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UNTIL FRAUD DO US PART: RECONCILING JOINT TENANCY AND THE TORRENS LAND SYSTEM IN *CASSEGRAIN v GERARD CASSEGRAIN & CO PTY LTD*

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In early 2015, the High Court of Australia decided Cassegrain v Gerard Cassegrain & Co Pty Ltd*, relating to the fraudulent registration of a joint tenancy under Torrens legislation. The Court unanimously criticised the methods employed by lower courts in interpreting New South Wales' Torrens legislation (and its 'protection of purchasers' provision) and in determining the existence and scope of an agency relationship. However, the Court split on the question of whether an innocent joint tenant had their interest rendered defeasible by reason of their co-joint tenant's fraud. This article reviews and analyses in particular the Court's evaluation and treatment of the legal principles of joint tenancy.*

I INTRODUCTION

Co-ownership of real property is a bit of an afterthought when taught to budding law students; and with reason. It is difficult enough for students to learn the typology of real interests, the operation of the Torrens land system and the battle for priority between legal rights, equitable rights and mere equities without laying over the top of that the sharing of interests amongst multiple persons.

Even within the topic of co-ownership, nothing elicits groans from students more than joint tenancy, where two persons share a single interest. The principles of four unities, survivorship and severance do not easily link with other real property principles — for that reason it is a prime candidate for examination questions — and it comes across as a relic of an earlier age of the common law.

In early 2015 the High Court of Australia raised and expounded these principles of joint tenancy in *Cassegrain v Gerard Cassegrain & Co Pty Ltd* ('*Cassegrain*').[1] The case concerned the fraudulent first transfer of land by a husband to a joint tenancy of his wife and himself, and a later second transfer of his interest in the joint tenancy to his wife. The major issue before the Court was how to reconcile the principles of joint tenancy with the operation of fraud doctrines in the Torrens system (in particular, New South Wales' ('NSW') 'protection of purchasers' provision). Along the way the Court also clarified points regarding interpretation of Torrens legislation and the proper methodology for determining agency relationships.

This article unpacks the High Court's decision. It deals first with the Court's decision regarding deferred indefeasibility, and secondly with what is has to say regarding judicial evaluation of possible agency relationships. Thirdly, it pays extended attention to the Court's treatment of

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[1] (2015) 254 CLR 425.

the law of joint tenancy. This article contends that the Court took liberties with the principles of joint tenancy that are too broad. Whilst this can be understood as a move to maintain a consistent position on Torrens fraud, this article suggests that it was an unnecessary burden on the doctrine of joint tenancy and that the two doctrines could have been better accommodated if the views in the dissenting judgment of Keane J (at the High Court) and the analysis of Macfarlan JA (at the NSW Court of Appeal) had been adopted.

II FACTS, LEGISLATIVE BACKGROUND AND CASE HISTORY

A *Facts*

In 1993, the respondent, Gerard Cassegrain & Co Pty Ltd ('GC&Co') settled a dispute and received $9.5 million. On receipt, GC&Co entered in its books a loan account showing that $4.25 million was owed to Claude Cassegrain (a director). A dispute within the Cassegrain family (who were also members and officers of various family companies) continued for many years. By the time the dispute reached the High Court, it was accepted that Claude had never been entitled to any of that settlement amount in the first place.

In 1996, GC&Co resolved to sell their estate in fee simple in a property known as the 'Dairy Farm' to Claude Cassegrain and his wife Felicity. Payment for the land was carried out by debiting Claude's loan account with GC&Co. The Dairy Farm was transferred to Claude and Felicity as joint tenants and registered in early 1997. This was the 'First Transfer'.

In March 2000, the joint tenancy of Claude and Felicity Cassegrain was severed when Claude transferred his estate in fee simple to Felicity for $1. From here on, Felicity was the sole registered proprietor of the Dairy Farm. This was the 'Second Transfer'.

In 2008, Dennis Cassegrain (another member of the family) brought a statutory derivative action on behalf of GC&Co against Claude and Felicity Cassegrain, alleging that Felicity's title to the property was defeasible for fraud.

Two important issues were not in dispute before the High Court:

i) There was no argument that Claude Cassegrain's actions in procuring the First Transfer constituted Torrens fraud under New South Wales' transfer of land legislation; and
ii) There was no argument that at all times, for both transfers, Felicity Cassegrain was unaware that her husband's actions were fraudulent. She had neither actual nor constructive notice.

B *Legislative Background*

The case concerned the operation of New South Wales' Torrens legislation, the *Real Property Act 1900* (NSW) ('*Real Property Act*'). Other jurisdictions have similar provisions in their own Torrens legislation,[2] outlined below.

In order to register the joint tenancy of the First Transfer, Claude and Felicity were registered equally on a single freehold. Section 100(1) of the *Real Property Act* states: 'two or more

[2] *Transfer of Land Act 1958* (Vic); *Land Titles Act 1925* (ACT); *Property Law Act 1974* (Qld); *Law of Property Act 2000* (NT); *Real Property Act 1886* (SA); *Land Titles Act 1980* (Tas); *Transfer of Land Act 1893* (WA).

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'. In order to provide content to this provision, the legislation incorporates the general law of joint tenancy through the deeming provision in the final clause of s 100(1).[3]

When the High Court heard the case, it was uncontested that Claude had procured the First Transfer through deception and that it amounted to Torrens fraud; ie, actual (as opposed to merely equitable) fraud involving dishonesty or moral turpitude.[4] Because of this fraud, GC&Co claimed that the registration of the First Transfer did not grant the joint tenants indefeasible title and was recoverable. Section 42(1) of the *Real Property Act* states:

> [T]he 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...[5]

The fraud doctrine is common to all other jurisdictions.[6]

If the First Transfer was defeasible for fraud, GC&Co had a cause of action under s 118 of the Act:

> 1) 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.

