

FELICITY CASSEGRAIN v GERARD CASSEGRAIN & CO PTY LTD (S141/2014)

Court appealed from: New South Wales Court of Appeal
[2013] NSWCA 453

Date of judgment: 18 December 2013

Special leave granted: 20 June 2014

A statutory derivative action was brought on behalf of Gerard Cassegrain & Co Pty Ltd ("GC & Co") against Mr Claude Cassegrain ("Claude") and his wife, Mrs Felicity Cassegrain ("Felicity"). GC & Co's claim related to \$4.25 million that was credited to Claude's company loan account on 31 October 1993. That sum was purportedly owed to Claude as part of an overall settlement of proceedings with the Commonwealth Scientific and Industrial Research Organisation for \$9.5 million. The payment of the \$4.25 million was a condition precedent to a Deed of Settlement entered into on 27 September 1993.

GC & Co alleged that Claude (a director of GC & Co) fraudulently debited that amount to the loan account in breach of his fiduciary duty to the company. It further alleged that Claude then drew on that account for personal (and other) expenses. He also utilised its credit balance in purported satisfaction of the purchase price of a farming property ("the Dairy Farm"), a property that GC & Co transferred to both Claude and Felicity as joint tenants ("the first transfer") around 1997. On 24 March 2000 Claude executed a transfer of his interest in the Dairy Farm in favour of Felicity for the nominal consideration of \$1 ("the second transfer").

Justice Barrett upheld GC & Co's claim against Claude, finding that he had dishonestly breached his fiduciary duty to GC & Co. His Honour however dismissed GC & Co's claim against Felicity, finding that her title was indefeasible. Both Claude and GC & Co subsequently appealed.

On 18 December 2013 the Court of Appeal (Beazley P, Basten & Macfarlan JJA) dismissed Claude's appeal with costs. Their Honours however allowed GC & Co's appeal.

The issues raised by GC & Co's appeal included:

- (1) Whether Felicity's title was defeasible pursuant to the fraud exception in section 42 of the *Real Property Act* 1900 (NSW) ("the Property Act") because Claude was acting as her agent;
- (2) Whether Felicity's title was defeasible pursuant to the fraud exception in the Property Act, because Claude and Felicity were joint tenants;
- (3) Whether proceedings may be brought for the recovery of the Dairy Farm from Felicity pursuant to Section 118(1)(d) of the Property Act.

The majority found that GC & Co raised sufficient evidence from which an inference may be drawn that Claude was Felicity's agent for the first and second transfers of the Dairy Farm. Justice Basten however held that there was insufficient evidence to establish agency and the preferable inference was that Felicity acted on her own behalf.

Both President Beazley and Justice Macfarlan found that Felicity's title in the Dairy Farm was affected by Claude's fraud as both were registered as joint tenants. Justice Basten however held that Felicity's interest was indefeasible because it was unaffected by Claude's fraud.

President Beazley and Justice Macfarlan further held that, pursuant to s 118(1)(d) of the Property Act, GC & Co was entitled to bring proceedings for recovery of the Dairy Farm. Justice Basten however held that, pursuant to s 118(1)(d)(ii) of the Property Act, GC & Co was only entitled to obtain an order that Felicity transfer a half share in the Dairy Farm to GC & Co, being that share that she obtained from Claude in the second transfer.

The grounds of appeal include:

- The Court of Appeal erred in holding that Claude was Felicity's agent in relation to giving instructions for:
 - a) the execution of Property Act transfer 2892535B on behalf of Felicity; and
 - b) the lodgement for registration of transfer 289253B.