarron as witnesses.

26 The criticism in AWS para 26 of the President's reasoning in {CA [41] – [42]} in relation to the second transfer does not mention that her Honour found that in that instance, contrary to usual practice, Claude (as one of two joint tenants) executed a transfer of his interest to the appellant. Her Honour also observed in {CA [41]} that the transfer was signed in the context of it being the second transaction in respect of the same property. It might also have been legitimately observed that this was the second transaction caused to be registered in relation to the same fraudulently acquired property – involving the same actors, and the receipt by the fraud of nominal consideration for something of very significant value. Contrary to the suggestion made in the penultimate line of AWS para 28, these matters constituted some evidence of agency. Whilst that evidence might have been outweighed by any credible testimony or document refuting agency, that did not occur.

27 The argument in AWS para 29 has been addressed in paras 18-20 above.

28 The argument in AWS para 30 does not accurately characterise the reasoning of the majority on this point. Whilst the reference to the *signing* of the transfer in {CA [31]} is a little obscure, the President essentially held {CA [33]} and Justice Macfarlan agreed {CA [155]} that since the solicitor for the transferees required instructions from both, and since there was clear evidence of *registration* of the first transfer occurring as a consequence of an instruction given by Claude alone, this supported a finding that Claude had assumed authority to act on that occasion.

29 Contrary to what is put in AWS para 31, on balance it makes more sense to apply the principle in *Blatch v Archer* to the facts of this case so as to require the appellant to call her husband and her solicitor.

30 AWS para 32 contains an inaccurate description of what occurred in this case. The respondent was asking the court to find, by reference to the evidence and by making appropriate inferences, that the fraud was the appellant's agent. The appellant's innocence was only material within the context of ascertaining that, given what the fraud had set out to do in this case, it is inherently more likely than not that the appellant did not act herself in relation to the registration of either transfer.

31 The respondent accepts what is put in AWS subpara 34(a) about it carrying the burden of establishing agency.

32 Contrary to AWS subpara 34(b), it was appropriate to apply the principle in *Blatch v Archer* in light of the appellant's decision not to give evidence herself or call Claude or Mr McCarron as witnesses. Further, in making any *Jones v Dunkel* inference, on balance it makes more sense in this case to construe that principle so as to require the appellant to call her husband and her solicitor.

33 AWS subpara 34(c) fails to mention that there has been no finding that Anne Marie Cameron (not 'Anne Marie Cassegrain' as the appellant has referred to her) was party to any of the central dealings between Claude and his father in about July 1993 – which dealings Claude initially relied on to justify his dishonest assertion against the respondent that it owed him $4.25m of the CSIRO settlement moneys. Further, the fraud had good reason to conceal the truth from as many people as possible when carrying out his plan to acquire the title to the property.

34 Whereas the appellant suggests in AWS subpara 34(d) that the interpretation given to the letter of 27th February 1997 went far beyond its terms, the interpretation was consistent with its terms and the context in which it was written.

35 The reference in AWS para 35 to there being 'very limited evidence' (of agency) has been addressed above. Further, there is nothing significant about the fact that making a finding of agency should lead to the appellant being deprived of the title to a property which was procured on her behalf through fraud.

36 In AWS para 36 the appellant argues that it is necessary to demonstrate some personal responsibility in a principal who has procured registration. In this case it was the appellant's agent who procured registration, and it is the fraud's conduct which is being relied on in order to retain the benefit of that transaction. As the passage from *Assets Co v Mere Roihi* extracted in AWS para 37 demonstrates, fraud in this context only need be brought home to the agent of the person whose registered title is impeached – and in a sense which includes fraud by or to the knowledge of the agent.

37 Contrary to what is being suggested in AWS para 38, there is no apparent conflict between the two references to 'his agents' in the passage from *Assets Co v Mere Roihi* extracted in AWS para 37.

38 In any event, this case encompasses both of the situations discussed in AWS para 39. The fraud was actually being committed by the appellant's agent, and so her agent had knowledge that a fraud was being committed in order to deprive the previous registered proprietor of its title.

39 Nor do the facts of this case lend themselves to an analysis of the kind conducted in AWS para 40 – because the nature of the fraud being carried out, the evidence and sound reasoning underpinning the finding that the fraud assumed authority to act in this case, and the appellant's innocence, all point towards the conclusion that this is not a case in which it can meaningfully be said that the appellant gave the fraud the opportunity to act fraudulently.

40 Similarly, the reference to *Schultz v Corwill Properties* [1969] 2 NSWR 576 in AWS para 41 is not to the point because this is not a case in which the court was dealing with the mere fact that the existence of a fraud was known to an individual who was, in the transaction under consideration, the agent for some purposes of the person whose title is impeached.