This provision (known generically in Torrens systems as the 'protection of purchasers' provision) is also found in the Torrens legislation of Western Australia,[7] Tasmania[8] and the Australian Capital Territory ('ACT').[9] Regarding s 118(1)(d)(ii), states like Victoria[10] and South Australia[11] do not grant indefeasibility to the title of volunteers, doing away with the need for such a provision, whilst statutes in Queensland[12] and the Northern Territory[13] confer indefeasibility on volunteers.

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[3] See also *Transfer of Land Act 1958* (Vic) s 30; *Land Titles Act 1925* (ACT) s 54; *Property Law Act 1974* (Qld) s 33; *Law of Property Act 2000* (NT) s 33; *Real Property Act 1886* (SA) s 74; *Land Titles Act 1980* (Tas) s 44; *Transfer of Land Act 1893* (WA) s 60.
[4] See, eg, *Butler v Fairclough* (1917) 23 CLR 78, 90, citing *Assets Company Ltd v Mere Roihi* [1905] AC 176, 210.
[5] *Real Property Act 1900* (NSW) s 42 (emphasis added).
[6] *Transfer of Land Act 1958* (Vic) s 42(1); *Land Titles Act 1925* (ACT) s 58(1); *Land Title Act 1994* (Qld) s 184(3)(b); *Land Title Act 2000* (NT) s 188(3)(b); *Real Property Act 1886* (SA) s 69(a); *Land Titles Act 1980* (Tas) s 40(3)(a); *Transfer of Land Act 1893* (WA) s 68(1).
[7] *Transfer of Land Act 1893* (WA) s 199(d).
[8] *Land Titles Act 1980* (Tas) s 149(d).
[9] *Land Titles Act 1925* (ACT) s 152(e).
[10] See, eg, *Rasmussen v Rasmussen* [1995] 1 VR 613.
[11] See, eg, *Biggs v McEllister* (1880) 14 SALR 86.
[12] *Land Title Act 1994* (Qld) s 180.
[13] *Land Title Act 2000* (NT) s 183.

By the time the dispute was before the courts, Felicity held the entire freehold estate: half through the severed joint tenancy under the First Transfer and half through receipt of her husband's interest in the Second Transfer. GC&Co sought to recover Felicity's severed joint tenancy interest under s 118(1)(d)(i), and her interest from the Second Transfer under s 118(1)(d)(ii).

C *Case History*

At trial before the New South Wales Supreme Court, Barrett J determined that Felicity Cassegrain held the full freehold estate to the property indefeasibly (ie, both her interests under the First Transfer and the Second Transfer were indefeasible). Regarding the First Transfer, he decided that Claude had not acted as her agent in the registration of the joint tenancy.[14] Instead, Felicity received her interest unaffected by her husband's fraud. Regarding the Second Transfer, Barrett J interpreted s 118(1)(d)(ii) narrowly, restricting the operation of the phrase 'registered ... through fraud' to situations where the actual act of registration itself was fraudulent, rather than to the broader circumstances of Torrens fraud.[15] Because Claude's fraud did not fit within this narrow interpretation, the Second Transfer was also indefeasible.

GC&Co appealed and the New South Wales Court of Appeal reversed the trial decision entirely. The Court of Appeal (Beazley P and Macfarlan JA, Basten JA dissenting) decided that Claude had acted as his wife's agent in the First Transfer. Consequently, Felicity's interest in the joint tenancy was defeasible for fraud.[16] Regarding the Second Transfer, the Court of Appeal unanimously overturned the Supreme Court's interpretation of the phrase 'registered … through fraud' in s 118(1)(d)(ii), substituting a broader understanding that included Torrens fraud. They declared that Felicity had received property in the Second Transfer that had been registered through fraud (the First Transfer) and was defeasible.[17] By the Court of Appeal's judgment, Felicity's interests were wholly defeasible.

Felicity sought and received special leave to appeal to the High Court.[18] The decision of the Court, set out and explored in this article, addressed three questions. Regarding the First Transfer, the Court considered:

1) whether Claude had been Felicity's agent and whether that relationship rendered her interest in the joint tenancy defeasible for fraud under s 42 of the *Real Property Act*;[19] and
2) if Felicity's interest in the joint tenancy was not defeasible by reason of fraud through an agency relationship, whether her interest was defeasible because her husband's fraud affected the whole joint tenancy.[20]

Regarding the Second Transfer, the Court considered whether the exception contained in s 118(1)(d)(ii) applied only to fraud that strictly occurred during the registration process, or to broader circumstances.

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[14] *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1156 (29 September 2011) [158].
[15] Ibid [178].
[16] *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 87 NSWLR 284, 295 [38] (Beazley P); 317 [155] (Macfarlan JA).
[17] Ibid 304 [90]–[93], 305 [98] (Beazley P); 315 [143]–[145] (Basten JA); 318 [158] (Macfarlan JA).
[18] Transcript of Proceedings, *Cassegrain v Gerard Cassegrain & Co Pty Ltd and Ors; Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2014] HCATrans 138 (20 June 2014).
[19] *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1156 (29 September 2011) [154]–[158].
[20] Ibid [159]–[165].

The High Court determined that Felicity's interest under the First Transfer was indefeasible. Her husband had not acted as her agent and her status as a joint tenant did not infect her title with the fraud either. However, the Court favoured the Court of Appeal's broader approach to s 118(1)(d)(ii), and consequently Felicity's interest under the Second Transfer was defeasible. GC&Co was entitled to recover a half share in the property.[21]

III THE EXCEPTION TO INDEFEASIBILITY IN S 118 — THE CIRCUMSTANCES OF DEFERRED INDEFEASIBILITY

The High Court's decision regarding the scope of the 'protection of purchasers provision' in s 118 of the *Real Property Act* is a salutary lesson in statutory interpretation. It is also, as Barnett has set out, a decision that increases the scope for practices of deferred indefeasibility in Australian Torrens systems with provisions similar to those in NSW, such as Western Australia, Tasmania and the ACT.[22]

The Supreme Court determined that the reference in s 118(1)(d)(ii) to registration 'through fraud' focussed 'exclusively on the process by which registration as proprietor was achieved and the question whether that process was achieved by fraud', and was a 'a much narrower and more specific subject-matter than the "except in case of fraud" exception in s 42'.[23] According to this logic, because the fraud did not relate to the actual process of registration, Felicity obtained indefeasible title to the half-interest received through the Second Transfer, notwithstanding that she was not a transferee for valuable consideration.

