

Gideon Gee, 'Limitation period for claims in respect of voidable transactions'

Endnotes

1. In the matters of *Octaviar Ltd (recs and mgrs apptd) (in liq) and Octaviar Administration Pty Ltd (in liq)* [2011] NSWSC 1691 per Ward J.
2. Ibid.
3. In the matter of *Octaviar Limited (receivers and managers appointed) (in liquidation)* and in the matter of *Octaviar Administration Pty Limited (in liquidation)* [2012] NSWSC 1460; (2012) 271 FLR 413 and in the matter of *Octaviar Limited (receivers and managers appointed) (in liquidation) and Octaviar Administration Pty Limited (in liquidation)* [2013] NSWSC 62; (2013) 272 FLR 398; 93 ACSR 316.
4. *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2014) 87 NSWLR 728; [2014] NSWCA 148 and *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Limited v Fletcher* (2014) 85 NSWLR 644; [2014] NSWCA 31.
5. [2003] NSWCA 216; (2003) 58 NSWLR 322.
6. *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2015] HCA 10 at [20]–[22].
7. Ibid. at [21].
8. Ibid. at [23].
9. Ibid. at [24].
10. Ibid. at [26].
11. Ibid. at [11]–[16].
12. *The Corporations Amendment (Insolvency) Act 2007* saw the introduction of s 588FF(3)(a)(ii) and the substitution of the words 'during the paragraph (a) period' for 'within those 3 years' in s 555FF(3)(b).
13. Ibid. at [14].
14. Ibid. at [16].
15. *Grant Samuel Corporate Finance Pty Ltd v Fletcher; JPMorgan Chase Bank, National Association v Fletcher* [2015] HCA 8 at [6].
16. Ibid. at [7]. Section 79 of the *Judiciary Act 1903* (Cth) relevantly provides that the procedural laws of a state shall apply in courts exercising federal jurisdiction in that state except 'as otherwise provided' by the Constitution or Commonwealth laws.
17. *Grant Samuel Corporate Finance Pty Ltd v Fletcher; JPMorgan Chase Bank, National Association v Fletcher* [2015] HCA 8 at [23].
18. *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Limited v Fletcher* [2014] NSWCA 31 at [89] per Beazley P.
19. [2006] HCA 62; (2006) 231 CLR 334.
20. Ibid., per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at [32]–[33], [40].
21. Ibid. at [13].
22. Ibid. at [14]–[15].
23. *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 at 345.
24. *JPMorgan Chase Bank, National Association v Fletcher; Grant Samuel Corporate Finance Pty Limited v Fletcher* [2014] NSWCA 31 at [84] per Beazley P.
25. *Grant Samuel Corporate Finance Pty Ltd v Fletcher; JPMorgan Chase Bank, National Association v Fletcher* [2015] HCA 8 at [21].

Fraud and the indefeasibility of a joint tenant's title

James Willis reports on *Cassegrain v Gerard Cassegrain & Co Pty Limited* [2015] HCA 2.

In *Cassegrain v Gerard Cassegrain & Co Pty Limited* [2015] HCA 2 (Cassegrain), the High Court gave consideration to the fraud exception to indefeasibility of title under the *Real Property Act 1900* (NSW) (RPA). In particular, the court found that a person's proprietary interest as a joint tenant in real property was not defeasible merely on account of a fraudulent act committed by a second joint tenant, to which the first joint tenant was not a party.

The facts

The proceedings concerned, *inter alia*, whether or not the proprietary interest held by the appellant, Felicity Cassegrain (Felicity), in real property known as the 'Dairy Farm', was defeasible on account of a fraudulent act committed by her husband, Claude Cassegrain (Claude). A brief summary of the facts are as follows.

Gerard Cassegrain & Co Pty Limited (GC&Co), the respondent in the proceedings, was registered under the RPA as the proprietor in fee simple of the Dairy Farm.¹ In 1997, Claude and Felicity acquired the Dairy Farm which was held

by them as joint tenants.² This acquisition was brought about, in part, by Claude and his sister, Anne-Marie Cameron, who were both directors of GC&Co at the time, passing a company resolution to sell the Dairy Farm to Claude and Felicity as joint tenants for an agreed consideration of \$1 million. It was further resolved that the consideration for the purchase would be effected by a journal entry in a loan account.³ The loan account purported to record a loan from Claude to GC&Co in the amount of \$4.25 million and the entry in the account purported to reduce the amount outstanding under the loan by \$1 million. In about March 1997, the transfer of the Dairy Farm was registered.

It was not in dispute before the High Court that the alleged debt recorded in the loan account did not represent a genuine debt owed by GC&Co to Claude and that, accordingly, Claude was acting fraudulently by causing an entry to be made in the loan account in respect of the purported \$1 million consideration. The loan account arose in circumstances where, in 1993, GC&Co sought to structure a payment made to GC&Co by the CSIRO, by way of a settlement, to bring about an apparent

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reduction in the proceeds of the settlement accruing to GC & Co (and a corresponding increase in the proceeds of settlement accruing to Claude), on the basis of an understanding that only the monies received by the company would attract a capital gains tax liability.