41 Including by reference to what immediately precedes it in the judgement at 583.27-583.29, Justice Street's statement about '*the presence of a fraud*' in AWS para 42 is a reference to a third person's fraud.

42 The reference to *Schultz* at 583.50-584.18 in AWS para 43 fails to mention that the 'important exception' being discussed in that passage operates by permitting the principal to give evidence to rebut the presumption that the agent communicated the matter to them. Further, the principle of imputed notice being discussed at 583.50-584.18, referring as it does to employing an agent and holding them out to the world as standing in one's place and representing oneself, is inapposite in a case such as this where implied agency is made out by the fraud assuming authority to act for the purpose of conferring a benefit on the appellant – followed by an absence of dissent to the fraud's clear assumption of authority.

43 The authorities cited in AWS para 44 do not take the appellant's argument in this respect any further. For example, the quote from Justice Hayne's reasons in *Vassos* is immediately followed by the words:

> ... and is not to be defeated by the mere fact that some other party to the instrument (which the bank has had registered to thereby procure an amendment to the register) is fraudulent.

44 Similarly, and consistent with *Assets Co v Mere Roihi,* the passages reproduced from the authorities in AWS para 45 refer to fraud by or on behalf of the party obtaining registration, and of bringing fraud home to the registered proprietor or their agent.

45 For the reasons explained at paras 40 to 42 above, the reference in AWS para 46 to *Schultz* being followed by Owen J does not assist this aspect of the appellant's argument.

46 The passage from *Davis v Williams* (2003) 11 BPR 21, 313 at [115]-[116] cited in AWS para 47 begins:

> It is trite law that statutory fraud is only operative if committed by the registered proprietor or his or her agent: *Assets Co Ltd v Mere Roihi; Assets Co Ltd v Wiremu Pere* [1905] AC 176 at 210.

47 The matter noted in AWS para 48 does not affect the position that it was not necessary as a matter of principle for the respondent to show that the appellant was involved in the fraud in an incriminating manner.

48 AWS para 49 has been addressed in the submissions above relating to the ordinary consequences of finding that the fraud was the appellant's agent – i.e. irrespective of her lack of complicity.

49 Contrary to AWS para 50, the jointure provided a further basis on which the court below could have held that the appellant was affected by her co-tenant's knowledge of his own fraud at the time of their registration in 1997.

50 At first instance Justice Barrett held {J [161]}:

> Where two persons hold as joint tenants, they are seised "per my and per tout" (the correct transaction of which, according to Young J in *Big River Timbers Pty Ltd v Stewart* (1998) 9 BPR 16,599, is "for nothing and yet for everything" or "for nothing and for the whole"), so that neither has a separate estate or interest that can be encumbered to the exclusion of an estate or interest of the other.

51 Justice Barrett ultimately held {J [171]} that the respondent's argument concerning jointure failed because he thought it significant that the appellant had obtained a different title when the transfer from the fraud was registered in April 2000.

52 As is noted in AWS para 51, Justice Macfarlan was alone in the court below in finding {CA [156]} that the appellant was affected at all relevant times by her joint tenant's knowledge of his own fraud.

53 The President ({CA [54]-[61]} did not find it necessary to deal with the respondent's essential point – which was that as joint tenants the fraud and the appellant were considered as one, there being no such thing (including in this context) as part of a jointure unaffected by fraud. Instead, her Honour decided {CA [60]} that, regardless of whether the jointure was true to its name, the appellant had subsequently acquired a different and indefeasible title as a

consequence of the second transfer – i.e. if not for her Honour's finding of agency in relation to that transfer.

54 Justice Basten appears to have held {CA [128], [137]} that the existence of one qualification to the characteristic of one single owner (i.e. for the purposes of alienation) provided a basis for overlooking that characteristic entirely within the context of section 42.

55 Following a review of some of the authorities {CA[129]-[134]}, and after noting a degree of ambivalence in them about whether jointure still meant jointure when referring to someone holding title under the Act, Justice Basten held:

> ... it is preferable in principle to treat the shares of the joint tenants, holding title 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. {CA[138]}

56 That reasoning, applied to the law of agency within the context of section 42, would also deprive those principles of one of their essential characteristics.

57 In {CA [156]} Justice Macfarlan referred to the principle that joint tenants are treated by the law as in effect one person only – citing *State of New South Wales v Loh Min Choo* [2012] NSWCA 275 at [72].

58 In *Wright v Gibbons* (1949) 78 CLR 313 Chief Justice Latham held at 323:

> No distinction can be drawn between the interest of any one tenant and that of any other tenant.

Also see *Peldan v Anderson* (2006) 227 CLR 471 at 480[19].