The Court of Appeal unanimously overturned this decision. The separate judgments all noted that Barrett J had ignored the identical plain language of ss 42 and 118.[24] Both provisions speak of registration 'through fraud'. There was no other conceivable reason why the phrase should be construed narrowly in s 118 but broadly in s 42 to the wider circumstances of the doctrine of Torrens fraud.

This reasoning was accepted by the High Court. It recognised that s 118 needs to be read consistently with s 42.[25] The two provisions operate so that, where fraud occurs under s 42, recovery is possible under s 118. If the relevant transfer was itself fraudulent, recovery will be possible under s 118(1)(d)(i). However, where the fraud-infected title passes to another party, recovery remains possible under s 118(1)(d)(ii), so long as the party is not equity's darling, that is, a bona fide purchaser for value without notice.

Whilst the decision seems a simple interpretation of statute, it has implications for how statutory exceptions to indefeasibility in some jurisdictions will operate. The decision highlights the tension between principles of immediate and deferred indefeasibility within the

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[21] See the orders of the majority of High Court: *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 445 [65]–[67].

[22] See Katy Barnett, *A Statutory Exception to Immediate Indefeasibility Explained:* Cassegrain v Gerard Cassegrain & Co Pty Ltd (4 May 2015) Opinions on High <http://blogs.unimelb.edu.au/opinionsonhigh/2015/05/04/a-statutory-exception-to-immediate-indefeasibility-cassegrain-v-gerard-cassegrain-co-pty-ltd/>.

[23] *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1156 (29 September 2011) [178].

[24] *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 87 NSWLR 284, 304 [90]–[93], 305 [98] (Beazley P); 315 [143]–[145] (Basten JA); 318 [158] (Macfarlan JA).

[25] See *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 443–4 [58]–[62] (French CJ, Hayne, Bell and Gageler JJ); 457 [117]–[119] (Keane J).

Torrens system.[26] Immediate indefeasibility operates to provide purchasers with immediate and total indefeasible title to property. There are no concerns about what occurred before the moment of registration, and the interest can be dealt with safe in the knowledge that the title is unimpeachable.[27] On the other hand, deferred indefeasibility allows vendors and third parties to reach past the moment of registration in certain circumstances. The title could be considered conditional, as circumstances such as fraud or status as a transferee for no consideration will mean that the interest will not become indefeasible until it is transferred bona fide and for good consideration to a new proprietor. The two different systems prioritise different principles: immediate indefeasibility prioritises the security of the transaction, whilst deferred indefeasibility offers greater protection to a person's property interest.[28]

In a system of immediate indefeasibility, one would assume that Felicity, innocent of fraud herself, would receive indefeasible title to the interest received under the Second Transfer. However, the High Court's interpretation of s 118 prevented this. The interest she received had been obtained and registered (by Claude) through Torrens fraud and she was not a transferee for valuable consideration (s 118(1)(d)(ii)). On the other hand, had Felicity provided valuable consideration under the Second Transfer, she would have obtained indefeasible title. This clarification narrows the operation of immediate indefeasibility in the Torrens system, widening the scope in some circumstances for plaintiffs to recover property even after it has passed from the hands of the fraudulent party.

IV AGENCY

The first issue the High Court addressed regarding the First Transfer was the matter of agency. If Claude had acted as his wife's agent in procuring the First Transfer, then his fraud could be imputed to Felicity. The whole of the First Transfer would have been defeasible and GC&Co could have recovered the whole property under s 118(1)(d)(i).

The law regarding agency principles and Torrens fraud is a well-trodden road. An agent's fraud will be imputed to the principal where the agent has acted within their actual or apparent authority — either carrying out their principal's instructions or activities necessarily incidental to those instructions. As a matter of practical civil procedure, it lies with the plaintiff to show on the balance of probabilities that a principal–agent relationship exists.

The Supreme Court determined that Claude had not acted within any actual or apparent authority as Felicity's agent in either transfer. Barrett J held that there was no basis to say that:

> [I]n any aspect of the events concerning the preparation of either transfer, its execution and the processes culminating in its registration, Claude had or exercised any actual or implied authority of Felicity.[29]

The Court of Appeal reversed this finding. Beazley P was satisfied that the evidence permitted a finding that 'Claude was Felicity's agent for the purposes of directing Mr McCarron [Claude's solicitor] to register the first transfer'.[30] This was to be drawn from a letter written

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[26] Barnett, above n 22.
[27] See, eg, *Frazer v Walker* [1967] AC 569. In that case, the innocent purchaser of land obtained indefeasible title to land, even though the sale had been accomplished using fraud.
[28] Barnett, above n 22.
[29] *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2011] NSWSC 1156 (29 September 2011) [158].
[30] *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 87 NSWLR 284, 294 [37].

by Claude to a solicitor requesting the registration of husband and wife as joint tenants — the inference was that Claude wrote the letter as his wife's agent. Macfarlan JA reached a similar conclusion that Claude acted as his wife's agent in the First Transfer.[31]

Basten JA disagreed, determining that an agency relationship could not be inferred from the evidence at trial.[32] In particular, he held that '[t]here was simply no evidence as to how the initial instructions were given on behalf of Felicity Cassegrain'.[33] As a result, it was undesirable to infer a relationship of agency, especially given the large consequences of such a finding.[34]

A majority of the Court of Appeal was satisfied that Claude's letter to McCarron showed that he was acting as his wife's agent, but their method and approach to the question of agency itself was disparaged by the High Court. Their concern was methodological: they considered that the Court of Appeal was not properly applying the term 'agent' as a term relating to a legal relationship. To the High Court, the Court of Appeal had addressed the following question: on the balance of probabilities, what inference can be drawn from the facts to show that Felicity was aware that 'Claude was arranging for the transfer of the Dairy Farm to them both as joint tenants?'[35] This question was incorrect because it focussed on Felicity receiving a benefit through her husband's actions, rather than any grant of authority she may have given him.