On 24 March 2000, Claude caused his interest in the Dairy Farm to be transferred to Felicity for nominal consideration (such that Felicity then held the whole of the title, in fee simple, to the Dairy Farm).⁴

Court of Appeal proceedings

By majority (comprised of Beazley P and Macfarlan JA; Basten JA dissenting), the New South Wales Court of Appeal found that Felicity held the Dairy Farm on trust for GC&Co absolutely and ordered her to execute a transfer of the land to GC&Co.⁵ Felicity appealed the decision of the Court of Appeal to the High Court.

High Court proceedings

The High Court found, by majority (comprised of French CJ, Hayne, Bell and Gageler JJ; Keane J dissenting) that Felicity's title as joint proprietor in the Dairy Farm was not defeasible on account of Claude's fraud. However, as Felicity had acquired Claude's interest in the Dairy Farm for nominal consideration, she was not a bona fide purchaser for value and accordingly, the proprietary interest she had acquired from Claude was defeasible and could be recovered by GC&Co.⁶ In coming to this conclusion, the court considered, *inter alia*, both the concepts of agency and joint tenancy in the context of the RPA.

Agency

One of the issues which arose for determination was whether the High Court should disturb the Court of Appeal's finding that Claude was acting as Felicity's agent in causing an interest in the Dairy Farm to be transferred to Felicity. In this respect, the court had regard to the well-known statement of Lord Lindley⁷ that 'the fraud which must be proved in order to invalidate the title of a registered purchaser for value...must be *brought home* to the person whose registered title is impeached *or to his agents*'.⁸ The majority found that this statement should be understood as posing, in the case of an agent, questions concerning the scope of authority and whether the agent's knowledge of the fraud can be imputed to the principal.⁹

The majority found that the evidence supported no more than the proposition that Felicity was a passive recipient of an interest in land which Claude had agreed to buy and accordingly, the fraud was not 'brought home' to her.¹⁰

Joint tenants

The High Court found that the fraudulent actions of one joint tenant should not be imputed to another joint tenant who has not themselves participated in the fraud.¹¹ In making this finding, the majority endorsed the finding of Basten JA in the court below that it was 'preferable in principle to treat the shares of the joint tenants, holding title under the [RPA], prior to any severance, as differentially affected by the fraud of one, to which the other was not a party'.¹²

In coming to this conclusion, the majority considered, *inter alia*, the interaction between ss 42(1) and 100(1) of the RPA. Relevantly, s 42(1) states, subject to some exceptions which were not relevant to this case:

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.

Section 100(1) of the RPA provides that:

Two or more persons who may be registered as joint proprietors of an estate or interest in land under the provisions of this Act, shall be deemed to be entitled to the same as joint tenants.

The gravamen of the enquiry undertaken by the High Court was whether the deeming effected by s 100(1) of the RPA necessarily had the effect that the fraud of one joint tenant would necessarily deny *all* joint tenants the protection afforded under s 42(1) of the RPA. The majority found that s 100(1) does not operate in this manner and, if it were to do so, it would constitute a significant departure from the accepted principle that actual fraud needs to be 'brought home' to the person whose proprietary interest is being impeached.¹³

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Fraud and the interaction between ss 42(1) and 118(1)

A further issue which the court considered was the interaction between ss 42(1) and 118(1) of the RPA. Relevantly, s 118(1) provides that:

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'.

In relation to s 118(1)(d)(i), the majority found that this subsection is co-extensive with the rights under s 42(1) of the RPA (in that it does not diminish or enlarge on those rights).¹⁴ Relevantly, where a person has been registered as a proprietor of land through fraud, their title is defeasible (by operation of s 42(1)) and proceedings may be brought by the person deprived of the land by fraud to recover that land (by operation of s 118(1)(d)(i)). Further, the majority held that s 118(1)(d)(i) should not be read as being limited to fraud being effected through the process of registration.¹⁵

By contrast, s 118(1)(d)(ii) does enlarge on the rights afforded to a person deprived of their land by fraud as the deprived party may bring proceedings to recover their land in circumstances

where the registered proprietor of the land did not participate in the fraud but equally, was not a bona fide transferee for valuable consideration.¹⁶

Findings of the High Court

In the circumstances, the majority found that Felicity's title as joint tenant in the Dairy Farm was not defeasible on account of Claude's fraudulent conduct (as the fraud had not been 'brought home' to her in either her capacity as principal, with Claude being the agent, or as a joint tenant). However, the interest which Felicity derived through Claude was defeasible by operation of s 118(1)(d)(ii) of the RPA as Felicity was not a bona fide purchaser for value of Claude's interest in the Dairy Farm.¹⁷

Accordingly, the court declared that Felicity held a half interest in the Dairy Farm on trust for GC&Co absolutely and ordered her to transfer that interest to GC&Co.

Endnotes

1. *Cassegrain*, at [5].
2. *Ibid.*, at [8].
3. *Ibid.*, at [7].
4. *Ibid.*, at [11].
5. *Ibid.*, at [29].
6. *Ibid.*, at [3].
7. *Assets Co Limited v Mere Roihi* [1905] AC 176 at 210.
8. *Cassegrain*, at [32] – emphasis added by High Court.
9. *Ibid.*, at [40].
10. *Ibid.*, at [41].
11. *Ibid.*, at [45].
12. *Ibid.*, at [44]; (2013) 305 ALR 612 at 641 [138] per Basten JA.
13. *Ibid.*, at [53].
14. *Ibid.*, at [60].
15. *Ibid.*, at [59].
16. *Ibid.*, at [61].
17. *Ibid.*, at [65]–[66].