59 In *Wright v Gibbons* the Chief Justice also held the following in relation to the Tasmanian Torrens legislation:

> The *Real Property Act* does not alter the law with respect to joint tenancy. It leaves the incidents of joint tenancy standing as they are determined by the common law and any other relevant statute. {78 CLR 313 at 323)

60 In his reasons below, Justice Macfarlan also relied {CA [156]} on:

(a) Justice Windeyer's decision in *Diemasters Pty Ltd v Meadowcorp Pty Ltd* (2001) 52 NSWLR 572, in which it was found that where 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 (at [17]);

(b) Decisions in the field of secret trusts, in which notice to one joint tenant is treated as notice to all: *Jones v Badley* [1866 - 1867] L.R. 3 Eq. 635 at 655; (1867 - 1868) L.R. 3 Ch. App. 362 at 365; *Rowbotham v Dunnett* (1878) 8 Ch. D. 430 at 437; *Freeman v Laing* [1899] 2 Ch. 355 at 358- 9; and

(c) This Court's decision in *Advance (NSW) Insurance Agencies v Matthews* [1989] HCA 22; 166 CLR 606 (at 618 - 619, 620 - 621) where, in relation to an insured's duty of disclosure, the words "known to the insured" in a policy of joint insurance were held to refer to the collective knowledge of the joint insured, that is, facts that were known to at least one of them.

61 The statutory fraud exception in section 42 is already understood by reference to the common law of agency – a body of principle which is not expressly contemplated by the section. In circumstances where a registered proprietor is already treated under section 42 as being affected by the actions of someone who is, in law, another person – it would be consistent with principle (including by reference to the better view that joint tenants are in a more intimate juristic relationship than agent and principal) for this Court to find that the knowledge of one joint tenant at the point of registration affects another within the context of section 42. Were this not the case, the Act must be seen as having created a significantly different type of joint tenancy.

62 Further, as Justice Macfarlan correctly found at {CA [157]}, upon the foregoing premise the appellant did not, and could not, shed her imputed fraudulent knowledge and character by taking a subsequent transfer from her co-tenant in whose fraud she was deemed to have participated – there being no moment in time when the appellant could have approached the registry without falling foul of the fraud exception in section 42.

63 Turning to s.118(1)(d), to AWS para 53 there should be added the possibility of s.118(1)(d)(i) applying as a consequence of a finding in the respondent's favour on the question of jointure.

64 The respondent accepts the statement in AWS para 54 that s.118(1)(d)(ii) can only apply to the second transfer.

65 The respondent also gratefully acknowledges the concessions made in AWS para 55.

66 The reasoning of the Court of Appeal in relation to the applicability of s.118(1)(d)(ii) of the Act to the facts of this case is sound – including in relation to the section's application to certain types of registered proprietors who are themselves entirely innocent of fraud. The respondent addresses the submissions in AWS paras 56 – 65 as follows.

67 The President, with whom Macfarlan JA concurred in this respect {CA [151}, began {CA [67]} by observing that sections 42, 45 and 118(1)(d) form provisions in the Act relating to the circumstances where a registered title is affected by fraud.

68 The ensuing reasoning, at {CA [67] – [99]}, contains the following immediately relevant steps:

(a) Section 42 relevantly provides for the indefeasible title of the registered proprietor 'except in case of fraud' {CA [67];

(b) By virtue of section 45, proceedings may not be brought against a registered proprietor who purchased real property bona fide for valuable consideration merely because of fraud on the part of the vendor in the circumstances specified in subsection 45(2) {CA [68]};

(c) Section 118(1) complements sections 42 and 45 in that it provides for a prohibition on bringing proceedings for the possession or recovery of land against a registered proprietor except in defined circumstances {CA [70]};

(d) Section 118(1)(d)(i) permits proceedings against a person who has been registered as proprietor through fraud {CA [70]};

(e) Fraud as used in section 118(1)(d)(i) bears the same meaning as in section 42 {CA [70]};

(f) Section 42, insofar as it relates to fraud, specifies an exception to the statutory scheme of immediate indefeasibility by registration {CA [70]};

(g) Pursuant to section 118(1)(d)(i) a remedy is available where the fraud exception applies {CA [70]};

(h) Felicity Cassegrain's title as registered proprietor (on the assumption that Claude was not her agent) is not vulnerable because she is a volunteer per se {CA [84]};

(i) The question that needs to be asked in this case is whether the appellant acquired title from or through a person registered as proprietor of the land through fraud {CA [84]};

(j) Therefore the question is whether Claude was a person 'registered ... through fraud' {CA [90]};

(k) 'Through' is an ordinary English word meaning 'by means of', 'by reason of' or in consequence of' {CA [91]};