The High Court's approach — in his separate judgment Keane J came to the same conclusion as the majority — begins by classical reference to the Privy Council's decision in *Assets Company Ltd v Mere Roihi*,[36] where Lord Lindley stated that:

> [T]he 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. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents.[37]

Of course, this alone does not provide an answer to the question of how knowledge is 'brought home' by an agent. For this the majority turned to Street J and his decision in *Schultz v Corwill Properties Pty Ltd*.[38] Street J wrote that:

> It is not enough simply to have a principal, a man who is acting as his agent, and knowledge in that man of the presence of a fraud. *There must be the additional circumstance that the agent's knowledge of the fraud is to be imputed to his principal.* This approach is necessary in order to give full recognition to (a) the requirement that there must be a real, as distinct from a hypothetical or constructive, involvement by the person whose title is impeached, in the

[31] Ibid [155]–[159].
[32] Ibid 310 [125].
[33] Ibid 310 [125] (Basten JA).
[34] Ibid.
[35] *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 438 [37].
[36] [1905] AC 176.
[37] *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 452 (Keane J), quoting *Assets Company Ltd v Mere Roihi* [1905] AC 176, 210. See also *Butler v Fairclough* (1917) 23 CLR 78.
[38] [1969] 2 NSWR 576.

> fraud, and (b) the extension allowed by the Privy Council that the exception of fraud under s 42 can be made out if 'knowledge of it is brought home to him or his agents'.[39]

The Court demanded to know first whether Claude acted on the authority of his wife, and secondly whether his agency brought home his fraud to Felicity. As far as the majority was concerned, Claude registered his wife as a joint tenant and brought her a benefit, but that alone did not imply any authority to act on her behalf. Felicity had been the passive recipient of land under the First Transfer, merely acquiescing in the registration of a joint tenancy. Without an additional circumstance, Claude's actions did not reveal any grant of authority, nor any reason that his knowledge should be imputed to his wife. Felicity's interest from the First Transfer was indefeasible, unless something inherent in the joint tenancy tarred her with the brush of her joint tenant's fraud.[40]

In coming to this decision, the High Court cannot be said to have embarked on any grand doctrinal adventure. Their judgement rests on the entirely uncontroversial twin pillars of *Assets Company Ltd v Mere Roihi* and *Schultz v Corwill Properties Pty Ltd*. The allegation that an agent's fraud can be imputed to the principal requires more than the bald statement that the agent undertook actions that benefitted the principal.

In fact, the Court's criticism is even more severe, because it took the lower courts to task for having found an agency relationship in the first place. Both the Supreme Court and Court of Appeal had jumped to the conclusion that Claude acted as Felicity's agent without providing sufficient basis for that decision.

In the future, courts will need to determine with explicit clarity that:

1) the basis of an agency relationship can be drawn from the facts, specifically whether a grant of authority has been made or appears to have been made; and
2) the scope and substance of that authority.

Only then can they judge whether an agent's fraud should be imputed to the principal by an additional circumstance. This includes circumstances where the fraud is committed by the agent acting within the actual or apparent scope of authority,[41] or where the agent obtains actual knowledge of the fraud whilst acting within their actual or apparent authority.[42]

The judgment of the Court is a strict application of the applicable doctrine, but it is a crucial reminder to practitioners and lower courts alike that the evidence must support legal relationships like agency and their scope and substance. Merely bringing home a benefit to a third party will not necessarily give rise to such a relationship.

V JOINT TENANCY AND FRAUD

On the second question regarding the First Transfer — whether Felicity's title as a joint tenant was inherently defeasible for her husband's fraud — the High Court determined 6:1 (with Keane J dissenting) that her title under the First Transfer was indefeasible. In deciding this, the

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[39] Ibid 583, quoted in *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 452–3 [101] (Keane J). The majority judgment also cited Justice Street's enunciation of this principle: *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 439 [40] (emphasis added).
[40] *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 439 [41]–[42].
[41] See, eg, *Loke Yew v Port Swettenham Rubber Co Ltd* (1913) AC 491.
[42] See, eg, *Schultz v Corwill Properties Pty Ltd* [1969] 2 NSWR 576.

Court revealed a tension between the doctrine of joint tenancy and the operation of the fraud exception in a Torrens system. It potentially undermines the operation of the joint tenancy as a coherent form of co-ownership right in the future.

A *The General Law of Joint Tenancy*

The general law of joint tenancy needs to be briefly discussed in order to properly understand the significance of the High Court's decision.

Joint tenancies are recognisable by the existence of the four unities: unity of interest; unity of title; unity of time and unity of possession.[43] To take a simple example, where two persons obtain identical interests through the same event and source, entitling both to possession of the whole land, the whole of the property will be shared.[44] Each joint tenant holds a full interest to the land alongside the other. A joint tenancy is also distinguishable by the right of survivorship (the *ius accrescendi*). The death of a joint tenant extinguishes their interest and the other joint tenants absorb it; there is nothing to be devised.[45]

If a joint tenant severs the joint tenancy by transferring their interest to another, the four unities are broken and the joint tenancy is converted to a tenancy in common in equal or 'aliquot' shares.[46] This is different from a typical tenancy in common, where co-tenants hold separate interests to the same land, often in unequal shares.

The origins of joint tenancy are feudal and they certainly belong to an older, more complex and arcane era of the common law. It does not sit easily in a legal system that is concerned with an individual's rights vis-a-vis a third party to have two or more persons sharing an entire, undivided interest. But that is the creature that the common law has made and it is that creature that s 100 of the *Real Property Act* incorporated into the modern Torrens system. In *Cassegrain*, the Court of Appeal and High Court had to determine whether the undivided interest held by Claude and Felicity meant as a consequence that Felicity's interest was affected by the other joint tenant's actions.

B *Court of Appeal*

A majority of the Court of Appeal, whilst reversing the Supreme Court's decision, concluded that Felicity's status as a joint tenant did not automatically mean that she was infected by her husband's fraud. Beazley P could not identify any fraud that might have affected Felicity's joint proprietorship.[47] Claude's fraudulent actions did not affect her title under the First Transfer. Similarly, Basten JA found that Felicity's joint proprietorship was unaffected by her husband's fraud.[48] To have infected her title with her husband's actions 'would impute fraud to a party who was not herself fraudulent',[49] raising issues of public policy (though arguably

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[43] These unities are the distinguishing features of joint tenancy as taught to students: see, eg, Robert Chambers, *An Introduction to Property Law in Australia* (2008, 2nd ed, Lawbook Co) 137–9.
[44] See, eg, *Wright v Gibbons* (1949) 78 CLR 313.
[45] See, eg, ibid 323.
[46] See, eg, ibid. Regarding some of the circumstances that will lead to severance, see, eg, *Corrin v Patton* (1990) 169 CLR 540; *Re Wilks; Child v Bulmer* [1891] 3 Ch 59.
[47] *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 87 NSWLR 284, 298 [60].
[48] Ibid 314 [138]–[139].
[49] Ibid 314 [138].

of very narrow application). On the topic of joint tenancies and joint proprietorship more generally he wrote:

> Although the authorities reveal a degree of ambivalence as to the extent to which feudal incidents attaching to joint tenancy (other than the accepted incident of survivorship) continue to apply, 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.[50]

In other words, joint tenants should not bear the burden of Torrens fraud equally. The fraud should be quarantined to the fraudulent tenant. Such a statement suggests a version of joint tenancy where the rights of joint tenants are, at some level, compartmentalised, despite the fundamental principle of the doctrine being full and shared ownership.

Macfarlan J took a different approach, basing his decision on the classical statement that 'joint tenants are treated by the law as in effect one person only'.[51] Therefore, fraud by a joint tenant is fraud that affects the entire interest, without differentiation between the tenants. He drew on the New South Wales Supreme Court decision of *Diemasters Pty Ltd v Meadowcorp Pty Ltd* ('*Diemasters*'),[52] where Windeyer J found that both joint proprietors took their interest subject to defeasible title in favour of the defrauded party, even though only one proprietor had committed the fraud and the other had no knowledge of it. Windeyer J stated, albeit in relation to general law rather than Torrens title, that:

> Where two persons, one taking with notice of and being a party to fraud, take as joint tenants under one instrument — as they must — the doctrine of the unities requires unity of title and unity of interest so that one cannot take more than the other.[53]

In cases where joint tenancy has come about by the fraud of one joint tenant, Windeyer J did not see 'any proper justification for any inroad upon pure doctrine'.[54] It is this current of thought that Macfarlan JA followed, determining that 'Felicity was infected with Claude's fraud because she and Claude took title from the company as joint tenants'.[55]

It is necessary to look at the reasoning in *Diemasters* in some more depth. In making the statements quoted above, Windeyer J explicitly set himself against the decision of the Supreme Court of New South Wales in *Myers v Smith*.[56] In that case, Hodgson J had held that where two joint tenants took a legal estate and one had notice of an outstanding interest, only the title of the tenant with notice was subsequently affected. Hodgson J claimed to be conforming with a long line of cases,[57] all the way back to *Lord Abergaveny's Case* in 1607,[58] though Windeyer J pointed out that those cases dealt with the separate issue of one joint tenant disposing an interest to another.[59]

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[50] Ibid.
[51] Ibid 317–8 [156].
[52] (2001) 52 NSWLR 572.
[53] Ibid 579 [17].
[54] Ibid.
[55] *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 87 NSWLR 284, 317–8 [156].
[56] (1992) 5 BPR 11, 494.
[57] See, eg, *Penny Nominees Pty Ltd v Fountain (No 3)* (1990) 5 BPR 11, 284; *Guthrie v Australia and New Zealand Banking Group Ltd* (1991) 23 NSWLR 672.
[58] (1607) 6 Co Rep 79.
[59] *Diemasters Pty Ltd v Meadowcorp Pty Ltd* (2001) 52 NSWLR 572, 579 [16].

Windeyer J chose not to follow *Myers v Smith* because he found that the cases cited by Hodgson J dealt with a different issue than how joint tenants may be affected by the law of fraud. As he said:

> In the cases founded upon *Lord Abergevenny's* case the interest of one joint tenant has become bound during the joint tenancy with some interest: it could not be said to be inequitable that it remain bound as it was always subject to enforcement and severance. That however, is very different from an outstanding interest good as against the whole of Blackacre when owned by A being good against only the interest of one of two joint tenant purchasers of Blackacre because the other joint tenant was not involved in the fraud intended to reduce the interest.[60]

It is on this basis that he came to the conclusions that Macfarlan JA would later arrive at.