(l) Both paragraphs of s.118(1)(d) use the phrase 'registered as proprietor of the land through fraud' {CA [92]};

(m) In para (i) the foregoing phrase covers, for example, a person who obtains title by or as a result or in consequence of, the fraud of their agent {CA [92]};

(n) Given that in para (ii) the same expression, 'registered as proprietor of the land through fraud' appears, there is no reason either from the text or context of the provision why a different meaning would be attributed to it {CA 93]};

(o) This construction does not mean that section 118(1)(d)(ii) has a wider operation than section 42, which uses the phrase 'except in the case of fraud' {CA [97]}; and

(p) There is no warrant in the text of section 118(1)(d)(ii) to confine 'registered ... through fraud' to the process of registration {CA [98]}.

69 On the latter point, Justice Basten also held:

(a) It would be surprising if section 118(1) deals with a narrower subject matter than the exception in section 42 because it would appear to leave no statutory mechanism for the defrauded landowner to recover the land, despite the exception in section 42(1) leaving the transferee's title defeasible {CA [144]};

(b) The term 'through' undoubtedly connotes a connection between the acquisition of title by registration and fraud, but the section does not (as Justice Barrett's reasoning at [178] – [179], reproduced at {CA[143]}, suggests) refer to 'fraudulent registration' {CA [144]};

(c) It makes good sense to say that Claude Cassegrain was registered as owner of the land 'through fraud', that is through his own act in arranging for the company to transfer title to the land for valuable consideration without that consideration being paid {CA [144]}; and

(d) Just as the company was deprived of its title 'by fraud', Claude Cassegrain obtained his title 'through fraud' (CA [144]}.

70 The words 'through fraud' are naturally to be understood in English and in the context of any legal reasoning as being means by which one can say something has been accomplished through fraud – i.e. the conduct which was fraudulent was what produced the registration. And in that proper ordinary English and legal sense the words "through fraud" obviously describe what happened in this case when Claude proceeded to registration.

71 The suggestion in AWS subpara 57(b) and following that this Court should find that Claude Cassegrain was not registered as proprietor of the land through fraud because the actual debiting of the loan account did not take place until after the date of registration should be rejected because Claude Cassegrain knew at the time of registration that he had obtained the transfer from the respondent upon the entirely false premise that it was indebted to him for $4.25m of the CSIRO settlement moneys. The company resolution summarised in the final

sentence of AWS para 9 neatly bears out the relationship between the supposed indebtedness and the obtaining of the transfer. The passages from Barrett J's reasons extracted in AWS 59 and 61 also entail findings that Claude's actions in 1993 in relation to the making of the entries in GC & Co's books of account recording a liability in his favour were improper and dishonest.

72 The calculated nature of the fraud which was committed against the respondent in this case also means that there is no basis for finding (as is essentially being suggested in AWS para 58) that Claude Cassegrain did not possess the requisite degree of actual dishonesty and moral turpitude at the time of registration by reason of the possibility that either himself or the appellant might have ended up providing the consideration for the dairy farm from their own pockets.

73 Similarly, the suggestion in the final sentence of AWS para 65 that this aspect of the appeal should be dealt with by finding that the fraud did not occur until after the loan account was debited with the amount of the consideration for the dairy farm in 1997 should be rejected. The finding that the company did not suffer the financial impact of the fraud until the book entry was made recording the debiting of the loan account in June 1997 {[2013] NSWCA 454 at [31]} – being a finding made within the context of a claim against Claude Cassegrain for the payment of equitable compensation – has no bearing on the question in this appeal of whether Claude possessed the requisite degree of actual dishonesty and moral turpitude at the time he became registered proprietor as one of two joint tenants in April 1997.

74 The approach of the Court of Appeal summarised in paras 68-69 above is also preferable to the position stated in the final two sentences of AWS 64 – including because no useful end appears to be served by construing the Act as though section 118(1)(d)(ii) only enables a person deprived of land to take proceedings against volunteers for the possession or recovery of the land in cases where there has been fraud in the process of registration. And it makes far greater sense to treat both limbs of section 118(1)(d) as being concerned with any type of fraud which satisfies the exception in section 42.

75 The foregoing approach does not reduce the beneficial protection of indefeasibility in section 42 of the Act. Rather, it sensibly gives effect to accompanying provisions which recognise salutary exceptions to indefeasibility in the case of frauds and their donees.

Part VII: Notice of Contention

76 The appellant addressed grounds 2 and 3(a) in the notice of contention in her submissions. The respondent has addressed those grounds, and grounds 1 and 3(b), during the course of responding to the appellant's submissions on agency and jointure.

Part VIII: Time estimate

77 The respondent would seek no more than two hours for the presentation of the respondent's oral argument.

15 August 2014

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