However, the utility of the decision in *Diemasters* should be qualified. Although Windeyer J was certain that in a general law situation fraud affected the whole joint tenancy as a matter of course, he did not suggest how the scenario would unfold under the Torrens system. Further, having made these statements Windeyer J immediately described them as 'irrelevant',[61] deciding the case on the basis of s 43A of the *Real Property Act* (dealing with protection for purchasers before registration),[62] and then addressing a claim for Torrens Assurance Fund compensation on the presumption that an innocent joint party in fact was *not* affected by the fraud of their co-tenant.[63]

Nonetheless, the judgment is useful because it sets out very clearly what might be termed the traditional approach to joint tenancy — the four unities create a single interest, held jointly, and the result is that the law treats the joint tenants as one person. The fact that the statement deals only with general law joint tenancy is not a weakness; in fact it provides a strong starting point for the translation of general law into the Torrens system. We will see this logic again in the dissent of Keane J at the High Court.

This review shows the tension between the operation of settled doctrines of Torrens fraud and the general law of joint tenancy. In the case of *Cassegrain*, resolving to maintain one doctrine necessarily meant weakening the other.

C *High Court*

The majority of the High Court determined that Claude's fraud did not affect Felicity's indefeasible title as a joint tenant under the First Transfer. They adopted the statement of Basten JA that fraud in a Torrens system will affect joint tenants differently.[64] In dissent, Keane J maintained an approach that treated joint tenants as one person for the purposes of the operation of the doctrine of Torrens fraud.

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[60] Ibid 579–80 [17].
[61] Ibid 580 [18].
[62] Ibid 580–1 [19]–[20].
[63] Ibid 583 [28]. Windeyer J states that: 'I approach this part of the judgment on the assumption that one joint tenant is not bound by or affected by the fraud of the other of which the first is unaware. As I have explained I do not consider that to be the correct position': ibid.
[64] *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 440 [44]–[45].

The majority began with the statute, which deems joint proprietors to be 'entitled to the same as joint tenants'.[65] The substantial effect of that deeming requires reference to the general law of joint tenancy.[66] For that the majority then turned to the judgment of Dixon J (as he then was) in *Wright v Gibbons*,[67] a classical reference for the common law of joint tenancy. In that case, Dixon J had downplayed (disparaged even) the traditional scholasticism and maxims of the general law, concluding that the traditional law that joint tenants are judged to be one person at law is not a satisfactory premise for legal deduction. From this conclusion the Court reached a preliminary conclusion that the unity and symmetry of interests in joint tenancy can be a qualified concept. They then turned to apply this general law conclusion to the operation of the *Real Property Act*.

The majority's question was: if you assumed that joint tenants were equally affected by one tenant's fraud, then in the context of Torrens legislation was it right that Torrens fraud could affect an innocent, unknowing owner? The answer was a resounding no. The majority's interpretation of the statute on this matter is best repeated verbatim:

> To hold that the deeming effected by s 100(1) denies all persons registered as joint proprietors the protection otherwise given by s 42(1) when one of their number has been guilty of fraud would constitute a significant departure from the accepted principle that actual fraud must be brought home to the person whose title is impeached. Both s 100(1) and s 42(1) take their place in an Act providing for title by registration, not registration of title. Both sections are directed to the consequences of registration and focus upon the position of the registered proprietor, not title in the abstract.[68]

The majority preferred the settled law of Torrens fraud over a supposedly qualifiable doctrine of joint tenancy. In the context of a land registration system in which certainty of title is of the greatest necessity, this decision makes sense. However, as outlined below, in their rush to maintain the 'accepted principle' of Torrens fraud, the Court did not sufficiently consider the proper nature of the joint tenancy's substance and scope. Further, by accepting the interpretation of Basten JA, the Court provided justification for the continued weakening of joint tenancy into the future.

In his dissent, Keane J turned away the foundational principle of Basten JA and the majority — that joint tenants can be treated as separate persons at law. Instead, he concluded that the registration of a fraudulent joint tenancy would be wholly defeasible, even against an innocent joint tenant.

First, Keane J evaluated the same judgment of Dixon J in *Wright v Gibbons*, determining that the cases considered had been specifically about alienation of the severable interest of a joint tenant, for which purpose each joint tenant 'is conceived as entitled to dispose of an aliquot share'.[69] Those considerations are quite different from considering the acquisition (and later the registration) of a joint tenancy.

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[65] *Real Property Act 1900* (NSW) s 100(1), quoted in *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 440 [46].
[66] *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 440 [46].
[67] (1949) 78 CLR 313, cited in *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 440–1. The authoritative citation of *Wright v Gibbons* in footnotes 44 to 46 above, regarding the general principles of joint tenancy, exemplify the importance of this case for Australian jurisprudence on the subject.
[68] *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 442 [53].
[69] *Wright v Gibbons* (1949) 78 CLR 313, 330.

Consequently, Keane J judged that it is not inconsistent to consider that joint tenants do not have 'a distinct or separate title'.[70] Instead, he pointed out decisions by the House of Lords and the High Court that had confirmed the traditional understanding of joint tenancy. In *Hammersmith and Fulham London Borough Council v Monk*, Lord Browne-Wilkinson conceived the transfer of land to joint tenants as 'operat[ing] so as to make them, vis-a-vis the outside world, one single owner'.[71] In Australia, the High Court in *Peldan v Anderson* noted the traditional formulation of joint tenants as 'together composing one single owner, each being seised *per my et per tout*', noting also the comments of Dixon J regarding alienation.[72] Despite the remarks of Dixon J in *Wright v Gibbons*, Keane J held that precedent actually showed that the law of joint tenancy was still applied with strict adherence to the formulation of the four unities — at least at the general law.[73]

But Keane J still had to show that a strict approach to joint tenancy could work in the context of Torrens legislation. He attempted this by picturing the Torrens system as a collection of registered titles. The First Transfer created a single title, jointly held by two people but a single title nonetheless. That single title was obtained by fraud, which was '"sheeted home" to the appellant, not because the appellant claimed her title through Claude as her agent, but by virtue of the nature of the joint tenancy of the single estate to which they were entitled'.[74] This decision, which qualifies the operation of Torrens fraud in respect of the unique circumstances of joint tenancy, is assisted by his interpretation of s 118. That provision already allows an innocent party — albeit one who is not a bona fide transferee for valuable consideration — to be relieved of their title if it is derived from a proprietor who obtained theirs through fraud (s 118(1)(d)(i)); it would be inconsistent if a joint tenant who was equally not a bona fide transferee for valuable consideration (as Felicity was under the First Transfer) could not also be affected where there is still a single title. In his own way, Keane J showed a public policy basis on which to support a strict interpretation of joint tenancy within the Torrens system.

VI ANALYSIS

The High Court's decision is a victory for a strict approach to Torrens fraud and promotes a broader and looser approach to evaluating the rights and burdens of joint tenancy. Respectfully, I do not believe this was the best possible outcome. It was open to the Court to resolve the tension between the two doctrines by recognising the unique nature of joint tenancy and carving out an (admittedly idiosyncratic) method to better integrate it with the Torrens system and the operation of Torrens fraud. In this Part of the article, I set out how fraud could have affected the whole title under the First Transfer whilst minimising any ripple effect to the rest of the Torrens system, which needs to be avoided for clear reasons of public policy.

The whole High Court underlined the importance of separating out considerations of the general law from how those principles may be modified in order to ensure the smooth functioning of our Torrens system. Therefore, *a priori*, we must evaluate the accuracy of their comments regarding the general law of joint tenancy before being able to determine the best way to incorporate it into the legislative framework.

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[70] Ibid 329, quoted in *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 456 [113].
[71] *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478, 492.
[72] *Peldan v Anderson* (2006) 227 CLR 471, 480 [19].
[73] *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425, 455–57 [111]–[116].
[74] Ibid 455 [110].

A *Critique of General Law*

Basten JA was the first to suggest a looser approach to joint tenancy, relying on the statement of Dixon J in *Wright v Gibbons* that 'the aliquot share of each [joint tenant] existed in contemplation of law as a distinct and ascertained proprietary interest'.[75] However, it is important not to read that quote in isolation. Dixon J stated that '*for the purpose of alienation of a share by one joint tenant to another* the aliquot share of each existed in contemplation of law as a distinct and ascertained proprietary interest',[76] and it was in this context of alienation that the High Court noted the statement in *Peldan v Anderson*.[77]

Indeed, a deeper exegesis of the judgment of Dixon J in *Wright v Gibbons* provides a better understanding of the scope and substance of joint tenancy. His Honour begins with reference to classic tomes of the common law: relevant passages from Bracton, Littleton and Blackstone are all cited in this sketch of the law.[78] This historical expounding of principle culminates in the 19th century lectures of Joshua Williams, who as Dixon J notes, 'went so far as saying that joint tenants in fact were considered by law as one person for most purposes'.[79]

In many cases involving the alienation of a joint tenancy, Dixon J notes that law does not treat tenants as though they were one person. Such circumstances include:

i) allowing a joint tenant to grant a lease of their interest, during which time the joint tenancy is suspended and there is a temporary severance;
ii) pursuing the aliquot share of a joint tenant who has suffered forfeiture or 'proved to be an alien of the Queen'; and
iii) seizing the aliquot share of a joint tenant against whom a judgment debt is executed.[80]

For these examples Dixon J again turned to the common law of an earlier age, citing Comyn's Digest (18th century).

Before turning to the specific circumstances of the case that was before him, Dixon J concludes his foray by quoting with approval *On Estates*: 'The real distinction is, joint tenants have the whole for the purpose of tenure and survivorship, while, for the purpose of immediate alienation, each has only a particular part',[81] before turning to the special rules regarding alienation. This quote is a more accurate statement of what Dixon J believed to be a fundamental proposition regarding joint tenancy. It is an error to confuse the proprietary interest of a joint tenant after alienation with the full interest they hold whilst the joint tenancy is on foot.

The above discussion shows that joint tenancy tends towards older rather than more recent case law. We have already seen a similar predisposition when Windeyer J referred in *Diemasters*

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[75] *Gerard Cassegrain & Co Pty Ltd v Cassegrain* (2013) 87 NSWLR 284, 313 [137], quoting *Wright v Gibbons* (1949) 78 CLR 313.
[76] *Wright v Gibbons* (1949) 78 CLR 313, 333 (emphasis added).
[77] Ibid, cited in *Peldan v Anderson* (2006) 227 CLR 471, 480 [19]. That case generally related to the alienation of a joint tenancy by way of unilateral severance.
[78] *Wright v Gibbons* (1949) 78 CLR 313, 329–30.
[79] Ibid 330, citing Joshua Williams, *The Seisin of Freehold, Being Twelve Lectures Delivered in Gray's Inn Hall; in the Months of January and February, 1876* (H Sweet, 1878) 117. Williams stated that '[j]oint tenants in fact are considered by law as one person for most purposes ...'.
[80] *Wright v Gibbons* (1949) 78 CLR 313, 330–1.
[81] Ibid 331.

all the way back to *Lord Abergevenny's* case. Few who study the topic come away without questioning its relevance in modern property law. Nonetheless, the common law does accommodate such creatures in other fields. The general law of partnerships allows for commercial entities that have no independent legal personality and permits partners to pool resources for a venture. Each partner acts as an agent for the partnership, and generally their actions bind all the partners personally, without limited liability.[82] The common law can treat groups of people as a single entity against third parties. More generally, older doctrines of the common law — often considered of only historical interest — have returned with epoch making force. For example, the decision in *Mabo v Queensland (No 2)*[83] rests largely on a doctrine of tenure that had until that point been of largely academic and historical interest.[84] A doctrine's age should not be a proxy for determining its contemporary coherence.

This analysis leaves two conclusions regarding the general law of joint tenancy. First, despite its reputation, the incidents of joint tenancy should not be considered alien to modern common law. Secondly, the majority's reliance on Dixon J failed to respect the distinction between joint tenancies for the purposes of tenure and for the purposes of alienation. Insofar as the general law of joint tenancy is the starting point for any discussion of the operation of ss 42 and 100 of the *Real Property Act*, the reasons of Keane J in dissent, and Windeyer J in *Diemasters* should be preferred.

However, these conclusions regarding the general law are only as useful as their integration with Torrens legislation allows. Whether, for the purposes of registration and defeasibility, joint tenants should be treated as a single person is a related but separate question. Nonetheless, as this analysis turns to that point, we can keep in mind that for the general law of tenure, including the creation of the interest, the joint tenants are considered a single, shared proprietor of land.

B *Critique of the Application to Torrens*

It remains to be seen if the operation of the Torrens system modifies joint tenancy, either explicitly or by necessary implication. The High Court identified a salient policy ground to justify their modification, being that fraud may otherwise affect an innocent third party. However, a decision that Claude's fraud affected Felicity's interest can be reconciled with the doctrine of Torrens fraud for several reasons.

First, on a proper interpretation of a Torrens system, only one title and only one interest are affected when a whole joint tenancy is rendered defeasible for fraud. This mirrors the operation of the Torrens system in respect of all other registered rights, which similarly are a single interest on a single title. There is no distortion in that respect. Further, because it respects the foundational premise of 'title by registration', there is no obvious way for this proposal to affect

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[82] This is not a perfect analogy: for example, where a partner acts fraudulently, the rest of the partners will only be liable if the fraud is either committed in the ordinary course of the firm's business or on the authority of the co-partners. This can be explained by reference to the general principles of agency that underpin partnerships and partnership legislation: see *Partnership Act 1892* (NSW) s 10(2); *Partnership Act 1958* (Vic) s 14(2); *Partnership Act 1963* (ACT) s 14(3); *Partnership Act 1891* (Qld) s 13(2); *Partnership Act 1997* (NT) s 14(3); *Partnership Act 1891* (SA) s 10(2); *Partnership Act 1891* (Tas) s 15(2); *Partnership Act 1895* (WA) s 17(2).

[83] (1992) 175 CLR 1.

[84] See J A Watson, 'A Sketch' in J T Gleeson, J A Watson and R C A Higgins (eds), *Historical Foundations of Australian Law — Volume I: Institutions, Concepts and Personalities* (The Federation Press, 2013) 1, 7.

other property rights, because there are distinct and separate registered interests that can be affected, even in the case of tenancies in common.

Secondly, the majority placed great emphasis on the wording of s 42, which speaks of a 'registered proprietor', the implication being that joint tenancy has multiple registered proprietors and therefore fraud should apply only to that person's title. However, in the case of a joint tenancy it may be better to consider the registered proprietor to be the 'joint proprietors' deemed to be joint tenants by s 100. The two provisions use separate terms, so there is no issue — as there was for the interpretation of s 118 — of the same terms being used with different meanings across a statute. Such an interpretation does employ a certain sophistry, it is true, but it does not create a distortion in the wider operation of the Torrens system. It also properly recognises the unique nature of joint tenancy. Under this interpretation, the exceptions to indefeasibility would operate precisely as usual, but where the interest is a joint tenancy, fraud affects the entire title, allowing the plaintiff to recover against both joint tenants. It was this interpretation that Keane J preferred and which may be seen as the interpretative path that has the least overall effect on the competing doctrines of joint tenancy and Torrens fraud.

Finally, the High Court's consideration of the rights of an innocent transferee does not properly represent the operation of the Torrens system. As described above, s 118 operates so that innocent parties (like Felicity under the Second Transfer) can be stripped of property in certain circumstances. The operation of deferred indefeasibility in Torrens legislation shows that protection of innocent parties in all circumstances is not an absolute value: where the circumstances of the transfer require it then indefeasible title might not be granted.

In these circumstances, and in light of the proposed reconciliation of ss 42 and 100, it was not necessary for the Court to fracture the foundation of joint tenancy in the way it did. The result under this proposal would have been that Felicity's title under the First Transfer was immediately defeasible. It would have done so by allowing consistent recognition of joint tenancy's operation and without undermining any settled doctrine of Torrens fraud. I stated above that the reasoning of the dissent of Keane J and the decision of Windeyer J should be preferred as statements of general law, and the foregoing analysis shows that those general law principles need not be altered when translated into the statutory system of Torrens title.

VII CONCLUSION

The decision of the High Court is valuable for the clarity with which it dealt with the proper methodology for determining agency and for interpreting the *Real Property Act* in respect of ss 42 and 118. However, the majority's decision on incorporating joint tenancies into the Torrens system unnecessarily damages the proper understanding of joint tenancy. The damage is twofold.

First, as a doctrinal matter, the High Court has unduly promoted the idea that joint tenancies can be viewed through the lens of the tenants' aliquot shares in circumstances beyond just alienation. Their misunderstanding of the comments of Dixon J could be used by lower courts to weaken the operation of joint tenancy rights more generally.

Secondly, within the sphere of Torrens land systems, the High Court has given licence for joint tenants' interests to be treated separately as a consequence of their registration. If tenants can be treated differently vis-a-vis the process of registration, there is no reason they cannot be treated differently in general matters of their tenure. The consequence of this development will

be the transformation of joint tenancies into something resembling a tenancy in common with a right to survivorship; something that the *Real Property Act* did not intend.

These concerns may be seen as so much navel gazing at old doctrine. Indeed, in this 21st century, the necessity of the joint tenancy in commerce and even in the planning of family property may wane: it may be simpler for commercial enterprises and families to strictly delineate the rights of each party by employing tenancies in common. The time may come when there is simply no longer a need for it. But Australia's Torrens systems explicitly incorporated joint tenancy into the modern law of property, and it was not the intention in doing so to create a new category of co-ownership. Similarly, it will be for Parliament to determine the fate of joint tenancy. For today, consistency demands continued respect for the foundational principles of joint tenancy.